

Court Sets Online Companies' ASCAP Royalty Rate

Legal Alert
May 14, 2008

Garvey Schubert Barer Legal Update, May 14, 2008.

Through the most recent negotiations with ASCAP, the Radio and Television Music License Committees negotiated flat fee blanket and per program licenses for broadcasters. Online companies AOL, Yahoo!, and RealNetworks, Inc., however, could not reach a negotiated settlement with ASCAP. As a result, the United States District Court for the Southern District of New York, which has administered the ASCAP antitrust consent decree since 1941, decided the rates for these Internet companies.

ASCAP had proposed charging the Internet companies 3% of domestic gross revenues, less deductions for sales commissions and traffic costs, multiplied by a music-use-adjustment factor for AOL and Yahoo! to take into account that some of their services to users involve features other than music. Application of that formula to 2006 revenues would have resulted in annual fees of \$7,831,188 for AOL, \$7,376,887 for Yahoo!, and \$8,502,990 for RealNetworks.

The Internet companies proposed multiple different rates that were based on revenues directly attributable to music streaming, ranging from 1.615% of revenues for internet radio, to 2.5% for on-demand audio. Their proposals would have resulted in annual fees for the year 2006 of approximately \$875,000 for AOL, \$1,135,000 for Yahoo!, and \$1,570,000 for RealNetworks.

The court disagreed with both parties. It found ASCAP's music-use-adjustment factor to be reasonable, as it reduces the domestic gross revenues part of the formula to take into account revenues generated from the Internet companies' websites attributable to the value of music. In establishing a rate at 2.5%, the court looked at what other online companies pay. The court acknowledged that terrestrial radio stations paid 1.615% of total net revenues under the old blanket license arrangement, but found that Internet companies stream about 25% more music per hour than terrestrial radio stations use for non-interactive use of music. Setting the rate at 2.5% of gross revenues coupled with the music-use adjustment factor establishes a rate for AOL at \$5.95 million and at \$6.76 million for Yahoo!, based on 2006 revenues. The court did not have enough data to compute the likely fee for RealNetworks.

As a result of the court's ruling, 2.5% of gross revenues, adjusted for intensity of music use on websites, less sales commissions and traffic acquisition costs, is the new benchmark for Internet companies. It remains to be seen whether this ruling will influence future negotiations with ASCAP, BMI, and SESAC on the use of music by broadcasters on the Internet.