COPYRIGHT OFFICE – LICENSING COMMENTS – May 23, 2014
By Deborah Newman, Esq.

I am a consultant and attorney specializing in copyright and content licensing for digital music start-ups. These young companies are developing innovative new services to stream music to a growing audience of online and mobile music consumers. They want their service to be "legal," so part of my job is to educate them on the basics of copyright law and how it applies to their service.

I advise my clients that easiest way they going to be able to get licenses is if their service meets the requirements of a "non-interactive, DMCA compliant" streaming service. That way they only need four licenses - SoundExchange for the master recording, and ASCAP, BMI and SESAC for the public performance rights of the underlying composition. The costs for obtaining those licenses are minimal - they do not require advance payments or revenue guarantees; the minimums are very reasonable, and the licensing costs under these agreements are based on formulas that compensate the copyright owners for the USE of their content, or for a share of the revenue generated by advertising (if there is any). This is only possible under the blanket licensing structure provided by Sections 112 and 114 of the Copyright Act.

Three years ago, the industry's biggest publishers began withdrawing digital rights to their music from ASCAP and BMI, forcing streaming services like Pandora to negotiate directly for a license publicly perform the music. For smaller start-ups -- most of which operate on a shoestring budget with funding from "friends and family" – these transaction costs would be prohibitively expensive. If management at these companies have to hire expensive lawyers with expertise in the digital music business, it's likely these start-ups would not be able to bring their services to market.

In its motion for summary judgment, Pandora argued that allowing publishers to withdraw their digital rights violated ASCAP's consent decree (which says that ASCAP must license its songs to anyone who asks). The 2013 decision by Judge Denise Cote of the US District Court in Manhattan (the ASCAP "rate court") agreed, saying that the PRO must make all the songs in its repertoire available to Pandora, and that if ASCAP licenses a song for some purposes, it must for all purposes.

In a related – but slightly different -- decision by the BMI rate court, the judge ruled that if a publisher withdrew its digital rights from the PRO, that ALL rights would be therefore be withdrawn from that PRO. This meant that a publisher would have to administer the public performance rights to its catalog for ALL USES, including radio, television, movie theatres, business establishments, clubs, hotels, shopping malls, and the myriad of places that publicly perform music. As expected, all publishers (except one) left their digital rights with BMI.

The benefits of a collective licensing regime, with a predictable rate, cannot be underestimated in this new world of hundreds (if not thousands) of streaming services. Without it, the opportunities for small players would be very limited.

The same issue exists for the public performance rights in the sound recording. The RIAA established Sound Exchange to administer and collect royalties for the 1995 Digital Performance Right in a Sound Recording Act. Regardless of how these rates are set by the Copyright Royalty Board (CRB), and what factors are considered in setting these rates, the digital music services are able to predict what their costs are going to be, and are only required to file the "Notice of Use" with the Copyright Office and then select the appropriate category under which they will license and pay for the millions of sound recordings that fall under the statutory license.

Now the labels are making noises that they believe the personalization and customization features of DMCA compliant, non-interactive radio are more interactive than the DMCA intended. These labels would like to direct license the sound recording performance rights, just as the music publishers want to withdraw from the PROs. This not only hurts the digital music start-ups by adding substantial transaction costs to this process, but also the thousands of artists who would lose the right to get paid the digital performance royalty DIRECTLY from SoundExchange, preventing their record label to apply those royalties to their potentially unrecouped balance with the label.

The benefits of collective, blanket licensing are essential for maintaining the culture of innovation and experimentation that is happening today. If the rights holders win the battle over direct vs. collective licensing, the music fans will ultimately be the ones to lose.