

SOUTH BY SOUTHWEST 2009 CLE CONFERENCE – WHERE TRENDY ENTERTAINMENT MEETS TRENDS IN ENTERTAINMENT LAW

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INTRODUCTION

On a late Thursday evening, a collection of young horn players, dressed in vibrantly painted vintage band uniforms (you could still smell the spray paint), stand on Austin's Sixth Street, blaring classic rock hits in surprisingly complex arrangements. They stand in the middle of a closed-off intersection because all of the doors and windows from the various venues are open to the street, and raucous sounds pour out of each establishment onto a street party of thousands. Somehow the middle of an otherwise busy intersection is the easiest place for passersby to hear the band. The music festival parades down Sixth Street and beyond, block after block after block. The sounds are a deafening, brilliant cacophony of modern musical expression.

South by Southwest, the premier convention and festival for music industry professionals, goes by a number of names. On paper, online, and on all the posters plastered around Austin, Texas, it is known as SXSW. Austinites simply call it "South-by," as if the last two syllables are worth as much as the thousands of bands who come and go every year without making a splash during the four-day music event.

For the music industry professional, SXSW is more than the thousands of up-and-coming musical acts trying to catch a break; it is more than the dozens of panel discussions regarding the current state of the music industry; it is more than the trade show featuring music and media

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oriented businesses; more than the Flatstock poster show, the vintage guitar swap, the showcases, the parties, and the hype. The sum of all these parts does not begin to tell the whole story.

Not to say that all the music is worth listening to, of course. Most of the musicians that come to SXSW are searching for someone to find them. The convention draws music professionals to the city by day, and the musicians try to woo them at night. For those with the stamina to endure it, SXSW is the perfect mix of the revolution and the establishment attempting to co-opt one another for their own goals.

This conference note provides a broad overview of the different legal education panels offered at the SXSW conference on February 20-21, 2009. The attorneys at the Minneapolis-based law firm Lommen Abdo organized the continuing legal education panels, and the Grammy Foundation sponsored the legal education program as well. And while the content of the legal panels was well worth the price of admission, it is important to keep in mind that a ticket to SXSW is a ticket to something much more vast and compelling than a mere legal conference.

PANEL #1 - COPYRIGHT ROYALTY BOARD: WHAT HAPPENS IN DC DOESN'T STAY IN DC

The Continuing Legal Education portion of SXSW Music started out with a contentious issue in the world of entertainment copyright law: how royalties for performances on Internet radio stations are collected and distributed. The moderator of the panel, Jay Rosenthal, stated the Copyright Royalty Board (“CRB”), is “the most important government body you’ve never heard of.” The CRB published their final ruling on royalty payments for copyrights of audio

recordings on January 26, 2009, and the decision of this board was fresh on the minds of the panel members.²

Joining Mr. Rosenthal, General Counsel for the National Music Publishers Association, was John Potter, Executive Director of the Digital Media Association (“DiMA”), Daryl Friedman, Vice President, Advocacy & Government Relations for the National Academy of Recording Arts & Sciences, and Ken Freundlich, a Los Angeles attorney who currently represents Royalty Logic, Inc. The panel took an open forum approach to the questions presented by the Royalty Board’s recent decision.

As the CRB stated in their published decision, Section 115 of the Copyright Act empowers this panel to set various royalty rates.³ Despite the 100-year history of the act, the January 26, 2009 rule “marks only the second time that a governmental body other than the Congress is establishing the royalty rates to be paid for reproductions of musical works by copyright users.”⁴ Considering the novelty of the event, the panel had a lot to share about the CRB’s choices and their possible impacts on artists, songwriters, and broadcasters.

One of the main issues at hand was not the actual royalty amounts, but how organizations like SoundExchange collect and distribute those royalties for artists and songwriters. Depending on the medium (i.e., non-interactive online broadcasts, satellite radio, ringtones, etc.), there are different royalty amounts and different organizations that collect data, license performances, and distribute collected royalty payments to copyright holders. By the end of the panel, it was clear

² See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4,510 (Jan. 26, 2009) (to be codified at 37 C.F.R. pt. 385).

³ See 17 U.S.C. § 115(c)(3)(C)-(D).

⁴ Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4,512 (Jan. 26, 2009).

that the question left unanswered in the CRB's decision was the politics behind it. While the various organizations represented on the panel lobbied members of Congress in different ways, no one was ready to admit who actually controls the agenda in Washington when it comes to these questions - though there is no shortage of attempts at influence.

PANEL #2 - ARE INTERNATIONAL DEALS THE ANSWER TO AMERICAN ARTISTS' PROBLEM?

The second panel took a more practical approach, discussing the advantages and disadvantages of taking a music product outside of U.S. borders. As Bob Donnelly, partner at Lommen Abdo, noted in his introduction, the 20 percent drop in hard record sales in the last year makes overseas markets more and more attractive to labels and musicians. However, the decision to go abroad means answering a number of questions regarding the mechanics of international deals.

At the outset, Mr. Donnelly noted a basic choice: sign one worldwide deal that covers the bases in all foreign jurisdictions, or ink a separate deal in each jurisdiction, depending on how much exposure the artist expects to receive in each jurisdiction from touring and the like. Mr. Donnelly described the factors that go into making that decision, such as the relative strength of a label in some countries as opposed to others. Taking these factors into account, the other panel members, Joe Salvo, Global General Counsel of Hit Entertainment and former attorney for Sony, Arista, and Sony BMG; and Chris Taylor, founder of the Taylor Mitsopoulos Klein Oballa law firm and Last Gang Entertainment, joined in to discuss the various facets of international deals.

The panelists continually reminded the audience that a lawyer for an artist signing overseas deals needs to know what he or she is getting into. In short, many of the norms for U.S.

contracts do not exist overseas or are defined in completely different terms (like Purchase Price to Dealer (PPD) deals for records sales, as opposed to a percentage of cost deal familiar in the United States). The panelists also talked about the different parts of the world and where more reliable deals are likely - United Kingdom/Europe, Japan, North America, and Australia/New Zealand. South America, China, and Africa, meanwhile, are rather uncharted and the “BRIC” nations - Brazil, Russia, India, and China remain high in piracy and notoriously difficult to collect on contracts.

For the big names and intrepid artists who plan on serious exposure overseas, there is a growing interest in international-level “360 Deals” - contract agreements between artists and labels that extend beyond the traditional x-number of albums and include contractual provisions between the artist and label for all profits related to the artist - merchandising, touring, etc. This was the first of many mentions of the 360 Deal, showing its new-found popularity among the professionals at the conference.

PANEL #3 - THE EVOLVING LANDSCAPE OF MUSIC PUBLISHING: SAME AS IT NEVER WAS

The third panel discussed new and growing trends in the publishing and licensing side of the music industry. According to moderator Ed Pierson, Adjunct Professor at Southwestern Law School and former General Counsel of Warner/Chappell Music, the advent of the Internet and other transformative technologies means the continuing transformation of the music publishing industry. Brothers Todd and Jeff Brabec, authors of the book *Music Money, and Success: the Insider's Guide to Making Money in the Music Industry*, gave a very entertaining and informative

look at all the ways that people are using music publishing agreements to squeeze every cent possible out of a great (or not so great) piece of music.

The Brabec brothers noted some of the emerging major players in the music publishing industry. A great example, video game publishing, was a particularly poignant example considering Metallica's rumored appearance at SXSW to release a Metallica-branded version of Guitar Hero (a justified rumor, as it happens). As video games become more and more complex, licensing and publishing deals for soundtracks have become as profitable as motion pictures. Another unique example is the sounds recordings included in many greeting cards, a relatively recent phenomenon. Combine these newer uses with traditional media outlets such as movies, television shows, commercials, and other mechanical uses (CDs, tapes, DVDs, etc.) and it becomes clear that thinking big, and marketing well, can pay dividends in the end for artists and labels alike.

PANEL #4 - RECORDING AGREEMENT PROVISIONS THAT DIDN'T EXIST IN 2000

Picking up where the Music Publishing panel left off, Lynn Morrow, attorney at Adams and Reese LLP; David Lessof, Vice President of business Affairs at New West Records; and Paul Bezilla, an attorney at Lommen Abdo, addressed a handful of contract provisions common in recording contracts today that did not exist in the year 2000. Building on a common theme at the conference, it was clear that declining hard copy record sales (75 million units in 2006, 63 million units in 2007, 45 million units in 2008) have forced artists and labels alike to look at new income streams. This shift in focus, however, has added to the spirit of animosity and competition between the various players at the music industry table.

The first new provision the panel addressed was the recording agreement's delivery requirement. Typically, an artist has to surrender the master recordings to the label and those recordings become the property of the label. In the past, this has meant physical tapes. However, most recording is now completely digital. This means that the delivery requirement could be a hard drive with data in a particular format and backup tapes. Other possible demands in a record contract include engineering notes, instrument and microphone placement diagrams, mixer diagrams, and effect processing information.

A second new provision addresses the online presence of an artist, including the official website, myspace.com page, merchandise sold online, and other provisions. This is clearly a new phenomenon in the music industry that has no pre-Internet corollary. In the minds of some industry analysts, the label's management of an artist's web presence and sharing in the financial profit of that venture was the first step towards the 360 Deal. However, the panelists noted that what has most often arisen out of these agreements is more of a partnership. Website management can be a hassle for artists, and labels end up having more resources to do the job effectively. However, this effectiveness also provides the label to access and input on a number of areas of the artists' income streams - merchandising, tour dates, and general branding strategy.

The third provision, digital royalty agreements, closely follows behind the artist's web presence. The panelists agreed that original contract provisions greatly undervalued the importance of digital royalties in the overall picture of an artist's worth. To address this discrepancy, most new deals attempt to reach parity with physical sales so neither party, the artist nor the label, is benefiting disproportionately. Additionally, the panelists noted that there are different contract provisions for digital sales for recordings made before and after the year 2000.

Perhaps all of this was just preliminary to the discussion of the 360 Deal, which took up the remainder of the panel's time. According to one panelist, the 360 Deal is either a "land grab" or the greatest thing that ever happened to the labels. Others say that the 360 Deal is an implicit admission by the labels that they dropped the ball on the digital transition and are now trying to recoup losses from mismanaging contracts over the last decade of transition in the music industry. No matter your perspective on the 360 Deal, it is clear from the panelists' discussion that it is here to stay.

The 360 Deal is the label's claim on a more valuable stake in the overall worth of an artist the label develops from the ground up. Essentially, if a label takes an unknown artist and develops them into an international superstar, they want a cut of the profits that come from the investment and development of that artist. This often shows itself in contract provisions that give a label a percentage of all touring profits, merchandise sales, other appearances, and areas that, at least in the past, had been the realm of the artist alone. From the panelists' experience, the question most artists are facing is whether to fight the provisions outright or just get the label to lower the overall cut they take.

PANEL #5 - AN INTELLECTUAL PROPERTY CHECK-UP OF MUSIC PRODUCTS AND SERVICES

This panel attempted to categorize the many ways musicians, songwriters, and inventors (many artists, it turns out, are all three) capitalize on the various creations of their minds. This panel was something of a group presentation by Dave McClaughry from the Detroit office of Harness, Dickey & Pierce; Tim Matson of Lommen Abdo; and Lara Pierson, an attorney in Lake Tahoe. The three went through a whole series of different kinds of intellectual property that

artists can hold, using well-known (and not-so-well-known) examples from the music industry to illustrate the examples.

A piece of intellectual property can fall into five categories, each with specific legal requirements to establish each one. Artists can have a right of publicity - the “persona” or likeness of an individual; copyrights; trademarks (including service marks, dress rights (think KISS costumes)); patents; and trade secrets.

An artist can exercise these rights through a number of goods and services. Discussion from the panel included some novel, but real, examples: board games, athletic equipment, action figures/bobbleheads, particular musical instrument designs, set lists from concerts, furniture, restaurants, and cross-marketing deals. Some of the most entertaining examples included the Dale Earnhardt/Dave Matthews Band die-cast race car, the numerous patents filed by Eddie Van Halen and other especially elaborate performers, and the Jimmy Buffet Margaritaville Blender - a device that encompassed a surprising number of IP questions.

In short, the lesson for the established artist is to conduct an audit with an IP specialist to find out what angles on capitalization and intellectual property rights an artist may be missing.

PANEL #6 - MUSIC ACROSS MULTI-MEDIA PLATFORMS

“90 percent of revenue used to come from CD sales. As the digital frontier expands, managing multiple revenue streams will be the business of the business.” Henry Root, an attorney in Santa Monica, California, moderated this panel, along with Ned Hearn, an attorney in Los Angeles and author of *The Musician’s Guide to Copyright* (1978) and *The Musician’s Business and Legal Guide* (8th ed. 2007), and Jonathan Haft, Senior Vice President of Business

and Legal Affairs for Hollywood Records and Lyric Street Records (Disney Music Group's pop and country labels).

Expanding on this idea of multiple revenue streams, the members of the panel tackled all different kinds of digital music services and what each has in store for labels and artists. It certainly pays to know the different models available at the current moment, whether it is download services such as iTunes, Amazon.com, or Wal-Mart. On the streaming side of content delivery, well-known names like Napster and Rhapsody continue to find themselves with new content providers like Last.fm and other social networking sites like Myspace.com. Another area building steam is wireless providers like Nokia's "It Comes with Music" campaign and the fallout of the Royalty Board's decision to peg ringtone royalties at 24 cents per download, which made sense when ringtones were \$2.99, but makes them less viable for content providers when they are now charging only 99 cents.

Clearly the heart of the business model is changing. Mr. Haft, from Disney, remarked that larger labels like Disney have a whole host of cross-branding opportunities for their artists (movies, websites, television shows), as well as the capital to incubate their own content-delivery systems like online streaming services and cell phone content delivery. However, there are many services that have come and gone, and so labels and artists must keep up to date on what start-ups are offering and making sure SoundExchange and other royalty organizations are properly representing the artists and labels.

PANEL #7 - MUSIC LITIGATION AND DECISIONS

Prof. Stan Soocher of the University of Colorado - Denver and Editor in Chief of *Entertainment Law & Finance*, and Christine Lopera from Mitchell Silberberg & Knupp LLP in New York provided an update on recent case law developments affecting the music industry. The following is a brief list of cases they reviewed and some important holdings.

In *Allman v. UMG Recordings*, the court found that a contract provision limiting royalty collections to a three-year limitation was reasonable.⁵ In *Reinhardt v. Wal-Mart Stores Inc.*, the court found that the Ramones' lead songwriter, Reinhardt, was entitled to reimbursement for digital sales of the audio recordings.⁶ *Sybersound Records Inc. v. UAV Corp.* addressed exclusivity of licenses for karaoke recordings.⁷ *Recht v. Metro Goldwyn Mayer Studio Inc.* is a case addressing change of venue motions for copyright infringement acts.⁸ This decision moved the case from the District Court of Wisconsin to the Central District of California.

In *Lahera v. The Walt Disney Co.*, the district court dismissed a copyright infringement action against the Walt Disney Company for allegedly using the phrase "dancing with the stars" from the plaintiff's song "Rosana" as the title the popular reality television show.⁹ The court found the following: "[t]here is no evidence that Defendants heard 'Rosana' nor is there evidence that Defendants had a reasonable opportunity to hear 'Rosana.' Lahera: (1) wrote the song while housed in a federal prison; and (2) does not provide evidence that the song was publicly released."

⁵ 530 F. Supp. 2d 602 (S.D.N.Y. 2008).

⁶ 547 F. Supp. 2d 346 (S.D.N.Y. 2008).

⁷ 517 F.3d 1137 (9th Cir. 2008).

⁸ 08-cv-250-slc (D. Wisc. 2008).

⁹ 08-11677 (E.D. Mich. 2008).

For more on these decisions and other affecting the music industry, the panelist recommend subscribing to the periodical *Entertainment Law & Finance*.

PANEL #8 - THE INDUSTRY'S FUTURE AND THE MAJOR LABEL LAWYER'S ROLE

The final session of the SXSW Music legal conference was a round table discussion featuring Ken Abdo of Lommen, Abdo, P.C.; Julie Swindler, Executive Vice President, Business Affairs and General Counsel for Sony Music Entertainment; Rand Hoffman, Head of Business and Legal Affairs for Interscope Geffen A&M Records; and Lisa Margolis, Senior Vice President, Business & Legal Affairs in the Music Division at Warner Bros. Pictures.

This panel acted as something of a recap of the issues of the entire conference, with these exceptionally experienced panelists offering insiders' insight into the current state of the music industry from the major label perspective. The panelists discussed a number of topics, including the building momentum for congressional recognition of a public performance right for terrestrial broadcasts, the usefulness of the 360 Deal, the foundational aspect of artist development as the heart of the music label business, and the different ways labels are trying to capitalize in the digital marketplace.

Looking to the future of the record industry, the panelists discussed where they thought the business might be in 5 years. All agreed that artist development would sit at the heart of the business, but discussed other avenues to complement this traditional role. More 360 Deals would mean greater emphasis by the labels to do branding and sponsorship of artists across many media platforms. Labels will attempt to skip brick and mortar or online record stores and instead

engage in direct-to-consumer marketing and sales. Labels will engage in more “manufacturing” of artists to address particular demographic markets (i.e. Pussycat Dolls, etc.).

The uncharted territories of music marketing, however, will likely remain problematic. These include geographic regions rampant with digital piracy (Brazil, Russia, India, China), and areas of little exposure, such as Africa. Finally, keeping one step ahead of the technology by capitalizing on developments before piracy undercuts possibilities, will remain at the forefront of labels striving for long-term financial stability.

CONCLUSION

As mentioned in the introduction to this review, South by Southwest is much, much more than what goes on in the CLE conference room, or the convention center as a whole. The overall experience of SXSW gives attendees a renewed sense of not only the current issues in the music industry, but also the entrepreneurial energy of the history of music. Walking the streets of Austin for a few short days, one’s mind cannot help but wonder what the Beatles looked like when they carried their own gear around Liverpool, England. When two thousand and more no-name bands gather in one place, greatness cannot help but lurk somewhere nearby. The question is whether or not you will be the one to find it.