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Sony, EMI Allowed To Intervene In Pandora-ASCAP Row

By **Jeff Sistrunk**

Law360, Los Angeles (December 13, 2013, 8:46 PM ET) -- A New York federal judge on Friday allowed Sony/ATV Music Publishing LLC and EMI Music Publishing Cos. to intervene in a lawsuit implicating access to the digital rights to their music catalogs through the American Society of Composers, Authors and Publishers, saying the publishers have a potential financial interest in the case.

U.S. District Judge Denise Cote granted Sony and EMI's motion to intervene, which they filed following a Sept. 17 ruling in favor of Internet radio giant Pandora that nullified their attempt to withdraw digital rights to their catalogs from ASCAP's blanket license.

In granting Pandora's motion for summary judgment, Judge Cote said the Internet radio company's five-year blanket license beginning Jan. 1, 2011, would cover "new media" rights, even though Sony, EMI and other members of performance rights organization ASCAP purportedly revoked the PRO's right to license them so they could forge private deals with Pandora.

Sony and EMI filed their motion to intervene on Sept. 30, saying Judge Cote's ruling divested them of their exclusive rights under Section 106 of the Copyright Act to publicly perform the songs in their catalogs or authorize others to do so.

The activities of ASCAP are governed by a consent decree stemming from a U.S. Department of Justice antitrust lawsuit, and Judge Cote said that agreement explicitly barred the performance rights organization from allowing members to selectively revoke certain rights.

Pandora argued that some larger music publishers' purported withdrawals of the digital rights to their catalogs, which allegedly apply only to Pandora and not other conventional ASCAP clients like terrestrial radio stations or to smaller streaming services, are unfair and not allowed under the DOJ decree.

Judge Cote disagreed with Sony and EMI's assertion that her ruling on Pandora's motion for summary judgment affected their rights under the Copyright Act, pointing out the DOJ decree applies only to ASCAP.

However, the music publishers do have a potential financial interest in the case, the judge said. Sony and EMI argued that licensing compositions to entities like Pandora through ASCAP leaves them with less money than they would receive by licensing those works

independently, according to court documents.

Moreover, it is unclear whether ASCAP and the music publishers have the same objective with respect to the question of allowing partial withdrawals of rights in their compositions from the PRO, Judge Cote said.

"On one hand, ASCAP did vigorously argue in favor of the position the publishers urge here in its summary judgment practice," Judge Cote wrote. "On the other hand, the publishers may well be correct that increased ASCAP revenue stemming from works that are required to remain in the ASCAP repertory to be licensed to all applicants means that the incentives of ASCAP and the publishers are not perfectly aligned."

Judge Cote granted Sony and EMI's motion to intervene on the condition that they not raise any arguments on appeal that weren't previously advanced by ASCAP, with the exception of their Copyright Act argument. The judge said the publishers' "failure to intervene earlier deprived the court of the ability to evaluate any new arguments they might bring so as to create a record for appeal."

The music publishers' attorney, Donald S. Zakarin of Pryor Cashman LLP, told Law360 that, "we agree with the judge's grant of our right to intervene, but disagree with the ruling insofar as it limits the arguments available to us on appeal." Judge Cote's Sept. 17 ruling granted relief that Pandora did not request, as the Internet radio company took the position that it was not trying to nullify the publishers' rights to partially withdraw their digital rights from ASCAP, Zakarin said.

The judge's ruling came amid a broader lawsuit over the licensing rate ASCAP charges Pandora for the right to stream music from the PRO's 460,000 members. The two sides reached a deal in 2005 when Pandora was a startup, but talks to renew the agreement broke down in 2010. The suit is set to go to trial Jan. 21.

A Pandora representative was not immediately available late Friday for comment.

Pandora is represented by Kenneth L. Steinthal and Joseph R. Wetzels of King & Spalding LLP.

Sony and EMI are represented by Donald S. Zakarin, Frank P. Scibilia and Erich C. Carey of Pryor Cashman LLP.

The case is *In re: Petition of Pandora Media Inc.*, case number 1:12-cv-08035, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Bill Donahue. Editing by Richard McVay.
