



Royalty Disputes: Legal Strategies in Pursuit of Information and Payments Due

Presented by David Slarskey (Slarskey LLC)
and Juli Saitz (Ankura Consulting)

Conditions Affecting Royalty Accuracy

- Expertise imbalance
- Asymmetric information
- Convoluted contracts, amendments, and reporting
- “Small” dollars at stake for many authors
- Marketplace changes in distribution
- Royalties trending downward
- Incentive for delay
- “Stickiness” of relationships in a changing market

Typical Problems in Royalty Reporting

Redefining the Work

How are supplements, digital packages, and eBooks treated in reporting transactions and calculating royalties?

How do changing distribution models affect royalties?

Subsidiary Sales

Who is actually selling and/or licensing the Work, and how does that affect the royalty rate?

Geographic Issues

Where is the Work being sold and/or licensed, and how does that affect the royalty rate?

Three Stages to Royalty Transparency

Auditor Inquiry

Cooperative Effort

Does the agreement have an audit clause? Will the publisher respond to requests for information?

Analysis

Audit and Analysis

Analyzing the sales, royalty rates, and royalties paid on versions of the Work

Formal Dispute Procedures

Litigation

Litigation strategies may help authors achieve results when publishers are not forthcoming.

Considerations in Developing a Legal Strategy

- What is the objective?
- What are the claims?
 - Breach of contract
 - Unjust enrichment
 - Fraud
 - Copyright infringement
 - Fiduciary duty
- Are others facing the same issue? Can the issue be resolved on a class-wide basis?
- Where and how to proceed

Common Legal Issues in Royalty Disputes

- Importance of Contractual Language
- Derivative and Electronic Works
- Sub-licensing vs. Sales
- Reporting Sufficiency/Accuracy
- Commercial Duties
 - Good faith and fair dealing
 - Fiduciary

Case Studies and Legal Precedents

- **Good Faith and Best/Reasonable Efforts**

Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing, 30 N.Y.2d 34 (N.Y. 1972)

- Successful author publishing a second edition refuses to reduce royalties
- Publisher hires a new author to replicate the work and deceives the author

- **The “Four Corners” of the Document**

Ellington v. EMI Music, Inc., 24 N.Y.3d 239 (N.Y. 2014)

- EMI paying an affiliate to engage in foreign royalty collection; paying only on remittances.
- Clear and unambiguous language in the agreement does not preclude such actions (50% of net revenue “actually received”)

Case Studies and Legal Precedents

- **Fiduciary Relationships**

Apple Records, Inc. v. Capitol Records, Inc., 137 A.D.2d 50 (1st Dep't 1988).

- Allegations of fraudulent underreporting of royalties
- Duration and significance of relationship, and “entrusting of talents” separate from contractual terms may create fiduciary duties

- **Full and Fair Reporting of Royalties**

Mellencamp v Riva Music Ltd., 698 F Supp 1154 (S.D.N.Y. 1988)

- Exclusive license creates obligation to make reasonable efforts to exploit the license
- Timely and complete reporting of royalties is an element of good faith

Case Studies and Legal Precedents

- **Testing The Spotify Model**

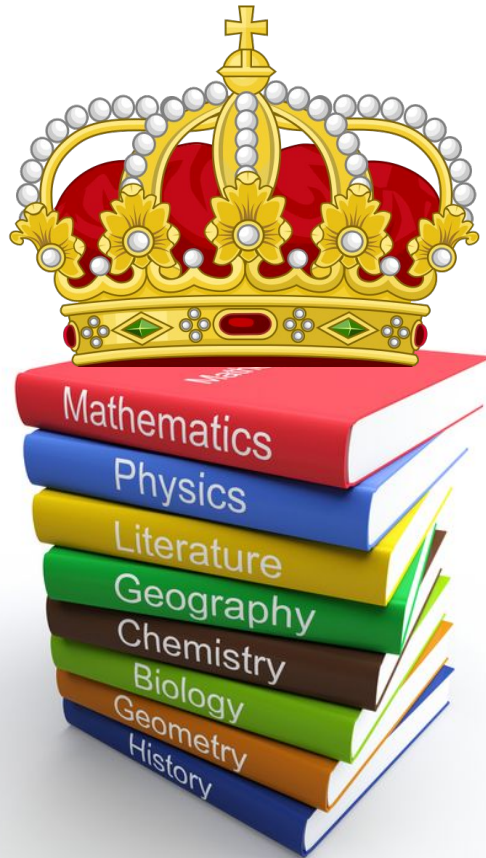
19 Recordings Ltd. v Sony Music Entertainment, 165 F.Supp.3d 156 (S.D.N.Y. 2016)

- 19 Recordings licenses recordings to Sony, with broad right to sublicense
- Sony licenses to Spotify and receives 'global' payments & equity rather than per track royalties
- Covenant of Good Faith and Fair Dealing may not imply inconsistent terms

- **Class Allegations**

Gitman v. Pearson Educ., Inc., 14-CV-8626, (S.D.N.Y. 2014)

- Improper sale practices (i) export sales; (ii) kit and custom edition sales; (iii) discounted domestic sales
- Class allegations upheld (citing *Englade v. HarperCollins Publs.*, 289 A.D.2d 159 (1st Dep't 2001))



David Slarskey
Slarskey LLC
(212) 658-0661
dslarskey@slarskey.com

Juli Saitz
Ankura
(646) 291-8571
juli.saitz@ankura.com