

Two More Comedians Added to Pandora Battle over Licenses to Perform Jokes

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“Writing is thinking and thinking is hard work.” – Lewis Black

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation



Image from Debby Wong / Shutterstock.com

Over his highly successful career, comedian Lewis Black has certainly done his share of hard work writing jokes. He also has copyrighted them. Now he and a host of other famous comedians are seeking compensation for the use of those jokes by streaming giant Pandora Media, LLC. Lawsuits by Black and George Lopez recently were added to the consolidated copyright infringement lawsuit in the United States District Court for the Central District of California titled *In re Pandora Media, LLC Copyright Litigation*, 2:22-cv-00809-MCS-MAR. Black and Lopez join other copyright holders of the comedic material created by Bill Engvall, George Carlin, Ron White, Robin Williams, Andrew Dice Clay, Nick Di Paolo, and Bill Hicks. Together, the comedians challenge Pandora's practice of making available through their digital broadcast radio and interactive streaming services the copyrighted works of these comedians without the proper licenses.



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The suit calls into question Pandora's entire business model for providing spoken word comedy content, and provides a useful backdrop for introducing the various copyright and licensing issues at play (pun intended) in the context of broadcasting and streaming comedy and literary works, as opposed to music.

The claims center on the plaintiffs' copyrights in their spoken word compositions recorded on various comedy albums; in other words, their jokes and other comedic material. Anyone wishing to perform these albums, or portions thereof, needs a public performance license from the rights holders of the underlying material. In the music industry, the required public performance licenses are typically obtained from organizations like BMI and ASCAP, which streamline the licensing process. Historically, there was no analog to BMI or ASCAP for literary works (more on this below), so Pandora obtained no public performance licenses for any of its comedic content. Plaintiffs allege this failure violates their copyrights both when Pandora broadcasts that content on its digital radio service, and makes it available through interactive streaming. For streaming, the comedians also fault Pandora for not obtaining a mechanical license to stream the underlying comedic works. They note that the mechanical license is required regardless of whether Pandora has obtained a license to stream the sound

recording of the plaintiffs' comedy albums, the copyright to which is typically owned by the record label, and not the artist.

The plaintiffs argue that Pandora has long been aware that its practices in the comedy space are illegal. They cite to Pandora's SEC filings from 2011-2017, in which it disclosed that it performs spoken-word comedy content "absent a specific license from any . . . performing rights organization" and has never obtained a license for the underlying compositions for the sound recordings that it streams. Pandora also acknowledged that it could be subject to significant liability for copyright infringement arising out of its providing spoken-word comedy content. That "significant liability" is potentially over \$60 million in statutory damages for the 475 copyrighted comedic works at issue for the plaintiffs (not counting the works of Black and Lopez).

For its part, Pandora claims that the comedians are compensated through licensing fees paid to the owners of the copyrights in the sound recordings, which are then shared with the comedians, and by pointing out that the comedians have historically accepted this arrangement. Up until now, no comedian has ever licensed separately the rights to their copyrighted jokes, and that, except for what Pandora calls the "dysfunctional music licensing market," all other copyright-intensive industries have relied on the creators of the final product like record labels to secure and pass along the required rights. Pandora also notes that comedians earn valuable publicity and exposure from their works being made available by Pandora, such that the current system is fair.

Pandora also has gone on the offensive, asserting antitrust counterclaims against the comedians and Word Collections—which markets itself as the ASCAP and BMI for spoken word instead of music. According to Pandora, Word Collections is a "cartel leader" that seeks to consolidate naturally competing rights into a "monopolistic portfolio" to fix the price of the only license available for the rights in the comedic works.

Both the comedians and Word Collections moved to dismiss the counterclaims. At the same time the court was adding Black and Lopez to the case, it also conducted a hearing on those motions, but has not yet issued a decision. The court also has given the parties approximately a year to engage in fact discovery. The case has the potential to change the entire system by which non-musical content is broadcasted and streamed over the internet, so the TMCA will be closely watching.