

To the Tune of \$45 Million

Two Texas attorneys filed a federal lawsuit to ensure a music fund distributed \$45 million in royalties to more than 60,000 musicians.

INTERVIEW BY ERIC QUITUGUA

Whether it's a distinct harmonica intro on a massive hit like Pitbull and Ke\$ha's "Timber" or a billowy trombone solo on a ska punk anthem like Sublime's "Wrong Way," some songs are given extra flavor thanks to the work of lesser-known session musicians. But contributing to chart-topping music doesn't always mean royalties and a Rolls-Royce. While there is legislation ensuring compensation for artists, snags in the distribution process can lead to the accumulation of money owed to unknowing musicians. The *Texas Bar Journal* caught up with Dallas-based intellectual property attorney Eric Zukoski, of Quilling, Selander, Lownds, Winslett and Moser, and Fort Worth-based commercial litigation attorney Roger Mandel, of Jeeves Mandel Law Group. Their federal case, *Blondell v. Bouton*, cast light on the backlog at AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund and netted a small city-sized population of financially unsung heroes a dizzying \$45 million.¹

WHAT WAS THE CRUX OF THE CASE?

Mandel: In a nutshell, we sought equitable and complete

distribution of a statutory set aside intended for a class of highly talented performers that helped create music enjoyed by billions of people throughout the world. The royalty was owed to people that the U.S. Code calls "nonfeatured performers," known as studio musicians and background singers to everyone else. One of the results of our efforts was \$45 million earmarked for 61,298 studio musicians and singers—some of whom were owed well into five figures and even into six figures.

HOW DOES A FUND DESIGNED TO PAY ROYALTIES FAIL TO DO SO AND INSTEAD JUST ACCUMULATE MONEY FOR OVER A DECADE, AND HOW DOES THAT SLIP BY THE MUSICIANS?

Mandel: There were a number of reasons put forth by the defendants, the most plausible of which was that distributing royalties is not an easy task. The real problem in our view—and also the key to fixing the problem—had to do with awareness. Studio musicians and singers, especially non-union ones, were largely unaware of their statutory royalty. And in our view, awareness was the key to distribution in that informed performers will self-report and self-claim, making distribution that much easier.

THERE'S A STAGGERING 60,000+ ROSTER OF MUSICIANS AND SINGERS OWED ROYALTIES BY THE FUND IN THE LAWSUIT YOU FILED IN FEDERAL COURT. HOW DOES THE \$45 MILLION GET DISTRIBUTED AMONG ALL OF THOSE?

Mandel: Our settlement includes specific procedures that the fund has to follow to identify, locate, and pay studio musicians and singers. Internet, social media, and Accurant searches are included, as well as pro-rata re-distribution of excess funds. As to the awareness component, the settlement requires the fund to take affirmative steps to publicize its existence and purpose.

WHY ARE STUDIO MUSICIANS AND SINGERS HISTORICALLY NOT PAID THEIR FAIR SHARE AND CAN YOU TELL ME GENERALLY ABOUT THE CONSTRAINTS THAT CAUSE THEM NOT TO BE FAIRLY COMPENSATED FOR THEIR WORK ON RECORDINGS.

Zukoski: The single biggest impediment is the anomaly in U.S. copyright law that there is no performance right for recordings played on terrestrial (over-the-air) radio. There are other countries besides the U.S. that don't recognize a performance right in recordings played on terrestrial radio—China, Iran, and North Korea. However, thanks in great part to the efforts of the American Federation of Musicians, there is a limited performance right in digital performances on non-interactive webcasting (e.g., Apple radio, Pandora basic), satellite radio (SiriusXM), and digital cable (Music Choice). The second biggest impediment, the one we worked to correct, was that for these digital performances, the money was not making its way to musicians and singers.

HOW WIDESPREAD IS THIS? IS IT CASE BY CASE WITH DIFFERENT AGENCIES AND DO YOU EXPECT THINGS TO CHANGE ACROSS THE MUSIC INDUSTRY AS A RESULT OF LAWSUITS LIKE THIS ONE?

Zukoski: The biggest problem facing the music royalty process is the difficulty of collecting and processing the data needed to pay royalties. There are 60,000 new recordings released on Spotify every 24 hours. If you multiply the number of recordings by the number of income participants on those recordings, the numbers are staggering. The mechanisms for equitable and thorough distribution to studio musicians and singers included in our settlement theoretically could work for



ZUKOSKI



MANDEL

other music royalty pools and we're hopeful that these provide a road map for doing so.

WHAT LEVERAGE DO STUDIO MUSICIANS AND SINGERS HAVE IN NEGOTIATION AND HOW DO YOU ASSESS FAIR COMPENSATION FOR A STUDIO MUSICIAN OR SINGER?

Zukoski: As to leverage, not so much. The public wants to hear music by their favorite artist, not their favorite studio musician or singer. As a result, a record producer doesn't need to hire particular studio musicians or singers to produce a hit. On the other hand, it's hard to have a hit without them, so fair compensation should reflect their artistic importance. And if one has any doubt about the artistic importance of studio musicians and singers, count the number of solo acapella records that have made it to the top 40—or even the top 500.

IS NEGOTIATION AN OPTION WHEN IT COMES TO A STUDIO MUSICIAN OR SINGER'S WORK ON A SINGLE FOR A CHART-TOPPING ARTIST?

Zukoski: Because studio musicians and singers are in many respects “fungible,” the contractual fee paid to studio musicians and singers is surprisingly uniform. The statutory royalty that we sought to enforce on the other hand is based on the post-release popularity of a particular recording. One of our class reps spent an hour recording one track and was paid a contractual fee in the low three figures—and then he remodeled his house with the statutory royalties that we collected for him for that one-hour session.

ERIC, AS A MUSICIAN YOURSELF, YOU SEEM TO HAVE A VESTED INTEREST. CAN YOU TELL ME HOW YOU STARTED WORKING ON CASES INVOLVING ROYALTIES FOR MUSIC ARTISTS?

Zukoski: As a musician that happens to be a lawyer, I knew

about the statutory royalty owed to studio musicians and singers. As a lawyer that happens to be a musician, I knew that most musicians and singers were unaware of this royalty—even to the point of debating its existence. Most of our class representatives were music colleagues of mine, and it was this connection that led me to investigate the bottleneck in the money flow from retail music consumers to studio musicians and singers. I'm convinced that at least one of our class reps started out thinking that we were chasing unicorns.

FOR THE MUSICIANS, THIS ISN'T JUST AN ISSUE OF FAIR PAY, IS IT?

Zukoski and Mandel: By and large studio musicians and singers want both fair compensation and artistic recognition. Although digital music has created economic savings in the delivery cost of music, the lack of a tangible medium means that we no longer have printed album credits. Our mission was not to fix this problem—that will take the next teen computer genius—but we were pleased that our efforts helped toward full and fair compensation, and the economic realities of life make this the primary concern for most working musicians. **TBJ**

NOTES

1. Recently, the fund that administers a statutory royalty generated by digital performances of music filed a report with a federal court confirming that it had distributed approximately \$45 million to over 60,000 studio musicians and singers pursuant to a class-action settlement,” Zukoski and Mandel said in an email. “The lawsuit was prosecuted by two Texas attorneys, and the class representatives were Texas musicians and singers who had performed on numerous hit records by a variety of artists. Texas Bar members with clients that might be entitled to this royalty can learn more at www.afmsagafrfund.org.”



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