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COPYRIGHT LAW

Comedians' Claims Against Pandora Are No Laughing Matter

By Thomas Kjellberg and Robert W. Clarida

In dual lawsuits filed on February 7, 2022, the estates of Robin Williams and George Carlin accuse Pandora Media of willfully infringing the legendary comedians' registered copyrights in their "spoken word compositions" – their standup routines – by streaming the sound recordings that embody those routines without a license for the spoken word works. *Robin Williams Trust v. Pandora Media, LLC*, No. 22-cv-815 (C.D. Cal. Feb. 7, 2022); *Main Sequence, Ltd. v. Pandora Media, LLC*, No. 22-cv-810 (C.D. Cal. Feb. 7, 2022).

The Williams complaint alleges that Pandora infringed 27 Robin Williams spoken word works ("SWWs"), which were included in the albums *Reality … What a Concept* and *A Night At The Met*. The 56 allegedly infringed George Carlin SWWs are contained on the albums *An Evening with Wally Londo*, *Class Clown* (including a performance of the famous – or infamous – "Seven Words You Can Never Say On Television" routine), *Classic Gold*, *George Carlin on Comedy*, *On the Road*, *SOFA – Comedy Clips*, *The George Carlin Collection*, *Toledo Window Box*, and *You Are All Diseased*.

Both complaints specify that the relevant sound recording copyrights are owned by major record labels, pursuant to recording contracts entered into by the labels with the respective comics, but that Williams and Carlin each retained all of their exclusive rights in their original SWWs. And both complaints allege that Pandora made the specified SWWs "available for dissemination to the public via their digital broadcast radio service knowing full well that it did not possess a valid license to publicly perform the [SWWs]," and that "[i]n addition to no license, it also made no royalty payments for the [SWWs].

Basis of Protection for Spoken Word Works

A commercially released sound recording typically embodies two distinct copyrights: the copyright in the sound recording itself (sometimes called the "℗ copyright"), as well as the separate "© copyright" in the "underlying work" that's fixed in the sound recording. If the underlying work is in the public domain (a Stephen Foster song, say) or is not a copyrightable work at all (e.g., bird calls or the sounds of heavy machinery), then the only valid copyright is the sound recording copyright.

It's safe to say that the lion's share of the underlying works fixed in commercial sound recordings are musical works, but the same rules apply regardless of the nature of the underlying work. Since February 15, 1972, the federal copyright law has expressly accorded protection to sound recordings, defined as "works that result from the fixation of a series of musical, spoken, or other sounds, … regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." (emphasis added). If the "spoken sounds" fixed in a sound recording themselves comprise a literary work (defined as a work "expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied" (emphasis added)), that literary work is separately protectable, so long as it is "original."

The Supreme Court in *Feist Publications v. Rural Telephone Service Company,* 499 U.S. 340 (1991), instructed that originality, for copyright purposes, has two components: first, that the work was "independently created" by its author (rather than copied from other works); and second, "that it possesses at least some minimal degree of creativity." *Id*. at 369. The Court emphasized that "the requisite level of creativity is extremely low; even a slight amount will suffice. The vast

majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Id.* Accordingly, short of Andy Kauffman reading the phone book, it is nearly impossible to conceive of a SWW fixed in a commercially released sound recording that does not meet that extremely low threshold.

Performing Rights Societies and the Right to Publicly Perform Copyrighted Works

The Copyright Act accords to the copyright owner, "in the case of literary, musical, dramatic, and choreographic works," the exclusive right to "perform the copyrighted work publicly" and to authorize others to do so. 17 U.S.C. § 106(4).

As a rule, entities, such as Pandora or Spotify, that wish to publicly perform copyrighted musical compositions obtain licenses to do so from one or more of the "performing rights societies," such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. The performing rights societies acquire nonexclusive public performance rights through agreements with musical-work copyright owners such as songwriters and music publishing companies. The societies, in turn, grant to music users such as terrestrial and digital broadcasters, and owners and operators of concert halls and nightclubs, the right to publicly perform any of the works in the societies' repertoire by means of "blanket license agreements." The rights societies distribute the money they collect in license fees from their music-user licensees as royalties to their affiliated music publishers and composers. The societies' licenses to broadcasters and other users are non-exclusive.

However, as a matter of industry practice the performing rights societies' coverage has never extended to literary works; indeed, the Copyright Act defines a "performing rights society" as "an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works." 17 U.S.C. § 101. Recently,

however, organizations have emerged with the stated mission of filling the role of the performing rights societies for the copyright owners of SWWs; i.e., to license, on behalf of the copyright owners, the right to publicly perform SWWs to terrestrial and digital broadcasters, to collect license fees for the broadcasters' use of the SWWs, and distribute the collected fees as royalties to the copyright owners of the SWWs.

The complaints in the Robin Williams and George Carlin cases allege that one such organization, which represents the Carlin and Williams interests, had been in contact with Pandora in 2020 and 2021 to attempt to negotiate a public performance licensing agreement for SWW copyright owners, including Williams and Carlin, but that no substantive response had been received from Pandora as of the filing date of the complaints.

In any case, it appears that Pandora has been aware for a number of years that it may require licenses for the SWWs it streamed; the complaints allege identically that

> In Pandora's own SEC 10K public filing[s] … from 2011 to 2017 … Pandora admitted in its Risk Factors every year that it performs spoken-word comedy content "absent a specific license from any [] performing rights organization" and it has never obtained a license for the underlying literary works for the sound recordings of spoken-word comedy content that it streams. Pandora further admitted that it "could be subject to significant liability for copyright infringement and may no longer be able to operate under [its] existing licensing regime."

CONCLUSION

It will be interesting to see why Pandora ceased listing the lack of streaming licenses for SWW's as a "risk factor" in its SEC filings after 2017, and what substantive defenses, if any, it may assert in its response to the complaints. The basis for protecting SWWs under the Copyright Act is clear, and the historic failure of the music performing rights societies to license public performances of such works should be of no consequence now that organizations exist to grant

those licenses. And the issues raised in the Carlin and Williams suits go far beyond comedy, extending to podcasts and other increasingly lucrative forms of spoken-word content.

To end with a joke: A cop pulls a teenager over for speeding and says "Show me your license please." The teenager says “Sorry, sir, I don’t have a license.” The cop replies, "Son, I've been waiting for a stupid kid like you all day." The teenager says, "Well officer, I got here as quick as I could." Watch this space.

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Robert W. Clarida is a partner in the New York law firm of Reitler, Kailas & Rosenblatt LLC and the author of the treatise *Copyright Law Deskbook* (BNA). He is a past Trustee of the Copyright Society, a past Board member of the American Intellectual Property Law Association and former chair of the Copyright and Literary Property Committee of the Association of the Bar of the City of New York.