

LOS ANGELES

Daily Journal

www.dailyjournal.com

TUESDAY, APRIL 17, 2012

FACING THE MUSIC?



Robert Levins / Daily Journal

Daniel Warshaw, a partner at Pearson, Simon, Warshaw & Penny LLP

Artists unite in royalty battle

Record companies accused of claiming unfair stake in digital music.

By Erica E. Phillips

Daily Journal Staff Writer

A slow trickle of lawsuits against the music industry's major labels has begun to surge.

There are now so many claims against UMG Recordings Inc., Sony Music Entertainment Inc., Warner Music Group Corp. and EMI Music Inc. alleging underpaid royalties on digital music sales that attorney Daniel Warshaw uses a chart to keep track of them.

In recent months, Warshaw, a partner at Pearson, Simon, Warshaw & Penny LLP,

joined a committee of plaintiffs' lawyers across the state to launch a broad legal attack on behalf of several classes of recording artists. If their claims ring true in court, it could cost the industry hundreds of millions of dollars.

"The numbers are staggering," Warshaw said, "especially on a class basis."

David M. Given of Phillips, Erlewine & Given LLP was one of the first attorneys to take on the issue, filing lawsuits on behalf of musicians Rick James and Rob Zombie last spring. Given and Warshaw have now teamed

up, along with sole practitioner Leonard B. Simon and lawyers from Hausfeld LLP; Johnson & Johnson LLP; Kiesel Boucher Larson LLP; Lief Cabraser Heimann & Bernstein LLP; and New Orleans-based Provosty & Gankendorff LLC.

The wave arose in the wake of the 9th U.S. Circuit Court of Appeals' 2010 opinion in *F.B.T. Productions LLC v. Aftermath Records* 621 F.3d 958 (9th Cir., Sept. 3, 2010). The court ruled that Aftermath, a subsidiary of UMG, owed rapper Eminem's production

Continued on reverse

Artists seek to recover royalties

Continued from page 1

company a significantly higher royalty on digital sales of his music than it had been calculating. Unlike a physical record, which generally earns artists a 12 percent to 20 percent contractual royalty, the ruling held that digital sales constituted the licensing of a master recording. And royalties from a license — in F.B.T.'s, as in many other artists' contracts — are generally split 50-50.

Given said the contracts at issue in all of the cases are those of so-called "catalog" artists, whose music continues to sell long after they've stopped making it. Catalog artists make up at least 25 percent of any label's sales in a given year, according to Given. As of Feb. 2010, iTunes had sold well more than 10 billion tracks at an average price of 99 cents apiece. With one-third going directly to iTunes and another 15 percent to 25 percent of the remaining income going to a distributor, that leaves more than \$1 billion in catalog revenue to be divvied up between the labels and the artists.

That makes the difference between 12 percent to 20 percent and a 50-50 split — in iTunes digital sales alone — \$300 million to \$380 million, conservatively.

Members of the coalition of law-

yers have filed class actions against UMG on behalf of James, Zombie, rapper Chuck D of Public Enemy and members of R&B group The Temptations; against Warner on behalf of "Dream Weaver" singer Gary Wright and 1970s soul group Sister Sledge; and against EMI on behalf of The Motels' singer Martha Davis. Another lawyer, William M. Audet of Audet & Partners LLP, has filed separate actions against Warner

'It's still so early on, but we feel these are going to be hard-fought cases.'

— Daniel Warshaw

and EMI in recent months. All of the cases were filed in federal court in the Northern District.

A spokesman for UMG said, "The complaints in question suffer from serious flaws and weaknesses, not the least of which is that the claims asserted are not appropriate for class treatment. We will vigorously defend against them." A Warner spokesman declined to comment, and EMI did not return messages.

But the question remains — how much will the cases be worth to the plaintiffs, and how big of a hit will each label sustain?

A class action suit against Sony settled last month for \$7.95 million in New York's Southern District. But to many, that amount seemed vastly understated, and some Sony artists have filed individual claims against the label rather than joining the class. Comedic singer "Weird Al" Yankovic, for example, sued Sony earlier this month for more than \$5 million. A spokesman for Sony declined to comment on the cases.

Meanwhile, the F.B.T. case, on remand from the 9th Circuit, is scheduled to go before a jury to determine damages sometime this summer. The judge continued an April 24 trial date last week at the parties' request. An accounting document leaked in that case estimated Eminem's unpaid digital royalties at \$3.8 million for 2005 through 2009 alone.

Still, the artists with the most to gain aren't the Justin Biebers or the Katy Perrys of this past decade. Royalty auditor Cedar Boschan of Hurewitz, Boschan & Co. LLP said musician contracts penned after 2005 have clear provisions for digital downloads and that the royalties are comparable, if not identical, to physical record sale royalties.

"They've definitely changed the language in order to protect themselves," Boschan said, providing for distinct royalties on several different types of licensing, such as compilations, sync licensing for television, streaming licenses and so forth.

Boschan said Sony's move to settle with its artists was a smart way to "limit their liability for a huge swath of artists," but Warshaw disagreed.

"It's still so early on, but we feel these are going to be hard-fought cases," Warshaw said.

Paul Young, a music business professor at the University of Southern California and UMG's former director of licensing and contract administration, said the cases will have a "major impact" on the industry. Nine out of 10 albums never recoup their costs, he said, so if the industry takes a \$100 million-dollar hit, it could mean less investment in new artists.

"When you get one Eminem, that pays for all the risk the label had to take for the other nine records," he said, in signing bonuses and marketing expenses — a label's number-one cost. "If everybody's getting a 50-50 split ... that just brings about another nail in the coffin for labels as investors."

erica_phillips@dailyjournal.com