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## 'Without the Services, You're Dead'—Why Kenneth Steinthal Litigates Against the Music Industry He Loves

From the dawn of the online music business, the King & Spalding partner, and Attorney of the Year finalist, has fought hard on behalf of webcasters, streaming services and other content providers to keep royalty rates affordable, while also trying not to alienate the creators his clients do business with.

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Intellectual Property



Scott Graham

### What You Need to Know

- Every five years the Copyright Royalty Board sets rates for sound recordings and musical compositions.
- The proceedings are adversarial, but afterward the same lawyers may have to do deals with each other.
- Two days before the 2020 hearings, D.C.'s mayor declared a COVID emergency, leading to a virtual five-week trial.

King & Spalding partner Kenneth Steinthal has always loved music. Growing up in New York, he attended Woodstock in 1969, and still owns vintage vinyl of The Beatles, Tom Petty, Bonnie Raitt and many others.

But he didn't think of himself as a music litigator early in his career. "I tried cases in the steel industry, in the securities industry and bankruptcy court," he said.

A few of his television clients joined MTV just about the time it was launching Imagine Radio, an early internet music service. Before long Steinthal was representing MTV and Yahoo Music as they hammered out the first licensing deals for online music at the dawn of the Napster age in the late 1990s.

"It became very, very clear that the internet was going to be used for the delivery of music," Steinthal said. "And we had to figure out ways to do that in a manner that was licensed, so that the labels and publishers would continue to get paid."

Fast-forward 20-plus years and Steinthal remains one of the biggest players in online music litigation, most notably representing Google before the Copyright Royalty Board (CRB), the administrative panel that sets rates every five years for streaming services to license sound recordings and musical compositions. His work there and elsewhere on behalf of streaming services makes him an Attorney of the Year finalist for The Recorder's [California Legal Awards](#).

The CRB work is challenging. The formulas and factors behind the rates are complex, and the various streaming services, though generally seeking to keep royalties down, can have different goals and objectives. "It's a delicate issue when your client wants you to be arguing their case but is mindful of not upsetting the bandwagon," Steinthal said.

Then there is the challenge of litigating against powerful record labels and music publishers on the other side. "My clients are negotiating and I am negotiating with Warner Music Group, Sony Music Entertainment and Universal all the time," Steinthal said. "So a week after I'm cross-examining somebody, I'm going to be having lunch with them, trying to talk nice and get a deal done. It is a very, very unique industry."

Pryor Cashman partner Donald Zakarin is one of the label lawyers Steinthal has sparred with in CRB proceedings and in rate-setting litigation for performing rights organizations ASCAP and BMI. “I respect Ken’s skills, his knowledge of the area and his sense of humor,” Zakarin said. “When you both know the field, you can get to the merits and cut to the chase of disputes without wasting time on things that have no meaning.

“Despite fighting with Ken in the context of the litigations in which we have been on opposite sides, I consider Ken a friend,” Zakarin added.

Now add a COVID-related wrinkle into the mix. In March 2020 music owners and streaming services were gearing up for [Web 5](#), the fifth round of rate-setting hearings before the CRB for sound recordings used in noninteractive streaming. Discovery was taking place in New York and Washington. “So we were all in the thick of COVID,” Steinthal recalls.

The trial was set to pit lawyers for the likes of Google, Pandora and Sirius XM Radio against lawyers for record labels and musicians in a windowless room in D.C.’s Madison Office Building before three administrative judges. Two days before trial, D.C. Mayor Muriel Bowser [declared](#) a public health emergency and the proceedings were suspended.

A few months later all of the players came together for a five-week virtual trial—still a novelty in the summer of 2021, and definitely one of the most complex. The board would hear testimony from 33 witnesses and admit 748 exhibits containing 900,000 pages of documents.

“My team is spread out all over the country, with lawyers in New York, San Francisco, Austin, Texas, Washington, so we were used to using Zoom,” Steinthal said. He participated from the garage in his Calistoga home: one monitor showed lawyers, judges and witnesses; another monitor was reserved for documents; and a separate laptop provided a private channel to his client.

The board’s [302-page decision](#) had good news for Google. The judges set a rate of \$0.0021 per play for commercial nonsubscription services for the 2021-25 period, a modest increase from the \$0.0017 set during the previous round in 2016, and close to the \$0.0019 Google’s economist had proposed. It was quite a bit less than the \$0.0028 sought by SoundExchange, the company that represents the copyright owners.

Each 1/100th of a cent implicates roughly \$7 million in aggregate royalties paid by the streaming services.

“We, Google, feel we won,” Steinthal said. “You had the sound recording companies seeking a more than 50% increase in the rate. You had certain of the streaming services seeking to roll back the rates really substantially. We at Google felt we had a pretty good sense of the market and of the judges.”

Google and other streaming services are also litigating the latest round of separate royalty settings for the musical compositions embodied in sound recordings. Known as [Phonorecords III](#), it has included a trip [to the D.C. Circuit](#) and is now back at the CRB.

Aside from CRB proceedings, Steinthal’s practice has included representing the Radio Music License Committee, on behalf of thousands of U.S. radio stations, in rate-setting litigation against ASCAP and BMI under antitrust consent decrees. He also represented Netflix, WarnerMedia, ViacomCBS, ESPN, and others in public comments urging the Department of Justice to maintain the consent decrees that regulate BMI and ASCAP. (The DOJ agreed to do so in January 2021.)

He also led the defense of six copyright infringement suits for Amazon.com and Sony subsidiary The Orchard against plaintiffs who claimed that these companies made available for download songs that had not been properly licensed.

Steinthal argued that no consumers had ever found their way to the downloads. “Is it copyright infringement to put something up in a store and ‘make it available’ if nobody downloads it?” he said. “We made that motion [and won](#)—that no-no-no-no-no, that’s not copyright infringement. There is no ‘making available’ right under U.S. copyright law. There may be in other countries, but there is not here.”

Meanwhile, Steinthal is still enjoying music, whether it’s Arcade Fire, U2 or Lyle Lovett, even while he consistently litigates on the side of broadcasters and streaming services.

“To be litigating against the music industry and to love music so much, people always say, ‘How can you do that?’” Steinthal said. “I say, ‘Because without the services, you’re dead.’ So we need to find the right balance.”

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