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Digital Copy Rights Make Wrongful Copying Costly

By Blake Keating, Vice President, Claims — First Media

Intellectual property litigation is quickly replacing defamation and invasion of privacy as the most serious – and expensive – threat to media companies. For this reason, OBPP has created a series of articles which will help educate our brokers about the new exposures faced by their clients as media-related companies are scrambling to meet the public's appetite for information, news and entertainment. This issue of IP 101 discusses infringement claims arising from the unauthorized use of intellectual property in the digital realm.

At the time of the invention of the automated “player piano” one hundred and fifty years ago, songwriters and companies selling sheet music sued to put the fledgling company out of business. Musicians and vaudeville performers sued Guglielmo Marconi for his invention of the radio. After the invention of the phonograph, the tape recorder, the VCR and now the proliferation of peer to peer file sharing, mainstream businesses have all sought to protect their commercial interests. Historically, new technology, backed by a groundswell of public interest, has trumped such business concerns.

Today, the ability to copy, publish and widely distribute works is easier than ever. The incremental cost of making additional copies of words, music or images in the digital age is relatively nominal since electronic file copies are inexpensive. This development has led to increasing copyright infringement by the general public. The issue became one of public debate in the year 2000 when the Recording Industry Association of America (RIAA), a trade group representing the recording industry sued Napster, a service which enabled

users to download music from others on the computer.

At the time, Napster was a website that enabled users to post information concerning music recorded on their hard drives and servers as a compiled and updated index of music available from various subscribers. After requesting a certain song by a particular artist, Napster generated a list of other subscribers who had the same song, and by clicking a key on the computer, the user was allowed to copy the song from another person's hard drive for free. The RIAA, responsible for collecting, administering and distributing music licenses and royalties, claimed this to be a form of piracy, costing \$4.2 billion in lost revenues annually. The RIAA aggressively sought to eliminate such file sharing by suing individuals engaged in the practice, as well as Napster and other websites. The RIAA alleged that almost all songs available through Napster were illegal copies of copyrighted works and that Napster and others aided and encouraged the illegal copying of music. Napster defended itself by claiming that it warned users not to transmit copyrighted material and that it was protected under the Fair Use Doctrine. The RIAA prevailed, and Napster ceased doing business. Later, a new Napster appeared, allowing legal “copying” of music for a license fee.

In 2005, the U.S. Supreme Court unanimously determined that more modern file sharing promulgated by peer-to-peer services such as Grokster Ltd, a now defunct West Indies software company that facilitated file swapping, was infringement. Companies with

business models such as Grokster, which effectively encouraged or “induced” copyright infringement, are liable for their customer's illegal actions. The holding in this case effectively places the burden on such businesses to demonstrate they are not encouraging subversion of copyright laws.

Following its success in the Grokster case, the RIAA sent cease and desist letters to a number of online music file sharing services websites, as well as individual users. Most of those, including Grokster, ceased operations. Others switched to a licensed, paid model.

One year later, the RIAA has settled with approximately some 18,000 individuals, with approximately one-third of the cases settling for \$4,000 each. The RIAA believes the demand for such file-trading has leveled off and that legal, digital downloads for a fee has become the new and preferred model. Apple's iTunes has apparently sold over one billion songs to consumers. While traditional music album sales are still down – about three percent currently – digital sales are up 77% and making up for the slump in album sales.

The newest threat of piracy of intellectual property in the entertainment field is not music, but video. It is not uncommon for new movies to be illegally distributed on the internet, even before the film has been officially released. Perhaps the most shocking aspect of this trend is that this sort of piracy is believed to be derived from illegal copying of movies with tiny cameras by industry insiders viewing films in small, private showings before

release. The industry is rightfully astounded by this possibility.

In other related current issues, “sampling”, or the use of pieces of existing recorded music within “hip hop” music works, has been deemed by many to constitute copyright infringement. Many performers from past years such as James Brown, who with some justification, has proclaimed he was the inventor - or at least the forefather - of rap or “hip hop”, greatly resent the extensive use of their works by contemporary artists. Many modern artists so accused have suggested their works are transformative examples of creative expression and a source of musical innovation. In a recent decision (May 2005), a federal judge in Nashville halted sales of the 1994 album *Ready to Die* by Notorious B.I.G. after a jury determined the title song used part of an Ohio Players song without permission. The jury awarded \$4.2 million in compensatory and punitive damages to the two music companies owning rights to Ohio Players recordings. The sales ban also prohibits internet downloads and radio play.

While the public’s understanding of copyright and trademark law in the digital realm is growing, many erroneously believe that anything downloadable can be freely used – whether for a personal or commercial purpose. A single mistake can be quickly magnified by the easy reproduction and forwarding of illegal copies to hundreds or even thousands of persons all over the world. The pressures of a new, easy means of conveying information can lead even the most experienced communications professionals – let alone ordinary

business people or individuals – to make costly or catastrophic errors concerning copyrights. Ordinary license fees are an uninsurable cost of doing business and the preferred, most economical resolution to such intellectual property issues. However, in those situations where permissive use is not properly secured, media insurance can help limit damages after the fact.

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OneBeacon Professional Partners
30 Tower Lane Avon, CT 06001
tel 860.773.6150
www.onebeaconpro.com