media•insights | issue 14

presented by **insights**

OneBeacon PROFESSIONAL PARTNERS

Digital Technology Developments Divide Content Providers

By P. Blake Keating, Vice President, Claims — First Media

media•insights is published periodically by OneBeacon Professional Partners to address the broad scope of exposures faced by our agents' and brokers' clients, as media-related companies scramble to meet the public's appetite for information, news and entertainment in an increasingly litigious society. This issue of media•insights illustrates a bold new world: as media firms try to devise economic models that profit from the digital distribution of intellectual property, they may find themselves taking unprecedented positions and opening themselves to allegations of copyright infringement.

First Media is a division of OneBeacon Professional Partners. OneBeacon Professional Partners, located in Avon, Connecticut, is the Specialty Liability underwriting division of OneBeacon Insurance Group ("OneBeacon"). With roots that date back 170 years, an A.M. Best rating of A (excellent) and a Financial Size of XV, OneBeacon Insurance boasts a heritage of keeping promises, backed by financial strength. OneBeacon is publicly traded on the New York Stock Exchange under the symbol "OB."

The high-stakes financial standoff between those who want to protect digital information – music, video and text – and those who want to provide free access to the public for same highlights the inherent conflict for multi-media companies trying to exploit intellectual property while nurturing the public's good will.

Digital Rights Management (DRM) is a software technology utilized by music providers to protect against theft or piracy. It is used by music companies such as Warner Music Group as a means of preventing piracy of their music catalogues. Sales of digital music by means of intermediaries such as Apple's iTunes Store continue to rise while compact disc (CD) sales continue to drop from their year 2000 high point. That was about the time that the original Napster file-sharing service made it easy for the public to access and copy free digital copies of songs online. At present there is no common DRM standard, which means that certain music will not play on some music players.

Steve Jobs of Apple, which currently predominates digital music with its iPod player and iTunes music store, has recently suggested that Apple would be delighted to do away with DRM and sell music unprotected, which would make all music and music players compatible. Apple has sold an estimated 100 million iPod players. European lawmakers have targeted Apple for alleged monopolistic business practices due to its heretofore refusal to license its "FairPlay" digital rights management system. With its recent suggestion to sell music without DRM, Apple posits that its refusal rests, at least in part, with music content providers.

EMI Group has recently agreed to sell most of its digital music catalogue without DRM, which it believes might boost digital music sales by removing compatibility barriers. However, other music companies and the Recording Industry Association of America, the country's preeminent trade group, continue to maintain that such protection is critical in preventing piracy. Albeit a declining share, CD sales continue to make up about 85% of U.S. music sales. Sales, however, have fallen 20% from year ago levels. While legal sales of digital songs online continue to rise, it is at a declining rate of increase which has not kept pace with the correlative decrease in CD sales. Approximately, one <u>billion</u> songs are traded on illegal file sharing networks <u>each month</u>, according to industry experts.

On another front, a number of media companies have criticized Google, Inc. and its YouTube free video website for benefiting from the advertising and sale of pirated movies and for directing consumers to websites which had until recently offered access to illegal film downloads. Media companies believe that unauthorized online transfer of movies, music and other content is a huge threat and that they have lost billions of dollars from such practices. Viacom has sued Google for one billion dollars for copyright infringement. More than 150,000 Viacom film clips have allegedly been viewed more than a million times on YouTube. Because of the traffic on its site, YouTube sells advertising along with search results, which provides financial benefit to Google.

Google and various film and television studios have been in high stakes negotiations and discussions concerning the unauthorized use of copyrighted material on YouTube. The video media content providers acknowledge that consumers want downloads and the providers don't want to miss out on potential business opportunities. They also seek to avoid trying to block downloads completely and generating bad will by suing consumers engaged in such illegal activity as the music industry unsuccessfully tried to do. Indeed, Viacom has chosen to sue content provider/intermediaries rather than consumer end users, which turned into a public relations disaster for music publishers.

The frustration with Google stems from the allegation that Google sales representatives allegedly sold advertising to the problematic websites – with full knowledge of the illegal access to protected intellectual property. Google makes money each time an internet user clicks on one of its advertisements, but has refused to pay other companies for their copyrighted material. It now seeks to balance its need for advertising revenue with its objective of working with large media companies that believe some of Google's customers are trying to take their intellectual property without paying for it.

Finally, *Playboy* magazine has recently announced plans to follow *The New Yorker* in releasing its entire archival text and photos including advertisements in digital format, which it believes provide an accurate portrayal of U.S. pop culture from 1953 to the present. Because it is duplicating the entire contents of each monthly magazine as it had existed in magazine form, *Playboy* asserts it already has necessary copyrights from artists and writers over the past fifty-plus years and needs no additional protection. Many writers' groups disagree and argue that even if such reproduction meets legal scrutiny for allowed reproduction, the writers may have a claim for unfair commercial advantage or unjust enrichment.

Traditional media content providers have had great difficulty in adapting to the new digital age. While consumers have more media choices than ever before, media companies have not been able to develop economic models to profit from the increased exposure. As previously learned by the music companies, newspapers are finding that internet sales of advertising aren't growing fast enough to replace revenue lost from the sale of traditional print ads.

As technology continues to develop faster than any precedent in existing law, media content providers may find themselves taking contradictory positions depending on the specific factual circumstances and the type of media involved. Such positions may be unavoidable in the short term resulting in mixed messages to consumers and those seeking a "bright line" to avoid exposure to copyright infringement, such as risk managers, insurers and legal counsel.

OneBeacon
PROFESSIONAL PARTNERS

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