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## *A Historical Perspective on Music Rights*

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*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 provides a historical perspective regarding music rights and modern infringement issues surrounding digital distribution.*

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Legal protection for music compositions began in a French court in 1847, as recounted by Brian Southall in his book [Northern Songs](#). A French songwriter objected to his music being performed for customers in a Paris café without his permission. He sued, and France became the first country to protect a composer's rights and to collect royalties on his behalf. From sheet music to the i-pod, a historical analysis of the music industry reflects that it has been shaped over the years by its delivery method.

In the 19<sup>th</sup> century, the sheet music industry flourished following the invention of the upright piano in 1827. Sheet

music for popular songs containing words and music was inexpensively reproduced and sold widely for use in theaters, restaurants, bars and at home.

The commercial model for music shifted yet again with the invention of the phonograph in 1877 when songs were reproduced on music cylinders and records for home use. The music business took another turn when families gathered around and tuned into their radios for home entertainment and then again when television became the primary source of home entertainment.

Historically, music publishing companies – backed by the songs and songwriters they represent and promote – have dominated the music industry. Music publishing companies license music for use on the stage, radio, television and in films. The sale of sheet music was the only means of determining a song's popularity in the days before record sales figures were published on a periodic basis. Music publishing companies also print music notations for a variety of instruments for small and large bands. Sheet music with words is sold for choral performances. Prior to music's dominance on the airwaves, the promotions department from a music company would circulate its works among small orchestras, brass bands, movie pianists and organists to enhance play and increase popularity. Music was also promoted at clubs, dance halls and other night spots in an effort to persuade popular singers to sing a given music company's songs.

By contracting with a music publisher, a songwriter effectively sells a fractional share of the copyright of a particular

song to the publisher who in return markets the song. The music publisher shares the income of the song with the composer on an agreed net percentage basis, commonly fifty-fifty.

In the 1950's and 1960's, record sales and the royalties generated therefrom, became increasingly important for music publishers. Every time a song is performed, broadcast or released on record, the music publisher and songwriter are entitled to a royalty or negotiated fee from the use of the song. New media formats for music downloads, mobile phone ring tones, commercials, films, radio and television, computer games and videos and DVD's all entitle the music publisher and songwriter to a royalty.

These amounts to be shared between publisher and composer are collected by societies such as ASCAP (The American Society of Composers, Authors and Publishers) founded in 1914 and BMI (Broadcast Music Inc.) which was established in 1940. These societies issue licenses for performances and broadcasts of a song and distribute the income from the licenses to their members. Originally competing with one another, ASCAP and BMI began to allow cross registration in 1972, meaning publishers could register with either society to receive their percentage of the money earned from the song.

Royalties due a writer from the sale of a song in recorded form are handled by the Harry Fox Agency, established in 1927. Such royalties are known as mechanical royalties – a term from the time when music was sold on wax cylinders. These mechanical royalties are negotiated with record companies which

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own the recorded version of a song.

The use of a song in a film, television program, commercial or video game requires a synchronization license which is arranged and issued by the music publisher with the license fee being shared with the writer. Publishers also issue print licenses to companies which produce sheet music and instructional books, and composers receive a share of these royalties as well.

Music publishers also perform a range of administrative roles as to copyright transfers and registration of songs, as well as collection of royalties from international publishing arrangements via sub-publishing deals with local publishing companies. Today, the largest music publishers are also the largest record companies.

The Economist reports that in 2006, EMI, one of the world's largest recorded music companies invited young people into its offices to talk about music trends. At the end of the session, to demonstrate its appreciation, EMI asked the young people to help themselves to some free CD's. Even though they were free, none of the cd's were taken. The EMI personnel realized that the new forms of obtaining recorded music had already overtaken their model. Just a few months ago, EMI announced that it had reduced its payroll by one-third.

The International Federation of Phonographic Industry (IFPI), a record industry trade group, is continuing to seek new sources of revenue. It is stepping up efforts to make internet providers legally liable for failing to stop music piracy on their networks. While contrary to current U.S. law, France entered into such an arrangement last

year and industry personnel are seeking similar measures in Britain and Sweden. The trade group is also lobbying the U.S. government to recognize a form of copyright for music played on American radio stations, something that has long been required in Europe. This "performance right" would give musicians a steady stream of royalty income.

More music is now legally sold over iTunes than on CD formats. Yet despite digital music business models including paid downloads, subscription services and advertising-supported free music services, illegal downloading continues unabated.

Digital music constituted an increasing share of total music sales in 2007 at \$2.9 billion dollars, up from \$2.1 billion in 2006. But the growth rate of digital sales stalled at less than a 40% growth rate, down from 100% growth in 2006. Digital sales in 2007 made up 15% of all music sales last year. The music industry is concerned since the sale of compact discs continues to drop at an accelerated rate and increased digital sales revenues are not making up the difference. Overall, industry sales were down 10% to \$17.6 billion last year.

The record industry continues to search for successful digital revenue business models. In December of 2007, Universal Music Group announced that it would offer free downloads of UMG recordings to buyers of certain Nokia phones in an effort to stimulate the change of phones into media devices and to compensate for lost music sales. Universal will get a portion of phone sale revenues. Neither subscriptions, paid-for downloads, nor advertising supported free music services have been seen as a viable option to online piracy. The Nokia deal seems to be an admission by UMG that it may

never be able to get young people to pay for digital music.

In an effort to curb alleged infringing downloads, record companies have filed more than 26,000 music copyright lawsuits for illegal digital downloads since 2003, but most defendants have settled cases by paying a few thousand dollars. The Recording Industry Association of America says the lawsuits have served as a deterrent to curb the growth of illegal file-sharing, which grew at a lesser rate from 6.9 million households in 2003 before such lawsuits were filed, to 7.8 million households last year.

In the very first such case to go to trial, a jury found a Minnesota woman liable for \$222,000 in damages to six record companies. The defendant maintained her innocence throughout the three day trial. The record companies, aided by a security firm and an internet service provider, showed that the copyrighted songs had been downloaded and then offered to others by a party named "tereastarr", which party used an internet IP address belonging to defendant.

Copyright law allows damages per infringement of \$750 to \$30,000, and as much as \$150,000 per infringement, if "willful". No one knows how jurors who had ruled defendant's use was willful ended up at an award of damages of \$9,250 per song. Because copyright law automatically awards court costs and attorneys' fees to the winning party, the \$222,000 verdict could result in a total judgment of up to a half-million dollars. Ironically, the songs could have legally been purchased for 99 cents each.

The case is significant in that the Court ruled that making copyright songs

available online, even without proof the songs were copyrighted by others, constituted an infringement. This ruling is consistent with existing international intellectual property treaties; some scholars have said we would be violating such treaties if the law was not interpreted that way while others believe this type of ruling allows plaintiffs to avoid having to actually demonstrate an infringing act and instead to go straight to the issue of damages. The lawsuits have been extremely costly for the record companies in terms of legal fees. However, record companies have brought the lawsuits to send a message which hopefully will deter other persons from exchanging music by file-sharing.

The Minnesota case expands the notion of copyright infringement protection in digital use. This is consistent with increased globalization and making American law more readily conform with prevailing international law and treaty requirements.

Music producers and digital users of music need to be mindful of rights of use, industry custom and practice, international law, developments in technology and appropriate risk management practices. Insurance can help minimize risk and the impact of the changing legality of various delivery and use aspects of music in the new and expanding digital realm. For more information about insurance solutions for music, please contact Regina Williams ([rwilliams@firstmediainc.com](mailto:rwilliams@firstmediainc.com)/913-384-4810) or Michelle Worrall Tilton ([mtilton@firstmediainc.com](mailto:mtilton@firstmediainc.com)/913-384-4806) at First Media.

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