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Music Claims Create “Discord”

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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 original music for commercial purposes.

A common risk for advertisers and their agencies are copyright infringement claims arising from the unauthorized use of unoriginal music in a radio or television commercial. Because these are cases where the alleged infringement has a strictly commercial purpose, the fair use defense discussed in previous articles has no application.

Infringement claims are prevalent in the marketing arena because using music has the kind of emotional impact on consumers which advertisers strive for. According to *Music Quarterly*¹, approximately 75% of radio and TV advertising content includes music, both to mask the intrusiveness of the advertisement and to more effectively command the listener’s attention. Using recognizable music which is associated with a certain genre, celebrity or movie (and which would likely be available only at a high license fee) strikes a chord of familiarity and also tends to enhance the branding of a product. For example, the *Mission Impossible* theme song evokes a feeling of adventure and excitement in the listener, which could be effectively associated with the marketing of products.

Often, an advertising idea is “pitched” with a specific piece of well-known music, which is “absolutely perfect” for the advertising campaign. Unfortunately, this perfect “pitch” approach may fail to consider the costly reality of the license fees, some of which can exceed six figures. Once sold on the pitch and in love with the music, the advertiser’s management may not accept a substitute. Trouble can arise if the license fee is outside the agency’s budget or if the copyright owner declines to license the music. Too frequently, there is an attempt to produce a recording similar to the perfect pitch, one that can evoke the same emotional response but is non-infringing. Regrettably, many cases have concluded that, if it looks like a duck and quacks like a duck, it is probably *commercial appropriation*, a cause of action very similar to copyright infringement.

In one famous case, the use of a Bette Midler song was sought for use in a Ford automobile television commercial. Ms. Midler declined, and in searching for the “next best thing” the advertiser obtained music from another singer who sounded quite a bit like the “Divine Miss M.” Upon hearing the advertisement, Midler sued, claiming that the “sound alike” infringed upon her unique sound and style. A court agreed and found that the voice used in the ad’s music was too similar to Midler’s voice. As is so often true in such cases, a damaging paper trail assisted the plaintiff with a defendant employee’s notes to the effect that: “we should get someone who sounds like Bette Midler”.

Advertising agencies must develop and

observe a thorough legal clearance process in order to assure that they have obtained all the appropriate rights to music they use. In this regard, it must be recognized that several entities might have an intellectual property right in a certain composition, including the artist, the composer and the arranger. This essential clearance work must occur *before* pitching or selling the concept to the client. Otherwise, the advertising agency may find itself in the very difficult position of trying to deliver the impossible to the client. Advertising executives must also be very careful about the paper trail that is left behind. Because music claims can be very expensive to defend, it is a good idea to work with experienced in-house or outside intellectual property counsel to assist with the licensing.

If new music is to be composed, it can be a prudent discipline for the advertiser and/or the agency to outsource that process to an independent composer (who has a policy of insurance) and to do so in such a way that that the marketers do not maintain any control over creation of music. In that way, the composer can produce the music with the effect that the advertiser was trying to achieve, but without any possibility of undue influence by predecessor music.

Music claims can also create problems in other media venues. In a copyright case involving a local cable television affiliate, two music videos containing video from a foreign film were broadcast on two occasions. One video included 10 seconds of the film, and the second used more than two minutes from the film. The footage was used by the music

video producer without permission. The distributor of the music videos had no knowledge of their infringing content. The film owner sued the local cable television affiliate (perceived as a deep-pocket) and not the video producer. Expensive experts were retained by each side to determine a “reasonable” license fee. The cable affiliate attempted to settle the case, but the plaintiff was not inclined to behave reasonably, so the attorneys’ fees for all parties added up quickly.

The television station sued the video producer for indemnity, correctly alleging responsibility for any infringement and an obligation to defend the station and pay all its expenses. As often the case, the video producer was destitute. The case settled for middle six figures – only slightly more than the incurred legal fees. In retrospect, the television station lost out because, even though its infringement was innocent and unknowing, it failed two basic loss control principles; that is, it did not obtain written verification that the producer had obtained all necessary and appropriate usage rights, *and* it did not verify that the video producer had insurance.

Because of the frequency and expense of music claims, businesses that rely upon music licensing or are otherwise “in the business” often carry relatively high self-insured retentions for claims arising from copyright infringement; they may even have difficulty procuring professional liability media insurance. Jingle-writers, for example, are a very difficult class to insure. The professional liability policy for advertising agencies, music publishers, music distributors and film producers may also contain

coverage-narrowing endorsements for claims arising from music or from the insured’s failure to procure and comply with licenses. Likewise, the insurance application may require the applicant to warrant that required licenses are procured. For these reasons, it is crucial to implement and practice sound music clearance practices.

The next *Intellectual Property 101* article will focus upon the risks of music sampling, which occurs when a portion of one sound recording is reused as an element of a new recording, and unauthorized music downloading, such as the *Napster* case.

¹ The *Musical Quarterly*, founded in 1915, has long been cited as the premier scholarly musical journal in the United States.

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