

presented by insights

Music Copyrights: Records and Radio Royalty

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 illuminates pressures to overhaul the U.S. copyright laws, with regard to music, and how this foray into uncharted territory may aggravate liability exposures.

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."

Music in film, broadcasting and advertising can often give rise to litigation. Many times, consents are improperly obtained or less expensive "sound alike" compositions are created to circumvent hefty license fees – ironically, with consequences that are much more expensive. While damages for copyright infringement, including the payment of the prevailing party's legal fees, are generally covered by media insurance policies, license fees and royalties paid to recording companies, composers and musical artists are typically excluded. Notwithstanding the foregoing, recent

actual and proposed changes to laws governing the payment of royalties reflect pressure to overhaul U.S. copyright law.

Recorded music is typically subject to separate copyrights – one for the composition itself and another for any specific recording of the music. Music publishers represent the composers and songwriters as to the compositions themselves, while record labels and musicians own the rights to the specific recorded performances of the compositions. The Beatles' "Yesterday" is the most recorded popular song in history with more than 3,000 different recorded performances by a variety of performers. Composers Lennon (now through his estate) and McCartney are compensated for each of these recordings and have doubtlessly made more from the performance of "Yesterday" by others than from the Beatles' own recording.

Royalties for record labels and performers are freely negotiated, but royalties are set for composers by a three person Copyright Royalty Board. Next year, composers will seek to have new internet royalties for music downloaded and/or streamed from the internet determined by the copyright board. The Recording Industry Association of America represents record companies in collecting royalties while music publishers, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc., (BMI) help to enforce the rights of songwriters and collect licensing fees. The Digital Media Association is a relatively new organization for internet radio companies, including web broadcasters,

such as Yahoo. There are now approximately 14,000 internet broadcast stations in the United States with an estimated thirty-five million listeners.

In the U.S., record labels and performers are not paid a royalty for radio airplay, although they are so remunerated internationally. Songwriters, however, are compensated for radio airplay in the U.S. through ASCAP and BMI. A one hundred year-old law created the "radio royalty exemption" for performers and has been strongly supported by American broadcasters.

The evolution of internet radio and its associated repercussions have been brought to the forefront by a current debate as to the application of internet royalty rates for record labels and performers. In March, royalties for webcasters were tripled to approximately one-fifth of a cent per song per listener, retroactively applied to 2006. The nascent internet broadcasting industry claims this will put most of them out of business. In June, thousands of American internet broadcasters ceased operations for a "day of silence" and asked their listeners to write Congress, and more than 400,000 e-mails and letters were delivered. In response, the U.S. House of Representatives drafted a statute nullifying the March increase in royalty rates which, as yet, has not become law. The record labels and webcasters are also now litigating this issue. Traditional broadcasters have also complained that many internet broadcasters don't pay any royalties at all.

Record labels and performers – faced with decreasing sales – are also seeking

to abolish the general radio/play royalty exemption. Historically, the exemption has been justified by broadcasters on the basis that radio play leads to increased record sales since most people do not buy music they haven't heard. Record companies are beginning to utilize non-traditional methods to monitor internet radio in an effort to increase sales of their recorded music.

In an extremely ironic development, broadcasters and record companies have studied data as to the most popular downloads from illegal file sharing on the internet to help radio stations develop their playlists so as to increase listeners, and perhaps, hopefully, record sales. Traditionally, broadcasters have used telephone research in which people are asked to listen to clips of different songs and rate them. However, the new illegal download data which is supplementing traditional research is estimated to eventually entirely replace the traditional methods. Record companies use the study of illegal downloads to learn which music is most popular and what to pitch to broadcasters. But the record companies are decidedly ambivalent about the information and are troubled that illegal music downloads have become so pervasive as to be useful for research.

Technological developments will continue to affect how record companies and radio stations study consumer data and market themselves. Likewise, how the issue of royalties for internet radio is ultimately resolved will determine the growth of internet radio. Music royalties are themselves excluded from most media insurance policies since licenses and permissions for use are uninsurable usual and

ordinary "costs of doing business". Nonetheless, the royalty debate bears watching for indications as to how U.S. copyright law may be changing – particularly with respect to technological developments – and whether or not the law will become more harmonious with laws in other countries, or will continue to go solo.

© 2007 First Media, a division of OneBeacon Professional Partners
The contents may be reproduced by recipients provided proper attribution is given. Material is provided for general informational and illustrative purposes and is not to be considered legal or risk management advice. Readers should consult their counsel for legal advice concerning copyright infringement.



OneBeaconSM
PROFESSIONAL PARTNERS

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