

# IT Law—Legal and Policy Challenges of P2P Networks

## Music and Copyright

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# Overview

- Background
- Music and Copyright
  - Historical Perspectives
  - Music Copyright Infringement and Fair Use
  - Music Licensing
- Digital Era Challenges
  - Music and P2P

# Music Copyright

- ⑩ Music copyright landscape
  - ⑩ Ongoing issues and controversies in application of copyright to music in digital era
  - ⑩ Significant issues/problems existed before digital era
- ⑩ Digital Copyright
  - ⑩ Creation side -- digital sampling
  - ⑩ Distribution side -- P2P

# Part I

BACKGROUND QUESTION

WHEN DOES SIMILARITY MEAN INFRINGEMENT IN  
MUSIC?

# Fit of Copyright for Music

- ⑩ Fit of literary copyright model in music
  - ⑩ 12 tones in Western musical scale
- ⑩ Copying notes not equivalent to copying words
- ⑩ Core elements considered by courts
  - ⑩ Melody -- pitch
  - ⑩ Harmony -- pitches assembled into chords
  - ⑩ Rhythm -- duration

# Fit of Copyright for Music

- ⑩ Music a relational system
  - ⑩ Same notes with different meaning in different contexts
  - ⑩ Borrowing a pervasive feature of musical creation in all periods and genres

# Part II

## MUSIC AND COPYRIGHT

# Literary Copyright

- 10 Copyright first applied to literary works -- later expanded to music
- 10 Statute of Anne -- copyright extended to music in 1777
- 10 *Bach v. Longman* (1777)
- 10 What are some ways in which music is different from literary works?



# *Bach v. Longman (1777)*

- ⑩ J.C. Bach takes legal action for breach of musical copyright
- ⑩ Files case in 1773 in Chancery for breach of musical copyright
- ⑩ No reliable legal basis at time for action for musical copyright
- ⑩ Time of uncertainty and change in copyright law

# Copyright Statutes & Music

- 10 United Kingdom
  - 10 1842 Copyright Act added music compositions
- 10 United States
  - 10 Musical compositions protected by 1831 Copyright Act
  - 10 Musical performance rights added in 1897
  - 10 Musical recording protection added in 1972

# Music Copyright

- ⑩ Musical composition -- notes and lyrics
- ⑩ Sound recording
- ⑩ Performance
  - ⑩ Musical composition (more later)
  - ⑩ Sound recording -- Neighboring rights for performance of sound recordings -- only digital and satellite broadcasters pay royalties (no terrestrial broadcast performance right for sound recordings) -- ***US atypical***

# Copyright Overview

- ⑩ (1) **Valid Copyright -- Protected by Copyright?**
  - ⑩ Original
  - ⑩ Fixed in tangible medium of expression
  - ⑩ Limitations
    - ⑩ Statutory subject matter -- §102(a) (and not idea, procedure, process, system, method of operation, concept, principle, or discovery -- §102(b))

# Copyright Overview

## 10 (2) Infringement

10 Involves violation of exclusive rights of the copyright owner

10 Elements

Access

Substantial Similarity

Direct Infringement and Secondary Liability

# Copyright Overview

## **10** (3) Defenses to Infringement

**10** Fair Use

**10** First Sale

**10** De minimis (?)

**10** Independent creation

# Exclusive Rights of Copyright Owners

- § 106. Exclusive rights in copyrighted works
  - Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
    - (1) to reproduce the copyrighted work in copies or phonorecords;
    - (2) to prepare derivative works based upon the copyrighted work;
    - (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending

# Exclusive Rights of Copyright Owners

- § 106. Exclusive rights in copyrighted works
  - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
  - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
  - (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission



# Musical Activities and Copyright

- Nature of musical activity may determine which exclusive rights of copyright owners are at issue
- For example (just examples, not comprehensive lists)
  - **Musical Creation:** reproduction, derivative work?
  - **Musical Distribution:** reproduction, display, distribution?
  - **Musical Performance:** performance?
- Different people may hold different rights

# *Porgy & Bess* and Rights

- Gershwin opera *Porgy & Bess* illustrates complexity of rights
- Concert (nondramatic) version of *Porgy & Bess*
  - Publishers typically hold rights -- can get license from performance rights organizations (more later on these)
  - Will need to purchase or rent music from publisher for musicians performing opera (cannot copy music used for performance)

# *Porgy & Bess* and Rights

- Staged version of *Porgy & Bess* (in costume)
  - Need full grand musical play rights
  - Gershwin estate holds those rights -- must get license from them
  - Racial casting restriction

# *West Side Story* Clip

- Want to use clip of dance scene from movie *West Side Story*
- Who would need to give permission?

# *West Side Story* Clip Rights

- Permissions/rights needed:
  - Motion picture studio that owns movie
  - Recording company that owns soundtrack
  - Music publisher of songs performed in scene
  - Authors that own “grand rights” from Broadway play
  - Representatives of Jerome Robbins (director)

# Part III

## COPYRIGHT INFRINGEMENT

# Copyright Infringement Analysis

- Infringement involves violation of any of the exclusive rights of the copyright owner
- Two key questions
  - Copying
  - Appropriation

# Copyright Infringement Analysis

- Copying (copying in fact) -- proved by showing:
  - Did the defendant copy?
  - Actual copying
  - Access and substantial (probative) similarity
    - Substantial similarity based on “extrinsic” or objective criteria
    - Criteria used to identify temporal and spatial proximity between two works



# Copyright Infringement Analysis

- Appropriation
  - Did the defendant copy too much?
  - Substantial similarity
    - Involves “intrinsic” or subjective criteria to determine whether the proximity between the two works constitutes infringement

# §106(1)

- Exclusive right to:
  - (1) to reproduce the copyrighted work in copies or phonorecords;

# §106(1)

- Examples of activities that might violate §106(1)?

# Three Boys v. Bolton (9th Cir. 2000)

- Background:
  - Song: Love is a Wonderful Thing

# Three Boys v. Bolton (9th Cir. 2000)

- Facts:
  - Rhythm and blues superstars The Isley Brothers sued contemporary pop star Michael Bolton for copyright infringement in connection with Bolton's song *Love is a Wonderful Thing*
  - Isley Brothers accused Bolton of copying a song of theirs by the same name
  - Bolton denied that the works were similar and denied having copied the Isley Brothers' song

# Three Boys v. Bolton (9th Cir. 2000)

- Procedural history:
  - Jury returned a sizable verdict in favor of the Isley Brothers
  - Court of appeals affirmed

# Three Boys v. Bolton (9th Cir. 2000)

- Jury verdict of \$5.4 million largest music copyright infringement verdict

# Three Boys v. Bolton (9th Cir. 2000)

- Ninth Circuit Holding:
  - Court held that evidence sufficient to justify an inference of actual copying based on widespread dissemination of original work and unconscious copying by Bolton



# Part IV

## LIMITATIONS OF COPYRIGHT OWNERS' EXCLUSIVE RIGHTS

# Limitations of §106 Exclusive Rights

- Other Copyright Act provisions limit §106 exclusive rights:
- Many limitations operate as defenses to liability for infringement
  - §108 -- Libraries
  - §109 -- First Sale
  - §106 -- Fair Use

# Limitations of §106 Exclusive Rights

- § 108. Limitations on exclusive rights: “Reproduction by libraries and archives”
  - (a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a **library** or **archives**, or any of its employees acting within the scope of their employment, to **reproduce no more than one copy or phonorecord of a work**, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if —

# First Sale

- Originated in common law disfavor on restraints on alienation of chattels
- *Bobbs-Merrill v. Straus*, 210 US 339 (1908) -- Supreme Court refused to enforce notice printed in book:
  - “The price of this book at retail is \$1 net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.”

# First Sale

- Distribution side issue
- First sale creates competition for titles
- Copyright industries are not fans of first sale doctrine
- Reduces ability of copyright owners to impose restrictions on uses of a work after it is sold

# First Sale

- Codified in 1976 Act
- Core of first sale -- when a copyright owner has sold a particular copy of the work, the owner of that copy may lawfully dispose of it by gift, resale, or rental
  - Without interference by the copyright owner
  - Such activities might constitute a “distribution” of copies of copyrighted work
  - First sale provides a defense to a claim of infringement under §106(3)

# Section 109 -- First Sale

- 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord
  - (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord

# Section 109 -- First Sale

- 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord
  - (c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.



# Universal-Augusto Case

- Universal Music Group (UMG) sued Augusto, an eBay trader, to prevent him from selling promotional CDs he bought from second hand stores
- Specialist music shops often sell promo albums or review copies that record labels send to journalists and radios stations

# Universal-Augusto Case

- Record companies assert that they continue to own promo albums and can ask for their return at any time
- Promo albums often have markings that say “For promotional use only” or “Not for resale” visible on the record or CD artwork or disc label itself

# Universal-Augusto Case

- Music industry view
  - Label establishes that record company is just licensing the content
  - The promo CDs are thus “loaned” by the record labels
  - Briefs filed by RIAA and UMG asserted that it is illegal to sell, give away, or ***throw out*** promo CDs

# Universal-Augusto Case

- What are the implications of the use of these “label licenses”
- Do the sales by Augusto constitute copyright infringement?
- Why or why not?

# Universal-Augusto Case

- District court (C.D. Ca.) 6/10/08 --  
<http://www.eff.org/cases/umg-v-augusto>
- Granted summary judgment to defendant Augusto
- Found that initial recipients of promo CDs own them
  - CDs are not loaned but are a gift
  - Label does not create a license
- UMG appealed to Ninth Circuit (still pending) --  
briefs at EFF website

# Fair Use Background

- Historical background in English fair abridgment cases
- Fair use
  - Arose in copyright jurisprudence
  - *Folsom v. Marsh* -- Justice Story opinion
    - Basis for U.S. fair use jurisprudence
  - Codified in 1976 Copyright Act in §107

# Section 107. Limitations on exclusive rights: Fair use

- Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as ***criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research***, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

# Fair Use Four Factor Test

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.



# Applications of Fair Use

- Examples of types of works
  - Personal Use
  - Criticism and parody
  - Transformative uses
- Affirmative defense
- Mixed question of fact and law

# Applications of Fair Use

- Equitable rule of reason applied on a case by case basis
- Legal Cases
  - Sony v. Universal
  - Harper & Row v. Nation
  - Campbell v. Acuff-Rose

# Campbell v. Acuff-Rose (1994)

- Highly influential fair use case
- Sixth Circuit case overturned by Supreme Court

# Campbell v. Acuff-Rose (1994)

- Facts:
  - 2 Live Crew, a South Florida rap group, asked the owner of the copyright in Roy Orbison's classic song *O, Pretty Woman* for permission to make a rap version
  - When permission was denied, the group proceeded anyway, and was sued for copyright infringement
  - 2 Live Crew claimed that its version was a parody of the original
  - Based on your listening to the two songs, how would you assess the 2 Live Crew arguments?

# Campbell v. Acuff-Rose (1994)

- Procedural history:
  - District court granted summary judgment for the defendants
  - Court of appeals (6th Circuit) reversed
  - Supreme Court reversed and remanded

# Campbell v. Acuff-Rose (1994)

- Holding:
  - Court of appeals erred by applying a conclusive presumption in favor of the copyright holder based on a finding of the defendants' use as "commercial"
  - A "transformative" use would weigh in favor of fair use
  - A "parodic" use, in which a parody of the plaintiff's work could reasonably be perceived, would count as transformative
  - Is the 2 Live Crew song a parody?

# Campbell v. Acuff-Rose (1994)

- Holding:
  - Finding such a parody in this case, the court remanded for further analysis of the effect of the defendants' work on the market for a derivative rap version of *O, Pretty Woman*

# Part V

## MUSIC LICENSES



# Music Licensing

- License
  - Permission granted by the copyright owner to use a copyrighted work
- §106 rights of copyright owners
  - Can be divided among more than one person
  - Owner of reproduction right in §106(1) can be different person than owner of public display right in §106(5)

# Music Licensing Basics

- Types of license needed will depend on proposed use of music

# Examples of Music Uses

- Commercials
- Karaoke
- Television Programs
- Motion Pictures
- Theatrical Productions
- Music Boxes
- Corporate Videos
- Samples
- CDs / Cassettes
- Adaptations
- Computer Software
- Parodies
- Printed Sheet Music
- Internet

# Types of Music Licenses

- Synchronization License (reproduction with visual image)
- Master Recording License
- Mechanical License (for CDs, cassettes, record albums)
- Videogram License (for video cassette, optical laser disc, home video product)
- Print License (sheet music, music folios)
- Grand Rights License (permission to perform a work dramatically)
- New Media License (computer software, Internet)
- Performance License (permission to perform a work publicly)

# Licensing Example— Commercial

- ⑩ Commercial featuring song *Ain't Nothing Like the Real Thing*
- ⑩ Need ***synch license*** from copyright owner of music

# Licensing Example— Commercial

- ⑩ Two options for recording of song
  - ⑩ Can rerecord song
  - ⑩ Can use version of song on existing recording
    - ⑩ If want to use song as performed by Marvin Gaye and Tammy Terrell
      - ⑩ Must get master recording license from copyright owner of sound recording

# Licensing Example—Karaoke

- ⑩ You own a bar
- ⑩ You want to offer karaoke to your customers
- ⑩ What exclusive rights of the copyright owner might be involved in karaoke performances by customers in your bar?
- ⑩ What types of license(s) would you need to get to enable your customers to perform karaoke in your bar?

# Licensing Example--Karaoke

- ⑩ Karoke device -- mechanical reproduction of song
- ⑩ Performance -- copyright of the performance of the song itself
- ⑩ Reproduction -- song lyrics
- ⑩ Synchronization -- performance of song and visual image of lyrics



# Recent Karaoke Cases

- ⑩ *Leadsinger v. BMG* (9th Cir. 2008)
  - ⑩ Use of the lyrics, in projecting them on the screen synchronized with the music, met every element of an “audiovisual work,” and therefore was not a phonorecord (which could be subject to a compulsory license)
  - ⑩ “images of successive portions of song lyrics are ‘intrinsically intended to be shown by the use of machine [sic] ... together with accompanying sounds.’” As an audiovisual work, it was excluded from the compulsory licensing scheme

# Verve-Rolling Stones Dispute

- ⑩ In 1997, the British band The Verve sampled an orchestration in one of their songs, "Bittersweet Symphony" from the Rolling Stones' "The Last Time".
- ⑩ Prior to the album's release, The Verve negotiated with and received a license from the Rolling Stones
- ⑩ "Bittersweet Symphony" significant hit, reaching number 23 on the Billboard Charts

# Verve-Rolling Stones Dispute

- ⑩ Rolling Stones argued that The Verve violated license agreement because they used too much of the sample in their song
- ⑩ Rolling Stones ended up collecting 100% of the royalties of the song
- ⑩ Members of The Verve argued that the Stones got greedy when they noticed the sudden success of "Bittersweet Symphony"

# Verve-Rolling Stones Dispute

- ⑩ Rolling Stones sold the rights over the "Bittersweet Symphony" and it became part of many advertisements
- ⑩ Song licensed to Nike and Vauxhall automobiles
  - ⑩ Melody used for multi-million dollar TV campaigns
- ⑩ Song nominated for a Grammy
  - ⑩ The Verve was not named as a nominee, but [Mick Jagger](#) and Keith Richards were named as nominees

# Part VI

## COMPULSORY LICENSES AND PERFORMANCE LICENSES

# Compulsory Licenses

- Reflect regulatory aspects of U.S. copyright law
- Under certain limited circumstances, copyright owners have no power to prevent reuse of their copyrighted works
- Qualifying users may reproduce, transmit, or otherwise exploit the works
- Mechanics of licenses and structure of compensation provided by statute

# Mechanical Licenses

- Section 115 -- 1909 Congress created first compulsory license scheme (mechanical licenses)
  - Congressional response to decision in *White-Smith v. Apollo*, 209 US 1 (1908)
  - Response to new technology (player piano) and ambiguity surrounding the extent of the copyright owner's right to control the making of a copy of its work on a piano roll

# Mechanical Licenses

- First decade of twentieth century, copyright owners sought legislation granting them the exclusive right to authorize the mechanical reproduction of their works
- Congress concerned about mechanical reproductions of musical works becoming monopoly controlled by a single company (Aeolian)
- Rather than provide for an exclusive right to make mechanical reproductions, Congress created a compulsory license in Section 1(e) of the 1909 Act which would allow any person to make “similar use” of the musical work upon payment of a royalty of two cents for "each such part manufactured"



# Section 115

- Qualifies the reproduction and distribution right for nondramatic musical works
- Refers only to license of musical composition

# Mechanical License

- Mechanical right covers the right to mechanically “fix” the song onto a recording medium and reproduce it, such as on a CD or a digital download
- Licenses are required for these uses, which generate royalties for the music publisher and songwriter
- Often used for “cover recordings”

# Mechanical Licenses

- 3 options for obtaining mechanical licenses
  - Publisher -- go to publisher and obtain right
  - Licensing agent -- obtain through licensing agent
  - Compulsory license -- under §115

# Mechanical Licenses

- Statute provides framework but most licenses are actually negotiated privately
  - Most do not comply with notice and other specific statutory requirements
  - Harry T. Fox Agency

# Mechanical Licenses

- Obtain appropriate mechanical license and pay the full royalty rate
- Copyright owner cannot prevent you from recording the song
  - Cannot not the first time the song has ever been recorded and distributed

# §115 -- Compulsory Licenses

- In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section

# §115 -- Compulsory Licenses

- (a) Availability and Scope of Compulsory License. —
  - (1) ***When phonorecords of a nondramatic musical work have been distributed to the public in the United States*** under the authority of the copyright owner, ***any other person***, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless . . .

# §115 -- Compulsory Licenses

- (a) Availability and Scope of Compulsory License.
  - 
  - (2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement ***shall not change the basic melody or fundamental character of the work***, and ***shall not be subject to protection as a derivative work*** under this title, except with the express consent of the copyright owner.



# Performance Licenses

- No compulsory license available for the performance of the underlying musical composition in a sound recording
- Those using music in a way that qualifies as a public performance must get a license from the owner(s) of the copyright in the musical composition

# Public Performance

- Copyright Act, § 101
  - To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

# Public Performance

- Copyright Act, § 101
  - To perform or display a work “publicly” means —
  - (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
  - (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

# What is a Public Performance?

- Public performance occurs in a public place or any place where people gather (other than a small circle of a family or its social acquaintances)
- Public performance is one that is transmitted to the public
  - Radio or television broadcasts, music-on-hold, cable television, and by the Internet

# What is a Public Performance?

- Anyone publicly performing music must obtain permission from the owner of the music or his representative
- Limited exceptions to this rule
  - Permission not required for music played or sung as part of a worship service unless that service is transmitted beyond where it takes place (for example, a radio or television broadcast)

# What is a Public Performance?

- Limited exceptions to this rule
  - Performances as part of face to face teaching activity at a non-profit educational institutions are also exempt

# Performance Licenses

- Performance rights organizations -- nonexclusive authorization and entitlement to negotiate blanket performance licenses with end users for any of the songs in its catalog
- Different organizations in different jurisdictions

# Performance Licenses

- U.S.
  - American Society of Composers, Authors and Publishers (ASCAP)
  - Broadcast Music, Inc. (BMI)
  - SESAC
- Hong Kong
  - Composers & Authors Society Of Hong Kong (CASH)



# Performance Licenses

- Most musical composition copyright owners in U.S. aligned with one of three performance rights organizations
- ASCAP
  - Created 1914
  - Membership association of more than 350,000 U.S. composers, songwriters, lyricists, and music publishers of every kind of music

# ASCAP

- Through international affiliate agreements, ASCAP also represents hundreds of thousands of music creators worldwide
- ASCAP licenses and distributes royalties for the non-dramatic public performances of copyrighted works of its members
- ASCAP makes giving and obtaining permission to perform music simple for both creators and users of music

# Performance Licenses

- Who needs performance licenses?
  - Bars, restaurants, clubs, hotels, concerts, businesses, telemarketing companies (music on hold)
- ASCAP -- 170 different licenses

# Performance Licenses

- Blanket license
  - Allows the music user to perform any or all of songs in performance rights organization repertory as much or as little as they like
  - Licensees pay an annual fee for the license
  - Saves paperwork, trouble and expense of finding and negotiating individual licenses with all of the copyright owners of the works that might be used during a year

# ASCAP Customers

- three major television networks: ABC, CBS and NBC
- public television - the Public Broadcasting System (PBS) and its affiliated stations
- the majority of the 11,000 cable systems and virtually all of the cable program services
- over 1,000 local commercial television stations, including affiliates of the Fox, Paramount (UPN) and Warner Bros. (WB) Networks

# ASCAP Customers

- the Univision Television Network
- about 11,500 local commercial radio stations
- about 2,000 non-commercial radio broadcasters, including college radio stations and National Public Radio (NPR) stations
- hundreds of background music services (such as MUZAK, airlines)
- about 2,300 colleges and universities

# ASCAP Customers

- about 5,700 concert presenters
- over 1,000 symphony orchestras
- over 2,000 web sites
- tens of thousands of "general" licensees: bars, restaurants, hotels, ice and roller skating rinks, circuses, theme parks, veterans and fraternal organizations and more

# Consent Decrees

- ASCAP and BMI have operated pursuant to antitrust consent decrees since 1941
- Consent decrees provide for a period of voluntary negotiation
- If the licensee and the PRO concerned do not reach a negotiated agreement over time, the PROs' only recourse is to apply to a federal rate court with jurisdiction over PRO rate administration for determination of reasonable fees
- In proceeding, the PRO has burden of proving that the rate that it is seeking is reasonable



# ASCAP Rates

- At times established by courts -- website music cases (2006):
  - Parties unable to agree
  - Court determined that 2.5% of gross revenues was appropriate license fee
  - AOL at \$5.95 million and at \$6.76 million for Yahoo! for 2006
  - Second Circuit has administered consent ASCAP antitrust consent decree since 1941

# ASCAP Rates

- Will depend on user and type(s) of use
  - University licenses depend on the number of full time students enrolled
- Can be quite complex

# ASCAP Revenues

- 2007
  - \$863 million in revenues
  - \$741 million in royalty payments of \$741 million to its members

# ASCAP License Example

- In 1992, ASCAP investigator caught a pianist at a New Brunswick, N.J., restaurant playing George Gershwin's *Rhapsody in Blue* without a license
  - ASCAP sued and got a \$5,500 settlement from the owner
  - Restaurants, hotels, other venues, strong opponents to ASCAP and other PROs

# Girl Scouts Case

- In 1996, ASCAP sent thousands of letters to summer camps across the country, demanding hundreds of dollars in annual royalties from the camps
- Argued that camps should pay performance licenses for songs that are sung (arguing that camps should be treated like hotels, restaurants, funeral homes and resorts)

# Girl Scouts Case

- ASCAP position -- no license, no campfire (or other) singing
- ASCAP wanted \$1,200 per season per camp, settled on an average annual fee of \$257

# Girl Scouts Case

- Plan became public and revelation made that Girl Scouts camps were among 288 camps required to pay performance licenses
  - Public outcry
  - ASCAP rescinded view about public performances at camps
  - Now charges symbolic \$1 per year

# Performance Rights Cases

- Current Case
  - ASCAP has asserted in brief that musical ringtone rings in public are a copyright violation because the ringing constitutes “publicly performing” the music without a license
  - Filed in ASCAP's court battle with mobile phone giant AT&T



# Current Issues

- (a) Mechanical Royalty Rates -- music industry wants changes
  - Songwriters and music publishers want the mechanical rate increased to 12.5 cents for physical recordings and 15 cents for digital downloads
  - Record labels have proposed a decrease to 6 cents for physical recordings and 5 or 5.5 cents for digital downloads

# Current Issues

- Performance Rights Act (HR 848)
  - Currently pending in House
  - [http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.848:](http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.848)
- Would impose performance royalties on broadcast radio
- Strongly supported by music industry
- Strong opposition from broadcast radio

# Current Issues

- Streaming
- Record labels and music publishers want interactive streaming to generate mechanical licensing revenue
- Webcasters -- interactive streaming should be subject only to payment of a public performance license and not a mechanical license since streaming is like radio and does not result in the listener obtaining a permanent copy of the song
- Music publishers say interactive streams should generate both public performance royalties and mechanical license royalties

# Part VII

## DIGITAL ERA CHALLENGES

# File Sharing

- What is file sharing?
- Relation to music copyright?

# Digital Era Challenges

- Widespread unauthorized copying and sharing
  - First, music
  - Now, video
  - Not new practice, but more widespread and problematic because of changing technology
- Competing business models
  - Content/Old Media vs. Technology
- Disagreements over value of content

# Digital Content

- Digital formats
  - Audio compression technology -- MP3
  - Video compression technology
    - MPEG4 and Windows Media (Internet)
    - MPEG2 (DVDs)
- Digital distribution -- Internet

# Copying Technologies

- Increasing copying with dissemination of copying technologies:
  - Xerox machines
  - Tape recorders
  - CDs, DVDs
  - Digital downloads



# Copying & Distribution

- Technologies increasingly widely dispersed over several decades
- Enabled significant changes in user, creator, and industry behaviors
- Influence on copyright balance

# Distribution

- Internet displacing distribution chains in broad range of areas
- Disruptive technology, devastating business models
  - Cheaper
  - Distributed
  - Decentralized

# Digital Era Conflicts

- Digital music -- first entertainment sector to confront digital content
  - Widespread distribution of unauthorized copies
    - Often verbatim copies
  - Creation side -- sampling

# Music Downloads

- Problem to be eliminated?
  - 2008
  - IFPI -- 95% of music tracks downloaded without compensation
  - Single track authorized downloads 1.4 billion (global)

# Music Downloads

- Business realities
  - Declining CD sales
    - Problem of digital downloads or unsuccessful business model or both?
    - Disintermediation, reintermediation and inability to bundle also key factors

# Digital Music Learning

- Digital music as learning experience for at least 3 distinct types of market participants:
  1. Developed (Mature) Business Models
    - Content industries
    - Control focused business models
    - Extensive use of IP
    - Value focus on content

# Digital Music Learning

## 2. New and Developing Business Models

- New entrants
- Changing business models
- Music
  - Apple iTunes/iPod -- uses content to leverage value of device/player
  - MySpace Music, Radiohead

# Digital Music Learning

## 3. Consumers/Users

- Expectations of free or inexpensive content
- Expectations of minimal control mechanisms
  - Unbundled music
  - Unrestricted uses (i.e., little DRM)



# Divergent Views of Internet

- “I’m a guy who doesn’t see anything good having come from the Internet . . . .[the Internet has] created this notion that anyone can have whatever they want at any given time . . . . They feel entitled. They say, ‘Give it to me now,’ and if you don’t give it to them for free, they’ll steal it.”
- Michael Lynton, Sony Pictures Entertainment CEO, 5/14/09

# Divergent Views of Internet

- But the Internet and digital technologies opened these media to the masses. Using the tools of digital technology—even the simplest tools, bundled into the most innovative modern operating systems— anyone can begin to “write” using images, or music, or video.
- Lawrence Lessig, *Remix*

# Competing Business Models

- **Media/Content Owners** -- traditionally controlled distribution
  - Record industry bundling
- **Developing Business Models**
  - Technology companies (iTMS, Google)
  - Artists (Radiohead, Nine Inch Nails)
    - Radiohead 2007 -- free album online

# New Business Models?

- Widespread perception of failure on content side (music) to adopt successful business models in new era
- *LA Times* on Radiohead:
  - “Cheers to Radiohead for taking a leap from a dying business model and trusting their fans to catch them.”



# Existing Players

- Early music industry efforts largely unsuccessful
- Digital music: iTunes vs. PressPlay and MusicNet

# iTunes Negotiation

- Technology companies vs. content owners
  - Initial iTunes store negotiations
    - Steven Levy, *The Perfect Thing: How the iPod Shuffles Commerce, Culture, and Coolness*

# Litigation Strategies

- Direct infringers
  - RIAA lawsuits (26,000+)
- Secondary liability
  - Suits against technology providers
    - Sony Betamax, Napster, Grokster, Google-Viacom

# Thomas Case

- Jammie Thomas first person brought to court by the RIAA for illegally sharing music files
  - Most of the other 26,000 other lawsuits brought by the RIAA settled out of court
  - Average settlement \$3,500
- Thomas found liable for 24 acts of infringement arising from her downloads of digital music



# Thomas Case

- On October 4, 2007, Thomas was found guilty of willfully downloading 24 songs using Kazaa file sharing network
- Minnesota jury handed down \$222,000 fine for statutory damages against Thomas
- Plaintiffs sought \$150,000 per song that was found to infringe on copyrights, the jury decided on a sum of \$9,250 per song for a total of \$222,000

# Thomas Songs

- Guns N Roses "Welcome to the Jungle"; "November Rain"
- Vanessa Williams "Save the Best for Last"
- Janet Jackson "Let's What Awhile"
- Gloria Estefan "Here We Are"; "Coming Out of the Heart"; "Rhythm is Gonna Get You"
- Goo Goo Dolls "Iris"
- Journey "Faithfully"; "Don't Stop Believing"
- Sara McLachlan "Possession"; "Building a Mystery"
- Aerosmith "Cryin'"

# Thomas Songs

- Linkin Park "One Step Closer"
- Def Leppard "Pour Some Sugar on Me"
- Reba McEntire "One Honest Heart"
- Reba McEntire "One Honest Heart"
- Bryan Adams "Somebody"
- No Doubt "Bathwater"; "Hella Good"; "Different People"
- Sheryl Crow "Run Baby Run"
- Richard Marx "Now and Forever"
- Destiny's Child "Bills, Bills, Bills"
- Green Day "Basket Case"

# Thomas Case

- Industry perspective in court
  - Ripping CDs that you own to an mp3 for an iPod is copyright infringement
- September 2008, judge overturned decision
  - Jury given incorrect instruction that led to incorrect verdict
  - Thomas received new trial -- new jury verdict this past week

# Thomas Retrial

- This past Thursday (June 18, 2009)
  - Federal jury on Thursday found Thomas liable
  - \$1.92 million for infringing 24 songs
  - \$80,000 per song (~9X earlier jury verdict)

# Statutory Damages -- §504(c)

- Current focus of copyright reform efforts
- Can be claimed by copyright holders in lieu of actual damages
  - Range from \$750 to \$30,000 per infringement (or up to \$150,000 when the infringement is "willful")
  - Huge ranges, and the lack of useful guidance on how to implement them, have led to significant inconsistencies in decisions and huge penalties for small crimes

# Damages Reform

- [Pamela Samuelson](#) & [Tara Wheatland](#), *Statutory Damages in Copyright Law: A Remedy in Need of Reform* (2009)
  - Courts failed to develop a jurisprudence to guide decision-making about compensatory statutory damage awards in ordinary infringement cases or about strong deterrent or punitive damage awards in willful infringement cases
  - Statutory damages frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive

# Litigation Strategies

- IP as business model protection strategy
  - Strategies based on copyright enforcement to eliminate behaviors that threaten business models
    - RIAA lawsuits
    - More recent ISP based strategies to punish filesharers



# Music Downloads

- Suits may diminish one but have no effect on the other
- Holy grail of making up for declining CD sales may never happen
- Key question remains -- what to do with dying or vulnerable pre-digital era business models?
- Copyright enforcement substitute?

# Recent Book

- Steve Knopper, *Appetite for Self Destruction: The Spectacular Crash of the Record Industry in the Digital Age* (2009)
- **NPR Discussion by Author:**  
<http://www.npr.org/templates/story/story.php?storyId=99312293&sc=emaf>