

Music Licensing On The Internet

Frank P Scibilia
Pryor Cashman LLP
410 Park Avenue
New York, NY 10022
(212) 421-4100

www.pryorcashman.com

Fast forward to . . . 2000

Your friend Joe calls you up to grab a \$5 cup of coffee at Starbucks. You tell him you have to head over to Virgin Records to pick up the new Metallica single, which you have been anticipating for weeks.



Competing Demands and the Need for Balance Striking

Music fans want as much music as possible delivered to them in the most convenient ways, and the ability to listen to that music anywhere and everywhere.

The music industry and its artists and writers need the ability to make money so that there would still be sufficient incentives to create and to invest in creation.

There is a need to strike a balance between protecting intellectual property and providing public access to it.



Copyright Law and DRM



Copyright law and *digital rights management* (“*DRM*”) technologies are two complementary approaches to reconciling these competing demands.

Copyright is a set of legal rules designed to incentivize creators to create and distribute their content by limiting what the public can and cannot do with that content. It is a set of *norms* that govern people’s conduct.



Copyright Law and DRM *(Cont.)*



DRM is a set of technological “rules” that can protect copyrights in the digital environment where it would be otherwise difficult to protect them (i.e., where there is an exponential threat of piracy).

DRM not necessary where the scholar had to handwrite the scroll.



Copyright Law and DRM *(Cont.)*

DRM can also control rights and usage permissions of content and digital information, creating new opportunities and efficiencies for media and information to be packaged and distributed.

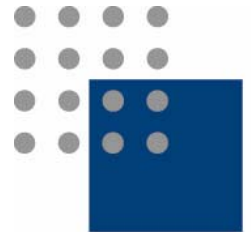
- DRM rules may address the price of the content, the frequency and duration of access, and whether the user is authorized to save, print, or transfer the content to other users or devices.



Copyright Law and DRM *(Cont.)*

- This permits consumers to purchase and pay for only what they want without having to pay for what they don't need. For example, a consumer may only desire to watch a video one time, on one device, without having to pay for the added value of repeated viewings or the ability to “space-shift” or “format shift.”

The technological “rules” of DRM are further enforced by legal rules that prohibit their hacking or circumvention. These rules are part of the Copyright Act – enacted in 1998 through the Digital Millennium Copyright Act – although they are technically not “copyright law.”



Other Technologies That Enable Music Licensing on the Internet

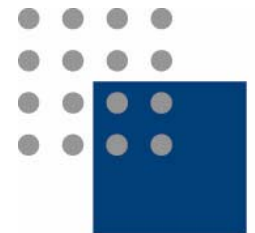
Content recognition software enables (initially) unauthorized Internet distribution to be curtailed, or monetized. It does so by enabling the identification of copyrighted material so that it can be either licensed and posted, or filtered and blocked.



Fingerprinting/Filtering



- *Audio-fingerprinting* technologies have existed for a number of years. A database stores digital representations or “fingerprints” of a sound recording, such as the soundtrack of a film. Existing video files on a service (such as MySpace, Grouper, or YouTube) are then “matched” to these fingerprints and the metadata is checked to determine whether the owner of the content has chosen to license the file, in which case it may remain on the site, or to filter and block it, in which case it shall be removed, and any file that a user attempts to post to the site in the future that match such “fingerprint” shall also be blocked from being posted.



Fingerprinting/Filtering *(Cont.)*



- *Video-recognition* software is to some extent in its infancy, but is being developed by Audible Magic, Gracenote and others. These will consist of databases of “fingerprints” of video files. Video is more complex to analyze and more information needs to be captured in the fingerprint. There are also more ways to fool the technology, for example, by cropping the image.



Fingerprinting/Filtering *(Cont.)*

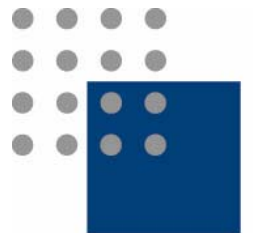
Monetization. Where fingerprinting is used, content owners can license and be compensated for exploitations of their works. There are any number of business models. For example:

- The number of times a film has been viewed or “streamed” to a user can be tracked, and the licensor paid a per-play fee.
- Advertising can be sold on the pages from which the films are streamed, and the content owner can be paid a percentage of such ad revenue.



Fingerprinting/Filtering *(Cont.)*

Caveat: Deploying any type of fingerprinting technology can carry a price, as users may leave the filtered web sites and migrate to online destinations that do not carry restrictions or advertising.



“Superdistribution”

In addition to fingerprinting, there are other electronic mechanisms to mark or tag digital files and trace their usage. These mechanisms can allow even content traded on P2P sites like BitTorrent or eDonkey to be monetized. SNOCAP and MASHBOXX provide such mechanisms to trace and monetize digital music on P2P networks.



“Superdistribution” (Cont.)

Superdistribution is a concept of licensing and distributing digital goods. The fundamental idea is to allow free distribution of digital content, for example, on a P2P network, while controlling access or usage with the content owner defining the terms through DRM. The content is distributed from user to user instead of selling the goods in a computer store or web shop. In order to work, a persistent cryptographic wrapper must stay in place when the digital property is used, copied, or redistributed, etc.



“Superdistribution” *(Cont.)*

That is, if User A must follow certain rules with respect to accessing and/or using the content (e.g., pay \$9.99 prior to access; copy never; copy only to three devices; etc.), those rules follow the content when it is distributed by User A to User B, and User B must follow those same rules. A DRM system tracks the deals and the usage associated with the access to the files, and payment information is exchanged securely among the parties.



“Superdistribution” *(cont.)*

Superdistribution is very efficient because the distribution chain forms a tree where one user copies the content to all his friends. For example if one user copies the content to five of his friends and every one of them copies the content to other five friends it does not take long before hundreds of users have the content (whether or not they choose to unlock it and pay for it, if that is what the DRM requires in order to access the content).



New Digital Media Business Models and Services

Fixed line

Audio

- Standard permanent downloads, wrapped in DRM
- Premium DRM-free higher sound quality downloads
- Subscription – portable and non-portable
- Free-to-the consumer advertising supported streams
- Custom interactive “radio”
- Preloaded devices
- Kiosks



New Digital Media Business Models and Services *(Cont.)*

Video

- Permanent downloads
- Streams
- Free-to-the-consumer ad-supported advertising supported streams
- User-generated video



New Digital Media Business Models and Services *(Cont.)*

Mobile

Audio

- Mastertone or ringtone (voicetone, video ringer)
- Ringback tone
- Full track download
- Streams
- Custom “radio”

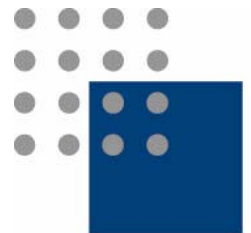


New Digital Media Business Models and Services *(Cont.)*

Video

- Permanent download
- Streams
- Mobile TV

As a result of these new models and technologies, consumers can now experience music in a variety of digital formats around the globe.



Licensing Pitfalls and Concerns



There are a host of legal issues to consider when licensing and monetizing music and videos for Internet distribution, particularly via P2P networks and UGV sites. A few:

- Is all of the content within the recording or video cleared for Internet distribution?
- What if the filter doesn't work? Are you indemnified?
- Have you inadvertently licensed unclaimed content (i.e., content not identified via the fingerprinting technology to be licensed or blocked)?



Licensing Pitfalls and Concerns *(Cont.)*

- Are you contributing to infringements or moral rights violations by end-users with respect to UGV (in other words, by licensing the site are you encouraging users to create unauthorized derivative works, including so-called “mashups”)?
- Are you a contributory or vicarious infringer if you financially benefit from a P2P service, even if you are only receiving revenue from content you have licensed?



Licensing Pitfalls and Concerns *(Cont.)*

One should be able to address most if not all of these problems by:

- carefully circumscribing the scope of the license (make it a quitclaim license, if possible, that is, you are only licensing to the extent of your rights);
- making it clear that the license only applies to recordings or videos that have been located and claimed and only takes effect once claimed;



Licensing Pitfalls and Concerns *(Cont.)*

- limiting your share of revenue to a per-play fee or a revenue pool directly tied to recordings or videos embodying your music (i.e., only advertising revenue attributable to pages from which “your” recordings or videos are streamed);
- getting a broad “take down” right; and
- getting and not giving an indemnity.



Pryor Cashman LLP

410 Park Avenue New York, NY 10022

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Pryor Cashman LLP is an independent full-service law firm with 120 attorneys in its main offices on Park Avenue in New York City and an office in Los Angeles. With a broad and sophisticated transactional and litigation practice, Pryor Cashman provides a wide range of services to meet the varying legal needs of businesses and individuals. The firm has well-established relationships with firms throughout the U.S. and the rest of the world to serve its national and international clients.



Frank P. Scibilia

Direct Tel: (212) 326-0445

fscibilia@pryorcashman.com

Frank P. Scibilia is an intellectual property and entertainment partner at Pryor Cashman LLP. Frank has been involved in several seminal cases establishing the boundary of liability in connection with the copying and distribution of copyrighted content via the Internet, including *A&M Records, Inc v. Napster, Inc.*; *Zomba Enterprises, Inc. v. MP3.com, Inc.*; and *Paramount Pictures Corp. v. ReplayTV, Inc.* He also played a key role in the first case to successfully enforce the anti-circumvention provisions of the Digital Millennium Copyright Act (*Universal City Studios v. Reimerdes*). Frank co-authored amicus briefs to the Supreme Court in *MGM Inc. v. Grokster, Ltd.* and *Eldred v. Ashcroft*.

Frank regularly advises clients on complex copyright issues, and negotiates and drafts agreements licensing content, including licenses for exploiting sound recordings and musical compositions via various new media platforms and services. Working in tandem with a music publishing client, Frank negotiated what has become the music industry's template for the licensing of musical compositions for a broad range of new technological exploitations of music. These licenses grant rights to exploitation of music by record companies, third-party service and content providers, and aggregators (including multiple service operators, Internet service providers, and wireless and other communications carriers), for use in so-called "master ringtones," "master ringbacks," and certain digital video products (including digital downloads of promotional videos, video-on-demand and linear pre-programmed video channels) delivered via wireless networks and other new technology distribution platforms.

