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Contents -

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Music-Related Expenses: 2016

pages 2-20

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MUSIC-RELATED OFFENCES: 2016

By

Sally Ramage

Abstract

This article explores the many offences (e.g. noise pollution, unlicensed performances, and Health and Safety offences) that may be committed by personnel in the music industry and their employers. It also explores the many breaches of Intellectual Property law that may be committed by others against the musician's rights.

1.1. Introduction

The Metropolitan Police Act 1864, s 1, enacted that any householder within the UK Metropolitan Police District, personally, or by his servant, or by any police constable, may require any street musician or street singer to depart from the neighbourhood of the house of any such householder, on account of the illness or on account of the interruption of the ordinary occupations or pursuits of any inmate of such house, or for any reasonable or sufficient cause, and that every person who shall sing in any thoroughfare or public place near any such house after being so required to depart, shall be liable to a penalty of not more than forty shillings, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned for any time not more than three days and in default of payment for not more than one month.¹

Under the adoptive Public Health Acts Amendment Act 1890, s 51, a house or garden, whether licensed for the sale of liquor or not, may not be kept for public dancing, singing, music or other public entertainment of such kind without a licence from the justices. Later, in the UK, the Private Places of Entertainment (Licensing) Act 1967, the Theatres Act 1968, The Courts Act 1971 and the Local Government Act 1971 enabled a local authority to control private music and dancing conducted for gain.

1.2. Busking in the United Kingdom

Busking can breach standards set by Parliament and extreme buskers could be charged under the Summary Offences Act 1981, ss3-4, for offensive or disorderly behaviour or using offensive language, or breach the Resource Management Act 1991 by making excessive noise. However, when busking is just annoying, it falls to local government to regulate that behaviour for the benefit of the whole community. Busking is only one of many activities regulated by local byelaws. The 2000 London Local Authorities Act, s 32, as amended by the Licensing Act 2003, Schedule 6, states that:

'Busking' means the provision of entertainment in a street but does not include the provision of entertainment-

(a) of a class which from time to time is by resolution of a participating council excluded from the operation of this Part of this Act;

(b) under and in accordance with a premises licence under Part 3 of the Licensing Act 2003, or a temporary event notice having effect under Part 5 of that Act, which authorises the provision of regulated entertainment (within paragraph 2(1)(e) to (h) or 3(2) of Schedule 1 to that Act (music and dancing));

(c) which is authorised specifically to take place in a street under any other enactment; or

(d) consisting of music performed as an incident of a religious meeting, procession or service; and 'busk' and 'busks' shall be construed accordingly; 'licence' means a licence under section 35 (Power to license) of this Act and 'licensed' shall be construed accordingly;

'street' includes- any street or way to which the public commonly have access, whether or not as of right; any place, not being within permanently enclosed premises, within 7 metres of any such street or way, to which the public commonly have access; any area in the open air to which the public commonly have access; any street, way or open area within any housing development provided or maintained by a local authority under the

¹ *R v Hopkins* (1893) 1QB 621.

Housing Act 1985; Part II, but does not include any land in respect of which there are byelaws in force which regulate the provision of entertainment and which are made by London Transport Executive or London Regional Transport⁷.

A permit or licence to busk is not always required, depending on the local authority's regulations. Some councils and railway stations require that a busker audition before a permit or license to busk be granted. There may be age restrictions, which do not allow children under the age of 18 to perform on the streets, at the risk of a police officer or relevant official removing the busker, arresting the busker, or fining the busker in breach of local byelaws.

1.3. Responsibilities of musicians and producers of music

Although it might seem unsocial to demand compliance of byelaws by buskers, these laws also have the purpose of anti-sound pollution.² A case against a musician and record producer is awaited, as it is an established fact that some noises can cause hearing damage. There is evidence that exposure to live can cause hearing damage. In April 2008 the existing regulations protecting workers in the music and entertainment sectors from exposure to excessive noise will be replaced by the Control of Noise at Work Regulations 2005 (Noise Regulations). For other industry sectors, these Regulations have been in force since April 2006.

The European Directive (2003/10/EC) on which the Regulations are based allowed the music and entertainment sectors a two-year transitional period. This recognises that music is unusual as it is noise deliberately created for enjoyment and therefore practical guidelines are necessary to help workers, employers and freelancers in the music and entertainment sectors protect their hearing and safeguard their careers and entertainment sectors are defined in the Noise Regulations as all workplaces where (a) live is played or (b) recorded is played in a restaurant, bar, public house, discotheque or nightclub, or alongside live or a live dramatic or dance performance. The Factories Act 1961(replaced by the Health and Safety Act 1974) has long protected workers from noise pollution at work. The striking point here is that musicians must bear responsibility for their product as well as enjoy rights of protection.

1.4. Insurance for musicians

Musicians must also be protected from injury or illness. In the case of a singer, for example, health insurance is essential for singers who earn their living from their instrument. Insurance cover for touring abroad, loss of voice, accidental injury, engagement cancellations and loss of earnings will protect the singer if they are unable to perform due to illness or other unforeseen events. Vocalists who use their own equipment, backing tracks or other accompaniment should consider insuring against damage or loss with musical equipment insurance.

2. 1886 Berne Convention

In 1886, the Berne Convention for the Protection of Literary and Artistic Works was the first attempt at creating a set of rules with a validity extending beyond notional borders.³ It gives a broad definition of 'literary and artistic works' that applies to every production in the literary, scientific and artistic domain using a variety of expressions. (Article 2.1)⁴ The Berne Convention was revised in 1979 to address these key points of literary and artistic works:

- (i) The author has the right to claim authorship of the work and to object to any distortion or mutilation which would be prejudicial to his honour or reputation (Article 6 bis)

² See website <http://www.dontlosethemusic.com/home/areyouatrisk/>.

³ Before this, there was the English Copyright Act 1709.

⁴(4) Berne Convention Article 2(1) states, "*The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain whatever may be the mode or form of expression, such as books, pamphlets and other writings, addresses, sermons and other works of the same nature; dramatic or dramitico-musical works; choreographic works and entertainment in dumb shows; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science*".

- (ii) Different media are protected for different periods of time (Article 7).
- (iii) Authors have the exclusive right to authorising the reproduction of their works, but reproduction of such works in certain cases is permitted. (Article 9)
- (iv) Quotations from a work made available to the public are permitted. (Article 10-1).
- (v) Works can be used by way of illustration in publications, broadcasts or sound or visual recordings for teaching. (Article 10-2).

There are also universal conventions such as the Universal Copyright Convention of 1952, the International Convention for the Protection of Performing Artists, Producers of Phonograms and Broadcasting Organisations (Rome Convention) of 1961 and the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms of 1971.

3. The Copyright and Related Rights Regulations 1996

The Copyright and Related Rights Regulations 1996 introduced extensive new rights for performers by way of amendment to the Copyright, Designs and Patents Act 1988. Performers have performer's non-property rights and recording rights. A performer's consent is required to exploit his or her performances. The Copyright, Designs and Patents Act 1988 defines 'performance' as a dramatic or musical performance, a reading or recitation of a literary work, or a performance of a variety act or any similar presentation which is or so far as it is, a live performance given by one or more individuals. (Section 180 (1)). Section 180(2) states that:

'A person having contractual recording rights in relation to a performance may take action in respect of any unauthorised recording of such performance.'

However, this Act was not retrospective, besides which, rights in performances are given to the performers and to the person who has recording rights in relation to the performance. A performance is a live performance and can be a musical performance and protection is by way of civil remedy. The rights in performance come on top of the rights conferred by copyright and they are independent rights. Performance rights expire after a 50-year-term. Infringement of performance rights are found in the following actions:

1. Making a recording of the live performance which is not exclusively for private or domestic use.
2. Broadcasting the performance live or including it live in a cable service.
3. Issuing copies or the original recording of the performance to the public.
4. Renting or lending copies of a recording of the performance to the public.
5. Making a recording of the performance.
6. Showing a recording of the performance in public.
7. Importing an infringing copy of a performance.
8. In the course of business, selling, renting, offering for sale or hire or distributing, or importing an illicit recording of the performance if the person importing it knows that it is an infringing copy.

4.1. What is a musical work?

The Copyright Act 1956 deals separately with musical works (s 2), sound recordings (s 12), sound broadcasts (s14) and published editions of the works (s15), stating, with reference to the works of each description. The conditions under which copyright is to subsist and the acts, are restricted by copyright.

4.2. Owner of copyright

The owner of the copyright of a musical work is generally the author (s 4);

*in a sound recording, the maker (s 12(4) and 13(4));

*in a television or sound broadcast, the BBC or the Independent Television Authority, as the case may be, (s14 (2) and s34); and

*in the published edition of a musical work, the publisher (s15 (2)).

4.3. Preventing copying of physical material existing in the fields of literature and arts

Copyright is concerned with the negative right of preventing the copying of physical material existing in the field of literature and the arts. It is concerned only with the copying of the physical material and not with the reproduction of ideas. This right to prevent others from multiplying copies of published work in a book, or record, is a statutory right, first created by the statute 1709, 8 Anne c 21 and whether this existed in common

law is uncertain.⁵ The 1956 UK Copyright Act repealed the Fine Arts Copyright Act 1862, the Musical (Summary Proceedings) Act 1906 and the Musical Copyright Act 1906.

The Dramatic and Musical Performers Protection Act 1958 and the Performers Protection Act 1963 and 1972 prescribed penalties for the unauthorised reproduction of dramatic and musical performances by way of records, cinematographic films or broadcasting. The 1988 Copyright Act states that there are three essential ingredients of an original musical work in which copyright subsists: (a) it must consist of ‘music’ [not defined], excluding all accompanying words and actions; (b) it must be original in an ‘originating’ sense; and (c) it must be recorded in some form, e.g., fixed in writing.

4.4. Author of musical work

The author of a work means the person who created it (CDPA 1988).

The author of a musical work has the right (s 77, CDPA 1988) to be identified as the author of the work in the circumstances specified in the section. One of these rights is the right to be identified whenever copies of sound recordings of the work are issued to the public.

5. Copyright, Design and Patent Act 1988

S180 (3) states that any act done before 1/1/89 or in pursuance of arrangements made before that date is NOT to be regarded as infringing performers’ rights or rights of persons having recording rights.

A performance qualifies for protection if it is given by a qualifying individual or if it takes place in a qualifying country (s 206).

A qualifying country includes the UK, other EC Member States and any country party to the Rome Convention for the Protection of Phonograms.⁶

6.1. Performers property rights

Performers’ property rights subsist for a period of 50 years from the end of the calendar year in which the performance takes place (s 191(1)). An infringement of a performer’s property rights is actionable by the rights owner.

6.2. Performers non-property rights

Performers also have non-property rights. These are the original rights under the CDPA 1988 to consent to the recording or line transmission of a performance and to importing, possessing or dealing with the recording.

6.3. Infringement of property rights

Infringement is a breach of statutory duty and a right to seize illicit recordings⁷ and sometimes-criminal sanctions. Non-property rights, like property rights, also subsist for 50 years maximum and performers’ non-property rights are NOT retrospective before 1/1/96. Permitted acts include fair dealing for the purpose of criticism, review or news reporting, incidental inclusion and things done for instructional, educational purposes or parliamentary and judicial proceedings. (S189).

7. Sub-licensing in the United States

⁵ *Jeffries v Boosey* (1854) 4 HLC 815

⁶ A qualifying country includes those signed the Rome Convention signed on the 26th October 1961 and the Trade Related aspects of IP Rights (TRIPS) agreement. 124 countries on the establishment of the World Trade Organisation (WTO) signed the TRIPS Agreement.

⁷ A recording, for these purposes, means a film or sound recording of the whole or substantial part of a qualifying performance. In the case of *Bassey v Icon Entertainment plc* [1995] EMLR 596, there is the issue of the wide definition of sound recording, capable of including “record”. The making of a record from a master tape constitutes the making of a separate sound recording, requiring separate consent, but the court will look at the quality of the recording that has been taken rather than the quantity, as in the case of *LB Plastics v Swish Products Ltd* [1999] RPC 555, 3rd December 2004.

On July 19, 2006, the Ninth Circuit held in *Miller v Glenn Miller Productions, Inc.*, No. 04-55874 (9th Cir. 2006) that a licensee of trademark and related publicity rights does not have the right to sublicense those rights to third parties without the licensor's express permission. In so holding, the Ninth Circuit extended the well-established "sublicensing rule" from copyright and patent law to the licensing of trademark and related publicity rights. In so doing, the Ninth Circuit joins a number of other jurisdictions, which have considered this issue and uniformly held that the sublicensing rule applies to trademarks.

This holding is a clear victory for trademark and right of publicity owners who wish to maintain maximum control of their rights. The ability to block undesirable trademark sublicenses is significant in view of a trademark owner's affirmative duty to supervise and control a licensee's use of the mark, on penalty of losing the ability to enforce the mark. The ability to block undesirable sublicenses of publicity rights, on the other hand, will allow the licensor to prevent unwanted uses of his or her name or likeness, including those that are offensive or otherwise injurious to the licensor or his image.

Approximately 12 years after musician and bandleader Glenn Miller died in a plane crash, his former lawyer established Glenn Miller Productions., Inc. ("GMP") with the aim of establishing a business based on the Glenn Miller name, which would, among other things, continue performances of the Glenn Miller Orchestra. Glenn Miller's widow, Helen Miller, served an executive role in the company and licensed to it the right to use the name and likeness of Glenn Miller and his music. GMP operated under this license agreement, executed in 1956, registering the "Glenn Miller Orchestra" trademark and operating a successful orchestra. Since 1988, GMP has also sublicensed to third parties the right to operate other orchestras called the Glenn Miller Orchestra, with the most current sublicenses in Germany and the United Kingdom. Miller's heirs, the present owners of his intellectual property rights, filed suit in the Central District of California, challenging GMP's ability to sublicense the Glenn Miller mark without their express permission.

Although the Central District granted GMP's motion for summary judgment on the ground that plaintiffs' claims were barred by the doctrine of laches due to their substantial delay in bringing suit, it nonetheless held that the ban on sublicensing absent the licensor's express consent, already well-established in patent and copyright law, should be extended to licenses of trademarks and rights of publicity. (See *Miller v Glenn Miller Prods.* 318 F. Supp. 2d 923 (C.D. Cal. 2004)).

In a brief opinion, the Ninth Circuit affirmed and adopted the majority of the district court's opinion, including its extension of the sublicensing rule to trademark and related publicity rights and the policy reasons justifying the extension. In the district court, GMP had argued that plaintiffs did not have the right to control sublicensing of the mark because that right was not reserved in the licensing agreement. Noting that under trademark law a trademark licensor has an affirmative duty to police its license, the district court observed, "A license agreement need not contain an express quality control provision because trademark law, rather than the contract itself, confers on the licensor the right and obligation to exercise quality control." *Miller*, 318 F. Supp. 2d at 936.

The district court then identified two policy reasons for extending the sublicensing rule: First, the licensor's ability to monitor use of the mark will remove the potential for litigation caused by disputes between the licensor and licensee regarding the actions of the sublicensee. Second, preserving the licensor's control is necessary to protect the public's expectation of the source and quality of the trademarked product. The district court applied these same policies to extend protection to related publicity rights, which often are licensed in connection with trademarks, and for which the licensor has a similar right and incentive to control sublicensing arrangements.

7.2. UK government suggestion on music tax rejected

In April 2008, the UK music industry rejected the Government's proposal to legalise the transfer of music from CDs to MP3 players (as long as the CD was paid for, the transfer happens just once and is for personal use only. Currently the practice, which is near ubiquitous amongst MP3 player owners, infringes copyright) without a levy (in the spirit of modern IP laws). It has asked for a tax on devices such as Apple iPods, which it says, should compensate artists for the transfer. The music Trade Body claimed that this rejection is founded on the fact that over 20 million MP3-capable portable devices were sold in the UK annually, coupled with the music industry's assumption that 90% of music on the average MP3 player is music that has been copied

8. Protection of the Rights of Broadcasting Organisations

An online culture built around user-generated content on Web sites like YouTube and MySpace would be imperilled by a new treaty, public interest groups and some technology companies said. At issue is a treaty called "Protection of the Rights of Broadcasting Organizations," which proponents say is necessary to ensure that TV and cable broadcasters - and now, their Web-based counterparts -- have the tools to combat unauthorized retransmission of their signals.

Most European countries grant consumers the right to make private copies, based on the principle that these are not likely to compete with, and so reduce the market for, the original works. At the same time, they accept a levy on recording equipment, including blank tapes.

In the US, there is the Audio Home Recording Act 1992, which grants consumers the ability to make private copies of broadcast music. The US copyright law has adopted the notion of fair use to include four parameters:

- Character of use (e.g. educational and non-profit purposes)
- Nature of work (e.g. factual as opposed to creative)
- Portion of work (e.g. small portion)
- Effect on the market value of work (e.g. small impact)

British record companies and songwriters have in September 2006, reached an agreement over how much artists should be paid every time their songs are sold online or to a cellphone, ending a long-running dispute that cast uncertainty over the future distribution of profits from digital download services. Both sides backed down from their initial claims, agreeing to adopt the existing temporary rate under which songwriters receive 8% of revenues for the next three years, equivalent to about 10 cents a download from Apple Computer Inc.'s iTunes service.

9. WIPO Performances and Phonograms Treaty

The UK's Copyright and Related Rights Regulations 1996 were due to the World Intellectual Property Organisation's conference on certain copyright and neighbouring questions, which also led to the adoption of two treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty^{8[8]}. Both treaties extend some provisions of the Berne Treaty and add provisions which offer responses to the challenges brought about by information and communication technologies.

The following statements are therefore correct:

- Computer programs are protected as literary works.
- Compilations of data and other material constitute intellectual creations.
- Authors of computer programs; cinematographic and phonographic works have the exclusive right of authorising commercial rental of their works.
- Authors have the exclusive right of authorising any communication to the public of their works by wire or wireless means.
- States that are party to the treaties provide legal remedies to those who alter Rights Management Information, i.e., information that identifies the work of the author, the rights owners, information about the terms and conditions of use, and any numbers and codes that represent such information.
- States that are party to the treaties make it unlawful to have any device or component incorporated into a device or product in order to circumvent any process, mechanism, or system that prevents or inhibits the exploitation of rights of rights holders.

10. Draconian penalties now in force but not adequate

In the UK, the new 2002 Copyright and Trade Marks Offences and Enforcement Act state that the court may make an order for forfeiture of illicit recordings and of destruction of unauthorised decoders with search warrants available to find same. It is a criminal liability to make or import an unauthorised decoder.

⁸To add to the complication is the issue of privacy since the establishment and adoption of general privacy and data protection principles in different multilateral forums such as the OECD, APEC and the EU, transposed, translated and applied in some jurisdictions.

Although the UK might have brought in draconian penalties for IP infringements, as regards computers worldwide, it is still difficult to stop illegal copying of copyright musical works by means of computer software. However, it seems that there has been more hype and fear than actuality in music piracy and after a four-year slump, global sales of recorded music increased in 2004, largely through the success of fee-charging on-line services and the expansion of portable music devices such as Apple Computer Inc.'s iPod.

The concern now is that it seems inevitable that the compact disc will become obsolete with music Internet and mobile phone delivery. Mobile operators offer downloads of songs directly into handsets, though fees for this service are higher than per-track prices for portable music players such as the iPod.

In the 2004 case of *BUMA/Stemra v KaZaA* in Amsterdam, the court of appeal in Amsterdam reversed the decision of the District court, which had ordered KaZaA to stop illegal copying of copyright musical works. KaZaA⁹ disseminates software, which allows its users to find date files, download them and offer them to other users. The exchange of MP3 files used for musical works is very popular. There are at least 17 million users of KaZaA software exchanging billions of files.

The Appellate Court held that it would be impossible for KaZaA to comply with the demand of BUMA/Stemra (the collecting society for copyright owners such as composers and lyricists) since, once it has allowed users to copy its software, KaZaA no longer has power to control its use and so dissemination of KaZaA software is not a tort and the infringement was committed by the users of KaZaA software and not be KaZaA itself.

In *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd* ¹⁰[10] it was found that, six of the respondents had authorised copyright infringement. Justice Wilcox found that these respondents knew that substantial copying was being undertaken by users. Their websites did contain warnings against copyright infringement and users were required to agree to licensing agreements but these warnings were obviously not effective. These respondents had not implemented any of the available technical measures, which could have reduced the incidence of copyright infringement. In China, there is so much copying of software without licence that the estimated loss to Western copyright owners is over \$50 billion. This can only be curbed by the Chinese authorities.

11. File-sharing

Because it is so easy to copy, upload, download and send as an email digitized content has led to the term commonly known as peer-to-peer file sharing and several business models have been developed over many years to enable file sharing. The 2001 US case *MGM Metro-Goldwyn-Mayer v Grokster*, was a case closely watched by the business world and which decision was given on 27th June 2005. The case hung on whether file sharing is legal or illegal although that does not enlighten lawyers as to who is liable or the person who downloads the file, the person who uploads the file in order for it to be shared. The Court ruled for the music companies. The court in this MGM case had previously affirmed that because peer-to-peer file sharing software has 'substantial and commercially significant non-infringing use', then the software producers, Morpheus and Grokster, were not responsible for the software's use to breach copyright law.

However, the Supreme Court reversed the Court of Appeal's decision in this case. The Supreme Court found evidence of Grokster's and Streamcast's intention to facilitate the unlawful use of the software through such activities as streaming advertising of their software program onto computer screens of users using Napster compatible programs; sending electronic newsletters promoting the software's ability to provide popular copyrighted material and marketing to possible advertisers the potential to capture former Napster users. This, together with the US Supreme Court ruling that cable television operators did not have to allow rivals to offer high-speed Internet access over their systems puts performers rights firmly in place for the long-term future.

12. Out-Of-Copyright Music

The case of *Hyperion Records Ltd v Dr Lionel Sawyers* [2005] AC 17th May, looks like a case where the person who first makes a composition of this after expiry of the copyright, is the person who owns the

⁹The Kazaa peer-to-peer file share case was brought by Universal Studios and about 30 others.

¹⁰ [2005] FCA 1242

copyright. In addition, anyone who copies that new rendition is breaching that person's copyright and also infringing that person's moral rights as that person must be identified as the author of the first edition since the expiry. A work may be complete rubbish and worthless, but copyright protection may be available for it, just as it is for the great masterpieces of imaginative literature, art and music. A work need only be "original" in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by another person.

The essential elements of originality were explained in *Walter v Lane* [1900] House of Lords and the Copyright Act 1842. Again, in *Express Newspapers plc v News (UK) Ltd* [1990] FSR 359 when it was held that copyright subsisted in shorthand written reports of public speeches as "original literary" works.

To this effect, a 30 million-page Traditional Knowledge Digital Library is being assembled from all available sources of Indian medical remedies and similar databases are being assembled for music

13. Technological issues

The explosion of easier and faster methods of distributing music over the Internet has brought fears of the end of record companies as well as predictions of the liberation artists from the clutches of the record companies. Copyright law is based fundamentally on economic motivations. It is the economic underpinning that makes IP law so important in the digital age.

Internet music concerns MP3 (MPEG 1, Audio Layer 3) - an algorithm that can compress digital audio by a ratio of 12 to 1 and can shrink an audio file so that it is easily and rapidly downloaded from an Internet source, such as a music Web page, and can then be stored on a computer's hard drive, to be listened to time and time. This concerns the recording industry because MP3 technology enables this audio file to be easily copied without authorization from the copyright owner and such illegal copies can be distributed over the Internet simply by, for example, being attached to an e-mail message and saved in a mobile phone-sized player, such as Diamond Multimedia Rio Player, for example, and played back at any time and any place for as many times as is wished. MP3 players are also available as a car accessory.

Companies, including IBM Corp., Microsoft Corp., AT&T Corp. and a partnership of Lucent Technologies, e.Digital Corp. and Texas Instruments Inc., plan to produce compression technologies that will compete with MP3. MP3 has attracted the attention of the recording industry, which fears copyright infringements in the sound recordings owned by record companies

The record industry formed the Secure Digital Music Initiative (SDMI), which seeks to establish an open architecture for the delivery of digital music, whether downloaded from the Internet or delivered through other media. This architecture, which may contain watermarks and encryption for protection, would include protections against unauthorized copying of digital music that would work across all platforms and media, and be user friendly. There are now several competing compression technologies, containing some form of copyright protection, thereby protecting the intellectual property rights of its members.

However, any protection against copying imbedded in the music's digital code ultimately can be undone by those who are proficient enough with the technology. The Authorities' objective is to convict the big offenders, major music pirates who commercially exploit multiple unauthorized copies of music for profit.

14. Posting music on the Internet

It can be argued that musicians will be able to control their destiny by posting their music on the Internet, thereby building their own fan base through more direct contacts with people who visit their Web site. Once compression and delivery technology is fully developed all music will be distributed over the Internet or other alternative media. There will be no need to have a record company manufacture physical plastic discs and distribute tens or hundreds of thousands or millions of these throughout the country and the world since the artist can do this from his own personal Web site.

However, it is not likely that physical compact discs [CDs] will be completely replaced by direct digital distribution of music because record companies provide benefits that are not available through this do-it-yourself approach. The record company provides fully integrated and experienced promotions, marketing machinery, contacts at radio stations to encourage airplay and support on tours. Although MP3 and similar

technologies simplify direct music distribution, there is no copyright protection because the music download simply becomes a free chain letter.

Such an artist who writes and records her own music, and retains the rights to the music and the sound recording, can do whatever she wants with her creation. She can sell it at whatever price she sets or she can give it away. However, it can be passed around repeatedly free at point of download and someone may decide to post the artist's music on his own site but charge people to download it, thus making money to which the artist is entitled. This can make for grand-scale piracy.

Copyright law rests on two fundamental rationales. One is to encourage creativity by protecting an artist's work from unauthorized copying by others. The other is to reward the copyright owner by enabling him to profit from this creativity. These two concepts work best together.

If more new artists set up Web sites and begin to offer their fans the ability to download samples^{11[11]} of their music - or even a limited number of songs, for free in order to promote themselves, this create a new type of promotion will force record companies to participate to help promote their artists on the record companies' own Web sites. Such record companies are able to avail themselves of the Internet to discover new talent.

Online sales of copyright music directly to the consumer are already a reality. However, will MP3 alter the relationship between the record company and the unknown artist? Yes, the artist also can gain from the technology itself. It will be easier for the artist to get her music out and get the attention of fans even without a recording contract thereby giving the artist more say with a record company during contract negotiations. In addition, the new technologies alter economies of scale thereby aiding small, independent record companies who compete with the major companies for the artist's services, all on the level playing field of the World-Wide Web.

15. Music Distribution and Sales

The technology mainly affects music distribution and sales. The record companies will undoubtedly survive, and will be successful in implementing satisfactory copyright protections for their music.

It was not so many years ago that the manufacture and sale of blank audio cassette and recorder was feared but did not destroy the music industry, but enhanced consumer choice, convenience and freedom. The same result is likely in the field of compression technology.

16. Infringement issues

Infringement suits^{12[12]} have been prepared against organisations, which continue in the offences of piracy in China and Mexico. Many Chinese Internet companies believe it is legal to make available unauthorized recordings. According to the IFPI there are approximately 200 illegal sites in China.¹³ In the UK, the statutory protection of passing off can be used to bring to book those who sell music that purports to originate from

¹¹ "Sampling" is the practice of digitally copying or transferring snippets or portions of a pre-existing (copyrighted) record to make a new composition. An artist will take a piece of a pre-existing recording and use that piece (i.e., "sample") to create a new recording. Sampling exists mostly in rap, hip-hop, street, or dance records. A prime example of a successfully sampled song is the huge MC Hammer hit single, "U Can't Touch This," which was a sample of Rick James' prior hit, "Super Freak." Thus, samples are "derivative works" of a previous copyrighted song. The right to prepare derivative works based on the copyrighted work is one of the five bundles of rights of the copyright owner - the song writer(s) or publisher(s). As such, the copyright owner must grant permission (a mechanical license) before the copyrighted song(s) can be used.

¹²The world's biggest music companies are preparing a lawsuit against Yahoo China for copyright infringement as part of the industry's efforts to crack down on piracy. In a similar situation in Mexico, illegal sales already account for 65 percent of CD sales in Mexico, and the entertainment industry is bracing for things to get much worse now that fast broadband connections have become more common, doubling to 61 percent of Web-enabled Mexicans in the last two years. See <http://www.gigalaw.com/news/2006/07/music-companies-preparing-to-sue-yahoo.html>

¹³ IPFrontline, "Illegal websites in China", 1.1.2000 at <http://www.ipfrontline.com/depts/article.asp?id=1169&deptid=6>

legitimate record companies.¹⁴ The United Kingdom Trade Marks Act 1994 made radical changes to the UK trademark law and improved the rights of the proprietor of a registered trademark and his licensee, bringing UK trademark law into line with the rest of the European Union and implementing Directive 89/104. It can also be seen as a short cut to recognising a product, which is worth buying from one, which is not.¹⁵

This 1994 UK Act has made it easier for the trademark owner to license production or distribution under the mark without endangering the validity of the registration. However, it is still important for the trademark owner to record licences¹⁶ and run checks to ensure the quality of music provided by the licensee is high enough in order for the reputation of the trademark to remain untarnished. If a market trader purports that the music compact discs he sells are from a certain reputable registered company and the music is not, even if he tells this to the customer, even if there is no forged trade mark on the box, this is unauthorised use as defined by section 103 UK Trade Marks Act 1994. For the first time in the UK, oral use of the music trademark is included as breach and misrepresentation of the trademark, complying also with the UK Consumer Protection Act 1987, Part 2. The UK Trade Mark Act 1994 gives statutory basis for orders, which the courts may grant for destruction of such offending goods.¹⁷

The UK Trade Mark Act 1994 is mainly concerned with protection of the public interest from deceptive and misleading practices. As to licensing, the UK Trade Marks Act takes a liberal stance and the responsibility now lies with the proprietor of a mark to ensure that the use of the mark by a licensee is not likely to deceive, risking revocation of his licence under section 46 of the Act.

When there are sufficient facts to support a passing off litigation case, damages can be sought for direct loss of sales, inferiority of the defendant's goods¹⁸ and injurious association with the plaintiff.^{19[19]}

¹⁴ Five people have been arrested in a police raid on what is thought to be the largest DVD piracy factory discovered in the UK in summer 2006. The Metropolitan Police's film piracy unit found more than 60 DVD copying machines and 30,000 blank discs in the search of the east London premises. Officers said the factory in an industrial estate in Leyton was capable of producing 2,700 DVDs an hour. Four men, aged between 21 and 36 years-old, and a 41-year-old woman were arrested. The raid was a joint operation between the film piracy unit, trading standards and the Federation against Copyright Theft (Fact). Det Sup Trevor Shepherd said the operation underlined the value of police working in partnership with industry to tackle organised crime. Fact director general Raymond Leinster said the operation was another "major intervention" against the distribution.

¹⁵ Although the application of a trade mark to music does not necessarily amount to a trade description. See the case *R v Veys* [CA (Crim Div) (Court of Appeal, 23 October 1992)] in which V had appealed successfully against his conviction on charges of offering to supply goods to which a false trade description had been applied. The offence had involved applying to T-shirts a coat of arms which was very similar to that of Manchester United Football Club and selling such T-shirts. This case went to the ECHR and it was held that it did not follow as a matter of law that applying a trademark to goods necessarily amounted to the application of a trade description within the meaning of the Trade Descriptions Act 1968.

¹⁶ A typical licence arrangement can be seen as having several distinct but related purposes: -to provide a definite indication of the IP rights being licensed, to set out what the licensee is permitted to do with the technology, for how long and where, to provide a "bible" or code of practice covering the duties of the parties to one another and how contingencies are to be addressed ,to state the financial terms of the deal ,to set out in standard routine clauses how various formal issues such as disputes and formal notices between parties are to be dealt with. Five crucial points are of foremost importance. The licensed IP must be correctly defined by quoting patent numbers, design registration numbers, trademarks etc – these are banal points but not infrequently the source of difficulties; an investigation needs to be carried out to establish that the IP rights are in force; this should be quite practical for registered rights such as patents but is more difficult and never completely certain for rights such as copyright and know-how rights; any other licences existing under the IP rights should be checked if possible; this can be a problem area and it is not uncommon for a licensee to rely on assurances (so-called warranties) from the licensor; ownership of the IP needs to be assured as far as possible and know-how will normally form an important part of a licence agreement; the agreement needs to spell out what this is and the licensee needs to see proof that it exists - it is by no means unheard of for unseen know-how to turn out to be meagre and of little value.

¹⁷ Trade Marks Act 1994(UK) states in section 15(1)(a) – “where a person is found to have infringed a registered trade mark, the court may make an order requiring him-

(a) to cause the offending sign to be erased, removed or obliterated from any infringing goods, material or articles in his possession, custody or control.”

¹⁸ In the case *Harris v Warren & Phillips*, one of the plaintiffs, a songwriter, claimed an injunction to restrain the owners of the copyright in one her earlier compositions from passing it off as one of her recent works.

17. Counterfeit music

Counterfeiting^{20[20]} of music is a criminal offence in the United Kingdom. The UK is party to the 2001 Co-operation Agreement between the United Nations Office on Drugs and Crime and the European Police Office, Europol and article 4, on the exchange of information, is relevant here.^{21[21]} Some statistics of loss of revenue due to counterfeiting are as follows- the loss of revenue from counterfeiting is 250 billion Euros per year in the European Union alone, with an estimated loss of 200,000 jobs in the EU. To this end, there is the anti-counterfeit strategy by way of the EC Enforcement Directive 48/2004 and EC Customs Regulation 1383/2003.

18. Enforcement

There are measures for preserving evidence within 20 working days of the discovery. The Enforcement Directive contains a right to information in Article 8 and a reminder of the privilege against self-incrimination as per *Coco-Cola v Gilbey* [1996] FSR 23. Article 9 of the Enforcement Directive provides for interlocutory injunctions against intermediaries and the safeguard by way of freezing of assets and bank accounts. Article 10 of the Enforcement Directive sets out corrective measures such as destruction of the goods or recalling the goods from channels of trade. The damages may take into account moral prejudice and costs are to be paid by the loser of the case. This Enforcement Directive covers imports, exports, and goods in transit, counterfeits, pirates, patent infringements and other IP infringements but does not cover parallel imports or over-runs. When counterfeits are seized by Customs, they must inform the copyright holders and the holder of the goods and the copyright holder then has ten days to act.

Although the allegation was that the defendants had represented the old song as new, the evidence was not strong enough to uphold the allegation. In addition, although the plaintiff further established that she herself held the merit of the older version in low esteem, she could not establish at which exact point the earlier song was inferior to the later song, nor could she prove the inferiority she claimed for the earlier song. This was a case of implied misrepresentation. In another case *Beecham v British Lion* [1951] 58 RPC 111, music conductor Sir Thomas Beecham objected to the issue of records of a film track he had conducted claiming that this issue was inferior to records of a concert performance and claiming a suffering of reputation but the defendants gave an interlocutory source. In *Sony Music Australia v Tansing* [1994] 27 IPR 649, an interlocutory injunction was refused against a pirate recording of a Michael Jackson concert because it was prominently labelled to show it was unauthorised and of a lower than normal recording standard.

¹⁹ C. Wadlow, *The Law of Passing-Off*, Sweet & Maxwell, London, 1995.

^{20[20]} See the case *Torbay DC v Singh (Satnam)* QBD 16th June 1999, in which TDC appealed against the acquittal of Singh on two charges under the Trade Marks Act 1994 section 92 (1)(b). Singh had sold children clothes bearing an identical logo to that of the registered trademark "Teletubbies". He sold the garments on the basis that the sign was not registered and that his supplier told him the goods were not counterfeit. Torbay District Council appealed and won because the offence was made under section 92(1) as the mark on the goods was identical to the registered trademark and were offered for sale with intent to cause loss to another and without the proprietor's consent, which imposed strict liability. It was therefore unnecessary to prove that an offender had knowledge of or intent to infringe the registered mark. The defendant's state of mind as to whether there was a registered mark capable of infringement at the material time was irrelevant for the purpose of establishing the statutory offence under section 92(5) because section 92(5) does not state anything about a reasonable belief that a mark is not registered, only referring to a "reasonable belief that the manner of use did not infer the registered mark". Therefore, the lower court had been wrong in enquiring as to the defendant's belief.

²¹ Article 4

Exchange of Information

1. Any exchange of information between UNODC and Europol shall be subject to their respective rules and procedures and shall only take place for the purpose of and in accordance with the provisions of this agreement. The transfer of information by Europol shall not include data related to an identified individual or identifiable individuals.
2. The transfer of information by Europol shall not include data that are subject to a Europol classification level.
3. Both parties shall inform each other, at the moment of transfer of information or before, of the purpose for which the information is transferred and of any restriction on its use, deletion or destruction, including possible access restrictions in general or specific terms. Where the need for such restrictions becomes apparent after the transfer, the parties shall also inform each other of such restrictions at a later stage.
4. The exchange of information as specified in this Agreement shall take place via the designated contact persons of UNODC and Europol.

The Customs can destroy the goods without legal action. In the world, it is moving in epidemic proportions and the combined value is known to be as much as 5% of total world trade every year. The World Intellectual Property Organisation (WIPO) is charged with administering the international system for registered trademarks known as the Madrid Arrangement. WIPO, created under the Paris Convention, takes an active position on enforcement issues worldwide; including trademark-counterfeiting WIPO established international norms for effective national laws so that counterfeiting activities will be halted at source... The USA relies more on GATT or the Customs Cooperation Council, the CCC. Brazil, India, Indonesia and other developing countries leaned towards WIPO to develop appropriate enforcement mechanisms.

19. Changing the Rules

However, firms that encourage music piracy are always looking for improvements in technology to bypass the regulations. NewsCorp's MySpace²² has done just this, by ensuring that both the musical bands and the buyers are of the same networking service by making it possible within the software for MySpace users to buy and sell from each other in a single move so that it is possible for as many as three million music bands to sell to the entire 106 million MySpace community²³

20. MySpace

The MySpace music bands are unsigned to any music label and they do not sign a contract with MySpace, thereby creating for MySpace one of the biggest digital music stores because of the fact that the music is sold without any content protection and the music bands themselves decide how much each track of album will be sold for. A company Snocap which has various copy protection technologies that it can work with is destined to manage the ecommerce service to validate transactions, collect funds and issue digital licences, thereby creating some level of marking or protection which combats piracy. It is not free of digital management therefore.^{24[24]}

²² In the US, at least, MySpace is covered in that an ISP is not responsible for infringement of copyright materials, as in the following caselaw:-

CoStar Group, Inc. v. LoopNet, Inc., No. 03-1911 (4th Cir. June 21, 2004)

The Fourth Circuit handed Internet service providers a victory in a copyright decision that could expand the reach of Religious Technology Centre v. Netcom On-Line Communication Services, Inc. That 1995 district court decision held that ISPs who are passive conduits of Internet traffic are not liable for direct copyright infringement, even if unauthorized copies of works are stored on the ISPs computers. Several courts have relied on Netcom in distinguishing between Internet providers that are passive and those that play an active role in selecting material stored on their computers.

LoopNet hosts a website that allows subscribers to post commercial real estate listings, which may include photographs. Subscribers cannot directly post photographs on LoopNet's website. Instead, all photographs are reviewed by a LoopNet employee to determine whether the photograph is appropriate (i.e., that it is a photograph of commercial real estate) and whether the photograph contains obvious signs of copyright infringement. Only after this review does the employee post the photograph to the website. CoStar sued LoopNet for direct copyright infringement after discovering that several of CoStar's photographs of commercial property appeared on LoopNet's website.

In a 2 to 1 decision, the Fourth Circuit relied on Netcom in affirming summary judgment for LoopNet. The majority and the dissent disagreed about whether LoopNet was a passive ISP entitled to Netcom protection in light of LoopNet's review of the photographs. The majority dismissed the screening process as "so cursory as to be insignificant." The dissenting judge argued that the screening process meant that LoopNet was actively involved in the infringements and could not be considered a passive ISP. Unquestionably, the majority's decision – if followed by other courts – would provide ISPs with greater protection against direct copyright infringement claims than might be suggested by a strict reading of Netcom.

²³ MySpace is so liberal that it seems it is not being censored. One instance that has come to mind is that it is not only music that is not being censored. See Law.Com, "Assistant Principal sues students over MySpace.com.", Associated Press, 25th September 2006 at <http://www.law.com/jsp?id=1158915934614> Ann Draker, an Assistant Principal at Clark High School, is claiming defamation, libel, negligence and negligent supervision over a page on the popular free-access Web site MySpace.com. The site falsely identified Draker as a lesbian and MySpace.com has removed the page since Draker informed them that the page was not hers, although one student is facing criminal felony charges involving retaliation and fraudulent use of identifying information, third degree felonies. Draker is suing for damages for emotional distress, mental anguish, lost wages and court costs.

²⁴ In June 2006, MySpace ran a competition to find the most popular unsigned band and caused it to be signed-up with the record company Wind-Up Records. Wind-Up Records in a similar way signed up Rockett Queen which wrote the theme music for the film John Tucker Must Die.

MySpace hopes to offer copyright-protected songs from major record companies as well as unknown bands' music. It is rapidly becoming so successful that it has sold some of its music content. It has three million unsigned music bands available for download DRM-free. It is however showing signs of a typical entrepreneurial enterprise and as it grows, it will conform to regular business methods or else it will become unsustainable. It is an alternative to iTunes and to iPod, selling music without any content protection with the selling price of each track determined by the bands. MP3 files are the conduit and MP3 files can play on all MP3 players and on both Apple iPod and Sony Playstation Portable. It will use the software Snocap to manage the ecommerce service to validate transactions, collect funds and issue digital licenses. From a practical viewpoint, counterfeiting can be stopped by monitoring by the private sector, use of technical devices sanctions and administrative co-operations between competent authorities.^{25[25]}

21. Indemnity Clauses in the UK music industry

There is the issue of indemnity^{26[26]} against leaks of advance music material. Music publishers are increasingly concerned about leaks of review copies of music onto the internet. Publishers have a practice of sending 'watermarked' cd's, with the reviewer's name on the CD. These have sometimes found their way into a buyer's market on the internet, this being a breach of the musician's copyright. The indemnity clause therefore, if agreed, holds the reviewer and the publication, which prints the review, liable for any damages caused by leaks of the CD.

22. Free sample of music online -not infringement-US

This is however, contrary to the situation in the US, where a sample of the music is not an infringement as in the following case, *Bridgeport Music, Inc. v. Dimension Films, Inc.*, No. 01-00412 (6th Cir. September 7, 2004) The Court admitted that it may not understand the issue and would rather not have to figure it out, but nevertheless, the Sixth Circuit held that all "samplings" of sound recordings -- no matter how small -are infringements. In other words, a defendant who samples any portion of another's sound recording on a new sound recording cannot raise arguments available in other copyright cases that the parties' works are not substantially similar and or that the use was de minimis.

Plaintiff Westbound Records owns the copyright in the sound recording "*Get off Your Ass and Jam.*" Defendant *No Limit Films* used a two-second sample of in the sound recording "Get Off." The district court granted summary judgment in favour of No Limit, concluding that its use of the sample was de minimis. The Court of Appeals reversed. Announcing a "new" and "bright-line" rule, the court read section 114(b) as providing owners of copyrights in sound recordings with the exclusive right to sample their own recordings. The court also justified its rule by observing that it would allow for "ease of enforcement." The court concluded by saying that if it made a mistake, there is a simple fix: "If this is not what Congress intended or is not what they would intend now, it is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law."

US Uruguay Round Agreements Act

This Act grants copyright protection to some foreign works. Furthermore, the US cannot be sued for making such a decision, contrary to what would have been the decision in other countries, as illustrated in the case, *Luck's Music Library, Inc. v. Gonzales*, No. 04-5240 (D.D.C. May 24, 2005) when the challenge to Congress's power to extend copyright protection had been rejected. Relying heavily on the Supreme Court's decision to uphold copyright term extensions in *Eldred v. Ashcroft*, the Court of Appeals for the District of Columbia upheld the constitutionality of Section 514 of the Uruguay Round Agreements Act. Section 514 grants copyright protection to certain foreign works that previously entered the public domain in the United States because, for example, the United States did not recognize copyrights of a particular nation or the copyright owner failed to comply with the formalities of US copyright law.

Luck's Music sold copies of foreign works that had become part of the public domain. It sued the US Attorney General, claiming that Section 514 violates the Constitution's Copyright and Patent Clause. In particular, Luck's Music argued that Section 514 does not "promote the Progress of Science and useful Arts" because a

²⁵J. Phillips, "PAKIN' IP", *European Intellectual Property Review*, 1999, Sweet & Maxwell, London.

²⁶See article by M. Holderness, "New musical excess", *National Union of Journalists*, October 2006, London.

retroactive grant of copyright protection for existing works already in the public domain does not “provide any significant incentive to create new works.” The district court dismissed Luck Music’s complaint, and the Court of Appeals affirmed.

The Court of Appeals held “to the extent Eldred requires any direct incentive; it plainly need not be great.” In this case, it was enough that authors believe that “Congress may pass laws like the URAA in the future.” Moreover, according to the court, “it is by no means clear that Eldred requires a direct incentive at all.” It noted that that the Supreme Court justified term extensions on the ground that they helped the United States negotiate with European countries for benefits for American authors. The Court of Appeals held that, similarly, the adoption of Section 514 “helped secure better foreign protection for U.S. intellectual property.”

24. Evolving Digital Technologies and Trade Mark Counterfeiting

This ²⁷rapidly evolving digital technology presents a number of challenges to the interpretation and application of traditional copyright and other Intellectual Property laws, forcing a shift from creators’ rights to users’ rights. The Internet is a digital form of culture and through fair dealing, fair use, permission and public domain, the social process of disseminating and borrowing from peers and previous generation takes place. It is difficult to apply traditional copyright laws ²⁸to fast evolving digital reproduction technology, which transcends national boundaries, and because of concerns of right holders who fear unauthorised distribution of their material on the internet, the law is evolving to accentuate the users’ rights more than the owners’ rights. This is because legislators are no longer the arbiters of public policy but have become hostages of lobby groups. To this effect, Litman chronicles the weaknesses of copyright and states that the public rejection of copyright laws will persuade legislators to change the law. On the other hand, Dhabos²⁹writes:

“The human rights community and the intellectual property community should begin a dialogue. The two communities have a great deal to learn from each other. Viewing intellectual property through the eyes of human rights advocates will encourage consideration of the ways in which the property mechanism might be reshaped to include interests and needs that it currently does not.”

25. New Internet opportunities

The Internet and the development of new technologies will continue to open up new markets of exploitation and challenges to Intellectual Property law and sometimes the right owners were given little importance to enable the development of new digital technologies. However, the proper balance will be reached as time and market forces balance out different interests as far as creation, use and distribution of digital media are concerned. One protection that online music companies cannot enjoy is Trade Secret Protection as in *Midsummer Products Inc v Rapid Filing Services LLC*, Case 600425/06, (NY Sup Ct.12 July ,2006) (Freedman. J), as this case makes clear that, if information is publicly available by way of a website and its functionality, it is publicly exhibited and therefore not secret. However, cyber music companies can protect themselves from cyberpirates who misuse their brand in order to gain favourable search engine placement, for example, with the help of ICANN Uniform Dispute Resolution and other tools by which brand owners can recover domain names with relatively little expense. Brand owners should work with their domain name Management Company and IP lawyer to develop good knowledge of their clients’ requirements.

²⁸In *re Napster, Inc.* Copyright Litigation, No. C MDL-00-1369 MHP (N.D. Cal. May 31, 2005).

In the continuing saga of the Napster case, the district court held that “merely listing a work in a directory” does not constitute “distribution” of a copyrighted work. In this lawsuit, the plaintiff record companies sued Bertelsmann AG and others who invested in Napster before it was shut down. One of the plaintiffs’ theories is that Napster and its owners are directly liable for copyright infringement because Napster maintained a centralized “index” of all the music files being shared by Napster’s users. Bertelsmann moved for summary judgment, arguing that listing a copyrighted work in a directory “does not result in the actual transfer of a copy of the work and thus does not violate the copyright owner’s distribution right.” The district court agreed, relying on legislative history and the Copyright Act definition of “publication” in holding that an unlawful distribution cannot occur without “the actual transfer of a copy of a copyrighted work.”

²⁹[29] P. Dhabos, “Intellectual Property and Human Rights”, *Intell. Prop. Qtrly*, 1999, pg349-370.

In addition, by valuing the music company's intangible assets, a requirement of the USA's Sarbanes-Oxley Act 2002 and the 2003 OECD European Intangibles Summit, such a business will have a better idea of its own worth and a reportable and more transparent indication to the general market of its own worth. Ultimately, trademark counterfeiting has the sanction of destruction of the offending material and in the United States at least, there is no appeal against such a court order.^{30[30]}

26. We7- legal file sharing

Advertising revenue is now paying for file-sharing. The legal loophole is by Peer-to-peer file-sharing, an example of which is We7 which has customers that can download free songs with short ads at the beginning. The revenue generated from these advertisements goes to artists, labels and other rights owners. The website of WE7 states:

"We7 aims to deliver you the music you want without any limits; we want every track to be available to listen now or to download in MP3 format to be played on any of your personal devices (e.g. iPods) at anytime. For the moment, some music tracks will not have all of the options available to you; some tracks will only be available to listen now, some will only be available for paid download, some will be limited depending on what country you live in, and others will be free to listen now and free to download to listen later. So please be patient with us. We are trying to change the world but it takes a little time! The good news is that things in the music industry are changing fast and We7 are leading the charge in making those changes happen; in the meantime enjoy the music we bring you, enjoy sharing music and tell everyone about We7. We are building new relationships with great record labels and artists every day. Therefore, each day we will be adding thousands of great tracks from great artists so you can listen to the music you want, On Demand, free. We will also have hundreds of thousands of tracks that you can download with ads for free or buy without adverts - whichever you prefer. Keep coming back for great free music and tell your friends".

27. Conclusion

For consumers of music who cannot easily investigate the merits of the music they buy, marks can provide a uniquely reliable source of information about potential purchases. For the producers this trademark crystallises the goodwill they have built up over time and criminal sanctions today and yesteryear represents punishment for the forgery of the good name of legitimate commercial music.

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³⁰ In re Lorillard Tobacco Company, No. 03-16553 (9th Cir. June 7, 2004)

The Ninth Circuit ruled that the denial of an ex parte application for a seizure order is not appealable. Lorillard Tobacco sought an order ex parte under 15 U.S.C. § 1116(d) (1) for the seizure of counterfeit cigarettes. The district court denied Lorillard's application because Lorillard's supporting declarations failed to offer sufficient evidence of the defendant's wrongful conduct. Lorillard appealed under 28 U.S.C. § 1292(a) (1), which provides for appeals of orders "refusing injunctions." Disagreeing with a decision from the Third Circuit, the Ninth Circuit held that it did not have appellate jurisdiction because a seizure order is not an "injunction."

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29. UK and US Statutes, Regulations, EC Directives & International Conventions

Conventions

1948 European Convention on Human Rights
1952 Universal Copyright Convention
1961 International Convention for the Protection of Performing Artists, Producers of Phonograms and Broadcasting Organisations (Rome Convention)
1971 Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms
1979 Berne Convention for the Protection of Literary and Artistic Works (revised)

EU Laws

2003 EC Customs Regulation 1383/2003
2003 European Directive (2003/10/EC)
2004 EC Enforcement Directive 48/2004

US Statutes

1992 Audio Home Recording Act (US)
2002 Sarbanes-Oxley Act (US)

UK Statutes

1709 Copyright Act (UK)
1862 Fine Arts Copyright Act (UK)
1864 Metropolitan Police Act (UK)
1890 Public Health Acts Amendment Act (UK)
1906 Musical Copyright Act (UK)
1906 Musical (Summary Proceedings) Act (UK)
1956 Copyright Act (UK)
1958 Dramatic and Musical Performers Protection Act (UK)
1961 Factories Act (UK)
1963 Performers Protection Act (UK)
1967 Private Places of Entertainment (Licensing) Act (UK)
1968 Theatres Act (UK)
1968 Trade Descriptions Act (UK)
1971 Courts Act (UK)
1971 Local Government Act (UK)
1972 Performers Protection Act (UK)
1974 Health and Safety Act (UK)
1981 Summary Offences Act (UK)
1985 Housing Act (UK)
1987 Consumer Protection Act (UK)
1988 Copyright, Designs and Patents Act (UK)
1991 Resource Management Act (UK)
1994 Trade Marks Act 1994 (UK)
1996 Copyright and Related Rights Regulations (UK)
2000 London Local Authorities Act (UK)
2002 Copyright and Trade Marks Offences and Enforcement Act (UK)
2003 Licensing Act (UK)
2005 Control of Noise at Work Regulations (UK)

30. Music Related Caselaw

Bassey v Icon Entertainment plc [1995] EMLR 596
Beecham v British Lion [1951] 58 RPC 111
Bridgeport Music, Inc. v. Dimension Films, Inc., No. 01-00412 (6th Cir. September 7, 2004)
BUMA/Stemra v KaZaA [2004]
Coco-Cola v Gilbey [1996] FSR 23
Express Newspapers plc v News (UK) Ltd. [1990] FSR 359
Hyperion Records Ltd v Dr Lionel Sawyers [2005] AC
Jeffries v Boosey (1854) 4 HLC 815
LB Plastics v Swish Products Ltd [1999] RPC 555, 3rd December 2004
Luck's Music Library, Inc. v. Gonzales, No. 04-5240 (D.D.C. May 24, 2005)
Midsummer Products Inc v Rapid Filing Services LLC, Case 600425/06, (NY Sup Ct. 12 July 2006)
MGM v Metro-Goldwyn-Mayer v Grokster [2001]
Miller v Glenn Miller Productions, Inc., No. 04-55874 (9th Cir. 2006)
Re Lorillard Tobacco Company, No. 03-16553 (9th Cir. June 7, 2004)
Re Napster, Inc. Copyright Litigation, No. C MDL-00-1369 MHP (N.D. Cal. May 31, 2005)
R v Hopkins (1893) 1QB 621
R v Veys [CA (Crim Div) (Court of Appeal, 23 October 1992)
Sony Music Australia v Tansing [1994] 27 IPR 649
Torbay DC v Singh (Satnam) QB 16th June 1999
Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd [2005] FCA 1242
Walter v Lane [1900] House of Lords



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