



NEWSLETTER

An Entertainment Industry Organization

THE SHARK BITES BACK

Judge will hear Grooveshark's counterclaim against Universal

By Richard Busch, Esq.

The President's Corner

Welcome to the 2012-2013 Season of the California Copyright Conference. I am honored this year to be fortunate enough to be President of this fantastic organization, and am thrilled at the slate of upcoming dinner meetings. I think you'll find that this season there will be quite a few new, extremely relevant topics discussed by an impressive list of panelists - I'm looking forward to attending each meeting with you.

If you haven't renewed your membership, please take a moment to do so soon. This great organization is only able to provide these dinners, networking opportunities and other services because of the memberships, both individual and corporate.

Finally, I encourage all members to fill out the survey available on the website, and to feel free to offer any input to me directly before or after the dinner meetings. We all know now that we're in a quickly changing industry, ripe with challenges and opportunities - all points of view are appreciated and are of great value!

Welcome again to the 2012-2013 Season!!

Eric Palmquist
President, California Copyright Conference.

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This summer, a New York Supreme Court judge refused to dismiss Grooveshark's counterclaim of tortious interference against record label giant Universal Music Group (UMG), a major setback for UMG.

Grooveshark is an online service providing free music streaming and online radio stations. Its users can search for artists and songs, stream music for free, create personal playlists, and share their favorite music with friends via social networking sites such as Facebook and Twitter.

UMG claims Grooveshark allegedly violated the label's copyrights by providing "free access to its pre-1972 recordings" including "some of the most popular and successful recording artists of the 20th Century." In response, Grooveshark claimed they are protected under the "safe harbor" provision of the Digital Millennium Copyright Act (DMCA). (The "safe harbor" defense was also raised by Grooveshark in a federal lawsuit filed by UMG in 2011, which I discussed in a prior post here).

The "safe harbor" provision of the DMCA shields internet service providers (ISPs) like Grooveshark from liability for copyright infringements committed by their users if the ISP helps prevent infringements by, for example, implementing a policy that terminates accounts for repeat infringers. (I previously discussed ISP liability and the meaning of "repeat infringer" here).

However, Universal argued because most of the recordings at issue were created before 1972 (the year Congress first provided federal copyright protection to sound recordings), the federal copyright laws do not apply and the safe harbor provision of the DMCA is unavailable to Grooveshark. Instead, Universal argued, state common law applies. (As a side note, at the end of last year, the U.S. Copyright Office performed a study at the request of Congress and recommended that pre-72 sound recordings be

placed under federal jurisdiction).

But New York Judge Barbara R. Kapnick disagreed with UMG, explaining, "there is no indication in the text of the DMCA that Congress intended to limit the reach of the safe harbors provided by the statute to just post-1972 recordings."

Indeed, Judge Kapnick's ruling did not come as much of a surprise as this same argument was raised by EMI and rejected in its suit against MP3Tunes.

Next, the Judge turned to Grooveshark's counterclaims of injury to competition and tortious interference. Grooveshark claims it had a \$325,000 deal with HP to host an online advertising campaign for HP Beats, but that HP backed out of the deal after UMG allegedly contacted HP officers and threatened to terminate its business relationships with HP unless it pulled its advertising from the Grooveshark website. Grooveshark also claims UMG convinced digital music distributor INgrooves, who happens to represent a large portion of UMG's catalogue of recorded music, to suspend its licensing agreement with Grooveshark. (It has also been rumored that Google's removal of Grooveshark's music app from the Android Marketplace in early April was a result of major record label pressure).

Grooveshark's injury to competition claim was thrown out because of a lack of factual support, but its tortious inference claim survived. Universal raised a justification defense, claiming it was only alerting a third party to Grooveshark's alleged copyright infringement and also argued because UMG had a legal and economic interest to advance its own pre-existing relationships with HP and INgrooves, Grooveshark had to show UMG acted with malice or through improper means, which UMG claimed Grooveshark failed to do.

But the Judge said "those relationships would offer UMG a defense only if it had acted to protect its interest in those relationships, not if, as [Grooveshark] claims, it used those relationships to coerce HP and INgrooves to breach their contracts with [Grooveshark], merely to damage [Grooveshark's] business and achieve a direct benefit to itself."

Bear in mind, whether or not Grooveshark will win on its counterclaim is yet to be seen. For now, all that's been decided is that the Judge will permit Grooveshark to pursue this claim.

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This and other "Legal Sound Check" blog entries by Mr. Busch can be read at <http://blogs.forbes.com/richardbusch/>

Panelist Bios

RICHARD BUSCH

Richard Busch is a partner in the litigation section of the law firm of King & Ballow. Mr. Busch has litigated many of the most important music industry cases of the last ten years, including the landmark case of F.B.T. Productions, LLC v. Aftermath Records, et. al., in which the Ninth Circuit Court of Appeals held that the agreements between record labels and download providers are licenses, and the plaintiff was entitled to be paid 50 percent of net receipts of the label's download revenue. Mr. Busch's full bio may be found at www.kingballow.com.

KEITH BERNSTEIN

Keith Bernstein serves as CEO of Royalty Review Council and is founder of Crunch Digital. Under Keith's guidance, Royalty Review Council has grown into the industry-leading team of specialists that provide financial consulting services for media and entertainment companies, in areas such as worldwide digital service audits and catalog acquisition financial due diligence. As founder of Crunch Digital, Keith has created a new business model that offers a simple, controlled way for content owners from the media & entertainment industry to exchange metadata and usage information with digital service providers. Crunch Digital facilitates more licensed content, more accurate accounting, more revenue opportunities, lower overhead and transparency for accounting to rightsholders.

Keith has over 20 years of experience managing the complexities of royalty accounting, reporting requirements, label and publishing operations, and copyrights. In his years prior to Royalty Review Council, Keith was Vice President of Operations for Napster, Senior Director of Operations for Universal Global e, the e-commerce division of the Universal Music Group, and Director of Operations for A&M Records.

CHRIS CASTLE

Chris Castle is Managing Partner of Christian L. Castle, Attorneys based in Austin, Texas. The firm represents a variety of clients in music, motion pictures and television, as well as technology companies and video game publishers. Chris also consults leading organizations on public policy matters relating to copyright, artist rights and the Internet, and is admitted in California and Texas.

MILTON OLIN

Milton Olin is a founding partner in the Los Angeles Law Firm of Altschul & Olin, LLP where he practices Entertainment, Internet & Intellectual Property, and Business Law. The Firm's clients include both firmly established and start-up companies, as well as individual entrepreneurs, executives, and entertainers.

STEVE WINOGRADSKY

With over thirty years experience as an attorney in the music industry, Steven Winogradsky is a partner in Winogradsky/Sobel in Studio City, California, providing global media and music business affairs & legal support for composers, songwriters, music publishers, recording artists and television, film, video and multi-media producers. In addition to an entertainment law practice, the company handles music clearance and licensing in all media for many production companies, worldwide administration of the publishing catalogs for a number of clients and New Media strategies and Revenue Modeling.