

CAN WE ALL GET ALONG AND BEAT THE PIRATES? (No Offense to Pittsburg)

A Presentation for the Legal Seminar of
the Council of Multiple Listing Services
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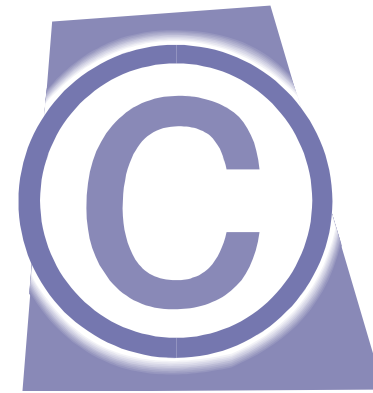
History of Group Copyright Enforcement

- Began with performing rights organizations
- ASCAP, BMI, SESAC today
- Group handles investigations
- Group manages litigation and pays for



Enforcement Must be by Owner

- Despite trade association control of investigation and litigation
- Action can only be in name of copyright holder



PRIMARY FOCUS OF PERFORMING RIGHTS ORGANIZATIONS

The Blanket License

Led to Antitrust challenges.

Consent decree that allows
litigation over pricing.

Still in place today.

Enforcement activity rarely
challenged on antitrust
grounds and when it is
challenge fails.

BUT.....



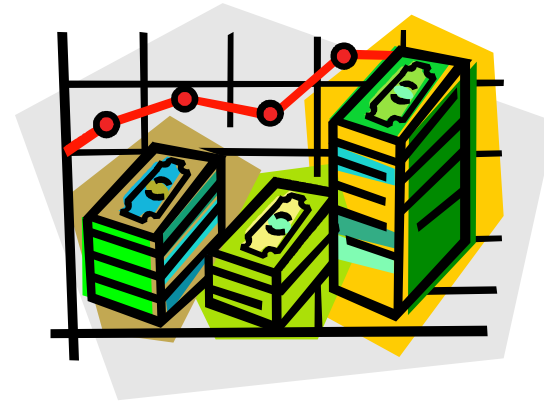
INVESTIGATIONS => LICENSE OR LITIGATE

- The performing rights organizations have staff and contract investigators all over the country
- When they find suspected violations, turn over to legal who contacts
- Choice: License or litigate



Expansion of Technology

- Computer software and databases due to historical legal precedent became primarily protected by copyright
- Massive growth in the software industry led to massive piracy



SLIA and BSA

- Very aggressive organizations
- Use seizure provisions of copyright code and often show up at your office with the marshal's
- Pay rewards
- No licensing program so few antitrust issues



DOWNLOADS THE FINAL FRONTIER

- Downloading a file is not a public performance
- Violates other rights in 17 USC 106
- Performing rights groups not prepared to handle
- Enter the RIAA

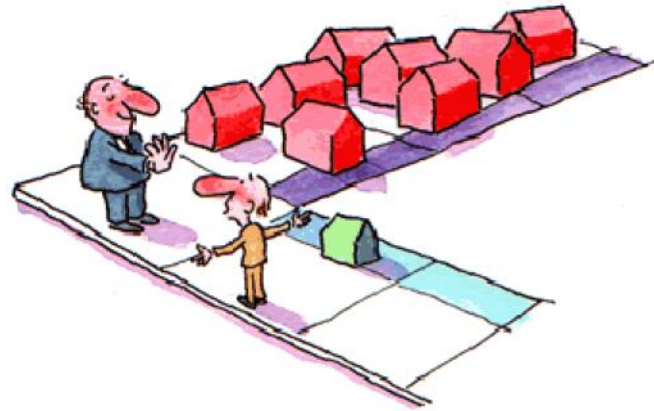


Massive National Investigation and Enforcement Effort

- File sharing and down loading present on every college campus, in businesses and homes
- Bigger targets are file sharing for fee groups
- But those sharing with friends also violate publisher/artist rights
- Managed and brought thousands of lawsuits on a budget

Why Isn't this Anticompetitive?

- Cooperation among competitors
- To keep others out of market
- BUT legitimate enforcement of legal rights AND
- No price setting (aside from blanket license)



Does What Trade Groups Do

- Shape the law
- Instead of lobbying or regulatory intervention
- Use litigation
- So long as no “anticompetitive purpose”
- All is well



Beware Copyright Misuse

- Doctrine is broader than just antitrust, although started with antitrust concepts
- Tying arrangements
- License terms that force licensee to give up other rights



Challenges Facing MLS

- National and regional businesses data scraping or using member streams
- Uploading and displaying all MLS databases or a select group
- Include copyright material



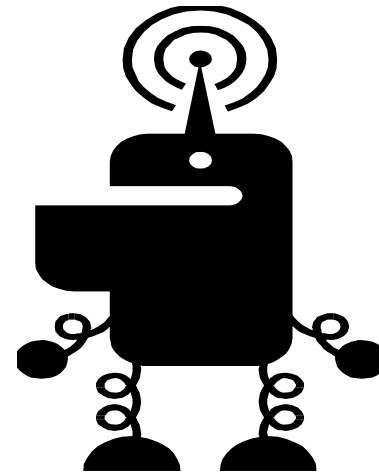
These Pirates are in it for Money

- The aggregators are taking fees for referrals or otherwise profiting from the use of MLS data
- Will not face criticism RIAA did of attacking little guy
- Will not face significant antitrust as no license program



How do they do it?

- Robot scrapers
- Use a member's feed
- Investigation will uncover
- Review sites, see what is on them
- They aren't hiding
- Review solicitations sent to MLS members



Forming a Group

- What will be its purpose?
 - Investigate and uncover situations, then litigate if cannot settle OR
 - Address possible lawsuit brought to the group by individual members or informants, evaluate lawsuit and, if found appropriate, conduct litigation?
- Either model can work, the investigative model is more expensive but more aggressive

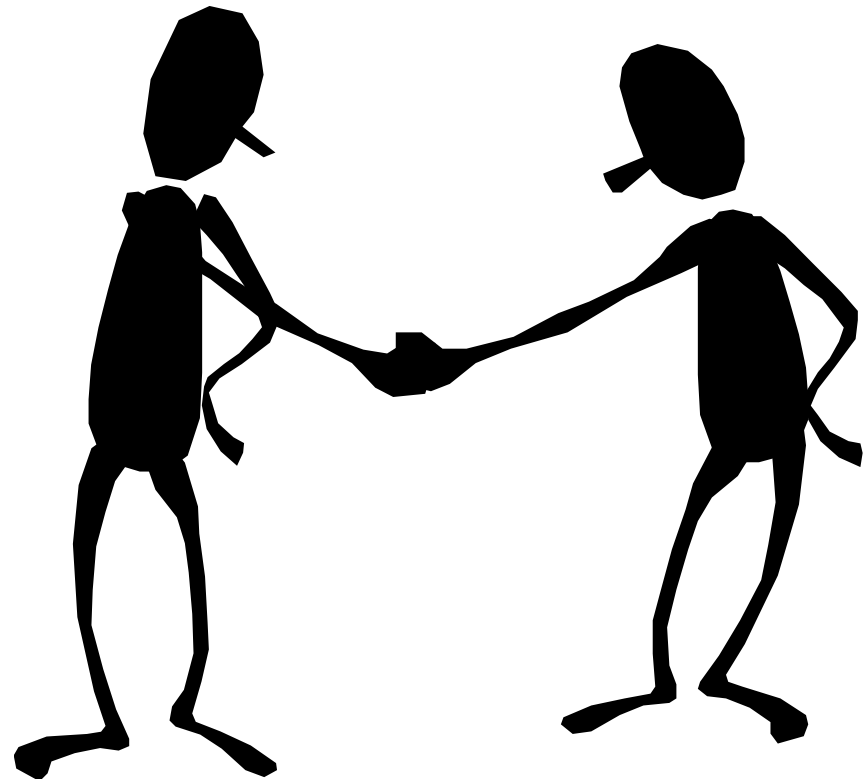
Key to Protect the Privilege

- Whichever model is chosen the group should be aware of maximizing confidentiality of strategy and work product
- Attorneys must be part of all meetings
- A joint interest agreement should be developed



Joint Interest Agreement

- Must show parties aligned and lawyers involved—signed by parties and counsel
- Anticipation of litigation
- Sample does not contain but consider should there be irreparable harm and sanction provisions



CMLS

- Like RIAA, CMLS is an already existing trade group that could take on this role through a piracy office or division
- Some RIAA members did not participate in litigation program so really a sub-group
- Another organization could be formed

COOPERATION

- The Group
- National Counsel
- Consistency
- Cost Savings
- Forms
- Requires heavy up front investment, but if a fair number of cases brought creates great savings
- The group and national counsel must be sensitive both to members and local issues
- Keep member executives and counsel involved—listen
- Hire good local counsel and use them appropriately, but they can't run the show

Privileges--Again

- Be sure everyone at local level, counsel and experts, sign on
- Select experts who will “sell” in local court
- Be sure everyone at member level, (entity, counsel and any consultants) sign on



Intellectual Property Issues

- Ownership
 - Assignments
- Registration
- Notice
- Compilation rights
- The group will be making new law

Copyright Ownership

- MLS product is a compilation, a database
- Despite major efforts, no separate database protection statute has passed Congress
- Not everything in compilation is protected by copyright



Copyright Ownership

What's Protected

- Photographs
- Original, non-descriptive text
- Architectural plans or renderings

How does MLS get ownership?

- Assignment by photographer
- Assignment by writer
- Assignment by drafter or architect
- **USUALLY THIS REALLY MEANS ASSIGNMENT BY AGENT**

Why is Ownership Important?

- Only the owner or an exclusive licensee can sue
- The assignments need to be consistent and airtight
- Use belt and suspenders—assign by rule and bylaw and signed form

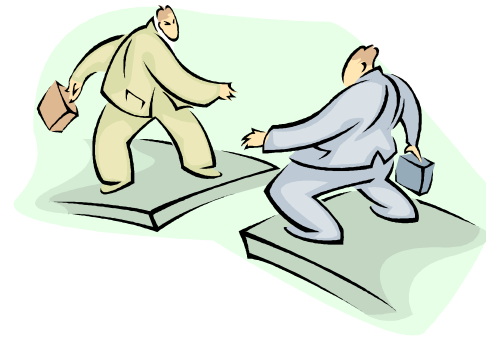


Registration and Notice

- You must register before you can sue 17 USC 411
- Gives you a presumption of validity, shifts burden 17 USC 410
- Registration BEFORE infringement necessary to get statutory damages or fees 17 USC 412
- Can register a database every quarter 37 CFR 202.3
- Each member must register consistently and keep records
- Use the copyright notice! Puts the world on notice and makes the infringer a bad buy out of the gate

Compilation v. Included Work

- Issue—is registering the compilation enough or do you have to recognize each included work and author?
- *Xoom v. Imageline*
- *BUC v. International Yacht*
- Two district courts with us
- Three against



Litigation

- Group and national counsel develop best case strategies and forms
- Select best cases
- Make best arguments consistently
- Improve chance to shape law in favor of protection



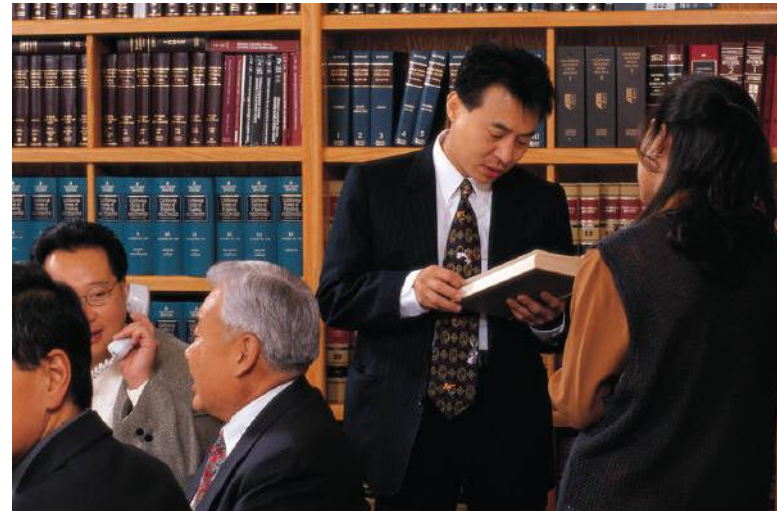
Early Motions will be Vital

- Defeat the inevitable motion to dismiss
- Win or come close on preliminary injunction
 - Likelihood of success
 - Harm to plaintiff if not granted
 - Harm to defendant if granted
 - Public interest



Have a National Script

- Issues list
- Trial theme list
- Specified document/deposition database and annotation formats
- Discovery plan
- List of experts
- Model summary judgment filings



Know what relief desired and possible

- Injunction
 - Preliminary usually wins case early
 - Permanent at end
- Damages
 - Hard to prove, what has MLS lost?
 - What profits gained by infringer due to infringement?



Relief

- Seizure and destruction of infringing goods not likely
- Import ban not useful
- Discretionary award of fees and costs very important!
 - Should be a goal and planned from beginning of each case
 - Look at basis that court uses



CONCLUSION

- An organization of MLS can be developed to pursue database pirates
- It can insure best practices, lowest cost for quality legal representation as well as consistency of positions
- The members would share costs and risks, making pursuing pirates more comfortable and affordable

QUESTIONS/DISCUSSION

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