



NEWSLETTER

An Entertainment Industry Organization

The DMCA Is Not an Alibi: Cyberlockers and Chop Shops

By Chris Castle

The President's Corner

First of all, I want to thank Steve Winogradsky and Jeremy Blietz for the great job they did in moderating an esteemed set of panelists for our yearly legal update. It was one of those panels from which we all learned something, even a few of the panelists!

Tonight's panel, moderated by renowned authority on the media and public policy, attorney Chris Castle, deals with the world of digital and the cloud, hot topics indeed. Chris has assembled a panel of industry leaders including Robert Allen, Keith Bernstein, Dean Kay, and Curt Marvis. Together they will delve beyond the superficial hype and buzz to present examples of what's actually worked and, maybe even more importantly, how to make sure you're getting paid properly. Thanks also to Shawn Lemone and Diane Snyder-Ramirez for their assistance in putting together this panel.

Next month, moderators John Bitrick and Cheryl Hodgson will front a panel we're calling "And The Brand Played On: Elevate Your Profile And Exploit Untapped Revenue Streams Through Brand Licensing." Please save the date of Tuesday, November 8th, for a panel you're not going to want to miss.

And at the risk of repeating myself...if you're not already a member, I'd like to encourage you to join the CCC. Believe it or not, we don't make a lot on the dinners. Your membership fees go a long way to supporting our not-for-profit organization in its mission to educate members of the entertainment industry on key issues pertaining to the owners and users of intellectual property.

Eric Polin
President, California Copyright Conference.

that their identity will be known to at least the service offering the storage?

Given the misreporting about recent activity in "The Cloud", one might want to consider the following regarding "locker services" or "cyberlockers."

1. Purpose of the "Locker": One of the fundamental issues in negotiating a license for a cloud music service is defining what the file storage areas will look like. It is common to refer to these storage areas by a physical meme, such as a "locker".

We know what a locker is, we've all had them. It's a place where you keep things that belong to you and you put a lock on it that only you can open. It's a private area in the middle of a bunch of people. It's a private secure area where only the locker owner is supposed to control access. A private locker is just that—a place with access usually limited to one person whose identity is known and that person, or that person's parents, usually have a contract with the gym or wherever the locker is located. If you look at some of the functionality of the sites that often call themselves "cyberlockers", you'll see that they bear little resemblance to the locker meme, and a lot more resemblance to a website with a bunch of links. Or a virtual chop shop, albeit one with an endless supply of luxury cars.

Remember—the purpose of the storage area is to allow a user to store music they acquired legally (or created themselves) in an online location that they can access conveniently. Maybe—maybe—the "user" includes the owner's family. And of course, the copies that are stored are licensed. That limitation on access and that license are two fundamental attributes of a licensed storage area and are the fundamental distinctions between a virtual private "locker" and a virtual chop shop.

Key aspects of an honest private locker service would include:

(a) Identification: Knowing the identity of both uploaders and downloaders—because if the true purpose of the service is to let users access their own content, then why wouldn't the service offering the storage space and access *want* to know who was accessing the account? Isn't the value of an honest locker in offering storage to a known person who presumably pays something for the service or has an expectation

(b) Access: Placing a limit on the number of persons able to access the account only makes sense because if you had even dozens of people accessing the private locker, at what point does it stop being private and start being public? And if it's public—it's not private. So if you

don't have a limit on the number of users when does the private locker stop being private and start being merely a user page in a larger website?

(c) Terms of Service: The honest locker operator should provide terms of service that prohibits misuse of the account, including making the content available to anyone other than the limited set of people with access to the private locker.

(d) Account Termination: A repeat violator policy needs to actually result in a meaningful termination and deletion of the account—not just allowing the user to sign up under a different name within minutes and maintain previously uploaded files. This is, after all, a predicate to the DMCA safe harbor.

(e) URL registration: If linking is permitted at all, there's no reason why a private locker would link to more than a handful of URLs.

(f) No Toolkits: It is very common for rogue sites to support tools that allow users to repost links that have been taken down under a DMCA notice (sometimes automatically reposting), permit files to be converted from one format to another (such as the many, many applications that allow YouTube videos to be converted to unauthorized mp3s). No honest locker service should have any legitimate reason to promote these tools or to support their use.

2. Purpose of the Virtual Chop Shop: Unlike a "locker", the virtual chop shop is not intended to be accessed by a limited number of users. Just like a real chop shop, nobody acknowledges where the illegal goods came from or even that the chop shop maintains willful ignorance of the origin of the illegal goods. Also like a real chop shop, it exists is to redistribute the illegal goods at a profit.

Don't forget—some of these are major operations including many that are consistently in the *top 100 sites in the world* (www.alex.com) including Rapidshare, Megaupload, Hotfile, MediaFire, 4Shared and Fileserve. This is big, big business. By comparison, licensed services (when checked) like Pandora is number 349, Spotify.com is 2,633, Rhapsody.com is number 5,649 and Slacker.com is 15,527.

Rapidshare is number 88 when I last checked. As Officer Malone said in *The Untouchables*, "Everyone knows where the booze is, Mr. Ness." So a virtual chop shop is the opposite of the "locker" in at least these important ways:

(a) The copies to be stored are not acquired legally. Not only are the copies not acquired legally, they are often pre-release copies that have not even been authorized for distribution *by anyone*.

(b) The copies are intended to be distributed to unknown and unrelated companies that profit from the distribution by selling advertising or by selling faster access to the illegal copies.

(c) The chop shop encourages other operators to link to them, and often compensates these operators for bringing traffic or referring users.

(d) They make no effort to identify users or to cross-reference content described in DMCA-style takedown notices. (If I own the movie *Casablanca* and there are 1,000 instances of *Casablanca* that I can find in a chop shop but have not authorized, I have to send 1,000 separate notices—even if the chop shop provides tools for its users to locate these illegal copies. And if the chop shop uses automatic reposting, the next minute I have to send another 1,000.)

(e) They allow users to use toolkit applications to check links for posting to blogs, message boards and the like, as well as reposting links that are disabled through take down notices.

Until these issues are dealt with cyberlockers will pose a continued threat to intellectual property and the jobs it represents.

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Chris Castle is Managing Partner of Christian L. Castle, Attorneys with offices in Los Angeles, Austin and San Francisco.

Panelist Biographies

ROBERT E. ALLEN

On the Executive team of the industry's leading global music publishing company, Robert E. Allen, Senior Vice President/Head of Business and Legal Affairs, Universal Music Publishing Group, is responsible for overseeing all contract negotiations in North America for new and existing songwriter signings, negotiating worldwide new digital media agreements, all motion picture and television work-for-hire agreements in North America and all copyright infringement, piracy and litigation in North America.

Since Mr. Allen joined the company (then called MCA Music Publishing) in February 1998, Universal Music Publishing Group has successfully positioned itself as a powerful global leader in music publishing. UMPG grew exponentially through direct signings and catalogue acquisitions, including the BMG Music Publishing, Zomba, Polygram, and Rondor catalogues. UMPG also became the global leader in the areas of Production Music, Christian, and Classical Music.

During Mr. Allen's tenure with the company, he has negotiated exclusive publishing agreements for Alex Da Kid, Beastie Boys, Justin Bieber, Mary J. Blige, Blink-182, Mariah Carey, Desmond Child, Ciara, Daughtry, Miles Davis, Ester Dean, Danny Elfman, DJ White Shadow, Eminem, Gloria and Emilio Estefan, Sean Garrett, Jimi Hendrix, R. Kelly, Ari Levine of The Smeezingtons, Linkin Park, Henry Mancini, Maroon 5, Prince, Owl City, Sex Pistols, Paul Simon, Britney Spears, Tricky Stewart, 3 Doors Down, Justin Timberlake, T-Pain, U2, and Diane Warren among many others. He has also been instrumental in maintaining and protecting the rights with respect to both the Tupac Shakur and DefJam catalogs.

Allen received his Juris Doctorate from UCLA School of Law in 1993 and a Bachelor of Science degree in Political Economy of Industrialized Societies from UC Berkeley in 1990.

About Universal Music Publishing Group

Universal Music Publishing Group (UMPG) is the industry's leading global music publishing operation and is part of Universal Music Group. UMPG represents music in every genre from some of the world's hottest songwriters and catalogs including ABBA, Adele, Alex Da Kid, Lily Allen, Beach Boys, Beastie Boys, Justin Bieber, Bjork, Mary J. Blige, Mariah Carey, Desmond Child, Ciara, The Clash, Coldplay, Elvis Costello, The Cure, Daughtry, Ester Dean, Danny Elfman, DJ White Shadow, Eminem, Gloria and Emilio Estefan, Jackie Evancho, Florence + The Machine, Kirk Franklin, Sean Garret, Jimi Hendrix, Elton John/Bernie Taupin, Joy Division, R. Kelly, The Killers, Avril Lavigne, Ari Levine of The Smeezingtons, Linkin Park, Henry Mancini, Maroon 5, Mumford + Sons, Prince, Otis Redding, Owl City, Sex Pistols, Paul Simon, Britney Spears, Tricky Stewart, 3 Doors Down, Justin Timberlake, T-Pain, U2, and Diane Warren among many others. UMPG is also a global leader in the areas of Production Music, Christian and Classical Music. For more information please visit <http://www.umusicpub.com>.

KEITH BERNSTEIN

Keith Bernstein serves as CEO of Royalty Review Council and 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 serves on the boards of several academic and industry organizations, and lectures at business, music and law schools. He is a regular speaker at professional meetings, industry conferences and public policy meetings. Chris has spoken on public policy matters at the UK Parliament, seminars at the U.S. Congress and at the Organization for Economic Cooperation and Development.

Chris is an MBA/JD of the Anderson Graduate School of Management and the UCLA School of Law where he was twice an Olin Fellow in Law and Economics under the tutelage of Professor Armen Alchian, a member of the *UCLA Law Review* and National Editor of the *Harvard Journal of Law and Public Policy*. Chris is a *magna cum laude* graduate of UCLA with a B.A. in Political Science. Chris founded the firm in 2004. Prior to founding the firm, he was of counsel to Mitchell, Silberberg & Knupp in Los Angeles and to Wilson Sonsini Goodrich & Rosati in Palo Alto, Senior Vice President, Business & Legal Affairs and General Counsel of SNOCAP, Inc. in San Francisco and held senior business affairs positions in the music industry. He is admitted in California and Texas.

Before law school, Chris was a professional musician working with artists such as Long John Baldry, Yvonne Elliman and Jesse Winchester, and has played with many notable musicians.

DEAN KAY

Dean Kay never quite figured out what he wanted to do ... so, he tried a little of everything in the music business ... musician, singer, television performer, recording artist, songwriter, head of a couple of major music publishing companies, board member of a few industry associations, president of a small, independent music publishing company, and compiler of news about music, copyright and new technology.

He was a featured entertainer on the nationally televised daytime Tennessee Ernie Ford Show, recording artist for RCA Victor Records, wrote "That's Life" for Frank Sinatra, was COO of the Welk Music Group and president of PolyGram International Publishing. Currently he is a member of the boards of ASCAP, NMPA, and HFA, president of Demi Music Corp., and, each morning, distributes "The Dean's List" and the "ASCAP Daily Brief powered by The Dean's List" to over 150,000 subscribers.

CURT MARVIS

Curt Marvis joined Lionsgate as President of Digital Media in April 2008. Reporting to Lionsgate's top management team, Mr. Marvis is responsible for helping guide the company's portfolio of digital businesses, and creating and strengthening the integration of Lionsgate content across all properties and divisions. Under Marvis, Lionsgate digital revenue has grown at a CAGR of 74%, two times the industry rate of 37%.

Marvis oversees all new digital content initiatives including original online programming, app development and social gaming. Numerous projects in all three digital segments will be released in 2011 based upon both existing Lionsgate IP as well as newly created brands.

Prior to joining Lionsgate, Marvis was co-founder and CEO of CinemaNow, an innovator in digital entertainment technology and delivery. He also previously served as President of publicly held game developer 7th Level, leading their successful restructuring into delivery of web-based gaming applications. Marvis was also founder of multimedia start-up Powerhouse Entertainment and served one year on the IBM Multimedia Task Force creating strategic plans for IBM in their continued development of interactive software. From 1984 to 1994 Mr. Marvis co-founded and served as CEO of The Company, an award winning and highly successful production company for music videos and commercials. During this time, he and his partner, Director Wayne Isham, produced many of the most popular and critically acclaimed videos in the history of MTV. They were awarded MTV's Video Vanguard Award honoring lifetime achievement in 1991.

Marvis is a graduate with honors from UCLA with a BFA in Motion Picture and Television.
