

Are the Cows out of the Barn or can MLS Still Protect Against Data Piracy

Marcus A. Manos

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

Key Points

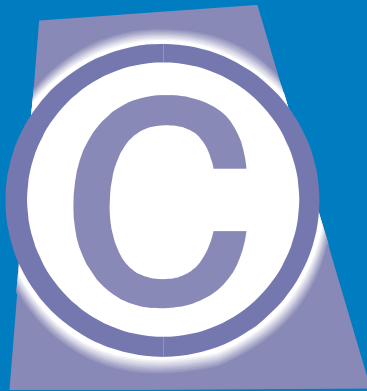
- Many industries have successfully used collective enforcement of copyright rights to spread cost and risk of expensive litigation over a group
- When done for the purpose of exercising legal rights to prevent piracy, no antitrust concerns
- The lessons and formats of these groups can provide a template for an MLS group
- Action must be taken and new law established before the cows get away

What is Happening Today?



- Pirates are setting sale with MLS data
- Data scraping
- Misuse of member feeds
- Taking the valuable database, including Copyright protected materials
- MLS need a coordinated, consistent approach to this piracy
- And good business practices and litigation strategy over copyright ownership and registration

Key Issues on Ownership and Underlying Works



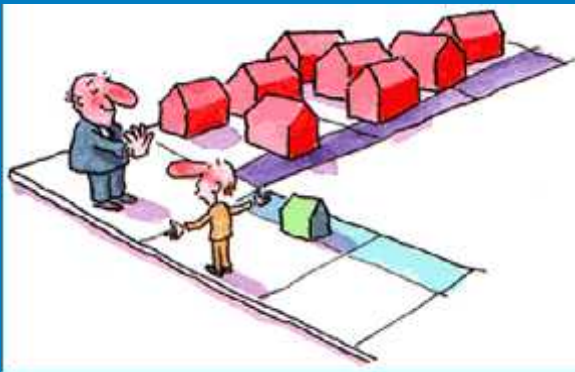
- The MLS owns the compilation, the creative aspects of gathering and putting together the database
- The US has not followed Europe and Japan with non-copyright database protection statutes based on effort
- If MLS must recognize every copyright element in the database to register, extremely burdensome
- This is being litigated NOW so far four courts favor MLS position, three against

History



- Performing rights groups—ASCAP, BMI, SESAC no antitrust problems on enforcement side but blanket license, not an issue for MLS
- SIIA and BSA and software piracy, again no problems with enforcement, no price setting members do that independently even for settlement
- RIAA—music downloading cases, closest to MLS situation

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)
- But must avoid copyright misuse

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
- Examples *Lasercomb* and *Tempo Music*

What can be Done?



- The cows are slipping out of the barn
- What can be done before it is a stampede?
- Copyright litigation can be expensive and protracted
- Is there a solution suggested by the historical examples in music performance, software, and music downloads?

Collective Action Group

- Can be an existing industry group like CMLS, if not all want to participate form a division with some being members—or can be a new group
- Spreads the cost and risk of litigation making it worth pursuing for members who could not individually
- Allows for experienced lawyers and executives to shape the issues and select the best cases to bring
- Must be done under a joint interest agreement to protect privileged information and work product

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

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

Forming a Group

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

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

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
- Keep the cows in the barn, and milk them for the MLS and members, not pirates

**QUESTIONS WILL FOLLOW
RICHARD'S PRESENTATION**

Marcus A. Manos, Member

Nexsen Pruet, LLC

mmanos@nexsenpruet.com

(803) 253-8275

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET