KANE KESSLER, P.C.
Our Business Is You® | October 2014

About Kane Kessler...

Kane Kessler is a midsize law firm located in Midtown Manhattan, serving clients throughout the United States and globally. Kane Kessler has been in the business of providing exceptional legal services to its clients for over 80 years, with experienced and specialized lawyers practicing in many areas of the law. At Kane Kessler, we take pride in delivering personal attention to each and every client and in our ability to offer a wide range of experience and knowledge in many legal specialties to help your business grow and prosper.

Our Business Is You®

For more information about the Firm, please visit our website at www.KaneKessler.com or call us at (212) 541-6222.

The Editors,

Judith A. Stoll
Gary E. Ostroff

MUSIC LICENSING— NOT JUST ALPHABET SOUP

Why the Letters ASCAP, BMI and SESAC Could Spell Trouble for Retail and Hospitality Businesses

Every day, retail and hospitality businesses unwittingly put themselves at risk of claims of copyright infringement by doing something that seems natural—turning on the television, playing recorded music, or even hosting a DJ or a live musical performance. This is because under federal copyright law, the owner of a music copyright has the exclusive right to control the public performance of that music. It does not matter whether you do not charge admission, or whether the music is played by a DJ, by a karaoke machine, in a hotel fitness center, or even across your telephone system while a caller is kept on hold. It does not even matter whether the music emanates from a television or radio broadcast. Liability can—and often will—accrue to the operator of the premises where the music is played. That potential liability can be significant, including the prospect of an award of statutory damages of up to $30,000 per work infringed ($150,000 if the infringement is willful).

Obviously, this potential liability raises the very good question: How do I insulate my business from such lawsuits? The answer is: by obtaining appropriate licenses.

Operators of retail and hospitality businesses may be familiar with so-called performance rights organizations (PROs), the most well-known of which are the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music Inc. (BMI); and the Society of European Stage Authors and Composers (SESAC). Such familiarity may arise from the receipt of correspondence from one

INSIDE: Music Licensing—Not Just Alphabet Soup • SEC Permits Compensation for Business Brokers • Kane Kessler Represents Investment Fund in Precedent-Setting Campaign • The Employment Relationship • Barriers to Unmasking the Anonymous Defamer

Copyright © 2014, Kane Kessler, P.C. All Rights Reserved.

or more PROs demanding that a business pay for a license to publicly perform music. You may wonder on what basis these entities make such demands.

PROs represent public performance copyright interests on behalf of music copyright holders. Among other things, PROs facilitate mass licensing regimes that pay royalties to the artists who create the work, and also enforce the rights of artists whose work may have been infringed. Infamously, PROs are known to send investigators into businesses they know to be unlicensed, to listen carefully for music controlled by the PRO in question to be publicly performed in an infringing manner —and then later use the acquired information to attempt to extract licensing subscription monies from the offending business. PROs usually use a combination of assertions of infringement and offers of licenses to cajole targeted businesses into obtaining a blanket license to perform all the works within each PRO's catalog. A blanket license typically grants to the licensee the right and license to publicly perform all the songs listed in the PRO's catalog on an unlimited basis. The fee for a blanket license is generally calculated under a rubric that takes into account the licensee's size, industry and type of use. Thus, for example, a hotel may be subject to a higher license fee than a small tavern.

There are some important exceptions to the general rules regarding public performance rights. One such exception is known as the "homestyle" exception. Under the homestyle exception, certain businesses may be permitted to play radio and television broadcasts publicly without a blanket license in place. This exception extends to cable television broadcasts. However, the exception does not apply to online radio services (e.g., Pandora, Spotify) or to non-broadcasting forms of performance, such as DJs playing CDs, bartenders using an iPod plugged into the venue sound system, karaoke or live music.

[U]nder federal copyright law, the owner of a music copyright has the exclusive right to control the public performance of that music.

Further rules apply to the homestyle exception. First, in order to fall squarely within the exception, a business must be a small business, i.e., a retailer, bar or restaurant with less than 3,750 square feet of space (excluding parking lots but crucially including all other gross space in the establishment) or another type of establishment with less than 2,000 square feet of space (excluding parking lots but including other gross space within the establishment). If your business does not fall within this portion of the exception, you are still permitted to play broadcast television and radio (but again, not online services) as long as you do not exceed the following standards:

Radio Broadcasts	Television Broadcasts
No more than six (6) loudspeakers	No more than four (4) televisions, none of which may exceed 55 inches on the diagonal
Of the six (6) loudspeakers, no more than four (4) may be in any single room (or adjoining outdoor space)	No more than one (1) television per room
	No more than six (6) loudspeakers, of which no more than four (4) may be in any single room (or adjoining outdoor space)

Since the foregoing rules governing the homestyle exception are so clearly directed to smaller-scale business, it is likely that many hospitality venues will not be able to operate by claiming this exception. We therefore strongly recommend that companies operating businesses of this nature seek advice in obtaining proper licenses from the various PROs. However, if the only interest that your business has is in publicly playing music from specific sources, you may be able to obtain fully licensed rights to do so by subscribing to services that permit such use (e.g., the custom music playlist design services offered by Mood Media Corp. through its subsidiary, Muzak, LLC); such services usually offer pass-through licenses from the major PROs to allow public performance of music included in the subscription. Nonetheless, careful review of the terms and conditions of any such subscription is important to avoid using a subscription service in a manner that would constitute unlicensed—and therefore infringing—use.

Adam Cohen is a Partner and Chair of and **Brendan McFeely** is an Associate in the Firm's **Intellectual Property practice group**. Adam can be reached at (212) 519-5146 or acohen@kanekessler.com and Brendan can be reached at (212) 519-5188 or bmcfeely@kanekessler.com.

SEC PERMITS COMPENSATION FOR BUSINESS BROKERS IN SECURITIES-BASED TRANSACTIONS

The Securities and Exchange Commission (the "Commission") recently expanded the ability of business brokers to receive commissions in certain securities-based transactions without being registered as broker-dealers. Historically, it was, and is, unlawful for anyone not registered as a broker-dealer to accept commissions for arranging the sale of securities or equity. Recently, the Commission issued a No-Action Letter which provides that an "M&A Broker" could collect a fee under certain circumstances. An M&A Broker is a person in the business of effecting transfers of ownership of privately held companies to buyers that will actively operate the purchased business or assets.

Previously, an M&A Broker could only receive a fee if the sale of the business was structured as a purchase and sale of assets. Accordingly, if the transaction was structured as a stock sale or other securities-based transaction, the broker was prohibited from accepting compensation without being registered. Potentially recognizing this form-over-function approach as unnecessarily restrictive, the Commission provided that it would not seek enforcement against an M&A Broker that received a commission if the sale comprised all or part of that company's securities, provided certain facts were met.

No-Action Letters are not law, so compliance with the particular facts in the letter is imperative. The accepted factual scenarios are:

1. The M&A Broker will not be able to bind any party to a transaction.
2. The M&A Broker will not directly or indirectly provide financing for the transaction.
3. The M&A Broker will not handle funds or securities exchanged in the transaction.
4. No transaction will involve a public offering, and the company being sold must be privately held, be a going concern and not be a shell company, except for a business combination shell company.
5. The buyer in the transaction will operate and control at least 25% of the purchased company.
6. A transaction may not result in the transfer of interests to a passive buyer.
7. Any securities received by the buyer or the M&A Broker must be restricted securities under Rule 144.
8. The M&A Broker may not have been barred or suspended as a broker-dealer.

The Commission did tacitly allow the M&A Broker to advertise information about the company for sale including information such as a description of the business, location and price.

Additionally, M&A Brokers will still be required to ensure their compliance with any state law requirements since they may differ materially from those set out in the No-Action Letter.

Kane Kessler's Corporate and Securities practice group has extensive experience with SEC rules and regulations.

Peter Campitiello is a Partner in the Firm's **Corporate and Securities practice group**. Peter can be reached at (212) 519-5109 or pcampitiello@kanekessler.com.

Kane Kessler Represents Investment Fund in PRECEDENT-SETTING, VICTORIOUS ACTIVIST CAMPAIGN

Kane Kessler successfully represented a well-respected investment fund focused on the healthcare and bioscience industries (the "Fund") in an activist campaign against a medical device company incorporated in Delaware (the "Company"). The Fund, as the Company's largest shareholder, repeatedly expressed its concerns regarding the Company's poor operating and financial performance to the Company's management, and in particular to its Chairman and CEO, but did not receive a satisfactory response. Our client then sought to have the Company add new independent directors and replace the CEO with one having relevant industry experience in order to improve the Company's lagging performance for the benefit of all shareholders.

In early March 2014, the Fund thought it was finally making progress when the Company announced in a press release that two of its directors had resigned at the end of February 2014 and been immediately replaced by two new, independent directors supported by the Fund, which would have left the Company with a six-person Board having a majority of independent directors. Several days later, the new directors, upon seeing the extent of the Company's problems and acting independently as outside directors, suggested to the CEO that he resign his office. The CEO, furious at the suggestion, caused the Company to file with the Securities and Exchange Commission a public filing acknowledging the two newly elected directors, but mysteriously claiming the Board

was now comprised of eight directors. The CEO later attempted to explain this inconsistency with the earlier press release by claiming that the two director resignations had not been accepted by the Company, even though the CEO had solicited those resignations himself. Director resignations are effective immediately as a matter of law and the Board size had been previously set by the Board to a maximum of six directors.

The Fund viewed this as blatant Board manipulation and, with the assistance of Kane Kessler and local Delaware counsel, commenced a shareholder action under Section 225 of the Delaware General Corporation Law seeking a declaratory judgment that the prior resignations of the two Company directors were effective and that the Board consisted of six members, including the two directors elected to fill the two recently created vacancies. After our client's complaint in the Delaware action demonstrated the legal falsity of the CEO's eight-person Board theory, the CEO caused the Company to take yet a third position. He claimed that the two resigning directors did not resign until after the conclusion of the Board meeting at which their successors were appointed, and therefore the elections of their successors were invalid since the Board had no vacancies at such time. Therefore, according to his theory, the Board was composed of only four members. The CEO asserted this bizarre four-person Board position not withstanding the Company's own announcement of the director resignations and replacements in a public press release. Realizing that he could no longer control the newly constituted six-member Board, the CEO attempted to maintain control of the Company through an alleged four-person Board that would allow him to deadlock any matter before the Board by acting in concert with the one remaining director loyal to him.

The Supreme Court of Delaware decisively ruled that under Delaware law, a director may resign from a board of directors orally...

Delaware Supreme Court Rules Oral Resignations of Directors Valid

In the Delaware litigation that ensued, the principal issues before the Court of Chancery were whether directors of a Delaware corporation could resign orally and, if so, whether the two directors had, in fact, tendered their resignations orally at the telephonic Board meeting prior to the appointments of the successor directors. The Fund contended that Delaware law permits directors to orally resign, as supported by numerous prior Court of Chancery decisions, and that the two directors had resigned at the telephonic Board meeting.

Given the deadlocked four-person Board (comprising the undisputed directors) was in place pursuant to a status quo order issued by the Court of Chancery, discovery and a trial were conducted and held on an expedited basis. In May 2014 the Court of Chancery held that oral resignations by directors were permissible under Delaware law. This ruling resulted in a clear victory for the Fund as it resulted in a majority of the Board being composed of independent directors.

The Company appealed the Chancery Court's decision and, in June 2014, the Supreme Court of Delaware upheld the lower court decision, decisively ruling that under Delaware law a director may resign from a board of directors orally, an issue that had never before been reviewed by the Delaware Supreme Court. In all likelihood this was an issue of first impression before the Delaware Supreme Court because sensibly no party had previously appealed lower court decisions upholding the long-standing practice of oral director resignations in Delaware. In fact, during oral argument, Chief Justice Strine derisively asked the appellant's counsel whether the Company seriously expected the court to overturn acceptance of oral resignations by directors that have been taking place since before Bruce Springsteen began singing "Born in the U.S.A."

Interestingly, with respect to the second director, the Delaware Supreme Court suggested that it may have been amenable to finding that a resignation may be inferred by mere silence if the other facts and circumstances support an intent to resign. However, that issue was not before the Delaware Supreme Court on appeal and, accordingly, the court did not rule on it, with Chief Justice Strine noting at oral argument that the court has been "deprived of the delicious opportunity" to consider the issue.

As a result of the Delaware Supreme Court's decision, the Company's Board was composed of five directors, with one of the two persons originally appointed to the vacant seats in February filling the one vacancy that the court ruled had been created. The remaining vacancy on the Board was subsequently filled by the other person whom the Board had originally sought to appoint as a director at the February meeting.

With the Board now composed of six directors, the deadlock at the Company was broken, and the Fund's goal of a Board consisting of a majority of independent directors was achieved. In the face of the Fund's victory, the CEO eventually resigned as Chairman, Director and CEO of the Company.

Steven E. Cohen is a Partner and **Peter R. Herman** is Counsel in the Firm's **Corporate and Securities practice group**. Steven can be reached at (212) 519-5115 or scohen@kanekessler.com. Peter can be reached at (212) 519-5118 or pherman@kanekessler.com.

THE EMPLOYMENT RELATIONSHIP:
Independent Contractors and the Costs of Misclassification

The employer-employee relationship is a dynamic and ever-changing component of American culture. There are few places where this is more apparent than New York State. According to the New York State Department of Labor, and contrary to popular belief, the number of private sector jobs has actually increased over the past year.[1] In fact, New York saw an increase of 137,300 private sector jobs from June 2013 through June 2014, including 24,800 in the leisure and hospitality industries.[2]

Of course, such an increase brings with it greater potential for employer liability under the myriad of vehicles through which the law endeavors to safeguard employees. One of the common pitfalls for employers is the misclassification of workers as independent contractors rather than employees. Independent contractors are not entitled to the broad spectrum of protections available to those classified as employees, including, but not limited to, unemployment insurance, workers' compensation, wage and hour laws, the prohibition against discrimination and harassment, leave under the Family and Medical Leave Act, and many others.

Employers who are heavily reliant on the use of independent contractors may open themselves up to as much as six (6) years of liability … and even criminal prosecution for fraud.

Many employers struggle with identifying workers correctly. In 2013 alone, the New York Joint Enforcement Task Force on Employee Misclassification (JETF) identified nearly 24,000 cases of employee misclassification and discovered over $333.4 million in unreported wages.[3] Fortunately, the frequency with which the issue of misclassification is litigated has led to the development of useful guidelines on how to differentiate between independent contractors and employees and the consequences for misclassification.

The distinction between an employee and an independent contractor has been said to be "the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used."[4] New York law primarily focuses on the degree of control exercised by the purported employer over the results produced or the means used to achieve the results. The factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule. The application of these factors is necessarily a question of fact, and no one factor alone will settle the question. Further, it has been held that even a contract designating a person as an independent contractor is insufficient on its own to bind (control) a court's determination of a worker's employment status.

The New York Department of Labor website contains some additional guidelines to help determine whether an employer-employee relationship exists. An employment relationship may exist if, for example, the employer requires mandatory attendance at meetings, permission for absences or that services are rendered exclusively.[5] On the other hand, signs that an individual is an independent contractor include the individual's establishment of a business and that he/she carries his/her own insurance, can choose to hire help, or can freely choose to refuse work.[6]

The absence of bright lines distinguishing independent contractors from employees forces employers to critically analyze their relationship with their workers, since the consequences for misclassification can be devastating. Employers who are heavily reliant on the use of independent contractors may open themselves up to as much as six (6) years of liability for unpaid federal, state and local income tax witholdings; unpaid workers' compensation and unemployment insurance premiums; Social Security and Medicare contributions; unpaid overtime compensation; and even criminal prosecution for fraud. For instance, in April and June of 2013, a JETF sweep of certain construction sites revealed unpaid unemployment insurance contributions totaling $531,628.12.[7] The case was then referred to the Queens County District Attorney for further investigation.

Employers can take steps to protect themselves by examining existing contracts or relationships, auditing all employee classifications, reviewing pay policies, and maintaining records on both nonexempt and exempt employees. Doing so will help the employer avoid disastrous consequences and lengthy legal disputes.

We strongly recommend that you consult with counsel to ensure that you have properly classified the individuals who perform services for your company. Kane Kessler has extensive experience advising clients on the classification of workers.

[1] *"New York State's Economy Adds 25,000 Private Sector Jobs in June as Unemployment Rate Drops to 6.6%, Lowest Level Since 2008,"* WWW.LABOR.NY.GOV, http://labor.ny.gov/stats/pressreleases/pruistat.shtm (last visited July 29, 2014).

[2] Id.ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION TO HONORABLE ANDREW M. CUOMO GOVERNOR STATE OF NEW YORK (Feb. 1, 2014).

[3] See Nassau Educational Chapter of Civil Service Employees Asso. v. Great Neck Union Free School Dist., 85 A.D. 2d 733 (N.Y. App. Div. 2d Dep't 1981).

[4] WWW.LABOR.NY.GOV, http://labor.ny.gov/ui/dande/ic.shtm (last visited July 29, 2014).

[5] Id.

[6] Note 3, supra.

[7] Id.

Judith Stoll is a Partner and **Michael Lydakis** is an Associate in the Firm's **Labor and Employment practice group**. Judith can be reached at (212) 519-5165 or jstoll@kanekessler.com and Michael can be reached at (212) 519-5163 or mlydakis@kanekessler.com.

BARRIERS TO UNM THE ANONYMOUS

With the advent of the internet, there has been a virtual explosion of web postings about an unlimited variety of topics, often masking the true identity of the persons making the posting through the use of pseudonyms, thereby being emboldened to engage in vitriol and even defamation with the expectation that their identity will be hidden from public disclosure. Feeling insulated from being held accountable for their statements, such persons have not only publicly disseminated whatever extreme or false statements they may feel like making, but in many cases have utilized a strategy of manipulating the internet for personal financial gain.

In the recent case of *NanoViricides v. Seeking Alpha*, 2014 Slip Op. 31681(U) (Sup. Ct. N.Y. Co. June 26, 2014). NanoViricides sought pre-action disclosure by means of a petition seeking the identity of an anonymous author who posted extremely negative and false comments about it (a public pharmaceutical development company) on the Seeking Alpha website. Seeking Alpha hosts a free online platform for open discussions about the U.S. financial markets. The anonymous author held a short position in the company's stock, and when the value of the stock declined sharply after his negative posting, he reaped a personal profit. It would seem as a matter of fairness that the Court should at least allow an aggrieved party to learn the identity of the author of the poison-pen piece to enable the aggrieved party to have its day in court to seek to hold him accountable for the damages resulting from loss in the company's market value directly resulting from his false comments. The website opposed the request, raising the full panoply of First Amendment defenses that would be available to the author in a direct lawsuit against him for defamation. Unlike other leading web forums, such as Google, which have taken a neutral position and would, in such circumstances, notify the author and allow him to intervene to assert his rights if he so chooses, Seeking Alpha raised those defenses directly as a surrogate for the author.

Persons usi thereby being engage in defamation that their iden from pub

ASKING
DEFAMER

The court denied NanoViricides' application for pre-action disclosure of the identity of the author. Instead of holding that it was premature to assess the merits of the defenses to the potential defamation claim, the court addressed those defenses directly and ruled that the article was protected under the opinion doctrine. Relying on certain precedent requiring a strong showing of a meritorious cause of action in order to obtain pre-action discovery, the court believed it was justified to directly address the merits of the defenses in the context of the pre-action disclosure petition.

In addition, the court emphasized the internet context of the anonymous posting as a significant factor supporting its decision, writing that "readers are likely to give less credence to the articles found on this website and view the assertions in the articles, like the one herein at issue, with some skepticism and to treat its contents as opinion rather than fact." However, in 2013, an appellate court in Illinois squarely rejected the notion that just because an article appears on an internet message board, it cannot be taken seriously and therefore cannot be interpreted as an assertion of fact.

ng pseudonyms, emboldened to vitriol and even with the expectation tity will be hidden lic disclosure.

While open and robust discussion has always been a protected right in our society, when an individual anonymously utilizes the internet to manipulate public opinion by false and malicious statements for personal financial gain, statements that would be actionable if made in print media, the victim of such attacks should be entitled to legal redress. Hiding behind the internet as a forum for anonymous defamatory statements should not alter the legal principle that mixed statements of fact and opinion or opinion unsupported by facts remain actionable at law.

Kane Kessler represents NanoViricides and has appealed the decision discussed above.

Jeffrey H. Daichman is a Partner and Co-Chair of the Firm's **Litigation practice group**. Jeff can be reached at (212) 519-5142 or jdaichman@kanekessler.com.
Peter Campitiello is a Partner in the Firm's **Corporate and Securities practice group**. Peter can be reached at (212) 519-5109 or pcampitiello@kanekessler.com.

Kane Kessler, P.C.
1350 Avenue of the Americas
New York, NY 10019
(212) 541-6222
www.KaneKessler.com

The information contained in this Newsletter is of a general nature and does not constitute legal advice. Under the rules of certain jurisdictions, this material may be considered attorney advertising. Consultation with our attorneys is recommended before taking any action based on any of this information. To comply with the requirements imposed by the IRS and Treasury Department rules governing tax practice, we inform you that any advice contained herein is not intended or written to be used and cannot be used by a taxpayer to (i) avoid tax penalties or (ii) promote, market or recommend to another person any transaction or matter addressed herein. You are receiving this Newsletter because you are or have been a client or friend of our Firm.

Firm News...

ACHIEVEMENTS

The Firm's **Corporate and Securities practice group** represented a Nasdaq-listed global supplier of innovative active outdoor performance equipment and apparel in the successful completion of its approximately $84 million sale of its wholly owned subsidiary's business of designing, manufacturing and selling technical, alpine, backpacking, hiking, mountaineering and active trail products and accessories, as well as outdoor-inspired lifestyle bags.

The Firm's **Corporate and Securities practice group** represented a provider of diverse consumer products in the successful completion of a €300 million private offering of Senior Notes.

The Firm's **Corporate and Securities practice group** represented a global public company in the successful completion of an amendment to its senior credit facility providing for incremental increases to term and revolver facilities in dollars and euros.

The Firm's **Corporate and Securities practice group** represented an NYSE-listed company in the successful acquisition for approximately $350 million of a worldwide consumer products company.

David R. Rothfeld, Chair of the Firm's **Labor and Employment Law Department**, was a panelist at the 2014 Cornell Labor and Employment Law Roundtable discussing the topic *Joint Employers?—Where Is the Line for Franchisors?*

The Firm's **Corporate and Securities practice group** represented a global public company in a successful incremental amendment to its secured senior credit facility increasing its term loans by an additional $300 million of term loans.

The Firm's **Corporate and Securities practice group** represented a healthcare and bioscience investment fund in a successful activist campaign against a medical device company, which resulted in new, independent directors being added to the company's board of directors and the company's entrenched CEO resigning his office and board seat.

The Firm's **Real Estate practice group** represented a NYC property owner in the sale of development rights to an adjacent neighbor; in addition to monetary compensation, this neighbor provided an egress easement on the neighbor's property for the benefit of the seller's property, which easement expands the permitted use of the below-grade space in the seller's building.

The Firm's **Corporate and Securities practice group** represented a NYSE- listed company in the negotiation and establishment of a $2.35 billion secured financing commitment in connection with the acquisition of a worldwide provider of agrochemical and biological products.

CONGRATULATIONS

Six of the Firm's attorneys have been named Super Lawyers for 2014. Congratulations to Robert L. Lawrence (**Corporate and Securities practice group**), S. Reid Kahn (**Litigation practice group**), Jeffrey H. Daichman (**Litigation practice group**), David R. Rothfeld (**Labor and Employment practice group**), Adam M. Cohen (**Intellectual Property practice group**) and Barry E. Negrin (**Intellectual Property practice group**).

Practice Groups

Bankruptcy, Reorganization and Creditors' Rights
Corporate and Securities
Corporate Investigations

General Business
Intellectual Property
Labor and Employment Law
Litigation

Matrimonial
Mediation
Real Estate
Trusts, Estates and Taxation

Kane Kessler, P.C.
1350 Avenue of the Americas, New York, NY 10019
(212) 541-6222 | www.KaneKessler.com