

## Media & Entertainment Group Of The Year: Winston

By **Carolina Bolado**

*Law360, New York (January 17, 2012, 9:15 PM ET)* -- Winston & Strawn LLP attorneys represented Yahoo Inc. and online video site Veoh Networks Inc. in cases that helped determine the legal standard for user-generated content and copyright infringement, earning the firm a spot among Law360's Media and Entertainment Groups of 2011.

In December, the firm was victorious in the Ninth Circuit, which upheld a California court's ruling that Veoh had federal protection from the copyright infringement claims brought by Universal Music Group Inc. The appeals court ruled that the video-sharing site is protected by the safe harbor provision in the Digital Millennium Copyright Act, despite its users' ability to download videos that often are infringing.

The case had been closely watched by those following the nationwide anti-piracy debate. Michael Elkin, who oversees litigation within Winston & Strawn's advertising, marketing and entertainment practice, said the Ninth Circuit's ruling could impact a dispute between Viacom International Inc. and YouTube Inc. over allegedly infringing user-generated content that is currently in the Second Circuit.

"This is where the action is now in the Internet and digital media world because if the company is found liable for using copyrighted content under the DMCA, there's a \$150,000 liability per work," Elkin said.

The firm also represented Yahoo in a challenge from the American Society of Composers, Authors and Publishers, which claimed its members were due royalty fees for music downloads. In 2010, the Second Circuit ruled that music downloads are simple transfers of electronic files containing digital copies from an online server to a local hard drive, and not musical performances contemporaneously perceived by the listener.

In October, the U.S. Supreme Court declined to take up the case, letting the Second Circuit's decision stand and marking a final victory for Yahoo.

"That's now the law of the land," Elkin said. "We're testing the outer limits of copyright and digital media."

In addition, in April, the firm beat back Universal's summary judgment bid in a suit brought by several of the world's largest record companies accusing Winston & Strawn's client Myxer Inc. of copyright violation.

The record company had argued that Myxer, a mobile technology company, violated copyrights by allowing users to create ringtones based on the plaintiffs' copyrighted works and did not qualify for the DMCA's safe harbor provision. The case settled in August.

The advertising, marketing and entertainment practice group at Winston & Strawn traces its roots back to the 1940s, when it focused on advertising, marketing and promotions, according to practice group chair Brian Heidelberger.

"It was really just the start of the field," Heidelberger said. "There was very little case law and very few practitioners in that area. It's become a much more popular field and one that has become of interest to major brands."

The practice group has about 11 attorneys, plus an additional 20 attorneys who overlap with the litigation and intellectual property groups, and do work in the advertising, media and entertainment space.

About half the practice is devoted to litigation, with the other half advising companies on how to avoid running into legal problems, according to Heidelberger. Because of the nature of the practice, much of which deals with rapidly-changing technology, attorneys often have no direct law to turn to and must instead advise based on how they think analogous law will be interpreted, Heidelberger says.

"We were advising companies on social media and user-generated content several years before it became hot," he said. "By the time it became the word of the day, we had already ourselves figured out how we believed the law would be."

A large part of the practice consists of coming up with creative solutions to decrease the risks that clients might face with their marketing or advertising plans, Heidelberger says. They offer alternatives to companies who show up with advertising plans that might not be legal.

"Our goal is to find a way to continue their plans but to continue in a legal fashion," he said. "We help them figure out how to still achieve their underlying goal without infringing third-party rights."

In addition to the rapidly-shifting case law, the practice presents its own unique challenges, according to Heidelberger. Creative-minded clients are sometimes not concerned with the legality of their creations and aren't always receptive to a lawyer's input, he says.

In addition, marketing and entertainment deals are usually made very quickly, and staying on top of the workload can be difficult, Heidelberger adds.

"A lot of the problems in the space are not strictly defined in the case law," he said. "Many of the problems come out of public relations issues as much as the law. Understanding the business of this space is just as critical as understanding the law."

Heidelberger credits the group's success to its emphasis on being cost-effective and giving practical advice and to the depth and diversity of its client base, which he says gives them a broad experience in the field. When a new client comes to the firm for legal advice, chances are the attorneys have already had to deal with a similar issue with another client, according to Heidelberger.

Elkin added that the strength of the firm's litigation team — which has tried more cases in the entertainment industry than any other law firm, according to Elkin — not only attracts clients who need top litigators to handle a trial, but is also a bargaining chip in negotiations with opposing parties. The firm's experienced litigators are not afraid to go to trial, he says.

"We try to do anything we can to get matters resolved at the earliest available opportunity because it's the right thing to do and our clients have better things to do," Elkin said. "But I think having the background and experience in trial work gives us an extra edge in trial negotiations."

In the past year, the firm has also represented American Honda Motor Co. Inc. and its advertising agency in a suit by Toho Inc., which owns the Godzilla property, over allegations that a Honda commercial used a Godzilla image without permission.

Winston & Strawn attorneys serve as counsel to the Chicago Sun-Times for its promotions, sweepstakes, text message and social media campaigns and to Taco Bell for its complex interactive campaigns.

In addition, the group represents MasterCard International Inc. in its worldwide sponsorship of Major League Baseball, including its sponsorship of several ball clubs, such as the Chicago Cubs and the Los Angeles Dodgers.

*Methodology: In November, Law360 solicited submissions from over 500 law firms for its practice group of the year series. The more than 550 submissions received were reviewed by a committee of Law360 editors. Winners were selected based on the significance of the litigation wins or deals worked on; the size and complexity of the litigation wins or deals worked on; and the number of significant, large or complex deals the firms worked on or lawsuits the firm had wins in. Only accomplishments from Dec. 1, 2010, to Dec. 1, 2011, were considered.*

--Additional reporting by Maria Chutchian and Stewart Bishop. Editing by Andrew Park.

All Content © 2003-2011, Portfolio Media, Inc.