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FEATURE

INTELLECTUAL PROPERTY

Copycat Blues

321 Studios has picked a fight with a dozen studios over its controversial software, which allows consumers to make copies of DVDs. **By Liz Valsamis**

To take on Hollywood with its deep pockets, in-house counsel and legions of outside law firms, you need lawyers with a lot of talent and resources on your side.

And that doesn't come cheap.

Luckily for 321 Studios Inc., San Francisco's high-profile civil and criminal defense firm Kecker & Van Nest will spring for the resources and talent at a reduced rate when it feels strongly about a cause.

321 Studios is a small Midwest software developer and manufacturer that has picked a fight with a dozen Hollywood movie studios over its DVD copying software, which allows consumers to make copies of DVDs containing copyright works, such as movies.

The studios say the company's software clearly violates their copyrights. Kecker & Van Nest, known for its intellectual property work, is representing 321 Studios at a bargain rate, according to co-counsel Daralyn Durie, who wouldn't elaborate on the rate structure. Her usual hourly rate, however, is \$450.

Durie, a litigation partner at Kecker & Van Nest, says that the firm involves itself in Digital Millennium Copyright Act cases because they are "phenomenally interesting, cutting-edge work."

Many companies, individuals and law firms across the country have taken on the constitutionality of the 1998 Digital Millennium Copyright Act, arguing that the law impedes the public's reasonable use of

copyrighted works. It's an argument that has had little success in three separate courtrooms, yet it's also one that refuses to go away.

"The Digital Millennium Copyright Act is an extraordinary law," Durie says. "It is, as of yet, relatively untested."

321 Studios is the latest company to argue that corporate America is bending the Digital Millennium Copyright Act in its favor, to the detriment of consumers' rights. Meanwhile, Hollywood claims it has been dealt a financial blow by technology that allows for bootlegged copies of movies to reach the public before the films are even released.

On April 25, the final credits may roll on 321 Studios. That's when U.S. District Judge Susan Illston will hear the Hollywood studios' motion for summary judgment in the case. If Illston grants the motion, 321 Studios would be prohibited from selling its software. *321 Studios v. Metro-Goldwyn-Mayer Studios Inc.*, C 02-1955 (N.D. Cal., filed April 21, 2002.)

Nevertheless, Durie and her group are unfazed.

"We really believe in the individuals and companies that we're representing," Durie says. "The Digital Millennium Copyright Act is incredibly important legislation, and it's very important that it's interpreted and understood correctly. Studios have an array of excellent lawyers and a lot of resources on their side of the battle, and it's very important for these smaller companies to

make themselves heard."

The studios in this case have some of Hollywood's best and brightest lawyers in Patricia Benson and Russell Frackman, both partners with Los Angeles' Mitchell, Silberberg & Knupp. Frackman and his team of lawyers shut down online music-sharing giant Napster in 2000 on behalf of the record labels. *A&M Records v. Napster Inc.*, 114 F.Supp.2d 896 (2001).

In addition to formidable opposing counsel, 321 Studios faces an uphill battle with the courts, which so far have ruled that selling equipment that can reproduce "locked" copyright works is a violation of the 1998 Digital Millennium Copyright Act. The act states that no person or device can circumvent protection systems.

The rise in technology that made illegal copies more available brought on the act's creation as Hollywood pushed for better protection of its copyright works. Hollywood also began using a content scrambling system, which scrambles a DVD's content and can only be read by DVD players.

Benson and her colleagues usually represent plaintiffs in Digital Millennium Copyright Act cases — studios suing companies for providing software that allows bootleg copies. But that's not the situation this time.

In an interesting twist, 321 Studios brought suit in April 2002 against the studios in an attempt to protect itself from any future prosecution for its products. In doing so, the

company woke a sleeping giant.

The suit names most major Hollywood studios: MGM Studios, Tristar Pictures Inc., Columbia Pictures Industries Inc., Sony Pictures Entertainment Inc., Time Warner Entertainment Co., Disney Enterprises Inc., Universal City Studios Inc. and The Saul Zaentz Co.

The studios, in turn, filed a counterclaim Dec. 19, asking that the court prohibit 321 Studios from continuing to make its product available. The studios also asked for all profits made off the software, according to Benson.

Durie, who refers to 321 Studios as a "pop-and-son" shop, says the company made the first move after learning of the plight of Russian software developer Dmitry Sklyarov, another Keker & Van Nest client whom the federal government criminally prosecuted for developing code-cracking software for his company Elcomsoft. The case spanned 2001 and 2002.

Computer programmer Robert Moore and his son, Brian, founded 321 Studios in 2001 when they developed software that allows consumers to make copies of DVDs containing copyright works. Today, 321 Studios has 60 employees and is based in Chesterfield, Mo.

Its product now sells for \$99.99 in retail stores across the country, like Best Buy, Fry's Electronics and Comp USA. Since August 2001, it has sold 100,000 units of its DVD Copy Plus and DVD X Copy, according to company spokeswoman Elizabeth Sedlock. The company would not disclose its revenues.

The company's products allow customers to make DVD copies more quickly than existing products on the market.

Hollywood contends that the software is a transgression of the Digital Millennium Copyright Act's Section 1201 provision, which prohibits the use of devices that can unlock technological protections like those used to protect copyright material on DVDs.

321 Studios counters that its product is intended for a consumer's private use, an acceptable use of copyright material under the law.

These cases are not new to Benson and her Mitchell Silberberg colleagues. She's familiar with the argument of fair use but

feels that it has little merit. She says the companies violating the copyright provision of 1998 are wasting valuable judicial resources.

In the Elcomsoft Inc. case, the Russian software company and its employee Sklyarov were prosecuted for selling software that allows customers to circumvent locks on digital books so that they could be translated from the Adobe format to the Portable Document Format. *United States v. Elcom Ltd., 01-20138*

In first leg of the case, U.S. District Judge Ronald Whyte upheld the constitutionality of the Digital Millennium Copyright Act, ruling that it was not overly restrictive of a consumer's fair use rights, in a May 8, 2002, decision.

The criminal charges were dropped in exchange for Sklyarov's testimony against his employer. The case then went to a jury, and the company admitted that it had violated the act but argued that it never meant to break the law, believing that its product was legal.

In December, the company was acquitted by a jury, which was given a critical instruction by Whyte that the prosecution had to show that the company knew it was breaking the law in order to convict.

In yet another case, eight movie studios sued 2600 Magazine for publishing the codes to crack encrypted DVDs. The magazine argued that its reason for publishing the codes was to provide users of the Linux operating system with a way to view DVDs, a use that it argued was fair.

But the court rejected the quarterly hacker magazine's arguments and found it in violation of the Digital Millennium Copyright Act. *Universal City Studios Inc. v. Reimerdes, 00Civ.0277* (S.D.N.Y., filed Jan. 14, 2000).

"The [2600] case and the Elcom case really answered all of the arguments that 321 is making," Benson says. "What we're seeing in this case is the same arguments unsuccessfully made in the case of Elcom."

O'Melveny & Myers partner Robert Schwartz, who represents Time Warner against online music swappers, sounds exasperated when discussing cases challenging the Digital Millennium Copyright Act.

"This case seems to me like 321 is

swimming upstream against a common-sense decision from the 2nd Circuit that says that this activity is prohibited under the Digital Millennium Copyright Act," Schwartz says. "Trying to make a business out of a prohibited activity is a pretty foolish endeavor."

Schwartz is referring to the 2nd U.S. Circuit Court of Appeals' nearly 200-page decision on the 2600 case, that intellectual property lawyers representing studios see as a strong denial of the claim that the Digital Millennium Copyright Act infringes on a consumer's legal use of copyright materials.

Yet the father-and-son team at 321 Studios took steps to prevent its software from being used for piracy even before they knew what the Digital Millennium Copyright Act was. For instance, the software puts a marker on a newly made DVD copy so that the copy cannot be used to make one or 1,000 more copies, in an attempt to prevent illegal mass production. The Hollywood studios fire back that only 321 Studios software can read this watermark, and the newly decrypted DVD copy can be duplicated countless times using other equipment.

Robert Moore picked up a newspaper one day in 2002 and read an article that specifically mentioned his own company as a potential violator of the Digital Millennium Copyright Act. Concerned, he called the San Francisco's Electronic Frontier Foundation, an Internet civil liberties organization that executives at the company were familiar with. The organization then directed him to Keker & Van Nest because of the firm's work in the Elcomsoft defense, according to Sedlock.

Some in the legal community accuse the Electronic Frontier Foundation of forum shopping by backing cases that have similar arguments in other courts. It's a charge that staff attorney Wendy Seltzer denies.

Seltzer says the facts in this case are different from the Elcom case. Namely, she says, the 321 Studios product has a broad variety of uses, such as inserting clips rather than just offering the ability to copy DVDs. The foundation submitted an amicus brief on 321 Studios' behalf, which Seltzer drafted. It did the same in the 2600 Magazine case.