Music-Licensing Reform May Be On The Way

Congress is currently engaged in a comprehensive review of the U.S. Copyright Act, 17 U.S.C. §§ 101 et seq., to evaluate potential revisions to the law in light of technological and other developments that impact the creation, dissemination and use of copyrighted works.[1] In connection with this review, the U.S. Copyright Office is conducting a study to assess the effectiveness of the current methods for licensing musical works and sound recordings.

Since March 17, 2014, the office has sought written comments[2] and conducted public roundtables in Nashville, Los Angeles and New York City[3] to obtain input from interested parties regarding issues relating to music licensing. After a review of the initially comments submitted, pursuant to a notice issued on Aug. 1, 2014,[4] the comment period has been extended to Sept. 12, 2014.[5]

Music Licensing Overview

Music is everywhere and its pervasive presence creates the soundtrack of our day-to-day lives. For decades, listeners have enjoyed music in traditional formats, from vinyl records to compact discs and live performance to radio. Stores, restaurants, stadiums and even elevators pipe in music to create ambiance. Little can convey emotion in motion pictures, television shows and advertising better or faster than music. Video games, apps and even greeting cards use music to enhance the user experience. And today, thanks to technology, consumers can access music in digital formats on demand through smartphones, computers, and other devices and integrate it into other works easier than ever before.

In order to use music in these and many other ways, licenses must be obtained from copyright owners of the musical compositions and sound recordings. Typically, a would-be music user would need to negotiate the terms of a license directly with the copyright owner(s). However, our copyright law has greatly impacted how these licenses are obtained, and the Copyright Act provides for certain exceptions[6] to copyright owners' otherwise exclusive rights[7] that amount to government-regulated music-licensing regimes, including statutory licenses for certain uses of musical compositions and sound recordings under Sections 112, 114 and 115 of the Copyright Act.

Rights and Owners

The complex labyrinth of music rights ownership and licensing often entails obtaining multiple licenses from multiple sources, and the developing digital landscape has further complicated matters. This article provides an overview of many of the major rights and licenses under review, but it is not exhaustive of all of the rights and licensees that may need to be obtained in order to use a certain musical composition and/or sound recording (e.g., rights related to an arrangement of the composition, certain performers, producers, print and foreign rights, etc.).

There are two separate works of authorship in every musical recording: (1) the underlying musical composition (music/notes and/or lyrics) created by the songwriter or composer, and (2) the sound recording — a recording of a particular performance of the musical composition. If a song is rerecorded — either by the same performer or a different performer — then the copyright in the musical composition would remain the same, but there would be a new copyright in the new sound recording.

In some cases, the copyright owners of the musical composition and the sound recording may be the same; however, the owners of the two works are frequently different. Typically, either the songwriter or

the songwriter's music publisher (by assignment) owns the copyright in, and licenses rights in connection with, the musical composition. Songwriters and music publishers also affiliate themselves with performing rights organizations ("PROs"). Either the performer or the performer's record label (by assignment) will own the copyright in, and license rights in connection with, the sound recording (except in the case of certain types of digital uses). To further complicate matters, there may be multiple copyright owners of both musical compositions (e.g., co-writers) and sound recordings (e.g., band members, producers). Exploitation of musical rights is known as "publishing."

Musical Compositions

Pursuant to the Copyright Act, the owner of a musical composition has certain exclusive rights, including the right to (1) make[8] and distribute[9] phonorecords of the work (such as CDs or digital files) and (2) perform the work publicly.[10] The copyright owner can also authorize others to engage in these acts.

Mechanical Rights

The right to make and distribute phonorecords of musical compositions (often referred to as a "mechanical" right) is subject to a compulsory statutory license under Section 115 of the Copyright Act.[11] Mechanical rights apply to compositions embodied in tangible media (such as CDs) as well as digital downloads.

The copyright owner has the right to make and distribute the first recording of a musical composition; however, Section 115 provides that once a song has been recorded and publicly distributed in the United States under the authority of the copyright owner, a compulsory mechanical license is available to anyone who wants to record and distribute a new recording of the musical composition (often referred to as a "cover" song license) in the U.S. upon serving a statutorily compliant notice and paying the mechanical royalty for each phonorecord made and distributed in accordance with the license.

The Section 115 mechanical royalty rate and license terms are set by the Copyright Royalty Board ("CRB"), an administrative tribunal authorized by Section 801 of the act.[12] The act directs the CRB to achieve four objectives: (1) maximize the availability of creative works to the public; (2) afford the owner a fair return and the user a fair income in connection with the works; (3) reflect the respective contributions of owners and users in making works available; and (4) minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[13]

The current statutory mechanical royalty rate[14] for physical recordings (such as CDs) and permanent digital downloads is 9.10 cents per copy for songs five minutes or less or 1.75 cents per minute for longer songs, 24 cents for ringtones, and varying rates for interactive streams and limited downloads as determined by a number of factors, such as service offering type, licensee type, service revenue, recorded content expense, and applicable performance royalty expense.[15] (Note: Most record labels negotiate even lower mechanical payments — typically three-fourths of the statutory rate, with caps on the number of songs for which mechanicals will be paid — in recording contracts with their artists.)

As licenses under Section 115 are obtained on a song-by-song basis, many music publishers have designated the Harry Fox Agency Inc.[16] as an agent to handle mechanical licensing on their behalf. However, as compulsory mechanical licenses apply to audio-only reproductions that are primarily made and distributed to the public for private use,[17] copyright owners directly negotiate the rates and terms for other uses of their musical compositions, including the right to synchronize a musical composition in timed relation with audio-visual images on film or videotape (often referred to as a "sync" license), such as

a television show, motion picture, advertisement, as well as derivative uses[18] such as “sampling” (taking a portion of one sound recording and using it in a different work).

A number of the comments suggest that the Section 115 statutory license for the reproduction and distribution of musical compositions should be eliminated or substantially revised to reflect the realities of the digital marketplace. Some of the proposals suggest phasing out the Section 115 license to enable owners to negotiate licenses directly with users at market rates, similar to how sync licenses are negotiated.

The record labels suggest that Section 115 be eliminated and replaced with an industrywide revenue-sharing arrangement collectively negotiated between music publishers and sound recording owners, which would allow licenses for musical compositions and sounds recordings — which are currently issued separately — to be bundled (and include some audiovisual uses not currently covered by Section 115, such as music videos and lyric display), with license fees to be split according to the terms of the industrywide agreement.

A number of other options have been suggested as well, and all of these proposals would need to be vetted in greater detail to address the details of how these alternatives may be implemented. Additionally, the Songwriter Equity Act of 2014[19] was introduced earlier this year to help songwriters, composers and publishers receive fair market royalty rates for their music.

Public Performance Rights

Songwriters and their music publishers affiliate with a PRO, such as ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music Incorporated) and SESAC (Society of European Stage Authors and Composers), to allow the PRO to issue public performance licenses and collect royalties on their behalf, both domestically and through reciprocal arrangements with similar organizations in other countries.

The PROs offer “blanket” licenses to music users (such as bars, restaurants, stores, radio stations, websites and music-streaming services) to allow the users to publicly perform the PRO’s entire music catalog, rather than issuing song-by-song licenses. (Note: As a songwriter may only affiliate with one PRO at a time, and as many songs are co-written by songwriters affiliated with different PROs, music users must often obtain licenses from all three PROs to cover all of the music performed in their establishments.)

The PROs monitor use of musical works by the licensees and distribute royalties to their songwriter and publisher members. The licensing practices of ASCAP and BMI have been subject to antitrust consent decrees overseen by the U.S. Department of Justice since 1941[20] to protect licensees from anti-competitive behavior by the PROs, and the decrees were last amended in 2001[21] and 1994,[22] respectively.

Music publishers have recently spearheaded litigation as to whether they can withdraw digital licensing rights from the PROs and negotiate public performance licenses directly with digital music services under the decrees. The federal district courts overseeing the decrees ruled that music publishers could not withdraw selected rights (e.g., “new media” rights) to be directly licensed outside of the PROs; rather, a particular publisher's song catalog must either be “all in” or “all out.”[23] These rulings have prompted some of the major music publishers to announce their intent to remove their entire catalogues from the PROs and directly license public performances if the consent decrees are not modified.[24]

If the music publishers were to make good on these threats, the entire public performance licensing system could be upended and online services, as well as radio, television, restaurants and other traditional public performance licensees, would be impacted. Although the PROs' existing usage tracking and royalty distribution methodologies have been under scrutiny for some time, even more tracking and payment issues would arise should the music publishers implement a direct licensing system, not to mention the fact that traditional songwriter agreements only contemplate collection and payment of performance royalties by PROs.

Sound Recordings

Sound or master recording rights include only the rights in a particular fixed performance of a musical composition. In order to use a particular sound recording, a user will have to obtain separate licenses to use (1) the sound recording and (2) the underlying musical composition embodied in the sound recording.

Master Use Rights

Sound recordings fixed on or after Feb. 15, 1972, enjoy federal copyright protection, and sound recording copyright owners also have the exclusive right to reproduce[25] and distribute[26] phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same. (Note: These sound recordings are typically known as master recordings (or "masters"), which refers to the original, produced recording of sounds (on a tape or other media) from which CDs, records or other copies are made.) However, the protection is not retroactive, and sound recordings prior to this date are subject to applicable state laws until 2067.[27]

For the most part, licenses to use sound recordings are negotiated directly between the licensee and the sound recording owner, and licenses are granted in the owner's sole discretion. Additionally, any license that may be required to use a pre-1972 sound recording pursuant to state or common laws would need to be obtained from the sound recording copyright owner.

The comments have debated whether the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings or whether it is best to continue to withhold such protection. Both the copyright office[28] and sound recording owners are in favor of an extension of protection.

Public Performance Rights

Since 1995,[29] sound recording copyright owners have limited public performance rights when sound recordings are publicly performed "by means of a digital audio transmission," and most public performances are not protected under the Act. This right extends to noninteractive satellite and Internet radio-style services, and these uses are subject to statutory licensing in accordance with Sections 112 and 114 of the act.[30]

Section 112 provides for a license to reproduce the phonorecords (sometimes referred to as "ephemeral recordings") necessary to facilitate a service's transmissions in a digital format, and Section 114 licenses the public performances of sound recordings resulting from those transmissions. Interactive, on-demand services (e.g., downloading and on-demand streaming) must negotiate licenses directly with the sound recording owners.

As the act does not recognize a public performance right in sound recordings except for digital audio

transmission, a license is not needed to perform the sound recording (at least for an post-1972 recording) … although a license would need to be obtained from a PRO to publicly perform the underlying musical composition embodied in the recording. However, any license that may be required to perform a pre-1972 sound recording would need to be obtained from the sound recording copyright owner.[31]

The Section 112 and 114 license rates and terms are set by the CRB,[32] and royalties are currently collected and distributed to rights holders by SoundExchange, Inc.[33] Section 114 requires that these royalties be distributed 50 percent to the owner of the digital public performance right in the sound recording, 2.5 percent to nonfeatured musicians, 2.5 percent to nonfeatured vocalists, and 45 percent to the featured recording artists.[34]

Under Section 114, the rate standard applicable to satellite radio (i.e., Sirius/XM) and music subscription services (i.e., Music Choice and Muzak) that existed as of July 31, 1998 (i.e., “pre-existing” services[35]) are governed by the same four-factor standard set forth in Section 810(b) that applies to Section 115 licenses for musical compositions.[36] However, rates and terms for noninteractive public performances via internet radio and other newer digital music services are to be determined by the CRB based on what a “willing buyer” and “willing seller” would have negotiated in the marketplace by taking into consideration certain relevant market factors.[37] The Section 112 rates for ephemeral recordings used to operate the services eligible for a Section 114 license are also established by the CRB under the “willing buyer/willing seller” standard.[38]

Notably, however, the public performance right for sound recordings does not apply to broadcast radio.[39] Aside from the United States, only China, North Korea and Iran lack this right. Not only does this affect royalties earned by public performances on radio in the United States, but also in foreign countries, as there is a reciprocity requirement in counties that recognize this right. Both the copyright office[40] and, obviously, sound recording owners support the extension of public performance rights to broadcast radio.

The other comments to date have generally called for improvements to streamline the copyright royalty judges' statutorily mandated rate setting procedures and propose modifying the current system to be more in line with the procedures used in ordinary civil litigation,[41] as well as doing more to encourage settlement of rate disputes.

Other Issues

Other issues that have been raised indicate that the lack of standardized and reliable data related to the identity and ownership of musical compositions and sound recordings is a significant obstacle to more efficient music licensing mechanisms. Not only is it difficult to identify musical compositions and sound recordings because identifiers are not always incorporated into digital music files, but it is also difficult to determine ownership information, especially with respect to musical compositions which often have multiple writers owning different percentages.

The office is also seeking comments to address music creators’ concerns with a lack of transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers and collective licensing entities, including disclosure of nonusage-based forms of compensation (e.g., advances against future royalty payments and equity shares).

Conclusion

Given the breakneck speed at which advancements in technology have occurred since the last comprehensive review of the Copyright Act occurred in 1976, not to mention the tremendous effect this has had on content creation and delivery, the current review seems long overdue. There is much at stake for the creators, users and consumers of music (as well as other content and technology), and revisions to the Copyright Act could have long-reaching effects. As the discussion continues, the big questions remain: Whose voices will be heard? What changes will be made? And what impact will those changes have in the marketplace?

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[1] The last comprehensive review of the Copyright Act occurred prior to the 1976 revisions, and the last significant amendments to the Act occurred in 1998 in connection with the Digital Millennium Copyright Act ("DMCA"), which addressed some issues that arose in connection with digital technologies and conformed United States law to two World Intellectual Property Organization ("WIPO") treaties.

[2] The eighty-five written submissions received in response to the initial notice can be found on the Copyright Office website at http://www.copyright.gov/docs/musiclicensingstudy/200B;comments/Docket2014_3/.

[3] Transcripts of the June 2014 proceedings at each of the three roundtables will be made available on the Copyright Office website at http://www.copyright.gov/docs/200B;musiclicensingstudy/.

[4] See https://www.federalregister.gov/articles/2014/08/01/2014-18096/music-licensing-study.

[5] To submit a comment, visit http://www.copyright.gov/docs/musiclicensingstudy/.

[6] See, e.g., 17 U.S.C. §§ 116, 118 119, regarding exceptions related to jukeboxes, noncommercial broadcasting (e.g., PBS), cable TV rebroadcast, respectively.

[7] See 17 U.S.C. § 106.

[8] 17. U.S.C. § 106(1).

[9] 17. U.S.C. § 106(3).

[10] 17 U.S.C. § 106(4).

[11] 17 U.S.C. § 115, which was instituted with the passage of the 1909 Copyright Act.

[12] 17 U.S.C. § 801.

[13] 17 U.S.C. § 801(b)(1).

[14] See http://www.copyright.gov/carp/m200a.pdf for current mechanical rates and http://www.copyright.gov/carp/m200a.html for mechanical rates from 1909-2007.

[15] The Digital Performance Right in Sound Recordings Act of 1995 (“DPRSRA”), Public Law 104-39, sec. 4, 109 Stat. 336, 344-48, confirmed that the copyright owner’s mechanical right and the Section 115 license extends to making “digital phonorecord deliveries”. See also 17 U.S.C. § 115(c)(3)(A).

[16] See https://www.harryfox.com/public/.

[17] Compulsory mechanical licenses do not apply to dramatic works, such as operas, film soundtracks, ballet scores, Broadway medleys.

[18] See 17 U.S.C. § 106(2), which affords the copyright owner the exclusive right to prepare derivative works based upon the copyright work.

[19] Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2013-2014), available at https://beta.congress.gov/bill/113th-congress/house-bill/4079?q=%7B%22search%22%3A%5B%22Songwriter+Equity+Act%22%5D%7D. This Act would require Copyright Royalty Judges (CRJs) to establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and seller, and proposes other revisions to the Copyright Act as well.

[20] See generally United States v. Broadcast Music, Inc., 275 F.3d 168, 171-72 (2d Cir. 2001) (describing the history).

[21] United States v. ASCAP, No. 41-cv-1395, 2001-2 Trade Cas. (CCH) ¶ 73,474, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

[22] United States v. Broadcast Music, Inc., No. 64-cv-3787, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), as amended, 1996 Trade Cases (CCH) ¶ 71,378, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).
[23] See In re Pandora Media, Inc., Nos. 12-cv-8035, 41-cv-1395, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); Broadcast Music, Inc. v. Pandora Media, Inc., Nos. 13-cv-4037, 64-cv-3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).

[24] See Ed Christman, Universal Music Publishing Plots Exit From ASCAP, BMI, Billboard (Feb. 1, 2013), http://www.billboard.com/biz/articles/news/publishing/1537554/universal-music-publishing-plots-exit-from-ascap-bmi; see also Ed Christman, Sony/ATV's Martin Bandier Repeats Warning to ASCAP, BMI, Billboard (July 11, 2014), http://www.billboard.com/biz/articles/news/publishing/6157469/sonyatvs-martin-bandier-repeats-warning-to-ascap-bmi.

[25] 17 U.S.C. § 106(1).

[26] 17 U.S.C. § 106(3).

[27] 17. U.S.C. § 301(c).

[28] See United States Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings (2011), available at http://www.copyright.gov/docs/sound/pre-72-report.pdf.

[29] Congress enacted the DPRSRA in 1995. See note 16, supra, and 17 U.S.C. 106(6), 114(a).

[30] See 17 U.S.C. § 112(e); 17 U.S.C. § 114(d)(2), (f).

[31] State law does not necessarily recognize or affirmatively acknowledge a performance right in pre-1972 sound recordings, but such a right could be interpreted or recognized by states.

[32] See 17 U.S.C. §§ 801 et seq.

[33] See http://www.soundexchange.com/.

[34] 17 U.S.C. § 114(g)(2).

[35] 17 U.S.C. § 114(j)(10), (11).

[36] See 17 U.S.C. §§ 114(f)(1), 801(b)(1).
[37] See 17 U.S.C. § 114(f)(2)(B).

[38] 17 U.S.C. § 112(e).

[39] 17 U.S.C. § 114(d)(1).

[40] See Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners With Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. 6-7 (2004) (statement of David Carson, General Counsel, U.S. Copyright Office), available at http://www.copyright.gov/docs/carson071504.pdf.

[41] See 17 U.S.C. §§ 803, 804 regarding current procedures utilized in connection with proceedings by Copyright Royalty Judges.