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Copyright changes impact music marketplace

For several years, the Copyright Act has been criticized for the failure of its antiquated provisions to effectively address innovative and constantly evolving aspects of the music industry.

This criticism is not without merit, of course, given that the Copyright Act was written before anyone could have envisioned the advent of a digital music marketplace. A marketplace that is comprised of consumers who download music, or who on an increasingly regular basis subscribe to streaming services, without ever owning the music they listen to.

It is for this reason the U.S. Copyright Office published an initial notice of inquiry in March 2014 requesting public comment on issues affecting the existing music licensing regime.

On Feb. 5, the office released a 245-page report entitled "Copyright and the Music Marketplace" that follows public comment from interested parties, including music industry associations, service providers, technology companies, artists and creators.

According to the office, its "review of the issues has confirmed one overarching point: that our music licensing system is in need of repair."

The report presents an array of recommended changes to the Copyright Act and a sweeping overhaul to the current music licensing environment. If adopted, these changes will have a substantial effect on the music marketplace and all of its members.

This article, the first of two parts, explores some of the fundamental changes recommended by the office.

According to the copyright office, the report "suggests ways to reshape our music licensing system to better meet the demands of the digital era." Indeed, the current licensing system, "while perhaps adequate for the era of discs and tapes, [is] under significant stress. From a copyright perspective, we are trying to deliver bits and bytes through a Victrola."

The office identified consensus among study participants on four key principles:

- Music creators should be fairly compensated for their contributions.
- The licensing process should be more efficient.
- Market participation should have access to authoritative data to identify and license sound recordings and musical works.
- Use and payment information should be transparent and accessible to rights owners.

With the above principles in mind, the office's recommendations contemplate "a series of balanced tradeoffs among the interested parties to create a fairer, more efficient and more rational system for all."

Primary among these changes are proposed modifications to the way in which the Copyright Act treats sound recordings, which for many years have received far less rights (and corresponding income) than their corresponding musical works.

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The office recommends amending the Copyright Act to provide full federal protection to "pre-1972 sound recordings," which has been a topic of strong debate over the past several years. As currently written, the Copyright Act does not provide protection to sound recordings fixed prior to Feb. 15, 1972. Rather, these recordings are protected only under state common law.

The office recommends, as it has for some time now, bringing these pre-1972 sound recordings "within the scope of federal copyright law, with the same rights, exceptions and limitations as more recently created sound recordings."

Not only would full federalization of pre-1972 sound recordings provide performers with the same rights as owners of the musical works embodied in these recordings, it would "improve the certainty and consistency of copyright law, encourage more preservation and access activities and provide the owners of pre-1972 sound recordings with the benefits of any future amendments to the Copyright Act."

Consistency is of utmost importance today, given several recent rulings in California and New York, which have held that unauthorized public performance of pre -1972 sound recordings violates applicable state laws, including common law copyright.

These rulings were entered in cases filed against satellite radio broadcaster SiriusXM, but "the reasoning employed in these decisions is not expressly limited to digital performances (i.e., Internet streaming and satellite radio); they thus could have potentially broad implications for terrestrial radio ... as well."

The average music listener may not realize that an artist who performs on the sound recordings you hear on terrestrial radio does not receive any money for that public performance (and this is true with respect to all sound recordings, not merely those fixed prior to Feb. 15, 1972). Rather, only individuals who write the underlying musical work are compensated.

The copyright office therefore suggests adopting a "terrestrial performance right for sound recordings," which would provide parity among a song's writers and performers and will allow for more fair competition between terrestrial radio broadcasters and the Internet and satellite radio providers who are already required to pay for use of these sound recordings.

According to the office: "In a world that is more and more about performance and less about record sales, the inability to obtain a return from terrestrial radio increases the pressure on paying sources. The market distorting impact of the terrestrial radio exemption probably cannot be overstated."

Part 2, which will be published Wednesday, will highlight additional recommended modifications to the Copyright Act and American music marketplace.

IN THE LIMELIGHT

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