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Music marketplace due for 'meaningful' copyright reforms

This column, the last of two parts on the U.S. Copyright Office's report "Copyright and the Music Marketplace," discusses several fundamental changes the office recommends for the way in which the American music marketplace operates.

(Part 1, which appeared Tuesday, examined suggested changes in the treatment of musical sound recordings to better account for the digital marketplace.)

Under the current licensing regime, songwriters and publishers coordinate with performance rights organizations, or PROs, which administer rights associated with the "public performance" of a songwriter's music, such as when it is performed at a live event or on the radio.

PROs frequently provide blanket licenses to companies for use of millions of songs at one time. Songwriters also are entitled to issue "mechanical licenses" when their music is recorded onto physical products (such as CDs), downloaded or streamed through a variety of digital services.

Mechanical licenses are not issued by the PROs, however, and cannot be licensed through the use of blanket licenses. Music users often complain that the song-by-song mechanical licensing requirement of the Copyright Act makes the licensing process administratively daunting for online providers who "seek licenses for millions of works."

The office therefore recommends modifying the framework of the statute to encourage bundled licensing, which "would eliminate redundant resources on the part of both licensors and licensees." According to the office, this could conceivably be accomplished by enhancing the role of PROs to become more general "music rights organizations" capable of administering not just performance rights but mechanical and other rights as well.

Significantly, the office also recommends allowing songwriters to partially withdraw rights in their musical works from certain compulsory licensing schemes. While sound recordings are subject to compulsory licenses for use in non-interactive streaming services (Pandora, satellite radio), they are otherwise licensed by their owners in the free market. The licensing of musical works, however, are regulated both in the area of mechanical licensing and public performance.

Songwriters and publishers therefore complain that, especially in the online world, the nature of this compulsory licensing framework "does not permit them to control the use of their works or seek higher royalties."

In an effort to restore control over these musical works to their owners, the copyright office proposes that, at least in the digital realm, "where sound recording owners have the ability to negotiate digital rates in the open market, so should owners of musical works."

To accomplish this, the copyright office recommends that owners of musical works be permitted to opt out of certain statutory licensing schemes in the areas of interactive streaming and digital downloads so they may negotiate fair market rates for use of musical works in these areas.

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IN THE LIMELIGHT

Jeffrey Becker

Jeffrey Becker is chair of Swanson, Martin & Bell LLP's entertainment and media law practice group. Among his clients are recording artists, screenwriters, filmmakers, record labels and publishers, actors, theatrical producers and various entertainment-related businesses for whom he provides comprehensive counseling and litigation services. He can be reached at (312) 321-8425 or jbecker@smbtrials.com.

Of particular note, this opt-out right would permit songwriters to deny a licensee's request to record a cover version of a musical work to the extent that the recording would be disseminated by interactive streaming or digital download.

In sum, an artist who produced a cover recording of a musical work would still be able to obtain a compulsory license to sell physical copies of the song, but he or she would need to obtain a voluntary license from the songwriter to post the recording on Spotify or iTunes. This voluntary license, especially for popular songs, will likely be much more expensive than the current compulsory rates, which for digital downloads is 9.1 cents.

While the copyright office believes that an effort should be made to allow for the fair-market negotiation of licenses whenever possible, when this is not possible, "all government rate-setting processes should be conducted under a single standard, especially since the original justifications for differential treatment of particular uses and business models appear to have fallen away."

Thus, to the extent possible, the office recommends that all rate-setting activities, whether on sound recordings or musical works, be migrated to the Copyright Royalty Board, since industry rate-setting is already a primary function of the CRB.

The CRB would step in to assist in setting rates only when the parties are unable to agree on one. If the CRB intervenes, it should implement a procedure "designed to achieve to the greatest extent possible the rates that would be negotiated in an unconstrained market."

The copyright office recognizes that "any such opt-out process would need to be carefully managed to ensure licensees did not face undue burdens in the licensing process as a result." For this reason, the office also proposes the formation of a general music rights organization, with which publishers would publicly identify those uses subject to withdrawal and where a license might be sought.

While the report was released only two weeks ago, several interested parties have released responses. The Recording Academy lauded the report for adopting its recommendation for the implementation of fair-market pay and terrestrial performance rights.

Meanwhile, the Digital Media Association cautioned that many of the report's recommendations "unfairly discriminate against digital technologies while supporting the further consolidation of market power among the handful of major corporations and their affiliated associations which dominate music licensing."

Regardless, nobody can dispute the report's fundamental premise: "The time is ripe to question the existing paradigm and consider meaningful change."