

Office of the General Counsel

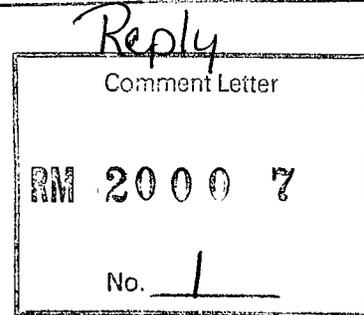
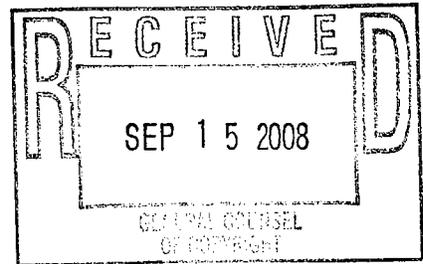
U. S. Copyright Office

Copyright GC/I&R

P.O. Box 70400

Washington, DC

20024



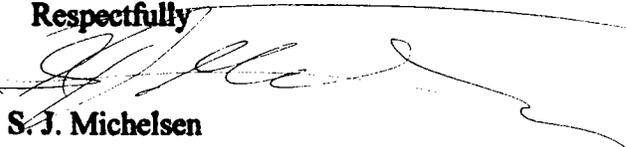
In the matter of Section 115 reform:

I have read the comments in the matter of Section 115 revisions for the digital age. These comments can be largely categorized as music industry nitpicking, and nowhere is there comment from the victims of Section 115. As a composer that has lived the Section 115 nightmare, I feel compelled to offer this reply statement. I look to a change in the copyright laws as the only reasonable way that the miscarriage of justice I have endured can be reasonably resolved. I feel their needs to be a voice of the victims and I think that the Copyright Office needs to see how creatively some people have used the license.

I enclose a brief description of my situation and my personal reflections. I ask that this comment be sealed because it is a unresolved licensing matter that, no doubt, will someday be litigated.

I would be more than happy to come to Washington DC if the Copyright Office feels that my testimony would be helpful

Respectfully


S. J. Michelsen

15517 Barn Hollow Rd.

Nevada City, Ca 95959

Overview

Section 115 is an antiquated loophole that has exploited music without proper license, that is impossible to adequately apply and is inconsistent with copyright law. Before it is extended in any way it needs to be reformed.

In the discussions of Section 115 reform it would be helpful to take a look at a case study of a work licensed under compulsory license. Hotel California is one of the best selling titles of all time and it has a dark secret; it is licensed under a section 115 license and is based on the underlying music of an Orphan Work. In a story written at the time of its release in *Crawdaddy* 77 Don Henley refers to the song as a "reincarnation"; in addition in the album liner notes it states, "copyright in dispute". Prior to its release Glenn Frey and Don Henley rented a little red house in Idyllwild, Ca for three months "sleeping on the floor", as reported by Cameron Crowe, they were on a "quest". In the British edition of his book "Heaven and Hell" Don Felder states that he was in the Palm Springs area just prior to his penning of "Hotel California".

As a victim of Section 115 I'd like to share my story and propose some solutions to the dilemma.

The problems with Hotel California

In August of 1974 I recorded a demo in a studio of a music teacher near Idyllwild, Ca. Track three was a song called the Basement Blues, that was a well arranged study of dominant and subdominant substitutions and alteration of a traditional blues progression. The track featured a signature two part harmonized guitar solo that was very technical and required hours of arrangement and practice. It was the lead guitarist of that track,

Trev Holmes, that first heard it on the radio. At first I doubted him, then I heard the song on KLOS and I thought, "well anybody can strum any changes and sound like anything, but by the end of the signature solos at the end of the song I knew that we had been plagiarized. There are between 30 and 40 measures of harmonized guitar solo that are note for note, including mistakes, in the coda of both songs. Soon after making the recording, my copy was lost to fire and I assumed that without a copy of the original I had no way of proving infringement. In addition, the studio where the recording was made, where the master was, had disappeared.

In December 2000, I finally was able to find the owner of the studio and it was revealed that shortly after the recording was made the studio was burglarized and although some of the equipment was recovered from pawnshops in the Palm Springs area, the tape machine with my project tape in it was ~~never~~ recovered. At the same time I became aware of Section 115 license, a fact that the copyright office personally verified the use of in the infringing song to me. In January 2001 I applied for copyright of the Basement Blues, which I feel is the underlying music of Hotel California. In a timely manor I also sent letters to the publishers that simply ask them to look into my claim. Only one of the publishers returned my request and sent back a response that even if it were an infringement there was nothing I could do because it was so long ago. All I am asking for is that the publishers look into it and they refuse.

Perspectives on Making Section 115 workable and consistent with existing law

The first problem is that this license is almost completely unknown even to copyright attorneys let alone the general public. The Copyright Office could do a lot to resolve this

problem by maintaining a data base system like Canada has instituted. In addition the public needs to know that there are Orphan Works out there.

The second problem is that under 1976 copyright laws, protection is granted at the time of fixation. It is inconsistent with existing copyright law to only offer Section 115 protection from the time of registration at the Copyright Office. Royalties should be payable from the first copy forward. In addition it is inconsistent that statutory cable royalties are paid to the Arbitration board and Section 115 are not. Royalties from Sec. 115 use should be paid to the Arbitration board, or a designated institution, from day one of use.

The third problem is serviceability. The only existing way to service a simple Section 115 licensing problem is an infringement lawsuit. At face value this is a frivolous means because no infringement ever occurred because of the use of the Compulsory license. In addition because only Royalties from date of registration are payable it makes the Royalties due less than the cost of legal fees. An infringement lawsuit also harms not only the product, but the artist as well and that could affect future Royalties. In order to make Section 115 workable publishers should be made to look into claims such as the one I made or face *severe criminal penalties*. The Arbitration board or an independent body should oversee the process so that the fox isn't watching the chicken coop. As in the case of my song, what should be looked at are the differences and similarities. The underlying work would contain unrevealed information that only the original composer would know. The Basement Blues has lyrics on the original recording that are not used in the licensed work that would positively identify the song.

The fourth problem is that the statute of limitations seem to be addressed as if it were an infringement. Again, because of the existence of the Section 115 license, no infringement ever occurred. In writing I would like to see the statute of limitations be consistent with existing copyright law in that a claim be made within 28 years, that's all.

The fifth problem that I am concerned about is that the song continues to be licensed and relicensed without addressing the underlying music. This would make it further impossible to litigate because the litigation would include many et. al. parties. I am particularly alarmed that the RIAA has singled out college P2P downloads of Hotel California. There seems to be a double standard in effect. It would seem that the recording industry knows that the Section 115 license is currently unworkable and wants to address the issue of downloads in a way that should be addressed under a Section 114 license. If the inherent section 115 problems cannot be resolved, it should be abandoned completely, because, in my experience, it is a completely unworkable loophole.

The sixth problem is that in resolving such litigation, if a publisher refuses to research such a claim, the publisher should be liable for legal fees. At face value it is unethical and a deterrent to resolution that the burden of legal costs falls upon the victims of Section 115.

The seventh problem is that under the existing law the song cannot be significantly rearranged. This leaves a legacy of stale music, and leaves no room for interpretations in new works.

The eighth problem is that the song has done so well and is the Swan Song of the Eagles. The reputation of the Eagles is at stake and this makes resolution very difficult.

cf

Resolution

The biggest problem with Section 115 is that it offers little grace in thanking anyone for the creation or use of a musical work. As a means of personal resolution I met with the party responsible for finding the music. I offered only thanks for the use of my music and we entered into a handshake agreement that it was OK. This handshake agreement was made without admitting anything. Under our handshake agreement my work is now approaching the realm of public domain, and until it is better defined, any claims against P2P downloads or any other uses of the song Hotel California are weakened and any claim by the Eagles to the ownership of the music almost worthless. In addition it makes future uses cloudy because it diminishes the existing license. Because this was the only agreement available under existing law I look to a restructuring of existing Section 115 law to reach a better arrangement. I think the song deserves better protection.

Summary

What we have here is a song that was published by theft, licensed as if it were Player Piano music, going on to become one of the best selling titles of all time without ever reconciling with the original composer (s); when the original composer(s) come forward dismissals and litigation ensue for years and in the end the Section 115 license that made it all possible is almost worthless, and the original composer(s) are uncompensated.

What is even worse is that this license scheme is being extended to sound recordings, extended to other copyrightable works under the guise of Orphan Works and the music industry gets away with it only to loose rights to the song Hotel California under public domain. Because of the magnitude of the situation I do not feel personally safe.

If the proposed changes are made without revisions to the Section 115 license that enable a mechanism for reasonable resolution the outcome will be more Orphan Works, frivolous lawsuits that include many et. al parties, court decisions that require years of litigation and in the end the only winners are attorneys. This is not copyright reform.

I know this all may seem far-fetched, but those at the Copyright Office know that the Section 115 license of Hotel California is unresolved, so, I present this twisted story.

6