

In re: U.S. Copyright Office Music Licensing Study  
Comments of Ty Turley Trejo  
Brigham Young University Copyright Licensing Office  
May 23, 2014

Here at Brigham Young University we deal directly with various types of non-classroom uses of music that require licensing in the marketplace. Everything from mechanical licenses for the production of CDs, public performance licenses for University performing groups, synchronization licenses for both YouTube and TV broadcast, and Dramatic performance licenses for artistic productions on campus. We write to highlight our experience as a large, private, non-profit institutional seeking to be compliant with the law. Below we have provided direct answers to the subjects of inquiry as published by the USCO in the Federal Registry.

### **Musical Works**

1. Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works.

**Section 115 is working wonderfully for our needs at the University. We love the predictable, statutory rate and the compulsory provision. It's the only part of the law (outside Section 107) where the user has some refreshing leverage in the music licensing world.**

3. Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis? If so, what would be the key elements of any such system?

**No. The direct licensing model of song-by-song licenses is working. Blanket licenses immediately inherit the complexities of unequal and potentially unfair distribution of royalties. It would also place an unnecessary burden on the licensing entities to track all song uses. The struggling model of the current American PRO blanket licensing system and its unequal royalty distribution is a quintessential example of the problems reaped from that system.**

5. Please assess the effectiveness of the current process for licensing the public performances of musical works.

**The licensing process of public performances via ASCAP/BMI/SESAC is straightforward and user friendly but there is one serious flaw regarding the scope of protection - the question of "Dramatic" vs "Nondramatic" uses of music.**

**The U.S. Copyright Office needs to clarify what constitutes a "dramatic" use of music. The 17 U.S.C. consistently limits certain provisions to "nondramatic" uses of music but offers no clear definition of what "dramatic" means. As an institution that is constantly**

involved in “semi-dramatic” performances of music (i.e. dance performances and other productions using music) we are being told conflicting things from the industry about whether or not our performances are dramatic or not. This distinction is critical since all the PRO agreements specify that they only grant a license for *nondramatic* uses of the music in their catalogues. If/when the performance is deemed dramatic then it requires direct permission and licensing from the publisher or writer.

*Kohn On Music Licensing*<sup>1</sup> offers the best definition of dramatic performance that we’ve seen:

*The term dramatic performance has been best defined as a performance of a musical composition that is woven into and carries forward a definite plot and its accompanying action.\**

\*This still leaves some ambiguity of whether or not choreographic works constitute a “plot” and/or its “accompanying action.”

When we approached ASCAP/BMI/SESAC about the issue, they either gave extremely vague (and sometimes conflicting) answers or deferred us to the publishers.

It’s clear that a Ballet or a Broadway musical is a dramatic work, but productions like *So You Think You Can Dance* or *Dancing with the Stars* are not. Are they “dramatic” performances of music? Those shows obviously procure synch licenses for the television broadcast but there are similar performances that are not televised and are occurring all over the country. There is a lot of uncertainty as to whether or not those types of performances are covered under the blanket licenses.

Additionally, as we canvassed the major publishers in the music industry there was much disagreement:

Two of the major publishers (Sony and EMI, which are now merged) do not believe that a dance performance with music playing over the venue speakers constitutes a dramatic performance, even with the presence of choreography, costuming and lighting. For them, the performance is covered under our PRO agreements. They rely on the simple fact that the music is not used to advance a storyline or plot. However, Warner Chappell (WC) and Universal Music Publishing believe that whenever choreography is involved it is a dramatic use, and requires direct licensing. Period. If the use is more than a “stand and sing” performance, then it is not covered under the PRO agreements. (Not coincidentally, WC and Universal both have departments dedicated to this type of “semi-dramatic” licensing, whereas Sony and EMI do not.)

Lastly, the USCO’s website characterizes choreography as a “dramatic” work, along with “pantomimes, plays, treatments, and scripts prepared for cinema, radio, and television.”<sup>2</sup>

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<sup>1</sup> Al and Bob Kohn. *Kohn on Music Licensing* (New York: Aspen Publishers, 2010), p. 1310

**All of this information greatly complicates the licensing process from our end. We're simply trying to do the right thing and obtain licensing when needed. This is difficult to do when the industry is confused and at odds with each other and when the Law is silent on the matter.**

**We think that a clearer definition from the USCO of what constitutes a "dramatic performance" would clear up this confusion.**

### **Sound Recordings**

10. Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

**Yes, federal copyright protection should definitely be extended to pre-1972 sound recordings to help unify the music licensing process. This would allow useful federal provisions like the Fair Use Doctrine and Section 110 to be applied to those older recordings. Understanding and complying with individual state laws for every pre-1972 recording is impractical and inefficient.**

### **Platform Parity**

13. How do differences in the applicability of the sound recording public performance right impact music licensing?

**In our case, it simplifies the music licensing process. We do not obtain public performance licensing for the use of sound recordings in dance performances, plays, and musicals sponsored by our institution. We appreciate this.**

### **Changes in Music Licensing Practices**

14. How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?

**Direct licensing is, by nature, massive and complex considering the number of copyright owners. For smaller or non-profit entities, there are problems such as non-response from publishers and painstakingly slow processing times. The dichotomy is apparent: smaller entities are seeking permission to use copyrighted works, in order to be compliant with**

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<sup>2</sup> U.S. Copyright Office Website. <http://www.copyright.gov/files/fl119.html> (accessed 23 May 2014)

copyright law, and copyright owners are overloaded with too many requests so they are never able to process the smaller ones. Naturally, their attention goes to higher dollar requests and leaves the small requests out to dry.

We've developed relationships with publishers and record labels. They know us (and know what we do), yet they sometimes still cannot get approvals back to us in time for a production. When pressed for a reason they simply state that requests like ours are at the bottom of the totem pole; they have to take care of the higher dollar requests first.

We're not sure what the solution is. The UK subscribes to blanket licensing for synch uses and it seems to work. This obviously limits the control for artists but makes it much easier for music to be licensed.

We suggest a compulsory provision that allows low-dollar, non-commercial requests to be approved for a specified fee.

Or a "Due Diligence" provision in which users are free to use copyrighted works when there is no response from the copyright owner after repeated attempts.

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

Yes. For smaller, non-commercial uses. A micro-licensing platform with statutory license fees based on reasonable fees. The infringement is already occurring everywhere at the smaller levels. Why not monetize it? Many of the smaller uses would like to be compliant but can't penetrate the beast that is music licensing.

16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?

The idea behind YouTube's Content ID system is brilliant. However, YouTube is still protecting itself from lawsuits by requiring all users to warrant and represent that they have the right to post 3rd party content. Yet, once users post 3rd party content "illegally" to YouTube it gets recognized by the Content ID system and subsequently monetized. All is well, right? Technically speaking, no. YouTube is digitally speaking out of both sides its mouth on this issue. This process produces uncomfortable risk for some users. But overall, Content ID as a model for future digital copyright management is innovative and a creative solution to to attack the mass proliferation of infringing content on the web.

24. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

**User-Generated Content (UGC):**

We suggest that the U.S. follow the example of Canadian copyright law in terms of what to do with the gargantuan UGC copyright "infringement" problem on the internet currently. Primarily with sites such as YouTube, Vimeo, and Facebook.

**In 2012, Canada passed the “Copyright Modernization Act.” This Act contains what has come to be known as the “YouTube Exception”, and can be found in Section 29.21 of the Act. The basic summary of the exception is that user-generated content that incorporates copyright-protected works is not an infringement so long as:**

- 1. The copyrighted work has been published or otherwise made available to the public;**
- 2. The use is solely for non-commercial purposes;**
- 3. Credit is given, if reasonable;**
- 4. The copy of the work used was lawfully obtained and is not infringing copyright;**
- 5. And the use of the work does not substantially harm the market for the original work.**

**This is also brilliant, forward-thinking for the digital age and we’d like to see U.S. Copyright Law follow suit.**