Music Licensing Study

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> "While the Copyright Act reflects many sound and enduring principles, … Congress could not have foreseen all of today's technologies … perhaps nowhere has the landscape been as significantly altered as in the realm of music. " ~ US Copyright Office, background to Music licensing study (found at http://www.copyright.gov/docs/musiclicensingstudy/)

To the contrary, I assert:

1. The landscape has not been so significantly altered that any fundamental changes in copyright law are required
2. Congress did, in fact, foresee today's technologies, in all essential respects
3. All that is required for copyrighted works, including music, to thrive, is the adoption of a registration system that will allow technological applications to verify that a User requesting a digital transmission is authorized to be receiving a given work.

INTRODUCTION. As an entertainment lawyer representing platinum music artists, I have watched royalties for authors atrophy over the last 15 years. Simultaneously, I have been assisting Mr. Jim Yates on the Digital Content Exchange (which had its origins c. 2003). The DCE Is a two-fold project:

1. A radical critique of the way that digital entertainment has been (mis)-handled since its very advent with Philips Electronics.
2. The development and beta-testing of a prototype for handling digital entertainment that corrects these errors.

I believe that enacting The Digital Content Exchange ("the DCE"), or something similar, is the solution to the economic malaise of the music industry (and of any industries involving copyrighted works including movies, Games and books).

Mr. Yates' *critique* has not been given a proper hearing, either by policy-makers or by private commercial interests. After 15 years of trying and failing, I believe Mr. Yates, and the digital content exchange, should be finally given a hearing.

MY POSITION. Mr. Yates has submitted to the copyright office a separate critique of current efforts/explanation of his invention. I heartily endorse what he has written and incorporate it in this statement. However, in contrast to Mr. Yates "inventor's viewpoint", I would like to present the copyright lawyers' viewpoint.

The reason Mr. Yates' Digital Content Exchange methodology, when described, may sound strange to the ear, is because of several of the vagaries surrounding how copyright has been

understood and enforced down through history. The word “copyright” itself is partially responsible for leading everybody off-track. It should be remembered that the purpose of copyright law, despite its name, is not to chase down and interdict infinite numbers of illegally-struck copies. The purpose of copyright law is to guarantee a monopoly to the author (in order to give a prospective author an inducement to create).

In a world where Users are being increasingly nudged to “log-in”, whether at home, work, or on-the-go, the copyright monopoly can be effectively guaranteed by an authorization process wherein it is verified that the User is indeed authorized by the copyright owner. Through a simple check of whether the copyrighted work being accessed through a connected device corresponds to the list of the logged-in User’s “library, the monopoly is maintained. Where this method is used, impregnating copies with DRM or enacting laws restricting Google’s search algorithm from delivering certain search results begins to fail the cost-benefit analysis (if ever they “passed” it).

(One such authorization methodology, the best that has ever been invented in my mind, is contained in the Digital Content Exchange Patent and the beta-test application hosted at theDCE.com.)

The key misunderstanding preventing the wide acceptance of this kind of methodology seems to center around the DCE’s taking Digital Rights Management and turning it on its head, by requiring that each User be authorized to access a digital work, irrespective of whether the digital work was an authorized copy or not.

But authorization is not really that strange of a concept. Prior to today’s technologies, an *unstated authorization* of Users took place in two major ways:

1. A User who had physical possession of a record was assumed to to be authorized to play the record (an unlimited number of times) and have complete disposal of the record (reselling, lending). This authorization was descended from the law of private property. The analog of this User in today’s technologies is called *an owner of a digital download*.
2. A listener of a device (e.g. a radio) that was capable of receiving (requesting) a terrestrial broadcast was deemed authorized to listen by virtue of the fact that the blanket public performance license paid for by the terrestrial broadcast station (or translator or repeater) covered the User’s listenership (even though the exact identity of the user was unknown and the total number of Users listening at a given moment was arrived at only by estimation). The analog of this User in today’s technologies is called *a streaming listener.*

Prior to today’s technologies, it was sufficient for enforcement of 1) and 2), to:

1. focus on the striking of a copy (hence the misleading term “copyright”) by
    a. interdicting bootleg copies
    b. combating home taping
    c. drawing pains-taking distinctions such as “ephemeral recordings”

2. implement FCC licensing (stopping Pirate radio stations)
3. assess nightclub and restaurant performances through voluntary performing rights societies

Fast-forward to 2014, the Authorization Strategies of the old technologies above are woefully *in*sufficient, and, (with the exception of public performance at a nightclub or restaurant), a waste of time:

1. "Physical possession of a record" is no longer a guarantee that the user is authorized, there being no way of telling whether a digital download that a User "possesses" was legally obtained.
2. Digital audio transmission has replaced terrestrial broadcast as the predominant form of music listening, and listeners instead of being unknown, are quite known (and in fact mined heavily by advertisers.) The old "scatter shot" approach of terrestrial sound waves reaching an estimated number of listeners is outmoded. "Radio stations" of today broadly include any streaming of a playlist to a user and must compete with playlists curated by the User from the user's own digital download collection.

To meet the new authorization challenges, the Digital Content Exchange has designed and prototyped what it believes is the best mode for ensuring that a trusted third-party can hold and disseminate the information about *who* is authorized to *listen to*, or *sell*, *what* copyrighted works. After making this check, the trusted third-party "green lights" that activity on the Internet, where 98% of all music activity occurs presently.

SOLUTION. In order to move towards the new authorization opportunities and fix the economic inefficiencies and injustices of the old authorization strategies, without tinkering with copyright law, all that the Copyright Office, and Congress, need do is:

> *Affirm that a system of registration, immobilization, and verification is in compliance with, and is in fact a substantial fulfillment of, the purposes of copyright law, i.e. to create a User Authorization system which ensures that no User is using copyrighted works without having purchased the work, borrowed the work (from a library), or obtained a current authorization from the owner of the copyright(s) (for example through a duly licensed streaming service).*

In this system, streaming services will function much as they do at present, but with more transparency (a concern voiced by many of my artist-clients) because of the overlay of the Exchange. In this system, however, the playing of downloads in an Application changes to this extent: it matters not whether the User is attempting to play a song that was gained legally or illegally, the app will only play the song if the User is Authorized via one of the modes mentioned above.

The only other thing that the US could possibly do, in order to speed up the wide acceptance of the Exchange, is to lend the services of the Librarian of Congress to aid in verifying editions and metadata and perhaps even supplying one best edition of each work for digital transmission by a cloud server.

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