

LIBRARY OF CONGRESS
Copyright Office Docket No. 2014-03
Music Licensing Study: Notice and Request for Public Comment

Comments by John T. Mitchell¹

May 23, 2013

My comments pertain to only some of the questions in the Notice of Inquiry.

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?

No. Blanket licensing has proven to be a wet blanket (as discussed in response to questions 5 and 7). Encouraging direct licensing on a per-work basis is essential. The ASCAP/BMI/SESAC approach, like any copyright holding company “bulk licensing” approach, all suffer from the fundamental problem of treating all works the same. The author of a work in high demand cannot benefit from that greater demand by charging a higher rate. The author of a work in low demand cannot reduce the rate in an effort to stimulate demand. It costs no more to play Top 40 songs and no less to play only emerging amateurs. All three of these approaches are broken, just the same as the “block booking” of theatrical motion pictures condemned 75 years ago. Section 115 serves a public purpose in limiting the right of exclusion after the first distribution, and thereby serves the Constitutional purpose of copyright (yielding myriad cover songs that give expression to even greater creativity) yet protects the freedom of any author to encourage greater use by offering terms more competitive than the statutory rate. The same cannot be said for the traditional “blanket” approach. The word “updated” in this question is an odd choice for regression.

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

The current system is ineffective in allowing authors to compete in the marketplace based on price. Blanket licenses are an insult to creative differences. The licensing organizations create the false sense that by getting licenses from all three performing rights organizations one is “covered” and can play any song, when that is simply not true. Authors who choose not to join a PRO have difficulty standing out as direct licensees, and more likely to be ignored as being “covered” by the blanket.

¹ The views expressed herein are solely my own, and in my individual human capacity.

The Copyright Office inexplicably fails to allow even the addition of a simple data point to a registration to indicate who should be contacted for a license. The three PROs make sure that cherry-picking will be more expensive than just paying for the entire blanket, even if the licensee is interested in a relatively short playlist. Blankets don't cover everything (while pretending they do), reward excellence and trash alike with the mediocrity of the same rate, and are too dense to allow effective peaking to see which songs are under the blanket, and which are not. (Since some works are licensed through more than one PRO, licensees in effect "pay twice" for the right to publicly perform such works if they get all three blankets.) Finally, the current licensing practice creates barriers for the author who might prefer to weigh the licensing terms by licensee, format, medium, venue, or the like, in a manner different from the majority.

7. Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternatives that might be adopted?

The consent decrees are serving their intended purpose, but they suffer from the fact that the purposes are very limited, and involve a rolling one-problem-at-a-time approach to the antitrust concern.

The concerns that motivated the entry of these decrees seem almost insignificant by today's magnification: Back in the 1940, it was hard to engage in direct licensing. Today, it is (or rather, should be) ridiculously simple, and done with a few clicks using a computer. Back then, it was hard for licensors and licensees to find each other. Today, it is relatively simple (but for the smoke screen erected by the collectives themselves). Back then, a blanket license with a single rate was deemed to be more efficient. Today, eBay and similar online markets have proven that modern databases supporting millions of buyers and sellers can facilitate direct dealings in nearly every conceivable product or service, except music. A marketplace such as eBay would not exist if, in order to sell my "stuff", I had to be included in a one-price-fits-all scheme in which the price of a beat up blender with a severed cord is the same as the new, in the box, top-of-the-line item complete with accessories.

It warrants reminding the Department of Justice of what it had to say before the 2001 "Amended Final Judgment 2". In a brief in support of it, filed in 2000, the Department of Justice added a footnote:

Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of

the justifications for collective licensing of performance rights by PROs. The Department is continuing to investigate the extent to which the growth of these technologies warrants additional changes to the antitrust decrees against ASCAP and BMI, including the possibility that the PROs should be prohibited from collectively licensing certain types of users or performances.

In the nearly 15 years since then, such technologies have evolved and re-evolved. The time is long past for the Department of Justice to renew the suggestion that "the PRO's should be prohibited from collectively licensing certain types of users or performances." eBay has demonstrated that machine-readable databases making offers and accepting agreement to the terms of sale in nano-seconds (whether under "buy now" or cutthroat competitive and automated bidding processes) between individual competitors selling the same or similar articles to the same pool of competitive customers is a reality.² There is absolutely no justification for anti-competitive blanket licensing in which the blanket serves little more than as cover for a failed marketplace in which individual works are not free to be offered competitively on their own merits, rather than as part of a pool, catalog or blanket.

There was a time when the Register of Copyrights shared the antitrust concerns. While defending the value of the copyright monopoly in a single work, the Register of Copyrights once stated, "The real danger of monopoly might arise when many works of the same kind are pooled and controlled together." Register's Report on the General Revision of the U.S. Copyright Law (1961), at 5. Since then, the consolidation of control within a few major copyright holding companies has only increased, but the Copyright Office has lost its concern for antitrust principles.

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?

Of course, the government can play a role in the development of alternative licensing models, such as micro-licensing platforms! For what types of uses? All uses that are within the copyright holder's exclusive power to do or to authorize. How? Here is how:

a. Modernize the copyright registration database so that copyright holders who wish to do so can access and update their own licensing data – at a minimum,

² One can type in "screwdriver" in an eBay search limited to the "tools" category and be presented with over 36,000 possibilities to buy one or bid on one. A music-licensing marketplace is just as feasible, but an eBay search across all categories for "musical work license" yields only three hits; two are automobile license tag frames, and the other is a 45 rpm single with the song "License Your Hands".

each work could include a field with nothing more than a link to the licensing entity or entities. But to be as vibrant a licensing alternative as possible, it must be scaled so that the high school singer/songwriter can simply pop in licensing terms without having to resort to an agent, a lawyer, a collective, or other third party. It should be so simple that the author could license it royalty free for public performance over the radio, or do so for “the month of October, 2014,” or for “any non-profit fundraising event.” It should be simple enough that the “derivative use” field could say “contact X to discuss,” or “\$50 per movie that is part of an academic requirement in film school,” or “\$500 per commercial movie plus 10 cents per DVD thereof.” Reproduction rights are easy enough – the fields relating to the reproduction right could easily permit indication of an actual price per reproduction, and the price could be changed by the copyright holder to meet competition or to address promotional opportunities.

b. Make the database machine-searchable, so that a prospective licensee might search by filtering parameters applicable to its business. For example, “show me only works of the Americana genre published in the 1990s where the reproduction right is less than 45 cents per phonorecord.”

c. Make the APIs useful to those who wish to add private sector richness to the searching/licensing features.

d. In addition to making it simple enough for any member of the public to manage their own works (including the sound recording made with a smartphone during a drunken weekend with a bunch of friends), and for any member of the public to license works of others (e.g., searching works to affordably use at a public fundraiser), it should be robust enough to interface with major commercial enterprises serving millions. The micro-licensing will take care of itself if the Copyright Office will simply give authors (and rights holders) a platform on which to offer their works on their own terms to anyone who wishes to accept the offer.

e. The improved database should include rules to cabin the licensing within the limits of the exclusive rights. That is, while a per-work license of any of the Section 106 rights for cash should be supported, the notion of including tying and bundling that leverages disparate works, or requirements for an equity stake in the licensee’s business before any works are licensed, or up-front fees or minimums pre-license, or conditioning a license on the use (or not use of) particular technology, should not be permitted. For example, the database might support a fee of \$2 for a reproduction of the work, but not the added condition, “provided you reproduce it using my cousin Alice’s software.”

f. The database must provide a simple alternative for members of the collectives (such as PROs) to direct license, and PROs should be required to disclose the information (such as copyright registration number) for every work included in their “blanket” rates.

g. Provide a legal safe-harbor for reasonable reliance on the information in the Copyright Office database, thereby encouraging rights holders to keep the information up-to-date.

In short, the Copyright Office database is a public space, and should facilitate person-to-person communication just as readily as the public square. The private sector can do the rest.

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

Yes. First, the most basic standard begins with the unique, government-issued copyright registration number. Although short-sighted treaties from the pen-and-paper era prohibit the requirement that works be registered before the copyright attaches, there is nothing in the treaties to prevent the government from creating incentives to register. The music industry has long wrestled with how best to universally identify works, complete with disambiguation and data correction. The basic copyright registration database should already do this, and should be the common reference point for licensors and licensees to “touch base” and resolve ambiguities and data-collisions. The Copyright Office should make the registration so valuable as a reference point for private databases that some merchants might be tempted to do business only with those whose works are registered. Second, see the response to question No. 15.

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

The problems with licensing in the music industry have more to do with government (and Copyright Office) coddling of broken, anticompetitive and cumbersome licensing practices developed at a time when authors could scarcely bring their works to the public’s attention without an intermediary. Those days are long gone, and those protections that tend to encourage (while policing anticompetitive excesses of) the “real danger of monopoly ... when many works of the same kind are pooled and controlled together” should be jettisoned in favor of facilitating the freedom of each author, no matter how old, how commercially viable, how talented, or how well known, to actually exercise the exclusive right “to do or to authorize” their Section 106 rights with a minimal of friction. The Copyright Office’s modern bias in favor of a presumption that every registrant author takes an “all rights reserved (and I reserve the right to sue you into bankruptcy if you cross me)” position makes a mockery of the copyright itself. Any copyright registration system that allows one to register a work and obtain the right to sue for potentially bankrupting statutory damages must also accommodate the copyright holder who wishes to be less than a maximalist. Our history is filled with revered authors who

valued dissemination of their works more highly than remuneration of their works. A system that places them at a disadvantage is dissonant with the Copyright Clause of the Constitution, and the First Amendment to it.

Disrespectfully submitted,

John T. Mitchell
15213 Reserve Road
Accokeek, MD 20607
301-965-0432