

Music Licensing Study Response
Submitted by James M Yates

Objective: "...the effectiveness of the existing methods of licensing music..."

The mechanisms for obtaining such licenses are largely shaped by our copyright law, including the statutory licenses under Sections 112, 114, and 115 of the Copyright Act, which provide government-regulated licensing regimes for certain uses of sound recordings and musical works.

The Copyright Act reflects many sound and enduring principles
Those principles are not changed by digital versions of copyrighted works.

The media companies initially (Philips and Sony) created the digital versions of their copyrighted works in the late 1970s and early 1980s. This includes Compact Discs (CDs) (see http://en.wikipedia.org/wiki/Compact_disc), Digital Video Discs (DVDs) and ebooks (which are simply an extension of electronic documents). Yet these same media companies failed to understand the impact of these innovations and failed to adjust their business models to accommodate the changes that would occur. This business failure is NOT a failure of the methods of licensing music. It is a business failure to make appropriate available adjustments to the changes the media companies made themselves. This business failure should not be characterized as a failure of copyright law. This business failure should not generate attempts to change copyright law, while not perfect in all cases, is more than adequate to handle digital copies of copyrighted media works.

A word about copyrighted digital works. The digital version, whether or not any other version (analog or physical (sometimes called mechanical)) exists, are no different than any other versions in the light of copyright law. The critical attributes of any particular edition of a copyrighted work are the copyright owner (and/or licensee) and the owner of the authorized copy (more about this later).

What makes the digital version of a copyrighted work more of a concern is the relatively easy ability to make an exact copy (precisely exact which is not available for copies of analog or mechanical versions). Making a copy that is not authorized by the copyright holder (or his licensee) is therefore, a counterfeit copy not a pirated copy which would be theft or stealing. It is therefore, more appropriate to compare the solutions to media problems with unauthorized digital copies to other solutions of counterfeiting, as in the banking system, rather than expecting changes in the copyright law to solve the problems initiated by changes the media companies made to their products.

The counterfeit media copy enters the marketplace, like all counterfeits, by someone making a copy and entering it into the commercial marketplace where it competes with the authorized copies. If any parties give value to the counterfeit copy then the authorized copies decline in value. If the counterfeit copy is not able to be identified by examining it directly then other methods of identification must be used and businesses must adjust to those new methods. Again, this is not the failure of copyright law so there is no reason to change copyright law. The

financial securities industry had similar issues and successfully made the appropriate changes in the 1970's. The banking industry has not changed the law but adjusted their business methods to identify and devalue counterfeits.

The media industry also has a strong incentive to wish that non first sale transactions (used transactions) in their copyrighted works did not exist since they do not presently get any further compensation after the first sale is completed. Again this is a failure of the media industry to adjust from a business standpoint and not a failure of copyright law or the long and well established first sale doctrine. The used transaction of a counterfeit copy is clearly illegal under the first sale doctrine.

It is straight-forward to treat authorized copies of copyrighted media as if they have value and maintain the chain of ownership necessary to separate counterfeit copies from authorized copies. This has been done by many industries but is resisted by the media industry.

One example of a counter productive (to copyright law enforcement) business practice of the media industry is the agreement with Apple for copyright holders to receive significant amounts of payment to allow and upgrade matched audio track files of unknown ownership to user accounts at Apple iTunes. This gives value to counterfeits and benefits the media companies as the media companies are condoning/approving the violation of copyright law in this instance while prosecuting similar actions by others. Can the copyright owner violate copyright law on items owned by that copyright owner while others cannot violate copyright law with the same actions on the same items?

A word about the Digital Millennium Copyright Act (DMCA).

From Wikipedia - "The **Digital Millennium Copyright Act (DMCA)** is a [United States copyright law](#) that implements two 1996 treaties of the [World Intellectual Property Organization](#) (WIPO). It criminalizes production and dissemination of technology, devices, or services intended to circumvent measures (commonly known as [digital rights management](#) or DRM) that control access to copyrighted works. It also criminalizes the act of circumventing an access control, whether or not there is actual infringement of copyright itself. In addition, the DMCA heightens the penalties for copyright infringement on the [Internet](#).^{[1][2]}"

and - "Although, section 1201(c) of the title stated that the section does not change the underlying substantive copyright infringement rights, remedies, or defenses, it did not make those defenses available in circumvention actions. The section does not include a [fair use](#) exemption from criminality nor a [scienter](#) requirement, so criminal liability could attached even unintended circumvention for legitimate purposes.^[3]"

1. <http://www.copyright.gov/legislation/dmca.pdf>. p7.
2. <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title17/html/USCODE-2010-title17-chap5-sec506.htm>
3. Band, Jonathan and Katoh, Masanobu (2011). *Interfaces on Trial 2.0*. MIT Press. p. [92](#). ISBN [978-0-262-01500-4](#). "

While supporting the two treaties and bringing US Copyright law in line with world activity in copyright is a good and proper objective the lack of a fair use exemption is troubling. More significant is the need to understand that Digital Rights Management (DRM) protection of digital

files is unnecessary when media companies implement a proper business strategy to deal with counterfeiting. The fact that the problem has been characterized as piracy (which is theft/stealing rather than counterfeiting) probably has not helped and has assisted in causing media companies to follow an incorrect solution path. Is software that will play or exchange digital files that does not check for proper ownership illegal in a similar way that “circumventing access control” has been criminalized in the DMCA?