Re: Music Licensing Study: Second Request for Comments
[79 Fed. Reg. 42833/Docket No. 2014-03 (July 23, 2014)]

Note: The following comments reflect my personal opinions and should not be construed to represent the positions of any past or present employers or clients.

Rather than reiterate points sufficiently made previously by others' comments, I would like to offer a few general comments for consideration. While obviously there are numerous important specifics to address in Congress' review of the U.S. Copyright Act, I think it is also important to not lose sight of the notion of practicality in any contemplated changes to the Copyright Act.

Musical Works

Having spent many years actively involved in the day-to-day licensing process from the rights-holder perspective (both publisher and record label), to me, one of the most important aspects for the Copyright Office to consider is simplicity (following closely behind fair and equitable compensation for uses of intellectual property).

What all too often seems to happen in similar proceedings is each side's representatives are so focused on clawing out the best mathematical distribution for their side that we end up with impractically convoluted formulas regarding rates (e.g., interactive streaming, limited downloads), with little if any consideration to the actual procedural ramifications of such arrangements. Beyond the undue administrative burden, it can also result in royalty statements that are unreasonably opaque and, certainly in the case of "pass-through" licenses and Digital Service Providers ("DSPs"), far removed from the original sources and figures and, consequently, the derivation of rates is often indecipherable to the ultimate recipient.

Further on the issue of pass-through licenses, to my mind, this seems to defy the very spirit and intention of the "exclusive rights" under the Copyright Act. In fact, it is difficult for me to come up with similar examples of third parties having automatic dominion over the disposition of others' rightful property.

The compulsory license provision of Section 115 in its current form is fraught with problems. The reality is it is rarely used in standard industry practice, serving only as a framework for negotiating terms of direct licenses, but acting as a *de facto* ceiling for royalty rates nonetheless. One of the issues is that technology has invited so many players to the marketplace that many have little if any knowledge of the applicable requirements under copyright law. Yet, they forge ahead anyway relying on only the most perfunctory understanding of the compulsory license provision that it ends up causing more problems than it solves. This creates a bevy of legally deficient "Notices of Intention" that force publishers into the involuntary role of teaching the fundamentals of copyright to the masses—which is neither practical nor fair—and often in the end the cost in effort and man-hours far exceeds the minuscule royalties for the use (that is, if an accounting is ever actually received).

In my opinion, the best chance for compliance regarding musical works licensing lies with simplicity. Ultimately, I believe this leads to two options: (1) either completely overhaul the compulsory license provision so that it is actually a practical and useable regime that serves the needs and purposes of all parties or (2) do away with it completely.

Regarding the cut-off date (June, 22, 1995) for contractually controlled/statutory rates for Digital Phonorecord Deliveries ("DPDs") [*see* §115(c)(3)(E)(i),(ii)], in my opinion, contractual controlled rates should either apply for DPDs or not. The cut-off only serves as an unnecessary disparity, unfairly penalizing those with older applicable agreements.

Other Issues

I want to highlight what I believe is a dangerous development. There seems to be a recent and disturbing trend toward devaluation of copyright. I don't think there is much disagreement that there needs to be a balance between innovation and copyright compensation. Where that balance belongs, on the other hand, is a source of impassioned debate (which is healthy) and deserves very careful deliberation as we consider shifting paradigms.

If we get the balance right, music, technology and innovation can be welcome and prosperous partners. But if we get it wrong, we risk destroying something (high-quality music) that has a value beyond its worth merely as a commodity.

There are examples of new innovations and companies in recent years that have offered great opportunities for music and rights-holders, and others that have had profoundly damaging effects. Accordingly, regarding companies that build their businesses around others' intellectual property (a/k/a "content"), I think it is wise and prudent to conclude that if your business model can't withstand paying fair market value for copyrighted material, then, regrettably, your business is not viable—even if it's a great idea.

Sincerely,

Gregory Carapetyan