Kernochan Center for Law, Media and the Arts
Columbia University
School of Law
435 West 116th Street
New York, New York 10027

September 12, 2014

Submitted Online

Jacqueline C. Charlesworth
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, S.E.
Washington, DC 20559-6000

Re: Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14,739 (2014) and Music Licensing Study: Second Request for Comments, 79 Fed. Reg. 42,883 (2014)

Introduction

This Comment is submitted by June M. Besek, Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia University School of Law, in response to the Copyright Office Notices of Inquiry cited above concerning the music licensing study. It addresses Question 10 in the initial request for comments, 78 Fed. Reg. at 14,742:

> 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 withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

The principal means of exploiting sound recordings is shifting, from the reproduction and distribution of copies (phonorecords) of sound recordings to streaming them.[1] Owners of pre-1972 sound recordings would like to benefit from the streaming market, and in particular, to take

[1] *See, e.g.*, Ben Sisario, *Downloads in Decline as Streamed Music Soars*, N.Y. TIMES, July 4, 2014.

advantage of the efficient licensing mechanism that section 114[2] provides. However, there is considerable uncertainty about the status of a right of public performance under state law, and disagreement as to whether owners of pre-1972 sound recordings should be able to take advantage of the section 114 licensing mechanism. Lawsuits have been filed to force Pandora and Sirius XM to obtain permission from right holders of pre-1972 sound recordings in order to stream those recordings.[3]

Folding pre-1972 sound recordings into federal copyright law would be the fairest and most efficient approach to creating a well-functioning music licensing market with respect to those recordings. I discuss briefly below (1) the current status of the public performance right for sound recordings under state law, (2) the advantages of federalizing protection for pre-1972 sound recordings, and (3) brief responses to some of the comments made in the music licensing roundtables about federal protection for pre-1972 sound recordings.

(1) *The current status of the public performance right in sound recordings under state law.*

In my work concerning legal protection for sound recordings under state law,[4] I have discovered no evidence that states currently recognize a right of public performance in sound recordings. I have not done an exhaustive study of all state laws or market practices, so it is possible that some few do so, in some manner. A couple of states specifically disclaim such a right.[5] In others, the law is simply silent.

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[2] For ease of reference I refer to the § 112 and §114 statutory licenses jointly as the §114 license.
[3] Ben Sisario, *Big Labels Take Aim at Pandora on Royalties*, N.Y. TIMES, Apr. 17, 2014; Ben Sisario, *Record Labels Sue Sirius XM Over Use of Older Music*, N.Y. TIMES, Sept. 11, 2013.
[4] *See, e.g.*, June M. Besek, Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Unpublished Pre-1972 Sound Recordings by Libraries and Archives (CLIR and Library of Congress 2009); June M. Besek, Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives (CLIR and Library of Congress 2005).
[5] *See* N.C. Gen. Stat. § 66-28 (2014); S.C. Code Ann. § 39-3-510 (2011).

This situation is not surprising. There is no right of public performance for non-digital transmissions (e.g., radio station broadcasts) for federally protected sound recordings or for pre-1972 sound recordings, as borne out by the market. Radio stations, for example, are not paying public performance royalties for broadcasting pre-1972 sound recordings. On the federal level, sound recordings were accorded a public performance right only in 1995 (significantly amended in 1998) and then only with respect to certain digital audio transmissions.

Some commenters appear to be taking the position that states recognize a limited right of public performance for digital audio transmissions of pre-1972 sound recordings – presumably developed after 1995 – and that this state law justifies inclusion of these recordings in the section 114 statutory license. But as far as I am aware, states have not enacted a digital audio public performance right for sound recordings, nor have state courts explicitly recognized such a right.

In many states the courts *could* recognize some type of public performance right in sound recordings, and this is the result that the suits against Pandora and Sirius XM apparently seek to achieve. Where state courts rely on common law copyright[6] or other common law torts of various kinds (unfair competition, misappropriation, etc.) it is possible that a court could be convinced that with the shifting market (from sales of copies to digital streaming), it is fundamentally unfair for a business to exploit and profit from performance rights in sound recordings owned by another. In other words, a court might find rights in pre-1972 sound recordings can be meaningful only if a public performance right were to be recognized.

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[6] New York relies on common law copyright for pre-1972 sound recordings, Capitol Records v. Naxos, 4 N.Y.3d 540 (2005). Other states likely rely on common law copyright at least for unpublished pre-1972 sound recordings, even if they look to other torts when misappropriation of published (commercial) recordings is at issue. Program on Information Justice and Intellectual Property, Washington College of Law, American University (under the supervision of Peter Jaszi with the assistance of Nick Lewis), Protection for Pre-1972 Sound Recordings Under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis 15 (CLIR and Library of Congress 2009).

Common law is not static; as one court has expressed it, the "flexibility for growth and adaptation is the peculiar boast and excellence of the common law. . . ."[7]

For other states, legislation would be necessary to provide for such a right. For example, in states where pre-1972 sound recording rights are based on a civil statute (e.g., one providing a private right of action for activities subject to criminal sanctions), presumably an amendment to the statute would be required.

Such changes are likely to take time. It's probable that states will not act consistently (if they act at all). And there are many questions about how this process would unfold: If states were to recognize public performance rights in sound recordings, would those rights have the same scope as federal rights? Would a state court simply recognize a general public performance right – thereby upsetting long-existing law – or would it defer to the legislature? Would a court recognize a narrower right for pre-1972 sound recordings, limited to certain digital audio transmissions? It seems unlikely that a state court sitting at common law would embrace the dense regulatory structure of section 114, including the statutory license concerning specified digital audio transmissions. Nor are the states empowered to simply relegate payment for streaming of these recordings to the federal system, absent federal authority.

In short, there are no established public performance rights in sound recordings under state law that resemble those in the federal law. There is, however, the potential for such rights to develop in the future.

(2) ***The advantages of federalizing protection for pre-1972 sound recordings***

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[7] Hurtado v. California, 110 U.S. 516, 530 (1884); *see* Hinish v. Meier & Frank Co., 113 P.2d 438, 447 (Or. 1941) ("The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues."); Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y. Supp.2d 483, 492 (N.Y. Sup. Ct. 1950), order affirmed, 279 A.D. 632 (1st Dep't 1951) ("[U]nfair competition. . . rest[s]. . . on the. . . broader principle that property rights of commercial value are to be and will be protected. . . .") While Metropolitan Opera's broadly articulated form of unfair competition was preempted by § 301(a) of the 1976 Copyright Act, it presumably remains operative with respect to those works that remain under state protection.

There are a number of advantages to federalizing pre-1972 sound recordings.

First, it would eliminate the disparate sources of protection for these recordings and free owners and users alike from the burden of consulting the inconsistent patchwork of state laws to determine the permissible uses of pre-1972 sound recordings, by providing a single regime of protection. It would make all pre-1972 recordings subject to federal copyright law (including the section 114 statutory license).

Second, it would enable archiving and other scholarly research and use that is currently hampered by the lack of discernable, consistent exceptions among the states, as well as terms of protection under state law that can extend until 2067. One of goals of those who sought the sound recording study was to be able to preserve and provide access to old recordings.

Third, it would reduce the disparate treatment of domestic pre-1972 sound recordings and foreign pre-1972 sound recordings whose copyrights have been restored.

Fourth, it would reduce confusion. One cannot always readily determine if a particular recording is protected by state law, by federal copyright law as a restored work, or by federal copyright law as a protected derivative work.

Fifth, it would benefit recording artists who would receive a portion of the revenue generated by the section 114 license.

Sixth, it would put pre-1972 sound recordings on par with those created thereafter with respect to any future changes to the Copyright Act.

(3) *Music Licensing Roundtable Comments*

Various participants in the roundtable discussions raised essentially three reasons for opposing full federalization: First, full federalization would be too complicated and raise too many problems; second, because full federalization would raise complicated issues that could

only be worked out over time, the U.S. should pass legislation bringing pre-1972 sound recordings into the section 114 statutory license, and deal with the rest of the federalization issues at some later time;[8] and third, including pre-1972 sound recordings in the Copyright Act, and in particular, in the section 114 statutory license, would provide their creators with a windfall because they had no expectation of this market when they created the recordings, so it could not have acted as an incentive.

(a) Full federalization would be too complicated and raise too many problems.

There is no question that federalizing pre-1972 recordings raises some difficult issues. I will not enumerate them all here; they are discussed at length in the Copyright Office's study on pre-1972 sound recordings.[9] The Office concluded, nevertheless, that these issues are "not insurmountable,"[10] a conclusion with which I concur. For example, difficult problems could arise if the federalization worked a change in ownership. However, if, as the Office suggests, the owner of rights under federal law would be the owner under state law on the day before the federalizing legislation becomes effective, those issues would largely be avoided.

On January 1, 1978, countless unpublished works were brought under federal copyright law pursuant to 17 U.S.C. § 301, with relatively few problems. Admittedly there are additional issues that pertain to published works, but it is possible to work through them so that the goal of achieving a unitary copyright system is achieved and the stakeholders are fairly treated.[11]

(b) The U.S. should pass legislation bringing pre-1972 sound recordings into the section 114 statutory license now, and deal with the rest of the federalization issues later.

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[8] *See* RESPECT Act, H.R. 4772 (113th Cong. 2d Sess.), introduced May 29, 2014.
[9] United States Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings (Dec. 2011).
[10] *Id.* at vii.
[11] *See* Eva E. Subotnik and June M. Besek, "Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings," 37 COLUM. J. L. & ARTS 327 (2014).

There are at least two problems with this approach. First, it appears to recognize a federal law right without corresponding exceptions. The pre-1972 sound recordings report was effectively initiated by libraries and archives who seek greater clarity in governing laws in order to better achieve preservation and scholarly use of older pre-1972 sound recordings. This "114 only" approach is aimed primarily at commercial recordings, and does little to respond to the legitimate concerns of libraries and archives. Second, it is not clear that the complications of full federalization can be avoided by this route. For example, doesn't one still have to determine ownership under this approach? Moreover, it would not obviate questions about termination rights, takings or the like.

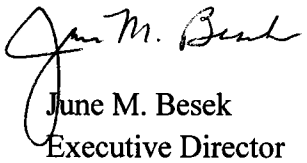
(c) Federalization would create a windfall for creators.

Some discussants argued that including pre-1972 sound recordings in the Copyright Act, and in particular, in the section 114 statutory license, would provide their creators with a windfall.

It is true that creators of pre-1972 sound recordings had no expectation of a performance right in digital audio transmissions when they created their works. At the same time, they *did* have an expectation of continuing to earn revenue from sales of copies (phonorecords) of their sound recordings. The market has changed in a way that few if any persons could have envisioned. Accordingly, allowing the creators to benefit from the streaming of their recordings is not a windfall. As to the argument that the creators should not benefit from this new market because it could not have acted as an incentive to the creation of these recordings, the Supreme Court rejected this "quid pro quo" theory in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Moreover, the benefits of full federalization along the lines proposed by the Copyright Office in its report

would accrue not only, or even primarily, to right holders of pre-1972 sound recordings but also to scholars, researchers, libraries, archives and other users of these recordings.

Respectfully submitted,



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