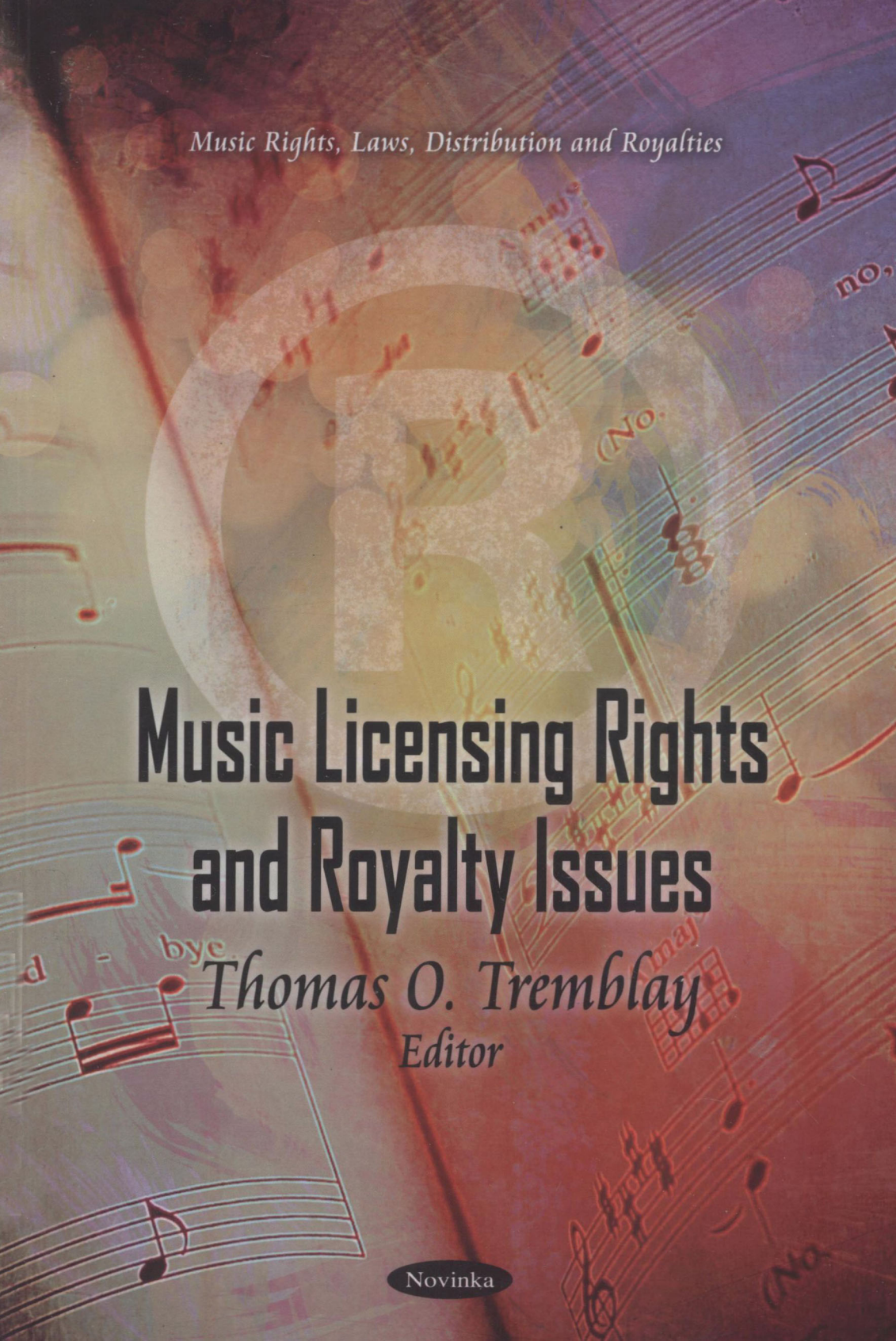
Music Rights, Laws, Distribution and Royalties
Music Licensing Rights and Royalty Issues
Thomas O. Tremblay
Editor
Novinka

MUSIC RIGHTS, LAWS, DISTRIBUTION AND ROYALTIES

MUSIC LICENSING RIGHTS AND ROYALTY ISSUES

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PREFACE

This book provides an overview of the complexities of the Copyright Act's provisions concerning music licensing in the digital age. Copyright law provides protection for original works of authorship by conferring certain exclusive rights upon their creators. Music is an example of a kind of literary and artistic work that falls squarely within the scope of copyright law. The realm of music copyright is characterized by two types of copyright holders; the holder of the musical work and the holder of the sound recording. The musical work copyright holder is typically the one who composes the piece of music. The sound recording copyright holder is the recorder of a rendition of the musical work.

Chapter 1- This chapter provides an overview of the complexities of the Copyright Act's provisions concerning music licensing in the digital age. Copyright law provides protection for original works of authorship by conferring certain exclusive rights upon their creators. Music is an example of a kind of literary and artistic work that falls squarely within the scope of copyright law. The realm of music copyright is characterized by two types of copyright holders: the holder of the musical work and the holder of the sound recording. The musical work copyright holder is typically the one who composes the piece of music. The sound recording copyright holder is the recorder of a rendition of the musical work.

Chapter 2- Under the Copyright Act, Internet radio broadcasters, or "webcasters," that stream copyrighted music to their listeners are obliged to pay royalty fees to the sound recording copyright owners at statutory rates established by the Copyright Royalty Board (CRB). However, some webcasters may also have the option of paying different royalty fees that are

privately negotiated with SoundExchange, the entity that collects performance royalties on behalf of sound recording copyright owners and recording artists.

On March 9, 2007, the CRB announced statutory royalty rates for certain digital transmissions of sound recordings by webcasters for the royalty period January 1, 2006, through December 31, 2010. Several webcasters appealed the CRB's decision to the U.S. Court of Appeals for the District of Columbia Circuit. The appellants argued that the rates were unreasonably high and that the absence of a cap on minimum fees paid per licensee was arbitrary and capricious. On July 10, 2009, the federal court of appeals issued a decision that upheld nearly all aspects of the CRB's determination of rates.

Chapter 3- The transmission of copyrighted sound recordings to the public by over-the-air AM/FM radio stations is an activity that implicates the right of public performance under the Copyright Act. However, under current law, terrestrial radio broadcasters who play copyrighted music need only compensate songwriters for the performance of their musical compositions and not the holders of the copyright in the sound recording (who may include the recording artist, musicians, and record label). Yet if music is publicly performed by digital audio transmission, such as by Internet radio stations ("webcasters") or satellite radio companies, both the songwriter and the recording artist are entitled by law to receive royalties from the transmitting entity.

Chapter 4- The recording and broadcast radio industries combined generated over $25 billion for the U.S. economy in 2008. These industries provide jobs for a range of skilled workers, including songwriters, producers, engineers and technicians, and radio announcers, among others. At the same time, recording studios and radio stations allow musicians, vocalists, and performers to share their talents with listeners across the nation. Through their work, the recording and broadcast radio industries contribute to the everyday American experience by creating and delivering music to people in their homes, cars, and workplaces. Beyond providing a popular form of entertainment, the recording and broadcast radio industries have helped music become a prominent feature of American culture.

Chapter 5- On April 16, 2010, we received a letter from the Copyright Office providing comments on *Preliminary Observations on the Potential Effects of the Proposed Performance Rights Act on the Recording and Broadcast Radio Industries (GAO-10-428R)*. As you know, this chapter provided our preliminary observations on the potential effects of the proposed Performance Rights Act (the proposed Act). Because we did not receive the Copyright Office's letter before we issued our report to you, we were unable to

include the letter in it. However, because the Copyright Office is responsible for administering U.S. copyright laws, which the proposed Act seeks to modify, and its letter provides a number of relevant insights on the proposed Act, we are providing the letter as a supplement to our report.

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Chapter 1

COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE

Brian T. Yeh

SUMMARY

This chapter provides an overview of the complexities of the Copyright Act's provisions concerning music licensing in the digital age. Copyright law provides protection for original works of authorship by conferring certain exclusive rights upon their creators. Music is an example of a kind of literary and artistic work that falls squarely within the scope of copyright law. The realm of music copyright is characterized by two types of copyright holders: the holder of the musical work and the holder of the sound recording. The musical work copyright holder is typically the one who composes the piece of music. The sound recording copyright holder is the recorder of a rendition of the musical work.

If a third party wants to use a copyrighted work in a particular way, he or she must seek permission from the copyright holder. However, for holders of copyrights in musical works and sound recordings, three of their rights (distribution, reproduction, and public performance) may be subject to a form of permission called "licensing." Licenses vary according to the type of user and the type of use. When the copyright law creates a compulsory license for a

particular use of a copyrighted work, the parties need not negotiate the right to use the work. If the type of use or type of user does not qualify for the compulsory license, the parties must negotiate, voluntarily, its availability and the specific terms of use. The musical work copyright holder is subject to a compulsory license for the reproduction or distribution of mechanical copies of the work, including digital copies that come within the definition of a digital phonorecord delivery (DPD). The compulsory license is seldom used, however, because many music publishers authorize the Harry Fox Agency to issue licenses on their behalf. Public performance of a musical work is typically licensed through a performing rights organization, such as ASCAP or BMI.

The licensing system behind non-digital music differs from that of digital music. Whenever a user reproduces or distributes a non-digital or digital phonorecord, the sound recording copyright holder and musical work copyright holder are both entitled to payment. Whenever a user publicly performs a phonorecord via non-digital transmission, authorization from *only* the musical work copyright holder is needed. However, if the phonorecord is publicly performed through digital audio transmission, both the musical work copyright holder and the sound recording copyright holder have a right to receive royalties.

A more comprehensive understanding of music licensing requires a familiarity with the Digital Performance Right in Sound Recordings Act (DPRSRA), the Digital Millennium Copyright Act (DMCA), and the Audio Home Recording Act (AHRA). These laws amend the Copyright Act to, among other things, refine the scope of licensing for both types of copyright holders.

The Copyright Act also sets forth several exemptions from infringement liability for certain unauthorized uses, including the fair use doctrine (17 U.S.C. § 107) and limitations on the public performance right under specific situations (17 U.S.C. § 110).

INTRODUCTION

Every essential Frank Sinatra collection contains the song "I've Got You Under My Skin." While Sinatra fans may know the words and the melody, how many of those fans understand the compensation structure behind this particular song? The answer is probably very few. The public may know that

the proceeds of any given song flow to the record company and to the recording artist. However, the compensation structure is actually more complex and involves more parties than just the recording artist and the record label.

Further, there are increasingly steady pressures, economic and otherwise, that the compensation scheme for music be dynamic to adapt to frequent changes in music delivery methods. For instance, how consumers purchase and listen to music has undergone significant changes in the last 15 years with the advent of the computer and digital music deliveries. Thus, advancing technology has an important role in further complicating the music compensation regime.

Appreciating the intricacies of music compensation requires an understanding of the development of copyright law. What follows is an explanation of the music licensing provisions of copyright law, and why enforcing rights to a song like "I've Got You Under My Skin" can sound so complex.

THE MUSIC COPYRIGHTS

Copyright Law Basic Principles

The source of federal copyright law originates with the Copyright and Patent Clause of the U.S. Constitution, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] Copyright refers to the exclusive rights granted by law to authors for the protection of original works of authorship fixed in any tangible medium of expression.[2] Original works must be captured in some form beyond a transitory duration. The types of original works eligible for copyright protection include literary, musical, dramatic, and pictorial works; motion pictures; and sound recordings.[3] Copyright is based on authorship and exists separate and apart from its physical embodiment. For example, if a person purchases a collection of books or records, the purchaser owns those particular material objects but not the rights afforded to the copyright holder.

The rights conferred on copyright holders do not last forever. Copyrights are limited in the number of years that copyright holders may exercise their exclusive rights. An author of a work may enjoy copyright protection for the

term of his or her life plus 70 additional years.[4] At the expiration of a term, the copyrighted work becomes part of the public domain. Works in the public domain are available for anyone to use without fear of infringement. The unauthorized use of a copyrighted work constitutes infringement of the particular exclusive right at issue, unless the action is permitted by a statutory exception, such as "fair use" for limited purposes.[5]

In the realm of music, there are two types of copyright: the musical work copyright and the sound recording copyright. Each of these copyrights confers a particular set of rights—some exclusive to a particular copyright holder. To understand these rights, one must first comprehend the difference between the two different copyright holders.

The Musical Work

A "musical work" is a lyrical and/or notational composition of a song, transcribed on a material object such as a sheet of paper. A holder of a musical work copyright is typically a composer, who authors the work, or a music publisher, who purchases copyrights from composers and exercises the rights of those composers.

The Sound Recording

The sound recording is the recorded version of a musician singing or playing a musical work. The Copyright Act distinguishes the terms "sound recording" and "phonorecord." A sound recording is an original work of authorship that "result[s] from the fixation[6] of a series of musical, spoken, or other sounds" in a tangible medium of expression.[7] The sound recording copyright protects the elements of original authorship expressed in a particular recorded rendition. A phonorecord is the actual physical object from which the sound recording can be perceived, reproduced, or communicated directly or with a machine's aid.[8] Examples of phonorecords include compact discs, vinyl albums, and MP3-format digital music files. A holder of a sound recording copyright is typically a recording artist or the recording artist's record label.[9]

An Example: Part One

Different rights attach to different uses and expressions of copyrighted work. The convergence of copyright interests in a sound recording is a prime illustration. Using the example of Cole Porter's song "I've Got You Under My Skin,"[10] the composer of this musical work was Cole Porter, represented by the music publisher Warner/Chappell Music, Inc.[11] Warner/Chappell Music holds the copyright in the musical work for "I've Got You Under My Skin."

When a performance of the musical work is then recorded to a phonorecord, as was done by Frank Sinatra, a new sound recording copyright attaches to the Sinatra version so captured, separate from the musical work copyright of the composer/publisher. Typically, a recording label (Reprise Records, in this example) may own the sound recording copyright.

THE EXCLUSIVE RIGHTS IN MUSIC COPYRIGHTS

The Rights of the Musical Work Copyright Holder

The Copyright Act confers discrete, exclusive rights for each type of music copyright. Holders of copyright in musical works have the right to do or to authorize the

- *reproduction* of the copyrighted musical work;
- *preparation of derivative works* based on the copyrighted musical work;
- *distribution* of the musical work to the public by sale, rental, lease or lending;
- *performance* of the musical work *publicly*; and
- *display* of the musical work *publicly*.[12]

The Rights of the Sound Recording Copyright Holder

Holders of rights in sound recordings have exclusive right to control the

- *reproduction* of the copyrighted sound recording;

- *preparation of derivative* works based on the copyrighted sound recording;
- *distribution of phonorecords* of the sound recording to the public by sale, rental, lease or lending.

In addition, holders of sound recording copyrights have a qualified and limited public performance right. The Act covers the *performance* of the sound recording *publicly* by means of a *digital* audio transmission only.[13] Thus, unlike musical work copyright holders who have robust public performance rights that apply in both digital and non-digital settings, sound recording copyright holders have no legal entitlement to control the performance of their works by non- digital means. One consequence of this lack of right is that terrestrial radio stations (AM and FM stations) that broadcast sound recordings through analog means need not compensate recording artists or record labels (or otherwise obtain their prior permission) in order to perform the work to the public (whereas all radio stations must compensate musical work copyright holders when the songs they have written are broadcast). However, transmissions of music by digital means (for example, by Internet radio broadcasters ("webcasters") or cable and satellite radio broadcasters) would trigger the performance right for the musical work copyright holder *and* the sound recording copyright holder; thus, both copyright holders would have the right to receive royalties for a performance made by digital audio transmission.[14]

An Example: Part Two

Different uses of Sinatra's "I've Got You Under My Skin" implicate the rights of the musical work copyright holder, Warner/Chappell, and the sound recording copyright holder, Reprise Records, in different ways.

As the musical work copyright holder, Warner/Chappell Music has the exclusive right, among other rights, to authorize the reproduction, distribution, and public performance of the "I've Got You Under My Skin" musical work.

As the holder of the copyright in the sound recording, Reprise Records (Sinatra's recording label) has the right to authorize the reproduction, distribution, and *digital audio* public performance of Sinatra's sound recording of "I've Got You Under My Skin."

THE TRADITIONAL LICENSING SYSTEM

Permission and the License

At the core of a copyright holder's bundle of rights is the concept of exclusivity. This exclusivity allows a copyright holder to exercise particular rights for the sole benefit of the holder. However, a copyright holder may confer these rights onto other users through permission; in some circumstances, statutes allow use by others under a specified compensation scheme.

Permission is often granted in the form of a license. In the context of copyright, a license permits a third party to do something with a copyrighted work that implicates a copyright holder's exclusive right, possibly for a fee, without concern of infringing the copyright holder's rights. Some licenses are negotiated instruments between a copyright holder and a third party (referred to as "voluntary licenses"). Other licenses are created by statute. Statutory licenses are instruments that compel copyright holders to allow others to exercise a holder's rights without negotiated permission. In copyright law, these are commonly referred to as "compulsory" licenses. When statutory requirements are satisfied by the party interested in using the copyrighted work, a compulsory license is available at statutory rates. Three Copyright Royalty Judges (CRJs) establish these copyright statutory licenses and rates.[15]

Although the music licensing system is a complex area of overlapping and sometimes competing interests and responsibilities, the essence of licensing remains in the context of permission— whether voluntarily negotiated or statutorily compelled.

The Core Rights of Music Copyright

Among the rights granted to copyright holders, three rights are essential in the music licensing context: the reproduction right, the distribution right, and the public performance right.

The right of reproduction is the right to duplicate, transcribe, imitate, or simulate a work in a fixed form. In the context of music copyrights, the right of reproduction authorizes the copying of musical works (e.g., duplicating sheet music) or sound recordings. Infringement of these rights would be the unlawful copying of the copyrighted work.

The right of distribution establishes the right to distribute copies or phonorecords of a copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.[16] In the context of music copyrights, the right of distribution permits the sale of copies (sheet music) or phonorecords (sound recordings) to the public. Infringement of this right would be any unauthorized public distribution of a copy or phonorecord.

The right of public[17] performance means the exhibition, rendition, or playing of a copyrighted work, either directly or by means of any device or process.[18] Public performance not only covers the initial rendition, but also any further act by which the rendition is transmitted or communicated to the public. In the context of music copyrights, the public performance right allows promotion and performance of the music. Infringement of this right would be the public performance of a copyrighted work without the consent of the copyright holder.

The Licensing of Reproduction and Distribution Rights

The legal landscape concerning music copyrights and licensing originates in the 1908 Supreme Court case of *White Smith v. Apollo Music*.[19] In *White Smith*, a composer challenged piano roll technology[20] as a violation of a musical work copyright holder's right to make copies of a work.[21] The Court ruled that the rolls were not copies of musical compositions, but rather component parts of a player piano machine.[22] Hence, there was no infringement of the composer's copyright.[23]

Through legislation, Congress overturned *White Smith* in 1909 by granting to musical work copyright holders the right to control the "mechanical[24] reproduction" of their works.[25] As a consequence, piano rolls would be infringements of the musical composition copyright. However, piano roll companies could still acquire the rights to make the rolls from musical work holders. To prevent monopolization by a large manufacturer of piano rolls, Congress subjected the mechanical reproduction right to a compulsory license, allowing any manufacturer of piano rolls to mechanically reproduce a musical work in exchange for a payment of a royalty fee, without negotiating with the copyright holder for permission. Thus, the compulsory license for the reproduction of musical works is commonly referred to as a "mechanical license."

Section 115 of the Copyright Act of 1976, as amended, is the current authority for a compulsory license (or a statutory mechanical license) for