Broadcast LAW BLOG

PUBLISHED BY
Davis Wright Tremaine LLP

Copyright Office Report Recommends Federalization of Pre-1972 Sound Recordings - Possible Implications For Music Royalties and User-Generated Content

January 2, 2012 by David Oxenford

The Copyright Office last week issued its **Report to Congress on pre-1972 sound recordings** (with an Executive Summary), addressing whether to bring these recordings under Federal law. As we wrote last year when the Copyright Office solicited comments on the issues raised by this report, sound recordings (i.e. aural recordings embodied in some fixed form like a CD, record or digital file) created in the United States prior to 1972 are not protected under Federal copyright law. Instead, any protections accorded to these sound recordings are under state laws. Congress, at the request of a number of archivist and music library groups, asked that the Copyright Office review the issues that would be raised by bringing these sound recordings under Federal law. Some archivists and librarians feared that, in preserving old recordings, they could run afoul of state copyright laws, and that a unified set of rules under Federal law might be easier to follow. Why is this issue more broadly important to the music community? For internet radio station operators, it is because the proposals to Federalize all such recordings could have an impact on digital performance royalties (as there does not appear to be any public performance right in sound recordings under state laws and, under current law, these recordings would not be covered under the **SoundExchange royalties** that most noninteractive services play). The Report is also significant in that it raises questions about copyright laws dealing with **user-generated content**, specifically whether the DMCA safe harbor provisions protecting the operators of Internet service companies from copyright liability for the content posted by third parties apply to pre-1972 sound recordings.

This is only a report to Congress, and such reports have no binding impact. Instead, they merely set out the position of the authors of the report from the Copyright Office. Such reports are also cited as evidence in court cases as to what the Office believes the current state of the law to be. The Office has written a number of reports over the years making suggestions about how copyrights should be administered and, given the complexity of copyright law and the competing interests affected by any revisions to the laws, many of their proposals have never been implemented. This report suggests that pre-1972 sound recordings be brought under Federal laws. Specifically, the report suggests that current copyright holders get protection for most pre-1972 works until 2067 (when state law protections are to run out under the current law, allowing the works to move into the public domain). The protections would be accorded to works that are used by the copyright holder (sold at some reasonable price) and registered with the Copyright Office at some point after a law implementing its proposals became effective. Works from prior to 1923 would be subject to a similar use and registration process, but would only get 25 years of additional protection. Seemingly, protections for works that are not

registered would pass into the public domain after the applicable registration period expires. For some webcasting companies, this change could have an immediate impact.

Some webcasting companies have taken the position that there is no obligation to pay SoundExchange performance royalties for pre-1972 sound recordings, as these recordings do not fall under Federal law, and the various states have not specifically adopted any sort of performance royalty obligation (and, even if such a state right could somewhere be found, there is no agreement with SoundExchange to act as a collective for any such rights). Many smaller webcasters may have continued to pay for these recordings as it may take too much trouble to figure out which recordings are outside the SoundExchange royalty structure (and it is particularly difficult as recordings from prior to 1972 first released outside the US are already covered under Federal law). Others may be concerned about claims by the record labels that the digitization of pre-1972 works created a new copyrighted work subject to Federal copyright law. However, other webcasting services have concluded that these works are not subject to any SoundExchange fees and reduced their royalty obligations accordingly. The Copyright Office report did not dispute the conclusion that no SoundExchange royalty is due on pre-1972 sound recordings, and did not conclude that there is any obligation under state law to pay a performance royalty, but nevertheless suggested that the Federalization would benefit webcasting services by clearing up any ambiguity as to whether they may owe some performance royalty, or any royalties for the ephemeral copies made in the digital transmission process (as we've written before, the ephemeral copies made in the transmission process are included under Section 112 of the Copyright Act in the royalties paid to SoundExchange for post-1972 sound recordings).

On another issue, the Report goes out of its way to suggest that safe harbor protections of Section 512 of the Copyright Act for User Generated Content do not apply to pre-1972 sound recordings. The Report takes the position that the DMCA safe harbor is one that applies only to copyrights under Federal law, and since pre-1972 sound recordings are not covered under Federal law, then the safe harbor doesn't apply to them. The Report takes issue with a recent US District Court decision in a case involving MP3Tunes that took exactly to opposite position - finding that the safe harbor was intended to protect website owners from liability for content uploaded by its users, and that excluding pre-1972 sound recordings from its coverage would be contrary to that purpose. The Report did not take a position as to whether such user-generated content would be covered under Section 230 of the Communications Decency Act (which provides a similar safe harbor to an Internet service provider for most user-generated content under other laws, but which specifically excludes intellectual property issues from its scope). Because of its position that Section 512 does not currently cover pre-1972 sound recordings, the Copyright Office saw the extension of Federal law to these recordings as protecting Internet service providers by extending Section 512 protections to any user-generated uses of these recordings.

The Report even expresses some sympathy for the position taken by copyright holders that the current process for the safe harbor rules should be re-examined as they may be too cumbersome for copyright holders to use. When copyright holders discover user-generated

content that infringes on their rights, they must provide take-down notices to site owners asking that it be removed from the site. Some copyright holders contend that sites with large amounts of content (like YouTube) and the number of site hosting such content across the web make the notice and take down process too difficult and time-consuming to provide real protection for copyrighted material. This is an issue much debated in other circles (see for instance the contentious debate over SOPA) that we'll tackle in a future post. But it was interesting that the Copyright Office addressed this point in a report having little to do with that debate.

As we said in comments we filed for a client in the matter, the objective of this proceeding was both to protect copyright holders and to make it easier to preserve and disseminate pre-1972 sound recordings. Does the proposed Federalization accomplish this, or does it provide more disincentive for the use of many of these recordings by webcasters and others who would have to pay performance royalties for content that currently have no such royalties attached? Content creators prior to 1972 did not have an expectation of a sound recording performance royalty (which wasn't established in the US until 1995), and certainly the adoption of such a right can't (without the use of a time machine) create any financial incentive for the the creation of more pre-1972 recordings. This report is likely to be just one volley set in a series of debates over copyrights that is occurring in Congress and the Courts now, and will likely continue over the coming years as old and new media struggle to adopt to the implications of these increasingly digital media world.