What’s Up with Music Copyrights?
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Overview

• Some Basics of Music Copyrights
• Music Modernization Act
• Recent high-profile litigation
Music Copyright Basics – two ©s

1. Musical works  -notes & lyrics (fixed in “copies”)
   Added to federal copyright in 1831
   - Reproduction & Distribution
     - Sheet music
     - Recordings
     - § 115 mechanical compulsory license (“cover” recordings)
   - Public Performance
     - Broad general rights
     - Licensed by PROs (e.g. ASCAP)

2. Sound Recordings
   (fixed in “phonorecords”)
   Added to federal copyright 1972
   - Reproduction & Distribution (and deriv.)
     - Rights do not include “sound alikes”
   - Public Performance
     - Only § 106(6): “by means of a digital audio transmission”
     - § 114 statutory license for non-interactive streaming services (Admin. by SoundExchange)
The Music Modernization Act

- **Title I: Musical Works Modernization Act**
  - Creates a “blanket license” under § 115 for certain digital uses of musical works
  - New entity, the “mechanical licensing collective,” will administer the § 115 license (and has related obligations)
- **Title II: Classics Protection and Access Act**
  - Pre-1972 sound recordings: provides rights under the federal copyright system and subjects those rights to the compulsory licenses of the Copyright Act (esp. § 114 license (streaming)).
- **Title III: Allocation for Music Producers Act**
  - Potential for some producers, mixers, and sound engineers to obtain a small portion of compulsory license revenue for digital public performance rights for sound recordings (Sound Exchange collected).
**Music Modernization Act**

- **Complex** deals worked out by industry insiders to “fix” aspects of the licensing markets viewed as broken
  - Added to the Copyright Act: 24,072 words
  - The Copyright Act of 1976: 33,759 words
- **Title I** – Musical Work Modernization Act (MWMA)
  - Complex licensing agreement for musical works codified in the statute
    - 18,500 words total
    - Section 115 mechanical licenses – created a new “blanket license” 2,742 words → 18,324 words
      - Musical works
      - Mechanical copies
      - “covered activities” (key part: interactive streaming)
Blanket License – the cozy side  
(what each side got)

- Streaming services: path to licensing all musical works  
  - Includes “unmatched works,” i.e. those works for whom the copyright owner is unknown or cannot be located

- MW copyright owners: (presumably) higher royalty than before  
  - Adjustments to rate setting standards used by the Copyright Royalty Judges  
  - Seeking: rates similar to SR rates (albeit for Pub. Performances)

Blanket License – the scratchy side

- Mechanical Licensing Collective (MLC)  
  - Designated by the Copyright Office  
    - Music Licensing Collective, Inc. designated in July, 2019  
    - Sponsored by the NMPA  
  - Paid for by the streaming services

- Royalties for unmatched works – held for 3 yrs:  
  - “equitably distributed to known copyright owners”

- Transaction costs problem “solved”  
  - By calling “interactive streaming” a mechanical copy!

- Parity (with SR) fallacy
### Equality and Fairness?

#### Reproduction and distribution

<table>
<thead>
<tr>
<th></th>
<th>Interactive Streaming</th>
<th>Non-interactive Streaming</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Musical Works</strong></td>
<td>§115 Mechanical Copy (!) (willing buyer/willing seller standard)</td>
<td>Not a mechanical copy – no license needed</td>
</tr>
<tr>
<td>(songwriters)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Sound Recordings</strong></td>
<td>?? (presumably taken into account in the arms-length agreements)</td>
<td>§112(e) statutory license</td>
</tr>
<tr>
<td>(performing artists)</td>
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### Equality and Fairness?

#### Public Performance

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<th>Non-interactive Streaming</th>
<th>Non-digital transmission</th>
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<td><strong>Musical Works</strong></td>
<td>PROs ASCAP/BMI (antitrust decree supervision)</td>
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<td><strong>Sound Recordings</strong></td>
<td>Arms-Length Deals (Sound Exchange-administrator only)</td>
<td>Statutory License – §114 (willing buyer/willing seller standard)</td>
<td>No Rights!</td>
</tr>
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<td>(performing artists)</td>
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<td>Sound Exchange</td>
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Title II: Classics Protection and Access Act

- New Chapter 14 of Title 17: “Unauthorized Use of Pre-1972 Sound Recordings”
  - Pre-1972: prior to February 15, 1972
  - Previously: state law copyrights
- Entitled to rights & remedies for “covered activities”
  - § 106 rights, § 602 rights, violations of § 1201 and § 1202
- DMCA Notice-and-takedown applies to pre-72 SR (§ 1401(f))
CPA Act - notables

• Rights are granted to whoever owns the reproduction right under state law at time of enactment
  – Subsequent transfers are subject to 201 & 204 requirements (signed writings)
  – No termination of transfers for transfers prior to enactment
• Recording rules to be eligible for statutory damages-recording with the copyright office
• Duration: 95 years from publication + “transition periods” of 3 to 15 years

Equality and Fairness?
Pre and Post 1972 Sound Recordings

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<tr>
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<th>Digital streaming royalty payments- non-interactive</th>
<th>Digital streaming royalty payments- interactive</th>
<th>Termination Rights</th>
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<tr>
<td>Pre-72</td>
<td>Direct payments to performing artists</td>
<td>Direct payments to performing artists</td>
<td>None</td>
</tr>
<tr>
<td>Post-72</td>
<td>Direct payments to performing artists</td>
<td>No requirements (arms-length agreements)</td>
<td>1972-1976: §304 terminations</td>
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<td></td>
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<td>§203 terminations</td>
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<td>1978-present: §203 terminations</td>
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Recent high-profile musical work cases

- Concluded litigation
  - Marvin Gaye v. Robin Thicke & Pharell Williams

- On-going litigation
  - Led Zeppelin – *Stairway to Heaven*
  - Ed Sheeran – *Thinking Out Loud*
  - Taylor Swift – *Shake it Off*
  - Katy Parry – *Dark Horse*

**Williams v. Gaye**, 895 F.3d 1106 (9th Cir. 2018)

- Claim: *Blurred Lines* copied elements of Marvin Gaye’s 1977 hit *Got to Give it Up*
- Jury trial (March 2015): $7.3 million jury award
  - Judge reduced to $5.3 million
  - Ninth Cir. upheld the verdict (except as to two defendants – remanded)
- Amended judgement (December 2018): $5 million + 50% songwriter and publisher revenue going forward
Skidmore v. Zeppelin

  – Jury verdict: insufficient similarity for improper appropriation
  – Ninth Cir. Panel vacated and remanded for new trial (Sept. 2018)
  – En Banc granted – oral argument heard 9/23/19

Skidmore v. Zeppelin

• Issue #1: Scope of protection for “unpublished” musical works under the 1909 Act
  – 1909 Act federal protection begins:
    • Upon publication with proper notice, or
    • Upon registration of an unpublished work*
  – Distribution of phonorecords is not a publication of the musical work (17 U.S.C. 303(b))
  – *Taurus* was registered with sheet music deposit
Skidmore v. Zeppelin

Issue #1: Scope of protection for “unpublished” musical works under the 1909 Act

- Dis. Ct. ruled: deposit copy defines scope of protection (original panel: affirmed)
  - En banc judges seemed inclined to affirm
- Dis. Ct. ruled: recording of Taurus could not be played ~ would be too prejudicial FRE 403
- Original 9th Cir. panel: abuse of discretion – limiting instruction can reduce prejudice

Skidmore v. Zeppelin

Issue #2: Jury instructions on selection and arrangement of unprotected elements, and on originality

- Dis. Ct. did not give jury instruction on S&A (both sides offered one)
  - Original panel: error requires a new trial
  - En Banc: focus at oral argument on whether plaintiff waived this objection
**Skidmore v. Zeppelin – why now?**

  - Laches is not a defense where infringement is ongoing
  - The “rolling statute of limitations” – each new reproduction made, copy distributed, public performance, etc. is a new act of infringement
- Damages reachback is limited to 3 years (statute of limitations)

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**Townsend v. Sheeran – S.D.N.Y.**

- Claim: Sheeran’s *Thinking Out Loud* copied major harmonic progressions and rhythmic elements from Marvin Gaye’s 1973 “Let’s Get it On” (Townsend co-wrote)
  - 1973: has the same 1909 Act deposit copy issue
- Judge Louis Staton canceled a scheduled September 2019 jury trial – waiting for en banc ruling in Skidmore v. Zeppelin
Hall v. Swift – C.D. Calif. 2018

• Claim: Swift’s *Shake it Off* copied two phrases from lyrics of plaintiffs’ song: “Playas, they gonna play / And haters, they gonna hate”
  – *Shake it Off*: “Cause the players gonna play, play, play, play / And the haters gonna hate, hate, hate, hate, hate

• Dis. Ct: 12(b)(6) dismissal granted- “no reason to delay the inevitable”
  – too brief, unoriginal, and uncreative to warrant protection under the Copyright Act.

Hall v. Swift -9th Cir.2019

• October 28, 2019 – reversed & remanded:
• “By concluding that, ‘for such short phrases to be protected under the Copyright Act, they must be more creative than the lyrics at issues here,’ the district court constituted itself as the final judge of the worth of an expressive work.”

• Unpublished Memorandum decision, non-precedential U.S.Ct. of App. 9th Cir. Rule 36-3

• Claim: Katy Perry’s song *Dark Horse* copied elements of plaintiff’s 2008 song “Joyful Noise”
  – Jury trial July 2019: $2.7 million – 22.5% of profits attributable to the musical passage infringed
  – Appeal filed October, 2019

Resources

Books:
• Donald S. Passman, *All You Need to Know About the Music Business* (10th Ed. 2019)

Articles:

Three Blog posts by Prof. Tyler Ochoa: