Music Copyright: Unraveling the Weirdness

By

Stephen M. Wolfson

stephen.wolfson@unt.edu

I. Music copyright: Background

If you spend even a little time looking into how copyright law works for music, you’ll soon find out that it’s a bit wonky. Then, if you dig deeper, you’ll see that it’s even wonkier than you first realized. Why is the law like this? How did this happen? And how do we make sense of it? I hope to unravel music copyright a bit, and with luck you will be better able to navigate the world of music copyright in the end.

Let’s start by looking at the two -- yes two! -- different music copyrights. Normally, when you read a book, look at a painting, or watch a movie, you’re experiencing just one copyrighted work. In the language of 17 USC 102, these are literary works, pictorial works, and motion pictures. The same is not true, however, for music you hear on the radio, Spotify, or SiriusXM. When you’re listening to recorded music, you’re actually hearing two separate works: a musical work and a sound recording.

So, what are musical works? Copyright law, like many statutes, has a definition section that provides guidance on how to understand the terms the law uses. Unfortunately, however, the statute does not explain what 17 USC 102 means by a “musical work[s], including any accompanying words.” When Congress passed the 1976 Act, it believed the meaning of a “musical work” was clear, so it did not create a statutory definition in the law. Fortunately for us, it is fairly easy to understand what musical works are. Simply stated, they are the parts of musical pieces that are written on a page. That is, the notes, lyrics, and any other notation created by songwriters.

What, then, are sound recordings? Unlike musical works, 17 USC 101 offers some clarity, here. According to the law, sound recordings are: “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a

---

1This is the section of the law that tells us what types of works copyright protects.
217 USC 102(a)(1).
317 USC 102(a)(5).
417 USC 102(a)(6).
517 USC 102(a)(2).
617 USC 102(a)(7).
717 USC 101.
817 USC 102(a)(6).
motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” Breaking that down, it means that sound recordings are the specific recorded performances of music/sounds. Contrasted with musical works, they are not what is on the page; instead they are the performed and recorded expression of that work. Note that sound recordings can exist without an underlying musical work -- for example, a recording of a jam session -- but it’s probably most common for sound recordings to be recorded performances of musical works. Get it?

Adding to the oddness of music copyright, the law gives musical works different protections from sound recordings. Looking at 17 USC 106, we see that authors of musical works have the right to control the reproduction, creation of derivative works, distribution, public performance, and public display of these works. Concurrently, authors of sound recordings have the right to control the reproduction, creation of derivative works, distribution, and public performance but only by digital audio transmission. One consequence of this is that when you hear a song on terrestrial radio, the only person who has rights over the performance of that song is the owner of the musical work. Meanwhile, if your hear the same song on SiriusXM, both the owners of the musical work and the sound recording have rights over that performance. As such, traditional radio stations only have to license the rights for musical works, but satellite and internet radio stations have to get licenses for both musical works and sound recordings.

This dichotomy between how the law treats musical works and sound recordings stems from copyright’s history vis-a-vis the history of recording technology. In the past, copyright was very different than it is today. Not only was its scope narrower -- protecting fewer categories of works for a shorter duration -- but also there were both state and federal laws protecting artistic works. As such, Congress did not provide protection for musical works until 1831. Meanwhile, sound recordings didn’t even exist at this time. The first sound recording was not made until 1860 and phonorecords were not developed until 1877.\(^9\) So, in 1909, when Congress passed the direct precursor to our current law, it continued protecting musical works, but did not include sound recordings.

Over time, however, as sound recordings grew more common, it became obvious that the law should protect these works. So, Congress extended copyright protection to sound recordings with the Sound Recording Act of 1971, but it only did so prospectively. All works created after February 15, 1972 came under federal law with this statute, but all works created before this date were still subject to the common laws of all fifty states.

\(^9\) See [https://www.copyright.gov/docs/sound/pre-72-report.pdf](https://www.copyright.gov/docs/sound/pre-72-report.pdf).
Moreover, in 1976, when Congress passed our current law, and essentially eliminated state copyright law by federalizing the whole system, it did not do so for sound recordings created before 1972. Instead, it left these works under the scope of state law, stating that they will enter the public domain on February 15, 2067 -- 95 years after the 1971 act took effect. Indeed, even sound recordings produced before 1923 -- the magical date before which works are supposed to be in the public domain -- are still protected by copyright for another 40 years! What is more, the 1976 Act did not create a performance right for sound recordings. These works only received their limited, digital transmission performance right in 1995.  

Ultimately, we’re left with a system for copyright over music that is a bit counterintuitive when you know how the law operates for other types of works. For our purposes, the most important things for you to remember are that there are differences between musical works and sound recordings and that we can’t assume any sound recording is in the public domain -- even sound recordings from before 1923.

II. Music licensing

One consequence of these differences between musical works and sound recordings is that music licensing is also bit wonky. In this section, I will address several ways that licensing is unique for music copyright and introduce four licenses that are common in this space.

Before we dive into specific licenses, however, we should discuss what we mean by the term “license.” In particular, since people often use this word when talking about copyright, we need to be clear about what it means in this context. A copyright license is a contract to use a work in certain limited ways. Because copyright grants authors a “bundle of rights” over their works, rights holders can choose how other people can use any or all of those rights without giving away their entire copyrights. They use licenses to do this.

Some of the most common copyright licenses are those from Creative Commons (CC). Though people often think about CC licenses as the easily identifiable images that are attached to some works -- like this -- it can be easy to forget about the “legal code” that gives this image its force. The image is not the license itself, but instead it is a message to the world that a work falls under the “Creative Commons

---

11 In case you forgot, these are: Reproduction, creation of derivative works, distribution, public display, public performance, and public performance by digital transmission for sound recordings.
A. Performing Rights Organizations

One way that music licensing is different from licensing for other types of works is the prevalence and importance of Performing Rights Organizations (PROs). PROs manage and administer licenses and collect royalties for groups of music copyright holders. Normally, if you want to license a work, you would ask the rights holder directly. With music, however, you would likely have to work with a PRO.

ASCAP, the oldest PRO, was founded in 1914 to deal with an issue created by the 1909 Act. Even though that law gave performance rights to musical works, it was very hard for copyright owners to enforce these rights. ASCAP provided a way to manage rights and to collect royalties for these works. Today, this organization represents over 650,000 songwriters, composers, and publishers, and has the rights to license over 11.5 million songs. Other major PROs are: BMI, SESAC, SoundExchange, and the Harry Fox Agency.

B. Copyright’s Statutory License

While most music licensing goes through PROs, copyright law also has a license built into the law itself. This statutory license for musical works is in 17 USC 115. According to section 115, if authors of “nondramatic musical works” (so not including things like musical theatre) distribute their works to the public, third parties can use those pieces of music, as long as they follow some guidelines. These include: you have to give notice to the copyright holder, you have to pay royalties that are established by the Copyright Royalty Board, and you can’t change the song from the original too much.

Note that this license only applies to musical works. There is no similar statutory license for sound recordings. In order to license sound recordings, you still need to work with the authors or a PRO.

C. Mechanical License

---

12 See The CC BY legal code, here: https://creativecommons.org/licenses/by/4.0/legalcode.
13 See https://www.ascap.com/about-us.
14 Copyright has several other statutory licenses, as well.
15 Unfortunately, there is no guidance on how much is too much.
Mechanical licenses give users the right to reproduce and distribute musical works. It’s probably easiest to think of mechanical licenses as either licenses to record covers of songs or to distribute the original musical works themselves. The Harry Fox Agency is the primary PRO for mechanical licenses.

D. Sync Licenses

Synchronization licenses, commonly called “sync” licenses,” give the right to use a piece of music as part of a soundtrack for a movie, television show, video game, or something similar. Sometimes PROs refer to this as the “sync right”\(^\text{16}\), but this is really an extension of the reproduction and/or derivative work right.\(^\text{17}\) These licenses are usually managed by PROs like ASCAP and BMI.

E. Digital performance license

Because sound recordings only have a copyright interest in digital transmissions, and not other types of public performances, PROs offer “digital performance licenses.” Sound Exchange manages digital performance rights for many recording artists.

III. The Future of Music Copyright

In 2018, we’re celebrating the 40th anniversary of our current copyright law taking effect, and it’s certainly showing its age. Though I have often said that I doubt we will see major copyright reform in the near future, there are a few pieces of legislation currently under consideration that could change how copyright treats music, at least a bit. I will briefly review three, below.

The CLASSICS Act

Introduced by Chris Coons (D-Del.) and John Kennedy (R-Louis.) in the Senate and Jerrold Nadler (D-NY) and Darrell Issa (R-CA) in the House of Representatives, the Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act (CLASSICS Act), aims to bring pre-1972 sound recordings more under federal copyright law then they currently are. To do so, it creates a digital performance right for pre-1972 sound recordings, and ensures that certain safe harbor provisions -- like the DMCA safe harbor and fair use/reproduction by libraries -- applies to these works.

\(^{16}\)See https://www.ascap.com/help/ascap-licensing/licensing-terms-defined.

The Music Modernization Act

The Music Modernization Act (MMA) addresses a problem with licensing music for streaming services like Spotify. Currently, it is very difficult for PROs to accurately manage licenses and royalty revenues for song played on streaming services. To address this problem, the MMA creates a blanket mechanical license for musical works along with an independent non-profit organization to manage royalties under the new system. The law also creates a database of information about musical works to help people identify rights holders and properly license usage.

Transparency in Music Licensing and Ownership Act

Representative Jim Sensenbrenner (R-WI) introduced the Transparency in Music Licensing and Ownership Act into the House in July 2017. If this bill becomes law, it would create a database of non-dramatic musical works and sound recordings that collects and provides information about their owners. To encourage authors to put their information into the database, this bill would limit the remedies available to people who do not do so. As such, if someone does not put their information into the database, they would only be able to sue for actual damages\(^{18}\) or injunctive relief.\(^{19}\)

---

\(^{18}\)Actual damages are the actual amount of money lost due to the infringement.

\(^{19}\)An injunction is an order by a court to stop an action.