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ECONOMIC JUSTICE: COPYRIGHT OWNERS, PERFORMERS, AND USERS

EDWARD SAMUELS*

INTRODUCTION

In recent years, most of the literature in the field of copyright has focused upon the rights of copyright owners versus the rights of copyright users. Although many others involved in the field of copyright seem to think that the balance has shifted in recent years either too much in favor of the copyright owners, or too much in favor of the copyright users, I believe that Congress has achieved a basically fair balance between the two extremes.

What I'd like to explore today, however, is a different perspective that generally doesn't receive a lot of attention. I'm talking about the role of *performers* of copyrighted works, primarily recording artists. In theory, musicians are creators, or at least contribute to the creation, of many of the works that we enjoy. Music is written to be performed: it is practically worthless without the talented people who convert the abstract "musical" compositions into the performances that we hear and enjoy, either live or through recordings. So you might expect that copyright law would protect these co-creators of the works.

Yet, the sad fact is that musicians have not been served well by the laws of copyright. Although performers are creators, they usually perform other people's works. Under the laws of copyright, their interests are generally subordinate to the rights of the composers of the music they perform and to the rights of the recording companies that control the creation of the physical recordings.

There are three major themes that emerge from the history of how copyright law treats performers of musical works. First, it has not protected the performers very well. Second, there have been several developments that were designed to create better rights for those who create sound recordings. And third, for various reasons, the perform-

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ers have not usually gotten the benefits of such developments. Due partly to recent organizing and lobbying efforts by the recording artists themselves, the situation may be changing.

PERFORMANCE RIGHTS IN MUSIC

Music wasn't protected under federal copyright law in the United States until 1831. In that year, Congress extended copyright to include music; but the right only covered the printing or sale of sheet music. In 1897, Congress for the first time created a performance right in musical works. This performance right granted the composers the exclusive right to "perform" (or to license for performance) their music publicly.¹ This amendment was great for the composers, who were thus encouraged to write music; but it didn't protect the rights of performers, who in fact now had to pay licenses to publicly perform the songs that were written by others.

RIGHT TO MAKE SOUND RECORDINGS

Back in 1909, Congress extended copyright in musical works to include the exclusive right to make mechanical reproductions of the music. However, fearing that a few companies might buy up many of the copyrights in musical works and extend their monopoly in musical works to a monopoly in sound recordings, Congress provided for what has come to be known as a "compulsory license". Under the compulsory license, any composer of a musical work can decide whether or not to allow anyone to make a recording of the song, and may charge the first performer whatever they can for the privilege of making the first recording. But after that first recording, anyone else may make their own recording of the same song for a set fee, initially set in the 1909 statute at 2 cents per song, and gradually increased to 8 cents per song in 2002.²

In theory, the compulsory license helps performers by allowing them to make sound recordings of songs at set fees, so that the performers have access to the whole body of musical works when they make their recordings. However, the sound recording compulsory li-

1. Today, musical works are protected under 17 U.S.C. § 102 (2002), and the exclusive right to perform such works publicly is protected under 17 U.S.C. § 106 (2002).

2. The 1909 provision was contained in the prior 17 U.S.C. § 1(e), and is continued in the current 17 U.S.C. § 115 (2002).

cense can backfire on recording artists in several ways. First, most recording contracts provide that the artist has to pay the compulsory licensing fees from the artist's portion of the profits, which can frequently swallow up a large portion of the artist's potential profits. Second, the standard record contract treats as a "controlled composition" a musical work that was written by the performing artist, and usually provides that the artist, as composer, receives a lower fee for the "compulsory license" than would a separate composer. And third, if a performer records a hit, the compulsory license allows other performers to record the same song, sometimes with greater success than the original recording artist.

SOUND RECORDINGS

In 1972, largely in response to rampant record and tape piracy, Congress provided that sound recordings were eligible for copyright, in addition to the musical works that existed on the sound recordings. Since the performers are co-creators of the sound recordings, you might expect that they would end up owning at least a portion of the "sound recording" copyright. But that's not the way it works in the music business.

The culprit that undermines the rights of performers in this case is the "work made for hire" doctrine. Most standard recording contracts (as well as contracts in some other industries) provide that performers are "hired" to create a copyrighted work that is owned by the company. In 1976, Congress tightened the copyright statute's definition of "works for hire" to assure that fewer works would be treated as works for hire.³ In particular, the doctrine would only apply for actual employees of companies, and for "independent contractors" in certain specified contexts. These specified contexts did not list "sound recordings," so that a party preparing a sound recording would not be treated as a worker for hire unless actually employed by the sound recording company (which most recording artists are not).

Notwithstanding the tightening of the rules, the recording industry pretty much continued to treat most recording artist contracts as "works for hire." In 1999, the industry even got an amendment passed by Congress that added "sound recordings" to the list of works that could be treated as works for hire. After complaints by music artists,

3. The works for hire rule is embodied in 17 U.S.C. § 201(b), and in the definition of "works made for hire" under 17 U.S.C. §101.

Congress repealed the change in 2000, leading to one of the most convoluted definitions in the current act. The definition of “work made for hire” provides that consideration shall not be given to the amendment or its repeal in defining the term, and the paragraph “shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999 . . . were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.”⁴ What? You can excuse the recording artists if they are a bit cynical about Congress’s passing the amendment in the first place.

In any event, most recording artist contracts provide that if the work for any reason is not a “work for hire”, the performer still grants any rights of copyright to the recording company that finances the recording. The performers get whatever payment or royalties they are in a position to negotiate with the recording companies. The successful artists get pretty good payments, and the unsuccessful artists make whatever deals they have to make to get the companies to sign them on.

LEGAL DOCTRINES OUTSIDE OF COPYRIGHT: CONTRACTS

In addition to the works-for-hire provision, one of the onerous provisions included in most sound recording contracts is one obligating the performer to produce the next two, five, seven or more albums for the same recording company. The recording companies argue that this provision is necessary to protect their investments in musical groups. Since many or most musical groups don’t start making money for years, the recording companies would not invest in new musical groups if they didn’t have some assurance that they could make money from the later works when the groups make it big.

Recently, several music groups held a “protest” concert opposite the Grammy awards, lobbying for a change in California contract law. Under California law, service contracts are generally limited to a seven-year term.⁵ (This is the law that eventually freed many actors from the

4. 17 U.S.C. § 101 (definition of “work made for hire”).

5. The California Labor Code provides:

“(a) Except as otherwise provided in subdivision (b), a contract to render personal service, other than a contract of apprenticeship . . . may not be enforced against the employee beyond seven years from the commencement of service under it. . . .” Cal. Lab. Code § 2855 (2002).

old “movie studio” system, under which actors had been tied up in long-term contracts with their studios, and were unable to obtain “free agency” to work for other studios.)⁶ The music industry, however, managed to get an amendment to the state law. Under that amendment, if a recording artist has a contract that requires the making of a certain number of recordings, and if the recording artist invokes the law to terminate the contract after the seven-year period, the “employer” may sue for the nondelivery of the remaining recordings.⁷ This amendment effectively made the seven-year term unavailable to most recording artists.

So, one way for artists to protect their negotiating position with the record companies is by specific state laws that prohibit particular unconscionable terms, such as long-term service contracts that bind the performers to a particular company. Other general doctrines of contract law, such as the doctrine of unconscionability, could also be used to police against harsh contracts in particular cases.⁸

6. See *De Haviland v. Warner Bros. Pictures*, 153 P.2d 983 (Cal. Dist. Ct. App. 1944).

7. The California Labor Code provides:

(b) Notwithstanding subdivision (a):

(1) Any employee who is a party to a contract to render personal service in the production of phonorecords in which sounds are first fixed, as defined in Section 101 of Title 17 of the United States Code, may not invoke the provisions of subdivision (a) without first giving written notice to the employer in accordance with Section 1020 of the Code of Civil Procedure, specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision (a).

(2) Any party to such a contract shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable period prescribed by law.

(3) In the event a party to such a contract is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action which, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.

Cal. Lab. Code § 2855 (2002).

8. As the California protest demonstrates, sometimes collective action is more effective than individual actions. The protest concert was sponsored by the Recording Artists' Coalition, a new organization designed to promote and lobby for recording artists' rights. You can find out about the organization and some of its lobbying efforts available at www.recordingartistscoalition.com.

ROYALTIES FROM DIGITAL AUDIO HOME RECORDING

In 1992, Congress passed the Digital Audio Home Recording Act. It created another compulsory license, this time to provide a fund of money to compensate copyright owners whose works were being copied using the new digital audio recording devices. The revenues raised from the compulsory license would be split 1/3 for the owners of the copyrights of songs, and 2/3 for the "sound recordings fund". For the first time in the history of copyright, a certain percentage of this fund (a bit over 40% of the sound recording fund) was to be paid not to the copyright owners of the sound recordings, but to the "musicians" and "vocalists" who performed on the sound recordings, regardless of their pre-existing contractual arrangements.⁹ The only problem with this amendment was that very few people bought the digital audio recording devices contemplated in the statute. Congress apparently did not foresee that most home recording of sound recordings would take place using home computers, which were not covered by the amendment.¹⁰

ROYALTIES FROM INTERNET WEBCASTING

Realizing that the new technology that was catching on like crazy was not the digital audio home recorders, but the Internet, Congress in 1995 passed the Performance Rights in Sound Recordings Act. This act for the first time provided for an exclusive digital performance right for sound recordings. The amendment, among other things, governs the "webcasting," or "streaming," of music on the Internet. Although quite complicated, the amendment does provide for a limited compulsory license for certain non-interactive streaming of music on the Internet. For only the second time in history, Congress included "musicians" and "vocalists" as parties entitled to participate in the funds generated from a compulsory license.¹¹ The musicians and vocalists will receive half of the money generated from the webcasting of sound recordings under the compulsory license. Curiously, however,

9. The Digital Audio Home Recording Act added chapter 10 to 17 U.S.C. The allocation of funds is provided in 17 U.S.C. §1006 (b).

10. *See Ass'n of America v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) (holding that the amendment did not apply to the Rio MP3 player, one of the most popular new technologies for recording music).

11. The relevant portion of the Performance Rights in Sound Recordings Act is 17 U.S.C. § 114 (g), setting out the percentages to be shared by the various parties under the new compulsory license.

the recording artists are relegated to their usually less favorable contract if the webcasting is “interactive”, or otherwise subject to full licensing by the sound recording copyright owner.

The copyright arbitration royalty panel recently recommended what it considered “reasonable” fees for the webcasts covered by the compulsory licenses. These amounted to 14/100 cent per transmission of a sound recording (or 7/100 cent if the webcast is of a regular radio broadcast of the sound recording). This amounts to about 2 to 3 cents per hour per person to whom the sound recording is transmitted. Many commentators, however, arguing that these fees will add up to hundreds of thousands of dollars for some Internet sites, have protested loudly that the rates are too high, and have urged the Librarian of Congress not to accept the panel’s rates.¹²

So, the recording artists finally get a piece of the pie through a compulsory license that is meant to generate some modest revenue, and what happens? Everybody’s screaming that the fees are too high, and that they should be set low enough to encourage the liberal development of new “business models” for delivering music on the Internet. If the Librarian of Congress, or Congress itself, should pull back on the fees, it will be the performers, again, who will lose out.

CONCLUSION

Performers to some extent have been indirect beneficiaries of the copyrights owned by the recording companies, since the performers do depend, to a large extent, on the income generated by the sale of their recordings. But the performers more often than not end up on the short end of the revenue flow.

12. On July 8, 2002, the Library of Congress issued a final rule and order adopting a uniform rate of 7/100 cent for all webcast transmissions coming under the compulsory license. *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240 (July 8, 2002) (to be codified at 37 C.F.R. pt. 261), available at <http://www.copyright.gov/fedreg/2002/67fr45239.html>. On December 2, 2002, President Bush signed into law the Small Webcaster Settlement Agreement of 2002 (P.L. 107-321); and on December 24, 2002, the Copyright Office published a notification of agreement under that act (available at www.copyright.gov/carp/webcasting_rates.html). The new rates, negotiated between Sound Exchange and Voice of Webcasters, allows eligible small webcasters to pay an alternative (presumably lesser) royalty rate, amounting to 8% of the webcaster’s gross revenues, or 5% of the webcaster’s expenses during the relevant period, whichever is greater, with other limitations designed to provide at least a minimum fee of \$500 for 1998, and \$2,000 per year for 1999 through 2002.

I don't expect you to fully understand the complicated copyright provisions based upon this cursory description. (You might take a look at my book, *The Illustrated Story of Copyright*, for a more thorough review of some of the copyright principles described briefly here.) But performers have had some success in getting Congress to at least consider the impact of copyright laws on them, and in limited contexts to actually allow the recording artists to participate in funds realized from the creation of new rights in the digital performance of sound recordings. I encourage Congress, the state legislatures, the courts, and the recording companies to be sympathetic to the complaints made by sound recording artists, so that the artists can at least share in some of the revenue flowing from their contributions.