

Introduction to the compulsory licensing mechanism of US music copyrights

With digital music industry rising and flourishing these years, in 1995 the US Congress amended the compulsory licensing regulations in the US Copyright Act to include digital music service in the scope of compulsory licensing. By doing so, it tries to save the industry from deprivation in copyright negotiations and to prevent detrimental effects on music circulation. By introducing the compulsory licensing regulations for music copyrights in the US Copyright Act, this paper wishes to provide a reference for the Taiwanese government to amend Taiwan's copyright act to promote the development of the digital music industry.

I. Exclusive rights in digital music copyright

According to the US Copyright, the copyright owner has the exclusive rights to do and to authorize any of the following¹:

- To reproduce the copyrighted work in copies or phonorecords;
- To prepare derivative works based upon the copyrighted work;
- To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- In case of sound recordings, to perform the copyrighted work publicly by means of digital music transfer.

If it is to be enforced by law that musical works can only be provided after the approval and authorization of the copyright owner, this will be unfavorable for the circulation of musical works. In terms of users, this may mean additional difficulties in providing musical works. Therefore, in addition to negotiating with the copyright owner of the licensing affairs, the US Copyright Act prescribes the compulsory licensing system. As long as the form of use does not violate any terms specified in the Copyright Act, service providers may obtain a license by means of compulsory licensing in order to lawfully "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."²

1. Scope of compulsory license

According to Section 115 of the US Copyright Act, limitation on compulsory licensing comprises two sections³:

(1) The scope of compulsory licensing is limited to the "exclusive rights provided by clauses (1) and (3) of section 106"; i.e. "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."

(2) A compulsory license can only be applied for unless the copyrighted works are

- Non-dramatic musical works;
- phonorecords of a non-dramatic musical work which have been distributed to the public in the United States under the authority of the copyright owner; and
- phonorecords made by a person whose primary purpose is to distribute them to the public for private use.

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Later on, to facilitate the application of the emerging digital sound delivery technology and the development of the digital music industry, in 1995 the US Congress passed the Digital Performance Right in Sound Recording Act of 1995 (DPRA) by which Section 115 of the Copyright Act was amended and the Digital Phonorecord Deliveries (DPD) was added. Based on these, the DPD can enjoy compulsory licensing to deliver digital music service.

2. Entitlement of compulsory license

Any person who wishes to obtain a compulsory license shall, before or within thirty days after making the recording, and before distributing any

phonorecords of the work, serve notice of intention to do so on the copyright owner. The notice shall comply, in form, content, and manner of service, with the requirements that the Register of Copyrights shall prescribe by regulation. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which the notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office⁴. After obtaining the compulsory license, service providers shall deliver to the copyright owner or its designated collecting agent the information relating to the royalty of the month and the successes or failures of downloading within twenty days from the end of every month⁵. If service owners are unable to identify how to deliver the royalty to the copyright owner, the collecting agent shall keep the royalties for the compulsorily licensed nondramatic musical works for three years in an independent trust account. The collecting agent shall assume no responsibility for the safekeeping of such royalties if the copyright owner is unreachable within three years⁶.

3. Royalty for compulsory license

The criteria for calculating the royalty of compulsory license are established by the Copyright Arbitration Royalty Panel formed by the Librarian of Congress. This panel updates the calculation criteria on a biennial basis. The calculation can be done by minute or by work. Applicants must pay the highest royalty calculated with either of the schemes⁷.

4. Limitation of compulsory license

A compulsory licensee shall only reproduce or distribute specific sound recordings and shall not use the work in the making of phonorecords duplicating a sound recording fixed by another; unless the making of the phonorecords was authorized by the owner of the copyright in the sound recording or such sound recording was fixed lawfully.⁸

II. Conclusions

Though compulsory licensing terms have been specified in the Copyright Law of Taiwan, users only need to apply for a compulsory license for sound recordings published for a full six months and the sound recording is used in the making of other musical works for sale⁹. In this case, the digital music industry will be unable to obtain a compulsory license to deliver lawful services, and negotiation with the copyright owner has thus become a prerequisite for service providers to deliver lawful services. As a result, service providers often become the weaker side of the negotiation and must pay the copyright owner a very substantial royalty. Consequently, the cost of the services will increase. In the future, if the government can amend the copyright law to include the reproduction and delivery of digital music in the scope of compulsory license of sound recordings with reference to the compulsory license terms for sound recordings in the US Copyright Act, service providers can have other access to obtain a license for sound recordings to deliver lawful digital music service other than negotiations with the copyright owner. It is believed that this will promote the fair royalties of sound recording licensing in Taiwan and the development of digital music application service industry in Taiwan.

17 U.S.C.A. §§ 106

17 U.S.C.A. §§ 115

17 U.S.C.A. §§ 115(a)(1).

17 U.S.C.A. §§ 115(b)(1).

17 U.S.C.A. §§ 115(c)(5).

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See the following for details of royalty criteria for compulsory license: U.S. Copyright Office, Mechanical License Rates-Copyright Royalty Rates Section 115, the Mechanical License, *available at* <http://www.copyright.gov/carp/m200a.html> (last visited 2007/8/17)

17 U.S.C.A. §§ 115(a)(1).

Article 69, Copyright Law.