Preregistration of Certain Unpublished Copyright Claims

Comments of
The Recording Industry Association of America (RIAA)

In response to
Copyright Office Notice of Inquiry
70 Fed. Reg. 42286 (July 22, 2005)

August 22, 2005

The Recording Industry Association of America (RIAA)[1] appreciates this opportunity to comment on the proposed rule issued by the Copyright Office to implement the pre-registration procedure created by 17 U.S.C. § 408(f), as enacted by Section 104 of the Artists' Rights and Theft Prevention Act of 2005.[2]

RIAA agrees with the Copyright Office that sound recordings should be recognized as falling within the class of works that have "had a history of infringement prior to authorized commercial distribution," and that thus should be eligible for the pre-registration procedure established by new Section 408(f). However, in some particulars, the definitions put forward in the proposed rule should be clarified, since otherwise they may be interpreted so restrictively as to bar the pre-registration of a significant number of sound recordings that are vulnerable to pre-release piracy. RIAA also proposes that the pre-registration application be simplified and streamlined, that a lower fee for pre-registration be considered, and that the contents of pre-registration applications not be made public by the Copyright Office.

1. Eligibility of Sound Recordings for Pre-Registration Procedures

From street vendors to Internet "file-sharing," millions of copies of sound recordings and motion pictures are distributed illegally every day, costing the music and film industries billions of dollars a year. In addition to physical piracy, the growth and ease of digital delivery systems have caused an increase in pre-release distribution online, including through organized piracy "warez" groups and peer-to-peer ("P2P") networks.

Commercial sound recordings have had a significant and well-documented history of unauthorized distribution prior to release. Each year, dozens of works from high profile artists have been pre-released over the Internet. The severity of the problem is evident from the growing involvement of law enforcement, such as Operation Fastlink, a Department of Justice investigation announced in April of 2004 which targeted APC, a music pre-release warez group responsible for leaking numerous albums prior to street date.[3] Recent examples of leaked sound recordings include the works of artists such as Coldplay, Eminem, U2, and Audioslave.[4] For these and many other popular works, the majority of sales are made in the first several weeks of official release. Unauthorized distribution of pre-release works, sometimes weeks or even months ahead of schedule, usurps the value of these works during this critical commercial period. By negatively impacting this primary source of funding (and often necessitating costly adjustments to

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[1] The Recording Industry Association of America is the trade group that represents the U.S. recording industry. Its members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

[2] Title I of Pub. L. 109-9, 119 Stat. 218, 221-22 (April 27, 2005).

[3] U.S. Department of Justice, *Justice Department Announces International Internet Piracy Sweep* (April 22, 2004) *available at* http://www.usdoj.gov/opa/pr/2004/April/04_crm_263.htm.

[4] *See, e.g.,* "Coldplay's new album falls prey to net pirates," Guardian Unlimited, 6/1/05; "Eminem, Snoop CDs Pushed Up Due to Piracy," Billboard, 11/4/04; "Pirated U2 Album Hits Net, Release Date in Limbo," Reuters, 11/8/04; "Rage/Cornell-Credited Tracks Get Leaked Online," MTV.com, 5/20/02.

promotion and marketing as record companies scramble to push up release dates), pre-release distribution continues to cause significant financial harm.

2. Which Sound Recordings Should be Eligible?

Section 408(f) appears to suggest that any unpublished work that is being prepared for commercial distribution ought to be eligible for pre-registration so long as it belongs to a class of works for which there is a history of infringement prior to authorized commercial distribution.[5] The Copyright Office proposes to define this class of works more narrowly to include (with respect to sound recordings) only "a sound recording subject to a contract for distribution of physical phonorecords with an established distributor of phonorecords" at 37 CFR 202.16(b)(1)(ii).[6] In RIAA's view, at least two aspects of this definition are ambiguous and should be clarified, while a third feature of it should be omitted altogether.

a. "Subject to a contract for distribution." This phrase is somewhat ambiguous with respect to the recording industry. In one typical form of agreement between a recording artist and a record label, the label obtains the exclusive ownership and distribution rights to the artist's recorded output during a specified time period. The label's ability to exercise these rights may be subject to various conditions (such as completed delivery or the artist's approval), but at the same time the artist may lack an enforceable contractual right to require the label to distribute a given recording.

Consider the scenario in which the artist delivers 15 tracks to the label pursuant to such an agreement, and an unauthorized copy of track 15 is posted on the Internet. The track is "subject to a contract for distribution" in that the label has the exclusive distribution rights for the work, but the label may not have decided (at the time of the infringement) whether it wishes to include this particular track in the 10-12 tracks that will be ultimately included in the album to be released. Nor is it necessarily known at that time whether it will be able to exercise those rights with respect to this particular track, because the prior agreement of the artist to the release may be required. (The status of a given track with respect to ultimate commercial distribution may be even less clear if the infringement occurs earlier in the process, before recording and post-production work on the track is even complete.) Despite these facts, the artist and the label may both have a strong interest in pursuing the infringer, and should be able to employ the pre-registration procedure to facilitate their doing so. This result would be more clearly

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[5] The Notice contains some confusing discussion about the phrase "class of works" as used in Section 408(f)(2). It asserts that this provision "was drafted with [17 U.S.C.] section 1201's 'class of works provision' in mind," and that therefore the legislative history of the enactment of section 1201 is "instructive" in the interpretation of the phrase "class of works" in new Section 408(f). Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 42,286, 42,289 (proposed July 22, 2005) (to be codified at 37 C.F.R. pt. 202). Nothing in the legislative history of section 408(f) supports this assertion; and since the two enactments serve entirely different purposes, there is good reason to question its validity. The Office should clarify in its final rule that its determination of "class of works" here has no impact on the definition of that phrase for the purpose of section 1201.

[6] *Id.* at 42,291.

reached if the operative language of the proposed rule were changed to cover any recording that is "subject to a contract granting rights for commercial distribution or for the making of digital phonorecord deliveries or digital audio transmissions."[7] This formulation would more clearly communicate that a track is eligible for pre-registration so long as it falls within the group of works that the label has acquired the right to distribute.

b. "Distribution of physical phonorecords." RIAA strongly opposes the exclusion from the pre-registration process of recordings intended (at least initially) for distribution only via online channels. The Notice itself recognizes that "online distribution is becoming increasingly significant."[8] This is particularly true in the music industry: an increasing number of sound recording releases are being made on an "Internet-exclusive" basis, and at least one major record company plans to launch a label devoted solely to downloads (no physical CDs) as soon as October.[9] Surely, as these trends accelerate, pirates will be just as eager to steal pre-release versions of "Internet only" tracks as they will be to jump the gun on the authorized release of recordings through more traditional channels. Yet the Copyright Office proposal would deny to copyright owners of such recordings any benefits from the ART Act, at least with respect to civil enforcement. Failure to address this problem now will almost certainly necessitate another rulemaking in the near future if the intent of the ART Act is to be maintained.

The Notice justifies this discrimination by observing that online distribution "has not yet supplanted physical distribution as the principal means of disseminating ... sound recordings."[10] While true (for now) at the level of overall statistics, this statement is clearly not true for individual tracks that will be attractive to pirates in pre-release form. In any case, it appears irrelevant since nothing in the ART Act restricts its applicability to works distributed through today's "principal means" of dissemination. Moreover, including online works within the scope of this rule will enable protection for products that will increasingly gain in commercial significance.

The Copyright Office also fears that to allow pre-registration of recordings that are subject to contracts for online-only distribution would be "overinclusive" because "anybody can make his or her work available for online distribution, even if there is no demand for the work."[11] Of course, in a world in which the price of a CD burner has plummeted, the same is true for "physical phonorecords." In both cases, the requirement

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[7] The words after "distribution" are needed to carry out RIAA's recommendation that recordings intended for online-only distribution should also be eligible for pre-registration. *See* discussion in section 2(b) of text of this comment.

[8] Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. at 42,289. Indeed, year to date figures through July 17, 2005 show that almost 36% of unit sales of sound recordings in the U.S. have been "digital tracks," i.e., not "physical phonorecords." The corresponding figure a year ago was only 15%. *Market Watch*, BILLBOARD, July 30, 2005, at 43.

[9] Lowry, *Warner's Oldies but Goodies*, BUSINESS WEEK, August 8, 2005, at 64.

[10] Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. at 42,289.

[11] *Id.*

that the distribution rights be held by an "established distributor" as well as the other filing conditions (including the fee) should provide more than adequate safeguards.[12] For these reasons, RIAA urges the Copyright Office to strike the words "of physical phonorecords" from the proposed Rule.

c. "With an established distributor of phonorecords." The RIAA is unaware of anything in the ART Act that compels the Copyright Office to impose this condition, and questions whether it is appropriate to limit eligible participants only to "established distributors." There may be occasions when an individual or an unsigned artist could have a legitimate need to protect their interest in a copyrighted work against pre-release piracy. If such entities satisfy all other criteria of the pre-release registration requirements, and are willing to pay the prescribed fee, then it is unclear why they should be prohibited from availing themselves of this tool. It seems likely that pre-registration by such entities will be extremely infrequent, and are not likely to substantially burden the Copyright Office.

In the event that the Copyright Office desires to maintain this condition for pre-registration, RIAA requests that it be clarified in at least three ways to ensure adequate coverage of commercial entities that the rule is intended to protect: (1) The "established distributor" definition must cover not only entities that distribute physical phonorecords, but also record labels that may exercise distribution rights through third parties that actually handle the physical distribution of phonorecords; (2) The definition should include entities that engage in dissemination of sound recordings by means of digital phonorecord deliveries or digital audio transmissions; and (3) A new label or imprint launched by an established record company should be able to claim "established distributor" status based on the previous activities of its corporate parent or sibling.[13] We suggest the following revision of proposed 37 CFR § 202.16(b)(3) to achieve these clarifications:

> (3) An established distributor of phonorecords is a person or entity that is (or whose corporate parent, subsidiary, affiliate or predecessor in interest is or has been) actually in the business (directly or through a third party) of commercial distribution of phonorecords (including by digital phonorecord delivery or digital audio transmission) and that has actually engaged in such commercial distribution of two or more phonorecords within the past 12 months.

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[12] In any event, the Notice never explains why a work for which there is no demand would be vulnerable to pre-release piracy, and therefore why anyone would bother to pre-register it; and, ultimately, what would be the harm if they did so.

[13] The proposed definition states that an "established distributor of phonorecords is a person or entity that is actually in the business of commercial distribution of phonorecords and that has actually engaged in commercial distribution of two or more phonorecords within the past year." *Id* at 42,291.

3. Preregistration Procedures

a. Informational Requirements RIAA strongly agrees with the Copyright Office that preregistration should be "as streamlined a process as possible."[14] However, the proposal put forth in the proposed Rule, while commendable in many ways, may fall short of that goal. It requires the submission of much information that, while perhaps interesting to know, is very unlikely to be required to fulfill the main goal of the pre-registration procedure: to enable a copyright owner victimized by pre-release piracy to overcome the jurisdictional hurdle imposed by 17 USC § 411(a), and initiate an infringement action as rapidly as possible.

To achieve this main goal, all that is needed is to identify the work sufficiently that a court can satisfy itself that the work whose infringement has been alleged is the same as the work that is the subject of pre-registration. This can be done most simply and efficiently through the identification of the performer and the title (or working title) of the work intended for pre-registration. Items 8-10 on the list of required data in the Notice[15] ordinarily contribute little or nothing to this task, and may be very difficult for the copyright owner to ascertain on an expedited basis. They should be made optional or omitted altogether.[16] Furthermore, the directive that the description of the work be "detailed and specific," and most of the examples listed in the proposed rule 37 CFR § 202.16(c)(6) (other than performer and title), should be omitted or, in the alternative, made optional.[17]

In the vast majority of cases, identifying the performer and the title (or working title) of the sound recording will be sufficient to identify the work for the extremely limited purpose required, and may also be the only information readily at hand at the moment of pre-registration. Even the requirement to identify the author and claimant may produce data of only minimal value in terms of identifying the work on which suit is about to be brought, and could produce confusion since the hurried entries made in a pre-release piracy situation may not match up exactly with the corresponding entries in the registration that is ultimately made.

The pre-registration procedure will be successful to the extent that it allows a copyright owner who learns in the morning about a pre-release act of piracy to file a pre-registration application by mid-day, receive an acknowledgement in the afternoon, and present it in court before the work day closes in conjunction with an application for a temporary restraining order. While it will not be possible to fulfill this ideal in every case,

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[14] *Id.*

[15] The requirements are: date on which creation of the work commenced; date of anticipated completion of the work; date of anticipated commencement of commercial distribution of the work. *Id.*

[16] If retained on an optional basis, these items should be revised to refer to the "approximate" dates of the activities in question.

[17] Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. at 42,291-92. The "detailed and specific" requirement is suggested in item 7 of the proposed list of required data.

it would very rarely be met if the full panoply of information called for in the proposed notice were required, and use of the procedure would be correspondingly discouraged. Such an outcome would be counter-productive to Congressional intent in enacting the ART Act.

b. Public Access Another aspect of the proposed procedure that is sure to discourage its use is the decision to make the preregistration record publicly available on the Copyright Office website, as required by proposed Rule 37 CFR § 202.16(c)(8).[18] Nearly all the information contained in the proposed pre-registration application can be commercially sensitive so long as the authorized release of the work has not occurred, and copyright owners would be very reluctant to provide it for public disclosure. Even in the scenario outlined above, in which the information contained in the pre-registration application will be presented to the court within hours after its acceptance by the Copyright Office, the copyright owner retains the ability to seek a protective order or to file the information under seal. These safeguards would be rendered useless if any member of the public could obtain the same information on the Copyright Office website. Copyright owners take great measures to keep commercial sound recordings from leaking to the public prematurely; it runs counter to the purposes of the ART Act to provide would-be pirates with additional, unnecessary information in their search for these works.

Making the pre-registration application public would thus undermine the usefulness of the entire procedure, and with virtually no countervailing value for the public. The pre-registration database has, by definition, a very short shelf-life, since normally a pre-registration would be superseded by a registration within weeks if not days; and, as the Notice itself acknowledges, the pre-registration database is likely to contain a great deal of incomplete or inconsistent data as contrasted with the registration database. It tells the public little, and what it does communicate is soon outdated. Making a public record is in no meaningful way the goal of the pre-registration procedure; it is, by contrast, one of the chief goals of the registration procedure, to which pre-registration is a mere "prelude."[19] As the Notice correctly states, "Pre-registration is not a substitute for registration. It is simply a means of preserving the ability to satisfy the requirements of sections 411(a) and 412 of the Copyright Act by advising the Copyright Office prior to the publication of the work...."[20] Creation of a public record is of minimal importance in this context, especially if to do so would be to impede copyright owners from making use of the procedure.

In practical terms, pre-registration's main goal is to overcome the hurdle posed by the registration requirement of unamended § 411(a) in a narrow category of pre-release piracy cases. That goal can be fully served if no more than three parties have access to the pre-registration information: the plaintiff copyright owner; the defendant alleged infringer; and the court, which must ultimately satisfy itself that it has jurisdiction

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[18] *Id.* at 42,292.
[19] *Id.* at 42,290.
[20] *Id.* at 42,286.

of the case because the work in question has been properly pre-registered.[21] Accordingly, RIAA urges the Copyright Office to reconsider its preliminary decision to post pre-registration application data on its publicly accessible website.[22]

RIAA appreciates the opportunity to submit its comments in this proceeding and stands ready to respond to any questions or provide further information that would assist the Copyright Office in achieving an effective implementation of this important legislation.

Respectfully submitted,

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[21] While it is true that posting the application on a public website enables the copyright owner to print and submit it to a court, should the court require something more formal than an e-mail acknowledgement, the same result could be achieved by providing an optional service, for an additional fee, under which a printed certificate or notification of pre-registration would be sent to the applicant immediately following the e-mail acknowledgement.

[22] The fee charged for pre-registration could also discourage use of the procedure. In light of the fact that the procedure involves no examination by the Copyright Office, and assuming that no publicly accessible database of applications needed to be maintained, we urge that the proposed $100 fee be re-examined. While not excessive in the context of the litigation scenario discussed in the text of the filing, the fee proposed could discourage prophylactic use of the pre-registration procedure for pre-release recordings on a more routine basis.