

# THE INADVISABILITY OF NONUNIFORMITY IN THE LICENSING OF COVER SONGS

YOLANDA M. KING\*

## ABSTRACT

In February 2015, the U.S. Copyright Office released a report entitled *Copyright and the Music Marketplace*, which summarizes its study of the music industry and recommends significant revisions to copyright law in response to the rapidly changing demands of the industry. Among its recommendations, the Copyright Office proposes an amendment to Section 115(a)(2) of the Copyright Act. Currently, Section 115(a)(2), referred to as the compulsory licensing provision of copyright law, permits someone to record a new version of a previously recorded and publicly distributed song, regardless of the format of the newly recorded version. The revised Section 115(a)(2) would require someone who wishes to distribute a cover recording of a song to seek a license from the copyright owner for dissemination via interactive new media and digital downloads. However, physical formats still would be subject to compulsory licensing.

The Copyright Office's suggested amendment to Section 115(a)(2) would create nonuniformity for creators of cover recordings based on the intended format of the newly recorded song. This approach seems contrary to the Copyright Office's reasoning for other amendments to copyright law in the report, which emphasize the importance of harmonization of the rules for music licensing. For example, the Copyright Office supports broadening the sound recording performance right to include terrestrial broadcasts, which would harmonize the rules governing terrestrial radio with the rules concerning digital and satellite radio, and including terrestrial uses under Sections 112 and 114 licenses, which, according to the report, keeps with "the principle that analogous uses should be treated alike." Yet, the recommendation for Section 115(a)(2) would create different treatments for digital and physical formats. A potential licensee who is the creator of a digital cover would no longer have the option of a compulsory license if the licensee does not want to contact the copyright owner or the copyright owner does not wish to license the song. This Article concludes that this recommendation is inadvisable because it creates inconsistencies in music licensing at a time when harmonization is critical for the industry, and it places an unjustifiable burden on musicians seeking to rerecord songs in digital formats.

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\* Associate Professor of Law, Northern Illinois University College of Law. J.D., Harvard Law School, B.A., Indiana University-Purdue University at Indianapolis.