Audio Home Recording Act Does Not Protect Device Distributor Against Copyright Claims Arising From Broadcaster Role

BY MITCHELL ZIMMERMAN

In a case of first impression, and one of the few cases interpreting the statute at issue, a New York district court held that the Audio Home Recording Act, 17 U.S.C. §§ 1001 *et seq*. ("AHRA"), does not immunize a distributor of digital audio recording devices from copyright liability when the infringement claims are based on the distributor's allegedly infringing activity in its simultaneous role as a satellite radio broadcaster. The case illustrates the ambiguous nature of digital transmissions, which can be treated as distributions of musical works as well as digital performances. *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, 2007 U.S.Dist.Lexis 4290 (S.D.N.Y. Jan. 19, 2007).

Defendant XM Satellite Radio operates a satellite broadcast service with some 6 million subscribers, operating under the compulsory statutory license scheme provided in 17 U.S.C. § 114. In connection with its broadcast services, XM also distributes special receivers marketed as "XM + MP3" players. The XM + MP3 players can do two things in addition to receiving XM broadcasts. They can store and play MP3 files the user acquires from other sources. And they can record and play back the songs that XM broadcasts. The XM + MP3 can hold about 1,000 songs, which the user can access so long as she continues to subscribe to the XM Satellite Radio's service.

XM + MP3 users can record a broadcast song by pressing a button at any time during a broadcast. To help users find and record songs or artists, XM provides digital playlists identifying all songs broadcast over particular channels during particular periods of time. XM also offers an alert service that notifies XM + MP3 users when a particular song or music of an artist they have previously flagged is being played on any XM channel, so the user can record the track.

The plaintiffs are ten record companies who own rights to the majority of copyrighted sound recordings sold in the United States. They sued XM for infringing their exclusive distribution rights under copyright law, for violating § 115's bar on unauthorized digital phonorecord delivery, for unauthorized reproduction, for violating its compulsory license, for secondary infringements relating to the foregoing, and for various other wrongs.

The compulsory license under § 114 is subject to statutory restrictions intended to ensure that satellite broadcasts operate like traditional radio broadcasters. For example, the stations cannot provide an interactive service, cannot publish their programming schedules before broadcast, and cannot play songs from the same artist or album more frequently than specified within a three hour period. Plaintiffs alleged that XM violated the scope of its license by acting as both a broadcaster and a distributor. XM asserted the AHRA as a complete defense.

The AHRA is a statutory scheme originally intended to address a technology that never took off, digital audio tape, and only a handful of cases have interpreted the law. For qualifying devices that embody appropriate technological limitations – particularly, features to preclude multiple generation digital copying – the AHRA provides immunity from copyright infringement claims. Under AHRA's complex provisions, players that download MP3 files from computers have been held not to be "digital audio recording devices" subject to the AHRA, but devices that make copies from broadcasts, like the XM + MP3, can qualify.

Section 1008 of the AHRA provides that no copyright infringement action can be brought "based on the manufacture, importation, or distribution of a digital audio recording device [DARD]... or based on the noncommercial use by a consumer of such a device ... for making digital music recordings ...." Relying on § 1008, XM filed a motion to dismiss. "Under XM's reading of the statute," the district court stated, "if XM is a distributor of DARDs within the definition of the AHRA, there is no limit to the infringing conduct in which they may engage." The court rejected that thesis and denied XM's motion.

"[U]nder a plain language analysis of the AHRA, 'A claim is "based on" manufacture, importation or distribution of a [DARD] only where the acts of manufacturing, importing, or distributing the device is the conduct on which liability is premised.' Put another way, XM is not being sued for actions taken in its capacity as a DARD distributor; therefore, XM is not immunized from this suit under the protection offered by the AHRA.

"What the Complaint does allege is that, in providing services specific to users of XM + MP3 players, XM is acting outside the scope of its license for broadcast service – XM's *only* source of permission to use their recordings. The Record Companies claim that by operating outside the authority of this statutory license, XM is violating their copyrights and unfair competition laws. Plaintiffs assert that XM's unauthorized use of their copyrighted material 'encroaches directly and obviously on the digital download business, undermining Plaintiffs' ability to distribute their copyrighted works through lawful legitimate services....'"

2007 U.S.Dist.Lexis 4290 at *18-*19 (citations to plaintiffs' motion and complaint omitted).

Since, the court reasoned, XM broadcast and stored copyrighted music for later recording by consumers, XM acted as a distributor as well as a broadcaster:

"The Court finds that because of the unique circumstances of XM being both a broadcaster and a DARD distributor and [because] its access to the copyrighted music results from its license to broadcast only, that the alleged conduct of XM in making that music available for consumers to record well beyond the time when broadcast, in violation of its broadcast license, is the basis of the Complaint, and being a distributor of a DARD is not. Thus the AHRA, on these facts, provides no protection to XM merely because they are distributors of a DARD."

Id. at *23-*24. Was the violation that is the basis of the complaint, then, the breach of the broadcast license or XM's "leasing" of recordings to consumers (*17-*18) or perhaps both? Although the opinion seems to fuse these analytically distinguishable strands into each other, the court is at least clear that they are different from distribution of the device, and that the claims are not based on that distribution.

Interestingly, under the court's ruling, the same actions by XM – transmitting digital musical content to end-users – constitutes both a digital audio performance under 17 U.S.C. § 114 and the distribution of copies under § 106 where the features of the device that XM distributes allows subscribers to maintain copies of the works on the XM + MP3. Notwithstanding that it is XM's distribution of devices with features that permit this, the court held that plaintiffs' copyright claims were not "based on" XM's distribution of the XM + MP3, but on XM's making music available for subscribers to record in a manner that violated XM's broadcast license, arguably a fine distinction.

Although fair use was not before the district court on XM's motion to dismiss, the court's discussion strongly suggested that XM will fare ill on that defense. Expressly referencing the Sony – Betamax decision, in which the Supreme Court held consumer copying for time-shifting to be fair use, and the distribution of video recorders therefore not contributory infringement, the district court stated:

"It is manifestly apparent that the use of a radio/cassette player to record songs played over free radio does not threaten the market for copyrighted works as does the use of a recorder which stores songs from private radio broadcasts on a subscription fee

basis. [¶] ... Finding that this conduct is not protected under the AHRA is consistent with the fundamental tenet of copyright law that 'all who derive value from a copyrighted work should pay for that use.'"

Id. at *21-*23 (citing Goldstein on Copyright). Some believe that that "fundamental tenet," so expressed, is squarely contradicted by the fair use doctrine, which is not merely a defense but is under § 106 an express limitation on the scope of the exclusive rights of copyright holders. In light of the district court's vigorous expression of its views on XM's conduct, it will be interesting to see how the case plays out.

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