4. Item (title) Worksheet filled out by typist and folklorist-cataloger.
5. All worksheets merged by computer for retrieval by collections, titles, performers, subjects, recording data, etc.

It is estimated that we hope to complete the project in less than five years. It will be a valuable initial step toward the control of the Library's 300,000 uncataloged recordings of all types.

OWNERSHIP AND COPYRIGHT OF SOUND RECORDINGS

Transcript of Panel Discussion

UCLA ARSC Conference -- November 22, 1969

Panelists: Melville Nimmer, Professor of Law, UCLA
Stan Kenton, National Chairman - The National Committee for the Recording Arts
Norman L. Chalfin, Patent Agent - Jet Propulsion Laboratory, California Institute of Technology
Elliott Schaum, Chief Counsel, Capitol Records
Carlos B. Hagen, 2nd Vice-President, ARSC; Head, Map Library, UCLA

Mr. Nimmer: To talk about the state of the copyright law with respect to phonograph or sound recordings could be done very quickly by simply saying there is no copyright protection for sound recordings -- period, remarkable as that may appear to be. There is however something more to be said about this; I will say it briefly. First of all we go back to prior to the time when the present copyright law was adopted. The present copyright law now enforced was adopted in 1909. Several years before that, there was a landmark case called, U.S. Supreme Court Case: Whitesmith vs. Apollo in which the issue there was whether someone who made a piano roll copy of a musical composition had infringed the copyright in that musical composition. And the court held per Mr. Justice Holmes, No. This piano roll copy which is as you may recall, a perforated paper or something of the sort, is not a copy of the music itself because it's only the part of a machine, a part of an instrument, that you have to put into the piano to make it play. And hence the copyright law, which protected against copying, was not violated, the court said, because this was not a copy, only part of a machine. Well, with that as a basis, when Congress adopted a new copyright law in 1909, they went along with this idea that a piano roll, and then by extension a phonograph record, is not a copy of the musical composition because you cannot read it with the eye. You pick up a phonograph record and you look at the grooves, you can't tell what it means. The only way you can know what it means is by putting it on the machine. And hence, making a phonograph record is not a copy of the musical composition. However, the Congress in 1909 did give some limited protection with respect to making of phonograph records, that is protecting the author of the musical composition. They provided

that the author of a musical composition could object, could claim infringement if a phonograph record was made, not because it is a copy, because they went along with this old view about a copy; but they said nevertheless, that is they wrote in a special provision, that it is an infringement on the right to record if you make a recording of the musical composition. But they added this interesting qualification: once the author of a musical composition permits any record company to make a phonograph record of his musical composition, if he consents one time, thereafter any other record company may likewise make a recording of that musical composition without the consent of the copyright owner, provided, however, that the recording company pays to the copyright owner, the author of the music, or the publisher, whoever is the copyright owner, two cents for each record manufactured. And that, down to today, is the current law with respect to the making of phonograph records. It is what is called a compulsory license, the copyright owner must license the right to make the record, provided he receives two cents for each record made. Now that's one side of the coin, as it were -- the extent of protection that a musical work, or another work, obtains insofar as a phonograph record is made of that work. But that leaves a new question that Mr. Kenton and others have been concerned with more recently. What is the copyright protection in the record itself. That is, suppose one makes a phonograph record, say they paid the two cents per record, so that they paid the owner of the music, or maybe they take old music, classical music or other music that is long been in the public domain so that there is no question of clearing the copyright and the underlying music that is contained in the record. But then the record company makes the record with performers putting in their artistic contributions. Somebody else comes along and simply reproduces that record. Is that an infringement of rights in the record itself as distinguished from the music which is being recorded? Is it an infringement of the performer's rights on the record, is it an infringement of the other artistic elements that go into making the record, of the engineering going into making the record, of the record company's contribution and so on? Well, the answer is no under the copyright law, that is not an infringement. So that record piracy, as it is called, does not constitute copyright infringement. And indeed there have been some record pirates that have been so bold: one of them was so bold as to call his company the Jolly Roger Company and sold records under that label. He later got into trouble for that, however, because although it is not copyright infringement, there is another legal label that may be put on it, called unfair competition or misappropriation. And at least until recently lawyers have generally assumed that although it is not copyright infringement to make a reproduction of a recording. It is nevertheless violating another right, this right of unfair competition. But for complicated reasons, they're not too complicated to explain to a lay audience but are sufficiently complicated that I can't do it here in the time alotted. Let me just say that by virtue of several, recent, U.S. Supreme Court decisions, not on this precise issue, but on a parallel issue it is now at least highly questionable whether it is unfair competition

to engage in this record piracy. So it may be that it is violation of no law whatsoever to reproduce records in this way. Now that's true if one follows the Supreme Court decision. Members of the lower courts have simply resisted following it in this context and have continued to hold that record piracy does constitute unfair competition. But it may be that if it goes back to the Supreme Court, it may well be held not to violate any rights. Now: there has been before this past session of Congress a bill for the revision of the copyright law. During this session of Congress, it passed in the House of Representatives, but it got bottled up in Senate Committee, so that in the next session of Congress it will have to go through both houses again. And it is of course questionable whether we will have a new copyright law or not. If we do, it seems quite likely that there will be included in that law at least some copyright protection for the reproduction of records per se. In the bill that was in Congress there was specific provision recognizing copyright in recordings, unlike the present 1909 law. Even in this proposed bill that is a severely restricted right. That is, compare it with the right in the musical composition itself; if you are the owner of the copyright of a musical composition you can, of course, prohibit anyone from making an absolute copy, that is identical sheet music, or you can prohibit them from putting it in a record form, or you can prohibit them from publicly performing the music for profit, or putting it in a motion picture. There are all sorts of rights a copyright owner has as to the various ways in which his works may be exploited. But with respect to the new proposed bill on phonograph records, that right is very circumscribed. The copyright owner of the phonograph record under the proposed bill will have one right and one right only. And that is to prohibit record piracy, that is, the actual duplication of the record. He will not, however, be able to object to or be able to control the public performance of his record. He will not be able to claim a royalty for the public performance of his record in the way that the author of the music which has been recorded can claim a royalty for the public performance of his music. That's where the ASCAP money comes in, the BMI money and so on. And this is where I suspect Mr. Kenton and others are quite unhappy. They feel that the performing artists should be paid for the public performance of their creations on record. Well, the proposed bill, at least now, does not provide for that, though one never knows how the bill will finally end up. A final note: I wonder if you are aware of the fact that the Bern Convention is an international treaty, an international copyright treaty. The United States is not a part of the Bern Convention but most of the major nations of the world are, and the United States, if we pass a new copyright law, will probably join the Bern Convention. The Bern Convention has been going on since 1883 and is revised every twenty years or so. The last revision was last year in Stockholm. I was there as a consultant to the Secretary. One of the measures adopted in the Bern Convention last year in Stockholm was a provision which in effect says that works of folklore which have not been published, and published means technically printed and distributed copies, if those

works of folklore have not been published and if it is reasonable to presume that the author is a national of a given country then that country may accord copyright protection to that work of folklore, so as to restrict the right to make recordings thereof. Now, this may come as shocking news to some of you. It goes to what is a very popular international issue, that is the need of developing countries to have some kind of copyrightable product they can export because they so desperately need to import copyrighted works and they don't have any quid pro quo.

Mr. Kenton: Well, I must say you brought out some very good points that pertain to my presentation here. I am National Chairman of a group called the National Committee for the Recording Arts. This organization is only a few years old, but it is not new to the revision or the necessary things we're asking about the revision of the copyright laws. In the 20's they battled it then, Fred Waring and Paul Whiteman struggled with it for a few years, and finally went right to Washington to the doors of the Registrar of Copyrights and so forth, and they were cut off, because no copyright revision was up on the calendar for new legislation. Tommy Dorsey again in the 40's went out, and gave up in vain after the same thing. I tried again in the 50's myself. So when we had reason to believe that the copyright laws were up for revision at this time, we started working some two years ago as best we could to call attention to our needs and to the necessary revisions of the 1909 copyright law. At that particular period there was no such thing as juke boxes, there were no such things as radio stations per se. The recording industry had hardly scratched the surface and there was no need at the time for the legislators to consider what they have to consider and must consider today because what exists today I think is a morally unjust thing from every standpoint. And that is basically this: when you take the performance of one artist and it is recorded and it is his creation (it's true the ASCAP, BMI represents the composers and the publishers), the ability of one artist over another to make a phonograph record that is valid from the entertainment standpoint, so much so that it can be used for profit in juke boxes or radio, in order to sell with the help of the advertising industry other commodities that make money for the advertising industry and the recording industry or juke boxes, then we feel that that particular artist is entitled to be compensated for the use of that record. Tommy Dorsey's great example in 1945 and 1946 was that before he made his version of I'll Never Smile Again, there had been something like twelve records made of that particular melody, same song, by the same composer, published by the same people, nothing happened to the song. Tommy Dorsey came along, through his arrangers, through his singers, and through his own ingenuity, made a phonograph record that sold into the millions and was to make goodness knows how much money in juke boxes and in radio stations and so forth. Tommy felt that this was unjust because he felt that it was through his efforts and the creative efforts of his own people, that they were able to make the melody I'll Never Smile Again important enough that it would gross

millions of dollars actually in all of these places in which is was used. So it prompted him to try to organize us all, and he did, but as I said after three or four years he gave up in vain. We feel that if an artist can make a phonograph record that has enough appeal so it can be used to attract attention to products that are to be sold, or be used in juke boxes to make money, the performer, himself or herself, along with the arrangers and the recording company, are entitled to be compensated. So far, in past years, composers, publishers, artists and recording companies have never received anything for the juke box use of phonograph records. Even the publishers of the composers have never received anything. There has been some legislation passed in the House of Representatives this year -- at least it is a step in the right direction -- whereby, the composers and the publishers will receive and be compensated for, and in a small way, I think, as compared to the money that is being grossed, for the use of their music in the juke boxes.

We feel that a recording company, as a producer, produces an item of value on a phonograph record. Through the producer and the A&R men, they get together with the arrangers and the singers. If they produce something that is worthwhile, they sell it to the general public. The general public pays to take that record home, and use it for its own pleasure. But if that record is used in any other way to make money, they should be compensated, just as the producer of a motion picture can copyright his production and make deals wherever he wishes, and in all sorts of ways, anywhere in the country, so that his film can be shown. He is compensated by the use of it. If it is a big popular motion picture, he receives quite a profit. A recording company gets nothing out of the use of a record. If they make a record, we feel that if it is used to make money for other people, they should be compensated for the use of that record. Through the National Committee for the Recording Arts, and in conjunction with our (NCRA) efforts, the American Federation of Music, AFTRA, and their recording companies -- all the people involved in the creation of music for recordings -- hope to one day see legislation passed so we can have the right to collect and bargain for performance money. Now so many times we find that this is so difficult to get across in other people's minds. In the first testimonies before the Senate Sub-Committee in Washington, a year and a half to two years ago, we found that after two, three, and four hours of testimony, by various people, that even the senators themselves still didn't comprehend what we were after. Because the average person today feels that the recording artist is paid whenever his record is used for profit, and it's very difficult to get people to understand that they are not paid. The composer and the publisher are paid but not the recording artist or the record company. They receive absolutely nothing. We have no right to demand payment because there is nothing in the copyright laws which exist today that would allow us to bargain with these various people that use our phonograph records for profit. It is that we hope to see passed so that we can rightfully demand what we believe is just compensation for the use of our talent in the production of a phonograph record that has enough commercial appeal

to make money. So these are the things that time and time again we call attention to, the unjust thing, and the unjust ethics, the moral issues involved and so forth. And it is a very difficult thing, I repeat, to get it across to the average person, or get it through his mind that we all are not paid for the use of these recordings. And you have to keep explaining time and time again, to help clear this thing up. It's been very difficult. That is the only thing the National Committee for the Recording Arts is concerned with. It is trying to help these other people, as well as the artists, to bring about a revision of the copyright laws, that will allow us the right to bargain at least for some compensation when our phonograph records are used for profit. Now there are many other aspects of it that I could get into, but that is a thumbnail sketch of what we are struggling for.

Mr. Chalfin: My topic as I was to discuss it here was the "fair use" of recordings and particularly the "fair use" of recordings as it was intended to be used for libraries, for educational purposes and so on. We ought to say first that there are three basic uses of copyrighted material. One of them is the permissive use. One asks for permission, one gets it, one uses the article. This use creates no problem. The second use would be the fair use -- for limited use, while the third use is the prohibited use -- it's just doing things which are wrong. In the first item, we have no problem because of the permission granted. The second use of copyrighted material has limitations set by court and traditional opinion. In terms of publication, the courts said if you took 200 words out of a 500-word article, that might not be fair use. But if you took 200 words from a 200-page book, it would possibly be fair use. If you have to ask permission, the chances are it's not a fair use. One can usually decide for himself, within limits, what would be a fair use. The doctrine itself is actually a limitation on the copyright model. Thus, not all copyrighted material is protected to the extent that absolutely every use of it is going to be forbidden, and to try to give you a precise definition is difficult, because there is no precise definition of fair use. In a broad sense, it means that some reasonable portion of a copyrighted work could be copied or reproduced without permission for a legitimate purpose which does not compete with a copyright owner (and please note this) in the market, where that copyrighted work is intended to be sold. Now, archivists are not competing in any markets. Generally, they are trying to collect history. While to make a complete recording and a complete copy is questionable, I can see where the quotations of excerpts from the work in either criticism or illustration for educational purposes is one of the criteria. I can see this being applied to recordings for classroom use where a small segment of a recording is dubbed by a teacher for literature or in a language course. And I can see nothing wrong with this because if a record was used, the two-cent mechanical royalty was paid. Now the performing rights would not be paid for, obviously.

Mr. Kenton: I would consider a librarian that buys a record, a consumer.

In that case I can say that all of the royalty situation is taken care of once the library has made the purchase. I wouldn't say that we have any complaint at all against anything like that -- the use of it for educational purposes or the use of it for any archive or any of that sort of thing. We're not concerned with that.

Mr. Chalfin: [Abstract] One reason for difficulty in discovering in recordings what is copyrighted material is that Congress never was able to establish that a recording was "writing". Yet in 1656, in an amazing fantasy written by Cyrano de Bergerac, Bergerac describes books used by imaginary moon people. The description is recorded from a film version. "As I opened the box I found within...almost like a clock with little springs and engines. It was a book! Indeed a wonderful book that had neither...nor leaves. A book made wholly for the ears and not the eyes.... See all the distinct and different sounds, sounds of a whole chapter or more if they have a mind to hear the book played through."

Now that's one example of why I think the courts could have had a precedent long ago. Cyrano had no difficulty in defining this box. Certainly this should have provided precedent for copyrighting the recording. Now, the recording we just heard here is an example of the fair use of a small segment of the sound portion of a film strip.

In photography of the moon, computer technology can take out all "artifacts" (items not part of the image being photographed) to get a clear photo. I have asked them to see if they can do the same with noise produced on recordings that are not part of the item recorded. But moving into the computer field -- is artificially produced music copyrightable? I will demonstrate a recording made by this deck of cards (IBM punched). (Demonstration of a recording of a computer making up tones to simulate a copyrighted song.) First of all, we have a computer program -- copyrightable? Second we have sounds similar to a copyrightable song. Can this new work be copyrighted? Or do these things put together require patent rights in order to be protected?

Here then are some of the questions now being resolved and some further excursions into the unknown area of protection and license in recordings:

Making a copy of a Library recording for personal use; is this infringement of copyright? I would not think this to be piracy.

Taking bits of copyrighted material to make a new work or a program for classroom instruction? Probably clear of infringement and a fair use.

Mr. Chalfin states that parodies have been declared fair use. Note: Hollis Music vs. (a Canadian firm) 1967. Court ruled parody of This Land Is Your Land "unfair competition" destroying the worth of the original song.

Taping program material that is not and would not be available commercially for educational use -- is this an infringement? In my opinion there is a clause in the proposed copyright law that will make use of recordings for educational purposes a legitimate "fair use".

Mr. Elliott Schaum: By way of introduction, I'd like to make one thing

clear, since I'm being recorded, that I do not purport to speak for either my employer, Capitol Records, or for the Record Industry as such, but I will talk of what seems to me a reasonable view that most record companies would agree with, concerning the use of their product. But I do not intend to bind my company or anybody else.

By way of additional background to what Professor Nimmer said, and if there are Canadians present here, I think most of the comments that have been made so far are not valid insofar as Canadian law is concerned. I think it's interesting that the U.S. is probably the only significant commercial country in the world that does not grant a copyright in the phonograph record itself. Under the Canadian law, the United Kingdom, Great Britain, France, Germany, I think, generally throughout the world, separate and distinct copyright is granted by statute to the producer, the manufacturer, the creator, whatever you want to call it, of the phonograph record. And that right is recognized not only in the sense that the proprietor or owner may prevent the unauthorized duplication of that recording, but in most countries the right is recognized to the point where he, the manufacturer, is entitled to be paid for any use of the particular recording. That right has been on the books since 1911 and yet there has been no effort by the record companies to be paid for the broadcast use, commercial use or whatever, of that master. Recently there is a group in Canada, The Canadian Record Manufacturers' Association, which has, I understand, spawned another group that is now attempting to cause a Canadian Commission to establish a performance payment rate, applicable to both commercial and CBC (Canadian Broadcasting Corporation) performances of phonograph records. In my opinion the U.S. is behind the rest of the world in not recognizing that right.

The second point that I'd like to make is that the commercial facts of life are such that a record company cannot permit unauthorized duplication in the way it is taking place today without, in effect, committing suicide. There's one example that I'm familiar with at the moment. It's a current problem. November 22, today, is the release date of a new Beatles recording and I won't speak to the merits of the recording. The recordings were originally recorded in England 45 to 60 days ago. In the process of recording and shipping the tapes or copies of the tapes to the U.S. for manufacturing purposes, an unauthorized duplication of a copy became available to a New York broadcaster. We believe derivative copies were made from that copy and as long as 30 days ago, radio stations began to play those recordings. The quality of the recordings was just terrible. To say nothing of the rights of the artists in seeing that their product is made available in a decent or reasonable quality, the economic and commercial injury that results to a phonograph record company from such premature air play is very, very great. When a Beatles recording is first broadcast, demand immediately is created in the record shops for the product. And if the product is not available, the premature air play goes on and on and the demand becomes saturated. Under the present copyright act, the right to prevent premature air play lies only in the owner of the copyright in the musical composition -- the

publisher. And the publisher may, for his own interest, which may not be the same as the record company's, decide that he will not prevent the unauthorized air play of that recording. There is, as Professor Nimmer mentioned, the right of unfair competition and possibly several other legal theories that could be applied to such premature air play. As a matter of fact some time ago, Capitol went to the trouble of suing a radio station to prevent such unauthorized duplication and we obtained a temporary restraining order. Thereafter the case was settled. But I think you may not realize how drastic a step it is for a record company to sue a radio station to prevent air play that was necessary in this particular circumstance. However, in most circumstances we're most anxious to get air play at the right time to create or help create the commercial demand for the product.

I personally, and I think all of the record companies, recognize a requirement for some viable doctrine governing fair use. The question is, what is fair use? I don't know that I can give an answer. I think that the copyright act as presented to Congress in the 89th session deals with fair use and there are some criteria established. They're not precise. They may not be too helpful at this stage, but if you're not familiar with the pending revision, Section 107, I'll read from that section. It says: "Notwithstanding the rights that are granted with respect to copies or phonorecords, for purposes of criticism, comment, news reporting, teaching, scholarship or research, such use is not an infringement of copyright." In determining whether the use made of a work in any particular case is a "fair" use, and that language is in the statute, "the factors to be considered shall include the purpose and character of the use." I think there's little question that the purpose and character of the kind of use that was made by Mr. Chalfin of the recordings that he duplicated in these particular circumstances is fair use. The second aspect that's considered under the statute is the nature of the copyrighted work. Well, I'm not sure that that's particularly applicable here. In the third criterion, the amount and substantiality of the portion used in relation to the copyrighted work as a whole is considered. And the fourth is the effect of the use upon the potential market for or value of the copyrighted work.

The problem that I see in interpreting this statute, from the standpoint of the members of this group, is where do you obtain the assurance that the use that will be made from the copy that you authorize or make does not go beyond the line of fair use in terms of commercial or whatever standard may be applied. For example, let's assume that Mr. Chalfin went to the Pasadena Library Monday and asked to see a copy of the new Beatles album. He happens to be a Beatles-maniac, let's say, and is very much interested in the new techniques and the new arrangements and the new compositions that are included in this particular performance. He gets a copy from the library, and takes it home. He studiously and from an educational standpoint approaches this recording. And his teenage son says, "Gee! Pop's got the new Beatles album. I'm gonna make 50 copies for my friends." He goes into Mr. Chalfin's studio

or music room and quickly dubs off 50 copies. Well, what's the library's responsibility under those circumstances? Is that a fair use? Let's start at the basic question. It may very well be that Mr. Chalfin's use is a fair use but is his son's use a fair use? I don't think there's any question in my mind, and I would hope in your mind, that those 50 copies to be sold or given, for that matter, to the friends of young Chalfin is not a fair use. The examples that could be posed, obviously are unlimited. There was a reference here to the archivists' concern over being nickeled-and-dimed to death for paying for the use of copyrighted materials and whether it be the underlying copyright in the musical composition or, what I hope will soon be established, the copyright in the record. I don't know whether nickel-and-diming is really not the nature of the music business. I've always been told or I think when I first got into the business as an attorney some ten years ago with Capitol, it was a penny and two-penny business. That's the difference between survival of the record company and bankruptcy. We make phonograph records and we sell those records for home, non-commercial use. If we, in the Beatles recordings, for example, are faced with competition from the unauthorized duplicator, no matter what his source, we're not going to sell so many phonograph records. If Stan Kenton's records are available commercially, I don't think any one of you would want to be in a position to make copies for some friend in another library. Let your friend go out and buy the record. Let the requesting party purchase the record in the normal, commercial manner. If, on the other hand, he has purchased that record, and let's say he's a teacher and wants to show that Stan's treatment of a particular Wagnerian work here in Los Angeles is a unique, exceptional, desirable, intellectually honest approach to Wagner, I don't know that Stan would object to that record being played in class. I feel certain he wouldn't. But I question whether he would not object and I think Capitol as the record company that released the recording might very well object, to that instructor making 100 tapes for the lecture this year and passing them out to students or charging the students a dollar to cover the cost of that particular tape and maybe profiting a little himself, and at the same time, foreclosing the sale of that commercial phonograph record. When you talk about the recording of the Kaiser, there is no property in that particular recording at this point, as far as I know. Although I guess the "producer", and I use the word in quotes, could claim or his estate could claim under the unfair competition theories that are still available in the United States. He might claim that that is an unfair, competitive use or this was an unfair competitive use and desire to be compensated. I think the pending copyright law deals with that. There is a specific provision in the act with respect to damages. We're talking about statutory damages that are established if the complaining copyright proprietor wishes to elect to take the statutory damages. The law then sets them between $250 and $10,000 in the judge's discretion. There are some exceptions. But there's a specific provision here in a case where an instructor in a non-profit, educational institution who infringed by reproducing a copyrighted work in copies or phonorecords for use in

the course of face-to-face teaching in a classroom or similar place normally devoted to instruction sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under Section 107. The court in its discretion may remit statutory damages in whole or in part. It doesn't answer the question, but I think it gives some guidelines. Again, we're talking about a reasonable, educational use. Perhaps the archivists should have that right specifically, in addition to the instructor in a classroom situation. I don't think there's any answer that I can give. I think one point that I'd like to help clarify, however, is related to the example of the Flight of the Bumblebee that we heard here, programmed by that computer. Mr. Kenton earlier mentioned that Tommy Dorsey had contributed substantially to a musical composition by his arrangement, his particular version of the recording or of the music. I doubt very much if the old Green Hornet broadcasts would have used the Flight of the Bumblebee as programmed by that computer for their radio theme song. I think that highlights the specific contribution of the artist, the arranger, the people behind the creation of these master recordings. This version of the Flight of the Bumblebee would not sell many copies. And as Stan mentions, he wouldn't want it for his jukebox. But I'll be damned if there aren't versions of that particular selection that have been contributed to by the creator of the master phonograph record. Why should they not be paid for what they contribute to your pleasure, your education, your enjoyment, to the society? You, ladies and gentlemen, come from libraries all over the country. I'm sure that not one of you walked to the ticket desk at the airline, when you began your trip here, and said, "Well, I work for an educational institution. I want to go aboard for nothing." I think that's essentially what can result from unauthorized duplication of phonograph records. The ultimate result of that, unfortunately, is that the record companies will be put out of business. That's all I have in the way of general comments.

Mr. Carlos Hagen: I will talk mostly from my paper which was titled A Report to the U.S. Copyright Office on the Library, Educational, and Private Usage of Recordings. (Abstracted in NAEB Journal, Oct. 1964.) The most important point of this paper is my definition of what fair use is.

As a producer and broadcaster, I too am angry at the unscrupulous use of recorded material, our own efforts, for which we are not paid. But how can we stop this? I can see that there has been an over-reaction. Several of my students have attempted to get recordings from Eastern libraries, and have been flatly refused materials without which they could not continue their line of research. Copyright owners, in these cases, could not be located. There are several cases where industry has been unrealistically demanding. In one case, with approval from the composer (Carl Orff) and performer, ASCAP still demanded payment for a KPFK broadcast -- resulting in a policy of the station never to broadcast ASCAP material. I would like to see some way in which all of us (industry and archivists) could come to an agreement as

to how we, in libraries, could allow the flow of materials, and yet preserve the doctrine of "fair use" without undue, unethical uses.

Mr. Colly and I, among others, feel the need to establish centralization and free exchange of recorded material, perhaps on the order of the International Inventory of Musical Sources on the Farmington Plan (different libraries accepting responsibility to buy all materials in certain areas), in order to increase each library's total resources. This would not likely hurt the industry, but probably help it -- especially in certain areas that libraries do not generally purchase.

An important point made in 1945 by Professor Zachary Chaffe was: "Nobody else should market the author's book. But I will refuse to say, nobody else should use it. The world goes ahead because each of us builds on the world of our predecessors. Progress would be stifled if the author had complete monopoly of everything in his book for fifty-six years or any other long period. Some uses of its contents must be permitted in connection with independent creation by other authors. The very policy which leads the law to encourage his creativeness, also justifies him in facilitating the creativeness of others."

We are speaking here of "out of print" recordings. Recordings no longer available commercially. There are two important problems to consider.

1. Does a publisher and/or record company have the right to forbid the fair use of one of his published products, merely because such use might possibly harm his economic interest in the event that he might decide to reissue the recording at some unknown future date?
2. Does the publisher and/or record company have the right to enjoy an unprecedented monopoly over one of his products and forbid not only commercial use but also fair-use of it for an indefinite period of time?

The answer to both, at least in my opinion, is an obvious "No".

Record companies by requiring permission of all users extend commercial practice into the field of "fair use". While copyrighted, permission is required, but to extend this practice beyond its normal limits would mean the abandonment of the established principle of fair use and a tacit recognition of the perpetual and absolute monopoly of the manufacturer over his product. And secondly, it leaves the user totally unprotected against the most dangerous possibility of what I call "censorship by copyright". This has actually occurred in Europe with Nazi songs and a Stan Freeburg record, Green Christmas.

Libraries, I feel, are being intimidated by the industry, to the point where the libraries have to say no -- even when dealing with qualified researchers who are unable to travel from coast to coast, to hear these items.

I would end here with a strong plea that we should find some way to stop this intimidation and over-reacting, and open our sound libraries to bona fide, fair-use customers through taped copies, with a way of enforcing against unethical practices.

Comments from the floor: [Abstract]

Mr. Paul Jackson: "There are reasons beyond publisher/manufacturer restrictions for limiting library copying. 1. Sometimes because of contractual agreements, the "industry" is not free to give or not to give permission. 2. At the Lincoln Center Rodgers and Hammerstein Archives of Recorded Sound, a deposit copy of a Composers' Forum work was not made available to the composer, because of restrictions of the A F of M. 3. Some libraries just don't have the budget, staff, or time for making copies, although working through a distribution network, such as NAEB, might be feasible.

Mr. Ed Kahn: We have been refused written permission to use out-of-print material for a radio show to be distributed to several stations. In each case, they said in effect, "We can't put it in writing. We cannot give you permission. We give you our verbal word that we will not press charges." Knowing perfectly well the reason for this, it does not solve our problem.

Mr. Elliott Schaum: Let's get a few things out on the floor. 1. When you asked for the right to create a radio program, I don't consider this to be archival use. I consider that to be a commercial use. 2. Given that the program is educational (non-commercial use), when a record company says "Yes", the record company (because of collective bargaining agreements) would be obligated to pay all the musicians, all the AFTRA performers, the arranger, the copyist -- everybody, a new additional scale payment. If you want to do that for a symphony the cost to the record company may very well be $50,000. Your use obligates us to make those payments. Now you're not asking for the right to fair use, you're asking us in effect to subsidize your use. The kind of comment Capitol would make (in writing) is that if you can obtain approval of the A F of M, AFTRA, the publisher, and the performer, Capitol will not object to your use.

Mr. Kahn: The show was an "educational" one. In some cases the artists asked us, "Will you see what you can do to make our material available?" Some companies were no longer in existence. The point is, the public, the consumer, had no one to defend him. The result was that the show was not produced. We could produce the show with the records we own, by going to different stations with the records. But to tape the show from these records becomes illegal.

Mr. Kenton: I can speak for the NCRA and almost speak for the A F of M (although not the record companies). The legislation we have been after is that when records are used for profit, that people pay according to their financial profit. This would exclude archives. It would exclude non-profit radio stations. Speaking for the artist, you would have every right to use that record, if you were using it for a non-profit purpose.

Mr. Schaum: It seems to me, that one of the functions this organization can perform is to contact the A F of M, AFTRA, and perhaps ASCAP and BMI, etc. and obtain the right for specific kinds of use, thereby avoiding the requirement for the individual approvals. We (record companies) have contractual obligations. It is not reasonable for you to ask us to breach these obligations. Also, you often are asking us to go to A F of M, etc. in your behalf, adding to our cost of business.

Mr. Kenton: Here is the unjust thing. You people are trying to be entirely above-board and ethical. You know, of course, that the music business, much of it, is not like that. There is stealing all over the place. I'm learning a great deal here today. I didn't know you people walked around with fear like this, regarding this sort of thing. It's time that the Record Industry Association of America is made aware of this -- that ASCAP is made aware of this.

Mr. Archie Green: As a teacher of folklore, I find it difficult to find material of hillbilly, Negro and white music of the 1920's and 30's. The companies are not reissuing the material (or very little of it) and in effect are depriving American students of the cultural experience of exposure to American history. It is imperative, a moral right, and an obligation that, for example, students have access to early race records. And if RCA and Columbia won't put the material out, I have two options: to attempt to put the material out through educational channels (and red tape) or to buy records from pirates. We're not just talking here about copyright. We're talking about tools and techniques, that are going to give young people a chance to rebuild the society.

Mr. Schaum: As far as Capitol's rights are concerned, we are more than happy to cooperate with legitimate, realistic requests for use of materials, subject to obtaining permission from other parties. I don't think we can go beyond that.

Mr. David Hall: It seems that in the instance of out-of-print recordings, a working agreement between industry and educational institutions be made for taking out license or lease of masters, so that a University or Archive could bring out a limited reissue on its own label. Building in, of course, a "re-capture" clause for the record companies should they find need for commercial re-issues. The National Music Council considered this at one time, but they were in no position to go into the record business. University Press organizations are available for this sort of thing, and it is being done in a limited way. Perhaps some ground rules could be established and by agreement become accepted practice.

[Abstract]: While it was noted that larger record companies have custom services which will repress small amounts for groups (100-300 or more) the real problems exist where small companies have gone out of business, or where large companies cannot locate masters.

Mr. M. M. Murray: Could there be a legalization of copying or re-pressing records if we could pay a reasonable fee to someone without this red tape of getting permission from each separate group in the industry, or heirs of estates?

Mr. Kenton: Present copyright legislation does not include this "compulsory license" except as it applies to publishers who must license new recordings after the first recording of a work has been done. There is no "compulsory license" that says in effect, the record company must license a re-issue of a recording.

Mr. Nimmer: As long as there is a theory of unfair competition to protect against record piracy, then that theory is not limited in time. It goes on as long as there is any party to assert that right. It is not subject to the limitation of the copyright period.

Mr. Donald Leavitt: I should clarify the position of the Library of Congress regarding duplicates. We do not forbid it, since we are proprietors of material in the public interest. LC does, however, recognize its responsibilities to those people who may have a legal right to this material. LC is not in the position to make judgments as to anyone's right to copy, though, and therefore the burden of getting permission is placed on the student or researcher.

Mr. Philip Miller: I think it's pertinent to say that Henry Brief (executive director of the RIAA) is a member of this organization, and perhaps a committee working with Mr. Brief, Mr. Kenton and others can bring about resolutions which ARSC can bring to those persons who are in positions to do something about them. We need to do this with care and deliberation.

AVAILABILITY OF EXTRA SLEEVE INSERTS AND LIBRETTI

Sparked by a letter from our old friend George Keating, I wrote letters on ARSC stationery to four major companies -- RCA Victor, CBS, London and Angel-Capitol enquiring if a person desiring extra copies of librettos or song-text sheets for group listening could get them and at what price. I am glad to be able now to pass on the replies.

In a couple of days I received a phone call from London Records, assuring me the librettos will be furnished on request at a charge of fifty cents, and that text-sheets may be had at ten cents apiece.

The following is quoted from a letter received from Angel Records: "As you surmised in your letter, it is not financially practical for us to include more than one copy of a text or libretto with each of our vocal recordings although all of us can readily understand the convenience of