COPYRIGHT AND SOUND RECORDINGS*

by

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Background

On February 15, 1972, certain provisions of an Act of Congress (Public Law 92-140) amending the copyright statute (Title 17 of the United States Code) took effect which substantially change the law with respect to certain sound recordings. This enactment provides that sound recordings "fixed" and first published on or after February 15 may be protected against unauthorized duplication if they are published with the notice of copyright consisting of the symbol Ⓟ (the letter P in a circle), the year of first publication of the sound recording, and the name of the copyright owner of the sound recording, applied on the surface of the copies of the recording, or on the label or container in such manner and location as to give reasonable notice of the copyright claim; the law also provides for certain alternative forms of the notice. The date of "fixation" under the statute is considered to be the date on which the complete series of sounds constituting the recording is first produced on a final master recording that is later reproduced in published copies; and the date of publication is the earliest date when copies (that is, reproductions in the form of phonorecords) of the sound recording are first placed on sale, sold, or publicly distributed by the copyright owner of the sound recording or under his authority.

Determining the date of "fixation" is not as simple in this day of multi-track tape recording, editing, and mixing as it was in former times. When Fred

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Gaisberg stood Enrico Caruso in front of a recording horn in Milan the sounds that came from the tenor's throat were instantaneously and unalterably inscribed in the wax master--or at least all of those sounds that the acoustical recording apparatus was capable of capturing--from which shellac pressings, bearing essentially those same sounds were subsequently placed on the market. Hence in 1902 the date of the "fixation" was, of necessity, the date of recording. Today the ultimate "fixation" can be delayed considerably, depending on artists' schedules and the judgment of the producer and engineer. Perhaps the required vocal group has a club date in Las Vegas, but the rhythm section is only available tomorrow. It is a simple matter to put the rhythm on one or two tracks, then to add the vocal track at a later time, and perhaps organ and strings on still different tracks on yet other occasions. After all of these tracks have been recorded and mixed, the producer may decide that a harpsichord "riff" or glockenspiel obbligato would be just the thing to put the record at the top of the charts, so further recording and mixing might be in order. It seems reasonable to suppose that only on the date that the last master mixed down tape is generated, sounding as the published recording will sound, that the enactment's meaning of "fixation" has been realized.

It is apparent from the legislative history of the Act that protection was envisaged both for cases where there are performers whose performances are captured by the producer who processes, mixes, and edits the sound, and for cases where only the producer's contribution is copyrightable (such as recordings of birdcalls or the like).

What does this mean?

This Act means, for instance, that if a sound recording were duly fixed on March 1, 1972, and discs or tapes were sold or otherwise distributed to the public on April 10 bearing a notice reading Ⓟ 1972 John Doe, then that recording would be protected against unlawful reproduction in the form of unauthorized discs or tapes. It also means that John Doe, or his successor in interest,

may bring an action in the Federal courts against infringers of his copyright, and that the United States could institute criminal prosecution in case of wilful infringement for profit of that sound recording.

Limitations

It is clear that there are certain limitations which apply to the rights granted by this Act. First, the legislative history makes it clear that it was not the intention of this legislation to restrain home recording which is for private use and with no purpose of capitalizing commercially on it. Also, the enactment specifically exempts from its coverage reproductions made by transmitting organizations, such as broadcasters, exclusively for their own use.

Moreover, it is clear that the rights granted are limited, as in the case of all copyrighted works, by the general principle of "fair use," according to which certain uses of copyrighted works have been held by the courts not to be infringements, where the use does not supercede or cut into the actual or potential market for the copyrighted work. A typical example of fair use is the reproduction of a small extract from a work for purposes such as study or comment. Thus, the practice of producing an edited tape of a given phrase or excerpt from the same work, as sung or played by different artists, for research or instructional purposes, perhaps with recorded comment or lecture notes edited in by an instructor, might not be regarded as an infringement, despite the fact that those phrases might have been dubbed from copyrighted recordings. On the other hand, were the record library in an institution to dub multiple copies of a currently in print record scheduled for heavy listening assignment use in order to save wear and tear on the original, the bounds of fair use would presumably be exceeded.

In addition, the enactment provides that its coverage extends only to phonorecords that are fixations of the copyrighted sound recording, and not to independent fixations of other sounds even though they may imitate

or simulate those of the copyrighted recording; and the history of the legislation makes it obvious that it does not restrict in any way the rightful lending, trading, or selling of any phonorecords that were lawfully made.

What the Act does not cover

While the new enactment makes the legal position clear with respect to what it covers, it does not clarify the status of what it does not cover. For example, the Act specifies that it shall not be construed as affecting in any way any rights with respect to sound recordings fixed before February 15, 1972; and this of course includes all recordings published before that date. Also the new Act does not deal with the unauthorized capturing of live performances nor does it refer to the duplication of unpublished recordings, both areas of interest to archivists and many collectors.

What then is the state of the law in these situations? The answer is that any regulation must flow from the common law, particularly that branch of the common law which provides civil remedies against unfair competition, or from the statutes of the States of the Union. For example, a number of the states have enacted criminal statutes against record piracy. However, recent legal actions have brought into question the validity of the state regulation in this area, and the outcome is at present uncertain. Moreover, it is not clear at this time what the effectiveness of the common law protection is with regard to recordings published before February 15.

Other important legal considerations

One must also consider in all cases the copyright status of any underlying work that is being recorded. Thus, for example, even though one may have received permission to make phonorecords from the owner of the rights in a sound recording, it is also necessary, before proceeding, to have the right to use the

underlying work if it is under copyright protection; proceeding unlawfully can subject one to civil litigation for infringement of the underlying work or, if there is a wilful infringement for profit, to a criminal action. The general procedure is to negotiate a contract with the copyright owner, and make the phonorecords under the terms of the agreement. With respect to musical compositions, there is a provision in the copyright law creating a "compulsory license" under which, once the copyright owner of the musical composition has recorded the work or permitted it to be recorded, any other person is entitled to make recordings of that work for two cents per phonorecord made of each composition, under conditions specified in the copyright law. It should be carefully noted, however, that it is at the present time unclear whether this provision is applicable where the user relying on the compulsory license is reproducing a pre-existing recording without permission of the creator of that recording, or whether the provision contemplates only the situation where the user under the compulsory license makes his own recording of the musical composition. And one must also bear in mind that, in any case, the compulsory licensing provision applies only to musical compositions and not to readings of literary works, to lectures, or to dramatic performances; thus one must obtain a license before using copyrighted works of these kinds.

It should be pointed out that no separate copyright notice for the underlying work need appear on a recording of that work. However, separate notices may be appropriate for the liner notes and any additional artistic or literary work associated with the published recording; and such a notice should be the conventional kind, for example, © Richard Roe 1972.

Motion picture sound tracks

The enactment specifically excludes from its scope a sound tract when it is an integrated part of a motion picture. But such works are considered by most copyright experts to be protected against unauthorized use, either

by the copyright law, which makes motion pictures a class of copyrightable work, or by the common law.

Performances

The new enactment gives the copyright owner of the sound recording only the right to prohibit unauthorized duplication of the recording. It does not accord him the right to prohibit or collect for performances of the recording. But again one must remember the copyright owner of the underlying work, for he has the right, under the copyright law, to prohibit or license public performances of dramatic works and public performances for profit of nondramatic literary or musical works.

Counterfeit labels

There is a Federal statute (Title 18 of the United States Code, Section 2318) making it an offense to transport, sell, or receive in interstate or foreign commerce, with fraudulent intent, phonorecords bearing forged or counterfeit labels.

Deposit, registration and cataloging

The law calls for the registration of sound recordings promptly after copyright is secured in them by their publication with the notice of copyright. Registration entails the deposit of two copies of the best edition of the recording, together with an application and the statutory fee of $6.

The processing of audio materials within the Copyright Office is, in some respects, of secondary interest to readers outside the Library of Congress. Some of the details in the handling and flow of material, moreover, will doubtless be adjusted after several months' experience. Nevertheless, certain measures taken for retrieval control may be of interest and of use to the library community at large.

At present Library of Congress printed cards are prepared only for a selection--albeit a fairly wide one--of recordings. Some long playing albums in "pop" genres cannot receive such cataloging, nor can 45 rpm "singles." The quantity of tapes (open reel, cartridge, and cassette) selected for cataloging has gradually increased in recent years, but the fact remains that the majority of the recordings in the Library's collections are uncataloged.

Obviously no such cataloging selectivity can be exercised in the case of recordings registered for copyright. Every item accepted must be controlled and will receive some degree of cataloging. The present operation within the Copyright Office provides for computer-assisted retrieval by the name of the copyright owner of the sound recording, title, author of the sound recording, and, in some instances, composer or author of the underlying work. Other data (contents notes, for example) are maintained in the computer storage and subject to possible future retrieval. Indications are that the long-sought analytics for anthology collections will not immediately spring from the copyright catalog, however. Those claimants who wish to make separate registrations for the individual selections in an album will receive separate cataloging, but thus far there have been few such applications. Perhaps most significant to libraries in general will be the lack of selectivity for copyright cataloging, and the availability in other libraries of a phonorecord catalog of copyright entries, either in book or microfilm form.

From the Copyright Office, the recordings are transported to the Library's Processing Department (except for 45's, which go directly to the Reference Department's custody), where the customary selection is made for traditional printed-card cataloging treatment. No doubt, a number of records so selected at this point will already have been cataloged, having been received from other sources./ Nevertheless, an additional result of the Act's deposit requirement will prove to be an increase in the number of recordings for which printed cards will be available. In these early months, it is

difficult to estimate the extent of that increase over the next few years.

Cautionary note

We have attempted to make the foregoing an accurate summary within its limits. Nevertheless, if the reader has a question, he should consider seeking legal counsel before embarking on any broad venture, particularly one of a commercial nature, since there are ramifications that cannot be treated here and since the law in this area is in a state of development and change.

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