TIM BROOKS

Fair Practices

The purpose of the Fair Practices column is to keep readers informed on copyright as it affects the availability and preservation of recordings. Questions of general interest regarding copyright are welcome and will be addressed in these pages by Erach F. Screwvala, esq., an attorney with the New York law firm of Robinson Brog (we cannot, however, offer private legal advice). Comments and short articles describing your own experiences with, and perspective on, copyright matters are also welcome. Questions and submissions should be sent to Tim Brooks, Chair, ARSC Fair Practices Committee (tbroo@aol.com). For general information readers are invited to visit the Committee's web page at www.arsc-audio.org.

Recent Copyright News

U.S. District Judge Harold Baer, Jr., has struck down a federal law banning the sale of bootleg recordings of live music. The 24 September 2004 ruling, in a criminal case involving Manhattan Internet and mail-order dealer Jean Martignon, held that the 1994 law unfairly granted "seemingly perpetual protection" to live performances. We hope to have more on this case in a later column.

The record industry saw a 2.4% increase in revenue in 2004, reversing several years of declines that the industry has relentlessly blamed on illegal downloading (though many are skeptical of this explanation). Ironically one of the biggest growth areas was sales of legal downloads, which jumped from 19 million during the last half of 2003 (the first period measured) to 151 million for the full year 2004. Universal Music Group (Decca to you oldtimers) led in overall market share with 29.6%, followed by Sony/BMG (the newly merged Columbia and Victor) with 28.5%. Edison's market share is unfortunately now zero.

The industry continues to sue its customers through its trade group, the RIAA. In one recent case a lawsuit was filed against an 83 year-old dead woman who while alive had refused to have a computer in her house. The suit claimed that she traded rock and rap songs under the screen name "smittenedkitten". The RIAA agreed to drop the case, but did not apologize to relatives (Associated Press, 4 February 2005).

An article in *Goldmine* (18 February 2005) maintains that attaching a sound file to an eBay auction – even a one second sample – is a violation of copyright law. Another article on copyright, in the 4 February 2005 issue, contains some dubious advice regard-

ing older recordings, including the claim that any record produced before 1925 is in the public domain.

A group of copyright reformers has formed IPac, a political action committee "dedicated to preserving individual freedom through balanced intellectual property policy". The group endorses and supports candidates who share its goals, and five of the six Congressional candidates endorsed in 2004 won election. IPac has so far attracted more than one thousand supporters. For more information: www.ipaction.org.

Civil rights activists have openly defied copyright law by screening the award-winning documentary *Eyes on the Prize,* a much-lauded chronicle of the 1960s Civil Rights struggle that originally aired on PBS in 1987. The original producers made the film on a shoestring and could only afford limited term licenses for the newsreel footage, photographs and songs used in the film. Since those licenses have now expired it is now technically illegal to broadcast or screen the film. "The events, images, narratives and songs of *Eyes on the Prize* were not written, created or performed by the corporations who now have the copyrights under lock and key," said one Civil Rights veteran. Added another, "these folks are burying our history". About one hundred screenings were planned across the U.S. during February 2005, Black History Month (*Wired News*, 9 February 2005).

An interesting article has appeared in *Popular Music and Society* (Vol. 28, No. 1) titled "Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic," by Prof. Kembrew McLeod. It describes how creative use of prior works, in both the popular and classical fields, has been severely hampered by recent expansions in copyright law. This includes sampling, collages, medleys and "mash-ups". To demonstrate the lengths to which intellectual property law has gone, McLeod filed a form with the U.S. Patent and Trademark Office seeking ownership of the phrase "freedom of expression". This was duly granted, and McLeod then announced a lawsuit against AT&T for using the phrase in an advertisement.

Reader Questions

The following two questions from readers will be answered by Mr. Screwvala together.

Question #1: An issue that comes up at our Library frequently is risk assessment. While each individual and organization has to decide for themselves what is an acceptable risk if they proceed with copying material that is not clearly in the PD, perhaps we could get some guidance on the risk of copying recordings from the 20s, 30s and so on, and what steps are required in doing a risk assessment for this material. RG

Question #2: Since the Digital Millennium Copyright Act does not apply to pre-1972 sound recordings, because they are not protected by Federal law, what, if any, additional rights do users of these sound recordings have? I'm particularly interested in streaming my old 78s over the Internet. (Name withheld)

Copyright Due Diligence

Clearing the rights to older sound recordings made prior to the time of federal statutory protection under the Copyright Act can prove to be challenging. Two reasons exist that create the difficulty. First, it may be difficult to determine the status of the copyright in and to a literary work. Amendments to the Copyright Act, most recently the Sonny Bono Copyright Term Extension Act (the "Sonny Bono Act") have extended copyrights that might otherwise be in the public domain. Second, no federal statutory protection exists for older sound recordings made prior to 15 February 1972.[1] However, the absence of federal statutory protection does not mean that the sound recording is in the public domain. Rather, for older sound recordings, one must look to state and common law to determine what, if any, rights exist. In addition, a work that may be in the public domain in its jurisdiction of creation will not necessarily mean that it will not enjoy some protection elsewhere.

Sound recordings are protected by two distinct copyrights. First, the underlying composition is protected as a literary work.[2] A copyright in a literary work simply refers to sheet music or other notation system that allows someone to create music. Second, the sound recording that embodies the literary work is also protected. If the sound recording was fixed[3] after 15 February 1972 the recording will be protected under the statutory provisions of the Copyright Act.[4] The lack of statutory protection does not automatically mean that the sound recording is in the public domain and may, in certain circumstances, add an additional layer of uncertainty concerning the rights.

Determining the status of a statutory copyright depends on many different factors. For a post-15 February 1972 sound recording, where an individual obtains the copyright, it will expire seventy years after his or her death.[5] For anonymous, pseudonymous, or works made for hire, the copyright will expire on the earlier of ninety-five years from the date of publication[6] or 120 years from creation.[7] The same periods apply to literary works created after 1 January 1978.[8]

For literary works created but not published or subsisting in copyright before 1 January 1978, copyright protection exists as of 1 January 1978 and continues for the period set forth above for works created after 1 January 1978.[9] Since it was conceivable that an unpublished work would fall directly into the public domain at the time protection was extended, the Copyright Act provided that the earliest an unpublished or unregistered copyright will expire is 31 December 2002 or 31 December 2047 is published on or before 31 December 2002.[10]

The status of works subsisting in copyright protection as of 1 January 1978 depends upon whether the work is in its initial or renewal period. For works in their initial period as of 1 January 1978, copyright protection "shall endure for twenty eight years from the date it was originally secured". All such works are entitled to a renewal period of sixty seven years after expiration of the initial term. For works in their renewal period on 27 October 1998, the effective date of the Sonny Bono Act, the copyright shall endure for ninety five years from the date of the original copyright. Any work that had fallen into the public domain as of the effective date of the Sonny Bono Act, remains in the public domain.

The Copyright Office is required to maintain records concerning the status of individual authors.[11] Individuals having an interest in a copyright may file a statement indi-

cating either the date of death of an author, or that the author is alive as of a particular date.[12] The Copyright Office may also maintain records of an author's death through other sources.[13]

This provision was added to address the potential difficulty in determining the status of copyrights where the term is based on the life of an author.[14] Therefore, in addition to the record keeping requirement, the Copyright Act presumes that on the earlier of ninety-five years from the date of publication or 120 years from the date of creation, an author has been dead for at least seventy years, unless the Copyright Office has a record on file to the contrary.[15] This provision is important because "reliance in good faith" upon the absence of any records of the author's date of death serves as a "complete defense to any action for infringement".[16]

In the case of sound recordings fixed prior to 15 February 1972, the lack of federal statutory protection requires a more detailed analysis. In 1973, the Supreme Court ruled that the Copyright Act did not preempt state law protection of pre-15 February 1972 sound recordings.[17] Thus, there may be state based rights – whether by state statute or common law – that will still protect sound recordings fixed prior to 15 February 1972.

An analysis of what state law or common law rights may exist first requires determining the appropriate state law to apply. Oddly enough, the choice of law has nothing to do with where the recording was made. Rather, courts will apply the law of the state in which the recording has been copied.[18] As discovered in the Naxos case, this has the potential of providing protection to works that had fallen into the public domain in the jurisdiction of their creation.[19]

It is readily apparent that the myriad amendments to the Copyright Act over the years, including extensions of copyrights and creation of new protections for previously unprotected work can create substantial uncertainty in determining the status of an older sound recording. Not only does one have to determine the current status of a copyright to the literary work, but it may be very difficult to determine the status of a copyright in and to a sound recording, since the analysis will likely turn on questions of state law – which will undoubtedly vary from state to state. Unfortunately, no hard and fast rules can be provided and each project will have to be analyzed independently.

Book Review

Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity, by Siva Vaidhyanathan. New York: New York University Press, 2001. 255pp. Index. ISBN 0-8147-8806-8. $18.95 (paperback).

One of the most accessible and oft-cited books about the current copyright situation, *Copyrights and Copywrongs,* is now available in paperback. Siva Vaidhyanathan is an assistant professor at the University of Wisconsin, but he tackles the subject with a style that is both informative and entertaining. Who would expect a book on copyright to begin by quoting Groucho Marx?

It seems that in 1946 Groucho received a letter from the Warner Brothers' legal department warning him that his next announced film, *A Night in Casablanca,* might violate the rights of their 1942 film *Casablanca.* He replied that he was surprised that Warners claimed to own a name like Casablanca, since it had been attached to a certain Moroccan city for centuries.

Marx then declared that he had recently discovered that in 1471 Ferdinand Balboa Warner, the great-grandfather of the Warners, had stumbled upon the North African city while searching for a shortcut to Burbank. Then Marx pondered how the filmgoing audience could possibly confuse the Marx Brothers project with the widely successful Warner Brothers production. American filmgoers, Marx argued, could probably distinguish between Casablanca star Ingrid Bergman and his blond brother Harpo Marx. "I don't know whether I could," Marx added, "but I certainly would like to try."

He went on to ask how the Warners could call themselves brothers, since the Marx Brothers were brothers before they were. So were the Smith Brothers, the Brothers Karamazov and "Brother Can You Spare a Dime?" Jack Warner, he said, also had a tenuous claim on the name "Jack". Unamused, the Warner Brothers lawyers wrote back requesting a plot summary of his film so that they could search for actionable similarities. Groucho replied with a ridiculous plot in which brother Chico was living in a Grecian urn on the outskirts of the city. When the lawyers replied asking for more, he changed the plot to one in which he played a character named Bordello, the sweetheart of Humphrey Bogart, and Chico was running an ostrich farm. The Warner Brothers lawyers finally gave up.

Groucho made his film, but in the half century since the lawyers have not given up. They, and their corporate employers, have become ever more aggressive in seizing parts of the public domain, restricting fair use, forbidding derivative works and limiting parody. With the advent of the Internet there is a major effort underway to surround the new technology with legal barbed wire, for the benefit of older distribution methods and established interests. Copyright advocates say they are merely stopping copyright theft, but is what they are doing really theft by copyright?

Like most writers on copyright Vaidhyanathan spends little time on the "recording exemption" that so constrains many ARSC members (the provision that results in nearly all pre-1972 recordings remaining protected, and thus out of the public domain, until at least the year 2067). However, he is a child of the media, and obviously loves music, and many of his examples revolve around the music and film industries.

The book begins with a reasonably concise summary of copyright principles and evolution during the 18th and 19th centuries. Vaidhyanathan distinguishes between "thin" copyright, which allows for a robust public domain and the ability of those who come later to build on the work of the past, within limits; and "thick" copyright, which benefits copyright holders by imposing greater restrictions.

Europe has tended to favor "thick" copyright, so international conglomerates have taken to heavily lobbying treaty-making conferences such as "Berne Convention" series (named after the first international copyright conference in Berne, in 1886; the most recent was in Geneva in 1996). Once they get what they want there they lobby the U.S. Congress arguing that they simply want U.S. law to "conform" to international stan-

dards. Among other things the 1996 Geneva agreement began to undermine the "idea/expression dichotomy," which Vaidhyanathan calls one of the bedrock principles of U.S. copyright law (expression can be copyrighted, ideas cannot). Now publishers of directories are arguing that facts themselves can be copyrighted, and want Congress to pass a bill protecting the facts they have gathered. Among other things, this could shut down most of discography.

A long and interesting chapter describes Mark Twain's views on copyright, as he evolved from an advocate of "thin" copyright (while he was adapting other people's stories) to a proponent of "thick" copyright (after he was famous, and wanted everything he wrote protected). Twain was influential during deliberations on the 1909 copyright act. There then are stories about skirmishes over early films, including those of D.W. Griffith (who first took from others, then wanted everything he created protected), the sensible and influential rulings of Judge Learned Hand in the 1920s and 1930s, and the overturning of many of those rulings by modern judges who grant protection to such vague notions as the "concept and feel" of television shows and greeting cards.

A chapter that will be of special interest to ARSC members is "Hep Cats and Copy Cats: American Music Challenges the Copyright Tradition". Here Vaidhyanathan traces many of the notorious infringement cases in modern music, including Willie Dixon vs. Led Zeppelin, the George Harrison "My Sweet Lord" case, and the Gilbert O'Sullivan "Alone Again" case that effectively shut down sampling in rap music. An obscure rap group had "sampled" about twenty seconds of piano chords from O'Sullivan's sappy 1972 ballad for the background of a CD track; although O'Sullivan suffered no economic harm from this, he indignantly insisted that he had complete control over how his recording would be used and he didn't want any part of it in any rap song. The judge agreed.

There are even racial overtones it seems. Copyright is a European tradition emphasizing ownership and control; the African tradition is more one of community. Blues writers commonly borrowed from and built on each other's work, but today, under U.S. copyright, that is strictly prohibited. Even politics and parody have been attacked. When Dallas mayor Ron Kirk aired a campaign ad referring to Kirk as "captain of the Dallas enterprise," the owners of the *Star Trek* copyrights threatened suit and the ad was pulled; on the other hand in 2000 MasterCard International sued Ralph Nader over a campaign ad that parodied one of their commercials, and lost. Humorless courts have sometimes ruled against take-offs, as in the case of "The Cunnilingus Champion of Company C" (to the tune of "Boogie Woogie Bugle Boy of Company B", from the off-Broadway, and evidently off-color, musical *Let My People Come*). However Rick Dees' "When Sunny Sniffs Glue" (to the tune of "When Sunny Gets Blue") did past muster with the Ninth Circuit Court. The distinction here seems to be protection for parody (a critical statement about the original song), but not for satire (humor about a more general subject). Aren't you glad you're not a judge?

Copyrights and Copywrongs is both informative and a good read. It obviously has a point of view, advocating "thin" copyright to promote creativity, but it also provides a wealth of specific examples of how the laws have worked, and sometimes not worked, with special emphasis on music. It is highly recommended. *Reviewed by Tim Brooks*

Endnotes

1 17 U.S.C. §104A(h)(6)(C)(ii).

2 17 U.S.C. §102(a)(1). A literary work is defined as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, tapes, film, discs, or cards, in which they are embodied". 17 U.S.C. §101.

3 A work is "fixed" when "its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration". 17 U.S.C. §101.

4. 17 U.S.C. §102(a)(7).

5. 17 U.S.C. §302(a). Where the copyright is held by two or more authors as a joint work, the expiration is based upon the date of death of the last surviving author. 17 U.S.C. §302(b).

6. Publication is defined as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending". 17 U.S.C. §101.

7. 17 U.S.C. §302(c).

8. 17 U.S.C. §302.

9. 17 U.S.C. §303.

10. *Id.* On its original enactment, the copyright was to have expired no earlier than 2027 assuming publication had been made. The Sonny Bono Act extended this for an additional twenty years.

11. 17 U.S.C. §304(a)(1)(A).

12. 17 U.S.C. §§304(a)(1)(B), (a)(1)(C). Entitlement to the renewal term depends upon the copyright holder complying with specific renewal requirement. 17 U.S.C. §§304 (a)(2)(A), (a)(2)(B).

13. 17 U.S.C. §304(b).

14. 17 U.S.C.§302(d).

15. *Ibid.*

16. *Ibid.*

17. See, Notes of Committee on the Judiciary, House Report No. 94-1476.

18. 17 U.S.C.§302(c).

19. *Ibid.*

20. *Goldstein v. California*, 412 U.S. 546 (1973). As of 15 February 2067, however, Federal law will preempt all state law and common law copyrights. 17 U.S.C. 301(c).

21. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.,* 153 F.3d 82, 91 (2d Cir. 1998). The rule is derived from general conflicts principles applied to tort claims. In essence, the law to be applied is the law where the wrong occurred. Obviously, this arises only in the context of an action for infringement.

22. In the Naxos case, the work in dispute had fallen into the public domain in the United Kingdom. Depending on how the Court of Appeals rules on the issue, it is possible that the recordings at issue in that case will be protected under New York law.