

Copyright & Fair Use

The purpose of the Copyright & Fair Use 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. Please send your questions and submissions to Tim Brooks, Chair of the ARSC Copyright & Fair Use Committee (tbroo@aol.com). For general information visit the Committee's web page at www.arsc-audio.org.

Recent Copyright News

In perhaps the most significant recent news in the field of copyright, the U.S. Copyright Office has released its findings on the subject of “orphan works” – works for which no copyright owner can be found, and thus for which permission to use or adapt the works cannot be obtained. The ever-present threat that an owner might emerge later and sue prevents many such works from being used at all. The Copyright Office recommended several beneficial changes in the law, which were explained in detail in the Winter issue of the *ARSC Newsletter*. The full report can be found at www.copyright.gov/orphan.

The Copyright Office is also looking into possibly recommending modifications of Section 108 of the Copyright law, the section that allows limited reproduction of copyrighted materials by libraries and archives. Unfortunately the scope of this inquiry is quite narrow. Might the Office someday undertake a broader investigation of the problems created by U.S. copyright law? No less a government official than Mary-Beth Peters, the Register of Copyright, recently observed on a public panel that in her opinion it was a “big mistake” for Congress to have created such long copyright terms.¹ Many who do not have a vested interest in those terms would certainly agree.

One party that does have a vested interest in draconian copyright laws is of course the Recording Industry Association of America, which recently boasted that it had so far filed 15,500 lawsuits against people it claims are illegal downloaders. About 25% of those sued have settled with the RIAA on its terms, but the rest have not and the first major cases fighting the RIAA lawsuits are expected to go to court in 2006. Lawyers representing defendants say that the organization is grossly overstepping the bounds of the law

with its sweeping dragnet.² In one recent case a home health aide in Brooklyn, New York named Marie Lindor, who says she has never bought, used or even turned on a computer, was sued for downloading files. She requested a summary judgment dismissing the case and awarding her attorney's fees. Numerous websites have sprung up discussing the suits, and some law firms and even renegade labels are offering legal support.³ Type "RIAA lawsuits" or something similar into your favorite search engine and you will get many thousands of hits on this subject.

In Europe entertainment companies continue to vigorously pursue a copyright term extension for recordings there from the current 50 years to as much as 95. This would virtually shut down the reissue industry there. The Autumn 2005 issue of *Classic Record Collector* suggests that readers write their Member of Parliament about this; a model letter can be found at www.kcl.ac.uk/music/dlw/copyright.html.

One of the more notorious music copyright cases of recent years has taken a bizarre turn. British musicologist Dr. Lionel Sawkins sued Hyperion Records over its use of his edition of a piece by an obscure Baroque composer named Lalande. Although Sawkins was not the composer the court agreed and awarded him nearly £1 million, which was upheld on appeal. However Sawkins will get just £5,500 of that. The rest goes to his lawyers.⁴ No wonder lawyers love copyright cases.

Finally, copyright is not the only intellectual property law to become increasingly skewed to benefit rights holders at the expense of everyone else. An interesting article in *Information Week* titled "The U.S. Patent System in Crisis" details how patent law has also been greatly expanded resulting in, among other things, the rise of "patent traffickers" who buy up questionable patents and then extort settlements from real companies by threatening endless challenges.⁵ Although patent holders have not been able to get term extensions (the normal term in the U.S. is about 20 years), they have won other changes and exploited loopholes in the law to the extent that even the Patent Commissioner believes reform is needed.

Review

Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives. By June M. Besek. Washington, D.C.: Council on Library and Information Resources, 2005. 54pp (softcover). ISBN 1-932326-23-5. \$20.00. Also available free as a downloadable pdf file from www.clir.org.

Many people, if they noticed the passage of the National Recording Preservation Act of 2000 at all, probably think it simply set up an annual list of "great recordings," much like the National Film Registry. A more significant provision of the law was that it directed the Library of Congress to study the effect of copyright laws on the preservation and accessibility of recordings, and report back on any legislative changes that might be needed.

The fruits of that directive are just now becoming available. This booklet is the second in a series of studies sponsored by the Council on Library and Information Resources (CLIR), a Washington-based library association, for the Library of Congress

and its National Recording Preservation Board. [The first study, by this reviewer, dealt with the availability of reissues of historic recordings.⁶] The new study is by June Besek, a professor at Columbia Law School. While no doubt delightful reading for lawyers, stylistically it is pretty dry and dense going for the neophyte. Nevertheless it does contain valuable new information on state laws affecting pre-1972 recordings, and for that reason alone is worth a look.

As most readers of this column probably know, pre-1972 recordings are treated quite differently from later recordings under U.S. law. While later recordings are covered by federal law, those made before 15 February 1972 (which ARSC members are most interested in) remain under state law – at least until 2067. [There are actually two copyrights for a typical recording, for the recording itself and for the underlying music, but that is another story.] So the largely unstudied field of state law as it relates to recordings is of great interest to those who want to preserve or disseminate older recordings.

Although the study is ostensibly about pre-1972 recordings, the first third consists of a detailed description of federal copyright law, which of course applies to post-1972 recordings. I say “a description” because the author offers little analysis, providing instead a careful recounting of various provisions of the law, including works covered, terms, rights conveyed, fair use, and special library privileges (which are quite limited). She explains that this extensive treatment of post-1972 law is necessary because some pre-1972 foreign recordings do fall under federal jurisdiction (due to treaties), the underlying music is governed by federal law, and state courts sometimes look to federal law for guidance in deciding their own copyright cases. It’s well-trod ground, but at least it is more complete coverage than is found in many of the popular books I’ve previously reviewed here, and it is not as difficult to read as the statutes themselves.⁷

The good stuff begins on page 16, when the author first tackles state laws. She looks at laws and court cases in five sample states – New York, California, Illinois, Michigan and Virginia. Why these particular states were chosen is not stated, but they seem reasonable enough. Within each state the study looks at criminal and civil law. One theme that emerges is that criminal laws almost all deal with record piracy “with the intent to use or sell for profit,” and would most likely not be invoked in cases involving non-profit uses such as those of a library. Looks like nobody’s going to go to jail for non-profit uses.

Civil law, under which you can get sued, is another matter. In all states except California recordings fall under “common law,” derived from prior judicial rulings; in other words, “judge-made law” (talk about legislating from the bench!). Because this body of “law” has grown up over time, and depends on the cases that arose, it is extremely vague and inconsistent from state to state. Besek does her best to sort out the commonalities and implications of this smoldering body of state common law, concluding that ownership of recordings is generally eternal (until federal law preempts in 2067), and most civil cases have dealt with for-profit situations. Case law on non profit uses, such as preservation or dissemination by a library, is yet to be written. She is, however, pessimistic that the courts will carve out many exceptions there.

One recent and notorious case, *Capitol v. Naxos*, is described in detail, again with little analysis. In this case a business-friendly court decreed a sweeping expansion of recording copyright privileges in New York State, and Besek is clearly concerned that other local courts will follow suit. At the back of the report is an interesting appendix listing specific criminal and civil findings in each of the five states studied.

Another section of the report deals with digital preservation and dissemination, again based on federal law (post-1972 recordings). An interesting section on “general equitable defenses” addresses the issue of abandonment, which some think is a possible defense in cases involving the dissemination of long out-of-print recordings. The legal principles of abandonment, estoppel, waiver and laches are described, but the conclusion is that none of them are likely to be successful except in very special cases.

Besek seems reluctant to come to clear conclusions or to offer many concrete recommendations to archives undertaking preservation or dissemination work (other than “the law is vague so be careful”). However it is apparent from her findings that state and common law, while not as clear-cut as federal law, is sweeping, onerous and heavily favors rights holders. At the end she tactfully suggests that “legislative change is critical to enable responsible and efficient digital preservation and dissemination,” and singles out section 301(c) of the federal copyright act – the provision that put pre-1972 recordings under state law – as one specifically in need of alteration.

Overall, this study is an important addition to the body of evidence supporting copyright reform in the U.S. It teases us with the first partial look at the murky area of state laws and pre-1972 recordings. A more comprehensive study of the laws of all fifty states is underway at the CLIR. *Reviewed by Tim Brooks*

Endnotes

1. http://www.boingboing.net/2006/02/21/copy-right_office_hear.html
- 2.. “RIAA Foes Turn Up the Volume,” *Variety*, November 28, 2005, p.9.3
3. “Nettwerk Music Groups Takes on the RIAA,” www.marketwire.com/mw/release_html_b1?release_id=1076234
4. “Hyperion Loses Copyright Appeal,” *International Piano*, January/February 2006, p.7.
5. Eric Chabrow, “The U.S. Patent System in Crisis,” *Information Week*, February 20, 2006. At www.informationweek.com/story/showArticle.jhtml?articleID=180204145.
6. Tim Brooks, *Survey of Reissues of U.S. Recordings*. Washington, D.C.: Council on Library and Information Resources, 2005.
7. U.S. Code, Title 17.