

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. Screwala, 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 Copyright & Fair Use 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

Much has been written about the vast expansion of copyright in recent years, and the ability of large entertainment companies to secure laws restricting preservation of and access to older recordings. It may sometimes seem that the situation is hopeless, from the preservationist's (and the consumer's) point of view. But much is going on behind the scenes. With the National Recording Preservation Act of 2000, the U.S. Congress established the National Recording Preservation Board at the Library of Congress and directed it to study and report on the state of sound recording preservation and access in the United States. These studies are intended to guide future legislation. The fruits of this law are just now becoming available, thanks in large part to the hard work of ARSC's Sam Brylawski and the Council on Library and Information Resources (CLIR), a Washington-based library association.

In 2004, Steve Smolian and I were commissioned to conduct a study on the impact of current law on the availability of historic recordings to the general public. The results are outlined in an article in this issue, and in a detailed report published by the CLIR. Another CLIR report, by June M. Besek of the Columbia Law School, surveys state copyright laws and how they affect preservation and dissemination of pre-1972 recordings. Still another recent paper reports on an audio engineers' roundtable on digital preservation. In addition, CLIR has published several earlier reports of interest to archives and collectors, including *Copyright Issues Relevant to the Creation of a Digital Archive: A Preliminary Assessment* by Besek; *Survey of the State of Audio Collections in Academic Libraries* by Abby Smith, David Randal Allen, and Karen Allen; and *Care and Handling*

of *CDs and DVDs: A Guide for Librarians and Archivists* by Fred R. Byers. All of these reports are (or will be) available for free on the CLIR website: www.clir.org.

Another important initiative currently underway is the “orphan works” inquiry by the U.S. Copyright Office. This is an investigation into whether copyrighted works whose owners are difficult or impossible to locate have created problems for preservation and access, and if so, possible legislative remedies. It was launched in response to requests from influential members of the U.S. Senate and House. More than 700 public comments and 150 replies to those comments may be viewed on the inquiry website: www.copyright.gov/orphan. [My comment and reply comment are nos. 579 and 37, respectively.] The Copyright Office held roundtable discussions with experts in the field in Washington, D.C., and Berkeley, California, during mid 2005, and the transcripts of those sessions are also available on the website (along with audio of the Berkeley session, if you want to listen on your I-Pod!). ARSC was not invited to these roundtables, but the problem of orphan recordings was raised by the MLA’s Jerry McBride, among others, and the Copyright Office seems to be listening.

While there is a slight whiff of possible copyright reform in the air in the U.S., in Europe the entertainment conglomerates are making a bold attempt to grab additional pieces of the public domain. They are lobbying the European Union to extend the copyright term for recordings there from the present fifty years to something much longer, perhaps the 95 years they got in the United States. [It’s actually even longer than that in the U.S., because of state laws.] The EU staff initially resisted this (*ARSC Journal* 2004;35(2):337), but with the United Kingdom’s young Minister for Creative Industries, James Purnell, who actively supports term extension, chairing the relevant EU committee in 2006, it could happen. Those opposed to such an extension are being urged to write Purnell (and their own governments) with information about the damage this could do, including the experience of the United States. Hopefully our European members will not be “asleep at the switch” as Americans were when vast expansions of copyright were quietly rammed through here. Purnell’s e-mail is purnellj@parliament.uk, and his website is www.jamespurnell.labour.co.uk.

Stereophile magazine has a fairly detailed guide for consumers on how copyright law affects the copying and sharing of recorded music, in its September 2005 issue.

Reader Question

I’m looking for some guidance regarding an “indie” webcast show I produce on the Internet. I use recordings of Irish, Scottish, and Canadian country dance music and songs made from the early 1900s up to the present. In addition to regular issues I use privately made CDs by independent artists that (I believe) are not licensed by a rights’ organization. They and some small labels have encouraged me to use their material. After all, I’m doing them a favor helping them market their product. In the case of 78s, I’m not marketing my transfers (cleaned up 78s transferred to CD) but only using them on the webcast. Here are my questions.

1. Can a webcast get into trouble using 78s even if the work is not the original but a cleaned up, digital copy that has been enhanced? How do I get permissions for old 78s?

2. Am I free to use privately made CDs?
3. On a webcast can I use John McCormack recordings made before the mid 1920s? What about the European issues on HMV, now EMI?
4. I use many Canadian Victor records, both 78s and LPs. I'm assuming that I can't use these on a webcast, or is it ok because they were pressed in Canada?
5. I use Apex (Canadian) 78s on which the label says "not licensed for broadcast". How does this fit into the rights picture for a webcast?
6. I use Columbia (and other) 78s of the 33XXXX Irish series. The masters for these records were dumped in the ocean years ago. Does that end the rights claim?
7. Do the rights organizations cover only the US or because webcasts cover the world, do SOCAN (Canada), IMRO (Ireland), and other foreign agencies get involved?

Any guidance you could provide would be very much appreciated.

(Name withheld)

Webcasting and Copyright Law or Why Old Dogs Can't Learn New Tricks

The Copyright Act grants copyright owners a bundle of exclusive rights with respect to copyrighted works.¹ Among these is the right of public performance,² including the right of public performance by means of digital audio transmission, such as webcasting.³ The nature of these exclusive rights, however, differ among the types of copyrighted work. Sound recordings, for instance, do not enjoy public performance rights other than through digital audio transmission.⁴

The Copyright Act exempts non-subscription webcasting services that are non-interactive and are primarily made for the purpose of providing audio programming or other entertainment to the public.⁵ The exemption of certain services means that use of sound recordings in this context will not constitute infringement of Section 106(6).⁶

Exempt digital audio transmissions are not free, however. Rather, the Copyright Act provides for a statutory license for all exempt and non-exempt transmissions to use a sound recording.⁷ In addition, it is necessary to obtain permission from the copyright owner of the literary work embodied on the sound recording.⁸

The statutory license provision for digital audio transmissions assumes the existence of a valid copyright in the sound recording. Of course, prior to 15 February 1972, no federal statutory protection existed for sound recordings⁹ and, at present, no sound recordings fixed¹⁰ prior to that date enjoy any federal copyright protection. Therefore, it stands to reason that the statutory license provisions of Section 114 do not apply to those pre-15 February 1972 sound recordings.

The lack of federal protection for pre-15 February 1972 sound recordings means that webcasters may need to obtain a license directly from the owner of the sound recording. Pre-15 February 1972 recordings may enjoy state common law protection.¹¹ The scope of state law protection involves a state by state analysis. The State of New York has recently determined that pre-15 February 1972 sound recordings enjoy perpetual copyright protection under New York common law.¹² The effect of the New York deci-

sion is to leave webcasters seeking to stream older sound recordings without a means to obtain compulsory permission to utilize such recordings.¹³ Webcasters, therefore, must seek permission from the owner of the sound recording before including these performances in a digital audio transmission.

Webcasters must also deal with the need to transform a sound recording in a physical format, such as a vinyl phonograph record or compact disc, into a recording that can be streamed through the Internet. The Copyright Act does provide for a statutory license allowing webcasters to create a copy of a copyrighted sound recording, known as an ephemeral recording, for the purpose of facilitating its use for transmission.¹⁴ The ability to create such recordings is limited to those webcasters who meet the criteria of Section 114 for a statutory license.¹⁵

Ephemeral recordings are subject to strictly prescribed rules concerning their creation and use. First, no more than one copy may be created.¹⁶ Second, the organization making the ephemeral recording must retain it for its sole use and must not copy or reproduce other phonorecords from such recording.¹⁷ Third, ephemeral recordings may only be used for the purpose of digital audio transmissions or for archival purposes.¹⁸ Finally, all ephemeral recordings must be destroyed within six months after the date of first transmission of the program utilizing the recording, unless retained by the organization for archival purposes.

The statute governing ephemeral recordings is silent as to whether one making a copy is permitted to enhance the recording in the creation of the recording. This is no doubt significant in the context of older recordings and the ability to create restorations and enhancements of the original recordings. Notwithstanding the lack of statutory guidance, however, it is likely to be the case that one would not engage in infringement for making an enhanced ephemeral recording, so long as the use is limited to the permitted uses of the statute.

The creation of ephemeral recordings for pre-15 February 1972 sound recordings raises the same issues of state common law as the ability to transmit such recordings over the Internet. Accordingly, webcasters must also obtain a license from the owner of the sound recording to create an ephemeral recording to be used in digital audio transmissions. *Erach F. Screwvala*

Book Review

Music and Copyright (Second Edition). Edited by Simon Frith and Lee Marshall. New York: Routledge, 2004. Index. ISBN 0-415-97253-1. \$24.95 (paperback).

Music and Copyright is a collection of eleven essays on various aspects of copyright as it relates to music and recordings. The coverage is international, as are the contributors, giving the reader a world view of modern copyright and its impact on creativity and distribution. This is perhaps appropriate as copyright laws have become increasingly standardized internationally through a web of "intellectual property" treaties and agreements.

Chapter one addresses this internationalization. The first edition of the book (1993) was organized by country, but this one has been arranged thematically because, as the editors point out, "developments within media industries over the last twenty to thirty years have resulted in increasingly transnational legal structures; local actors now find

themselves in very similar situations". What happens in the United States is very much affected by deliberations in Rome or Geneva, and can only be understood in terms of the operation of multinational corporations. Subsequent chapters deal with such subjects as the history of copyright; the economic theory behind copyright (Adam Smith was against copyright); the political forces that led to international agreements; how the music industry uses copyright in practice (threats and intimidation seem to be as important as direct legal action); composers and copyright; performers and copyright; the impact of copyright on creativity (stifling some forms, encouraging others); copyright and traditional or folk music; how rights impact different media; and different types of infringers, innocent and deliberate. The last chapter points out how the expansion of copyright protection has converted once-innocent (and often desirable) uses of creative material into "infringement," and how even the language describing such uses has been hijacked by the content industries to justify their ends. Practically every activity that does not result in direct payment to a rights holder is now branded "piracy" or "theft, plain and simple". The public domain is clearly under assault. [As I have noted elsewhere, what we are really seeing here may not be "copyright theft" but "theft by copyright".]

Most of the chapters are analytic rather than polemic, although the editors do note that they were surprised that the essays – submitted by experts from different countries and different disciplines – expressed a recurring skepticism about the benefits of copyright as it is presently structured. Some of the complaints are in conflict with each other; for example creators feel constrained by copyright's growing strictures, but an ethnomusicologist argues that the musical creations of native tribes (those that do not have lawyers) are not protected well enough. Larger social issues are also alluded to, for example the use of rights as a means by which richer countries exploit poorer ones (modern "economic imperialism"). But the general theme is one familiar in almost all modern writing on copyright, that it has shifted the balance of power dramatically from users to rights holders (who are generally intermediaries and not the creators), and that in doing so it has actually become a disincentive to creativity (p.211).

The editors conclude the book with two possible scenarios for the future: "Copyright Totalitarianism," in which rights holders own, charge for, and most ominously require permission for (i.e., control) the use of just about everything; and "Copyright Anarchy," in which the rules collapse under assault from new technologies that make it impossible to trace and control usage, and music itself recedes as a part of our daily life because no one can make a living at it. Reality will probably be somewhere in-between these two extremes, but the editors conclude that it will not be as dire as some predict. Their reasoning is that any copyright regime will stay in place only for as long as it remains economically effective, and that if ever more restrictive laws are ignored or undermined because they are perceived as fundamentally unfair they – and the music business – will eventually change. "What is at stake here (for the industry) is profit rather than principle." I hope they're right.

Music and Copyright is accessibly written and not overly technical, although it does assume a basic knowledge of and interest in the subject. It is probably not best used as an introduction to copyright for the novice; for that try something like *Copyrights and Copywrongs*, reviewed previously (ARSC Journal 2005;36(1):53-55). However, it is an excellent guide to structured thinking about copyright from the point of view of different disciplines and different interest groups, and would serve well as an academic course reference. *Reviewed by Tim Brooks*

Endnotes

1. 17 U.S.C. §106.
2. 17 U.S.C. §106(4). Public performance rights are limited to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works”.
3. 17 U.S.C. §106(6). Webcasting rights are limited to sound recordings only.
4. 17 U.S.C. §114(a).
5. 17 U.S.C. §114(d)(1). Section 114 sets forth several requirements for entitlement to the exemption that are too complex to detail in this article. See also, 17 U.S.C. §114(i).
6. *Ibid.*
7. 17 U.S.C. §114(d)(2). License fees for statutory licenses are set by the Librarian of Congress on a biennial schedule.
8. 17 U.S.C. §106. Previous articles have discussed the fact that a sound recording is composed of two separate copyrightable works – the recording itself, and the composition on which the recording is based.
9. 17 U.S.C. §104A(h)(6)(C)(ii).
10. 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.
11. The Supreme Court has ruled that the Copyright Act does not preempt state law protection for these recordings. *Goldstein v. California*, 412 U.S. 546 (1973). As of 15 February 2007, however, Federal law will preempt all state law and common law copyrights. 17 U.S.C. 301(c).
12. *Capitol Records, Inc. v. Naxos of America, Inc.*, 4 N.Y.3d 540, 797 N.Y.S.2d 352 (2005). For an analysis of the Naxos case, please refer to {January 2005 Newsletter}. All state law protection will be preempted on 15 February 2007. 17 U.S.C. § 301(c).
13. The origin of the recording will not have any bearing on whether common law protection will apply. For further detail on this point please see *ARSC Journal* 2005;36(1):52-53.
14. 17 U.S.C. §112.
15. 17 U.S.C. §112(a)(1).
16. *Ibid.*
17. U.S.C. §112(a)(1)(A).
18. U.S.C. §119(a)(1)(B).