

Copyright Issues in a Digital Environment

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Goals

- Review copyright law as applied to musical works and sound recordings
- Remind you about what you already know
- Provide a framework to help you identify the issues, and ask the right questions, so you can work out the answers
- Manage risks with knowledge because lots of times there are no clear cut answers



Things We Are Not Going to Talk About

- Streaming audio or file sharing
- Music and sound recordings when used as parody/satire
- Record piracy and bootlegging laws
- Public performances or displays of works



Things We Are Going to Talk About

- Identifying and locating copyright owners
- Determining if permission is needed or an exemption applies
- How to go about seeking permission for use
- How to explain why the exemption applies



Assumptions

- Creating digital copies of analog works in non-profit library collections
 - not digital-to-digital copying
- Library is (1) providing copies of works to patrons, and/or (2) putting musical works and sound recordings on intranets and/or the Web
- Copying and distribution (access) activities are conducted in the U.S., so federal and state laws apply
 - international copyright laws vary



Music Copyright Nomenclature

- Musical works (print)
 - protected by US copyright law since 1831
 - not defined in copyright law
- Sound Recordings (phonorecords)
 - pre-February 15, 1972, not protected by US copyright law until 2067; protected by state laws
 - February 15, 1972, forward, sound recordings fall under U.S. copyright law



Music Copyright Nomenclature

- Sound tracks are defined as audiovisual works and include motion pictures, and they are protected by federal copyright law and are not sound recordings or phonorecords



Copyright Law and Music

- § 106 Exclusive rights in copyrighted works
- § 107 Limitations on exclusive rights: Fair use
- § 108 Limitations on exclusive rights:
Reproduction by libraries and archives
- § 109 Limitations on exclusive rights: Effect of
transfer of particular copy or phonorecord
- § 110 Limitations on exclusive rights: Exemption
of certain performances and displays
(teaching)



Copyright Law and Music

- § 114 Scope of exclusive rights in sound recordings
- § 115 Scope of exclusive rights in nondramatic musical works:
compulsory license for making and distributing phonorecords
- Chapter 3 Duration of copyright, including preemption of U.S. copyright
with respect to other (state) laws
- Chapter 10 Digital audio recording devices and media
- § 1101 Unauthorized fixation and trafficking in sound
recordings and music videos
- § 1201 Circumvention of copyright protection systems



Proposed Uses of Digital Copies

- Digital preservation only copy
- Digital (internal library) use copy
- Digital sound recording for patron use on the premises
- Digital access copy for patrons off the premises, i.e., outside the library
- Digital access copy for other libraries (ILL)
- Digital copy for e-reserves



Rights Information

- Identify all the possible rights holders
 - composition
 - lyrics
 - performance
 - recording (technical)



Rights Information

- What type of work is it?
 - musical work, sound recording, sound track
- Is the work published or unpublished?
- When was the work created or published?
- Who is the “creator”?
 - individual: if assigned, termination rights
 - work for hire
- Who owns the copyright, now?
 - subsequent transfers of ownership
 - license of rights to third party



Finding Rights Information

- All the usual sources
 - the work itself
 - BMI, ASCAP, SESAC
 - Harry Fox Agency
 - Copyright Office
 - Web searches
 - Scholars
 - Library catalogs



Rights Assessments

- Copyright is clearly in the public domain
- Copyright is valid and clearly owned by the institution
- Copyright is valid and clearly owned by someone else who is identifiable
- Copyright is or may be valid and seemingly owned by an unidentified party
 - anonymous makers
 - orphan works (will not apply to pre-1972 sound recordings)



Rights Assessments

- The institution has partial copyright or specific usage rights granted by license; note restrictions and conditions; beware the quitclaim
- A third party purports to own the copyright but further analysis may be beneficial to examine issues of the public domain, additional heirs, implied licenses, statute of limitations, and so forth



Capturing Rights Information

- If you know who owns or controls the rights i.e., the rights metadata, where do you keep that information?
 - embed with the digital copy of the work
 - insert into metadata for bibliographic record (MARC 540)
 - capture in a separate database
 - record in a paper file



Capturing Rights Information

- Cataloging rules and a controlled vocabulary for legal rights metadata
- Media-specific rights
- California Digital Library Project



Translating Rights Metadata into Business Rules

- Business rules
 - reflect institutional judgments about rights and risks
 - will need as part of digitization cataloging efforts
 - will need to attach rules to digital surrogates
- Any terms can be used; it is important to use terms consistently
 - probably no more than six categories



Examples of IP Business Rules (or Values)

- OK to publish internally on intranet high/low resolution
- OK to publish on web with access restrictions and/or other encryption or watermarking
- OK to publish on web with copyright notice and ownership information
 - may require IP information for the object and the copy
- OK to publish on or after [insert date], or insert specific time period
- **DO NOT INCLUDE** in any data access or export



Permission or Fair Use

- Without permission or a legal exemption, creating a digital copy of a copyrighted musical work and/or sound recording would be an infringement
- In addition, digitizing sound recordings could be record piracy and distributing via the web could be webcasting
 - review permissions issues
 - review two important exemptions:
 - fair use
 - reproduction rights of libraries and archives



Permission Analysis

- Is the work protected by copyright?
- Does the institution own the copyright or have a license for the use?
 - beware the quitclaims
- Do you need permission? Would fair use apply or some other limitation on exclusive rights apply?
 - case-by-case analysis
 - difficult to create and implement a “bright line” test
- Do you need to obtain the physical material?



When Seeking Permission

- Identify owner(s)
 - Copyright Office plans to seek comments on problems encountered in finding owners (tracing costs)
- Contact owner(s)
 - email
 - letter
 - phone
- Follow-up at least twice; give yourself lots of lead time
- No difference for foreign institutions even though they may be harder to track down



Permission Request

- Explain your proposed use(s)
 - be specific
 - be comprehensive
 - explain fair use
- Include a license or an “Agreed to and Accepted By” signature line
- If grant of permission is verbal, confirm with a writing



Permissions – No Response

- If you cannot find the owner or they don't respond, need to analyze the facts relating to the proposed use and the possible risk of an infringement claim
 - how much will be used?
 - what media?
 - how long?
 - can you include a copyright notice?
- If no response after diligent and good faith efforts, assess risks and document what you did



Fair Use

- Fair use is source neutral
 - must legally acquire copy
 - contracts trump the statute
 - DMCA issues
- Fair use applies to published and unpublished works
 - higher burden to prove fair use for unpublished materials



Purpose of Use

- Commercial or nonprofit, educational use
- Criticism
- Comment
- News reporting
- Teaching
- Scholarship
- Research



Transformative Uses & Functional Test

- A factor that judges discuss in various fair use opinions
 - generally, the concept is that the new use (the fair use) transforms the original work
 - not just copying
- Judges also look to see whether the “new” work functions in the same way as the original, or not
 - the more different, the better



Fair Use Four Factors

- Section 107 and the four (4) factors weighed by courts when determining if the “copying” is legal under the fair use defense:
 - (1) purpose and character of use
 - (2) nature of copyrighted work
 - (3) portion and substantiality of work used compared to the whole work
 - (4) effect on potential market or value for the copyrighted work
- Not an exhaustive list
 - judges may consider other factors



Character of the Use

- Favoring Fair Use

- One of the listed uses
- Restricted access
- Transformative
- Parody

- Favoring Permission

- Commercial use (profit)
- Entertainment
- Bad-faith



Nature of Material Used

- Favoring Fair Use
 - Published
 - Factual
 - Nonfiction
- Favoring Permission
 - Unpublished
 - Highly creative work
 - Fiction



Amount Used

- Favoring Fair Use
 - Small amounts
 - Not the heart of the work
 - Appropriate in light of purpose
- Favoring Permission
 - Large amounts
 - Heart of the work



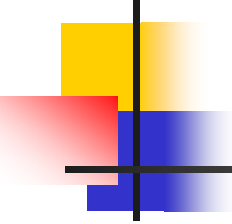
Effect on Market

- Favoring Fair Use

- Owning a copy
- Few copies made
- First 3 factors favor fair use
- No ready market for permission
- Out of print
- Owner unidentifiable

- Favoring Permission

- Takes away sales
- Easy licensing mechanism
- Many copies made
- Wide distribution of copies
- Repeated use
- First 3 factors favor permission



Contemporaneous Writings of Fair Use Analysis

- Why is the proposed use a fair use?
 - Assume fair use is the same legal analysis under federal and state laws
- Memo to File
 - doesn't need to be long with lots of legalese
 - needs to explain how the facts support factors favoring fair use



Reproductions by Libraries and Archives of Works in Collection

- Copying without permission
- Unpublished works: preservation and security
- Published works: replacement copies if original is lost, damaged, deteriorated, or stolen and an unused replacement copy cannot be obtained for a fair price
- But, Section 108 does NOT apply to musical works or sound recordings
- Section 108 Study Group



Special Rules for Pre-1972 Sound Recordings

- Not covered by federal copyright law until 2067
- State laws govern
 - record piracy statutes are part of criminal law
 - fair use is not a criminal defense
 - some states such as California have a non-profit educational use exemption
- Do you know the state laws that apply to your work?



Best Practices and Guidelines

- Documentary Filmmakers' Statement of Best Practices In Fair Use
- Music Library Association
- RIAA



Required Reading

- California Digital Library Project
- CLIR Reports
- Copyright Office
- The Patry Copyright Blog
- Peter Hirtle's Term of Copyright Chart
- University of Texas Crash Course in Copyright