

## Oldies, Music Rights, and the Digital Age

Could there possibly be anyone, especially anyone reading this magazine, who has not heard the music industry's loud complaints that their profits are tanking because wily and law-scoffing youngsters are bypassing the industry in favor of stealing songs and CDs via file-sharing software? Readers' sympathies may vary on this issue, but it is perhaps hard to muster much pity for an industry that has clung, in this age of the Internet, to outmoded technologies (CD sales, for one), that has singularly failed to innovate (iTunes was created by a computer company), and that has stubbornly favored heavy-handed litigation (e.g., the Recording Industry Association of America has sued kids, software innovators, colleges/universities, and other file-sharing miscreants coast to coast). Still, the industry does have a legitimate beef. Such file-sharing is clearly illegal and doubtless does hurt an industry that supports musical artists of every stripe, including composers, symphonies, rap singers, and rock bands.

From the industry's point of view, what is at stake is revenue, or lack thereof, and not a whole lot more. Yet, with sad regularity, the issue of rightful compensation for intellectual property has been lumped with infringement of copyright, even though the two are actually quite separate issues. One arena where this lumping has hit hardest is not-for-profit archives of recorded sound. Whether at Yale, Syracuse, the New York Public Library, or the Library of Congress, analog repositories are preserving the very heritage of U.S. (and world) music into the twenty-first century. The recording in-

dustry, by contrast, does not inventory this historical output. Its focus, understandably, is on the sale of "current" (the past thirty years) recordings and the occasional remastering of older materials on a selected basis. Indeed, the industry looks to national sound archives to preserve our musical legacy unto perpetuity. And therein lies the rub. At almost every turn, the industry has stymied the legitimate efforts of recorded sound archives to provide digital preservation of and access to their vast collections of "oldies" (recordings from 1890 to the 1950s).

According to current U.S. copyright law,<sup>1</sup> the preponderance of musical recordings (post-1890s) in archive collections remains under copyright protection. Indeed, music copyright is often governed more by state laws than federal. Archives can let users listen to (and, in some cases, borrow) these recordings, and under certain conditions, archives can provide fair use "copies" on an item-by-item basis for teaching, research, and preservation. But they are prohibited by the terms of copyright law from creating substantial digital repositories of commercially recorded sound. To date, the music industry has balked outright at this suggestion. And yet preliminary studies conducted by the National Recording Preservation Board show that only 14 percent of older material recorded in the United States to about 1970 is available for purchase in digital format.

However, advances in digital technology and the advent of robust networks and digital repositories in particular indicate there are no technological barriers to creating interlinked, publicly accessible "archives" of digitized recordings from

the 1890–1950s time period. Although some standards for sound digitization and best practices may still need to be established, the technology itself is mature enough to accommodate repository architecture and creation on an international basis. But between the possibility of greater access and the current situation of copyright lock-down lies the chasm of rights clearance.

Sound archives must therefore begin a new dialogue with the recording industry in order to find creative, even visionary ways to move ahead to mutual benefit. This dialogue must acknowledge a complex legal tangle while simultaneously framing a mechanism to protect potential revenues for the industry. Yet without some sort of flexible copyright-clearance model, our national heritage of recorded sound is at risk. It is no accident that the U.S. Constitution speaks of copyright as a means "to promote the progress of science and the useful arts." Clearly, sound archives and the music industry share a desire to promote the progress of these useful arts, so that the rich heritage of American recorded sound is made available to the widest possible audience.

Just as *location, location, location* is the sine qua non of real estate development, the development of a digital sound repository is all about *access, access, access*. Unfortunately, the educational/scholarly world's desire for, and right to, fair use access to older sound recordings, if extended to a significant digital repository freely available to constituents, would smack headlong into the sine qua non of the recording industry: *revenue, revenue, revenue*. More specifically, it would run up against an industry rightfully worried

about significant loss of revenue due to illegal file-sharing.

To this end, several models of industry-archive engagement are being widely vetted. One is the effort of the Library of Congress's National Recording Preservation Board (NRPB), mandated into existence by an act of Congress in 2000 to come up with a comprehensive, national sound-recording preservation program. The NRPB, composed of key leaders in the music and entertainment world, has commissioned several important copyright studies as noted above and, with these, is poised to engage the industry in high-level discussions on issues related to copyright and preservation. The NRPB seeks to bridge the divide between the preservationists and the industry in an atmosphere of healthy debate and common goal-setting, defining a set of synergistic opportunities that will help the two groups to become allies rather than adversaries.

Another effort is being led by Syracuse University's Belfer Audio Archive and Laboratory. Their approach seeks to build on the NRPB's excellent work. Given that Syracuse has one of the top-ranked music industry programs in the country, and therefore has very close ties to the industry itself, Syracuse is in an excellent position to bring together high-level stakeholders from the music industry and the music archive world, as well as other interested parties, to explore some sort of streamlined rights model. Several meetings will likely be held in late 2005 or early 2006. The desired product/outcome of these meetings is a set of guidelines that will enable stakeholders to chart a course in the preservation of, and access to, the recorded music held by these archives.

With these guidelines, and armed with the important copyright studies being conducted by the NRPB, it is hoped that the sound archives would be in a bet-

ter position to collaborate on and design some sort of digital repository that would provide educational and research access to students, teachers, and scholars. Clearly, this access would be limited (at least at first) to educational and scholarly use, would be moderated by appropriate authentication schema, and would be programmed to prevent file-sharing and illegal duplication. The music industry, for its part, could also collaborate in the design and maintenance of the same repository. The difference is that the industry would be able to create an entirely



Illustration by Paul Wattson, © 2005

different "front end" to this repository, something akin to Apple's iTunes Music Store, where the Web-surfing public would be able to browse the repository holdings and then download content for a set fee per download. With this revenue stream, some money would go to the industry, and some would go to the repository. The technical and economic details of such a scenario would have to be worked out, but a corporation such as Loudeye<sup>2</sup> could provide the know-how and the revenue management for all participants.

Using the same repository, with different front ends, everybody (in theory) benefits. By being able to digitize their music holdings freely, without fear of copyright

infringement, sound archives would be able to do what they do best: preserve the content of their holdings following established digital standards. Meanwhile, those in the recording industry would have an entirely new revenue stream, mining their own rights back to the 1890s at a set price per recording. The industry would also garner great publicity for this sort of collaboration.

Clearly, these sorts of ideas are but first steps in an important national enterprise related to the preservation of our musical heritage. As old playback technologies become increasingly inoperable, as analog recordings wear out, we stand to lose an entire modern art form if some sort of agreement is not reached in the near future. Despite all the recent bad press and the bitter us-vs.-them climate, there are abundant reasons, not the least being self-interest, for the two sides to meet and to hammer out an agreement. For the sound archives, an agreement would mean fulfilling their stewardship mandate. For the industry, an agreement would mean additional revenue and a potential public-relations bonanza, with front-page photos of music executives signing on to a new partnership with college and universities. It's a win-win collaboration.

#### Notes

1. The Sonny Bono Copyright Term Extension Act of 1998 extended the duration of copyright protection. In general, for individual works, the copyright term is the life of the creator plus seventy years, and for works of corporate authorship and works first published before January 1978, the term is ninety-five years.
2. For example, every time a customer scans a CD at Tower or Barnes & Noble, Loudeye (one among many digital media revenue corporations) tracks the rights management, including the cost for the store and the payback for the record company.

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