Dismarc – guide to copyright for archives

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SUMMARY

This document contains an overview of Intellectual Property Rights (IPR) as applicable to music recordings of various kinds. Two types of rights are usually involved in archival recordings: the rights of authors (composer) and the rights of performers and producers. Both rights owners have the right to control and prohibit the use of recordings. In some cases, it is possible to obtain permission to use from copyright organisations. If not, it must be sought from the individual rights owners.

Copyright law may also provide exceptions for certain types of uses. Usually the exceptions apply to educational uses and research. Exceptions vary from country to country.

Copyright lasts for a limited time only. After copyright has expired, materials can be used without the permission of the original rights owners. However, there may be contractual, moral or ethical considerations which limit the use of public domain materials.

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Glossary

Copyright and related rights. Copyright in the narrow sense refers to the rights of authors such as composers. In Continental legal thinking, sound recordings are strictly speaking not protected by copyright, but by a "related right" (also called a "neighbouring right"). In the UK, and in common usage, 'copyright' usually refers to both author's rights and neighbouring rights.

Author – a person who has created an artistic or literary work: composer, lyricist, novelist, painter

Work – in copyright law, a "work" is an identifiable artistic or literary creation: a song, an instrumental composition, an opera, a novel, a painting. A work can have one or several authors.

Publisher – a person, organisation or company which has obtained from an author the right to duplicate and sell copies of his works, and to licence his works for public performance, etc. A publisher also deals with books, sheet music, theatrical rights etc

Performer – a person who performs artistic or literary works: a singer, a musician, an actor.

Recording, phonogram – a recording of a performance or sounds, regardless of the technology used (analogue, digital, etc). Also called "fixation" in copyright law.

Producer – a person, organisation or company which makes sound recordings for various purposes (commercial sale, broadcast, archiving), or has them made. This is not the same term as the individual who is listed as "producer" on records. In copyright law, the producer is normally the company who has employed the maker of the recording. A collector may be a producer in this legal sense if he makes recordings at his own initiative (i.e. not on behalf of an archive).

Collecting society , copyright society – an organisation which has obtained from authors, publishers and/or producers the right to licence a large number of works or recordings for specific uses. Typical examples are MCPS-PRS, GEMA, GVL, STIM, TEOSTO, etc. Typically, there are separate collecting societies for musical works (compositions) and for recordings (performances). Collecting societies usually have fixed fees for various kinds of uses and are legally obliged to offer the same terms for all customers.

Collective licensing – a system where numerous rights owners have authorised a "collecting society" or "copyright society" (see above) to licence their works for various uses, at a fixed rate. Typical examples are the licensing of musical works and commercial recordings for broadcast. In some cases collecting societies are authorised by law to represent non-members as well.

Public domain – copyright lasts for a limited time only. When copyright has expired (see later), the works are "free", although the authors still have certain protection of their moral (but not economic) rights. In American legal literature, "public domain" is used to refer to this state of affairs. In the absence of a better term, it could also be used in European contexts. Typical cases of public domain are the works of Shakespeare, Goethe and Beethoven, the recordings of Pablo de Sarasate, and historical collections of folklore. (In current debate, "public domain" sometimes refers to works whose authors do not wish the exercise their rights but rather allow others use the works free ("freeware", "copyleft"). Here we do not use the term in this sense).

1 What rights exist?

Copyright refers to the exclusive right of authors to control the use of their works. Protected works must not be made available to the public, reproduced, copied, performed in public, broadcast, etc without the permission of the author or his representative (usually a publisher).

The same principle applies also to performers and producers. A performance must not be recorded without the permission of the performers. A recorded performance must not be copied, performed in public etc without the permission of the performers and the producer. Often it can be assumed that the producer (in the sense used above) of a commercially issued recording has the right to represent the performers as well.

Copyright lasts for a limited time only. The rights of authors last for 70 years from the end of the calendar year in which the author has died. Copyright in anonymous works expires 70 years after the creation or first publication of the works. However, an arrangement of an older work may also be protected; the arranger is then treated as an author.

The rights of performers and producers last for 50 years from the end of the year in which the recording was first issued; for unissued recordings, it lasts 50 years from the end of the year when it was made. (As previously noted, in copyright law the word “producer” is not used in the same sense as in everyday speech. The producer is usually the company which has financed the production of the recording.

The term of copyright is the same in all EU countries (with some minor variations).

Copyright law is territorial. The law of the country where an act takes place applies. If an archive in Poland makes a copy of a recording for broadcast in Germany, the act of making a copy is covered by Polish law and the act of broadcasting by German law.

International copyright is based on international agreements and the principle of *national treatment*. Most nations of the world have agreed to give authors, performers and producers from other countries the same protection they give to their own citizens, and thus in Europe, European law takes precedence. Example: although the US has a term of 95 years for the protection of sound recordings, American recordings are protected in Europe for only 50 years, just like European recordings.

2 The transfer of rights: how can you use protected works and recordings?

There are three ways to use protected works and recordings:

a) Obtain permission from the relevant rights owners or their representatives. In the case of sound recordings, this may involve the representatives (publishers) of the authors of the recorded works, the performers and/or the original producers.

b) Make sure that both the copyright existing in the recording of the work and the author’s copyright has expired. When copyright has ended, the works and/or recordings are in public domain, and no permission is required.

c) Exceptions provided by the law. In most countries, copyright law allows certain uses of protected works without the permission. Typically, there are many exceptions on the educational uses of protected works. The exceptions vary greatly from one country to another, and are often quite detailed.

3 Typical cases: commercial recordings

With commercial recordings, we refer to recordings (in any format) which have been produced by record companies for sale. There are usually three rights involved here.

3.1 Author's rights

The authors of the recorded works are usually listed on the label. You may even find information on the work's publisher and the collecting society which has granted the producer the right to make copies of this work. If there is no authors/composer listed, there is a possibility that the work is in public domain – the relevant collecting society in the country where the recordings were issued should be able to clarify the situation.

3.2 Producer's rights

The producer is the company whose name is given on the label, or which owns the registered trade mark (label) under which the record has been issued. For instance, His Master's Voice is the trade mark of EMI records.

For the duration of the rights, see above. Typically, if the recording was first issued more than 50 years ago and if all the authors had died more than 70 years ago, the recording and the works it contains are in public domain and case b) above applies.

If not, and if the educational exceptions would not apply, you will need to obtain permission for any uses. For the producers, you should normally contact the local (or nearest) representative of the producer – for instance, EMI Finland. They may not be able to grant permission themselves, but should at least know whom to contact.

For the authors'/composers' rights, you should contact the collecting society in your country. They will know how to contact the authors, composers and/or publisher. In some cases they may be directly able to grant permission to use for a fixed fee.

3.3 Performer's rights

Most European countries now acknowledge the right of the performer. Musicians' rights are either (a) represented by a national performers' society (or societies), (b) have been assigned to the producer of the recording or (c) are unassigned and are owned by the individual performer/s or group of musicians. As above, societies and producers may be able to grant use permission, or to provide contact details where rights are unassigned.

4 Typical cases: broadcasts

In the case of broadcasts, the rights of the authors are the same as in commercial recordings (see above).

The broadcaster is the producer (in the legal sense) of its transmissions. It owns the "neighbouring rights" together with the performers. The extent of these rights depends on the contracts between the broadcaster and the performers. To use a recording of a broadcast in any other context, you need the permission of the authors, the performers and the broadcasting company. In most cases, the broadcasting company itself owns only limited rights to its archival recordings. It may have the right to rebroadcast them, but it probably needs to go back to the performers to obtain the right to issue the recordings commercially, for sale.

The rights of broadcasters also expire after 50 years, so a broadcast of the works of Beethoven made before 1957 would now be in public domain.

5 Typical cases: field recordings

From the viewpoint of copyright law, archival recordings present many complications. The general principles are the same, but they are difficult to interpret.

Copyright protects the works of all authors whose home countries have joined the Berne convention, which includes practically all states. Works by authors from Burkina Faso are protected just like the works of Finnish authors, according to the principle of national treatment. A work does not need to be written down, as long as it is possible to distinguish it from other works of the same genre. Even works by unknown authors are protected for a period of 70 years from their creation (which may be difficult to find out).

Thus a work created by a known African author is not problematic in any way. If a Finnish broadcaster wishes to transmit the author's compositions, it will obtain a license from the Finnish collecting society Teosto, and the money will theoretically be transferred to the author's national collecting society, which will remit it to the author. The same applies – vice versa - when Finnish compositions are performed in Africa.

A work can have many authors, but these must be distinct individuals. There is no limit on the maximum number of authors that a work can have. However, copyright law does not protect works which have evolved over a long period and are created by "ethnic groups". Such compositions (but not any recordings of the compositions) would usually be assumed to be in public domain.

Another distinction which has to be borne in mind is the distinction between published and unpublished works. This is important in many ways. For instance, within various clearly-defined frameworks, it is legal to publish quotations from published works, but not from unpublished works. Collecting societies may not be able to represent authors whose works have never been published.

In the case of archival recordings, it is often unclear who the "producer" is in the legal sense. The definition of the producer may vary from country to country. Under Finnish law, the collector would be the producer, if he has made the recordings on his own initiative. If the collector was an employee of an archive, the archive would be the producer, and it would have the producer's rights.

The rights of the performers can also be problematic. If there is a written contract between the performers, the producer and the archive, everything is clear. For any other uses, one would have to go back to the performers (unless there is specific national legislation on this point).

6 Moral rights and ethical questions

Copyright lasts for a limited time only. However, in some countries authors have moral rights which are perpetual – they last forever. Moral rights are limited. The deceased author still has a right to have his name mentioned in connection with the publication of his works. They might also prevent the use of works in improper contexts. Pop arrangements of classical compositions are no longer seen as infringements of the composer's moral rights. Moral rights might apply to cases such as the use of a religious work as background for a pornographic advertisement.

In Finland, there is a High Court decision that moral rights do not apply to works by unknown authors. Thus folklore would be outside the scope of moral rights in the copyright sense. Moral rights, which protect the relationship between an author and his/her work, are attached only to identified authors. Therefore where there is no identified author, there can be no moral rights. However, if an author becomes identifiable, then his/her moral rights also manifest themselves and can be infringed.

Archives and researchers have developed their own ethical codes. Although they may not be legally enforceable, archives would want to follow such codes. In the DISMARC context, ethical questions could emerge in connection with the use of public domain materials. Suppose that an archive has a recording of a secret religious ritual made in 1955, for the purpose of academic research. If the recorded work is by an anonymous author and clearly more than 70 years old, the entire recording would be in public domain, and the archive could legally put it on its website or use it in any

way it wishes. In a case like this, the archive might still want to consider the question from the viewpoint of the ethics of research.

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