Questions & Answers -- Copyright Column

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Broadcast Music International (BMI). BMI represents over 300,000 songwriters, composers and music publishers. Like the ASCAP, BMI also has reciprocal arrangements with agencies in other countries. BMI collects license fees for the public performance of music, particularly for music that is going to be broadcast, used in restaurants and stores, etc.

Society of European Stage Authors and Composers (SESAC). Like ASCAP and BMI, SESAC represents songwriters and publishers. SESAC is a much smaller organization than the other two organizations.

The Harry Fox Agency. This agency also represents the music industry. Fox’s list includes the largest concentration of digital music of any agency.

Motion Picture Licensing Corporation (MPLC). According to its Website, MPLC is “an independent copyright licensing service exclusively authorized by major Hollywood motion picture studios and independent producers to grant Umbrella Licenses to non-profit groups, businesses and government organizations for the public performances of home videocassettes and DVDs (‘Videos’).”

Movie Licensing USA. This organization serves public libraries and schools by providing public performance rights for movies.

The American Association of Community Theatre. This organization helps community theatre groups obtain necessary permissions, as well as providing other types of resources and information. According to its Website, “AACT is the central resource for theatre information and resources, connecting not only members in an information network, but providing data and information to non-members, businesses, other arts and not-for-profit organizations, and the media, as well as to members of local, state and federal governments.”

Dramatists Play Service, Inc. This organization has the largest catalog of plays in the English language, and helps to provide performance rights in the U.S.

Baker’s Plays. This organization provides performance rights for plays in the Eastern U.S.

Samuel French, Inc. This agency provides performance rights for plays in the Western U.S.

So now we return to the question of George and his advice to Agnes. George should not make copies of the script for Agnes, and should advise her to seek a license for public performance from the appropriate rights agency. The license will include also the number of copies she is entitled to make. As part of the agreement, Agnes will need to indicate whether she will charge admission, as the licensing fee will probably be higher for a commercial use of the play. (By the way, it doesn’t matter that Agnes works for a university. If she charges admission, it will be a commercial use.)

Similar rules apply to the public performance of films or music (recorded or printed) that the library owns. Because librarians are often consulted for copyright advice, it is very important to understand when to counsel library clients that they need to seek formal permission. I always adhere to the rule that “if in doubt, seek permission.” That will not only help us to provide better service to our library clients, but will also help to keep the library (and the library workers) from getting sued.

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Endnotes

1. The rights of the copyright holder are outlined in 17 U.S.C. § 106.
2. id.
10. The Copyright Clearance Center’s Website is http://www.copyright.com. To contact the CCC, use the following address: Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923; Phone: 978-750-8400; Fax: 978-646-8600; Email: info@copyright.com.
14. The Website for the Harry Fox Agency is at http://www.harryfox.com. Their office is located at: 711 Third Ave, New York, NY 10017; Telephone: (212) 370-5330; Fax: (646) 487-6779.
15. The Motion Picture Licensing Corporation Website is at http://www.mplc.com. Their office is located at 5455 Centinela Avenue, Los Angeles, CA 90066-6970; Telephone: (800) 462-8855, (310) 822-8855; Fax: (310) 822-4440; info@mplc.com.
16. The Movie Licensing USA Website is at http://www.movlic.com. You may contact them at: Movie Licensing USA, 201 South Jefferson Avenue, St. Louis, MO 63103-2579; Fax: 1-877-876-9873; mail@movlic.com. For K-12 schools, call toll-free 877-321-1300; for public libraries, call toll-free 888-267-2658.
17. Their Website is at http://www.aact.org. You can contact AACT at: 8402 Briarwood Cr., Lago Vista, TX 78645; Telephone: 512-267-0711; Toll-Free: 866-687-2228; Fax: 512-267-0712.
18. id.
20. Baker’s Website is at http://www.bakersplays.com. Baker’s mailing address is: P.O. Box 69922, Quincy, MA 02269-9222; Telephone: 617-745-0805; Fax: 617-745-8981. They also maintain a reading room and store that is open to the public at 1445 Hancock Street, Quincy, MA.

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QUESTION: May a university library provide temporary access to the University’s online databases to individuals who are not enrolled students?

ANSWER: Only if the library’s licenses to those databases permit such access. The question does not indicate who these individuals might be. Are they faculty and staff or are they totally unaffiliated with the institution? Most licenses provide access to faculty and staff of that university along with enrolled students.

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Under section 108(e), a performance as long as only unaffiliated users. Many libraries attempt to include in all of their licenses access for “walk ins.” However, if the license says that access is available only to the university’s faculty, staff and enrolled students, then walk-in access is not allowed.

**QUESTION:** A small college library serves as the library support for some contract schools that are both online and for profit. The commercial institutions pay an annual fee for services to the library. What does the library need to know in terms of copyright as well as using database material to provide materials to students from these schools?

**ANSWER:** In the days before licensing was prevalent, contracting with a library to provide services was pretty straightforward. The library would provide reference services, permit students from the other fee-paid schools to come and use the collections and other in-person services. It would borrow materials through interlibrary loan for students at these schools and generally serve as the college library for students at those schools. Licensing of access to materials has changed this dynamic somewhat.

Typically a license will provide access to databases and other electronic materials to students, faculty and staff of the institution signing the license. Under such a license, providing access to non-enrolled students would violate the terms of the license agreement. It may be possible to negotiate some of the database licenses in order to provide access to students who are enrolled at other institutions. Absent such provisions in the license agreement, access to non-enrolled students should not be provided.

**QUESTION:** May a library show a DVD series in its lobby on a plasma television set in order to promote student interest in the series?

**ANSWER:** One of the rights of copyright owners is the right of public performance. Showing a video series in a public place is a public performance, and the lobby of a library clearly is a public space. The library should seek permission from the owner of the copyright if it wants to perform the video series in the lobby.

It is possible that showing very small clips of the DVD series would qualify as a fair use, but it is not certain that this would be the case. There is an exception for performance of works in a face-to-face teaching situation in a classroom in a nonprofit educational institution. But the classroom performance is not deemed to be a public performance as long as only teachers and students are present for the performance. The playing of the video and performance is part of instruction and not for entertainment. Performing the videos in the lobby does not qualify under the classroom exemption which is section 110(1).

**QUESTION:** A public library has an interlibrary loan request for a dissertation from the University of Wisconsin. A librarian found a .pdf copy of the 26-page dissertation on WorldCat, which the library accesses through a license. May the library print the dissertation for the patron and charge him $2.60 (the library’s standard printing charge of ten cents per page)?

**ANSWER:** Under section 108(e), a library is permitted to make a copy of an entire work for user if it firsts makes a reasonable investigation to determine that a copy cannot be acquired at a fair price and (1) the copy becomes the property of the user; (2) the library has no notice that the copy will be used for other than fair use purposes; and (3) the library gives the user the prescribed copyright warning. All of this also applies even if the library has to obtain the copy of the work for the user via interlibrary loan.

In the described situation, however, there is another solution that avoids all of this, and that is to provide the link to the user and let him print it for himself.

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Does the first sale doctrine apply to all sound recordings or only musical works? By gosh, an issue never heretofore decided. So let’s get right into the excitement.

Brilliance Audio makes audiobooks for the retail market and for libraries. It has exclusive contracts with numerous publishers and copyright in the sound recordings. Haight’s Cross Communications is a direct competitor. Brilliance claimed Haight’s was buying retail editions and repackaging them as library editions and selling them under the trademark Brilliance name.

Admittedly, library and retail were packaged differently, but the court, much as I, was stumped as to what if any differences there were in the recordings.

Brilliance sued for copyright infringement under 17 U.S.C. § 109 and trademark infringement under 15 U.S.C. § 1114. Haight’s moved for dismissal for failure to state a claim under which relief can be granted and won the motion. Brilliance appealed to the Sixth Circuit. It was reviewed de novo.

**First Sale Exception In Trademark**

Trademark law permits the “first sale” exception as an infringement defense. Prestonettes, Inc. v. Coty, 264 U.S. 359, 368-69 (1924). Trademark law is designed to prevent consumer confusion over the origin of a product. This doesn’t exist if the mark is the real deal. NEC Elecs. v. CAL Circuit Abco, 810 F.2d 1506, 1509(9th Cir. 1987).

This exception does not apply under two circumstances, one being where the repackaging is inadequate. See Eoncso Corp v. Price/Costco Inc., 146 F.3d 1083, 1085-86 (9th Cir. 1998). In Coty, the defendant repackaged Coty perfume into smaller containers and sold them under the Coty name. This was not an infringement. The trademark is designed to protect the owner’s good will by maintaining product quality. As long as the rebottling of the perfume did not cause deterioration, then there was no injury to Coty. Coty, 264 U.S. at 368-69; see also Enesco, 146 F.3d at 1086.

The second exception occurs when materially different goods are sold under the trademark. Davidoff & CIE, S.A. v. PLD Int’l Corp., 263 F.3d 1297, 1302 (11th Cir. 2001). Here we’re protecting the owner’s good will against a lousy knock-off. A material difference goes to matters a consumer considers relevant to the purchase. But consumer choice being the subtle thing that it is, even subtle differences may be material. See Davidoff, 263 F.3d at 1302.

Brilliance said both exceptions apply. The repackaging and relabeling of retail audios as library creates a misrepresentation that Haight’s have a long-standing relationship with Brilliance and that this action is sponsored and authorized. As to material difference, Brilliance said the library and retail editions were packaged and marketed differently.

Of course you’re asking how did Haight’s make any money on this. They had to mark it up to gain a profit. Are libraries so daft they didn’t realize they could get a cheaper product from Brilliance? Anyhow, this creates a question of fact. So Brilliance gets a trial on this one.

**What about Copyright?**

Copyright likewise has a first sale doctrine. The copyright owner has rights to the underlying work, but a purchaser of a particular copy can dispose of it as he wishes. 17 U.S.C. § 109(a).

But there’s an exception in the Record Rental Amendment of 1984.

For years now, the Tort Kings have been subjecting us to the term “BIG TOBACCO.” Well here we find the lobbying hand of BIG MUSIC.

...unless authorized by the owners of a copyright in the sound recording[,] ... and ... in the musical works embodied therein, the owner of a particular phonorecord ... may [not], for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord ... by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending.” Id. § 109(b)(1)(A).

Yes, they don’t want you buying music and renting it out. Although why that should be different from renting a novel, only the lobbyists can explain. Which is to say, BIG MUSIC wants the money and you can’t have it.

Brilliance said this applied to audiobooks; Haight’s contended it was only music.

§ 109(b); Ambiguous or Clear?

Well, the language of the statute does say “musical works.”

Duh. I mean who was lobbying for the “Record Rental Amendment” after all?

But go back to the language of the statute and focus on the words “sound recording.” Brilliance said there were two permissions required if you want to rent audios: one for the copyright owner in the sound recording; and the second for the music copyright owner if music was in the recording. And sound recordings include musical and non-musical. 17 U.S.C. § 101.

The court found both interpretations plausible. So the language is “not unambiguous.”

But they can’t bring themselves to call it “ambiguous.” Is that just an egghead way of talking, or are they timid about their position? And for the life of me, I can’t see the second interpretation. It seems to mean to humble moi that a sound recording might have some narrator’s blather along with the music.

**So Let’s Go To Legislative History**

Yes, that vital question of who was in there lobbying.

Congress exclusively focused on the music industry and the need to “remove the threat continued on page 71