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Questions & Answers -- Copyright Column

Laura N. Gasaway

University of North Carolina-Chapel Hill School of Law, laura_gasaway@unc.edu

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Legally Speaking from page 67

- **Broadcast Music International (BMI).**¹² 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).**¹³ Like ASCAP and BMI, SESAC represents songwriters and publishers. SESAC is a much smaller organization than the other two organizations.
- **The Harry Fox Agency.**¹⁴ 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')."¹⁵
- **Movie Licensing USA.**¹⁶ This organization serves public libraries and schools by providing public performance rights for movies.
- **The American Association of Community Theatre.**¹⁷ 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."¹⁸
- **Dramatists Play Service, Inc.**¹⁹ 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.**²⁰ This organization provides performance rights for plays in the Eastern U.S.
- **Samuel French, Inc.**²¹ 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. 🐾

Endnotes

1. The rights of the copyright holder are outlined in 17 U.S.C. § 106.
2. *id.*
3. The information for my book is as follows: **Carson, Bryan M.** *The Law of Libraries and Archives*. Scarecrow Press, 2007. ISBN-10: 0-8108-5189-X; ISBN-13: 978-0-8108-5189-4.
4. **Bryan M. Carson.** What is Intellectual Property? 12-2 *Against the Grain* p. 52-54 (April 2000).
5. 17 U.S.C. § 108(a).
6. 17 U.S.C. § 108(g).
7. 17 U.S.C. 108(a).
8. 17 U.S.C. § 110.
9. **Bryan M. Carson.** "Legally Speaking." TEACHing Online: An Update on the TEACH Act, 15-6 *Against the Grain* pp. 34, 36, 40 (November 2003)
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.
11. **ASCAP's** Website is at <http://www.ascap.com>. ASCAP has offices in New York, Los Angeles, London, Nashville, Miami, Chicago, Atlanta, and Hato Rey, Puerto Rico.
12. The **BMI** Website is at <http://www.bmi.com>. They have offices in New York, Nashville, Los Angeles, Atlanta, London, Miami, and Hato Rey, Puerto Rico.
13. The **SESAC** Website is at <http://www.sesac.com>. Their headquarters are in Nashville, with offices in New York, Santa Monica, and London.
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 offices are 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.*
19. Visit their Website at <http://www.dramatists.com>. You may contact the **Dramatists Play Service** at: 440 Park Avenue South, New York, NY 10016; Telephone: 212-683-8960; Fax: 212-213-1539.
20. **Baker's** Website is at <http://www.bakersplays.com>. **Baker's** mailing address is: P.O. Box 699222, Quincy, MA 02269-9222; Telephone: 617-745-0805; Fax: 617-745-9891. They also maintain a reading room and store that is open to the public at 1445 Hancock Street, Quincy, MA.
21. Their Website is at <http://www.samuel french.com>. Contact: **Samuel French, Inc.**, 7623 Sunset Blvd. Hollywood, CA 90046-2795; Telephone: 323-876-0570; Fax: 323-876-6822; info@samuel-french.com.

Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~unclng/gasaway.htm

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

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students. The issue is more complicated if the individuals seeking access are 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?*

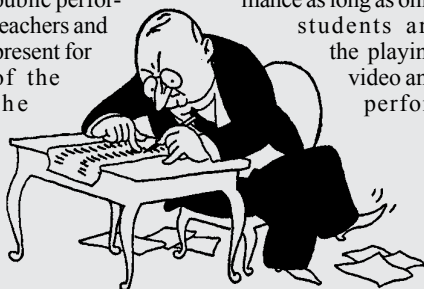
ANSWER: In the days before licensing was prevalent, contracting with a library to provide services was pretty straightforward. The library would provide reference services, permit students from the other fee-paid schools to come and use the collections and other in-person services. It would borrow materials 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? The library has purchased a copy of the DVD series for the collection.*

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 playing of the video and the performance.



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mance 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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Cases of Note — BIG MUSIC Owns the US Congress

Copyright & Trademark — First Sale Doctrine

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Brilliance Audio, Inc. v. Hights Cross Communications, Inc., United States Court of Appeals for the Sixth Circuit, 474 F.3d 365; 2007 U.S. App. LEXIS 1706 (2007).

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. **Hights Cross Communications** is a direct competitor. **Brilliance** claimed **Hights** was buying retail editions and repackaging them as library editions and selling them under the trademarked **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. **Hights** 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. **Pre-stonettes, 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 **Enesco 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 **Hights** 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 Hights 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; **Hights** 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."

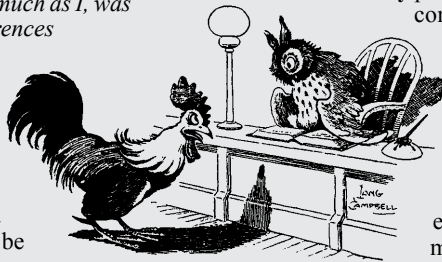
But they can't bring themselves to call it "ambiguous." Is that just an egghead way of talking, or are they timid about their position? And for the life of me, I can't see the second interpretation. It seems to mean to humble moi that a sound recording might have some narrator's blather along with the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

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QUESTION: *At the beginning of each semester a community college library receives many requests to borrow currently assigned textbooks. The library returns these requests and explains that it does not order textbooks that are currently being used in the college's classes nor does it borrow them through interlibrary loan. A faculty member is pressuring the library to purchase textbooks for the collection and place them on reserve for student use. Aside from the practical and policy reasons for not borrowing or purchasing currently used textbooks, is there a legal reason for not doing this?*

ANSWER: Some academic libraries do purchase current textbooks and some do not. The problem is not in providing textbooks to students who cannot afford them but in encouraging students to photocopy or scan the textbook. Any student can forget to bring her textbook one day and having a library copy as a backup is very helpful; however, faculty members should not tell students that they can reproduce from the library copies in lieu of purchasing the textbook for the course. 🐔