On the Nature of the Copyrighted Sound:

How the Music Modernization Act and Fair Use Will Shape Digitization Projects in Recorded Sound Archives

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Graduate School of Library and Information Science

Queens College, City University of New York

Prof. Carey Stumm

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Eric Silberberg

eric.silberberg49@qmail.cuny.edu

Important Abbreviations

DMCA - Digital Millennium Copyright Act

MLC - Mechanical Licensing Collective

MMA - Music Modernization Act

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The purpose of this paper is to examine how the Music Modernization Act (MMA), in federalizing copyright for all sound recorded before 1972, will affect archives embarking on the digitization of their recorded sound collections. By archives, this paper is focused on not-for-profit and academic institutions that have collections produced outside their respective institutions, whether that be recordings by governments, record labels, ethnographers, media companies, or independent artists. Instead of a restriction, the MMA should be considered an opportunity as it will supplement the existing statutory exemptions to copyright already at an archive's disposal. Of these exemptions, fair use is perhaps the most popular. It is often cited by archives that reproduce copyrighted material in the name of preservation, research, or education. However, this paper will argue that archives should possess a more nuanced understanding of fair use criteria given that its combination with provisions of the MMA can offer digitization projects a wider legal territory in which to operate.

Finally, this paper champions the archival imperative to make recorded sound collections available to the public through digitization. As Keller (2008) reminds us, "human culture is always derivative, and music perhaps especially so. New art builds on old art" (135). Future sounds and appreciation of recorded sound culture is dependent on public access to older forms captured on physical media.

I. How is Sound Copyrighted?

To understand how the MMA will change copyright considerations for archives, it is important to first take a step back. What is the point of copyright to begin with? Keller (2008)

succinctly and critically defines it as "the body of laws which turns creative expression into private property" (136). In fact, this is the definition promoted by Jack Valenti, the long-time lobbyist for the Motion Picture Association of America, who testified before Congress that "creative property owners must be accorded the same rights and protection resident in all other property owners in the nation" (Lessig, 2004, 117).

However, the Intellectual Property clause of the Constitution does not support Valenti's argument. The clause creates a unique power for Congress to regulate creative property as distinct from other forms of property. It declares that copyright should promote "the progress of science and useful arts, by securing for limited times to authors and inventors their exclusive right" to their work (U.S. Const. art. VIII, §8). According to Creative Commons founder Lawrence Lessig (2004), copyright was established to "create the economic and legal conditions within which science, learning, and culture can flourish" (118). The key is that creators should be able to capitalize on their creativity or ingenuity for a "limited" time, after which culture can only continue to "flourish" if others can adapt previous creations in the course of developing new works or modes of thinking.

As to how copyright law covers sound recordings, law scholar June Besek (2005) makes it clear that it is "extremely complex. This complexity results both from historical and political factors and from the particular challenges presented by new technological means of disseminating music" (1). One could argue that copyright of sound recordings is the most complicated area of the law due to the way that sound is produced, recorded, distributed, and consumed.

The question becomes, what exactly are we copyrighting when we copyright sound? Sound, specifically music, contains two, sometimes independent layers of copyright. First, is the underlying work. This is the musical composition that the composer publishes as a written score.

The second layer is the recording of the performance. Composer and performer may be different people or corporate bodies. While the law has long recognized the copyright of written music, it has until only recently, as this paper will discuss, that of recorded sound. Thus, a single recording might have two distinct copyright protections.

For recordings, when it is "fixed in a tangible medium of expression," what the law calls a "phonorecord," copyright is established (Besek, 2005, 4; 17 U.S.C., §101). A phonorecord may be any format, such as a cylinder, magnetic media, such as 1/2" reel to reel tape, optical media, such as a CD, or digital media, such as an MP3. For archives, it is important to determine the copyright of both the underlying work and the phonorecord during digitization projects.

To further complicate an understanding of what sorts of sounds fall under copyright protection is the notion that a work does not need to be published to be copyrighted. A published work is one that has been distributed, or sold, to the public, while an unpublished work is one that has only been "fixed" to a phonorecord. Copyright is automatic for published or unpublished works meaning that a creator does not need to seek registration with the copyright office (Ibid).

But wait, the complexities are not over yet. Archives must also take into account when a sound recording was "fixed" to a phonorecord. If the sound recording was fixed on or after February 15, 1972, the copyright will last the life of the creator plus 70 years. If it is an anonymous work, sometimes called an orphan work, the term of copyright is 95 years from creation (date fixed to phonorecord) or 120 years from publication (date distributed) (Ibid). While a sound recording is under copyright, the creator has exclusive right to reproduction (to make copies), adaptation (derivative works), distribution, and performance. This right is not absolute and the law does carve out specific allowances, called statutory exemptions, for archives and libraries that this paper will discuss later.

For those sound recordings fixed before 1972, the situation has been grave: the lack of federal copyright oversight enabled a patchwork of state laws to govern reproduction, adaptation, distribution, and performance rights. These pre-1972 recordigns are the historically significant sounds that archives have struggled to make publicly available.

II. Enter the Music Modernization Act

The MMA, signed in 2018, was designed to address the technical and statutory complexities around copyrighted sound. Jordan (2008) gives us some idea as to why the MMA emerged when it did:

> The combination of databases (for storage), software (for manipulation), and networks (for interactivity between databases, software, and musicians) is challenging many long-held notions of what music-making can or should be. Established boundaries are blurring (100).

In the 1990s, the music industry perceived peer-to-peer file sharing communities such as Napster, KaZaa, and Limewire as an existential threat. "Historically," writes Keller (2008), "flurries of lobbying and changes in the legal balance between authors' and consumers' rights have tracked changes in popular media" (140). The industry lobbied swiftly to expand digital protections for its intellectual property. The result was the Digital Millennium Copyright Act (DMCA) and it effectively ended the "culture of distributed networks, held together by a common thread: each represent[ed] a particular taste as distributed through the system (Jordan, 2008, 102). But in the rush to stamp out peer-to-peer file sharing, one unintended consequence of the DMCA has been the emergence of a highly centralized market for digital audio distribution, dominated by YouTube, Spotify, and Apple Music, and which "now represent[s] more than half of U.S. music industry revenues" (Hickey, 2018, 2).

Though the Association of Recorded Sound Collections (ARSC) did lobby hard for the MMA, the law's priority, and perhaps why it gained so much industry support, is the way it will course correct the market that the DMCA created. The MMA is actually three separate pieces of legislation rolled into one. Tile I, the Musical Works Modernization Act, establishes a Mechanical Licensing Collective (MLC), which Tim Brooks (2018), chair of ARSC's Copyright and Fair Use Committee, defines as:

> A collective to identify and pay owners of songs, distributing royalties for songs whose owners can't be identified to current publishers, giving recording rights owners their long-sought royalties for streaming of pre-72 recordings, and for the first time paying royalties to producers of recordings (2).

The MLC is the first way that the MMA will benefit archivists and music researchers. For the MLC to effectively pay out royalties, it requires a database of copyright holders and the law provides for this database to be publicly accessible. As a result, this public database will give archivists and researchers free "information relating to musical works [...] and, to the extent known, the identity and location of the copyright owners of such works and the sound recordings in which the musical works are embodied" (U.S. Copyright Office, 2018). Archivists will now be able to check one centralized register to determine if a work is in the public domain or who is the rights holder to be contacted when planning for digitization. Likewise, this information will be useful to music historians and discographers.

The second and most dramatic way that the MMA will aid archivists is through Title II of the MMA, The Classics Protection and Access Act. This law simplifies the maddening complexity of determining copyright for pre-1972 recordings by bringing them under federal law. Starting January 1, 2022, pre-1972 recordings will begin a predictable march into the public domain starting with phonorecords fixed in 1922 or earlier. To give some idea as to the current

lack of uniformity among state legal protections for sound recordings from the pre-1972 era, look at the inconsistent rates of historic recordings still under protection. 39% of recordings from 1890 to 1894 are still protected. From 1910 to 1914, a period of "extreme concentration in the record industry," that rate jumps up to 89%. Then from 1920-1924, a period that saw an expansion of independent labels, the rate backs down to 66% of recordings still under state protections (Brooks, 2005, 5). Another interesting trend to emerge from the data is the direct relationship between market concentration and stiffening legal protections.

Moving beyond 2022, The Classics Protection and Access Act will enter historic recordings into the public domain as follows: recordings from 1923-1946 will have copyright term of 100 years; recordings from 1947-1956, a 110-year-term; and recordings from 1957-1972 will begin to enter the public domain in 2067. Furthermore, the law permits non-profit streaming of recordings which are verified to be out-of-print (Brooks, 2018, 2).

The patchwork of state laws concerning pre-1972 recordings created a lot of confusion around whether an archival recording was in the public domain or what were the reproduction and performance limitations. As a result, archivists were at times inhibited (probably by institutional counsel). Some archivists dedicated considerable time and resources to understanding state law or they simply embarked on a digitization project, crossed their fingers, and hoped to never receive a cease-and-desist order in the mail. The federalization of copyright under the MMA should streamline planning for digitization projects in two major ways. First, the MLC database of copyright holders will expedite research of copyright holders. And second, now that historic recordings will enter the public domain at a predictable rate, archives can plan accordingly when they can legally make their collections publicly available via digitization. For example, ARSC, in collaboration with the Library of Congress, is planning to release a CD and special journal edition featuring the inaugural class of recordings entering the public domain in

2022. Private collector David Giovannoni is making his historic recordings free and publicly accessible online with his i78.org project (Brook et al., 2021).

III. Preservation, Fair Use, and the MMA

Though the MMA does mark a watershed moment in the world of copyrighted sound, its provisions may not come soon enough for archives. First, many audio formats are rapidly approaching the end of their shelf life. Magnetic media is on the verge of an apocalypse. Second, educators and researchers increasingly expect that media resources be available online. The technochauvanist adage that "if its not online, it doesn't exist" enjoys wide currency.

In those cases where the MMA is too measured, United States Code (U.S.C.) Title 17 has long recognized the unique needs of archives and other educational institutions. Title 17 contains a series of statutory exemptions that allow "individuals to exercise one of the exclusive rights of copyright [a] without obtaining the permission of the copyright owner, and [b] without the payment of any license fee" (Hirstle et al., 2009, 87). While the law describes a variety of statutory exemptions, this paper will focus on the exemption that is commonly invoked to justify archival digitization: fair use. Many archivists assume that because a digitization project serves an educational use that it is automatically fair. Fair use considerations are more subtle. To determine if an activity falls under fair use, an archive needs to weigh four factors:

(1) *The purpose and character of the use*. The use of copyrighted material for factual over artistic contexts, such as for criticism, comment, news reporting, teaching, and scholarship are established fair uses. A pitfall for archivists is to argue that non-commercial activity automatically establishes a fair use. But what does non-commercial actually mean? Hofman (2009) argues that:

> Non-commercial means that no money should change hands. The usual meaning of noncommercial, however, is that money may change hands if this is part of cost-recovery. Cost recovery, typically, would include copy charges, salaries and overhead expenses. The only restriction is that anyone doing this does not intend to make a profit out of distributing the work (99).

OER Africa complicates the idea further by pointing out that the lack of caselaw precedent creates a large gray area.

(2) *Nature of the copyrighted work.* Again, justifiable fair use includes those cases where the copyrighted work is of a factual rather than artistic nature. Returning to the Constitution's defense of "the progress of science," reproduction of an excerpt from a scholarly sound recording, such as a lecture, is more open to a fair use claim than an excerpt of pop music.

(3) *Amount of copyrighted worked*. A fair use is one that reproduces a reasonable amount of a copyrighted work. Criticism and scholarship do not need to reproduce an entire work.

(4) *Market impact.* This factor argues that the use of a copyrighted material, especially with derivative works, should not diminish the economic value of the copyrighted work.

Each of these four factors is not an isolated test; in fact, a digitization project should be holistically evaluated by how it will affect all four together. As Lessig (2004) points out "copyright law has not been a rock of Gibraltar. It's not a set of constant commitments" (169). Furthermore, as Hirtle et al. (2009), reminds us, "what is a fair use today may not be tomorrow—and vice versa" (97). Let us investigate several archival practices with respect to preservation to see how fair use applies.

First, one statutory exemption that nicely compliments the MMA is that recordings in the last twenty years of their copyright term may be digitized and made available online by an archive.

Second, archives rely on reproduction as a cost-effective method of preservation against theft, damage, or deterioration. The law permits three copies for such purposes. Often times archives will outsource digitization. However, Besek (2005) argues that a "third party commercial contractor does not necessarily stand in the shoes of [an archive] for legal privilege to make copies" as vendors are expressly private and commercial entities (28).

Third, digitization is a common solution for recorded sound archives that manage obsolete formats. The fact that the archive acquired a recording on a lacquer disc does not automatically give it the right to produce a digital version of that recording. Again, Besek (2005) cautions that an archive must search for an unused replacement at a fair market price before digitization (9).

Researching the copyright holder and term length is a major component of establishing fair use. Hirtle et al. (2009) offer important advice:

> [There is] no excuse in court for "good intentions," however documentation of digitization process is looked on favorably by court: (1) Explain what you are doing, (2) Solicit info from copyright owner (3) Document copyright investigation (4) If no title, avoid commercial use (207).

Thus, the MMA will significantly support statutory exemptions such as fair use. As discussed in the previous section, the MLC database of copyright holders will make it easier for archives to document copyright investigation. The four factor criteria of fair use offers a legal framework within which an archive can justify digitization within a written project proposal.

IV. Copyright and "Progress"

When the physical instantiation of a sound recording, Congress' phonorecord, is made digital, it begins a life of copies. With that in mind, does the notion of an original go out the

window when discussing digital archives? Blockchain can cut through this *life of copies* for data by authenticating the series of transactions behind data. This is however an idea for different paper. Musician DJ Spooky, The Subliminal Kid, aka Paul Miller (2008) reflects on current developments in music that "when it's recorded, adapted, remixed, and uploaded, expression becomes a stream unit of value in a fixed and remixed currency of the ever-shifting currents of the streams of information running through the networks we use to talk with one another" (10).

Since the peer-to-peer file sharing era, streams of digitized sound have become so ubiquitous and so easy to access online, often without a paywall, that users have come to expect it. At the same time, archives need to be careful. What authors Hickey (2018), Paganelli (2018), Hirtle et al. (2009) and Besek (2005) all concede is that there is virtually no caselaw concerning a media company suing a not-for-profit or academic archive over copyright infringement. This lack of caselaw denies archives legal precedent to study and creates a sense among archives that litigation could not possibly happen to them.

This paper has pointed out there is considerable, legal territory within which an archive can safely pursue digitization. "Copyright law is not the enemy," writes Lessig (2004):

> The enemy is regulation that does no good [...] I have no doubt that it does good in regulating commercial copying. But I also have no doubt that it does more harm than good when regulating (as it regulates just now) noncommercial copying and, especially, noncommercial transformation (172).

It is not only a question of *can* an archive legally make a digital copy of recorded sound, *it must*. Again, back to the Constitution. To "promote the progress of science" is the reason copyright exists in the first place. Promote, not control. For continued growth in culture and science, it is imperative that archives make cultural legacy available to the public in a respectful and accessible manner.

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