Library Reproduction of Musical Works: A Review of Revision

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ARTICLE I, SECTION 8 of the U.S. Constitution vests in Congress the power "to promote the Progress of Science and Useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries...."[1] The wording itself has given rise to many a discussion on actual intent, especially with regard to subject matter. Today we speak of "intellectual property" when we speak of authorship in the copyright sense. This reflects a clear shift in emphasis from that of laws a hundred years ago, although the Constitutional mandate remains.

Hearings and legislation, cases in court as well as out-of-court settlements, meanwhile, have necessarily concerned themselves with monetary aspects of copyright. Two sections of the new law (PL94-553), however, have specifically dealt with the not-for-profit aspects of copyright. The concept of "fair use" has now been codified in Section 107, although authors have not been altogether pleased with the result. Nor for that matter have educators and librarians. The Copyright Office itself had great difficulty in drafting this legislation, as did the House and Senate at the time of the long years of hearings and comment. Among the most difficult of all must have been Section 108, devoted to "Reproduction by Libraries and Archives" and the subject of this paper.

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Historical Interpretation and Exclusion of Music and Copyright

Music has been covered by copyright protection for only a comparatively brief period, since it is not specifically mentioned in a federal copyright statute until the 1832 Act. Not until 1972 could sound recordings claim protection at the federal level (although the states had enacted legislation ad interim). Under the 1976 Act, music is seen in a special light. It can be copyrighted as before, but library photocopying is severely restricted. For some reason it was largely excluded from the King Research surveys, and thus it very nearly escaped being addressed specifically in the resulting report of the Register of Copyrights.

In the history leading up to PL94-553, music librarians typically took issue with the wording of the act's Section 108(h), which largely excludes a "musical work" from the classes of materials for which copying by libraries is permissible. Section 108 itself is a "limitation" on the rights of the copyright owner (in most cases read publisher). "Reproduction by Libraries and Archives" is available for other classes of materials, but not for "a musical work." The act states:

> [108](h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or to a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights under subsections (b) and (c)....[2]

In order to understand why musical works are treated specifically here and elsewhere in the law, we should ask how they have generally been dealt with under various laws, in law schools, and in the entertainment industry since the Copyright Act of 1832. The concept of music as "entertainment" is strongly reflected in the wording of Section 108(h) of the current law. Music librarians have long sought to separate the contrasting concept of music as a subject of scholarship, research and education, from the for-profit sense with which entertainment is associated. During the legislative history, through lobbying, forceful testimony, even pointing to unrelated case law involving financial harm, the publishing community was able to convince legislators that photocopying would erode the copyright in a work, even that done under the strict reading of Section 108(h). The legal staff of the Copyright Office, having most likely been exposed to the "entertainment law" concept presented by many law schools, could also have been an influential factor. In any event, music library representatives were then unable to convince either the publishing community, or the Copyright Office and House Subcommittee, that music was also a subject of research, study of

general scholarship. Perhaps more basic, these parties missed the important fact that the music industry is in a constant state of flux, thus making general permissions for out-of-print materials far more difficult to obtain than in any other publishing field. Virtually all case law and suits settled out of court had pointed to relatively clearcut situations. To the music library community at the time, the specifics of Section 108 seemed simply not to be addressed by any of the parties involved with the legislation except, of course, the other library associations with whom the Music Library Association had drafted testimony.[3] PL94-553 was signed into law with Section 108 as quoted earlier.

Impact of the Copyright Act on Music Libraries

Even before passage music librarians had been coming to know the law through articles, lectures, sessions at national and local meetings, and fact sheets. Articles on 108(h) appeared in the MLA *Newsletter* and in *Notes,* the quarterly journal of the Music Library Association (MLA). In addition, publishers of serious music and Copyright Office representatives were attempting to continue the discussions of differences in outlook. The result, however, was further confusion. On the one hand, the Copyright Office representatives, who were theoretically not at liberty to offer legal advice, did indeed advise that music might well be copied by a library if "fair use" (Section 107) were invoked. The guidelines attendant to Section 107, however, do not necessarily provide for the needs of music libraries, nor were they intended to. Publishers, on the other hand, spoke of the monetary aspects and "erosion" of the copyright. Music librarians maintained once again that they saw no monetary disadvantage to such copying; in fact, they maintained, it would be to the advantage of composers and publishers to have certain music brought to light so that it could be made available—specifically, the music which the publisher might not have cared to promote due to "lack of interest" in the work. The parties still were not communicating, nor seemingly listening to one another.

Over subsequent years music libraries have gradually ceased to provide copies for interlibrary loan or for reserve for class assignments. Many felt that they were losing their ability to serve their patrons and to fulfill their role as librarians—at least as well as they had in the past. Nor did they cherish the idea of translating into practice a law which, had they been attorneys, they would have termed *bad law.*

When the new law became effective on 1 January 1976, music librarians were faced with the grim reality that they must come to grips

with the fact of its existence. Indeed, many would decide to alter some seemingly proper and innocent practices that had evolved, and which they had been carrying out in the interest of their patrons.

As regards library photocopying, however, the act itself recognized the difficulty of codifying both the doctrine of "fair use" and library copying. Indeed, in the particular issue of library photocopying (or, rather, "reproduction"), the difficulty is specifically recognized in one of eighteen briefing papers prepared by the Copyright Office, as cited in the Register's testimony before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice on 7 May 1975:

> Related to the general question of the extent to which the "fair use" doctrine should operate as a limitation on the exclusive rights of the copyright proprietor is the specific issue of exceptions for library reproduction of copyrighted works.[4]

The second paragraph of the summary begins with the statement:

> Section 108 of the revision bill represents an effort to provide a partial legislative solution to a most difficult issue.

Congress having recognized the thorny problems at hand, incorporated Section 108(i) in order to provide a monitoring device, as well as to ascertain where the law had fallen short of providing for acceptable practices.

The ideas of Barbara A. Ringer, then Register of Copyrights and a prime drafter of the legislation, permeate the hearings and the surrounding discussions, and ultimately were taken into account by the legislators when the law was eventually passed. This was particularly important for music. Section 108(h)[5] having been passed as written, a further look would be necessary after the law had been in effect. At that time music librarians believed that Congress would clearly recognize a "stifling effect" on music scholarship, research and education, as well as other allied activities, including publishing. The provisions in Section 108(i) provided for a review, and the music library community anticipated its voice being heard in that review. Section 108(i), in paraphrase, mandates consultation by the Register of Copyrights with the various parties involved—including publishers, authors, library users, librarians, and other users of copyrighted materials—in order to evaluate Section 108.[6] This was to be reported out within five years, and, in a splendid display of efficiency given the circumstances and the magnitude of the undertaking, this has now been achieved. However, the "Road to Review" (as was the so-called "Road to Revision") was fraught with problems and perhaps special prejudices concerning

music. King Research, Inc. (KRI), of Rockville, Maryland, was contracted for a planned survey which would provide the Copyright Office with data. Surprisingly, the questionnaires contained no specific questions on music. Nor were any representatives from the music library community invited to participate in the Copyright Office's sessions held to develop the survey questions. To many in the music library world this seemed a gross oversight. Because of exclusions of printed and recorded music from the majority of sanctions of 108, music librarians had concluded, music would *necessarily* be a part of any survey on the topic of reproduction by libraries. Instead, word came circuitously from the Copyright Office that since music as a class of materials was excluded from 108, it *need not be* a topic of study.

MLA Legislation Committee Lobby with MPA

Prompt action by MLA's Legislation Committee and officers sought to remedy the situation by meeting directly with the Copyright Office. It was then too late to adjust or augment the already expensive King survey. MLA representatives, however, were assured that any information they could obtain from a "parallel" survey addressing musical works *specifically* could be taken into consideration in the final report. They were advised that their survey must, for the sake of validity, include in its undertaking representatives from the music publishing community.

In order to prepare a survey in the available time, an ad hoc Working Group was formed, including MLA Legislation Committee members, board members of the Music Publisher's Association of America (hereafter cited as MPA), and sound archivists. By the autumn of 1981 questionnaires for the survey were complete and in the hands of Dr. Gustave Rabson at Clarkson College of Technology in Potsdam, New York, who generously contributed the data processing and questionnaire evaluation. The continued communication within the Working Group turned out to be of great importance.

During the survey, the MLA Legislation Committee also continued to meet. It was MLA's basic belief that there might still be some hope for concessions in line with their earlier testimony during the revision process prior to 1976. A resolution was approved in general session at the MLA Annual Meeting in Santa Monica, California on 4 February 1982. As we shall see, this resolution has largely been disregarded by the Copyright Office:

Resolution

The Copyright Law of the U.S.
PL 94-553
Section 108, Reproduction by Libraries and Archives

WHEREAS, prior to the Copyright Act of 1976, which went into effect on 1 January 1978, libraries supported research and scholarship by providing certain music materials in form of a reproduction, as did libraries in other disciplines, and

WHEREAS, since 1978 such music copying has not been permitted under Section 108 of the Law (although it has been permitted for other materials), to the detriment of music research and scholarship and the arts as a whole, and

WHEREAS, the Copyright Act has not achieved the proper balance between the rights of authors and the needs of users, as its stated intent, and

WHEREAS, music libraries, as a national resource, and their patrons, as educators, authors and scholars, have a need just as right and just as proper for access to music materials as do libraries and patrons who deal with materials in other formats, and

WHEREAS, creators and publishers themselves have often had a need to have reproductions of musical works supplied by libraries, and

WHEREAS, elimination of the exemption of a "musical work" from the library photocopying section of the Copyright Act would recognize the needs of users and restore the balance between user and author, and

WHEREAS, such elimination would have no discernable monetary effect upon either publisher or author,

THEREFORE BE IT RESOLVED that the United States Congress enact ligislation permitting the reproduction of a musical work under PL 94-553, §108.

Approved in General Session, 4 Feb. 1982.

Continuing its work on the survey, the ad hoc Working Group met in the summer of 1982 at the Cornell Club of New York. Here they were able to agree on a proposal to submit to the Copyright Office. Long deadlocked over the idea of music as a topic of serious scholarly endeavor in and of itself (as apart from public performance for profit, for example), neither MLA nor MPA had been able to accept fully the other's point of view. Talks at the Cornell Club meeting, lasting a day a half, finally gave the Working Group a much-needed chance to sit quietly and discuss the matter. The resulting joint proposal, submitted to the Register of Copyright, intended to make out-of-print material available for library copying under specified circumstances. Ultimately accepted by both MLA and MPA, it was entered for the record with the

Copyright Office. The text of the proposal, which was intended as a new paragraph of Section 108, reads as follows:

> The rights of reproduction granted by subsection (e) may be exercised by libraries and archives in respect of musical works if the library or archive shall first undertake a diligent search for the copyright proprietor of such musical work, which search shall include, but not be limited to, the records of the Copyright Office. If, following such search, the copyright proprietor cannot be located, the library or archive may reproduce such musical work in accordance with subsection (e). If the search discloses the identity and location of the copyright proprietor, no such reproduction may be undertaken without the approval of the copyright proprietor.

The drawbacks to the exercise outlined in the proposal are both numerous and obvious; but this small step, it was felt, could also pave the way for further discussions, and further loosening of the law's restrictions on the reproduction of musical works under Section 108.

Another purpose of the July 1982 Cornell Club meeting was to write a joint report on the findings of the three-part survey described earlier. Unfortunately, for a variety of reasons this was not possible. The publishers for their part, did not wish to see the survey results from the publishing industry published at that time, generally feeling that the results yielded little, if anything, of value or pertinence. MLA, however, felt it mandatory that the library survey results be reported out, and did submit this portion of the survey to the Copyright Office together with a general statement from the association on the matter. Both of these documents are included in the comment volumes accompanying the Register's report.[7] Their wide range of feelings concern a law which is greatly changed from past understanding and practice, which required them to formulate and defend new policies.

MLA/MPA Recommendation for Revision

When the Register of Copyrights reported to Congress, the joint MLA/MPA proposal was, interestingly, one of the few recommendations made for change within the law. The Register states:

> The Copyright Office endorses the substance of the proposal to accord a copying privilege for out-of-print musical works after an unsuccessful, reasonably diligent search for the name and address of the copyright proprietor. The Office considers the proposal a salutory example of the positive results that can be achieved by persistent good

faith negotiations between the principal parties affected by a photocopying practice for the Act's photocopying provisions.

As a technical matter, it may be more appropriate to amend paragraph (e) rather than add a new subsection (j). In any case, paragraph (h) would require consequent amendment.

The Copyright Office is not prepared to support any other new "108 copying" privileges with regard to musical works. The Office believes that the adoption of the above amendment, together with the existing fair use exemption, will provide adequate copying privileges to facilitate musicological research. If the 1982 Resolution of the Music Library Association represents a broader proposal than the above amendment, the Office recommends rejection of the Resolution's proposal.

At this writing, however, there has been no further discussion between any of the parties involved in the "musical work" question. Nor does any appear to be planned for the near future.

Of major import at present, and crucial for the correct interpretation of the law as it reads today, is the relationship between Section 107 and 108, a perhaps more convoluted problem than might be imagined. How librarians themselves read the law and how they conduct their business under it will inevitably establish certain traditions. Just now music publishers do not appear to be conspicuously litigious with regard to libraries per se; music litigation is quickly settled out of court in cases which appear to be clear infringements.

The history of the actual legislative activity surrounding PL94-553 has already spanned nearly two decades, and made for a flourishing copyright bar and kept our civil servants busy indeed (to say nothing of copyrightologists-errant). But, may we say one day, as did Hazlitt: "It was a time of promise, a renewal of the world and of letters...."

References

1. *Constitution of the United States,* article 1, §8.

2. *United States Code.* Supplement V, title 17. "General Revision of Copyright Law." 94th Cong. 2d Sess. 19 Oct. 1976 (PL94-553; 90 Stat. 2541. §108. Washington, D.C.: USGPO, 1981 (hereafter cited as Copyright Act).

3. U.S. Congress. House. Committee on the Judiciary. Subcommittee Courts, Civil Liberties, and the Administration of Justice. *Copyright Law Revision: Hearings on H.R. 2223, 94th Cong.,* 1st sess. 14 May 1975, pt. 1, pp. 184-216.

4. Ibid., 7 May 1975, §108, pt. 3, p. 2057.

5. Copyright Act, §108(h).

6. Ibid.

7. U.S. Library of Congress. Copyright Office. *Report of the Register of Copyrights: Library Reproductions of Copyrighted Works* (17 U.S.C. §108). Washington, D.C.: Copyright Office, 1983.