Some Conversation Starters Concerning the Problem of Online-Only Music for Libraries

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The following are a few conversation-starting ideas that I hope will be useful for the group as it meets to discuss these issues further in July.

I. Copyright law may bar library acquisition, circulation, and preservation of certain sound recordings in at least three ways:

1. *The Vernor/Blizzard Problem:* When libraries acquire digital files, those files may be encumbered by contract terms which authorize only certain activities, or bar certain others. Under cases like *Vernor v. AutoDesk*, courts may find that libraries are not "lawful owners," and hence not entitled to the protection of the first sale doctrine, which allows lending. Under cases like *MDY v. Blizzard,* courts may find that libraries who use licensed media in ways that exceed the license are thereby infringing copyright, and may be subject to the staggering statutory damages that attend copyright infringement.

2. *The ReDigi Problem:* Even when digital files are not encumbered by hostile licensing terms, those files (like all computer files) can only be circulated or preserved by making additional copies of the file. These reproductions may not be covered by the provisions of the Copyright Act that empower libraries to circulate and preserve physical formats - Sections 108 and 109. A federal district court in California held to that effect in the *Redigi* case,[1] and the Copyright Office has said, in its Section 104 Report, that there is no such thing as "digital first sale."[2]

3. *The Spotify Problem:* Some modes of music distribution do not involve the acquisition of files at all, but rather involve access to streamed content. Streaming providers set the terms under which they will provide access to this content, and they may describe those terms in ways that preclude libraries from subscribing. And, of course, because libraries never acquire a copy of the recordings, there is no preservation role for libraries.

Music libraries should think seriously about all three of these issues. Rolling back hostile license terms is at best a partial solution if libraries aren't sure what rights they have by default or need to be affirmatively granted in order to make all of the uses they would like to make of digital files. And solving all problems related to digital files will still leave a gap in the ecosystem as long as streaming providers like Spotify, Pandora, and Beats use exclusive releases as a way to distinguish themselves in the marketplace. Any discussion of these issues with either recording industry representatives or policymakers should be as holistic as possible, lest the library community find itself returning again and again to ask for additional concessions to cover additional gaps in its ability to acquire, preserve, and lend copyrighted recordings.

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[1] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (SDNY 2013), http://scholar.google.com/scholar_case?case=11987243262728384575&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[2] Copyright Office, DMCA Section 104 Report, http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

II. Unlike Section 109 (first sale) and Section 108 (library copying for preservation and distribution), Section 107—the fair use doctrine—is an open and flexible doctrine that may be helpful in this situation even though (or precisely because) it was not foreseen by lawmakers. Here are some things to consider regarding fair use and online-only music:

1. *When would fair use come into play?* I think fair use could play a role when libraries come to possess digital music files without licensing terms that clearly bar preservation, circulation, or related activities. Fair use would be the response to a rights holder who came forward and claimed that whatever mode of preservation or distribution a library chose required reproduction, distribution, or performance beyond the bounds of Section 108, Section 109, or Section 110 (or the permissions of a given license). As noted below, fair use is likely *not* an effective response to a rights holder who comes forward claiming violation of a license agreement.

2. *Incidental copying & the arguably transitive property of scholarly use*: Courts have ruled that where the ultimate use was a lawful one, acts of copying that were intermediate or incidental to that use are fair use. For example, in *AIME v. UCLA,* the court held that because ripping a DVD and placing a copy on the UCLA servers was necessary in order to make public performances via streaming, and AIME had already licensed UCLA to make such performances, the necessary copying was "incidental fair use." So, a library that obtains an affirmative license to lend or to publicly perform a sound recording may be protected by fair use when it makes reproductions necessary to doing so.

   This principle could also be deployed to extend the fair use rationale available to individual scholars so that it reaches the collection development that is a necessary antecedent to scholarship. For example, in *Sundeman v. Seajay Soc'y, Inc.*, 142 F. 3d 194 (4th Cir. 1998), the court held that a scholar's use of substantial excerpts from an unpublished manuscript in a critical paper was transformative. Further, the court held that the Seajay Society, which provided the scholar with a complete copy of the manuscript to support her research, did so "in pursuit of her scholarly objective and only because she might harm the fragile, seventy year old original manuscript during her analysis." The court also found that providing the entire work to the researcher did not weigh against fair use under the third factor because, "the amount and substance of the copies are justified" by the scholarly purpose and the fragility of the original. The court continued, "It would severely restrict scholarly pursuit, and inhibit the purposes of the Copyright Act, if a fragile original could not be copied to facilitate literary criticism." In the end, then, the Seajay Society was found to have engaged in fair use by distributing an entire copy of an unpublished manuscript in support of scholarship. Arguably the digital nature of music files makes it necessary to lend them by making reproductions or public performances, just as fragility in the *Sundeman* case necessitated providing the scholar with a complete copy for research.

3. *Recreating first sale:* While digital distributions involving reproduction are likely not literally covered by the right of first sale described in Section 109 (if we believe the *Redigi* court and the Copyright Office), it may yet be possible for libraries to recreate something that looks like first sale under the aegis of Section 107. Unlike Redigi, which is a for-profit business that takes a percentage of the sales made on its platform and thus profits directly from each distribution, libraries engaged in acquisition, preservation, and lending have a story to tell about how their uses are socially beneficial and historically favored by the law in the same way that traditional lending under first sale is beneficial and favored.

4. *Substantial compliance:* Libraries could invoke a "substantial compliance" argument (described in detail in a paper by Jonathan Band)[3] to explain that while lending digital files does not literally meet the requirements of Section 109, it is consistent with the public policy considerations that motivate the first sale doctrine, so courts should look favorably on such uses as they determine whether they are fair.

5. *Is it transformative?* Among the very first things courts ask about a purported fair use is whether the use is "transformative." While a negative answer is not necessarily determinative, a positive answer very often is. That is, where courts find a use to be transformative, they almost always find the use to be fair. Libraries should ask whether and how they can characterize activities involving acquisition, preservation, and circulation as transformative. I think there are ready descriptions of these activities that could convince courts that they are transformative, so long as the uses are properly circumscribed to conform to the argument.

   Preservation, for example, is in principle (if not in practice) entirely separable from access, and serves a purpose that is very clearly different from ordinary consumption of copyrighted works—ensuring the long-term survival of the work far beyond its copyright term (and, most likely, its commercial life). The transformativeness of preservation has been affirmed in both the ARL *Code of Best Practices in Fair Use for Academic and Research Libraries* and in the forthcoming best practices in fair use for collections likely to contain orphan works (title TBD). At the same time, Judge Baer's opinion in the *HathiTrust* case cast doubt on whether preservation is transformative, though it found the use to be fair nonetheless.

   Collecting and providing access to an academic library collection of music is also arguably transformative in that it facilitates a mode of consumption that is unique and distinct from ordinary commercial consumption of music and related items. I've already described the *Sundeman* case, and I think more could be said to flesh out the idea that scholarship generally is a transformative activity which can be used to justify antecedent necessary activities. I also believe that developing a well-curated collection to support research can be characterized as a transformative activity in itself. Scholars use ready access to a wide and deep collection to facilitate development of new knowledge and new ideas. They browse tens, hundreds, or thousands of items; they place these items in conversation with one another; they delve deeply into rare or obscure materials. Libraries add great value to their materials by curating them together in collections, adding metadata, rendering them searchable, perhaps creating exhibits, and so on. The ordinary market simply cannot support scholarly activity in this robust way; only a library collection can.

   I think statistics about the nature and value of library collections, the extent and cost of value-added library services, some typical scholarly use cases, and the like would all help support an argument that developing library collections is transformative in the way I describe. I also think some kind of limitation on access, perhaps by streaming to authenticated users, a click-through notice, or the like would help insulate such uses from claims that library users would download and keep digital files for their personal, non-scholarly use.

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[3] See *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966593.

6. *Walking through the factors.* While the transformativeness inquiry generally drives the outcomes of fair use cases, courts still walk through the four statutory factors in evaluating alleged fair uses. Leaving transformativeness aside, the four factor analysis might go like this:

   - Purpose and character of the use: The purpose and character of library acquisition, preservation, and circulation of these materials would be non-profit, educational, and in support of several of the kinds of purposes described in the preamble of § 107 (teaching, scholarship, research, criticism). On the other hand, the use might be characterized by rights holders as "consumptive" or even "substitutional" insofar as the works may be used by patrons in ways that could supplant the ordinary market. This connects back to the transformativeness inquiry described earlier. The better job a library does in distinguishing the activities it supports from ordinary consumer enjoyment, the stronger its case will be under this factor.
   - Nature of the work used: Musical works and related items are generally likely to be considered creative in nature, which will mitigate against fair use. This factor is rarely taken very seriously by courts, however, and is never determinative of decisional outcomes.
   - Amount of the work used: Libraries and their patrons would presumably use entire works, which sometimes mitigates against a finding of fair use, though this is not necessarily the case. Sometimes, as in *Sundeman*, the court views the third factor through the lens of the first factor, asking whether the amount taken is appropriate to the favored purpose, favoring fair use if so. Other times, however, courts view the third factor through the lens of the fourth, asking whether so much is taken that there will be a market substitution effect. If courts take this view, the factor is likely to weigh against fair use.
   - Effect of the use upon the value or market for the work: Here a court will ask whether making library collections materials available to patrons will cause cognizable harm to the commercial market for the same works. Again, it is difficult to view this factor in isolation from the question of transformativeness. If the court finds the use to be novel and transformative, then any potential harm is irrelevant. If the court does not, then the possibility of substitution could weigh heavily against the use. Again, much will ride on libraries' ability to tell a convincing story about why the kinds of uses they and their patrons make of the materials are non-substitutional, transformative uses.

7. *You can surrender your fair use rights by contract*. No fair use argument is likely to overcome an express promise by a library not to engage in a particular activity, or, by implication, an express promise to engage only in certain limited modes of activity. So, when online music is encumbered by a license agreement, fair use arguments are unlikely to be helpful in overcoming the terms of the agreement. If, on the other hand, the license is silent as regards a particular activity, and if the license has not carefully circumscribed which activities are permitted, then the license may not have waived all of the affected library's fair use rights. It will depend on the language of the contract. I'm afraid from what I've seen of the major online retailers' EULAs, there is little room for fair use to operate.

III. The political economy of copyright in general and of music copyright in particular is stacked against libraries right now. Voluntary private arrangements are king.

As the copyright review/reform process continues to unfold in Washington, DC, and in various "field hearings" around the country, there is very little reason for hope that anything good or useful for libraries can emerge from the federal political process.

For example, at a recent roundtable event at the Copyright Office a representative from the Authors Guild threatened to sue libraries and others in the room who might consider engaging in mass digitization and orphan works projects. A representative from the photographer community compared the *Authors Guild v. Google* and *Authors Guild v. HathiTrust* decisions to the notorious *Plessy v. Ferguson* case which upheld the racist principe of "separate but equal." Most importantly, representatives from the music industry denied that there was any such thing as an "orphan works" problem for musical works and insisted that licensing solutions were already working to ensure adequate access to sound recordings.

The most active policy area right now for music groups is changing the way various licensing regimes operate in order to obtain higher licensing fees from providers like Pandora and Sirius XM, as well as from terrestrial radio. Multiple bills have been introduced to create royalties where none existed before, or to inflate royalties that music industry lobbyists characterize as too low. The only reason these initiatives are not moving more quickly toward becoming law is that powerful entities like the various associations of radio broadcasters and web companies like Google and Pandora have opposed them. It is very hard to imagine that libraries could seek any kind of special dispensation to acquire or circulate sound recordings in a policy environment where the only question on the table seems to be just how much more money the music industry should be paid for use of its copyrighted works.

It is also important to know that even after the watershed moment of the SOPA blackouts and protests, there is a deep affinity for the content industry among key committee members and committee staff in both houses of congress and among staff in key agencies. This has been true since the 1990s. There are some members and some staffers who "get it," or who are at least open to other points of view (Zoe Lofgren and Jared Polis on the Dem side; Darrell Issa and Jason Chaffetz on the GOP side, for example), but they are in the minority. Support for the content industry is a bi-partisan phenomenon that encompasses Democrats who see the content industry as an important cultural force (and donor base) and Republicans who see it as an important economic one. The post-SOPA dynamic in Washington is one of continuing deference to content industries tempered only by a grudging respect for the political power of the Internet, and especially for large Internet companies like Google and Facebook. The dysfunction of congress, compounded by the entrenched positions of opposing interests, makes legislative progress on anything short virtually impossible.

The primary (and often the only) option for real movement in discussions of copyright policy these days is private arrangements among affected stakeholders. Whether it's the "six strikes" copyright alert system being administered by the content and ISP industries, or the ContentID program administered by YouTube in cooperation with rightsholders, private arrangements seem to be the going thing. Indeed, the USPTO is now sponsoring a series of stakeholder negotiations to craft a new set of voluntary best practices for administering the DMCA notice-and-takedown process. So, if you approach a congressional or agency staffer with any kind of policy proposal, the first question they ask will be, "Have you approached the recording industry about this? Is there some way you can work this out between you?" This is both a strategy for avoiding difficult work when policymakers are already quite busy, and a strategy for avoiding political controversy in an area that is densely packed with land mines and third rails.

Relatedly, whether it's an agency like the PTO or a committee like the House Judiciary Committee, the primary mode of copyright policymaking for a long time (since the process that led to the 1976 Copyright Act, at least) has been trying to establish "consensus" behind any bill. Legislative and administrative actors are under great pressure to show that their plan or policy is

broadly acceptable to all affected communities. Government actors rely heavily on industry lobbyists and other stakeholder experts and advocates to tell them what sorts of policies are acceptable and workable for affected industries and groups. That means that there is really no way to do an end-run around the recording industry in order to achieve policy goals with which they might disagree. The minute you leave a meeting with almost any staffer, that staffer will pick up a phone or open up her email and reach out to the RIAA to see what they think of your proposal. If you haven't got a sense of what those stakeholders will say, and of whether and how they could be brought on board or somehow neutralized, any policy action you pursue will be dead on arrival.