

From
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To respond to your inquiry regarding the problems associated with "orphaned" works...

I should begin by stating that our record company is a tax-exempt 501 c 3 corporation.

I have had to scrap several recording projects due to "orphaned" works. The problems stem from the inability to locate owners for mechanical rights as well as the owners of the rights for recordings.

Example 1

My former teacher, a composer named Spencer Norton wrote several works I wanted to record on CD. The disc would have been a tribute to his memory. He died in the 1970s. He copyrighted his music, yet he did not have a publisher. He had no heirs and I have had no luck tracking down the estate. As it stands now, it will be impossible to release recordings of any of his music during my own lifetime.

We also wanted to include some broadcast performances of his music. These broadcasts were done by the Oklahoma City Symphony. The Orchestra was dissolved many years ago and, as required by law, any of its remaining assets being distributed to other non-profits. The current orchestra in Oklahoma City has stated that they got nothing from the old orchestra, nor do they know of any individual owning whatever rights might exist to those broadcast performances. At this point in time, IRMA will not allow us to publish any of these recordings, even though the ownership of the broadcasts, assuming they were copyrighted, cannot be determined. Similarly, all attempts to contact the Oklahoma City local of the musician's union have turned up nothing.

Example 2

We are featuring a disc of the recordings of two of the great Italian musicians of the 20th Century, Ottorino Respighi and Alfredo Casella. Respighi made some recordings of solo songs accompanying his wife at the piano. They were released on the Parlophone label back in the 1920s. These recordings are now Public Domain in the country of origin, but not in the US. Parlophone has been out of business for many years. Therefore, due to the current copyrights, these historic performances cannot be made available to the US public through the normal means of publishing and distribution.

Example 3

This example relates not directly to the notion of "orphaned" works, but to the contradictions in the enforcement of the current US copyright laws. In the European Economic Community, the

duration of copyright of recordings is 50 years. As a US company I can legally issue in Europe, a recording, commercial, or broadcast, that is public domain in Europe but still covered by copyrights in the US. I can press in Europe, warehouse in Europe and sell in Europe a recording covered by US copyright. Further, a US customer can purchase, via the internet, a copy of that recording and have it shipped to them in the US, thus bypassing the US copyrights. European vendors do not monitor the copyright restrictions of the countries to which they ship product. US customs does not check. In short, the extra 25 years of the US copyrights forces US companies to take the pressing and sale of such products to Europe depriving US pressing companies from possible revenue and forcing US customers to pay extra for both the cost of pressing in Europe and the added transportation costs.

Further, there is nothing in the law that prevents my company from setting up a server in Europe, and sending electronically my restored version of a recording still under copyright in the US to that server in Europe. I can sell downloads of that recording to anyone world-wide, including anyone in the US, and have the income transferred directly to my bank account in the US. My restored copy can be covered by European copyrights, but not by US copyrights.

For me, these examples demonstrate the lack of understanding of both the nature of e-commerce and the what I see to be, myopic thinking on the part of those responsible for our Federal Copyrights.

Why should any of this be of concern...

From my perspective there is a substantial amount of material, broadcast recordings, unpublished music, etc. that would be of interest to scholars and music lovers. It is not economically viable to search out ownership, and in many cases, attempt to define and argue ownership, in an effort to bring this material to that small, but appreciative public.

On the other hand, as I have stated above, due to the nature of e-commerce, there is no way to adequately enforce the US copyrights, beyond the more universally accepted standard of 50 years. For that matter, music copyrights are, these days, very costly to enforce. For a company such as ours, copyright protection is relatively meaningless, since we do not have the funds to seek legal action to protect our own product.

Further, a small organization such as mine, does not have the resources to test the law, as Naxos did with when it was sued by Capitol. Does that particular decision mean that if one can reasonably demonstrate abandonment of copyright, one can republish with impunity. IRMA does not agree. So, I can bring in dozens of commercial issues of New York Philharmonic performances which were broadcast in the 1940s, issues not authorized by the New York Philharmonic, clearly demonstrating abandonment of copyright, and yet IRMA will not recognize the abandonment of copyright as justification for pressing and sale in the US, even if the version I offer is restored. Further, the market is so small, the New York Philharmonic isn't interested in issuing the recording. While they will say over the phone, you can issue it as long as you call the orchestra by its old name, the Philharmonic Symphony Society, and provided it isn't something that they have included in their historic reissues. However, they won't put it in writing. So that leaves the US company, in our case, a non-profit, being

forced into abandoning potential projects, or, pressing in Europe, or placing our files on a server in the Europe, or Canada, and selling downloads to anyone world wide.

Also, not necessarily specific to the question at hand, in the US it is the responsibility of the record company to obtain the mechanical rights. In Europe, the pressing plants will do this for you. They are usually larger organizations and unlike my company, have more than two unpaid people, myself and my wife, running the organization.

To give you an idea of the problems involved in getting mechanicals on something published...some works aren't orphaned, its just that their parents have so many children they can't remember all of the names...

I recently released a recording of a Violin Concerto published by G. Schirmer. I know it was published by G. Schirmer because I was able to find a copy of the score in their rental library. When it came time to pay the mechanical rights, Schirmer said they didn't publish the score. Only after several letters were exchanged and I showed them the receipt for the charges to access the rental copy, did they get the work listed on the Harry Fox web site. Is it the responsibility of my company to insure that G. Schirmer gets paid their rights? It took about ten hours of my time, so I could pay Harry Fox about \$500, so they could pay Schirmer a portion of that amount. What is the point? And was it not Schirmer's responsibility to have their music listed? No, the law does not require this.

The recording featured the National Orchestral Association training orchestra, a non-union orchestra. The Association only dealt with us because we are tax exempt. When I asked for written permission to issue their broadcast performance, dating from the the 1940s, they gave me a document stating that I had their permission to the extent that they had ownership. They weren't even sure what they owned.

If I can be of any assistance in these matters, please don't hesitate to ask. I believe there should be some way for a major organization, like Disney, to retain its corporate identity without having to inhibit a small American businesses, or in my case, a non-profit tax exempt educational organization, which deals with relatively esoteric material of interest only to a small market.

If we are going to be forced with a notion of ownership of intellectual property in perpetuity, which seems to be the direction we are headed, we must adopt regular copyright renewal. On the other hand, a unilateral term duration of ownership of intellectual property, not in agreement with the rest of the world is, in this day of e-commerce, inhibiting to US business on one hand, and unenforceable on the other.

Faithfully,

Karl F. Miller, DMA