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G A R V E Y S C H U B E R T B A R E R

**PACIFICA RADIO ARCHIVES
PRESERVATION AND ACCESS PROJECT**

**DIGITIZATION, PRESERVATION AND
DISTRIBUTION**

A Garvey Schubert Barer White Paper

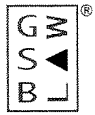


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I. INTRODUCTION

The Preservation and Access Project of the Pacific Radio Archives (“PRA”) seeks to digitize and make accessible 100 historic radio programs of exceptional cultural and artistic value that were originally broadcast on KPFA-FM, KPFK, WBAI, WPFW and KPFT between 1958 and 1995. Pacifica’s master, analog, reel-to-reel tapes are maintained in secure climate and humidity-controlled storage at PRA in North Hollywood, CA, but the tapes are fragile and in need of preservation.

PRA’s initial plan is to digitize sound recordings of a discussion between painter Larry Rivers and poet Kenneth Koch (1975), the reading of poetry by Vietnam vets (1972), a documentary on poet Anne Sexton (1975), and a program featuring songwriter Mabel Mercer hosted by Marian McPartland (1975). PRA would like to make the restored and digitized programs available by means of streams or downloads on its website.

PRA would like to provide access to the recordings to scholars and educators, documentarians, researchers, authors, artists, and musicians and to allow Pacifica stations and producers as well as other production entities and media outlets to re-broadcast all of or excerpts from the programs. It would also like to include these recordings in “From the Vault,” its nationally distributed radio series. Other content to be digitized and made available to the public includes documentaries, lectures/speeches, interviews, music, literature/poetry, public speeches and events, panel discussions/roundtables, commentary, original radio dramas and readings, adaptations of published drama, literature, and poetry.

Copyright liability for violation of the copyright laws is substantial. In a civil suit, an infringer may be liable for a copyright owner’s actual damages plus any profits made from the infringement. Alternatively, in lieu of actual damages a copyright owner may elect a statutory recovery of up to \$30,000 or, where the court determines that the infringement occurred willfully, up to \$150,000, per infringement.¹ Where the infringer proves that it had no reason to believe its acts infringed copyrights, the court has discretion to reduce damages to \$100 per infringement. The court can reduce statutory damages for a public broadcaster if it had no reason to believe its acts constituted a violation. When done willfully, with an intent to profit from an infringement, a copyright violation may constitute a federal crime. Criminal penalties of up to ten years may be imposed depending on the nature of the violation.

It is useful to think of potential liability or a “continuum of risk,” and to distinguish relatively low-risk uses of copyrighted material from uses with much higher risk. Because copyright issues are complex, this memo should be viewed only as a starting point, and not as a legal opinion, on any specific course of action.²

¹ See 17 U.S.C. § 504 (c).

² This white paper is based upon research by Michael V. Erzingher who served as an extern to Garvey Schubert Barer in 2011-2012.



II. QUESTIONS

This memo explores the following questions:

1. What legal issues are relevant to digitizing historic recordings?
2. Under what circumstances may an archive stream or offer downloads of sound recordings on its website?
3. What are the risks? How can the risks be reduced?
4. If a copyright infringement suit is filed, what defenses are available and what is the relative likelihood of their success?

III. LEGAL OVERVIEW

Copyright law imposes high hurdles to digitization, preservation and distribution. A study commissioned by the National Preservation Board made the following findings:

1. Were copyright law followed to the letter, little audio preservation would be undertaken. Were the law strictly enforced, it would brand virtually all audio preservation as illegal. Copyright laws related to preservation are neither strictly followed nor strictly enforced. Consequently, some audio preservation is conducted.
2. Libraries, archives, and other public and privately funded institutions are finding it virtually impossible to reconcile their responsibility for preserving and making accessible culturally important sound recordings with their obligation to adhere to copyright laws.
3. Privileges extended by copyright law to libraries and archives to copy sound recordings are restrictive and anachronistic in the face of current technologies, and create only the narrowest of circumstances in which making copies is fully permissible.³

The creator (or “author”) of a work protected by copyright has certain basic rights for limited periods of time. They are the right to:

³ NATIONAL RECORDING PRESERVATION BOARD OF THE LIBRARY OF CONGRESS, THE STATE OF RECORDED SOUND PRESERVATION IN THE UNITED STATES: A NATIONAL LEGACY AT RISK IN THE DIGITAL AGE 7 (August 2010), *available at* www.clir.org/pubs/reports/pub148/pub148.pdf.



1. reproduce the work;
2. create derivative works based on the copyright work;
3. distribute copies of the work;
4. perform the work publicly;
5. display the work publicly; and
6. in the case of sound recordings, perform the copyrighted work publicly by means of a digital audio transmission.

Sound recordings in the United States are accorded different protection than are other types of copyrighted works.⁴ Under the 1976 Copyright Act, books, articles, published music, movies, photographs, and other creative works are generally protected for 95 years from publication, or for the life of the author plus 70 years.⁵ Published sound recordings did not receive federal copyright protection until February 15, 1972.⁶ Unpublished recordings made prior to that date are governed by the civil, criminal and common law of the states.⁷ One consequence is that few if any unpublished sound recordings will enter the public domain before 2067.⁸ Unpublished sound recordings made after 1972 are protected for 20 years after the death of the author or 120 years after the work was created by an employee of the copyright owner.

Recordings made prior to February 15, 1972 (and recordings made after February 15, 1972 that include pre-1972 recordings) are governed by state common law,⁹ which applied to a recording from its creation until the moment of general publication.¹⁰ Performance of a work is not necessarily “publication.”¹¹ Courts have distinguished “general publications” from “limited publication.”¹² A general publication occurs “when a work was made available to members of

⁴ For further information, see Tim Brooks, *Only in America: The Unique Status of Sound Recordings under U.S. Copyright Law and How It Threatens Our Audio Heritage*, 27-2 AMERICAN MUSIC 125 (Summer 2009), available at http://www.recordingcopyright.org/pdf/AMuscop_fnl.pdf.

⁵ *Id.* at 125-126.

⁶ *Id.* at 126.

⁷ *Id.*

⁸ *Id.*

⁹ See generally *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1212 (11th Cir. Ga. 1999) [hereinafter “*Estate of King*”].

¹⁰ *Id.* at 1214.

¹¹ *Id.* at 1215.

¹² *Id.* at 1214.



the public at large without regard to their identity or what they intended to do with the work.”¹³ “A general publication occurs if tangible copies of the work are distributed to the general public in a manner that allows the public to exercise dominion and control over the work.”¹⁴ A general publication may also occur “if the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public.”¹⁵ By contrast, a limited publication does not divest the author of the common law copyright.¹⁶ A limited publication is one that communicates “the contents of a work to a select group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale.”¹⁷ Courts have held that “distribution to the news media, as opposed to the general public, for the purpose of enabling the reporting of a contemporary newsworthy event, is only a limited publication.”¹⁸

Section 108(h)(i) of the Copyright Act of 1976, the successor to the 1909 Act, provides a limited exception which allows schools and libraries to make a digital copy of a phonorecord during the last 20 years of its term of copyright for purposes of “preservation, scholarship, or research,” provided that the library or archive has first determined that the work neither is subject to normal commercial exploitation, nor obtainable at a reasonable cost. The term of the copyright in each recording would need to be established to determine whether the exception applies. Section 108(h)(i) covers only post-1972 sound recordings.¹⁹

Sound recordings published between 1972 and 1989 are entitled to copyright protection only if they comply with certain notice requirements. If the proper notice did not appear on the work, the sound recording entered the public domain. If published with the copyright notice, sound recordings during this period will not begin to enter the public domain until 2067.

Attachment A contains a chart showing the duration of copyright protection for sound recordings published in the United States.

IV. DIGITIZATION AND PRESERVATION

Section 108(a) of the 1976 Copyright Act permits a library or archive to reproduce one copy or a phonorecord of a work if:

¹³ *Id.*

¹⁴ *Id.* at 1215.

¹⁵ *Id.*

¹⁶ *Estate of King* at 1214-1215.

¹⁷ *Id.*

¹⁸ *Id.* at 1216, *citing* Public Affairs Assoc., Inc. v. Rickover, 109 U.S. App. D.C. 128, 284 F.2d 262 (D.C.Cir.1960) [hereinafter “*Rickover*”], *rev’d by*, Public Affairs Associates, Inc. v. Rickover, 268 F. Supp. 444 (D.D.C. 1967).

¹⁹ 17 U.S.C. § 301(c).



1. The reproduction or distribution is not made with any purpose of direct or indirect commercial advantage;
2. The collections of the library are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
3. The reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this Section 108(a).²⁰

A library or archives may make up to three copies or three phonorecords of an *unpublished* work solely for purposes of preservation and security or for deposit for research use in another library or archives if the copies or phonorecords are:

1. Currently in the collections of the library or archives; and
2. Any copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.²¹

The limited right of reproduction also applies to a *published* work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if:

1. The library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and
2. Any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.²²

Libraries and archives are authorized by Section 108 to make at least one digital recording of the copyrighted material if the format of the original work is obsolete or the work is in danger of becoming damaged or destroyed. This right is subject to the condition that the copy is “made without any purpose of direct or indirect commercial advantage.”²³ Thus, a threshold

²⁰ 17 U.S.C. § 108(a).

²¹ *Id.* at §108(b).

²² *Id.* at §108(c).

²³ *Id.* at § 108(a)(1). Contrast the word “commercial” as used in Section 108(a)(1)—held to mean for profit—with the terms “commercial” and “noncommercial” as used and defined in other sections of



consideration is whether the purpose in making the sound recording is for direct or indirect commercial advantage. The key factor is whether the charge for obtaining a copy exceeds the costs of making the copy. The legislative history of Section 108 indicates that Congress did not want libraries or archives to make a profit on reproduction of digital readings.

V. DISTRIBUTION

The right to copy a sound recording is further defined by restrictions on distribution. Although libraries and archives have limited rights to make archival copies of sound recordings,²⁴ those rights do not extend beyond the buildings that house the copies.

A. *Interactive Webcasting and Podcasting*

Streaming of sound recordings is governed by federal copyright law, which creates a “statutory license” subject to a number of restrictions discussed below. An agreement between the Corporation for Public Broadcasting (“CPB”) and SoundExchange specifies royalty payments and requirements for filing reports of use for certain noncommercial entities.

The Digital Millennium Copyright Act of 1998 (“DMCA”), which modifies the 1976 Copyright Act, created a statutory license for the digital performance of non-dramatic sound recordings.²⁵ The DMCA creates a license for “public performances” of *sound recordings* that is similar to the licenses administered by ASCAP, BMI and SESAC for the public performance of *musical works*. ASCAP, BMI and SESAC collect royalties for the public performance of musical works (the composition, notes and any accompanying lyrics) and distributes those royalties to composers, songwriters and their publishers. Similarly, under the statutory license for sound recordings, SoundExchange collects royalties from those who make sound recordings available to the public in a digital medium and distributes the royalties to musicians and copyright owners of the sound recordings. This statutory license is also called a “compulsory” license because it requires copyright owners to permit their sound recordings to be publically performed by those who meet the requirements of the statutory license, which are discussed below.

B. *Non-interactive, Live Streaming*

Section 114(d)(1)(A) of the Copyright Act of 1976 provides that public performances of sound recordings are not infringements of Section 106(6) if the following requirements are met (to the extent they apply):

volume 17 of the United States Code—used to maintain a distinction between for-profit companies and not-for-profit, 501(c)(3) organizations.

²⁴ See IV. DIGITIZATION AND PRESERVATION.

²⁵ Dramatic works, such as operas and plays (including musicals) must be licensed directly from the copyright holders. No statutory or blanket license for dramatic works exists.



1. The transmission is *not* part of an interactive service;
2. The transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another (except in the case of a transmission to a business establishment);
3. The transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer (with certain exceptions);
4. The transmission does not exceed the sound recording performance complement defined below in Section C, except that this requirement shall not apply in the case of a retransmission of a broadcast transmission if the retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission;
5. The transmitting entity does not publish an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists;
6. The transmission is not part of an archived program of less than five hours duration; is not part of an archived program of five hours or greater in duration that is made available for a period exceeding two weeks; is not part of a continuous program which is of less than three hours duration; or is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at more than three times in any two-week period that have been publicly announced in advance, in the case of a program of less than one hour in duration, or more than four times in any two-week period that have been publicly announced in advance, in the case of a program of one hour or more in duration;
7. The transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;



8. The transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;
9. The transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;
10. Phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner;
11. The transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal; and
12. The transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity.

When a broadcaster retransmits a station's audio signal over the Internet it is no longer broadcasting, but engaged in a different, digital form of transmission usually called webcasting. By adhering to the above conditions, a webcaster is covered by the statutory license, provided it also pays the requisite royalty and complies with relevant reporting requirements.

C. The Sound Recording Performance Complement

The statutory license is subject to the following "sound recording performance complement," set forth in Section 114(j)(13) of the DMCA:



During a three hour period one may:

- Play no more than three songs from a particular album;
- Play no more than two songs consecutively from a particular album;
- Play no more than four songs by a particular artist;
- Play no more than four songs from a boxed set; and
- Play no more than three songs consecutively from a boxed set.

“Side” channels, in addition to over-the-air broadcast programs, may be streamed but those additional channels must also comply with the sound recording performance complement. The sound recording performance complement also applies to archived and looped programs, defined below.

Limitations on prior announcements. Advance program schedule or prior announcement of song titles may not be transmitted by text, video or audio. Webcasters may name one or two artists or a particular genre of music to illustrate the type of music on a particular channel. It is permissible to announce the name of a song immediately before it is performed or to announce that a particular artist will be featured at an unspecified future time. The prior announcement that a sound recording will be played at a particular time is prohibited because such an announcement facilitates the copying of that recording.

Identify song, artist and album. When performing a sound recording during, not before the performance, one must identify, in textual data, the sound recording, the album and the featured artist, if receivers are capable of displaying the information.

Transmission of copyright management information required. If technically feasible, digital transmissions must be accompanied by information encoded in the sound recording that identifies the title of the song, the featured artist and any other related information.

Archived Programming. Archived programs – those that are posted on a website for listeners to hear repeatedly, on demand, in the same order – may not be *less* than five hours in duration. Permitted archived programs may reside on the website for no more than a total of two weeks. Merely changing one or two songs does not meet this condition, nor can programs be taken off for a short period of time and then be made available again.

The limitations on archived programs do not apply to recorded events or broadcast transmissions that make no more than an incidental use of sound recordings, as long as



such transmissions do not contain an entire sound recording or feature performances of a particular sound recording.

Looped programming. Looped or continuous programs – those that are performed continuously so that the program automatically starts over when it is finished – may not be *less* than three hours in duration. Again, merely changing one or two songs does not create a new program.

Repeat of other programs limited. Programs that are retransmitted at publicly-announced times in advance can be repeated only if:

- The repeats of a program are limited to three times in a two-week period for programs under one hour in duration.
- The repeats are limited to four times in a two-week period for programs over one hour.

Do not falsely suggest a link between recordings and advertisements. A sound recording may not be performed in a way that falsely suggests a connection between the copyright owner or recording artist and a particular product or service.

Take steps to disable copying by recipient. Under the statutory license, one must disable copying by a transmission recipient if the technology used can be disabled, and not induce or encourage copying by transmission recipients.

Accommodate technical protection measures. One must accommodate measures widely-used by sound recording copyright owners to identify or protect copyrighted works if those measures do not impose substantial burdens on the transmitting entity.

Cooperate to defeat scanning. The transmitting entity must cooperate with copyright owners to prevent recipients from automatically scanning transmissions in order to select particular recordings if such cooperation will not entail substantial costs or burdens.

Transmission of bootlegs not covered. The statutory license is limited to transmissions made from lawful copies of sound recordings. Transmissions made from bootlegs or pre-released recordings (unless the performance of a pre-released recording is authorized by the copyright owner) are not covered by the statutory license.

Automatic switching of channels prohibited. Digital transmissions may not automatically and intentionally cause a device receiving the transmission to switch from one program channel to another. The statutory license does not cover interactive services where the consumer selects the songs.



D. Direct Download of Musical and Non-Musical Works

Downloads are considered a form of copying rather than performing and are thus not covered by the statutory license administered by SoundExchange. A library or archives may not make content available for direct download unless access is limited to the physical premises of the library or archives as discussed in Section IV above. For this reason, podcasts are not covered by the statutory license.

E. General Publication of Pre-February 15, 1972 Works

A speech at a public event is distinguishable from an oral presentation of a copyrighted work, such as a public event where the speaker “performs” a copyrighted version of a written work (e.g., Martin Luther King, Jr.’s *I Have a Dream* Speech). Recordings of newsworthy events therefore present less risk of infringement than the performance of a literary work (such as a play).

VI. POSSIBLE DEFENSES

A. Fair Use

The Copyright Act grants authors certain exclusive rights related to their works, but also imposes certain limitations on their rights. “Fair use” is one such limitation. Fair use allows for copying of copyrighted material for certain purposes, such as news, commentary and educational purposes. Fair use is most likely to apply when there is little or no commercial motive for using the copyrighted material and the use of the material does not adversely affect the commercial market for the work. Where the fair use exception applies, permission from the copyright owners of the work is not necessary.

Section 107 of the 1976 Copyright Act specifies four factors to determine whether an otherwise infringing use is a “fair use”:

“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purpose;
- (2) The nature of the copyrighted work;



- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for the value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if the finding is made upon consideration of all the above factors.”²⁶

For a number of reasons, it is often difficult to determine with certainty whether copying a copyrighted work will be a fair use. Fair use is an affirmative defense to a claim of copyright infringement. Fair use analysis is fact-intensive and can often be performed only as part of the assessment of the potential market after an infringement action is brought.

Section 504(c)(2) provides that “[t]he court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under § 107...”. Thus, nonprofit educational institutions, libraries and archives are not subject to statutory damages for copyright infringement when they demonstrate that they had reasonable grounds for believing that a particular use is a “fair use.” The fair use defense usually does not apply to wide-spread distribution of entire copyrighted works. The burden is on the infringer to show that the use is for a noncommercial purpose and that the use does not diminish the copyright owner’s ability to make money from the work.

VII. THE CONTINUUM OF RISK

A key consideration in the assessment of risk is the mode of transmission. “Broadcasting” means over-the-air transmission. “Live streaming” means digital transmission of content over the Internet. “Podcast” or “download” are ways of copying rather than performing a work. “Streaming from an archive” means that one can listen to archived content online but cannot move the content to another device. The mode of transmission also has implications not only for “performing” and “copying” a work, but also for distributing copies and preparing derivative works.

To make a determination as to the level of risk of copyright infringement for the sound recordings that an archive may digitize and to make available by means of streams or downloads on its website, due diligence needs to be undertaken with respects to the issues and considerations set forth below.

²⁶ 17 U.S.C. § 107.



A. No Risk

1. An Archive Holds the Exclusive Copyright

Works for which an archive holds the exclusive copyright and has cleared the reproduction and distribution rights in both the musical rights and the sound recordings contained in the program.

2. Written Permission of Copyright Holders

Works for which the archive obtains permission from the copyright holder(s) to digitize the sound recording and to provide digital access to the public for a fee. An archive must obtain licenses from various copyright owners, particularly those in musical works and sound recordings. Broadcasting and streaming musical works requires licenses from ASCAP, BMI, and SESAC. Sound recordings must be covered by either the statutory license administered by SoundExchange or by a license obtained directly from the copyright owner (a “source license”). Podcasts require reproduction and distribution rights from copyright owners of musical works and sound recordings. Determining ownership can be a formidable task. For pre-1972 sound recordings, no centralized registration exists. The 1976 Copyright Act created a copyright interest from the moment a sound recording is “fixed” in tangible medium, and thus eliminates requirements for prior registration, marking and renewal. This approach also makes it difficult to determine the ownership of sound recordings made after 1972.

3. Works in the Public Domain

Any work that is not protected under copyright law falls within the “public domain.” Once a sound recording enters the public domain, it may be used by anyone for any purpose. Sound recordings in the public domain include:

1. Recordings whose copyrights have been abandoned or waived;
2. Works published before 1978, on which the proper notice for publication was not affixed;
3. U.S. recordings published between 1972 and 1989 that were published or otherwise widely distributed without the proper notice; and
4. Works published between 1923 and 1964 for which the copyright was not renewed at the end of the initial 28-year term.

4. Noncommercial, Non-interactive Streaming

A noncommercial entity covered by the terms of the statutory license for which CPB pays the royalty may broadcast and stream copyrighted musical work and sound recordings on its broadcast stations and web sites, provided that the technology used to stream the content neither



allows the user to record, rewind or fast-forward the content, nor allows the user other forms of control that would make the service interactive.

B. Intermediate Risk

1. Noncommercial Direct Download and Podcasts

An archive would risk copyright infringement by making archived programming available on its website for download if the programming contains sound recordings for which the archive neither owns the exclusive rights nor has entered into agreements with the owners of the exclusive rights. The risk exists even if the file(s) being downloaded are restricted to media playback software that limits user control(s) over the recording and buffers the content so as to make an entire work unavailable for copying at any point during playback. Selecting a restrictive file format and accompanying playback software is risky because the playback software may insufficiently prohibit user control or ‘interactivity’ and a court, therefore, may deem the service interactive.

2. Noncommercial, Interactive Streaming

An archive would risk copyright infringement if as part of an interactive streaming service it freely made available archived programming for which it neither owns the exclusive rights nor has entered into agreements with the owners of the exclusive rights.

This assessment of risk is premised on the assumption that the copyright owner would be less likely to file an infringement action if (a) the archive made no commercial use of the sound recording by making the recording available at a profit (i.e., in excess of its costs) and (b) there were no diminution in commercial value to the copyright owner.

C. High Risk

1. Commercial Direct Download and Podcasts

An archive would incur substantial risk by making archived programming available via direct download, it did not first obtain licenses for reproduction of the sound recording and mechanical licenses for use of the underlying musical composition.

2. Commercial Streaming

An archive would incur substantial risk by making archived programming commercially available (e.g., for a fee) via streaming over its website if it does not own the exclusive rights to the programming or has not entered into agreements with the owners of the exclusive rights.



3. *Newsworthy Broadcasts*

The risk of streaming newsworthy noncommercial broadcasts transmitted prior to February 15, 1972, depends upon whether the work was copyrighted under the 1909 Copyright Act and whether the work is published or unpublished. If the speaker has copyrighted the underlying work which remains generally unpublished, the risk is high.

D. Minimizing Risk

With regard to the intermediate and high risk categories an archive can protect itself from infringement actions by obtaining the consents of individual artists and authors of copyrighted works not in the public domain. This option requires determining whether a work is in the public domain and, if it is not, whether royalties must be paid.

If after conducting a search and not finding that a work has been registered, an archive could still be subject to liability for copyright infringement should the copyright owner bring an infringement action. Under such circumstances, the sound recording is an “orphan work.” Orphan works are materials for which the copyright owner is difficult or impossible to identify or locate, but which does not lose its copyright protection. To minimize the risk of “willful infringement,” an archive must be able to show that it has conducted a reasonably diligent search for the copyright owner. It is important to keep a paper trail of such efforts.

A noncommercial archive could perform copyrighted content over the Internet without paying royalties and rely on fair use as a defense. Relying on fair use as a defense is risky, however, absent a compelling showing under the four factors spelled out in Section 107 of the Copyright Act. See VI.A herein.