

IMMF COPYRIGHT AND CONTRACTS REPORT 2007

DELIVERED BY DAVID STOPPS AT THE IMMF AGM IN GRONINGEN 10TH JANUARY 2008

WIPO

2007 was a very interesting and active year for the IMMF at WIPO (World Intellectual Property Organisation). WIPO is an agency of the United Nations and is based in Geneva. The IMMF is a full status NGO (non governmental organisation) and participates fully in all WIPO processes concerning Copyright and Related Rights at the international level.

The main forum for these activities is the SCCR (Standing Committee on Copyright and Related Rights) which meets in Geneva several times each year. One of the main functions of this committee is to negotiate new international treaties concerning copyright and related rights. The most significant treaties that WIPO has agreed in recent times were the so-called WIPO internet treaties which came into being in 1996. More specifically these were the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) which addressed the issues that copyright faced in the light of the way copyright protected works and performances could be commercially exploited on the internet. At the heart of these treaties was the doctrine of Digital Rights Management (DRM) and its subset known as Technical Protection Measures (TPMs) which dealt with copy protection applications. These treaties included enforcement provisions for anyone circumventing these technical measures and also provided for limitations and exceptions wherein copyright protected material or performances could be used without permission in certain circumstances.

In 1996 these concepts and provisions were visionary and everyone thought they would be the answer to all the copyright problems thrown up by the internet. In practice it didn't turn out that way. Phonogram producers (record companies) applied these TPMs in a heavy handed way with very little consultation with consumers which turned out to be disastrous. Consumers became very angry when they bought CDs only to find that they wouldn't play in a computer drive or/and that they could not be copied. Incensed consumers took the situation into their own hands, which resulted in the file sharing anarchy that we now see on the internet which affects artists and managers in such a detrimental way.

Not all countries have signed the WPPT and the WCT, most notably Canada and Australia, although these countries have brought in their own national laws to deal with some of the issues addressed by the WPPT and the WCT.

With the 'success' of the WPPT and the WCT WIPO attempted to bring in two

further treaties. The first was an audio-visual treaty and the second was a new treaty for broadcasting organisations.

The IMMF warmly welcomed the introduction of an audio-visual treaty which would have provided rights for audio visual performers. Unfortunately this treaty failed in 2000 due to a fundamental disagreement between the EU and the USA concerning the transfer of rights. This is why in many countries artists enjoy a public performance right in sound recordings but as soon as that sound recording is used with visual images such as is the case when an artist makes a video the artist gets no public performance rights at all. Some countries such as Germany have brought in national laws to deal with this but in most countries audio-visual performers in music and in television and film have very weak rights and in some cases no rights. The other way of tackling this problem is to have very strong trade unions who can achieve results by strong collective bargaining. SAG and AFTRA have been particularly effective in USA and the American Writers Guild are also taking very tough action which resulted in the cancellation of the US Golden Globe Awards this week.

Since 2000 the SCCR at WIPO has been focused on a new treaty for broadcasters. Whilst the audio-visual treaty would have been a big plus for managers and artists, the introduction of the proposed broadcasting treaty would have been a big negative. As a result the IMMF has campaigned tirelessly for this treaty to be abandoned. Basically, the broadcasters were to be given another layer of copyright in their programmes over and above the copyrights already in place for the content included in their programmes, such as music. Discussions have been on-going in earnest since 2000 but the proposed treaty has been in sharp focus since 2001 which coincides with the time that the IMMF was accepted as an NGO at WIPO processes.

In 2007 the IMMF participated in the two meetings of the SCCR which took place in Geneva. We are very fortunate to have an excellent copyright lawyer Gill Baxter who acts as legal counsel to the IMMF at no charge concerning WIPO issues. She has also attended several of the SCCR meetings over the years at her own expense. At the first SCCR meeting which took place in March 2007 I was unable to attend as I was on tour in Australia. Gill attended on the IMMF's behalf and delivered the excellent intervention below on fixation which was very well received by the SCCR.

The second meeting was in June 2007 and marked a considerable victory for those NGOs who had been campaigning for the abandonment of the treaty. The IMMF was in the front line on this campaign. The IMMF intervention can be seen below.

Since June 2007 the treaty has effectively been shelved and the SCCR is now turning its attentions to harmonising limitations and exceptions across WIPO member states.

I also represented the IMMF at three WIPO conferences held in Geneva in 2007. The first two were on the same day and were 'The Future of WIPO' conference which was organised by consumer groups critical of WIPO and the second was an excellent official WIPO conference on Rights Management Information. The third was another excellent WIPO conference titled 'WIPO International Conference on Intellectual Property and The Creative Industries' which took place on 29th and 30th October 2007. Shaggy was the guest artist speaker along with the Jamaican Minister of Culture who used to be a manager! These one day WIPO seminars are first class.

The IMMF is now firmly established and respected as a driving force at WIPO processes. The following are the two WIPO SCCR interventions made in 2007.

Intervention by Gill Baxter on behalf of the IMMF at the SCCR 15 held in Geneva March 2007

1. What is meant by fixation?

The Berne Paris text (Art 2(2)) states that it shall “be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form”

The US Copyright Act 1971 s101 states that a work is fixed in a tangible medium of expression “when it’s embodiment in a copy or phonorecord by or under the authority of the author is sufficiently in a permanent state to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration”

The UK CDPA 1988 states that copyright will exist in a work as soon as it written down or otherwise recorded in a reasonably permanent form i.e. fixed.

It is reasonable to assume that fixation means that in order to attract copyright protection, the work to be protected must be fixed in some sort of tangible form.

2. Fixation in relation to broadcasts.

Wireless telegraphy waves can neither be heard nor seen. It is the content of the broadcast waves or the “message” carried by the broadcast waves (the visual images, sounds and other information) that gives weight to the waves (or signals). In practical terms what is protected by broadcast copyright are the visual images, sounds or other information the waves (or signal) may carry. It follows that fixation in this context is the fixation of the message or content carried by the signal. In the case of pre recorded content such as television

programmes, films, adverts, sound recordings this content can be seen as a bundle of rights belonging to other people attracting its own protection. In the case of live events the event is not subject to underlying rights.

Examples and queries:

If a lecture is given extempore, or a tune improvised on the piano and someone else records it, the person who records it perfects the copyright in favour of the lecturer or the pianist.

What would be the position in respect of a live broadcast? Would the broadcast of the lecture or tune fix the respective performances? If so the lecturer and the pianist, as authors of their work would have to give the broadcaster permission to broadcast the work and the broadcaster could not reproduce or distribute copies of this broadcast without the lecturer and pianist permission.

A live broadcast of a boat race is broadcast and videoed by a member of the public. This video is then broadcast at a later date by another broadcaster without the permission of the original broadcaster. This will infringe the rights of the original broadcaster. Does this also mean that the act of broadcasting the boat race fixes the actual boat race and also gives the broadcaster copyright in the content carried by the signal (the boat race)?

The Treaty

The definition of broadcasting in the treaty is historic.

The definition of fixation is confusing at Article 5. The explanatory comments state that “embodiment” “covers the result of incorporating or recording programme material carried by a signal using whatever means and whatever medium”. Used in the context of the definition does it mean that the act of broadcasting is in itself “fixing” the content or the broadcast and content is fixed at the point the images and sounds are received through a device (television set, radio)?

It is clear from the current wording that the treaty only protects signals and not already protected content (Art 6). How do you fix a signal without affecting the content – protected or otherwise? For something to attract copyright protection it must be recorded in a tangible form. How can you achieve this with a signal without affecting the content? This is the question that needs to be addressed and definitions amended accordingly.

Intervention at the WIPO SCCR S2 held in Geneva by David Stopps on behalf of The International Music Managers Forum on Tuesday 19 June 2007 regarding a possible Treaty for Broadcasters

Madam Vice Chairman I would like to add my warmest congratulations to you, to the Chairman and to the other Vice Chair, the distinguished delegate from Morocco on their re-election, and I would like to sincerely thank the committee for allowing us to speak today. I am addressing our comments to our Chairman Mr Jukka Liedes even though he is unfortunately unable to be with us today.

I am speaking on behalf of the IMMF, The International Music Managers Forum. We represent featured artist managers and through them the featured artists, both authors and performers, who are the source of over 95% of the economic activity in the worldwide music industry.

Mr Chairman, after a great deal of lobbying by NGO's and the constructive comments put forward by many delegations it was concluded that all broadcasters really need to prevent piracy is signal protection provisions, to prevent the illegal use or theft of their signals.

The General Assembly convened in September 2006 and came to the conclusion that if there was to be a treaty it should be based on signal protection. To most people in this room 'signal based' clearly means 'no exclusive rights' as was articulated by several delegations yesterday.

We read in the latest Non Paper that the broadcasters have stated "If this treaty is not based on some elementary rights, the treaty should be abandoned".

This poses us with a dilemma. On the one hand the General Assembly has instructed the committee to construct a treaty that is based on signal protection which implies no exclusive rights, and on the other the broadcasters say that without such rights the treaty should be abandoned.

Well Mr Chairman, let us pause for a moment and think the unthinkable....abandoning this treaty. If this treaty was abandoned this week or perhaps put on hold for 5 years and then re-visited would this be a disaster?

We say it would not be. As an organisation we have been attending these SCCR meeting for 6 years, and some here amongst us in the cheap seats at the back have been attending these meetings for 10 years discussing this treaty. In that time we have all become experts in broadcasting, webcasting, the internet and we have even discovered what a pre-broadcast signal is.

We have had the opportunity to discuss a multitude of copyright and related rights issues with delegations and NGOs who we would never have had the opportunity of meeting otherwise. For example, yesterday I was able to lobby

the UK delegation face to face, something that is nearly impossible for us to do in London.

It has also been no great hardship, once or twice a year visiting this beautiful city of Geneva with its majestic lake, its mountains and its spectacular high velocity fountain!

No, Mr Chairman, to abandon this treaty would not be a failure.

However, if with the lack of consensus that currently exists, this committee moves forward to a diplomatic conference and that fails, as many believe is quite likely, this will indeed be a disaster for WIPO and this Committee.

Some here may recall the failure of the last diplomatic conference on Audio-Visual rights. To have two failures in a row would indeed be a disaster.

Mr Chairman the landscape out there is changing at the speed of light. Never before has there been so much important and useful work on which this prestigious committee could be focused.

Issues such as, reform of collective management, harmonisation of limitations and exceptions, resolution of the audio visual dilemma, provision of a public performance right in sound recordings in the United States and progress on new compensation structures for all copyright stakeholders in the anarchy that is currently going on the internet, are all issues that this committee should be constructively addressing.

Mr Chairman we have all wasted far too much valuable time going round and round with this unnecessary broadcasting treaty when there is so much more important work to do.

Please take the courageous, bold and right decision to postpone any further discussion for 5 years and then revisit the issue in the light of future developments.

Thank you Mr Chairman.

The International Music Manager's Forum represents featured artist music managers and through them the featured artists (performers and creators) themselves. These featured artists are those that are the source of over 95% of the economic activity in the global music industry. Featured artist music managers are uniquely placed to comment on music industry issues, as they are the only group of professionals that deal with every aspect of the music industry and the copyright system as it applies to music on a daily basis. Music

managers are responsible for every aspect of the artist's career including interfacing and negotiating with phonogram producers, music publishers, making arrangements for touring, sponsorship, merchandising, and ensuring that all the available income streams, including those from collection societies, are properly managed. Managers are generally remunerated on a commission basis (usually in the region of 20% of income actually received by the artist) so income streams affecting the artist also directly affect those of the manager. The International Music Managers Forum comprises 15 Music Managers Forums around the world including Australia, Belgium, Canada, Denmark, Finland, France, Germany, The Netherlands, New Zealand, Norway, Poland, South Africa, Sweden, United Kingdom and United States.

EUROPE

Both the 2007 IMMF Chairman Peter Jenner and myself have had continued dialogue throughout 2007 with the European Commission, particularly with Tilman Leuder who is the Head of Copyright for the Knowledge Based Economy at the EC.

I managed to have a very useful conversation with Tilman at the Future of WIPO conference held in Geneva on 17th September.

The EC seem to definitely be moving in the direction of extending performers rights which is very refreshing. Ideas currently under consideration include:

- (a) Legislation concerning 'use it or loose it'. i.e. If record companies act in restraint of trade and do not actively exploit the copyrights they hold, the artist can somehow get them back or have the right to exploit them themselves.
- (b) Extending the public performance right for the benefit of performers from 50 years or the death of the performer, whichever occurs first. In other words they may not extend the term of protection for sound recordings, but they may consider extending the public performance right in sound recordings. The EC finds it incongruous that authors rights are controlled by the life of the author whereas performers rights just have a fixed term...and so does the IMMF.
- (c) The EC may also consider redefining 'equitable remuneration' in the context of the public performance in sound recordings to perhaps 60/40 in favour of performers. It is currently 50/50. This would be a radical change if it went through but one the IMMF would wholeheartedly support.
- (d) The EC is continuing with its 'one stop shop' approach to the licensing of digital content across Europe. It published its Communication on Creative Content Online in the Single Market on 3 January 2008. The

consultation closes on 29th February 2008 and the IMMF will be sending in a submission. For more details go to:

[HYPERLINK "http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm" http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm.](http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm)

USA

One of the huge holes in worldwide copyright is undoubtedly the lack of a public performance right in sound recordings for analogue and digital terrestrial broadcasting in USA. If your artist's record is played on terrestrial radio in USA the radio station pays the author(s) of the song but nothing is paid to the performers who performed on the recording or to the record company who owns the recording. The only other countries that do not have this right are Iran, North Korea, China and Rwanda. The net result is that US performers are missing out on a major income stream not only in their own country but also abroad as countries will only pay out across borders to other countries who do not have the right.

There is a public performance right for digital broadcasting in USA which includes webcasts over the internet and satellite radio such as XM which is the income collected by Sound Exchange but the vast majority of US broadcasting is terrestrial.

To place the income in context, PPL who are the collection society that collect income from the public performance in sound recordings in UK collected around £100 million in 2007 (€134 million). If the USA were to introduce this right the money collected on behalf of performers and record companies could be many times this figure.

President George Bush had the following exchange at an any questions session on his visit to Nashville in July 2007:

Q Mr. President, music is one of our largest exports the country has. Currently, every country in the world -- except China, Iran, North Korea, Rwanda and the United States -- pay a statutory royalty to the performing artists for radio and television air play. Would your administration consider changing our laws to align it with the rest of the world?

THE PRESIDENT: Help. (Laughter.) Maybe you've never had a President say this -- I have, like, no earthly idea what you're talking about. (Laughter and applause.) Sounds like we're keeping interesting company, you know? (Laughter.)

Look, I'll give you the old classic: contact my office, will you? (Laughter.) I really don't -- I'm totally out of my lane. I like listening to country music, if that helps. (Laughter.)

Thanks to the musicFIRST Coalition of which the MMF US play a major part legislation is finally being put before congress. The MMF US's Perry Resnick is on the board of the musicFIRST Coalition and has made an important contribution to the campaign on behalf of performers worldwide. The IMMF has also included the issue in almost every intervention made in Geneva at the SCCR especially in the context of the proposed broadcasting treaty. (see the June 2007 intervention above).

On the 18th December 2007 Senators Leahy and Hatch and Representatives Berman and Issa introduced new legislation as follows:

INCLUDEPICTURE "cid:3282770035_878128" * MERGEFORMATINET

Senators Leahy and Hatch and Representatives Berman and Issa Introduce Bicameral, Bipartisan Performance Royalty Legislation

–Bills to close “Corporate Radio Loophole” –

WASHINGTON, December 18, 2007 – Today Senators Patrick Leahy (D-VT) and Orrin Hatch (R-UT) and Representatives Howard Berman (D-CA) and Darrell Issa (R-CA) jointly introduced legislation that would ensure AM and FM radio fairly compensate artists when their performances are broadcast over the air. This announcement follows recent testimony from GRAMMY® winner Lyle Lovett and singer songwriter Alice Peacock at a Senate Judiciary Hearing on the issue in November.

“Aspiring performers, local musicians and well-known artists should be compensated for their music when it is played on the radio, both today and in the future,” said Tod Donhauser, spokesperson for the musicFIRST (Fairness in Radio Starting Today) Coalition. “For more than 50 years AM and FM radio has received a free ride; today Senators Leahy and Hatch and Representatives Berman and Issa, among others, have introduced legislation that would finally close the ‘Corporate Radio Loophole’.”

For decades AM and FM broadcasters have enjoyed an exemption from current copyright law which requires satellite radio, cable radio channels, and Internet webcasts to pay a royalty for the use of music. The ‘Performance Rights Act’ would correct a loophole in the copyright law by removing the broadcaster exemption to assure that all platforms are treated equally and pay a performance royalty to artists. It would also bring the United States in line with every other OECD nation which currently grants performers a right to be

compensated for their work when it is broadcast on terrestrial radio.

“Commercial broadcasters make a profit from the public airwaves. Advertisers are paying for the opportunity to get sandwiched in with our works, our creations,” said Boz Scaggs, a founding member of the musicFIRST Coalition. “We, the creators of this work, should be paid for this.”

“The bottom line here is that radio plays music to attract listeners and bring in advertising dollars,” said Tom Waits, a founding member of the musicFIRST Coalition. “It’s just plain wrong for radio to be allowed to build profitable businesses with growing revenues on the backs of artists and musicians without paying them fairly for it.”

Highlights from the proposed legislation:

- Over-the-air broadcast stations would be able to use a statutory license and make one payment annually under a government-set rate for all the music they play, instead of having to negotiate with every copyright owner for each use of music.*
- The proposed legislation accommodates small broadcasters and others to assure balance and fairness to broadcasters and artists. More than 75 percent of all commercial radio stations and more than 80 percent of all religious stations would be covered through the planned accommodation.*
 - o Small commercial stations would pay only \$5,000 per year;*
 - o Noncommercial stations such as NPR and college radio stations would pay only \$1,000 per year;*
 - o Stations that make only incidental uses of music, such as “talk radio” stations, would not pay for that music; and*
 - o Religious services that are broadcast on radio would be completely exempt.*
- Proposed amendments to existing law would make clear that a new right for recording artists and owners cannot adversely affect the rights of, or royalties payable to, songwriters or musical work copyright owners.*

“The accommodations ensure the law is fair to performers and fair to broadcasters,” Donhauser added. “A fair performance right encourages creativity and content that will continue to make American radio profitable.”

Senate cosponsors include: Patrick Leahy (D-VT), Orrin Hatch (R-UT) and Dianne Feinstein (D-CA). House cosponsors include: Representatives Howard Berman (D-CA), Darrell Issa (R-CA), John Conyers (D-MI), Marsha Blackburn (R-TN), Jane Harman (D-CA) and John Shadegg (R-AZ).

Other artists that have spoken out about a performance right on radio include

GRAMMY® winners Judy Collins and Sam Moore, and singers Martha Reeves of Martha and the Vandellas and Mary Wilson, founding member of the Supremes – all members of the musicFIRST Coalition. Moore and Collins testified on behalf of the coalition during a hearing in the House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property.

Creation of a fair performance right would compensate the performers, background singers, studio musicians and copyright holders for their talent and hard work when their songs are broadcast on AM and FM radio.

###

People who love music understand that creativity, talent and hard work are required to bring it to life. The goal of the musicFIRST (Fairness in Radio Starting Today) Coalition is to ensure that aspiring performers, local musicians and well-known artists are compensated for their music when it is played both today and in the future. Of all the ways we listen to music, corporate radio is the only one that receives special treatment. Big radio has a free pass to play music – refusing to pay even a fraction of a penny to the performers that brought it to life. The musicFIRST (Fairness in Radio Starting Today) Coalition is committed to making sure everyone, from up-and-coming artists to our favorites from years-ago, is guaranteed Fair Pay for Air Play. For more information on the musicFIRST (Fairness in Radio Starting Today) Coalition please visit www.musicFIRSTcoalition.org < [HYPERLINK "http://www.musicfirstcoalition.org/"](http://www.musicfirstcoalition.org/) <http://www.musicfirstcoalition.org/>> .

Supporting organizations include: American Association of Independent Music (A2IM), American Federation of Musicians (AFM), Christian Music Trade Association (CMTA), Music Managers Forum - USA (MMF- USA), The Latin Recording Academy, The Recording Academy, The Rhythm & Blues Foundation, Inc, Recording Artists' Coalition (RAC), Recording Industry Association of America (RIAA), Society of Singers, SoundExchange, Vocal Group Hall of Fame, and The American Federation of Television and Radio Artists (AFTRA).

*Tod Donhauser
Vice President
www.edelman.com
tel | 202.326.1829 fax | 202.371.2858
tod.donhauser@edelman.com*

If this legislation is successful it will make a major difference to the income of not only US performers but also to performers outside of the USA who have their records broadcast in the USA. This issue has been the focus of IMMF policy since its inception and its wonderful to see our efforts and particularly the efforts of the MMF US bearing fruit.

Please come back to me with any comments or questions on the above or any other issues concerning copyright and related rights in your country.

David Stopps

Director of Copyright and Related Rights

International Music Managers Forum

33 Alexander Road

Aylesbury

Buckinghamshire

England HP20 2NR

e: davidstopps@fmlmusic.com

t: +44 1296 434731

PAGE

PAGE 1