

position the experience of different nations in promoting competition in information and communications sectors to provide some guidance and signposts through the *policy development maze*.

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and purchasing details are available at: http://www.circuit.rmit.edu.au/publics/ipm_book.html

¹ Nevertheless, the study does recognise national differences. For example, in Australia, legislation targeted the development of a dual network infrastructure between 1991-1997 and carriers have invested significantly in infrastructure development. Similarly, in the UK, policy has supported infrastructure duplication. With the announcement of the US National Information Infrastructure agenda in 1993 there was a coincidence of industry investment in infrastructure and new services.

² Including regulation of horizontal and vertical agreements between firms; control of mergers and acquisitions; regulation of horizontal and/or vertical integration activities of individual firms;

and tests of the misuse of market power.

³ Extending across: carrier interconnection; service provider and content creator access to distribution channels; and end-user access to services.

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'For Those About to Rock' Cybersimulcasting Live Music on the Internet

Therese Catanzariti offers a lively analysis of the intellectual property issues in cybersimulcasting.

Australia is one of the largest music markets in the world. In terms of recorded music, in 1998 the Australian retail market accounted for US\$606.7 million, or 1.6% of world sales, making it the ninth largest market in the world. In terms of live music, a recent survey revealed that 50% of people surveyed in 1998 had watched a live band (including pub and small venue bands) in the previous 12 months, and 45% had attended major rock concerts performed in stadiums and large venues.

Australia is poised to become a major player in cybersimulcasts of live music.

This paper considers the copyright and other legal issues relating to the Content. I will explain the concepts using recent Sydney rock concerts as examples, and in particular:

- The *Billy Bragg and the Blokes* concert at the Enmore Theatre on 11 April 1999 to promote *Billy Bragg's* most recent album 'Mermaid Avenue', where *Billy Bragg* was supported by *Rebecca's Empire*;
- The *Regurgitator* concert at Selinas to promote *Regurgitator's* recent album 'Unit', where

Regurgitator was supported by *TISM*:

- The *You Am I* concert at the Enmore Theatre on 7 August 1998 to promote *You Am I's* recent album 'No 4 Album'.

THE CONTENT

The Content is made up of a number of different elements -

The Content can be split into:

- Works (literary, dramatic, artistic, musical works).
- Other subject matter (sound recording and cinematograph films).
- Performances.
- **Musical works** such as the music of the songs being performed and the music of the pre recorded music played as "warm-up" or "lights up" music.

At the Billy Bragg concert, the musical works included the music composed by Billy Bragg performed by Billy Bragg, the music composed by Rebecca's Empire performed by

Rebecca's Empire, and the music composed by the 'Small Faces' in the song covered by Billy Bragg.

- **Literary works** such as the lyrics of the songs being performed and the lyrics of the pre-recorded music and any banners or slogans.

At the Billy Bragg concert, the literary works included the Woody Guthrie lyrics which have been put to music by Billy Bragg and Wilko and which were performed by Billy Bragg, the lyrics to the Billy Bragg songs performed by Billy Bragg, the lyrics to the Small Faces song covered by Billy Bragg, the lyrics to the Rebecca's Empire songs performed by Rebecca's Empire, and the lyrics to the songs which were Billy Bragg songs translated into foreign languages and which were played as 'warm-up' music.

At the Regurgitator concert, the literary works included the piece recited by TISM 'Why TISM never gets groupies'.

At the Comedy Store, the literary works include the live comedy routine of any comedian, as soon as it is recorded in a material form, for

THE RIGHT TO REPRODUCE WORKS

In order to encapsulate the Works into the Media, it will be necessary to secure certain rights from the owners of the Works. In particular, it will be necessary to secure:

- the right to reproduce the Works, that is, record the Works;
- if the Media is a Film, the right to synchronise the recording of the Works with the Film.

A person needs these rights because copyright includes the exclusive right to reproduce a literary, dramatic, musical work, or artistic work, and a literary, dramatic or musical work is deemed to have been reproduced if a sound recording or cinematograph film is made of the work, and any record embodying such a recording and any copy of such a film is deemed to be a reproduction of the work. As stated above, a cybersimulcast usually requires that Works are encapsulated into a medium such as a sound recording or a cinematograph film.

In addition, there may be a reproduction on the user computer's RAM during the simulcast.

However, there are some exceptions. First, copyright in an artistic work is not infringed by the inclusion of the work in a cinematograph film if its inclusion is only incidental to the principal matters represented in the film. The inclusion of any backdrops, posters and sets at the concert may be incidental to the principal matter of the film namely, the performance of the artist(s) at the concert.

Second, there is a limited exception in the Act for broadcasters, namely that copyright in a literary, dramatic or musical work is not infringed by reproducing the work in a film or sound recording if the recording or film is solely for the purpose of broadcasting the work. This exception will rarely apply as most people arranging a cybersimulcast will not be a 'broadcaster' that is, the ABC, SBS or a person who has a licence under the *Broadcasting Act 1992* and a cybersimulcast may not always fall within the definition of 'broadcast' because broadcast only covers 'wireless' transmission and not, for example, transmission by cable.

Third, the Australian federal government proposes to amend the Act so that

example when the comedian's mum records the performance on video camera.

- **Artistic works** such as the backdrop, the sets, any photographs, including promotional photographs which appear during the cybersimulcast; and any costumes.

At the Billy Bragg concert, the artistic works included the photograph of Woody Guthrie which was used to advertise the 'Mermaid Avenue' promotional tour.

At the Regurgitator concert, the artistic works included the TISM costumes.

At the Midnight Oil concert at the Tivoli in Cabramatta, the artistic works included the Tivoli stage which appeared as a backdrop to the band during the concert.

- **Dramatic works** such as choreography; and any script.

At the Regurgitator concert, the dramatic works included the TISM dance choreography.

- **Performances** such as performance of the main artists and any support artists; performance of any MC/comper; and performance of any artists in the pre-recorded music.

At the Billy Bragg concert the performers included Billy Bragg and the Blokes (including the keyboardist from 'Small Faces'), and Rebecca's Empire.

At the Whitlams concert at the Metro, the performers included Adam Spencer from Triple J Radio who was the MC for the evening.

- **Sound recordings** such as pre-recorded sound recordings of 'lights up' and 'warm up' music.

At the Billy Bragg concert, the sound recordings included Billy Bragg recordings from 'Workers Playtime' played before the concert, and Wilko recordings from 'Mermaid Avenue' played before the concert.

- **Cinematograph films** such as film clips and moving images used as backdrops during the performance.

At the You Am I concert, the cinematograph films included the

visual fractal equation images which appeared as a backdrop to the band during the performance.

At the Regurgitator concert, the cinematograph films included the 'Polyester Girl' film clip which appeared as a backdrop during the performance of the song 'Polyester Girl' by the band.

The Content can be split into:

- works (literary, dramatic, artistic, musical works);
- other subject matter (sound recordings and cinematograph films); and
- performances.

THE MEDIUM

The Content will usually need to be encapsulated into a medium, a material form, which can be cybersimulcast to the user. No medium will be involved if the music is *streamed in real time* without being recorded in a material form. However, many cybersimulcasts do not only involve *pure real time streaming*.

First, if all users hit on one site and that site cybercasts in real time direct to all users, the site may become jammed because of the traffic. It may be more efficient to cybercast in real time to one site, that site is mirrored, and users hit on to a number of mirrored sites rather than the one site, and receive the cybercast from the mirrored site rather than receiving the cybercast in real time direct from the one site. To the extent a site is mirrored, the Content is recorded in a material form.

Second, the person arranging the cybersimulcast may find it difficult to exploit the rights to the cybersimulcast if the rights are limited to a once only live performance. The owner of the site taking the cybersimulcast will usually require that the concert is streamed in real time and the concert is available on the site for a period after the live performance. To the extent that the owner of the site requires that the concert is archived and available on the site, the person arranging the cybersimulcast will need to record the Concert in a material form. The Content could be encapsulated as a cinematograph film, a sound recording or as a broadcast.

copyright in a work is not infringed by making a temporary reproduction of the work as part of the technical process of making or receiving a communication.

This means that you may not need to secure the right to reproduce for a cybersimulcast to the extent it is real time, or near real time. For example, the proposed exception would probably cover the reproduction of the Content on the user computer's RAM, and may cover reproduction by the mirrored sites. However, you would still need to secure the right to the extent that the cybersimulcast will be stored and archived on the site and available on the site after the concert for a period of time.

THE OWNER OF THE RIGHT TO REPRODUCE THE WORKS

The owner of copyright in the Works will vary with the particular element. The first owner of copyright of a literary, dramatic, musical and artistic works is usually the author. However, copyright rarely *stays* with the author.

The likely owner of the right to reproduce literary works will be:

- AMCOS (Australian Mechanical Copyright Owners Society) for song lyrics;
- music publishing company for song lyrics for songs composed by their signed artists/composers.;

At the Billy Bragg concert the likely owner of the reproduction/synchronisation rights in the 'Workers Playtime' songs would be Festival Music and the likely owner of the reproduction/synchronisation rights in the 'Mermaid Avenue' songs would be Warner/Chappel Music;

- the print publisher or CAL (Copyright Agency Limited) for poems, novels; and
- the comedian for a live comedy routine.

The likely owner of the right to reproduce musical works will be:

- AMCOS for songs; and
- music publishing company for songs composed by their signed artists/composers.

The likely owner of the right to reproduce artistic works will be:

- for photographs – the photographer, the record label (who may have commissioned the photographer to take photographs of the artist/s signed to the label and obtained an assignment of rights from the photographer), or the promoter of the concert (who may have commissioned the photographer to take photographs of the artist/s performing at the particular concert and obtained an assignment of rights from the photographer);
- for backdrops/sets – the venue or the promoter of the concert; and
- for 'high-end' artistic works – VISCOPY or the artist.

The likely owner of the rights in the dramatic work such as choreography will be:

- promoter of the concert; or
- record label who the artist performing the choreographed routine is signed to.

OTHER SUBJECT MATTER

Any pre-recorded music or film clip which is part of an existing recording or cinematograph film may also be encapsulated on the Media, being the Film, the Sound Recording or the Broadcast.

The right to make a copy of the sound recording or film clip will need to be secured to allow the recording to be copied on to the Sound Recording or the sound track of the Film, or the film clip included in the Film or Broadcast. This is because:

- copyright in a sound recording includes the right to make a copy of the sound recording; and
- copyright in a cinematograph film includes the right to make a copy of the film.

The first owner of copyright in a sound recording will be the maker of the sound recording or a person who commissions another person to make the sound recording for 'valuable consideration'. The maker of the sound recording is the owner of the record. This would usually be the owner of the matrix. Historically, the likely owner of the right to reproduce

a sound recording is the record label's record company. However, increasingly, artists themselves are producing their own recordings and owning the rights in the sound recordings.

The first owner of copyright in a cinematograph film is the person who makes the necessary arrangements for the production of the first copy of the film, or a person who commissions another person to make a film for 'valuable consideration'. The likely owner of a film clip used as a backdrop during a concert will be the record label who has released the accompanying song; or the venue.

PERFORMANCE

A performer does not have any positive legal rights in their performance. However, the performer must consent to the recording of their performance, the broadcast of their performance, and the use of the recording of their performance as part of the sound track of a film. In addition, performers who are 'signed' to a record label are usually required to agree in their contracts that they will not allow any other person to record any of their performances. This is to protect the record label's investment in the record label's sound recordings of the performer, and ensure its commercially released sound recordings are not in competition from sound recordings of the performer made by some one else. Finally, performers who have a manager or agent are usually required to agree in their contracts that they will not consent to any arrangements relating to their professional career except through the manager or agent. This is to protect the manager or agent's investment in the performer's career and ensure that the agent or promoter gets a cut when the performer 'breaks through'.

This means consents need to be secured consent from the performer, from the manager or agent, and from the record label if the performer is signed to a record label.

CYBERCASTING THE CONTENT THROUGH THE MEDIA TO THE USER

In order for the user to receive the Film Sound Recording or Broadcast encapsulating the Content, the Film Sound Recording or Broadcast must be 'cybersimulcast' to the user. The reason that we use the phrase 'cybersimulcast' is because the current concepts used in the *Copyright Act* do not exactly cover what it is happening.

Four points can be noted in particular. Copyright in a literary, dramatic or musical work includes the right to perform a work in public, broadcast the work and cause the work to be transmitted to subscribers to a diffusion service. Copyright in an artistic work includes the right to include the work in a television broadcast or cause a television program including the artistic work to be transmitted to subscribers to a diffusion service. Copyright in a sound recording includes the right to cause the recording to be heard in public and to broadcast the recording. Copyright in a cinematograph film includes the right to cause the film to be seen and heard in public, broadcast the film and cause the film to be transmitted to subscribers to a diffusion service.

It is not settled and not clear whether a cybersimulcast is a 'television program', a 'public performance', a 'broadcast' or a 'transmission to subscribers to a diffusion service'. In some circumstances, it may be some of these things, in other circumstances it may be none of these things.

This is not as problematic as it first appears. This is because these rights in elements of the Content are often controlled by the one person. In addition, the government has proposed that some of these rights be abolished and a new right introduced. The right to 'communicate to the public' is intended to cover broadcast, transmission by cable as well as making available on line.

THE RIGHT TO PERFORM IN PUBLIC / BROADCAST / TRANSMIT BY CABLE / COMMUNICATE

The likely owner of these rights in the literary work will usually be APRA (Australian Performing Right Association) for song lyrics; and CAL for poems, novels. The likely owner of the rights in the musical works that are songs will usually be APRA. The likely owner of the rights in the sound recordings that are commercially released sound recordings produced by major record labels will usually be PPCA (Phonographic Performance Company of Australia).

THE TECHNOLOGY

In order to cybersimulcast the Content as encapsulated in the Film, the Sound Recording or the Broadcast to the User, certain technology will need to be used. In particular, the ISP will need to secure

rights to use live streaming technology, such as Liquid Audio™ or Real Network's Real System G2™.

The 'Mushroom Concert of the Century', cybersimulcast on the 'Addicted to Noise' site was streamed using Real Network's streaming technology.

It is important to note that the licences to use the streaming technology may restrict the ISP to a limited number of feeds. This is because the technology is still being developed, and the sound and visual quality may fall as more users log on.

CLEARANCES

As well as the rights in the Content and in the Media such as the Film, the Sound Recording or the Broadcast there are other legal risks in arranging a cybersimulcast. First, there is the risk of defamation. A person can bring an action for defamation if a statement is capable of conveying a defamatory meaning, and the subject of the defamation can be identified from the statement.

Second, there is the risk of passing off. This is a misrepresentation of an endorsement or association that does not in fact exist.

Third, there is the risk of infringing the *Tobacco Advertising Prohibition Act 1992* if the cybersimulcast gives publicity to or otherwise promotes or is intended to promote smoking, the purchase or use of a tobacco product or a range of tobacco products, the whole or a part of trade marks registered in respect of goods including tobacco products or the whole or part of the name of a person who is a manufacturer of tobacco products or whose name appears on or on the packaging of some or all of those products.

Fourth, there is the risk of copyright infringement for miscellaneous bits and pieces that inadvertently appear on screen.

The high-risk items include:

- the venue (for example, it may not want to be seen to be associated with the gig);
- products such as musical equipment such as amps, guitars, drumkits

During the Billy Bragg concert, Billy Bragg complained that his amp never

worked, but luckily, the brand of the amp was not clear from the pit.)

- alcohol or other drinks that appear on stage; T-shirts worn by the artists during the concert; and cigarettes
- the artist's repartee during the performance

During the Billy Bragg concert, Billy Bragg discussed East Timor, Serbia, Slobodan Milosevic, NATO and the airstrikes; Hans Eisler, and the bad manners of English tourists).

CREDIT

Many artists and record labels will be keen to get involved in a cybersimulcast because of the free publicity and promotion rather than because of any fee that they may be paid. An artist and/or record label may be willing to accept a reduced fee if they are guaranteed a certain amount of publicity.

For this reason it is critical to sort out and confirm what credit each artist and record label will be entitled to before the cybersimulcast; and the relative credits of the other artists and performers, that is, the size of credit, type of credit and order of credits.

The types of credits may include:- spoken credit before the start of cybersimulcast;

- spoken credit before the start of cybersimulcast;
- written credit before the start of the cybersimulcast – single frame;
- written credit before the start of the cybersimulcast – rolling credit;
- spoken credit at the end of the cybersimulcast;
- written credit at the end of the cybersimulcast – single frame;
- written credit at the end of the cybersimulcast – rolling credit;
- credit in all advertising/promotion of the cybersimulcast on the site; and
- credit in all paid advertising/promotion of the cybersimulcast in any medium.

Some artists and record labels may require a credit on the basis that the artist or record label's credit is tied to the credit

of other artists or record labels so the artist or record label receives a credit whenever a particular artist or record label receives a credit; or any other artist or record label receives a credit.

However, because of the technology glitches of the Internet, a person should never **guarantee** the cybersimulcast of the concert will be made, in whole, or in part, or at all. In particular, all liability for loss of opportunity to enhance the reputation of the artist or record label should be expressly excluded for failure to undertake the cybersimulcast at all; or failure to include the performance of the artist or the works of the record label in any cybersimulcast.

EDITS/ADDITIONS/ DELETIONS

The cybersimulcast may be framed by a website, framed by banner advertising, or appear on screen with other advertising. In addition, parts of the concert may need to be cut because of the risk of infringing a law such as defamation, contempt of court or obscenity, because of a technology glitch, or because of the low quality of the performance. Thus, it is necessary to secure the right to add to, delete from, adapt, change and/or otherwise modify the concert and place it in any context during the cybersimulcast, and each contributor should consent to such changes.

INTERNATIONAL NATURE OF THE INTERNET

The internet is accessible by any person who has the necessary equipment, anywhere in the world. As such, it is necessary to secure rights throughout the world. It will not be enough to secure the rights for Australia, even though the main audience is Australia, the concert may only be of interest to Australians, and the concert is only advertised in Australia.

Triple J Radio's 'Super Request', broadcast throughout Australia on weekday evenings often announce requests from outside Australia, mostly from homesick Australians tuning in through the ABC website.

This is not as problematic as it sounds. APRA, AMCOS, PPCA, CAL and VISCOPY have affiliates throughout the world so the local collecting society can co-ordinate the rights. In addition, many major record labels are multinationals, so the local office can co-ordinate the rights.

COLLECTING SOCIETIES

As cybersimulcasting and cybersimulcasting technology develops and matures, the focus will become the relative bargaining position of the different stakeholders in the music industry, and in particular the demarcation between the different collecting agencies involved in the music industry. This has been foreshadowed by the recent dispute in the United States between the Harry Fox Agency which collects royalties for the sale of recordings and ASCAP which collects royalties for the broadcast of musical works. The Harry Fox Agency considers digital distribution as downloads that are no different from getting a physical copy of a tape or CD. On the other hand, ASCAP considers it to be a broadcast.

Alternatively, the various collecting societies could merge. Currently, collecting societies collect for particular rights and particular types of works in particular territories. The various collecting societies could become super-collecting societies, a one-stop worldwide clearance house for a number of different rights and a number of different types of works. However, this could have serious anti-trust implications.

Another option would be for the various collecting societies to retain their separate

identities, but become part of a coordinated copyright management system. For example, the European Union recently funded a project known as the IMPRIMATUR program which involved telecommunications companies; music industry stakeholders such as Bertelsmann and the International Federation of the Phonographic Industries; European collecting societies such as CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs); and European libraries and archives such as the British Library and the University of Florence (notably the Alinari archive of photographs). The project involved a central clearing house for the digital use of works. The project was completed at the end of 1998, but the work is being carried forward by Imprimatur Services Limited.

CONCLUSION

A live rock webcast requires forward planning and effective contract management to ensure that all rights owners and creative contributors understand the process and are comfortable with the way the webcast is managed and their work is presented.

It is hoped that as the webcasting technology develops, the various rights owners will co-ordinate and streamline the clearances process to facilitate effective rights management.

In the meantime, look out it's rough and mean. It's a long way to the top if you wanna rock and roll.

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