COPYRIGHT IN THE INTERNATIONAL CLASSROOM AND MARKETPLACE
By Alan S. Bergman

At this year's IAJE Convention in Toronto, I moderated a panel on "Copyright In the International Classroom and Market Place, A Panel of Attorneys and Educators from the U.S. and Canada Compare their respective copyright systems and with specific reference to how they deal with conflicting interests of educators, performers, composers, arrangers, scholarly publications, and users of music like record labels". The panel included Canadian attorneys, Casey Chisick and Peter Steinmetz, American attorney Jon Waxman, Paul Spurgeon from SOCAN the Canadian performing rights society and our own Antonio Garcia, the former editor of the Jazz Education Journal.

The session contrasted the Canadian concept of Fair Dealing with the American Fair Use doctrine. The Canadian system was presented by Peter Steinmetz and Jon Waxman described our convoluted fair use history. This being an IAJE audience we also spent considerable time on the complicated relationship between Jazz educators and copyright. Many Jazz educators are also active musicians and so often a conflict exists between their interests in protecting their own work on the one hand and maximizing educational access to Jazz music on the other hand. From a conceptual point of view, we were also concerned with the central issue of when you can use someone else's intellectual property without asking permission and also in the special case of Jazz solo improvisation, to what extent you can change or "transform" a work and make it your own to create some rights you yourself can protect.

In this article I will quote or paraphrase extensively from the comments of the panelists and also quote or refer to my September 2002 JEJ article on this topic which was entitled, "Copyright in the Classroom", The Use of Protected Materials in an Educational Setting.

Peter Steinmetz outlined the portions of the Canadian copyright law which relate to what the law calls fair dealing. In our law we use the term fair use. As might be expected, there are similarities but there are also differences. In his outline, Peter made the following points:

Under Canadian law, anyone may deal fairly with any work for five, and only five, specific purposes: They are: research, private study, criticism, review, and news reporting.

In the cases of criticism, review, and news reporting – unlike in the U.S. – it is necessary to mention both the source of the work and the name of the author, performer, broadcaster and sound-recording maker (if given in the source) before the dealing can qualify as "fair".

Also unlike in the U.S., the Canadian fair dealing categories are an exhaustive set. If a particular use doesn't fit within one of the categories, it can't be "fair dealing" for purposes of the exception.

However, the Canadian Copyright Act does include other specific exceptions – outside the fair dealing doctrine – for certain uses by educational institutions and by libraries, archives and museums.

Even if a particular use does fall within a fair dealing category, it is still up to the user to establish that the dealing was actually "fair". What is "fair" for the purpose of fair dealing under Canadian law is not spelled out in the legislation so we must look to case law and laws and precedents from other jurisdictions including the US. What is fair in Canada is a question of fact in each case and the main factors we consider include:

- The purpose and character of the dealing.
- The nature of the source work. For example, it's difficult to establish fair dealing with an unpublished work, since the author would seem to have an interest in keeping it under wraps.
- What and how much of the source work has been used, compared with the source work as a whole. Has the user taken more than is reasonably necessary for the purpose?
- The effect of the dealing on the potential market for, or value of, the source work. A use that substitutes for or competes with the source work is less likely to be fair. This applies to existing and future markets – so, for example, it wouldn't be persuasive to argue that including a particular jazz tune in a music textbook is a fair use just because the music publisher that owns it isn't currently in the textbook business.
- Whether the source work was available within a reasonable time, at an ordinary commercial price. It's more difficult to complain about unauthorized use if the copyright owner's distribution or permission practices are unfair or inefficient, such as where there is no ready market or means to pay for the desired use.

As a general rule, the more that is taken, the less likely it is that the dealing will be fair, since the use of substantial extracts is more likely to cut into the market for the source work by serving as a substitute for it.

But note that it's possible to deal fairly with even a <u>whole</u> work, especially if the source work is brief or indivisible (e.g., a photograph). Likewise, it's fair to tape an entire musical work or broadcast to allow the user to decide what extract from it to use – provided that the subsequent use of the extract turns out to be fair.

Also, the fairness of the dealing may depend on its purpose and medium. An extract may be too long to be fair if copied for criticism or review but may still be fair if copied for research or private study.

Finally, the purpose of the dealing needn't be directly related to the source work. For example, I may review Miles Davis's recording of "Round Midnight" by playing excerpts both of that recording and of Thelonious Monk's original, so long as the dealing is otherwise fair and the source is attributed.

Educational uses have their own specific exceptions and are not automatically considered fair dealing. But they can also be fair dealing if they meet all of the criteria just discussed.

Recently, Canada introduced additional exceptions for educational institutions and for non-profit libraries, archives and museums. These exceptions haven't yet received much judicial attention, so it's hard to say how they will be interpreted.

What is certain is that the exceptions are very limited.

Educational exceptions:

- An educational institution may, for purposes of education or training and on the premises of an educational institution, make a manual reproduction of a work for display or project a copy of a work on an overhead projector or similar device.
- May also make copies, perform a work in public, or communicate a work to the public, again on the premises of the educational institution, for purposes of a test or exam.
    - But, except for manual reproduction, these exceptions don't apply where the work is commercially available in an appropriate medium.
- Live performance of a work or sound recording, on the premises of an educational institution, is permissible if for educational purposes, not for profit, and for an audience consisting primarily of students and/or faculty.
    - But, note that the making of copies to facilitate this purpose – such as photocopying sheet music for a choir or band to read at the performance or rehearsals – seems not to be included in the exception. Permission must be obtained and royalties potentially paid.
- Unlike in the U.S., there are not at present any set guidelines for the use of music for educational purposes. Our only guideline is the statute itself, since there hasn't yet been any judicial interpretation of it.

The Canadian law governing both fair commercial dealing with music and its use in library and educational settings is less settled than in the U.S., although there is reason to believe that many of the same interpretive principles would apply here.

For the moment, it's safe to say that most educational uses – especially the making and distribution of copies for student use – still require licenses from the copyright owner. The same goes for the vast majority of commercial uses, of course, other than those that fall within the closed set of fair dealings that are recognized by Canadian law.

In reviewing Peter's comments I noted that the similarities to the US law are quite striking but so are the differences. First there is nothing in our law like the five specific categories allowed under the Canadian law: research, private study, criticism, review and news reporting. True all of these areas would probably constitute a fair use but that would have to be a matter of judicial interpretation, but of course Peter points out that ultimately even in these five areas, the user may have to establish that the dealing was, "fair". And

the criteria outlined in the law which Peter described are very close to Section 107 of the US Copyright Law, which sets forth the four fair use factors to be considered in evaluating a particular use. I'll repeat the four factors from my JEJ article so you can compare them with the Canadian version.

The first of the four factors is the purpose and character of the use. A nonprofit, educational, or personal use would more likely be a fair use than a commercial use. However, that doesn't mean that a teacher could make ten copies of a choral arrangement for distribution for choral members at a paid performance where the proceeds go to the school. A counterbalancing element here is whether the use is for criticism or commentary, or other "transformative" use, like parody, or whether it is an exact copy of the original. In other words, incorporation of an excerpt from a play in a criticism or commentary is more of a fair use than reproducing it verbatim for wider distribution. This would apply to a use of the chords and part of the melody in a jazz version that includes improvisation.

The second factor is the nature of the original work to be used. A factual work that has been published is more likely to be a fair use than a creative unpublished work. If a work is unpublished the law favors the creator having the right to make the decision about how the work will initially be disseminated and many lesser known original jazz compositions may very well be unpublished.

The third factor is how much of the work will be used. In music, a lot of classroom copying is of the entire work, but one question I was asked was if the teacher could make copies of the bridge of a tune to distribute to the students, while at the same time asking them to transcribe the rest of the composition by ear. I would think that this would probably not constitute a fair use even though only part of it uses the work. The quantity of copies also could inversely relate to the use. A teacher could copy an entire article from a journal for students in a class, but if this were done in a commercial copy shop, permission would be required. Similarly commercial publishers have much less latitude in using quotations than a student writing a paper.

The fourth factor is the effect of the use on the market for the original. Although this would appear to be the most important use, the Supreme Court took great care to point out in the 2 Live Crew case, that all four factors should be weighed equally and that it is indeed possible for a fair use to be made for purely commercial purposes.

Peter described the educational exemption recently added to the Canadian law. We have a similar exemption under section 110 of our copyright act. These exemptions in our law for educational uses of copyrighted works are divided into two sections, one relating to face-to-face of use of copyrighted materials by educators in a classroom context directly to the students and the other dealing with an educational transmission, the newly emerging area of distance learning, where instead of it being utilized in a face-to-face teaching situation directly in a classroom, where we are now talking about digital transmission over the internet to a distant place. In that context Jon Waxman described the brand new legislation, referred to as the "Teach Act", which deals specifically with

the distance-learning situation and expands the law relating to distance learning to be consistent with the face-to-face situation.

Another difference in approach is that with regard to educational uses of music, we, unlike Canada, rely on the music guidelines promulgated in 1976 that have remained intact and establish the minimum standards of educational fair use under Section 107. These guidelines are reproduced and described in detail in my JEJ article.

Tony Garcia's presence on this panel offered the opportunity to discuss the very hot issue of Jazz transcriptions and solos. Tony expressed frustration as editor of the Jazz Education Journal at not being able to publish many important article submissions because they are transcriptions and analyses of Jazz solos.

Casey Chisick was uniquely qualified to discuss this issue from both the US and Canadian point of view. Casey is a Canadian lawyer and law schoolteacher, and also received an LLM from Harvard Law School. In addition he is himself a musician and a promoter of Jazz concerts. Casey's comments focused on his explanation of how copyright fits in with an improvised or partially improvised Jazz tune. His comments in part are as follows:

"The classic format of a Jazz recording is usually a 32 bar composition (sometimes referred to as the "Head"), followed by a number of solos and then a restatement of the head.

The ownership of copyright in the head is clear enough. It is a musical work composed by one or more composers and, under the law in both Canada and in the U.S., that is a copyright protected musical work, protected in Canada for the life of the author plus 50 years and in the U.S. for the life of the author plus 70 years. So that's perhaps the only clear aspect of copyright in Jazz. The composer is the first owner of copyright and usually assigns some or all of the copyright to a music publisher. If you want to play that song in a variety of different ways, or rearrange it, or transcribe, or do whatever you wish to do with it, you seek permission from the publisher or the agent of the publisher.

The trouble starts, when you get to the subject matter of those solos that follow the statement of the head by the ensemble. There may be several musicians improvising their own original melody over the harmonic and rhythmic structure of the head. One question is to what extent are these protected by copyright law? If so, how and who owns them, and what is the nature of that protection?

In Canada, my interpretation has always been that the improvised Jazz solo is, in its own right, an original musical work, therefore protected by copyright. First, the threshold for originality in copyright law is not particularly high and it is clearly met and far surpassed by the principal that each Jazz player imbues in his or her own improvised solo. And the requirements for a copyrightable musical work in Canada are simply that the work be original to the author, not copied from another, and that it be fixed in some tangible medium of expression. A recent case however has cast some doubt on this by

holding that to be a "work" entitled to copyright, it must be able to stand on it's own which might lead to the conclusion that the Jazz solo which uses little or no melody from the original would stand a better chance for protection than a solo that relies heavily on the melody of the underlying work.

So the question now is in Canada; who owns copyright in that solo? And that's where things start to get tricky. Because it is clear enough that when somebody creates an original musical work, the creator of that original musical work is the first owner of copyright in it. So other things being equal, and absent any other factors, the individual musician ought to be the owner of copyright in that improvised solo. Unfortunately, all things are not equal and we are not operating in the absence of other factors one of which is the contractual relationship that exists between members of that band and the record company. It may well be that the record company has some claim to ownership of the original musical works that are created in that recording session under the works made in the course of employment doctrine, which is the equivalent of the American works for hire doctrine.

. Now what is the practical effect of this for Tony Garcia, who wants to print transcriptions of these solos? First, he needs to go to the music publisher of the underlying composition and request permission to deal with that composition. Then Tony will need to go either to the record company, or in exceptional cases to the musicians themselves, and request their permission to use their solos in a transcribed form. It is a very complicated structure, complicated even further as Alan pointed out to me the other night and in his article in the Jazz Education Journal, about a peculiar situation that exist in Jazz where musicians quote other tunes in the course of their improvised solos. So this is potentially a limitless web of permissions that need to be sought. This is complicated further in the U.S. by the doctrine of derivative works where unlike in Canada, there is a section of the copyright law that reserves to the owner of copyright in a musical work, the sole and exclusive right to make new works based on that work. The right does not exist in Canada but it clearly does exist in the U.S.. So technically then, it is an infringement for any musician to improvise a solo over a protected musical work other than with the permission of the composer or the publisher. What happens then, (at least in Canada) is that there is an infringing solo on the musical work on which it is based creating a situation of blocking copyrights where the soloist isn't authorized to play the original solo, but the composer also isn't authorized to play the original solo because the composer didn't compose it."

As Casey anticipated, in the United States the issue of sorting out the rights in Jazz solos and arrangements is complex. My advice to clients has always been that the only permission you need is that of the owner of the underlying copyright because an arrangement (or for that matter a solo) is, (at least according to American case law), not original enough to be entitled to separate copyright protection. The rights that may be owned by the record label are in fact a derivative work of the original owned by the copyright owner and may not be used without permission. And the performer unfortunately owns nothing despite the fact that he may have created a solo that became

almost as famous as the original as is the case with James Moody and Coleman Hawkins, among others.

Tony ended his presentation of this problem with an impassioned plea:

"I suggest, as I have suggested on several times in the past, that the IAJE executive Board assemble a committee of representative from the Music Industry to discuss this problem regarding transcriptions and their use by non-profit institutions and non-profit publication and propose guidelines, which may serve as solutions. Said committee might be comprised of representation form the Record Industry Association of America, Music Publishing Association of America, certain recording musicians, perhaps with an AFM representative and the legal profession. It would meet on an ongoing basis until substantial progress was achieved, which would be the creation of guidelines for the requisition and published use of transcribed solos, especially in non-profit situations.

To those who say that progress on the subject can never be made, I say as I did in 1998 to the Executive Board, if we do not attempt to find the solution, who will? And if not us, and not now, when?"

Unfortunately part of Tony's problem is that the permission he's seeking involves complex issues, conflicting personalities, and very little money, not an unfamiliar position to find yourself in when you're working in the Jazz world. Until recently that is, when it has all of a sudden stirred up significant interest from a surprising source. In recent years, with the advent of sampling, Jazz solos and fragments have become popular with rappers and other users of samples and very substantial fees have been earned by Jazz performers, publishers and labels for the licensing of these samples. This issue of who owns the recorded fragment has now become financially significant to labels and lawyers for big pop acts who have aggressively created novel theories supporting their ownership in the arrangement or solo under the employment for hire theory (while at the same time the theory itself was becoming the object of some high profile controversy in Congress and in the media).

So who knows? Maybe this issue which only Tony Garcia and the rest of us in the Jazz community seem to care about, will someday wind up in some high stakes litigation involving the biggest names in pop music business. If Eminem and Dr. Dre can help sort out the rights of James Moody and Coleman Hawkins, I'm all for it.

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