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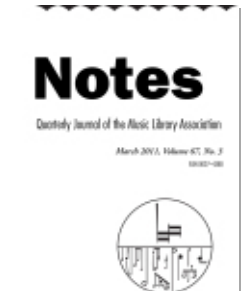
*Copyright and Cultural Institutions: Guidelines for
Digitization for U.S. Libraries, Archives, and Museums*
(review)

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Classical music is often uploaded through live (and perhaps bootleg) video performances as well as audio from commercial recordings. I have seen cameras pointed both at spinning Victrolas and clunking player pianos as people rush to add musical content to the site. Thousands of compositions are now up online in their entirety, and YouTube does not seem to be shutting them down due to digital rights management. And now that YouTube is owned by Google, and would therefore seemingly be to Burkart's philosophy the most unlibertarian site imaginable, it is curious that a video consisting of primarily musical content (and copyrighted music at that) can sit on the site for years, garnering millions of hits without any attempt to remove it. What backroom deal Google has made with the RIAA is anyone's guess, and yet, there it is: a massive mess of mostly uncontrolled free music that millions, if not billions of people around the world are using and sharing and hearing. And it's all happening without a "cyberliberties manifesto."

The cover of *Music and Cyberliberties* features an illustration of a globe of the earth, each latitudinal and longitudinal square bolted down like the gray hull of a ship. And yet the globe is cracked, with rays of digital ones and zeros as well as musical notation bursting out like so much internal sunshine. Is this the "music lifeworld" breaking the shackles of the real "lifeworld" that we inhabit? Or is music more like a cloud, and a celestial one at that, relentlessly following its own path around the feeble weather controls imposed on it by the powers-that-be, and which sendeth rain on the just and the unjust? Only the future will reveal which ending the forces of the controllers, and the musicians and consumers who don't want to be controlled can create together.

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Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums. By Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon. Ithaca, NY: Cornell University Library, 2009. [xi, 259 p. ISBN 9780935995107. \$39.95; free

electronic copy available at http://ecommons.library.cornell.edu/bitstream/1813/14142/2/Hirtle-Copyright_final_RGB_lowres-cover1.pdf (accessed 9 June 2010)]. Illustrations, bibliography.

This collaborative work gives an overview of the conventional topics of copyright—the scope of protection and duration, tests of fair use and principles of exemptions—together with considerations that specifically address the needs of non-profit institutions planning to put materials in their holdings on the Internet. Thus contracts, licenses, methods of searching for owners, attributions, and risk management get due consideration. The book is completed by two extensive case histories. One covers interviews and oral histories, the other the posting of dissertations, theses, and other student work. A short bibliography of further readings and a list of cases cited throughout the text appear at the end.

Copyright and Cultural Institutions is replete with questions, tips, Keypoints, "tricky areas," bulleted lists, decision trees, and tables. This is mostly to the good, but the actual text often seems to lack much scope beyond serving as a background for these ubiquitous inserts. The nucleus of the work originated in the Australian *Guidelines for Digitization* drafted in 2005, which is due for an update soon. Peter Hirtle is a professor of law at Cornell University; the second and third authors come from the law schools of the University of Queensland and the University of Melbourne respectively.

The collections imaged by the authors extend to literary, artistic, and musical works, but do not exclude the more pedestrian materials that may reside in libraries and archives. Despite the clarity with which the material is presented, the endemic problem of understanding this or any other area of jurisprudence is conspicuously present. That is, laws exist only within networks of other laws, all of them prone to wiggle too much to allow complete clarification of the issue at hand.

In general, there is a lack of direct applicability to music, because music is not specifically differentiated in Section 108 of the United States Copyright Act, which governs libraries and archives. The authors note this lapse early on and remark that

“[i]nteresting questions arise as to the boundaries of musical works” (p. 18). Some of the most intriguing questions that arise, in particular those concerning born-digital materials, are not mentioned, however. They refer to the efforts of John Cage’s estate to protect the work of the composer’s “4½ minutes of silence” (p. 19) against all comers, but this sheds little light on the fundamental quandaries posed by more substantial works. The text is full of non-sequiturs and unclear relationships such as the one following a photographic reproduction of the title page of sheet music for a piece called “America’s Pitch Hit March” (McMillan, 1919), which immediately follows the Cage discussion and precedes a section on protections for dramatic works (p. 19). However arbitrary their placements in the text, the illustrations are valuable for their captions. The “Pinch Hit March” comes with five tags: (1) image content, (2) composer, (3) date and agency of publication, (4) source of the image, and (5) copyright status of the image.

The reader has to excavate comments on topics related to music libraries. The protections on the sound track of audiovisual works are differentiated from those on a musical work on page 25. Most subsequent references to music occur only in long strings of media labels such as “motion picture, opera . . . music of a song” (p. 57) or “maps, charts, tables, editorial notes, musical arrangements” (pp. 59–60). The diversity of content types does, of course, underscore why copyright in the digital age has become so contentious and so confusing. The heterogeneous polyphony of legacy concepts is now wrapped in a Christo-like installation of “digital rights management.” The music itself, even if digitally enhanced beyond its original capabilities, is all but lost in external layers of control.

Undaunted by the datedness of the law and the sometimes helter-skelter sequence in which topics are discussed, the authors provide much of value. Table 5.1, “Some major groups of exemptions in the Copyright Act,” is a handy guide, annotated with the specific sections in the United States Code (Copyright Act) relevant to each kind of exemption from license fee payment, including the provisions for classroom and distance-learning uses of musical works. This is covered in Section 110, which also

covers background music in restaurants, a matter the authors mention on page 104. (Those with a serious interest in the “public space” side of licensing can learn a lot from Magnatune’s licensing apparatus at <https://magnatune.com/artists/license/>, accessed 25 September 2010.)

Special topics are treated in later chapters. Selective reproduction of media for individual patrons (pp. 116–25) is one such topic: the law draws a careful distinction between this and reproduction for the purposes of preservation. For sound recordings, the authors give a succinct description of and contact information for ASCAP, BMI, and SESAC (the three main licensing agencies). A realistic but hypothetical scenario on page 169 concerning the prospective digitization of a 1943 song by Jerome Kern shows how one may need to consult the first two *and* the original recording company in order to proceed.

A real case concerning scanned sheet music on the Internet is described on page 188. In this instance, a Canadian Web site had made available sheet music no longer protected by Canadian copyright law. The music was still protected by copyright in several other nations, however, and when the Austrian rights holder threatened legal action, the Canadian Web site chose to withdraw the music from Web circulation rather than defend itself on the basis of Canadian law. (Readers of MLA-L will be familiar with the particulars from online discussions.) To avoid situations like this, the authors advise (p. 189) site managers to state that all materials posted on an American Web site are provided “in accordance with American laws”; and to verify prior to posting that virtual distribution in the United States does not violate the laws of the country of origin of the underlying physical materials when the posting institution has a substantial presence in that country.

Fair use coverage is extensively covered at many excellent Web sites, including the MLA’s own. Music librarians are unlikely to find that the elaborate decision tree (flowchart 6.2) on page 117 breaks any new ground. It indicates that if the work does not deal with news, is not available at a reasonable price, and is to be used for study, scholarship, or research, the institution is at liberty to make a copy. However, “copies

of sound recordings cannot be made . . . unless the underlying scores are in the public domain” (p. 118; citing Section 108). It is Section 108 that chiefly stipulates what libraries and archives can and cannot do. Widespread dissatisfaction with the lack of clarification on many points led to the formation of a Section 108 Study Group of copyright specialists (including Hirtle) almost ten years ago. Its recommendations, available at <http://www.loc.gov/today/pr/2008/08-063.html> (accessed 25 September 2010), have been available since mid-2008 but remain unimplemented.

The authors identify changes in current law that would be desirable. For example, American law does not distinguish between (physical) libraries and archives and that vigorous debate surrounds the definition of “virtual” libraries and archives (p. 127). While the need to secure permissions for the use of underlying musical works in documentaries is well understood, the durations of multiple permissions in the context of a single documentary can be so different from one case to another that extensive management (and, potentially, the payment of additional licensing fees) may be required to keep the documentary “in print” (p. 132). The existence of multiple rights in a musical work (or in other media in which it is used) can impose similar needs (p. 158).

Copyright and Cultural Institutions is available in two formats—as a traditional book

(i.e., on paper) and as a searchable online text in PDF format. This is simultaneously a blessing and a curse. The PDF is easy to read for the same reason as the book is difficult: the same file seems to have been used to produce both. While screen images can be virtually enlarged for visibility, the text font size in flow charts and image identifiers in the book corresponds to a fixed five-point mark and lies well below the human threshold for legibility. The “two-for-the-labor-of-one” craze that has swept publishing in recent years is delusionary. (This work was intended primarily as an electronic resource and is available without restriction, but comparable instances run rampant in the world of licensed journals.)

The PDF of this work has the further merit of showing images in color. Color images add more than an endorphin fix; they accurately portray what the user will see on the hypothetical library or archive Web site that the book seeks to enable. Libraries and archives will find this work a handy starting point for mapping a pathway through the thicket of rights and restrictions that shape the services they are allowed to provide Web users. One hopes that the authors will sustain the work as the law evolves.

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Musical Form, Forms & Formenlehre: Three Methodological Reflections. By William E. Caplin, James Hepokoski, and James Webster. Edited by Pieter Bergé. Leuven: Leuven University Press, 2009. [179 p. ISBN 9789058677150. \$45.] Music examples, bibliography.

The Sixth European Music Analysis Conference (EuroMAC), held in Freiburg, Germany in 2007, may turn out to have been a watershed in American music theory. The paradox is only apparent: among the most active current research programs in the United States is the revival of *Formenlehre* in the writings of James Webster, William Caplin, and James Hepokoski and Warren Darcy, and *Formenlehre*, after all, is the “most ‘German’ of . . . theory topics” (as Ludwig Holtmeier puts it in his intro-

duction to the volume under review, p. 8). The EuroMAC conference featured Caplin, Hepokoski, and Webster in a plenary session organized by Pieter Bergé and moderated by Poundie Burstein. The revised position papers, together with responses and rebuttals, are now available under the collective title *Musical Form, Forms & Formenlehre*.

Caplin’s contribution, the volume’s first, addresses the most obvious open question left by his treatise *Classical Form: A Theory of*