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# "I Found It, How Can I Use It?" Dealing with the Ethical and Legal Constraints of Information Access

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## Abstract:

It is very easy to find music on the Internet today, but how it may be used is the source of considerable conflict, front-page news stories, and increasingly of scholarly reflection. One of the frustrations for libraries, archives, and patrons alike is the gulf between the information about a holding and actual access to it. But users are not the only ones to have an opinion about free access. Local musicians feel that everyone profits from their cultural heritage but them; researchers find themselves held responsible for research recordings made decades earlier and largely forgotten; and some communities seek to protect music that was never meant to be commercialized, and is considered to be secret or divine. Caught in the middle between angry patrons, angry companies, and angry artists, what are music librarians and archivists supposed to do? Using his own experience as a researcher, archivist, and record producer, the author discusses the issues and makes some suggestions that can help those who wish to use the music they can so easily find out about.

It is a great honor to be with you at the ISMIR 2003. I have devoted much of my life to making information available for eventual retrieval, and it is nice to be among specialists in doing just that. As a researcher, I have made field recordings among indigenous peoples in remote jungles of Brazil. As the director of an audiovisual archive I wanted to make available as much information as possible about the collections by publishing printed catalogs, entering collection-level information on OCLC, creating in-house databases, and revising depositors' contracts. As a record company director I have produced hundreds of CDs with extensive liner notes, maintained a vast back catalog in print, and moved early to supplying information on the Internet. As the archival consultant to the Smithsonian Institution's GlobalSound Internet music project, I have continued to search for new ways to make information about music, and music itself, available to as wide a public as we can reach.

A huge amount of music is available on the Internet today, and even more music is signaled in myriad archives

catalogues. More music will certainly become available. One problem we face is finding what is there (and also what isn't). Another problem is finding out how we may use it. The short summary of my talk would be: although you can find it, a variety of forces (not all of them related to greed) shape the way music should be used. As specialists in information retrieval, we must also become specialists in helping others learn not only the techniques of finding music, but also the ethics of using it.

## Introductory

This is my first ISMIR conference, but I have learned a lot about you from your web site. Among the interesting essays was the history of the ISMIR. It revealed the origins of the group in online music recognition and searching. I printed out a number of very interesting articles and read them before speaking to you today.

My grandfather, Charles Seeger, was a composer and music theorist, one of the founders of the American Musicological Society and later of the Society for Ethnomusicology. In the 1950s he developed a machine that would measure pitch, amplitude, and tone quality that came to be called the Seeger Melograph. It took up the whole wall of a room, required constant attention from a technician, and provided detailed analysis of very short samples. But it revealed some very interesting relationships between sounds and the way they are perceived, and anticipated the importance of machines in musical analysis and creation that followed.

Grandfather would have loved the HMM project. In fact, the endeavor to create a melody recognition software fills an important gap that has opened in the reference services at the Smithsonian Institution and the Library of Congress. When I directed Smithsonian Folkways recordings I sometimes answered the telephones to learn more about how to improve our mail order office. People would call wanting to replace an old LP recording they had lost with a CD. The trouble was that often they remembered very little about the original. Sometimes they would say "The LP jacket was made of heavy cardboard and had a black border around the edge." Since the jackets of nearly 2000 of the LP titles on Folkways Records had black borders, that was not very helpful. They would sometimes say, "Well, it had a blue two-tone cover." Since on every print run the colors could be changed, that was not very helpful either. In all honesty, most customers inquired about a subject matter (songs of the Civil War), an instrument (five string banjo bluegrass style), or an artist.

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But occasionally the question came "the melody went something like this: la-la-la-la.... Do you know it?"

Sometimes I was successful, and could reply, "Yes, I know that song. It is on LP number xxxx. But more often I failed. Between the poor phone connection, the inability of the person on the phone to hum any melody at all, and his or her uncertainty as to what the melody might have been, I was usually stumped. When that happened, I would refer them to Joe Hickerson who often tended the phones at the reference desk at the American Folklife Center of the Library of Congress. Joe has a huge repertory of songs and could help a lot of people uncertain about what it was there were actually looking for. But now I have left the Smithsonian, and Joe has retired. Hurry up and work on the HMM project some more, the public is waiting!

### **Observations on Retrieving Music Melodies**

Melodic structures are very useful for classifying certain types of music, such as fiddle tunes, but not as good at others. Some of the earliest databases of melodies were Scandinavian fiddle tunes. There are probably some very advanced music information retrieval techniques to be found in the Scandinavian countries. The HMM project will have more difficulty with improvised music like Indian ragas or Iranian Dastgah. Rap, and voice-box music, which is made with the mouth and lips and by slapping the face, will be difficult to retrieve through a melodic search alone. But ethnomusicologists may be helpful in the creation of automated musical retrieval systems for those forms. For example, in the Indian raga structure is provided by a system of intervals approached in a specific manner rather than by a particular sequence of notes.

Many of the people who requested information at Smithsonian Folkways recordings wanted more than just the sound of a given piece of music. They wanted information about the music, photographs of the artists, and as much additional bibliography and discography as we could provide. This supplementary information was particularly important when the traditions were unfamiliar. Most of the research in the papers I read from previous ISMIR meetings dealt only with US popular music or a restricted part of European "Classical" concert music. But there is a lot more music out there. Content providers will need to set up a system of integrated files with supplementary information to create something resembling a multimedia resource.

Even local libraries need to know how to find background information about musical traditions, and Internet users—accessing from many different places—will need to know too. Many cities, suburbs and even rural areas in the United States are home to multiple musical traditions. One cannot assume that a child or adult looking for music will know much about even so-called mainstream American traditions without access to more than just the sound files.

This brings me to my two observations about information retrieval. First, people will want to access more than just sounds—they will want supplementary information including song texts, photographs, biographical material and the like.

Second, people will want to retrieve music from many different traditions, in only some of which is melodic structure the best approach for retrieval. It is essential to design music information retrieval systems that will work not only for American popular music but also Indian ragas, African xylophones, South American Indian songs, and Indonesian court music. Even if initial experimentation focuses on contemporary popular music, it is important to fashion the overall system so that it can eventually include all kinds of music. One of the oddities of many early word-processing programs was that they could not handle diacritical marks—the signs above and below letters with which many languages distinguish words from one another. Even today these marks are often lost in translation programs and e-mail transmission. This probably happened because of technical limitations, US dominance in technology, a lack of vision, and a lack of interest in creating systems that would serve all languages rather than just that of the developers. I hope the creative minds at ISMER will not make the same mistake.

You have many potential collaborators to help avoid such ethnocentric traps. Ethnomusicologists can be of some help. They study, write about, and often perform music of more than one musical tradition. Even more helpful might be the ethnomusicologically trained librarians. They are quite familiar with the difficulties of dealing with multiple music systems, since they have a constant problem with the subject headings and other classification systems that were designed for only a few of the world's musical traditions. Collaborative ventures are sometimes tiresome, but if the right system is created it will endure; if not it will be replaced by another made by people who understand both music and their audiences more broadly.

### **Who owns music and what can I do with it?**

Now to my main topic. When I asked of the organizers of this meeting why they invited me to address you, they said it was because of my work on music copyright and ethics (especially Seeger 2001). This explains my title, "I found it, How Can I Use It?"

The issue of who owns music and what other people's rights are to it is a front-page subject these days because of file sharing. Two articles in this morning's USA Today addressed this subject—one announcing the distribution of analog music at MIT and the other discussing software to prevent sharing of digital films.

Countless institutions and individuals have placed a vast amount of information about music as well as music sounds at our fingertips. It is easy to find things that are for sale and also for free—including music files. There are many free services, among them hundreds of excellent library-produced projects that provide rich musical resources. Oxford University has made available marvelous collections of broadside ballads from previous centuries. A number of American universities are collaborating in posting large collections of sheet music, as shall be reported later in this conference. The Library of Congress American Memory

Project, which you are visiting this afternoon, includes such treasures as the John and Ruby Lomax field expedition of 1940. This features streaming sound of all the recordings made on their recording expedition to the American South. So much information is made available on the Internet provided by so many different people and so easily found that we forget to ask two important questions: First, what is not there that I might want to find? And second, what can I do with something I find information about something that cannot access the sounds themselves.

## **A Short History of Copyright Legislation**

One obvious problem for music users is copyright law. Mary Levering, from the Library of Congress, presented a paper on that subject at a previous ISMER conference. She accurately presented information about the law, but she did not editorialize about it the way I will. If you ever read the law and review the changes over the decades (and I recommend this as a lesson in American political process), you will see how special interests have shaped national policy.

The history of copyright is quite a fascinating topic (see Woodmansee and Jaszi 1994 for early history and Samuels 2000 for American copyright history). Copyright has little to do with art and everything to do with commerce. Copyright provides a limited term monopoly on printing copies of a given work. After the term is over, the monopoly ends and the works go into something called the Public Domain. This is a little like a lake from which all can draw water, or a commons to which all have access. The purpose of copyright was thus to stimulate the increase in knowledge and arts by ensuring that creators and publishers would receive recompense for new works that would enter the public domain and be available for use by everyone.

Initially, US copyright law only covered the creations of United States citizens. After US independence, most of the printed literature was taken from England and printed without having to pay any fees. This only changed in 1891. Now the U.S. focuses its ire and trade retaliation on other countries that are doing what it did until 115 years ago.

Music was initially copyrighted because of printed notation. Hymnbooks were a major source of income for some publishers, and sheet music was highly profitable throughout most of the 19<sup>th</sup> and part of the 20<sup>th</sup> Century. Only much later were the sounds made copyrightable. With a few exceptions, most copyrights on music compositions have been and still are controlled by large music publishing companies. Over the centuries these companies have consistently argued for extending the term of their monopoly. The term of 14 plus 14 years became 28 plus 14 in 1831 and 28 plus 28 years in 1909. This was extended to the life of the author plus 50 years in 1976, and later to the life of the author plus 70 years in 1998.

The United States also has something called "fair use," which modifies the limited-term monopoly by allowing materials to be copied for certain specific reasons—for such purposes as criticism, news reporting, or teaching. Legislation is far less specific about the precise definition of fair use than it is about

the rights of the monopoly holders. Individuals and institutions are having to forge practices for themselves.

Today, file sharing has transformed the delivery of music and the transnational music industry is in a major crisis. Most of the major record companies are up for sale or merger. This is not the first time technology has reconfigured the recording industry since it began in the 1880s. The invention of the radio and the Great Depression, both created economic turmoil. But the industry adopted new technologies and emerged stronger in the end. I expect this will happen again, but the serious conflicts in this area require institutions (and perhaps even individuals) to be quite careful about how they use music that might be copyrighted.

Even though it appears copyright would apply to all music, that isn't true. What is called "folklore" and community works for which there is no known author/composer are not covered in most legislation. Instead they are part of the Public Domain. Countries with large oral traditions that are being used as sources of inspiration by popular musicians find this discriminatory. Many indigenous communities also complain that their culture can be exploited without their permission. They see it as a kind of neo-colonialism in which their folklore is the raw material for someone else's profitable creation. The United Nations Educational Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) are both examining possible modifications in international agreements that would address the issues of indigenous rights and traditional knowledge.

The conflicts over intellectual property, in which artists, nations, and commercial interests are all applying pressure to change (or maintain) existing laws creates a very difficult environment for researchers and their institutions. Among the institutions hardest hit by the changes and the insecurity are audiovisual research archives, because they hold so many thousands of hours of unique recordings that were never published at all.

## **Accessing Music in Audiovisual Archives**

Millions of hours of field research recordings like the ones I made in Brazil are preserved in audiovisual archives. Until very recently, researchers never bothered to obtain written permission to make a recording and archives never bothered much about defining what rights they had to their collections. Only now, when intellectual property laws are changing and the Internet makes possible broad access to their collections have archives discovered the difficulties they face. They are filled with recordings people would like to access but which they are not sure they can make available under current legislation and ethical guidelines. They have been taken by surprise by the changing laws, the increased popularization of non-Western music, and the unanticipated ease of access to music that the Internet has made possible. Most of you would want to access some of the treasures found in audiovisual archives; most audiovisual archives aren't sure they can let you do so.

Since many archived recordings haven't been published, they

are not usually governed by the same rules that would apply to a commercial recording. Researchers who record music somewhere and then deposit their recordings in an archive often place restrictions on the use of the material. They cite a variety of reasons for doing so, among them to keep the material from circulating before they complete a book or to protect the privacy of their sources. Performers sometimes place restrictions on the use of the recordings when they record it for the collectors, and the collectors require the archives to observe the same restrictions.

Not all music was meant for commerce. Not only do other societies have different musical sounds, they also may have entirely different notions of music ownership. In Australia, some Aboriginal women perform songs that should only be heard by other female clan members. In Vanuatu some songs are so secret that they are only whispered. In other communities music must be performed only at certain seasons and certain times of day. In certain communities, music can be dangerous—causing illness or enemy attack. In these cases, wide distribution seems totally unjustified, and eventual entry of the materials into the Public Domain is totally inappropriate.

Restrictions by artists and depositors typically apply to only part of an archive's collection. The rest is unavailable because of uncertainties about the status of the material. What can we do about the unavailability of archival recordings? Potential users need to understand that other people also have an interest in and claim rights on the archived materials they would like to use. Archives, for their part, should make parts of their collections available to the general public while restricting access to other parts, so that the Internet becomes more than simply a place to find commercial recordings. Archives can improve access by defining which parts, if any, of each collection can be used by the public, and in which ways. To do this they must enlist researchers, depositors, and artists whenever possible.

I have some experience with this. Between 1982 and 1988 I was Director of the Indiana University Archives of Traditional Music. A large preservation and access grant allowed us to not only copy the wax cylinders and acetate discs but to make listening copies of those materials for consultation in our reading/listening room, and to catalog the collections online using OCLC so that basic information would be available very broadly. Part of the grant project was an attempt to renegotiate the existing contracts with the depositors who had placed collection-wide restrictions on access to their recordings. Under the earlier contract, a single restriction would apply to the entire collection, which could contain five, fifty, or hundreds of audio recordings. We had over 1,100 collections, and we contacted all those we could to ask them to consider restricting only those items that really needed it, and making others available for nonprofit research use. In many cases this was permitted; in others it was not. But the end result was that many collections were considerably more accessible—through cataloging, copying, listening room copies, and renegotiated contracts—than before.

## **Attracting Retrieval: Distributing Folkways Recordings**

Between 1988 and 2000 I was the curator of the Folkways Collection and director of Smithsonian Folkways Recordings. The Folkways record company had been founded in 1948 by a visionary who wanted to release the sounds of the world on a record label and keep them all in print—from number 1 to number 2,168. The Smithsonian acquired the collection from him in order to maintain the remarkable collection of sounds—most of them obscure and not meant to be popular—available to the public. I was hired to figure out how to do it. I became both an archivist and a (small time) media mogul (in a non-profit institution).

The exciting thing about running a record company after running an archive was that the entire purpose of a record company is to make as many copies as possible for as many people as can be convinced to want them. The problem was not whether we could make the materials available, but figuring out how the public could discover they were available. In a large commercial company this would have been called marketing; in the context of the Smithsonian I called it dissemination, or throwing out bait to be recovered by specialists in information retrieval (you and the general public).

The LP era was over, and I anticipated the eventual item-by-item access to these recordings by creating a database of all 35,000 tracks. I restructured the contracts to be more favorable to artists. Every title was kept in print through publication of very small numbers of each (when we received an order for one copy of a title we made five, and kept four on hand for the next orders) and establishing a mail-order division to sell them. My early search for easy automated methods of distribution included considering 900- numbers (at the time mostly used for telephone pornography). I thought we could devise a jukebox that would enable people to dial up and get any track at any time of day or night, without having to go to a record store. Charges to 900-numbers appeared on the telephone bill, so we wouldn't have to collect the money. I planned to price the tracks cheaper than pornography but enough to pay the expenses and the artists and composers. As I was investigating how to do this, the Internet emerged as a better option. I was immediately enthusiastic about the potential of the Internet for distributing arcane, less-than-popular music. It seemed to me we could charge half as much and pay the artists twice as much because we would not need to manufacture, store, and ship heavy breakable products to deliver the music.

## **Smithsonian GlobalSound: Internet Music With a Difference**

My involvement as the archival consultant to the Smithsonian global sound project is a natural outgrowth of my work at Indiana University and the Smithsonian institution. We have four objectives:

- (1) To add diverse and non-commercial content to the offerings of music made available on the Internet. In

addition to sound files the web site will provide supplementary print and visual material to supplement the sound recordings. These materials will be made available by subscription or for-pay download by consumers as well as for licensing to films and for the commercial use.

- (2) To create a network of audiovisual research archives around the world, assist them with the digitization of their collections and eventually to provide an income stream from Internet access to parts of their collections.
- (3) To encourage the performers of traditional music by providing an income stream directly to the artists or communities for the use of the materials placed on the Internet by the archives. Once it is running, income from the site will be divided equally with the archives (for every \$1.00 received, the archives will receive \$.50). The archives, in turn, would divide the money they received with the artists whose performances were downloaded.

This is a very different kind of music access program than most of those that have been launched. Its objective is to support the performers of musical traditions, to strengthen local audiovisual archives in different parts of the world by assisting with digitization and dissemination as well as providing a small income stream to them, and to create a website that provides a great deal of extra musical information—enough to be used in schools and universities as well as by individuals.

We started with three archives, all of which were already digitizing their collections: an archive in India (The Archives and Research Centre for Ethnomusicology [ARCE] in New Delhi) one in South Africa (The International Library of African Music [ILAM] in Grahamstown) and the Folkways archive at the Smithsonian Institution. There were many challenges to this project. Some of them were technical. Selecting formats and delivery procedures in a rapidly changing technological environment was one of them. The difficulty of finding a suitable search engine for Internet databases was another.

Obtaining the appropriate permissions to enable archives to put their collections onto the Internet was a third. For example, a change in the Indian copyright law granted complete rights to performances to the performers. As a result ARCE decided to contact all the depositors to request their permission to upload parts of their collections and accompanying data, and asked their assistance in locating artists who would be most likely to agree to having their recordings, photographs, and interviews available in this way. Although the process has been time-consuming, virtually all the depositors agreed, and every artist that was contacted granted permission. The process had an added benefit. Some of the depositors had more materials they wanted to put into the archive, and the artists themselves were often interested in adding to the collection as well. Some also assisted the archive with new translations of the lyrics provided supplemental information that could be uploaded. Improving the communications between archives and those who have deposited their collections in them, as well as creating new

relationships between archives and the artists on the recordings in their vaults, benefits both the archives and the general public. ARCE created and demonstrated the feasibility of a model framework for moving archival collections from the vaults to the Internet. It takes time, but it actually strengthens the archives itself.

The global sound project is still in the development stage, and development funds dried up in 2003. [In my presentation I showed some pages from the test site.] But we are far enough along to see that it has great potential for providing unique music with all the rights to use it cleared. I hope you will all be retrieving information from the Smithsonian GlobalSound site in the future, after it has been launched.

## Some Recommendations For the Future

In my abstract I committed myself to providing some practical suggestions based on my remarks. In this section I will touch on a few of the things that come from the experiences I have described above.

1. When users want to access a particular kind of music it is very important to ask them what they want to do with it. Their intention should determine the kinds of sources to which they should be directed. Does their intention fit fair use? Is their purpose research or publication? Would the publication be commercial or non-commercial? Is it sufficient for them to listen to a streaming audio file, or must they be able to download a file in order to analyze it more thoroughly? Are they looking for sound samples they can use to create new compositions?
2. Once the intention of a user is clarified, he or she should be directed to a source that can serve their particular interests. For example, if they want to sample the music for their own creations they should be directed to the public domain sources and to independent record companies, who usually grant rights more easily for less money than the major labels.
3. Users should also be reminded of ethical issues as well as legal ones. They should know that communities whose music they wish to access have their own ideas about appropriate uses. Religious music, especially, should probably be avoided in sampling unless permissions have been obtained. All users should be reminded to cite their sources. Some of the most strenuous objections to sampling have come from artists who were not credited for their contribution.
4. When a collection is in an archives or collection rather than on a commercial recording, counsel patience. Even if people discover something exists, it doesn't mean they can use it. Archives are struggling with a rapidly changing environment and are often unsure of exactly what rights they have to the recordings and their collections. Queries directed to audiovisual archives should be as specific as possible as to what is being sought, and what use will be made of it.
5. Our music schools, conservatories, and music research departments need to add training in music law and

ethical practice. Artists need to know how to protect their own rights to their creations. Researchers need to learn how to obtain the rights they need for archiving and publication when they make a recording. Librarians, archivists, programmers, and other information specialists should be involved in these training processes as well.

6. At a different level of action, we as a citizens need to move to defend the public domain. It is important to roll back the digital copyright act provisions that allow public domain works to be encased in a digital code that restricts access to them. Citizens need to address the imbalance towards corporations in the term periods for which monopoly is allowed on copyright. We should also recognize the claims of non-literate artists of oral traditions. Music information professionals like you in this room have an interest in this as well. You need to have access to sounds for study, and you need to be able to make your results available. I think this is a case for citizen activism as well as scholarly research.

The Internet has opened some wonderful possibilities, but it will take a while before we may use everything we can find, and find everything we may use.

Thank you.

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