

RIGHTS, INTELLECTUAL PROPERTY AND ARCHIVES TODAY

The past 20 years have seen tremendous changes in the context in which audiovisual archives function. Changes in communication, the end of old colonial domination and rapid technological changes in audiovisual recording and transmission require major changes in the way archives acquire, preserve and disseminate their recordings. The older archives are in no better shape than the new ones that are just beginning to function. They have very large collections acquired at a time when no one could imagine the expectations produced by the Internet or the interest in their collections on the part of the people who were originally recorded. This chapter addresses some of the issues that everyone at the workshop felt were important: what right do archives have over their collections? What is an appropriate relationship between an archives, the collectors who deposit their recordings in it and the performers and communities those collectors have recorded? Changing ethics, changing intellectual property laws and changing opportunities for dissemination have all contributed to uncertainty about how to use the recordings that already exist and how to collect new ones.

Everyone at the workshop had already undertaken their own field-work. They had all travelled to other places where they recorded musicians, took notes on performances and wrote up the results later. Many of them had deposited their own recordings in archives; some had produced commercial recordings from their field tapes. All of them

also worked in archives or archives-holding institutions. Relationships between researchers and the people they recorded in the field are changing rapidly, as are the relationships between those two parties and archives. It is easier to travel than ever before, publications are spread throughout the world and are often read by the very people about whom they are written. The global music industry has led musicians to have very high expectations for the monetary rewards of making recordings. Archives need to make some changes in their policies to strike a balance between the expectations of both performers and researchers. At the same time, researchers also need to revise some of their procedures and performers will have to realize that their expectations of financial success cannot be met through researchers and archives.

I would also like to address the reasons why archives and researchers need to change many of their procedures and the methodology involved. This begins with a role-playing debate among performers, researchers and archivists [see Appendix C for the complete text] and moves on to a long question-and-answer session regarding intellectual property rights, publication and various kinds of collaboration and ends with a second set of position papers drawn up by small groups and reviewed by the whole. We thus move from a dramatic presentation of a problem to an informal airing of questions to, finally, a series of concrete recommendations.

Performers, Researchers, Archivists: Issues and Concerns

Researchers and performers are working together more closely than ever before. Archives are far more involved with researchers in preparing them for the field and assisting them to obtain good recordings than many of them were in the past. Archives have found that the most important audiences for the materials in their collections are the communities from which they were recorded. It is for these groups that the materials have their most profound meanings. Keeping this in mind, we devised a role-playing activity. We divided the participants into three groups: a group of performers, a group of researchers and a group of archivists. It was an especially good-humoured exercise because each person had done all of the things and could identify with

the complaints. Also, the group had been together long enough to know each other better. They often invoked each other's names in their improvised speeches, mentioned the Ford Foundation frequently (the granting agency that sponsored the workshop we were all enjoying) and felt no inhibition about interrupting and interacting in the midst of the exercise.

As before, the groups had about 30 minutes to get together, prepare their arguments and decide on the mode of presentation. After the first round, they met again for a few minutes and then replied to the criticisms they received the first time, presenting some new ones of their own.

It should be noted that none of the hypothetical examples were in any way related to actual cases. Nor were any of the participants actually condemning the activities of the others—some of the strongest performers' statements came from researchers and some of the strongest statements of researchers' positions came from archivists. The important thing to notice is that musicians feel they are being ignored by researchers who make recordings and then disappear for long periods of time. Researchers feel that the value of their collections has been ignored by archives that separate the parts of their collections and sometimes crumple photographs, mistype catalogue entries and names and insufficiently respect members of communities they work with who happen to visit the archives. They feel that archivists do not understand the exigencies of fieldwork. Archivists, on the other hand, feel that researchers are not doing a good enough job documenting their collections, are not getting the kinds of releases from the performers that the archives need in order to use the materials and expect too much of them.

As already mentioned, the complete text of the debate appears in Appendix C. What follows here is a collation of the main issues foregrounded by each of the groups, all extremely pertinent to the entire enterprise of audiovisual archiving.

Performers to Researchers and Archivists

An unequal, even exploitative relationship: They freely offer their hospitality and cooperation to researchers but it remains a one-way

relationship; the researchers disappear once they have got what they want; reciprocal visits by the performers are not encouraged.

A question of access: Their creativity serves as source material for books in languages they have no access to or is turned into CDs to which they have no access either. It is difficult for them to access archives due to distance or unfamiliarity with institutional protocol; they often feel unwelcome or out of place.

A question of remuneration: They feel that they are often paid far too little for their material/performances compared to the commercial usage they facilitate.

A question of philosophy: They feel that their souls are being stolen/sucked out of them, imprisoned in archives, often used in situations that are not appropriately sacred/respected. They feel that photography robs them of their spirit/soul/essence. They feel that their sacred rituals are trivialized or rendered into entertainment by being reproduced outside the holistic cultural or spiritual context. They feel that publication of their materials robs them of sacred power.

A question of ownership: Their material belongs to them, not to the archives, and they are uncomfortable with it being housed there. It would be useful if researchers trained the performers/informants to gather their own material or do their own documentation and research, rather than just taking their skills or material away from the place of origin

Transgression of confidentiality pact: Information or material shared in confidence gets printed or published, violating the pact of confidentiality.

Researchers to Performers

Unfairly high expectations of monetary gain: Performers often feel that researchers should be able to pay large sums of money which they are unable to afford, confusing them with commercial agents who use their material for commercial ends and make a profit off them.

Problems of fieldwork: Researchers are often unable to function at their best due to unfamiliar conditions, cultural or climatic, i. e., being expected to drink heavily, record in wet weather or cope with hazardous storage conditions which may damage collected materials.

Unreliability of information: Politicking and egoism amongst the performers often hampers the quality of the material gathered or the accuracy of the data.

Researchers often spend years of their lives and a lot of their own resources processing the materials gathered during fieldwork. This aspect of commitment, time and money rarely gets acknowledged by the performers who demand more payment.

Researchers to Archivists

Problems of access: After giving their own material to the archives, they are unable to access it, resulting in delays, repeated trips at the cost of much time and money, loss of publication opportunity and so on, including being expected to wait in queue to access their own material. There is also an unwillingness to store originals with the archives due to emotional attachment to the material.

Performers are reassured by researchers that they will be able to visit the archives and see their material where it is stored, but when they do they are not welcome and this has negative repercussions on the researchers' standing and relationships in the field.

Problems of adequate accreditation: Material gathered and donated by them to the archives is published or broadcast without any credit being given to the researcher or even the performer/informant, leading to loss of credibility for the researcher.

Problems of preservation and cataloguing: Rare and precious materials are not stored under proper conditions. This is compounded by misleading, confused, even wrong cataloguing or categorization

Problems of technology: Technological requirements are either too expensive or impractical for fieldwork in particular conditions, resulting in rejection of material painstakingly gathered by the researcher which is not useful to the archives because it is in the wrong format or medium.

Problems of administration: Too many demands and conditions laid down by the archives as in forms, questionnaires, technological requirements. Not enough knowledge of rough field conditions. Unrealistic expectations of technical quality.

Archivists to Performers

Public domain: Recordings/holdings are for public, educational and research use and are disseminated further, not just locked away. Moreover, they are preserved for posterity, for their own children and grandchildren to avail of.

Rules: If performers care to familiarize themselves with archives rules and usage, they can hear/see their own and other materials as well.

Royalties: Performers are paid if any recording/broadcasting is done of their materials. Performers are requested to enter into contracts so that the archives can market/promote them, earning them both reputation and money.

Cooperation: Performers should cooperate with researchers to achieve the highest quality of recording/documentation possible with optimum inputs in terms of lighting, recording environment, setting and so on. This contributes to a high quality technical product for the archives.

Archivists to Researchers

Planning: Forward planning would enable the archives to get involved with the research project well in time rather than on the eve of the field trip. Before embarking on field research they should seek methodological, logistic and technical advice from archivists to ensure that the material is in the requisite medium and of the requisite quality. Archives should be included in the grant proposal.

Methodical approach: Materials should be accurately labelled and documented to avoid mistakes; relevant information pertaining to permissions should be deposited with the archives.

Deposition of materials: Originals rather than copies should be deposited with the archives which is in a position to preserve them much better than individual researchers.

Administrative procedures: Researchers should sign forms with agreed terms of preservation and access to protect their donated materials.

Rules: Researchers must appreciate that they have to observe the

rules of the archives once their material is housed there, especially in terms of queuing up for access.

Preservation: Safeguarding audiovisual recordings is a very costly process and keeping records on an annual basis is more expensive than a fair honorarium for the performance, whatever it may be. This should be considered when asking for compensation for performances or deposited collections. Archives keep records for posterity and this is in the interest of both the performer and the researcher.

Archiving: Challenges of Ownership and Rights

The following question-and-answer session is a direct outcome of the issues that came to the fore in the debate summarized above. What rights do the archives hold over its materials? How should one share benefits with performers if commercial recordings are made? How can parts of the collections be made more accessible through exchange with archives and other methods? How can archives assist field workers and performers to obtain the rights they need and protect the rights they desire to protect?

The panel members could not research the questions but had to answer them from their own experience. Readers should also consult written legislation and materials in the Bibliography and Websites section for more information on details about legislation. Professional societies such as International Association of Sound and Audiovisual Archives (IASA), the Society for Ethnomusicology (SEM), and the International Council for Traditional Music (ICTM) can also provide contacts and information. Many of the general issues, however, are fairly well covered here.

Panelists: Grace Koch, Anthony Seeger, Dietrich Schüller

Before this session, the participants wrote down questions they had about copyright, publication and technology. The three panelists went through the questions, consolidated them and addressed them one at a time. Questions and answers on technology have been included in the previous chapter. Most of the remaining questions dealt with issues of intellectual property rights, publication and archives exchange. They are included here. Since these questions have come up over and over again in discussions among researchers and archivists

over the years, we present the subject in a simple question-and-response format.

ON COPYRIGHT AND ETHICS

What is really meant by the term copyright?

KOCH: I can speak best from the perspective of my experience in Australia and I will restrict my comments to musical performance. In Australia, there are two aspects to copyright. One is enshrined by law and that is copyright; the other is a philosophical aspect which is moral right. Copyright itself actually has its roots in legislation. So for those countries that have copyright law, there is a law they can refer to. Moral rights are not usually legislated, although some countries have such legislation.

Copyright protects original forms of expression—in music these are the performances on cassettes, tapes, films, etc. Moral rights protect the use of forms of expression. So we get two levels: one addresses the content and the other looks at the form itself.

Copyright, in essence, is a set of specific rights for creators of literary, dramatic, artistic or musical works and the makers of audio, video, photographic and film recordings. It gives them a limited monopoly on making copies (publishing) and otherwise using their original works for a set period of time. Copyright exists automatically if two criteria are met. First of all, the work must be original—to be copyrightable a work needs originality. Secondly, the original creation must be reduced to a material form. In music, ‘material forms’ could be notation on paper, a field recording or commercial publication. To be copyrighted, a performance has to be recorded in some way. If there is a song or a performance that is not reduced to material form, for example, if it is passed from generation to generation by oral tradition, that song is not in copyright until it is reduced to material form.

Copyright also lasts for a fixed number of years after the performance has been reduced to a material form (50 years, in Australia). There is always a time limit on copyright and that is a key thing to remember. That’s what copyright is all about. During the copyright period, the author or producer of the material form has specific rights as to who may make copies, among other things. At the end of the

period they lose their rights and the work becomes accessible to all in what is called the 'public domain'.

Could you explain the concept of 'moral rights'?

KOCH: Moral rights are not legislated. There are two major moral rights: Right of Attribution (recognition of authorship, performance or composition) and Right of Integrity (respecting material).

Right of Attribution concerns the recorded material on tapes—songs, ceremonies, etc. The right of attribution means that the right person is recognized as a creator of the work. In other words, you know that a particular person is the creator of a song and you credit him or her. In some cases the creator may be a clan group or a moiety or a community. There can be all sorts of different ownership. Unfortunately, in most countries, copyright legislation only recognizes individuals as authors. This has been a serious problem for recordings of tribal groups and communities because they may recognize non-individual forms of ownership. This is not a law. In Australia, moral right is not legislated. This is, however, something archives need to keep in mind whenever they make or acquire recordings.

Right of Integrity is the right not to have one's creative works subjected to derogatory treatment. In other words, it prevents people from taking material and using it for a purpose that is really demeaning to that material. It requires a certain respect for the material, not merely the use of it. You cannot simply take a religious song and use it without permission for something totally inappropriate. There is no law here either, but indigenous people in Australia have made declarations on how important this right is to them. [Since this workshop, a Copyright Amendment (Moral Rights) Act 2000 was enacted in Australia on 21 December 2000.]

SEEGER: The United States copyright legislation doesn't include moral rights either. But French law actually does speak about moral rights and that is one of the reasons it is coming up in international law. The issue of moral rights is a way of addressing some of the ethical issues that aren't addressed by copyright law. All of us know there are ethical issues in the treatment of performances. There are things that may not be legally required but that may be considered moral

obligations. The crucial question is, what should those moral obligations be? The rights of attribution and integrity are certainly two important moral obligations. There probably are some others. In Australia, legal instruments have been developed to give indigenous people control of moral rights and also to protect their material. Other countries have not yet even considered this.

How can an archives play a constructive role in issues of ownership and rights?

KOCH: Correct attribution is something that indigenous people would like to see given either to a group or to the rightful owners. Now, as you can appreciate, this may cause lot of difficulties for archivists too. It is very important that the archives deposit form clearly indicates correct attribution and approved uses. When people deposit their tapes or a collection of tapes, they need to indicate the attitude of the indigenous people regarding appropriate attribution and also with respect to approved uses of the recordings. We try to respect the wishes of indigenous owners of the material whenever anything is deposited with us.

Our forms have changed over the years. One problem we encountered was that our old forms did not foresee issues we now take for granted. Our institution is relatively old; it was established in 1964. When we opened, we used the Indiana University Archives of Traditional Music's old conditions for deposits. They allowed four types of access. One of them was open access to anyone. The others were more and more restrictive until the most closed access was access by staff for archival preservation only. No exception was made to allow the performers access to their own performances. Unfortunately, my institution has that restriction for some of its old collections. Some depositors have refused to change that even when we have tried to negotiate with them. So we have a very unfortunate situation where the indigenous owners cannot get access to their own cultural material. We are trying to deal with this right now.

SEEGER: Archives need to act proactively with respect to rights. We need to educate collectors about how to obtain the rights they need along with their recordings. We need to be sure that communities are

aware of how their rights can be protected if they wish to do so. And we need to be sure that the dissemination of the recordings in our archives is done in a way that observes the agreements we have made with depositors and those that they in turn have made with the people they recorded.

When it comes to permitting commercial recordings of a performance, I think it is really a question of archivists and researchers becoming involved and discussing a project with all parties, or taking steps to protect the material to be disseminated especially if it is going to be disseminated for sale.

As a researcher, one of the things you can do when you are recording is include a clause in your recording agreement stating that if any of the material is made available for sale, the artist will receive compensation for it. Such an agreement indicates that the performers were willing to let it be published. You can work out the specific payment schedule later. If you publish it, you can also attempt to get it copyrighted in their name. There are ways to arrange for publishing to be attributed to an individual, even when it doesn't seem to fit. We can talk about it separately.

What I am advocating is a kind of mediating role where archivists and researchers operate in the middle, between legislation that may be inappropriate and the communities that don't understand their rights. To a certain extent our job has to be educational, helping people to learn about the laws and, above all, to protect them from getting exploited by some third party.

I have found that once money is involved in a recording, people feel deceived and exploited even if they aren't. So if you can get publication permission in writing (or recorded on tape) then you at least can say: 'Look, this is what you agreed to, and you are not getting exploited any more than any other artist. It has only sold a 1,000 copies and that's all the royalty received from those sales.'

Once again I think the key to these issues is your recording permission form. If you make it very clear that you are recording something for research, for archival purposes and for publication—but if it is published (if they allow you to publish it) they will get something—

then you have the basis you need for future publications. You can't specify what they will receive because you don't know any of that in advance. Formats and prices change all the time. I think a clear permission form is essential for all new recordings. I have a form for all the recordings that I do with Folkways that are not for immediate publication. It includes a little clause saying, 'Yes, they may be published but I must receive some compensation.' Without such permission, not only are your rights to publish your recordings unclear under most copyright laws, they are also suspect ethically.

KOCH: My experience is drawn from the case of Australia which is relatively compact and has relatively fewer people within the country. One of the innovative things we have done is to bring members of indigenous groups to the Institute to see what the archives is all about. We have discussed it with them and we have shown them some of our publications so that they understand what we do. We actually haven't returned the original materials to indigenous communities. We have a programme where we make copies for them for their 'keeping places' or local archives. We do all kinds of things so they understand what it will mean when a recording is made by someone who is registered by the Institute. We are lucky as we have funding for doing this.

SEEGER: That is an example of establishing a middle way between the copyright law on the one hand and the communities on the other. AIATSIS has developed a very nice way of doing that.

SCHÜLLER: There is a constant tension between legislation and new situations to which the laws are being applied. Copyright law was invented for totally different situations than those it is now applied to. So there is always a lot of confusion. As archivists you are, in fact, between two fires. You can't really infringe on the copyright legislation, especially not if you are a governmental body. On the other hand, if you deal with a society which has different moral perspectives than what the law states—if the law is only in theory applicable to all the citizens but not practically, and if it creates great injustice—then you have to take the side of those parts of the society that you are recording or whose material you have in your archives. But sometimes you have to balance on a very sharp edge.

SHUBHA CHAUDHURI: *I want to ask Grace about the Australian situation. It is really true that it has provided lot of leadership and is unique. I was wondering whether this is because of government policies or NGOs being a little more enlightened, or is there some organization within the indigenous community that has led to this situation? Are these other bodies working actively? What accounts for this unique situation?*

KOCH: A number of things happened. First of all, Aboriginal Land Rights have come to the fore and ownership of land is inextricably connected with the ownership of songs, the ownership of stories and ownership of knowledge. This really came to a head in 1993 when the Native Title legislation was enacted. Previous to this legislation, only Aboriginal people in one area—the Northern Territory—could claim ownership of their traditional lands. Native Title extended land rights to all areas of Australia. Although it did not give exclusive ownership (as in the Northern Territory), it meant that Australian Indigenous people could claim the right to be recognized as owners of the land and to have a say in how it would be used. And they have seen the injustices. More and more Australian Indigenous people are becoming educated as well. I think it is these sorts of things that give the Australian case its particular features. A political body was formed that is almost a government within our government called the Aboriginal and Torres Strait Islander Commission. Its commissioners are elected from various parts of Australia. Australian Indigenous people were elected by other Australian Indigenous people. This is a very strong political body. They take great interest in legal matters. I think all of these things together have served to make this situation what it is.

Who can actually be considered the owner of a recording?

KOCH: In Australia, mechanical copyright or ownership of the tape or other carrier belongs to the person who presses the button of the tape recorder, the person who actually makes the recording. There is a qualification to this. If that person has been funded in a project, then the copyright rests with the institution that has paid for the recording to be made. In Australia we recognize the owner of the mechanical copyright, the depositor and also the community who owns the cultural material.

CHAUDHURI: *Indian law doesn't give any rights to a recordist. This is one of the areas where researchers need to examine national laws very carefully. An Australian might assume she owns the performance because she recorded it, but in India this would be incorrect.*

SEEGER: Countries differ on this. In India the real ownership lies with the performer, regardless of who recorded it, regardless of where it was stored, regardless of the agreement signed. The right lies with the performer alone. In Vietnam, as I understand it from Professor To, the right lies with the government. No matter who recorded it, no matter where it was made, no matter what archives it is in, the government owns it. The answer to your question is that there is no single answer.

Who *should* own it? Most archivists and activists feel that creators and performers or their communities should own and control their own cultural heritage and its use. As researchers and archivists, we should be pro local control. Specific rights should be transferable, however. They must be transferred if we are to be able to use any recordings in our archives. Performers can transfer the right to archives, publish and otherwise use their performances to a researcher, to an archives, to a record company, to a collection agency or to whomever they want. I think it should begin and end with them.

I don't think that the person who happens to have a tape recorder should have all the rights to a performance. But that's my opinion and that has nothing to do with what is true in various countries. I think there is a moral right to control the results of one's art but that should not be confused with a legal right.

As archives, what rights do we have to take into account when we publish recording?

SEEGER: There are two major kinds of rights that need to be negotiated, and usually paid for, when you publish a recording. One kind is the right to the performance itself—the sounds performed that you capture on tape or any other medium. The other thing you need is the right to use the composition if it is under copyright. This refers to the work that is being performed. These two different kinds of rights may be controlled by a single person—for example, when you sing a song

you wrote. Or they may be controlled by entirely different people—as when you sing a song written by John Lennon and owned by a publishing company controlled at one time by Michael Jackson. To publish a recording of you singing a song composed by John Lennon, you would need permission from the company that controls the composition. In order to produce a recording, you have to obtain the rights for both the composition and the performance.

Our archives mostly contain performances. Even if we have permission from the artists to publish their performances, we don't usually have permission from the composers to publish it, if the composer is different from the performer and if it is copyrighted. It is important to keep this in mind when you are working on any publication. When you are sitting in the archives it doesn't matter quite so much. When you start to think about dissemination, these two become relevant because the central issue in copyright is making copies.

Once a composition is so old that it has gone out of copyright, you don't need to worry about obtaining permission because it enters what is called in US law the 'public domain' and is available for anyone to use. In many countries, all folklore is also available for this kind of free use, without any permission. Thus if you want to record the old English ballad 'Barbara Allen' you don't need to worry about the composer's rights because it is hundreds of years old.

In some countries, if you want to make a copy of a very old commercial recording, one that was published so long ago that it is out of copyright (the amount of time required for this varies in different countries), it is legal to do so because both the performer's and the composer's rights have expired. You would not need anyone's permission nor have to pay anything for it.

Copyright legislation in most countries does not cover folklore. Folklore and traditional material are excluded from copyright because of the way copyright law started and grew. It was created to protect new things produced by urban literate people living in cities. No one was thinking about protecting other people's traditional knowledge at all. Today, people are thinking a lot about traditional knowledge, not only musical knowledge but especially pharmaceutical and other

traditional knowledge that may yield profits. Efforts are being made to change international legislation in this area but so far only local or national regulations grant individuals or communities ownership of traditional knowledge.

AL-DAW: *In Sudan, my country, for example, folklore is not protected by copyright law. In our case it is very difficult to differentiate between the performer and the composer. In many cases you don't know whether the performer himself composed the piece or if there is any other composer. They may never tell you because they think that there is a difficulty in doing so. Instead, people will identify themselves as a group and they will say that a certain performer is the best performer who can sing for you, and that's all. The other details are kept secret.*

SEEGER: If people don't tell you who composed the song, then you can credit it as 'unknown' or 'traditional'. How should you deal with the community as opposed to the individual? Most copyright laws are built around a kind of myth of individual creativity. Many of us record in places where communities claim ownership of ideas and not just individuals. This is another area that is being reconsidered in international copyright legislation, but on which there is still little international agreement.

The situation is frustrating. In order to protect traditional materials, we would have to claim that they are newly created by an individual creator who then gets credited and paid. There isn't much we can do as archivists about this. We can catalogue by group name or claim arrangement copyright for the specific performances we publish.

Archivists can be advisors in this, but the real responsibility has to lie with the communities and the collectors. In your specific case, you know the law and you have done the field recording. You are the archivist and you did the research. The researcher is often the key person in deciding what the best mechanism is to make something work in both a national legal framework and a local context. But as archivists you need to recognize that most researchers do not know the copyright laws of the country in which they do their research.

AL-DAW: *My question is that in some places the music is performed by a group, singing, dancing, etc. If we want to use this material for*

production, to whom should the copyright go? I ask this because part of our work is to give the performers a portion of the productive material, 50% of the product material is sent to the performers. Should we give it to the chief of the group or to the local government? What should we do?

SEEGER: You need to think through your fieldwork experience to decide where to give the 50% of the cassettes you manufactured. I believe they are meant to be given instead of monetary royalties. Some copies should go to each of the artists and some probably to the headman or other person who admitted you to the community and gave you permission to record. The advantage of copies of cassettes is that they are inexpensive for you to make, but the artists may be able to sell them, trade them or record over them.

What is the situation with fair use or fair dealing? What about researchers?

SEEGER: In the USA there is a provision for 'fair use' (also called 'fair dealing' in Indian copyright law). This allows individuals to make copies of copyrighted works for individual and educational use under somewhat vague conditions. 'Fair use' is not found everywhere—it is not found in parts of Europe, for example. In the USA, copyright owners are constantly trying to reduce the scope of 'fair use'. They are also trying to prevent things from entering the 'public domain' where they can be used by anyone.

UNESCO has a policy of keeping as many things in the public domain as possible, especially those works that are there already, and not putting them back into a publication which is again copyrighted to earn money. One can argue that there is a basic democratic right to get information and this must also include cultural information about one's own and different cultures. Against that one can also argue that traditional artists should get the same rights as artists whose works are considered 'new' and thus are protected by copyright.

One of the problems archives face is deciding what exactly constitutes scholarly and academic use. Many publications by scholars are also entertainment; a lot of entertainment is also scholarly. This makes it somewhat difficult to maintain the traditional distinctions about scholarly versus public use when considering our recordings.

If there is a known composer, there is a mechanical right. Does this mean that if you produce a recording of a song composed by a known living composer you have to ask that publishing company for permission or can you say that the collector has already paid the composer the royalties and that is done?

SEEGER: You have to ask permission. In the USA, you have to get a written license to do it. In many countries, composers assign their rights to large publishing companies or collection agencies who act in their interest. These agencies grant licenses to recording companies to produce recordings that use their compositions and collect money for it. Since these royalties, called 'mechanical royalties' in the USA, are usually paid on the number of copies actually manufactured, the fact that a researcher previously paid a composer something will not usually make a difference—unless there is a written contract to that effect that states that the composer waives his or her right to further royalties.

KOCH: There are companies that actually help with the licensing of this material. In Australia, if you want to publish something, you don't necessarily want to go directly to the composer. But you want to make sure that they get the money that should be coming to them. There are lots of organizations that arrange for payments to the people and you work through them. In Australia, they are thinking about creating an indigenous licensing organization that will protect indigenous rights and make sure that they are paid.

Does copyright exist outside the publishing process?

SEEGER: Yes, it exists from the moment a performance is recorded or transcribed. A work is automatically copyrighted in most countries. In general, making copies for archival preservation is not questioned, but once you start making copies for something else, it may be. For most archives, the issues of copyright only really arise when they want to publish something, or disseminate it widely.

Does copyright exist just by the expression of something created in material form?

KOCH: Yes, once it is in material form or once it is on the tape. My question is about a recorded interview, or oral history. It may be somebody talking about biographical details, family history. What is

the experience with that kind of material? Does it have copyright in the same way?

KOCH: In Australia, the owner of a recorded interview is the person who made that tape or cassette. The person who pressed the button actually has ownership of that cassette or recording. But we insist, in Australia, that where there are individual interviews, the interviewee should participate in determining access to the tapes.

SEGER: In South African copyright legislation, interviews are specifically excluded from being 'works'. Informal speeches aren't works, impromptu speeches aren't works but formal speeches are. Oral histories and the like are one of the areas that may vary widely from country to country.

Let's say a fieldworker works on a project to create archival recordings, where the project director is also the archives director. The fieldworker wants to publish a book on ritual music. What is the obligation to the project director for the use of the materials? Is the copyright shared with the director? Should the ritual performers get paid if they are now deceased?

Who really owns the recordings anyway? Where did the project director get the money from? What were the obligations with respect to the ownership of the material in the archives? That is the first question I would ask. In general, if the use is ethical and legal, then the archives director should not prevent the researcher from using the materials.

There is a broader issue here, though. People making recordings as employees need to have their rights—and those of the employer—spelt out in some kind of agreement. All the Smithsonian contracts with researchers say the material belongs to the archives, not to the individual. That needs to be clear. People are working for an archives if they are paid by an archives, and not for themselves. Forms are a real nuisance but they have the great advantage of making things clear later because verbal understandings or sympathy at one moment can disappear under another situation. On the other hand, if you have done research you should be able to use the recordings and analyse them in your own publication.

Should you share the copyright with the director?

Your scholarship is your own, so I do not see why you should share the copyright with the director. You do, however, need to give bounteous credit to him or her as well as to all the others who assisted you. If you use recordings from the archives, you will need written authorization to do so—the copyright in that case would probably not belong to the archives but to the artist.

I have a question about access to foreigners. Can we make copies of archival material for foreigners? How do we coordinate copyrights of different countries?

SEEGER: My answer is that you should look at your laws. In my experience, however, there is just as much exploitation of artists by people within a country as there is exploitation by foreigners. Many citizens of almost any country are ‘outsiders’ with respect to a given cultural community within it. I would argue that it is best to treat everybody who wants to use materials as equals.

This said, it is important to note that many countries *do* make precisely that differentiation. Indonesia is one such case, and there are others.

Comment: In China this is ambiguous, a gray area. There are very clear regulations about printed material and, in a sense, anything which is unpublished. If you give it to a foreigner and people are unhappy, your act is viewed as leaking state secrets. This has been done in cases that were seemingly innocuous. Whether or not a recording could be considered in that way is unclear. I know that people doing fieldwork don’t have any guarantee that they have the right to anything. In that same sense, if someone provides a copy of an archival recording or something, there could be a very clear distinction between giving it to foreigner or to a citizen. So I think this distinction is important to keep in mind.

Comment: In Sudan, we don’t distinguish between foreigners and general users. The material is accessible to any user. But we have restrictions about certain materials not being accessible to all users because some performers are convinced that this material is for archives use only and should not be available to users until a specific

period of time has elapsed. This is the only area which is prohibited to users. But I think it will make international collaboration very difficult if we distinguish between foreigners and local users. I think people who have such laws should work hard to make no distinction among users. I am looking forward to sharing our cultural material all over the world. This is the attitude we should adopt.

As archives, how do we coordinate different copyrights of different countries through international collaboration?

SEEGER: The most important laws to be familiar with are those of the country your archives is in and those of the country you plan to publish anything in. Anything published in the USA is governed by US copyright. But if it was recorded in India, that has an effect as well.

Archivists can be a lobbying group and there is already some archives representation within international organizations such as World Intellectual Property Organization (WIPO) and UNESCO that are looking at these sorts of things. There is lot of money involved in issues of intellectual property, however, especially in pharmaceuticals. Archivists are a very unimportant lobby compared to the other powerful groups involved. We definitely need our feelings to be known, to make statements like Dietrich has done about the importance of fair use, like Grace has done about the importance of respecting communities and seeking their involvement in creating whatever legislation emerges. There are number of areas where our expertise needs to be heard. We do not have to coordinate these ourselves. They are being coordinated by the WIPO and by UNESCO, and both the International Council for Traditional Music and the Society for Ethnomusicology have groups of people concerned with these issues.

What is the best strategy to get the release agreements for field recordings? When does one bring it up with the performers?

SEEGER: The best strategy is to create a suitable release form for all potential uses you can imagine before you go to the field, and to get the permissions before you begin recording. The actual strategy for getting permissions may vary. If you are working with people who do not know about writing, then it is often better to discuss the issues on tape and get the permission recorded as part of the event. If you are

working with artists who have lawyers and managers, then get a very detailed 20-page contract that grants you the rights you need. The most important thing is to be sure you have the right form before you start and that you get the permissions as you proceed.

The permission can be informal. It doesn't have to be filled with legal jargon. It could be a discussion of the following type, for example: 'May I record you today for research, archiving, and preservation, so that your grandchildren can listen to it?' And they may say 'That's a great idea! Let's start!' Then you can say, 'Some of your performances are so wonderful I think many people would like to hear them. Would it be all right if we used some of these recordings on a commercial recording and send it all around the world, as long as you get a share of the royalties on it? You might not get very much money, but you will get a share of anything that is paid.' And they might say 'Oh yes, that's a great idea!' Then at least you have two separate things clarified: the archival rights and the commercial rights. As you go along you can ask about attribution and appropriate use.

You don't need a 20-page contract but you do need something you can show later to that person's children and grandchildren as well as to the publishers who are taking the responsibility of publishing.

SCHÜLLER: In Austria, for example, if we do recordings of folk music or things like that, we do not mention publishing in our agreements because it would raise false expectations. However, when we go in for publishing, we can go back and take permission.

KOCH: This is a very important point for deposit forms—the conditions you put in your forms to give your archives enough freedom to meet your objectives but also to protect the rights of the individuals or communities. You have to maintain a balance.

In matters of publishing, do archives have any kind of rights?

SCHÜLLER: In my contract at the Phonogrammarchiv, I have a clause that says we want only the right for scholarly research and nothing else. Any publication is commercial and, if there are revenues, they will be divided by the owner (which in most cases is the collector) and the archives. We allocate two-thirds to the owner and one-third to the archives in recognition of what the archives has done for the preser-

vation of the material. This is our standard point of reference, recognized by everybody. Because we are not Folkways, we are not in the possession of so many rights and there is not that much money involved. But I think we should consider our own rights which we achieve because of our work as archives. Archivists should, in their negotiations with the copyright holders, always have a figure in their mind of what their costs are so as to counterbalance the threats or the demands from the other side.

We are approaching a point where there is a total disproportion between the claims of the copyright holders and our costs to protect the material on which their claims are based. In Amsterdam, in 1987, I said this to some of the copyright lawyers. They tell us what to do and what not to do because they think that the law is the gospel and there is nothing to negotiate about. I said, 'We will come to you one day and say okay, you imposed these restrictions on us, which means that if we ourselves listen, we have to pay compensation. But then we will give you the bill for what we are protecting because you could not be making these claims if we were not preserving the originals. Specifically, we will charge you for the cost of electronic and audiovisual preservation. Yes, I am very sorry, but we have our expenses too.' We have to try to reverse this imbalance.

Putting something on the Internet does in a way almost sidestep a lot of the issues about national copyright. What are the things to be considered in deciding to put material on the Internet?

KOCH: To speak from my own experience, we are not putting any of our direct audio material on the Internet yet, until we negotiate with the indigenous owners of the material. We are very wary of this at present.

It also seems to me that under Indian copyright law, where the performer owns and controls the performance, your right to put something on the Internet is doubtful. The Internet can be considered a form of publication. You will need to have the right to do that under most copyright laws that I know of today.

Comment: We have to use the same parameters as we use for other forms of access. The Internet has the same implication. If you are not

allowing a foreigner to have access to certain material, you cannot put that material on the Internet. You have to follow the very same conventions. Right now we were told that if you use streaming instead of downloadable files for audio, it could be allowed. No one can record streaming and it becomes like a listening right.

SEGER: This is an evolving question. Will the Internet be considered to be like publishing or like broadcasting, or like something totally new? Technology is advancing far more quickly than legislation. Internet publishing is something you have to be careful of. You don't want to be the test case in court for misuse. A test case establishes the precedent for everybody else and also gets you in trouble for many years. I would follow rather than take the lead. Let a large company or a major institution take the lead, then we can follow what turns out to be the precedent. On the other hand, I do think the Internet offers great potential for dissemination of archives collections.

Which organization should protect or punish misuse? Is there some kind of implementing agency? Otherwise anybody can violate copyright laws.

SEGER: That is one of the reasons we suggested that archives could serve as watchdogs, as organizations that can denounce misuse or violation of copyright law because we are the ones who know what is appropriate. We specialize in it. We could take activist positions on these issues. Hugo Zemp has written a very interesting article on this (Zemp 1996). In my opinion, notifying the infringer of the situation may be sufficient to get it changed or for a compromise to be worked out that includes a sum of money for the person whose work was used without permission.

Comment: Collection agencies are found in many countries. These are organizations that collect royalties on behalf of performers and they charge money to do so. That becomes a very important resource in many countries. We have one in India but it is not really active. We are still talking law and not talking ethics. This is just a legal position with copyright so that you can actually sue in the court, just in the regular court.

Regarding the sharing of profit from archival holdings with your performer, to what extent is it practical, particularly when you made a

one-time payment to him and didn't give him any further rights? If you have several recordings of different persons and somebody wants them, it is not possible to contact the performer.

SEEGER: Usually CD production is not the first thing you do. First, you store the recordings in the archives. Later, after some years, you might make a CD for production and then you can return to these people and give them the share of any payments you have received. If you have done a one-time payment, you have already shared the profit. That is easier because you are sharing even though you don't know there is to be a profit. When you make a payment, I think the main thing is to obtain the rights for all kinds of uses. The problem comes when you make recordings for research and archival purposes and you pay or do whatever in keeping with that, but later decide to broadcast or publish it. If you do that without establishing a fresh agreement, then people will start feeling betrayed and think 'this archives or institution is exploiting us' or something of that sort.

Can an archives make copies of commercial recordings?

SCHÜLLER: The question about making copies of commercial recordings is really related to what you are allowed to copy. In Austria, archives aren't allowed to copy any commercial recording for any purpose except for personal use. An archives might be able to do it under some aspects of fair use in those countries that have it in their legislation. But most archives don't make copies of commercial recordings at all. It seems to verge on the illegal, and the last place you want to be illegal is your archives. It exposes you and the institution you are a part of to really terrible things. It is very dangerous to make copies. You might have to close the institution if you are prosecuted for it. You have to be extraordinarily careful about it and you should also look at your national copyright law for details.

Comment: In some countries you can make working copies if you own a commercial recording. If you own the original, you can make a preservation copy. But these rights vary nationally.

Who can make copies of old recordings that are out of print or for which no company exists?

SEEGER: No one can make copies of an old recording that is still within copyright without permission because someone still owns it.

You may not be able to find them easily, but someone somewhere probably has either the master or claims the rights to them. Your country might have specific copyright regulations that cover this. Europe, for a long time, had a 50-year limit on copyright after publication. This meant that a lot of recordings in the United States, which are still under copyright from the 1920s, 30s and 40s, could be legally published in Europe. They are only 'pirate' publications if they are sold in the United States. So you need to look at your own copyright law and see if you are allowed to publish recordings, and how old they must be.

Is an archives responsible if someone makes a personal copy themselves in the archives?

KOCH: Could I just say an archives needs to have an indemnity form whether it is a commercial recording or not? An archives has to protect itself against misuse of its facilities and collections. Every archives needs to make its users liable for any misuse of the materials they obtained from the archives.

SEEGER: If somebody borrows or secretly copies a tape from your archives, s/he should be held legally responsible for that misuse. You are required to check that copying is not done in your archives. If you provide the patch cord for making a copy, it may be legitimate in terms of your mission but is illegitimate in terms of copyright. In the ARCE, when the users sign a request form, they are also agreeing to the fact that they are legally liable for any misuse of the recording. Controlling copies in an archives can be quite tricky. I do know that people have sneaked into archives and taken things out of a headphone jack or something like that. At Indiana and UCLA, the recording heads have been removed from the tape recorders provided for listening and the rooms are supervised. In my experience, nothing damages an archives' credibility more than having illegal copies circulated that reach the ears of the artists.

Who ultimately has legal responsibility for your archives? It is probably the institution of which you are part. It might be the university, the institute or even the national government. But if something happens, they will blame the archives. Dietrich is not exaggerating when he says they might close you down for a single prosecuted violation. It is important to be able to show that you have taken steps to

avoid misuse of materials under control and to make sure that the user knows s/he is legally responsible for any misuse.

What are the implications for an online catalogue?

SCHÜLLER: What comes in here is also the distribution of sound samples over the Internet. You could not, according to general copyright law, put all your material on your web server and disseminate it without clearing copyright. However, there are attempts to allow users to browse samples on the Internet of what you have in your collections, even if it is copyrighted material. But this is not yet negotiated. I just want to suggest that you should keep this possibility in mind. If you can let potential users hear 30 or 45 seconds of a musical example, it gives them a meaningful idea of what you have. If you make this available in low quality—something like Real Audio™ and not in MP3, nobody can really misuse it. But on the Internet it would attract the potential interest of a wide audience to even copyrighted material which could be then correctly acquired. So the archives could operate as a showcase of recordings, like a bookshop.

It is not illegal to read a book in a shop. Why should archives not offer the same possibility? Then the users can buy commercial recordings or consult the archives, because providing a sample on the Internet is an incentive for them. This could be one of the future roles of libraries and archives of published material. The samples are an aperitif for the performances. This arrangement will be beneficial to the copyright holders.

SEEGER: In fact there are many commercial companies in the United States that specialize in sample recordings. Most newly-released commercial recordings have 30-second samples of each track (or a selection of tracks) available for free listening and downloading on Internet stores, for example CDNOW or amazon.com.

SCHÜLLER: So is 30 seconds accepted?

SEEGER: 30 seconds is not legally accepted but it is the promotional standard. Almost everybody is now saying 30 seconds is all right. Ideally the sample is promoting the sale of a recording whose sale will benefit the copyright holders, so it is all right.

EXCHANGE AND COLLABORATION BETWEEN ARCHIVES

What would be the guidelines for exchanging recordings with other archives?

KOCH: In thinking about exchanging recordings it will be really helpful to know what the collection policy is of the archives that you approach. They might have material that they would give to you. For example, our brief is to collect Australian Aboriginal and Torres Strait Islander materials. If someone overseas wants to exchange recordings with us we have bit of a problem because our archives really doesn't extend to non-Australian indigenous material. So there are things you need to think about when you approach the organization for exchange.

SEGER: I received a lot of requests for exchange when I was running the Indiana Archives of Traditional Music. The problem was that it cost me money to make copies and it took the staff away from doing the accessioning and other work that had to be done. What was I getting in exchange for it? I was not sure of the documentation quality. I was not sure it was something we wanted. So it is very hard to do exchange right away if somebody requests it. Exchange has to be done with a much longer discussion of objectives among the institutions doing it. Make sure that exchange is interesting to both parties, otherwise it becomes onerous and expensive. Ideally, we all want to have our collections somewhere else, in case a bomb drops or a natural disaster destroys our archives. Setting up exchanges, however, can be extremely time consuming.

LAYNE: We have a kind of collaboration with a Modern History archives which helps us by training people who deposit tapes with us. As a result we face a strange situation. We are both archives, both doing oral history and taking deposits. We are trying to sort out how to deal with that. One is based at a university. We have a greater moral claim because our material is more easily accessible. It is a form of sharing that has already happened. I wonder if you have any advice on how to unravel the situation. Because when we went into it, with great ignorance, we thought we could somehow share the copyright of the material and both institutions could claim ownership to it. But I

increasingly think it is not practical. I wonder if you have any comments or advice.

SEEGER: When you go into any relationship, you should not assume that anything can be shared. It is very hard to share copyright. It should be clear who actually controls the decision-making on anything you do. It sounds very authoritarian but it is the only way to avoid misunderstandings later.

Going with another institution or individual is fine but if one party does not have all the rights, then you should know which rights each one has. That is the exercise. 'You store these and protect them, you grant on-site access to them, I have to approve copies, we both get credit, etc.' Rights can be shared but you have to be very clear who has which rights so that you don't end up with misunderstandings and lawsuits later.

Comment: Exchange depends on problems like manpower as well. I also end up saying that I feel the need to renegotiate our depositor's contract because it was for access within one archives and it wasn't for access in another archives. So agreements have to be redone.

ARCHIVES FUNDING

How do we get money for preservation copies?

SCHÜLLER: We have a policy to support researchers by loan of equipment and recording material in return for archival copies. They are also methodologically and technically trained if necessary. And this has worked very well for a hundred years. We have recently started asking researchers who get grants for field projects to request money in their grant proposals for archiving, so that the costs which are necessary later for transfers of working copies and for making archival copies would be covered by their field project. This is our situation. If you have a good proposal, you get the money. Sometimes it does not enormously raise the overall sum of the grant you are asking for but it should be considered from the outset.

Secondly, some funding institutions and international funding agencies are sympathetic to archiving. We should also try to convince copyright holders and intellectual property protection societies that we are serving their aims and they should put money in archiving. I

am thinking of Switzerland, and I am sure that there are many other instances where such collaboration is already happening. This is especially important in the complicated work we face, the work of very elaborate technical inputs into safeguarding audiovisual and electronic documents. The companies who want to make money in the long run should also be interested in physically safeguarding things on which their financial interest is based.

SEEGER: That is an interesting possibility for the future. Some countries have a long way to go to have something like that. Regarding other sources of funding, the Ford Foundation has financed archives all over the world. It depends on the cultural programme in every country. But you can certainly enquire. Another possibility is the Rockefeller Foundation which has some international activities.

Comment: We had an equipment grant from an agency but they wanted to give us only dinosaurs. They had a rule that developing countries don't get the latest generation equipment.

SEEGER: That is possible. Some agencies don't work out. You can also look to government grants. You can look at international aid arrangements and see if you can get your archives built into their plans. What we are trying to do here is to give you an idea of what funding opportunities may be available around the world. If a particular agency is operating in your part of the world, your chances may be much greater because of that. UNESCO might provide some funding under certain circumstances. It is important that you try to find outside funding because often just obtaining funds convinces your own institutional administrators that your archives is more worthwhile than they had previously thought.

Comment: Unfortunately, there is no simple answer. Funding is different in different countries. The same agencies that fund archives in other parts of the world only fund development projects in India, like irrigation or primary health.

PUBLISHING ARCHIVAL RECORDINGS

SEEGER: Publishing archival materials is a form of dissemination of your archives' holdings. It might also bring a small income to the

archives. Many of the issues that we have been talking about become acute when the possibility of making money is involved. That happens at the moment of dissemination through publication. The publisher is, in principle, trying to get financial returns to cover all of the expenses and something extra which the publisher will use to produce additional recordings and perhaps pay stockholders.

What advice do you have for archives who want to publish their recordings?

SEEGER: The first thing you have to do when you want to publish a CD is to ask yourself who you are trying to reach. You might want to disseminate the material inside your own country or region. In that case you don't need an international publisher. You want somebody with a presence in the market or community you are trying to reach. If you are trying to reach an international audience, if you want to call the world's attention to the wonderful things in your country, then you do want international distribution. It really depends on what you are trying to do with your publication. Who is it for? That is something to think through really carefully because everything else depends on that first decision. Even the style of the liner notes and the selection of the photographs depends on your answer to that question.

In a proposal I developed for the TRAMA archives in Sudan with Ali al-Daw for producing cassettes, half of the cassettes manufactured were to go back to the artists and their communities instead of monetary royalties. This was so that the recordings would get circulated within the community and across the local markets rather than only outside. Another part of the cassette-manufacturing run was to be for the archives, for exchanges around the world. Yet another part would go to the archives to sell and thus recover costs. It seemed like a sensible arrangement for certain objectives. It takes care of the intellectual property issue, encourages local distribution of the product and hopefully strengthens the local tradition. There are lots of other ways to create interesting publication programmes that fit your specific objectives. I recommend that you do not immediately leap to the conclusion that an international commercial project is the best publication for your archives.

Another challenge is finding a good company to manufacture and distribute your CDs. One way to find a good company for your own kind of music is to look in stores in the market area you want to target and see what company is publishing the kind of material that you want to have distributed. You just go to the market or the record store, look at the recordings, pick them up and find out who published them. You can often find their addresses on the back of CDs or cassettes (pirated recordings may not be helpful for this). Many record companies also have websites, some of which describe the best way to submit record proposals. I always recommend starting with companies that produce the kind of projects you would like to produce. It means they are experienced and successful at least in reaching the store or market you are in.

When you approach a company with a request to publish your recordings, remember that they are getting hundreds of proposals. You need to make a strong case as to why yours is important. There is much more good music being recorded than can possibly be published. Your justification should go in the first letter. You could write 'I am really interested in publishing this CD. It is very important material, performed by the best artists in the world. Nothing else like it has ever been published. I have seen your recordings and really like the artwork and presentation.' You should probably send a CD-R so that they can listen to some samples of what you want to publish.

I wouldn't send the whole project unless they ask for it. Record companies usually don't have time to listen to it all. Hundreds of projects are submitted to Smithsonian Folkways every year. And it is a small record company. Once the company expresses interest, you can start to negotiate the terms. I went through the kinds of things you should negotiate in some detail in my article (Seeger 1996). I don't want to repeat that here except to say that you want to negotiate for rights at the very beginning, while you are negotiating the other details of the recording. It is too late to get them back later. You need to work that out beforehand, when they have the project and before they put it out. That is when they are interested in these subjects.

Once you have negotiated the rights, you need to find out what format they want for the sound, the photographs and the text of the

notes. These things vary from company to company. Many companies only allow a very short booklet, so that is something to investigate quite early in the project if you have a long essay in mind. The Internet provides interesting options for making additional material available while keeping the booklet itself really short.

Should you publish works of performers or groups that cannot be traced?

In general, the answer is that you should publish works of performers in groups that cannot be traced only after you have tried very hard to trace them. You should trace them first. If you can't find them you should check with both copyright law and an entertainment lawyer in your own country, since different countries work in different ways. It is very important that you should have made a good faith effort to find the artists or groups. You should be sure there is also a paper trail showing what steps you took to find them. This way you can demonstrate to the company that you sent a letter to the artist's last known residence, you telephoned the artist's son, you went to the national registry of births and deaths and so forth. You should document each one of these steps, including addresses, telephone numbers and the dates you called, everything you did. You can make a copy of this for the publishing company and they will put it in their files to protect themselves in the event that anyone questions their right to produce the recordings. If there is a question later, the company can demonstrate that it did not publish the recording without looking for the artist. In sum, try to get permission. You will not find everybody, especially in case of old recordings. But do your best and document what you did to try to find them.

Should you pay performers when you make fieldwork recordings?

It is difficult to generalize about how to deal with payment for performances. What you do depends partly upon what the artists are asking and what is common to the specific tradition you are working in. You need not pay them for royalties for a CD project in advance because you don't know whether it is going to come out or not. Many recording projects never materialise.

Sometimes a single payment is the best option. The Ford

Foundation grant that Smithsonian Folkways received for a 20-CD series of Indonesian music included money for advance payments to the artists in the budget. That advance payment was meant to cover the anticipated sales of the CDs. We paid a flat fee to the musicians who signed a contract giving us permission to publish the recordings. There were many artists involved. To trace them all later would have been impossible. If you pay everybody in advance, you don't have to use their material—they get paid whether or not the material ever gets published. That is useful for the artist. All of the Indonesian recordings are now in archives in Indonesia and the United States, and all the recordings are pre-authorized for publication. That makes them very useful for future projects.

So should you pay artists to a certain extent?

Yes. If you are planning a publication project you should also try to include payments for the artists. But if you do pay them, you should be sure to get some kind of document authorizing you to use the recordings and also indicating that payment was received for their performance. You can even agree in writing to give the artists their share of future payments from recordings, but you cannot be very specific unless you already have a contract with the record company. Companies vary widely in their rates and the recording industry is changing very rapidly. The most important thing, as we have been saying over and over again, is to make some form of agreement that is quite explicit about giving permission to publish the recordings as well as to archive them.

How can archives protect themselves from commercial misuse?

This may be easiest to discuss using an example. I will give a hypothetical example although Hugo Zemp has published an excellent detailed description of his own problems dealing with record companies in the *Yearbook for Traditional Music* (Zemp 1996).

Imagine that a researcher came, obtained a legitimate research copy from your archives and took it home to analyse. While he listened to it a friend said, 'That's a great recording! Let me borrow that tape.' The friend then takes it straight to a record company and the music appears on a record label. Suddenly, the performers bring you

a copy of the recording and complain that you have not been honest with them about how you intended to use the recordings you made.

The first thing you should do is write to the record label that published the recording. The record label may not have known what it was doing. It may, in fact, have thought it had clearances. If they do not answer your letters, or write and say, 'No, we just got it from this person who walked in off the street and we don't care if he had permission or not. We have published it, tough luck,' then you may have to take further steps. You can go back to the person you gave the authorized copy to. Or it may be that someone in your archives is at fault. If it seems that the record company is at fault, then you can pursue your claim in court. But lawsuits are very expensive and time consuming. The companies have much more money than individual artists or archives and their lawyers are very experienced in protecting company interests. Occasionally, however, the companies find it less expensive to settle the matter out of court. This should include both financial payments for use of material and formal apologies to the artists and the archives.

Ethnomusicologists or archivists might also get together and agree that some record companies are causing problems and try to pressure them to change their business practices.

Typically, what is the recommended arrangement or compensation for performances recorded specifically for a CD to go with a book? It is being done more and more.

A CD published with a book is somewhat different from a commercial CD, because the price of the CD is built into the price of the book and therefore is not usually the full price. The purpose of the CD also is not to serve as popular entertainment but as a supplement to some kind of scholarship. The two types of rights that need to be negotiated—performance rights and composer's rights—remain the same, however. Both need to be negotiated and paid. Book publishers usually require the author to obtain all clearances, so you may be limited as to what you will be able to include. You can often arrange a one-time advance payment to artists and collection agencies for the print run of the book (usually under 3,000 copies) but you need to

negotiate that with the book publisher in advance. You need to be careful not to sign away rights to further uses of the music beyond that of the CD in that particular book. You need to retain the rights for uses other than that in the book. Otherwise the book publisher may sub-license the materials for considerable profit.

Should the performers of ritual music on the recordings get paid if they are now deceased?

That is a difficult question because of the practical obstacles to making the payments. The answer, in principle, is yes. If money is being made from their knowledge then somebody should be paid. Who should get paid? If it is an individual, then you can find an heir. If it is a community, then you give it to the community.

We have made all kinds of royalty arrangements at Folkways. How the money actually flows is something that is not automatic and needs to be discussed with members of the community. If you talk and figure it out at the time you make the recordings, it helps a great deal. If you don't, you have to decide later, which is more difficult. If you have a book with hundreds of artists mentioned in it, then it is probably impossible to find every single one and pay them. That's when you may try and give it to a foundation or a cause—if you don't have the disposition of payments for the book or recording specially mentioned in the contract.

SCHÜLLER: If you publish historical materials, it will be almost impossible to find anybody who can really be linked to the recordings. The whole enterprise of trying to locate them could cost as much as 1,000 times more than what you would normally pay as compensation. What would you do if you wanted to produce a compilation of many different artists from your archives? It is definitely a non-profit publication of archival holdings, although it is sold.

SEEGER: If it is a compilation of many different artistes from archival holdings, then in that case it may not make sense to try to find heirs and pay them. This would be especially true if no one has any legal claims left because of the passage of time. In your case I would simply say that it is archival material. Then wait and see if anybody complains. If it is archival material of a single artist, however, even if it is beyond the copyright limit, I think the ethical thing to do is to try

to locate someone who can benefit from the publication. I would say the same thing if all the recordings were from a single community. I think there has to be a limit to artists' claims balanced by an objective for the archives which have preserved materials. We have an obligation to artists, but we also have some obligation to make this material available for research and analysis. As long as we are working within the law and it is ethically appropriate, I think we should consider our obligations to the general public as well.

SCHÜLLER: I would say, perhaps as a general perspective, that archives are doing something for the communities by publishing their older traditions. But it puts us in a peculiar position if we have to pay compensation for something that happened 90 years ago and is not making any money for us.

SEGER: There are important issues of ethics, issues of law and issues of intention. All of these need to be weighed. I think we should not let ethics and law completely obliterate intention.

One could argue that, in the best of all possible worlds, copyright wouldn't exist but moral rights would be observed. It would be a world of free exchange and when the music or performance was over, people would compose more and perform more. In this ideal world artists would be paid spontaneously, in gratitude for their performances and their compositions. I fear we have a long way to go before that happens and, in the mean time, we have to work hard to transfer the rights needed from creator to researcher to archives and then to the publishing company.

Guidelines on Copyright, Ethics, and the Preparation of Archives Forms

The participants divided themselves into three groups according to their interests, and prepared the following documents on the issues discussed in the earlier parts of this chapter.

GUIDELINES: COPYRIGHT AND ARCHIVES

Nearly every country has its own copyright legislation, and it is not the same in every country. Some international guidelines and laws are emerging from the activities of the World Trade Organization (WTO),

the World Intellectual Property Organization, UNESCO and other agencies. Archives should take care to inform themselves of the copyright legislation within their own countries and to act according to its provisions in order to avoid being used as examples in legal cases.

Copyright legislation in most countries was not written for archives and does not include a number of provisions that many archivists would like to see included. Most copyright laws have been developed to protect creations by identifiable individuals (rather than groups) for a limited period of time and only covers the form (recording, publication, transcription, etc.) rather than the expression itself.

Most copyright laws distinguish between the performance and the composition, and each of these needs to be considered separately by archivists and others who would use works. For example, a person may perform a song composed by another person. In this case, each has rights on that performance and the rights of each need to be observed.

Copyright laws tend to change more slowly than technology and ethical considerations. Thus they are not always adequate in themselves for the formulation of archival policy and the appropriate protection of the materials that archives contain. Archives thus need to consider the ethical and moral facets of their activities as well as the legal ones. They must also consider the importance of access to the collections under their care.

Because archives must of necessity be familiar with national copyright laws and with the ethical issues that surround the collecting, deposit, access and dissemination of audiovisual recordings, they should consider becoming involved in training researchers, collectors, users and commercial audiovisual companies so that they are aware of both legal and ethical issues in their activities. For example, archives might prepare manuals for field researchers, hold training programmes for artists on how to protect their rights and serve as 'watch-dogs' of commercial companies who might misuse materials obtained from archives.

Since some archivists have become specialists in certain aspects of intellectual property management, other archives would benefit from information and expertise in this area. This can be done through

workshops, short courses, list serves, and informal consultations.

Since research archives often deal extensively with the creations of communities and traditional artists (often referred to as folklore), they are acutely aware of some of the shortcomings in the standards of copyright law. Specifically, we believe that archives have an obligation to participate in the debate over the formulation of copyright laws in every country, in international forums and should, to a degree, serve as watchdogs over the application of those laws in the areas of their expertise and experience.

Among the aspects of copyright law that we find require reformulation in many cases are:

1. Group ownership of compositions should be recognized in addition to the already recognized individual ownership of creative works. Similarly, traditional works and 'folklore' should not be excluded from protection under national laws.
2. Attention should be given to whether the time limitation on copyright is appropriate in cases of traditional heritage, religious observances and other artistic endeavours that members of a community consider to be uniquely theirs and thus not subject to arbitrary limitations of protection that were established to protect individual creators.
3. While what we referred to as 'moral rights' are not recognized in every copyright law, we believe that certain ethical standards should be reflected in archival policies as well as in national legislation. Among these are (i) correct attribution to the original artist and researcher when their works (or collections) are used and (ii) protection against derogatory use of works without the permission of the artist or creator.

Since the objective of archives is to preserve audiovisual records of human endeavour, they need the right to make preservation copies, copies for consultation and copies for the traditional owners. We thus believe that every national copyright law should include provisions for copies that are made for educational institutions, research, members of the community where the recordings were made and other appropriate parties.

Archives are primarily repositories for the safeguarding of materials. Every archives should develop a set of legally binding forms that govern the deposit and access to its holdings. These forms should protect the archives against prosecution for the misuse of copies obtained from it for other purposes. Thus, if a user obtains a copy of something from an archives and misuses it, the archives should not be held responsible for such misuse of the materials, seeing that it has taken precautions to prevent it.

Copyright laws should be updated to include provisions for access to archival materials via the Internet, as well as the protection of the rights of creators for materials distributed in that form. For example, archives might be permitted to provide access to parts of their collection in low-resolution visuals and low-sampling rate audio clips in order to make it easier for users to discover what is available in their holdings.

Archives incur great expense of funds and human resources for the preservation of creative works on audiovisual media. Creators, collectors, depositors, funding agencies, and copyright collection agencies should all be aware of the expense that is incurred in preserving their work. It might even be appropriate for archives to receive part of the royalty income from copyrighted works to enable them to preserve those works for future generations.

GUIDELINES: ETHICS FOR ARCHIVES

Ethics in fieldwork and research can vary greatly with situations and cultures. The following recommendations are not hard-and-fast rules. They are meant to assist archives in their interactions with fieldwork, research and performers. As copyright laws vary in different countries, a code of ethics can provide a universal document.

Acknowledgements in publication:

1. Include names of fieldworkers, groups, performers' communities, ethnic groups, etc. in recordings/publications/documentation.
2. Mention donor agencies and supporting institutions/individuals.

Obligations towards field community:

1. Ensure access to their materials in the fieldworker's and archives' collections.

2. Encourage and assist fieldworkers to provide a copy/copies to the community if they so desire.

3. Ensure that fieldworkers obtain permissions and communicate any conditions on access and use to the archives.

4. Protect rights of communities and performers.

5. Serve as a link between performers and fieldworkers.

Responsibility towards fieldworkers:

1. Be pro-active in providing training and ethical guidelines to fieldworkers. Archival guidelines for fieldworkers should include the following:

a) Just remuneration (financial or otherwise); sharing of profits.

b) Remuneration should be based on the fieldworker's ability to pay in line with the local economic and social situation. Wherever necessary, other practical help should be provided. In the event of later publication, there should be provision for just remuneration.

2. Honesty and clarity of purpose.

3. Recording only if people agree.

4. Making transparent the scope and objective of the project.

5. Provide adequate technical training to fieldworkers along with information on the goals and value of the archives.

Obligation to maintain credibility and reputation of researchers and archivists:

1. Keep your professional agreements and personal promises.

2. Behave in accordance with local customs.

3. Respect community norms and local standards of reciprocity.

4. Work practically and do not get carried away.

5. Maintain a working situation of mutual respect.

Rights of fieldworkers and researchers:

Archives should provide fieldworkers easy access to material deposited by them, respect their desires and right to privacy and consult with them about further use where possible.

Providing access:

Performers should have access to recordings of their own performances/interviews, as well as photographs of themselves and other personal documents. If agreements or contracts have been made to

the contrary, they should be amended to grant this fundamental right.

1. Responsibility to protect and preserve.
2. Ensure preservation using accepted archival standards for storage and use, supervised by qualified staff.

GUIDELINES: DESIGNING FORMS FOR AUDIOVISUAL ARCHIVES

General guidelines for forms:

1. Keep forms short and simple.
2. Have them available in multiple languages if necessary. Ensure that forms say the same things in all of these languages.
3. Avoid specialized legal language [jargon] as far as possible.
4. If written forms are not possible, record alternative verbal agreements.
5. Make sure that the language and conditions do not appear to be overtly harsh. Use positive rather than negative phrasings.
6. Include details of possible options within a form so that most aspects are covered.
7. All contractual forms should include names of parties involved with addresses and other contact information, date and place. Care should be taken to ensure that the individuals involved in a contract or agreement have the authority to enter into such agreements.
8. List all affiliating and/or donating institutions.
9. Make clear distinction between signatories signing in an individual or institutional capacity.
10. The preparation of any legal documents requires the consultation of legal authorities.

A. FORMS FOR THE PRE-FIELDWORK STAGE

Contractual agreement between supporting archives and their researchers:

1. Name(s) of participants; their role in the project.
2. Title of project and description.
3. Kind of support being offered.
4. Funding.
5. Equipment.
6. Stock.
7. Training.

Conditions from the archives, which would typically include:

1. Deposit of original recordings and full documentation.

2. Permission and contracts with performers and/or communities over use of material should be within the general framework of the aims and objectives of the archives. The researcher takes responsibility for all claims made by performers/informants/communities. The archives should be informed of all agreements made by researchers and provide documentation.

3. Recommended formats for deposited material; appropriate technical standards.

In return, the archives will provide:

1. One set of copies free of cost to the researcher; additional copies to be purchased.

2. The archives may grant exclusive rights of use to the researcher for a limited number of years to allow completion of publication. Under exceptional conditions, this period may be extended upon written request, up to a period extending to no more than the lifetime of the researcher.

3. Once the archives accepts a collection, it agrees to implement and honour the agreements made by the researchers and informants/performers in letter and spirit.

4. The researcher takes responsibility, financially and morally, for all claims/arrangements made to the performer and/or community relating to the fieldwork.

5. Exceptions or special conditions should be specified.

Possible appendices:

a. Loan sheet.

b. Insurance documents.

c. Technical guidelines.

d. Ethical guidelines.

e. Methodological guidelines.

B. RECORDING PERMISSION FORMS

This is a contract between a) the researcher and/or the institution, and b) the performer(s) and/or the community.

1. Provide short description of what is recorded.
2. List possible uses, such as research, archives deposit, publication, broadcast, use on the Internet, etc.
3. Restrictions, if any, stipulated by the individual or the community involved. These may vary for individual items.

C. DEPOSIT AGREEMENT

1. List materials being deposited (format and quantity).
2. List all accompanying material—photographs, notes, journal, recording logs, etc.
3. Include the obligation of the depositor to keep the archives informed of any changes to their address.
4. Provide degrees of access:
 - a) Complete and unrestricted use, including commercial.
 - b) Copies provided for research and educational use only.
 - c) Reference—listening/viewing on site.
 - d) Restricted for a fixed period.
 - e) Access to the performer and/or community, researcher and collector should be ensured. Varying degrees of access could be applied to different parts of a collection.
5. List recordings that carry restrictions based on legal, moral or cultural conditions.
6. Donations of materials over which the depositor has no legal claim (e.g. a collection of commercial discs, original recordings made by a deceased relative, etc.) should be accessed under existing copyright laws.
7. The archives retains the right to publish descriptive catalogues, including print catalogues, short audio and video clips in an audiovisual catalogue, etc.

D. USER AGREEMENT

1. Materials requested.
2. Request for copies of materials or for reference use only.
3. Declaration of purpose by the user:
 - a) Return of copies to appropriate performers/communities.
 - b) Individual research.

- c) Institutional research.
- d) Educational use including other non-profit making uses.
- e) Publication.
- f) Broadcasting and the Internet.
- g) Institutional exchange.
- 4. Time restriction of use
- 5. Restriction of further copies, loans, sales and donations.

Archives must be protected against any use of materials, except as specified in user agreement.

In case of publication:

- 1. Acknowledgment of archives, researcher and performer/informants.
- 2. Copy of publications to be donated to the archives.

In the event of profits accrued on archives-supported projects:

- 1. Royalties are to be shared with the archives and performers.
- 2. Fresh permission to be sought if intent of use is changed from that stated in user agreement.

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Section II
Archives in Industrializing
Countries at the Dawn of the
Millennium:
Papers and Proposals