ETHNOMUSICCOLOGISTS, ARCHIVES, PROFESSIONAL ORGANIZATIONS, AND THE SHIFTING ETHICS OF INTELLECTUAL PROPERTY

by Anthony Seeger

We are living in an age of trans-national development and major changes in transportation, communication, leisure activities, and work environments. For centuries, and in some places still, the accumulation of land and the enslavement or employment of farm laborers has ensured wealth. In many places this was supplanted by the ownership of factories and the employment of manual labor, or the ownership and exploitation of non-renewable raw materials such as oil, coal, and precious metals. But today the richest man in the United States is not the owner of a large ranch or a railroad, or of vast reserves of petroleum. He is Bill Gates, the owner of a computer software company called Microsoft. One of the United States' largest exports is entertainment "software"—films, television, recordings, and computer software. Ideas are big, big business, and even U.S. foreign policy is influenced by considerations of intellectual property.

One result of these changes is that knowledge of all kinds is increasingly coming to be dealt with in market terms. Many forms of knowledge and wisdom have become "intellectual property." While farms and factories continue to be an essential part of our lives, knowledge is a commodity that is bought, sold, smuggled, sabotaged, stolen, and above all consumed. The ownership of knowledge is not shared equally among human beings any more than the ownership of land, raw materials, or factories have been. Inequality, and the relationship between "knowledge providers" and "intellectual property rights owners" often resembles that found in earlier relations between developed countries and colonies.

These changes have, of course, affected musicians and ethnomusicologists as much as they have affected other facets of modern life. Copyrights on music and dance increasingly determine who gets wealthy and who does not in the performing arts. If, at one time, members of communities performed for one another in a face-to-face way, today, in most parts of the world, these performances are mediated by, and to a very large extent shaped by, legal considerations. What an audience today hears, and what it may not hear, is partially determined by copyright and money. For example, some radio stations may favor recordings by long-dead composers over those by living ones for whose music they would be obliged to pay royalties; some festivals or clubs may insist that performers not play songs "owned" by one or another collection company; and some educational software developers may decide to use only music whose copyright has expired or which has no copyright in the materials prepared for schools and entertainment in order to reduce their costs. Within our discipline, many ethnomusicologists find it difficult to write about popular music because they cannot cite song lyrics or include recordings with their books without a great deal of difficulty. Such constraints certainly affect the kind of research we are able to publish, the kinds of music
we may be able to teach about, and even the subjects we will read about in professional journals like this one.

Artists around the world are increasingly aware of the commodification of their art, and increasingly resentful that they are not sharing in the wealth that is accumulated by the entertainment industry. The huge contracts of the Jackson family and the success of some world-beat albums like Paul Simon’s collaboration with African musicians in Graceland (see Steve Feld’s article in this volume) make even legitimate royalty payments to less commercially successful musicians appear to be unjust. During the past decade, the protests of such musicians are being heard with greater frequency. Their concerns must be addressed by ethnomusicologists through research and practical action.

In spite of the dramatic impact of the trans-nationalization of the music industry and the transformation of virtually all music to potentially for-profit “intellectual property” throughout the world, ethnomusicologists and musicologists have been very slow to consider the implications of local, regional, national, and international laws concerning musical performances. Even in music conservatories, where we train practicing composers and performers, courses in music law are rarely offered. Ethnomusicologists have not only failed to consider legal issues in an intellectual way, many have also failed to assist the people they record to protect their own rights to their music, dance, and performing arts. Our failure to act both intellectually and practically in this area can only vitiate our analyses, damage our reputations, and make us suspect in the communities in which we wish to work.

Ethnomusicologists who have dealt with the entertainment industry have often found the issues to be complex, companies to be intolerant or unsympathetic to ethnomusicological concerns, and existing copyright laws to be unclear or unenforceable (see Hugo Zemp’s article, this volume). The issues raised by commercial successes (Feld 1994) make it all the more important to consider practical steps that allow ethnomusicologists, archives, and record companies to act ethically and effectively in this changing economic environment.

This paper makes a number of practical suggestions that ethnomusicologists can consider to ensure that the music of the peoples we work with is accorded similar treatment to that of commercial artists, and to ensure that our audio and video recordings will survive into the next century. While the details of the law and particular opportunities for working within the entertainment industry will continue to change, some elementary steps are urgently needed and will have long-lasting results.

There is a singular peril in making practical suggestions in a scholarly journal — they are even more obviously time and situation sensitive than most of our theoretical speculation. Some of the suggestions proposed below will probably be rendered ineffective by future laws; others will later be considered suspect through shifting ethical stances in certain areas. Yet issues of intellectual property touch at the foundations of “free” speech and song, and are at once practical, emotional, and philosophical. Like all other articles, this one should be read as a moment in an evolving discussion within the field about an important facet of music.
**Ethnomusicologists, Archives, and Recording Companies: The Message, the Media, and the Property**

Many ethnomusicologists prefer not to read or listen to papers about archives. Archives clearly have an image problem. Most people associate archives with dark, lifeless places hidden in basements and guarded by monsters whose principal function is to deny blameless people access to what they want. In fact, most archives are in the basement because our collections are so heavy they would fall right through the floor on a higher level; the rooms are dark to protect the materials; and your monsters are often colleagues caught in a web of rights and obligations over which they have little control.

Archives can be places of discovery and rediscovery, basements filled with delight, creativity, confirmation, and enjoyment. You must work in an archive to know the light in people’s eyes when they hear the voices of their grandparents or grandmothers, or the satisfaction on a lawyer’s face when she or he listens to an oral history and discovers the legitimation of a land claim, or the twitch in a musician’s fingers when she or he listens to a particular sequence of notes and rhythms for the first time.

Archives do have to be careful about copying recordings. Yet the restrictions on audio archive collections are changing. A great deal of music is currently restricted by copyright, but those copyrights are expiring. If the recordings are carefully preserved, more and more of the music will eventually become more freely available for research and dissemination.

Archives are also important because without them most audio and video recordings will not survive far into the next century. Audio and video recordings will be the major sources for the future musicological scholarship of this century — just as manuscripts have been for previous centuries. But the recordings available for research and enjoyment in one hundred years may be very few, and may only reflect the commercially viable and popular parts of the world’s 20th century repertoire unless systematic steps are taken to preserve research recordings and community documents. By not taking action to preserve their collections, ethnomusicologists are reducing the variety of musical performances available in the future.

This leads me to another reason I believe the mere mention of archives drives many colleagues to skip to the next article: archives raise the reality of our mortality and challenge the ultimate usefulness of our field research and collections.

Here are some questions every ethnomusicologist should consider: (1) If your house were to burn to the ground, how many irreplaceable tapes would you lose? (2) If you were to be killed in an accident, how many of your collections would be left poorly annotated and documented? (3) What will the people you recorded, or their descendants, think of you when they want to use the recordings you made and find they no longer exist?

The table below compares the expected life of commonly used media, researchers, and copyright law. While we have documents on papyrus and early paper from centuries ago, the earliest recordings date from little over one hundred years ago and are not lasting very well. Assuming a fortunate human life of 95 years and a copyright limitation of life plus fifty years, here is the relationship between the length of a human life and the anticipated life of your recordings on a number of different media:2
<table>
<thead>
<tr>
<th>Medium</th>
<th>Anticipated Life</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human life</td>
<td>XXXXXXXXXXXXXXXXXXXXXXXXXXXX (95 years)</td>
</tr>
<tr>
<td>US Copyright law</td>
<td>(Life plus 50) XXXXXXXXXXXXX</td>
</tr>
<tr>
<td>Magnetic reel-to-reel tape</td>
<td>XXXXXXXXXXXXX (50 years)</td>
</tr>
<tr>
<td>Cassette tape</td>
<td>XXX (15 years)</td>
</tr>
<tr>
<td>Digital audio tape (DAT)</td>
<td>XXX (15 years)³</td>
</tr>
<tr>
<td>Reel-to-reel videotape</td>
<td>XXX (15 years)⁴</td>
</tr>
<tr>
<td>Videocassette</td>
<td>XXX (15 years)</td>
</tr>
<tr>
<td>Compact discs</td>
<td>XX(?)(10? years)⁵</td>
</tr>
<tr>
<td>Computer operating systems</td>
<td>XXX(?)(15? years)⁶</td>
</tr>
<tr>
<td>Computer discs</td>
<td>XXX(?)(15? years)⁶</td>
</tr>
<tr>
<td>Acid free paper and good ink</td>
<td>XXXXXXXXXXXXXXXXXXXXXXXXXXXX...</td>
</tr>
</tbody>
</table>

Table 1: Anticipated relative life of media, humans, and copyrights.

In addition to the life of the storage medium, one must consider the life of the hardware it can be played on. How many wire-reel players are working today? How many reel-to-reel video players? How will we transfer the discs saved on earlier generations of computers whose operating systems are no longer used? Leaving something on the shelf even during one’s professional lifetime may make it impossible for anyone else to use it. The competition between hardware companies to dominate the world market, and a lack of commercial interest in preservation, have created real problems for archives and all those who would use them.

The messages on the media we use in our research recordings can be lost. Does it matter? Is it a bad thing that our field recordings fade away and cannot be played after a few decades? That is a question every ethnomusicologist has to answer for him or herself, but should not put off thinking about.

Ethnomusicologists and Current Copyright Law

Copyright law is dealt with more extensively by Sherrylee Mills elsewhere in this volume. Here it is sufficient to emphasize some general points. Copyright law is a complex subject that varies considerably from country to country. In general, however, copyright laws recognize only individual invention or composition (or that by a small group). In general they do not recognize oral traditions or folk music as copyrightable, and do not establish enduring rights to an invention or idea (there are currently some 14 exceptions).

The inadequacy of copyright law to protect aboriginal communities of any kind is quite clear. How does one copyright a performance originated by an ancestor in the distant past who may continue to live in a parallel present “dream time” as declared by some Australian Aboriginal communities? The “life plus fifty years” will be difficult to agree upon across cultures. Or, in the case of the Suyá Indians of Brazil, how does one register a song composed by a jaguar, learned from a captive over 200 years ago, and controlled not by an individual but by a ceremonial moiety? These issues tend to be systematically ignored by copyright law centered on the concept of individual creation for profit.
While few copyright laws consider the protection of enduring cultural patrimony, many laws do directly affect the recordings made by ethnomusicologists and (we hope) deposited by them in archives for preservation. It is very important for ethnomusicologists to have a basic understanding of the issues relating to their own work.

Imagine, for example, a field recording of a revolutionary song recorded with a request by the performer that the field worker keep the recording secret from the performer’s political enemies. The rights over this piece include:

1. The rights of the individual composer of the work, some of which may have been transferred to the field worker who is making a field recording with permission.

2. The rights of the collector, who quotes from the texts and deposits the recording in an archive with the stipulation that no one may have access to it in order to protect the life of the performer from persecution and imprisonment by a political leader.

3. The right of the archive to make copies in order to preserve the recordings and the varying obligation to make the collections available for research, teaching, and general learning. There is often some discretion allowed here. An archive could preserve the revolutionary song, but might eventually decide that all participants are dead and revise the collectors’ and performers’ requests for secrecy. An archive’s rights are usually established through a contract with collectors, who are expected to have agreements with the performers and composers.

4. The rights of the general public. In many countries, anything held in a publicly funded archives must be made available upon request, with the exception of certain documents considered to contain national security secrets. Let us assume for the moment that a brother of the political leader who was not to be allowed to hear the song lives in the United States. He exercises his legal access rights to the public archive and obtains a copy of the recording. The archivist, who refused earlier access on moral and ethical grounds, is fired. The triumphant brother plays the song at a party the night before he sends the tape home to his brother, who will send it to the security forces who throw the original composer/singer in jail.

5. The rights of an arranger/composer — Imagine that a popular musician is attending the party, and hears the protest song being played by the brother of the political leader. He is tremendously impressed by the musical and political sincerity of the performance. This musician writes a popular song based on the melody and text of the original and copyrights them in his or her name. His right to do so are well established in copyright law, and he may get very rich.

Even in this fairly simple hypothetical case conflicting rights abound. We also see the potential for suffering, going to jail, and getting rich from the impulses stored on a fragile recording medium and handled with normal ethical and moral care. Whose rights will win out in a conflict? Another way to look at that question is “Who can afford to hire a lawyer?” The original composer is at best in jail and in no condition to sue for piracy; the collector is an impoverished academic; the archive is part of a university or political unit that prefers to avoid litigation whenever possible; the ruler doesn’t care.
as long as the protest is repressed. This leaves the popular musician, his or her record company, and his or her publishing company. Surprised?

While legally the others may have some rights, the issue is often who has the power, the time, the motivation and the money to exercise his or her rights. The social and economic aspects of the practice of law must be considered along with the texts of the laws themselves.

*Between Scylla and Charybdis: Running Folkways Records*

Ethnomusicologists will increasingly be faced by the concrete, day-to-day concerns of intellectual property rights as we record, archive, teach, produce commercial recordings, and in a few cases run record labels. Each activity, however, involves different considerations. In view of the reflections of compilers and editors available elsewhere in this issue, I shall present a brief, first-person reflection on my involvement with recordings as a researcher, co-producer, archivist, and Curator and Director of Folkways Records (and Smithsonian Folkways Recordings).

When I recorded the Suya Indians of Brazil in the 1970s, it was so obvious that I did so with their consent that I did not bother to get even verbal clearances. None of them could read or write, which made written contracts impossible. My recordings were public knowledge. I was asked not to play certain tapes for neighboring Indian communities, but otherwise there were no restrictions placed on my use of the recordings.

When I deposited my tapes in the Indiana University Archives of Traditional Music in the mid 1970s I granted the Archives the right to allow non-commercial uses of the materials, but prohibited any commercial use of the recordings without my permission (presumably involving Suya authorization).

My first commercial recording project was a joint one with the Suya community. The Suya, themselves, asked me whether I was going to produce a commercial recording. The resulting LP record, *Música Indígena, A Arte Vocal dos Suya* (Seeger 1982), was a true co-production in the sense that we collaborated closely on what would be included, how it would be described, and how the texts would be translated. I was pretty clear what rights should (in theory) be reserved for the artists. I made certain they received artist and producer royalties from the small independent label that produced the album in Brazil. They provided these in the form of 10% of the pressing — available to me to sell. I took money out of my savings, gave the equivalent of the sales price of that 10% to the most powerful Suya leader, and he went on a shopping spree and took things back to the village. I then sold the records myself, recovering part of my investment. My experience with publishing books and recordings is that they cost more money than they earn — especially with the policy of giving courtesy copies to advisors, friends, colleagues, etc. The second pressing was handled in a similar way. Only in 1994 could the Suya set up a community account to which royalties and other payments can be sent without passing through me (and therefore being subject to my income tax).

Shortly after co-producing the Suya recording I became Director of the Indiana University Archives of Traditional Music (1982-1988). I wanted to make the Archives’ collections more accessible and also to protect individuals and groups as required by emerging ethical standards. Among my innova-
tions was to change the contract that governed deposits by field workers into
the archives. The previous contract had applied one of three levels of restric-
tion to the entire collection (thus my entire Suya collection was easy access
for profit-generating uses). I substituted for this a physical item restriction.
Thus one tape could be completely restricted for ten years (renewable), while
other tapes in the collection could be made more accessible. When I enquired
about the conflict between our contracts with depositors and national laws
governing public access to the Archives’ collections, an Assistant Counsel
at Indiana University told me that while I might be legally obligated to grant
access to something with a contractual restriction, he thought going to jail
to protest that would be an honorable and appropriate thing for me to do
(easy for him to say!). Fortunately, no one ever insisted on access to restricted
recordings.

Along with other archivists in the United States and abroad, I tried to
alert the profession to some of the problems with new media and intellectual
property, and made suggestions about field procedures to avoid the problems
I saw in archival field collections (Seeger 1986; Society for Ethnomusicology
1994).

In 1988, I was offered the opportunity of becoming the first Curator of
Folkways Records after its acquisition by the Smithsonian Institution from
the family of Moses Asch, its founder and owner for forty years. For ethno-
musicologists, Folkways was famous as a publisher of “scholarly” ethno-
graphic recordings — thick LP records in heavy cardboard sleeves, replete
with 12 or more pages of liner notes. Although not a scholar himself, Moses
Asch believed strongly in the importance of documenting and preserving
musical traditions of all kinds from all parts of the world. Folkways was the
precursor of many of the later “world music” labels such as Auvidis, Rounder,
Arhoolie, and others. Folkways was also famous for its role in the U.S. (and
world) folk music revival of the 1950s-1960s and for its policy of keeping all
recordings in print.

The Smithsonian Institution acquired Folkways (and all transferable rights)
in order to preserve the collection of master tapes, paper files, photographs,
and other materials, committing itself to keeping every recording in print.
I was hired because of my scholarship and my experience with archiving,
not my experience with record company management. I walked into a
complex web of rights and obligations that years later I am still working on.
I also walked into economic challenges: Folkways is expected to be self-
supporting. It receives no Federal tax dollars, and has to pay an institutional
overhead on all money it spends. Although it is part of a national museum,
it is in many ways like any other record company in the capitalist world.9

Folkways, which typically sold very small numbers of copies of any given
title,10 had a reputation for not paying royalties on a regular basis. I wanted
to transform Folkways from a company whose ethical stances had been left
behind by changing times to one that reflected the Center for Folklife
Programs’ commitment to equity for artists and ethical probity.

In order to move toward this goal, I took the following steps regarding
intellectual property during my first years as Director of Folkways:

1. I had as many titles as possible reviewed by contemporary scholars, and
searched all earlier record reviews. The reviews covered issues of sound
quality, documentation quality, and overall significance. This review turned up some ethical problems — including recordings that might be objectionable to the people recorded, which I took steps to rectify.

2. I devoted large amounts of money and staff time to setting up royalty records and paying royalties on all contracts where royalties were stipulated. I changed the basis for all royalties from a basis of pennies per unit sold (for example, US$.25/unit) to a percentage of the list price of all units sold. The difference is that artists’ payments rise with inflation with a percentage, while the record company’s profits rise with a fixed number of cents per unit. Even raising them to a modest percentage more than doubled most artist royalties, and protected them from future erosion. 11

3. Using computers, we were able to prepare and send out royalty statements and payments in a systematic way. After my first mailing I received a number of phone calls and letters saying, essentially “This is the first payment I have received since the recording was released. Where is the rest?” I referred all such queries to the Asch Estate, which was contractually responsible for all charges against sales prior to 1987.

4. We established a new label name, Smithsonian Folkways Recordings, for new projects and reissues with new liner notes and often additional sound. For new releases I changed the policy of flat purchase of master tape rights for non-Western music to a royalty basis. When most world music titles sold fewer than 400 copies during their lifetime, Folkways typically paid a field worker US$100.00 or so for the master tape and notes, and put out the recording. While this amount has been raised by other companies, the practice of a single buy-out price remains fairly common practice. I thought the artists and compilers should benefit from the popularity of their recording by paying a percentage of unit sales on all new contracts. 12

5. With all new releases we have established who, if anyone, holds the “songwriter’s” copyright on the compositions, takes out licenses, and pays “mechanical royalties” to the songwriter or his or her publishing company. To handle cases where artists do not have a publishing company, but want to protect their compositions, we established a music publishing company, Smithsonian Folkways Music Publishing, affiliated with BMI (Broadcast Music Incorporated), a songwriter registration and collection agency. 13

6. In cases where an ethnomusicologist, or other compiler, prepares a recording, we request written clearances from the artists and also request that all or most of the royalties are paid to the original artists. This can be a complex issue, as I was aware from my work with the Suyá Indians in Brazil. We do not have a single method for paying royalties, but have made various arrangements including (1) paying the individual artists directly; (2) making a payment to a community organization indicated by the artist(s); (3) paying the compilers with the understanding that they will pay the artists when they are able to do so; (4) putting the money into an escrow account for later payment. We let amounts smaller than US$10.00 accrue to the next royalty period.

The Limitations Imposed by the Economics of Record Production:

I found that although I might have very good intentions in my changes, the economics of record production and sales in the United States limited
what I would be able to pay the artists and keep Folkways from losing money. To understand this, I provide a brief economic primer on record production:

It is relatively inexpensive for an ethnomusicologist (or musician) to make his or her own compact disc, and quite profitable to sell it directly. The actual material (pressed disc and simple insert) may not cost more than $1.25/unit, and the price of a CD in the United States is US$15.00. This yields $13.75 "profit." How can one lose money making recordings? When considering this "profitability" one must remember that the artist or compiler has, in this case, (1) done the labor without charge, (2) does most of the marketing and promotion as part of touring, also not charged to the CD, and (3) usually does not have an extensive, international network of distributors and stores — whose percentages would cut into the apparently lucrative margins.

The figures are different when one is running a record company and selling through distribution channels. Here is a "hypothetical" case based on Smithsonian Folkways. Most of a record company’s expenses are incurred before the recording is put on sale: studio fees, mastering, layout and design of cover and inserts, manufacturing, marketing and promotion. Only after this money is spent do recordings begin to be sold.14 This tends to create classic "cash-flow" problems: the money has to be spent long before any money is made on a project, and some projects never repay their costs.

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retail price of a recording: US$15.0015</td>
<td></td>
</tr>
<tr>
<td>Price to the store: US$10.25 (store keeps US$4.75)</td>
<td></td>
</tr>
<tr>
<td>Payment to Smithsonian Folkways $6.95 (distributor keeps US$3.30)</td>
<td></td>
</tr>
<tr>
<td>Royalties (8% to artist plus US$.69 mechanical): US$1.89</td>
<td></td>
</tr>
<tr>
<td>Marketing and Promotion $2.00/unit</td>
<td></td>
</tr>
<tr>
<td>Staff salaries &amp; benefits $2.50/unit</td>
<td></td>
</tr>
<tr>
<td>Manufacturing $1.35/unit (28 page booklet, stickers, etc.)17</td>
<td></td>
</tr>
<tr>
<td>Total: -US$.65</td>
<td></td>
</tr>
</tbody>
</table>

Table 2: Calculation of costs of a compact disc sold through distribution.

The discerning reader will see that by the figures above, Smithsonian Folkways would be losing money on every recording sold. We would soon be out of business, unable to pay our bills and salaries. This is true. If we sold everything through standard distribution channels and did nothing else, Smithsonian Folkways would have had to rethink its entire strategy. Even so, our margin on the total recordings sold is small. We stay in business through the following activities:

1. Some recordings are paid for through grants. In this case, some of the manufacturing costs, and perhaps a flat fee to the artists, has been paid. This reduces the cost of the unit, especially the expenses that must be paid early in the project.

2. We sell some recordings directly through mail order. While our catalogue and labor costs are higher, so is our per unit income. In this case we are more like the artist: on a $15.00 sale we receive $15.00, and pay all costs from that. We can pay more of our labor costs out of these sales — our labor costs are not deducted per unit, but from the total income of the label. This is one reason many record companies have mail order offices.18
3. We sublicense music for other uses. We make music available to feature films, exhibits, some advertising (after consulting the royalty recipient), and other uses, according to contractual arrangements established in the recording contracts. Any sublicensing income is split evenly between the artist and Smithsonian Folkways. If, for example, we license a song to a feature film, we might receive US$7,000. US$3,500 goes to the royalty recipient; and US$3,500 goes to support the licensing office and to pay other expenses.\textsuperscript{19} Sublicensing is relatively easy — the master tapes and contracts have already been made and there are no manufacturing expenses. Without our income from this area, Smithsonian Folkways could not have produced the recordings it has.

Is there a profit? The Smithsonian Institution is a non-profit organization, and Smithsonian Folkways is not run as an income-generating operation. However, Smithsonian Folkways is expected to be self-supporting and to end each year with a positive balance of income over expenses. During each of the past eight years we have ended the fiscal year with a small surplus. That balance is divided three ways: one third is put in an account for me to use for archival supplies and other expenses related to the collection; one third is deposited into an account for the Center for Folklife Programs to support its cultural programming, and one third goes to the general fund of the Smithsonian Institution. In our most successful year our gross sales were roughly US$2,000,000 and our net after all expenses was around US$120,000. We paid out considerably more than that in artist and songwriter royalties.\textsuperscript{20}

This a very small margin, and represents about 6\% of sales. We would not be attractive to investors, and if I were reporting to stockholders, I would probably have been fired long ago. Our staff salaries are generally low; no one is driving a fancy car; and a few bad decisions or a sudden change in the market place would have very serious effect on Smithsonian Folkways. Like many independent record labels, Smithsonian Folkways is subject to cash-flow challenges, changing markets, and diminishing margins as all parties (stores, distributors, warehouse owners, the U.S. Postal service, and others) try to increase their profits from every sale and customers expect prices to stay the same or decrease in spite of inflation and rising costs.

It is important that ethnomusicologists understand the economics of small, independent, record companies in order to interpret their contract offers. Most independent record companies (and CD-ROM companies) cannot afford to be generous with money up-front. They can afford to pay royalties, because that money is only paid after actual sales. They often want to recoup their direct expenses (with studio costs, design, and other expenses) as quickly as possible and subtract those amounts from royalties because without income they cannot produce the next recording.

In general, as Director of Smithsonian Folkways Recordings I have tried to establish the label on an ethically sound footing within the limits of the marketplace, the institutional constraints of the Smithsonian, and the shifting sands of U.S. laws. New projects are relatively easy; there are greater difficulties dealing with contracts established decades ago among people who are often now deceased, in an environment of more rigorous ethical standards. I know there are issues that have not been resolved, but hope we are able to resolve them as they arise, and that the overall stance of the label will protect it as these arise.
Field Recordings: Gold Mine or Mine Field

After my discussion of the economics of record production, the process of negotiating the commercialization of recordings can be clarified, and the interests of the various parties analyzed and interrelated.

Recordings can be both a gold mine and a mine field for performers, collectors, archives and commercial companies. In those cases where the performers would like their performances to be widely disseminated and want to make money from them, there are many opportunities today. The emergence of multi-media, combining print, photographs, music, and video, leads production companies to seek materials. Ethnomusicologists have published audio recordings for decades, and the current boom in compact discs continues a long tradition of ethnomusicological dissemination. Other potential users of field recordings include film-makers, student and professional video producers, and companies that seek bulk rights and then act as licensing agents for a percentage of the license. The opportunities can be bewildering, but here again a few basic principles help sort out the variety of opportunities.

Should You License and How Much Should You Charge?

Like almost any question, the answer is more complicated than might at first appear. Several different parties may be involved, each with its own motivations and objectives. In a simple case we can consider a producer who wants to make a CD-ROM about the cultures of the groups that live in a large country, an ethnomusicologist who has audio, video, slides, and knowledge of one of the groups in the country, and the artists who appear on those recordings and documents.

The Producer wants to get clear rights quickly and simply. He or she has a limited budget, is arranging for dozens of sound samples, several video clips, hundreds of photographs, and thousands of pages of text. The producer needs to work within a fixed budget, a short (often impossibly short) time schedule, and the requirement that all materials used must have their rights unambiguously cleared.

The ethnomusicologist wants to be sure s/he is not being taken advantage of by the producer and wants to benefit the community in which s/he had made recordings. The ethnomusicologist in this case is certain s/he has the right to license the materials, and has permission from all the participants, as I have recommended above.

The performers (in this ideal case) unanimously want the field worker to make money for them because they need the money, and expect to receive money from the use of their music.

The Approach and Initial Decision

Once the producer contacts the ethnomusicologist, the ethnomusicologist should ask for the request in writing. Unless it is received in writing, there is no control over what is actually done later. The ethnomusicologist then needs to decide whether the project is worthwhile, and to evaluate the importance of participating in it. This is the first decision: will participating in this project benefit the artists and field worker in any way — will they receive wider recognition, is the project worthy in itself, a contribution to knowledge, or a contribution to truth or beauty. Or is this project simply
a commercial project whose objective is to sell something (as in an advertisement) or to use the music as background (as in a commercial film where the music might appear in the background of a restaurant scene). There is nothing wrong with signing a lucrative contract that adds little truth and beauty to the world, but these considerations certainly reflect on the second stage — deciding how much money to ask for.

The ethnomusicologist must also decide whether this is a project for which money should be requested for use of a recording. Many requests for use are purely educational (a student making a classroom video that will not be commercially shown, a temporary exhibit in a free museum, etc.). One way to decide if one should ask for money is to ask how much the producer is paying for the other music sources. If several other labels/institutions/individuals of renown have given free use permissions, then such use should be considered. At this point, the ethnomusicologist and the artists have complete control: they can decide to deny usage of the recording, or to permit it. If they send a written refusal of the written request to use the material, they have very good evidence to take the company to court should the music be used in spite of their refusal.

The producer will typically want an answer very quickly. If the artists need to be consulted and the process is expected to take a long time, the producer will often look elsewhere and the artists will not receive any income.

Let us assume that the ethnomusicologist (who has the artists’ approval) decides to participate in the project and writes the producer saying “yes, I would consider the use of certain materials in the project.” It is at this point that the interests of the different parties are most distinct. The producer would like all the material for free, without time limitations, and without any restrictions. The ethnomusicologist normally wants to license for a limited time, for the most possible money, and with as many restrictions as possible. Some kind of agreement must be reached on these matters.

1. Time limits. The reason to impose time limits on a license is so the contract can be renegotiated later. It also allows one to withdraw from projects that do not work out. Producers often have a time limit during which they expect to sell the product. Most agreements should have time limits. But it is common to allow automatic renewals unless one party or the other requests termination in a determined period (90 days is common) before the end of the period. Thus the ethnomusicologist might agree to license the music for three years, with subsequent automatic renewal for two year periods unless one of the parties objects 90 days in advance.

2. Use of material. The exact material to be used, the number of minutes and seconds whenever possible, and the scene in which it will be used (if film or video) should normally be presented in writing by the producer. This is particularly important if the ethnomusicologist is sending more material than will be used in the final product.

3. Monetary terms. Money can be paid out by the producer in at least three ways: among them a royalty per unit sold, a single buy-out lump sum, or an advance on royalties with further royalties to be paid if sales exceed the advance. A CD-ROM producer normally licenses from many different sources, and it is very difficult to pay royalties to that many suppliers — the amounts per unit are usually very small and the postage alone on a royalty mailing
will be expensive. When there are many sources, a lump sum is standard practice. When only a few sources are used (say the ethnomusicologist is supplying 15% of the material), then a percentage royalty is more appropriate. Again, asking how the other rights-owners have arranged for compensation may help decide which type of compensation to ask for. In general, Smithsonian Folkways prefers to arrange for royalties with cash advance whenever possible, but situations differ.

4. Repeated lump sums. One of the concerns of all licensors is that the licensing company will sell millions of copies, and that they and the artists will get nothing but the initial lump sum payment. This can be avoided by asking how many copies the company expects to sell. Then ask to have repeated lump sum payments made at multiples of that number. If the producer says he expects to sell 5,000 copies, ask to have another payment made at 10,000 copies, 15,000 copies, and all multiples of 5,000 thereafter. This ensures the artists will benefit from high sales without requiring regular royalty statements. The project may never sell even 5,000. In fact, many projects are planned and then not produced at all (a good reason to get paid something in advance).

5. How much to ask for. One way to establish the amount to be paid is to ask how much they are paying other sources. A useful but not always allowed term is “most favored nations status.” This means that the artists receive the same rate as the highest paid artists on the project. This may not be possible because the producer needs popular music and has to pay Sony music more for Michael Jackson than he has to pay the ethnomusicologist — if he can find other usable material elsewhere. On the other hand, it is often useful to stress that the distant artists are just as much artists as millionaire popular music stars, and that non-Western music should in principle receive the same amount in licensing as Western music.

6. Advances. Ask for some money in advance at the time the master tape is supplied or when the product is released. This is when the producer and the company attention is focused on the project, and when they have a budget for it. It is often more difficult to get paid later, and the artists often feel cheated if they have received nothing when they discover the product has already been released. If later payment is requested, it is a good idea to check on the reputation of the company. If there are costs in copying your tapes, videos, and slides, ask the producer to pay those costs, in addition to the licensing fee. In some cases, the producer will guarantee a certain number of sales — say 2,000 units — and pay that royalty in advance, while paying royalties above that only after the sales have been made. This is perfectly normal and should be acceptable. The principal objective is to get some money in advance.

7. The payment. If the artists are going to receive a share of the money, it is in the ethnomusicologists’ interest to have it paid directly to the artists. Otherwise it appears as income and must be accounted for, and rumors often circulate that the compiler is not paying the artists all the money due to them. It is sometimes expensive and complicated too for the licensing company to send the money on to the artists. Many ethnomusicologists however, don’t have a choice, but must receive the money and take it to remote artists whenever possible.
8. Other terms. There are some other things that do not have so much to be negotiated as specified in writing. Specify that this is a one-time, nonexclusive license. This means the material cannot be used in any other products by that company, or sublicensed to any other company, and that you can use the same material in other ways. This is important because our hypothetical ethnomusicologist wants to have the artists benefit from licensing, and that works best if the ethnomusicologist supervises all uses. Specify, too, exactly how you would like the credits to read and where and how they will appear. If you are licensing a piece of larger work, you might want to insist that the full reference be given, including a phone number and address for orders.

9. The producer will want the ethnomusicologist to sign a clause saying that s/he is responsible if there is a legal question about the license if the material is used in the way agreed to in the letter of agreement or contract. This is to be expected, and the ethnomusicologist should be sure about the rights situation before licensing.

The producer will be in a hurry. The field worker should expect this, and be ready to respond quickly. Otherwise, the artists will receive no income.

The points above apply to most kinds of licensing to CD-ROM, film, video, advertising, and textbook companies. Record company agreements are somewhat different, especially when the ethnomusicologist (or archive or other organization) is the producer and the artists are royalty recipients. Record companies are issuing projects on an established medium that may be in print for a long time; they are accustomed to paying regular royalties; they often want sublicensing rights and have offices that handle them. There are a wide variety of arrangements, however. Of particular concern are to be sure the artists benefit whenever the company itself benefits — in high sales, in licensing, etc. — and not to give away rights that the ethnomusicologist does not have, since the record company contract will usually contain an indemnity clause that holds the ethnomusicologist responsible for lawsuits over rights s/he has transferred to the record company.

There is no particular mystery to licensing, and as ethnomusicologists we can all appreciate the difference between words about music and the actual sounds and images themselves. Part of our job as academics should include sharing the excitement and significance of the sounds we study. But it is also our responsibility to make sure we are doing so with the permission of the artists and for their benefit as well.

**Proposals for Individuals and Institutions about Recording, Depositing, and Licensing the Commercial Use of Recordings**

As the other articles in this Yearbook indicate, copyright laws have changed, and are bound to continue to be changed as powerful interests jockey for ways to maximize their control over, and profit from, intellectual property. Regardless of what changes may come, researchers can take some fairly elementary steps to facilitate the future preservation and use of their materials.
A. Researchers

1. When making any recording — whether in the field, at a concert, or in a studio — write a simple contract or record the permission of the participants to make the recording on the tape itself. While a five to fifty page legal contract offers more complete protection, such contracts are not appropriate in most circumstances. Some record that permission was given is, however, very important.

2. When planning the wording of the recording permissions, think through what you would like to do with the recordings — or what you think could ideally be done by someone else with the recordings. For example, imagine that someday you may want to deposit the recordings in an archives and possibly use some of them as teaching materials, or in a multi-media textbook. The communities we work with are increasingly familiar with commercial recordings and increasingly distrustful of strangers bearing audio and video recorders. It would be useful to discuss, on tape, what would be done in the event that something from the recording were produced for sale. Include references to audio, video, and still images of the performers. The objective here is not to set up a way to steal rights, but to establish that at the time you were doing your research you and members of the community have discussed the possible commercial uses and thought through appropriate ways to handle such uses should they arise.

3. Carefully note the name, address, and affiliation of each participant, whenever possible, and get permission from all of them if possible. Discuss where royalties might be directed were any to be earned by the materials. Try not to raise expectations about financial rewards — in most cases they will be very small. If the composer of a piece recorded is different from the performer(s), try to get permission from the composer also. This is impossible in some cases, but easy in others. Learn to do this as part of the recording and research process — like keeping a journal or a recording log.

4. Copy the community's own recordings, where appropriate, or assist them to establish a community resource centre or archive of their own, if they are interested in doing so. Most communities today record their own events, even in remote places. Their recordings may not be of high technical quality, but they can be tremendously important in helping to understand how the event goes when the researcher is absent, and also for discovering what is considered important about an event by the recordist.  

5. Take some time after each field trip to carefully document your recordings. In addition to the standard documentation, note which selections were agreed upon for public use, which can be used for non-profit use, which should be suppressed for a period of time, and which should be destroyed after you have listened to them.

6. Deposit your tapes in an archive, with due attention to which types of restricton are attached to which recordings. In this deposit, ethnomusicologists should expect to sign a contract. Expect the archive to want certain rights, and be sure you have the right yourself to transfer these. If not, tell the archivist. The contract should give the archive permission to make preservation copies — since most media last only a short time. The contract should give the archives permission to use the recordings for on-site research. Archiving is expensive, and archives are established with certain objectives.
It is not fair to expect an archives to invest time and money preserving and cataloguing a collection if it cannot use those recordings for realizing its own goals — be they educational, broadcast, commercial, or whatever. Most archival contracts have some room for flexibility. If you have concerns that you feel are not being met, discuss your collection and objectives with several archivists before deciding where to deposit the originals. Keep the archives informed of your change of address, and of changes in the status of the collection. Archives often have to review their contracts in the light of emerging laws, and it is important that they be able to find you in twenty or more years. Keeping the archives informed of your address, phone, and e-mail are even more important if you restrict use of the collection, because they will need to contact you regarding special use of your collection.

7. Carefully monitor and document, as you would any fieldwork experience, your negotiations with record companies, CD-ROM producers, tour organizers, and all of the other intermediaries that approach you with requests to make the music more widely accessible. Although many ethnomusicologists have created recordings or presented at music festivals, relatively few of them have reflected upon and written about the process. This is an important part of our professional activities, and therefore an important one upon which to reflect and write. Controlling their intellectual property, and receiving money for granting rights to use it are also an important part of the experience of a musical group or community, and we do not know much about the effects of such negotiations and payments on musical groups and communities. Ethnomusicological reflection on these topics is an important part of our study of the effects of the market system on the communities and traditions we work with.

B. Archives

1. Archives can take steps to facilitate the use of their materials through their contracts with depositors and through policing their users. Steps that facilitate this include:

2. Establish ways to determine appropriate commercial use of those parts of the collection available for such use, and ensure that at least 50% of any royalty amounts paid to the archive is paid to the artists or their representative (this amount is fairly standard).

3. Encourage the transfer of practical knowledge to local communities so they may take steps on their own to protect their rights within the laws of a particular country.

4. Investigate new ways the collections can be used by the artists' community and take a long view on how the collections can be used.

Professional Societies

Professional societies such as the ICTM also have roles to play in the way the profession works in this area.

1. Encourage the intellectual study and practical recommendations in areas that are appropriate to this council. This publication is an example of such an activity.

2. Avoid any official associations with companies or organizations that do not act in a manner considered by specialists to be responsible, and that
treat "third world artists" differently from artists in an industrial country.

3. Encourage the transfer of practical knowledge to local communities so they may take steps on their own to protect their rights within the laws of their countries.

In sum, there is something everyone can do. It does not require batteries of lawyers or reams of paper to accomplish something. But the emerging situation in intellectual property does require some additional steps in fieldwork and in audio-visual publications. Doing this, however, has long term benefits for artists, ethnomusicologists, archives, and professional societies. The changing values and attitudes towards the intellectual property with which we deal are at once an emotional issue, a practical necessity, and a political process in which we must not be at the rear, but should assume the lead, assisting the potentially dispossessed with whom we often work to take control over their intellectual property — including music and dance — before some large profit-minded company takes it from them and leaves them nothing in return.

NOTES
1. An earlier draft of this paper was read at the 33rd World Conference of the ICTM in Canberra, Australia, 11 January 1995. I am indebted to numerous members of the Council for their careful reading and discussions.
2. Remember that, like human life, the life of a recording medium depends on the quality of the original (the equivalent of genetic heritage), how well it is taken care of (protection from extremes of heat and cold, humidity and dryness), and the frequency and method with which it is played. The "life" of a recording medium is thus approximate — but as with human life should not be taken for granted.
3. I have had trouble with DAT tapes after fewer than five years, but this figure was arrived at after a floor discussion at the ICTM meeting in Canberra.
4. Many scholars have reported problems with videotape becoming sticky or "glued together," and unplayable after fewer than fifteen years.
5. There is considerable debate about compact discs. A determining factor is going to be how well the laminations hold together over time. Certain "archival" discs claim to last for much longer periods, and may well do so. But archivists tend to be cautious about believing manufacturers' claims. Presently, CD-R (recordable compact disc) manufacturers are guaranteeing a life of 10 years for their products.
6. The issue here is not so much physical survival of the medium as the availability of the hardware to play the recordings on, and the ability to convert one platform or medium to a more modern one. Extensive tests have been done on the durability of computer storage media, but relatively little attention has been paid to the effect of changing software platforms on our ability to read the discs.
7. The burden of documenting and copying field collections should not all fall on the individual. Grant support, professional organizations, and departmental policies could easily make it far less onerous for individuals to improve the documentation and preservation of their collections.
8. This was the accepted manner of donating things to the community. The political leader's obligations included fair distribution of goods to the community (but see A. Seeger 1981 on political factions).
9. I am greatly indebted to many people who taught me about the recording industry, only a few of whom can be mentioned here: Ken Irwin and Bill Nowlin of Rounder Records, Bruce Kaplan of Flying Fish Records, Joan Pelton of Silo Distribution, Chris Strachwitz of Arhoolie Records, and Matt Walters and Jeff Place at the Smithsonian.
10. When I examined Folkways' sales for the last four years that Moses Asch ran it, about 30% of the titles had sold less than ten copies and only about 75 of the 2165 titles sold more than 500 copies during the period 1982-1986. To compare, major record companies
often delete a title that is selling less than 10,000/year — more than Folkways sold of all
but a handful of recordings in their entire lifetime).

11. I was warned by the owner of a record company to be careful about setting artist royalty
rates, because it is easy to lose money on recordings. In fact, that is so. One of the lessons
I have learned at Smithsonian Folkways is how precarious small independent record
companies are. Moses Asch went out of business twice early in his career, and record
companies go out of business (or decide to close) all the time.

12. In some cases we pay a single buy-out at recording, with the understanding that after
a certain number of recordings we will make further payments — typically at 10,000, 20,000,
and every ten thousand thereafter. We tend to follow this procedure when a recording
has many different artists on it, and when it is difficult or impossible to send them funds
in a reliable fashion.

13. Music publishing is an important subject. Most recordings involve artist royalties and
songwriter royalties, and the process whereby the latter are established can be quite
important. Composing popular songs can be more profitable than singing them, if one
is able to collect the royalties that are due.

14. This is why many record companies try to recover these costs as quickly as possible by
postponing royalties until after their expenses have been recovered. In addition to the per-
unit costs, every record label has a lot of money tied up in inventory that may never be
sold. We often print 5,000 booklets to take advantage of a substantial price break, but
manufacture only 2,000 compact discs on the first run. After selling 5,000 we have to
remanufacture the print (fairly expensive) even if we only sell 50 copies in the next three
years. Keeping titles in print is expensive because of the manufacturing and warehousing
costs involved.

15. Actually, stores set the price of their recordings, not record companies. Every store decides
what its margin will be on a given product. I have seen Smithsonian Folkways single CD
recordings priced in U.S. stores anywhere between $13.95 and $17.95 — and all stores
purchased at the same price from our distributor. This table reflects U.S. prices. European
compact disc prices are generally higher, with CDs in Germany and France selling for
US$28.00 or more. European recording companies, therefore, may have higher margins.
On the other hand, Smithsonian Folkways receives less per unit on overseas sales because
we offer special pricing to compensate for import duties, sales in small quantities, and
currency fluctuations.

16. The cost of marketing and promotion and salaries are averaged out by taking the total
amount spent on these during a year, and dividing by the number of units sold.

17. While everyone cites the inexpensive price of pressing a compact disc (now around US$.70),
other costs include the paper parts (booklet, rear card), insertion costs, snickering costs,
top spine stickers, and shipping from the plant to the label’s warehouse.

18. We encourage people to buy through record stores. If a store cannot sell our recordings,
it sends them back (and gets its money back) and doesn’t carry any other recordings on
our label. If we are to survive in the highly competitive store market, we need people to
go into stores, ask for, and purchase our recordings.

19. This is the standard division of licensing income (when any at all is given to the artists;
many companies are not obliged to pay anything to artists for licensing). While it seems
like a lot of money for this lucrative $7,000 contract, a great deal of licensing falls into
the US$50.00-US$150.00 category, and involves the same amount of staff time, phone
expenses, and effort as the fewer, but larger, licenses. I also consider this fee to be partly
a payment for our expensive efforts to preserve the master tapes. We have found in a number
of cases that the collector’s original tapes are unplayable, whereas the Folkways production
masters are playable because of the care with which they have been stored over the past
forty-five years. Finally, we also advertise in professional publications to attract more licensing
business.

20. Royalty payments were roughly $180,000 that year; with an additional $60,000 spent on
salary, postage, office rental, computer equipment and software upgrades, and other expenses
for the royalty services.

21. I owe this title to a colloquium at the American Association of Museums, “Intellectual
Property Museums: Gold Mine or Mine Field,” organized by Bill Ivey in May 1996. Some
of my points in this section were raised in my presentation at that forum. I am particularly
indebted to Kevin Doran, licensing and royalties manager for Smithsonian Folkways Recordings for his comments on this subject.

22. This is an “ideal case” because often the musicians won’t be unanimous about this or anything else. I am simplifying the case in order to simplify the discussion of the central issues involved.

23. In my research among the Suyá I have been very impressed by their use of both audio and video technology to document events. Their coverage is often fuller and more focused (in the sense of focussing on culturally important things) than anything I would have done. This does not negate the significance of my own recordings — driven as they are by comparative or theoretical concerns — but it emphasizes the usefulness of taking plenty of cables along and making copies whenever possible.

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