

'For Those About to Rock': cybersimulcasting live music on the internet

Therese Catanzariti¹

*The walls start shaking
The earth was quaking
But your mind was aching
They were making it
and you ...*

... couldn't really enjoy the music, the noise and the scene because you were worried. Was anyone going to come out of the woodwork and claim royalties? Sue you for defamation? This paper analyses the creative contributions involved in a live rock webcast and suggests effective rights management methods and risk management strategies.

Cybersimulcast

Australia is one of the largest music markets in the world. In terms of recorded music, in 1998 the Australian retail market accounted for US\$606.7 million, or 1.6 per cent of world sales, making it the ninth largest market in the world.² In terms of live music, a recent survey revealed that 50 per cent of

1 Senior Associate, Mallesons Stephen Jaques. This is an edited version of a paper, 'For Those About to Rock', presented to the NSW Society for Computers and the Law on 22 April 1998 in Sydney. The author would like to thank Warwick Rothnie and Anthony Borgese for their comments on earlier drafts of this article. The opinions and comments are the author's own and do not necessarily reflect the opinions of Mallesons Stephen Jaques or its clients.

2 International Federation of Phonographic Industries music statistics cited in *The Economist* 15 May 1999, and on the IFPI website at <http://www.ifpi.org.uk/music_stats/index.html>.

people surveyed in 1998 had watched a live band (including pub and small venue bands) in the previous 12 months, and 45 per cent had attended major rock concerts performed in stadiums and large venues.³

Australia is poised to become a major player in cybersimulcasts of live music. A cybersimulcast can be represented graphically in the form of *Diagram 1*.

Diagram 1



This paper considers the copyright and other legal issues relating to the content.⁴ I will explain the concepts using recent Sydney rock concerts as examples, and in particular:

- the Billy Bragg and the Blokes concert at the Enmore Theatre on 11 April 1999 to promote Billy Bragg's most recent album *Mermaid Avenue*, where Billy Bragg was supported by Rebecca's Empire;
- the Regurgitator concert at Selina's to promote Regurgitator's recent album *Unit*, where Regurgitator was supported by TISM; and
- the You Am I concert at the Enmore Theatre on 7 August 1998 to promote You Am I's recent album *No 4 Album*.

Content

The content is made up of a number of different elements: musical works, literary works, artistic works, dramatic works, performances, sound recordings and cinematograph films. It will include the following.

1. Musical works, such as the music of the songs being performed and the music of the prerecorded works played as 'warm up' or 'lights up' music.

- At the Billy Bragg concert, the musical works included the music composed by Billy Bragg performed by Billy Bragg, the music composed by Rebecca's Empire performed by Rebecca's Empire, and the music composed by the Small Faces in a song covered by Billy Bragg.

2. Literary works, such as the lyrics of the songs being performed and the lyrics of the pre-recorded music, and any banners or slogans.

3 Sweeney Arts Report conducted by Brian Sweeney & Associates as cited in Joyce Morgan, 'Big screen a winner as focus narrows' *Sydney Morning Herald* 23 April 1999, 15. A 1990s ABS survey revealed 26.9 per cent of people surveyed had attended a popular music concert in the previous 12 months: ABS Catalogue Number 4114.0, *Attendance at Selected Culture Venues*, March 1995 reference period. (Editor's note: see generally Tony Bennett, Michael Emmison and John Fraw, *Accounting for Tastes: Australian Everyday Culture* (1999), especially ch 7 'Music Tastes and Music Knowledge' 170.)

4 This paper is not a comprehensive analysis of all of the legal issues involved a cybersimulcast. In particular, the paper does not address regulatory issues which may affect the cybersimulcast, including the implications of the *Broadcasting Services Act 1992* (Cth) and the *Telecommunications Act 1997* (Cth).

- At the Billy Bragg concert, the literary works included the Woody Guthrie lyrics which have been put to music by Billy Bragg and Wilco and which were performed by Billy Bragg, the lyrics to the Billy Bragg songs performed by Billy Bragg, the lyrics to the Small Faces song covered by Billy Bragg, the lyrics to the Rebecca's Empire songs performed by Rebecca's Empire, and the lyrics to the songs which were Billy Bragg songs translated into foreign languages and which were played as 'warm-up' music.
- At the Regurgitator concert, the literary works included the piece recited by TISM, 'Why TISM never gets groupies'.
- At the Comedy Store, the literary works include the live comedy routine of any comedian as soon as it is recorded in a material form, for example when a comedian's mum records the performance on video camera.

3. Artistic works, such as the backdrop, the sets, any photographs, including promotional photographs which appear during the cybersimulcast, and any costumes.

- At the Billy Bragg concert, the artistic works included the photograph of Woody Guthrie which was used to advertise the *Mermaid Avenue* promotional tour.
- At the Regurgitator concert, the artistic works included the TISM costumes.
- At a Midnight Oil concert at the Tivoli in Cabramatta, the artistic works included the Tivoli stage which appeared as a backdrop to the band during the concert.

4. Dramatic works, such as choreography, and any script.

- At the Regurgitator concert, the dramatic works included the TISM dance choreography.

5. Performances, such as performance of the main artists, any support artists and any MC or compere, and the performance of any artists in the pre-recorded music.

- At the Billy Bragg concert the performers included Billy Bragg and the Blokes (including the keyboardist from The Small Faces) and Rebecca's Empire.
- At a concert by The Whitlams at the Metro, the performers included Adam Spencer from Triple J Radio, who was the MC for the evening.

6. Sound recordings such as prerecorded sound recordings of 'lights up' and 'warm up' music.

- At the Billy Bragg concert, the sound recordings included Billy Bragg recordings from *Workers' Playtime* played before the concert, and Wilco recordings from *Mermaid Avenue* played before the concert.

7. Cinematograph films such as film clips and moving images used as backdrops during the performance.

- At the You Am I concert, the cinematograph films included the visual fractal equation images which appeared as a backdrop to the band during the performance.
- At the Regurgitator concert, the cinematograph films included the 'Polyester Girl' film clip which appeared as a backdrop during the performance of the song 'Polyester Girl' by the band.

Thus, the content can be split into:

- works (literary, dramatic, artistic, musical works);⁵
- other subject matter (sound recordings and cinematograph films);⁶ and
- performances.⁷

5 Part III of the *Copyright Act 1968* (Cth) (the Act) available at <http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/index.html>.

6 Part IV of the Act.

7 Part XIA of the Act. Note the Act does not protect performances for educational institutions; a reading, recital or delivery of any item of news and information; a performance of a sporting activity; or participation in a performance as a member of an audience: ss 248A(2) and 28(1).

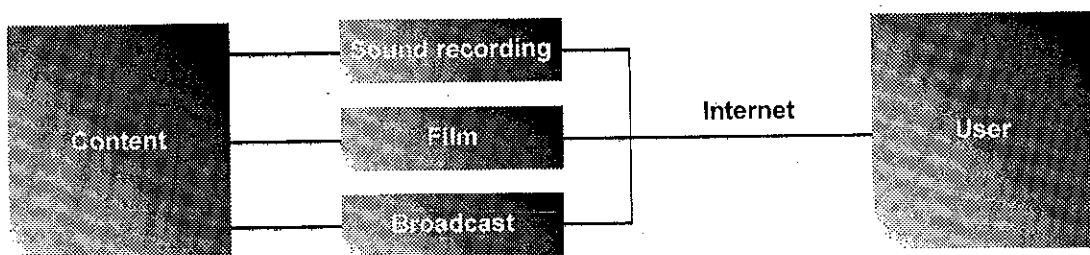
Medium

The content will usually need to be encapsulated into a medium, a material form,⁸ which can be cybersimulcast to the user. No medium will be involved if the music is *streamed in real time* without being recorded in a material form. However, many cybersimulcasts do not only involve *pure* real time streaming.⁹

This is for two reasons. First, if all users hit on one site and that site cybercasts in real time direct to all users, the site may become jammed because of the traffic. It may be more efficient to cybercast in real time to one site and have the site mirrored so that users can hit a number of mirrored sites rather than the original site, and so receive the cybercast from the mirrored site rather than in real time direct from the one site. To the extent a site is mirrored, the content is recorded in a material form.

Second, the person arranging the cybersimulcast may find it difficult to exploit the rights to the cybersimulcast if the rights are limited to a once only live performance. The owner of the site taking the cybersimulcast will usually require that the concert is streamed in real time *and* available on the site for a period after the live performance. To the extent that the owner of the site requires that the concert is archived and available on the site, the person arranging the cybersimulcast will need to record the concert in a material form. The content could be encapsulated as a cinematograph film, a sound recording or as a broadcast (see *Diagram 2*).

Diagram 2



Right to reproduce works

In order to encapsulate the works into the media, it will be necessary to secure certain rights from the owners of the works. In particular, it will be necessary to secure:

- (1) the right to reproduce the works (that is, record the works); and
- (2) if the media is film, the right to synchronise the recording of the works with the film.

A person needs these rights because copyright includes the exclusive right to reproduce a literary, dramatic, musical work,¹⁰ or an artistic work,¹¹ and a literary, dramatic or musical work is deemed to have been reproduced if a sound recording or cinematograph film is made of the work, and any record

8 Material form means a form of storage, whether invisible or not, from which a work or a substantial part of the work can be reproduced: s 10 of the Act.

9 For a discussion of live streaming technology, see M Bamford, 'Sounds Unlimited: Music and Copyright in Cyberspace' (1998) 17:4 *Communications Law Bulletin* 16; J Koranteng, 'Music on the Internet' in *FT Media and Telecommunications* (1998); H Siegal and D Stein, 'Music Performance Rights on the "Net"' [3 November 1997] *New York Law Journal*; J Blair and M Bamford, 'Sounds Unlimited: Music and Copyright in Cyberspace' [May/June 1998] *Copyright World*, available on <<http://www.ipworldonline.com>>; and K Murphy, 'Waiting for the Webcam' *The Australian* (Sydney), 12 August 1999, Media Supplement, 9.

10 Section 31(1)(a) of the Act.

11 Section 31(1)(b) of the Act.

embodying such a recording and any copy of such a film is deemed to be a reproduction of the work.¹² As stated above, a cybersimulcast usually requires that works are encapsulated into a medium such as a sound recording or a cinematograph film.

In addition, there may be a reproduction on the user computer's RAM during the simulcast.¹³

However, there are some exceptions. First, copyright in an artistic work is not infringed by the inclusion of a work in a cinematograph film if its inclusion is only incidental to the principal matters represented in the film.¹⁴ The inclusion of any backdrops, posters and sets at the concert may be incidental to the principal matter of the film, namely, the performance of the artist(s) at the concert.

Second, there is a limited exception in the *Copyright Act 1968* (Cth) (the Act) for broadcasters, namely that copyright in a literary, dramatic or musical work is not infringed by reproducing the work in a film or sound recording if the recording or film is solely for the purpose of broadcasting the work.¹⁵ This exception will rarely apply, as the person arranging a cybersimulcast is unlikely to be a 'broadcaster' — that is, the ABC, SBS or a person who has a licence under the *Broadcasting Services Act 1992* (Cth) — and a cybersimulcast may not always fall within the definition of 'broadcast' because broadcast only covers 'wireless'¹⁶ transmission and not, for example, transmission by cable.

Third, the Australian Federal Government proposes to amend the Act so that copyright in a work is not infringed by making a temporary reproduction of the work as part of the technical process of making or receiving a communication.¹⁷ This means that you may not need to secure the right to reproduce for a cybersimulcast to the extent it is real time, or near real time. For example, the exception would probably cover the reproduction of the content on the user computer's RAM, and may cover reproduction by the mirrored sites. However, you would still need to secure the right to the extent that the cybersimulcast will be stored and archived on the site to be available for a period of time after the concert.

12 Section 21 of the Act.

13 *Microsoft Corporation v Business-Boost Pty Ltd* (unreported judgment, Tamberlin J, Federal Court, 8 October 1999).

14 Section 68 of the Act.

15 Section 47 of the Act.

16 The term 'broadcast' is defined in s 10 of the Act as 'transmit by wireless telegraphy to the public'. The internet may not be 'wireless' to the extent the signal travels via telephone lines or cable as opposed to, for example, the extent to which the signal travels via satellite. For a further discussion of the meaning of the term 'broadcast' see *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 71 ALJR 1312. Some mobile phones and hand held devices can connect to the internet and send and receive email. Some hand held devices such as Psion 5 have basic web browsing ability: see, for example, 'A Road Warrior's Best Weapon is Knowledge' *Weekend Australian Financial Review* (Sydney) 22 May 1999. Many phone makers are becoming involved in partnerships, such as the one between IBM and Nokia, to pursue the WAP (wire application protocol) market to allow mobiles to access internet control: see, for example, Helen Meredith, 'Any way you look at it, WAP is the clear winner' *Weekend Australian Financial Review* (Sydney), 16 October 1999, 20. However, at this stage, the technology requires wire technology (particularly cable) rather than wireless technology because of the amount of content and the bandwidth required for a webcast. For example, on a standard 28.8 kbps modem, webcast can provide FM quality audio and 10-15 visual frames per second. This significantly improves with broadband technologies such as cable modems which can receive data at up to 10Mbps (as cited in Murphy, above n 9).

17 Proposed s 43A, inserted by Sch 1, item 45 of the Copyright Amendment (Digital Agenda) Bill 1999 (the Bill) available at <<http://www.aph.gov.au/parlinfo/billsnet/99173.pdf>>. However, the House of Representatives Standing Committee on Legal and Constitutional Affairs Advisory Report on the Bill, issued November 1999, recommended that this exception be removed from the Bill (Rec 35).

Owner of the right to reproduce the works

The owner of copyright in the works will vary with the particular element. The first owner of copyright of a literary, dramatic, musical or artistic work is usually the author.¹⁸ However, copyright rarely *stays with the author*.¹⁹ The likely owner of the right to reproduce literary works will be:

- the Australian Mechanical Copyright Owners' Society (AMCOS) for song lyrics;
- a music publishing company for song lyrics for songs composed by their signed artists/composers (for example, at the Billy Bragg concert the likely owner of the reproduction/synchronisation rights in the *Workers' Playtime* songs would be Festival Music and the likely owner of the reproduction/synchronisation rights in the *Mermaid Avenue* songs would be Warner/Chappel Music);
- the print publisher or the Copyright Agency Ltd (CAL)²⁰ for poems or novels; and
- the comedian for a live comedy routine.

The likely owner of the right to reproduce musical works will be:

- AMCOS for songs; and
- a music publishing company for songs composed by their signed artists/composers.

The likely owner of the right to reproduce artistic works will be:

- for photographs — the photographer, the record label (who may have commissioned the photographer to take photographs of the artist/s signed to the label and obtained an assignment of rights from the photographer), or the promoter of the concert (who may have commissioned the photographer to take photographs of the artist/s performing at the particular concert and obtained an assignment of rights from the photographer);
- for backdrops or sets — the venue or the promoter of the concert; and
- for 'high end' artistic works — Viscopy Ltd or the artist.

The likely owner of the rights in a dramatic work such as choreography will be:

- the promoter of the concert; or
- the record label to which the artist performing the choreographed routine is signed.

Other subject matter

Any prerecorded music or film clip which is part of an existing recording may also be encapsulated on the media, being the cinematograph film, sound recording or broadcast (see *Diagram 3*).

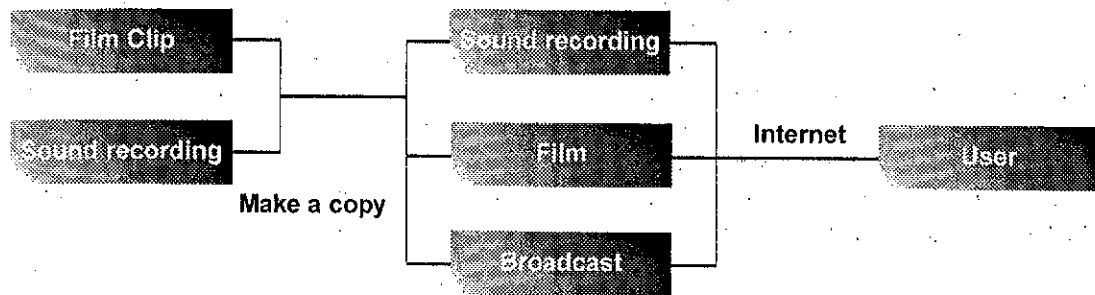
The right to make a copy of the sound recording or film clip will need to be secured to allow the recording to be copied onto the sound recording or the soundtrack of the film, or the film clip included in the film or broadcast. This is because:

¹⁸ Section 35 of the Act.

¹⁹ In 1997 more than 70 per cent of the music recordings supplied to retailers around the world were owned by six multinationals, namely EMI Music (Capitol, Virgin), Sony Music (Columbia Records, Epic), BMG (Arista, RCA) Warner Music, Universal (MCA, Universal Records, Geffen) and Polygram; Koranteng, above note 9. The 1998 *Economist* survey on the entertainment and technology industry noted that the international entertainment industry is dominated by seven multinationals, namely Time Warner (owner of Warner Music), ABC/Walt Disney, Bertelsmann (owner of BMG), Newscorp (owner of Mushroom Records and Festival Records), Seagram (owner of Universal and, since 1998, Polygram), Sony (owner of Sony Music) and Viacom. Viacom is the only one without a notable music arm: *The Economist* (London) 21 November 1998.

²⁰ CAL's statutory licence is currently limited to reprographic reproduction only (that is, photocopying): *Copyright Agency Limited v University of Adelaide* (1999) 42 IPR 529, especially 548-549. Initially, the universities were seeking a determination in the Federal Court to determine whether the Copyright Tribunal is required to determine a rate for digital copying. However, this is no longer being pursued.

Diagram 3



- (1) copyright in a sound recording includes the right to make a copy of the sound recording,²¹ and
 (2) copyright in a cinematograph film includes the right to make a copy of the film.²²

The first owner of copyright in a sound recording will be the maker of the sound recording or a person who commissions another person to make the sound recording for 'valuable consideration'.²³ The maker of the sound recording is the owner of the record.²⁴ Historically, the likely owner of the right to reproduce a sound recording is the record label's record company. However, increasingly, artists themselves are producing their own recordings and owning the rights in the sound recordings.

The first owner of copyright in a cinematograph film is the person who makes the necessary arrangements for the production of the first copy of the film,²⁵ or a person who commissions another person to make a film for 'valuable consideration'.²⁶ The likely owner of a film clip used as a backdrop during a concert will be the record label who has released the accompanying song, or the venue.

Performance

A performer does not have any positive legal rights in their performance.²⁷ However, the performer must consent to the recording of their performance, the broadcast of their performance, or the use of the recording of their performance as part of the soundtrack of a film.²⁸ In addition, performers who are 'signed' to a record label are usually required to agree in their contracts that they will not allow any other

21 Section 85 of the Act; Section 23 of the Act provides that sound embodied in a soundtrack associated with visual images forming part of cinematograph film is deemed not to be a sound recording. However, the High Court confirmed in *Phonographic Performance Company of Australia Limited v Federation of Australia Commercial Television Stations* (1998) 72 ALJR 924 that a sound recording does not disappear into the soundtrack of the film, and the rights in the sound recording continue to be exercised every time the rights in the film which incorporates the sound recording are exercised, so it is necessary to obtain the rights from the owner of the sound recording.

22 Section 86 of the Act.

23 Section 97 of the Act.

24 Section 22(3) of the Act.

25 Section 22(4) of the Act.

26 Section 98 of the Act.

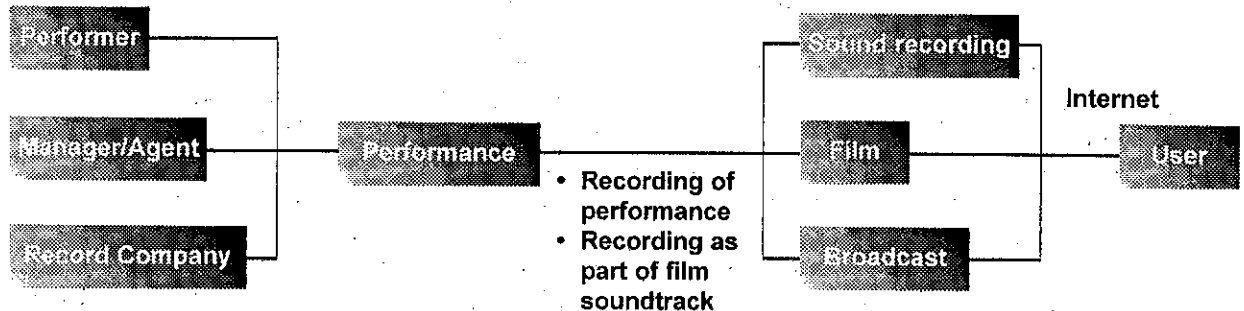
27 The Australian Federal Government is considering introducing more comprehensive performers' intellectual property rights as part of acceding to the World Intellectual Property Organisation (WIPO) *Performances and Phonograms Treaty* 1996: see the discussion paper issued by the Attorney General and the Minister for Communications, the Information Economy and the Arts, *Performers' Intellectual Property Rights* (December 1997) which is available at <<http://www.dclta.gov.au/cgi-bin/trap.pl?path=823>>.

28 Section 248G of the Act.

person to record any of their performances. This is to protect the record label's investment in the record label's sound recordings of the performer, and ensure its commercially released sound recordings are not in competition from sound recordings of the performer made by someone else. Finally, performers who have a manager or agent are usually required to agree in their contracts that they will not consent to any arrangements relating to their professional career except through the manager or agent. This is to protect the manager or agent's investment in the performer's career and ensure that the agent or promoter gets a cut when the performer 'breaks through'.

This means consents need to be secured from the performer, from the manager or agent, and from the record label if the performer is signed to a record label (See *Diagram 4*).

Diagram 4



Cybercasting the content through the media to the user

In order for the user to receive the film sound recording or broadcast encapsulating the content, the film sound recording or broadcast must be 'cybersimulcast' to the user. I use the phrase 'cybersimulcast' because the current concepts used in the Act do not exactly cover what it is happening.

Four points can be noted in particular. Copyright in a literary, dramatic or musical work includes the right to perform a work in public, broadcast the work and cause the work to be transmitted to subscribers to a diffusion service.²⁹ Copyright in an artistic work includes the right to include the work in a television broadcast or cause a television program including the artistic work to be transmitted to subscribers to a diffusion service.³⁰ Copyright in a sound recording includes the right to cause the recording to be heard in public and to broadcast the recording.³¹ Copyright in a cinematograph film includes the right to cause the film to be seen and heard in public, broadcast the film and cause the film to be transmitted to subscribers to a diffusion service.³²

It is not settled and not clear whether a cybersimulcast is a 'television program', a 'public performance',

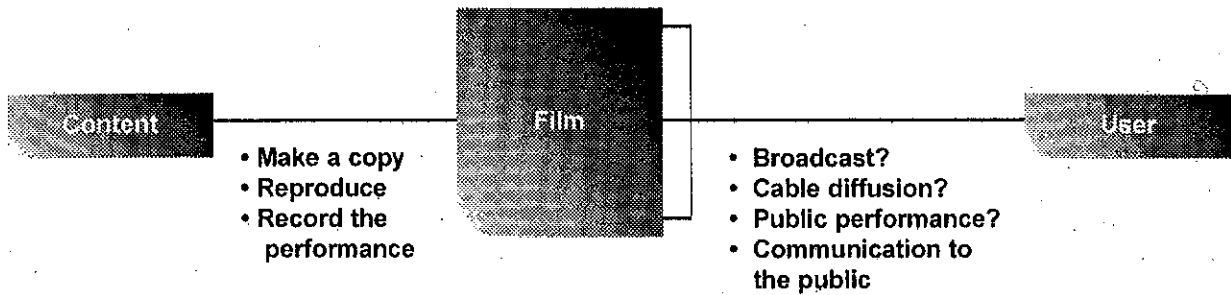
²⁹ Section 31(1)(a) of the Act.

³⁰ Section 31(1)(b) of the Act.

³¹ Section 85 of the Act. For a discussion of how the rights in a sound recording continue to be exercised even after a sound recording has been incorporated into the soundtrack of a film see *Phonographic Performance Company of Australia Limited v Federation of Australia Commercial Television Stations* (1998) 72 ALJR 924.

³² Section 86 of the Act.

Diagram 5



a 'broadcast' or a 'transmission to subscribers to a diffusion service'.³³ In some circumstances it may be some of these things; in other circumstances it may be none of these things.

This is not as problematic as it first appears. This is because these rights in elements of the content are often controlled by the one person. In addition, the Government has proposed that some of these rights be abolished and a new right introduced: the right to 'communicate to the public', which is intended to cover broadcast and transmission by cable as well as making available online.³⁴

Right to perform in public/broadcast/transmit by cable/communicate to public

The likely owner of these rights in the literary work will usually be the Australian Performing Right Association (APRA) for song lyrics and CAL for poems or novels. The likely owner of the rights in the musical works that are songs will usually be APRA.³⁵ The likely owner of the rights in the sound recordings that are commercially released sound recordings produced by major record labels will usually be the Phonographic Performance Company of Australia (PPCA).

Technology

In order to cybersimulcast the content as encapsulated in the film, the sound recording or the broadcast to the user, certain technology will need to be used. In particular, the internet service provider (ISP) will need to secure rights to use live streaming technology, such as Liquid Audio™ or Real Networks' Real System G2™.³⁶ For example, the 'Mushroom Concert of the Century', cybersimulcast on the 'Addicted to Noise' site, was streamed using Real Networks' streaming technology.

It is important to note that the licences to use the streaming technology may restrict the ISP to a limited number of feeds. This is because the technology is still being developed, and the sound and visual quality may fall as more users log on.³⁷

33 These issues were the subject of litigation in APRA's claim against Ozemail in 1998. However, the case settled before it reached trial.

34 Schedule 1, items 6, 35, 36, 37, 81, 82 and 83 of the Bill amending ss 10(1), 31(1)(a)(iv), 31(1)(a)(vii), 31(1)(b)(iii), 85(1)(c), 86(c) and 87(c) of the Act and deleting ss 31(1)(a)(v), 31(1)(b)(iv) and 86(d) of the Act.

35 APRA already issues experimental online music licences; see Kirsty Needham, 'Pirate radio blast in the past' *Sydney Morning Herald* 17 November 1999 32.

36 For a discussion of live streaming technology, see above n 9.

37 Real Networks claims that its system maintains quality for up to 50,000 simultaneous users, and it is working with Microsoft to create a more advanced streaming format: Koranteng, above n 9. *The Australian* has reported that the webcasting picture may be prone to interruption if there is too much traffic visiting the site: Murphy, above n 9.

Clearances

As well as the rights in the content and in the media such as the film, the sound recording or the broadcast, there are other legal risks in arranging a cybersimulcast. First, there is the risk of defamation. A person can bring an action for defamation if a statement is capable of conveying a defamatory meaning, and the subject of the defamation can be identified from the statement.

Second, there is the risk of passing off. This is a misrepresentation of an endorsement or association that does not in fact exist.

Third, there is the risk of infringing the *Tobacco Advertising Prohibition Act 1992* (Cth) if the cybersimulcast gives publicity to or otherwise promotes or is intended to promote smoking, the purchase or use of a tobacco product or a range of tobacco products, the whole or a part of trade marks registered in respect of goods including tobacco products or the whole or part of the name of a person who is a manufacturer of tobacco products or whose name appears on the packaging of some or all of those products.

Fourth, there is the risk of copyright infringement for miscellaneous bits and pieces that inadvertently appear on screen. The 'high risk' items include:

- (a) the venue (for example, it may not want to be seen to be associated with the gig);
- (b) products such as musical equipment such as amps, guitars or drumkits (during the Billy Bragg concert, Bragg complained that his amp never worked, but luckily, the brand of the amp was not clear from the pit), alcohol or other drinks that appear on stage, T-shirts worn by the artists during the concert, and cigarettes; and
- (c) the artist's repartee during the performance (during the Billy Bragg concert, Bragg discussed East Timor, Serbia, Slobodan Milosevic, NATO and the airstrikes, Hans Eisler, and the bad manners of English tourists).

Credit

Many artists and record labels will be keen to get involved in a cybersimulcast because of the free publicity and promotion rather than because of any fee that they may be paid. An artist and/or record label may be willing to accept a reduced fee if they are guaranteed a certain amount of publicity.

For this reason it is critical to sort out and confirm what credit each artist and record label will be entitled to before the cybersimulcast, and the relative credits of the other artists and performers; that is, the size, type and order of credits.

The types of credits may include:

- spoken credit before the start of cybersimulcast;
- written credit before the start of the cybersimulcast (single frame);
- written credit before the start of the cybersimulcast (rolling credit);
- spoken credit at the end of the cybersimulcast;
- written credit at the end of the cybersimulcast (single frame);
- written credit at the end of the cybersimulcast (rolling credit);
- credit in all advertising or promotion of the cybersimulcast on the site; and
- credit in all paid advertising or promotion of the cybersimulcast in any medium.

Some artists and record labels may require a credit on the basis that the artist or record label's credit is tied to the credit of other artists or record labels so the artist or record label receives a credit whenever a particular artist or record label receives a credit, or even when any other artist or record label receives a credit.

However, because of the technology glitches still inherent in the internet, a person should never guarantee the cybersimulcast of the concert will be made in whole, or in part, or at all. In particular, all liability for loss of opportunity to enhance the reputation of the artist or record label should be expressly excluded for failure to undertake the cybersimulcast at all, or failure to include the performance of the artist or the works of the record label in any cybersimulcast.

Edits, additions and deletions

The cybersimulcast may be framed by a website, framed by banner advertising or appear on screen with other advertising. In addition, parts of the concert may need to be cut because of the risk of infringing a law such as defamation, contempt of court or obscenity, because of a technology glitch, or because of the low quality of the performance. Thus, it is necessary to secure the right to add to, delete from, adapt, change and/or otherwise modify the concert and place it in any context during the cybersimulcast, each contributor should consent to such changes.³⁸

International nature of the internet

The internet is accessible by any person who has the necessary equipment, anywhere in the world. As such, it is necessary to secure rights throughout the world. It will not be enough to secure the rights for Australia, even if the main audience is in Australia, the concert may only be of interest to Australians, and the concert is only advertised in Australia. For example, Triple J Radio's 'Super Request', broadcast throughout Australia on weekday evenings, often announces requests from outside Australia, mostly from homesick Australians tuning in through the ABC website. However, this is not as problematic as it sounds. APRA, AMCOS, PPCA, CAL and Viscopy have affiliates throughout the world³⁹ so the local collecting society can co-ordinate the rights. In addition, many major record labels are multinationals,⁴⁰ so the local office can co-ordinate the rights.⁴¹

Collecting societies

As cybersimulcasting and cybersimulcasting technology develops and matures, the focus will become the relative bargaining position of the different stakeholders in the music industry, and in particular the demarcation between the different collecting agencies involved in the music industry. This has been foreshadowed by the recent dispute in the United States between the Harry Fox Agency, which collects royalties for the sale of recordings, and ASCAP, which collects royalties for the broadcast of musical works. The Harry Fox Agency considers digital distribution as downloads to be no different from getting a physical copy of a tape or CD. On the other hand, ASCAP considers it to be a broadcast.⁴²

Alternatively, the various collecting societies could merge. Currently, collecting societies collect for particular rights and particular types of works in particular territories. The various collecting societies could become super-collecting societies, a one stop worldwide clearance house for a number of different rights and a number of different types of works. However, this could have serious anti-trust implications.⁴³

Another option would be for the various collecting societies to retain their separate identities, but become part of a co-ordinated copyright management system. For example, the European Union recently funded a project known as the Imprimatur program, which involved telecommunications companies,

38 See proposed s 195AW of the Copyright amendment (Moral Rights) Bill 1999 (Cth) relating to consent by an author.

39 For example APRA is affiliated with SACEM (France), ASCAP (United States) and PRS (United Kingdom).

40 See above n 18.

41 For a discussion of the rights involved in webcasting sound recordings in the UK see Blair and Bamford, above n 9, and for a discussion of the rights in the US, see V Espinel, 'The US Recording Industry and Copyright Law' [1999] *European Intellectual Property Review* 53 and Siegal and Stein, above n 9.

42 As reported in Dan Goddin, 'Net Music Changing Copyrights' *CNET News.com*, 27 April 1999.

43 For a discussion of the role of collecting societies and super collecting societies, see ALAI 1997 *Montebello Report*. For a review of the collecting societies operating in Australia, including an analysis of competition law issues, see S Simpson, *Review of Australian Copyright Collecting Societies* (1995) commissioned by the Attorney General and the then Department of Communications and the Arts available at <http://www.dca.gov.au/nsapi-text/?Mlval=dca_dispdoc&ID=593>.

music industry stakeholders such as Bertelsmann and the International Federation of the Phonographic Industries, European collecting societies such as CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs) and European libraries and archives such as the British Library and the University of Florence (notably the Alinari archive of photographs). The project involved a central clearing house for the digital use of works. The project was completed at the end of 1998, but the work is being carried forward by Imprimatur Services Limited.⁴⁴

Conclusion

A live rock webcast requires forward planning and effective contract management to ensure that all rights owners and creative contributors understand the process and are comfortable with the way the webcast is managed and their work is presented.

It is hoped that as the webcasting technology develops, the various rights owners will co-ordinate and streamline the clearances process to facilitate effective rights management.

In the meantime, look out — it's rough and mean. It's a long way to the top if you wanna rock and roll. ●

44 For further information about the Imprimatur project, see the Imprimatur website at <<http://www.imprimatur.akcs.co.uk>>.