

**Protocols for Commercial Release of Archival Concert Recordings
as developed by the Old Town School of Folk Music
for the Gaylord and Dorothy Donnelley Foundation
3/30/2012**

Preface

Sound archives are important for preserving and disseminating artistic and historical information. Since the advent of digital capture and storage of audio, sound archives have become more feasible for medium and small sized arts organizations who present concerts. The legal burden of making a backlog of concert recordings available to the general public is formidable for these types of organizations, but not insurmountable.

What follows is a description of the protocols that were developed for an archival release project at the Old Town School of Folk Music. The project's outcome was the commercial, digital-only release of 127 songs from our archive of live concerts. The budget for this project was \$81,000 over two years, \$50,000 from the Donnelley Foundation and \$31,000 from the Old Town School. The aim of the project has been to unearth some hidden gems that can be used in the classroom, to shed new light on the history and musical life of the School and to pave the way for more access projects in the future. It is our hope that this document will inspire others to take up the work of releasing archival material.

Introduction

The Old Town School of Folk Music has been a cultural center in Chicago since it was founded in 1957. It has grown from 150 students studying folk instruments, singing and dance to 6,000 plus students studying a greatly expanded pallet of vernacular disciplines. From its beginning the School presented concerts by artists like Big Bill Broonzy, The Weavers, Pete Seeger, Josh White and Mahalia Jackson, and many recordings survive from that early era. For a full History of the Old Town School, please visit <http://www.oldtownschool.org/history/>

In the early 2000s, the School secured two grants from the Donnelley Foundation to set up a digital archive for concert recordings. Digitization of older recordings on tape-based storage is well on its way to completion, and updated storage is underway for the newer, digital-only recordings currently being captured in our concert halls. Three years of initial digitization produced a cache of 12,000 archived songs that we were able to pick from when we started our release project in 2010.

Read on to discover how to channel the excitement of discovering a cache of lost and important music into a practical plan for making that music and that emotion available to the general public.

Designation of Project Manager, Attorney and Licensing Agent(s)

To successfully license content, a project manager (“Project Manager” or “Manager”),

attorney, and licensing agent(s) are hired or contracted to carry out certain duties (collectively referred to as “Project Staff”).

Project Manager. Whether working with grant funding or otherwise, the project will require a leader. The leader, or project manager, will be the final decision maker with respect to how the project will be administered, including: providing support to the licensing agents; contacting artist representatives; tracking progress of the project; and updating grant funders or other interested parties as to the status of the project. Once the licensing is complete, the project manager will take on additional roles, which will be outlined later in this protocol.

Attorney. With the assistance of the project manager and any other interested parties, an attorney must be selected and retained. It is imperative that the attorney has experience working with music licensing and copyright law as it pertains to music. The attorney will: draft the contract for the artists to sign, authorizing the use of the artist’s recordings; draft the mechanical license; correspond with artist representatives who require interaction solely with legal counsel; and answer any questions regarding contract language and construction.

Licensing Agent(s). Licensing agents will work as the liaison between the artists and the project manager. It is critical that the licensing agent(s) have an understanding of music copyright law, although it is not mandatory that the agents be attorneys. The licensing agent must be comfortable doing the following tasks: conducting online research to determine proper artist representatives; describing the project to artist representatives; maintaining organized records of daily activities; updating spreadsheets; and any other tasks the project manager or attorney assign.

Preparation and Strategy

Prior to the first meeting with the Project Staff, the Project Manager, Attorney, and Licensing Agent(s) must each conduct certain tasks to prepare for the project.

Project Manager.

Content Selection. Content selection is determinative of the overall length of the licensing process and impacts the type of contracts to draft and issue. Requesting authorization from artists that have a pre-existing relationship with the licensee may be less time consuming. Also, it is very important to know whether the content is owned or licensed by the party releasing the content.

To aid in the selection process, it is valuable to gain input from informed community members. If the release will be part of a business or school, perhaps it would make sense to make inquiries to administrators, executive officers, sales representatives, or consumers to select the content for release.

Although outside input is helpful in selecting the content to release, it is the final decision of the project manager as to what will be released. It is important to note that during the licensing process, there are artists that will not authorize use of their content. Faced with that reality, it is important to maintain a list of “back-up” or “waiting list” options. Further, throughout the process of releasing content, new information may surface during the process that may add or subtract options from the overall available content.

Review Contracts on File

Of the Project Staff, the Project Manager will work closest with the organization or individual seeking to license the content. In his or her capacity, the Project Manager must obtain any and all contracts pertaining to the content. The contracts may be in the form of past performance contracts or other licensing schemes. Regardless of the form of the past contracts, it is imperative that the Project Manager review each individual artist’s signed agreements with the licensee because certain artists may have signed an agreement but crossed off provisions, such as whether to record a live performance. These individualized amendments to a signed contract will dictate whether or not to approach an artist for the present project.

Attorney.

Draft Sound Recording Authorization Agreement

The Attorney must review the project proposal to determine which rights need to be acquired by the licensee. Whether the Project will be a license or an ownership acquisition will dictate how the sound recording authorization agreement (“Agreement”) will be drafted.

When drafting the Agreement, a Most Favored Nations clause (“MFN”) will likely prove fruitful when proposing the Agreement to artists and their representatives. The MFN will provide assurance that no other artist is getting a better deal than another.

The Attorney may want to contemplate incorporating an Audit Clause into the Agreement. Only one artist was unable to participate in the 100 Songs Project due to the absence of such a clause, but it was a sticking point in many negotiations.

Other considerations include, providing blank lines in the Agreement for an artist to fill in the name and date of the licensed work, whether to include a line allowing for the artist to donate any proceeds from the sale of the work, and drafting the language of the Agreement such that drastic editing for each artist is unnecessary.

Initial Meeting with Project Staff

Once the Project Manager has created a list of content to release, an initial meeting must be arranged between the manager and attorney to review the legalities of the project and to establish the role of each person involved in the project. Furthermore, the more

information the attorney is aware of at the beginning of the licensing project, the easier it will be to project a reasonable estimate of costs.

Prior to the first meeting with the manager, attorney and licensing agents, an office or space should be set up where the licensing agents will conduct work. The agents need: computers with Microsoft Word and internet access; writing utensils and paper; telephones with voicemail boxes; email addresses; media players to review the content; file cabinets; access to copy machine, scanner, stapler and hole puncher; stationery, stamps and envelopes; and other office supplies.

At the first meeting, each person's role should be clarified. Designate which team member will contact which artist. Each licensing agent should either select or be assigned roughly five artists. Although five may be a small percentage of total artists to contact, this small number will prevent the team members from getting overwhelmed.

In the early stages of project development, it is important to meet with the project manager, licensing agents and attorney every couple of weeks in person.

Project Staff Duties Before Contacting Artists

Throughout the Project, the Project Manager, Attorney, and Licensing Agent(s) will often work interchangeably and collectively. With that said, there are distinct functions for each.

Project Manager.

Prepare mp3 links of all songs to share

The Project Manager is responsible for ensuring all of the content is available to send to the artist via email (if possible). In the 100 Songs Project, all of the recordings were prepared on mp3 format and associated with a link to share. It is important to remind the artist that the recordings embodied in the mp3 are proprietary and not to be shared commercially or to the public - otherwise the Project would be undermined.

Attorney.

Prepare a Term Sheet and Pitch

Attorney is responsible for preparing a short, two (2) to three (3) paragraph proposal that can be sent to the artist and his or her representatives ("Pitch"). The Pitch will provide the background of the organization, explanation of the project, the date the artist performed, why the artist was selected for the project and why the artist should participate. The Pitch will be sent in conjunction the mp3 or other content for licensing.

In addition to the Pitch, Attorney should prepare a Term Sheet, which will be a one-page

statement summarizing the terms of the Agreement.

Licensing Agent.

Create Spreadsheet

The Licensing Agent will be responsible for maintaining a high level of organization throughout the Project. To facilitate order, the Licensing Agent should create a spreadsheet. One possible way to share the spreadsheet is through creating a Google.doc. The spreadsheet should include the names of the Artists along the first column, and designate each subsequent column as the following categories:

- Name of Recording
- Date of Recording
- Artist representative or contact
- Date of contact
- Miscellaneous

Determine Proper Contact

In some circumstances, the artist is the the proper contact, in other instances there is a designated representative of the artist that deals with licensing. Reviewing any previously signed contracts by the artist or on behalf of the artist may provide insight as to who is the proper contact. Other resources include:

- All Music Guide: www.allmusicguide.com
- Google: www.google.com
- Wikipedia: www.wikipedia.org
- Other projects or organizations in the business of licensing, for example, Smithsonian Folkways was helpful with the 100 Songs Project
- Broadcast Music, Inc.: www.bmi.com
- Get creative, sometimes the white pages or reading an artist's history may lead to valuable information.

Sound Recording Clearance: Contacting Artists and Representatives

Project Staff.

Choose Initial Artists to Contact

Strategically deciding which Artists to contact first may improve the overall success of the Project. A suggested order of contact is as follows:

- (1) Friends of the organization, or people that are already aware of the project and enthusiastic about its prospects;
- (2) A bigger name that is easy to reach and/or highly values the licensing organization;

- (3) Lesser known Artists that are on the same label as other artists already signed;
and
- (4) Major Artists that will be excited to know that talented but up and coming or current Artists are already involved.

Without explanation, certain Artists will not be interested. Others will not like the quality of their work that the organization is seeking to release. Others will take issue with the Agreement. Remember, this is a most favored nations contract, so although Project Staff can explain provisions of the Agreement, the consideration cannot be changed.

Initial Contact

Once the general order has been decided upon and the proper contact has been determined, the Project Staff should make the initial contact. Depending on the design or breakdown of a particular Project, the Licensing Agents may do most or all of the outreach.

To ensure that the proper contact receives the Pitch, Agreement, Term Sheet, and the content to be licensed (“Initial Email”), the Program Staff should prepare all of the documents and anticipate emailing them either while on the phone with the Contact or shortly thereafter.

Next, telephone the Contact. Speaking directly to the contact or leaving a voicemail with the verbal pitch will both let the Contact know to look for your email, and provide the Project Staff with the opportunity to request the Contact’s email address.

Finally, within moments of the telephone conversation, send the Initial Email to the Contact. In the body of the email, remind the Contact that all contents enclosed are proprietary and should not be shared with anyone other than the Artist and his or her agents.

Keep Team Informed

Although the initial contacts were strategically selected, the process is amorphous. In order to avoid doubling up efforts, it is imperative that daily reports be circulated to all Project Staff providing a quick, one or two line, explanation of each Staff member’s progress.

The daily reminder is also a forum to ask questions, and through circulating the questions and answers, all Staff will stay informed. For example, if one licensing agent thinks a particular clause in the contract can be amended to conform to an artist/agent’s request, the suggested language change should be sent to the entire Staff so that all members will know how the issue is resolved.

As information is shared each day, remembering to update the shared document will

make it easier for the Staff to stay informed. Designating a color to highlight each artist is a simple and efficient way to identify the phase - voicemail, documents sent, documents signed, documents counter-signed.

The Follow-Up

In some instances, the Artist or Representative will sign the Agreement with very little back and forth correspondence. With that said, the majority will want to dissect the Agreement and know what other artists are participating in the project.

Early on in the project, there may be little to no artists who have already signed the Agreement. In that phase, it is important to respond to inquiries in a general fashion. For example, the response can be, “well-known historic folk artists.” It is a bad idea to name drop artists that have not signed the Agreement because the community will talk to one another to fact-check your statements.

Yet, once Artists do sign the Agreement, you can use their name to assist in pitching the project to those other Artists still on the fence. For this reason, it is a good idea to approach a well-known Artist early on, so his or her name can be provided to prospective artists.

Many Representatives will want to edit the Agreement. Remind the Representatives that the Agreement is on a Most Favored Nations basis, meaning that no Artist is getting a better deal than any other Artist. The MFN will provide comfort to the Representatives and keeps the costs for the organization down since there will be little to no negotiation. Despite the MFN, you can still explain how the Representative’s concerns are actually folded into clauses already in existence.

Another genre of Artist and Representative are those who will not return your calls. Some of these people are busy, many are disorganized, and others are not interested. It is difficult to determine the reasons why a person will not return your calls or emails. In this instance, it is important to be persistent without being a pest. Try to space out when leave voicemails or messages with assistants, but do not let more than one week pass without leaving a message or email. People may be out of town on tour, so do not give up even if months go by without any response at all. Remember to keep track of the dates of your messages on the shared spreadsheet. Continue to update the Artist or Representative as to what other Artists have joined the project. If many months pass with no word, and you are certain you are contacting the proper person, the Project Manager may make an executive decision to drop the Artist from the project.

Licensing Agent(s).

Organize the Signed Contracts

After receiving the signed Agreements, the Licensing Agents should request the Project Manager counter-sign the Agreements. Licensing Agents should photocopy the fully executed Agreements and send the **photocopy** to the Artist or Representative along with

a cover letter thanking the Artist for participating.

The original fully executed Agreement should be hole-punched, alphabetized by last name, and put into a binder.

Completion of Sound Recording Clearance

Once a group of Artists have authorized the use of their sound recording, a new set of duties arise.

Project Manager.

Engineer to Master Recordings

Groups of fifteen to twenty-five recordings should be mastered at a time. Beginning the mastering process prior to receiving all of the signed Agreements will expedite the process. It is helpful to have the engineer on site or scheduled to arrive on site to master the recordings in the presence of the Project Manager or other Staff.

Obtain ISRC Numbers

To move on to the musical composition clearance, the Project Manager and Licensing Agents should work together to obtain an International Sound Recording Code, or ISRC, for each of the recordings. In essence, the ISRC will allow certain agencies to track the number of times any given recording is downloaded. An ISRC can be requested through: <http://www.usisrc.org/>. A word of caution, if the recording has been previously released, it may already have an ISRC associated with it, so be sure to confirm this information prior to requesting an ISRC.

Licensing Agent(s).

Create New Spreadsheet for Cleared Artists

The Licensing Agents should create a second spreadsheet for Artists that have signed the Agreement (“Cleared Artists”). The Cleared Artists spreadsheet should be shared amongst the Staff, and include the following information:

- Performer on recording (most likely the Artist you contacted to sign the Agreement)
- Song Name
- Songwriter
- Publishing Company for the composition
- Whether the Song is represented by Harry Fox
- Whether the Song is listed on ASCAP, BMI, or SESAC
- Contact Name
- Notes/Miscellaneous

This set of information skews more in favor of information regarding the composition, not just the sound recording. The reason for obtaining this data will become clear in the following section: Musical Composition Clearance and Mechanical Licensing.

Musical Composition Clearance: Mechanical Licensing

Two different types of copyright clearance must be conducted prior to releasing a sound recording. The sound recording was already addressed in the first part of this protocol. The second right is in the composition or song. The process for clearing the song can be more streamlined because certain agencies, such as the Harry Fox Agency (“HFA”), allow a person to request up to 100 songs to clear at once or a greater amount depending on the type of account created.

Determine Songwriter

To clear the rights to a song, the songwriter or the songwriter’s publishing company will authorize the mechanical license. This information should appear on the Agreement, but can also usually be obtained through All Music Guide, ASCAP, BMI or general google searches.

Once the songwriter is known, you can access HarryFox.com and use the public search function to see if HFA can issue the mechanical license. Each song has a % next to the name, representing the % HFA can authorize. Sometimes the rights are split between HFA and the Artist or his/her publishing company, or all of the above.

Non-HFA Artists

Song clearance, or mechanical licenses, are compulsory. Meaning, if a song has been previously recorded and released, any future artist that wishes to record the composition must be allowed to do so by the author of the song. To document the request and acknowledgment, both parties must sign the mechanical license. Some artists or publishing companies may have their own mechanical license form, others may require you to send one. The license may be as simple as a one-page explanation of the rights requested and for what project. It is best to pay the composer quarterly or bi-annually after the recordings are downloaded, as opposed to paying an advance. The amount to be paid to the composer is established by statute, which at the time of this writing is 9.1 cents per use. There is an additional fee if the song is longer than 5.5 minutes long.

Once you have determined who to contact for the mechanical license, the approach of sending a pitch is useful, although not as necessary as for the sound recording since this license is compulsory. Nevertheless, you will still need to follow-up regularly. It is helpful to share with the artist or publishing company that there is a deadline for release.

If you never hear from the artist or publishing company, review the Copyright Act, because there is information as to how to issue a compulsory mechanical license through the Copyright Office.

HFA Artists

HFA Artists will be much faster to clear. First, create an account. Songfile is a good fit if you plan to have a small release with minimal downloads and want to pay for the use as an advance. If you are unsure of the number of songs will be downloaded, e-Mechanical is a better account. You will create a username, password, and place each song with its songwriter, release date, ISRC, and performer into a queue. The queue will sit in your shopping cart for up to 90 days.

Stay Organized

Be sure to update the spreadsheet so that you are sure all of the mechanical licenses have been requested and issued. Some will require advance payments, others may be quarterly while still others will be bi-annually. It is best to have as many as possible be on the same pay period to avoid accounting snafus.

Completion of Mechanical Licensing: Distribution of Content

If you are not working with a record label that has a direct relationship with e-tailers like iTunes, Amazon and others you will need to choose a company that will be your aggregator.

CD Baby, TuneCore, and The Orchard are all examples of companies that take your electronic masters, distribute them to e-tailers and then makes sales reports available to you.

Fees

The fee structure for these aggregator services changes based on the market, and there are up-front set up fees and percentages of sales to consider when weighing the options.

Options

Base choice on how many songs plan to release, whether promotional download cards are offered, how much assistance you will need in setting up and maintaining an account and how wide a distribution you need with e-tailers.

Marketing and Managing a Release

As soon as a release date is locked in with an aggregator, a whole new set of duties arise around the need to market and manage a release.

Download Cards

Distributing free download cards before the actual release is a way to generate interest within organization. Promotional downloads make excellent perks for Membership or Development Departments to hand out, and cards distributed to staff and faculty with generate a word of mouth buzz about the project.

Contracting with a company that specializes in download cards is recommended

(Dropcards) and it is good to have some cards/codes that allow for a complete download of the project and some allow download of a limited number of tracks. Set up and maintenance of the account uploading content, coding mp3s, and distributing the cards/codes are all new duties for the Project Manager.

External Publicity

Making use of your organization's contacts at radio stations, print media, blogs or web-based publication, etc. can be the shared responsibility of the Project Manager and the organization's Marketing Department. Using an outside publicist for a coordinated, short, release-only publicity campaign is an effective way to announce your project release, and can generate positive, high level attention from the media.

Accounting

A few months after release, sales reports can be downloaded in Excel format from your aggregator, and a system for making quarterly and bi-yearly reports for mechanical payments and artist share payments will need to be set up. It is possible to use Excel to generate reports and save a history of accounting, but a good deal of data manipulation is needed. A database designed to accept the raw sales data and generate reports is the next best step from working in Excel.

For songs that are not in the public domain a mechanical fee of \$.09 per sale (or \$.0175 per minute on songs longer than 5.5 minutes) must be paid to the publisher. Since this is based on volume of sales and not revenue generated, a tally of sales for each song title on the project will work. These payments will be due quarterly.

To compute the artist share the total revenue and total expenses for each song need to be compared on a bi-yearly basis. A per song number for total project expenses like mastering or marketing can be calculated, and once a song's post-mechanical revenue exceeds its expenses, that artist is entitled to 50%. Checks are issued after a threshold of \$20 in artist earnings is met.

The Future

Many will not have the staff or the budget to get into licensing on an ongoing basis, and an archival release may be a one time project for some organizations. However, there are benefits to regular or even rolling releases of archival material which may make an ongoing licensing component worthwhile. Moving forward past the initial release, there appear to be two general models for future projects.

Wide Range Model

A more hands-on approach to obtaining rights would be to plug a licensing agent component into the work-flow of booking concerts. Directly after booking the show with the Concert Department, the artist representatives would be put in touch with a licensing agent who would explain the recording portion of the contract and determine if the

artist might be interested in having the recording be part of a release, used in-house for educational purposes or if no recording is desired.

The licensing agent would likely be an existing employee charged with the additional responsibility of negotiating these licenses from the beginning, and the process would mirror much of the work that is done to license recordings that have already been made. Critical to this process is that all artists who agree to record are provided with a review copy of their concert so that they can determine if the quality warrants a commercial release, an on-line posting, or a strictly archival recording that is not available to the general public.

This approach would be geared to creating a wide range of uses for the recordings, and it assumes that there will be a few on-going release projects (yearly best-of CD, radio broadcast, an online juke-box that the organization maintains to promote concerts). The agent can point to these projects when talking with artist representatives and follow a path to licensing based on emphasizing the gains that the artist can make from a concert recording. The drawback to this approach is that artists and their representatives may be confused or unresponsive when given options about how their future content will be used.

Single Project Model

If ongoing release projects are going to be limited to just one mode, like a semi-annual best-of CD, then the time spent on licensing can be greatly reduced. A basic recording rider in the recording contract could be administered by the team booking the concerts and the licensing agent could approach compilation artists later with an expanded recording agreement. The work-flow would be the same as in a larger project described in these protocols, but since each CD is limited to 10 or 12 songs, it would be a fraction of the work.

The strength of this model is that it is easy to communicate and simplifies negotiations with the artists and their representatives. The drawback is that you are only able to get your organization's brand name out in one way whereas more even coverage over several media platforms is more likely to reach people.

Partnership

Partnership with a company that specializes in the kind of delivery your organization is offering is desirable for ongoing archival releases. Just like the aggregator who handled your organization's digital distribution, there are record labels or software designers who are interested in the potential of your organization's licensed archival content. A well-defined contract with a logical partner will ensure an ongoing outlet for archival material.