

# CLARIN Annual Conference 2021

## PROCEEDINGS

Edited by

Monica Monachini, Maria Eskevich

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## **CLARIN 2021 submissions, review process and acceptance**

- Call for abstracts: 19 January 2021, 1 March 2021
- Submission deadline: 28 April 2021
- In total 40 submissions were received and reviewed (three reviews per submission)
- Virtual PC meeting: 16-17 June 2021
- Notifications to authors: 22 June 2021
- 35 accepted submissions

More details on the paper selection procedure and the conference can be found at <https://www.clarin.eu/event/2021/clarin-annual-conference-2021-virtual-event>.

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## Ethnomusicological Archives and Copyright Issues: an Italian Case Study

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### Abstract

This paper adds a piece to the puzzle of the complex balance between diffusion and legal restraints in the management of oral archives. We focus on the Caterina Bueno Italian ethnomusicological archive, which is being processed by the *Archivio Vi.Vo.* project and represents a challenging case study in terms of protection of the original informants, the author of the arrangements and the other performers. In particular, the paper expounds problems and partial solutions related to authorship, the fixation of the musical performance, its reproduction, diffusion and the compensation for subsequent uses. Overall, the paper aims to promote awareness on legal protection while defusing the apprehension of potential obstacles and dampening excessive risk aversion in the diffusion of oral materials.

### 1 Moving targets, moving shields: oral archives and legal issues

In his preface to the *Guide to Oral History and the Law*, Neuenschwander (2014: XIII) bluntly stated through the words of attorney H. M. Welch that “[oral history], like any other [occupation], harbors a possibility of inflicting real or imagined injury and wrongs upon others, and those things usually. . . result in litigation”. Indeed, when dealing with copyright and privacy infringement, defamation and access management (Rubel, 2007: 171), legal risks lurk behind any discipline concerned with the recording, archiving and diffusion of human voice excerpts. However, several factors hinder the raising of legal awareness in oral discipline practitioners and researchers. For example, the constant evolution of the legal systems calls for cyclic revisions in the research practices. Interestingly enough, the American Oral History Association promoted the presentation of papers on legal issues (Dixon and Zachert, 1968) at its second National Colloquium in 1967. Nonetheless, a few years later, Eustis (1976: 6) warned the Association that the legal context had vastly changed, invalidating previous knowledge on the related issues. Ultimately, it is only through the work of periodic updates offered by Neuenschwander to the Association in the mid eighties that oral historians have welcomed the beginning of a new awareness on legal issues (Swain, 2003: 149)<sup>1</sup>.

The effects of obsolescence in knowledge are amplified by the advent of new technologies which, in turn, complexify case typology. In particular, the internet as a storage resource has critically undermined the researcher’s sense of guardianship towards oral materials, engendering uncertainty in management choices (Perks, 2009). Surveys conducted in the US (Brewster, 2000) and in the UK (Perks, 2009) stressed the absence of a consistent level of legal knowledge and uniform practices in the web management of oral archives. It comes as no surprise that this general feeling of uncertainty is making web archivists around the world lean toward risk aversion which, despite some recent developments, excessively limits the diffusion and access to the materials (Stobo, 2019: 51-58).

One way to rationalize risk aversion is to enrich our reference bibliography by presenting several case studies which may provide partial guidance to the assessments of those who are dealing with similar issues (Neuenschwander, 2014). Following attempts in Italy (Calamai et al., 2018) and elsewhere

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<sup>1</sup> Elsewhere in Europe a renewed awareness towards ethical and legal affairs in oral archives led to the collective writing of guides such as Ginouvès and Gras (editors, 2018).



(e.g., Chaudhuri, 2009), this paper will synthesize the legal problems which are pertinent to the management of a specific type of web resource, that is, in this case, an Italian ethnomusicological archive. In the following chapter (§2), the Caterina Bueno archive will be contextualized in the framework of the ongoing *Archivio Vi.Vo.* project. Then, a selection of legal issues related to authorship, the fixation of the musical performance, its reproduction, diffusion and the compensation for subsequent uses will be explored through the eyes of the management approach of the project (§3)<sup>2</sup>. At the end of each section, a diagram of the pertinent legal topics will be provided (Figures 1-4). Lastly (§4), conclusions will be drawn in the light of the constant struggle between “economicization” and free diffusion of culturally relevant materials.

## 2 The Caterina Bueno archive

The *Archivio Vi.Vo.* project started in 2019 through the approval and support of the Region of Tuscany. The project is coordinated by the University of Siena in collaboration with CNR-ILC & CLARIN-IT, *Soprintendenza Archivistica e Bibliografica della Toscana* and *Unione dei Comuni del Casentino*<sup>3</sup>. *Archivio Vi.Vo.* aims to build a web infrastructure which will be available to host several regional archives, with particular attention paid to the proposal of reliable procedures concerning the digital philology of oral materials, metadata and audio restoration. Moreover, accessibility and diffusion are at the core of the project: *Archivio Vi.Vo.* strives to make data findable, accessible, interoperable and reusable (FAIR). At the present time, the Caterina Bueno ethnomusicological archive is serving as a first case study and stress test for the constructs and utilities developed in the context of *Archivio Vi.Vo.* The eponym folk singer and researcher, Caterina Bueno (1943-2007), travelled around Tuscany recording the voices of common men and women singing their folk song repertoires. Through musical rearrangements, Bueno tried to preserve this intangible tradition, which became the object of her intense career as a musician. The archive consists of 476 analogue carriers (audio open-reel tapes and compact cassettes), for a total of more than 700 hours of recordings, which were previously digitised (see Calamai et al., 2021 for a brief history of the archive).

Even though, from the legal standpoint, the physical archive is unitarily governed by Art. 816 Civil Code (*universalità delle cose mobili*) as a collection of things belonging to a single person and having a single purpose, this only helps in solving issues related to the actual property of the physical carriers. On the other hand, as Law 633/1941 clarifies that copyrights apply to the contents of the archival materials and are independent of their physical carriers, the noticeable heterogeneity of the archive contents calls for multiple precautions. For this reason, the reader will not find any further mention to the issues related to the physical archive which, in any case, was returned to the original owners after digitisation. With respect to its musical contents, the archive includes not only some of the original field recordings, with the performances by Bueno’s informants, but also live events revolving around published pieces and rehearsals of Bueno and the members of her band. That is to say, *Archivio Vi.Vo.* is involved with the assessment of the risks concerning both authorship and performer rights. In addition to that, the transmission of the recordings through the web interface of the project may suggest keeping a strict eye on defining concepts such as diffusion (see below).

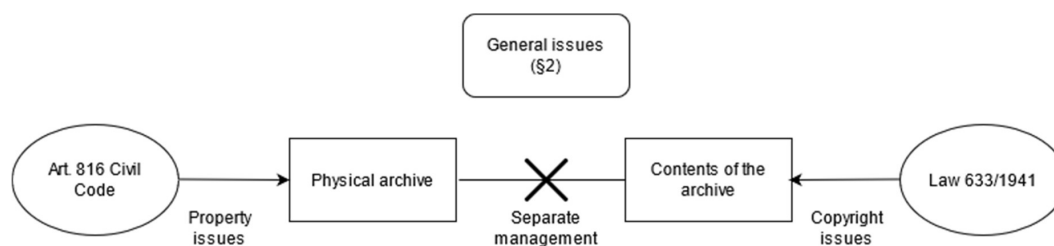


Figure 1. General management of an oral archive

<sup>2</sup> All of the above has been written with the actual Italian legislative context in mind; new rules following EU directive 2019/790 are expected shortly and could change the scenario in a significant way.

<sup>3</sup> The research group is composed as follows: Silvia Calamai, Giovanni Candeo, Monica Monachini, Duccio Piccardi, Niccolò Pretto, Maria Francesca Stamuli. Dissemination activities are coordinated by Pierangelo Bonazzoli.

### 3 A selection of ethnomusicological copyright hurdles

#### 3.1 Authorship

Two different facets of authorship rights pertain to the management of an ethnomusicological archive: the authorship of the original compositions and that of subsequent rearrangements and executions. As regards the former, it should be noted that the attribution of an orally transmitted composition to a specific author is often unfeasible. Even in the unlikely event that an accurate investigation manages to unequivocally back a claim of composition authorship, Law 633/1941 states that copyright protection ends 70 years after the death of the original author. Thus, composition authorship can hardly be considered a problem in similar ethnomusicological contexts, as the songs are presumably in the public domain.

Rearrangement or execution authorship can be claimed if the original composition incurred in a substantial creative revision. It is unlikely that the improvised elicitations of the source materials can be taken as proof of such endeavour. Therefore, a claim of execution authorship can be more plausibly attempted by the heirs of the folk singer (i.e., Caterina Bueno) or the other members of her band. However, onerous musicological reports are required to back this type of claim as well. In addition to that, the law does not specify the actual level of creative revision required for an attribution of execution authorship, thereby promoting disputability. Lastly, in the case of the Caterina Bueno archive, the donors are also the potential disputers, i.e., the heirs of the musician. Since the donors willingly cooperated with the project's staff and agreed with its general aim, behavioural coherence should be considered a fundamental aspect in the assessment of this kind of legal risk.

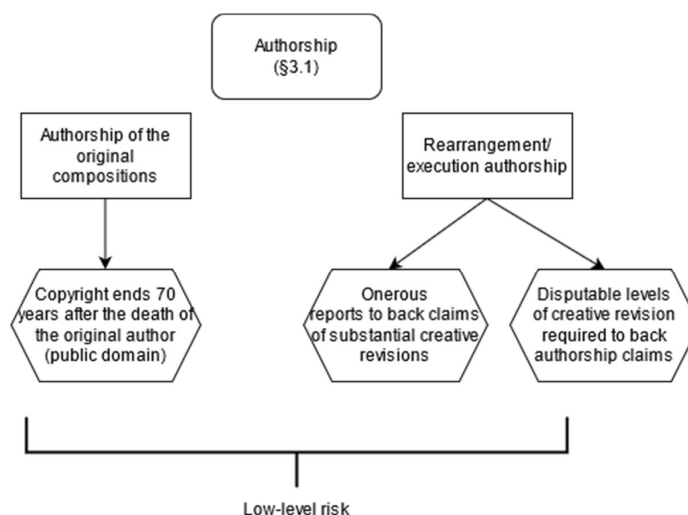


Figure 2. The two facets of authorship rights

#### 3.2 Performer rights

Even though authorship seems to be a minor issue in our ethnomusicological instance, music performers are protected independently of the authorship of the played pieces. Law 633/1941, Art. 80, Par. 2 elucidates the performer rights. Because of their relevance for the management of our archive, we will focus here on the rights concerning the fixation, reproduction and diffusion of music performances.

Fixation rights can be claimed when the recording is not authorized by the performer. With respect to the source materials, it can be safely assumed that Caterina Bueno's informants were aware of being recorded; Bueno always made clear that her intent was to preserve (through fixation) the oral tradition. Since the live events and the rehearsals were recorded by either Bueno or one of the members of her band, the lack of authorization for these contents can be hardly claimed. In the remote chance that specific recordings were taken without the consent of Caterina Bueno and her musicians, the fact that they were welcomed at some point in the Bueno private archive can be interpreted as a manifestation of approval.

Reproduction rights concern the digital copying of the contents of the physical carriers. This legal requirement seems to be per se clear-cut (but see below), since the only exception of the temporary reproduction for technological processes (i.e., caching; Art. 68-bis) is not pertinent to the core management of the archive. Therefore, each of the recorded performers (or their heirs) should ideally authorize the digitisation of the materials.

Lastly, diffusion rights are not always easy to interpret. The original copyright Law 633/1941 and its early reinterpretations were written with respect to synchronous, non-interactive and point-to-mass diffusion (live events, radio broadcasts, television). With the advent of the internet, an effort was made to translate the rules into new communicative contexts. In particular, Art. 80, Par. 2 c and d originally made reference to two different types of diffusion, i.e., live events and diffusion of fixed performances: the judgement by the Milan Tribunal (21/04/2010 n. 4549) equated these types to streaming and downloading services, respectively. Since the assessment of eventual damages depends on the actual propagation of the diffused materials, streaming services are highly preferable for an online archive. Nonetheless, each of the musical performers (or their heirs) should give consent to its streaming diffusion. In addition to that, in the specific case of published materials, producers should give their authorization as well (Art. 72).

The onerousness of providing declarations of consent for each of the music performers represented in the archive (or their heirs) can be mitigated in reference to the legal definition of “orphan work” and “performer”. In 3.1 we underlined the difficulties in the identification of an exact author of a folk song. A work is defined as “orphan” when scrupulous investigations fail to pinpoint its copyright holders (Art. 69-quater, Par. 1). This does not apply to authorship only, but also to the identification of performer right holders (Art. 71-decies). Note that Caterina Bueno’s informants are often anonymous; in this specific instance, non-profit reproduction and diffusion is allowed (Art. 69-bis). However, this permission is awarded only through a specific certification process, which involves the writing of an extensive report and the approval by the Ministry of Culture.

On a final note, it should be observed that Law 633/1941, Art. 82 leaves room for interpretation in the definition of which kind of performer is entitled to claim copyright. In addition to choir and orchestra leaders, the law protects the performers playing a “noticeable artistic role” in the disputed work. Of course, this phrasing does not unequivocally exclude specific categories of performers from copyright protection. Nonetheless, some Italian music associations of performers are independently trying to circumscribe the features of such “noticeable” individuals. Overall, it seems that terminological uncertainty may add fuel to the disputability of any claim of performer right violation.

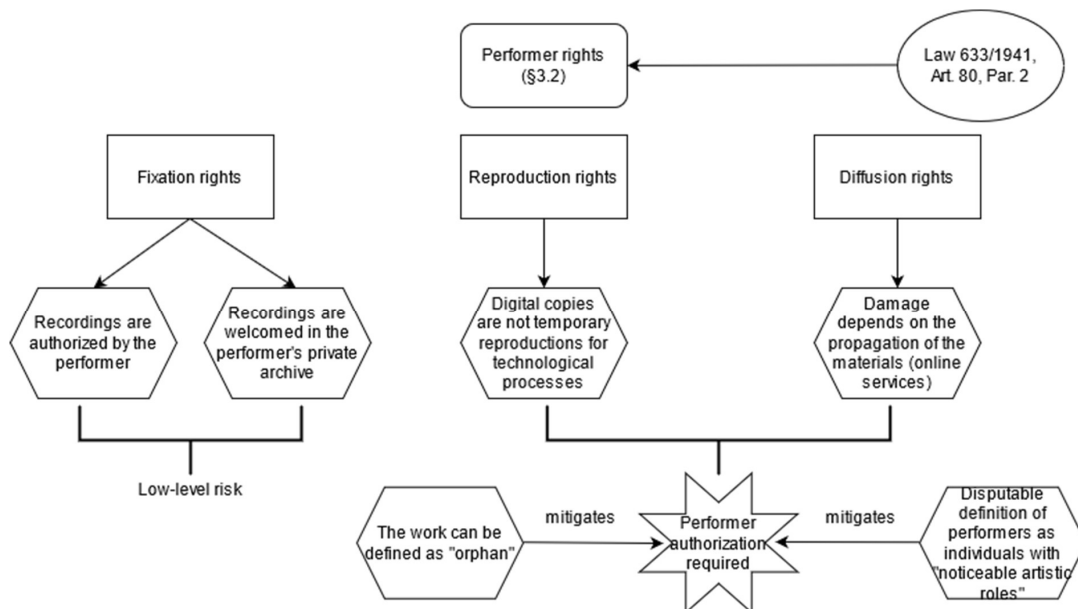


Figure 3. The three facets of performer rights

### 3.3 Compensation for subsequent uses

Authors, performers and, for published materials, producers are entitled to monetary compensation when their work is repurposed by third parties (Art. 73, 73-bis). This compensation is due in any circumstance, including non-profit repurposing (e.g., our archive) and is considered inalienable. Thus, written authorizations should never include an explicit surrender to compensation. Nonetheless, this should be regarded as a minor concern in the management of the archive, for three main reasons. Firstly, the quantification of monetary compensation for the non-profit repurposing of (mainly) unpublished materials is quite problematic, since estimated profitability usually plays a major role in such estimations. Secondly, the streaming offered by an online archive seems to be excluded from the acceptance of “public” repurposing which triggers the need for compensation (Art. 73). Lastly, the Court of Justice of the European Union (Third Chamber, 15/03/2012, n. 135) has specified that the disputed repurposing should benefit “an indeterminate number of potential listeners, and, in addition, implies a fairly large number of persons”. Therefore, the implementation of an authentication system for authorized access to the online archive should be enough to rule out most of the claims for compensation.

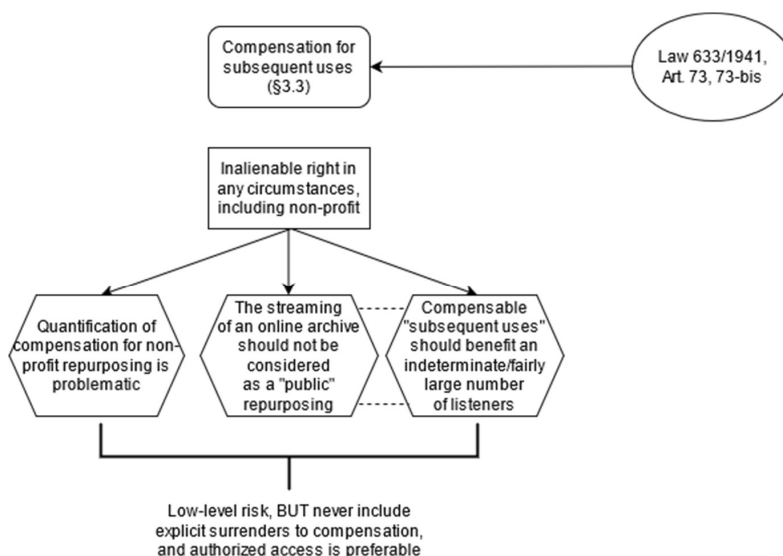


Figure 4. Compensation for subsequent uses

## 4 Conclusions

This paper presented a set of possible legal obstacles and their foundations when an oral archive is being established and/or managed. Although many such archives are being compiled and offered to different types of users, the absence of a consistent level of legal knowledge and uniform practices in the management of oral archives is still present. Specifically, we assessed the risks of copyright infringement in the online management of the Caterina Bueno Italian ethnomusicological archive. This survey of potential legal issues minimized authorship, performance fixation rights and the compensation for subsequent uses, while underlining the importance of effectively dealing with performance reproduction and diffusion rights. Terminological fuzziness on who is actually entitled to claim those rights is probably not enough to overrule the need to ideally gather consent forms from all the identifiable performers (or their heirs).

Two clashing forces dramatically condition any copyright regulation. One strives to protect the creative efforts of the artists and performers in terms of profit; the other promotes the free diffusion of culturally relevant works. In actual fact, European law systems do not equate these two intents: economic protection is assumed as default, while non-profit cultural promotion has to be contextualized in one of the many “exceptions” to the default. At the present time, those exceptions cannot be generalized, i.e., they cannot constitute alternative categories for the application of copyright regulations (see

the so-called “three-step test”). Therefore, the exceptions have to be defined on a case-by-case basis, and analogical reasoning cannot guarantee the exemption from the default rules. Nonetheless, as risk-aversion runs rampant in the management of online oral archives, presenting legal case-studies can help rationalize common fears and promote procedures to optimize the diffusion of the materials.

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