The following outline offers an overview of intellectual property issues, especially copyright issues, related to the development of the Digital Music Library (DML). This outline is an evolving task, and future versions of it will be forthcoming with the development of the overall project.

The principal purpose of this outline is to create a framework for research related to intellectual property throughout the project’s duration. Future studies will isolate individual elements for in-depth analysis. In the end, the investigator anticipates a series of studies or briefing papers and related materials offering a broad perspective on the range of matters suggested here.

I. Introduction to the Problem

   A. Creation of Digital Music Library (DML)
      1. Objectives and Purposes of the DML
      2. Selection of Content
      3. Identification of Users
      4. Nature of the Uses

   B. Implications for Uses of Copyrighted Works
      1. Potential for Infringements
      2. Fair Use and Other Statutory Rights of Use
      3. Public Domain Materials
      4. Permissions and Licensing
      5. Special Problems of Music and Sound Recordings

   C. Implications for Ownership of New Works
      1. Protection for New Content
      2. Protection for New Software
      3. Other Possible IP Protections

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II. The Scope of Copyright Protection

A. The Range of Works Within Copyright

1. Automatic Copyright Protection
2. Applicability to Music, Sound Recordings, etc.

B. Works Not Protected by Copyright

1. Works Ineligible Under Section 102(b)
2. Facts and Non-Original Works
3. Expired Copyrights
4. Pre-1972 Sound Recordings
5. Works of the U.S. Government

C. Restoration of Foreign Copyrights
1. Foreign Works that Lack Formalities
2. Pre-1972 Sound Recordings

III. Rights of the Copyright Owner and Potential for Infringement

A. Fundamental Rights

1. Right to Reproduce the Work
2. Right to Make Derivative Works
3. Right to Distribute the Work to the Public
4. Right to Make Public Displays of Most Types of Works
5. Right to Make Public Performances of Some Works

B. Public Performance of Sound Recordings

1. Added to the Copyright Act in 1995
2. Limited to Digital Transmissions
3. Elaborate Exceptions

D. Moral Rights

1. Limited Scope under American Law
2. Generally Applicable only to Certain Works of Art

E. Digital Millennium Copyright Act
1. Enacted in October 1998
2. Prohibition of “Circumvention of Technological Measures”
3. Protection for “Copyright Management Information”

IV. Exceptions to the Rights of Copyright Owners

A. Section 107: Fair Use

1. Broad and Unspecific in Scope
2. Based on Application of Four Factors
   a. Purpose of the Use
   b. Nature of the Work
   c. Amount of the Original Used
   d. Effect of the Use on the Market for the Original
3. Meaning of Interpretive Guidelines
4. Meaningful Application of Fair Use
   a. Common Scenarios
   b. Possible Application to DML
5. Good-Faith Application of Fair Use
   a. Meaning under the Statute
   b. Protection from Liabilities

B. Section 108: Reproduction and Distribution of Works by Libraries

1. Framework of the Statute
2. Institutional Requirement for Application (Section 108(a))
3. Scope of Applicable Materials
   a. Narrow application to music
   b. Broader application to sound recordings
4. Scope of Applicable Activities
   a. Preservation
   b. Copies for Research, Study, Scholarship
   c. Interlibrary Loans
5. Specific Conditions and Limitations for Uses
6. Statutory Applicability to Digital Copies
C. Section 109(a): First-Sale Doctrine

1. Applicable to Transfers of Works
2. Limited Applicability to DML

D. Section 109(c): Public Display Where the Copy is Located

1. Public Display of Work Where Copy is Located
2. Limited Application to Projection of Image
3. Constrained Application to DML

E. Section 110(1): Displays and Performances in the Classroom

1. Applies only to Display and Performances
2. General Conditions to Application in Classrooms
3. Could Apply to DML uses for Classroom Use

F. Section 110(2): Performances and Displays in “Transmissions” for Education

1. Restrictive Application to Distance Learning
2. Narrow Classes of Permitted Works
3. Applies only to Displays and Performances
4. Extensive Problems with Application to DML Systems
5. Overview of Proposals for Reform

G. Section 114(d): Performance of a Sound Recording by Digital Audio Transmission

1. Generally, Performance Rights Do Not Apply to Sound Recordings (Section 114(a))
2. Performance Rights Can Apply in the Context of “Digital Audio Transmissions”
3. Right Can Apply to an “Interactive Service” Accessible to the Public
   a. “Interactive Service” Could Include a DML system that Allows Retrieval of Works on Request
   b. “Public” is Not Specifically Defined, but Could Include a Students and Researchers
4. Exemptions Apply only to the Recording and Not to the Underlying Composition
H. Section 121: Copies for Persons Who are Blind or have Other Disabilities

1. Applies Only to Nondramatic Literary Works
2. Only for Narrow Purposes
3. Only Copies Made by Qualifying Organization

V. Digital Millennium Copyright Act

A. Circumvention of Technological Measures

1. Prohibits Circumvention of Measures that Limit Access to Copyrighted Works
2. Prohibits the Creation or Trafficking of Devices
3. Can be Used to Prevent the Use of Such Devices or Procedures to Obtain Materials for the DML
4. Can be Used to Provide Added Security or Control against Unauthorized Access to the DML
5. Can Provide Added Assurance against Misuse of the System for Purposes of Fair Use or Obtaining More Favorable Licenses

B. Copyright Management Information (CMI)

1. Prohibits Removal of CMI Under Some Conditions
2. CMI is Broadly Defined to Include Almost any Identifying Information on a Copyrighted Work
3. Could Require Procedures to Assure that All Works in the DML are Properly Identified and that All CMI is Preserved

C. Online Service Provider Liability

1. Establishes Detailed Provisions for an OSP to Avoid Liability for Infringements Committed by Users of Networked Systems.
2. Provides Special Provisions for Websites that Allow Students to Access Materials Stored for Instructional Purposes
3. Provisions are Highly Detailed and Problematic
4. Not Likely to Apply to the DML as Proposed
5. If It does not Apply, the Question of Liability Returns to General Principles of Copyright Infringement and Institutional Responsibility

VI. Audio Home Recording Act
A. Enacts a Compromise Between Music Producers and Equipment Manufacturers

1. Allows the Production and Importation of Digital Tapes and Other Recording Media and Devices
2. Imposes Fees on Sales to Compensate Composers and Performers

B. Generally Imposes Requirements Regarding Devices and Media of a Type “Commonly Distributed for Use by Individuals”

C. Bars Lawsuits Based on the “Noncommercial Use by a Consumer” of Such Device or Medium

D. Interpretation of AHRA at Issue in the Napster Litigation

E. Not Likely to Have Significant Implications for the DML

VII. Protecting IP Rights of the University Community

A. Creation of the DML System

1. New Software Programming
2. User Interfaces
3. Compilation and Cataloging of Contents

B. Possible Original Content

1. Faculty Compositions and Other Works
2. Recordings of Student Performances
3. Instructional Materials

C. Alternatives for Determination of Rightholders

1. Legal Structures, Including Work-For-Hire Doctrine
2. University Policies
3. Obligations Under Terms of NSF Grant
4. Private Agreements
5. Patent and Other Possible Legal Protection

D. Management of IP Rights

1. Licensing Procedures
2. Permitting Academic Uses
3. Distribution of Proceeds
4. Enforcement
5. Role of ARTI and University Counsel