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## **THE "FAIR USE" OF SOUND RECORDINGS: A SUMMARY OF EXISTING PRACTICES AND CONCERNS**

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**By Suzanne Stover**

### **Overview**

In the Fall 1989 *Newsletter*, the Fair Practices Committee of ARSC distributed a questionnaire to all ARSC members residing in the United States pertaining to copyright and "fair use" concerns. Of the 743 questionnaires mailed to individual members and 152 mailed to institutional members, 111 private collectors (14.9%) and 29 institutional representatives (19%) responded. These respondents represent a fair cross-section of the ARSC membership, with materials in their collections focusing on the following areas of interest: classical, jazz, big band, popular music, musicals, country/western, ethnic/folk music, rock, comedy, broadcast, and spoken word. Although the bulk of these collections comprise commercial sound recordings, half of the institutional respondents indicated that at least 20% of their materials are non-commercial and unique, and about half of the private members have collections with at least 10% of their recordings that are not commercial and/or believed to be unique.

Of the 139 members who responded, 116 indicated that they will duplicate recorded materials from their collections for others under certain circumstances. Only 5 institutions and no private collectors indicated that they never copy the recordings in their collections. Copyright and fair use, therefore, is a topic which is relevant to a majority of ARSC members, based on the results of this survey, as well as a subject of confusion and ambiguity to the majority of respondents. Only 24 respondents knew if their state had a copyright law, and only 11 of these members were familiar with its content. Ninety-two members felt that it would be useful for the Fair Practices Committee to publish information concerning state copyright laws in the ARSC Journal; 14 respondents felt this would not be useful, and 29 were unsure.

In general, private collectors are the most flexible and university music libraries (excluding special collections) the least flexible with regard to providing duplicates of sound recordings in their collections. Four out of the 6 responding university music libraries will not duplicate sound recordings for any reason. Special collections or historical archives within university libraries tend to have their own separate policies for duplication, and are more likely to have written guidelines. Twelve institutions sent copies of the written guidelines or policies they follow for duplication. In

general, the institutional collections which do not follow written guidelines appear slightly more restrictive in their policies, duplicating commercial recordings with the written permission of the record company, only, in several instances.

Many of the institutions with written guidelines base their policies on their own interpretation of the fair use section of the U.S. copyright law. In general, the institutions responding to this survey interpret fair use as follows: portions of out-of-print commercial recordings can be duplicated for legitimate scholarly purposes if these duplicates are not to be used for commercial purposes or resold. There does not seem to be an established policy from any institution, however, indicating how much of a commercial recording can be duplicated under these guidelines. In addition, there is confusion on the part of private collectors and institutions as to whether fair use copies can be legitimately sold, or whether these should be lent or provided to researchers at no cost, or at cost (materials and/or labor, only). Some institutions will duplicate any out-of-print recording for research purposes; others require the requestor to search for copies of the recording in record stores specializing in used and out-of-print recordings.

Several institutions include a clause on their tape duplicate order forms releasing the institution and its staff from any copyright infringement claims or liabilities, although it is uncertain whether the inclusion of such a clause would actually indemnify the institution. Other institutions and private collectors claim that it is ultimately the responsibility of the requestor to comply with U.S. copyright fair use restrictions, and some state this on their order forms.

Policies for duplication vary widely among institutions, ranging from the provision for duplicates of an in-print commercial recording which is not available in the format requested by the patron, to the duplication of only material which will be subsequently issued. Two of the institutions which responded will provide duplicates for research purposes only if the requestor lives beyond a set distance from the institution (100 miles in one case, 500 miles in the other).

Institutional policy varies as to whether or not duplicates may be made for classroom purposes or faculty use. Several institutions loan either original recordings or cassette copies to faculty, which are returned to the library after use; sometimes these cassettes are destroyed upon return. At least one institution will provide copies for other academic archives; other institutions indicated on this survey that they would like to provide this service, but are uncertain as to the legality of the procedure.

Archivists and librarians of collections containing primarily unique materials, such as field recordings of ethnological materials and recital recordings from performance archives, tend to review each request for duplication individually. Few of these collections have specific written policies, although the majority appear to stay within fair use guidelines for duplication, as defined above, despite the fact that they are not dealing with commercial recordings. Any restrictions placed by donors on materials in archives, however, supersede all other copyright or fair use restrictions, according to respondents.

None of the private collectors of ARSC submitted written guidelines, and 24 respondents indicated that they do not follow any policy for duplication. Three respondents indicated they will duplicate any materials in their collection that were not acquired with restrictive agreements. Most individual collectors will duplicate on a case-by-case basis. Over 40 private collectors appear to follow fair use guidelines to

some extent, limiting duplication to research purposes or, at the minimum, to non-commercial projects. 20 respondents indicated that they will duplicate only materials which are out-of-print, in the public domain, if the collector owns the rights, or if the requestor has obtained the appropriate clearances.

A number of individual members feel that clearance concerns are the responsibility of the requestor. Others will duplicate only older materials: 50 years old, or pre-1972, depending upon the individual. On the whole, private collectors are less concerned with the ramifications of violating copyright law than institutional representatives. A number indicated that although they may not be staying within the law regarding duplication and copyright, the law would appear to be unenforceable for the private collector.

Responses to the questionnaire were broken down by category. The responses of private collectors were tallied by Richard Warren, with a profile of the respondents provided on the following page. Institutional responses were divided between types of collections and areas of focus: Libraries (music libraries at colleges and universities; special collections of academic libraries; public libraries, music divisions); Company Archives; Folk/World Music Collections; Symphony Orchestra and Performance Archives; and Other Archives. Duplication policies are outlined in greater detail under the preceding categories on following pages.

A number of problematic issues were raised by the responses to this questionnaire. Private collectors and institutional representatives shared a number of concerns regarding the rules and terms of copyright, policies for older materials, and fair use limitations. Questions concerning videotape duplication, reissues and foreign imports were raised, as well. Performance archives were concerned about determining who holds the rights to their materials. Libraries were very interested in the current practices of other institutions, and in establishing policies for duplicating materials for classroom use, reserve and listening purposes, and faculty research.

It is hoped that more work in these areas of concern will result in a greater understanding of the copyright law as it affects both the private collector and institutional archive. Further investigation will help institutions and private collectors establish policies for duplication that will suit both the nature and purpose of these collections, as well as the spirit of the U.S. Copyright Law.

**Breakdown of Respondents by Type and Scope of Collection**

**A. Responses from Institutional Members:**

**1. Type of Institution**

University or College Libraries or Archives (including: 6 music libraries; 1 performance archive; 9 special collections or historical archives):	16
Public Institutions (libraries and museums: music divisions):	4
Company Archives:	4
Other:	5

**2. Contents of Institutional Collections**

Primarily Classical:	12
Assorted (classical, jazz, popular, broadcast, spoken word):	3
World Music Archives:	3
Symphony Orchestra archives: (2 incorporated into Special Collections)	3

Performing Archives:	2
Popular Music Collection:	3
Spoken Word/Broadcast Collections:	2
Jazz/Big Band Collection:	2
Country Music Collection:	1
Pre-1929 Victor recordings:	1
95% or more commercial recordings (less than 5% of materials unique):	15
10-30% non-commercial recordings (10-20% unique):	5
50-80% non-commercial recordings (most unique):	5
98% non-commercial recordings (most unique):	4

**B. Responses from Private Collectors:**

**1. Intended Use of Collection**

Personal:	99
Research:	29
Radio Broadcast:	7
Reissue or Sale:	7
Archive or Preservation:	7
Teaching:	4
Use of Friends:	5
Trade:	3
Sale:	3

**2. Actual Users of Collection**

Self:	102
Family and Friends:	38
Other Collectors:	8
Researchers and Students:	14
Radio Stations:	7
Customers:	3
Institutions:	2
Critics:	2
Publications:	1

**3. Contents of Private Collections**

Classical:	68
Jazz/Big Bands:	43
Popular:	31
Spoken Word:	22
Broadway Musicals, Movie soundtracks:	17
Country/Western:	10
Ethnic/Folk:	10
Rock:	9
Comedy:	8
Radio Broadcast:	7
General (varied):	16

95% or more commercial recordings (less than 5% of materials unique): 58

10-30% non-commercial recordings (8 with 10-25% unique materials): 38  
 Primarily non-commercial recordings (2 with mostly unique materials): 7

**Tally of Responses**

The following questions were asked of ARSC members regarding their knowledge of state copyright laws and their policies for the duplication of sound recordings in their collections:

1. Do you know if your state has a copyright law?
 

<b>Institutions</b>	YES: 11	NO: 17	NO ANSWER: 3
<b>Indiv. Members</b>	YES: 14	NO: 90	NO ANSWER: 8
2. If yes, are you familiar with its content?
 

<b>Institutions</b>	YES: 6	NO: 4	
<b>Indiv. Members</b>	YES: 5	NO: 9	
3. Would it be useful if a summary of each state's copyright policy were printed in the *ARSC Journal*?
 

<b>Institutions</b>	YES: 25	NO: 0	NOT SURE/NO ANSWER: 4
<b>Indiv. Members</b>	YES: 67	NO: 14	NOT SURE/NO ANSWER: 26
4. Do you or your institution have a legal representative who helps determine policy regarding lending or duplicating materials in your collection?
 

<b>Institutions</b>	YES: 17	NO: 11	NO ANSWER: 1
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(Of 17 "yes" responses, 6 indicated that although their institutions have access to legal representation, copyright is not an area of expertise, and they receive little if any help from legal counsel. Only 11 out of 29 institutions feel they receive adequate legal counsel regarding questions pertaining to the duplication and lending of sound recordings.)

<b>Indiv. Members</b>	YES: 5	NO: 68	NO ANSWER: 35
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5. Do you provide duplication services for others (friends, researchers, patrons, etc.)?
 

<b>Institutions</b>	YES: 26	NO: 5	
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("Yes" includes 6 rarely; 1 for playback purposes, only; 1 for issue, only)  
 ("No" includes 2 almost never)

<b>Indiv. Members</b>	YES: 91	NO: 0	NO ANSWER: 91
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("Yes" includes 1 for gift, only; 1 for exchange, only; 1 single copy, only)
6. Do you require written or oral clearance for duplication?
 

<b>Institutions</b>	YES: 19	NO: 3	N/A or Unclear Response: 3
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(Policy statements or sample release forms for the duplication of sound recordings were sent by 12 institutions.)

<b>Indiv. Members</b>	YES: 5	NO: 72	N/A or Unclear Response: 14
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**Duplication Policies for Institutional Collections**

**A. University Music Libraries (6)**

- No duplication: 4
- Duplicates made for listening reserve for faculty; returned to faculty: 1
- Duplication for non-commercial purposes: 1

**B. Special Collections/Historical Collections, College or**

**University Libraries (8)** (world music collections tallied separately)

Will duplicate commercial recordings only with permission of record company:	2
Will duplicate recordings under "fair use" guidelines:	4
Will duplicate only for issue or publication:	1
Will duplicate commercial items if not available in format requested:	1
Will duplicate to cassette for listening purposes:	1
Will duplicate for research purposes if requestor lives more than 100/500 miles from institution:	2
Will duplicate broadcast recordings:	1
<b>C. Public Libraries: Music Division (3)</b> (world music collections tallied separately)	
Will provide duplicates under "fair use" guidelines:	2
Will duplicate commercial recordings only with written permission of record company:	1
<b>Summary, library collections of recorded sound (A-C above) (17)</b>	
No duplicates made:	5
Will duplicate recordings for library reserve; materials remain property of library:	2
Will duplicate recordings for publication or reissue, only:	1
Will duplicate for research purposes under "fair use" guidelines: (Only 2 for requestors living more than 100/500 miles from institution)	7
Will duplicate commercial recordings only with permission of record company:	3
Will duplicate commercial recording if not available in format requested:	1
Materials copied for classroom use: (3 returned to institution)	4
Will duplicate for preservation purposes or playback purposes:	2
Will duplicate broadcast recordings: (9 written policy/guidelines provided)	1
<b>D. Folk/World Music Collections (primarily unique materials) (3)</b>	
Restricted duplication, on a case-by-case basis; some written clearances required	
No written guidelines provided	
<b>E. Performance Archives (2)</b>	
Will provide duplicates for composers/conductors, only:	1
Will provide duplicates for the performers involved; written clearances required from all other requestors:	1
Will provide fair use copies of materials that are no longer available commercially if the composer/performer is deceased: (1 duplication order form enclosed; 1 in process of developing written guidelines)	1
<b>F. Other Archives (3)</b> (see D. above for world music collections)	
Will provide duplicates of non-restricted materials for research purposes; no materials sold:	1
Duplicates made with written clearance from copyright holders: (1 written guideline provided)	2
<b>G. Company Archives (4)</b>	
Materials loaned:	3
Occasional duplication for other institutions; rarely duplicates commercial recordings:	1
Duplicates made of original material recorded by the archive or by the requestor:	2
No duplication:	1

(1 written guideline provided)	
Materials loaned or rented:	14
(6 loaned exclusively — will not duplicate; 2 loaned to faculty only; 4 loaned from copies, not originals)	
Duplicates made for broadcast:	15

**Duplication Policies for Private Collectors**

No policy followed:	24
Will duplicate on subjective, case-by-case basis:	8
Will copy any recording except those acquired with no duplication agreement:	3
Will make copies for personal use of others:	10
Will make copies for friends, only:	10
Will provide copies for research purposes, or under fair use guidelines:	14
Will provide copies for non-commercial use:	7
Will provide copies for demonstrated need or serious interest:	4
Will copy out-of-print items, only:	15
Will only duplicate items believed to be in the public domain:	2
Will duplicate only if collector owns rights:	2
Will duplicate only with clearance:	1
Will duplicate with credit to owner:	2
Will duplicate only recordings of 50 years or more:	
Will duplicate, leaving clearance acquisition the responsibility of the requestor:	5

**Questions and Concerns of ARSC Members**

The following issues and concerns were raised by ARSC members in response to the following: “What questions do you have concerning the fair use of sound recordings in your collection?”

**A. General Questions (institutions and private collectors):**

1. What are the rules and terms of copyright?
  - a. What recordings are copyrighted?
  - b. Can older sound recordings (pre-1930s) not protected by copyright law be duplicated freely, without concern for copyright infractions of the materials on the recording (i.e., authors'/composers' copyrights)?
  - c. What material is in the public domain?
2. How much of an in-print commercial recording is legal to duplicate under fair use?
  - a. How carefully must an institution screen requests for copies? Is the institution legally responsible for misuse by a client (e.g., later commercial use)?
  - b. Can you duplicate a commercial recording if it is not available in the format requested by a client (i.e., available on CD but not on LP or cassette)?
  - c. What are the rules for using recorded excerpts of acoustical 78s in published studies?
3. From whom do you need to get permission before you can duplicate a commercial recording that is still in-print?

- a. How do you find out who has the rights to published recordings when the recording company is defunct?
- 4. Can you freely duplicate a recording if it is out-of-print?
  - a. Is it legal to sell copies of out-of-print recordings?
  - b. Is it legal to provide one or two copies of an out-of-print recording at no charge, or at cost, only?
  - c. How does fair use apply to the duplication of out-of-print recordings?
  - d. How can you tell if a recording is out-of-print?
  - e. How sure do you have to be that a recording is out-of-print before you duplicate it?
- 5. How does the law apply to public officials' speeches?
- 6. How does copyright law apply to videocassettes?
- 7. How do U.S. copyright laws compare to copyright laws in other countries?

**B. Libraries:**

- 1. What are the practices of other institutions regarding duplication for:
  - a. Scholars
  - b. Other institutions (interlibrary loan)
  - c. Radio broadcast
  - d. The general public
  - e. Private collectors
- 2. When is it permissible to duplicate commercial recordings?
  - a. What recordings may be duplicated for library reserve?
  - b. How many copies may be made and placed on reserve?
  - c. Is it allowable to duplicate a commercial recording for research purposes?
  - d. Can a library make copies of recordings for students or faculty to use in the classroom?
- 3. Is the library liable if a student or faculty member uses their facilities to make copies for themselves (for research or classroom use)?
- 4. Is it allowable to duplicate a commercial recording for preservation purposes?
- 5. Is it legal for one archive to make copies for another archive to add to its collection?
- 6. What should an archive do with cassette copies of commercial recordings that are acquired as part of a collection?

**C. Performance Archives:**

- 1. Is it legal to make copies of non-commercial performance recordings?
- 2. Who owns the rights to performance recordings in an archive (the institution, the performer, both)?
- 3. From whom do you need to get permission before you can duplicate a non-commercial performance recording in an archive?
  - a. If the performer is deceased, must the performer's estate be consulted before a duplicate of a non-commercial sound recording is provided?
  - b. When must the publisher be consulted for duplication of a non-commercial recording of a performance recording?
  - c. When must the American Federation of Musicians be consulted before duplicating non-commercial live recordings of union performers?



4. Do routine publisher music rental recording restrictions apply to every use of rented music? Is it permissible to make an archive recording of performances of rented twentieth-century music protected by these restrictions? Could this recording later be broadcast or duplicated under any circumstances?
5. May a dance company rehearse using playbacks of commercial recordings without paying fees or royalty?

**D. Folk/World Music Collections:**

1. Who owns the rights to field recordings?

**E. Private Collections:**

1. What is the impact of fair use on the private collector?
  - a. Isn't fair use unenforceable for the private collector?
  - b. What are the legal consequences of not obeying the copyright law?

**F. Broadcast:**

1. What are the laws governing the broadcasting of sound recordings?
2. Is there a distinction between broadcast by commercial vs. public stations?

**G. Reissues and Foreign Imports:**

1. How does the copyright law apply to "nostalgia" cassette issues?
2. What are the laws on "custom" cassettes?
3. What copyright laws apply to video tapes?
4. How do U.S. copyright laws apply to foreign reissues?

**Areas of Continuing Interest**

Respondents provided the following list of topics in response to the question: "What sort of information would you like the Fair Practices Committee of ARSC to provide you with?"

**A. Institutional Members:**

1. Guidelines for music libraries with regard to sound recordings policy;
2. Guidelines for music archives
3. Comparative report on the practices of other music institutions;
4. Guidelines regarding the provisions of Fair Practice and specific information on when copying is legal and under what terms;
5. Updates on pending legislation

**B. Individual Members:**

1. Guidelines on the copyright law, specifically a clear summary of applicable laws on copying;
2. Clear summary of applicable laws on reissuing;
3. Guidelines for how to obtain clearances for duplication, radio broadcast, and commercial publication;
4. Information regarding proposed legislation, current law suits, current court interpretations of the copyright law, and law updates;
5. Comparison of state and federal laws;
6. Summary of prevailing practice;
7. Recommendations for ways to modify current copyright law to allow the distribution of historically important sound recordings that are currently not available. 