
BRIAN SHAW ON COPYRIGHT ISSUES

By Brian Shaw

Brian Shaw is a partner of the Rochester, New York law firm Cumpston & Shaw, specializing in the practice of intellectual property law. In this first in a series of columns dealing with the subject of copyright law and sound recordings, Mr. Shaw will address questions posed by readers of the *ARSC Journal* regarding the rights of individuals and libraries to duplicate sound recordings in their collections.

Copyright questions may be submitted to Mr. Shaw for response in future issues, c/o:

Suzanne Stover
Chair, ARSC Fair Practices Committee
Department of Recording Arts and Services
Eastman School of Music
26 Gibbs Street
Rochester, NY 14604

Question 1: What rights do individuals, that is, private collectors, have to duplicate sound recordings for other individuals?

As stated in Charlotte Roederer's article "Copyright Status of Historical Recordings,"¹ sound recordings involve a myriad of copyright issues. Sound recordings include not only the copyrights of the underlying work, such as the musical work or speech that is recorded, but also the copyrights in the performance of the musical work or speech. Therefore, reproducing a sound recording may infringe copyrights of both the underlying work and the performance of the work.

To further complicate the scenario, it may be uncertain who owns the copyrights

in a sound recording. Generally, the performer owns the copyrights in the sound recording of their performance. However, if the performance, or creation of the recorded sounds, does not meet the level of original authorship, such as nature recordings, then ownership of the copyrights in the sound recording may be held by the producer of the recording. It is also possible that both the performer and the producer own the copyrights in the sound recording. In addition, the death of the author or owner of the copyrights does not terminate the copyrights. The copyrights may pass to the estate of the deceased.

The owner of the copyrights in a sound recording has the right to: reproduce the sound recording, prepare derivative works, and publicly distribute the sound recordings. The copyright owner of the sound recordings does not have the exclusive right to publicly perform the sound recording.² Reproduction of all or a substantial portion of the recorded sounds infringes the copyright in the sound recording. However, mere imitation of a recorded performance would not constitute copyright infringement.

It is important to distinguish between the copyrights in the sound recording and the copyrights in the underlying work whose performance is recorded. This distinction is particularly relevant with respect to sound recordings of non-dramatic musical works. The author of a non-dramatic musical work has the exclusive right to make or authorize the first sound recording of the work. Once the author has permitted the

making and publishing of a sound recording embodying the non-dramatic musical work, anyone else may rely upon the compulsory license provisions of the copyright statute to record their own performance of the non-dramatic musical work.³ The compulsory license does not permit copying the sound recording. Therefore, even if the underlying work is subject to the compulsory license provisions, the re-release of a sound recording may infringe the copyrights in the sound recording.

For sound recordings created after February 15, 1972, copyright protection is conferred by the federal copyright statute.⁴ If the sound recording was made before February 15, 1972, the only protection is found in individual state laws. With respect to federal copyright law, reproduction of a sound recording made prior to February 15, 1972 infringes only the underlying work.

Question 2: When is it permissible for a library to duplicate commercial recordings for library reserve purposes, or for user requests?

In accordance with judicial opinions, Congress has recognized the necessity of libraries and archives to make copies of works in their collections for preserving the collection and assisting users.⁵ The congressional compromise which resulted in section 108 of the copyright statute represents the belief that photocopying by researchers, scholars, and other library users does not have an adverse effect on the rights of copyright holders.⁶

GENERAL REQUIREMENTS

Section 108 of the copyright statute defines the scope of permissible reproduction of copyrighted works by libraries. The exemption extends to libraries and employees acting within the scope of employment, and encompasses user requested and library needed copying. To qualify for this limited privilege of copying, the library must satisfy a number of thresholds.

1. The copying must not be for the purpose of directly or indirectly providing a commercial advantage to the library.⁷ That is, the library must not be attempting to profit from the act of reproducing the work. While the library may be reimbursed

for the expense of making the copy, it must not be for a commercial advantage.

2. The collection of the library also must be either open to the public, or at least open to those who may be doing research in the specialized field of the collection.⁸ Therefore, if a library allows access to only those researchers having an affiliation with the library (or institution), the library cannot qualify for the exemption.

3. The permitted copying extends only to certain works. For user requested copying, the library's right to reproduce does not extend to musical, pictorial, graphic or sculptural works.⁹ Copying of sound recordings is permitted. However, if the sound recording includes a musical work, then copying is not permitted. In contrast, library copying for preservation and deposit purposes is not restricted by the type of work.¹⁰

4. The number of copies that may be made also is set forth in the statute. Specifically, "no more than one copy or phonorecord of a work" can be made.¹¹ However, the statute permits 'isolated and unrelated' reproduction and distribution on separate occasions. That is, a library may make multiple reproductions of a single copy in its own collection so long as the various users are not members of the same group. If the library has reason to believe the multiple copying is intended for aggregate use by one or more individuals, or for separate use by individual members of a group, then the copying is not permitted. Therefore, under Section 108, the library is not permitted to make multiple copies of a sound recording of a musical work for placement on reserve.

USER REQUESTED COPYING

Once a library has met these criteria, the statute then permits both user requested copying and library requested copying. For all user requested copying, the library must have the item in its collection or in the collection of an interlibrary loan library. The user requested copying is governed by the restrictions on the type of work to be copied. In addition, the library must prominently display a copyright warning where the copying is requested. Also, the library must not have any notice that

the copy will be used for any purpose other than private study, scholarship, or research. Further, the copy must become the property of the user. Therefore, the library cannot loan the copy to the user.

In user requested copying a distinction is made between (a) copying no more than one article of a periodical or small part of the copyrighted work, and (b) copying the entire work or a substantial portion of the work.¹² If only a single article or small part of a larger work is requested, the library may copy the requested amount. If the copying of a substantial portion or the entire work is requested, then prior to copying, the library must make a reasonable investigation and attempt to obtain a copy at a fair price. Even if a work is out of print, if a used copy in reasonably good condition is available through ordinary trade sources at a fair price, then the copying is not permitted.

COPYING FOR LIBRARY PURPOSES

Distinct from the copying by the library for its patrons, libraries are entitled, under certain circumstances to reproduce individual items in their collection. Unlike user requested copying, this right of reproduction is not limited by the type of the work to be copied. Instead, permissible copying for the library depends upon whether the work is unpublished or published.¹³ Therefore, the library may be permitted to reproduce sound recordings of musical works.

Unpublished works

For unpublished works currently in a library's collection, the library may duplicate the sound recording, in facsimile fashion, for the sole purpose of "preservation and security" of the collection, or for deposit for research for another library that has an open collection. The statute has been read to mean that after the copy has been made for preservation of the collection, a second copy for preservation of the collection cannot be made until the first copy has been damaged, deteriorated, lost or stolen. However, the library may make a single copy on separate occasions for deposit in other libraries that are not all members of the same group.

Published Works

For published works, the library must first make a reasonable effort to obtain an unused replacement at a fair price. If no copies are available, then the library may make one entire sound recording of the work in facsimile fashion to replace the copy that is damaged, deteriorating, lost or stolen.

This rule differs from the rule for unpublished works in that it does not include the right to make copies for deposit in another library. In addition, the library must make a reasonable effort to obtain the sound recording through normal trade sources. Finally, the reproduction of published works requires that the sound recording being replaced is damaged, deteriorating, lost or stolen. In contrast, the statute for unpublished works implies the library may retain the original and the copy. While interlibrary associations are subject to the provisions of Section 108, the interlibrary arrangements are specifically permitted so long as the arrangement does not have the primary purpose, or effect, to substitute for the subscription or purchase of the work or sound recording.¹⁴

The provisions of Section 108 do not affect the availability or scope of defenses to charges of copyright infringement, such as the fair use defense. Future articles may discuss the fair use defense and accompanying guidelines.

Notes:

- 1 Roederer, Charlotte, Copyright Status of Historical Recordings—Protecting and Promoting the Public Domain, *ARSC Journal*, Vol 23, No. 1, 1992.
- 2 17 U.S.C. Section 114
- 3 17 U.S.C. Section 115
- 4 17 U.S.C. Section 101 et seq.
- 5 17 U.S.C. Section 108
- 6 See 137 Cong. Rec. H10289 (daily ed. Nov. 18, 1991) statement of Rep. Moorhead.
- 7 17 U.S.C. Section 108 (a)(1)
- 8 17 U.S.C. Section 108(a)(2)
- 9 17 U.S.C. Section 108(h)
- 10 17 U.S.C. 108(h)
- 11 17 U.S.C. Section 108(a)
- 12 17 U.S.C. Section 108(d),(e)
- 13 17 U.S.C. Section 108(b),(c)
- 14 17 U.S.C. Section 108(g)