
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 series of columns dealing with the subject of copyright law and sound recordings, Mr. Shaw addresses 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:

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Question: *Is it allowable under U.S. copyright law for private individuals to make and distribute copies of out-of-print commercial sound recordings to friends for personal use? If not, what are the penalties for copyright infringement?*

Private collectors of sound recordings often are confronted with requests from friends and associates to listen to specific items in the collections. As the collections usually are limited to single copies and include out of print recordings, there is a strong incentive for the collector to make a copy for the friend, helping them out and

preserving the collection all at the same time. The impact of the United States copyright laws on this practice depends on the specific facts associated with the given sound recording, and there are general guidelines to follow for private collectors of sound recordings. As always, though, there is good news and bad news, and in this case the status of the news depends on whether you are the copyright owner of the work or just the owner of the sound recording itself.

The copyright laws of the United States give certain exclusive rights to the owner of copyrightable material such as sound recordings. The exclusive rights of the copyright owner include, but are not limited to, the right to reproduce or authorize the reproduction of the copyrighted work; and the right to distribute or authorize distribution of copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. In other words, an individual who is not the copyright owner of the sound recording has no right to make copies of a sound recording regardless of whether it is out of print, or to distribute copies by giving them away to friends or selling them for profit.

Although the federal copyright laws were broadly revised in 1976, the noteworthy date for sound recordings is February 15, 1972 because that is when federal

copyright protection became available for this form of authorship. Federal copyright protection for musical works (or sound recordings of musical works) has been available only since February 15, 1972 because prior to that date musical works that were recorded on phonorecords or tape recordings were not considered visually perceptible and, therefore, not copies according to the letter of the law. For some older works, the statutory term of protection for the musical composition itself may have lapsed, so that the work is now in the public domain, making it available for use by others without restriction. The sound recording, however, that is, the work resulting from the fixation of a series of sounds in a tangible medium of expression, may be protected under separate state copyright laws, the effect of which will not be annulled or limited by federal law until February 15, 2047.

Accordingly, protection for pre-1972 sound recordings may not terminate until February 15, 2047. For works created on or after January 1, 1978 when the Copyright Act of 1976 became effective, the term of copyright protection begins with the creation of the work and endures for the life of the author plus 50 years after his or her death. Other works subject to statutory copyright prior to January 1, 1978, which did not enter the public domain prior to that date, are protected for an initial term of 28 years starting from the date the statutory copyright originally was secured. The term of statutory copyright may be extended for an additional or renewal period of 47 years for a total duration of statutory copyright of 75 years from first publication. Therefore, private collectors have a long wait before they can legally duplicate and distribute, for free or for profit, copyrighted sound recordings.

The one exception to the restriction on distributing copies of a sound recording by an individual who is not the copyright owner of the recording is dictated by what is known as the "first sale doctrine." Under

this legal construct, the owner of a lawfully made copy or phonorecord of a work may sell or otherwise dispose of that copy or phonorecord without the copyright owner's consent. The owner of the authorized copy, however, may not rent, lease, or lend that copy for direct or indirect commercial advantage without the copyright owner's authorization. One must remember that ownership of an authorized copy of a copyrighted work is merely ownership of the material object in which the work is fixed, but not of the copyrighted work itself.

The copyright laws absolutely apply to individuals as well as to other entities who may infringe the copyrights of others. The penalties for copyright infringement range from equitable remedies including destruction of infringing goods, to civil liability requiring payment of lost profits to the copyright owner or statutory damages up to \$100,000, and attorneys fees, to criminal sanctions in certain circumstances which can include imprisonment and/or fines of up to \$250,000. The copyright laws are for real and the lobbying efforts of certain financially interested groups, such as the music industry, have made sure that those who steal what is not theirs will pay.