

Brian Shaw on Copyright Issues

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.

This month's column deals with problems that affect users' access to sound recordings in archival collections. In order to address the multiple aspects of the question posed in this issue, two responses offering differing perspectives have been included. In the first, Suzanne Stover, Chair of the ARSC Fair Practices Committee and Sound Recording Archivist for the Department of Recording Arts and Services at the Eastman School of Music, offers an archivist's viewpoint. Brian Shaw adds the lawyer's perspective.

QUESTION: WHY ARE SOUND ARCHIVES SO RELUCTANT TO DUPLICATE NON-COMMERCIAL RECORDINGS OF MUSICAL PERFORMANCES FROM THEIR COLLECTIONS? DOES THE U.S. COPYRIGHT LAW REALLY PROHIBIT ARCHIVES FROM MAKING AND DISTRIBUTING PERSONAL USE COPIES FOR INDIVIDUALS? WHOSE RIGHTS ARE THESE LAWS SERVING TO PROTECT?

Stover: Most archives that specialize in collections of sound recordings receive a great number of reference requests each year. For the most part, individuals who enter the field of archiving do so because they enjoy the research aspect of the profession, and are interested in and knowledgeable about the subject matter of the materials in which their collections specialize. Most archivists gain a great deal of satisfaction from successfully assisting researchers and other users of their collections. Why, then, are archivists sometimes perceived as a hindrance, rather than a help, to users who try to obtain personal use copies of archival audio materials? In order to address this question fully, it is necessary to consider what issues may be involved in a decision to honor or deny a request for a duplicate of an archival sound recording.

A. Type and Function of an Archive

An archive typically functions within a clearly defined set of parameters, determined by the type of archive it is, and by its intended purpose. A decision to honor or deny a request for duplication of materials from an archival collection rarely is made arbitrarily, and usually is determined in adherence to

carefully established guidelines. Copyright restrictions are only one of the many factors that archives and libraries must consider when determining the suitability of requests for duplicates. Anticipating what other factors may be operating to limit access to audio materials, based on a consideration of the following issues, can sometimes prove useful to an individual in deciding whether or not a particular archive is an appropriate venue from which to request a personal use recording in the first place:

- (1) What is the purpose and function of the archive? Why was the archive originally established?
- (2) Where did the audio materials in the collection come from? Who recorded them? How did they become part of this archive's collection?
- (3) Is the archive private or public, for profit or not for profit? Is it open to the public?
- (4) Is the archive part of a library, university, or other institution? Is it bound by policies established and administered by another part of that institution?

A performance archive, for example, may specialize in recordings made by a specific musical organization, such as the Chicago Symphony Orchestra; made at a certain institution, such as the Eastman School of Music; or representing a particular musical focus, such as the University of Maryland's International Piano Archives. Performance archives are usually established with the intention of documenting and preserving the performance history of the musical ensemble, institution or genre it represents.

Archives for a performing ensemble or musical institution often own some rights to the materials in their collections. The Eastman Audio Archives, for instance, contains only recordings made by the Eastman School of Music, giving the institution certain rights to its own holdings, specifically to the "sounds" captured on these recordings. Under the copyright law, however, it shares these rights with the participating performers, and owns no rights to the underlying music. Music publishers' rental agreements, signed by an institution when music is rented for performance purposes, may further limit the rights of the institution with regard to recordings it has made of recitals and concerts for the purpose of archival deposit.

B. Contractual Considerations

Archives that acquire collections from outside the institution may not own any rights to their recordings. Their materials may have been acquired through any number of different donor arrangements, which may diversely affect the accessibility of materials within a single collection. Restrictions in contractual agreements may override copyright and *fair use* considerations. It is important, therefore, to consider the following issues:

- (1) Are there any donor restrictions placed on materials in an archive? Did the donor specifically give permission for his materials to be duplicated, or did the donor transfer the collection to the archive only for purposes of safe keeping? Did the donor own rights to these materials in the first place? When no written contracts exist for materials donated to an archive, it is necessary to consider whether a request for duplication meets the original purposes for which the materials were deposited. Contracts that are written, oral, or even implied, may be legally binding.

- (2) Are the musicians, whose performances have been captured on concert recordings made for archival purposes, under contract to a recording company? If so, is the duplication and distribution of recorded live performances permissible within the terms of their recording contracts?
- (3) Does the musical ensemble performing on a sound recording work under the provisions of a contract as a member of a local musician's union? Are members of a professional orchestra owed royalties for any recordings made and distributed of their concert performances?
- (4) Have the performers participating in a concert that has been recorded given their consent for copies of their performance to be duplicated and distributed? Such permission is frequently denied when the performers do not feel that a given performance has lived up to their artistic standards. Musicians are often understandably reluctant to relinquish their share of rights to the educational institution that recorded their performances for archival deposit.

C. Copyright Issues

Even in the absence of any contracts, written or implied, which limit access to materials, archives that do not own all of the rights to the sound recordings in their collections may legally duplicate materials for individuals upon request only if one of the following criteria is met: (1) the materials are in the public domain or are otherwise not copyrighted; (2) the requestor has obtained all necessary clearances from the copyright holders; or (3) the request for duplication meets the guidelines established in Sections 107 or 108 of the 1976 U.S. Copyright Act which limit the exclusive rights of copyright holders.

Sound recordings made before 1972 were not eligible for federal copyright protection, and are protected, instead, by copyright statutes or common law for the states in which the recordings were made originally. When the federal copyright revision was enacted in 1976, it was determined that common law copyright for pre-1972 sound recordings would not be limited by federal law until the year 2047, at which time these recordings will fall into the public domain. Sound recordings made after 1972 are usually protected under federal copyright law for a period of 75 years. It is safe to assume, therefore, that regardless of the copyright status of the underlying music in any given sound recording, which must be investigated separately for each work contained therein, most audio materials in archival collections are, indeed, under some form of copyright protection.

Section 108 of the Copyright Act pertains to permissible duplication of copyrighted materials by libraries and archives. This section specifically prohibits libraries and archives from duplicating unpublished materials for purposes other than preservation, security, or deposit for research purposes in another archive or library. Duplication of unpublished copyrighted materials without the permission of the copyright owners, therefore, may only be made for individuals if the request complies with the *fair use* guidelines established in Section 107 of the Copyright Act.

Section 107 states that the *fair use* of a copyrighted work for purposes of criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In making a decision regarding whether or not an intended usage of copyrighted materials is allowable, archivists must consider the following four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work; usually interpreted as the format (sound recording vs. manuscript), content (creative vs. factual), or general availability (unpublished unique materials vs. published materials found in multiple copies) of the material;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Court rulings from the past several years called into question the eligibility of unpublished materials for *fair use* consideration, making archivists and librarians wary of providing *fair use* copies of archival recordings. The recent passage of House Resolution 4412 reestablished the eligibility of unpublished materials for *fair use* consideration, a factor which may serve to influence institutional policies regarding the granting of *fair use* requests for duplication.

Most archives consider a request to be *fair* if the material is needed for research or study purposes; if the content of the material is not available commercially; and if the requestor does not intend to sell or duplicate the copy, nor use it for any commercial or performance purposes. The third criterion established in Section 107, prohibiting the duplication of an entire work, is particularly problematic with regard to requests for recordings of musical works. But even if a request does comply with all four *fair use* criteria, an archive still may be prohibited from providing individuals with copies of materials from their archives due to the poor condition of the original recordings.

D. Condition of Archival Materials

Most archives are reluctant to play an older, deteriorating recording for duplication purposes in order to avoid adding stress and wear to already fragile materials. Archives may require that a duplicating master be made from which subsequent service copies can be run, or may deny a request all together until such time that the original recording has been transferred for preservation purposes. Institutions may not have the recording facilities needed to process requests for duplicates without extended waiting periods. The cost to produce a *fair use* copy of an historical sound recording can be quite expensive when labor fees are added to the cost of materials, especially if an archive requires the requestor to pay for the preservation of the original recording or for a duplication master which will be retained by the institution. If a comparable recording is available commercially, it usually will be far less expensive to purchase than a single copy made upon request from an archive.

E. Practical Considerations

Finally, practical and monetary considerations factor into the ability of an archive to respond to requests for duplicates of materials in its collections. Archives that accept collections of sound recordings often do not have adequate means of handling and processing them. Without the necessary funding and staff to inventory and catalog new

acquisitions, collections often remain inaccessible to the public. Public access to collections acquired years ago also can be limited by inadequate and obsolete methods of cataloging; few archives have the funds or staffing needed to convert all existing manual catalog records to online systems that would improve user access.

How can sound archivists better respond to the needs of the public? Perhaps the best solution may be reached through compromise on the part of archive administrators, donors, and users. If donors and benefactors systematically set up endowment funds to help cover the costs of maintaining and cataloging collections, improved access to materials would be ensured. If scholars and students calculated into their schedules and budgets the time and funding necessary for travel to the archives that house materials essential to their research, a greater appreciation of our archival resources, and of primary resource material, in general, would be realized. If individuals tried to obtain written permission from the copyright owners of archival audio materials, the time delay between the receipt and completion of a duplication request could be reduced. Finally, if institutions only accepted collections which they had the resources to maintain, and if they established more liberal policies for *fair use* duplication which complied with the spirit of the copyright law without undue trepidation toward the possibility of a law suit, archivists could better fulfill their ultimate purpose: protecting their holdings for use by future — and present — researchers and students, performers and educators, and all who appreciate the priceless treasures they are entrusted with safeguarding.

And in response, Shaw:

A. Multiple Rights Existing in a Sound Recording

A sound recording is legally defined as a work resulting from the recording of sounds, such as music or words, in a material object. The copyright of a sound recording does not attach to the underlying work which is performed, but only to the aural version that is fixed in the material object.

The copyright owner of a sound recording has the right to reproduce and to distribute the sound recording to the public, as well as to prepare derivative works from it. The copyright owner, however, does not have exclusive rights with regard to the public performance of the sound recording. In other words, sound recordings may be performed (i.e., played) in public without infringing any copyrights in the sound recording *except* that of the underlying copyrighted work. While the Registrar of Copyrights has recommended that Congress amend the copyright statute to give equal protection to the rights of performers with regard to public performance, as of yet, the statute remains unchanged.

B. Performers' Rights

As stated in the copyright statute, the author of a work is the original owner of the copyright. Only those who have made original contributions to a work may claim themselves as authors, and only authors may be considered copyright owners. Performers' renditions of a work are considered original works and are, therefore, protected in the sound recording. In addition to the performers' rights, it is clearly contemplated by the statute that the producer or recording engineer making discretionary decisions with respect to the recording of the sounds into a fixed medium also claims rights as an author in the sound recording.

In the absence of an employment relationship where there is an express assignment of copyright from the performers to the record producer or any other party, the resulting ownership of the sound recording copyright will be held either exclusively by the performing artist, or by a joint ownership between the record producer and the performing artist. Therefore, when an archive reproduces a sound recording, the performers' copyrights (and, perhaps, the copyright of the original recording engineer) must be considered as well as the copyright in the underlying work. That is, the reproduction of a sound recording, even with the permission of the performers involved, is a reproduction of the underlying work. Subject to the privilege of *fair use*, any unauthorized copying of a phonorecord, even for the private purpose of the reproducer without subsequent distribution, is an infringement of copyright.

C. Transfer of Ownership vs. Transfer of Copyrights

The transfer of ownership of a material object, such as a copy of music or a phonorecord in which the work is fixed, does not in itself convey any rights in the copyrights of the embodied works. The transfer of ownership from a donor to an archive of a phonorecord, for example, may be accomplished without an accompanying written document or contract. The transfer of copyrights for this recording, however, does require a written instrument, whether or not a physical copy was transferred. Therefore, unless there is a written transfer of the copyrights of a sound recording donated to an archive, the original authors retain copyright, and the archive does not possess rights to duplicate that recording.

D. Existing Contracts and Obligations

Since only copyright owners are entitled to permit exploitation of copyrights embodied in a work, an archive must consider what entity owns the copyrights for donated materials. That is, a donor may give a specific recording to an archive and give permission to the archive to reproduce the recording. However, unless the donor holds the copyrights in the sound recording, as well as in any embodied works, reproducing the sound recording would represent copyright infringement unless the reproduction qualified under *fair use*. The use of a recording may also be further restricted by an agreement, whether written or oral, made by a donor, such as a request that the recording not be copied.

The courts have not widely recognized the intended purpose of a donation or an archive as a factor in determining a *fair use* of archival materials. If a donor owns the copyrights to the materials he is donating, however, this factor may be used as evidence in the evaluation of the four *fair use* criteria set forth in the copyright statute. Specifically, if a sound recording has been donated to an archive for research purposes, a request for a copy of that recording for nonprofit educational use enjoys a greater likelihood of being considered *fair use*.

Works that are generally unavailable, however, such as unique unpublished materials, must be examined especially in light of the effect that copying may have on the potential market value for, or of, the copyrighted work. While this consideration has been used heavily by the courts to deny *fair use*, the 1992 revision to this section of the copyright statute can support a finding of *fair use* with respect to unpublished materials, especially when such use is consistent with the intention for which these materials were originally deposited.

E. Sections 107 and 108

Ms. Stover's summary of Sections 107 and 108 of the 1976 Copyright Act is excellent. With respect to Section 108, subsection (h) specifically states that the permissible reproduction granted under Section 108 applies to musical works only under subsections (b) and (c). Subsection (b) is directed to unpublished works and permits reproduction only for use of libraries or archives. Therefore, any other reproduction of unpublished musical works must find sanctuary under the *fair use* provisions.

Copyright questions may be submitted to Mr. Shaw for response in future issues of the *ARSC Journal*, *to*: Suzanne Stover, Chair, ARSC Fair Practices Committee, Department of Recording Arts and Services, Eastman School of Music, 26 Gibbs Street, Rochester, NY 14604.