COMMENTARY

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.*

QUESTION 1: As a hobbyist collecting popular music from the early decades of this century, I have been asked by the owners of a new restaurant, which features the "Roaring Twenties" as its motif, to provide tapes of popular music from the 1920s to use as background music. Much of the music is from the original 78 rpm records and has never been reissued. Some of the recordings, however, have been reissued on compact discs or commercial cassettes.

I am willing to provide the restaurant with several tapes, but am concerned about possible copyright complications. What would the situation be if I were to sell the original records, cassettes, or CDs to the restaurant, instead of taped copies; could the owners legitimately use these recordings for background music?

Musical works created in the 1920s may still be protected by valid copyrights. The law in this area is arcane, and the copyright owners would have to have taken the necessary steps for copyright protection to still be in force, but these works are simply not old enough necessarily to have fallen into the public domain. If the owners of the copyrights did not take the necessary steps, the copyrights may have expired by now.

Copyright in the works, even if in force, does not prevent you from selling the original records, tapes or CDs to the restaurant. However, it could not use (perform) these recordings for background music without a license.

It is conceivable that the works embodied on these recordings are among the collections licensed by ASCAP or BMI. If they are, the restaurant may be able to obtain a blanket license relatively cheaply, and thereafter legitimately use these recordings for background music.

The 1909 Copyright Act governs the copyrights for musical works of the 1920s. While sound recordings were encompassed under Federal Copyright Law in 1972 (with only state law remedies available prior to 1972), the underlying musical

works were protected by the 1909 Act. Under the 1909 Copyright Act, copyright protection generally began with the publication of the work with proper copyright notice. Although the requirement for copyright notice does not exist under the current Copyright Act, the 1909 Act required notice on published works.

Under the 1909 Act, registration was possible for certain unpublished works. Specifically, registration without publication of works was available for those works that were not previously reproduced or sold and were a dramatic musical composition. For these unpublished works, the term of copyright protection began upon registration. While the 1909 Act did not expressly set forth a term of copyright protection for such unpublished works, the Courts have held that the term for registered, but unpublished dramatic musical works began on the date of registration.

Duration of Copyright

Under the 1909 Act, copyright protection of an eligible work lasted for an initial term of 28 years. By filing a renewal registration in the Copyright Office during the last year of the term, the author (or author's successors-in-interest) could renew the copyright for a second term of an additional 28 years. Therefore, the total duration of copyright protection on the 1909 Act was 56 years. A failure to file a renewal registration resulted in termination of copyright protection at the end of the original 28 year term.

However, beginning in September 1962, a series of laws were passed which extended the renewal term for works whose renewal terms had not yet expired, effectively keeping these copyrights alive to ultimately enjoy the increased term provided by the 1976 Copyright Act. Under the 1976 Copyright Act, the duration of the original term for all works copyrighted prior to January 1978 remained at 28 years, and the requirement of filing a renewal registration as a prerequisite for renewal was retained. However, the duration of a renewal term for copyrights renewed on or after January 1, 1978 was increased to 47 years, thereby giving all such copyrights a total duration of 75 years. For copyrights in the renewal term of between December 31, 1976 and December 31, 1977, the total duration of copyright protection was extended to "75 years from the date the copyright was originally secured".

No copyright whose renewal term had expired (or had otherwise entered the public domain) prior to the effective date of the 1976 Act could be revived by the 1976 Act. For example, for a work first copyrighted on July 1, 1915, the original 28-year term would last through July 1, 1943, and if no renewal registration were made, the work would then fall into the public domain. If a renewal was properly made, however, the copyright would expire on December 31, 1990, for the following reasons. Under the 1909 Act, the renewal term would endure through July 1, 1971 (56 years from the date of registration). The interim extension acts would have extended the life of the copyright through December 31, 1976, thereby coming within the provisions of the 1976 Act, which would extend the duration of the original and renewal terms to a total of 75 years, thereby bringing the term of copyright protection to 1990.

QUESTION 2: I am completing my Ph.D. dissertation in musicology, which offers an exploration of shaping and expression in Chopin performance. It has been

decided that a number of key recordings, approximately fifteen or so, should accompany the text of the dissertation as a taped cassette appendix. This appendix will not be published and will reside, for reference purposes, with the dissertation in the University Library. What are the implications of the Copyright Law for recordings used to accompany dissertations?

Frédéric François Chopin died in 1849, and all of his original works are in the public domain. However, sound recordings of Chopin's works performed after his death may still be covered by valid copyrights. Your reproduction of recordings of Chopin's work would, therefore, be copyright infringement *unless* it is fair use according to the Copyright Act.

Fair use, defined in the Copyright Act as reproduction in copies or phono records, or by any other means specified [by Sections 106 and 106a] for purposes such as criticism, comment, news reporting, teaching, scholarship or research, is not an infringement of copyright. While all cases are different and fair use is the ultimate *ad hoc* determination, it is more likely than not that your proposed reproduction of 15 recordings in a single appendix to a dissertation, the only copy of which is archived in a university library, would be fair use. There are published guidelines for educational uses of musical works. However, these are only guidelines and are not binding on any court. Further, each defense of fair use is dictated by the surrounding circumstances.

Guidelines for Educational Uses of Music

The following guidelines state the minimum and not the maximum standards of educational fair use. "Educational use" in these guidelines is directed toward educators rather than students and dissertation writers. Moreover, the guidelines are not intended to limit judicial decisions regarding the types of copying permitted under the standards of fair use which are stated in Section 107. There may be instances in which copying which does not fall within the guidelines may nonetheless be permitted under the criteria of fair use.

A. Permissible Uses

1. Emergency copying to replace purchased copies which, for any reason, are not available for an imminent performance, provided purchased replacement copies shall be substituted in due course.

2. For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performance unit, such as a selection, movement or aria, but in no case more than 10% of the whole work. The number of copies shall not exceed one copy per pupil. For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is (1) confirmed by the copyright proprietor to be out of print or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of his or her scholarly research, or in preparation to teach a class.

3. Printed copies which have been purchased may be edited or simplified,

provided that the fundamental character of the work is not distorted; the lyrics, if any, are not altered; and lyrics are not added if none existed.

4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes, and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as a tape, compact disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. Prohibitions

1. Copying to create, replace, or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or teaching, such as workbooks, exercises, standardized tests, answer sheets, and like material.

3. Copying for the purpose of performance, except as in A(1) above.

4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

QUESTION 3: *If I am teaching in a public school or university and wish to play copyrighted sound recordings for demonstration purposes during class, must I or my institution pay any fees to the copyright owners of the recordings?*

Playing a copyrighted sound recording is a performance of the work, one of the rights that is reserved to the owner of the copyright. However, playing a copyrighted sound recording for educational purposes in a public school or university is more likely than not fair use, and therefore not infringement. There are licensing clearing houses which represent many copyright owners, and offer blanket licenses under the copyrights. If the playing of the sound recording supplants a separate acquisition of a copy of the work, the likelihood of finding fair use decreases.

QUESTION 4: *Most reviewers' copies of sound recordings have some sort of stamp on them stating that the album is either given or lent to the recipient for*

review purposes only, and that the recording company retains the right to request the return of the album. What is the legal significance of this?

A stamp on a copy of a sound recording stating that the album is given or lent to the recipient for review purposes only is, if anything, evidence of a contract between the record company and the recipient, setting forth the mutual understanding of the conditions under which the recording may be used. Using the recording for a purpose beyond that contemplated by the agreement would be a breach of contract, as well as possibly copyright infringement, depending upon the use to which the recording was put. This assumes that the other requirements for the existence of a valid contract between the recipient and the record company have been met. These are interesting, but beyond the scope of this column.

QUESTION 5: *In the last column on copyright issues* (ARSC Journal *1994; 25(2): 208), you stated that recording engineers making discretionary decisions may also claim rights as an author in a sound recording. What is the situation regarding discretionary decisions made "post recording" in a mixing-sweetening session after the original tracks are laid down? Further, what are the implications of remixes of pre-1972 sessions, and sonic restorations?*

Copyright protection extends to original works of authorship, wherein "original" requires the work to be independently created (as opposed to copied from other works) and "authorship" requires the work to possess at least some minimal degree of creativity. The choices as to selection, arrangement or other discretionary parameters that exhibit at least some minimal creativity may be sufficient to support copyright protection. Therefore, in post-recording discretionary decisions, if the changes exhibit at least some creativity, representing some amount of discretionary process, copyright protection will lie in the changes. It is important to remember that the copyright attaches to the changes and not to the original underlying work. In addition, such changes may create a derivative work which may infringe the copyrights held by the owner of the underlying work.

As the standard for establishing copyright protection is not tied to the temporal relation of the "post recording" to the original recording, the fact that post recording takes place immediately after the tracks are laid down or many years thereafter does not change the requirements or existence of copyright in the post recording. For a pre-1972 recording, copyrights may exist for those changes made after 1972 if the post recording is an original work of authorship. The fact that the original work was recorded prior to 1972 does not impact copyright in subsequent changes. Therefore, a remix of a pre-1972 recording may be entitled to its own copyright protection; however, the copyrights of the underlying work may be infringed, as well as any state laws which encompassed sound recordings prior to 1972.

With respect to a sonic restoration, if the restoration is merely the removal of damage to the recording media through time, it may be difficult to assert copyright ownership in the degree of restoration. However, this does not foreclose the

possibility that such restoration may exhibit sufficient creativity to warrant copyright. If the restoration includes significant modification of the ambient background of the work, as well as discretionary modification of the relative components of the tracks, it is likely that copyright protection will be found in the restoration of either a pre or post 1972 sound recording.

Addendum

This column marks the start of a new feature, an Addendum highlighting recent developments in the area of copyright, fair use and sound recordings. This issue's Addendum summarizes the outcome of two recent copyright court cases: Agee v. Paramount *and* LaCienega Music Co. v. ZZ Top.

Agee v. Paramount- No. 93 Civ. 6348 (CBM) U. S. District Court, Southern District of New York - Decided June 3, 1994

Michael Agee, owner of L & H Records, brought suit against Paramount Communications, Inc. and the owners of 129 independent television stations for infringement of his sound recording copyrights in two Laurel & Hardy musical recordings. Agee alleged that the defendants infringed his rights of reproduction and performance by purchasing copies of his two Laurel and Hardy sound recordings, copying and synchronizing them, without authorization, into a portion of their February 16, 1993 broadcast of *Hard Copy,* a daily half-hour news-magazine television program produced and transmitted by Paramount to television stations throughout the United States. Portions of the Laurel and Hardy sound recordings were used as background music to accompany a video segment of a burglary in progress, as captured by security surveillance cameras. Agee also alleged that by adding his sound recordings to their audio-visual images, Paramount created a derivative work, in violation of the Copyright Act.

The court dismissed Agee's copyright complaint on the following grounds:

1. The U.S. Copyright Act makes clear that the copyright owners of sound recordings do not possess any performance rights. Therefore, there is no way that either Paramount's satellite transmission or broadcast by the television stations to the viewing public could infringe plaintiff's right to performance in the sound recordings.

2. The Copyright Act does confer an exclusive right of reproduction upon copyright owners of sound recordings, intended to prevent the unauthorized duplication, i.e., record piracy, which was causing substantial losses in the recording industry. The mere process of synchronizing a sound recording to a video image alone, however, does not infringe the plaintiff's rights to commercially reproduce his recording. The plaintiff's reproduction rights could only be infringed by the unauthorized sale or public distribution of video tapes, phonorecords, audio cassettes, or compact discs containing his sound recordings, which did not happen in this case.

3. The use of a sound recording qualifies as a derivative work only if the actual sounds fixed in the recording are rearranged, remixed, or otherwise altered in sequence or quality. A derivative work must be substantially a new and original work, not a copy of a piece already produced. As a result, the court held that copying a sound recording for use in a broadcast television program does not create a derivative work which warrants protection under the Copyright Act.

LaCienega Music Co. v. ZZ Top C.A. 9, No. 93-55230 - U.S. Court of Appeals for the 9th Circuit - Decided January 10, 1995

On January 10, 1995 the U.S. Court of Appeals for the 9th Circuit held that the selling of phonorecords constitutes a "publication" of the underlying work under the 1909 Copyright Act (*LaCienega Music Co. v. ZZ Top* C.A. 9, No. 93-55230).

"Boogie Chillen" was written by Hooker and Besman in 1948, and recordings of three different versions were released for sale to the public in 1948, 1950 and 1970. Hooker assigned his rights in the composition to Besman, who obtained a copyright registration for the versions captured in these recordings in 1967, 1970 and 1992.

The blues rock band ZZ Top released an album containing a song entitled "LaGrange" in 1973. Besman notified the publisher of the LaGrange album that the song infringed his copyright in "Boogie Chillen".

As has been stated, under the 1909 Copyright Act, the first term of protection lasts for 28 years from the date of first publication with notice, and is renewable for an additional 28 years. Unpublished works were protected under state law from the date of creation to the date of publication. If an author of the work failed to satisfy the 1909 Act's registration requirements after publication, the work was irrevocably cast into the public domain.

Besman maintained that the release of the recordings in 1948, 1950 and 1970 were not a publication of the work. The 9th Circuit (disagreeing with the 2nd Circuit - which includes New York State) adopted the rule that selling recordings constitutes publication under the Copyright Act of 1909.

Copyright questions may be submitted to Mr. Shaw for response in future issues of the *ARSC Journal*, 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.