

# Copyright Issues

*In this series of columns dealing with the subject of copyright law and sound recordings, ARSC addresses questions posed by readers of the ARSC Journal regarding the rights of individuals and libraries to duplicate sound recordings in their collections.*

*This issue's column, authored by Joseph Reidy, focuses on questions concerning broadcast recordings and copyright in a two-part feature. Mr. Reidy is a member of the Rochester, New York, law firm Cumpston & Shaw, specializing in the practice of intellectual property law. Part II will appear in the Spring 1996 issue of the ARSC Journal.*

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**QUESTION 1:** Is it permissible for individuals to record off-the-air radio broadcasts for personal use? May this material be duplicated and shared among collectors?

**T**o be copyrightable, an original work of authorship must be fixed in a tangible medium. Therefore, an original radio or television program is copyrightable if the material from which it is made is simultaneously fixed in film, a phonorecord, or a video tape at the time of the broadcast transmission. The status of live broadcasts - sports, news coverage, live performances of music, etc. - that are reaching the public in unfixd form but that are simultaneously being recorded by the broadcaster are still fixed in a tangible medium of expression. As a result, off-the-air broadcasts may be subject to copyright protection.

If the program content is transmitted live to the public while being recorded at the same time, the program content would be considered subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. The copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast. However, an individual who is recording broadcasts off the air for personal use is allowed to do so as long as the individual does not record or distribute the copies for commercial gain. The Audio Home Recording Act of 1992 (AHRA) allows home tapers to copy the original recordings as long as no direct or indirect commercial motivation is involved. This home taping immunity applies to both digital and analog (traditional) recordings. Under AHRA, home taping is immune from copyright infringement liability, but reproduction for purposes of sale or other commercial applications is barred. Therefore, an individual may tape an off-the-air broadcast for his own use and be immune from copyright infringement liability. However, the individual is prohibited from duplicating a home

recording and distributing the copies among collectors.

**QUESTION 2:** What rights do private individuals have to home recordings of the following types of radio broadcasts, whether recorded by themselves or by others? Does a collector have the right to commercially issue any of these recordings...

- a. U.S. symphony orchestra broadcasts (past and current)?
- b. Vintage radio comedy shows?
- c. Historical political speeches and newscasts?

**W**ith respect to Question 2(a) concerning current U.S. symphony broadcasts, any home recording after 1992 would fall under the AHRA (see response to Question 1, above). The individual would be allowed to record the symphony orchestra broadcast at home for personal pleasure, but would be prohibited from commercially issuing any of the recordings.

If one is dealing with past U.S. symphony broadcasts or vintage radio comedy shows, the individual home recording was allowed under the fair use exception to the copyright laws. Fair use of copyrighted work, including such use for reproduction and copies of phonorecords, or by any other means, for purposes such as criticism and comment, news reporting, teaching, and scholarship or research, is not an infringement of the copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered include: (1) the purpose and character of use, including whether such use is of a commercial nature or is for non-profit educational uses; (2) the nature of the copyrighted work; (3) the amount and substantiality of a portion used in relation to the copyrighted work as a whole; and (4) the effect of use upon a market for, or value of the copyrighted work. Under the fair use doctrine, an individual is generally allowed to record off-the-air broadcasts for personal use. However, if the individual copies or publicly distributes any of the recordings, the individual would affect the potential market for, or value of the copyrighted work. Therefore, the collector or individual would likely not fall within the fair use exception, and would be liable for copyright infringement.

In response to Question 2(b) concerning vintage radio comedy shows, the same relevant factors as discussed in Questions 1 and 2(a) must be addressed. First, one must determine if there is a valid copyright on the radio comedy show. If a person recorded an off-the-air broadcast in 1935 and that broadcast was being recorded by the owner at the same time it was being transmitted live to the public, and the owner applied for a copyright and the copyright protection is still valid today, the owner of that home-recorded radio comedy show would infringe the copyright protection of the original owner. The individual, under the fair use doctrine, may enjoy the recordings at home for personal, non-commercial reasons, but may not enter into a commercial endeavor or commercial gain using the recorded comedy shows.

If the work is not copyrighted or the copyright has not been renewed, the private individual or collector may do whatever he wishes with the recorded material. Since the recorded uncopyrighted material is in the public domain, it is free for anyone to use.

In regard to Question 2(c) concerning newscasts, a newscast is copyrightable because it is an expression of a news story, not just the content of a news story. The actual newsworthy information is not copyrightable, but the expression of the newsworthy information is. Therefore, for example, a newscast of a newsworthy event is

entitled to copyright protection. However, the actual newsworthy event is not entitled to exclusive copyright protection by individual or news agency.

With respect to historical and political speeches, the content of the political speech is copyrightable. The author of the speech may apply for copyright protection and prohibit use of the speech by other individuals. A newscast of a political speech is copyrightable, but the newsworthy event of covering the political speech is not copyrightable. For example, if a politician addressed a crowd of supporters using a fixed or written speech, the politician would own a copyright in the speech and could likely preclude its reproduction and distribution.

If a news agency covers the political speech, its film coverage or reporting of the political speech is copyrightable. However, an individual is not prohibited from covering the same newsworthy event, i.e., the political speech. An individual or any other news agency may cover the same political speech and gain copyright protection in their coverage of the political speech, but not in the actual speech. However, the fair use exception may be slightly broader with respect to factual material, and, therefore, use of these old historical events may enjoy greater distribution by individuals.

**QUESTION 3:** What, if any, are the copyright restrictions for radio transcription discs of both syndicated and non-syndicated broadcast material?

- a. Is the recorded content owned by the producer, broadcaster, network, performer, musician, distributor, or owner of the disc itself?
- b. If the material is not syndicated, does the owner of a "one of a kind" disc have the right to reproduce it?
- c. Is the nature of the recording a factor of consideration, i.e., whether a recording is a political speech, a musical performance, or some other material?

**T**here is no distinction between syndicated and non-syndicated broadcast material with respect to copyright laws. The copyright restrictions for radio transcription discs are the same as the restrictions with respect to recording off-the-air radio broadcasts. If the original radio program is copyrightable and is fixed in a tangible medium of expression before or simultaneously with the transmission of the broadcast, the radio program is entitled to copyright protection. If the owner of the radio program applied for copyright protection and has maintained a valid copyright, the owner of that copyrighted material is entitled to prevent anyone else from using his copyrighted material. However, if there is no valid copyright, the copyrighted material is in the public domain and is free for anyone to use.

In response to Question 3(a), the ownership of the recorded content of the disc is typically decided by contractual agreements. Typically, prior to creation of the work, the producer, broadcaster, network, performer, musician and distributor of the radio program enter into a contractual agreement stating the ownership of the copyright rights. Therefore, most of the syndicated shows and non-syndicated shows are owned by recording industry conglomerates, such as Time/Warner, Sony, or Disney. A recording studio or publishing house may own the copyright rights to a previously-broadcast radio show. An individual may search the U.S. Copyright Office to determine if a valid copyright still exists on an old broadcast.

With respect to Question 3(b), while archival consideration is made for libraries and archives, the right to reproduce a one-of-a-kind disc or any recorded material

depends on whether or not a valid copyright still exists in the material. If the one-of-a-kind disc still has a valid copyright and a term is still in effect, a home recorded transcription may infringe the copyright protection if the owner of the home-recorded one-of-a-kind disc substantially affects the market or value of the copyrighted work. If the home taper copies the disc for commercial purposes, he may be subject to copyright infringement liability. However, if there is no valid copyright on the original broadcast, the owner of a one-of-a-kind disc may have the right to reproduce it.

With respect to Question 3(c), copyright protection extends to the expression of an idea or concept, not to the underlying idea or concept. Copyright protection can protect a political speech, musical performance, or other material. However, as previously stated, a newscast of a newsworthy event may be afforded copyright protection, but the actual newsworthy event is free for anyone to publish or broadcast because the actual facts are considered to be in the public domain.

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## Addendum

### ***Mstislav Rostropovich vs. Koch International, Southern District court, New York, 94-CV-2674***

A recent case involving ownership of old recordings and the use of a person's name and likeness to publicize the recordings has been allowed to proceed to trial and will eventually be decided by a jury. *The Wall Street Journal* recently reported that U.S. District Court Judge John Keenan has allowed the Russian cellist and conductor Mstislav Rostropovich to sue in an attempt to block the distribution of old recordings made by the former Soviet Union. The Soviet Union recorded performances by Mr. Rostropovich during the 1950s and 1960s while Mr. Rostropovich was a solo cellist with the Moscow State Philharmonic Orchestra and the U.S.S.R. Symphony Orchestra. Mr. Rostropovich, who recently retired last year as music director of the National Symphony Orchestra in Washington, D.C., claims the Soviet Union taped his performances without his consent and, therefore, he still retains a property interest in his recorded performances.

However, the recording label Russian Disc America and distributor Koch International contend they bought the rights to the recordings from the legal successor to the Soviet agency that recorded the state concerts. Russian Disc America claims Mr. Rostropovich, who was an employee of the Soviet government at the time of the recordings, surrendered any rights to the recordings because he was an employee of the Soviet government. In addition, the distributors are using Mr. Rostropovich's name and a stylized likeness of him on the CD package without his consent. Mr. Rostropovich claims he retains the rights to reproduce the recordings as well as control the use of his name and likeness.

In order to resolve the Rostropovich case, the initial dilemma of who owns the copyrights in the recorded material must first be determined. The laws of the Soviet Union must be researched to determine whether or not the Russian agency owns the copyrights in the material, or whether the individual, Mr. Rostropovich, owns them. Once the former Soviet Union laws are determined and analyzed, the ownership of the material may then be determined.

With respect to the unauthorized use of Mr. Rostropovich's name or image, the

issue does not lie in copyright law, but rather in the trademark law. Mr. Rostropovich (as does any individual) retains the right to control the use of his name and likeness, and may prevent others from using his name to publicize or commercially sell any product or material. Therefore, Mr. Rostropovich, even though he may not be the copyright owner of the recorded material, may prevent the recording label Russian Disc America and distributor Koch International from using his name and his likeness on the jacket of the CD of which they own the copyrights.

***Senator Orrin Hatch Introduces the “Performance Rights and Sound Recordings Act of 1995”***

On another note, Senator Orrin Hatch of Utah has again introduced a bill to amend the Copyright Act to provide copyright owners of sound recordings with the exclusive right to control digital transmissions of the music. Like its 1993 predecessor (S.1421), the “Performance Rights and Sound Recordings Act of 1995 (S.227)” would accord sound recordings the same performance rights that all other works capable of performance enjoy. At the present time, there are no exclusive rights to perform the sounds in a sound recording copyright. Copyrights in a sound recording are not infringed by a public performance of the sound recording. While the underlying copyrights of authorship may be infringed, public performance of the sound recordings will not create copyright infringement liability. The copyrightable elements in a sound recording copyright will usually, but not always, involve authorship both on the part of the performers whose performance is captured in a recording and on the part of the record producer responsible for setting up the recording session, capturing the processing sounds, and compiling and editing them to make a final recording. Ownership of the copyright in a sound recording is left to bargaining among the performers and the producers.

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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.

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***Corrections and Clarifications***

An error appeared in the “Copyright and Fair Use of Sound Recordings: A Preliminary Resource Guide” in the last issue of the *ARSC Journal* (1995;26[1]:72-78). The correct Copyright Information Line for the Library of Congress is: (202) 707-3000.