

Copyright Office - Pre-72 Study Comments

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Subj: Comment on Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

The Association for Recorded Sound Collections strongly supports bringing sound recordings fixed before 1972 under federal jurisdiction. ARSC is a non profit organization founded in 1966 and representing both scholars and archivists, and is dedicated to the preservation and study of sound recordings in all genres of music and speech, in all formats, and from all periods. It holds an annual conference, publishes a peer-reviewed journal, and is unique in bringing together private individuals and institutional professionals to work on issues of common concern.

The following comments have been endorsed by the Historical Recording Coalition for Access and Preservation (consisting of ARSC, The Music Library Association and the Society for American Music), and also by the Society for Ethnomusicology.

General comments

Our basic goals are threefold, to encourage the preservation of our rich and varied audio heritage, enable public access to that heritage, and at the same time respect the rights of creators. We firmly believe that these three goals are fully compatible with each other, and that none must be made subservient to the others, as has unfortunately been the case in recent years. None can be stripped out. In particular, preservation and access are closely interdependent. In the real world, neither can be achieved without the other.

Many of the questions put forward in the Notice of Inquiry deal with whether there is currently differentiation in the treatment of pre- and post-1972 recordings. In our view it is not so much that there is a differentiation, but that access to all recordings is heavily restricted in the U.S. due to the lack of legal clarity. The answer often given by counsel to scholars and archivists is "don't" for everything, simply because of this lack of clarity.

The law desperately needs clarity, "bright lines" that holders of these recordings (both public and private) can understand. It also needs to insure that attempts to update federal law, such as Orphan Works and Section 108 revision, will apply to pre-1972 sound recordings. It is quite clear that the states are making no real effort to update their laws in this regard.

The Naxos case illustrates the chilling effect that a court ruling in one state can have. We have been told by rights holders that this case "only applies to New York," however Naxos withdrew its historical catalog from the entire U.S. in the wake of the ruling. This is because of the utter impossibility of marketing state by state in the internet age. Sound recordings are clearly an interstate commodity, and cry for a single interstate (i.e., federal) regime of coverage.

We want to emphasize that we in no way wish to harm the legitimate interests of creators. Many of our members are themselves rights holders. Instead we advocate a balance between the interests of rights holders and those of the public to have access to its rich audio heritage, in a way that will hopefully benefit both.

Individual questions:

4. Would bringing pre-1972 recordings under federal law improve access (by libraries and archives, and/or by other cultural institutions)?

a. Such a change would definitely make accessible pre-1923 recordings and others that would presumably enter the public domain. There is much from that era that is of considerable historic (if of little commercial) value.

Examples:

(1) Of the pre-1920 recordings by African-Americans enumerated in the book *Lost Sounds*, fewer than 1% have been reissued by rights holders.¹

(2) Thousands of commercial recordings of immigrant and other ethnic groups were made in the 78 rpm era. According to the study *Survey of Reissues of U.S. Recordings*, zero percent of those made before 1920 have been reissued by their owners. Only an average of 1% of those made before 1964 have been reissued.²

b. For post-1923 recordings such a change would provide much needed clarity. For example, it would invoke federal standards of fair use, which is unclear in many states. Example: The Association for Recorded Sound Collections (ARSC) holds a scholarly conference each year in which speakers use as examples excerpts from historically-important recordings. The conference is held in a different state each year, and the legal basis for allowing the playing of such excerpts where admission (registration) has been charged, even in a scholarly setting, is unclear in many states. Further, ARSC endeavors to make these presentations available on its website after the conference, on a non-commercial, non-profit basis, but each year one or more speakers declines to allow this because of the lack of legal clarity. Making these presentations

¹ Brooks, Tim, *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919*. University of Illinois Press, 2004, 10.

² Brooks, Tim, *Survey of Reissues of U.S. Recordings*. Council on Library and Information Resources and Library of Congress, August, 2005, 10.

available is a non-profit scholarly service by ARSC and would have no negative impact on rights holders, but is being denied in these cases because of unclear laws. The rules by which such use can be made need to be clear, uniform and rational.

8. Are there economically valuable pre-1923 recordings? Whatever individual examples might be cited, the reality is that an average of fewer than 4% of historically important pre-1925 recordings have been reissued in any form by rights holders, and the revenue from that 4% has to be tiny given the lack of marketing of such reissues. We should not allow 96% to be withheld from scholars and the public in order to protect such a tiny percentage.³

Regarding the economic value of those few early recordings that have been reissued, it is clearly not very great. We are not aware of any album containing primarily acoustical (pre-1925) recordings that has been a significant seller in the last 55 years, as measured by placement on the *Billboard* best selling albums chart. These charts generally track the top selling 150 or 200 albums each week, but no compilation of acoustical material has placed on them even briefly, or at the bottom of the charts, in more than half a century.⁴

Economically at least, acoustical recordings are the "silent movies" of the recording world. They have never been economically viable among later audiences. But while they may not be sufficiently profitable for U.S rights holders to exploit in any meaningful way, non-rights holders are clearly ready to pick up the slack. According to *Survey of Reissues*, non-rights holders, principally foreign labels, have reissued 24% of the earliest U.S. recordings vs. the rights holders' 4%.

9. Are there economically valuable recordings that were made between 1923-1940? Undoubtedly there are a few, but only an average of 12% of historically important recordings made between 1925 and 1939 have been reissued by rights holders, which is strong evidence that these too have little current economic value overall. The proportion of such recordings that are available from rights holders does not increase to even one-quarter of the total until we reach recordings made between 1940-1944.⁵

Examination of *Billboard* charts of the last 55 years reveals that hardly any albums of recordings made prior to 1935 have ever placed on the charts, even briefly.⁶

If pre-1972 recordings were to be brought under federal law, keeping current terms, no post-1922 recordings would enter the public domain until at least 2018, and then very slowly. As noted under Q8 albums of recordings made prior to the late 1930s almost never place on the best selling album charts. Recordings made in 1935 or later would not begin to enter the public domain until 2030, by which time even those will likely have exhausted any real commercial value.

³ *Survey of Reissues*, 7. The sample used in *Survey of Reissues* was drawn from widely used discographies, and is thus a sample of recordings which are considered by scholars to be in some sense "historically important." A sample of all recordings would presumably produce even an even lower incidence of reissues.

⁴ Whitburn, Joel, *Top Pop Albums*, 7th Edition [1955-2009], and Whitburn, Joel, *Top Pop Albums: 1955-2001*. These include albums that placed on *Billboard's* "catalog" chart.

⁵ *Survey of Reissues*, 7.

⁶ *Top Pop Albums*.

Fundamentally, older recordings that are still economically viable are nearly always those made within the lifespan of contemporary record buyers. This has been true throughout the history of the marketing of sound recordings. Exceptions to the "within buyers' lifetimes" rule are extremely rare and transitory (e.g. the reissue of 1930s Robert Johnson recordings in 1990). Even recordings by the Beatles will one day be considered historical artifacts, with commensurately limited economic value.

It is important to remember that all of these recordings, even those from the 1920s, would retain the potential for copyright protection under current federal terms if pre-1972 recordings were brought under federal law. The issue being considered here is whether those made more than 88 years ago (pre-1923) should be considered exhausted, and possibly whether those made somewhat later should be considered for some type of regime in which abandoned material could be made available by other parties, perhaps with benefits for the rights holders (if they still exist).

13. What would be the economic impact of bringing pre-1972 recordings under the digital transmission (streaming) provisions of federal law? This would be an important benefit to rights holders of still-economically-valuable recordings of the 1950s and 1960s (e.g. Elvis Presley, the Beatles, etc.). We do not believe it would seriously impact the preservation of and access to historical recordings, however, especially if there are exemptions in place for preservation, educational uses such as distance learning, and appropriately low fees for non-profit or low-profit streaming activities.

17. To what extent does State law recognize the work made for hire doctrine with respect to sound recordings? We will not comment on the legal status of work-for-hire recordings under state law. There is little state litigation or legislation of which we are aware on this issue. However we do note that based on historical research virtually all commercial recordings of the 78 rpm era appear to have been produced as works for hire, and are now claimed by corporations rather than by individuals. Thus, unlike the situation with some other types of intellectual property (IP), it is our belief that the vast majority of commercial recordings (and many non-commercial recordings as well) will fall under the work-for-hire regime of 95-year coverage, rather than the harder-to-determine coverage pertaining to individuals.

18. To what extent have state laws that equate ownership with ownership of the original master recording been applied? We are not aware of state cases regarding historical recordings that have invoked this provision, although it has been noted as theoretically possible. We do note that a correspondent to the *ARSC Journal* raised this question in 2006, citing specific statutes of Connecticut, Georgia, Hawaii, Illinois, Alabama, Alaska, Arizona and California that indicate those states recognize some version of this principle.⁷ An attorney who then commented on the question did not answer it directly, but instead outlined means by which it might be further investigated.

19. How would copyright ownership be determined for recordings made prior to 1972? Ownership is not as large an issue for commercial recordings as it is for some other forms of IP (e.g., photographs). According to the *Survey of Reissues* study, an average of 84%

⁷ *ARSC Journal*, Vol. 37, No. 2, Fall 2006, 211-212.

of recordings made prior to 1965 had identifiable owners, and for most five-year periods the figure was 90% or more. Only the very early periods were lower. For 1925-1964, the closest period we can align with the present inquiry's 1923-1972, the average identified was 94%. This is due to the concentration of the industry in most periods, and the consolidation that has brought many commercial catalogs into the hands of a small number of owners. The study outlined means by which ownership of recordings could be traced.⁸

Although these findings indicate that identification of owners is not a major problem vis-a-vis recordings, it does not lessen the need to address "orphan works" concerns for those recordings that are still unidentified. A means to trace ownership, and orphan works protection, will be particularly important for unpublished or privately owned recordings.

21. Should the basic term of protection for pre-1972 recordings be the same as for other intellectual property? Can different treatment for pre-1972 sound recordings be justified? We believe that a shorter term can definitely be justified. Virtually every other country in the world grants sound recordings "neighboring rights" which are less than those for other IP. This is because the economic life of sound recordings is on average much shorter than for other IP, such as songs or books. Recordings are also at much greater risk of unavailability and/or outright loss than are books or songs. This is compounded by the fact that sound recordings are preserved in media that are more fragile and subject to technological obsolescence than are printed media.

Several impartial European studies have quantified these differences, and enunciated the philosophical basis for differential treatment of sound recordings. Some of the most important studies are referenced at the website <http://soundcopyright.eu/learn>. (e.g. *The Gowers Review of Intellectual Property*, HM Treasury, 2006; *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*, Centre for Intellectual Property and Information Law, University of Cambridge, undated but c.2006; *The Recasting of Copyright & Related Rights for the Knowledge Economy*, Institute for Information Law, University of Amsterdam, The Netherlands, November 2006.) All of these studies addressed a proposal to extend European sound recording copyright from 50 to either 70 or 95 years, and concluded that such an extension was not warranted. The Cambridge study concluded that extension would result in less than a 1% increase in rights holder revenues, while incurring substantial social cost. Gowers concluded that the optimal term for recording copyright was in fact *less* than 50 years (although it did not recommend that). There is no reason to believe that similar investigations would reach significantly different conclusions in the U.S.

Although we believe that the current U.S. federal term of coverage for recordings is too long, and unsupported by any economic evidence, we do not believe that the issue under investigation here (bringing pre-1972 recordings under federal law) needs to be complicated by combining it with the term issue. That issue can be dealt with independently, perhaps through some more palatable means such as making coverage for certain classes of recordings dependent on availability (see Q25). The issue here is that under the current federal/state regime most U.S. recordings are de facto covered for even

⁸ Source: *Survey of Reissues*, 5, 23-26.

more than 95 years, longer than any other class of intellectual property, which makes no sense at all. At the extreme, according to our reading of Naxos, recently discovered sound recordings made in France in 1860 would be entitled to coverage in New York for more than 200 years (until 2067). Can anyone defend that? Bringing pre-1972 recordings into compliance with current, long federal terms is not ideal, but at least it clarifies the law and is a step in the right direction.

22. Should a special extension be granted to recordings that would otherwise have no opportunity for federal protection (e.g., pre-1923)? We do not believe so. The special extension that was granted to unpublished works in 1976 was meant to protect relatively recent, personally-held works that would otherwise have had little or no protection at all. In this instance we are talking about recordings that have already had 88 or more years of protection and the concomitant opportunity for exploitation. Moreover these recordings are clearly not valued by corporate rights holders, as seen by their almost complete unavailability today. Adding more years of coverage for pre-1923 recordings will simply keep them unavailable and deteriorating that much longer, to no purpose. In addition any extension scheme would violate the "bright line" goal that is so desperately needed.

It should be noted that the rights to the large majority of pre-1923 recordings are held by one corporation, Sony Music, which will benefit greatly in other ways from bringing pre-1972 recordings under federal control (digital streaming rights, increased enforcement provisions, clarified law, etc.). It is hardly fair to say that this entity should in addition be able to continue to restrict public access to large numbers of very old, commercially unused, yet historically important recordings. The public interest needs to be considered here.

While we do not take a legal position on the "takings" issue, we do note that the fifth amendment provides that private property shall not be taken for public use "without just compensation." What is "just compensation" for something that has been demonstrated to be of *de minimus* economic value?

23. If an extension scheme is adopted, should there be an exception for unavailable material? As noted under Q22, we believe that an extension scheme for pre-1923 recordings would be unwarranted and counterproductive. However if such an extension scheme is adopted, an exception for those recordings that are commercially unavailable ("use it or lose it") is absolutely essential. This goes to the heart of preservation and access to our cultural heritage. We do note that this would greatly complicate the law, raising among other things the question of how to determine "commercial availability"? Such provisions would need to be drawn as broadly, as simply, and as understandably as possible.

25. Would protection contingent on publication encourage availability? While we do not think it is appropriate for pre-1923 recordings for the reasons given above (Q22), we strongly support a "use it or lose it" provision for later recordings. We frankly doubt that such a provision would lead many rights holders to make unavailable material available, since that decision is based on the likelihood of imminent economic return. However it would allow others to make available the very recordings most in need of preservation and access, those which rights holders have in effect abandoned.

It should be noted that rights holders would derive tangible benefits from a regime under which non-rights holders could legally reissue older recordings which the rights holders did not. First, such activity might identify individual recordings or artists with unexpected commercial viability which the rights holders could then exploit themselves. Depending on the way such a system was structured musicians might be entitled to some compensation from such reissues, and the rights holder might even be able to reassert ownership after a reasonable period. This would certainly be preferable to the current regime in which no one (in the U.S.) derives any revenue from recordings that are kept artificially unavailable. Second, rights holders would of course retain ownership of any extant master recordings and tapes, and some reissuers would wish to lease these in order to obtain the best possible source sound quality. Many entities that reissue historical recordings are in fact quite concerned with quality, perhaps more so than the rights holders themselves. There is precedent for this. One well-known example is the German Bear Family label, which is under no obligation to pay U.S. rights holders of pre-1960 recordings (since they are in the public domain in Europe), but does so anyway, in part to obtain access to the master recordings held by those rights holders.

26. Is it possible to bring pre-1972 sound recordings under federal law for limited purposes (partial incorporation)? This would be extremely messy in the real world. Moreover, it would likely privilege certain institutions over others. The widespread availability of historical public domain recordings in Europe is precisely because *anyone* can make them available. Scores of private labels, many run by enthusiasts with little hope for any significant economic return, move in when the commercial market cannot justify doing so. Historical reissues similar to those from small, specialist foreign labels such as Document, Jazz Oracle, Timeless Historical, and Symposium, and from scholarly societies such as the City of London Phonograph and Gramophone Society and the Canadian Antique Phonograph Society, should be encouraged (not made illegal) in the United States. Scholarly organizations in this country, including the Association for Recorded Sound Collections, would likely be shut out in any such "partial" scheme, even though we are non-profit, dedicated to sound preservation, and operating for the public good. Again, we believe that a system can be structured that would bring benefits to both the public and rights holders while allowing such entities to release otherwise unavailable recordings (Q25).

27. Could federalization of pre-1972 recordings affect underlying rights (such as musical works)? We do not see how this could happen. The two-tier rights regime is well understood today and has been highlighted in presentations at our conferences.

28. What non rights-holder uses of pre-1972 recordings might be affected by a change to federal control? Unauthorized reissues are widespread, as documented by the *Survey of Reissues*, but these are largely by foreign labels that are not subject to our laws. The effect on this marketplace would presumably be to make at least some of the U.S. recordings that are being reissued by foreign entities (those that would move into the public domain in the U.S.) available from domestic sources, and thus keep the money spent on them in the U.S. rather than having it sent overseas. This would be a net benefit for the U.S. economy.

For domestic non-rights holders who are currently reissuing recordings that would not be in the public domain (e.g., those made between 1923 and 1972) federal coverage would not change the reissues' legal status (they are currently protected by state law), but might still be a net negative, primarily because of greater federal enforcement provisions. To the extent that those recordings are available from rights holders this is justifiable in our view. To the extent that they are not it would be desirable to have an exception for unavailable material so that the public is not denied these works entirely (see Q23).

29. To what extent are people currently refraining from making use of pre-1972 recordings due to state law coverage? Our experience is that the current state of the law primarily inhibits larger, more established entities, including public institutions, large scholarly organizations, and larger companies, from using their resources to make historical recordings available to the public. It does less to inhibit individuals who operate on a small scale from ignoring a legal regime that is widely considered to be both unclear and grossly unfair. Thus it is the very institutions that are in the best position to achieve the basic goals of preservation and access, and which in fact do so in other countries, that are prevented from doing so in the U.S. As an example, the Association for Recorded Sound Collections has on occasion considered establishing a reissue program of historical recordings, which would be in direct fulfillment of our mission, but decided not to do so because of the risk of legal exposure. The International Association of Jazz Record Collectors (IAJRC) has severely limited its reissue program for the same reason, and other U.S. associations that might logically be active in this field have no such program at all.