

Recommendations to the New Administration Regarding Sound Recording Copyright

By the Association for Recorded Sound Collections
and the Historical Recording Preservation and Access Coalition
December 5, 2008

We urge the new administration to take a fresh look at copyright law in the United States as it pertains to older (pre-1972) sound recordings. Action is needed to save our audio heritage from inaccessibility and/or destruction. Such action can be accomplished primarily through copyright law and does not require any outlay of government funds.

We urge that policies be adopted that recognize that copyright must strike a balance between the economic needs of creators and the need of society to have a vibrant and fertile public domain of older creative works, and to appreciate its cultural history. We urge that officials (such as the new cabinet-level copyright “czar”) be appointed who understand this balance.

We believe that the current sound recording copyright regime militates against a balance as regards historical recordings. Largely through inattention to unintended consequences, laws meant to address other problems have locked away large portions of our musical, literary and ethnic heritage with no real benefit—and in some cases to the detriment—of rights holders.

Background

The copyright status of historical sound recordings is unique among the creative arts in the United States. Indeed, it is unique in the world. In the U.S. recordings made prior to 1972 have been left under individual state laws until the year 2067 (and perhaps longer, if there are further term extensions). Recent studies have shown that nearly all states regard copyright as perpetual and absolute, with no public domain and few of the protections (such as archival preservation and fair use) guaranteed by federal law.ⁱ This was codified in the 2005 New York State decision *Capitol v. Naxos*.ⁱⁱ As a result no pre-1972 recordings will enter the public domain for at least 95 years from creation and, in the case of the earliest examples, for as much as 177 years. There is today no public domain for recordings in the U.S. and there will not be one within the lifetime of nearly anyone who is reading this report.

The idea that very long periods of exclusivity incentivizes rights holders to reissue their early holdings has long since been discredited. There are simply no real-world economic incentives for them to do so. A study by the Library of Congress documented that only 14% of historically-significant pre-1965 recordings had been made available by rights holders, and most of those were from more recent eras.ⁱⁱⁱ Reissues from earlier eras and from such important genres as the music of ethnic minorities were negligible. A study of

the earliest recordings by African-Americans, including the first black jazz recordings, indicated that only one-half of one percent of those had been reissued by modern rights holders.^{iv} Academic and scholarly organizations stand ready to make these important recordings available for study and appreciation, as they do in other countries, but they cannot do so due to U.S. law. So the recordings languish, locked up and silent, to the benefit of no one.

In fact the Library of Congress study indicated that when U.S. citizens do access their audio history they must often do so by sending dollars overseas to buy reissues of American recordings from foreign labels, which are not subject to U.S. law. In the case of jazz recorded in the 1920s, more than five times the number of recordings published by rights holders are available for sale by non-rights holders, such as record companies located in countries with a copyright expiration term for early recordings.

Rights holders also suffer from state control of pre-1972 recordings. State laws are a confusing patchwork of varying and often inadequate statutes and judicial rulings that do not provide federal levels of protection for their valuable assets of the 1950s and 1960s and, importantly, do not provide income from federally-mandated revenue sources such as internet streaming.

No other country in the world has such a dysfunctional system. Even the European Union, which is considering a 95-year term for sound recordings, is accompanying its proposal with a “use it or lose it” provision for recordings more than 50 years old.

What Should Be Done

We believe the solutions to these problems are relatively straightforward. They simply require attention to the problem, which in our experience has been sadly lacking in the copyright debates of the past 20 years. ARSC and its representatives have spoken with numerous members of the House and Senate Judiciary Committees who deal with intellectual property matters, as well as with federal officials. We found that most were frankly unaware of the legal constraints on preservation and access to historical recordings, and were willing to consider remedies. Support was bipartisan. We have also spoken to rights holders, represented by the Recording Industry Association of America, and they have said that while they want their rights protected they would be willing to negotiate on this issue. We are willing and eager to work toward a compromise that all parties could live with, and one that would benefit the American people, artists, and recording companies.

The greatest barrier has been, simply, inertia. Preservation and access to America’s recorded heritage has not been an agenda item (much less a priority) for either the legislative or executive branches. There has been no pressure to reach an accommodation. This is where we seek the support of our new leaders. With increased attention to copyright matters as mandated by the PRO-IP Act and the appointment of a cabinet level copyright “czar,” we urge that the fate of our audio heritage not continue to be ignored.

Specific Recommendations

ARSC has made five specific recommendations, outlined in the document “Legal Impediments to Preservation of and Access to the Audio Heritage of the United States.”^v In brief they are as follows. Representatives of ARSC and HRPAC are available to discuss any and all of these recommendations in detail if desired.

1. Place pre-1972 U.S. recordings under a single, understandable national law, by repealing or modifying section 301(c) of Title 17, U.S. Code.
2. Harmonize the term of coverage for U.S. recordings with that of most foreign countries, i.e. a term of between 50 and 75 years. This would address the specific needs of recordings, and need not impact other creative works. No other country in the world, it should be noted, has or is considering an unconditional 95-year term for sound recordings.
3. Legalize the use of orphan recordings, those for which no owner can be located.
4. Permit and encourage the reissue by third parties of “abandoned” recordings, those that remain out of print for extended periods, with appropriate compensation to artists and record companies.
5. Update U.S. copyright law to allow the use of current technology and best practices in the preservation of sound recordings by non-profit institutions.

Bills have been introduced in Congress to address the orphan works issue (no. 3), and a study was recently completed by the Copyright Office recommending changes in the rules governing archival preservation (no. 5).^{vi} However changes in federal law will have no effect on pre-1972 recordings until recommendation no. 1 is addressed.

Summary

The new administration has committed to taking a fresh look at many aspects of our governance. We call to your attention the fact that a generation of Americans has been denied access to an important part of its cultural heritage, or forced to buy recordings overseas, due to the legal constraints surrounding historical recordings. In some cases the very survival of that heritage is in danger. Rights holders do not benefit from this situation and most certainly the American people do not. We urge the new administration to help us break this impasse.

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Organizations that support the ARSC recommendation for a study of the repeal of Section 301(c):

The American Library Association (www.ala.org)

The Association of Moving Image Archivists (www.amianet.org)

The International Association of Jazz Record Collectors (www.iajrc.org)

The Music Library Association (www.musiclibraryassoc.org)

The Society for American Music (www.american-music.org)

The Society for American Archivists (www.archivists.org)

Notes

ⁱ June Besek, *Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives*. Washington, D.C.: Council on Library and Information Resources and Library of Congress, December 2005. Available at www.clir.org. Prof. Peter Jaszi, *Protection for Pre-1972 Sound Recordings Under State Law & Its Impact on Use by Non-Profit Institutions: A Ten-State Analysis*. Prepared by the Program on Intellectual Property and the Public Interest, Washington College of Law, American University. (In preparation).

ⁱⁱ *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E. 2d 250 (N.Y. App. 2005).

ⁱⁱⁱ Tim Brooks, *Survey of Reissues of U.S. Recordings*. Washington, D.C.: Council on Library and Information Resources and Library of Congress, August 2005. Available as a free download at www.clir.org (Publication No. 133).

^{iv} Tim Brooks, *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919*. Urbana, IL: University of Illinois Press, 2005, 10-11.

^v Available as www.arsc-audio.org.

^{vi} U.S. Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress, *The Section 108 Study Group Report*, March 2008. At www.section108.gov.