

Recommendations to the Intellectual Property Enforcement Coordinator Regarding Historical Sound Recordings

By the Historical Recording Coalition for Access and Preservation (HRCAP)
The Association for Recorded Sound Collections
The Music Library Association
The Society for American Music

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In response to your request for public comment on the Joint Strategic Plan, we urge you to take into account how any actions you propose will affect the preservation of, and, importantly, access to historical sound recordings. These recordings, many dating back to the nineteenth century, represent our audio heritage and preserve our cultural history, yet they have been largely ignored in discussions of intellectual property enforcement. Mere preservation of these recordings has in some cases been criminalized by U.S. laws (federal and state), and access to them by the public has been severely limited, to the economic benefit of no one.

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 be able to appreciate its cultural history.

In regard to the enforcement plan, our comments can be summarized as follows.

1. Some have maintained that foreign countries should be pressed to expand their sound recording copyright terms to match the terms in the U.S., the longest in the world. This would be counterproductive both economically and culturally. There is much opposition to such a move in Europe, and it should not be a U.S. agenda item. Rather, we should concentrate on bringing U.S. terms in line with established international standards in this field.
2. The only legal access Americans have to much of our own cultural history on sound recordings is through reissues and websites emanating from foreign countries with less onerous copyright terms than ours. No action should be taken to block access to legitimate public domain recordings from those countries. Rather, we should work for U.S. and foreign terms that are both rational and comparable.
3. Enforcement efforts should be focused on recent recordings, not on historical recordings that are no longer economically viable (and are therefore not commercially available). This is where the jobs are. If rights holders want more effective enforcement to protect economically valuable property--which we support--they should in return be asked to acknowledge the legitimacy of a reasonable public domain for older recordings.

4. A more rational term for sound recordings in the U.S. should be advocated as economically beneficial. (For sound recordings HRCAP recommends a maximum term in the range of 50 to 75 years, with certain provisions for access to out-of-print recordings.) This would mean that older recordings that are not available from rights holders could be legally reissued by individuals and cultural institutions in the U.S. and the money paid for them would stay in this country. Currently, the money paid for such reissues either flows out of the country to purchase foreign reissues, or goes to unlicensed operators in the U.S., of whom there are many and which current law encourages.

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.

More information on this issue is on the website of the Historical Recording Coalition for Access and Preservation (HRCAP), www.recordingcopyright.org.

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.¹ This was codified in the 2005 New York State decision *Capitol v. Naxos*.² 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.³ 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.⁴ 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 behind locked doors 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 themselves 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-recognized 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. HRCAP 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” bill and your appointment as chief enforcement officer, 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”.⁵ In brief they are as follows. Representatives of ARSC and HRCAP are available to

discuss any and all of these recommendations as they affect the Joint Strategic Plan, 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).⁶ A National Recorded Sound Preservation Plan is in preparation by the Library of Congress, and the Copyright Office has been directed by Congress to study the desirability and means for bringing pre-1972 recordings under federal law (no. 1).⁷

Summary

The current 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 administration to help us break this impasse.

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Organizations that support the HRCAP recommendations in whole or in part:

The American Library Association (www.ala.org)
The Association for Recorded Sound Collections (www.arsc-audio.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 Popular Culture Association (<http://pcaaca.org>)
The Society for American Music (www.american-music.org)
The Society for American Archivists (www.archivists.org)

Notes

¹ 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. Prof. Peter Jaszi, *Protection for Pre-1972 Sound Recordings Under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis*. Prepared by the Program on Information Justice and Intellectual Property, Washington College of Law, American University. Washington, D.C.: Council on Library and Information Resources and Library of Congress, December 2009. Both are available at www.clir.org.

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

³ 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).

⁴ Tim Brooks, *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919*. Urbana, IL: University of Illinois Press, 2005, 10-11.

⁵ Available at www.arsc-audio.org.

⁶ 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.

⁷ Omnibus Appropriations Act, 2009, H.R. 1105.