LIBRARY OF CONGRESS

January 31, 2011

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Office of the General Counsel
U.S. Copyright Office
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FROM : Patrick Loughney, Ph.D., Chief
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SUBJECT : Library of Congress Comments in Response to: Copyright Office Notice of Inquiry Pertaining to Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972 [Docket No. 2010-4].

This response from the Library of Congress addresses the Copyright Office inquiry relating to its forthcoming study of "the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction."

The Library of Congress takes the position that it would be highly desirable to bring sound recordings fixed prior to February 15, 1972 under federal jurisdiction (Title 17), and furthermore that such a change would be in the best interests of the U.S. Congress, the citizens of the United States, and the community of libraries, archives, museums and other educational and cultural institutions engaged in collecting, preserving and providing public research access to America's recorded sound history.

The National Recording Preservation Act of 2000 (Public Law 106-474) affirmed the national interest in preserving America's sound recording history, and established the Library of Congress National Recording Preservation Board and the National Recording Registry. That legislation further directed the Librarian of Congress to "…implement a comprehensive national sound recording preservation program…" and, in the course of implementing that program, to "…undertake studies and investigations of sound recording preservation activities as needed, including…recommended solutions to improve these practices."

In August 2010 the Library of Congress National Recording Preservation Board (NRPB), in collaboration with the Council on Library and Information Resources (CLIR), published the results of the first nationwide investigation of recorded sound preservation ever conducted in the U.S. That study, titled The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age," investigated and reported on conditions in four chapters:

1. Sound Recording Collections: An Overview of Preservation and Public Access in the Twenty-first Century.
2. Technical Issues in Digital Audio Preservation.
3. Development of Curricula in Recorded Sound Preservation and Archives Management.
4. Preservation, Access, and Copyright: A Tangled Web.

In addition, in the course of conducting necessary investigations for The State of Recorded Sound Preservation in the United States, the Library of Congress National Recording Preservation Board also commissioned and published the following preparatory studies for the purpose of placing into the public record accurate information in answer to questions that directly impinge in various ways on the question of bringing pre-1972 sound recordings under the control of federal law.

- *Survey of Reissues of U.S. Recordings by Tim Brooks* (LC-CLIR, August 2005).

- *Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives by June M. Besek* (LC-CLIR, December 2005).

- *Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Unpublished Pre-1972 Sound Recordings by Libraries and Archives* by June M. Besek (LC-CLIR, March 2009).

- *Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis supervised by Peter Jaszi and Nick Lewis* (LC-CLIR, September 2009)

The Library of Congress wishes to incorporate these findings into the record in their entirety. The responses provided hereafter incorporate pertinent findings drawn from these investigations carried out under the auspices of the Library of Congress National Recording Preservation Board, in fulfillment of the Library's Congressional mandate to study, develop and implement a national level plan to preserve America's recorded sound heritage. In addition the Library's response incorporates draft recommendations compiled by a special "Task Force on Copyright" organized by the Library in 2009 in preparation for the Library of Congress National Recorded Sound Preservation Plan to be published later in 2011.

Response:

The Copyright Office Notice of Inquiry [Docket No. 2010-4] seeks answers to thirty (30) questions listed under six general categories: Preservation, Access, Value of the Recordings, Ownership of Rights of Recordings, Term of Protection and Increasing Availability of Pre-1972 Sound Recordings.

Preservation: (Questions 1 and 2)

1. Do libraries and archives, which are beneficiaries of the limitations on exclusive rights in section 108 of the Copyright Act, currently treat pre-1972 sound recordings differently from those first fixed in 1972 or later ("copyrighted sound recordings") for purposes of preservation activities? Do educational institutions, museums, and other cultural institutions that are not beneficiaries of section 108 treat pre-1972 sound recordings any differently for these purposes?

The ability of libraries, archives and educational institutions to preserve published and unpublished pre-February 15, 1972 sound recordings is complicated by the exclusion of these recordings from federal copyright law (Title 17). The uncertain status of these works under state, common law copyright, and the inapplicability of federal copyright law for archival preservation, greatly prejudices the ability of institutions to raise funds, or to allocate resources for preservation activities. This is because the uncertain legal treatment even for preservation copying, much less the ability to ultimately make these materials available, makes archive and education officials reluctant to fundraise for, or allocate resources for the acquisition and preservation of the culturally valuable material. In addition, the ability of institutions to make these works publicly accessible, once preserved, is hampered by the common law status (and inapplicable federal law) making it even less likely that resources are allocated to save, much less make available this material. For example, these recordings are not eligible for the limited preservation and access exemptions found in section 108 of the Copyright Act, nor is it clear if concepts such as "fair use," (section 107) may be applied to permit certain types of preservation or access activity. A separate issue that needs to be addressed, if older recordings are eligible for preservation, is how to treat the underlying musical compositions to make these recordings more widely accessible to library and archival patrons (especially since preservation funding is often tied to the ability to make material available to the public).[1]

2. Would bringing pre-1972 sound recordings under federal law—without amending the current exceptions—affect preservation efforts with respect to those recordings? Would it improve the ability of libraries and archives to preserve these works; and if so, in what way? Would it improve the ability of educational institutions, museums, and other cultural institutions to preserve these works?

Effective preservation of sound recordings by institutions holding large (and small) collections, and increased funding to undertake this work, would be significantly

[1] Excerpted from draft recommendations of the "Task Force on Copyright" prepared for the Library of Congress National Recording Preservation Plan and submitted January 2011.

improved if these recordings were brought under title 17. This would serve two related benefits: (1) it would provide certainty for qualified libraries and archives to undertake needed preservation and cataloging activity; and (2) it would permit clear rules for permissible access by library and archival patrons to these materials. These conclusions are rooted in the Library's belief, based on 85 years of experience in preserving and providing public access to sound recordings, that these activities will not undermine the legitimate rights or interests of rights holders in their sound recordings (especially for commercial recordings), nor will it harm the rights holders in underlying works. [2]

Access: (Questions 3 through 7)

3. Do libraries and archives currently treat pre-1972 sound recordings differently from copyrighted sound recordings for purposes of providing access to those works? Do educational institutions, museums, and other cultural institutions treat them any differently?

Yes, generally speaking, libraries, archives, museums, educational and other cultural institutions collectively provide less public access to pre-1972 sound recordings because of the lack of uniformity in state laws that apply to pre-1972 recordings. And, because there are public research collections and/or archives of sound recordings in virtually all states of the Union, no single set of guidelines or policy statement on public access has been developed that applies to all those organizations.

A preliminary study published in 2009 in preparation for The State of Recorded Sound Preservation in the United States (August 2010) compared existing laws in ten states established for the protection of pre-1972 sound recordings. According to that study:

> "Almost all states have now extended some form of protection for pre-1972 sound recordings. States may protect sound recordings by criminal statutes (e.g., unauthorized-distribution laws), by civil statutes, or through common law theories such as common law copyright and the doctrine of unfair competition (along with its relative, the doctrine of misappropriation). While these protections have accrued over time, they are cumulative rather than exclusive (i.e., state unauthorized-distribution laws do not displace or exclude common law rights). However, different states have enacted different laws, and different state courts have applied common law theories in various ways, making a state-by-state review necessary for owners and potential users of pre-1972 sound recordings."[3]

The legal staff resources available in libraries, archives, museums, educational and other cultural institutions are not usually well versed in either federal or state copyright law, and are generally unable to provide clear guidance to reference librarians and archivists, who either serve the public or have responsibilities for preservation programs. Even large recorded sound libraries and archives lack the resources to conduct a state-by-state analysis of the laws that may apply to the pre-1972 sound

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[2] Ibid.

[3] *Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis* (LC-CLIR, September 2009), p. 8.

recordings in their collections. Thus, potentially legitimate public requests to obtain copies of pre-1972 sound recordings are frequently denied as a precaution motivated by an unspecified threat of prosecutorial action. Within the community of librarians and archivists having custody of sound recording collections, when faced with complex or unclear information on the copyright status or ownership of a pre-1972 sound recording relating to a public access request, the "safe" response is "No".

4. Would bringing pre-1972 sound recordings under federal law—without amending the current exceptions—affect the ability of such institutions to provide access to those recordings? Would it improve the ability of libraries and archives to make these works available to researchers and scholars; and if so, in what way? What about educational institutions, museums, and other cultural institutions?

Bringing pre-1972 sound recordings under Federal law—without amending the current exceptions--would provide significant, though less than ideal, benefits to libraries, archives, museums, educational institutions and other recorded sound collecting institutions. First, it would create parity in the term of federal copyright protection extended to other categories of works covered by Title 17, e.g., motion pictures. Second, the applicability of Section 107 would mean that the concepts of "fair use" and "public domain" would apply to sound recordings in more or less the same manner to which they apply to other works protected under Title 17. This action would benefit staff in libraries, archives, etc., who are responsible for identifying rights holder information and making decisions about legitimate public access. Thus, it would allow those institutions to provide better, more timely and accurate public service.

However, it must be noted that the current exceptions for making copies allowed under Sections 108 (b) and (c) are of little real benefit to libraries, archives and other institutions that preserve and provide public access to sound recordings. The present limitation of Section 108 (b) to making "…three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation", and Section 108 (c) "…three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen…" are of little practical benefit to archival recorded sound institutions.

Current "best practice" standards for preserving sound recordings for posterity require the making, and storing in multiple secure digital archival locations, of more than a maximum of 3 copies of any sound recording format. In practice this is true regardless of whether a work is unpublished or published. In addition, it is against the "best practice" standards of professional sound recording preservation to delay preserving a sound recording until it is damaged or deteriorated. Deteriorated or damaged sound recordings are much more costly to preserve or restore than those in good condition. To deliberately delay preserving a culturally, historically or aesthetically important sound recording until it is in a deteriorated condition is a foolhardy practice that could constitute malfeasance on the part of a professional librarian or archivist. As they now exist, Sections 108 (b) and (c) place recorded sound archivists who perform their duties to the highest professional standards, plus the libraries, archives, museums and other institutions for whom they work, at odds with the word of the law, if not its intention.

The same logic also applies to the problem of lost or stolen sound recordings in

recorded sound libraries and archives. Best practice standards call for the making of preservation and/or surrogate copies of historically, culturally or aesthetically important sound recordings before they are made publicly accessible to protect the original artifacts from damage or theft. In the modern world of digital audio preservation, producing a maximum of 3 copies is a limitation that impinges on the ability of audio preservation engineers to carry out their conservation responsibilities to the full extent required.

5. Currently one group of pre-1972 recordings does have federal copyright protection—those of foreign origin whose copyrights were restored by law. (See the discussion of the URAA above.) In order to be eligible for restoration, works have to meet several conditions, including: (1) they cannot be in the public domain in their home country through expiration of the term of protection on the date of restoration; (2) they have to be in the public domain in the United States due to noncompliance with formalities, lack of subject matter protection (as was the case for sound recordings) or lack of national eligibility; and (3) they have to meet national eligibility standards, i.e., the work has to be of foreign origin. 17 U.S.C. 104A (h)(6). In determining whether a work was in the public domain in its home country at the time it became eligible for restoration, one has to know the term of protection in that country; in most countries, sound recordings are protected under a "neighboring rights" regime which provides a 50-year term of protection. As a result, most foreign sound recordings first fixed prior to 1946 are not eligible for restoration. To be of foreign origin, a work has to have "at least one author or right holder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, [must have been] first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country." 17 U.S.C. § 104A (h)(6)(D).

Does the differing protection for this particular group of recordings lead to their broader use? Have you had any experience with trying to identify which pre-1972 sound recordings are (or may be) so protected? Please elaborate.

The Library of Congress recorded sound collection exceeds 4 million items, of which in excess of 50,000 are pre-1972 recordings of foreign origin, particularly those in the 78rpm and LP formats. The differing protections for these recordings does not lead to their broader use or, in practical terms, make it easier to respond to public requests for access copies. If anything, the added complexity of having another category of legal guidelines, e.g., "neighboring rights" and the difficulty of determining the public domain status of a work in a foreign country, simply add to the challenges faced by the staffs in libraries, archives, etc., who field public requests.

The practice of the Library of Congress Recorded Sound Reference Center is to require public researchers, seeking copies of pre-1972 sound recordings of foreign origin from the Library's collection, to provide written evidence of permission from the rights holder(s) to a particular recording before a research copy can be made. According to the current head of the Recorded Sound Reference Center, no single instance has occurred in the past 12 years in which a researcher has succeeded in gaining written permission to obtain a copy of a foreign recording from the Library's collection. Even when the contact information for rights holders is provided by the Library staff, public researchers encounter such a fog of confusion, denial and

misinformation that they either give up or are forced to seek copies available from illegal or unauthorized sources.

In the case of both foreign and U.S. owned pre-1972 sound recordings, it is common to encounter rights holders who either no longer own any copies of recordings to which they hold the rights, or to no longer have documentation of any kind that verifies their ownership interests. Likewise, it is common in regard to pre-1972 sound recordings of both foreign and U.S. origins, for there to be a lack of institutional memory within companies and/or documentation about the past sale or transfer of ownership of recordings to other parties. The effect on libraries, archives, etc., and members of the research public is confusion caused by cold information trails leading to long dead owners and record companies that have gone out of business. The inability to cut through this Gordian Knot of "orphan" recordings, as they are termed by librarians and archivists, is a major barrier to public access and the institutions that collect and preserve sound recordings.

The reference staff of the Library's Recorded Sound Reference Center reports that, in recent years, the increasing concentration of ownership interests to pre-1972 sound recordings world wide—both foreign and domestically produced--into the hands of a small number of international corporations has had the effect of slightly easing the difficulties in locating rights holders.

6. *Are pre-1972 sound recordings currently being treated differently from copyrighted sound recordings when use is sought for educational purposes, including use in connection with the distance education exceptions in 17 U.S.C. 110(2)? Would bringing pre-1972 sound recordings under federal law affect the ability to make these works available for educational purposes; and if so, in what way?*

Pre-1972 sound recordings, in the practical experience of the Library of Congress Recorded Sound Reference Center, are treated no differently when use is sought for educational purposes. Bringing pre-1972 sound recordings under Title 17 would ease the difficulties of determining questions of public domain and "fair use", but it would not necessarily make it easier to obtain the use of pre-1972 sound recordings for educational purposes. The main problem will remain; the burden on the part of the user to identify or locate historic rights holders for purpose of obtaining permissions.

7. *Do libraries and archives make published and unpublished recordings available on different terms? What about educational institutions, museums, and other cultural institutions? Are unpublished works protected by state common law copyright treated differently from unpublished works protected by federal copyright law? Would bringing pre-1972 sound recordings under federal law affect the ability to provide access to unpublished pre-1972 sound recordings?*

In practical terms the Library of Congress Recorded Sound Reference Center generally treats published and unpublished recordings on the same basis. The decision to provide a public access copy of a sound recording depends on the ability of the

potential user to identify, locate and obtain documented permission from the rights holder for the Library to duplicate and provide a physical or digital copy. Bringing pre-1972 sound recordings under federal law would incur the same limitation of permitting no more than 3 copies of an unpublished work for purposes of preservation and security, etc. And, it would make no change in the limitation that prohibits digital copies from being made available to the public outside the premises of a library or archive.

Economic Impact: (Questions 8 through 15)

8. Are there commercially valuable sound recordings first fixed before 1923 (e.g., that would be in the public domain if the ordinary federal term of protection applied) that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.

There may or may not be commercially valuable sound recordings produced before 1923. The recording industry in America and in Europe has a long history of surveying historical recordings in all genres and reissuing those perceived to have commercial value to new generations of listeners. The Library of Congress itself has a history of producing and reissuing sound recordings of cultural and historical importance dating back to the 1930s.

However, from the standpoint of the Library of Congress as a research and preservation institution holding hundreds of thousands of pre-1923 sound recordings, the major issue is the lack of public availability in the market place of the great majority of pre-1923 sound recordings, regardless of whether or not they are commercially valuable.

A 2005 study of the commercial availability of U.S. sound recordings titled, Survey of Reissues of U.S. Recordings by Tim Brooks, examined the commercial availability of the most commercially significant sound recordings issued in the U.S. from the 1890s through 1964. By examining more than 20 major discographies, it was determined in the course of this study that more than 400,000 "recordings of interest" were issued in the U.S. during that period.[4] The study estimates that over 90% of those original recordings survive in the collections of libraries, archives, educational institutions and in the possession of private collectors.[5] However, the same study also concluded that of the commercially significant recordings released from the 1890s through the start of World War II, less than 10 percent are currently available from the rights holders. And, for sound recordings released prior to 1920, the percentage currently available in the marketplace from the rights holders is less than 1 percent.

Thus, based on this statistical analysis documenting the small percentage of significant pre-1923 sound recordings that are available in the market place today, it is difficult to conclude that they or their rights holders would be adversely affected by

[4] Survey of Reissues of U.S. Recordings by Tim Brooks (LC-CLIR), p. 11.
[5] Ibid, p. 13.

bringing them under the control of federal law.

9. *Are there commercially valuable sound recordings first fixed from 1923-1940 that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.*

Citing the information from the same study referred to in the answer to question #8, it can be concluded that there would be very little adverse affect on commercially valuable sound recordings from the period 1923-1940. The reason is that, based on a careful statistical analysis, less than 10 percent of the recordings of that era are currently available in the market place in the form of reissues from the original rights holders.[6]

10. With regard to commercial recordings first fixed after 1940: What is the likely commercial impact of bringing these works under federal copyright law?

Again, citing the information from the Survey of Reissues of U.S. Recordings referred to in the answer to question #8, it can be concluded that there would be very little adverse affect on commercially valuable sound recordings fixed after 1940 through the end of 1964. The reason is that, based on a careful statistical analysis, less than 10 percent of the recordings of that era are currently available in the market place in the form of reissues from the original rights holders.[7]

Ownership of Rights of Recordings: (Questions 16 through 20)

Answer: No comment at this time.

Term of Protection: (Questions 21 and 22)

21. If pre-1972 sound recordings are brought under federal copyright law, should the basic term of protection be the same as for other works—i.e., for the life of the author plus 70 years or, in the case of anonymous and pseudonymous works and works made for hire, for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first? Can different treatment for pre-1972 sound recordings be justified?

It is the recommendation of the Library of Congress that the proper term of federal protection for sound recordings should be harmonized with the 50 year period of protection extended to sound recordings under the copyright law of the United Kingdom. This is to say, should pre-1972 sound recordings be brought under U.S. federal copyright law, the term of protection for published recordings would be 50 years, beginning on the date on which the recording is first made publicly available. And for unpublished recordings, the term would be 50 years, starting on the date on which the

[6] Ibid.
[7] Ibid.

work first becomes publicly available.

It is the opinion of the Library of Congress that the different treatment of pre-1972 sound recordings, establishing a 50 year term of protection under federal law rather than the longer terms existing for other classes of works, is fair, reasonable and justifiable. The evidence that a 50 year term of protection is justifiable is found in the results of the historical and statistical analysis published in Survey of U.S. Recordings.[8] That report, based on a close analysis of more than 400,000 of the most commercially successful sound recordings released in the U.S. from the 1890s through the end of 1964, found that less than 1 percent of those recordings released prior to 1920 are commercially available currently from the rights holder. And, for sound recordings released prior the start of World War II, less than 10 percent are commercially available currently from the rights holder.

The conclusions that can be reached from these facts are 1) that virtually all the commercial benefits accruing to rights holders from historic sound recordings released in past decades occur within a shorter period of time than 70 years, 95 years or 120 years from date of release; 2) that having a longer term of protection under federal law than 50 years has not proved to be an incentive to rights holders to keep historic recordings commercially available in the market place, and 3) that the current protection for sound recordings until the year 2067 creates a "dead zone" during which culturally and historically important recordings are not commercially available, and thereby contributing to a public loss of memory about their existence—a sort of cultural amnesia from one generation to the next—that is detrimental to the process of creativity that has been crucial to developing and sustaining American musical composition and the recording industry itself. Number 4, and perhaps most important of all, for that small percentage of the U.S. population—less than 10 percent-- interested in listening to and researching pre-WWII recordings, the lack of commercial availability from the rights holder creates an incentive to seek out pirated copies produced in other countries with shorter terms of copyright protection where they are in the public domain.

22. Currently, states are permitted to protect pre-1972 sound recordings until February 15, 2067. If these recordings were incorporated into federal copyright law and the ordinary statutory terms applied, then all works fixed prior to 1923 would immediately go into the public domain. Most pre-1972 sound recordings, including all published, commercial recordings, would experience a shorter term of protection. However, as the date of the recording approaches 1972, the terms under federal and state law become increasingly similar…If pre-1972 sound recordings were brought under federal copyright law, should a similar provision be made for those recordings that otherwise would have little or no opportunity for federal copyright protection? If so, what would be a "reasonable period" in this context, and why? If not, would the legislation encounter constitutional problems (e.g., due process, or Takings Clause issues)?

Answer: No comment at this time.

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[8] Ibid.

Increasing Availability of Pre-1972 Sound Recordings: (Questions 23 through 26).

23. If the requirements of due process make necessary some minimum period of protection, are there exceptions that might be adopted to make those recordings that have no commercial value available for use sooner? For example, would it be worthwhile to consider amending 17 U.S.C. 108(h) to allow broader use on the terms of that provision throughout any such "minimum period?" Do libraries and archives rely on this provision to make older copyrighted works available? If not, why not?

The Library of Congress currently takes into account the provisions of Section 108 (h) when determining the permissibility of distributing, performing or displaying digital and other copies of works during the last 20 years of protection, if they meet the criteria set forth in subparagraphs (A), (B) and (C). However, the Library of Congress believes it would be in the best interests of libraries, archives and other sound recording preservation institutions to adopt a broader range of exceptions for sound recordings—and indeed all classes of copyrightable works—having no commercial value, during the final 20 years of copyright protection.

Adopting a broader range of exceptions for pre-1972 sound recordings would offer an important remedy to libraries, archives and other sound recording preservation institutions in addressing the challenge of so-called "orphan sound recordings", i.e., sound recordings of uncertain copyright status or for which no reliable rights holder information is identifiable or locatable without accepting an unreasonable burden or research effort or expense.

24. Are there other ways to enhance the ability to use pre-1972 sound recordings during any minimum term, should one be deemed necessary?

Currently available digital technologies offer great opportunities for the Library of Congress and other libraries, archives, museums, etc., engaged in sound recording preservation and access, to provide much broader access to works that have been preserved but which are not widely available because of overly burdensome restrictions in the federal copyright law on distribution and dissemination for research and other non-commercial purposes. Internet streaming is one such application that would enable the Library of Congress to bring its sound recording collections to the people of the U.S., especially those historical recordings having no commercial value.

25. How might rights holders be encouraged to make existing recordings available on the market? Would a provision like that in section 303—an extended period of protection contingent upon publication—be likely to encourage rights holders to make these works publicly available?

An extended period of protection, such as the provision in Section 303 granting an additional 25 years of protection, is not likely, on its own merits, to be a significant encouragement to rights holders in keeping the universe of pre-1972 sound recordings available in the market place. For many decades recording companies in the U.S., Europe and elsewhere, have been combing through their archives of recording masters

looking for sound recordings worthy of commercial reissue. This practice has been going on for at least the past 50 years, covering all genres of recordings.

In spite of this activity, which has occurred during a period of virtually complete copyright protection until the year 2067, the Survey of Reissues of U.S. Recordings shows that less than 10 percent of the commercially important sound recordings released in the U.S. prior to World War II are still commercially available from the rights holders. And, for those sound recordings released prior to 1920, less than 1 percent are commercially available from rights holders.[9] The conclusion is that adding a special extended period of protect, after the pre-1972 sound recordings are brought the protection of federal law, will not necessarily be an effective incentive to rights holders to keep their assets in commercial distribution.

One possible encouragement could be a stipulation that rights holders collect a 25 percent share of the revenue gained by libraries, archives, museums, educational and other sound recording preservation institutions if those institutions undertake to preserve and distribute or reissue historic recordings that have not been made commercially available by rights holders during the final 20 years of their term of protection under federal law. To be eligible a rights holder would have to prove their ownership interest in a specific recording and proactively make him or herself known to the archive and be partner to a royalty collection mechanism, e.g., Sound Exchange, established to disperse licensing and royalty fees.

Partial Incorporation:

26. Is it legally possible to bring sound recordings under federal law for such limited purposes? For example, can (and should) there be a federal exception (such as fair use) without an underlying federal right? Can (and should) works that do not enjoy federal statutory copyright protection nevertheless be subject to statutory licensing under the federal copyright law? What would be the advantages or disadvantages of such proposals?

The disadvantage to libraries, museums, educational institutions and other members of the recorded sound archive community would be the addition of another layer of confusion to professional sound preservation archivists and the general public over the boundaries between state and federal copyright laws covering pre-1972 sound recordings. The disadvantage of statutory licensing, without the foundation of federal law, is that such an approach would fail to provide an adequate remedy to potential users among the public to the problem of the large number of “orphan” works that exist among pre-1972 sound recordings. The historic loss of ownership information relating to pre-1972 sound recordings, and the inability to conduct research to locate that information without unreasonably high costs in time and money, presents real hardships to users interested in research and access for non-commercial purposes. If the burden of discovery remains wholly with the potential user of a recording, the distinction between dealing with sound recordings brought entirely under the control of federal law versus those under the partial control of federal law and statutory licensing will be virtually meaningless.

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[9] Ibid.

Miscellaneous Questions: (Questions 27 through 30)

27. Could the incorporation of pre-1972 sound recordings potentially affect in any way the rights in the underlying works (such as musical works); and if so, in what way?

Answer: No comment at this time.

28. What other uses of pre-1972 recordings, besides preservation and access activities by libraries and other cultural institutions, might be affected by a change from state to federal protection? For example, to what extent are people currently engaging in commercial or noncommercial use or exploitation of pre-1972 sound recordings, without authorization from the rights holder, in reliance on the current status of protection under state law? If so, in what way? Would protecting pre-1972 sound recordings under federal law affect the ability to engage in such activities?

It is the collective opinion of the Library of Congress professional staff, who are engaged in preserving and providing public access to the Library's extensive sound recording collections, that the present lack of federal control of pre-1972 sound recordings has been a major contributing factor to the extensive piracy of those recordings in recent years. That, and the general confusion among the general public over the facts of state and federal copyright protection, the unavailability of a source for clear and authoritative information on rights holder information, the large and growing number of orphan works among pre-1972 sound recordings, and the cumulative public frustration over gaining easy legal access to pre-1972 sound recordings that their digital hand held devices make so readily available, have all contributed to an alarming erosion of respect for the concept of federal copyright law relating to pre-1972 sound recordings. That disregard for copyright law extends to more than just the young generation of users to professionals in all occupations, and argues for immediately reforming copyright law for sound recordings before the attitude of civil disobedience becomes more prevalent.

29. To the extent not addressed in response to the preceding question, to what extent are people currently refraining from making use, commercial or noncommercial, of pre-1972 sound recordings in view of the current status of protection under state law; and if so, in what way?

The collective observation of the staff of the Library of Congress Recorded Sound Reference Center and others engaged in recorded sound preservation in the Library is that there is very little restraint on the part of the general public in making noncommercial use of pre-1972 sound recordings. Because of the greater risk of legal penalties for misuse, it is the experience of the Library staff that there is less piracy in the commercial exploitation of pre-1972 sound recordings, though no statistical information has been developed by the Library to support this opinion. It should be observed however that a great deal of pre-1972 sound recordings are used for commercial purposes and that there is an infrastructure of professions who provide rights clearance services to the commercial community that are not available to the average noncommercial public user.

30. *Are there other factors relevant to a determination of whether pre-1972 sound recordings should be brought under federal law, and how that could be accomplished?*

Answer: No comment at this time.