
COPYRIGHT STATUS OF HISTORICAL RECORDINGS— PROTECTING AND PROMOTING THE PUBLIC DOMAIN

By Charlotte Roederer

We all recognize how important it is to protect the rights of creative people, such as composers and performers, and to provide a fair return on investment to the business people who promote their work, such as recording companies. This we do by respecting their protectible copyright interests.

That is only part of the story, though. Equally important is the need to actively protect and promote the public domain and the interests of users — a primary opportunity and calling for librarians and archivists.

The copyright status of sound recordings is particularly interesting, though admittedly complex, with respect to those first fixed before February 15, 1972. Accordingly, it is with such “historical sound recordings” (as they shall be referred to here) that I would like to deal as follows: (1) Give you a brief idea of the nature of the legal analysis that needs to be undertaken with respect to any particular sound recording in order to determine its copyright status. (2) Point you, through footnotes, in the direction of further information and resources on the subject. (3) Encourage you to include in your professional priorities the express protection and promotion of the public domain and the interests of users.

What is a Sound Recording?

Legally speaking, sound recordings usually involve at least two elements. One is the musical composition; the other is the recorded performance. The musical composition has long been eligible for protection in the U.S. under federal copyright law. The recorded performance has been eligible for such protection only since February 15, 1972. Accordingly, an analysis of the copyright status of a sound recording has to proceed work by work (which often means band by band) along at least two parallel lines of legal inquiry. What is the status of the musical composition? What is the status of the recorded performance?

As a practical matter, the two are physically inextricable in a sound recording, so unless both the musical composition and the recorded performance are in the public domain, then the sound recording as a whole is not in the public domain.

What is the status of the Musical Composition?

In order for a work to be protected under U.S. federal copyright law, it must be “fixed.” For purposes of this analysis, we will assume that the musical composition has been fixed in the most traditional way — as a printed score.

The U.S. Copyright Office has prepared a very helpful circular entitled “How to Investigate the Copyright Status of a Work” which gives the following general rules concerning “published” (in the legal sense) or copyrighted works.¹

1. *Works first published or copyrighted before January 1, 1916.* In general, “any work published or copyrighted more than 75 years ago (75 years from January 1st in the present year) has expired by operation of law, and the work has permanently fallen into the public domain in the United States.” For example, on January 1, 1991, copyright expired in works first published or copyrighted before January 1, 1916.

2. *Works first published or copyrighted between January 1, 1916 and December 31, 1949.* “[I]f a valid renewal registration was made and copyright in the work was in its second 28-year term on December 31, 1977, the renewal copyright term was extended under the present [1976] act to 47 years. In these cases, copyright will last for a total of 75 years from the end of the year in which copyright was originally secured.” For example, “copyright in a work first published in 1917, and renewed in 1945, will expire on December 31, 1992.”

3. *Works first published or copyrighted between January 1, 1950 and December 31, 1977.* “[I]f the work was in its first 28-year term of copyright protection on January 1, 1978, ... [and] if renewal registration is made during the 28th calendar year of its first term, copyright will endure for 75 years from the end of the year copyright was originally secured. If not renewed, the copyright expires at the end of its 28th calendar year.”

4. *Works that fell into the public domain before January 1, 1978.* “The 1976 Act does not restore protection to works that fell into the public domain before January 1, 1978. If copyright in a particular work has been lost, the work is permanently in the public domain in the United States. The most common ways in which copyright could have been lost were publication without the required copyright notice, expiration of the first 28-year term without renewal, or final expiration of the second copyright term.

Prior to 1978, if a work was not “published” in a legal sense nor registered in the Copyright Office, it was subject to perpetual protection under state common law.² The basic rationale behind common law copyright was that the author had the right of first publication. If the author chose not to publish, whether out of a desire for privacy or for any other reason, then no one else could either.

What is the Status of the Recorded Performance?

Prior to February 15, 1972, recorded performances were not eligible for protection under U.S. federal copyright law. The pivotal case leading to that result was a lawsuit from the first decade of the twentieth century, *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), in which it was alleged that piano rolls were infringing copies of the musical compositions they embodied. The U.S. Supreme Court disagreed and held that because piano rolls did not visually reflect the musical composition they embodied, they were not “copies” of the musical composition and thus could not infringe the copyright in the composition.

Courts and the Copyright Office read *White-Smith’s* holding to imply that piano rolls (and by extension sound recordings) also were not “copies” for purposes of the 1909 Copyright Act’s registration and notice requirements, and hence that they were not eligible for federal copyright protection.³

The fate of performances fixed before February 15, 1972, thus came to rest upon state law, primarily common law copyright and misappropriation; and a series of cases in various states yielded, not surprisingly, patchwork results. These cases make very interesting reading.

Some of the earlier cases held that the public distribution of phonorecords divested common law rights in the recorded performance,⁴ a result consistent with the principle

underlying the theory of divestitive publication generally — i.e. that a copyright owner should lose its common law rights when its exploitation of the work exhausts or substantially exhausts the work's economic value.

The more general holding of the courts under state law, however, and the one that was ultimately upheld in the U.S. Supreme Court⁵ was that the public distribution of a phonorecord embodying a protected performance did not divest a common law right in the performance.⁶ This rule resulted from an economic “cause and effect” type of logic which reasoned that (i) sale of phonorecords was an important source of revenues for recorded performance, (ii) the federal copyright law did not protect recorded performance, and (iii) therefore, investment in recorded performances would be encouraged only by allowing state law protection to survive the sale and distribution of phonorecords embodying them.

As a result, recording companies (after substantial litigation) ended up in an unusually good situation. They had an economically exploitable product which was not just protected under the law but protected indefinitely, rather than for only the constitutionally “limited terms” of the federal copyright statute. This anomaly affects the status of many of the sound recordings in your collections today. If the performance was first fixed before February 15, 1972, the musical composition itself may still be under federal copyright protection, or the statutory term(s) may have run out so that it now is in the public domain. However, even if the musical composition is in the public domain, the recorded performance still benefits from its old state law protection; for under the 1976 Copyright Act, “With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any state shall not be annulled or limited by this title until February 15, 2047.”⁷

Accordingly, the entry of these historical sound recordings totally into the public domain (i.e. both the musical compositions and the recorded performances) is an event that some of us will not live to see. Librarians and archivists, though, are dedicated to acting in the present with a long-term perspective; and so, I would urge action on at least three fronts in order to move towards maximizing the good uses to which your historical sound recordings can and will be put.

1. Preserve Originals. Preserve original piano rolls, original Edison cylinders, and original phonorecords. Keep them in top physical condition, so that when they enter the public domain legally, they will still be available physically to do so. That is the best way to avoid any issue arising as to whether any copyright or other right in an intervening copy might serve to block entry of the original into the public domain.

2. Publicize the Public Domain. With the aid of legal counsel, track and publicize the entering into the public domain of various individual works or classes of works. Include such information, when you have a legal opinion to base it on, in standard reference works.⁸ At first, there will be few recorded performances, but begin with musical compositions fixed in scores. The idea is to get people used to thinking of the public domain as a treasure to be actively preserved and promoted rather than as a neglected limbo into which works occasionally fall, almost accidentally and with little fanfare.

3. Monitor Congress. Until a recorded performance does enter the public domain, it would be desirable for users to be able to take advantage of a “fair use” exception. “Fair use,” however, as applied to “unpublished” works has been severely restricted within the past few years by the Second Circuit Court of Appeals.⁹ Indeed, that court has placed virtually a blanket prohibition on any use of an unpublished work.

This has raised great concern among users of unpublished works, particularly historians, biographers and journalists. In response to such concerns, several bills have

been introduced in the U.S. Congress which would overrule the overly restrictive language of the *Salinger* and *New Era* cases. Under proposed legislation, while the unpublished nature of the work would weigh against a finding of “fair use,” it would not diminish the importance of the other statutory fair use factors being taken into account in the judicial analysis as well.¹⁰

You may want to monitor the progress of this legislation as well as the development of any other legislation that might be put forward because it would have a direct impact on the scope of permissible uses for your historical sound recordings. If, as a result of new legislation, such a recorded performance became eligible for a “fair use” exception (covering unpublished works generally) and if that recorded performance embodied a musical composition already subject to the old statutory “fair use” exception for published works¹¹ (or a musical composition in the public domain), then the recording as a whole would probably be significantly more accessible to users in the library and archival context than currently is the case.

In short, you have wonderful old treasures in your collections; and it behooves us all to try to see that they are as widely known, enjoyed, and appreciated as they deserve to be.

Notes:

1. The U.S. Copyright Office has many fine publications as well as supplies of registration forms. (Photocopies of forms may not be used.) To obtain copies of any of its circulars or forms, call the “hotline” at (202) 707-9100. The general number is (202) 479-0700. Among the circulars of particular interest are the following:

- R1 - Copyright Basics
- R2 - Publications in the Copyright Office
- R15a - Duration of Copyright
- R15t - Extension of Copyright Terms
- R21 - Reproduction of Copyrighted Works by Educators and Librarians
- R22 - How to Investigate the Copyright Status of a Work

Points 1-4 in the text of this article are addressed in, and the quotations are taken from, pp. 7-9 of Circular R22. If in the example given in Point 2, you do the apparent arithmetic (1917+28+28) and wonder why the copyright did not expire before 1977, it is because there were various “interim” laws extending the terms of such works in anticipation of passage of the 1976 Copyright Act. See Circular R15t.

2. A very readable reference work that should be in any musical library is the new three-volume study of copyright by Professor Paul Goldstein of Stanford University (formerly of the State University of New York at Buffalo). It is a comprehensive study of statutory and common law, with extensive footnote references to the case law. His own personal bent is rather artistic, which helps to balance out the fact that the forces of commerce are turning copyright increasingly into a battleground for the computer software industry. The full citation: Paul Goldstein, *Copyright - Principles, Law and Practice*, Little, Brown and Company - Law Division - 1989, 34 Beacon Street, Boston, Massachusetts 02108, 1-800-331-1664.

Concerning “publication” under the 1909 Copyright Act, see Goldstein, *Copyright*, vol. I, pp. 233-253. Much of the discussion in this article about the status of a recorded performance draws heavily on Professor Goldstein’s fine work.

The definitive four-volume treatise on copyright is: Melville Nimmer and David Nimmer, *Nimmer on Copyright*, Matthew Bender and Co., Inc., 1275 Broadway, Albany, New York 12201, (518) 487-3000. First published in 1963, updated annually.

3. Goldstein, *Copyright*, vol. I, p. 244.

4. *Ibid.*, vol. I, p. 247. As cited there in n. 62, see also, *RCA Mfg. v. Whiteman*, 114 F. 2d 86, 88-89 (2d Cir.), *cert. denied*, 311 U.S. 712 [citation corrected] (1940).
5. *Goldstein v. California*, 412 U.S. 546, 178 U.S.P.Q. 129, *reh'g denied*, 414 U.S. 883 (1973). The Goldstein in this case is unrelated to the author of the *Copyright* study.
6. Goldstein, *Copyright*, vol. I, p. 247. As cited there in n. 63, see e.g., *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657, 663 (2d Cir. 1955); *National Ass'n. of Performing Artists v. Wm. Penn Broadcasting Co.*, 38 F. Supp. 531, 533 (E.D. Pa. 1941); *Metropolitan Opera Ass'n., Inc. v. Wagner-Nichols Recorder Corp.* 199 Misc. 786, 798, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 453, 194 A. 631 (Pa. 1937).
7. 17 *United States Code* Section 301(c). The U.S. federal Copyright statute (with case notes) is 17 *United States Code Annotated - Copyright*, published by West Publishing Company, M-2 P.O. Box 64833, St. Paul, MN 55164-1804, 1-800-328-9352. Inexpensive, updated annually.
8. While the information in this article is believed to be accurate, it is general in nature, does not purport to be complete, and should not be construed or relied upon as legal advice. If legal advice or opinion is required, legal counsel should be consulted.
9. *Jerome D. Salinger a/k/a J.D. Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d 177 (1987); *New Era Publications Int'l, ApS v. Henry Holt and Co.*, 873 F.2d 576 (2d Cir.), *petition for reh'g denied*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1168, 107 L.Ed.2d 1071 (1990); *New Era Publications Int'l, ApS v. Carol Publishing Group*, 904 F.2d 152 (2d Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 297, 112 L.Ed.2d 251 (1990).
10. As of December 15, 1991, two such pieces of "fair use" legislation pending are Senate Bill No. 1035 (passed by the Senate and now in the House Judiciary Committee) and House Resolution No. 2372 (passed by the House and now in the Senate Judiciary Committee).
11. 17 *United States Code* Section 107.

Correction

In the last Journal, Vol. 22, No. 2, the article "The Toscanini Legacy: Part II, the Selenophone," was a continuation of a previous work by Don McCormick and Seth Winner. Seth Winner's name was inadvertently omitted as co-author. The ARSC Journal apologizes for this oversight.