Is ARSC Sleeping While Historic Recordings are Buried by Copyright Law?

In the 1970s Congress passed the most sweeping changes in U.S. copyright law in more than half a century. The new laws introduced two important principles. Personal copyrights, such as those of authors and composers, would now be on a "life-plus" basis, instead of for a fixed period from the time of publication. [For many years the term was 28 years from publication, renewable for 28 more, or a total of 56 years.] A parade of elderly authors and composers appeared before Congress complaining that they had "outlived" their copyrights, among them Eubie Blake, who was then nearing one hundred. A song he had written as a teenager was no longer "his". The new term was set at life plus 50 years. Eubie – and more importantly his heirs – could rest easy that their royalties would keep coming. A second class of copyrights, "corporate" copyrights (those not belonging to an individual), was set at 75 years from the date of publication.

The second major change was that for the first time sound recordings were covered by federal copyright. Prior to this, in the absence of federal action, many states had passed laws covering recordings, some quite sweeping, others less so. In some cases they appeared to grant perpetual ownership to the record companies. The record companies welcomed uniform federal legislation, but of course they wanted the longest term they could get. [Even though a few years earlier they had been busy destroying their archives, Columbia by throwing out most of its Bridgeport masters and RCA Victor by literally blowing up its Camden vaults.] They persuaded the Senate to give them perpetual copyright protection for recordings. But the House of Representatives refused to go along, recognizing that this would fly in the face of the Constitutional requirement that copyright must be for "limited times".[1]

A devil's bargain was struck in the conference committee charged with reconciling the Senate and House bills. Most recordings would be covered by "corporate" copyright, so those made prior to 1972 (the effective date of the law) were exempted for a period of 75 years. During that period, i.e., until 2047, they would still come under state law, which favored the record companies. After 2047 federal copyright would take over. Everything made prior to 1972 would enter the public domain at once; until then, nothing would.

The argument was made that giving the companies such lengthy ownership would encourage them to preserve and reissue older recordings. With nearly thirty years of experience, however, it is now clear that nothing of the sort has happened. My own recent study of early African-American recordings (surely a field of interest) reveals that only one half of one percent of covered recordings made prior to 1920 have been reissued by the copyright holders. Undeterred by such experience (or ignorant of it), Congress in 1998 passed the now-notorious "Sonny Bono Copyright Term Extension Act," lengthening all

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the terms in the original act by 20 years. Now no covered recordings will pass into the public domain until 2067.

The net effect of these laws has been to bury early recordings. The owners won't reissue them (not profitable enough), won't allow others to do so (prohibitive licensing fees), and have even tried to stop foreign reissues from being sold in the U.S. (through "parallel import" laws – which are fortunately not too effective). As a result a small but thriving marketplace has grown up in imported reissues and illegal domestic ones. Established labels, archives and scholarly associations like ARSC are discouraged from producing historic reissues for fear of legal problems. In most countries the term for recordings is 50 years, and much more is available. A label like Europe's Document, which provides a real service to scholars by making available rare material whatever its origins, could not exist in the U.S.

Availability is only part of the problem. As any historian will tell you, the best form of preservation is duplication – and lots of it. The more copies there are, and the more widely disseminated they are, the better the chance some will survive. We will never "lose" the Mona Lisa or "Hamlet," no matter what happens to the originals. [This is one of the reasons for a vibrant public domain.] However many early recordings are in danger of disappearing if their "owners" won't preserve them, and nobody else dares reissue them. Current copyright law provides for very limited reproduction by archives, and even more limited access by scholars. In my opinion, that's a recipe for disaster.

If ARSC's purpose is to "foster recognition and use of sound recordings ... by students and research scholars" (Bylaws, Article II, paragraph c), where was it during the 1970s and 1990s copyright debates? Nowhere, as far as I can determine. Not until the Copyright Term Extension Act was challenged before the Supreme Court, in 2003, did ARSC weigh in by supporting a "friend of the court" brief submitted by the Association of Research Libraries.

Working with public interest lawyers and lobbyists on that brief, I was amazed at how little Washington insiders knew about the harsh treatment of historic recordings under current law. Who better to make the case for laws that encourage, rather than discourage, the preservation and dissemination of our recorded heritage than ARSC? [By "preservation" I don't mean one copy locked in a vault.] The issue is not whether there should be effective enforcement of current copyrights (downloading, bootlegs, etc.) – there should be – but about locking up very old recordings that have little economic value but historical significance.

But, you say, "non profit organizations can't lobby". That is one of those half-truths monied interests use to keep small non-profits quiet. (Bigger ones know better, and do lobby.) In fact they can, as long as it does not become their main focus. This subject is covered in detail in an interesting article by Tufts Professor Jeffrey M. Berry in the 30 November 2003 Washington Post, and in his book, A Voice for Nonprofits.[2] He argues that nonprofits could and should play an important role in educating legislators to the real effect of the laws they are considering. That means keeping on top of what is being considered in Congress, and contacting legislators with relevant information in a timely manner.

My own congressman, Christopher Shays, once remarked that voting in Congress is a little like being at a university and being expected to be an expert in every subject taught. Most legislators appreciate knowledgeable sources of information. How many speak to them on behalf of historic recordings?

I think that ARSC should play a much more active role in the current dialogue. This does not mean endorsing candidates or even necessarily advocating specific laws, but might simply mean providing information. The damage being done by current law to effective preservation and dissemination speaks for itself. I hope that the Fair Practices Committee, which I have been asked to chair, can help organize and further this dialogue, as well as provide a forum for ARSC members to contribute their thoughts and experiences regarding this issue. Actual examples of reissue projects that were aborted or made unnecessarily difficult due to copyright concerns would be particularly helpful.

The views expressed here are mine and not necessarily those of the Committee or ARSC. Members' views – and help – are welcome.

We hope to restart the Question and Answer column that formerly ran in the ARSC Journal, with the help of Erach Screwvala esq., an attorney versed in copyright matters. Please send your questions to tbroo@aol.com <mailto:tbroo@aol.com> and he will respond in these pages. ***TB***

Endnotes

1. *House Report No. 94-1476, available on www.title17.com <http://www.title17.com>*
2. *Jeffrey M. Berry, "The Lobbying Law Is More Charitable Than They Think".*

Washington Post, 30 November 2003.