

# Legal Impediments to Preservation of and Access to the Audio Heritage of the United States

## Recommendations by the Association for Recorded Sound Collections and the Music Library Association

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The unique copyright standing of pre-1972 sound recordings in the United States places historical recordings at significant risk of loss and has made it difficult for students, scholars, and the general public to hear and appreciate the vast majority of music and spoken word recordings produced in the U.S. during the first century of commercial recording. In the legitimate and necessary attempt to protect audio works against piracy, U.S. copyright law has negatively impacted the very activities that best protect these works.

This paper proposes five changes to the U.S. copyright law that would assure that our rich audio heritage is preserved and accessible and that it remains available to generations of Americans to come, while protecting the legitimate interests of the artists and enterprises that created this national treasure.

The Association for Recorded Sound Collections ([www.arsc-audio.org](http://www.arsc-audio.org)), founded in 1966, represents approximately one thousand professionals concerned with the preservation and study of historical sound recordings. Members include major educational and archival institutions, librarians, archivists, musicologists, music historians, cultural historians, and a large number of private collectors of historical sound recordings.

The Music Library Association ([www.musiclibraryassoc.org](http://www.musiclibraryassoc.org)) is the professional association for music libraries and librarianship in the United States. It has an international membership of librarians, musicians, scholars, educators and members of the book and music trades. The MLA's purpose is to promote the establishment, growth and use of music libraries; to increase efficiency in music library service and administration; and to promote the profession of music librarianship.

### **Summary of Recommendations**

1. Place pre-1972 U.S. recordings under a single, understandable national law by repealing 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. Note that this would address the specific needs of recordings, and need not impact other creative works.
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 the copyright owners.

5. Change U.S. copyright laws to allow the use of current technology and best practices in the preservation of sound recordings by non-profit institutions.

## Discussion

A few general points regarding pre-1972 recordings should be noted.

U.S. copyright law treats historical sound recordings, those issued in the United States prior to 1972, unlike other creative works by placing them under state law. State laws, generally based on common law, nearly always treat ownership as perpetual with few provisions for preservation or public access.<sup>i</sup> A 2005 ruling of the New York Court of Appeals (*Capitol v. Naxos*) explicitly adopted this position, prohibiting pre-1972 commercial sound recordings from entering the public domain until federal law takes precedence in 2067.<sup>ii</sup> In the U.S. marketplace, the law of New York State effectively becomes the law of the land.

Unlike books, paintings, photographs and other creative works, sound recordings are technology-dependent.

Recordings in legacy formats (cylinders, 78-rpm discs, 45-rpm discs, or LP discs) require special equipment to reproduce. Few libraries, and increasingly few consumers, have such equipment.

Therefore, “used copies” or loans from libraries, which provide access to other out-of-print creative works, are of limited use with recordings. This applies to the vast majority of historic recordings. Cylinder recordings were manufactured until 1929, and 78-rpm discs were the standard format until the early 1950s. Even LP turntables will eventually be difficult to find in an era of CDs and portable digital audio players.

If a pre-1972 sound recording is not available in a contemporary format (digital file or compact disc) the scholar, student, educator, or consumer who discovers a historical recording of interest cannot hear it in most instances.

Restrictions on access to historical audio recordings thwart preservation programs.

To funders as well as the public, access and preservation have become synonymous.

- The advent of digital preservation has made distribution of audio preservation copies technically feasible. Licenses to provide access to preservation copies are difficult to obtain legally.
- Both public and private funding for audio preservation programs are often dependent on a public access component. Funding is exceedingly difficult to obtain for “dark archives,” where access is restricted or prohibited.

Many of the greatest audio rarities are in private hands, and libraries and archives are dependent upon donations from private collectors to build their holdings. Private collectors are often unwilling to donate a collection to a public archive or library unless public access is assured. Increasingly, public institutions are viewed as “black holes” by private donors, places where records “will never be heard again.”

In order to address these issues, while preserving the legitimate right of creators to profit from their work, we propose five specific modifications to U.S. copyright law.

**1. Place pre-1972 U.S. recordings under a single, understandable national law by repealing section 301(c) of Title 17, U.S. Code.**

There is no uniform Federal law for historical recordings.

Section 301(c) provides that U.S. sound recordings made prior to February 15, 1972, are protected by various state laws until 2067, whether issued as early as 1890 or as late as 1972. This equates to a *de facto* copyright term of from 95 to 177 years.

Repealing 301(c) would ensure a single, understandable and rational national code for recordings, as the law does for other creative work.

The multiple state laws are difficult to find and interpret, for copyright holders and non-copyright holders alike.

Few, if any, state laws include explicit provisions for non-profit, educational use of pre-1972 sound recordings, or Internet streaming of pre-1972 sound recordings. State laws include few provisions for fair use or preservation.

In the Internet era, prohibitions by one state may effectively be imposed on all states, due to the difficulty of policing the location of Internet access. This was the effect of the *Capitol v. Naxos* case.

The vast majority of recordings were and are produced for interstate, not local, commerce and are appropriately the subject of federal regulation.

**2. Harmonize the term of coverage for U.S. recordings with that of most foreign countries, i.e. 50 to 75 years.**

The term of copyright for recordings is excessively long, by commercial, cultural and international standards.

**Commercial:** Based on a study commissioned by the Library of Congress National Recording Preservation Board, *Survey of Reissues of U.S. Recordings*, which documents the reissue activities of U.S. recording rights holders, harmonizing the term would have very little economic impact on current rights holders of historical sound recordings.<sup>iii</sup>

Rights holders are not reissuing early recordings. *Survey of Reissues of U.S. Recordings* showed that for periods prior to 1955 rights holders have reissued an average of only 10% of recordings in genres of interest to scholars and collectors.<sup>iv</sup> Note that this does not refer to all recordings, only those considered by scholars and collectors to be of greatest interest (the percent for all recordings would presumably be less).

- Fewer than ten percent of copyrighted historic recordings are reissued by the rights holders for most periods prior to 1935.
- For recordings by African Americans made prior to 1920, only one-half of one percent of those that were still under copyright have been reissued by the rights holders.<sup>v</sup>

- Less than 1% of foreign language “ethnic” 78-rpm discs have been reissued by rights holders.
- A justification for the 1998 extension of copyright term (to the year 2067 for pre-1972 sound recordings) was preserving incentives for rights holders to exploit, i.e. reissue, their intellectual property. The Library of Congress study shows that this has not occurred for recordings. Internet distribution is unlikely to change this.

Economic analysis cited in the Gowers Commission report in the U.K. indicated that the optimal term for recordings in order to incentivize investment is approximately 25 years.<sup>vi</sup>

U.S. copyright laws force well-intentioned consumers to purchase from other countries. The only way for Americans to purchase copies of many vintage American blues and jazz recordings is by importing foreign reissues, thus sending American dollars overseas.

**Cultural:** Harmonizing the copyright term would greatly encourage both preservation and access to the many early recordings pressed in small quantities (especially jazz and blues), for which the masters have been destroyed and few copies survive.

Where more historical recordings are in the public domain, more are reissued.

- In countries with a 50-year copyright term (e.g., Britain and France) substantial numbers of historical recordings are reissued legally and made available to the public.
- There is clear interest in such recordings. *Survey of Reissues of U.S. Recordings* shows that in the U.S. more historical recordings are imported from foreign countries or reissued by non-rights holders than are made available by the rights holders themselves.
  - Only 10% of pre-1955 recordings of interest to scholars and collectors are available from U.S. rights holders.
  - However 24% of such recordings are available from foreign sources or non-rights holders (not duplicating those from rights holders).

**International Standards:** The Sonny Bono Copyright Term Extension Act (1998) was intended to harmonize U.S. copyright terms with those of our major trading partners, and it did so for most types of creative works—except recordings.

A 95-year term, as provided under Title 17, would mean, currently, that only U.S. recordings made prior to 1912 would be in the public domain. Most countries, including the European Union and other Berne Convention partners, recognizing the special needs of recordings, have enacted a 50-year copyright term for sound recordings. Those with longer terms include India (60 years), Australia, Singapore, Chile, Peru, Brazil, Ecuador and Turkey (70 years), Mexico, Honduras and Guatemala (75 years) and Columbia (80 years). None have a term as long as that of the U.S.<sup>vii</sup>

### 3. Legalize the use of orphan recordings, those for which no owner can be located.

Positive steps are being taken in this direction by the Copyright Office study on orphan works.

- Note: these steps will not apply to pre-1972 recordings as long as section 301(c) remains in force (recommendation one above).

**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 the copyright owners.**

It is entirely reasonable that copyright owners may not wish to reissue older material that is not, for them, economically viable.

A compulsory license would provide income for both rights holders and artists, where there now is none, while still allowing a reasonable time to “rest” a recording between periods of availability.

The period that a recording would be out of print before triggering the availability of a compulsory license is open to discussion, but the absence of any limit does no one any good. It is recommended that a recording that is out of print for five (5) years be eligible for reissue and/or Internet distribution via a compulsory license. In-print is defined as available in a generally used format at normal market prices.

We note that the Recording Artist Groups, comprising the Future of Music Coalition, the American Federation of Television and Radio Artists and the American Federation of Musicians, has recommended that a compulsory license should be available *to the performing artist* once a recording is out of print for two (2) years.<sup>viii</sup> We believe that such a license should be available to any interested party.

**5. Change U.S. Copyright laws to allow the use of current technology and best practices in the preservation of sound recordings by non-profit institutions.**

Acknowledged best practices in digital preservation of cultural materials are in many cases illegal for historical sound recordings.

U.S. copyright law states that institutions may make only three preservation copies of copyright-protected materials. This is fewer than recommended by digital preservation specialists.

- A widely accepted preservation practice is to make multiple copies of threatened materials and store them in separate locations. Many libraries are adopting what is termed the LOCKSS philosophy: “Lots of copies keep stuff safe”
- Other countries have much more flexible rules regarding the number of preservation copies that may be made.<sup>ix</sup>

Copyright law dictates that preservation copies may be made of a published work only if the work is “duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete.”

- Such restrictions are illogical when applied to sound recordings. While a book with a torn page may be adequately preserved by microfilming or digitization, preservation re-formatting of a worn or damaged sound recording will result in a substandard copy.

- Many historical recordings were not manufactured in large quantities, and even for those that were, the majority of surviving copies have been significantly degraded by use. “Mint” copies are always rare.
- Given the high cost of digital audio preservation, libraries require the legal ability to pool resources and share best digital preservation copies.

A Section 108 task force is in the process of making recommendations to Congress to change U.S. Copyright law to acknowledge and promote current preservation best practices. We encourage this effort and ask Congress to:

- Allow digital copies of sound recordings to be made before the originals have already begun to deteriorate.
- Allow the creation of more than three copies of a historical sound recording.
- Provide a legal framework to enable sharing of preservation copies among institutions.

### **Conclusion**

We believe that this is a critical moment in the public debate over how we balance the legitimate economic needs of those who create our culture with the preservation and enrichment of our cultural heritage for education today and for posterity. Sound recordings are an enormous part of that heritage, one we are in danger of losing if we do not rationalize our laws. Our organizations are dedicated to protecting this body of American creative work and encouraging the use and appreciation of our audio heritage.

<sup>i</sup> June M. 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, 2005), 21-23. California was the only state found with an explicit term (to 2047).

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

<sup>iii</sup> Tim Brooks. *Survey of Reissues of U.S. Recordings*. (Washington, D.C.: Council on Library and Information Resources, and Library of Congress, 2005).

<sup>iv</sup> Brooks. *Survey of Reissues*, 7.

<sup>v</sup> Tim Brooks. *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919* (University of Illinois Press, 2004), 10.

<sup>vi</sup> *Gowers Review of Intellectual Property*. (London: HM Treasury, 2006), 50-53. Accessed at [www.hm-treasury.gov.uk/gowers](http://www.hm-treasury.gov.uk/gowers).

<sup>vii</sup> *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*. (Cambridge, U.K.: Centre for Intellectual Property and Information Law, University of Cambridge), 37.

<sup>viii</sup> Recording Artist Groups, “Comments of Recording Artist Groups on Orphan Works,” U.S. Copyright Office, Orphan Works Inquiry, Comment No. OW0669, 25 March 2005, pp.7-10. Accessed 10 June 2007 at <http://www.copyright.gov/orphan/comments/OW0669-FMC-AFTRA-AFM.pdf>

<sup>ix</sup> *Gowers*, 64.