

## **LIBRARY OF CONGRESS**

### **Copyright Office**

**[Docket No. 2010-4]**

### **Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972**

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of Inquiry.

---

**SUMMARY:** Congress has directed the Copyright Office to conduct a study on the desirability and means of bringing sound recordings fixed before February 15, 1972, under federal jurisdiction. Currently, such sound recordings are protected under a patchwork of state statutory and common laws from their date of creation until 2067. This notice requests written comments from all interested parties regarding federal coverage of pre-1972 sound recordings. Specifically, the Office seeks comments on the likely effect of federal protection upon preservation and public access, and the effect upon the economic interests of rights holders. The Office also seeks comments on how the incorporation of pre-1972 sound recordings into federal law might best be achieved.

**DATES:** Initial written comments must be received in the Office of the General Counsel of the Copyright Office no later than [INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Reply comments must be received in the Office of the General Counsel of the Copyright Office no later than [INSERT DATE 30 DAYS AFTER INITIAL COMMENT DEADLINE].

**ADDRESSES:** The Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at <http://www.copyright.gov/docs/sound/comments/comment-submission-index.html>. The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browse button. To meet accessibility standards, each comment must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or

ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted on the Copyright Office web site, along with names and organizations.

If electronic submission of comments is not feasible, comments may be delivered in hard copy. If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Room LM-401, James Madison Building, 101 Independence Ave., SE, Washington, DC 20559, between 8:30 a.m. and 5:00 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

If delivered by a commercial courier, an original and five copies of a comment or reply comment must be delivered to the Congressional Courier Acceptance Site (“CCAS”) located at 2<sup>nd</sup> and D Streets, SE, Washington, DC between 8:30 a.m. and 4:00 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM-403, James Madison Building, 101 Independence Avenue, SE, Washington, DC 20559. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** David O. Carson, General Counsel, or Chris Weston, Attorney Advisor. Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

**SUPPLEMENTARY INFORMATION:**

**Introduction**

The Copyright Office is conducting a study on “the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction.” When it enacted the Omnibus Appropriations Act of 2009, Congress directed the Register of Copyrights to conduct such a study and

seek comments from interested parties. H. Comm. On Appropriations, H.R. 1105, Pub. L. No. 111-8 [Legislative Text and Explanatory Statement] 1769 (Comm. Print 2009). With this notice, the Copyright Office explains the background to the study and seeks public comment on whether pre-1972 sound recordings should be brought within the federal copyright statute. The Office also poses a number of questions on specific topics relevant to the overall inquiry.

## **Background**

Sound recordings are “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied.” 17 U.S.C. 101. Until 1972, sound recordings were not among the works of authorship protected by the federal copyright statute; they enjoyed protection only under state law. In 1971, Congress passed the Sound Recording Amendment, which provided that sound recordings first fixed on or after February 15, 1972, would be eligible for protection under federal copyright law. Sound recordings first fixed prior to that date (pre-1972 sound recordings) continued to be protected under state law.

In 1976, when Congress passed the Copyright Revision Act, it created a unitary system of copyright, by bringing unpublished works (until then protected by state law) under the federal copyright law, and preempting all state laws that provided rights equivalent to copyright. 17 U.S.C. 301(a). However, it explicitly excluded state laws concerning pre-1972 sound recordings from the general preemption provision, allowing those laws to continue in effect until 2047. 17 U.S.C. 301(c). That date was later extended by the Copyright Term Extension Act (CTEA) until 2067. Pub. L. No. 105-298, 112 Stat. 2827 (1998). On February 15, 2067, all state law protection for pre-1972 sound recordings will be preempted by federal law and will effectively cease.

Thus, there are currently two primary regimes of protection for sound recordings: state law protects pre-1972 recordings, and federal copyright law protects sound recordings of U.S. origin first fixed on or after February 15, 1972.

Federal law also protects pre-1972 sound recordings of foreign origin that were eligible for copyright restoration under the Uruguay Round Agreements Act (URAA). Pub. L. No. 103-465, 108 Stat. 4809, 4973 (1994). This legislation, passed in 1994 in order to implement U.S. obligations under the TRIPS (“Trade Related Aspects of Intellectual Property”) Agreement, “restored” copyright protection to certain works of foreign origin that were in the public domain in the United States on the effective date, which for most works was January 1, 1996. Because most other countries provide a 50-year term of protection for sound recordings, generally only those foreign sound recordings fixed in 1946 and after were eligible for restoration under the URAA.

One consequence of the continued protection under state law of pre-1972 sound recordings is that there are virtually no sound recordings in the public domain in the United States. Pre-1972 sound recordings, no matter how old, can have state law protection until 2067, so that some sound recordings will conceivably be protected for more than 170 years. Even pre-1972 foreign sound recordings that were ineligible for copyright restoration because their term of protection had expired in their home countries are eligible for state law protection, at least in New York. *See Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005). Those sound recordings that do have federal copyright protection will not enter the public domain for many years. For example, sound recordings copyrighted in 1972 will not enter the public domain until the end of 2067.

State law protection for pre-1972 sound recordings is provided by a patchwork of criminal laws, civil statutes and common law. Almost all states have criminal laws that prohibit duplication and sale of recordings done knowingly and willfully with the intent to sell or profit commercially from the copies. Most states also have some form of civil protection, sometimes under the rubric of “common law copyright,” sometimes under “misappropriation” or “unfair competition,” and sometimes under “right of

publicity.” Occasionally these forms of protection are referred to collectively as “common law copyright” or “common law protection,” but in fact not all civil protection for sound recordings is common law – some states have statutes that relate to unauthorized use of pre-1972 sound recordings – and a true “common law copyright” claim differs from a claim grounded in unfair competition or right of publicity. In *Capitol Records, Inc. v. Naxos of America, Inc.*, the New York Court of Appeals (the highest court of the state) explained that a common law copyright claim in New York “consists of two elements: (1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by copyright.” *Id.* at 563. It went on to state that “[c]opyright law is distinguishable from unfair competition, which in addition to unauthorized copying and distribution requires competition in the marketplace or similar actions designed for commercial benefit.” *Id.*

The scope of civil protection varies from state to state, and even within a state there is often uncertainty because there are few court decisions that have defined the scope of the rights and the existence and scope of exceptions. What is permissible in one state may not be in another. This uncertainty is compounded by the unsettled state of the law concerning the activities that subject an entity to a state’s jurisdiction.

In general, federal law is better defined, both as to the rights and the exceptions, and more consistent than state law. In some respects federal law provides stronger protection. For example, owners of copyrighted works who timely register are eligible for statutory damages and attorneys fees. 17 U.S.C. 412, 504, and 505. In addition, copyright-protected sound recordings are eligible for protection under 17 U.S.C. 1201, which prohibits circumvention of technological protection that protects access to a copyrighted work. At the same time federal law provides a more consistent and well-articulated set of exceptions. While some states include exceptions in their laws protecting sound recordings, the federal “fair use” and library and archives exceptions—17 U.S.C. 107 and 108, respectively—are likely much more robust and effective in providing safety valves for the unauthorized but socially valuable use of copyrighted works.

## The Copyright Office Study

Faced with the uncertain patchwork of state laws that cover pre-1972 recordings, libraries, archives and educational institutions have voiced serious concerns about their legal ability to preserve pre-1972 recordings, and provide access to them to researchers and scholars.<sup>1</sup> A 2005 study concluded that copyright owners had, on average, made available on CD only 14 percent of the sound recordings they control that were released from 1890 through 1964.<sup>2</sup> Reissues of recordings from before World War II are particularly scarce. While the statistics and conclusions from that report are now five years old, the Copyright Office knows of no reason to believe that the situation has changed significantly since that time.

Copies of many recordings from these eras reside in libraries and archives. Their custodians, however, are concerned that without the certainty of federal copyright exceptions, the reproduction and distribution activities necessary to preserve and provide access to these recordings will lack clear legal bases. As a result, some have urged that consideration be given to bringing pre-1972 sound recordings under federal copyright law, so that users have to contend with only a single set of laws.

When it directed the Register of Copyrights to conduct a study on the desirability of and means for bringing sound recordings fixed before February 15, 1972 under federal jurisdiction, Congress specifically stated:

The study is to cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage.

---

<sup>1</sup> See generally Rob Bamberger and Sam Brylawski, National Recording Preservation Board, *The State of Recorded Sound Preservation in the United States: A National Legacy At Risk in the Digital Age* (2010).

<sup>2</sup> Tim Brooks, National Recording Preservation Board, *Survey of Reissues of U.S. Recordings 7* (2005). For more recent years in that period, the percentage of recordings that were available reached 33 percent.

H.R. 1105, Pub. L. No. 111-8 [Legislative Text and Explanatory Statement] 1769. As part of the study, the Register is to provide an opportunity for interested parties to submit comments. The Register’s report to Congress on the results of the study is to include any recommendations that the Register considers appropriate.

The body of pre-1972 sound recordings is vast. Commercially released “popular” recordings come most readily to mind—from Rudy Vallee to Frank Sinatra and Ella Fitzgerald to the Beatles and the Rolling Stones. But pre-1972 commercial recordings encompass a wide range of genres: ragtime and jazz, rhythm and blues, gospel, country and folk music, classical recordings, spoken word recordings and many others. There are, in addition, many unpublished recordings such as journalists’ tapes, oral histories, and ethnographic and folklore recordings. There are also recordings of old radio broadcasts, which were publicly disseminated by virtue of the broadcast, but in many cases are technically unpublished under the standards of the U.S. Copyright Act.

The Copyright Office requests that parties with an interest in the question of whether to protect pre-1972 sound recordings as part of the federal copyright statute submit their comments on the issue and, in those comments, respond to the specific questions below. A party need only address those issues on which it has information or views, but the Office asks that all answers be as comprehensive as possible.

### **Specific Questions**

#### **Preservation of and Access to Pre-1972 Sound Recordings**

The following questions are meant to elicit information about how federal protection of pre-1972 sound recordings will affect preservation and public access.

##### *Preservation.*

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?

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?

*Access.*

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?

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?

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 rightholder 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.

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?

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?

### **Economic Impact**

Likely economic impact is an important consideration in determining whether pre-1972 sound recordings should be brought under federal law, and how that change might be accomplished. The questions below are intended to elicit information regarding what revenue expectations copyright owners have with respect to pre-1972 sound recordings, and how these expectations would be affected by bringing these recordings under federal protection. These questions are also intended to elicit information concerning the determination of ownership in such recordings.

*Value of the Recordings.*

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.

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.

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

11. Would there be any negative economic impact of such a change, *e.g.*, in the scope of rights, or the certainty and enforceability of protection?

12. Would there be any positive economic impact of such a change, *e.g.*, in the scope of rights, or the certainty and enforceability of protection?

13. What would be the economic impact of bringing pre-1972 sound recordings into the section 114 statutory licensing mechanism applicable to certain digital transmissions of sound recordings?

Would there be other advantages or disadvantages in bringing pre-1972 sound recordings within the scope of the section 114 statutory license?

14. Does the uncertainty of different regimes under state law make it less practical for rights holders to bring suit under state law? Are you aware of any infringement suits concerning pre-1972 sound recordings brought in the past 10 years?

15. Would business arrangements concerning sampling of sound recordings be affected by bringing pre-1972 recordings under federal law; and if so, how would they be affected? Are pre-1972 sound recordings currently treated differently with respect to sampling?

### *Ownership of Rights in the Recordings*

It is worthwhile to explore state law principles applicable to authorship and ownership of rights in sound recordings to determine whether there would be any tension with federal copyright law principles.

16. Under federal law the owner of the sound recording will generally be, in the first instance, the performer(s) whose performance is recorded, the producer of the recording, or both. Do state laws attribute ownership differently? If so, might that lead to complications?

17. Under federal law, some copyrighted sound recordings qualify as works made for hire, either because (1) they are works prepared by employees in the scope of their employment, or (2) they were specially ordered or commissioned, if the parties agree in writing that the works will be works made for hire, and the works fall within one of nine specific categories of works eligible to be commissioned works made for hire. 17 U.S.C. 101.<sup>3</sup> If a work qualifies as a work made for hire, it is the employer or commissioning party who is the legal author and initial rights holder, rather than the individual creator of the work. Prior to the January 1, 1978, the courts recognized the work for hire doctrine with respect to works created by employees in the course of their employment, and particularly from the mid-1960s on, they recognized commissioned works made for hire, under such standards as whether the work was created at the hiring party's "instance and expense" or whether the hiring party had the "right to control" or exercised "actual control" over the creation of the work.

To what extent does state law recognize the work made for hire doctrine with respect to sound recordings? To what extent does state law recognize commissioned works for hire, and under what standard? Have state laws in this respect changed over time? Is there any likelihood that, if federal standards were applied, ownership of pre-1972 sound recordings would be attributed differently? Is there any reason to believe that, if pre-1972 sound recordings were to become protected under federal copyright law, their ownership would then become subject to federal work-made-for-hire standards?

---

<sup>3</sup> The types of works that can qualify as commissioned works for hire include: a contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas. 17 U.S.C. 101(2).

18. Under federal copyright law, ownership of rights is distinct from ownership of the material object in which the copyrighted work is embodied. Transferring ownership of such an object, including the “original,” *i.e.*, the copy or phonorecord in which the copyrighted work was first fixed, does not convey rights in the copyright. 17 U.S.C. 202. A transfer of copyright ownership must be made in a writing signed by the owner of the rights or her authorized agent. *Id.* 204.

Some state laws provide (or for a period of time provided) that transferring the original copy of a work could operate as a transfer of copyright ownership, unless the rights holder specifically reserved the copyright rights. To what extent have these state law principles been applied with respect to “master recordings”? How if at all would they affect who would own the federal statutory rights, if pre-1972 sound recordings were brought under federal law?

19. If pre-1972 sound recordings were to be given protection under the federal copyright statute, how would or should copyright ownership of such recordings be determined? Has the issue arisen with respect to pre-1978 unpublished works that received federal statutory copyrights when the Copyright Act of 1976 came into effect?

20. What other considerations are relevant in assessing the economic impact of bringing pre-1972 sound recordings under federal protection?

### **Term of Protection and Related Constitutional Considerations**

#### *Term of Protection.*

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?

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. For example, a sound recording published in 1940 would be protected until the end of 2035 instead of February 15, 2067; one published in 1970 would be protected until the end of 2065 instead of February 15, 2067. In the case of one category of works – unpublished sound recordings whose term is measured by the life of author – there would actually be an extension of term if the author died after 1997. For example, if the author of an unpublished pre-1972 sound recording died in 2010, that sound recording would be protected under federal law until the end of 2080.

In the 1976 Copyright Act, Congress made all unpublished works being brought under federal law subject to the ordinary statutory term that the 1976 Act provided for copyrighted works: life of the author plus 50 years (later extended by the CTEA to life of the author plus 70 years). However, Congress was concerned that for some works, applying the ordinary statutory copyright terms would mean that copyright protection would have expired by the effective date of the 1976 Copyright Act, or would expire soon thereafter. Congress decided that removing subsisting common law rights and substituting statutory rights for a “reasonable period” would be “fully in harmony with the constitutional requirements of due process.” H.R. REP. NO. 94-1476, at 138-39 (1976). Accordingly, the 1976 Copyright Act included a provision that gave all unpublished works, no matter how old, a minimum period of protection of 25 years, until December 31, 2002. 17 U.S.C. 303. If those works were published by that date, they would get an additional term of protection of 25 years, to December 31, 2027 (later extended by the CTEA to 2047).

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)?

*Increasing the Availability of Pre-1972 Sound Recordings.*

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?

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

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?

**Partial Incorporation**

26. The possibility of bringing pre-1972 sound recordings under federal law only for limited purposes has been raised. For example, some stakeholders seek to ensure that whether or not pre-1972 sound recordings receive federal copyright protection, they are in any event subject to the fair use doctrine and the library and archives exceptions found in sections 107 and 108, respectively, of the Copyright Act. Others would like to subject pre-1972 sound recordings to the section 114 statutory license, but otherwise keep them within the protection of state law rather than federal copyright law.

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?

### **Miscellaneous Questions**

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?

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?

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?

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?

**Dated:** October 29, 2010

---

David O. Carson,  
General Counsel

**[BILLING CODE: 14310-30-P]**