



January 19, 2011

David O. Carson, General Counsel
Office of the General Counsel
U.S. Copyright Office
LM-403, James Madison Building
101 Independence Avenue, SE.
Washington, DC 20559

*Comments in Response to the Notice of Inquiry Concerning Federal
Copyright Protection of Sound Recordings Fixed Before February 15, 1972*

Dear Mr. Carson:

The Society of American Archivists appreciates the opportunity to comment on the likely effect that Federal protection would have on preservation of and public access to sound recordings made before 1972.

SAA is the oldest and largest association of professional archivists in North America. Representing more than 5,900 individual and institutional members, SAA's is the authoritative voice in the United States on issues that affect the identification, preservation, and use of historical records. Archivists have a special interest in policy and legal issues associated with unpublished materials (which form the bulk of the holdings of archival repositories) and thus the status of sound recordings within U.S. copyright law is of considerable importance to the archives profession.

Preservation is near the heart of the archival mission because it is fundamental to the most important goal of archives—access and use. The number of sound recordings housed in archives is enormous. According to a 2005 survey, American cultural institutions house more than 46 million recorded sound artifacts.¹ Most of these are unpublished. They far surpass the number of commercially published sound recordings that have ever been released. In content they reflect the variety of archival repositories in the U.S., with subject matter that includes interviews with survivors of the Shoah; local radio broadcasts; performances from local music festivals; lectures on a university campus; acetate

¹ Heritage Health Index, *A Public Trust at Risk: The Heritage Health Index Report on the State of America's Collections* (Washington, D.C.: Heritage Preservation, 2005): 28, available at <http://www.heritagepreservation.org/HHI/index.html>.

recordings sent by family members to soldiers serving abroad in World War II; recorded sermons; commercial recordings that arrive with the papers of performers and other artists; and oral histories. Although most of the recordings are domestic, there are also foreign recordings.

The recordings exist in a wide variety of physical formats and in many different conditions, but all eventually will require preservation intervention because of the fragility of the media on which they are contained. Preservation of sound recordings, therefore, should be a shared national priority. It is not enough to leave audio preservation to the Library of Congress or to the commercial recording industry. Most unpublished audio holdings in repositories are unique, and thus it is impossible to rely on one institution to preserve our nation's audio heritage. If the invaluable information that has been stored as audio recordings is to be preserved, everyone must be on board. Congress and the Copyright Office should remove any legal impediments that may discourage libraries and archives from preserving sound recordings. In this, SAA is in sympathy with the comments submitted by our colleagues at the Association for Recorded Sound Collections and the Music Library Association. Nevertheless, SAA is separately offering the following responses to the specific questions that you posed in the notice in the *Federal Register* because of the specific nature of the archives community's concerns.

1. Do libraries and archives currently treat pre-1972 sound recordings differently from those first fixed in 1972 or later ("copyrighted sound recordings") for purposes of preservation activities? 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?

We have no data that would suggest that archives differentiate between pre-1972 and post-1972 recordings for preservation purposes, even when they may so differentiate for access purposes. Because of the complexity of laws governing sound recordings, few archivists are even cognizant of the difference in the legal status of pre-1972 and post-1972 recordings. Almost all archivists assume that their ability to "format shift" material for purposes of preservation is a given in existing law, both Federal and state, and act accordingly. If a sound recording is in the collection and it needs to be preserved, archivists will try to preserve it. In some cases, it might be as a 108(b) preservation copy for a post-1972 unpublished sound recording; in other cases, if an archivist thought a legal defense was necessary, she might argue that preservation is a fair use. And just as archivists act to preserve our cultural heritage without legal knowledge (and sometimes potentially in spite of the law), our understanding is that our members in historical societies and museums act in the same way.

If fragile material needs to be preserved and funding is available, archivists will attempt to preserve sound recordings – even if there is no explicit legal justification for the actions. Funding is a key issue, however. Given that grant and foundation funding is a major source of preservation funding and given that such agencies have tended to be “strict constructionists” in their interpretation of copyright law, we believe that the current status of pre-1972 recordings is a likely impediment to securing funds for the preservation of sound recordings.

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?*

As we indicated in the response to the first question, archivists currently preserve sound recordings largely in possible ignorance of, or perhaps even in spite of, the law, favoring preservation over the loss of cultural heritage. Most archivists likely assume that Federal copyright law applies to recordings and that their preservation activities are authorized by existing law. The danger exists that if archivists come to understand the uncertain legal foundation on which their current behavior rests, they may become hesitant to continue with their preservation activities. Providing a clear legal basis for preservation, therefore, would encourage archivists to be less risk-adverse when it comes to preservation. The explicit and broad preservation exception for unpublished material found in 108(b) would be a definite improvement over the current confused state of the law for the vast number of unpublished sound recordings housed in archival repositories.

Furthermore, the funding and scope of preservation programs are closely related to the extent to which the preserved items can be made readily available for research use. Archivists are more likely to preserve sound recordings if access to those sound recordings is enhanced. Bringing pre-1972 sound recordings under the Federal copyright law as it currently exists would provide some improvement in the opportunities for access and might encourage archives to engage in significantly more preservation efforts. A change in the law in light of the comments on access (as is discussed below) would improve the likelihood that archivists could secure funding to preserve sound recordings.

It is much less clear whether the unamended Federal exceptions would encourage preservation in educational institutions, museums, and historical societies because currently they are not eligible for the exemptions found in Section 108. Nevertheless, Federal protection would make it certain that fair use applies to sound recordings, and thus would contribute to the willingness of these groups to engage in preservation.

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?

It is our impression that currently many (if not most) archivists do not differentiate between pre- and post-1972 sound recordings when it comes to providing access. The same is true for educational institutions, museums, and other cultural institutions. By and large, few professionals in the field are aware that different legal regimes exist for these different types of sound recordings. Many assume that pre-1972 sound recordings follow the same duration rules as other publications, and that many of these older sound recordings have entered the public domain. As a result, they are made freely available. A good example is a highly-regarded repository that makes available on the Internet rare sound recordings of Jewish music. It does so in the apparent belief that U.S. sound recordings made before 1923 are in the public domain. The good news is that current practice has not harmed any rights owners; the repository has received only acclaim, with no reported complaints.

Some repositories that are aware of the differing legal status of pre- and post-1972 sound recordings do treat pre-1972 sound recordings differently from copyrighted sound recordings. At least one of our member repositories is willing to make copies of post-1972 spoken sound recordings under the provisions of Section 108(d) and 108(e) of the Copyright Act. It is more reluctant, however, to make copies of pre-1972 spoken sound recordings because there is no explicit legal permission for doing so. This is in spite of the fact that a leading expert on copyright in libraries and archives, Georgia Harper, recommended in 2003 that archivists consider acting as if the exemptions found in Federal copyright law also applied to common law copyrights.²

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?

There would be real and important improvements in the ability of archives to make sound recordings available to researchers and scholars if they were brought under Federal copyright protection. First, doing so would immediately inject into the public domain a substantial number of sound recordings (although pre-1923 recordings still constitute only a small percentage of our total holdings). Archival repositories would be free to make these recordings, as public domain works, available to researchers.

² Georgia Harper, "Copyright Law and Audio Preservation," in Judith Matz, ed., *Sound Savings: Preserving Audio Collections* (Washington, D.C.: Association of Research Libraries, 2003): 135-144, available at http://www.arl.org/preserv/sound_savings_proceedings/Copyright_law_audio_pres~print.shtml.

Second, for those pre-1972 sound recordings that would still be protected by Federal copyright, the availability of the Section 108 library and archives provisions would make providing access easier. Although the current provisions in Section 108, especially Sections 108(b) and 108(c), are inadequate at providing access in any meaningful way, the availability of provisions of Sections 108(d) and 108(e) would provide a definite improvement in access to non-musical sound recordings for local and remote users. (Section 108(i), of course, currently prohibits archives from using 108(d) and [e] to provide copies of sound recordings containing musical works to patrons.) The availability of Section 108(h) would also increase patron access to all sound recordings. Most importantly, the availability of Section 107 would provide absolute assurance that fair use would apply to reproductions of sound recordings. Currently it is not clear in many states whether fair uses of sound recordings can be made.

Furthermore, it is worth making the change because we cannot assume that archives will continue to provide access to pre-1972 sound recordings in the absence of explicit exemptions. As we noted in our answer to question 3, access is sometimes inadvertently or unknowingly provided because the current law is too complex to comprehend. Our worry is that as institutional lawyers and preservation funders become more aware of the uncertain legality of providing access to pre-1972 sound recordings, they will remove their support for archival access programs and everyone will suffer.... Explicit protections, including the possibility of a fair use defense, would encourage repositories to be less risk averse when it comes to making our cultural heritage available.

It is also important to make the change as a matter of principle. Preservation of and access to pre-1972 sound recordings is currently being provided almost in spite of copyright law, rather than in accordance with it. If society believes that preservation of and access to these sound recordings is a good thing (as we firmly believe), then the letter of the law should reflect this.

Although the question asks whether patron access would be improved without amending the current exceptions, two small changes would greatly increase the availability of sound recordings. First, removing the 108(i) prohibition against using 108(d) and (e) to provide copies of musical works would be the first significant improvement. This would provide explicit authority to archives to make copies of non-commercially available musical sound recordings for patrons (provided, of course, that the copies comply with the requirements of those sections). In the absence of this explicit authorization, archives would have to rely on the patron's assertion of fair use in order to make copies. Second, deleting the current limit of Section 108(h) to published works would be a significant improvement because it would enable archives to make non-commercially available published and unpublished sound recordings available on an archival website during the last 20 years of copyright term.

Of course, the 108(h) improvement is dependent on a satisfactory solution to the problem of multiple copyrighted works present in a sound recording. It would not be useful, for

example, to be able to put up a sound recording of a *music critic's lecture* that is in its last 20 years of copyright if the inclusion in the lecture of musical examples that had more than 20 years left in their copyright term precluded making the sound recording available.

5.

Does the differing protection for this [foreign sound recordings with restored copyrights] 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.

We are not aware of archivists who have followed different practices for foreign published sound recordings made after 1946. The complexity of the law, and in particular the difficulty of determining whether a foreign sound recording is eligible for Federal protection, limits the usefulness of this section to archivists. If they knew about it, it would only be a source of fear and concern because their preservation activities might expose them to onerous statutory damage penalties.

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?

Again, most archivists are not aware of this distinction, and act as if there were no difference. Bringing pre-1972 sound recordings under Federal protection would cause the law to correspond with what archivists are doing now (and are doing without harming any rights owners).

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?

Archivists do treat published and unpublished sound recordings differently, but the difference is based primarily on how material is acquired and its rarity rather than on any issues in copyright. Libraries will purchase copies of published sound recordings for lending under Section 109. Unpublished sound recordings, such as oral history interviews and recordings of local radio programs or organizational lectures and other events, usually are not lent, but must be consulted *in situ* in the repository in which they are housed. In this regard, they are treated like other unpublished textual items found in the collection.

Occasionally the repository may make a copy of these unpublished sound recordings for inclusion in the general collection of the repository from where they can be borrowed like any other recording.

Bringing unpublished sound recordings under Federal protection will encourage archivists to improve access to those recordings. The clear ability to make copies for patrons of unpublished recordings, as is specified in 108(e), would provide needed certainty. The limited damages available under Federal law for the infringement of unregistered works would also provide more certainty than the uncertain damages available under state common law.

Questions 8-15

Value of the Recordings

On the economic impact of the proposed change, we would note that archivists currently act as if pre-1972 sound recordings are protected by Federal copyright. They do this with no discernible economic impact on rights holders. This is likely due to the fact that the vast majority of sound recordings in the U.S. are unpublished. They were never intended to have commercial distribution and are of no commercial value.

A small percentage of all sound recordings are released commercially, but published studies suggest that few commercial recordings that are more than 50 years old are commercially available. The practice of the rest of the world, which limits copyright term to 50 years, would suggest that longer terms are not necessary as an incentive to creation. Furthermore, many of the exceptions in Federal copyright law are not applicable when an authorized copy is available in the market place. The theoretical “long tail” economic benefit of non-commercially available pre-1972 sound recordings must be weighed against the certain benefit of bringing copyright law into conformance with current practice, removing any doubts or concerns that libraries and archives may have, and making available to the public for research use the immense reserve of unpublished recordings.

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?

It is our position that the authorship of pre-1972 sound recordings is unlikely to be a problem if those recordings were to be given Federal protection. The 1909 Act recognized different communities of practice. If transfer of a master recording, for example, was presumed to transfer copyright ownership, even in the absence of a written transfer, the same would hold with Federal protection (just as Federal law recognized until the 1976 Act the “Pushman doctrine” present in some states that dictated that the transfer of a work of art transferred copyright). We are not aware of a single case involving written works

that has hinged on how states defined authorship since unpublished works were brought under Federal protection.

As with unpublished textual materials, many of the unpublished sound recordings found in the nation's archival repositories are likely to be "orphan works." Archivists would address the ownership of "orphan" sound recordings in the same way that they approach unpublished orphan textual materials.

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?

Given the very difficult issue of determining whether an unpublished recording was a work made for hire, adopting the basic term rules that exist for other works would not be a good solution. For example, the speakers or performers on a recording might have a copyright in their performance; this traditionally has not been considered to be a work made for hire. Copyright would expire 70 years after the death of the last surviving speaker or performer. The recording engineer might also have a copyright in his or her contributions to the recording. Because it is likely that he or she was an employee of the recording organization, this copyright would be a "work made for hire" and would have a different copyright term. Furthermore, even with recordings made in the 1960s, the documents that would describe the employment relationship are unlikely to exist. Lastly, it is frequently impossible to determine whether a work was "published" as expressed in the case law that emerged from the 1909 Act. For example, was a recording made by a labor union actually sold to the public, or was it only distributed to members of the union? Was a radio program broadcast in 1950 published on that date, or did it occur in 1995, when a CD of that recording was released? And how can one easily determine if that CD was a publication that was authorized by the copyright owner?

There must be different treatment for pre-1972 sound recordings. The best solution would be to afford them the 50-year term of copyright found in most international copyright agreements. This would ensure the harmonization of copyright term that was advanced so strongly by copyright owners as a justification for copyright extension in 1998.

If a 50-year term should prove to be impossible, then pre-1972 sound recordings should have at most a 95-year copyright term dating from the moment of creation, regardless of whether they are published or unpublished. In order to mirror copyright for printed material, all sound recordings made before 1923 should be put into the public domain.

22.

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)?

Unlike the unpublished items brought under Federal copyright protection in 1978, the owners of rights in sound recordings had a long time to exploit these works commercially. Furthermore, rights owners have had the opportunity since 1972 to reissue earlier sound recordings and receive Federal protection. Additional protection is unnecessary.

In our experience, almost no unpublished works were published between 1978 and 2003 in order to secure the extended protection offered by the 1978 Act. In fact, rather than serving as an incentive to publication and distribution of works, it may have served as a disincentive. At least one noted copyright expert encouraged libraries and archives not to publish any unpublished works in their holdings for fear that by doing so, they might actually extend copyright, thus limiting access and use of the material.³ Furthermore, as we noted above, it is very difficult to determine with certainty the publication status of an older sound recording. The basic principle must be that a recording enters the public domain 50 (or 95) years after its creation.

Nevertheless, we recognize that some commercial record companies may have unpublished tapes of recording sessions that they would like to re-master and release. It may be appropriate to allow them to extend their copyright protection to at least 2067 by publishing those tapes, regardless of when they were made. To ensure that copyright law does not serve as an impediment to broad distribution of cultural heritage, the window that is available should be short – no longer than 5 years – and it should not extend to sound recordings that predate 1923.

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?

Making sound recordings subject to 108(h) would be an entirely appropriate way of making recordings with no commercial value available sooner if it is determined that there must be some window for owners of commercial recordings to exploit their work.

³ Kenneth Crews, "Do Your Manuscripts Have a Y2K+3 Problem?" *Library Journal* 125 (15 June 2000): 38-40.

Archivists have not used 108(h) extensively as of yet for four primary reasons. First, the requirements of 108(h) are unclear. What is meant, for example, by “not subject to normal commercial exploitation”? Second, the temporal “window” of additional material that could be digitized is small. Only now, a decade after the passage of the provision, is there enough material to make it seem reasonable to consider using 108(h). Third, it is administratively difficult to determine when a work is in its last 20 years of copyright term. Fourth, 108(h) applies only to published material, not unpublished material.

Given the large amount of published printed material that is clearly in the public domain, most librarians and archivists have made the undesirable decision to leave unpublished material on the shelf and to digitize public domain material instead.

All of these issues would be exacerbated if 108(h) would apply to sound recordings. There are three things that should be done to make sure that noncommercial recordings are available:

1. Rather than calculating on the last 20 years of copyright term, 108(h) eligibility should be a sharply defined line: 50 years after creation. This would mirror European practice. Because commercially available recordings are not eligible for 108(h) protections, this provision would provide no threat to them even if they are more than 50 years old in an implementation that affords a 95-year term.
2. Given the difficulty of determining whether a recording is published or unpublished, the new 108(h) provision should apply to all recordings, regardless of publication status.
3. Just as the component parts of a book can be made available via 108(h), even if each is separately copyrighted, so too should a 108(h) exemption for sound recordings allow the library or archives to distribute or perform the work embedded in the sound recording without having to pay a license fee to a performance rights society or music publisher. If this is too controversial, then these groups should be required to include in their databases of licensable works a current copyright registration number as proof that they are not demanding performance fees for public domain works.

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?

As we have noted above, one of the biggest problems with the existing protection regime for sound recordings is its complexity. If we want archivists to be able to follow and obey copyright law, it is imperative that it be clear and efficient. It should not require constant

access to copyright lawyers and expensive copyright treatises in order to determine if a specific course of action is authorized. The notion that works not having Federal statutory protection are subject to other elements of Title 17 is a ticket to confusion, uncertainty, and (of course) lots of legal fees and litigation. Amending the statute to bring sound recordings fully under Title 17 would provide the efficiency and clarity that has been behind the constitutional objective of copyright since 1787.

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?

It has long been the Copyright Office's position that publishing a sound recording did not at the same time publish the underlying work. This opinion was confirmed by Congress in 1997 with the addition of Section 303(b) to the Copyright Act, making it clear that distribution of a sound recording "does not for any purpose constitute a publication of a musical work embodied therein." We can see no reason why the incorporation of pre-1972 sound recordings into Federal copyright law would affect this doctrine.

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?

Given the uncertainty of jurisdiction when distributing material on the Internet, archivists have been reluctant to mount material for non-commercial use. What is legal in New York may not be permitted, for example, in California. Federal protection would remove this area of uncertainty.

Once again, we thank the Copyright Office for the opportunity to comment on this proposal. Preserving and making accessible America's recorded heritage is at the heart of the archival mission. We greatly appreciate the fact that the Copyright Office wants to make sure that the current legal regime does not serve as an impediment to these actions.

Sincerely,



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