

January 31, 2011

Submitted online at
<http://www.copyright.gov/docs/sound/comments/comment-submission-index.html>

David O. Carson, Esq.
General Counsel
Copyright GC/I&R
U.S. Copyright Office
P.O. Box 70400
Washington, DC 20024

Re: Syracuse University's statement in response U.S. Copyright Office's call for testimony concerning the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction

Summary

Syracuse University, the Syracuse University Library ("Library") and its Belfer Audio Laboratory and Archive ("Belfer") appreciate this opportunity to present this statement in response to the Copyright Office's solicitation of testimony¹ concerning the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction.

Syracuse University has one of the nation's most expansive collections of historical sound recordings. Much of this collection was produced or published before February 15, 1972. While the process of making historical sound recordings accessible to scholars and the public involves many challenges, the current split in the way copyright law provides protection to sound recordings before and after February 15, 1972, has proven so burdensome so often that it has threatened the viability of several of our institution's archival projects, and contributed greatly to indefinitely stalling several others. Given the University Library's reliance on the preservation and archival limitations available to us under Federal law, and the legal uncertainty the University faces whenever historical sound recordings are subject to common law protection, Syracuse University strongly urges your Office to recommend that copyright protection for sound recordings be determined exclusively according to the Copyright Act of 1976.²

The remainder of this statement describes Syracuse University's vast sound recording archive; the archive's use by students, researchers and scholars, both at Syracuse University and abroad; the challenges Syracuse University has encountered in trying to manage this sound recording collections given the pre- and post-1972 doctrinal split; and the importance of standardizing sound recording protection under Federal law.

¹ 75 Fed. Reg. 67777 (Nov. 10, 2010).

² 17 U.S.C. § 101, *et seq.*

Thank you in advance for considering this statement, and please feel free to contact me at one of the contact points below should you require any additional information.

i. Through its Belfer Audio Laboratory and Archive, Syracuse University manages a world-class historical sound recording collection

The Belfer Audio Laboratory and Archive at Syracuse University (“Belfer”) is a significant research repository that documents the history of American recorded sound. Belfer, which now is a division of the University Library’s Special Collections Research Center (“SCRC”), holds the largest collection of commercially-released audio cylinders in North America, and an extensive body of 78-rpm discs and other time-based media, including unique releases and comprehensive collections of genre. The Belfer facility, which is located adjacent to Bird Library on Syracuse University’s campus, was the first building in the United States designed exclusively for audio preservation. The facility contains environmentally controlled stacks, two functioning recording studios, and a classroom.

Belfer purchased its foundational collection of about 100,000 discs in 1963 from Joseph and Max Bell, proprietors of a New York City record shop called the Bell Music Box. Belfer’s collections now exceed 500,000 recordings that span nearly 50 years, making it one of the United States’ foremost audio archives. Belfer’s collections and playback equipment represent a wide range of audio recording history, from the earliest experimental recordings on tinfoil to Edison cylinders, Edison Diamond discs, 78-rpm and 45-rpm recordings, and a variety of audiotapes. The collections are especially rich in popular vocal and instrumental music and include classical, jazz, marches, novelty, comedy, folk, country, ethnic and experimental genres. Belfer’s 78-rpm vinyl record collection includes the Morton J. Savada collection,³ and ranks second in size in the United States, trailing only the Library of Congress.

In addition to music, the Belfer collection also contains recordings of political leaders, poets, philosophers, and famous actors, as well as early radio broadcasts and unreleased discs from major recording companies. Famous voices include Thomas Edison, George Bernard Shaw, Amelia Earhart, Albert Einstein, Margaret Bourke-White, Franklin D. Roosevelt, Albert Schweitzer, and Benjamin Spock.

Recently, Belfer has been promoting and making its holdings accessible to disparate communities across the country. In April 2010, the Library, SCRC and the University’s Humanities Center teamed to produce *REPLAY: The Syracuse University Symposium on Sound Sampling*. Funded by an Andrew W. Mellon grant through the Central New York Humanities Corridor, the symposium brought together a world renowned panel to discuss the aesthetic, cultural, economic and legal issues that govern the use, manipulation and orchestration of contemporary and archival sound through digital samplers. The project website, including video of the entire symposium, can be viewed at <http://sampling.syr.edu>.

The Library also is developing a daily 90-second radio program called *Soundbeat*, which will profile Belfer’s rarest and most interesting recordings. The program is in production now and being marketed nationwide to public radio stations. Further, Suzanne Thorin, Syracuse University Librarian and Dean of the Libraries, has been investigating leveraging use of the

³ Oren Yaniv, *Syracuse University to Get Records Revisited Icon Morton Savada’s 78s*, N.Y. DAILY NEWS, July 3, 2008, at http://www.nydailynews.com/ny_local/2008/07/03/2008-07-03_syracuse_university_to_get_records_revis.html; Nancy Cole, *SU Receives Records Worth \$1 Million*, SYRACUSE.COM, July 2, 2008, at http://www.syracuse.com/news/index.ssf/2008/07/su_receives_records_worth_1_mi.html.

Belfer's collections, technologies, and facilities (including a contemporary recording studio and sound stage) in disciplines such as linguistics, forensics, psychology, and psychoacoustics within the University's College of Arts and Sciences and in forensic science within the College of Law. One current partnership, with the College of Visual and Performing Arts' Bandier program, is discussed below.

Scholars from all over the world visit Belfer in person or through its Web site [<http://libwww.syr.edu/information/belfer/index.html>] for scholarly, research, and educational purposes. Further, as outlined in the next section, the Belfer archival collection and facility have become a vital and rich resource for scholars and students in Central and Western New York generally, and at Syracuse University specifically.

2. Scholars and students within and outside Syracuse University depend on access to Belfer's collections for scholarly and research purposes

Syracuse University's Bandier Program for Music and the Entertainment Industries ("Bandier") launched in 2007. The program provides a unique multi-disciplinary curriculum and bundles the strengths of the College of Visual and Performing Arts ("VPA"), the Bandier program's home college; the S. I. Newhouse School of Public Communications, the Martin J. Whitman School of Management, and the School of Information Studies. Bandier students are selected through a highly competitive admission process and enter a rigorous variety of coursework and experiential learning, including internships, independent studies, and hands-on, laboratory style classes. Students enroll in one or more semesters at Syracuse University's centers in London or Los Angeles. While on the main campus, they enjoy a weekly lecture from a music business leader. The University's vast music business alumni network supports the program by lecturing, providing internship opportunities and mentoring students.

The program's Music Enterprise Laboratory (MUI 320) is one of the experiential learning courses that is available to advanced students. The class is a professor-led, student-operated music company that selects, records, manufactures and markets audio and music performances from fellow students, faculty and the community.

Students involved in this class also research the Belfer archive for unique and compelling material to preserve and release in a digital format. One such project, *Edison Español*, has been ready for release for a year. Under the direction of John Lavery, a VPA professor, and in concert with Library personnel, music business students have curated Latin-influenced, Edison cylinder tracks from Belfer for the *Edison Español* project.

Unfortunately, the project's release has been stalled because of concerns that the Edison cylinder material, for which copyright clearance is virtually impossible,⁴ cannot be used because of the possible applicability of state law.⁵ Some of the students who contributed to

⁴ Compare TIM BROOKS, SURVEY OF REISSUES OF U.S. RECORDINGS 26 (August 2005), at <http://www.clir.org/pubs/reports/pub133/pub133.pdf> ("One notable component of the public domain for recordings is the body of recordings made by the companies of Thomas A. Edison between 1890 and 1929. Legal title to those recordings did pass to a successor company; however, in the 1950s that company conveyed title to the U.S. government as part of an agreement with the U.S. Parks Department. Thus, Edison recordings can today be used without restriction."); with National Park Service, *Duplication Policy*, at <http://www.nps.gov/edis/photosmultimedia/duplication-polciy.htm> ("When an audio recording can be legally duplicated, without risk of damage to the original, we make copies available upon request. The National Park Service does not presume that all Edison recordings are in the public domain. Under certain conditions specified in the law, the National Park Service is allowed to furnish a reproduction of the audio recording if it does not infringe upon the legal rights of any individual, group, or corporation.")

⁵ Posting of Peter Hirtle to LibraryLaw Blog, <http://blog.librarylaw.com/librarylaw/2008/07/the-messy-messy.html> (July 1, 2008).

the *Edison Español* project already have graduated; the remaining class of involved students will graduate in May 2011.

Therefore, it is possible that two student classes of Bandier program alumni will have graduated from the University after having worked to curate a program of archival recordings, but will have had their capstone academic projects thwarted due to the uncertainty over the copyright status of the Edison cylinders and comparable, archival sound recordings that also are available in Belfer's holdings. This missed opportunity hampers the University's pedagogical and research mission.

3. Syracuse University hesitates making its Belfer collection accessible because of the uncertain legal status of pre-1972 releases

A significant portion of Belfer's sound recording collection contains works whose release or copyright dates precede February 15, 1972. Belfer holdings that fall into the pre-1972 category include the Edison cylinder collection (a portion of which the aforementioned Bandier class has been attempting to release as part of its academic program), and the much of the Morton J. Savada collection of 78-rpm recordings.

Therefore, it is likely that New York law – not the Copyright Act of 1976 – governs any effort the University makes to digitize any portion of the Belfer collection and to present it for scholarship and archival purposes.⁶ This is problematic for several reasons. First, it requires substantial resources just to identify which state legal regime may apply to the University's prospective digitization efforts. New York's penal law contains several provisions that apply to the unauthorized advertising, reproduction, sale or distribution of sound recordings made before 1972.⁷ New York lawmakers have revised the law substantially twice – in 1990, and again in 1995 – since its 1978 introduction.⁸ Further, the State's right of publicity laws⁹ also may apply under a commercial misappropriation theory.

As a result, any attempt to clear rights for the purpose of archival digitization requires Syracuse University to research and analyze several different areas of state's laws – across at least three eras – to determine their applicability, potential exceptions, and possible penalties. Doing this work requires such a tremendous resource allocation¹⁰ that many

⁶ New York's Court of Appeals, the state's highest court, affirmed the applicability of state common law copyright in sound recordings in *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005); 4 N.Y.3d 540 (2005) (holding Naxos is not entitled to defeat Capitol's claim for infringement of common-law copyright in the original recordings) (hereinafter "Capitol IV"). See also *Capitol Records, Inc. v. Naxos of America, Inc.*, 262 F.Supp.2d 204 (S.D.N.Y.2003) (converting Naxos' motion to dismiss per F.R.C.P. § 12(b)(6) to a granted summary judgment pursuant to F.R.C.P. § 56) (hereinafter "Capitol I"); *Capitol Records, Inc. v. Naxos of America, Inc.*, 274 F.Supp.2d 472 (S.D.N.Y.2003)(affirming Capitol I with expanded reasoning) (hereinafter "Capitol II"); *Capitol Records, Inc. v. Naxos of America, Inc.*, 372 F.3d 471 (2d Cir. 2004)(staying district court's holding in Capitol II pending certification by the New York State Court of Appeals on the issue of whether a common law copyright under New York law expires when the work enters the public domain in the country of origin) (hereinafter "Capitol III"). This means Syracuse University could be held liable for state-based copyright infringement claim despite engaging in industry-standard safeguards and practices that may enable digitization under the Federal Section 108, 17 U.S.C. § 108, as a result of being sued by a rightful owner it was unable to find. See also note 10, *infra*, and accompanying text.

⁷ N.Y. Penal Law § 275.00, *et seq.*

⁸ NATIONAL RECORDING PRESERVATION BOARD, PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY NONPROFIT INSTITUTIONS: A 10-STATE ANALYSIS 71-2 (September 2009) (hereinafter PRESERVATION BOARD, STATE ANALYSIS).

⁹ N.Y. Civ. Rights L. §§ 50-51; see also PRESERVATION BOARD, STATE ANALYSIS, *supra* note 4, at 81-82 ("Although [the New York rights of publicity laws were] designed to protect individual privacy and publicity, as opposed to copyrights, there are at least two cases where this section could have been used as an attempt to thwart unauthorized use of pre-1972 sound recordings ...").

¹⁰ Maggie Dickson, *Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers*, 73

institutions – including Syracuse – simply may choose not to make historical works available, thereby leaving a huge gap in the nation’s cultural memory.

Second, the applicability of state law means Syracuse University’s Library cannot even reasonably rely on the Section 108 limitations¹¹ that are available under the current Copyright Act. Following the New York Court of Appeals’ 2005 ruling¹² to its natural conclusion, the applicability of the state’s anti-piracy statutes renders irrelevant Section 108, which limits a copyright owner’s exclusive right to allow libraries and archives the ability to engage in preservation and archival activities for certain kinds of protected works, including sound recordings. The applicability of state law also eliminates any “good faith” defense that libraries or archives may have in the course of a sound recording digitization project,¹³ as well as the truncated copyright term to which the University and Library may be entitled when either engages in preservation activities.¹⁴

4. Exclusive application of Federal law would simplify archival copyright issues, and help provide access to Syracuse University’s Belfer collection

Currently, the University Library engages in preservation and archival activities hoping that the Section 108 limitations apply to sound recordings. In reality, though, there is no realistic way to make that conclusion, or even engage in a reasonable analysis because of this doctrinal split between state anti-piracy laws and the current, Federal Copyright Act. Indeed, it is not only problematic that there continues to be gnawing possibility that Section 108 and other limitations under the current Act may be inapplicable to all of the Library’s preservation activities; the lack of certainty introduces a level of legal risk that should not exist given that there are clear and current Federal limitations that allow such activities. Further, this legal risk exists in a climate in which copyright owners have begun to take rare, and in some cases, unprecedented steps in suing colleges and universities over perceived violations of copyright law.¹⁵

AMER. ARCHIVIST 626, 627-30 (2010) (investigating the copyright status of materials from an effort to make the Thomas E. Watson Papers, which is at the University of North Carolina at Chapel Hill, accessible online. The study concluded the copyright and related research work cost more than \$1,000 per linear foot of correspondence. The Belfer Archive has 5,594 linear feet of holdings.)

¹¹ 17 U.S.C. § 108.

¹² See note 6, *supra*, and accompanying text. For sake of simplicity, I purposely have avoided an analysis of the so-called “orphan works” problem, which also plagues the University’s digitization efforts, even beyond sound recordings.

¹³ In affirming the applicability of New York state common-law copyright, the Court of Appeals also rejected the relevance of whether Naxos acted in bad faith. *Capitol IV*, 4 N.Y. 3d at 563-64 (“A copyright infringement cause of action in New York consists of two elements: (1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by the copyright To the extent that any inference of deceptive or fraudulent intent may have been referred to in early copyright case law, it appears to have been the view that bad faith was inherent in the act of copying and selling a work without permission from a competitor because this would deprive the true owner of the work’s value But fraud or bad faith is not an element of an infringement action in modern New York law. ... Copyright infringement 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”). (Citations omitted.)

¹⁴ 17 U.S.C. § 108(h) (“... [D]uring the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in [Section 108(h)(2)] applies.”)

¹⁵ *Cambridge University Press, et al. v. Becker, et al.*, Civ. Action No. 1:OB-CV-1425-ODE (N.D.Ga., April 15, 2008); *Assn. for Media Info. & Equip. v. Regents of the University of California, et al.*, CV10-09378 CBM (C.D.Cal., Dec. 7, 2010). For an analysis of perception and paradigms held by various copyright stakeholders, see K. Matthew Dames, *When All See the Same Picture: The Piracy Paradigm in U.S. Copyright Law and Policy* (2011) (manuscript on file with author).

If this conclusion reasonably holds, it makes bad policy for several reasons. First, there is ample reason to question whether the New York State legislature intended at the time of passage (or intends now) to supersede the Federal Copyright Act and its Section 108 limitations,¹⁶ which essentially govern and allow access to historical information. Second, Syracuse University, along with other colleges and universities, have as one of our missions the dissemination of teaching, scholarship and research within the reasonable bounds of the law. The confluence of digital networks, the ability to digitize unique, fragile or heretofore unavailable artifacts provide Syracuse and other institutions the ability to allow access to an extraordinary amount of history. Unfortunately, the lingering legal uncertainty over the ability of scholarly institutions to make their holdings available to the communities they serve dampens ambitions and hampers initiatives.

In a way, the uncertainty that pervades this issue is worse than having a clear legal determination that such sound recording archival work is illegal: at least upon the latter analysis, direction and risk analysis are unambiguous, and affected parties may decide either to bear the risk or work creatively to find alternatives. Instead, Syracuse University, its Library, and similarly situated institutions are left having copyright question marks in an environment where such question marks are not reasonably negotiated between copyright owner and public, but instead are the basis of lawsuits by the copyright owner against various members of the public. This situation is untenable.

While a clear, declarative affirmation that the Section 108 limitation applies to pre-1972 sound recordings will not eliminate all problems, such a policy declaration will go a long way toward affirming the ability of institutions like Syracuse University to engage in activities that would make our historical sound recording collection available to the public. To this end, we urge and support the U.S. Copyright Office taking the necessary steps to make and affirm a policy change that would apply Federal law and all its limitations in Section 107 through Section 122 to sound recordings, regardless of when they were produced.

Sincerely,

K. Matthew Dames
Copyright & Information Policy Adviser
Syracuse University
222 Waverly Avenue
Syracuse, New York 13244 (USA)
+1 315 443-1870
cipa@syr.edu
<http://copyright.syr.edu>
<http://twitter.com/SUCopyright>

¹⁶ 17 U.S.C. § 301(a) (“On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”).