

**LIBRARY OF CONGRESS**

**Copyright Office**

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

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

Comment Submitted by:

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Pursuant to the Notice published by the Copyright Office in the Federal Register of November 3, 2010 (p. 67777-67781), and the subsequent notice of an extended deadline for written submissions, Kenneth D. Crews, director of the Columbia University Copyright Advisory Office, submits these Written Comments regarding certain issues relating to the implications of protection of sound recordings fixed before February 15, 1972 under the Copyright Act.<sup>1</sup>

The Notice published by the Copyright Office sought general comment on the issue of protection of pre-1972 sound recordings and posed a number of particular questions. This Comment generally addresses the implications such protection could raise with respect to certain exceptions and limitations contained in the Copyright Act. This Comment is based on the premise that the scope of protectable works and the scope of statutory exceptions are intrinsically related to one another. Hence, any change in the reach of copyright protection should include a systematic examination of implications for existing exceptions and of the possible need for new exceptions. The decision to grant a new statutory copyright protection would most assuredly have implications for the ability of the public to use some of the existing copyright exceptions.

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<sup>1</sup> The Comments here are my personal views and do not necessarily reflect the views of Columbia University. Affiliation with Columbia is stated for identification purposes and to evidence my extensive experience working with copyright issues in the context of research, publication, teaching, library services, and many other activities. The Copyright Advisory Office (see <http://copyright.columbia.edu>) offers guidance and educational services to help the wider community address copyright issues in furtherance of the university's information objectives. I thank my research assistant, Celia Muller, Columbia Law School class of 2011, for her important contributions to this project.

The relationship between changes in the scope of protection and the scope of exceptions has a complex history, which will be discussed below.<sup>2</sup>

Protection for pre-1972 recordings runs the risk of simultaneously over-protection and under-protection, especially with respect to application of limitations and exceptions. Under current law, such works have certain explicit protections in a minority of states (common law copyright, misappropriation, anti-pirating statutes); in the majority of states, however, sound recordings are entirely unprotected.<sup>3</sup> Moreover, state law does usually not bestow protection that is relevant to many of the issues that are carved out by federal statutory exceptions and limitations: few, if any, states provide sound recording protection comparable to federal copyright protection for post-1972 sound recordings. Thus, the decision to bring works lacking full protection under the federal system not only has implications for creators' rights, but also for the structure and reach of existing statutory exceptions. Some of these exceptions are also evidently drafted on the presumption that such works are not protected. Therefore, the decision to bring a new work under federal protection should be done only after a detailed review of the exceptions and limitations and how they may need to be adjusted.

The main purpose of this Comment is to offer guidance for approaching the legal challenges posed by these possible measures, should Congress proceed with granting protection to pre-1972 recordings. This Comment does not aim to suggest or recommend substantive changes. The substantive specifics of statutory changes should emerge from further study and from Comments received from other interested parties. In sum, this Comment highlights the need for diverse approaches to shaping the law, and it identifies some current provisions that would benefit from evaluation in connection with any decision to expand copyright protection.

### **Three Approaches to Coordination of Rights and Exceptions**

Examination of these past developments in the growth of the U.S. Copyright Act suggests three possible approaches that Congress could take to develop exceptions or other legal safeguards in response to extension of copyright protection to a new class of works. Congress has taken one or more of these approaches with past expansions of copyright protection, and with respect to any particular development, Congress may conclude that a combination of approaches best serves the objective of enacting an effective copyright law that addresses diverse interests and concerns.

The three approaches are as follows:

- Adoption of Limitations on Remedies Available Against Pre-Existing Uses.

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<sup>2</sup> The Notice from the Copyright Office specified numerous questions of particular interest. This Comment will include in footnotes an indication which questions may be especially relevant to particular points expressed.

<sup>3</sup> See June Besek, *Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Unpublished Pre-1972 Sound Recordings by Libraries and Archives*, Council on Library and Information Resources Pub. 144 (Mar. 2009).

- Enactment of New Statutory Exceptions.
- Revision of Existing Statutory Exceptions.

This Comment will summarize the implementation of such approaches in the context of previous copyright legislation. The primary purpose of this Comment is to identify a systematic method for effective revision of the Copyright Act. Accordingly, this Comment does not recommend specific changes. It does, however, underscore the unevenness of congressional attention to the connection between the expansion of rights and the crafting of limitations and exceptions in past legislation. This pattern of experience demonstrates the importance of making a systematic review of the implications of extending copyright protection to pre-1972 sound recordings.

### **Adoption of Limitations on Remedies Available with Respect to Pre-Existing Uses**

When Congress enacted the Uruguay Round Agreements Act in 1994, it effected a sweeping application of copyright protection to “restored” foreign works.<sup>4</sup> At the same time, the bill also included important safeguards with respect to derivative works and reliance parties.<sup>5</sup>

Nevertheless, in enacting Section 104A Congress brought tremendous numbers of works under copyright protection without corresponding adjustment of any copyright exceptions. All users apart from the reliance parties specified in Section 104A were abruptly deprived of the benefits of the public domain and left to work with existing exceptions not tailored to the new situation.<sup>6</sup>

The safeguards in Section 104A are an important part of the equation for the law of restored copyrights, but they directly affect only the copyright owner and the party who had been a previous user of the restored work. The safeguards are also structured as a limit on the remedies that may be sought against such users. These statutory provisions are not truly “exceptions” to the rights of owners that would permit new future uses, and they do not allow any new users to gain the advantages. Congress could, nevertheless, employ this approach of limited remedies in future legislation and consider extending it to a broader class of future users of the recordings.

### **Enactment of New Statutory Exceptions**

Congress has overtly paired the enactment of new protections with new copyright exceptions on multiple occasions. Some of the most salient examples are as follows:

*Addition of performance rights to sound recordings.* In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act, which created a public performance right with

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<sup>4</sup> Public Law 103-465, 108 Stat. 4809 (1994).

<sup>5</sup> U.S. Copyright Act, 17 U.S.C. § 104A(d).

<sup>6</sup> Question 5 of the Notice raises the problem, affirmed here, that the term of protection for works could differ, because some pre-1972 recordings would have protection under the terms of copyright restoration, while others may have protection under the general or new terms of protection.

respect to sound recordings in the context of a “digital audio transmission.”<sup>7</sup> Despite the potential breadth of that right, it was sharply limited by the rigorous terms of Section 114, a complex statutory exception.<sup>8</sup> In this instance, the exception effectively defined the rule and became a critical part of understanding and applying the exception.

*Addition of protection for architectural works.* Congress created a class of protected “architectural works” in 1990 with the Architectural Works Copyright Protection Act (“AWCPA”). The same bill wisely included a new Section 120 to the U.S. Copyright Act, permitting the public to make photographic and other images of built architectural works.<sup>9</sup> The new exception was seen as essential to balance interest in architecture as a “public art form” with rightsholders’ interest in “normal exploitation of [their] works.”<sup>10</sup> Because Congress was creating an entirely new form of protection, it also addressed the distinct need for new statutory exceptions.

*Expansion of performance rights to dramatic and nondramatic works.* The performance right has a long history of incremental change under American copyright law, and with the passage of the 1976 Act, both dramatic and nondramatic works gained broad protection and rights of public performance. However, the exceptions did not develop directly parallel to the growth of rights. In 1976, Congress expanded the rights in nondramatic works to performances that were for profit and not for profit. In response, Congress also enacted various new exceptions, notably the list of provisions related to performances in Section 110 of the Copyright Act. One such provision is Section 110(2) of the Copyright Act, which originally allowed educational performances of nondramatic works in educational transmissions. Not until 2002 did that section encompass the use of dramatic works, even though dramatic works have had performance rights since 1856.<sup>11</sup>

## **Revision of Existing Statutory Exceptions**

In each of the foregoing examples of the expansion of copyright protection, Congress could also have proceeded with a systematic and thorough review of the statutory exceptions in the Copyright Act. Such a review may reveal possible implications and hence possible need for revisions of the law that could accommodate the interests of users of the newly protected works. To affirm, the purpose of this Comment is not to offer for consideration possible substantive revisions of the law, nor is the purpose to take a position on any possible substantive change. The primary purpose is to underscore the worthiness of undertaking a systematic review.

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<sup>7</sup> U.S. Copyright Act, 17 U.S.C. § 106(6).

<sup>8</sup> U.S. Copyright Act, 17 U.S.C. § 114.

<sup>9</sup> U.S. Copyright Act, 17 U.S.C. § 120.

<sup>10</sup> H.R. REP. 101-735 (1990).

<sup>11</sup> This incremental development of the law is examined in Kenneth D. Crews, “Distance Education and Copyright Law: The Limits and Meaning of Copyright Policy,” *Journal of College and University Law* 27 (Summer 2000): 15-51.

The following review of statutory exceptions thus notes the many ways that an expansion of rights for pre-1972 sound recordings is likely to have consequences for the functioning of specific statutory exceptions and for the ability of the public, as users of copyrighted works, to continue to make constructive application of the statutes.

*17 U.S.C. § 108 (Reproduction by Libraries and Archives):* Many sound recordings in need of preservation or research copy exceptions were fixed before 1972. While limited reproduction and distribution of sound recordings are permitted under Section 108, pre-1972 recordings are currently available for reproduction without adherence to the rigors of this statute.<sup>12</sup> Many libraries' sound recordings collections encompass much more than musical works: they include speeches, literature and poetry readings, discussion and celebratory events, and oral histories.<sup>13</sup> Such works are often unique, and hence only one library may possess the original and be able to make and provide copies under Section 108. The uniqueness of these works also renders preservation copies crucial to their survival. The current law facilitates preservation and research of early sound recordings by placing them outside copyright; bringing such works under federal copyright protection could impose limits on library preservation programs, or impose on libraries duties to clear rights that were previously non-existent.<sup>14</sup> As with any new limit established by law, such limit could result in lost opportunity, or they could create a chilling effects or administrative burdens on library services. While a change in Section 108 in this context would be crucial, any change would itself be a significant challenge. The Section 108 Study Group issued its recommendations for change in March 2008. No follow-up legislative action has been taken on the Group's findings or recommendations, and any proposals for change would likely be met with extensive criticism.<sup>15</sup>

*17 U.S.C. § 109 (First Sale):* The first sale doctrine is an exception to the distribution right of the copyright owner. It applies broadly to all types of works, so a change in the scope of protected works may have little direct consequence for the application of this rule. However, Section 109 does include a prohibition on commercial lending of sound recordings. Such lending may not be a widespread business model, but extension of copyright to pre-1972 recordings would undercut music-lending services that may have been built in reliance on the public domain.

*17 U.S.C. § 110 (Performance and Display):* Section 110(2) (the TEACH Act) sets relatively strict parameters for transmission of copyrighted content. Any decision to bring pre-1972 sound recordings under copyright protection means that these recordings would be subject to the

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<sup>12</sup> Question 1 of the Notice raises the question of different treatment of pre-1972 recordings, and I can affirm that some libraries do in fact treat early recordings differently because of the lack of federal protection, particularly for purposes of preserving unique or scarce works.

<sup>13</sup> The discussion here is only about rights in the sound recording. The underlying content of the recording may have copyright protection. Those rights, and the applicability of Section 108 to such works, are part of the current law. Presumably, any proposals for the protection of early sound recordings will not affect that state of the law.

<sup>14</sup> This point is in response to Question 2 of the Notice.

<sup>15</sup> For more information about the Section 108 Study Group, including background materials and its recommendations, see: <http://www.section108.gov/>.

strictures of the TEACH Act.<sup>16</sup> Because the TEACH Act has proven difficult for many educational institutions to implement, an expanded scope of protection is likely to remove more materials from the reach of distance education.<sup>17</sup> This difficulty could chill transmission of works currently used freely in educational environments; an instructor teaching musical history with pre-1972 recording of public domain Beethoven composition, for example, could suddenly be rendered unable to post that piece to a course server as she had in previous years.<sup>18</sup> She might have picked that particular version in consultation with university counsel precisely to stay outside the TEACH Act's reach; reworking such arrangements could present a burden to instructors, students, and educational institutions. By contrast, Section 110(1) broadly permits displays and performances of copyrighted materials for live face-to-face classroom instruction. The extension of copyright to pre-1972 recordings may not have a direct effect on classroom performances. However, many instructors today facilitate the use of materials in the classroom by loading a single copy to a personal computer or onto a CD-ROM. Such a copy may not be within Section 110(1), but such isolated copies may be within fair use under confined circumstances. Currently, the use of many early recordings is not limited to the rigors of fair use, but if copyright protection is extended, the practical ability to make classroom performances could demand adherence to the limits of fair use.

*17 U.S.C. §§ 114, 115 (Rights in Sound Recordings and Phonograms):* These sections may be the most directly affected by the extension of copyright protection, and they are likely to be of greatest concern to members of the music industry. Clearly, bringing more works under copyright protection will necessitate application of these complex and detailed provisions to more works. While an industry that is accustomed to working with the provisions may find little difficulty in extending them to additional works, they will face the practical consequence of needing to pay royalties for works that had previously been in the public domain. Any such costs would naturally be passed along to the consumers. It is equally likely that additional costs and transaction burdens may result in unavailability of the works on the consumer markets.

*17 U.S.C. § 118 (Noncommercial Broadcasting):* This statute opens opportunities for certain "public broadcasting entities" to negotiate with owners of rights in nondramatic musical works (as well as certain other types of works) without risk of violation of antitrust laws. The expansion of rights in sound recordings would need to take into consideration the possible implications of new rights and new rightsholders joining the negotiations, and the effect on costs and transactional burdens. In the alternative, the grant of new rights may exclude certain uses from the scope of the copyright protection, as the law currently provides for sound recordings.

*17 U.S.C. § 121 (Reproduction for People with Disabilities):* This provision permits some uses of phonorecordings of nondramatic literary works for the benefit of persons who are blind or have other disabilities. Because pre-1972 sound recordings are currently without copyright

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<sup>16</sup> See generally, Kenneth D. Crews, "Copyright and Distance Education: Making Sense of the TEACH Act," *Change* 35 (November/December 2003): 34-39.

<sup>17</sup> The complexities of the TEACH Act are further reflected in 17 U.S.C. 112; Sections 112(b) and (f)(1) limit the number of copies an organization may make pursuant to Section 110(2) and the ability to make copies of some digital and analog works.

<sup>18</sup> This point is in response to Questions 4 and 6 of the Notice.

protection, they are available to meet the needs of blind persons without attending to the detailed conditions of Section 121. For example, under current federal copyright law, a person who is blind could make and use copies of a pre-1972 sound recording, whether it is of a dramatic or nondramatic work. If such recordings were under copyright protection, the blind user would be limited to recordings of nondramatic works—with those uses further subject to the specific parameters of Section 121.<sup>19</sup> Extending protection recordings without a corresponding revision of this statutory exception would potentially deprive disabled users from a rich variety of recorded materials.<sup>20</sup>

*17 U.S.C. § 107 (Fair Use):* Fair use is a fact-based doctrine, and prospect of its interaction with newly protected works would necessitate new examination of how Congress envisions application of the law. On initial consideration, however, pre-1972 recordings raise a number of issues. First, new protection for old works could greatly complicate analysis relating to the fourth factor (market effect) of fair use. Ordinarily, documented sales may evidence the market for a work, but if many of those sales occurred while the work was in the public domain, assessing the market value of a work in the hands of a newly reestablished copyright owner can be uncertain if not dubious. Second, need for consideration of newly protected recording rights alongside previously protected composition rights could potentially complicate litigation and court judgments. Sound recording rightsholders could theoretically get a second bite at the copyright apple, reopening disputes and allowing assertions that new allocations of rights between compositions and recordings could alter previous analyses. Finally, these complications arise in a context where fair use will surely become more important to help compensate for the difficult transition from public domain to new protection for pre-1972 sound recordings.

Thank you very much for inviting Comments, and I look forward to following developments on these important issues.

Respectfully submitted,



Kenneth D. Crews

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<sup>19</sup> This provision is further complicated by the possibility that new treaty language on the use of copyrighted works for persons who are visually impaired is currently under discussion in the World Intellectual Property Organization.

<sup>20</sup> A simple review of pre-1972 recordings that could be affected range from audio recordings of established actors making dramatic readings of Shakespeare plays to the 1950s recording of Perry Como reading Clement Moore's "'Twas the Night Before Christmas."