

## Commentary on the Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

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### The Nature of the Problem

Many sound recordings produced before 1972 require immediate duplication if they are to be preserved. Significant forms of physical degradation affecting ephemeral sound media – wire recordings, magnetic tape recordings, and acetate transcription discs – include permanent deformation and breaking, tearing, and delamination which can be irreparable. All duplication has to be performed in real time making all preservation projects time consuming and expensive. The media in question are already at high risk of loss simply because they reside on impermanent substrates.

The image below demonstrates one such form of deterioration--an acetate home recording disc containing a Utah family's oral history from 1951. Once a recording gets to this stage it becomes extremely difficult to make quality copies. The chipped areas represent lost content that will become more pronounced during the copying process because the play-back equipment (i.e. record-player needle) is likely to cause more chipping.



photo taken by Allyson Mower, December 2010

## **State of Utah Law Pertaining to Copying pre-1972 sound recordings**

According to Utah's Unauthorized Recording Practices Act, libraries and other collecting institutions in the State of Utah are permitted to copy and distribute pre-1972 recordings [http://le.utah.gov/~code/TITLE13/htm/13\\_10\\_000500.htm](http://le.utah.gov/~code/TITLE13/htm/13_10_000500.htm) This statute is more liberal than current U.S. code and **does not**

1. specify the amount of a work that can be duplicated
2. create limitations based on whether the work is published or unpublished
3. impose access restrictions on the copied work

Utah State law does not even require that the work be originally created in Utah; rather, if the work resides in a library or collecting institution within the state, the statute provides for archival copying.

## **State of Utah Law vs. Federal Copyright Law**

Because of the existing exemptions occurring in Utah's Unauthorized Recording Practices Act described above, bringing pre-1972 U.S. sound recordings under Federal protection could potentially limit or restrict preservation efforts in Utah. Pursuant to section 108, Title 17 of the current U.S. Code (Limitations on Exclusive Rights: Reproduction by Libraries and Archives), libraries in the state would be limited to making three copies of unpublished recordings and copying published recordings for the purposes of preservation only if the:

1. library made a reasonable effort to locate a new replacement at a fair price;
2. digital copy was only made available within the premises of the library

Taken at face value, Utah collecting institutions might well argue it serves their interest to prevent changes to the current situation. However, the issue of preserving this country's legacy sound recordings remains far more serious than the interests of a single state, and accordingly, J. Willard Marriott Library supports the national initiative to modify section 108, Title 17 of the current U.S. Code. We in this state understand and are sympathetic to the national efforts made by the National Recording Preservation Board to address this issue. The problem of determining which laws govern a recording stands as a major impediment to moving forward and significantly hampers the national digital preservation effort despite the creation by Library of Congress of the National Audio-Visual Conservation Center in Culpeper, Virginia.

## **Recommendation**

This issue is of grave importance to Utah's higher educational institutions as well as the State Archives, Utah State Historical Society, and the Church of Jesus Christ of Latter Day Saints, all of which hold thousands of pre-1972 ethno-musicological recordings. These works can clearly be preserved under current Utah state law but might not be able to be duplicated for preservation in most other states or by Federal agencies. The current situation ensures the loss of this State's legacy recordings if held outside the borders of

this state, prevents Utah scholars from accessing most recordings digitized for preservation outside of Utah, and severely limits the work of the most sophisticated preservation facility for sound recordings in America.

Accordingly, we urge Congress and the U.S. Copyright Office to endorse the eight recommendations that resulted from public hearings held by the National Recording Preservation Board as set out in *The State of Recorded Sound Preservation in the United States* (Washington, DC: Council on Library and Information Resources and The Library of Congress, August 2010: 114). These improvements represent the long-term national interest and include the following:

1. to use sound recordings for educational purposes without violating the Digital Millennium Copyright Act;
2. to enable archives to share copies of digitized sound recordings among themselves for the purpose of eliminating redundant efforts to preserve commercial recordings held in many institutions or existing in multiple copies, and, in so doing, assure that as many legacy recordings as possible can be saved and be made publicly accessible in digital formats;
3. to harmonize the term of protection for sound recordings with that of other intellectual property formats, and to explore possible benefits of harmonizing U.S. and European terms of protection;
4. to foster better methods of identifying rights holders for proposed uses of sound recordings that require prior authorization from rights holders;
5. to make out-of-print and/or orphan recordings available to the public over the Internet;
6. to permit making copies of recordings before their sound quality has deteriorated;
7. to clarify the legal definition of “obsolete” media to allow application of routine archival best-practice standards to preservation reformatting of legacy analog media; and,
8. to extend fair-use provisions to pre-1972 recordings as national policy.

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