

January 31, 2011

In regards to: Notice of Inquiry - Federal Copyright Protection of Sound Recordings
Fixed Before February 15, 1972

David O. Carson, General Counsel
Office of the General Counsel
U.S. Copyright Office
LM-401, James Madison Building
101 Independence Avenue, SE.
Washington, DC 20559

Dear Mr. Carson:

As an information professional, and recent graduate from San Jose State University's (SJSU) School of Library and Information Science (SLIS), with an interest in sound recordings and intellectual property, I appreciate the opportunity afforded by the U.S. Copyright Office's request for written comments from interested parties regarding Federal coverage of pre-1972 sound recordings.

As part of my coursework at SJSU SLIS, I completed a case study and followed up with an internship, including research for and development of an intellectual property assessment report, on an emerging digitization project of pre-1972 sound recordings. The ongoing project, spearheaded by Melodie Morgan Frances, Head of Cataloging at the Graduate Theological Union's (GTU) Flora Lamson Hewlett Library in Berkeley, California, seeks to digitize a collection of unpublished pre-1972 sound recordings.

The sound recordings are on reel-to-reel magnetic tape, were originally recorded in the late 1950s and 1960s, and have reached the end of their life span, meaning preservation of the analog tape itself is only a temporary measure. Some tapes are already deteriorating and brittle, making digitization and digital preservation difficult if not impossible, in certain cases. Yet, many of the tapes have high research value, due to the underlying content present on the recordings.

Notably, some tapes were recorded locally during the time of the Second Ecumenical Council of the Vatican (Vatican II) and represent the development of activism and other dynamic conversations in the United States, particularly the San Francisco Bay Area, that are relevant to changes at the time emerging within Catholicism (Frances, M. M., personal communication, April 13, 2010). It is out of this environment that the GTU was founded. The recordings are unique and reflect an important aspect of the history of the United States, the San Francisco Bay Area, and the GTU. Due to their unique and rich content, it is important that the Jesuit Tape Collection (JTC) not only be preserved, but also be made accessible in a meaningful way to the students, staff, scholars, and research community who use the collections at GTU.

Unfortunately, there are many barriers to digitization and digital preservation of and access to this unique and valuable collection. Foremost among them are legal and funding

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barriers exacerbated by the current state of intellectual property law as it pertains to unpublished pre-1972 sound recordings. Further, the complexity of the inconsistent body of state laws that govern these recordings introduces needless delays—sometimes indefinitely—and hampers decision making regarding preservation and access for collections of pre-1972 sound recordings within archives, libraries, and other cultural heritage institutions in the United States. Too often, as a result, preservation activities including digitization and digital preservation are not prioritized, and projects are left unfunded and otherwise unsupported. For unique and rare resources, the possibility of future access and use is at best diminished, and may be extinguished. This is too great a risk to take with our cultural heritage.

Legal impediments that discourage libraries and archives from preservation of and access to collections of pre-1972 sound recordings should be removed, so that the law reflects the needs of audio and digital audio preservation standards and guidelines established by industry leaders. I submit responses to some of the specific questions found in the notice of inquiry below, based on my experience as a graduate student of Library and Information Science, and as the Digitization Intern for the Jesuit Tape Collection at the GTU's Flora Lamson Hewlett Library.

Specific Questions

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?

Bringing pre-1972 sound recordings under Federal law without amending the current exceptions would improve the context in which libraries and archives seek to preserve collections of pre-1972 sound recordings. Much of the confusing complexity due to the patchwork of state common, criminal, and statutory law that currently protects this class of recording would be eliminated, assisting information professionals in libraries and archives to make decisions about risk to their institution if and when preservation activities proceed.

Copyright is at the heart of planning any digitization or digital preservation project. This has been emphasized in the library literature, and in my education at SJSU SLIS. It is recommended that resolution of copyright issues be prioritized not only because of the time it takes to research and receive permission, but because funding agencies typically will not grant funds to projects at odds with the law or that have little prospect for use by the public/research community. Clarification of the law can have positive results for the library and archive community when it comes to preservation of pre-1972 sound recordings. However, it is important to note that as written, particularly in regards to digital preservation, it is difficult to engage in preservation activities according to audio preservation standards and guidelines recommended by industry experts.

Section 108(b) only allows for the creation of three copies for preservation purposes. The term “copies” is not adequately defined and “three copies” are not enough to safeguard digital objects according to industry standards. Digitization is often the most viable way to begin the preservation process for deteriorating or at risk pre-1972 sound recordings. However, digital objects, which are particularly fragile and prone to decay, require ongoing maintenance. Between digitization and digital preservation, more than three copies of a digital object are required. Initially, during digitization, an analog to digital conversion copy must be made, which resides on the digital transfer/recording device. This copy is downloaded as an archival copy, which is typically mastered and thus copied again. Finally, derivative copies would be made for further preservation and access purposes. In the digital world, three copies are insufficient to ensure preservation of unpublished pre-1972 sound recordings.

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?

At least some libraries and archives treat pre-1972 sound recordings differently from copyrighted sound recordings for purposes of providing access to those resources. Currently, catalog records and access to the digital recordings of tapes in the Jesuit Tape Collection at the GTU are suppressed. To date, grant writing has not proceeded, due to, among other reasons, 1) the complexity of determining ownership of copyright for these tapes; and 2) the complexity of the many confusing state laws protecting the tapes.

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?

Bringing pre-1972 sound recordings under Federal law without amending the current exceptions would affect positive change regarding the ability of libraries and archives to provide access to those recordings. Some recordings would enter the public domain and so immediately improve the ability of libraries and archives holding pre-1923 sound recordings to make this class of recordings available to researchers and scholars. For those sound recordings that would not, the exceptions, particularly those in Section 108(d) and (e) would be useful for providing access to some pre-1972 sound recordings.

As expressed in question 2, above, by bringing this class of recordings under Federal law, some clarity would be lent to the copyright status of pre-1972 sound recordings. As a result, funding agencies may be more likely to provide grants or other funding to both preservation and access projects. Without preservation of pre-1972 sound recordings, access and use of them would not be possible. Thus, it is important that there is clarity within the law, including the exceptions for libraries and archives in providing access to this class of recordings. In this way, decision makers at cultural heritage institutions such

as libraries and archives as well as the funding agencies who make preservation and access possible, will make correctly informed, intelligent choices when deciding to proceed with a preservation and access project.

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?

Unpublished and published resources are typically treated differently in the archives and libraries environment. Unpublished resources, including pre-1972 sound recordings, usually have stricter access requirements or restrictions. Typically this is due to their unique and/or rare status, or by donor agreement. This is seen more often within the archives and/or special collections environment.

Were pre-1972 sound recordings brought under Federal law, the improvements in ability to preserve and make accessible these recordings might trigger increased attention to these collections. Activities necessary to ensure proper preservation action is taken including inventory, collection assessment (including condition, format, copyright status, etc.), and grant writing potentially would increase as legal barriers to preservation and access are lifted.

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

The unpublished sound recordings I worked with at the GTU are from the 1950s and 1960s. They are primarily lectures and discussions, and likely were not intended for commercial use. I believe that if these tapes were to be made more widely accessible to the public as a result of bringing pre-1972 sound recordings under Federal law that their value would only increase, as the potential for and actual use of them increased. Without preservation and access however, the collection, and collections like it are more likely to languish in archives and libraries, with any potential commercial value wasted, and cultural heritage lost.

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

Determining ownership of copyright for the GTU's Jesuit Tape Collection has proved difficult. It is likely that, although some speakers are identified on the tapes, that many of them nevertheless fall into the category of "Orphan Works." Currently, in exploring the potential rights holders for resources in the collection, both underlying works and recordings must be researched separately so that Federal versus State law may be reviewed. Speakers and their institutional affiliation must be noted in order to determine whether as part of regular employment or as a work for hire. Further details must also be

captured and researched. The process of determining copyright ownership is not clear cut, and is incumbent on the institution. Some of these difficulties in determining ownership might be eased if only Federal law need be considered.

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?

Pre-1972 sound recordings with no commercial value should be made available for use sooner, so that preservation and access can proceed unimpeded for these items. With the removal of legal barriers and the funding difficulties that stem from them, libraries and archives can be more proactive in preserving and making accessible collections of pre-1972 sound recordings that have no commercial value, but that nevertheless have research value.

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?

The disadvantages to leaving pre-1972 sound recordings protected as is, by the complex and confusing patchwork of State law include the continued difficulties experienced by libraries and archives. Currently, because State law is so difficult to interpret as it applies to the varied collections of pre-1972 sound recordings held by libraries and archives, these collections are not prioritized for preservation action. Preservation of our cultural heritage is at the heart of the purpose of the library and archive community because it is so closely tied to ensuring ongoing access and use. The law as it pertains to these collections needs to be simplified.

29. To the extent not addressed in response to the preceding question, to what extent are people currently refraining from making use, commercial or non-commercial, of pre-1972 sound recordings in view of the current status of protection under State law; and if so in what way?

Digital copies of the Jesuit Tape Collection, a collection of unpublished pre-1972 sound recordings that are non-commercial in nature, is currently not being made available online as digital preservation of the deteriorating and unique tapes of lectures, sermons, etc. proceeds. The project is as of yet unfunded, in part due to the current status of protection under the confusing and complex body of State law. Collections are more likely to lie unexploited and untapped as resources, due to the complexity introduced by the current protection under State law. When libraries and archives must give low priority

to this type of collection, the collections are not featured as part of the collection, and as a result public awareness of these valuable resources is low to non-existent. This means that use of these collections is low.

Conclusion

Thank you for the opportunity to respond to the notice of inquiry regarding Federal copyright protection of sound recordings fixed before February 15, 1972. I believe this is an important area for consideration, as changes have the potential to positively or negatively affect the library and archives community, who maintain so much of our nation's cultural heritage. As part of our cultural heritage, pre-1972 sound recordings are at high risk for deterioration and/or format obsolescence. Preservation activities, including digitization and digital preservation, are necessary for continued access and use of pre-1972 sound recordings. The state of the law greatly impacts the library and archive communities' ability to plan and fund such projects. Changes to the law that enable preservation and access to pre-1972 sound recordings should be prioritized.

Respectfully,

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