COPYRIGHT AND HISTORICAL SOUND RECORDINGS: RECENT EFFORTS TO CHANGE U.S. LAW

By Tim Brooks

It is no secret that expanding copyright laws have complicated the work of scholars and archivists in recent years. Nowhere is this truer than in the field of recorded sound. This article will look at copyright as it affects sound recordings, and will cover three main areas: basic guidelines for the use of copyrighted recordings, some important recent developments, and what scholars and institutions might do to help lessen the restrictions on the use of early recordings.

GUIDELINES FOR THE USE OF COPYRIGHTED RECORDINGS

Recordings are covered by two basic copyrights, one for the music (or text), and another for the recording itself. The rules for the music are pretty simple. Just remember the year 1923. Anything published before 1923 is in the public domain. Nearly everything published after 1 January 1923 is copyrighted. The length of that copyright is ninety-five years, or in some recent cases, the life of the author plus seventy years.

There are some post-1923 works in the public domain, including certain unpublished works, some foreign works, works published without copyright notice, and works whose copyright was not renewed. However these are exceptions and not the norm. In most cases if it is post-1923, it is under copyright.[1]

Unfortunately the situation regarding the recording copyright is very different. Many are surprised to learn that virtually every recording ever made in the U.S. is protected, from the very first commercial recordings made more than a century ago, around 1890, to the present day. There is no public domain for recordings and there will not be one until one is established in the year 2067—maybe. For recordings made before 1972, which includes most historical recordings, there is also no fair use, and

Tim Brooks is chair of the Copyright and Fair Use Committee of the Association for Recorded Sound Collections (ARSC). This article is based on a paper presented at the 34th annual conference of the Society for American Music, San Antonio, Texas, 27 February 2008.

1. For detailed information on the status of different types of works, consult the excellent table "Copyright Term and the Public Domain in the United States" compiled by Peter Hirtle at http://www.copyright.cornell.edu/public_domain/copyrightterm.pdf (accessed 19 November 2008).

few provisions for archival preservation. Recordings are subject to a far more restrictive copyright regime than any other type of intellectual property.

The reason is a little-known provision in the 1976 copyright act which brought post-1972 recordings under federal law but left everything made before that year under state law.[2] Here is where it gets complicated. There are fifty different sets of state law, all of them different, and for a long time there was no road map to these laws. However the last few years have brought two important studies, one by June Besek of Columbia Law School and another, which still is in progress, by Peter Jaszi of American University.[3] These studies reveal that in most states pre-1972 recordings are covered not by statute but by "common law copyright," which is derived from judges' rulings and the results of trials—essentially, "judge-made law." Nearly all consider copyright in recordings to be absolute and perpetual, with no public domain and little or no provision for fair use or archival preservation.

This was made explicit in the 2005 *Capitol v. Naxos* decision in New York State, which held essentially that the public has no rights, all rights belong to the copyright holders.[4] The judges based their decision on the common law of seventeenth-century English kings.[5] This was a New York state decision, but in the Internet age the law of one state effectively applies to all. A Web site operator cannot control where recordings are streamed or downloaded, and one copy downloaded in New York (without permission) would be actionable. The Naxos label, which lost the case, withdrew its historical reissue series from the entire United States.

There have been few lawsuits by copyright holders against institutions or scholars based on these stringent laws, but there do not have to be. The "chilling effect" of potentially expensive lawsuits has caused most institutions and scholarly organizations to avoid distributing historic

2. U.S. Code., Title 17, Section 301(c), http://www.copyright.gov/title17/92chap3.html (accessed 19 November 2008).

3. June Besek, *Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives*, CLIR Publication no. 135 (Washington, DC: Council on Library and Information Resources and Library of Congress, December 2005). The report is available as a free download at the Council on Library and Information Resources Web site, http://www.clir.org/pubs/abstract/pub135abst.html (accessed 19 November 2008). Prof. Peter Jaszi, *Protection for Pre-1972 Sound Recordings Under State Law & Its Impact on Use by Non-Profit Institutions: A Ten-State Analysis*, prepared by the Program on Intellectual Property and the Public Interest, Washington College of Law, American University (forthcoming).

4. Capitol Records, Inc. *v.* Naxos of America, Inc., 2005 NY Slip Op 02570 (4 NY3d 540). The opinion is found at http://www.courts.state.ny.us/reporter/3dseries/2005/2005_02570.htm (accessed 19 November 2008).

5. The justices acknowledged the entire history of English-American copyright, including the clear actions of Parliament (in 1710) and the U.S. Constitution to place limits on rights holders' rights, but concluded that neither of these applied to the case at hand, opting instead for what they considered a "just and realistic" ruling (Section III).

recordings outside their immediate premises.[6] The laws have created a situation in which important historic sound material, once placed into archives, then cannot be heard or used, except under the most restrictive conditions. This phenomenon, called "dark archives," can cause problems in obtaining archival funding, as well as donations of rare recordings. Some private collectors of rare recordings have been reluctant to donate their hard-won treasures to closed archives where no one will be able to hear them.

Copyright holders defend these restrictions as necessary to maintain control over their intellectual property. In an era when record companies are suffering from online sharing and easy digital duplication of their recordings, even archives are seen as a possible source of "leakage."

If copyright holders have been given such absolute control over old sound recordings, what are they doing with it? In 2005, the Library of Congress asked me to conduct a study of the availability of historic recordings from copyright holders and others.[7] It was the first quantitative study of this area. It covered the period 1890 to 1964, and was based on a sample of 1,500 historic recordings listed in widely-used discographies or in the National Recording Registry. Thus it was not a study of *all* recordings, but rather of recordings that scholars have identified as in some sense important.

One finding was that 84 percent of these recordings had a current owner that could be identified, and could control that recording today. In light of events since the study was conducted, I believe that the figure is actually higher than that. Most historical recordings ever made in the United States are controlled today, primarily by the major recording conglomerates which have absorbed many older, smaller labels.

An even more striking finding was that, on average, only 14 percent of those historic recordings were made available by the copyright holders, either directly or through licensing. Moreover the 14 percent was highly skewed toward more recent periods (see fig. 1).

6. No major, legal, online archive of historical commercial recordings is known to exist in the United States comparable to Library and Archive Canada's "Virtual Gramophone" (http://www.collectionscanada.gc.ca/gramophone/index-e.html) or The European Archive (http://www.europarchive.org/). The latter restricts access from the United States. The Library of Congress has a limited number of 1890s Berliner recordings on its American Memory site (http://memory.loc.gov/ammem/berlhtml/berlhome.html), tied to its collection of the papers of inventor Emile Berliner; and the University of California–Santa Barbara has a site containing a large number of Edison cylinders (http://cylinders.library.ucsb.edu/), but these are believed to be the property of the U.S. government. Other U.S. sites containing such recordings are of dubious legality. For more, see Tim Brooks, "Current Bibliography," *ARSC Journal* 38, no. 2 (Fall 2007): 307–8. (All Web sites above accessed 19 November 2008.)

7. Tim Brooks, *Survey of Reissues of U.S. Recordings* (Washington, DC: Council on Library and Information Resources and Library of Congress, August 2005), CLIR publication no. 133, available as a free download at http://www.clir.org/pubs/abstract/pub133abst.html (accessed 19 November 2008).

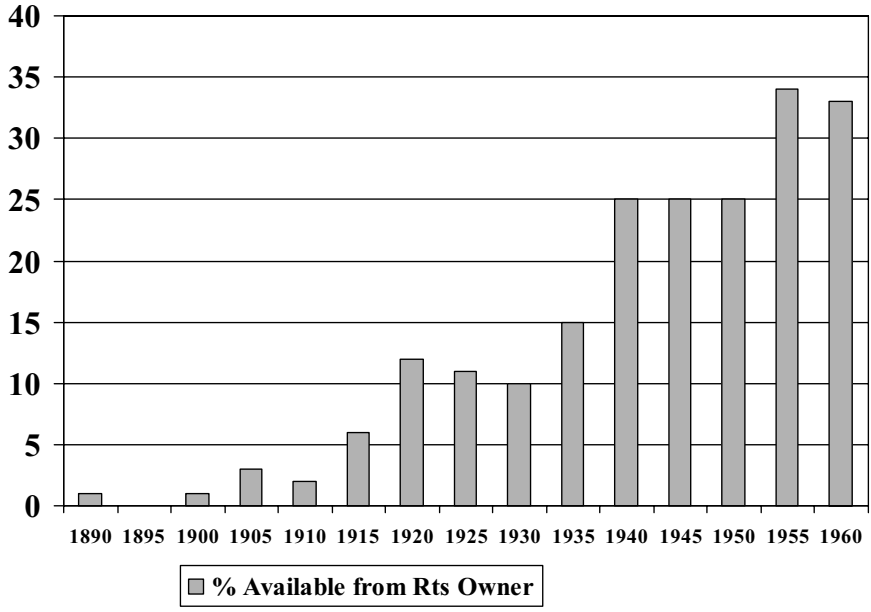

Fig. 1. Reissue availability (percent protected available by five-year span)

About one-third of recordings made during the early rock 'n' roll era, 1955 to 1964, were found to be currently available, and about 20 percent of those from the big-band swing era. About 10 percent of recordings made between 1920 and 1935, which was certainly a vibrant period in the development of American music, were available. The percent of historical recordings made prior to 1920 that was available was negligible.

This does not mean there are *no* rights holder reissues of recordings made in earlier periods, but very, very few. The vast majority of such recordings are unavailable and likely to remain so.

The story was basically the same in each major genre of music (see fig. 2).

The least reissued genre was ethnic music, the music of minorities and foreign-language immigrant groups. Tens of thousands of such recordings were made in the early twentieth century. Less than one percent were currently available from rights holders. Blues, gospel, and, surprisingly, jazz were also poorly served, at about 10 percent available. Most reissued was country music and spoken word, but even this was under 30 percent. And all of these figures were skewed towards more recent periods.

	From Rts Hldr
■ Jazz/Ragtime	9 percent
■ Blues/Gospel	10 percent
■ Country	20 percent
■ Ethnic	1 percent
■ Pop/Rock/R&B	12 percent
■ Classical	17 percent
■ Other (spoken word, show)	28 percent

Fig. 2. Reissues: by genre (protected records)

The study also revealed that there was a clear demand for these recordings, even if it was not large enough to satisfy large rights holders. Non-rights holders, including foreign labels that are not subject to U.S. laws, and small, illegal U.S. operations, made available another 22 percent of the recordings studied, more than the rights holders. Accessing the audio heritage of the U.S., ironically, often requires breaking the law or buying it from foreign countries, whose copyright laws are much less stringent.[8] Institutions and scholarly associations, which in other countries serve an important role in disseminating as well as preserving historic recordings, are prevented from doing so in the U.S.

IMPORTANT RECENT DEVELOPMENTS

There have been several efforts in recent years to ameliorate this situation, all of which are in their early stages.

In 2005 the U.S. Copyright Office commissioned a landmark study of "orphan works," copyrighted works for which no owner can be located.[9] There is a significant amount of such material. Under current law if you search for but cannot find the owner of such a work, then use the work and an owner later emerges, that owner can sue you for both punitive and actual damages. This makes it extremely risky to use any orphan ma-

8. Most countries, including those of the European Union, have a fifty-year copyright term for recordings.
9. http://www.copyright.gov/orphan (accessed 19 November 2008).

terial, even if the owners are in all likelihood no longer in existence. The punitive (or "statutory") damages in U.S. copyright law are quite large.

The Copyright Office proposed that if a potential user made a diligent search for a copyright holder and could not find one, that user should be permitted to use the item without fear of such a lawsuit. If an owner did later emerge (presumably a rare situation) the owner could reclaim the work and be entitled to a normal license fee, but not to punitive damages. A non-profit institution would not be liable for any license fee at all. There has been strong opposition to this legislation from some copyright holders who feel it is a license to infringe, and that it will be too hard for them to track down users of their unmarketed works (photographs, for example). However the bill has widespread support and most observers believe that it will eventually pass.[10]

A second initiative, by the Library of Congress and the Copyright Office, is the so-called "Section 108 Study Group," named after the section of copyright law dealing with the conditions under which non-profit archives may preserve copyrighted material. The law was written decades ago, before digital preservation or the Internet, and many of its provisions effectively prohibit modern "best practices" in audio preservation. For example it is illegal to preserve a rare copyrighted recording until it has already begun to deteriorate; make more than three copies, which is impractical in the era of digital servers and automatic backup systems; and archives are not allowed to pool their resources to make one best preservation copy and share it amongst themselves. The record companies are fighting to limit liberalization of these antiquated rules, and the report issued by the group in March 2008 reflected sharp divisions between copyright holders and archives on many specific issues.[11] However I believe there is a good chance that some type of legislation will result in the next few years.

Unfortunately due to the fact that pre-1972 recordings are under state law, neither of these federal initiatives will at present affect historical recordings.

There have also been significant developments in Europe that could influence the situation in the U.S. In 2005 the British government

10. The House version of the Orphan Works bill (H.R. 5889) is cosponsored by three powerful congressmen: Howard Berman (D-CA) and Howard Coble (R-NC), chairman and ranking member respectively of the House Subcommittee on Courts, the Internet, and Intellectual Property; and Judiciary Committee Chairman John Conyers (D-MI). The Senate version (S.2913) has equally influential cosponsors: Senators Patrick Leahy (D-VT) and Orrin Hatch (R-UT), chairman and ranking member of the Senate Judiciary Committee. It is supported by most public and private groups (although there is still some disagreement over wording), with the notable exception of the photographers' and fabric designers' associations.

11. See the study group's Web site, http://www.section108.gov/ (accessed 19 November 2008).

commissioned Andrew Gowers, former editor of the *Financial Times,* to conduct a wide-ranging review of the intellectual property laws in that country. Among other things the international recording companies, with the strong support of the Blair government, wanted to extend the term of copyright for recordings from the current fifty years there to ninety-five years, to match the nominal term in the United States, the longest in the world.

When the Gowers Report was issued it did contain a great deal for copyright holders, including better enforcement provisions and easier access to the courts, but it recommended against an increase in the fifty-year term for recordings, finding no economic or social justification for a term longer than that.[12] A detailed economic analysis revealed that, on average, 67 percent of the revenue that would ever be realized from a recording was realized in the first seven years after issue, and 97 percent in the first thirty years. After 50 years the remaining revenue amounted to only one or two percent of the total, and that small percentage was heavily skewed to a few, already-wealthy artists.[13] As a result of this report the British government declined to lengthen the fifty-year copyright term for recordings in that country.

The European Union (EU) also commissioned studies of the issue, in 2004 and 2006. Both studies, by different sets of experts, came to essentially the same conclusion, that a lengthening of the fifty-year term of copyright for recordings was not justified.[14]

The record companies were very unhappy with these findings, and declared that they would take the fight to Brussels and try to get a ninety-five-year term imposed throughout the European Union. The first result of this campaign was an announcement in February 2008 by European Union Internal Markets Commissioner Charlie McCreevy that he would indeed recommend extending recording copyright in the EU from fifty to ninety-five years, with certain conditions.[15] Almost immediately there

12. *Gowers Review of Intellectual Property* (London: H.M. Treasury, 2006), http://www.hm-treasury.gov.uk/gowers (accessed 19 November 2008).

13. *Gowers,* 50–53.

14. Commission of the European Communities, "Commission Staff Working Paper on the Review of the EC Legal Framework in the Field of Copyright and Related Rights," Sec(2004) 995 (Brussels, 19 July 2004). The document has been moved since it was originally published, but it is currently available at http://ec.europa.eu/internal_market/copyright/docs/review/sec-2004-995_en.pdf (accessed 19 November 2008). Institute for Information Law, "The Recasting of Copyright & Related Rights for the Knowledge Economy, Final Report" (University of Amsterdam, The Netherlands, Institute for Information Law, November 2006), http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf (accessed 19 November 2008). These and other relevant documents are referenced at Sound Copyright, http://www.soundcopyright.eu/learn (accessed 19 November 2008).

15. "Performing Artists—No Longer the 'Poor Cousins' of the Music Business," press release from the office of Charlie McCreevy, Brussels, 14 February 2008, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/240&format=HTML&aged=0&language=EN&guiLanguage=en (accessed 19 November 2008).

was an organized public outcry against this recommendation, including petitions and opposition from national archives. The battle in Europe has been joined and it will likely take several years for the issue to be resolved.

Due to the Gowers, EU, and Library of Congress studies there is much more evidence of the negative effects of long copyright terms available now than there was when copyright terms were last extended in the United States in 1998. The opposition to extension is also better organized now than it was then, due in large part to the Internet. This could influence future developments in the U.S.

Another recent development in the U.S. has been the effort by the Association for Recorded Sound Collections (ARSC) to promote changes in U.S. copyright law to encourage preservation and access to early recordings. In 2007, after much study, ARSC's Copyright and Fair Use Committee announced five specific recommendations for changes in U.S. law.[16] The stated goal was to ensure better preservation and public access while not harming the legitimate interests of rights holders. The five recommendations are as follows.

- First and foremost, to place all recordings in the U.S. under a single, understandable federal law, by repealing the pre-1972 state-law exception.
- Second, to harmonize the term of coverage for U.S. recordings with the terms in other countries, which generally range from fifty to seventy-five years.
- Third, to legalize the use of orphan recordings.
- Fourth, to allow third parties to disseminate "abandoned" recordings, those for which the owner is known but which that owner has not made available for very long periods of time. There are huge numbers of such recordings, as demonstrated by the Library of Congress study. The owner would be paid for this use under a compulsory license system, such as now exists for recorded musical performances. The owner would therefore receive income where there now is none and the public would have access to the recordings.
- Finally, modify section 108 to permit best practices in digital preservation of recordings.

16. "Legal Impediments to Preservation of and Access to the Audio Heritage of the United States," Recommendations by the Association for Recorded Sound Collections and the Music Library Association, 2 November 2007, http://www.arsc-audio.org/pdf/ARSC-MLAcopyright.pdf (accessed 19 November 2008).

As noted, there is legislation currently being discussed that would address the third and fifth proposals. However it will not affect pre-1972 recordings until the first recommendation is adopted.

Several organizations have endorsed ARSC's recommendations in whole or part, including the Music Library Association, the Society for American Music, the Society of American Archivists, the International Association of Jazz Record Collectors, the Association of Moving Image Archivists, and the American Library Association. Others are considering doing so.

ARSC began shopping these recommendations in Washington in late 2007. An interview with Rep. Rick Boucher (D-VA), one of the senior members of the U.S. House subcommittee responsible for intellectual property legislation, revealed that even one of the recognized experts on copyright in Congress was unaware of the unfavorable treatment of historic recordings compared to other intellectual property.[17] This interview was followed by meetings with legislative aides for almost all two-dozen members of the House intellectual property subcommittee, some senators, and Register of Copyright Marybeth Peters. The finding was the same. Most were unaware of the situation regarding historic recordings. Reactions ranged from curiosity and a desire to know more about the subject, to active offers to help by introducing a bill or amendment to remedy the situation.

All urged ARSC to speak with copyright "stakeholders," as represented by the Recording Industry Association of America (RIAA). In three meetings the RIAA proved noncommittal but willing to explore possible remedies. Publicly it has not taken a position on the issue of preservation and access to older, historical recordings. In 2004 a representative of the organization who was a panelist at an ARSC conference declined to address the issue.[18] In 2007 a RIAA spokesperson told a reporter that the organization did not have a position, and "this is not something we're looking into at this time." Individual major record companies declined to comment to the reporter.[19] However, based on the meetings with ARSC, it appears that the RIAA is willing to negotiate, although these negotiations will not be easy. The industry's willingness to reach an

17. Tim Brooks, "An Interview with Rep. Rick Boucher on Copyright," *ARSC Newsletter* 115 (Fall 2007): 4–5.

18. Jonathan Whitehead, VP-Counsel, RIAA, panelist, "Musical Downloading and File Swapping: Differing Views," joint conference of ARSC and the Society for American Music, Cleveland, OH, 11 March 2004, attended by the author. In an unprecedented move Whitehead and other panelists requested that audio recordings of the session be suppressed and not made available to association members.

19. Andrew Harmon, "Unlocking the Nation's Musical Memories: Pre-1972 Copyright Confusion Keeps Music Archives Out of Reach," *Daily Journal* (Los Angeles), 13 April 2007, 1.

agreement depends in part on how widespread the demand for change is perceived to be.

A number of facts have become clear from these early efforts. There is much fear and resistance to change from rights holders, and any change will take time and persistence, as almost everything in Washington does. Copyright holders must be heard and assured that their legitimate need for effective protection of viable intellectual property is respected. They have large, well-funded lobbying organizations in Washington making their case. However once legislators are made aware of the issue with older recordings they are generally sympathetic, and many have expressed a willingness to consider legislative remedies. ARSC hopes to pursue this initiative, but it is a small organization and will need the support of other scholarly organizations, as well as funding, to do so.

WHAT CAN INDIVIDUAL SCHOLARS DO?

Maintaining a balance between the needs of the public and private sectors in copyright law is not an abstract issue that can be left to others. It involves everyone to one degree or another, and those in the scholarly community need to make their needs known forcefully to lawmakers.

A first step is to simply be aware of the facts regarding copyright and recordings, and tell others about them. Like legislators, most in the academic world are unaware of the "recording problem."

Organizations can be encouraged to take a public position on the issue of historical recordings. As far as I can determine, until very recently no scholarly organization had ever done so. Even ARSC, for whom preservation and access to historic recordings is a core mission, was silent on legislative matters until recently, due mostly to ignorance of the political process.

Institutions and organizations can be encouraged to consider "risk assessment" rather than "most conservative approach" in making the determination whether to use older recordings for legitimate scholarly purposes. No university has ever been sued for making available early recordings, no matter what the law says. The more institutions that do so, in a way that does not infringe on rights holders' revenues and for obviously pro-social purposes, the harder it becomes to justify overly broad laws that operate mostly on fear.

Finally, individuals can contact their own congresspersons. Until now legislators have heard only from lobbyists such as the RIAA about recording issues. The concerns of those in the scholarly community need to be heard as well. Many legislators pay special attention to input from their own individual constituents.

In conclusion, it is important to remember the goal of all this activity. It is not about diminishing the viability of creators, but about preserving our audio heritage, and making it available to students and scholars today, not in some distant future time. Other countries have found a way to strike this balance while creating a rich and vibrant public domain of recorded creative works that their citizens can study, appreciate, and build upon. In Europe not only do institutions make available their countries' aural history, but private labels such as Pearl and Document, run by dedicated enthusiasts, pour out lovingly restored and documented reissues that commercial interests would have no interest in producing. Such labels are illegal in America. ARSC and others are attempting to find a way to strike a better balance in U.S. copyright laws.

ABSTRACT

Constantly expanding copyright laws in the U.S. have made it increasingly difficult for archives to preserve our past effectively, and for the public to legally access it. This is especially true in the field of historical sound recordings. Most people are surprised to learn that for recordings made prior to 1972 there is no public domain, no fair use, and very few exceptions for preservation. This article looks at current guidelines for the use of copyrighted historical recordings; some important recent developments in the effort to change this situation; and what scholars and institutions can do now to help lessen the restrictions. Particular attention is given to the efforts of the Association for Recorded Sound Collections (ARSC), which is seeking five specific changes in U.S. copyright law to benefit preservation and public access to historical recordings.