

Showdown at the Copyright Corral: Why Scholars Need to Speak Up about Copyright and Recordings

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Copyright has long been a subject that made most people's eyes glaze over. It's complicated, lawyerly and seemingly rather distant from our everyday concerns. Do your taping, send someone a file of an old record over the internet, and don't worry about it. What are they going to do, arrest me?

Well, yes. A number of recent high-profile events, including huge lawsuits against grandmothers and teenagers (for downloading songs), the crushing of Napster, Congress's passage of the "Sonny Bono Copyright Term Extension Act" (which provides that nothing will go into the public domain for the next 20 years) and the Supreme Court challenge to that Act have given copyright matters a much higher profile in recent years. It's time the scholarly community woke up to what's really going on here.

In the 1970s Congress passed the most sweeping changes in US copyright law in more than half a century. Two important principles were introduced by the new laws. Personal copyrights, such as those of authors and composers, would now be on a "life-plus" basis, instead of for a fixed period from the time of publication. (For many years the term was 28 years from publication, renewable for 28 more, or a total of 56 years.) A parade of elderly authors and composers appeared before Congress complaining that they had "outlived" their copyrights, among them Eubie Blake, who was then nearing 100. A song he had written as a teenager was no longer "his." The new term was set at life plus 50 years. Eubie—and more importantly his heirs—could rest easy that their royalties would keep coming. A second class of copyrights, "corporate" copyrights (those not belonging to an individual), was set at 75 years from the date of publication.

The second major change was that for the first time sound recordings were covered by federal copyright. Prior to this, in the absence of federal action, many states had passed laws covering recordings, some quite sweeping, others less so. In some cases they appeared to grant perpetual ownership to the record companies. The record companies welcomed uniform federal legislation, but of course they wanted the longest term they could get. (Even though a few years earlier they had been busy destroying their archives, Columbia by throwing out most of its Bridgeport masters and RCA Victor by literally blowing up its Camden vaults.) They persuaded the Senate to give them perpetual

copyright protection for recordings. But the House of Representatives refused to go along, recognizing that this would fly in the face of the Constitutional requirement that copyright must be for “limited times” (“House Report”).

A devil’s bargain was struck in the conference committee charged with reconciling the Senate and House bills. Most recordings would be covered by “corporate” copyright, so those made prior to 1972 (the effective date of the law) were exempted for a period of 75 years. During that period, i.e., until 2047, they would still come under state law, which favored the record companies. After 2047 federal copyright would take over. Everything made prior to 1972 would enter the public domain at once; until then, nothing would.

The argument was made that giving the companies such lengthy ownership would encourage them to preserve and reissue older recordings. With nearly 30 years of experience, however, it is now clear that nothing of the sort has happened. My own recent study of early African-American recordings (surely a field of interest) reveals that only one half of one percent of covered recordings made prior to 1920 have been reissued by the copyright holders (Brooks, *Lost Sounds* 10). Another study indicates that of the pre-1965 recordings of greatest interest to scholars and collectors, those listed in major discographies, only 14 percent are made available by rights holders, and for recordings made prior to the 1940s the percentage dwindles to almost nothing (Brooks, “Sound Recording”). Undeterred by such experience (or ignorant of it) Congress in 1998 passed the now-notorious “Sonny Bono Copyright Term Extension Act,” lengthening all the terms in the original act by 20 years. Now no covered recordings will pass into the public domain until 2067.

The net effect of these laws has been to bury early recordings. The owners won’t reissue them (not profitable enough), won’t allow others to do so (prohibitive licensing fees), and have even tried to stop foreign reissues from being sold in the US (through “parallel import” laws—which are fortunately not too effective). As a result a small but thriving marketplace has grown up in imported reissues and illegal domestic ones. Established labels, archives and scholarly associations are discouraged from producing reissues of historic material for fear of legal problems. In most countries the length of copyright for recordings is 50 years, and many more historic recordings have been released than in the United States. An operation like Europe’s Document label, which provides a real service to scholars by making available rare material whatever its origins, could not exist in the US.

That source may soon be shut down as well. Right now the international recording companies are lobbying furiously to convince the European Union to increase its 50-year term for recordings to as much as 95 years.¹

Availability is only part of the problem. As any historian will tell you, the best form of preservation is duplication—and lots of it. The more copies there are, and the more widely disseminated they are, the better the chance some will survive. We will never “lose” the Mona Lisa or *Hamlet*, no matter what happens to the originals. (This is one of the justifications for a vibrant public domain.) However, many early recordings are in danger of disappearing if their “owners” don’t preserve them, and

nobody else dares reissue them. Current copyright law provides for very limited reproduction by archives, and even more limited access by scholars. In my opinion, that's a recipe for disaster.

Speaking with public interest lawyers working on the 2003 Supreme Court challenge to the Sonny Bono law, I was amazed at how little Washington insiders knew about the harsh treatment of historic recordings under current law. Who better to make the case for laws that encourage, rather than discourage, the preservation and dissemination of our recorded heritage than scholars and associations who work directly with that heritage? (By "preservation" I don't mean one copy locked in a vault.) The issue is not whether there should be effective enforcement of current copyrights (downloading, bootlegs, etc.)—there should be—but about locking up very old recordings that have little economic value but historical significance.

But, you say, "non profit organizations can't lobby." That is one of those half-truths monied interests use to keep small non-profits quiet. (Bigger ones know better, and do lobby.) In fact they can, as long as it does not become their main focus. This subject is covered in detail in an interesting article by Tufts Professor Jeffrey M. Berry in the November 30, 2003 *Washington Post*, and in his book, *A Voice for Nonprofits*. He argues that nonprofits could and should play an important role in educating legislators to the real effect of the laws they are considering. That means keeping on top of what is being considered in Congress, and contacting legislators with relevant information in a timely manner.

My own congressman, Christopher Shays, once remarked that voting in Congress is a little like being at a university and being expected to be an expert in every subject taught. Most legislators appreciate knowledgeable sources of information. How many speak to them on behalf of historic recordings?

Individual scholars should play a much more active role in the current dialogue. This does not necessarily mean lobbying, but might simply mean providing information lawmakers do not have. A useful guide to copyright laws currently being considered is at www.publicknowledge.org. The Association for Recorded Sound Collections provides information on recordings and the law at its website www.arsc-audio.org (under "Copyright and Fair Use Committee").

When is the last time you fired off an e-mail to your Congressman, or urged your colleagues or an association to which you belong to do so? The damage being done by current laws to the preservation and dissemination of historic recordings speaks for itself.

Note

- [1] See http://europa.eu.int/comm/internal_market/copyright/review/consultation_en.htm

Works Cited

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