

How Copyright Law Affects Reissues of Historic Recordings: A New Study

The following article looks at how U.S. copyright law affects the availability of older recordings. Among the issues covered are how many “historic” recordings are still under legal restrictions, how many are available to the public today via reissues, and what proportion of reissues are from rights holders vs. non rights holders. The article also suggests how to determine whether a specific older recording is controlled by a rights holder or is “abandoned,” and thus free to disseminate.

The article is based on a paper presented at the 2005 ARSC Conference, with much of the information drawn from a study by the author commissioned by the Council on Library and Information Resources for the National Recording Preservation Board and the Library of Congress. The full study is available at www.clir.org.

In recent years entertainment companies have secured sweeping expansion of copyright laws and new limits on the public domain, making the subject of copyright increasingly controversial. The world, they say, is changing and the law has to “keep up”. However, those who seek to care for and disseminate our recorded heritage feel justifiably threatened by laws that seem to restrict their activities at every turn.

While many in the academic and collecting communities lament these developments – witness the heavy attendance and passionate response at a session on “Music Downloading and File Swapping” at the 2004 ARSC Conference – there is surprisingly little solid data on the effects of current law on recordings.¹ Such data is necessary to influence policymakers. The study described in this article is the first known attempt to put specific numbers to the question, “how has the availability of historic recordings been affected by current U.S. copyright law?”

The History of U.S. Copyright Law

In the field of copyright everything starts with Article 1, Section 8 of the U.S. Constitution, which states:

The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Note particularly the stated purpose (“promote the progress of science and useful arts”) and the express limitation on rights (“limited times”). The idea here is to balance

two publicly desirable goals: to encourage creators to create by giving them exclusive control of their creations for a limited time, and then to allow others to be able to freely reinterpret, build on, and hopefully improve upon those creations by means of a robust public domain. All creative works can be said to be built upon the work of those who came before, so the existence of a cultural public domain is essential. Another unstated goal is to make sure our cultural heritage is available to future generations. The establishment of a public domain into which creative works eventually pass is supposed to insure this. It was certainly not the intent of the founding fathers to allow third parties to permanently “lock up” our cultural past.

Based on this constitutional provision, the first copyright act was enacted in 1790, providing for a fourteen year term of coverage, plus a second fourteen years if the creator renewed his claim (most didn’t). It was narrowly tailored to cover only “maps, charts and books,” and did not include music. Over the next 170 years there were very few changes. The initial term was lengthened to 28 years in 1831, and the renewal term to 28 years in 1909. Along the way music was added to the list of works covered. Thus by 1909 the maximum term was 56 years, if the holder renewed his claim (most still didn’t).

Beginning in 1962, however, there has been an explosion in copyright coverage, including eleven term extensions and numerous restrictions on academic and public domain usage. Currently the term is the life of the author plus seventy years, or in the case of copyrights owned by corporations (“works for hire”) ninety-five years from the date of publication. There is no longer a requirement to renew a copyright after a specified number of years (which has prevented abandoned copyrights from entering the public domain), and no requirement to register or mark a copyrighted work (which has created an large class of “orphan” works, whose ownership is unknown).

Two Copyrights for Recordings

One essential fact to remember is that for recordings, two different copyrights apply – one for the song or underlying work, and one for the recording itself. Because the changes made in copyright law in the 1970s were not retroactive, songs published before 1923 are now in the public domain. However this is not the case with recordings.

Surprisingly, recordings were not covered by federal copyright law at all until 1972. At that time the term was set at 75 years from the date of publication for corporate copyrights, which include most recordings. In 1998, the now-notorious “Sonny Bono Copyright Term Extension Act” lengthened this to 95 years. Thus a 1972 *recording* will not enter the public domain until 2067.

But what about recordings made before 1972? Unlike songs and books, they were given special treatment. Under section 301(c) of U.S. copyright law, they remain under *state* law until 2067.² State laws applicable to recordings are generally those dealing with unfair competition, misappropriation of property and in some cases state copyright. “Common law,” based on prior judicial decisions, also applies. Most experts believe that state and common law confer permanent ownership in recordings, with no expiration at all.³ Thus, in practice, nothing recorded prior to 1972 will enter the public domain until 2067, when federal law takes over.

It might not happen even then, if copyright holders convince Congress to give them more “copyright term extensions,” which many people think likely. Consumer advocate

Lawrence Lessig has called this “perpetual copyright on the installment plan,” and effectively the end of anything ever entering the public domain again.

The bottom line, then, is that all recordings made in the U.S. from the dawn of commercial recording (c.1890) are covered until 2067, either by state (pre-1972) or federal (1972-on) law. Foreign recordings issued here are covered as well, since by treaty the U.S. must extend the same term of protection enjoyed by U.S. citizens to foreign works issued here. Thus the *de facto* term in the U.S. is from 95 to 177 years, depending on when the recording was made. This is far longer than the terms in foreign countries, which in most cases is fifty years.

So, you may conclude, things look pretty bleak for those who want to make early recordings available, unless they plan to live a very long life. There are some exceptions, however. If the rights holder for a recording no longer exists, there is no one to claim the rights and that recording is free to use. This is the case with recordings made by small companies, mostly pre-rock era that disappeared and left no successor. You are not likely to get into trouble reissuing cylinders made by the U.S. Everlasting Company of Cleveland, Ohio, in 1910. Although the cylinders are “everlasting” the company wasn’t. There is no known corporate successor, and no one who can legitimately claim its rights today. This can be a tricky area; a user would have to be certain that the company’s assets were not in fact bought by some entity that is still in existence. More on this later.

The other shining exception is the large body of recordings made by the companies of Thomas A. Edison from the 1880s to 1929. In an act of unparalleled corporate generosity Edison’s successor deeded its copyrights over to the federal government in the 1950s, as part of an agreement establishing the Edison National Historic Site. Since they are now the property of the government, Edison recordings are freely available for anyone to use. To this author’s knowledge no other company has ever done anything like this.

What’s the Big Deal?

Some ask, “what’s the big deal?” You can find out-of-print books, magazines and newspapers in libraries and used-book stores, why not recordings? It is important for specialists in the field to understand this line of thinking if they hope to sway public opinion. Many people, including legislators, simply don’t understand why there is a problem with recordings, since books and other ephemera “live” perfectly well in the used-copy marketplace.

The fact is that while used copies provide access to out-of-print printed material, they are an impractical means for students and the general public to hear older recordings. Few libraries have archives of 78s or cylinders, and there is no interlibrary loan service for recordings. Even if those interested can find used copies, they will not usually have the equipment to play obsolete formats such as cylinders and 78s. The Internet might be a promising way to make older recordings available, but it is even more stringently regulated by current law than other means of dissemination. It remains to be seen how these laws impact pre-1972 recordings.⁴

Without the audio equivalent of “reprints,” important recordings can be surprisingly hard to find at all. Even specialists familiar with archives, auctions and networks of collectors may find it difficult to locate specific recordings. I speak from personal experience on this. It took me fifteen years to track down the records I wrote about in *Lost Sounds*, my book on pre-1920 African-American recording artists, and after scouring the earth I am

still missing some.⁵ Without reissues from someone (via physical CDs or Internet websites), most of our recorded heritage is simply unavailable to the public today.

Nor is this simply a matter of access. The very existence of many rare, fragile recordings, such as early cylinders, is threatened. A single digital copy locked up in an archive, as provided for by current law, is not very reassuring. The best form of preservation is dissemination, as widely as possible. We will never “lose” the Mona Lisa or the Declaration of Independence, no matter what happens to the originals. But if copies of old and rare recordings remain so tightly controlled, we may indeed lose them.

Methodology

So we have a problem. But how serious a problem is it, really? We must always remember that copyright is a balancing act, intended to preserve the rights of the creator as well as those of the user and the public. In this study we set out to determine the degree to which rights holders have made available their holdings of historic recordings. After nearly thirty years’ experience with the Copyright Act of 1976, which granted many new rights, what has our experience been?

The study was commissioned by the Council on Library and Information Resources (CLIR) at the request of the National Recording Preservation Board (NRPB) and the Library of Congress, under terms of the National Recording Preservation Act of 2000 (Public Law 106-474). That law directed the NRPB to report on the current state of sound-recording archiving, preservation, and restoration, and to recommend standards for access to preserved sound-recordings. CLIR is a Washington, D.C.-based non-profit organization whose mission is “to expand access to information however recorded and preserved, as a public good”. Its membership includes hundreds of university and public libraries. The study was conducted during the second half of 2004, with design and analysis by me and data gathered by Steven Smolian.

We began with a random sample of 1,500 recordings commercially released in the U.S. between 1890 and 1964. Eighteen-ninety was chosen as the starting point because that year approximates the beginning of the commercial record industry in the U.S.⁶ It is the earliest period from which re-issuable commercial recordings survive, and the earliest year from which recordings are still under the exclusive control of a present-day rights holder (i.e., the first full year of recording by a predecessor company of a rights holder that is still in existence).⁷

The end year of 1964 was based on three factors.

1. *Scope.* The study covers the first 75 years of commercial recording in the United States.
2. *Industry changes.* A cutoff of 1964 makes it possible to include the cylinder era, the 78-rpm era, and the first decade of widespread acceptance of 45-rpm and LP formats. All these are formats now challenged by the lack of generally accessible reproduction capability.
3. *Feasibility.* Due to the explosion in the number of recordings issued in recent years, and the proliferation of reissues of those recordings, the project would be much more difficult to execute for more recent periods.

The 1890-1964 time span was broken into fifteen five-year blocks, with a quota of approximately 100 recordings drawn per five-year block. This permitted a more granular analysis of changes over time than decades would allow, yet kept the size of the sample needed manageable (a minimum sample of 100 is generally considered necessary for statistical analyses). Five-year periods also allowed us to map changes coinciding with industry changes that began mid-decade, e.g., the shutting down of independent producers by the patent-holding major companies ca.1905-1908; the introduction of electrical recording in 1925; the post World War II record boom that began in 1945; and the inception of the rock 'n' roll/microgroove era in 1955.

The sample was drawn from approximately twenty leading discographies in seven major fields of study. Thus this is not a study of the availability of all recordings, but rather of those that are of the greatest interest to scholars and collectors. Many, arguably, could be called "historic".

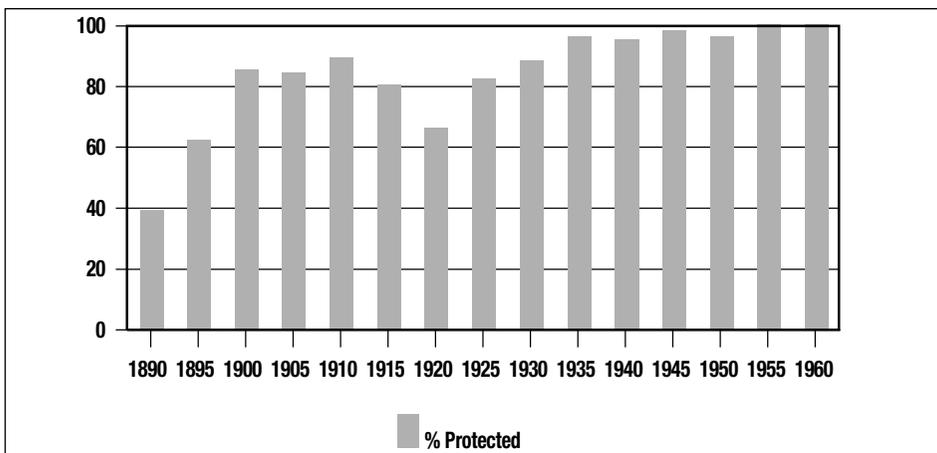
The study methodology is discussed in greater detail later in this article.

Findings

Protected Recordings. The first finding was that the percent of sample recordings that are currently protected under U.S. law for the various periods between 1890 and 1964 averages 84 percent.⁸ This percentage varies somewhat by period, although not as much as expected (Figure 1).

Even for the first half of the 1890s – more than a century ago – 39 percent of sample recordings are still protected, all of them cylinders made by the Columbia Phonograph Company. For the late 1890s the percentage rises to 62 percent, and in nearly every subsequent five-year period it exceeds 80 percent. The percent protected peaks during 1900-1915, an early period of extreme consolidation in the record industry, declines a bit during the late 1910s and early 1920s when independent labels flourished, then rises to over 90

Figure 1: Protected Records by Time Period
(% Protected by Time Period)



percent after 1935, as major labels came to dominate the marketplace. In later years, smaller labels were increasingly bought up by larger companies, whose successors retain rights to their recordings. Given the current concentration in ownership and buying and selling of rights, it is entirely possible that in the future “abandoned labels” will be few and virtually all recordings will be restricted for the full term allowed by law.

It should be noted that the percent classified as non-protected, and therefore freely available for duplication and dissemination (16 percent), can and probably will be reduced by future claims of ownership. Already one of the few notable labels believed to be “free” at the time this study was conducted has been claimed. Gennett, the jazz and blues label of the 1920s, is now being claimed by Concord through an ownership chain tracing back through Fantasy and Riverside.⁹

There is some variation in percent protected by genre of music (Figure 2). Classical and country recordings are the most heavily protected overall, each exceeding 90 percent. Jazz and ragtime, blues and gospel and “other” (mostly show music) are in the 86 percent to 90 percent protected range. Surprisingly, popular music is on the low end (76 percent), but this is mostly very early material.

Figure 2: Protected Records by Genre

	<u>% Protected</u>
Jazz/ragtime	90%
Blues/gospel	89
Country	91
Ethnic	81
Popular/rock	76
Classical	93
Other	86

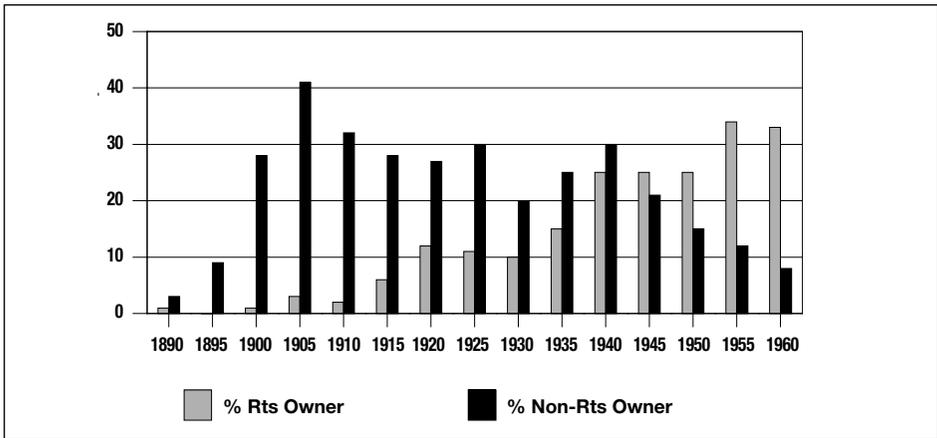
Reissues. The second set of results looks at CD reissues of protected historic recordings by rights owners and their licensees. Over the whole period studied rights holders have made available 14 percent of what they own.¹⁰ This is heavily skewed toward the big band (1940s) and early rock eras (1950s-1960s). (See Figure 3)

What is fascinating is that non-rights holders – unlicensed U.S. labels and foreign labels—have made available an *additional* 22 percent. This does not consider duplications, but rather recordings available *only* from non-rights holders. Two conclusions can immediately be drawn.

1. Non-rights holders, domestic and foreign, have done a much better job of making historic U.S. recordings available than have the rights holders, despite laws that discourage such activity.
2. Despite what rights holders might claim, there is clearly an interest in these recordings.

Looking further at the Reissue Availability chart, nobody is reissuing much from the 1890s, although what there is comes almost entirely from non-rights holders. Non-rights holders make available approximately 20 to 30 percent of the historic records

Figure 3: Reissue Availability
 (% Protected That Are Available, by Time Period)



from most periods between 1900 and 1945. Meanwhile rights holders have reissued a negligible amount of what they “own” from pre-1920 periods, and only about 10 percent of what they own from 1920 to 1935. They reissue more from the swing era, and from early rock. Primarily, they are serving the nostalgia market, not history. Reissues by non-rights holders start to drop off as rights holders step up to the plate with material from the 1940s and 1950s.

If it were not for non-rights holders, we would have almost nothing available from the early years of recording. This does not mean that rights holders have reissued none of the early recordings they control – we can all think of a few examples – but statistically very few.

The story is the same in most of the individual musical genres studied: more reissues from non-rights holders than from rights holders (Figure 4). Blues and gospel music has been particularly well-served by non-rights holders, with 54 percent of the listed recordings reissued by them vs. only 10 percent from rights holders. The most reissued genres overall are blues and gospel (64%), show music and spoken word (“other,” 52%) and country (45%). The least reissued has been ethnic music (2%), which has been poorly served by everyone.

Figure 4: Reissue Availability (by Genre)

	<u>From Rts Holder</u>	<u>From Other</u>	<u>None</u>
Jazz/ragtime	9%	18	73
Blues/gospel	10	54	36
Country	20	25	55
Ethnic	1	1	98
Popular/rock	12	16	73
Classical	17	20	63
Other	28	24	48

Conclusions

How many historic recordings are there?

That depends on one's definition of "historic". The major discographies used as the basis for this study, widely used by scholars and collectors, list more than 400,000 recordings of interest issued prior to 1964. That figure may grow as additional fields are documented that have not been adequately researched, for example white gospel recordings, post-World War II ethnic recordings, and recordings made in the 1890s.

How many still exist?

Although answering this question was not a principal goal of this study, experts in the field believe that the vast majority of recordings commercially issued in the U.S. – probably more than 90 percent – still exist in some form. Record companies have destroyed most of their masters and often even their files from earlier periods, but archives and private collectors have assembled large collections of commercial pressings. It is from these holdings that most reissues for the pre-1940 period are drawn. Most likely to have been lost are cylinder recordings made in the 1890s, but even there preservation specialists believe that 7,000-10,000 such cylinder releases still exist in the U.S.

What percent of the recordings in this study are still controlled by someone under current U.S. law?

Despite bankruptcies, abandonment, and long-dead record labels, under current U.S. law an overwhelming majority of historic recordings – in this study 84 percent – are still owned by someone, even in cases where the owners have done nothing to preserve or distribute them. This is true even for the earliest periods, with more than 60 percent protected for every period after 1895. The figure exceeds 90 percent after the 1930s. The high percentage is true for every musical genre studied. Most of America's recorded musical heritage of the last 110 years is "locked up" by current law until 2067.

Have rights-holders made these recordings available?

No. After nearly thirty years' experience with the 1976 Copyright Act, our analysis shows that rights-holders have reissued – or as a practical matter allowed legal access to – only a small fraction of the historic recordings they control. Overall, 14 percent of listed pre-1964 recordings were found to be available from rights holders, mostly from the 1940s, 1950s and early 1960s. The figure drops to ten percent or less for most periods prior to World War II, and approaches zero for periods before 1920. This study focused on recordings in which there is demonstrated interest; it is likely that the percent of *all* recordings that have been reissued is even less.

Does anyone care about these recordings?

Yes. Despite laws discouraging unauthorized reissue activity in the U.S. or the importa-

tion of reissues of U.S. recordings from other countries (parallel import laws), foreign labels and small entities in the U.S. have made available a considerable amount. The study found that other entities have exclusively reissued 22 percent of the sample recordings compared to 14 percent by rights holders. To the extent rights-holders do reissue older recordings, they concentrate on recent periods with larger potential markets, while third-party distributors serve all periods more or less equally. As a result, non-rights holders have reissued more than rights-holders for every period prior to 1945. But current copyright law has made such activity difficult and risky for small organizations, and has driven much of this activity overseas. It is worth noting that a label such as Europe's Document Records, which has provided a considerable service to scholars by making available thousands of rare pre-World War II American blues and gospel records, could not exist in the U.S. due to copyright restrictions.¹¹

What has been the effect of U.S. copyright law on the ability of scholars and other interested parties to reissue historic recordings legally?

Those who wish to reissue early recordings face daunting legal challenges. Because the 1976 Copyright Act and subsequent acts have eliminated all requirements for registration, marking, or renewal of copyright, determining who owns a recording can be extremely difficult. In this study, despite a major effort to trace ownership and consultation with several experts, 25 percent of the labels in the sample proved untraceable. Many of the rest had to be assigned *probable* protected or non-protected status. The uncertainty introduced by current copyright law has prevented reputable companies, institutions, and associations that want to operate within the law from engaging in any reissue activity at all – or bearing great risk when they do so. Another unintended consequence, seldom recognized, stems from the fact that many of the rarest and most historically important recordings are currently in private collections. Many collectors are reluctant to donate or will their collections to public institutions for fear that once there they will “never see the light of day” again. Fairly or not, current restrictive access laws, by which institutions must abide, foster this perception.

Conclusion. The present study has uncovered a number of areas of concern, potentially calling for legal and/or legislative action. One is the elimination of registration and formal marking requirements, which not only causes difficulty in determining current ownership, but also means that protected status can be subject to differing interpretations, even among experts. This lack of clarity has placed a considerable burden on those who wish to preserve, study, or disseminate past recordings. Indeed, it is no exaggeration to say that there has been a chilling effect on the market for public domain reissues because it is prohibitively difficult to establish what is or is not in the public domain. False or dubious claims of ownership are easy to make and hard to challenge effectively. Making recording ownership difficult to trace has led to the unintended consequence of giving larger rights claimants considerable leverage over smaller entities such as educational institutions, scholarly associations and interested individuals that attempt reissue because of the specter of potential litigation. To avoid litigation in an area with so little clarity, many of these entities (including ARSC) simply forgo any reissue activity at all.

This seemingly irrational provision has been justified on the basis of conforming to

international treaties, specifically the Berne Convention which calls for the elimination of “formalities” that unfairly deprive rights holders of their rights. However those treaties also allow for exceptions “which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”.¹² Some type of registration to bring clarity to this area would seem to be consistent with Berne, which in my opinion is being used as a smoke screen by those opposed to change.

Another concern is the ability of rights holders to “lock up” historic recordings for excessively long periods, allowing neither access to nor dissemination of those recordings by others.¹³ A number of parties, including the American Federation of Musicians (AFM) and the American Federation of Television and Radio Artists (AFTRA) are calling for some type of compulsory license that would allow non-rights holders to legally reissue recordings which rights holders do not, on payment of a fee set by the government.¹⁴ This would be similar to the compulsory license for music, which allows anyone to record a copyrighted song on payment of a set (not negotiated) fee. A more sweeping solution – and one which is anathema to rights holders – is a “use it or lose it” law that effectively strips them of ownership of material they refuse to make available, after a certain period (perhaps the 50 years term recognized internationally).

Some believe the correct path is to encourage (or even force) rights holders to reissue their historic holdings, but I do not believe this is reasonable. For-profit businesses, which are supposed to act in the best interests of their stockholders, should not be expected to do things inimical to their own interests, such as the production of large numbers of reissues of low-volume product. This is exactly why they have done so little in the last thirty years. It is not that they want to bury history, it is simply not profitable enough for them to exhume it. Internet marketing has been suggested as a possible solution (put older material on a website and charge for downloads), but the considerable cost of finding clean copies of large numbers of recordings, mastering new electronic files, and maintaining the service would be prohibitive. It makes eminently more sense to lift the legal restrictions so that those with the passion and small scale necessary to do this kind of work – private and institutional – can shoulder the load.

While current copyright law for recorded sound has extended unprecedentedly long exclusive rights to copyright holders, this analysis indicates that it has not been successful in ensuring or encouraging the legal preservation of and access to historic recordings. While there is no reason to assume that the law intends to create or sustain such an imbalance between the private and public domains, the evidence suggests that the current law has de facto created such an imbalance. This study also indicates that there is an active and hardy network of foreign and small domestic companies, associations, and individuals willing to make historic recordings available, and to some extent does so in spite of laws that force them underground or overseas. The subject of rights is controversial and much appears to be at stake in an information environment rapidly transformed by digital technologies. That said, America’s recorded heritage is also at stake, for rich as it is, it is extremely fragile, endangered as it is by the obsolete formats on which it is recorded. These circumstances make for a complex policy environment, and the time for sorting out some of these matters grows short as the recording formats become more difficult to maintain.

Discussion of Study Methodology

Definitions

Commercial Recording. A commercial recording is defined here as a single recording of a selection or selections by an artist, issued for sale in the U.S. to the general public during the period specified, and meeting the definitions in Title 17, U.S. Code, sections 101-104. For popular music, this generally means a single “track,” whether it originally appeared on a cylinder, on one side of a 78 or 45-rpm disc, on a multi-track LP, EP or tape, or in some combination of those or other fixed formats. Multi-part recordings of a single extended selection (e.g., a symphony or opera) are considered to be one recording. Alternate takes of the same selection, made at or about the same time, and re-recordings made solely for duplication purposes, as was common in the early years of the industry before mass duplication technology became available, are not considered separate recordings.¹⁵ However recordings of different lengths made for different recording formats (for example seven and ten-inch 78-rpm discs), are considered separate.

Master recordings may have originated from any source, domestic or foreign, as long as they were or are controlled in the U.S. by a rights holder subject to U.S. law. The recording must have been originally intended for issue as a commercial sound recording; recordings taken from broadcasts or film soundtracks are not included. Copyright for those recordings presumably resides with the broadcasting or film entity.

Protected / Non-Protected Status. Whether or not a recording is currently protected (i.e., controlled by a rights holder) is in the judgment of the compilers. The approach was to replicate the determination a reasonable person would make, after a reasonable amount of diligent research, if that person, their institution, or their association wished to reissue the recording legally. We did not make use of legal counsel, or substantial expenditures of time and money, to try to establish with 100 percent certainty the status of each individual recording. Rather, the goal was to determine whether it was probably protected or not. Since our ultimate purpose was to calculate the *proportion* of recordings from each period that are protected, the exact status of individual recordings is less important.

Reissue Availability. Current availability is defined as reasonable availability of a new copy to an ordinary person, through normal commercial channels (store, mail order, Internet). The giant online music databases of Allmusic, Amazon, and Muze were the principal sources used to determine current availability. It is not the purpose of this study to track reissues of extremely limited availability, or availability only to predetermined parties such as club members. Availability must be in the form of a CD or other currently-produced physical format. This study did not consider on-line access due to its impermanence and (at least at this time) non-availability to a significant portion of the public. It is in any event unlikely that many of the protected historic records covered here are being made legally available via the Internet.

Availability from the rights holder means issued by them or by their licensee (as indicated on packaging) and legally distributed within the U.S. It does not include illegal reissues or reissues available only from foreign sources (these are enumerated separately). It is presumably not the purpose of U.S. copyright law to force those who wish to reissue historic recordings to operate illegally or move overseas.

The Sample

The original plan was to base the analysis on a random sample of all recordings released in the U.S. during the seventy-five years in question. However, of an estimated two to three million recordings released, the vast majority attract little interest today. Including large numbers of recordings that few people care about would be very egalitarian (*someone* may care), but it could be attacked as a weakness of the study. So I chose instead to focus on recordings in which scholars, students and the general public have shown documented interest, as indicated by their inclusion in widely used discographies and other reference works. Thus this is not a sample of all recordings, but rather of recordings in which there is the greatest interest. Indeed, many of them could be considered “historic”. This is a sample of the recordings *most* in need of preservation and availability today.

The 1,500 recordings were drawn from approximately 20 modern discographies, representing seven major fields of study (see appendix):

ragtime and jazz
blues and gospel music
country and folk music
U.S. ethnic groups
popular, rock, R&B music
classical music
other – including spoken word recordings and show music

The discographies were chosen to meet the following criteria:

1. Each is a standard reference in its field.
2. Each is a genre discography covering all labels relevant to its field, and not limited to a specific label or artist. Label and artist discographies would have skewed the sample toward specific labels, and the protected/non-protected status they represent.
3. Each covers some part of the period 1890-1964. In most cases no single discography covered the entire period, so more than one was required to cover the entire time span.
4. The discographies are non-duplicative to the extent possible. This required some difficult choices: it meant, for example, that Brian Rust’s well-known *Jazz Records* (1897-1942) was not used because it is a subset of the much larger CD-ROM *The Jazz Discography* (1896-2001).

In addition, twenty pre-1965 selections were drawn from the 2002 and 2003 National Recording Registry lists of historic recordings.

How Many Are There?

The discographies used list more than 400,000 recordings from the period 1890-1964. How many of these recordings still exist? Although answering that question was not a principal goal of the study, experts in the field believe that the vast majority of recordings commercially issued in the U.S. – probably more than 90 percent – still exist in some form.¹⁶ Often

this is in the form of commercial pressings, since in the past record companies routinely destroyed their older masters, and sometimes even the files that documented what they had recorded. However, archives and private collectors have assembled large collections of recordings, and they serve as the source for many reissues. For example Europe's Document Records, relying on a worldwide network of collectors, has issued more than 600 CDs documenting the contents of the book *Blues & Gospel Records, 1890-1943*, alone.

Many of the discographers whose works were consulted physically examined the majority of records they listed, or received reports from others who had done so. Rock-era compiler Joel Whitburn claimed to own a copy of every record listed in his huge *Top Pop Singles*. Those working in earlier periods commonly derive take numbers and label credit from copies examined. This was the case with my own *Columbia Master Book*. Most likely to have disappeared are "brown wax" cylinder recordings made in the 1890s, but even these continue to turn up. One preservation specialist reports that he has personally seen approximately 1,200 such recordings, and believes that 8,000 to 10,000 are in existence nationwide; another puts the figure at about 7,000 to 8,000.¹⁷ Interestingly, fifty percent of the more than 600 1890s cylinders the first individual has transferred were made by the Columbia Phonograph Company. If his sample is representative, approximately half of the cylinders from this era may still be protected by law, even though the rights-holder, Sony BMG, has retained or reissued almost none of them, and appears to have no intention of doing so.

Many early cylinders are in poor condition, but it is nevertheless important to preserve them so that future preservation experts will have the opportunity to retrieve their sound using technologies yet to be developed. Several advanced technologies for this purpose are currently in development.¹⁸

Once the discographies were chosen, subquotas were established for each musical genre within each period. Not all genres of music were recorded in every period (for example the first country records were made in the early 1920s), so the quota of 100 recordings per period was divided equally among the genres that were represented in that period. Each genre was given equal weight.

A random sampling methodology was employed to choose specific recordings within each genre. A random number was drawn and used to point to a specific page in a discography. The first qualifying recording on the designated page was then chosen. If no qualifying recording was found on that page, subsequent pages were examined until a qualifying recording was located. The goal, in accordance with sampling theory, was to ensure that each qualifying recording in the discography had an equal and known chance of being chosen.

Two rounds of sampling were conducted. After the first 1,500 recordings had been selected, their status was researched to estimate the proportion of all recordings in each period that are protected and non-protected.

In the second round, the same methodology was used to draw a sample of 1,500 *protected* recordings. [Protected recordings already identified in the first round were used toward the quota.] These were researched to determine the proportion of protected recordings that are currently available in reissue, and the sources of those reissues.

Determining Current Ownership

The first task was to determine how many of the initial sample of 1,500 recordings were currently protected by law. This was a daunting assignment. Since the 1976 Copyright Act and subsequent legislation did away with registration and formal marking require-

ments, ownership and thus protected status can be subject to differing interpretations, even among experts. In the present study three tests were used to determine whether a recording is probably protected.

1. Corporate lineage. Can the entity that made the recording be traced forward, either directly or through mergers and acquisitions, to a present-day rights holder?
2. Marketplace evidence. Who has asserted ownership in the years since the recording was made (a minimum of 40 years in this study), either through legal claims or “authorized” issues/reissues? If the original recording company has disappeared, who has reissued the recording and under what circumstances?
3. Consultation with experts. The Project Director and Contractor are both recording industry historians, and were able to resolve many cases. For the most problematic cases we also asked a number of experts with years of experience in the field of reissues their opinion regarding current ownership of the labels involved. [For the names of the experts see the acknowledgments.]

None of these tests is infallible. Corporate lineage would seem to be definitive proof of ownership, but it is not. Without access to documents specifying ownership at the time the recording was originally made, and documents associated with each subsequent change of ownership of the original record label, we cannot be sure to whom ownership of the recordings passed. Press reports that a record company was “acquired” by another can be misleading.

Here are some examples. Scholars were long uncertain about the relationship between the Indestructible Record Company, a cylinder manufacturer, and the Columbia Phonograph Company between 1908 and 1912. The trade press at the time said that Columbia had purchased Indestructible “lock, stock and barrel,” and Columbia itself called it an “acquisition”.¹⁹ That would suggest that Indestructible cylinders made during this period were owned by Columbia, and today would be the property of its successor, Sony BMG. However, recently documents have surfaced that show the two companies simply had a distribution agreement. Since IRC owned the recordings, later went bankrupt and had no known successor, the cylinders are in fact *not* protected.

Products of the small record companies of the 1890s that quickly went out of business and have no known ownership chain to the present day are presumed to be non-protected. However, ownership of many small labels of the 1920s and beyond is extremely unclear, due to mergers, alliances, exchanges of matrices, bankruptcies and the like. The Emerson Phonograph Company was founded in 1915, went bankrupt in 1920, operated for a time in receivership and then suspended operations, was sold and reactivated in 1922, was sold again in 1924, was sold again in 1926, and was discontinued in 1927.²⁰ Along the way Emerson masters were released on many other labels, although whether they were sold to or leased by those labels is unknown. The company also spun off a radio division that has lasted to the present day and may or may not have an interest in some Emerson recordings. So with all this turmoil, who owns the rights to Emerson recordings today? Since the last known owner of Emerson, the Consolidated Record Corporation, went out of business in 1929 and had no known successor, we have assumed that Emerson recordings are unprotected today.

In some cases ownership appears obvious. Recordings originally made by Columbia, Victor and their subsidiaries are generally assumed to be controlled today by Sony BMG,

and those of Decca by Universal Music. Sony and BMG have asserted ownership to the earliest products of their predecessor companies, including 1890s cylinders of the Columbia Phonograph Company of Washington D.C., and Victor and Berliner discs of the 1890s and early 1900s, and have occasionally reissued such recordings as their own. Given the bankruptcies and numerous changes of ownership that have occurred over the years it might be difficult to prove chain of title in court, but custom has been to assume that it does have such rights and we have made that assumption here.

It should be noted, however, that there has been very little litigation in this area, especially on the state level. Things may or may not be what they seem. Just because record companies claim they own elderly material, and collect fees for its use, does not mean they could actually prove ownership in court. Also, the fact that they have taken no action against obvious third-party reissuers for so many years could be construed as abandonment. Some parties believe that it is though legal challenges that older, out-of-print material may eventually be freed from modern corporate control.

Consider, for example, the case of Berliner discs. Does Sony BMG really own them? The relevant history is that in 1900 Emile Berliner's sales agent, Frank Seaman, obtained a permanent injunction against Berliner preventing Berliner's company from selling its products in the U.S. Seaman also sued Berliner's business associate Eldridge Johnson. Johnson began recording on his own, set up separate and distinct labels (Improved Gramophone, Improved) using Berliner's processes, and in late 1901 founded the Victor Talking Machine Company. Emile Berliner was an investor in this company, but what Johnson needed was Berliner's patents, not his masters. Due to the injunction and Seaman's continuing lawsuits the Berliner masters were legally "radioactive," and it was in Johnson's best interests to avoid doing anything that might suggest that Victor was a continuation of the Berliner company. Moreover the older masters were useless to him, technologically inferior because recording processes had improved so much since they were made. There is no evidence that they were reissued on Johnson's labels.²¹ So did Victor (and thus Sony BMG) acquire the rights to the Berliner masters, or only to Berliner's patents? It would make an interesting case.

Recently Sony's title to pre-1939 Columbia masters has even been called into question. Author and legal researcher Geoffrey Wheeler has pointed out irregularities in the CBS acquisition of Columbia in 1939 that may invalidate the transaction. Further investigation into the subject has been promised.²²

Modern corporations can be expected to deny all this and fight fiercely to claim the rights to everything they can. Often this is done through threats and intimidation ("cease and desist" letters) rather than risking court actions that are costly and might go against them.

Much has been made of the recent case of *Capitol v. Naxos*, in which the U.S. company Capitol Records did go to court to claim the rights to recordings made by an affiliated company in England in the 1930s. The case turned largely on the issue of whether recordings that are in the public domain in their own country can still be protected in the U.S., under the laws of New York state, and has little to do with U.S. chain of title issues.

The second test is marketplace evidence. In most cases of past corporate changes, legal documents spelling out the exact terms of sale are not available. In their absence, one test used to determine transfer of masters during a change of business status is whether the successor label continued to press and sell the predecessor label's back catalog. If it did, that is a strong indication that the successor *did* acquire rights to the predecessor's record-

ings, not just its trademarks, physical plant, etc. If it did not, that is at least a suggestion that rights to the recordings were not part of the transaction. For example, after the Indestructible Record Company severed its relationship with Columbia in 1912, IRC continued to operate as an independent company for ten more years, manufacturing and selling the recordings made between 1908-1912 among others. This is a clear indication that ownership of the 1908-1912 recordings resided with IRC, not Columbia.

We also looked at who in recent times has asserted ownership of long-dead labels. Liberty Music Shop, a New York retailer, produced its own recordings from 1933-1942, including many important stage and cabaret artists. The store went out of business during the 1970s and it is unclear who, if anyone, now owns the majority of its masters (a few were sold). They have been reissued by a variety of labels, including those of such reputable organizations as the Smithsonian Institution and the Metropolitan Opera Guild, without clear credit. [Sometimes when labels are unable to find an owner they hold money in escrow in case one should emerge.] With no one known to be asserting ownership, our panel of experts believes that, with a few exceptions, LMS masters are currently not protected.²³ Likewise the Newark, New Jersey-based Manor label, which produced important jazz and rhythm and blues recordings in the 1945-1949 period, appears to be in limbo. One of our informants indicated that two reissue producers “tried hard to find ownership of Manor, but the trail went cold”.²⁴ They proceeded with their reissues, in one case putting money in escrow, but no claimant ever emerged.

Since few legal challenges have as yet been undertaken we assumed a conservative position in this study, namely that the companies do own what they claim they own.

Approximately 400 labels are represented in the study. The majority were individually identified as to protected/non-protected status. However, the status of about one hundred small labels – 25 percent of the total – could not be identified, even after extensive effort. For those labels, a statistical process known as ascription was used to assign a status.²⁵ It is possible that with more time and the engagement of legal experts, it might be possible to track down the status of additional labels (and possibly change the assignment of some we did categorize). However, it is our belief, given our experience in this exercise, that even with substantial expenditures a large number – perhaps not much less than the 25 percent we were left with – would remain unknown. In addition, many of those that were identified as to ownership would be “probable” rather than “definite” identifications, due to the lack of an unambiguous legal paper trail. Even lawyers couldn’t help in this area. This is an illustration of the confusion and uncertainty that has been introduced into the field of recording rights by the absence of registration and marking requirements.

The assumptions made here are not intended to prejudge legal determinations that may be made in the future.

Acknowledgments

The author would like to thank our panel of “reissue experts” who provided valuable advice and input during the compilation of this study: Dan Morgenstern, Director of the Institute of Jazz Studies, Rutgers University; Bob Porter, author and long time record producer; Robert Pruter, author of *Chicago Soul*, *Doowop: the Chicago Scene*, and other books; Jack Raymond, author of *Show Music on Record*; and Chris Strachwitz, ethnic record producer and owner of

Arhoolie Records. Others assisting included author Will Friedwald and author/producer Dick Spottswood. Special thanks to Sam Brylawski, formerly of the Library of Congress, and Abby Smith of CLIR, who encouraged this study from the start and gave much valuable counsel during its execution. Without them it would not have existed.

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Appendix

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- Muze. www.muze.com.
- Red Saunders Research Foundation. <http://hubcap.clemson.edu/tildecampber/rsrf.html>
- Wikipedia. <http://en.wikipedia.org/wiki>

Endnotes

1. "Music Downloading and File Swapping: Differing Views," 2004 Joint Conference of the Association for Recorded Sound Collections and the Society for American Music, Cleveland, Ohio, 11 March 2004. Normally recordings of ARSC Conference sessions are made available to the membership, but in this case the three panelists – Jonathan Whitehead of the Recording Industry Association of America, Marc Dicciani of the National Academy of Recording Arts and Sciences, and Charles E. Phelps of the University of Rochester – were reportedly so upset by the passionate and mostly negative response of the audience to current record industry copyright practices that they insisted that tapes of the session be suppressed.

2. U.S. Code, Title 17, Section 301(c).
3. Some parties are trying to find gaps in state laws that might allow some pre-1972 recordings to become freely available, but no such situations have been found thus far. A major study of state copyright law is currently underway by the Council on Library and Information Resources.
4. Internet-related laws are complex, and distinguish between streaming (listening with no permanent copy created) and downloading. While underlying works are covered by federal law, and downloading of pre-1972 recordings would presumably run afoul of state statutes, it is possible that streaming of pre-1972 recordings might be permissible under state laws.
5. Tim Brooks, *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919*. Urbana: University of Illinois Press, 2004.
6. Tim Brooks, "Columbia Records in the 1890s: Founding the Record Industry," *ARSC Journal* 1978;10(1):5-36
7. The original recording company was the Columbia Phonograph Co. of Washington, D.C. The successor company, and present rights holder, is Sony BMG.
8. This is the average percent for the fifteen five-year periods between 1890 and 1964, not the percent for all recordings issued in that time span (that is, it is not weighted by the larger number of recordings issued in more recent periods). The percent protected does not vary much by period, so skewing the percentage toward more recent periods should not result in a significantly different number.
9. Correspondence from Elizabeth Surles, Starr-Gennett Foundation, to Tim Brooks, 4 August 2005.
10. As with percent protected, this is the average percent reissued for the fifteen time periods examined. Because more recordings were made in later years, and rights holders reissue more from later years, the gross reissue percentage for *all* recordings would presumably be higher – at least for rights holders. The central purpose of this study is to determine reissue practices by time period, however, not to privilege more recent periods to the detriment of earlier ones.
11. Document, it should be noted, avoids reissuing material readily available from rights holders.
12. Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), 15 April 1994, art. 13. http://www.wto.org/english/docs_e/legal_e/27trips_04_e.htm#1
13. Under federal law it does not matter if such dissemination is for profit or not-for-profit, all such dissemination is forbidden unless authorized by the rights holder. State laws are less clear on this subject.
14. "Comments of Recording Artist Groups on Orphan Works," U.S. Copyright Office Orphan Works Inquiry, comment #OW0669, 25 March 2005. www.copyright.gov/orphan/comments/
15. At the beginning of the 1890s technology for duplicating cylinder recordings was quite primitive, and most cylinders sold to exhibitors and to the public were "original" recordings, individually made (or made in small groups) by the artist. These rerecordings are considered production copies, made for the sole purpose of maintaining stock, and are not considered separate reissuable recordings for the purpose of this study. While mechanically made duplicates of cylinders became more common as the 1890s progressed, mass duplication did not become the norm until cylinder moulding was introduced in 1902. Likewise, early press runs of disc records were limited by technology to a few hundred duplicates of each original recording,

after which the artist had to record the selection over again to maintain a stock for sale. A system for the mass duplication of discs was also introduced in 1902. Virtually no original masters of cylinders or discs survive from the 1890s, and even copies sold to the public are rare, so the reissue of alternate versions would be difficult in any event.

16. Correspondence with Sam Brylawski, Library of Congress, 11 October 2004.
17. Figures reflect the number of different titles, not the number of copies of those titles. Telephone conversation with Glenn Sage, 10 October 2004, and correspondence with Bill Klinger, 12 October 2004. Sage provided label counts for the more than 600 1890s cylinders he has transferred.
18. Examples are the experiments at Syracuse University and at the Lawrence Berkeley National Laboratory in California. For more see the *New York Times*, 6 May 2004, and *ARSC Journal* 2000;31(1):161 and 2004;35(2):339.
19. *Talking Machine World*, 15 October 1908, 8, 51. As a result of these statements later histories of recording tended to be somewhat vague about the Columbia/Indestructible relationship. The widely used *From Tin Foil to Stereo* by Read and Welch, 100, states that Columbia said it was "taking over sales" of IRC products; another basic source, Gelatt, *The Fabulous Phonograph*, 165, asserts that Columbia "took over the entire output of (the Indestructible) factory". Columbia marketed the cylinders as its own, calling them "Columbia-Indestructible" cylinders.
20. Sutton and Nauck, *American Record Labels and Companies*, 76-79, 269, 277-281.
21. There may have been one or two anomalies, but the vast majority of Johnson and Victor issues appear to be original recordings.
22. A detailed analysis of the issue by Wheeler was posted on 78-L (online chat room), 18 June 2005. Archived at www.78online.com.
23. A New York record producer is rumored to have claimed ownership, but this could not be confirmed at this writing.
24. Correspondence from Dan Morgenstern to Tim Brooks, 24 September 2004.
25. In ascription, a portion of a sample for which a characteristic is known is used to predict the incidence of that characteristic in a similar portion of the sample for which it is not known. In this case, the sample of small, post-1940 record labels was separated into two groups: those for which protected status is known, and those for which it is not known. The proportion of the first group that is protected was then assumed to be true for (ascribed to) the second group as well.