

CINE-GT 1804: Copyright, Legal Issues, and Policy  
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### Assignment 3 - Copyright Reform

In the last few years, there has been a lot of talk regarding pre-1972 sound recordings. SoundExchange, a “premier digital collective management organization,”<sup>1</sup> sued Sirius XM Radio over “‘systematically underpaid’ royalties from 2007 to 2011”<sup>2</sup> of several pre-1972 recordings. In 2013, Sirius XM received another blow regarding this type of sound recording. A major lawsuit, headed by the band Turtles, accused the radio station of performing “pre-1972 recordings without obtaining licenses from or paying royalties to owners of the recordings.”<sup>3</sup> This lawsuit was finally resolved in 2015, giving the win to the Turtles. These are only a couple of examples of the confusion surrounding the copyright law for pre-1972 sound recordings. In order to better protect and make use of such recordings, I believe pre-1972 sound recordings need to be brought into the federal copyright system.

With the Copyright Act of 1976, recordings fixed after February 15, 1972, became protected by federal law, but the ones done before 1972, were not. If there

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<sup>1</sup> “Mission & Values.” *SoundExchange*. Accessed November 19, 2016.  
<https://www.soundexchange.com/about/our-work/mission-values/>.

<sup>2</sup> Peoples, Glenn. “SoundExchange Sues SiriusXM Radio Over Royalty Calculations.” Text. *Billboard*, August 26, 2013. <http://www.billboard.com/biz/articles/news/5672683/soundexchange-sues-siriusxm-radio-over-royalty-calculations>.

<sup>3</sup> Prins, Nomi. “The Turtles Win Class Action Certification In SiriusXM Copyright Lawsuit, Opening Door For Others.” *Forbes*. Accessed November 19, 2016.  
<http://www.forbes.com/sites/nomiprins/2015/05/28/the-turtles-win-class-action-certification-in-siriusxm-copyright-lawsuit-opening-door-for-others/>.

is no change in the law, they will remain under state law until 2067, “when they would lapse into the public domain, regardless of what the state statute says.”<sup>4</sup>

Placing pre-1972 sound recordings under federal law would mean that all the rights surrounding pos-1972 recordings would apply to the older recordings as well, including:

Section 106(6) (public performance right for digital audio transmissions), section 107 (fair use), section 108 (certain reproduction and distribution by libraries and archives), section 110 (exemption for certain performances and displays), section 111 (statutory license for cable retransmissions of primary transmissions), section 112 (ephemeral recordings by broadcasters and transmitting organizations), section 114 (statutory license for certain transmissions and exemptions for certain other transmissions), section 512 (safe harbor for Internet service providers), Chapter 10 (digital audio recording devices), and Chapter 12 (copyright protection and management systems), as well as any future applicable rights and limitations (e.g., orphan works) that Congress may choose to enact.<sup>5</sup>

Under the current law, the public is the one that suffers the most. Due to the confusion and uncertainty associated with the current law, libraries and archives face many challenges when it comes to preserving and making these works available to researchers and others, who end up missing out on recordings from an era which

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<sup>4</sup> Bailey, Jonathan. “What’s the Deal With Pre-1972 Sound Recordings?” *Plagiarism Today*, August 29, 2013. <https://www.plagiarismtoday.com/2013/08/29/whats-the-deal-with-pre-1972-sound-recordings/>.

<sup>5</sup> “Federal Copyright Protection for Pre-1972 Sound Recordings.” United States Copyright Office, December 2011. <http://www.copyright.gov/docs/sound/pre-72-report.pdf>.

“[comprises] a key component of American cultural and historical heritage.”<sup>6</sup> To make matters worse, many of these recordings “were fixed in fragile, inaccessible analog formats such as wire recordings, cylinders, and instantaneous lacquer discs”<sup>7</sup> and run the risk of being lost forever without proper care and an active preservation effort.

The current law also harms satellite and terrestrial radios. As mentioned earlier, the likes of Sirius XM and Pandora have been sued over playing the recordings on the air by artists and the RIAA, the Recording Industry Association of America, due to the loopholes in the law. For this reason, they would most likely support the federalization of the recordings.

Consequently, this federalization would greatly serve libraries and archives, both of which have been interested in such change for quite some time since it would improve preservation efforts of the pre-1972 sound recordings, but also allow the public to have better access to these items. In addition:

While many librarians and archivists are dissatisfied with the scope of the federal statutory privileges enjoyed by libraries and archives, these exceptions and limitations (sections 107 and 108 in particular) provide more certainty and, in general, more opportunity than state laws to preserve and make available sound recordings from many decades past.

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<sup>6</sup> Bell, Avonne. “Federalization of Pre-1972 Sound Recordings: A Debate about Uncertainty and Public Access.” *Public Knowledge*. Accessed November 20, 2016. <https://www.publicknowledge.org/news-blog/blogs/federalization-pre-1972-sound-recordings-deba>.

<sup>7</sup> Ibid.

In other words, eliminating the uncertainties created by the various state laws and creating a unified system, allow institutions to better deal with the implications of handling sound recordings without having to go through a patchwork of “criminal antipiracy statutes or common law theories such as common law copyright, the doctrine of unfair competition, or misappropriation.”<sup>8</sup>

However, not everybody would be in favor of this reform. The RIAA, the trade group that represents the U.S. recording industry, and the Association of Independent Music (A2IM) would most likely not be in favor of this change, alleging it would cause “overwhelmingly burdensome legal, administrative and related problems, and accompanying costs.”<sup>9</sup> They could also point out that Congress has had two opportunities (one in 1971 and another in 1976) to include pre-1972 sound recordings under federal law and for some reason chose not to do so.

However, there is an even more selfish reason why the likes of RIAA would not like to see this change. For quite a few years, this recording industry group has been suing terrestrial and satellite radios alleging they should pay performance rights fees over pre-1972 sound recordings since such works are not protected by federal law. Good examples of this situation are “the new lawsuits, from ABS entertainment, [which] aims to be a class action lawsuit for a bunch of pre-1972 music, and has

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<sup>8</sup> “Protection for Pre-1972 Sound Recordings Under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis.” Washington College of Law, American University, September 2009. <https://www.loc.gov/programs/static/national-recording-preservation-plan/publications-and-reports/documents/pub146.pdf>.

<sup>9</sup> “Comments of Recording Industry of America (RIAA) and American Association of Independent Music (A2IM).” Accessed November 20, 2016. <http://www.copyright.gov/docs/sound/comments/initial/20110131-RIAA-and-A2IM.pdf>.

targeted terrestrial broadcasters who also stream online, including CBS, iHeartRadio (previously known as Clear Channel) and Cumulus.”<sup>10</sup>

Pre-1972 sound recordings copyright law needs to be federalized. The current patchwork of state laws protecting such recordings is confusing and prevents proper public access and preservation. For this reason, this change would benefit the public, libraries, archives, satellite and terrestrial radios.

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<sup>10</sup> “ENCORE: The Standard in Live Entertainment News.” Accessed November 21, 2016. <http://encore.celebrityaccess.com/index.php?encoreId=534&articleId=52157>.

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