

Who Owns Pre-1972 Sound Recordings?

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Sound recordings first fixed before Feb. 15, 1972 -- a category that includes the collective recorded genius of the Beatles, Charlie Parker, Hank Williams and (almost) Elvis Presley -- are generally not eligible for federal copyright protection but must be protected, if at all, under the disparate laws of the individual states. This article describes some of the issues surrounding ownership, duration and GATT/TRIPS "restoration" as they apply to these sound recordings.

OWNERSHIP

Pre-1972 sound recordings can be protected either by state statute or by common law. Under common law, the featured performer or bandleader was often held to own the exclusive right to reproduce the recorded performance, but that right could be conveyed to the record producer by express or implied agreement. Such agreement could be found simply from the physical transfer of the original master recording. *See, e.g., Ingram v. Roberts*, 57 F.2d 65, 66 (2d Cir. 1932)(L. Hand, J.) (noting that any arguable copyright held by performer Enrico Caruso in master sound recordings "passed with the property in them").

Thus, sound recordings were subject to the same general rule often applied to paintings and literary manuscripts, i.e., that transfer of the original tangible object embodying the work was held to effect a transfer of the reproduction rights as well. *See Pushman v. New York Graphic Soc'y Inc.*, 287 N.Y. 302 (1942)(abrogated by statute 1966); *Ripley v. Findlay Galleries Inc.*, 155 F.2d 955 (7th Cir. 1946)(applying Illinois law).

The various state record-piracy statutes echo the common law rule, equating ownership of the tangible master recording with ownership of the exclusive reproduction right in the recorded performance. Under Section 5/16-7 of the Illinois Code, for example, it is a Class 4 felony to make commercial use of recorded sounds without the consent of the owner, and the owner is defined as "the person who owns the master sound recording on which sound is recorded and from which the [unlawfully] transferred recorded sounds are directly or indirectly derived." The New York and California statutes define "owner" in substantially the same way.

Ownership of state law rights in pre-1972 sound recordings can thus be established much more informally than ownership of a federal copyright, which is independent of the tangible object in which it is embodied (Section 202) and which cannot be transferred without a signed writing (Section 204).

DURATION

The federal Copyright Act, which generally preempts state law protection equivalent to

copyright, carves out an exception for pre-1972 sound recordings. Under 17 U.S.C. § 301 (c), as recently amended by the Sonny Bono Copyright Term Extension Act (P.L. 105-298), the common-law copyright in these recordings, and state statutes offering copyright-like protection, will not be preempted by federal law until Feb. 15, 2067. The potentially indefinite term of state law protection for these works will therefore end in 2067, 95 years after the recordings first became eligible for federal copyright in 1972. In California, current law provides for an end to state statutory protection in 2047, Cal. Civ. Code § 980 (a) (2), although well in advance of that date the legislature will probably extend the term to correspond to the additional 20 years of protection now permitted under the Sonny Bono Act.

'RESTORATION'

Despite the general rule precluding federal copyright protection for pre-1972 sound recordings, the 1994 GATT/TRIPS amendments, codified at Section 104A of the Copyright Act, extend protection to such recordings when they (a) were first published in a country that is a signatory to the Berne Convention, the WIPO Performances and Phonograms Treaty, or is a member of the WTO, and (b) were not subsequently published in the United States during the 30-day period following that initial publication. §104A(f)(6)(C)-(E).

Consequently, these foreign recordings are protected by federal copyright despite their fixation prior to 1972, and their term of protection is the same as it would have been had they been protected under U.S. federal law ab initio, i.e., 95 years from publication.

Virtually all works "restored" under this provision will therefore lapse into the public domain sooner than domestic recordings, which will enjoy state law protection until 2067 regardless of their initial publication date.

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