Pre-1972 Sound Recordings: Why Does the Law Treat Them Differently?

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Sound Recordings vs. Musical Works

Sound Recordings = Works that result from the fixation of a series of musical, spoken or other sounds, regardless of how embodied.

Musical Works = Musical compositions, including the music and lyrics of a song.
Sound Recordings and Copyright

Sound recordings were created in the 19th century.

Protection, if any, was under state law.

Effective in 1972, sound recordings became protectable by federal copyright law, going forward. Pre-1972 recordings remained under state law.
What kind of works are we talking about?

Commercial sound recordings: Frank Sinatra, early jazz, Louis Armstrong, Ella Fitzgerald, Elvis, Motown, Stevie Wonder, Aretha Franklin, Johnny Cash, the Beach Boys

Also: Oral histories, nature recordings, archival recordings of radio shows, etc.
1976 Copyright Act

• Pre-1972 sound recordings remained under state law

• However, a “sunset provision” was added. In 2047 all state law protection for recordings would cease and pre-1972 sound recordings would enter the public domain.

• The end date was later changed to 2067.
Federal Copyright Protection for Sound Recordings

Copyright provides a “bundle of rights”:
- Reproduction
- Right to create “derivative works”
- Distribution
- Public performance (limited for sound recordings)
- Public display (not very relevant)
State Law Protection for Sound Recordings

- Protection varies from state to state
- May be based on unfair competition, misappropriation, common law copyright or state statutes
- Scope of rights may differ
- Exceptions ambiguous
- Term of protection can last until 2067 (depends on state)
Comparison of Term

Musical work created in 1922: In the public domain

Sound recording created in 1922: Protectable by states until 2067
Capitol Records v. Naxos
4 N.Y.3d 540 (N.Y. 2005)

Holding: New York protects pre-1972 sound recordings under common law copyright until 2067.

A sound recording in the public domain in its home country can still be protected under New York law.

In New York, a claim does not require bad faith, commercial benefit, or commercial competition.
Impetus for Federalization

• Achieve greater availability of pre-1972 sound recordings

• Clarify applicable exceptions

• Clarify applicable rights

• Get oldest pre-1972 sound recordings into public domain
Copyright Office Study

The Copyright Office was requested by Congress to study pre-1972 sound recordings and make recommendations re federalization.

The Office invited written comments, held public meetings, met with experts, etc.

Report issued in December 2011 and available at 
http://www.copyright.gov/docs/sound/pre-72-report.pdf
Copyright Office Recommendations

Federal copyright protection should apply to sound recordings fixed before Feb. 15, 1972.

Special provisions are necessary to address
  Copyright ownership
  Copyright registration
  Term of protection
  Etc.
Copyright Office Recommendations re Term of Protection

All pre-1972 recordings protected for a minimum “transition” period.

Sound recordings published 1923-72 can get protection until 2067 if “extended term requirements” are met during the 6-10 year transition period. Otherwise, term is 95 years from first publication.

For pre-1923 recordings, if during 3 year transition period the “extended term requirements” are met, total of 25 years of federal protection.
Copyright Office Recommendations

• “Extended Term Requirements”:

  (1) Make sound recording available to the public at a reasonable price;

  (2) File a notice in the Copyright Office;

  (3) Continue to make the work available throughout the extended term.
Concerns about Federalization

- General concerns about amending federal copyright law
- Possibility of upsetting expectations re ownership
- Potential earlier termination of rights
- Expense of copyright registration
“Hot Issue” under State Law

Record companies have sued Pandora and Sirius for public performance royalties for pre-1972 sound recordings.

This is not a right that state law courts have recognized, but they could do so.
“Hot Issue” under State Law

- Under federal law, there’s a limited public performance right for digital audio transmission of sound recordings.
  - For webcasting, compulsory license
  - For on demand streaming, must negotiate a license.

Record companies would like to have pre-1972 sound recordings brought under the webcasting license.
Thank you.

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