

ALA's take on pre-1972 sound recordings and copyright law

Carrie Russell, director of program on public access to information for OITP

The U.S. Copyright Office conducted a day and a half of meetings in June to hear stakeholder comments on whether pre-1972 sound recordings, currently protected by state law, should be protected by federal copyright law.

This quirk in copyright law is a result of the fact that Congress did not recognize sound recordings as protected works until 1972. All sound recordings created prior to 1972 have been, and continue to be, protected under state law that does not move works into the public domain until 2067.

Music librarians have dealt with the confusing situation of not being able to preserve sound recordings and make them available to the public because state laws do not have express statutory exceptions available in federal law. Instead state law is “judge made law,” created through court rulings that establish precedent in the state. However, many reports studying the effect of the pre-1972 oddity state that no library or archives has violated state common law. Thus even though state law lacks the exceptions available to libraries and archives, no legal action has been taken against libraries and archives that have been preserving pre-1972 sound recordings. This is due to the fact that nearly all state laws focus on violations that are commercial in nature. For the most part, library and archive preservation activities make nonprofit uses of works that are no longer commercially viable.

ALA's position is that the federalization of pre-1972 sound recordings will make the situation worse than it is presently. Federalization causes more problems, namely subjecting libraries to statutory damages—from

\$750 to \$30,000 per infringed work—that are not limited to only commercial uses. In addition, courts can determine to impound and destroy copies making preservation of works a worthless activity.

There are other reasons to be skeptical about federalization of pre-1972 sound recordings. Consider the limitations of Section 108, the exception to copyright law that allows nonprofit libraries and archives to make preservation and replacement copies. Preservation under Section 108 can only occur for nonpublished works and does not allow for the making of digital copies necessary to preserve works over time. Replacement under Section 108 only allows libraries to make a copy of a work after it has been damaged or is deteriorating. That is too late if the goal is to preserve important cultural artifacts. In addition, even when making a digital copy of a work is allowed, the resulting copy cannot be made available outside of the premises of the library. One can argue that, at least under federal law, one has fair use, but the ALA counters that state law already provides for a fair use determination by state courts. To provide clarity, ALA recommends that the Copyright Office make a statement that fair use exists in state law.

The Recording Industry Association of America (RIAA) was well represented at the public meetings in opposition to the federalization of pre-1972 sound recordings but willing to develop a state law solution that would be mutually beneficial. Eric Schwartz of the RIAA made a few comments near the end of the session that were illuminating, including that fair use in state law is “on the table,” that they would consent not to sue libraries and archives that are preserving works, and that “non-profits need to be able to assess risk like the for-profits do all of the time.”

Stakeholder consensus over the protection of pre-1972 recordings seems to be a real possibility, with the Copyright Office urging that we continue the dialogue. *zz*

Jenni Terry is press officer at ALA's Washington Office, e-mail: jterry@alawash.org