Proposed Legislative Fixes for Pre-1972 Sound Recordings

Eric Harbeson

University of Colorado at Boulder, eric.harbeson@colorado.edu

Follow this and additional works at: https://scholar.colorado.edu/amrc_facpapers

Part of the Archival Science Commons, Intellectual Property Law Commons, Public Policy Commons, and the Scholarly Communication Commons

Recommended Citation

Copyright & Fair Use

The purpose of the Copyright & Fair Use column is to keep readers informed on copyright as it affects the preservation and availability of historic recordings. We welcome your questions regarding copyright, and will endeavor to address them in these pages. (We cannot, however, offer private legal advice.) Comments and short articles describing your own experiences with copyright are also welcome. Please send submissions to Tim Brooks, Chair, ARSC Copyright & Fair Use Committee, at tim@timbrooks.net. Opinions given here are those of the contributors. For general information visit the Committee’s webpage at www.arsc-audio.org and the site maintained by the Historical Recording Coalition for Access and Preservation, of which ARSC is a member (www.recordingcopyright.org).

In the last several installments we reported on a number of court cases that have the potential to impact the shape of copyright law in the US. In order to protect the interests of archives and scholars, ARSC’s Copyright and Fair Use Committee weighed in on some of these cases by filing “friend of the court” amicus briefs. In mid-2017 the action suddenly shifted back to Congress in the form of two proposed bills, and if these gain traction ARSC members may need to make themselves heard by our legislators. Committee member Eric Harbeson explains the two bills and their implications.

Proposed Legislative Fixes for Pre-1972 Sound Recordings

By Eric Harbeson

Two bills, introduced in Congress within a week of each other this July, have for the first time meaningfully shifted the discussion of pre-1972 sound recordings away from the courts and on to Capitol Hill. The two bills, H.R. 3301 and H.R. 3350, appear to be a response to the recent trend in the courts in finding that state laws protecting sound recordings do not include an exclusive right of public performance.¹ H.R. 3301 would create a new chapter in Title 17 that applies a right to collect royalties and damages for performances of pre-1972 sound recordings through digital delivery systems, while H.R. 3350, which applies to all sound recordings, would impose registration requirements as a prerequisite to collecting damages in certain cases. Sadly, the bills still fail to correct the problem Congress created by carving pre-1972 sound recordings out of federal copyright. The legislation is in committee as of this writing, but whether or not there

---

¹ For a description of the legal question that these bills seek to address, see "The Fairness Ringling Case" in the Fall 2016 issue of ARSC Journal.
is movement on these specific bills, the proposed changes are illustrative of the pitfalls of trying to integrate early recordings into federal law, as well as of some of the benefits that may come about from well-crafted legislation.

**Background: The report of the Register of Copyrights**

In 2010, Congress directed the United States Copyright Office to study “the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction.” Specifically, Congress was interested in three aspects of federalization: the effects that such a move would have on preservation of, and public access to, the recordings, and on the interests of right holders of the respective recordings. The Office studied the issue for more than a year, including two rounds of soliciting written comments from the public and a two-day public roundtable, as well as several private conversations with various stakeholders. Federalization of the copyright laws for pre-1972 sound recordings has been a major policy priority for ARSC for many years. ARSC was heavily involved both in convincing Congress to demand the study, and in commenting during the study itself.

The result was a 200-page report, released in 2011, in which the Office determined conclusively that federalization of pre-1972 sound recordings was in the public interest. In doing so, the Office specifically cited the benefits to libraries, archives, and other bodies working to preserve historic sound recordings. The report recommended full federalization – with all of the rights and limitations contained within the US copyright law applying. In particular, full federalization would include the availability of statutory damages, the exclusive right to perform the recordings publicly in digital transmissions, and exceptions such as those contained in Sec. 108 (exceptions for libraries and archives), Sec. 107 (fair use), and Sec. 110 (teaching and performance exceptions). In addition, the Office recommended a limited ability for right holders to terminate transfers of copyright, and recommended a limited transitional period during which right holders may extend copyright terms beyond the suggested 95 years, provided they follow certain steps toward making the recording available.

A curious element of the study was the industry objections. During the study, the principal objections to federalization came from the recording industry, whose representatives argued very strongly against federalization. The industry chiefly argued that federalization would cause an intractable problem in the chain of title to the recording. The report largely rejected this concern, stating simply that the owner under the applicable state law prior to federalization should be the owner under federal law. The record companies also objected to the taking of valuable property by moving older, pre-1923 recordings into the public domain.

The recording industry’s focus on chain of title and the loss of recordings to the public domain came largely at the expense of a more difficult problem that federalization brings, namely the difficulty in applying the federal copyright act’s provisions for termination of copyright transfers, which allow authors to reclaim rights to their works after a period of time. The Office nonetheless addressed this issue by recommending that termination of transfers apply only to contracts that are signed on or after the date that federalization comes into force, thus handing the record industry a victory in one of the more potentially contentious issues.
In opposing federalization so vigorously, the record companies ignored many of the benefits that they could see from federalization. Though preserving the existing system of state rights does allow right holders to keep the exclusivity of their rights for a period that is much longer than is available under federal laws, the state rights are much limited in the scope and power of that exclusivity. For example, state rights do not provide for statutory damages (which allow right holders to claim extensive damages without having to show account for actual loss of sales). Most states do not have statutes in place governing civil infringement of copyright, and many have very broad exceptions to their criminal statutes for libraries or non-profit activities. A few states provide for much more limited terms of copyright than does federal law, and ownership definitions in other states are such that record companies might find they don’t even own recordings that they clearly would under federal law.

Most importantly for purposes of this comment, no state explicitly grants owners of pre-1972 recordings any exclusive rights beyond the reproduction and distribution of the recordings. Criminal copyright statutes vary from state to state; most explicitly impose penalties for illegal reproduction and distribution of recordings, but none explicitly offers right holders the exclusive right to license public performances of their sound recordings. Federal copyright does include an exclusive public performance right for copyrightable works, from which owners of pre-1972 sound recordings would benefit under federalization. For sound recordings, the federal public performance right is limited to performances made through digital audio transmissions, chiefly through online streaming services.

In the years since the Report was issued, the recording industry’s position on pre-1972 sound recordings has evolved, apparently in large part because the lack of a public performance exception. The Recording Industry Association of America (RIAA) indicated support for some degree of federalization during the Copyright Office’s 2014 study on Music Licensing, though the industry also took the position that a public performance right was understood as being part of the common law protection of state copyrights. Courts have been exploring this question, thanks to the ongoing litigation surrounding SiriusXM and Pandora Media’s use of recordings by the Turtles.

As I discussed in the previous issue of ARSC Journal, the courts appear to be moving toward a consensus that public performance rights do not exist in the common law of the states. With digital transmission increasingly replacing terrestrial signals as the primary means of broadcasting recordings, Flo & Eddie, and other sound recordings right holders of early recordings, increasingly see owners of post-1972 recordings enjoying a market they cannot themselves participate in. As a result, there is new pressure on Congress, from all sides of the issue, to fix the problem of pre-1972 sound recordings.

The CLASSICS Act

On July 19, 2017, Rep. Darrell Issa (R-CA), along with five cosponsors, introduced H.R. 3301, the “Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society (CLASSICS) Act.” The bill aims specifically to retroactively grant “legacy artists” the same right to collect royalties for public performances of their sound recordings that is enjoyed by their peers whose recordings are covered by federal copyright.

The CLASSICS Act would create a brand-new chapter within US Code Title 17, the home of US Copyright law. The new chapter 14 would apply the penalties specified in
federal law to anyone who publicly performs a pre-1972 sound recording via a digital transmission, “to the same extent as an infringer of copyright.”

The first thing to observe about the language of the bill is that, by placing the new law in a new chapter and creating penalties that are equivalent to copyright infringement, the bill is not actually bringing pre-1972 sound recordings under federal copyright, but rather placing them in a copyright-like system that is otherwise outside the normal copyright law. Under this bill, pre-1972 sound recordings would receive protections that resemble copyright, but would not be subject to the rest of the copyright law – its exceptions, limitations, regulations, etc. – except where the bill specifically indicates otherwise.

The bill does specify certain elements of federal copyright that apply. As already indicated, unauthorized performances under this new law would be subject to some of the same remedies as infringements of copyright. Specifically, the law applies the remedies found in sections 502–505, which provide for injunctions, impoundments, statutory and actual damages, and court costs and attorney’s fees. Applying these sections in their entirety means that the innocent infringer provisions of Sec. 504 (allowing courts to reduce statutory damages to as little as $200) also apply. The damage remission provisions of the same section do not have an effect, since they apply, in the case of libraries and archives, only to reproduction infringements.

In addition to damages, the CLASSICS Act also applies existing limitations contained in Sec. 107 (fair use) and Sec. 108 (library and archives exceptions), an important provision for balancing the public’s interest with the new law. The three-year statute of limitations (Sec. 507) and the safe harbor provisions of Sec. 512 (part of the Digital Millennium Copyright Act) are also applied. The latter means that service providers, such as YouTube, will not face new liability over pre-1972 sound recordings. Digital audio broadcasters would continue to be able to perform pre-1972 sound recordings; however, those broadcasts would now be subject to the compulsory licensing terms that are already provided for post-1972 recordings in Sec. 114.

The bill thus applies pre-1972 sound recordings to federal law in some very important ways, and makes some attempt to balance the demands of right holders with the needs of the public. But with all the similarities to federal law, the bill would exclude pre-1972 recordings from much of the law. By failing to fully incorporate pre-1972 recordings into federal copyright, the bill’s authors would not only fail to fix the problem, they would further enshrine the law’s strange carve-out for early recordings, further cementing the problem. To see why, it is worth examining what is not included in the law.

For example, H.R. 3301’s application of the copyright law’s fair use and library exceptions, as helpful as they may be, do not mean that those provisions apply to all uses of pre-1972 recordings. State laws would still govern in all cases except for those public performances that are covered by the new law. Under the bill, any organization that wishes to make uses of recordings that involve reproductions, or derivative works, still must wade through the uncomfortable morass of state laws. The applicability of library exceptions will depend on the applicable state’s laws (since the sec. 108 exceptions in federal law generally do not apply to public performance, their inclusion in the bill’s limitations is largely meaningless), and whether fair use applies in these cases will depend upon the common law of the state. Furthermore, the multi-state nature of any web-based project forces many preservation initiatives, including would-be grant seekers, into the extremely murky legal territory of determining which state’s jurisdiction
would apply. The bill’s failure to fully preempt state laws by applying exceptions and limitations across the board severely hinders the public’s interest.

Other important elements of copyright not addressed by H.R. 3301 include application of uniform copyright term limits (and leaving researchers with essentially no public domain for recordings); uniform definitions of the scope of exclusive rights in sound recordings, such as those contained in Sec. 114(a) and (b); any application of the TEACH Act provisions of Sec. 110(1) and (2); or any of the registration requirements contained in chapter 4. These and other sections of the law provide important clarity for and balance the needs of the public, especially those institutions whose missions specifically speak to the preservation and access priorities that Congress identified when it initially sought to study the problem.

Finally, the bill makes no attempt to resolve the competing understandings of sound recordings ownership between the states. To the contrary, the bill enshrines the problem in federal law, by defining “rights owner” as “the person who has exclusive right to reproduce a sound recording under the law of any State.” This follows the recommendation of the Copyright Office’s report, that the state ownership rules be followed for all pre-1972 sound recordings. Unfortunately, that recommendation fails to consider the fact that states define how ownership applies differently. The owner of the “sounds” in one state may not be the person who owns the master tape in another state; it is possible that as many as three different parties could exert full ownership over a given recording, depending on which state is being considered.14 The ownership definition in the bill therefore ensures that the copyright law will apply to different states differently, defeating one of the great benefits of having a single, uniform copyright law.

Is H.R. 3301 a good first step? It might be, perhaps, if it were just the first step. The bill does no harm, and even produces much good, as far as it goes. Unfortunately, the pressure on Congress to fix pre-1972 sound recordings copyright is in large part due to the intense pressure from heavily moneyed interests to correct the parity problems that are addressed by the bill. Cherry picking the record companies’ needs removes much of that pressure, leaving little hope of fixing the bill’s many sins of omission in the future.

**Transparency in Music Licensing?**

The other important bill in Congress currently bears on all musical works and sound recordings, and though it is limited in its application carries important implications for all users of sound recordings. James Sensenbrenner (R-WI), along with three co-sponsors,15 introduced H.R. 3350, the Transparency in Music Licensing and Ownership Act, just a day after the introduction of the CLASSICS Act. Even in a scenario that favored copyright legislation more than this one does, H.R. 3350 would have an unlikely future at best. However, as with the CLASSICS Act, it can be instructive to look at its components, looking at them as trial balloons, as Congress tiptoes into a future where it attempts meaningful copyright legislation.

H.R. 3350 (its authors failed to supply a catchy acronym) would direct the Copyright Office to create and maintain a database of information concerning both sound recordings and non-dramatic musical works, collecting information that identifies the titles and helps would be licensees, such as registration information, right holders, recording artists, ISMN or ISRC, etc. Under the bill, completion of the required informa-
tion is a prerequisite to any legal actions for monetary damages for any sound recording or musical work, if the action is against commercial entities such as stores, food service establishments, broadcast entities, or anyone subject to one of the compulsory licenses in Sec. 112, 114, or 115. In addition to requiring compliance prior to a demand for damages, the bill would provide immunization for parties that acted lawfully in reliance on information in the database. Because the bill was introduced simultaneously to the CLASSICS Act, it is unclear how the two would interact, and whether the latter would be subject to this bill.

Though this bill’s limitations on liability may not include many of the projects that might be taken up by the ARSC community, the fact that the bill would impose a significant financial incentive on right holders to take steps to make important work metadata easily available to the public would be no small side benefit. Since the database would be easily available to anyone (including in harvestable XML formats!), the bill would go a long way toward addressing orphan works as they exist in these two formats.

The bill is not uncontroversial, and much of the controversy surrounds the creation of yet one more database, and the challenges that will surround upkeep and population of the database, and the burdens it will place on right holders. These fears are supported by well-documented challenges the Office has faced in recent years maintaining even its existing databases.

Still, for projects involving sound recordings, the bill would be helpful. The database’s primary function of identifying parties with stakes in a work makes strides toward correcting the ownership identification issues that are so problematic with respect to sound recordings, and especially so pre-1972. The bill is aimed at helping small business owners, but along the way it could be very beneficial to sound recordings researchers and guardians.

**Conclusion**

Neither of these bills is likely to advance very quickly in the current Congress. As of this writing, Congress is facing remarkable pressure to address urgent matters including escalation on the Korean Peninsula, the ending of DACA, an impending budget crisis, and natural disasters, not to mention presidential investigations. Moreover, the bills are unlikely to reach the president’s desk (if they ever do at all) in their original form.

However, each bill gives some insight into how copyright reform might present itself, and both the dangers of new legislation and some of the exciting prospects, and in the process will hopefully give the sound recordings community clues as to what to watch for. The Transparency in Music Licensing and Ownership Act draws on some of the insight from the Copyright Office’s music licensing study and introduces an optimistic and helpful, if logistically difficult, bit of targeted reform. The CLASSICS Act is less ambitious, and so perhaps more feasible to implement, but at the same time its lack of comprehensiveness makes it less workable from a policy perspective.

As Congress looks toward a long-term future of comprehensive copyright reform, and a possibly nearer-term future for these two bills, they will have to balance not only the many different interests, but also the conflicting pressure between acting quickly and acting thoughtfully. As we watch Congress engage in this pressure, ARSC and its members should be careful to make sure that the good doesn’t become the enemy of the perfect.
Endnotes

1. As of this writing, the New York and Florida courts have definitively ruled that their common law copyright does not include a public performance right. Courts are currently reviewing the question in California. These court cases were discussed in the previous issue of the ARSC Journal.


4. See comments of the RIAA, Sony, et al. http://www.copyright.gov/docs/sound. The Library Copyright Alliance also advocated against federalization, on grounds that new legislation would inevitably harm libraries, and that libraries already had sufficient common law basis for meeting their needs.

5. See, e.g., Colorado's term limit of 56 years, C.R.S. 18-4-601.5 (2010).


11. Congress has done this before: perhaps most notably for readers of ARSC Journal, chapter 11 of Title 17 also creates a parallel system outside of copyright for unauthorized recordings of public performances. 17 USC 1101. Semi-conductor chips (Chapter 9) and useful designs (Chapter 13) are also receive protections that are contained within Title 17, but which are self-contained and inapplicable to the rest of the copyright laws.

12. 17 U.S.C. 504(c)(2)

13. The Supreme Court has suggested that fair use is an essential in order to reconcile copyright with the First Amendment’s protections of free speech, and if that were the case, the doctrine would be necessarily incorporated into state laws. Golan v. Holder. 132 S. Ct. 873, 890 (2012). However, it is very uncertain how far this dictum might apply were it challenged.


15. Steve Chabot (R-OH), Suzan K. DelBene (D-WA), and Blake Farenthold (R-TX). As of this writing, no further co-sponsors have signed on. https://www.congress.gov/bill/115th-congress/house-bill/3350/cosponsors