

# COPYRIGHT and the MUSIC MODERNIZATION ACT

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Congress recently enacted one of its most significant changes to the Copyright Act in decades. The Orrin G. Hatch–Bob Goodlatte Music Modernization Act (MMA),<sup>1</sup> which was enacted October 11, 2018, aims to rework the complicated music licensing regime into something that is more compatible with modern music distribution models. The law presents a number of opportunities for archivists seeking to make use of sound recordings in ways that previously had been unavailable or legally ambiguous.

The new law is in three parts: Title I of the act is devoted to the statutory music licensing regime found mostly in sections 114 and 115 of the Copyright Act, and Title III concerns royalties for producers of sound recordings. The most important change for archivists is contained in Title II—the “Classics Protection and Access Act”—which creates a new federal law governing recordings fixed prior to February 15, 1972.

Previously, use of “pre-1972 recordings” was governed entirely by state laws, and those varied widely. As a result, none of the principles that archivists apply when making copyright analyses—including the term of copyright, available exceptions or limitations, potential damages, and even the nature of exclusive rights—could be applied to pre-1972 recordings. The new law, while still leaving in place some of the problematic aspects of the state laws, substantially improves the situation by bringing certain key elements of the recordings copyright under a more uniform federal law.

## The Public Domain

One important way in which the new law benefits archivists is in its creation—for the first time—of a substantial public domain for sound recordings. Though post-1972 recordings have always had limited copyright terms, protection for pre-1972 recordings was perpetual, protecting even the earliest nineteenth-century cylinder recordings and possibly even piano rolls. The MMA creates a phased-entry public domain for recordings, granting all recordings at least 95 years from publication, with later recordings getting additional protection. The result is the following schedule of protection<sup>2</sup>:

Date of publication	Term of federal protection
Pre-1923:	Through December 31, 2021
1923–46:	100 years from publication
1947–56:	110 years from publication
1957–72:	Through February 15, 2067

Additionally, all federal protection for pre-1972 sound recordings ends after February 15, 2067. Because the expiration of protection is based on publication date, rather than fixation date, unpublished recordings appear to be unaffected by this schedule, and so this latter provision ensures that all recordings eventually enter the public domain.

## Existing Limitations and Exceptions

The primary motivation for Title II of the MMA was the creation of a new royalty right for digital public performances of pre-1972 sound recordings, following the failure of recent litigation to secure those rights at the state level. Though the new right is housed within the Copyright Act, it is not technically a copyright and so is outside the copyright system, including the normal federal suite of limitations and exceptions, except as specifically provided in the text of the new law. The fact that MMA includes provisions for limitations and exceptions is therefore of critical importance for archivists.

Prior to the passage of the MMA, the state of limitations and exceptions for pre-1972 recordings was impossibly vague and inconsistent. Among the various state laws, some provide exceptions for library uses and some provide exceptions for nonprofit use. A small number of states provide neither, and none of the states’ exceptions is consistent across state lines.<sup>3</sup> The result is that making any Internet-based or other interstate use of pre-1972 recordings required knowledge of and compliance with multiple state laws. In addition, though it’s widely presumed that the US Constitution demands some form of fair right use as a matter of First Amendment law,<sup>4</sup> the extent to which fair use is applied at the state level is unknown.

The new law makes useful changes to this. The MMA carves out exceptions to the new royalty right for four exceptions most important to archivists:

1. fair use (Sec. 107)
2. library and archives exceptions (Sec. 108)
3. the first sale doctrine (Sec. 109)
4. limitations on public performance, including classroom teaching (Sec. 110)

Importantly, these exceptions apply to *all* uses of pre-1972 recordings. When initially introduced, the royalty right and its exceptions applied only to digital public performances of recordings. Near the end of the legislative process, the bill was amended so that the exceptions applied also to reproduction, distribution, etc., creating a much stronger bill and one that is more useful to archivists. Under the new law, archivists may take advantage of any of these four exceptions when making use of pre-1972 sound recordings.<sup>5</sup>

It is important to note that other provisions in the law that archivists sometimes employ—notably the registration requirement in sec. 412, or the safe harbor for online material in sec. 512—are not carved out in the new law and should be assumed not to apply to pre-1972 sound recordings.

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## The Greatest Theft in the Archives

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the last person to rob the special collections where I was on staff. In 1995, Gilbert Bland<sup>10</sup> stole from a number of libraries and archives including the Southern Historical Collection at the University of North Carolina where I was employed at the time.

## So What Happened to Blumberg?

It was initially estimated that Blumberg had more than \$20 million in stolen books and manuscripts at his Iowa house. The penalty for his crime? The prosecution recommended ten years in prison, but the judge sentenced him in 1991 to seventy-one months with a \$200,000 fine.<sup>11</sup> While the sentence seemed light to those of us who were robbed, for the judicial system it was a simple interstate possession of stolen goods with no weapons or personal injury involved.

There was concern by many that Blumberg would try to rebuild his collection. Since his release from prison in December 1995, he has been arrested for stealing antiques and violating probation, but no record of additional library theft has come to light.

Even so, I remain vigilant. ■

## Notes

- <sup>1</sup> Cocks, Fraser, "Witness for the Prosecution: The Trial of Stephen Cary Blumberg," *SAA Newsletter* (July 1991): 16–7, 22–3.
- <sup>2</sup> Weiss, Philip, "The Book Thief," *Harper's Magazine* (January 1994): 37–56.
- <sup>3</sup> Ziegler, Edward, "Case of the Rare-Book Phantom," *Reader's Digest* (November 1991): 92–96.
- <sup>4</sup> Basbanes, Nicholas A., *A Gentle Madness* (New York: Henry Holt and Company, 1995): 465–519.
- <sup>5</sup> Basbanes, 476.
- <sup>6</sup> Interview with John Sharpe, May 21, 1991.
- <sup>7</sup> The Society of American Archivists honored Steven Huntsberry with a certificate of appreciation at its 1990 Annual Meeting.
- <sup>8</sup> Ziegler, 94–95.
- <sup>9</sup> Basbanes, 481. (Special Agent Aiken gave the same quote to Basbanes for his book when describing Blumberg's determination and ability.)
- <sup>10</sup> Harvey, Miles, *The Island of Lost Maps* (New York: Random House, 2000).
- <sup>11</sup> Weiss, 54.

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### New Provisions

Thanks to skillful lobbying on the part of several public interest groups, the new law contains two important exceptions to the protection of pre-1972 recordings that exceed the exceptions already contained in the Copyright Act for other works.

The first new benefit to archivists concerns the existing Sec. 108(h). This exception allows librarians and archivists broad freedom to reproduce, distribute, perform, and display *published* works that are in their last 20 years of copyright and that currently are not being commercially exploited, for purposes of preservation, scholarship, or research. The MMA extends that exception so that all pre-1972 recordings are considered to be in the last 20 years of their copyright term. Archivists may therefore consider any published pre-1972 sound recording that satisfies the conditions specified in Sec. 108(h) to be covered by this exception.<sup>6</sup> It's unclear whether this provision applies to unpublished pre-1972 recordings, but the plain language appears to suggest that only published recordings apply.

A second new benefit is a provision for noncommercial uses of pre-1972 recordings that are not being commercially exploited. The law states that such uses are non-infringing provided that the user satisfies three conditions:

1. that after a good faith, reasonable search, the user has not found the recording available for sale or rental or in the Copyright Office records;
2. that the person provide notice to the Copyright Office of their intended use; and
3. that within 90 days of filing notice, the owner of the royalty right has not objected to the use.

This is a remarkably broad exception in that it applies to any and all noncommercial uses and to any person.<sup>7</sup> From an archivist's perspective, the use of this provision may depend to some extent on the definition of "good faith, reasonable search." However, the noncommercial exception applies to unpublished recordings where Sec. 108(h) may not; in any case, it may prove useful to scholars and other patrons for whom the Sec. 108 exception is not available.

## Imperfect Good News

The Music Modernization Act is not perfect, and it's a far cry from the full federalization for which SAA and others have been advocating for many years. The MMA preserves the state laws protecting pre-1972 recordings to the extent that they are not preempted by this law, leaving in place several inconsistencies across the states that need resolution.

In addition, the law directs the copyright office to study, among other things, what constitutes a "good faith, reasonable search," and that study is in progress. As of this writing, the Copyright Office is proposing a rule that would require a five-step search, which may be sufficiently cumbersome that it's preferable to apply Sec. 108(h).

That said, new copyright legislation is rarely good news for archivists. The general trend in Congress over the past several decades has been a consistent push toward longer terms and stricter, narrower, and more difficult to follow exceptions.

Taken in this context, the MMA is a significant victory for libraries and archives that are concerned with sound recordings. The Music Modernization Act reduces the term of protection for a class of works for the first time since the enactment of the 1976 Copyright Act; it creates two new and easy-to-follow exceptions; and it formally applies, if not the full suite, at least the most important copyright exceptions, simplifying the law governing works whose protection regime was previously the most complicated of all creative works. ■

## Notes

- <sup>1</sup> *Orrin G. Hatch – Bob Goodlatte Music Modernization Act*, H.R. 1551, Pub. L. 115-264 (2018).
- <sup>2</sup> 17 USC 1401(a)(2)
- <sup>3</sup> Survey of State Criminal Laws, [https://www.copyright.gov/docs/sound/20111212\\_survey\\_state\\_criminal\\_laws\\_ARL\\_CO\\_v2.pdf](https://www.copyright.gov/docs/sound/20111212_survey_state_criminal_laws_ARL_CO_v2.pdf).
- <sup>4</sup> See for example *Golan vs. Holder* 565 U.S. 302, 328 (2012). "We then described the 'traditional contours' of copyright protection, i.e., the 'idea / expression dichotomy' and the 'fair use' defense. Both are recognized in our jurisprudence as 'built-in first amendment accommodations.'"
- <sup>5</sup> 17 USC 1401(f)(A)
- <sup>6</sup> 17 USC 1401(f)(B)
- <sup>7</sup> 17 USC 1401(c)