

Federal Law Protection on pre-1972 Recorded Music Masters in the United States?

I have read that the US Copyright Office is asking for opinions on the subject of Federal Law protection for recorded music masters. While this may just result in copyright owners lobbying trying to just a way for further copyright extensions, I thought to express some ideas about it.

I am a copyright owner myself, both of musical compositions and recorded masters.

First of all, I will never fully understand why in the American system it is allowed that for a banal mistake (forgetting to write “©” and the correct year in the credits, or similar issues) a 1968 or even 1998 can fall entirely out of copyright protection, while according to the results of the *Capitol v. Naxos* case, some pre-1972 recorded masters that originated outside USA, despite entirely public domain in the country of origin, may have a “common law” protection in the US and hence be protected eternally. Technically, under this presumed “common law” protection, even Edison Records’s early audio recordings (the oldest dating back to 1888) would still be protected (no other work made in 1888 is protected in the US: actually anything pre-1923 already fell into the Public Domain). Edison, luckily, falls out of this because the masters were acquired by a state agency: being the property of the US Government, they entered the Public Domain, just like the NASA picture of an astronaut or a photo taken by a soldier while in service.

Again, many movies have fallen into the Public Domain because of not being properly registered with the Copyright Office and issued before 1976. Since this applies to extremely popular works such as horror movie “Night of the Living Dead” and adult movie “Deep Throat”, I don't see what would be so scandalous if it also applied to a Beatles album from the 1960s.

I have just read that the Copyright Office is accepting proposals about the introduction of Federal Law for pre-1972 music recordings. In the US law there has been a gap for a long time: since Federal Law protection never existed until 1972 for recorded music masters, you can easily see how many musical milestones (which are also the basis of some music majors’ businesses) would have gone entirely unprotected in America - namely the whole discography of the Beatles and a large chunk of discographies by the Rolling Stones, to make the most evident examples.

The infamous “Sonny Bono Copyright Extension” law of 1998 was basically drawn more by the movie industry than by other sectors of copyright owners.

Mostly, Disney needed protection on Mickey Mouse (it is still debated anyway what was the first published output incorporating Mickey Mouse; and since some of those were released without Copyright notice, Mickey Mouse itself – as a character – might still already be in the public domain, whatever Sonny Bono and friends did to the US legal system to save Disney properties).

In 2006, United Kingdom decided to confirm 50 years as a term for sound recordings to enter public domain: early Beatles recordings will start expiring January 1, 2012. This seems fair.

There are three points in the American copyright law that could be attacked relatively easily in my opinion:

1) it is unfair for someone who produced a recording prior to 1972 to enjoy a longer term of protection just because this "exception" set up the 2067 date without regard to the year in which the recording was made. This could mean that something recorded in 1930 would last 137 years, more than 40 years longer than something recorded in 2000 (95 years of protection).

2) **the exception applies to foreign recordings too:** an Italian recording made in 1955 is now in the public domain in Italy or UK and I think all of Europe. The same identical recording could be claimed as "copyrighted" in the US since in the American territories the 95 year term applies and in this case the year 2067 term (!) since we are talking of a pre-1972 recording.

3) **how do you consider a remastered 50+ years old recording that originated in the US and was remastered in Europe after the 50 years term expired,** and then rereleased on CD and even exported to America?

- If you just consider the European term, the master is public domain and anyone can reprint or remaster that without licensing the sound recording (but probably licensing the compositions and paying for mechanical rights)

- If you consider the Sonny Bono exception, shouldn't this be considered as a foreign product that of course has to be "protected" for 95 years, but it happens that the new copyright is controlled by the European company who produced the remaster?

The 2005 *Capitol v. Naxos* case has enough ground for a Supreme Court case. First of all, can "common law" be applied to Intellectual Property at all?

A song, a book, a poem, and so on are not like a material good. You can pass on a house to your heirs through the centuries. It is physical. In Europe, some ancient buildings, castles, palaces and so on have been in the hands of the same families for several centuries.

But we are not paying royalties to the (how many?) descendants of Dante Alighieri for his "Inferno". Nor anyone is paying royalties to the eventual descendants of those who wrote sacred texts included in the Bible. If you apply that "common law" principle to Intellectual Property, be prepared to pay some person in Israel next time you print a Bible.

Second, let's admit "common law" covers Capitol's rights on recordings that are in the Public Domain elsewhere. Naxos is not based in US. In another country, in which the original masters are now in the Public Domain, Naxos created their own remaster. A remaster requires work: recovering a copy of the original (from tapes, 78 RPM vinyls or other media), cleaning, restoration, and so on. Remasters are generally new copyrights. Record labels and movie producers often remaster and edit their materials; sometimes to create a better, cleaner version of some artist's discography; some other time, for simple copyright purposes. Otherwise, certain operations conducted by Disney (adding new dubbing and soundtrack to some movies, even drawing new material into a classic movie like Pinocchio) would really have no "artistic" justification.

But if a remaster is copyrighted – even if just outside the USA – if the US don't enforce these new copyrights coming from abroad, aren't they in open violation of GATT/WTO principles and particularly the TRIPS (Trade-Related Aspects of Intellectual Property Rights)

Agreement of 1994?

In other words, **by saving the (weak) rights of the owners of old master recordings by means of "Common Law" of dubious application, the USA – after *Capitol v. Naxos* – is openly not respecting foreign copyrights on remasters.**

Third, **Capitol never owned those recordings in the first place, but just a license** to release them in the US; they originated in UK on the Gramophone label which is part of EMI UK. **If the original copyright doesn't exist anymore, how can I still be the licensee for it?**

I don't know in which direction the Copyright Office might be working now, and I imagine many other suggestions and proposals will be coming in at the moment. I can imagine a lot of RIAA action and pressure also and in very creative ways. I remember Jack Valenti's crazy idea from some years ago about copyright lasting "Forever minus one day" (since "forever" was not usable in the American law wording). I expect such type of display of creativity in this case too.

The request to extend terms to send opinions to the Copyright Office, also means their lawyers are at work (and they are late as usual).

But whatever the intention is, I think the US law should be reworked to get rid of elements of confusion such as the outcome of *Capitol v. Naxos*. If Federal Law has to be brought in for recorded masters made before 1972, this has to result in shorter terms compared to those in use now not in further extensions that are negative both for creativity and for the business. In Europe, the very same label group that brought *Capitol v. Naxos* (EMI) through the subsidiary Disky released Elvis Presley and other 50+ years old recorded masters they never owned, because master recording copyrights have expired in Europe. They also sell these in the USA as imports in places like Amazon.

Basically, if Sonny Bono's purpose ended being "you cannot do to Disney what Disney did to Collodi, Andersen and the Brothers Grimm", the message of *Capitol v. Naxos* is "don't do to EMI in USA what EMI is already doing to everyone else in Europe".

In other words, **with regard to Recorded Music Masters, Federal Law pre-emption will only be a good thing if:**

- **pre-1972 works not registered with the Copyright Office or published before 1989 but released without a (P) notice fall automatically in the public domain as recorded masters. After all, none of them could be copyrighted in the old system and certainly they could not be renewed on time before 1972, too.**
- **Common Law is kept out of scope.**
- **GATT/TRIPS principles are enforced and foreign Copyright on remasters too, hence removing the injustice perpetrated through *Capitol v. Naxos*.**

The Founding Fathers never wanted an eternal copyright. In a world in which the request for a new vision in this area, more **rights for the consumers** and also more creative freedom for the artists (in regards to incorporating/rearranging elements of old works, orphan works and similar) are so high, a further extension of copyrights to a Federal level, without serious limitations, would basically result in just protecting the interests of a dying industry: the major beneficiary of such an extension - just like the major beneficiary of *Capitol v. Naxos* - would be the EMI group, through their control on Beatles' masters. And - without any changes in their property and financial assets - EMI is a company that will be probably bankrupt within the first months of the current year.

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