

Commentary: Our Recorded Heritage Deserves to Be Heard

[Editor's note: This commentary was originally published in Billboard, May 14, 2005 (and reproduced here with the permission of the author), accompanying an article by Bill Holland on "orphan works." The study will be published later in the year by the Council on Library and Information Resources.]

By Tim Brooks



Record companies have long treated catalog product—whether created by them or inherited from companies they acquire—as an asset they could exploit or ignore at will. Most have ignored it, reissuing a tiny percentage and locking the rest away.

What has also been ignored is the social harm this can do. In researching a book about the earliest African-American recording artists, I was able to identify about 400 commercial recordings black artists made before 1920 that a rights holder still owns today. Of those 400, rights owners have reissued exactly two (one-half of one percent) during the entire CD era. This is a scandalous suppression of our history in the name of "rights."

Another study indicates that of all the historically important recordings issued in the United States before 1965 that are still owned by someone, only 14% have been made available or licensed by the rights holders—and most of those date from the 1950s and early 1960s.

Record companies may be forced to change this "lock it up" approach. The failure of rights owners to make older recordings available has led to a vibrant underground reissue business, spurred by the easy manufacture of CDs. More important, it has led to a growing roster of foreign labels—not subject to our laws—that are reissuing older American material and selling it in the United States. Thanks to the Internet, this field is exploding. While U.S. rights holders have reissued only 14% of important pre-1965 recordings, nonlicensed and foreign companies have made available nearly twice that number—without paying the "owners." Foreign companies are literally selling our culture back to us. Jobs and profits are being shipped overseas.

Control is illusory. For example, even if the Euro-

pean Union lengthens its copyright term for recordings beyond the current 50 years (which is uncertain), it will not make it retroactive. Pre-1955 material is lost there. The way I see it, one of three things will happen.

1. The status quo continues. U.S. companies continue to refuse to reissue older material, or allow others do so on reasonable terms (reasonable, that is, to the users). Exploitation of this material moves overseas. Small operators and websites in Europe and Canada are very happy. U.S. companies get nothing, except perhaps grief in Washington about the unfair situation they have created in which Americans have to buy from foreign countries in order to access their own culture.

2. Under pressure from archivists and others, the United States enacts a "use it or lose it" law that strips companies of older material that they won't make available. Don't think it can't happen.

3. The United States enacts compulsory licensing for older (and perhaps also for more recent) recordings that are out-of-print. Anyone would be able to reissue them on payment of a set fee.

The last option could be surprisingly beneficial to U.S. rights holders. They would not have to spend millions trying to push through more and more legal restrictions in every corner of the world. (This only makes the lawyers rich and does little to stem the digital tide.) They would not incur the considerable costs of marketing low-volume back catalog that will never pay for them, even with Internet distribution; but they would get a steady stream of revenue from small operators in the U.S., including institutions that have the passion and small scale necessary to make such distribution work. Plus, a lot of Americans would learn to appreciate our recorded heritage, which can only be good for the business.

Record companies should embrace a system that produces maximum profits for minimum investment on assets they don't even use.

For once, shouldn't the U.S. recording industry get ahead of change, rather than letting the lawyers and lobbyists lead it into another Little Big Horn?

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