Comments for a Hearing on the Current State of Recorded Sound Preservation

The following testimony was given to the National Recording Preservation Board in New York, Dec. 19, 2006, by Tim Brooks on behalf of the Association for Recorded Sound Collections.

My name is Tim Brooks, and I am the author of a number of studies regarding historic recordings, including *Lost Sounds: Blacks and the Birth of the Recording Industry* and *Survey of Reissues of U.S. Recordings*, which was commissioned by this board. I also chair the Copyright and Fair Use Committee of the Association for Recorded Sound Collections, and the following views are presented on behalf of ARSC.

ARSC is a nonprofit organization founded in 1966 to promote the preservation and study of historic recordings in all fields of music and speech. We currently have about one thousand members, including institutions, archivists, scholars, and private collectors. In 2005 the ARSC Board adopted a statement on copyright that recognizes and wholeheartedly endorses its valid purposes in rewarding creators of recordings with a temporary exclusive right to exploitation, in order to encourage them to invest and create.

However, the Association believes that it would be in the public interest to make a number of changes to current copyright law in order to promote, and in some cases simply allow, preservation and access to older recordings. The prohibitions of current law make criminals out of many of us, especially scholars and educators. It is difficult to understand why the preservation and study of our culture should be criminalized as a byproduct of broadly written laws which clearly had other goals in mind.

It can also be argued that certain provisions in the law have fostered disrespect for copyright law itself. As documented in the aforementioned study, far more historic American recordings are being made available by non–rights holders, both domestic and foreign, than by the rights holders themselves. The so-called "right" to withhold and even destroy historic sound artifacts is simply, and widely, considered unfair.

The first point I would like to make regarding preservation is that, now more than ever before, preservation and access are inextricably linked. For sound, the best form of preservation is duplication—many high-quality copies shared by many institutions. We will never truly "lose" the Declaration of Independence or "The Great Train Robbery" because many high-quality copies exist. Can you imagine the situation if only three copies of each of these treasures were allowed to exist, locked in a single vault, due to copyright restrictions? Many historic recordings were not manufactured in large quantities, and even among those that were, the majority of surviving copies have been significantly degraded by use. "Mint" copies are always rare.

Lack of legal access also discourages the donation of rare recordings to institutions that could care for them over the long term. I personally know of major private collections of unique material whose owners would not consider placing them in institutions because, as they put it, the records "will never be seen again." Institutions are aching to demonstrate that they will not only preserve but make available these rarities. Current copyright law makes this nearly impossible.

In order to address these issues, while preserving the legitimate needs of creators, ARSC would like to propose five specific modifications to U.S. copyright law.

First, and absolutely essential, is to repeal section 301(c) of Title 17, U.S. Code. This is the section that exempts pre-1972 sound recordings from federal coverage and keeps them under state law at least until the year 2067. As long as this provision remains in place, any changes made in federal law will have no effect on the vast body of historic recordings made prior to 1972. Why were recordings treated differently from all other creative works in the 1976 copyright act? I will not go into detail about the reasoning then or the damage done over the past 30 years by this unique exemption, but suffice it to say that it has not strengthened the anti-piracy regime as anticipated and has certainly not resulted in large numbers of historic recordings being reissued by rights holders.

To the contrary, it has created massive confusion. Instead of a uniform and understandable national code, we are faced with a welter of state laws, many unclear, all varying from each other, most based on ad-hoc common law rather than legislation, and none—as far as I can tell—directly addressing the needs of recordings in the internet age. The New York State Court of Appeals, in the recent Naxos case, has dragged recording copyright in that state back to the 17th century, before the enactment of the first copyright act, making it absolute, perpetual, and with no provision for fair use or the public domain. Because the internet crosses state lines, this absolutist stance is now suppressing reissue activity across the country; one copy sold, streamed, or downloaded in New York State can result in prosecution no matter where the originator is located.

If there is one point I could make to you today it is that we must have a single, understandable and rational national code for preservation and access. Recordings are almost always consumed nationally, not locally. The law should reflect this, as it does for other cultural products.

Our second recommendation is to repeal the 1998 Copyright Term Extension Act, at least for recordings. A 95-year term for recordings would mean, currently, that only recordings made prior to 1911 would be in the public domain. But cylinder recordings continued to be manufactured until 1929, and 78s were the standard format until the early 1950s. Unlike the case with print materials, access to recordings is very much restricted by obsolete technologies. Moreover, though I am sure they would like to keep everything forever, there would be very little economic impact on current rights holders. As my study showed, less than ten percent of copyrighted historic recordings made before 1930 are reissued by the rights holders. Note that this does not refer to all recordings, only to those considered by scholars and collectors to be of greatest interest. For recordings made earlier than 1920, the percent reissued drops to almost zero. Ethnic and blues recordings are particularly poorly served. In the research for my book on recordings by African-Americans prior to 1920 I found that only one-half of one percent of those that were still under copyright had been reissued by the rights holders.

As I mentioned earlier, many early recordings were pressed in small quantities, especially those in the jazz and blues fields. The masters are gone and few copies remain. Liberalization of the copyright term would greatly encourage both preservation and access to these at-risk recordings.

Our third recommendation is to legalize the use of orphan recordings, those for which no owner can be located. Steps are being taken in this direction, but of course they will not apply to pre-1972 recordings as long as section 301(c) stands in the way.

Our fourth recommendation is for some type of compulsory license for abandoned recordings—those whose owner is known but who declines to make them available over a long period of time. It is entirely reasonable that copyright owners may not wish to go to the expense of reissuing very early material that is not, for them, economically viable. However, it is not reasonable

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that they should be able to prevent others from doing so. History should not be buried by indifference or, even worse, by intentional suppression. Although we have different goals in mind, ARSC agrees with the American Federation of Musicians (AFM) and the American Federation of Television and Radio Artists (AFTRA) that there should be a compulsory license to allow public access to recordings that may still be under copyright but are not available from the rights holder, with reasonable compensation to the rights holder.

Fifth and finally, the provisions for preservation activities by nonprofit institutions need to be changed to reflect current technology. This is a highly technical area and one in which I do not profess to be an expert. Many in ARSC are, however, and ARSC would be happy to participate in a study of this area. The most frequently cited concerns among our members include provisions that digital copies may not be made until the originals have already begun to deteriorate; that not more than three copies may be made, which is impractical and irrational in the digital age; and that limitations restrict the sharing of best copies between archives.

We in ARSC believe that this is a historic moment in the public debate over how we balance the economic needs of the present with the preservation and enrichment of our cultural heritage. I do not need to tell you that sound recordings are an enormous part of that heritage, one we are in danger of losing if we do not rationalize our laws. ARSC was founded to help protect that heritage, and we are pleased to be able to participate in this laudable and long-overdue inquiry.

Thank you for your attention.

November 17, 2006