

Survey of Reissues of U.S. Recordings

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by Tim Brooks

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The National Recording Preservation Board

The National Recording Preservation Board was established at the Library of Congress by the National Recording Preservation Act of 2000. Among the provisions of the law are a directive to the Board to study and report on the state of sound recording preservation in the United States. More information about the National Recording Preservation Board can be found at <http://www.loc.gov/rr/record/nrpb/>.

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About the Author

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Mr. Brooks conducted his study with the assistance of Project Contractor **Steven Smolian**. Mr. Smolian has owned and operated Smolian Sound Studios since 1960. He specializes in the restoration of obsolete audio formats. He has been a dealer in used records for 45 years and a professional appraiser of sound recordings of historical value since 1975. In 1970, he published *A Handbook of Film, Theatre and Television Music on Record, 1948–1969*, the first discographic work on the topics in the title. For 10 years he wrote a monthly column for *The American Record Guide*. He is a founding member of the Association for Recorded Sound Collections and has chaired its Dealers Committee and its Technical Committee. He has been a member of the Music Library Association since 1960 and is an active member of its Preservation Committee.

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Foreword

Recorded sound has played an important role in the cultural, social, and political life of the United States. Recognizing this, and concerned about the preservation of and long-term access to the national sound heritage, the U.S. Congress enacted the National Recording Preservation Act of 2000 (Public Law 106-474). This law directed the National Recording Preservation Board (NRPB), under the aegis of the Library of Congress (LC), to conduct a study and issue a report on the current state of sound-recording archiving, preservation, and restoration activities and to recommend standards for access to preserved-sound recordings by researchers, educators, and other interested parties.

The legislation clearly reflects Congress's interest in ensuring accessibility to preserved-sound recordings. Legislators were careful to specify the study of technical physical-preservation needs as well as the study of any policies and laws that may hinder access to our nation's preserved audio heritage. (The words *copyright* and *access* are explicitly mentioned three times in the outline of what the study is to include.)

Such interest is well justified. The copyright status of historical sound recordings is unique among the creative arts in the United States. Federal law did not protect recordings until February 15, 1972. In fact, federal copyright law states that pre-1972 recordings will be protected by state and common law copyright until the year 2067. Although other copyrighted works routinely enter the public domain, this is not the case for recorded sound. With the exception of recordings of a few companies whose assets have been abandoned or donated to the public, there are virtually no public domain U.S. sound recordings. This includes many of the very first recordings, which were published as early as the 1890s. The usual allowances for copying or distributing given to older works by federal law under the orphan works clause do not and will not apply to pre-1972 recordings, further impeding public access. Because only the copyright owner can legally make old recordings available, historical recordings are at risk of physical loss as well as of passing, unnoticed, from the nation's aural memory.

One consideration by Congress in extending copyright protection to owners for such a long period was to give those owners an incentive to reissue, and thereby preserve, older recordings. How successful has this incentive been over time? This report answers that question by quantifying the commercial accessibility of recordings published before 1965. Recordings, like other publications, do not usually remain in print in perpetuity. On the basis of statistical analysis, this report shows that most pre-1965 recordings have not been reissued for public sale and are accessible only to those who visit the institutions that archive historical recordings or to individuals

with access to private collections. Today, pre-1965 recordings usually can be found only in large research libraries. Smaller institutions that still hold pre-1965 recordings rarely have the playback equipment needed to provide access to the recordings, and patrons of most public libraries do not have the equipment needed to listen to long-playing (LP) discs or 78-rpm recordings.

Because state and federal laws that give copyright protection for recorded sound are complex and can vary greatly from one jurisdiction to another, there is widespread uncertainty about what the law allows libraries and archives to do to preserve their collections. There is even greater uncertainty about how libraries can legally and cost-effectively provide offsite access to the recordings that they have preserved. Particularly for those media for which preservation can be costly and many original sources are rare, such as analog audiotape and disc, it is difficult to justify the expense of preservation without a view to near-term access. This suggests that the ability to provide access to historical recordings is essential to any long-term plan to preserve recorded sound.

This report is one of several studies that the Council on Library and Information Resources (CLIR) is undertaking on behalf of LC and the NRPB. Tim Brooks, project director, designed and supervised the study and analyzed the results. Project Contractor Steven Smolian compiled and organized the data.

The responsibility for ensuring long-term access to the sound heritage of this nation rests with many communities and organizations, public and private, technical and legal, scholarly and popular—indeed, with all who care about recorded sound. LC and the NRPB hope that this report, and those that follow, will enable those involved to work from a common pool of knowledge and expertise toward solutions that will benefit all.

Samuel Brylawski
Library of Congress

Abby Smith
Council on Library and
Information Resources

PURPOSE OF STUDY

The purpose of this study was to determine the legal accessibility of sound recordings published in the United States. The survey was designed to quantify the degree to which rights holders of historical sound recordings have made available, either directly or through licensees, past recordings that they control. It is premised on certain key assumptions:

- the availability of past creative works is essential to learning and the growth of knowledge;
- access to historical recordings has benefits both for the public—researchers, students, collectors, and enthusiasts—and for creators and copyright holders;
- distribution of created works plays a crucial role in the preservation of those works, for one of the most reliable guarantees of preservation is the widespread dissemination of copies to interested individuals and archives.

Using a fact-based framework, this report seeks to determine the following three things:

1. the proportion of historical sound recordings that are controlled by a present-day rights holder;
2. the degree to which rights holders of historical sound recordings have maintained their catalog backlists of older releases and kept them available in the marketplace; and
3. the degree to which non-rights holders, foreign and domestic, have taken action to make historical sound recordings available.

It is important to keep in mind that used (that is, preserved, non-current) copies of books and other printed materials of a work that are in circulation or in libraries serve to provide access to past works. Recordings do not follow this pattern. Because of changing recording and playback technologies, surviving copies of early recordings on cylinder, 78-rpm, or even LP format cannot be played on modern equipment. Therefore, their mere availability in antique formats does not necessarily make them accessible to the listening public. Moreover, access to original copies of past recordings is quite limited

for the general public because most libraries do not have extensive sound-recording archives or interlibrary loan facilities for early sound recordings. For all practical purposes, the only way for most people to listen to historic recordings is through CD reissues or, more recently, through the Internet. For old and new recordings alike, both distribution channels are strictly controlled by U.S. copyright law.

This report focuses on the accessibility of historical recordings to scholars, students, and the general public for noncommercial purposes.

METHODOLOGY AND DEFINITIONS

Period of Study

The study is based on a random sample of 1,500 recordings commercially released in the United States between 1890 and 1964. We chose 1890 as a starting point because that year approximates the beginning of the commercial recording industry in the United States (Brooks 1978). It is the earliest period from which reissuable commercial recordings survive and the earliest year from which recordings are still under the exclusive control of a present-day rights holder (i.e., the first full year of recording by a predecessor company of a rights holder that is still in existence).¹

The end year of 1964 was based on three factors.

1. *Scope.* The study covers the first 75 years of commercial recording in the United States.
2. *Industry changes.* A cutoff of 1964 makes it possible to include the cylinder era, the 78-rpm era, and the first decade of widespread acceptance of 45-rpm and LP formats. All these are formats now challenged by the lack of generally accessible reproduction capability.
3. *Feasibility.* Because of the explosion in the number of recordings issued in recent years, as well as of the proliferation of reissues of those recordings, the project would be much more difficult to execute for more-recent periods. As will be seen, rights-holder reissues are in any event more frequent in more-recent periods.

The 1890–1964 time span was then broken into 15 five-year blocks, with a quota of approximately 100 recordings drawn per block. This permitted a more granular analysis of changes over time than decade-long blocks would allow, yet kept the size of the sample needed manageable (a minimum sample of 100 is generally considered necessary for statistical analyses). Five-year periods also allowed us to map changes coinciding with major changes in the industry that began mid-decade, e.g., the shutting down of indepen-

¹ The original recording company was the Columbia Phonograph Company of Washington, D.C. The successor company, and present rights holder, is Sony BMG.

Definitions

Brief definitions follow for terms used in this report. More-detailed definitions are provided in Appendix C.

Commercial recording. A single recording of a selection or selections by an artist, issued for sale in the United States to the general public during the period specified.

Protected/nonprotected status. Whether or not a recording is currently protected (i.e., controlled by a rights holder) is in the judgment of the compilers. The approach was to replicate the determination that a reasonable person would make, after a reasonable amount of diligent research, if that person, or his or her institution or association, wished to reissue the recording legally. We used three tests to determine whether a recording is *probably* protected: corporate lineage, marketplace evidence, and consultation with experts.

1. *Corporate lineage.* Is the entity that originally issued the recording, or a known legal successor, still in existence today?
2. *Marketplace evidence.* Has a person or company asserted ownership of the recording in the years since the recording was made, either through legal claims or “authorized” reissues?
3. *Consultation with experts.* The project director and contractor for this report are both recording industry historians and could trace the ownership of most recordings; in some especially difficult cases a number of experts with years of experience in the field of reissues were also consulted.

Reissue availability. Reasonable availability of a new copy to an ordinary person, through normal commercial channels.

dent producers by the patent-holding major companies around 1905–1908, the introduction of electrical recording in 1925, the post–World War II record boom that began around 1945–1946, and the inception of the rock-and-roll/microgroove era in 1955.

Scope of Study

We initially considered basing our analysis on a random sample of all recordings released in the United States during the 75-year period in question. However, most of such a sample would have consisted of recordings that are of little interest to scholars, students, or the general public. Thus, we decided to restrict the study to recordings for which there is documented historic interest. We drew the study sample from approximately 20 modern discographical sources, representing seven major fields of study:

1. ragtime and jazz
2. blues and gospel music
3. country and folk music
4. music of U.S. ethnic groups
5. popular, rock, rhythm and blues (R&B) music
6. classical music
7. other (including spoken-word recordings and show music)

The discographies chosen list more than 400,000 recordings from the period 1890–1964. These are recordings in which modern scholars, students, and collectors have shown special interest, as documented by the widespread use of the source publications. Thus, the sample used for this study is not of recordings in general, but rather of recordings in which there is documented interest. Indeed, many of them could be considered “historic.” This is a sample of the recordings most in need of continued availability today.

In addition, we drew 10 pre-1965 selections from the National Recording Registry (NRR) list for 2002 and an equal number of such selections from the 2003 list.

We used the following criteria in choosing the discographic sources for this study (see Appendix A):

- Each is an acknowledged standard reference in its field.
- Each is a genre discography covering all labels relevant to its musical field, as opposed to a discography of specific labels or artists. Label and artist discographies would have skewed the sample toward specific labels, and the protected or nonprotected status they represent.
- Each covers some part of the period 1890–1964. In most cases, no single discography covered the entire period; consequently, more than one discography was required to cover the entire time span.
- The discographies are nonduplicative to the extent possible. This required some difficult choices: It meant, for example, that Brian Rust’s well-known *Jazz Records* (1897–1942) was not used because it is a subset of the much larger *The Jazz Discography* (1896–2001).

Statistical Methodology

Once we had chosen the source discographies, we established quotas for each musical genre within each period. Not all genres of music were recorded in every period (for example, the first country records date from the early 1920s), so we divided the quota of approximately 100 recordings for a period equally among the genres that were represented in that period. We gave each genre equal weight. If five genres were recorded in a period, we allocated each genre a quota of 20 recordings; if all seven genres were represented, each genre was allocated 14. See Appendix B for a table of specific quotas by genre.

We used a random-sampling methodology to choose specific recordings within each genre. We drew a random number and used it to point to a specific page in a discography. We then chose the first recording on that page that met our definition of *commercial recording* (see box, p. 3). If we found no qualifying recording on that page, we examined subsequent pages until a qualifying recording was located. The goal, in accordance with sampling theory, was to ensure that each qualifying recording in the discography had an equal and known chance of being chosen.

We conducted two rounds of sampling. The purpose of the first round was to estimate the proportion of *all recordings* in a period that is protected. Once 1,500 recordings had been chosen, we researched their status in order to develop an estimate of the proportion of all recordings in each period that is protected and nonprotected. In the second round, we used the same methodology to draw a sample of 1,500 *protected recordings*. (Protected recordings already identified in the first round were used toward the quota.) These were researched to determine the proportion of protected recordings that is currently available in reissue, and the sources of those reissues.

FINDINGS

Protected Recordings

The first goal of this study was to determine the percentage of historic recordings of interest to scholars and collectors that are currently protected under U.S. law. The average proportion of this sample found to be protected was 84 percent.² A summary of protected recordings, presented by time period, appears in table 1.

² This is the average percentage for the 15 five-year periods between 1890 and 1964. It is not weighted by the number of recordings issued in each period. The percentage protected does not vary much by period, so skewing the percentage toward more-recent periods, in which more records were issued, should not result in a significantly different number.

Table 1. Summary: Protected recordings by time period

Five-Year Period	Total Recordings	% Protected
1890–1894	72	39
1895–1899	109	62
1900–1904	98	85
1905–1909	105	84
1910–1914	106	89
1915–1919	105	80
1920–1924	102	66
1925–1929	101	82
1930–1934	99	88
1935–1939	102	96
1940–1944	106	95
1945–1949	107	98
1950–1954	105	96
1955–1959	106	100
1960–1964	98	100
Total/ Average	1,521	84

The proportion protected varies somewhat by period, although not as much as might be expected. Even for the earliest period, 1890–1894, 39 percent of sampled recordings are still protected today (all of them cylinders made by the Columbia Phonograph Company). In the late 1890s, the proportion rises to 62 percent, and in nearly every subsequent five-year period it exceeds 80 percent. The percentage protected peaks during 1900–1915, an early period of extreme concentration in the record industry, declines a bit during the late 1910s and early 1920s, when independent labels flourished, then rises to more than 90 percent after 1935, as major labels dominate the marketplace. In later years, smaller labels were increasingly bought by larger companies, whose successors retain rights to their recordings today.

The percentage classified as nonprotected, and therefore freely available for duplication and dissemination (16 percent), could be reduced by future claims of ownership. Already, one of the few notable labels believed to be "free" at the time this study was conducted has been claimed. Gennett, the jazz and blues label of the 1920s, is claimed by Concord through an ownership chain tracing back through Fantasy and Riverside.

There is some variation in percentage of recordings protected by genre of music (table 2). Classical and country recordings are the

Table 2. Summary: Protected recordings by genre

Genre	Total Recordings	% Protected
Jazz/ragtime	233	90
Blues/gospel	214	89
Country	145	91
Ethnic	154	81
Pop/rock	317	76
Classical	237	93
Other	221	86
Total	1,521	

most heavily protected overall, each exceeding 90 percent. Jazz and ragtime, blues and gospel, and “other” (mostly show music) are in the 86 percent to 90 percent protected range. On the low end are popular (76 percent) and ethnic (81 percent) recordings.

It is difficult to generalize about the trends over time within genre, because breaking down the sample into such small segments results in unstable data (there are usually only 15 to 20 recordings per time period per genre). However, the data indicate that the majority of historic U.S. recordings are still under a current owner’s control, and that this ownership extends over all genres of music and all time periods since the 1890s (table 3).

Table 3. Summary: Protected status by genre and time period

Five-Year Period	% Protected						
	Jazz/Ragtime	Blues/Gospel	Country	Ethnic	Pop/Rock	Classical	Other
1890–1894	—	—	—	—	40	—	—
1895–1899	100	100	—	65	44	46	72
1900–1904	94	100	—	59	60	94	100
1905–1909	100	100	—	76	65	100	61
1910–1914	100	100	—	94	80	88	71
1915–1919	67	100	—	82	67	100	67
1920–1924	57	60	67	71	47	93	64
1925–1929	67	93	87	87	50	100	93
1930–1934	79	87	79	93	92	93	93
1935–1939	100	100	100	86	100	100	87
1940–1944	100	93	94	100	100	87	95
1945–1949	89	100	100	—	100	100	100
1950–1954	100	100	88	—	92	100	100
1955–1959	100	100	100	—	100	100	100
1960–1964	100	100	100	—	100	100	100
Average	90	89	91	81	76	93	86

Reissues

Drawing next on the sample that included only protected recordings, we looked at the number of CD reissues of protected historic recordings by rights owners, their licensees, and others (see table 4). Here we found distinct differences by period. On average, rights owners have made available 14 percent of the historic recordings that they control from the various eras.³ However, the percentage varies greatly by age. For the two post-1955 periods, the rock-and-roll era, they have reissued 33 percent to 34 percent. This number declines sharply in earlier periods. The 1940s and early 1950s average 25 percent reissued, and the late 1930s (the beginning of the big band swing era) average drops to 15 percent. In most periods before that, rights holders have reissued 10 percent or less of their holdings, and in some periods virtually none. The 1 percent reissued for the early 1890s, it should be noted, is based on a single reissued recording, to our knowledge the only recording of that era reissued by a rights holder, which happened to fall into our limited sample.

Table 4. Summary: Reissues of protected recordings

Five-Year Period	Total Protected Recordings	% Available on CD from:		
		Owner	Other	None
1890–1894	102	1	3	96
1895–1899	101	0	9	91
1900–1904	98	1	28	71
1905–1909	104	3	41	56
1910–1914	104	2	32	66
1915–1919	97	6	28	66
1920–1924	97	12	27	61
1925–1929	98	11	30	59
1930–1934	98	10	20	69
1935–1939	102	15	25	61
1940–1944	105	25	30	46
1945–1949	107	25	21	54
1950–1954	105	25	15	60
1955–1959	106	34	12	54
1960–1964	98	33	8	59
Total/ Average	1,522	14	22	65

³ As with percentage protected, this is the average percentage reissued for the 15 periods examined. Since more recordings were made in later years, and the rights-holder reissue rate is also higher for later years, the gross reissue percentage for *all* recordings listed in the consulted sources would presumably be higher—at least for rights holders. The central purpose of this study was to determine reissue percentage by time period, however, not to favor more-recent periods, so the latter percentage is less relevant.

Unsurprisingly, rights holders tend to reissue recordings that were made within the life span of their current mass customers—essentially the nostalgia market. The rights holders virtually ignore earlier periods, no matter how historically important recordings from those periods may be. It is difficult for third parties to reissue such material legally.

How much demand is there for historic recordings? The number of unauthorized reissues by other entities, such as foreign labels (which are not subject to U.S. copyright laws) and small domestic operations operating under the legal radar, may give some evidence of the potential demand. An additional 22 percent of historical recordings have been reissued by these other entities, which is substantially more than are made available by the rights holders themselves. This figure reflects recordings reissued *exclusively* by others and *not* by the rights holders (not recordings issued by both). The percentage of exclusive reissues by third parties does not differ as significantly by time period as does that of reissues by the rights holders. Non-rights holders have reissued 20 percent to 40 percent of these recordings for most periods from 1900 to 1950. The percentage drops off after 1950 as rights-holder reissues become more frequent.

As a result of these differing patterns, more historic recordings are made available by non-rights holders than by rights holders for every period up to 1945. While historically important recordings may not constitute a large-enough market for rights holders to invest in, they are clearly of enough cultural interest to persuade others to reissue some of what the rights holders themselves decline to make available, despite the legal obstacles to doing so. There is a measurable public interest in these recordings, and individuals and organizations are willing to serve it.

An analysis of reissues of historic recordings by genre (see table 5) reveals some interesting disparities. Recordings in the “other” category (spoken word and show music) are most likely to have been reissued by rights holders, at an average 28 percent. Country music is the second-highest field of rights holder interest, with 20 percent

Table 5. Summary: Reissues of protected recordings by genre

Genre	Total Protected Recordings	% Available on CD from:		
		Owner	Other	None
Jazz/ragtime	233	9	18	73
Blues/gospel	213	10	54	36
Country	143	20	25	55
Ethnic	152	1	1	98
Pop/rock	337	12	16	73
Classical	231	17	20	63
Other	213	28	24	48
Total	1,522			

reissued. Ethnic recordings appear to have been very poorly served, with only 1 percent reissued. Surprisingly, jazz and ragtime music, blues and gospel, and popular music are all around only 10 percent reissued.

In virtually every category, parties without legal rights—foreign labels and domestic non-rights holders—have made more historic U.S. recordings available than have rights holders. Blues and gospel music has been particularly well served by third-party reissuers, although a significant demand for reissues seems to exist in every genre, with the possible exception of ethnic.

Tables 6 through 9 show reissues of protected recordings by time period within genre. These data should be regarded as very approximate and subject to fluctuation, owing to the small sample sizes when the sample is broken down this finely (again, there were only about 15 to 20 recordings for each genre within each five-year time period).

The general pattern of rights-holder reissues is the same within genre as it is overall. Recent periods are heavily mined for reissues; earlier periods are largely neglected. In fact, we found no rights-holder reissues of jazz or ragtime in this sample for periods before 1915, and only one popular recording before 1930. This does not mean that rights holders have reissued no such recordings; it simply indicates that such reissues are such a tiny percentage of those that interest scholars and collectors that they did not show up in our sample.

Others have taken up the slack in earlier periods, especially with reissues in the blues, classical, jazz, and other (show music, spoken-word) fields.

Table 6. Reissues of protected jazz and blues recordings

Five-Year Period	Jazz/Ragtime (%)			Blues/Gospel (%)		
	Owner	Other	None	Owner	Other	None
1890–1894	—	—	—	—	—	—
1895–1899	0	13	88	0	50	50
1900–1904	0	18	82	7	57	36
1905–1909	0	29	71	0	89	11
1910–1914	0	24	76	6	94	0
1915–1919	6	17	78	0	100	0
1920–1924	0	21	79	7	67	27
1925–1929	7	40	53	0	71	29
1930–1934	7	21	71	14	50	36
1935–1939	31	19	50	25	56	19
1940–1944	25	19	56	20	67	13
1945–1949	17	17	67	6	18	76
1950–1954	0	6	94	12	6	82
1955–1959	19	10	71	22	17	61
1960–1964	12	0	88	18	18	65
Average	9	18	73	10	54	36

Table 7. Reissues of protected country and ethnic recordings

Five-Year Period	Country (%)			Ethnic (%)		
	Owner	Other	None	Owner	Other	None
1890–1894	—	—	—	—	—	—
1895–1899	—	—	—	0	0	100
1900–1904	—	—	—	0	0	100
1905–1909	—	—	—	0	0	100
1910–1914	—	—	—	0	0	100
1915–1919	—	—	—	0	0	100
1920–1924	7	14	79	0	7	93
1925–1929	13	27	60	7	0	93
1930–1934	0	7	93	0	7	93
1935–1939	0	7	93	0	0	100
1940–1944	19	31	50	0	0	100
1945–1949	39	39	22	—	—	—
1950–1954	29	53	18	—	—	—
1955–1959	41	29	29	—	—	—
1960–1964	33	17	50	—	—	—
Average	20	25	55	1	1	98

Table 8. Reissues of protected popular and classical recordings

Five-Year Period	Pop/Rock (%)			Classical (%)		
	Owner	Other	None	Owner	Other	None
1890–1894	1	3	96	—	—	—
1895–1899	0	13	87	0	0	100
1900–1904	0	20	80	0	29	71
1905–1909	0	41	59	6	28	67
1910–1914	0	0	100	6	24	71
1915–1919	0	13	88	12	18	71
1920–1924	0	23	77	27	27	47
1925–1929	0	9	91	8	23	69
1930–1934	14	14	71	15	23	62
1935–1939	0	14	86	0	46	54
1940–1944	19	38	44	7	33	47
1945–1949	17	17	67	26	16	58
1950–1954	46	12	42	24	6	71
1955–1959	39	11	50	44	0	56
1960–1964	39	11	50	56	0	44
Average	12	16	73	17	20	63

Table 9. Reissues of protected other (show music, spoken word) recordings

Five-Year Period	Other (%)		
	Owner	Other	None
1890–1894	—	—	—
1895–1899	0	18	82
1900–1904	0	44	56
1905–1909	12	59	29
1910–1914	0	53	47
1915–1919	21	14	64
1920–1924	50	25	25
1925–1929	40	33	27
1930–1934	20	20	60
1935–1939	40	27	33
1940–1944	53	11	37
1945–1949	47	18	35
1950–1954	27	9	64
1955–1959	43	7	50
1960–1964	42	0	58
Average	28	24	48

SUMMARY OF KEY FINDINGS AND CONCLUSIONS

Number of historical recordings issued

The 20-plus major discographies used as the basis for this study, which are widely used by scholars and collectors, list more than 400,000 recordings of interest issued prior to 1965. That figure may grow as additional fields are documented that have not been adequately researched (e.g., White gospel recordings, recordings made in the 1890s, and post–World War II ethnic recordings).

Number of historical recordings extant

Experts believe that the vast majority of recordings commercially issued in the United States—probably more than 90 percent—still exist in some form.⁴ Often this is in the form of commercial pressings, since in the past, record companies routinely destroyed their older masters, and sometimes even the files that documented what these companies had recorded. However, archives and private collectors have assembled large collections of these recordings, and they serve as the source for many reissues. Relying on a worldwide network of collectors, Europe’s Document Records has issued more than 600 CDs documenting the contents of the book *Blues & Gospel Records, 1890–1943*, alone.

⁴ Correspondence with Sam Brylawski, Library of Congress, October 11, 2004.

Many of the discographers whose works were consulted for this study physically examined most of the records they listed or received reports from others who had done so. Rock-era compiler Joel Whitburn claimed to own a copy of every record listed in his huge *Top Pop Singles*; individuals working in earlier periods commonly derived take numbers⁵ and label credit from copies examined. This was the case with the author's *Columbia Master Book* volume covering 1901–1910. Most likely to have been lost are cylinder recordings made in the 1890s, but even these continue to turn up. Preservation specialist Glenn Sage reported that he has seen approximately 1,200 such cylinder recordings and believes that 8,000 to 10,000 are in existence nationwide. Another expert, Bill Klinger, puts the figure at about 7,000 to 8,000.⁶ Interestingly, 50 percent of the more-than-600 1890s cylinders that Sage has transferred were made by the Columbia Phonograph Company. If this sample is representative, approximately half of the cylinders from this era are still protected, even though the rights holder, Sony BMG, has retained or reissued almost none of them.

Though many early cylinders are in poor condition, they can still provide future preservation experts with the opportunity to retrieve their sound using technologies yet to be developed. Several advanced technologies for this purpose are in development.⁷

Percentage of the recordings in this study controlled by someone under current U.S. law and percentage in the public domain

An important provision of the 1976 copyright law is Section 301(c), which provides, for recordings made prior to 1972, that “any rights of remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067.” This means that recordings issued before 1972 will not be covered by federal copyright until 2067. Until that time, they fall under state laws, generally those regarding copyright, property rights, and unfair competition. State laws vary, and there is no known summary of their current coverage of sound recordings. However, these laws are universally interpreted to grant permanent ownership of recordings to the creating entities until such time as federal copyright law takes over in 2067.⁸

⁵ Several “takes” are usually required to obtain a recording suitable for issue and these are generally numbered sequentially. Sometimes multiple takes survive for a given recording.

⁶ Telephone conversation with Glenn Sage, October 10, 2004, and correspondence with Bill Klinger, October 12, 2004. Sage provided label counts for the more-than-600 1890s cylinders he has transferred. Figures reflect the number of different titles, not the number of copies of those titles.

⁷ Examples are the experiments at Syracuse University in New York and at the Lawrence Berkeley National Laboratory in California. For more, see the *New York Times*, May 6, 2004, and the *ARSC Journal*, Vol. 31 No. 1 (2000), p. 161; and Vol. 35 No. 2 (2004), p. 308.

⁸ See, for example, *Capitol Records, Inc., v. Naxos of America, Inc.*, United States District Court, Southern District of New York, 02 Civ 7890 (RWS)(2003), Section I(B)(1), Applicable Law.

The net effect is that pre-1972 recordings are treated in the United States as protected from the time of their creation, no matter how long ago that may have been, until 2067. At that time, barring a change in the law, all such recordings will become part of the public domain. Inasmuch as the first commercial recordings were made around 1890, this is a de facto term of between 95 and 177 years, depending on the date the recording was made. All recordings included in this study were made before 1972 and therefore fall into this category.

Despite bankruptcies, abandonment, and long-dead record labels, under current U.S. law an overwhelming majority of historic recordings—in this study 84 percent—are still owned by someone. This is true even for the earliest periods, with more than 60 percent protected for every period after 1895. The figure exceeds 90 percent after the 1930s. It is also true for every genre of music studied. Most of America's recorded musical heritage of the last 110 years, even recordings made in the nineteenth century, is protected by state and common law until 2067.

Reissues made available by rights owners

Ten percent or less of listed recordings have been made available by rights holders for most periods prior to World War II. For periods before 1920, the percentage approaches zero.

The demand for historic recordings

Despite laws discouraging unauthorized reissue activity in the United States or the importation of reissues of U.S. recordings from other countries (parallel import laws), foreign labels and small entities in the United States have made available a considerable number of such recordings. Our study found that other entities have exclusively reissued 22 percent of historic recordings, versus rights holders' 14 percent. To the extent that rights holders reissue older recordings, they concentrate on recent periods with larger potential markets, while third-party distributors serve all periods more or less equally. As a result, third-party entities reissued more than rights holders did in every five-year period prior to 1945. But current copyright law has made such activity difficult and risky for small organizations and so has driven much of this activity overseas. It is worth noting that a label such as Europe's Document Records, which has made available thousands of rare, pre-World War II American blues and gospel records not reissued by rights holders themselves, could not exist in the United States because of copyright restrictions.⁹

⁹ Document Records avoids reissuing material readily available from rights holders.

Accessibility of historic recordings to scholars and other interested parties wishing to reissue historic recordings legally

The first task for a third party wishing to reissue a recording is to find the rights holder. This can be difficult or effectively impossible. In this study, despite a major effort to trace ownership and consultation with several experts, 25 percent of the labels in the sample were untraceable and many of the other labels had to be assigned *probable* protected or nonprotected status. The uncertainty introduced by current copyright law has prevented many reputable companies, institutions, and associations from engaging in any reissue activity at all.

Conclusion

Evidence uncovered in this analysis suggests that a significant portion of historic recordings is not easily accessible to scholars, students, and the general public for noncommercial purposes. There are many reasons for this, but the primary one appears to be a convergence of two factors. The first is that the physical barriers created by recording technologies change often and have rendered most such recordings accessible only through obsolescent technologies usually found only in special institutions. Second, copyright law allows only rights holders to make these recordings accessible in current technologies, yet the rights holders appear to have few real-world commercial incentives to reissue many of their most significant recordings. The law has severely reduced the possibility of such recordings entering into the public domain, at least until 2067.

While there is no reason to assume that the law intended to create or sustain such an imbalance between the private and public domains, the evidence suggests that it has, in fact, created such an imbalance. This study indicates that there is an active and hardy network of foreign and small domestic companies, associations, and individuals willing to make historic recordings available; indeed, some do this in spite of laws that force them underground or overseas.

These circumstances create a complex policy environment. The time for sorting out these matters grows short as the recording formats become more difficult to maintain. We hope that the evidence we have gathered and the analyses of reissue practices we have made will help inform an urgent and much-needed policy debate.

Appendix A

Discographic Sources

In the list that follows, publication numbers are used to identify the source of individual recordings in the master database, which will be made available on the CLIR Web site, www.clir.org.

1. Jazz/Ragtime

1.1 Lord, Tom. 2004. *The Jazz Discography*, ver. 4.4. Vancouver, B.C.: Lord Music References, Inc. (CD-ROM).

2. Blues, Gospel

2.1 Dixon, Robert M. W., John Godrich, and Howard Rye. 1997. *Blues & Gospel Records, 1890–1943*, 4th ed. New York: Oxford University Press.

2.2 Leadbitter, Mike, and Neil Slaven. 1987. *Blues Records, 1943–1970*, Vol. 1 A–K. London: Record Information Services.

2.3 Hayes, Cedric J., and Robert Laughton. 1992. *Gospel Records 1943–1969, A Black Music Discography*. London: Record Information Services.

3. Country, Folk

3.1 Russell, Tony. 2004. *Country Music Records, A Discography, 1921–1942*. New York: Oxford University Press.

3.2 Numbered source not used.

3.3 Whitburn, Joel. 1989. *Top Country Singles 1944–1988*, 4th ed. Menomonee Falls, Wisc.: Record Research Inc.

4. U.S. Ethnic Groups

4.1 Spottswood, Richard. 1990. *Ethnic Music on Records*. Urbana: University of Illinois Press.

5. Popular/Rock/R&B

5.1 Whitburn, Joel. 1986. *Pop Memories 1890–1954*. Menomonee Falls, Wisc.: Record Research Inc.

5.2 Rust, Brian, and Allen G. Debus. 1989. *The Complete Entertainment Discography, 1897 to 1942*. New York: Da Capo Press.

5.3 Rust, Brian. 1975. *The American Dance Band Discography 1917–1942*. New Rochelle, N.Y.: Arlington House.

5.4 Whitburn, Joel. 1996. *Top R&B Singles 1942–1995*. Menomonee Falls, Wisc.: Record Research Inc.

5.5 Whitburn, Joel. 1997. *Top Pop Singles 1955–1996*. Menomonee Falls, Wisc.: Record Research Inc.

- 5.6 Whitburn, Joel. 1993. *Top Pop Albums 1955–1992*. Menomonee Falls, Wisc.: Record Research Inc.
- 5.7 McGrath, Bob. 2000. *The R&B Indies*. West Vancouver, B.C.: Eyeball Productions.
- 5.8 Whitburn, Joel. 1973. *Top LP's 1945–1972*. Menomonee Falls, Wisc.: Record Research Inc.
- 5.9 Numbered source not used.
- 5.10 “New Records for Talking Machines.” *The Phonoscope* 1(2), December 15, 1896, p. 18. New York.
- 5.11 Collection of 21 catalogs and other release lists of the Columbia Phonograph Company of Washington, D.C., 1890–1894.

6. Classical

- 6.1 Arnold, Claude Graveley. 1997. *The Orchestra on Record 1896–1926*. Westport, Conn.: Greenwood Press.
- 6.2 Moses, Julian Morton. 1949. *Collector's Guide to American Recordings, 1895–1925*. New York: American Record Collectors' Exchange.
- 6.3 Clough, Francis F., and G. J. Cuming. 1952. *The World's Encyclopedia of Recorded Music*. London: London Gramophone Corporation.
- 6.4 Myers, Kurtz. 1978. *Index to Record Reviews*. 5 vol. Boston: G. K. Hall.

7. Other

- 7.1 Rust, Brian. 1979. *Discography of Historical Records on Cylinders and 78s*. Westport, Conn.: Greenwood Press.
- 7.2 Raymond, Jack. 1998. *Show Music on Record*. Falls Church, Va.: Self-published.

8. National Recording Registry (Library of Congress)

- 8.1 National Recording Preservation Board. 2002 National Recording Registry. Available at <http://www.loc.gov/rr/record/nrpb/nrpb-2002reg.html>.
- 8.2 National Recording Preservation Board. 2003 National Recording Registry. Available at <http://www.loc.gov/rr/record/nrpb/nrpb-2003reg.html>.

Discussion of Sources

1.1 *The Jazz Discography* is a database on CD-ROM that brings together a large number of discographical citations previously published in other sources, supplemented by a modest amount of new research. The work covers 1896 to 2001 and claims to include 136,000 sessions and 238,000 tunes. Since it is a database, with the basic entry unit being a recording session, the sampling methodology had to be modified slightly. We sorted recording sessions by year, selected random years between 1896 and 1964, and then chose random sessions and recordings within those years.

We did not use two other well-known jazz discographies, *Jazz and Ragtime Records, 1897–1942*, by Brian Rust (Denver: Mainspring Press, 2002) and *Jazz Records, 1942–1962*, by Jorgen Jepsen (Copenhagen: Karl Emil Knudson, 1965–1966), because they are now subsets of Lord. Likewise, an “umbrella” discography similar to that of Lord, *85 Years of Recorded Jazz*, by Walter Bruyninckx (CD-ROM; Mechelen, Belgium: Self-published, 2002), was not considered because it is being issued in parts and had only reached the letter “T” at the time of this study. For a detailed analysis of the Lord and Bruyninckx discographies, see Brooks 2002.

2.1 *Blues & Gospel Records* is the standard reference on African-American blues and gospel recordings prior to World War II. There is no known general reference to White gospel or religious music of this period, although many such listings are found in source 3.1.

2.2 A second volume of *Blues Records 1943–1970* was published covering the letters L through Z (Mike Leadbitter, Leslie Fancourt, and Paul Pelletier, *Blues Records, 1943–1970*, Vol. 2. London: Record Information Services, 1994). It is out of print, and we could not locate a copy in time for inclusion in this study. For the purposes of the study, we believe that the percentage of recordings that are protected and reissued in the letters A through K serves as a representative sample.

2.3 *Gospel Records 1943–1969* is the standard reference on post-World War II Black gospel.

3.1 *Country Music Records, A Discography*, by Tony Russell, the long-awaited first general discography of pre-World War II country recordings, was originally scheduled for publication several years ago. Publication was delayed past the compilation of this study. However, through the kindness of Mr. Russell and the Country Music Foundation, Steven Smolian was given access to a virtually complete manuscript from which to draw a sample. A related work (Guthrie T. Meade, Dick Spottswood, and Douglas S. Meade, *Country Music Sources: A Bio-Discography of Commercially Recorded Traditional Music*, Chapel Hill: University of North Carolina Press, 2002) covers the same period with supplementary musicological information, but, in terms of the record listings needed for this study, it is essentially a subset of Russell.

3.3 *Top Country Singles* is an index to the *Billboard* country charts, which varied from a top-10 (or less) to a top-50 format during the pre-1965 period.

4.1 *Ethnic Music on Records*, published in seven volumes, is the standard reference on pre-World War II ethnic recordings made in the United States, with a few omissions (e.g., Hawaiian recordings). No general discography exists for imported or post-WWII ethnic recordings.

5.1 *Pop Memories 1890–1954* claims to list recordings that made the best-seller charts during the stated period. The chart positions before 1940 are fictional and unreliable since there were no record-popularity charts at that time; after 1940, positions are based on real *Billboard* charts. However, the book does list a wide range of presumably popular recordings from very early periods, and it is widely used. For a detailed analysis of this book, see Brooks 1990 and Friedwald 1994.

5.2 *The Complete Entertainment Discography* lists popular singers, omitting a few who have major discographies of their own.

5.3 *The American Dance Band Discography* has some overlap with Lord (source 1.1), although *ADBD* focuses primarily on extensive coverage of nonjazz dance bands. This is one of the most widely used discographies among collectors of pre-WWII popular music.

5.4 *Top R&B Singles 1942–1995* lists best sellers from *Billboard* charts.

5.5 *Top Pop Singles 1955–1996* lists best sellers from *Billboard* charts.

5.6 *Top Pop Albums 1955–1992* lists best sellers from *Billboard* album charts. A random sample of individual album tracks was drawn from this work for the period 1955–1964.

5.7 *The R&B Indies* (two volumes) contains numerical listings by label of (according to its author) “every” identifiable R&B 78-rpm and 45-rpm recording from about 1945 to the 1970s. Coverage includes blues, gospel, R&B, zydeco, soul, and funk on 4,500 independent record labels.

5.8 *Top LP’s 1945–1972* is an earlier edition of source 5.6. While less detailed than the later source, it was used to provide LP listings before 1955.

5.10 Because of the limited number of listings found in modern discographies for recordings of the late 1890s, this original multilabel listing of new releases from the 1896 trade newspaper *The Phonoscope* was used for a limited number of selections.

5.11 Modern discographies include even fewer listings for recordings of the early 1890s, a period that is at the frontier of current research. As a result, we did not find enough listings in standard discographies to meet our quota for 1890–1894. Since only one label of this early period (Columbia) is still protected, we consulted a collection of 21 Columbia catalogs and release lists from 1890 to 1894 (photocopies in the collection of Tim Brooks) to augment the sample used to determine the percentage of protected recordings from this period that has been reissued on CD. Because this source lists only protected recordings, it was not used in compiling the sample used to determine the percentage that are protected or nonprotected.

6.1 *The Orchestra on Record 1896–1926* lists classical orchestral recordings.

6.2 *Collector's Guide to American Recordings* lists classical vocal recordings of the period 1895–1925. This book was first published in 1936, revised in 1949, and reprinted several times since with substantially identical contents.

6.3 *The World's Encyclopedia of Recorded Music* (aka *WERM*) is a general list of classical records from 1925 to 1950, with supplements.

6.4 *Index to Record Reviews* is an index of reviews of 16,500 classical and other LPs that appeared from 1948 to the 1970s. An earlier version, *Record Ratings*, by Kurtz Myers and Richard S. Hill, is incorporated in the 1978 edition. To make this a selective list, we chose only recordings rated by the reviewer as neutral or positive.

7.1 *Discography of Historical Records on Cylinders and 78s* lists historical spoken-word recordings made before 1942.

7.2 *Show Music on Record* lists original cast recordings from U.S. productions arranged by show. A revised electronic version of this definitive reference source by Jack Raymond is on the Library of Congress Web site (www.loc.gov/rr/record/showmusic).

8.1 2002 National Recording Registry (NRR). Under the terms of the National Recording Preservation Act of 2000, the Librarian of Congress is responsible for annually selecting a group of recordings that are “culturally, historically, or aesthetically significant.” These recordings must be at least 10 years old. Nominations are garnered from members of the public and from the National Recording Preservation Board, which is composed of leaders in the fields of music, recorded sound, and preservation. Fifty selections are announced each year; however, many are in fact groups of recordings or broadcasts. For the purposes of this study, we considered only commercial recordings as defined by this study. If the NRR entry selected represented a group of recordings, we randomly chose one recording from it. For calculation purposes, we assigned recordings drawn from the NRR to the appropriate five-year span and genre.

8.2 2003 National Recording Registry. Same rules as for 2002.

Table A-1. Estimated number of U.S. releases listed in each source

	Years Covered	Total Recordings Listed	1890–1964 Recordings Listed
1.1 Lord	1896–2001	238,000	100,000
2.1 Dixon et al.	1890–1943	20,000	20,000
2.2 Leadbitter/Slaven	1943–1970	13,000	10,000
2.3 Hayes	1943–1969	16,000	12,000
3.1 Russell	1921–1942	20,000	20,000
3.3 Whitburn: TCS	1944–1997	16,700	5,000
4.1 Spottswood	1893–1942	50,000	50,000
5.1 Whitburn: PM	1890–1954	12,000	12,000
5.2 Rust/Debus	1897–1942	15,000	15,000
5.3 Rust: ADBD	1917–1942	35,000	35,000
5.4 Whitburn: TR&B	1942–1995	16,716	5,000
5.5 Whitburn: TPS	1955–1996	22,224	4,000
5.6 Whitburn: TPA	1955–2001	225,000*	15,000*
5.7 McGrath	c1945–1980s	25,000	20,000
5.8 Whitburn: TLP	1945–1972	70,000*	18,000*
5.10 Phonoscope	1896	280	280
5.11 Columbia lists	1890–1894	2,000	2,000
6.1 Arnold	1896–1926	12,000	12,000
6.2 Moses	1900–1925	7,500	7,500
6.3 Clough/Cuming	1925–1955	20,000	20,000
6.4 Myers	1948–1978	35,000	16,500
7.1 Rust: DHR	1890s–1942	1,000	1,000
7.2 Raymond	1890s–1998	25,000	20,000
8.1 NRR 2002	1888–1977	50**	45**
8.2 NRR 2003	1888–1975	50**	41**
Total			420,366

*Number of tracks that do not duplicate single releases.

**Many NRR listings are groups of recordings.

Appendix B

Breakdown of Survey Sample by Period and Genre

Table B-1. Quotas by period and genre

Five-Year Period	Jazz/Ragtime	Blues/Gospel	Country	Ethnic	Pop/Rock	Classical	Other	Total
1890–1894	0	0	0	0	100	0	0	100
1895–1899	20	2	0	20	20	20	18	100
1900–1904	17	17	0	17	17	17	17	102
1905–1909	17	17	0	17	17	17	17	102
1910–1914	17	17	0	17	17	17	17	102
1915–1919	17	17	0	17	17	17	17	102
1920–1924	14	14	14	14	14	14	14	98
1925–1929	14	14	14	14	14	14	14	98
1930–1934	14	14	14	14	14	14	14	98
1935–1939	14	14	14	14	14	14	14	98
1940–1944	15	15	15	8	15	15	15	98
1945–1949	17	17	17	0	17	17	17	102
1950–1954	17	17	17	0	17	17	17	102
1955–1959	17	17	17	0	17	17	17	102
1960–1964	17	17	17	0	17	17	17	102
NRR								20
Total	227	209	139	152	327	227	225	1,526

Notes: The nominal quota of 100 recordings for each period is approximate because of the use of whole numbers for the component genre quotas. The 20 recordings from the National Recording Registry are to be divided among the genres as appropriate.

Notes on Quotas

Listings of early-1890s recordings are so rare in these discographies that virtually every listing encountered from that period was chosen. Most fall into the popular music category. The decade of the 1890s is one of the last frontiers of recorded-sound research, and it is only beginning to be seriously documented. Most researchers believe that because of the rarity of surviving recordings from this period, everything that still exists in playable form should be preserved.

For periods after 1895, we assigned quotas to each genre recorded during the period. In most cases, the quota for each genre was the same, although we made a few adjustments for genres that had very few listings and for those that reflected only part of a time block. Genre quotas were further broken down among the source discographies representing that genre and period on the basis of the estimated number of listings in each.

In some cases, the total for a time block exceeds the quota because of the addition of recordings from the National Recording Registry.

Table B-2. First-round sample by period and genre

Five-Year Period	Jazz/Ragtime	Blues/Gospel	Country	Ethnic	Pop/Rock	Classical	Other	Total
1890–1894	0	2	0	0	70	0	0	72
1895–1899	16	2	0	20	25	28	18	109
1900–1904	17	14	0	17	15	17	18	98
1905–1909	17	18	0	17	17	18	18	105
1910–1914	17	17	0	18	20	17	17	106
1915–1919	18	17	0	17	18	17	18	105
1920–1924	14	15	15	14	15	15	14	102
1925–1929	15	14	15	15	14	13	15	101
1930–1934	14	15	14	14	13	14	15	99
1935–1939	16	16	14	14	14	13	15	102
1940–1944	16	15	17	8	16	15	19	106
1945–1949	18	17	18	0	18	19	17	107
1950–1954	17	17	17	0	26	17	11	105
1955–1959	21	18	17	0	18	18	14	106
1960–1964	17	17	18	0	18	16	12	98
Total	233	214	145	154	317	237	221	1,521

Table B-3. Second-round sample by period and genre

Five-Year Period	Jazz/Ragtime	Blues/Gospel	Country	Ethnic	Pop/Rock	Classical	Other	Total
1890–1894	0	2	0	0	100	0	0	102
1895–1899	16	2	0	20	23	23	17	101
1900–1904	17	14	0	17	15	17	18	98
1905–1909	17	18	0	17	17	18	17	104
1910–1914	17	17	0	18	18	17	17	104
1915–1919	18	17	0	15	16	17	14	97
1920–1924	14	15	14	14	13	15	12	97
1925–1929	15	14	15	15	11	13	15	98
1930–1934	14	14	14	14	14	13	15	98
1935–1939	16	16	14	14	14	13	15	102
1940–1944	16	15	16	8	16	15	19	105
1945–1949	18	17	18	0	18	19	17	107
1950–1954	17	17	17	0	26	17	11	105
1955–1959	21	18	17	0	18	18	14	106
1960–1964	17	17	18	0	18	16	12	98
Total	233	213	143	152	337	231	213	1,522

Appendix C

Discussion of Definitions

Commercial recording. A single recording of a selection or selections by an artist, issued for sale in the United States to the general public during the period specified and generally meeting the definitions in Title 17, U.S. Code, sections 101–104. For popular music, this generally means a single “track,” whether it originally appeared on a cylinder; on one side of a 78- or 45-rpm disc; on a multitrack LP, extended play (EP), or tape; or in some combination of these or other fixed formats. Multipart recordings of a single extended selection (e.g., a symphony or an opera) are considered to be one recording. Alternate takes of the same selection, made at or about the same time, and rerecordings made solely for duplication purposes, as was common in the early years of the industry before mass-duplication technology became available, are not considered separate recordings.¹ However, recordings of different lengths made for different recording formats (for example 7- and 10-inch 78-rpm discs) are considered separate.

Master recordings may have originated from any source, domestic or foreign, as long as they were or are controlled in the United States by a rights holder subject to U.S. law. However, the recording must have been originally intended for issue as a commercial sound recording; recordings taken from broadcasts or film soundtracks are not included. Copyright for those recordings presumably resides with the broadcasting or film entity.

Protected/nonprotected status. Whether or not a recording is currently protected (i.e., controlled by a rights holder) is in the judgment of the compilers. Our approach was to replicate the determination that a reasonable person would make, after a reasonable amount of diligent research, if that person, or his or her institution or associa-

¹ In the early 1890s, technology for duplicating cylinder recordings was quite primitive. Most cylinders sold to exhibitors and to the public were “original” recordings, individually made (or made in small groups) by the artist. These rerecordings are considered production copies, i.e., made for the sole purpose of maintaining stock, and were not considered separate reissuable recordings for the purpose of this study. While mechanically made duplicates of cylinders became more common as the 1890s progressed, mass duplication did not become the norm until cylinder moulding was introduced in 1902. Likewise, early press runs of disc records were limited by technology to a few hundred duplicates of each original recording, after which the artist had to rerecord the selection to maintain a stock for sale. A system for the mass duplication of discs was also introduced in 1902. Virtually no original masters of cylinders or discs survive from the 1890s, and even copies sold to the public are rare, so the reissue of alternate versions would be difficult in any event.

tion, wished to reissue the recording legally. We did not make use of legal counsel, or expend substantial amounts of time and money, to try to establish with 100 percent certainty the status of each individual recording. Rather, our goal was to determine whether it was *probably* protected or not. Since our ultimate purpose was to calculate the *proportion* of recordings from each period that is protected, the exact status of individual recordings was relatively unimportant.

We used three tests to determine whether a recording is probably protected.

1. *Corporate lineage.* Can the entity that made the recording be traced forward, either directly or through mergers and acquisitions, to a present-day rights holder?
2. *Marketplace evidence.* Who has asserted ownership in the years since the recording was made (a minimum of 40 years in this study), either through legal claims or “authorized” issues or reissues? If the original recording company has disappeared, who has reissued the recording and under what circumstances?
3. *Consultation with experts.* The project director and contractor for this report are recording-industry historians, and we were able to resolve many cases. For the most problematic cases, we asked a number of experts with years of experience in the field of reissues their opinion regarding current ownership of the labels involved. These experts are named in the acknowledgments.

None of these tests is infallible. Corporate lineage would seem to be definitive proof of ownership, but it is not. Without access to documents specifying ownership at the time when the recording was originally made and to documents associated with each subsequent change of ownership of the original record label, we cannot be sure to whom ownership of the recordings passed. Press reports that a record company was “acquired” by another can be misleading. For example, scholars were long uncertain about the relationship between the Indestructible Record Company (IRC), a cylinder manufacturer, and the Columbia Phonograph Company between 1908 and 1912. The trade press at the time said that Columbia had purchased Indestructible “lock, stock, and barrel,” and Columbia itself called it an “acquisition.”² This suggests that Indestructible cylinders made during this period were owned by Columbia and that they would currently be the property of Columbia’s successor, Sony BMG. However, documents recently have surfaced showing that IRC and Columbia simply had a distribution agreement. Since IRC owned the recordings, later went bankrupt, and had no known successor, the cylinders are in fact not protected.

² *Talking Machine World*, October 15, 1908, 8, 51. As a result of these statements, later histories of recording tended to be somewhat vague about the Columbia-IRC relationship. The widely used *From Tin Foil to Stereo* by Read and Welch, states that Columbia said that it was “taking over sales” of IRC products (p. 100). Another basic source, Gelatt, *The Fabulous Phonograph*, asserts that Columbia “took over the entire output of [the Indestructible] factory” (p. 165). Columbia marketed the cylinders as its own, calling them “Columbia-Indestructible” cylinders.

In some cases, ownership is fairly obvious. For example, recordings originally made by Columbia, Victor, and their subsidiaries are now controlled by Sony BMG; Decca recordings are controlled by Universal Music. Products of the small record companies of the 1890s that quickly went out of business and have no known ownership chain to the present day are presumed to be nonprotected. However, ownership of many small labels of the 1920s and beyond is extremely unclear, because of mergers, alliances, exchanges of matrices, bankruptcies, and the like. The Emerson Phonograph Company was founded in 1915, went bankrupt in 1920, operated for a time in receivership, and then suspended operations, was sold and reactivated in 1922, was sold again in 1924, was sold again in 1926, and was discontinued in 1927 (Sutton and Nauck 2000, 76–9, 269, 277–81). Along the way, Emerson masters were released on many other labels, although whether they were sold to or leased by those labels is unknown. The company also spun off a radio division that has lasted to the present day and that may or may not have an interest in some Emerson recordings. So who owns the rights to Emerson recordings today?³

In most cases of past corporate changes, legal documents spelling out the terms of sale are not available. In their absence, one test used to determine transfer of masters during a change of business status is whether the successor label continued to press and sell the predecessor label's back catalog. If it did, that is a strong indication that the successor did acquire rights to the predecessor's recordings, not just its trademarks, physical plant, etc. If it did not, that is at least a suggestion that rights to the recordings were not part of the transaction. For example, after the Indestructible Record Company severed its relationship with Columbia in 1912, IRC continued to operate as an independent company for 10 more years, manufacturing and selling the recordings made between 1908 and 1912, among others. This is a clear indication that ownership of the 1908–1912 recordings resided with IRC, not Columbia.

The second test is marketplace evidence. Who has asserted ownership? Liberty Music Shop (LMS), a New York retailer, produced its own recordings, including those of many important stage and cabaret artists, from 1933 to 1942. The store went out of business during the 1970s. It is unclear who, if anyone, now owns the majority of its masters (a few were sold). They have been reissued by a variety of labels, including those of such reputable organizations as the Smithsonian Institution and the Metropolitan Opera Guild, without clear credit. (When a label is unable to find an owner, it sometimes holds money in escrow in case one should emerge.) With no one known to be asserting ownership, our panel of experts believes that, with a few exceptions, LMS masters are currently not protected. Likewise, the Newark, New Jersey-based Manor label, which produced important jazz and R&B recordings in the 1945–1949 period, appears to be in

³ Since the last known owner of Emerson, the Consolidated Record Corporation, went out of business in 1929 and had no known successor, we have assumed that Emerson recordings are unprotected today.

limbo. One of our informants indicated that two reissue producers “tried hard to find ownership of Manor, but the trail went cold.”⁴ They proceeded with their reissues, in one case putting money in escrow, but no claimant ever emerged.

On the other hand, Sony BMG has asserted ownership to the earliest products of its predecessor companies—including 1890s cylinders of the Columbia Phonograph Company of Washington, D.C., and early Victor and even Berliner discs of the 1890s and early 1900s—and has occasionally reissued such recordings as its own. Given the bankruptcies and numerous changes of ownership that have occurred over the years, it might be difficult for Sony BMG to prove chain of title in court, but custom has been to assume that a company in such circumstances does have such rights, and we have made that assumption here.

One notable component of the public domain for recordings is the body of recordings made by the companies of Thomas A. Edison between 1890 and 1929. Legal title to those recordings did pass to a successor company; however, in the 1950s that company conveyed title to the U.S. government as part of an agreement with the U.S. Parks Department. Thus, Edison recordings can today be used without restriction. No other major company is known to have donated its rights to the public in this manner.

Some 400 labels are represented in this study. Most were individually identified as to protected/nonprotected status. However, even after extensive effort, we could not identify the status of about 100 small labels—25 percent of the total. For those labels, we used a statistical process known as ascertainment to assign a status.⁵ With more time and the engagement of legal experts, it might be possible to track down the status of additional labels (and possibly change the assignment of some we did categorize). However, we believe that even with substantial expenditures, a large number—perhaps not much less than the 25 percent that we were left with—would remain unknown. In addition, many of those that were identified as to ownership would be “probable,” rather than “definite,” identifications, owing to the lack of a clear legal paper trail. This is an illustration of the confusion and uncertainty caused by the lack of federal copyright protection of pre-1972 works and related prescribed copyright and ownership markings. The elimination of mandatory registration and marking in the 1976 law will make future research of more-recent publications equally difficult and open to question.

The assumptions made here are not intended to prejudge legal determinations that may be made in the future.

⁴ Correspondence from Dan Morgenstern to Tim Brooks, September 24, 2004.

⁵ In ascertainment, a portion of a sample for which a characteristic is known is used to predict the incidence of that characteristic in a similar portion of the sample for which that characteristic is not known. In this case, the sample of small, post-1940 record labels was separated into two groups: those for which protected status is known, and those for which it is not known. The proportion of the group that is protected was then assumed to be true for the other group.

Reissue availability. *Current availability* is defined as reasonable availability of a new copy to an ordinary person, through normal commercial channels (e.g., store, mail order, Internet). The giant online music databases of Allmusic, Amazon, and MUZE were the principal sources that we used to determine current availability. It was not our purpose to track reissues of extremely limited availability or of availability only to predetermined or exclusive parties, such as club members. Availability had to be in the form of a CD or other currently produced physical format. This study does not consider online access. There is no evidence of legal Internet distribution of pre-1965 recordings not simultaneously offered to the public as compact discs.

Availability from the rights holder means issued by that entity or by its licensee (as indicated on packaging) and legally distributed within the United States. It does not include illegal reissues or reissues available only from foreign sources; these are enumerated separately. It is presumably not the purpose of U.S. copyright law to force those who wish to reissue historic recordings to operate illegally or move overseas.

Appendix D

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