

Constitutional Obstacles?: Reconsidering Copyright Protection for Pre-1972 Sound Recordings

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We are writing an article about the copyright and constitutional implications of extending federal copyright protection to pre-1972 sound recordings, which are currently protected only under state law. Such a modification of the legislative framework is not necessarily hypothetical: Congress has directed the Copyright Office to study the feasibility of federalizing copyright protection for these recordings with an eye toward how such a legislative change might facilitate preservation work by libraries, expand public access to them, and affect the economic interests of right holders.

State law provides a patchwork of protection: strong in some states, weak to nonexistent in others. Under federal law as it stands, states may continue to protect pre-1972 sound recordings until 2067, at which time they will all enter the public domain. Because of this scheme, there are almost no sound recordings in the public domain in the U.S., no matter how old. Federalization schemes being discussed would protect sound recordings no longer than the term that other types of works receive under federal copyright law, which would result in part of the current term being cut off unless some special provision is made. (So for example, a sound recording made in 1950 can be protected under state law till 2067; if the federal term were applied, it would enter the public domain in 2045.)

In this article, we consider the policy implications of federalizing copyright protection with respect to the interests of the various stakeholders (right holders, users, libraries, scholars, the public, etc.). We focus on the potential Takings and Due Process hurdles to federalization that might be raised. In particular, our goal is to consider how such claims might be framed and how reviewing courts should apply the constitutional doctrines to this context. In addressing these issues, we draw upon historical examples of related copyright law reform measures that have been enacted.