

Comments of the Library of Congress
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In Response to the
Copyright Office Notice of Inquiry
“Music Licensing Study”

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The nation’s libraries, archives, and museums hold some 46 million sound recordings and millions of other music collections. The digital age offers increased possibilities for broadened dissemination of music and sound recordings in ways unimaginable in prior eras. However, technological, institutional, and legal impediments to increased access have created daunting challenges for libraries and archives.

Complicating matters, millions of historic music and sound recordings are in need of preservation. In the digital age, new technology offers great promise for preservation initiatives. The digital world, however, has created significant challenges for those institutions responsible for preserving music and recorded sound history for future generations.

In December 2012, *The Library of Congress National Recording Preservation Plan*¹ was published as a blueprint to “implement a comprehensive national sound recording preservation program,” as mandated by Congress in the National Recording Preservation Act of 2000. In crafting the Act, Congress specified that the program established under this legislation “shall ... increase accessibility of sound recordings for educational purposes.”² The Plan’s recommendations for implementing the national program were derived from six task forces of experts from public and private institutions and organizations across the country in the fields of law, audio preservation, library/archive management and public service, business, digital technology, and cultural history.

The following comments pertaining to music licensing issues relate to the preservation and dissemination responsibilities of libraries and archives. They reflect the Plan’s recommendations in addition to conclusions reached in the comprehensive survey of recorded sound preservation in America that the Library published in August 2010, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age*, which also was mandated by the National Recording Preservation Act of 2000.³

¹ *The Library of Congress National Recording Preservation Plan*. Sponsored by the National Recording Preservation Board of the Library of Congress (Washington: Council on Library and Information Resources and The Library of Congress, 2012); available at <http://loc.gov:8082/programs/static/national-recording-preservation-plan/publications-and-reports/documents/NRPPLANCLIRpdfpub156.pdf>.

² National Recording Preservation Act of 2000 (P.L. 106-474), Sec. 111. This Act was amended by the Library of Congress Sound Recording and Film Preservation Programs Reauthorization Act of 2008 (P.L. 110-336).

³ *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age*. Commissioned for and sponsored by the National Recording Preservation Board of the Library of Congress

The staff of other divisions of the Library of Congress look forward to working with our colleagues in the Copyright Office to accomplish any legal, policy, or procedural changes that will facilitate preservation of and access to the nation's cultural heritage.

5. and 8. Is Section 114 statutory licensing effective?

The current statutory licensing scheme is not a good fit for the Library of Congress and similar libraries and archives. A statutory, collective, or other licensing scheme that would provide "one stop shopping" for the bundle of rights inherent in music and sound recordings would be of great use to libraries and archives seeking to provide public access to these works. Currently, it is difficult for the Library of Congress to provide wide public access via the Internet to music and sound recordings in the Library's collections because multiple permissions must be identified and obtained from various sources for each of the layers of copyright and each of the potential uses. For any single work, the Library might need to obtain rights for the lyrics, music, published score, sound recording, streaming or download, interactive uses, and synchronization. While the Library obtains blanket licenses where available and appropriate, the time and effort that it costs to identify and obtain permissions frequently prevents the Library from making music and sound recordings of historical interest available to scholars and the public. Other libraries and archives with music and sound recording collections face similar constraints.

10. Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

Yes, pre-1972 sound recordings should be included within the Section 112 and 114 statutory licenses. Ideally, pre-1972 sound recordings should be completely federalized under the current U.S. copyright law, including limitations and exceptions provisions.

Few, if any, public domain recordings exist in this country because federal copyright law in the United States does not cover sound recordings made prior to February 15, 1972. Instead, pre-1972 recordings are subject to a variety of disparate state laws and state common law that have no expiration dates and lack statutory language to exempt archival copying for preservation purposes. As a result, a study sponsored by the Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress found that "[m]any librarians and archivists are reluctant to copy and disseminate older sound recordings in the face of this patchwork of state laws that lack well-delineated exceptions."⁴ Section 108 of Title 17, which grants libraries and archives limited rights to copy federally protected post-1972 sound recordings for preservation and access purposes, does not apply to pre-1972 recordings because they are not covered under federal law. Section 107 of Title 17, which provides

(Washington: Council on Library and Information Resources and The Library of Congress, 2010); available at <http://www.loc.gov:8082/programs/static/national-recording-preservation-plan/publications-and-reports/documents/pub148.pdf>.

⁴ United States Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress, *The Section 108 Study Group Report* (March 2008), available at www.section108.gov/docs/Sec108StudyGroupReport.pdf.

federal fair use rights, likewise does not apply to pre-1972 recordings, although common law fair use likely applies, see, e.g., *Lennon v. Premise Media Corp.*, 556 F.Supp.2d 310 (S.D.N.Y., 2008). In addition, the lack of clarity concerning copyright status and the inapplicability of section 108 hampers efforts by libraries and archives to raise funds to save this material.

Many pre-1972 sound recordings will deteriorate long before 2067, the year in which they will enter the public domain under current federal law. Sound recordings historically have been fixed on media that are much more fragile than many other types of copyrighted works. A 2005 survey of libraries, archives, museums, and historical societies responsible for preserving recordings estimates that of the 46 million recordings existing in their collections, more than 6 million are “in need” or “in urgent need” of preservation. Many more may be at risk: the institutions in the survey categorized the condition of more than 20 million of the recordings as “unknown.”⁵

Most of the 46 million recordings housed in public institutions in the United States never have been published. Most unpublished recordings are unique. And most unpublished recordings made before 1972 were fixed on lacquer discs, acetate tapes, or polyester tapes, formats at high risk of deterioration because of chemical instability, external hazards, and replaying. Many do not have clearly identified owners who can be contacted for permission to preserve the material and make it accessible to the public.

The prospects for effective preservation of sound recordings by libraries and archives holding recorded sound collections and increased funding to undertake this work will be significantly improved if sound recordings fixed before February 15, 1972, are brought under Title 17, as the U.S. Copyright Office recommends in a December 2011 report.⁶ Coverage under Sections 107 and 108 will provide certainty for qualified libraries and archives to undertake needed preservation copying and cataloging activities.

Bringing pre-1972 sound recordings within the ambit of the Section 112 and 114 statutory licenses would also assist libraries and archives to make historic sound recordings publicly accessible via on-site exhibits and the Internet, providing uniform and transparent rules for licensing these materials. Rights holders of pre-1972 recordings would also benefit by receiving coverage under federal law: generally speaking, they would enjoy the certainty and uniformity provided by federal law, and more specifically, they would become eligible for licensing payments under the Digital Performance Right in Sound Recordings Act of 1995—payments that are required only for transmissions of recordings protected by federal law.

Should pre-1972 sound recordings not be placed under full federal copyright protection in the near future, as an alternative approach to resolve this issue, legislation should extend limitations and

⁵ *A Public Trust at Risk: The Heritage Health Index Report on the State of America's Collections* (Washington: Heritage Preservation, Inc., 2005), 40; available at <http://www.heritagepreservation.org/HHI/HHIfull.pdf>.

⁶ Library of Congress. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights*, December 2011; available at <http://www.copyright.gov/docs/sound/pre-72-report.pdf>.

exceptions, including both section 107 fair use and section 108 library and archives exemptions, to such recordings.

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

Licensing models for libraries and archives to acquire and preserve digital files

Libraries and archives need licenses to allow them to acquire sound recordings by download and not just streaming of digital music files. Libraries and archives must have the ability to individually select, purchase, and preserve commercially distributed digital audio files as permanent digital downloads (PDDs) to ensure preservation. If legislation to change music licensing practices is not a real possibility, the Copyright Office should bring stakeholders together and encourage them to create a licensing system for libraries and archives that will allow these institutions to acquire and preserve digitally distributed recordings for posterity.

Many of the most recently created recordings might not be preserved for posterity because of changes in the way that sound recordings are published and distributed. Physical copies of commercial recordings are being rapidly replaced by digital audio files distributed online by third party companies (such as iTunes, Amazon, and eMusic) through end-user license agreements that limit uses to “personal, non-commercial, entertainment” only.⁷ Often the purchase is not even classified as a “sale.” Under the terms of the license, the content remains the property of the provider, and all uses are governed by the terms of the license. In the near future, it appears likely that much new music will be distributed via the “cloud,” with users permitted access privileges only. Libraries and archives must be able to legally download music files in order to effectively preserve them for posterity.

These licensing agreements effectively make it impossible for research libraries and archives to legally purchase copies of file-based recordings, while simultaneously preventing legal educational use of these recordings. Because licenses generally trump copyright law, contractual licensing provisions may expressly prohibit reliance on the section 107 and 108 provisions for libraries and archives, which are meant to serve the public good and ensure the availability of works over time. One solution would be to amend the U.S. copyright law to specify that copyright exceptions such as fair use will always prevail over license terms in licenses offered to libraries and archives. Another, partial, solution would be to clarify that statutory licensing schemes supplement rather than replace rights provided by the U.S. copyright law.

Furthermore, private collectors, who are most adept at discovering and documenting emerging genres, may never legally be able to place their digital audio files in archives, no matter how rare or at risk their collections may be. If this licensing problem is not resolved soon, the bulk of the nation’s culturally

⁷ See Amazon MP3 Music Service: Terms of Use, <http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=200154280&pop-up=1>.

significant recordings from the twenty-first century will be held privately by companies and individual artists who may lack incentives or resources for long-term preservation.

Currently, several library subscription services offer on-demand streaming access to a catalog of preselected music, as well as fulfillment services that provide a limited selection of downloadable music files, designed to meet the needs of public and smaller academic libraries. Research libraries and archives, however, must have the ability to individually select, purchase, and preserve commercially distributed digital audio files as PDDs to ensure preservation and meet the needs of a broad range of scholars.

Resolving these digital licensing issues will require a concerted effort on the part of libraries and archives that have a vested interest in preservation and access. The Copyright Office could help by facilitating discussions between representative library and archive organizations, music industry representatives, and online distributors, beginning with a review of licensing agreements and business models between recording companies and vendors, and followed by a sustained effort to develop agreements for educational use and preservation. Copyright Office oversight throughout this process will help it succeed.

A pilot project should be undertaken whereby one or more research libraries develop an agreement with specific recording companies that would allow a library participating in the agreement to purchase preservation quality digital audio files (e.g., uncompressed WAV) for PDD. This option also might include a provision that allows on-demand streaming access outside the library as long as certain conditions are met, such as restricting access via user authentication to university faculty and students, and obtaining appropriate digital media licenses with SoundExchange; the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and SESAC. The Copyright Office should facilitate discussions to establish this project and provide oversight to the project. The pilot project would lay the groundwork for future endeavors between public institutions and private interests by identifying major hurdles likely to arise with regard to licensing, downloading, access, and associated costs.

Licensing models for libraries and archives to make accessible to patrons digital music files that are out of print or not commercially available at a reasonable price.

An efficient, low-cost or gratis system is needed for licensing to libraries and archives digital files of music content not available in the commercial marketplace at a reasonable rate that would allow them to more effectively perform dissemination services. This has two components: orphan works and general library uses.

First, music and sound recordings should be included in any orphan works solution for works whose copyright owners cannot be identified or located, or who are not actively commercially exploiting the works. This should include solutions related to mass digitization, such as a collective licensing model. It is in the public interest to make orphan and out-of-print works available for productive, socially beneficial uses.

Library use clauses in end-user license agreements are needed. Library use licenses should not be structured by pay-per-use because research often requires repeated uses.

The Supreme Court, in discussing the intent of the Copyright Clause, stated, “Evidence from the founding ... suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science.”⁸ Dissemination of works is a necessary and vital mission of libraries and archives.⁹ Especially in instances when works are not available commercially or only available commercially at costs unaffordable to many researchers and educators, libraries and archives can provide service to those who otherwise cannot access works necessary for their research or educational projects. Taxpayers have funded libraries and archives, including the Library of Congress, to acquire, retain, catalog, and preserve recordings. These activities do not benefit taxpayers unless libraries and archives can make these recordings more widely available than the present system allows.

In hearings conducted by the National Recording Preservation Board, Donald J. Waters, program officer for scholarly communications at The Andrew W. Mellon Foundation, stated that “the royalty regime is aimed at pay-per-use and educational use is deeply inhibited by such a regime. Often, study requires repeated use of a work by many students or by a single scholar who is carefully analyzing the piece. If they are required to account for each and every use and pay for them even at discounted rates, study and education simply will not happen.”¹⁰ Licenses for archival use are needed that are not structured according to pay-per-use.

The Copyright Office could help resolve this issue by facilitating discussions between representative library and archive organizations, music industry representatives, and online distributors to develop an efficient, low-cost or gratis system to license music files to libraries and archives that will not interfere with the commercial marketplace. Copyright Office oversight throughout this process will help it succeed.

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

The adoption of universal standards for the identification of musical works and sound recordings by the Copyright Office in its registration process would benefit libraries and archives in their efforts to process and catalog these materials more efficiently. In 2011, the Library of Congress characterized the establishment of “[e]fficiencies in the creation and sharing of cataloging materials” as “imperative.”

⁸ *Golan v. Holder*, 609 F. 3d 1076, 21.

⁹ The mission statement of the Library of Congress Library Services unit includes the following: “The mission of Library Services is to develop qualitatively the Library’s universal collections, which document the history and further the creativity of the American people and which record and contribute to the advancement of civilization and knowledge throughout the world, and to acquire, organize, *provide access to*, maintain, secure, and preserve these collections” (emphasis added). See <http://www.loc.gov/about/>.

¹⁰ Testimony of Donald J. Waters, program officer for scholarly communications, The Andrew W. Mellon Foundation, NRPB public hearings, December 19, 2006, New York; quoted in *State of Recorded Sound Preservation*, 59.

Acknowledging an ongoing “era of diminishing budgets and heightened expectations in the broader library community,” the Library has advised that “information providers and cultural heritage institutions must reevaluate their use of scarce resources, both as individual organizations and as a community.”¹¹ Universal standards for the identification of musical works and sound recordings would facilitate more exchange of data with the music industry and between libraries and archives. The Copyright Office should consult with the National Recording Preservation Board’s expert working group on best practices for audio cataloging and consult with representatives from fields such as informatics, audio archives, digital repositories, scholars, discographers, private collectors, libraries, and other experts in the library community in order to create standards that will best serve libraries and archives.

Universal standards also will benefit the music industry. Standards requiring the exact identification of works, authors, and rights holders will aid processes of licensing underlying works and sound recordings, and thus make legal searches easier, more accurate, and more efficient.

More collaboration between the Copyright Office and the Library’s cataloging units would be beneficial to all parties. The U.S. International Standard Music Number (ISMN) agency, for example, is hosted by the Library of Congress’s Music Division. The ISMN “is a unique number for the identification of all notated music publications from all over the world.” It is used by libraries, music publishers, music traders, rights organizations, and others. The ISMN is used in conjunction with the following standards in tracking musical works: International Standard Name Identifier (ISNI); International Standard Musical Work Code (ISWC); International Standard Recording Code (ISRC); and International Standard Audiovisual Number (ISAN).¹² Standards such as these, if adopted by the Copyright Office, will benefit all stakeholders.

Respectfully submitted,

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¹¹ Deanna Marcum, “Transforming Our Bibliographic Framework: A Statement from the Library of Congress” (May 13, 2011); available at <http://www.loc.gov/marc/transition/news/framework-051311.html>.

¹² See <http://www.ismn-international.org/faq.html>.