

13 April, 2011

To: David O. Carson, General Counsel
U.S. Copyright Office
Library of Congress
Washington, D.C.

Re: NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972—Reply comments submitted on behalf of The Music Library Association (MLA)

Comments submitted by:
Eric Harbeson, chair
Legislation Committee
Music Library Association

Reply Comments of the Music Library Association

The Music Library Association appreciates this opportunity to respond to comments made in response to the Notice of Inquiry, “Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972” (75 FR 67777-81, Doc. 2010-4), and welcomes the thoughtful dialogue that the NOI has facilitated. While we concur with many of the comments submitted, especially those made by the Society of American Archivists, the Association of Recorded Sound Collections, the Electronic Frontier Foundation, and others, there are points made in the comments submitted by the Recording Industry Association of America and the American Association of Independent Music (“RIAA/A2IM”) with which we respectfully disagree, and it is those points to which we respond here.

Specifically, in response to the RIAA/A2IM statements to the contrary, we assert that:

- Market solutions, while unquestionably useful, are not and cannot be a complete solution to the problems raised by the NOI;
- The issue of "piracy" is not relevant to the questions at hand;
- A chilling effect currently exists, despite the lack of litigation;
- Incorporation, despite the complexity, is nonetheless achievable with thoughtful, carefully-worded legislation; and
- Incorporation of pre-1972 sound recordings into federal law is constitutionally sound in principle.

MARKET SOLUTIONS ARE NOT SUFFICIENT TO SOLVE THE PROBLEM

The RIAA/A2IM comments describe several preservation and access activities engaged in by their members.¹ The Music Library Association (MLA) commends these activities and agrees they do important work in preserving some of our nation's recorded musical heritage. However, the RIAA/A2IM comments propose that these types of activities (individual corporate preservation programs, corporate donations of original masters to archives, and corporate-public partnerships) are sufficient to solving the problem of pre-1972 sound recordings.² We disagree on grounds that (a) the recordings represented by the RIAA and A2IM represent only a fraction of the total number of recordings which are affected;³ and (b) that even among recordings represented owned by RIAA/A2IM members, industry solutions will not be enough to save all the recordings currently endangered. By their own admission, RIAA/A2IM members have already lost many tapes due to neglect and deterioration.⁴ For economic reasons explained in the RIAA/A2IM comments, record companies understandably focus on preserving the older recordings they perceive to be more commercially viable.⁵ Relying only on the approach suggested by the RIAA and A2IM would leave large groups of recordings at risk of loss by deterioration. As the comments filed by the Library of Congress note, a comprehensive national sound recording preservation program, as mandated by Congress in the National Recording Preservation Act of 2000, will require a systematic approach necessarily broader in scope than that which individual record companies can achieve. The recent report by the National Recording Preservation Board (NRPB) also described record company activities and partnerships, and concluded that "however effective individual initiatives such as these may be, they will not resolve all the outstanding issues."⁶ Both copyright law reform and collaboration between rights holders and archives are needed to preserve America's recorded sound history.⁷ Extending to pre-1972 sound recordings the exceptions for libraries and archives in Section 108 would lay the groundwork for a comprehensive, systematic national preservation program, and would not negate opportunities for additional corporate-public partnerships.

¹ RIAA/A2IM comments, pp. 8–18.

² RIAA/A2IM comments, p.2: "Greater preservation of and access to RIAA and A2IM-member owned recordings and other culturally and historically significant recorded materials is a worthy goal. However, the means by which that goal is achieved should be left to the marketplace."

³ Rob Bamberger and Sam Brylawski, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age* (Washington, DC: Council on Library and Information Resources, 2010), <http://www.clir.org/pubs/abstract/pub148abst.html>, pp. 3–4, accessed 20 January 2011.

⁴ RIAA/A2IM comments, pp.10, 46.

⁵ RIAA/A2IM comments, pp. 8–9.

⁶ NRPB, pp. 136–37.

⁷ NRPB, pp. 136–37.

THE ISSUE OF "PIRACY" DOES NOT BEAR ON THIS QUESTION

The RIAA/A2IM comments imply that bringing pre-1972 sound recordings under federal copyright law will promote piracy of pre-1972 sound recordings and thus harm the marketplace for their rights holders.⁸ MLA acknowledges the financial investment required of record companies to reissue early recordings,⁹ and that unauthorized distribution may substantially harm the marketplace for those recordings. However, a national preservation program for early sound recordings that includes extending exemptions contained in Title 17 to pre-1972 recordings would in no way serve to augment piratical activities. Question 28 of the Copyright Office Notice of Inquiry asks:

“to what extent are people currently engaging in commercial or noncommercial use or exploitation of pre-1972 sound recordings, without authorization from the rights holder, in reliance on the current status of protection under State law? If so, in what way? Would protecting pre-1972 sound recordings under Federal law affect the ability to engage in such activities?”

In response to this question, the RIAA/A2IM comments report knowledge of “numerous websites offering unauthorized access to back-catalog materials,” all of which “provide links to unauthorized downloads of (pre-1972) sound recordings.”¹⁰ However, the existence of these websites is not evidence that protecting pre-1972 sound recordings under federal law, rather than state law, would make it easier for these websites to engage in unauthorized distribution of these recordings. Nor would it make prosecution of infringement by rightsholders any more difficult; if anything, the fact that they make pre-1972 sound recordings available means that these websites—which also provide links to post-1972 sound recordings, as well as movies, sheet music, software, and other federally copyrighted works—demonstrate that state laws are no more effective at preventing unauthorized copying than are federal laws. To the extent that such websites consider the law at all, there is no loophole in federal law which they are exploiting. On the other hand, RIAA members in particular have, in their many recent lawsuits in federal court, shown that federal law provides relief for rightsholders wishing to enforce their rights which would be unavailable under state law.¹¹ The proposed change in the law will make

⁸ RIAA/A2IM comments, pp. 3, 4, 8.

⁹ RIAA/A2IM comments, p. 8.

¹⁰ RIAA/A2IM comments, p. 8, footnote 10.

¹¹ For example, in the ongoing case against Jammie Thomas-Rasset, juries have awarded the plaintiffs damages ranging from \$9,250 to \$80,000 per song (each of which was released after February 15, 1972). The judge has issued a reduced award of \$2,250 per song. *Virgin Records America et al. v. Thomas*, No. 0:2006cv01497 (D. Minn. January 22, 2010). In the case against Joel Tenenbaum, also ongoing, the plaintiffs were awarded \$67,500 in statutory damages for 31 songs, also \$2,177 per song. *Sony BMG et al. v. Joel Tenenbaum*, No. 07cv11446-NG (D. Mass. July 9, 2010). In both these cases, the damages awarded were statutory damages provided under 17 U.S.C. 504(c)(2). We are aware of no state which provides comparable relief.

it easier for libraries to make legal use of copyrighted sound recordings, but those making illegal use will gain no encouragement from the law.

The RIAA/A2IM argue that current law does not permit, "nor should permit, every qualified library or archive to make a copy of every recording in existence or desired" and that it does not permit "free-for-all' copying."¹² This is unquestionably the case with respect to both state and federal law, and nothing that MLA proposes would change that—we see no way in which "free-for-all' copying" would be any more permissible under federal law than under any of the state laws. A plain reading of Sec. 108 should be enough to demonstrate that librarians and archivists wishing to make copies under federal law do not intend to engage in a "free-for-all" of piratical copying. Rather, Sec. 108 contains explicit provisions intended to protect active markets and to identify narrow conditions under which preservation copying may be made. Copies made under Sec. 107 would still need to satisfy the requirements of that section's four factor test. Extending the exceptions contained in Title 17 to pre-1972 recordings as part of a national preservation program would not negate the ability of rights holders to prosecute infringement, and would have no effect on the marketplace.

A CHILLING EFFECT EXISTS, DESPITE LACK OF ACTUAL LITIGATION

The RIAA and A2IM assert that federalization of pre-1972 sound recordings is unnecessary for preservation activities by bona fide libraries because no such institution has yet been sued for preservation copying.¹³ That there is an absence thus far of litigation over preservation copying is true as far as we know, but the conclusion drawn—that this means the law has not been a hindrance—is invalid for three reasons.

First, this assertion, while giving tacit support for preservation copying, ignores the corresponding need for libraries to provide access to these copies. As we argued in our initial filing,¹⁴ provision of access is an inseparable part of any preservation plan. Knowing how and when the public might access preserved materials not only guides the curation of a preservation project, but also serves to convince institutional budget officers

¹² RIAA/A2IM comments, p. 19.

¹³ RIAA/A2IM comments, p. 19. "regarding legal issues and preservation activities—namely, copying unstable recorded materials onto more stable, archival media—to our knowledge, no public or private institution has been sued (or threatened with a lawsuit) by an RIAA or A2IM member for undertaking preservation activity; nor should any reputable archive be so threatened. In response to QUESTION #29 of the NOI the RIAA and A2IM believe that in fact, since they know of no such instances of litigation for legitimate preservation activities by libraries or archives, that the copyright law—state or federal—is largely not a factor or hindrance, by itself, to preservation activity."

¹⁴ "For more than a decade, it has been understood in the library world that 'preservation is access, and access is preservation.' . . . [T]he two are fundamentally intertwined. . . . Access generates interest, which results in further support for preservations. Preservation, in turn, makes materials safely available for the public to access." MLA comments, p. 5.

and external granting agencies that a preservation project is worth funding. A plan for providing access is therefore critical to preservation projects. As a result, it is impossible—for both practical and financial reasons—to propose or undertake large-scale preservation activity without the support of federal law clarity where provision of access is concerned. This point is supported in the initial comments filed by many of our colleagues, including the Association for Recorded Sound Collections¹⁵ and the Library of Congress.¹⁶

Second, the RIAA/A2IM implication that the lack of litigation should somehow provide assurance that there will be no litigation in the future is unhelpful, even if it were true. The implication is contingent upon there being no expansion of preservation activities beyond current practice. However, as the NRPB report notes repeatedly, expansion of that activity is desperately needed. This is precisely the reason this issue is before the Copyright Office.

Finally, the absence of past litigation is not, in and of itself, evidence that the current law is not hindering progress. As we argued in our initial comments, it is not just litigation, but the threat of litigation that causes the hindrance. Given the ongoing copyright infringement lawsuit against Georgia State University,¹⁷ and the increasingly litigious copyright environment surrounding recordings in the United States today, libraries and archives have no reason to believe that they would be perpetually immune to litigation over projects they believe to be fair. The threat posed by the potential of litigation is in many cases sufficient to stop an otherwise legal project.¹⁸ Furthermore, while industry groups may be comfortable negotiating the boundaries of the law through litigation, libraries are, on the whole, much more risk-averse for reasons we outlined in our initial filing.¹⁹ We do not know the number of projects that fail to advance beyond the proposal stage owing to the chill of litigation threat, but that such cases are plentiful is attested to

¹⁵ “[P]reservation and access are closely interdependent. In the real world, neither can be achieved without the other” ARSC comments, p. 1.

¹⁶ “The uncertain status of [pre-1972 sound recordings] under state, common law copyright, and the inapplicability of federal copyright law for archival preservation, greatly prejudices the ability of institutions to raise funds, or to allocate resources for preservation activities. . . . In addition, the ability of institutions to make these works publicly accessible, once preserved, is hampered by the common law status (and inapplicable federal law) making it even less likely that resources are allocated to save, much less make available this material” Library of Congress comments, p. 3.

¹⁷ *Cambridge University Press et al. v. Patton et al.*, No. 1:2008cv01425 (N.D. Ga. filed April 15, 2008).

¹⁸ As the Electronic Frontier Foundation (EFF) noted in their comments, “while it may be perfectly legal for a given entity to make archival copies of pre-1972 sound recordings, absent clear answers to these questions, that preservation and access may never occur. Federal jurisdiction over pre-1972 sound recordings would help remedy the problem by replacing the current haze of confusion with the explicit statutory exceptions to and limitations on copyright protection that exist under federal law.” EFF comments, p. 10.

¹⁹ See MLA comments, pp. 2–3.

in professional conversations across the country. The threat posed by potential litigation to any expansion of efforts to preserve and provide access to pre-1972 sound recordings is real.

LEGISLATING PREEMPTION WOULD BE A COMPLEX, BUT NOT INTRACTABLE PROBLEM

The RIAA and A2IM contend that legal uncertainty and chaos would result from extending federal copyright protection to pre-1972 sound recordings, because the resulting “complex legal and business issues would undermine the 100-year state and common law jurisprudence that governs the protection and rights afforded to pre-1972 U.S. recordings.”²⁰ However, as we argued in our initial comments, legal chaos already exists, and this is exactly what we hope federal preemption will help to solve.²¹

The RIAA/A2IM comments raise issues which should not be considered lightly, but for which we believe it is nonetheless possible to find solutions. We note, for example, that the comments submitted by Kenneth D. Crews and the Electronic Frontier Foundation offer strategies for approaching many of these potential legal challenges. Erlinger proposes language for an amendment to extend federal copyright protection to pre-1972 sound recordings that addresses the difficulties inherent in transferring protection from state to federal law related to terms of protection, the Takings Clause of the Fifth Amendment, questions of ownership, and impact upon reliance parties, and concludes that it would be possible, and desirable public policy, to amend the federal copyright law to extend protection to pre-1972 sound recordings in a way that adequately addresses the legal and constitutional concerns.²² Indeed, the RIAA/A2IM point to a system which nominally works, thanks to years of litigation, but which, to read their comments, is not nearly as robust as that which is provided by federal law.²³ Problems in resolving

²⁰ RIAA/A2IM comments, p. 23.

²¹ See also, EFF comments, p. 8. “The absence of defined exceptions and limitations to copyright, together with the capriciousness of a common-law system and confusion of fifty distinct state regimes, creates an environment of legal uncertainty that has produced a forceful chilling effect on the preservation and making accessible of historical sound recordings fixed before 1972.... Unlike statutory law, common law is judge-made and therefore subject to change. While this may be advantageous in view of the possibility of claiming defenses that have no precursor under the law, the unpredictability of the outcome acts a deterrent to actions that might lead to asserting such defenses in the first place. Preservation and distribution of pre-1972 sound recordings are a casualty of this legal indeterminacy.”

²² Michael Erlinger Jr., “An Analog Solution in a Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings,” *UCLA Entertainment Law Review* 16:1 (winter 2009): 69–77.

²³ RIAA/A2IM, 26: “This system may be complex, but at least there have been decades of litigation and precedent to resolve ownership issues under these laws. In fact, the over 100-year history illustrates that state courts have been able to resolve ownership and rights issues in a system which, even if complicated, works.”

ownership will not be created by federal preemption; the need for continued litigation to determine ownership demonstrates to us that these problems already exist and, if anything, shows an even more pressing need for reform.

The RIAA/A2IM comments argue that Congress deliberately decided not to include pre-1972 sound recordings because of insurmountable legal complexity, and that this provides historical precedent for continuing to allow special rules to apply to them. However, we should also consider other interpretations of the legislative history. Erlinger and others, for example, interpret Congress's historical choices differently, suggesting that the omission of pre-1972 sound recordings was as likely as not an historical accident.²⁴ Meanwhile, the NRPB and others have argued convincingly that the status quo creates its own legal chaos, to the detriment of our recorded heritage. As Henry Lee Mann argues, current protection of pre-1972 sound recordings under state laws, as exemplified in the holding by the New York Court of Appeals in *Capitol Records, Inc. v. Naxos of America, Inc.*, allows record companies to have an unlimited monopoly over pre-1972 sound recordings, and "exacerbates a market failure for the already difficult-to-access early works."²⁵

THE PROPOSED CHANGES ARE CONSTITUTIONALLY SOUND

The RIAA/A2IM comments raise two constitutional objections to updating the law. The first challenges the constitutionality of incorporation under the Takings clause of the Fifth Amendment. Specifically, the RIAA/A2IM comments state that placing pre-1923 sound recordings into the public domain would "clearly take the property of rightsholders."²⁶

²⁴ Erlinger, 58, quoting David Nimmer, *Nimmer on Copyright* (Newark, NJ: LexisNexis Matthew Bender, 2008), section 2.10]: "Even if record piracy of pre-1972 sound recordings would no longer be prohibited by state law, it would have been prohibited by federal law. Although the stated reason for preservation of state record piracy laws as applied to pre-1972 recordings was erroneous, when the House came to consider the Senate bill, it retained this provision. But because state law protection for pre-1972 sound recordings was preserved, it became unnecessary also to confer federal statutory copyright protection for such recordings. Therefore, the House added a further amendment, which appears in the final Act, whereby pre-1972 sound recordings are excluded from coverage of statutory copyright. In this manner, the Justice Department's mistaken belief that pre-1972 sound recordings were excluded from statutory copyright under the general revision bill led to an amendment that validated that belief."

²⁵ Henry Lee Mann, "As Our Heritage Crumbles into Dust: the Threat of State Law protection for Pre-1972 Sound Recordings," *Wake Forest Intellectual Property Law Journal* 6:1 (2006): 61–62.

²⁶ RIAA/A2IM, comments, p. 33. The RIAA/A2IM comments discuss this objection in the context of pre-1923, pre-1930, and pre-1940 recordings. Though we remain concerned with the ever-expanding copyright terms for many reasons, and fully support our colleagues' efforts to reduce the copyright term for sound recordings to 50 years, harmonizing with those of treaty partners, we consider this a separate issue and so are not

They argue that the existence of commercially viable recordings from these eras makes changing the law an actionable taking because it would "deny rightsholders...*all* economically viable use of those works."²⁷

We submit that the RIAA and A2IM have overstated the potential financial loss which they would suffer from putting pre-1923 sound recordings into the public domain. As noted by Brooks²⁸ and Erlinger,²⁹ the number of pre-1923 recordings that have been reissued pales in comparison to the number that have not. The fact that so many pre-1923 recordings remain unreleased demonstrates how low the commercial value of recordings from this era is perceived to be by the industry. As noted in our initial filing, for a plausible cause of action under the Fifth Amendment, the plaintiff would need to show monetary harm; however, with respect to pre-1923 recordings, this harm would be *de minimis*. Even should a taking occur in certain circumstances, the financial cost involved in awarding just compensation will also be minimal. As Erlinger argues, "evidence indicates that pre-1923 sound recordings have a limited share of today's record market and their commercial value is correspondingly low. As such, it is likely that the benefits of the proposed amendment outweigh the obligations imposed under the Takings clause."³⁰

In addition, the RIAA and A2IM ignore a crucial economic reality: in their filing, they argue that a work's entering the public domain "[deprives] an owner of *all* economically productive use of his property." (emphasis in original) If this were the case, then we are at a loss to explain, for example, the number of Dover Publications' reprints which remain in print.³¹ Given the economics of the publishing industry, we are confident that Dover does not continue to publish public domain works solely out of an altruistic concern for the world's musical heritage, but because they are making money on the publications. Placing a work into the public domain does not take away "*all* economically productive use" of the work—the rightsholders are not foreclosed from making use of the works to which they formerly held a monopoly. However, reintroducing competition

addressing it in this forum. We have offered the notion of amending Section 108(h) to allow for sound recordings in their last 45 years of copyright as one possible way of bridging the gap between rightsholders' fears of losing income from economically valuable copyright and libraries fears of losing access to culturally-valuable, though economically unexploited recordings. We encourage the RIAA and A2IM to join us in seeking and exploring compromise solutions which satisfy the needs of all stakeholders.

²⁷ RIAA/A2IM comments, p. 33. Emphasis in original.

²⁸ Tim Brooks, *Survey of Reissues of U.S. Recordings* (Washington, DC: Council on Library and Information Resources, 2005), <http://www.clir.org/pubs/reports/pub133/contents.html>, p.13, accessed 20 January 2011. Also cited in MLA comments, p. 10.

²⁹ Erlinger, p.73.

³⁰ Erlinger, p. 73.

³¹ As of March 22, 2011, Dover states that they have over 750 titles in their music catalogue alone, including numerous public domain works. <http://store.doverpublications.com/by-subject-music.html>.

greatly increases the chances that a work will be productively exploited in some fashion (possibly by the original rightsholder), increasing availability, and with a corresponding benefit to researchers, to society, and to the market.

The RIAA/A2IM comments raise a second constitutional objection in the question of "traditional contours." The RIAA/A2IM concede that "the traditional contours analysis has, to date, only been applied to cases where rightsholders 'gain' protections, and the existing cases shed little light on how, if at all, any such challenge or resolution would result in a case where rightsholders lose protection."³² Members of the RIAA/A2IM hold an unfettered monopoly over pre-1972 sound recordings, with none of the exceptions for users that Congress included in federal law to balance the rights of creators with the needs of society. We submit that Congress has the authority to disrupt traditional contours of copyright, especially one which allows for such an unrestricted monopoly, and that any challenge on that basis would fail in court. Congress, under the Constitution, has the authority to set limited terms during which creators have the exclusive right to their works when it is determined that such is necessary to encourage learning and innovation. By extension, in order to maintain the Constitutionally-prescribed balance, Congress must be able to shorten terms or otherwise adjust the temporary rights granted to authors if it determines that the law is stifling innovation. We believe that this is the case here, as demonstrated in our initial comments and those of our colleagues, and that Congress would be well within its authority to make the necessary changes.

CONCLUSION

We applaud the many efforts by RIAA and A2IM members in preserving recordings within their possession. But while these efforts provide a great benefit to society, the RIAA and A2IM's members' efforts alone cannot solve the greater problem of managing our recorded heritage. These efforts, while laudable, are necessarily prioritized by potential commercial value and cannot hope to cover all the recordings that may be of interest to library patrons. Libraries have for many years made and provided access to preservation copies of other materials under Sections 107 and 108, with considerable benefit to scholarship and negligible economic harm to rightsholders' markets. They should be allowed to apply this good work to pre-1972 sound recordings as well. A systematic effort to preserve sound recordings, such as that recommended by the National Recordings Preservation Board, is not possible without the widespread participation of all libraries and archives capable of contributing to the effort. Bringing pre-1972 sound recordings under federal law would make it clearly legal and thereby feasible for them to do so. We thank the Copyright Office for the opportunity to comment on this important issue.

³² RIAA/A2IM comments, p. 36.