



Future of Music Coalition

1615 L Street NW, Suite 520, Washington, DC 20036 • 202.822.2051

April 13, 2011

TO: David O. Carson, General Counsel
Office of General Counsel
U.S. Copyright Office
LM-403 James Madison Building
101 Independence Ave S.E.
Washington DC, 20559

FROM: Future of Music Coalition
1615 L St. NW
Suite 520
Washington DC 20036

Future of Music Coalition Reply Comments in response to: Copyright Office Notice of Inquiry Pertaining to Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972 [Docket No. 2010-4].

I. INTRODUCTION

Copyright protection for sound recordings have historically afforded working musicians the opportunity to benefit from their creativity, either by exploiting their limited monopoly over said recordings, or transferring their copyrights to another entity for financial, or according, benefits. As the history of the recorded music industry has borne out, however, not all of these arrangements have been advantageous to working musicians. Likewise, the establishment of a copyright in sound recordings has been both a boon and encumbrance to a public seeking access to such artifacts, a public which also includes musicians who draw inspiration from exposure to other musical expressions,

particularly those of a historic nature. It has been a boon due to the fact that a commercial incentive existed to bring sound recordings to market (or to keep them available); an encumbrance due to traditional, scarcity-based music business models, which necessarily meant that not all products justified perpetual availability due to the economics of said business models.

The arrival of digital technologies changed the landscape for music, particularly in terms of access. No longer was it cost-prohibitive to keep a piece of music “in print” — the efficiencies of digital duplication, storage and transmission made recordings available on a scale previously unimagined. Yet this new landscape also created tremendous uncertainty for those who had built businesses on bringing physical recorded media to the marketplace. Although there are still a great many questions regarding how best to address these issues for today’s musical works, it is important to also consider the impact of digital technologies on the availability and accessibility of older recordings, and whether the affixing of federal copyright protections for sound recordings made before 1972 would allow for broader public enrichment while still affording adequate opportunities for copyright owners to exploit these works in an economically meaningful way.

As the Copyright Office’s inquiry highlights, pre-1972 sound recordings remain under the domain of certain state statutory and common law copyright regimes. Not only is there a dramatic inconsistency between our federally codified copyright system and those state statutory and common law systems, but disparities also exist between the separate

state statutory and common law systems as well. Specifically, state statutory and common law copyright's lack of federal copyright exceptions, such as fair use and preservation and access exceptions for libraries and archives, remove societal benefits from creative content implicit in our notions of American copyright.

In these reply comments, Future of Music Coalition (FMC) argues that bringing sound recordings recorded before February 15, 1972 under federal copyright protection is good for the American public, including musicians, and will not unduly constrain owners of pre-1972 sound recording copyrights. FMC's contentions rely primarily on two premises which are closely tied together: 1) The streamlining of sound recordings so that copyright law can be uniformly applied is beneficial for those institutions preserving our cultural heritage, such as libraries, archives and universities and 2) enhanced access to American musical culture captured on fixed media means greater artistic enrichment for today's creators and new opportunities for rightsholders.

II. STREAMLINING COPYRIGHT LAW FOR SOUND RECORDINGS IS BENEFICIAL

Access to our musical heritage is necessary for a healthy culture and society. However, both preserving cultural works, and subsequently offering them to the public, is expensive and labor intensive. With pre-1972 sound recordings covered by a multiplicity of different state statutory and common law copyright protections, effectuating preservation and access, as well as fundraising for those activities, is made even more

difficult. We support generally Tim Brooks' 2005 study, Survey of Reissue of U.S. Recordings,¹ which buttresses the Library of Congress' contention that if all sound recordings are brought under federal copyright protection then broader preservation and access will naturally ensue.² We are cognizant that the legal and logistical niceties of placing pre-1972 sound recordings under federal copyright protection should not be taken lightly; however, the benefits of the federal system, specifically fair use and exceptions for libraries and archives, will engender the greater preservation and access mentioned above. Furthermore, the current system exacerbates the orphan works problem because it allows for pre-1923 sound recordings to retain protection under state statutory and common law copyright in contrast to the federal system that places all published pre-1923 material in the public domain.

Along with orphan works, it must be emphasized that any action taken with pre-1972 sound recordings will lead to questions surrounding whether (and when) grants of pre-1972 copyrights can be terminated. We are sensitive to the uncertainty that surrounds many issues dealing with termination, especially as they apply to sound recordings. However, we support the recent work that the Copyright Office has done on the issue of the termination gap³ and are certain that they will approach issues of termination in this context with as much rigor and parity. More generally, FMC would like to make sure that the Copyright Office fully explores the possible implications on any licenses executed which involved, or will involve prospectively, pre-1972 sound recordings.

¹ NATIONAL RECORDING PRESERVATION BOARD & LIBRARY OF CONGRESS, SURVEY OF REISSUES OF U.S. RECORDINGS BY TIM BROOKS (2005).

² See Comment from Library of Congress to U.S. Copyright Office (January 31, 2011).

³ See Reply Comment from Future of Music Coalition to U.S. Copyright Office (May 21, 2010) (on file with author).

Comments from the Recording Industry Association of America (RIAA) and the American Association of Independent Music (A2IM)⁴ suggest that private industry should facilitate endeavors for greater preservation and access of our nation’s sound recordings. We respectfully disagree with the efficacy of such a proposal. Tim Brooks, in his aforementioned study, illustrated that less than 10 percent of American “recordings of interest” from approximately 1890 to 1940 are made available in the marketplace by rightsholders,⁵ even though 90 percent of those same “recordings of interest” can be found in archives, libraries, educational institutions and the collections of private individuals.⁶ Providing for preservation and access opportunities is resource intensive, which makes it reasonable that private industry could not or would not direct their energies and capital towards such activities at the scale necessary so as to preserve a larger quantity of historical sound recordings. That is why the proper resolution of this issue should involve pre-1972 sound recordings being brought under federal copyright protection.

⁴ See Comment from Recording Industry of America and American Association of Independent Music (January 31, 2011).

⁵ NATIONAL RECORDING PRESERVATION BOARD & LIBRARY OF CONGRESS, SURVEY OF REISSUES OF U.S. RECORDINGS BY TIM BROOKS 13 (2005).

⁶ *Id.* at 11.

III. GREATER ACCESS TO AMERICAN MUSICAL CULTURE ENRICHES

SOCIETY

If pre-1972 sound recordings are brought under federal copyright protection it will mean that libraries, archives and educational institutions will be able to offer enhanced access to important artifacts of American musical history. Such enrichment, to both the general populace and musicians alike, will necessarily have larger beneficial implications for culture and creativity, which in turn can inspire activities through which those in a position to exploit newly-established copyrights can receive financial rewards from the fruits of such inspiration.

Americans interact with cultural works daily by way of traditional media and the internet. It is important that our sonic foundations, without which America's diverse and ever growing musical landscape would not exist, is not allowed to fade away. Americans value their identity as citizens by interacting with the past and this is no less true for our cultural heritage. Individuals will be unable to interact with such objects if they are not properly preserved, and it is inevitable that that older sound recordings, especially in the mediums of wax and magnetic tape, will soon start to degrade beyond the point to which they cannot even be preserved. The RIAA/A2IM comments claim that such access comes at a price to rightsholders of pre-1972 sound recordings because more access will allegedly perpetuate unauthorized distribution of pre-1972 sound recordings;⁷ however, this threat is not unique to pre-1972 sound recordings. We believe that the legal access

⁷ Comment from Recording Industry of America and American Association of Independent Music 8 (January 31, 2011).

such sound recordings that will be available by way of libraries, archives and educational institutions outweighs any potential detriments for rightsholders from unauthorized distribution of their pre-1972 sound recordings, the majority of which do not even exist in today's marketplace. Likewise, we support ongoing efforts to establish business models that reward creators and rightsholders while satisfying the public's desire for access to a diverse array of content across platforms. Where lawful services exist to facilitate such exchanges, FMC believes there is tremendous opportunity for cultural and monetary enrichment; we continue to encourage the development of such models, particularly those that manifest meaningful revenue streams for creators. FMC stands absolutely for the equitable treatment of rightsholders as pertains to the copyrights they hold. However, we also believe that the ability to proliferate important historical musical works will only stimulate individuals to keep America's legacy of innovation and creative expression alive.

IV. CONCLUSION

The Copyright Office has inquired, on behalf of Congress, as to whether pre-1972 sound recordings should be brought under the scope of federal copyright protection. The Copyright Office has always done an admirable job of balancing the interests of copyright holders against society, who must bear certain costs from such a monopoly. By bringing pre-1972 sound recordings under federal copyright protection, the Copyright Office will achieve an appropriate equilibrium between rightsholders and the general populace. Neither the interests of the rightsholders nor the public are served if there

remains a serious lack of continuity in our copyright code and if the fruits of America's historic musical expression cannot be experienced and enjoyed by present and future citizens. FMC looks forward to the Copyright Office's analysis of this important concern, and thanks the Office for the opportunity to comment.

Respectfully Submitted,

Future of Music Coalition