



LIBRARY OF CONGRESS

April 12, 2011

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Office of the General Counsel
U.S. Copyright Office
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FROM : Patrick Loughney, Ph.D., Chief
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SUBJECT : Library of Congress response to statement submitted by the Recording Industry of America (RIAA) and the American Association of Independent Music (A2IM) to the U.S. Copyright Office in regard to the Notice of Inquiry pertaining to Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972 [Docket No. 2010-4].

The Library of Congress takes this opportunity to respond to selected statements and assertions incorporated in the response submitted by the RIAA and A2IM to the U.S. Copyright Office Notice of Inquiry pertaining to Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972 [Docket No. 2010-4].

- 1) “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.” [RIAA-A2IM submission, page 2, paragraph 1]

LC response: In regard to ensuring the long term archival preservation and public access to the culturally, historically and aesthetically significant sound recordings

produced in the U.S. since the 19th century, the marketplace has failed, to provide either an adequate or a durable remedy. This fact is demonstrated in the findings of the Survey of Reissues of U.S. Recordings (LC-CLIR, August 2005), a statistical analysis of the public availability of the most commercially and historically significant sound recordings issued in the U.S. from the 1890s through 1964. By examining more than 20 major discographies, it was determined that more than 400,000 “recordings of interest” were issued in the U.S. during that period.¹ The study estimates that over 90% of those original recordings survive in the collections of libraries, archives, educational institutions and in the possession of private collectors.² However, it also concludes that of the commercially significant recordings released from the 1890s through the start of World War II, less than 10 percent are currently available from the rightsholders. And, for sound recordings released prior to 1920, the percentage currently available in the marketplace from rightsholders is less than 1 percent.

These stark findings, which were not challenged in the RIAA-A2IM response to the Copyright Office NOI, strongly indicate that the marketplace has not provided any significant or consistent solutions to the general lack of archival preservation and public availability of pre-1972 sound recordings on the part of rightsholders.

Publicly funded libraries, archives, museums and educational institutions play a major and important role in preserving and providing access to America’s cultural history. In regard to pre-1972 sound recordings, a majority of that cultural history was produced by commercial entities or rightsholders who either no longer exist or who have decided against maintaining substantial portions of their recording libraries in the marketplace because of limited public interest and subsequent lack of revenue generation.

Publicly funded institutions which collect, preserve and provide access to sound recordings of the past have historically filled the void left by the lack of marketplace-based solutions to the demonstrated need for continued, research-oriented public access to recordings that have gone out of fashion. RIAA’s “solution” is for these institutions to continue to bear the legal risk of preservation activities that would be clearly permissible if federal copyright exemptions applied to sound recordings.

- 2) “...some of the RIAA member companies are engaged in significant projects with major archives and educational institutions, to improve not only preservation but also access for older recordings that are not otherwise commercially available. As illustrated in this filing, these private agreements between rightsholders and archives, libraries and educational institutions, **are a much more efficient and effective means for improving preservation and access than any legislative change.**” (emphasis added) [RIAA-A2IM submission, page 2, paragraph 1]

LC response: Two RIAA members have indeed either made major donations of

¹ Survey of Reissues of U.S. Recordings by Tim Brooks (LC-CLIR), p. 11.

² Ibid, p. 13.

important archival materials (Universal Music Group) or allowed to the Library of Congress to stream pre-1925 recordings to the internet (Sony Music Entertainment). Those cooperative agreements are very important and have helped enable the Library to fulfill its Congressionally mandated mission to collect and preserve an archival record of America's recorded sound history and culture for future generations. However, it must be pointed out that, in one instance, the transfer of sound recordings held by the company to the Library of Congress has placed a significant responsibility on the Library and the American taxpayer to store the recordings in an archival sound environment and to bear all costs for preservation reformatting. No concrete rights to provide access to the recordings were conveyed with the gift. The Library acknowledges that altruism on behalf of the public good was an important motivation on the part of RIAA donors. Yet none of the significant donations of archival collections to the Library of Congress by RIAA members in recent years has been accompanied by funds donated either to support the Library's preservation costs or to defray the significant annual storage and collection maintenance costs. And, with the notable exception of the agreement reached with Sony Music Group, nor by licenses to provide access to the general public except on Library premises.

The restrictions incorporated in the donation agreements concluded between the Library and RIAA donors closely limit the Library's ability to provide public access to materials preserved from those collections. These limitations tend to demonstrate that the marketplace has not provided "...a much more efficient and effective means for improving preservation and access than any legislative change." To the contrary, it reveals that the more common alternative trend in recent years, on the part of RIAA and A2IM members, is to seek collaborative agreements with publicly funded archival institutions, with mandates to collect and preserve the nation's recording history. Moreover, RIAA's proposal that archiving institutions negotiate agreements on a piecemeal basis with sound recording rightsholders is not only inefficient, but ignores the fact that a significant proportion of pre-1972 sound recordings are orphan works for which no current rights holder can be identified. Absent a federal legislative solution, archives will be unable to legally preserve and share these orphan materials until 2067, by which time they may well have deteriorated to the point that they cannot be preserved. Regarding efficiency, it should be noted that one agreement made between the Library of Congress and an RIAA member took more than three years to finalize after the terms had been agreed upon by both parties.

- 3) "Any 'federalization' of pre-1972 sound recordings would subject existing rightsholders, including RIAA and A2IM members, to overwhelmingly burdensome legal, administrative and related problems, and accompanying costs. [RIAA-A2IM submission, page 2, paragraph 2]

LC response: The "burdensome legal, administrative and related problems, and accompanying costs" referenced here were, in fact, left in place for publicly supported libraries, archives, museums and educational institutions engaged in collecting, preserving and providing public research access to pre-1972 sound recordings. Thus, while RIAA and A2IM member organizations have been relieved of burdensome legal

and administrative problems for almost forty years, the Library of Congress and other publicly funded sound recording archive institutions were not. The Library of Congress holds tens of thousands of out-of-circulation, pre-1972 sound recordings for which it receives public requests for research related copies. In virtually every instance the Library's reference staff is required to assist researchers in working through the difficult challenges associated with identifying rightsholders and locating up-to-date contact information for requesting permission to obtain a copy.

As an aside, it should be noted that the 1976 Act brought millions of works previously covered by state law under federal protection: prior to the effective date of that act, every unpublished work not registered for copyright was protected only under state law. The 1976 Act expressly preempted state law protection. The Library of Congress is not aware of any constitutional challenge to the federalization of that huge body of work – nor of any occurrence of the adverse consequences that RIAA invokes regarding ownership or contractual claims.

- 4) “In lieu of any protracted statutory amendment process, RIAA and A2IM and their member companies suggest a redoubling of private (and public) efforts to develop a national recording plan under the auspices of the Library of Congress’ National Recording Preservation Board (NRPB), and other similar—albeit smaller, institutional and regional efforts—without the need for legal reforms. These efforts—by the NRPB or others—should focus: (i) primarily, on non-commercial materials; and (ii) under private agreements and partnerships, on historically or culturally significant catalogs of out-of-print commercial (that is, RIAA and A2IM) member recordings.” [RIAA-A2IM submission, page 2, paragraph 3]

LC response: Though the Library of Congress National Recording Preservation Board was established by Congress in 2000 to create general public awareness of the need to save the nation’s sound recording history and to develop and coordinate a national plan to achieve that mission, it lacks both the resources and the legal authority either to carry out this mission directly or to command the attention and commitment of RIAA and A2IM members, not to mention the other publicly funded U.S. sound archives, to meeting this objective. Moreover, if such a level of coordination was achieved, it is unrealistic for it to be restricted primarily to “non-commercial materials” or that it can be carried out within the framework of “private agreements and partnerships” focusing only on “historically or culturally significant catalogs of out-of-print commercial recordings” owned by RIAA and A2IM members.

In August 2010 the Library of Congress published The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age. the first national level study of the state of sound recording preservation ever conducted since the American recording industry began in the 1890s. The major conclusions of that historic study clearly show that organizing and funding a coordinated national plan will take more than merely “...a redoubling of private (and public) efforts” suggested by the RIAA and A2IM. This conclusion grows out of the Library’s hard won experience over the past 25 years to develop and implement a credible national plan to harness public

and private efforts, solely on a voluntary basis, toward preserving America's motion picture history. That experience demonstrates that it will require a stronger legislative mandate, plus a considerable increase in funding and staff well beyond what is available to the Library and the NRPB at the present time. Notably, RIAA and A2IM members have shown little inclination to assist with funding for these efforts.

- 5) The RIAA and A2IM and their members are already actively engaged in preservation and access activities as rightsholders...for their commercially viable as well as their out-of-print commercial materials. In some instances they are also working in conjunction with particular archives and educational institutions, to preserve and make accessible so-called "back-catalog" materials, (especially out-of-print commercial materials) that comprise the historical legacy of sound recordings. In fact, thanks to two historic agreements signed within the last two years—(i) the Sony Music Agreement, and (ii) the Universal Music Agreement, both with the Library of Congress...--thousands of "back-catalog" materials are not only being preserved but will be made freely accessible to the public. Other RIAA and A2IM members (including, for example, Concord Music Group), are interested in exploring similar ventures. As these examples illustrate, marketplace solutions can effectively and efficiently target catalogs, especially out-of-print commercial recordings, for improved preservation and public access." [RIAA-A2IM submission, page 4, paragraphs 3 and 4]

LC response: The Library of Congress gratefully acknowledges the seriously-intended and public-spirited interests of Sony Music Group and the Universal Music Group for entering into the agreements referenced here. But it must be pointed out that only the Sony agreement with the Library was developed expressly for the purpose of increasing public access to out-of-circulation, pre-1925 sound recordings in the Sony-controlled library. This agreement allows the Library of Congress, using its own resources and those of the University of California Santa Barbara, exclusively, to digitize pre-1925 recordings, to which Sony owns the rights, and to make them publicly available by means of streaming them to internet through an LC website. The copies of the pre-1925 era 78rpm recordings being digitized are already in the collections of the LC and UCSB. By agreement, a gratis copy of digital files is provided to Sony Music Entertainment.

In regard to the Universal Music Group, a large donation of original recording master elements, consisting of more than 200,000 items, was made to the Library in 2010. However, in accomplishing this historically important acquisition, the Library assumed substantial shipping and collection management costs. In addition, as the collection is digitally preserved by the Library to archival standards in the future, UMG will have the right to free digital copies as they are produced by LC sound recording preservation engineers. To date no agreement has been developed with UMG to provide public access by streaming or other means, though discussions are underway.

The major point here is that though two important RIAA member organizations have entered into historically significant agreements with the Library of Congress neither can be described as purely marketplace-based solutions to the enduring

problems of lack of preservation and public access from the rightsholders. It is doubtful that any sound archive other than the Library of Congress could take on the responsibility to provide gratis archival storage of commercial mater materials, as has the Library on behalf of Universal Music Group.

Crossing the nation's collective fingers and proceeding on a piecemeal "trust us" basis with RIAA and A2IM members will not solve either the problem of orphan works nor the inability of archival institutions to legally preserve our nation's sound heritage without a concrete commitment from rights holders to recordings. Presently, major and independent record companies may not be in the financial position to provide direct support for audio preservation. Federal protection of sound recordings would provide, for the first time, a public domain (pre-1923 recordings), a term of exclusive protection whereby additional recordings will enter the public domain annually (after 95 years), and the benefit of Section 108 rights to enable preservation to take place legally. The Library of Congress urges the protection of all sound recordings under federal law.