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Subj: Comment on Orphan Works Inquiry

I would like to offer some information from an as-yet unpublished study I conducted for the Council on Library and Information Resources, which may be of interest in the present inquiry.¹ The following comments are mine and not those of the C.L.I.R.

The principal goals of the study were to determine the proportion of historic sound recordings that are controlled by an existing rights holder, and the degree to which rights holders have made those recordings available, either directly or through licensees. Procedures were developed to identify rights holders and these will be detailed below.

The study was carried out with the assistance of Steven Smolian. We are both recording industry historians and I have published three books and numerous articles on the subject (see appendix for biographical details).

One possible limitation of the study for the purposes of the present inquiry is that it focuses on recordings released prior to 1965. Pre-1972 recordings are not generally covered by current U.S. copyright law, but rather remain under state and common law until the year 2067 (Title 17, Section 301(c)). Thus they may not be directly impacted by modifications in federal copyright law. However the procedures developed for identifying rights holders of older recordings, and the success rate of those procedures, may be of interest; certain pre-1972 foreign recordings are covered by federal law; and pre-1972 U.S. recordings may be impacted by federal law to the extent that states evaluate claims under state laws relating to recordings with reference to federal copyright law.

Further, I would recommend that the Copyright Office consider the possibility of including pre-1972 recordings in any rights holder identification scheme it may consider. The lack of such identification procedures has been at least as harmful in the field of recordings as it has been in other fields, and in any event all recordings will eventually fall under federal statutes.

Summary of Findings

Based on my experience with this study, I believe that one of the most troubling

provisions of current copyright law in regard to recordings has been the blanket elimination of registration and marking “formalities.” While it may represent a convenience for rights holders, it has been detrimental to users. It not only results in difficulty in determining current ownership, but also means that protected status can be subject to differing interpretations, even among experts. This lack of clarity has placed a considerable burden on those who wish to preserve, study, or disseminate past recordings. Indeed, it is no exaggeration to say that there has been a chilling effect on the production of public domain reissues because it is prohibitively difficult to establish what is or is not in the public domain. False or dubious claims of ownership are easy to make and hard to challenge effectively. Making recording ownership difficult to trace has led to the unintended consequence of giving larger rights claimants considerable leverage over smaller entities such as educational institutions, scholarly associations and interested individuals that attempt reissue, because of the specter of potential litigation.

To avoid litigation in an area with so little clarity, many of these entities limit their reissue activities, or forgo any reissue activity at all. Examples include two national organizations with which I have been associated, both dedicated to the preservation, study and dissemination of historic recordings. The Association for Recorded Sound Collections (which I served as President) has stayed out of the field of reissues entirely, in part due to legal uncertainties; the International Association of Jazz Record Collectors sharply limits the scope of its reissue program due to similar concerns. On a personal note, a reissue of early recordings by African-Americans was planned by the University of Illinois to accompany my recent book, *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919*, which would have illuminated my findings on that important subject, but it had to be aborted because of the time and cost involved in locating and dealing with rights holders.

The present study covered approximately 400 labels. The majority were individually identified as to probable protected/non-protected status. However, the status of approximately one hundred small labels—25 percent of the total—could not be categorized at all, even after extensive effort. It is possible that with more time and the engagement of legal experts, we could determine the status of additional labels (and possibly change the assignment of some we did categorize). However, it is my belief, given my experience in this exercise, that even with substantial expenditures rights owners for a large number—perhaps not much less than the 25 percent we were left with—would remain unknown. In addition, many of those that were identified as owners would remain “probable” rather than “definite,” due to the lack of an unambiguous legal paper trail. This is an illustration of the confusion and uncertainty that has been introduced into the field of recording rights by the absence of registration requirements.

Study Methodology

The rights portion of the study was based on a random sample of 1,500 recordings commercially released in the U.S. between 1890 and 1964. The starting point of 1890 was chosen because that year approximates the beginning of the commercial recording industry in the U.S.² It is the earliest period from which re-issuable commercial recordings survive, and the earliest year from which recordings are believed to be still

under the exclusive control of a present-day rights holder (i.e., the first full year of recording by a predecessor company of a rights holder that is still in existence).³

The end year of 1964 was based on three factors.

1. Relevance to public policy. A minimum copyright term for recordings of 50 years is generally accepted internationally. Since there is little likelihood of terms shorter than that being considered, it was felt that data from more recent periods would have limited bearing on policy discussions at this time.

2. Feasibility. Due to the explosion in the number of recordings issued in more recent years, as well as the proliferation of reissues of those recordings, the project would become much more difficult to execute for more recent periods.

3. Industry changes. A cut-off of 1964 allowed us to include the first decade of recording activity after major changes brought about by the proliferation of record companies at the advent of rock 'n' roll. It also encompasses the first decade of widespread acceptance of the 45 rpm and LP record formats.

The 1890-1964 time span was broken into 15 five-year blocks, with a quota of approximately 100 recordings drawn per five-year block. This permitted a granular analysis of changes over time (a minimum sample of 100 is generally considered necessary for statistical analyses).

Originally, consideration was given to basing the analysis on a random sample of all recordings released in the U.S. during the 75 year period in question. However, of the several million recordings released during that period, not all are necessarily of equal interest today. We therefore chose to focus on those in which scholars, students and the general public have shown the greatest interest, as documented by their inclusion in widely used discographies in several fields of music and speech. Thus the sample used for this study was not of recordings in general, but rather of recordings in which there is documented interest. Indeed, many of them could be considered "historic." This is a sample of the recordings most in need of preservation and availability today.

The sample was drawn from approximately 20 modern discographies, representing seven major fields of study:

- ragtime and jazz
- blues and gospel music
- country and folk music
- U.S. ethnic groups
- popular, rock, R&B music
- classical music
- other—including spoken word recordings and show music

In addition, 10 pre-1965 selections each were drawn from the National Recording Registry lists for 2002 and 2003.

The sources, which are listed in the appendix, were chosen to meet the following criteria:

1. Each is an acknowledged standard reference in its field.
2. Each is a genre discography covering all labels relevant to its musical field, as opposed to a discography of specific labels or artists. Label and artist discographies would have skewed the sample toward specific labels, and the protected/non-protected status they represent.
3. Each covers some part of the period 1890-1964. In most cases no single discography covered the entire period, so more than one was required to cover the entire time span.
4. The discographies are non-duplicative to the extent possible. This required some difficult choices: for example, Brian Rust's well-known *Jazz Records* (1897-1942) was not used because it is a subset of the much larger *The Jazz Discography* (1896-2001).

The discographies chosen list more than 400,000 recordings from the period 1890-1964. These are recordings in which modern scholars, students, and collectors have shown special interest, as indicated by the widespread use of these source publications.

Once the source discographies were chosen, quotas were established for each musical genre within each period. Not all genres of music were recorded in every period (for example the first country records date from the early 1920s), so the quota of approximately 100 recordings for a period was divided equally among the genres that were represented in that period. Each genre was given equal weight. If five genres were recorded in a period, each was allocated a genre-quota of 20 recordings; if all seven genres were represented, each was allocated 14.

A random sampling methodology was employed to choose specific recordings within each genre. A random number was drawn and used to point to a specific page in a discography. The first qualifying recording on the designated page was then chosen. If no qualifying recording was found on that page, subsequent pages were examined until a qualifying recording was located. The goal, in accordance with sampling theory, was to ensure that each qualifying recording in the discography had an equal and known chance of being chosen.

Determining Protected/Non-Protected Status

The approach used to determine current rights status was intended to replicate the determination a reasonable person would make, after a reasonable amount of diligent research, if that person, their institution, or their association wished to reissue the recording legally. We did not make use of legal counsel, or substantial expenditures of time and money, to try to establish with 100 percent certainty the status of each recording. Rather, the goal was to determine whether it was probably protected or not. Our ultimate purpose was to calculate the *proportion* of recordings from each period that are protected.

In the absence of a registration or marking system, three tests were used to determine whether a recording is probably protected.

1. Corporate lineage. Can the entity that made the recording be traced forward, either

directly or through mergers and acquisitions, to a present-day rights holder?

2. Marketplace evidence. Who has asserted ownership in the years since the recording was made (a minimum of 40 years in this study), either through legal claims or “authorized” issues/reissues? If the original recording company has disappeared, who has reissued the recording and under what circumstances?
3. Consultation with experts. The Project Director and Contractor are both recording industry historians, and were able to resolve many cases. For the most problematic cases we also asked a number of experts with years of experience in the field of reissues their opinion regarding current ownership of the labels involved.

Discussion and Examples

Corporate Lineage. For this we consulted reference books such as *American Record Labels and Companies*⁴, as well as academic articles and our own primary research in early industry trade periodicals. A useful source for locating academic articles is the “Current Bibliography” column in the *ARSC Journal*, which I conduct and which includes an index to articles on record labels appearing in specialized journals.

Corporate lineage would seem to be definitive proof of ownership, but it is not. Without access to documents specifying ownership at the time the recording was originally made, and documents associated with each subsequent change of ownership of the original record label, we cannot be sure to whom ownership of the recordings passed. Press reports that a record company was “acquired” by another can be misleading. For example, scholars were long uncertain about the relationship between the Indestructible Record Company, a cylinder manufacturer, and the Columbia Phonograph Company between 1908 and 1912. The trade press at the time said that Columbia had purchased Indestructible “lock, stock and barrel,” and Columbia itself called the transaction an “acquisition.”⁵ That would suggest that Indestructible cylinders made during this period were owned by Columbia, and today would be the property of its successor, Sony BMG. However, recently documents have surfaced that show the two companies simply had a distribution agreement. Since IRC owned the recordings, later went bankrupt and had no known successor, we believe the cylinders are in fact *not* protected.

In some cases ownership is fairly obvious. For example, recordings originally made by Columbia and its subsidiaries and those of Victor Records are now controlled by Sony BMG, while those of Decca are controlled by Universal Music. Products of the small record companies of the 1890s that quickly went out of business and have no known ownership chain to the present day are presumed to be non-protected. However, ownership of many small labels of the 1920s and beyond is extremely unclear, due to mergers, alliances, exchanges of matrices, bankruptcies and the like. The Emerson Phonograph Company was founded in 1915, went bankrupt in 1920, operated for a time in receivership and then suspended operations, was sold and reactivated in 1922, was sold again in 1924, was sold again in 1926, and was discontinued in 1927.⁶ Along the way Emerson masters were released on many other labels, although whether they were sold to or leased by those labels is unknown. The company also spun off a radio division that has lasted to the present day and may or may not have an interest in some Emerson recordings. So who owns the rights to Emerson recordings today?⁷

In most cases of past corporate changes, legal documents spelling out the exact terms of sale are not available. In their absence, one test used to determine transfer of masters during a change of business status is whether the successor label continued to press and sell the predecessor label's back catalog. If it did, that is a strong indication that the successor *did* acquire rights to the predecessor's recordings, not just its trademarks, physical plant, etc. If it did not, that is at least a suggestion that rights to the recordings were not part of the transaction. For example, after the Indestructible Record Company severed its relationship with Columbia in 1912, IRC continued to operate as an independent company for ten more years, manufacturing and selling the recordings made between 1908-1912 among others. This is a clear indication that ownership of the 1908-1912 recordings resided with IRC, not Columbia.

Marketplace Evidence. The second test is marketplace evidence. Who has asserted ownership? Liberty Music Shop, a New York retailer, produced its own recordings from 1933-1942, including many important stage and cabaret artists. The store went out of business during the 1970s and it is unclear who, if anyone, now owns the majority of its masters (a few were sold). They have been reissued by a variety of labels, including those of such reputable organizations as the Smithsonian Institution and the Metropolitan Opera Guild, without clear credit. (Sometimes when labels are unable to find an owner they hold money in escrow in case one should emerge.) It was rumored that a New York record producer may have claimed ownership at one time, but this could not be independently confirmed. With no one known to be asserting ownership, our panel of experts believed that, with a few exceptions, LMS masters are currently not protected.

The Newark, New Jersey-based Manor label, which produced important jazz and rhythm and blues recordings in the 1945-1949 period, appears to be in limbo. One of our informants indicated that two reissue producers "tried hard to find ownership of Manor, but the trail went cold."⁸ They proceeded with their reissues, in one case putting money in escrow, but no claimant ever emerged.

On the other hand Sony BMG has asserted ownership to the earliest products of its predecessor companies, including 1890s cylinders of the Columbia Phonograph Company of Washington D.C., and early Victor and even Berliner discs of the 1890s and early 1900s, and has occasionally reissued such recordings as its own. Given the bankruptcies and numerous changes of ownership that have occurred over the years it might be difficult for it to prove chain of title in court, but custom has been to assume that it does have such rights and we have made that assumption here.

Consultation with Experts. Most problematic were small labels of the 1940s and 1950s, many of them in specialty fields such as jazz, R&B and show music. For this we consulted with a half dozen writers and independent producers who have had experience with reissues from this era. It should be noted that even this expert panel did not always agree completely, and it was sometimes necessary to use the majority opinion or our own evaluation of their comments.

Comments on Specific Copyright Office Questions

Q1. *Nature of Problems Faced by Subsequent Users*

I believe the forgoing has illustrated the challenges faced by users, steps than can be taken to identify recording rights holders, and the results of taking such steps.

Q2. *Registration of "Orphan Works"*

The chief purpose of registration would be the identification of truly abandoned works. Thus registration should be as easy and inexpensive as possible. However to avoid abuse of registration the Copyright Office should not endorse claims of ownership, which can only be conclusively established through litigation or some similar process.

For registration I would recommend that the Copyright Office require "reasonable" evidence of ownership (for example a statement of corporate lineage, evidence of rights purchase, or testimony by experts, as outlined above). The assertion would then be posted as a claim, rather than proof of ownership.

If a work is not so registered a user who consults the register *and* determines that no current exploitation can be located from a rights claimant, should be deemed to have made a "good faith effort" to locate the owner and be protected against punitive damages in case a claimant later emerges. To preserve the claimant's rights those rights should be fully restored at whatever later time the claimant enters an uncontested registration or begins exploitation. This would seem consistent with the TRIPS allowance of "certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

Given the current consolidation in the recording industry it is my belief that the vast majority of recordings now controlled by those entities will be registered.

Q3. *Age of "Orphan Works"*

Other portions of our research indicate that even for recordings for which there is believed to be a current rights holder, there is considerable interest by foreign labels (not subject to U.S. law) and non-licensed domestic entities (usually small or specialist) in reissuing historic U.S. recordings from all periods up to the 1950s. This period could be enlarged if it were clear what was legally available to reissue from later periods. Thus I would recommend a recording be considered for "orphan" status not more than 20 years after its initial publication.

A further problem identified in our study is that rights holders are neither reissuing nor allowing others to reissue historic recordings they are presumed to control from periods prior to the 1940s. Thus it would be highly desirable to place recordings more than 50 years old into orphan status if the rights holder (if any) does not currently make it available at market prices, directly or through a licensee. This would prevent the use of registration to permanently deny access to historic materials. [Again, it should be noted that most pre-1972 sound recordings currently fall under state law, so legislation might be required to implement this recommendation.]

Q4. *Publication Status of "Orphan Works"*

In the field of sound recordings, unpublished recordings are an important part of the historical record. They should be subject to the same registration procedures outlined above.

Appendix A: Biographical Information for Project Director and Contractor

Tim Brooks, Project Director, is a media executive with experience in survey design and statistical sampling who for the past thirty years has also written extensively on the history of the recording industry. He has authored or co-authored numerous articles as well as three books on the subject: *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919* (2004); *The Columbia Master Book Discography* (1999); and *Little Wonder Records* (editor, 1999). A past president of the Association for Recorded Sound Collections, and current chair of its copyright committee, he was in 2004 honored with that organization's Lifetime Achievement Award. He is also a columnist for the *ARSC Journal*.

Steven Smolian, Project Contractor, has owned and operated Smolian Sound Studios since 1960. He specializes in restoration of obsolete audio formats. His web site, www.soundsaver.com, describes his services and lists many of his clients. He has been a dealer in used records for 45 years and been performing tax gift appraisals of recordings given to institutions for tax purposes since 1975, at least five per year. He has contributed information to some of the sources used for this study and is acknowledged in the credits of three of them. In 1970 he published the first discographic work on the topics in the title, *A Handbook of Film, Theatre and Television Music on Record, 1948-1969*, and for ten years wrote a monthly column for *The American Record Guide*. He is a founding member of the Association for Recorded Sound Collections where at various times he has chaired the Dealers and Technical Committees. He has belonged to the Music Library Association since 1960 where he is active on their Preservation Committee. He has a long list of presentations and publications related to the history of recording.

Appendix B: Sources

The following discographies constituted the sample frame.

1. Jazz/ragtime

1.1 Lord, Tom. *The Jazz Discography*, ver. 4.4. Vancouver, B.C., Canada: Lord Music References, Inc., 2004 (CD-ROM).

2. Blues, gospel

2.1 Dixon, Robert M.W., John Godrich & Howard Rye. *Blues & Gospel Records, 1890-1943*, 4th ed. New York: Oxford University Press, 1997.

2.2 Leadbitter, Mike, & Neil Slaven. *Blues Records, 1943-1970*, Vol. 1 A-K. London: Record Information Services, 1987.

2.3 Hayes, Cedric J., & Robert Laughton. *Gospel Records 1943-1969, A Black Music*

Discography. London: Record Information Services, 1992.

3. Country, folk

3.1 Russell, Tony. *Country Music Records, A Discography, 1921-1942*. New York: Oxford University Press, 2004.

3.2 (Not used)

3.3 Whitburn, Joel. *Top Country Singles, 4th Ed., 1944-1988*. Menomonee Falls, WI: Record Research Inc., 1989.

4. U.S. Ethnic groups

4.1 Spottswood, Richard. *Ethnic Music on Records*. Urbana: University of Illinois Press, 1990.

5. Popular/Rock/R&B

5.1 Whitburn, Joel. *Pop Memories 1890-1954*. Menomonee Falls, WI: Record Research Inc., 1986.

5.2 Rust, Brian, and Allen G. Debus. *The Complete Entertainment Discography, 1897 to 1942*. New York: Da Capo Press, 1989.

5.3 Rust, Brian. *The American Dance Band Discography 1917-1942*. New Rochelle, NY: Arlington House, 1975.

5.4 Whitburn, Joel. *Top R&B Singles 1942-1995*. Menomonee Falls, WI: Record Research Inc., 1996.

5.5 Whitburn, Joel. *Top Pop Singles 1955-1996*. Menomonee Falls, WI: Record Research Inc., 1997.

5.6 Whitburn, Joel. *Top Pop Albums 1955-1992*. Menomonee Falls, WI: Record Research Inc., 1993.

5.7 McGrath, Bob. *The R&B Indies*. West Vancouver, Canada: Eyeball Productions, 2000.

5.8 Whitburn, Joel. *Top LP's 1945-1972*. Menomonee Falls, WI: Record Research Inc., 1973.

5.9 (not used)

5.10 "New Records for Talking Machines," *The Phonoscope*, Vol. 1, No. 2, December 15, 1896, p.18. New York.

5.11 Collection of 21 catalogs and other release lists of the Columbia Phonograph Company of Washington, D.C., 1890-1894.

6. Classical

6.1 Arnold, Claude Graveley. *The Orchestra on Record 1896-1926*. Westport, CT: Greenwood Press, 1997.

6.2 Moses, Julian Morton. *Collector's Guide to American Recordings, 1895-1925*. New York: American Record Collector's Exchange, 1949.

6.3 Clough, Francis F., and G.J. Cuming, *The World's Encyclopedia of Recorded Music*. London: London Gramophone Corporation, 1952.

6.4 Myers, Kurtz, *Index to Record Reviews*. Boston: G.K. Hall, 5 vol., 1978.

7. Other

7.1 Rust, Brian. *Discography of Historical Records on Cylinders and 78s*. Westport, CT: Greenwood Press, 1979.

7.2 Raymond, Jack. *Show Music on Record*. Falls Church, VA: self published, 1998.

8. National Recording Registry (Library of Congress)

8.1 National Recording Preservation Board, 2002 National Recording Registry. Available at <http://www.loc.gov/rr/record/nrpb/nrpb-2002reg.html>

8.2 National Recording Preservation Board, 2003 National Recording Registry. Available at <http://www.loc.gov/rr/record/nrpb/nrpb-2003reg.html>

Notes

1. Tim Brooks, "Sound Recording Reissue Practices Under Current U.S. Copyright Law," December 19, 2004. The study was designed, and the findings analyzed, by Brooks; data was gathered principally by Steven Smolian. The full findings are currently being incorporated into a report to the Library of Congress and the National Recording Preservation Board.

2. Brooks, Tim, "Columbia Records in the 1890s: Founding the Record Industry," *ARSC Journal*, Vol. X No. 1 (1978).

3. The original recording company was the Columbia Phonograph Co. of Washington, D.C. The successor company, and present rights holder, is Sony BMG.

4. Allan Sutton and Kurt Nauck, *American Record Labels and Companies, An Encyclopedia: 1891-1943* (Denver: Mainspring Press, 2000). Several other books were consulted as well.

5. *Talking Machine World*, October 15, 1908, 8, 51. As a result of these statements later histories of recording tended to be somewhat vague about the Columbia/Indestructible relationship. The widely used *From Tin Foil to Stereo* by Read and Welch, 100, states that Columbia said it was "taking over sales" of IRC products; another basic source, Gelatt, *The Fabulous Phonograph*, 165, asserts that Columbia "took over the entire output of [the Indestructible] factory." Columbia marketed the cylinders as its own, calling them "Columbia-Indestructible" cylinders.

6. Sutton and Nauck, 76-79, 269, 277-281.

7. Since the last known owner of Emerson, the Consolidated Record Corporation, went out of business in 1929 and had no known successor, we have assumed that Emerson recordings are unprotected today.

8. Correspondence from Dan Morgenstern to Tim Brooks, September 24, 2004.