

**Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of:

Federal Copyright Protection of Sound
Recordings Fixed Before February 15, 1972

Docket No. 2010–4

**COMMENTS OF RECORDING INDUSTRY OF AMERICA (RIAA) AND
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)**

The Recording Industry Association of America (RIAA)¹ and the American Association of Independent Music (A2IM)² appreciate this opportunity to respond to the above-referenced Notice of Inquiry (NOI) regarding the Copyright Office’s study on the legal and policy issues pertaining to “the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction.” The NOI says the Copyright Office is specifically seeking “comments on the likely effect of Federal protection upon preservation and public access, and the effect upon the economic interests of rights holders.”

¹ The Recording Industry Association of America is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes its members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA® members create, manufacture and/or distribute approximately 85% of all legitimate sound recordings produced and sold in the United States. In support of this mission, the RIAA works to protect intellectual property rights worldwide and the First Amendment rights of artists; conduct consumer industry and technical research; and monitor and review state and federal laws, regulations and policies. The RIAA® also certifies Gold®, Platinum®, Multi-Platinum™, and Diamond sales awards as well as Los Premios De Oro y Platino™, an award celebrating Latin music sales and its new Digital Sales award.

² The American Association of Independent Music (A2IM) is a not-for-profit trade organization serving the independent music community as a unified voice representing a sector that comprises over 30% of the music industry's market share in the United States (and 38% of SoundScan digital sales). The organization represents the Independents' interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community. A2IM is headquartered in New York City. Currently, the organization counts over 250 music label members and over 120 associate members (companies who don't own masters but rely upon, provide services for, or otherwise support independent music labels). A2IM members share the core conviction that the independent music community plays a vital role in the continued advancement of cultural diversity and innovation in music.

To summarize:

1) The genesis of the Copyright Office study is the narrow issue of addressing how, if at all, federal copyright law should or can improve the preservation of and access to older recorded sound materials. 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. Indeed, as detailed in this filing, record labels are actively engaged in the preservation of their own master materials. Additionally, 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.

2) The legal issues of bringing pre-February 15, 1972 sound recordings under federal copyright law – in whole or in part – raise a series of exceedingly complex copyright, contract, and perhaps, constitutional issues. Because of these complexities and the resulting prejudice to copyright owners, the RIAA and A2IM and their member companies oppose any proposal to bring pre-February 15, 1972 (hereafter “pre-1972”) U.S. sound recordings under federal copyright law – in whole or in part. 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. Twice before in U.S. history – in 1971 and in 1976 – Congress had the opportunity to provide federal protection for pre-existing (pre-1972) recordings and twice it declined to do so because of these complexities. Almost forty years later, any reversal of existing law would only be more complicated and more prejudicial to current rightsholders.

3) In addition to the costs and other hardships any “federalization” would impose on rightsholders, it would take years to enact and then resolve the myriad legal challenges and issues, diverting needed attention and resources from more practical solutions to better preserve and make accessible older historical recordings. In lieu of any protracted statutory amendment process, the RIAA and A2IM and their member companies suggest a redoubling of private (and public) efforts to develop a national recording preservation 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.

I. INTRODUCTION: WHY PRIVATE SOLUTIONS FOR PRESERVATION AND ACCESS ARE MUCH MORE EFFECTIVE THAN LEGISLATIVE SOLUTIONS

Congress directed the Copyright Office to conduct a study – the subject of this Notice of Inquiry – to consider changing the legal status of pre-1972 U.S. sound recordings for one narrow purpose: in short, to improve the preservation of and public access to older sound recordings, both commercial and non-commercial.

As detailed in this filing, the goal of improved preservation of and public access to older recordings can best be served in two ways and without the need for legislative change for pre-1972 U.S. sound recordings: (1) to allow the marketplace for the legal use of commercially viable recordings by rightsholders to expand, and to reduce the high levels of piracy that harm these markets, especially for “low margin” materials like older recordings that make it so costly and risky to make these recordings widely accessible; and (2) continuing and expanding partnerships between rightsholders and private institutions, such as libraries and archives, for out-of-print commercial recordings and non-commercial materials.

The Copyright Office Study was requested, in large measure, by public research libraries, educational institutions, and archives, which either house recorded materials and/or wish to make such material more readily available to their patrons. It is estimated by the Library of Congress’ National Recording Preservation Board August 2010 study (“The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age”) (hereinafter the “NRPB Study”) that “[p]ublic institutions, libraries, and archives hold an estimated 46 million recordings, but few institutions know the full extent of their holdings or their physical condition.”³

³ National Recording Preservation Board, THE STATE OF RECORDED SOUND PRESERVATION IN THE UNITED STATES: A NATIONAL LEGACY AT RISK IN THE DIGITAL AGE (August 2010) [“NRPB Study”]. There have been a total of five studies undertaken by, or in the name of, the National Recording Preservation Board of the Library of Congress. In chronological order, they are: Tim Brooks, Survey of Reissues of U.S. Recordings, Publication #133 (August 2005), available at <http://www.loc.gov/rr/record/nrpb/pub133.pdf> (discussing the legal accessibility of sound recordings in the United States); June M. Besek, Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives, Publication #135 (December 2005), available at <http://www.loc.gov/rr/record/nrpb/pub135.pdf> (focusing on the scope of protection and allowable uses by libraries and archives, more specifically research and scholarly uses, of pre-1972 commercial sound recordings, and including a brief survey of state law protections for such recordings); Paul Kingsbury, Capturing Analog Sound for Digital Preservation: Report of a Roundtable Discussion of Best Practices for Transferring Analog Discs and Tapes, Publication #137 (March 2006), available at <http://www.loc.gov/rr/record/nrpb/pub137.pdf> (summarizing discussions on possible technological preservation procedures, and concluding, among other things, that “technology will never replace the listener”); June M. Besek, Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Unpublished Pre-1972 Sound Recordings by Libraries and Archives, Publication #144 (March 2009), available at <http://www.loc.gov/rr/record/nrpb/pub144.pdf> (examining the laws applicable to ownership rights of unpublished pre-1972 sound recordings, which provide “impractical, and even damaging, barriers to preserving America’s recorded sound-history”); Program on Information Justice and Intellectual Property (PIJIP), Protection for Pre-1972 Sound Recordings under State Law and its Impact on Use by Nonprofit Institutions: a 10-State Analysis, Publication #146 (September 2009), available at <http://www.loc.gov/rr/record/nrpb/pub146.pdf> (analyzing protection of pre-1972 sound recordings under not only state anti-piracy laws, but also common law copyright, unfair competition laws, rights of privacy, and federal copyright law as it relates to underlying works).

The RIAA and A2IM and their members fully support the preservation goals of those institutions requesting this study, and of the parallel work by the National Recording Preservation Board: namely, to ensure a nationwide effort of better, and more systematic, preservation of recorded sound materials – commercial (by and/or in cooperation with rightsholders), and, especially, of non-commercial material, including field recordings, ethnographic and folklore materials, spoken word (oral histories, speeches etc.), recorded radio broadcasts, and other culturally and historically significant material. As the Library of Congress’ NRPB Study noted: “Recorded sound preservation has been declared a national objective; however, without greater support as a matter of public policy, this objective will not be realized.”⁴

The RIAA and A2IM and their members agree and want to further their part in building greater public support for this “national objective.” The RIAA and A2IM take great pride and care in the preservation of the recordings in their respective catalogs, and consider it a part of their civic responsibility to work on or assist with the preservation of and access to all historical recordings, whether of commercial interest or not.

The RIAA and A2IM and their members are already actively engaged in preservation and access activities as rightsholders (as detailed in this filing) 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 Group Agreement, both with the Library of Congress (and detailed later in this filing) – 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, the 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.

As detailed below, there are many older recordings owned by RIAA and A2IM-member companies that still have commercial viability. The record labels who own these recordings have invested, and continue to invest, significant money, staff time and other efforts, to create, manufacture, advertise, promote, preserve, catalog, store, and sell and license (and enforce their rights pertaining to) these recordings. With regard to these commercial recordings, the best way to expand the marketplace for and provide further public access to them, is to allow existing rightsholders to continue to protect and use their recordings under present law, to expand existing general and niche markets for them, while at the same time effectively reducing piratical sources.

⁴ NRPB Study, *supra* note 3, at 4.

The “federalization” of pre-1972 U.S. sound recordings is considered in the NOI as a way to address improved preservation and access. The nature of any legal issues would, of course, depend on the specifics of any legislative reforms, but, would very likely include “takings” constitutional challenges especially if some subset of currently protected recordings were thrust into the public domain or state law terms were shortened, as well as major copyright and contract disputes. First, with regard to commercial recordings (whether in or out of print), any legal changes in the status of these recordings would result in significant economic harm to those companies who own them, were rights to either be lost entirely (by putting older recordings “in” the public domain – if constitutionally permissible to even do so), or thrust into a legal abyss of uncertainty. Any “federalization” – as analyzed in Section III – would result in “legal chaos” – raising basic questions pertaining to the ownership, rights, exceptions and remedies applicable to each and every pre-1972 U.S. recording with the hardships of chain of title, administrative and legal review, litigation, etc. borne exclusively by rightsholders. This would exact a very heavy “cost” for the use of any individual recording, much less for whole catalogs of recordings. Plus, the time and effort expended in a protracted legislative process would exact a heavy toll of resources away from existing exploitation of older works, as well as preservation and public access programs. This chaos, when weighed against the minimal likely “benefit” to doing so, strongly argues against any legislative change.

In short, any “federalization” done retroactively will not only seriously impact rightsholders, but would ultimately not offer a better solution than private agreements as illustrated in this filing, for the improved preservation of and/or access to older recordings because of the attendant “costs” of the legal uncertainties that such reforms would bring. Thus, instead of proposing any legislation, the RIAA and A2IM and their members would strongly recommend this proceeding conclude by encouraging the development of more private agreements for out-of-print commercial materials – along the lines of the Sony Music and Universal Music Group agreements – between rightsholders and archives, educational institutions and the like, and better and coordinated efforts for the preservation of and access to non-commercial materials.

This filing begins with an in-depth look at ongoing preservation and access activities by RIAA and A2IM members, and details how these and other “marketplace solutions” can improve preservation and access better than any legislative ones, especially for out-of-print commercial materials.

II. PRESERVATION AND ACCESS ISSUES

A. THE STATE OF PRESERVATION AND ACCESS: THE NRPB STUDIES

The NOI asks a number of very specific questions regarding the legal treatment of pre-1972 sound recordings, and how, if at all, that treatment – or a change in that treatment, from current state and common law to federal law – would improve, harm, or leave unchanged, the

current state of preservation and access of older works.⁵ Many of the questions originate in large measure from the NRPB Study.⁶

As already stated, the RIAA and A2IM and their members fully support efforts to preserve all recordings – commercial recordings, and especially non-commercial ones. They agree with the NRPB Study that what is needed, and what RIAA and A2IM and their members have and continue to support, is a more sustained and systematic effort to preserve, and especially make available, the non-commercial materials, especially by libraries, research institutions, and archives that have collected, cataloged, preserved and maintained these materials. They suggest – as illustrated by the examples below – that they and the labels continue to work together, as well as working with bona fide collectors and enthusiasts on specifically identified out-of-print commercial and non-commercial collections, towards this aim.

As the NRPB Study notes, the universe of “recordings” includes a wide variety of musical genres of commercial recordings – singles and albums – by major labels and independent labels, as well as a large body of so-called “non-commercial” musical material, including field recordings, ethnographic materials, spoken word (literary and oral history), broadcasting, natural sounds and other material that is culturally, historically and/or aesthetically significant. Examples of this latter material would include the John and Alan Lomax field recordings made, beginning in the 1930s, and comprising over 5,000 hours of recordings (and 2,450 videotapes) from the American South, the Caribbean, Britain, Scotland, Ireland Spain and Italy, all now housed in the “Lomax Collection” at the Library of Congress.⁷ In responding to the NOI questions regarding the preservation of and access to older recorded sound materials, the filing notes these distinctions, and suggests some different treatment, between out-of-print commercial materials (such as, RIAA and A2IM-owned materials), and “non-commercial” materials – the latter being what archivists often referred to as “orphan” materials because they have no commercial benefactors (such as the field recordings, etc.).

The studies undertaken by the Library of Congress, and others, such as the Indiana University study in 2008-2009, underscore the financial and logistical problems facing preservationists: the tasks of identifying recorded materials, classifying their physical conditions, adding metadata (for later identification and retrieval), and setting “priorities for further

⁵ In response to QUESTION #27 of the NOI, this filing is limited to the treatment of sound recordings and make no recommendations on legal or other issues pertaining to underlying rights. Question #27 of the NOI states: “(27) Could the incorporation of pre-1972 sound recordings potentially affect in any way the rights in the underlying works (such as musical works); and if so, in what way?” Any treatment of underlying works or rights based on any proposed changes to federal copyright law should be addressed to and only considered in light of the rights of composers and music publishers (for musical works) and other authors or owners of non-musical underlying works.

⁶ The NRPB Study outlines two “critical” needs: “the need to recognize the risk to a literal and metaphorical recording of our society, culture, and heritage [through preservation education], and the need to fashion a coordinated response to save and preserve sound recordings.” NRPB Study, *supra* note 3, at 2.

⁷ See Library of Congress, The American Folklife Center: Alan Lomax Collection Website, <http://www.loc.gov/folklife/lomax/>; David Bianculli, *Folklorist Alan Lomax: Everyone Has a Story*, NPR (Jan. 7, 2011), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=132733850>.

cataloging and preservation.”⁸ These problems are real and need public and private-party assistance and attention. More needs to be done, in particular on materials without commercial benefactors (as was similarly identified with film materials by the early 1990s seminal study of the National Film Preservation Board of the Library of Congress). It is these so-called “non-commercial orphan” titles that are the most in need of preservation and care for historical and cultural reasons, or that are the most vulnerable to being neglected. The RIAA and A2IM and their members are willing to work with libraries, archives and bona fide collectors in this regard and, as it pertains to their materials, to develop consensual agreements as they have begun to do, for the preservation and storage of, and access to, all culturally and historically significant materials.

In addition, there is and should continue to be a sharing of technical knowledge and resources among and between rightsholders and archives, to improve preservation and storage technologies for commercial and non-commercial materials.

Perhaps one way to further public access to out-of-print commercial recordings would be to increase the number and scope of such private agreements with public libraries and archives (and other cultural and educational institutions and museums) for older materials – focused on particular catalogs – that are owned by RIAA and A2IM-member companies. These private agreements could, by mutual cooperation, improve public access to certain materials – with access “staged” at varying degrees, depending on the nature and age of the material (*i.e.*, lesser commercial material), and the nature of the access (*i.e.*, education and research). The advantage of private agreements of this nature, is that they could be done by label, by catalog, and/or by collection, and do not need legislative or regulatory change – thus, resulting in speedier agreements, improved relationships between rightsholders and educational and research institutions, and, for the public, improved (free) access to culturally and historically significant material. Further, because such agreements can spell out various “staged” access conditions, they can pinpoint the types of access agreed upon, and, by revision (and agreement of the parties), be more flexible than legal reforms for on-site usage (for education and research) and/or for broader stream-only (or other forms of) public access to materials.

With regard to RIAA and A2IM-member owned recordings, the RIAA and A2IM and their member companies have, over the years, and with an accelerated push in the digital age, spent many millions of dollars to preserve recordings under their ownership or care, and to make these recordings more accessible to the public, especially via digital services. These activities include the preparation of digital files of preservation quality, consistent with industry-accepted norms, and undertaken in cooperation with audio engineering standards and practices.

In the “Survey of Reissues of U.S. Recordings” (August 2005) a study commissioned for and sponsored by the National Recording Preservation Board of the Library of Congress, author Tim Brooks reported on the availability of sound recordings “published” (that is, released) in the United States. The study was undertaken by a “random sample of 1,500 recordings commercially released in the United States between 1890 and 1964” – the first 75 years of the

⁸ NRPB Study, *supra* note 3, at 14.

commercial recording industry in the United States.⁹ The study indicates, according to this random sample, the low level of materials available in certain decades. Clearly, more can be done – as suggested by private archival partnership agreements – to make additional recordings available to the public. The Brooks Study was undertaken in 2005. As noted in this filing, two major labels – Sony Music and Universal Music Group – have subsequently agreed (in two separate private agreements) in partnership with the Library of Congress, to preserve, and make thousands of pre-1925 (Sony Music) and pre-1948 (Universal Music Group) recordings available to the public. It is not clear how these two (just being implemented) agreements might alter the Brooks study (2005) statistics of the availability of out-of-print commercial recordings.

One common misunderstanding is that all commercial recordings, especially vintage ones, can and therefore should be made available for nominal costs by rightsholders. In fact, the costs, per recording, can be quite prohibitive. These include: the costs of storage, review in real-time (of analog recording media) for missing or incomplete metadata, data entry, cataloging, conversion/digitization using carefully preserved obsolete equipment and storage media (*i.e.*, preservation), and, related overhead costs including legal fees (for the recordings and/or for clearing underlying rights, such as compositions). This, coupled with uncertainty about the commercial value of the vast majority of the recordings, is the principal reason many recordings are not widely available. Worse, from the monetary break-even point, once made available, even at a lower resolution quality (such as MP3 files), ready access, including the ready access of pirate sites, can eviscerate any legitimate market, which, at the outset consists for most of these older materials, of a very small, very niche consumer-base.¹⁰ Collectively, that is, taking a catalog of vintage recordings and readying them for digital distribution can cost millions of dollars with little likelihood of any commercial return. Notwithstanding these cost and other obstacles, rightsholders have undertaken preservation work and do incur huge costs for these efforts as well as for the cataloging, storage, etc. of their materials. The notion that public libraries or archives should be able to make these older recordings available, does not remove the other associated costs, nor the possible future revenue streams for the rightsholders lost (to piracy) once the files are “released” to the public in digital formats, which is, in the view of the RIAA and A2IM, the motivation for the increase in rightsholder-archival partnerships to preserve and make available older recordings.

B. RIAA AND A2IM-MEMBER PRESERVATION AND ACCESS ACTIVITIES

In alphabetical order, this filing provides some examples of RIAA and A2IM-member company preservation efforts and access activities of “back-catalog” materials.

⁹ See Brooks, *supra* note 3, at 2.

¹⁰ In response to QUESTION #28 of the NOI, which in relevant part asks about other types of “commercial or noncommercial use or exploitation of pre-1972 sound recordings, without authorization from the rights holder”: the RIAA and A2IM, of course, cannot address how others – institutions and/or individuals – are motivated by current (or future) law to exploit back-catalog materials. The RIAA and A2IM are, however, aware of numerous websites offering unauthorized access to back-catalog materials. These include, to name a few: thepiratebay.org, torrentz.com, BTJunkie.com, torrentdownloads.net, torrentreactor.net, and torrenthound.com. These websites all provide links to unauthorized downloads of (pre-1972) sound recordings from Enrico Caruso, Billie Holiday, Louis Armstrong, Bessie Smith, Duke Ellington, Bing Crosby, Robert Johnson, Frank Sinatra, and Vladimir Horowitz.

This information responds to QUESTIONS #8 and #9 of the NOI regarding “commercially valuable sound recordings first fixed before 1923” (QUESTION #8) and “commercially valuable sound recordings first fixed from 1923-1940” (QUESTION #9), and it also includes information on other (later) back-catalog recordings – both preservation efforts and availability.¹¹ Here are the examples of company preservation and access activities:

1. Concord Music Group

Concord Music Group (CMG) was formed in 2004 by merging two independent record companies – Concord Records, Inc. and Fantasy Records, Inc. In 2005, Telarc Records joined the CMG family. In 2010 CMG acquired Rounder Records.

The vast majority of the pre-1972 sound recordings in the CMG catalog were acquired in the Fantasy acquisition. In addition to the 1960s recordings made under its own Fantasy label (most notably those of Creedence Clearwater Revival), Fantasy had acquired over the years a number of iconic American record labels specializing in jazz, blues, and rhythm and blues, including Prestige, Riverside, Milestone, Stax, Specialty, Pablo and Takoma, among others. Their collective pre-1972 holdings comprise approximately 7,000 albums. Since Rounder was founded in 1970, it has only a handful of pre-1972 albums in its catalog. Concord Records and Telarc were formed post-1972.

CMG stores these and related materials at Iron Mountain (a commercial storage and archival service), with backup and extra copies kept at various locations, including at or near the offices of the various labels. Digital copies of commercially released masters are also kept at the facilities of Universal Music Group, which presently acts as CMG’s exclusive digital music distributor.

Although different companies and labels under the CMG umbrella have different standards and practices with respect to digitization and preservation, for the most part, anything that has been made available on CD or that was first fixed digitally, has at least some *de facto* digital archival copy. The practice of the Fantasy labels and, more recently, Concord as their owner, has been, and continues to be, creating digital transfers whenever something is going to be released or reissued on CD. Some of these early transfers were done using an X-80 format (which is an open reel digital format), and will have to be reconverted when time and money permit.

CMG has now digitized the majority of its recordings; these efforts are, by necessity, prioritized to those recordings having the most commercial value. CMG estimates that digitization of the remainder of masters that have previously been released will be accomplished

¹¹ The NOI Question #8 states: “(8) Are there commercially valuable sound recordings first fixed before 1923 (*e.g.*, that would be in the public domain if the ordinary Federal term of protection applied) that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.” The NOI Question #9 states: “(9) Are there commercially valuable sound recordings first fixed from 1923-1940 that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.”

over the next few years. Digitization and preservation of unreleased masters by artists of lesser stature will take longer.

CMG has spent over a million dollars since 2004 in its digitization, preservation, archiving and storage efforts and estimates that it will spend hundreds of thousands of dollars per year in ongoing costs.

2. Countdown Media

Countdown Media, until recently a wholly-owned subsidiary of the Canadian record label Madacy Entertainment, serves as an archive, mastering, digitization and licensing company. With its main offices located in Hamburg, Germany, in addition to technical, sales and marketing staff in the U.S. and Canada, Countdown Media's archive totals over 150,000 recorded tracks, and represents third-party catalogs on a worldwide basis totaling an additional 100,000 recordings. Its significant pre-1972 recordings include the majority of the Everest recording catalog, including its associated imprints Davon, Legacy, Olympic & Tradition, as well as much of the contents of the Alshire recording catalog, which includes the complete 101 Strings archive of recordings and the Somerset, Essex and Stereo Gold Award imprints.

Of particular note in the Everest catalog are 33 tracks recorded by the legendary country artist Patsy Cline, historically significant not only for the classic performances, but also in their influence on later generations of country singers. In addition, this catalog contains over 200 hours of material on 3-channel, 35mm film stock, recorded in the late 1950s & early 1960s. This group of recordings is recognized as one of the earliest multi-channel efforts, with many of these historic sound documents recognized by audiophiles for their stature and quality. Some of the highest artistic classical performances of that era, from artists such as the London Symphony Orchestra, the New York Philharmonic, Leopold Stokowski, Adrian Boult & Malcolm Sargent, make up the majority of this body of work.

The highlights of the Alshire catalogue include one of the earliest existing rock & roll albums, by the legendary Bill Haley and His Comets, alongside some of the earliest professional recordings by Dolly Parton (which have been provided to the Library of Congress on a gratis license basis for streaming on its website) and the rhythm and blues great Otis Redding. The greatest number of pre-1972 sound documents in this catalog are hundreds of recordings performed by the 101 Strings Orchestra, established in 1955 with its first recordings in Hamburg, Germany and continuing through the mid-1980s in Los Angeles.

The Countdown Media recorded holdings are archived adjacent to its offices in Hamburg, Germany in a temperature and humidity-controlled environment. A full-time staff of engineers, tonmeisters & digitization specialists are engaged in maintaining, cleaning, transferring and digitizing the recorded assets of its archive, as well as third-party catalogs it represents around the world. Its efforts in the area of preservation have totaled over a million dollars during the past decade, and cost hundreds of thousands of dollars on an annual basis today. In addition to the aforementioned climate-controlled archive, considerable expense, for example, has been incurred for new specialized containers for the 35mm film recordings, designed in order to minimize oxidization and slow down any further deterioration of the magnetic tape surface. A number of the Everest recordings' original master tapes have already been lost to decay and age;

as a result, efforts are underway to make transfers from the earliest existing duplicate material, whether in the form of a safety copy, or even original pristine vinyl pressings. Also, the wide range of recording formats found in the archive (*e.g.*, quad, 3-channel, videotape, ½" tape, 24-channel multitracks, various Dolby encodings, etc.) have necessitated the purchase and consistent maintenance of a wide array of playback equipment, some of which is no longer manufactured or commercially available.

Concurrent with Countdown's care, maintenance and exploitation of its own archives have been its efforts on behalf of third parties whose catalog holdings Countdown represents for licensing and exploitation throughout the world. Of particular note is the historic Vox classical catalog, as a significant portion of the performances on its 10,000 reels of tape emanate from the 1950s & 1960s. Countdown Media has applied the identical efforts of cleaning and restoration, transfer and digitization to this catalog over the past five years, and ongoing comprehensive efforts to restore this archive to its former glory are showing superior results measurable in the intrinsic value of the archive, and its availability in the marketplace for exploitation.

3. EMI

EMI stores its U.S. repertoire of pre-1972 master recordings in various Iron Mountain film and sound facilities in Los Angeles, California; Felton, California; Moonachie, New Jersey; and Antiock, Tennessee. EMI stores the majority of its global repertoire of pre-1972 master recordings in EMI-owned facilities located in Middlesex Hayes, England and Paris, France. Both facilities are wholly owned and run by EMI.

EMI routinely digitally remasters analog tape material for release in both digital and physical formats. With very few exceptions, EMI's engineers use in-house studio resources to perform the analog to digital conversions. In addition to ad hoc conversions based upon catalog requests, EMI proactively digitizes analog assets at risk of format obsolescence and media degradation. Over the last twenty-five years, EMI has digitized tens of thousands of analog masters for both commercial (re-issue) and archival purposes. EMI's global archive program costs several million dollars per year. The program's primary costs include Iron Mountain storage fees, operating and managing EMI-owned warehouses, and supporting a team of dedicated archival staff (*e.g.*, librarians, archivists, etc.) to catalog and convert archive material for commercial and preservation purposes. With the exception of digitizing analog assets at risk of format obsolescence and media degradation, EMI seeks to monetize all of the converted archive material through physical sales or by way of EMI's digital channels (streaming, download, subscription, etc.). EMI estimates that it successfully monetizes approximately 70% of its converted assets. EMI occasionally executes formal agreements to allow academic researchers to utilize archival assets. EMI also loans physical materials (physical artifacts such as gramophones) to museums and exhibitions. EMI is currently exploring third-party relationships with several institutions such as the Country Music Hall of Fame and the French Ministry of Culture.

While no formal cooperative agreements are in place, EMI maintains informal relationships with various institutions from around the world such as the Library of Congress, National Sound Archive of the British Library, The City of London Phonograph and Gramophone Society, The National Media Museum (UK), and the French National Library. In

addition, EMI, as a matter of course, provides the British Library with a copy of every sound recording.

EMI has a variety of pre-1940 back-catalog material that is still being released or being licensed for release. For example, there are independent enthusiast labels and distributors (*e.g.*, Honest Jon's, Historic Masters, etc.) that license EMI's archival content from the pre-1923 period for small release runs to niche markets. The majority of EMI's commercially valuable sound recordings first fixed before 1923 include tracks from The Gramophone Company and The Columbia Phonograph Company as well as their associated worldwide labels (*e.g.*, His Master's Voice (UK), Parlophone (UK), Odeon (Germany) and Fonotipia (Italy)). In particular, EMI UK maintains a significant collection of pre-1923 sound recordings including potentially the largest collection of single-sided Berliner 78s (approximately, 16,000 discs). The UK collection includes regional and internationally known performers from throughout Europe, Asia and the Middle East. In addition, EMI France maintains approximately 1,000 Pathé 78s as well as "mother plates" that date back to 1902. This invaluable collection encompasses every field of audible performing activity, from folk songs and local dialect recitations, to grand opera.

EMI actively seeks to commercially market its pre-1923 masters by licensing the sound recordings for a fee to independent third parties such as Honest Jon's and Historic Masters. To date, EMI estimates that it digitally remastered and marketed approximately 100 sound recordings that predate 1923. While EMI owns all commercial exploitation rights to its pre-1923 masters, the physical discs are owned by The EMI Group Archive Trust. The EMI Group Archive Trust actively promotes free access to EMI's archival collections and is undertaking numerous projects such as the Berliner Project and the Metal Masters Check Project for the advancement of education and research of the development of sound recording and the history of the sound recording industry.

In accordance with the objectives of The Berliner Project (funded by The Stratton Trust), EMI hopes to scan all 16,000 of the pre-1923 "Berliners" and, for the first time, create a complete searchable database of its Berliner catalog including rare recordings by Adelina Patti (1843-1919), Nellie Melba (1861-1931) and Enrico Caruso (1873-1921).

In conjunction with Historic Masters Ltd, EMI is also undertaking the Metal Masters Check Project. This project involves a full and detailed check of every metal master held in EMI's vaults. Errors in the database are amended and gaps in information are filled through extensive research. To date, EMI has checked all 27,000 ten-inch masters and continues to work on the remaining twelve-inch metal masters. The project is ongoing and likely to continue for several years.

The Metal Masters Check Project yielded many important revelations, including the discovery of previously unknown operatic sound recordings: recordings by Jussi Bjorling (1911-1960), Beniamino Gigli (1890-1957), and Feodor Chaliapin (1873-1938) to name a few. In addition to these "lost" recordings, the project also discovered master recordings performed by Salome Pinkasowicz, which recount pre-1914 hostilities in Eastern Europe.

EMI material that predates 1930, includes: EMI's ancestral companies, such as The Gramophone Company, The Columbia Phonograph Company, Odeon, Electrola, Beka, Pathé,

Fonotipia, Parlophone, and His Master's Voice (HMV), all of which collaborated with a vast roster of classical artists to record tens of thousands of sound recordings between 1923 and 1930. EMI continues to explore commercialization opportunities for its pre-1930 archival assets. To date, EMI estimates that it digitally remastered approximately 1,200 sound recordings, first fixed between 1923 and 1930, for commercial purposes.

Further examples of commercially important EMI material that predates 1940 include the merged (in 1931) Gramophone Company and Columbia Graphophone Company – which became “Electric and Musical Industries” or EMI. Under the EMI umbrella, the global labels collectively recorded tens of thousands of sound recordings between 1930 and 1940. In addition, in 1939, Blue Note Records released recordings from, among others, Albert Ammons, Meade “Lux” Lewis, Frankie Newton Quintet, J.C. Higginbotham Quintet, The Port of Harlem Jazzmen, Sidney Bechet Quintet, The Port of Harlem Seven, Earl “Fatha” Hines Solo, and the Pete Johnson Blues Trio. EMI digitally remastered Blue Note's 1939 recordings from all of these artists and continues to seek opportunities to commercially exploit them.

In total, EMI estimates that it has digitally remastered approximately 4,500 sound recordings, first fixed between 1930 and 1940, for commercial purposes. There are other examples of still older recordings including a special release called *The Record of Singing*, devoted to the art of singing on record over the past century. This is a set of twenty CDs divided into two boxes of ten discs: the first extends from the earliest vocal recordings in 1899 up to 1952, when the era of the 78 rpm shellac record effectively ended; the second covers the period 1953 to 2007 from the introduction of the vinyl LP record to the digital era and the CD.

For more information on this and other EMI classic releases, see:
<http://www.emiclassics.com/releaseabout.php?rid=47773>

For information on back-catalog ethnographic materials in release see, for example:
http://www.mojo4music.com/blog/2008/03/emis_buried_treasures_unearthe_1.html and
<http://www.discogs.com/Various-Give-Me-Love-Songs-Of-The-Brokenhearted-Baghdad-1925-1929/release/1601387>

4. Sony Music

Sony Music's audio assets are stored in two high-security, climate-controlled underground facilities owned by Iron Mountain. One facility is located in Rosendale, NY (staffed by Iron Mountain employees), the other in Boyers, PA (staffed by Sony Music employees). Sony Music has undertaken many thousands of high-resolution analog to digital transfers since beginning its archiving programs in the early 1990s. All genres, all eras, all formats, from the metal parts and lacquers of the pre-tape era (pre-1948) to the 24-track recordings of the 1970s, 80s and 90s, are being addressed on an ongoing, full-time, daily basis. All analog to digital transfers are made as uncompressed WAV files in the 24-bit/96khz format. Obsolete digital formats are also transferred onto new, viable carriers.

Millions of dollars have been spent on preservation, storage and cataloging in each year since the early 1990s; each year's audio preservation budget is in the many hundreds of thousands. The cost of climate-controlled storage of approximately 1.5 million recorded assets is

several million dollars per year. An array of obsolete audio gear capable of playing back any format from the whole history of recorded sound has been retained and is meticulously maintained at great annual expense. Repertoire consultants with expertise in specific eras and genres are kept on annual retainer to help supervise preservation transfers. A staff of more than half a dozen is devoted exclusively to the cataloging of recorded assets, and considerable IT resources are devoted annually to improving and refining Sony Music's proprietary asset management database and its search capabilities.

The historic Sony Music agreement with the Library of Congress detailed below will make thousands of pre-1925 Sony library recordings available to the public for free on the Library's website.

Prior to 2007, Sony Music provided to the Library of Congress high-resolution digital transfers of Sony-owned master recordings that were selected for inclusion in the National Recording Registry, an annual list of iconic American recordings prioritized for preservation (and part of the work of the Library of Congress' National Recording Preservation Board). Hundreds of recordings were transferred and provided to the Library, entirely at the expense of Sony Music.

Among the older (pre-1923) artists who retain some commercial viability for Sony Music: Sergei Rachmaninoff, Enrico Caruso, Bessie Smith, Louis Armstrong (his earliest recordings with King Oliver & Fletcher Henderson), Arturo Toscanini, the Original Dixieland Jazz Band (the very first Jazz recordings), Paul Whiteman Orchestra (who recorded the Original Rhapsody in Blue with George Gershwin on piano in 1924), John McCormack, Jascha Heifetz, Al Jolson, Will Rogers, John Philip Sousa, Eddie Cantor, George M. Cohan, W.C. Handy, Jelly Roll Morton, Leopold Stokowski, Peerless Quartet, Fanny Brice, Nora Bayes, Fritz Kreisler and Sidney Bechet. Among the material up to 1930, this includes: Duke Ellington, The Carter Family, Jimmie Rodgers, Bing Crosby, Fats Waller, Artur Rubinstein, Vladimir Horowitz, Paul Robeson, Ethel Waters, Hoagy Carmichael, Maurice Chevalier, Charlie Poole, Lonnie Johnson and Blind Willie McTell. Among the material up to 1940, this includes: Frank Sinatra, Billie Holiday, Robert Johnson, Artie Shaw, Count Basie, Arthur Fiedler, Fred Astaire, Coleman Hawkins, Lionel Hampton, Benny Goodman, Glenn Miller, Tommy Dorsey, Leadbelly, Sonny Boy Williamson, Bill Monroe, Big Bill Broonzy, Gene Autry, Fritz Reiner, Tampa Red, Memphis Slim, Cab Calloway, Hank Snow, Sons of the Pioneers, Bob Wills, Bruno Walter, Art Tatum, Dizzy Gillespie, Nelson Eddy & Jeanette McDonald, and Noel Coward.

5. Universal Music Group

Universal Music Group, as noted in detail below, in 2010 gifted its pre-1949 master material – that is, 1929 to 1948 master recordings – to the Library of Congress. So, that material is now housed at the Library of Congress. The post-1948 Universal Music Group material is housed under Universal's management at third-party vaults in New Jersey, Pennsylvania, and California.

Universal Music Group is digitally converting, at a cost of millions of dollars, tens of thousands of its master materials. The work is being undertaken primarily using a third-party

production studio near the vaults to transfer the music to digital files; Universal is then storing the original materials and the digital files in multiple geographic locations.

As a part of the gift agreement and partnership with the Library of Congress, the physical masters are being digitized with the physical masters remaining at the Library, and digital copies being returned to Universal. Also, as a part of the agreement, the Library of Congress will be able to make the recordings available for free streaming purposes on the Library's "National Jukebox" website; Universal retains all copyrights to the sound recordings, and can additionally sell these recordings for downloads, or distribute them in hard copy or digital copies via other music services.

With regard to older back-catalog materials, there are no pre-1923 U.S. recordings in the vaults of Universal Music Group; there are, however, pre-1923 recordings – of particular classical artists – that were recorded in and housed in archives in Europe. In fact, the Universal Music catalog of U.S. recordings starts in the 1930s. There are many seminal artists of 1930 and 1940 recordings in the Universal Music Group that are still enjoying commercial releases. These include artists such as: Louis Armstrong, Bing Crosby, Tommy Dorsey, Judy Garland, Dinah Washington, Ella Fitzgerald, Billie Holiday, Andrew Sisters, Connie Boswell, Mills Brothers, Guy Lombardo, Fred Waring, Jimmy Dorsey and Louie Jordan.

6. Warner Music

Warner Music stores its materials at multiple vaults it owns and controls and at Iron Mountain facilities in the U.S. and abroad.

In 2005, Warner Music began digitizing its analog assets and converting "born digital" masters to the WMG high resolution archive specification (192/24). Warner Music has archived over 12,000 album masters (mono, stereo, released mix masters as well as unreleased mixes and instrumental mixes) to date, and has thousands more that it is continuing to digitize or convert – all in accordance with industry standards. In 2010, Warner Music began archiving multi-track masters as well. Warner Music spends millions of dollars in storage, cataloging and conversion costs. The company's archived assets are used on a daily basis for physical and digital album reissues, new box sets, for synch licensing uses in new audiovisual materials, videogames and the like.

The earliest assets in the Warner Music archive date from the late 1940s (Atlantic Records had its first release in 1947). There are many back-catalog assets – in fact "crown jewels" – that have commercial viability including Frank Sinatra, Aretha Franklin, John Coltrane, Ray Charles, Led Zeppelin, as well as (relatively) more recent recordings by James Taylor and Joni Mitchell. Many of its back-catalog recordings are distributed through the Rhino label. In short, once every finished album in the Warner Music catalog has been digitized – from 1947 to the present – the materials will be available for exploitation in digital (or any hard copy) formats.

C. SONY MUSIC AND UNIVERSAL MUSIC GROUP AGREEMENTS WITH THE LIBRARY OF CONGRESS

In addition to these ongoing preservation activities, two major initiatives that have been very recently agreed to and announced, deserve particular attention:¹²

1. Sony Music – Library of Congress Project

In 2009 Sony Music Entertainment and the Library of Congress entered into a (confidential) agreement to make accessible to the public a vast collection of historical sound recordings. This partnership will result in the largest collection of historical recordings ever made publicly available for study and appreciation. The collection consists of all of Sony Music's pre-1925 recordings – that is the entire acoustic recording era (roughly from 1900-1925). Thus, with Sony Music's cooperation, the Library of Congress is creating a website, known as the "National Jukebox," that will make accessible via streaming, for free, tens of thousands of pre-1925 sound recordings owned by Sony Music Entertainment that are presently out-of-print and inaccessible to the public. Also as part of the agreement, the Library of Congress will prepare digital preservation copies provided by Sony Music from its master materials – including analog (78 rpm discs and cylinder) recordings. This project is intended to generate public interest in historical recordings, and it is hoped, result in developing new audiences for older recordings.

An important companion project is the Encyclopedic Discography of Victor Recordings which is being compiled at the University of California, Santa Barbara. This project will catalog the entire Victor and RCA Victor recordings from the birth of the company through the end of the 78 rpm era (roughly 1900 to 1950). The project is comprised almost entirely of information derived from and provided by the Sony Music archives. Many original documents and recording ledgers, dating back to the early 1900s, have been loaned to the University of California, Santa Barbara for digitization. This will provide metadata to enhance the National Jukebox project, as well as provide the comprehensive database of the historic Victor Records catalog. For more on this project, see <http://www.library.ucsb.edu/speccoll/collections/pa/victor.html>. (Prior to the merger of Sony Music and BMG, BMG archives staff worked for many years, going back to the mid-1990s, with Stanford University on a massive Victor discographical project that was the predecessor of the current UC Santa Barbara project.)

2. Universal Music Group Donation to the Library of Congress

On January 10, 2011, the Library of Congress and the Universal Music Group ("UMG") released a joint press statement pertaining to a 2010 executed agreement between UMG and the Library of Congress whereby UMG donated its master recordings to the Library, constituting the largest recording collection in the Library's history. The project entails a joint UMG-Library preservation effort, and will allow the Library to make UMG recordings available from this seminal catalog of music dating from 1929 to 1948, for free, on the Library's "National

¹² Numerous news articles about these agreements have been published. For a selection of these articles, see Appendix A attached to this filing.

Jukebox” website. The UMG masters will be stored at the Library of Congress’ Packard Campus in Culpeper, Virginia, where digital copies will also be available for on-site inspection by educators and researchers.

The January 10, 2011 Joint Press Statement summarized the agreement as follows:

Totaling in excess of 5,000 linear feet, UMG’s gift is the largest single donation ever received by the Library’s audio-visual division and the first major collection of studio master materials ever obtained by the nation’s oldest cultural institution. Among the collection’s thousands of metal and lacquer discs and master mono tapes are released and unreleased versions of recordings by such seminal artists as Louis Armstrong, Bing Crosby, Tommy Dorsey, Billie Holiday, the Andrews Sisters, Connee Boswell, Jimmy Dorsey, the Mills Brothers, Guy Lombardo, Ella Fitzgerald, Fred Waring, Judy Garland, and Dinah Washington, among others.

They include:

- Bing Crosby’s 1947 version of “White Christmas”
- Louis Armstrong singing “Ain’t Misbehavin’”
- The Mills Brothers’ “Paper Doll”
- Ella Fitzgerald’s and Louis Armstrong’s duet “Frim Fram Sauce”
- Les Paul’s “Guitar Boogie”
- Josh White singing “Jim Crow”
- Machito and his Afro-Cuban All Stars Mercury recordings

The Universal Music Collection, which consists of the company’s best existing copies, will be cataloged and digitized at the Library’s Packard Campus for Audio Visual Conservation in Culpeper, Va., which will permanently secure their exceptional sonic quality. The Library will also stream recordings from the collection on a website to be launched in the spring. The additions of these recordings will significantly broaden the scope of the site and enhance the Library’s already unprecedented authority to stream commercially owned sound recordings online.¹³

As the record label information clearly shows, there are myriad examples of U.S. recordings – back-catalog material – that is being preserved and commercially distributed at great cost to the rightsholders. Thus, in answer to QUESTIONS #8, #9 and #10 of the NOI,¹⁴ bringing U.S. recordings before 1940, or 1930 materials, or even pre-1923 materials, under federal copyright law, and possibly putting such material into the public domain in the United

¹³ Press Release, Universal Music Group, Universal Music Group Donates Over 200,000 Master Recordings to the Library of Congress (Jan. 10, 2011), *available at* <http://www.universalmusic.com/corporate/universal-music-group-donates-over-200000-master-recordings-to-the-library-of-congress>.

¹⁴ The NOI Question #10 states: “(10) With regard to commercial recordings first fixed after 1940: What is the likely commercial impact of bringing these works under Federal copyright law?”

States, would result in significant economic harm to the rightsholders of these materials – as well as raise constitutional “takings” problems (discussed below). Moreover, these examples demonstrate that significant preservation and access activity for back-catalog material is taking place without the need to change current law. Any such change in current law, could cause some of this activity to grind to a halt while rights and other legal issues were sorted out for U.S. recordings.

D. IMPACT ON PRESERVATION ACTIVITIES

Changing the legal status of pre-1972 sound recordings would not, by itself, improve preservation activities. Preservation activities are mainly limited due to a lack of financial resources, and perhaps some technological ones as well (as detailed in the NRPB Study).¹⁵

Thus, in answer to QUESTION #1 of the NOI,¹⁶ the legal issues (that is, the failure to treat pre-1972 sound recordings under federal law) should not, and the RIAA and A2IM believe are not for the most part, inhibiting the necessary transfers of unstable or deteriorating recordings onto more permanent media – for example from old analog recordings, wax cylinders, etc., onto digital preservation media – for preservation and retention purposes. Pre-1972 sound recordings are not, and should not be treated differently. It is RIAA and A2IM’s understanding that such preservation of old and new recordings is currently being undertaken by public libraries and archives regardless of the legal status of any recording. It is true that some institutions may not be able to raise monies, or additional monies, for preservation activities without a guaranteed ability to make some of these materials accessible. Preservation and access are worthy partnered goals, but preservation is more time critical.¹⁷

Some critical catalogs of materials – such as the Sony Music library of pre-1925 recordings (including the historic Victor catalog), are being preserved by agreement between the rightsholders (Sony Music) and the Library of Congress. Other such agreements can, and should, be privately negotiated with the Library or other institutions.

As several National Recording Preservation Board studies have noted: the uncertainties of copyright law are making some preservation copying a “technical” violation of the law, even if it is not, in reality, hampering necessary preservation copying by libraries, archives and similar institutions. For example, the Besek Study (2005) noted:

¹⁵ NRPB Study, *supra* note 3, at 68 (“The terrain that most archives navigate is largely uncharted and usually marked by considerable technological, financial, and human obstacles.”).

¹⁶ The NOI Question #1 states: “(1) Do libraries and archives, which are beneficiaries of the limitations on exclusive rights in section 108 of the Copyright Act, currently treat pre-1972 sound recordings differently from those first fixed in 1972 or later (‘copyrighted sound recordings’) for purposes of preservation activities? Do educational institutions, museums, and other cultural institutions that are not beneficiaries of section 108 treat pre-1972 sound recordings any differently for these purposes?”

¹⁷ NRPB Study, *supra* note 3, at 111 (“Because the interests of preservation and access have become joined, it might seem that the objectives of both should be mutually reinforcing. But copyright law may stall or imperil both, with the result that access becomes irrelevant for sound recordings that are lost for want of preservation.”)

Preservation efforts with respect to pre-1972 sound recordings are hampered by legal restrictions. For example, a work is considered to be in an “obsolete” format, eligible for preservation copying, only if the device necessary to play it is no longer “commercially available.” Under this formulation, even LP and 78-rpm records are not eligible for copying as “obsolete,” since turntables can still be purchased, even though they are no longer commonly used.¹⁸

That study further notes that: “Preservation efforts are also hindered by significant ambiguities in the law,” citing the varying treatment of recordings under state laws.¹⁹

However, on a contradictory point, the National Recording Preservation Study notes: “Were [current] copyright law followed to the letter, little audio preservation would be undertaken. Were the law strictly enforced, it would brand virtually all audio preservation as illegal.”²⁰ The study goes on to note that: “Copyright laws related to preservation are neither strictly followed nor strictly enforced. Consequently, some audio preservation is conducted.”²¹

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,²² 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.

The RIAA and A2IM and their members support preservation activities by qualified institutions. They do not, however, believe that current law permits, nor should permit, every qualified library or archive to make a copy of every recording in existence or desired, for a “preservation” purpose – and for the use of its on-site patrons. The restrictions on necessary preservation copying – albeit in an outdated Section 108 – were not intended to permit “free-for-all” copying by every institution, nor is such an outcome necessary for prudent national preservation policies. The provisions allow (and should never be expanded beyond) qualified institutions of acquired and cataloged recorded materials, especially significant historical or cultural materials, or unique and/or rare collections, to make only the necessary preservation copying that is required for safekeeping, future retention, and playback.

¹⁸ See Besek (2005), *supra* note 3, at 43.

¹⁹ *Id.*

²⁰ NRPB Study, *supra* note 3, at 7.

²¹ *Id.*

²² The NOI Question #29 states: “(29) [T]o what extent are people currently refraining from making use, commercial or noncommercial, of pre-1972 sound recordings in view of the current status of protection under state law; and if so, in what way?”

In answer to QUESTION #2 of the NOI,²³ any change in law with or without amending the current exceptions, would not affect preservation efforts, for the reasons noted above – the Copyright Act – is not now an obstacle to preservation efforts. Nor should it be. The related question (not asked) is whether even with additional exceptions added, preservation activities would change – by libraries, archives, educational institutions, museums or cultural institutions, given the absence of any legal threats under current law for wholesale copying as part of these preservation activities. The RIAA and A2IM think they would not, given current practices, and do not support any legislative change.²⁴

E. IMPACT ON PUBLIC ACCESS

In answer to QUESTION #3²⁵ and QUESTION #4²⁶ of the NOI, with regard to public access, changes in the legal status of pre-1972 U.S. sound recordings would not automatically result in more historic recorded materials being publicly accessible.²⁷ That is because of the legal complexities – described herein for sound recordings. It is also true because of the issues pertaining to underlying rights in musical compositions which would be unaffected by these changes. These issues in combination would or could serve to prevent access, because public

²³ The NOI Question #23 states: “(2) Would bringing pre-1972 sound recordings under Federal law—without amending the current exceptions—affect preservation efforts with respect to those recordings? Would it improve the ability of libraries and archives to preserve these works; and if so, in what way? Would it improve the ability of educational institutions, museums, and other cultural institutions to preserve these works?”

²⁴ We also note that Section 108 activities – including preservation copying and all the other activities therein – are limited to qualified public libraries and archives and are and should be focused on the preservation of priority historical and cultural materials, and cannot be used as a subterfuge for unauthorized duplication of materials – by any and every entity that calls itself an “archive.”

²⁵ The NOI Question #3 states: “(3) Do libraries and archives currently treat pre-1972 sound recordings differently from copyrighted sound recordings for purposes of providing access to those works? Do educational institutions, museums, and other cultural institutions treat them any differently?”

²⁶ The NOI Question #4 states: “(4) Would bringing pre-1972 sound recordings under federal law – without amending the current exceptions – affect the ability of such institutions to provide access to those recordings? Would it improve the ability of libraries and archives to make these works available to researchers and scholars; and if so, in what way? What about educational institutions, museums, and other cultural institutions?”

²⁷ In response to QUESTION #7 of the NOI, certain unpublished sound recordings held in folklife and ethnographic collections are made available on different terms than published sound recordings. In fact, some such sound recordings are not made available at all, as they raise additional preservation and access challenges, including ethical responsibility issues – as the NRPB Study points out, many such sound recordings are sacred and “not intended as entertainment, or, in some cases, to be heard at all by individuals outside the cultural communities,” as a result rendering preservations “ethically improper” without proper written permission. NRPB Study, *supra* note 3, at 19. This issue is often coupled with lack of adequate documentation, *e.g.*, written agreements between the artists and the bona fide collectors. These problems are described in the *Folk Heritage Collections in Crisis* report (quoted by the NRPB study). See Council on Library and Information Resources, *Folk Heritage Collections in Crisis* (May 2001), available at <http://www.clir.org/pubs/reports/pub96/contents.html>. The NRPB Study notes that the lack of documentation of unpublished recordings is not limited to ethnographic collections. See NRPB Study, *supra* note 3, at 19. Thus, there are numerous considerations, apart from the copyright issues, that contribute to the unavailability of these unpublished sound recordings including ethical, privacy, and documentation issues which would not be resolved by any “federalization” of older recordings.

libraries and archives, in the uncertainty, and given their general reluctance to take risk, would be less, not more, likely to make material available. Alternatively, private-public partnerships with labels – large and independent – and public libraries and archives, would manage these risks much more efficiently, and would more likely result in more materials being made accessible. The better goal is to encourage donation to public libraries and archives of master materials by record labels – large and small that cannot or are not able (for financial or other reasons) to preserve their own master materials – and to include, access to such materials to the extent agreed upon. The same is true for bona fide record collectors and enthusiasts – of niche materials – to get more materials, especially rare cultural and historical materials, into public institutions, and ultimately to the general public.

Thus, although the goals of preserving and accessing older recordings, many of which have little or no commercial value (including field recordings, historic speeches, etc.), are worthy goals, in response to QUESTION #23,²⁸ QUESTION #24,²⁹ QUESTION #25,³⁰ and QUESTION #30³¹ of the NOI, they can be accomplished without upsetting the entire legal structure of the recording industry for pre-1972 U.S. recordings, including, by private agreements. Issues pertaining to particular uses, users and the like, can be resolved by private agreements – as has been done in the two seminal agreements (Sony Music and Universal Music Group) with the Library of Congress in 2009 and 2010. Additionally, it is likely that as new business models develop, more back-catalog materials could be made available either directly by record labels, by partnership agreements with particular libraries and archives, or both.³²

The Copyright Office NOI refers to the “desirability and means” of the potential legal changes for “federalization.” The RIAA and A2IM have in this section addressed the policy question (*i.e.*, the “desirability”) of whether legal changes would serve the purpose underlying this Copyright Office study – namely, to preserve and make accessible older recordings. They think it would not, which is why they have suggested alternatives to legislation that are more practical and more likely to rapidly achieve the goals of better preservation and broader access of

²⁸ The NOI Question #23 states in relevant part: “(23) If the requirements of due process make necessary some minimum period of protection, are there exceptions that might be adopted to make those recordings that have no commercial value available for use sooner? For example, would it be worthwhile to consider amending 17 U.S.C. 108(h) to allow broader use on the terms of that provision throughout any such “minimum period”?”

²⁹ The NOI Question #24 states: “(24) Are there other ways to enhance the ability to use pre-1972 sound recordings during any minimum term, should one be deemed necessary?”

³⁰ The NOI Question #25 states in relevant part: “(25) How might rights holders be encouraged to make existing recordings available on the market?”

³¹ The NOI Question #30 states: “(30) Are there other factors relevant to a determination of whether pre-1972 sound recordings should be brought under federal law, and how that could be accomplished?”

³² The RIAA and A2IM-member companies are at the forefront in exploring and developing online business models for dissemination of creative works. Unfortunately, pervasive online copyright theft undermines these efforts. Back-catalog dissemination could be one area where, due to the high costs of “readying” material for dissemination, library and archival cooperation could develop for the mutual benefit of rightsholders and library and archives and their customers/patrons for certain out-of-print commercial materials.

older recorded materials. The filing next turns to the “means” – the details of any legal changes – by showing the harsh consequences and costs of any such change.

III. LEGAL ISSUES: WHY “FEDERALIZATION” WOULD RESULT IN A MAZE OF LEGAL UNCERTAINTY UNDER COPYRIGHT AND CONTRACT LAW FOR OLDER RECORDINGS, AS WELL AS LIKELY CONSTITUTIONAL CHALLENGES

A. CONGRESS TWICE BEFORE CHOSE NOT TO EXTEND FEDERAL PROTECTION TO PRE-EXISTING RECORDINGS – IN 1971 AND 1976

Twice before – and over forty years ago – Congress considered whether to generally provide protection to pre-existing recordings or only newly fixed recordings. Twice – in 1971 and 1976 – Congress decided to extend broad federal protection only to newly fixed recordings, as this brief history illustrates.

Although not adopted until 1971, the need for legislation to create “a limited copyright in sound recordings [had] been under active consideration by the Congress for a number of years in connection with the program for general revision of the copyright law.”³³ That general revision, begun in 1955, lasted until the enactment of the Copyright Act of 1976, in October 1976.

Legislation providing full federal copyright protection for sound recordings was on two parallel tracks throughout the 1960s as part of the general copyright law revision legislation and as a free-standing bill. When the general revision legislation continued to stall in the late 1960s, Congress decided to move the free-standing bill. So, in 1971, for purely practical reasons, with the growing problem of record and tape piracy, Congress opted to provide such protection quickly and, to avoid having to resolve any complex legal issues, to do so prospectively only.

In 1971, Congress satisfied itself that sound recordings were constitutionally protectable “writings” and passed prospective-only legislation.³⁴ Thus, in the 1971 Sound Recording Act, Pub. L. 92-140, 85 Stat. 391 (1971), all issues pertaining to ownership, rights, exceptions and remedies, were made applicable to recordings first fixed on or after the effective date of the new law. In accordance with Section 3 of that law, that meant, four months after the date of enactment of the bill, which since the law was enacted on October 15, 1971, was February 15, 1972.³⁵ In fact, it was so unpopular that in the hearings held before enactment of the 1971 Act,

³³ S. REP. NO. 92-72, 92nd Cong., 1st Sess., at 3 (1971). In fact, the legal questions of bringing sound recordings under federal law persisted for over a century (almost from the dawning of the technology). The NRPB Study refers to the “earliest identifiable sound recording of the human voice” (a ten second fragment of “Au Clair de la Lune”) as occurring on April 9, 1860. NRPB Study, *supra* note 3, at 1.

³⁴ There is a long history of the consideration by the courts and Congress on federal subject matter protection of “sound recordings” detailed in a comprehensive study by (future Register) Barbara Ringer. Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings*, Copyright Law Revision Study No. 26, 86th Cong., 2d Sess., (Comm. Print 1957) [hereinafter “Ringer Study”].

³⁵ 1971 Sound Recording Act § 3, Pub. L. 92-140, 85 Stat. 391 (1971) (“The provisions of title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copyrighted on
(...continued)

wanting to avoid any protracted fights on complicated issues, there was barely any mention of providing the contemplated new federal protection “retroactively.”³⁶ As a result, there was – with the exception of the record and tape pirates – no opposition to this federal legislation.³⁷

During the general revision of the copyright law – the enactment of the Copyright Law of 1976 – the existing federal protection for sound recordings was retained (re-codified as amended in various sections of 17 U.S.C.); this left in place the “old” 1971 date of enactment for such protection – February 15, 1972. This was done for the same reason as in 1971 – to avoid the myriad legal issues of “retroactive” protection (and, worth noting, to avoid any legal or political challenges to the over twenty-year effort to overhaul federal copyright law).³⁸

Given the intervening forty years, even more 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.³⁹

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and after the effective date of this Act and before January 1, 1975, and nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.”)

³⁶ See generally Hearings on S. 646 and H.R. 6927 before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 1st Sess. (1971).

³⁷ Statement of Stanley Gortikov, RIAA, Hearings on S. 646 and H. R. 6927 before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 1st Sess., at 27 (1971) (“[T]he House Judiciary Committee, the House itself, and the Senate Judiciary Committee’s Subcommittee on Patents, Trademarks, and Copyrights, the Copyright Office, the Department of Justice, and the Department of State have unanimously and without any dissent, approved the creation of a copyright in sound recordings[.] We know of no organization or group, with the exception of the pirates themselves, that does not support the creation of this copyright in sound recordings . . .”).

³⁸ There was one major change in 1976 from the 1971 Act: that was to shorten the perpetual protection under state and common law for pre-1972 sound recordings, to a federal term of 75 years. As the House Report on copyright law revision noted in 1976: “A unique and difficult problem is presented with respect to the status of sound recordings fixed before February 12[sic] 1972, the effective date of the amendment bringing recordings fixed after that date under Federal copyright protection.” H.R. REP. NO. 94-1476, 94th Cong. 2nd Sess., at 133 (1976). Citing a Department of Justice letter that the original pre-emption (Section 301) language “could be read as abrogating the anti-piracy laws now existing in 29 states relating to pre-February 15, 1972, sound recordings” the Department of Justice recommended that the pre-emption provisions be clarified and amended to “exclude sound recordings fixed prior to February 15, 1972 from the effect of this preemption.” The Senate adopted this suggestion when it passed the revision bill (S. 22). See S. REP. No. 94-473, 94th Cong., 1st Sess., at 116 (1975). The House did as well, but, while not wanting to “throw[] into the public domain instantly all pre-February 15, 1972 sound recordings” the House could not agree to the perpetual state and common law protection for these recordings the Senate had adopted, and recommended in lieu, the 75-year term set to run from the 1971 Act (in force, February 15, 1972 – thus, until February 15, 2047). The 1998 term extension legislation added 20 years to this date as well, to the current February 15, 2067. Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 112 Stat. 2827, § 102(d) (1998). It is worth noting that state and common law protection for sound recordings is now available in virtually every state. Such protection, however, takes many forms including, inter alia, statutory rights, unfair competition and misappropriation. A bifurcated federal – state/common law system is not unique to sound recordings. For example, the rights of publicity co-exist with other federal rights including the Lanham Act and copyright law.

³⁹ New York first provided protection to sound recordings in 1909. See *Fonotipia Ltd. v. Bradley*, 171 F. 951 (E.D.N.Y. 1909) (finding the making and selling of copies of commercial records constituted unfair competition).

The Copyright Office has, in the NOI, noted that the “uncertain patchwork” of state laws that currently covers pre-1972 sound recordings has – for “libraries, archives and educational institutions . . . [caused] . . . serious concerns about their legal ability to preserve pre-1972 recordings, and provide access to them to researchers and scholars.” The existing system of state laws (including civil, common and criminal laws, and other remedies) is detailed in a summary of these laws undertaken by the Library of Congress’ National Recording Preservation Board.⁴⁰

However, extending federal copyright protection for all pre-1972 sound recordings would do little to enhance preservation and access, and would instead substitute a whole new set of complexities far worse than those presented by the status quo. In fact, for the reasons set out below, “federalization” would lead to a bewildering legal landscape by raising basic questions of ownership, rights, exceptions and remedies for these older recordings. This would not only harm rightsholders and thwart their use of their own recordings, but would effectively prevent anyone else’s use and exploitation of these older recordings.

The legal (and business) issues of retroactive protection can be subdivided into three broad categories, which this filing treats separately: (1) copyright law and policy; (2) contracts and other existing federal (trademark), and non-federal, rights; and (3) constitutional law questions.

B. COPYRIGHT ISSUES AND POLICY

Any attempt to “federalize” pre-1972 sound recordings would raise serious questions about basic copyright matters: (a) initial authorship and ownership; (b) exclusive rights and exceptions; (c) termination; (d) duration; (e) compliance with formalities – notice, registration, renewal, manufacturing clause; and (f) effective remedies – among many other issues. In fact, since no specific federal legislation is contemplated, this filing anticipates the host of issues that any such legislation might generate.

1. Initial and Subsequent Ownership of “New” Federal Rights

The first, and perhaps most troublesome issue for any federal copyright protection for pre-1972 sound recordings would be how to transition the vesting of any new rights, from existing state and common laws to any new federal law, and, to the extent different from the

⁴⁰ See Besek (2005), *supra* note 3, at 21-25 (summarizing the conclusions regarding state law protection: (1) “the term of protection may not be limited by the date on which the sound recording was fixed or published, or on the basis of the life span of an individual;” (2) “the scope of protection can differ;” and (3) “where civil liability is concerned, it is difficult to generalize”); See generally Jaszi, *supra* note 3 (providing an in-depth analysis of ten state copyright law protection regimes, and noting that “state anti-piracy laws alone do not define the legal uses of pre-1972 recordings. Legal uses of these recordings are also affected by common law copyright, unfair-competition laws, rights of privacy, and federal copyright law related to underlying works, such as musical compositions performed on the recordings.”). Of course, certain foreign sound recordings have already been, or are eligible for, federal protection under 17 U.S.C. § 104A. See 17 U.S.C. § 104A(h)(6) (defining “restored work”). These provisions apply to a limited body of older recordings in the United States, and the thorny issues of the vesting of rights (treated herein) for these recordings rest on pre-existing foreign law, rather than any newly created federal law.

existing vestiture of rights under state law, common law or other laws for these sound recordings, how differences would, if at all, be reconciled – in answer to QUESTION #19 of the NOI.⁴¹ The Copyright Office asks how, in other words, would the federal copyright law adopt the 1976 Act rules on authorship and the initial vesting of ownership, including the work-for-hire rules of the 1976 Act, or would the 1909 Act and the case law developed thereunder apply (with its different work-for-hire rules, from the 1976 Act, for example) – since the recordings (all pre-1972) would have been first fixed during the time the 1909 Act applied? And would the law suggest that the owners under state law would somehow have to forfeit remedies? These questions surely raise constitutional “takings” problems, and a chaotic situation for any rights clearances and/or commercial uses of the recordings (not to mention for any preservation or access activities by libraries and archives).

There is precedent for bringing works in existence under federal copyright law. The Uruguay Round Agreements Act (URAA), effective January 1, 1996 (for most foreign works and sound recordings), restored copyright protection to previously public domain, or in the case of some works and sound recordings, brought never-protected works and recordings, under federal law.⁴² However, the URAA provisions restored ownership under federal law and vested it “initially in the author or initial rightholder of the work as determined by the law of the source country of the work.”⁴³ Thus, the question of “changing” rightsholders from one party (under state or common law) to another (under federal law) – as might occur with pre-1972 U.S. recordings legislation, was not at issue. Under the URAA, the new federal rights vested in whoever was the author or initial rightsholder of the foreign work or sound recording under the law where the work or sound recording was first fixed. Even so, the law is silent on whether restored rights transfer under U.S. law (federal and state contract law), or under the foreign law (“source country”) – making it unclear how to reconcile such chain of title issues.

In response to QUESTION #14 and QUESTION #16 of the NOI,⁴⁴ there would certainly be “complications” in vesting new federal rights by changing the law for pre-1972 U.S. sound recordings. If retroactive protection were to be afforded to pre-1972 sound recordings in the United States, the most basic question would arise, as noted: who would own these new federal rights and how would they be reconciled with the pre-existing state and common law rights? For example, federal copyright law requires a “writing” for transfer or assignments, where state laws

⁴¹ The NOI Question #19 states in relevant part: “(19) If pre-1972 sound recordings were to be given protection under the federal copyright statute, how would or should copyright ownership of such recordings be determined?”

⁴² 17 U.S.C. § 104A.

⁴³ 17 U.S.C. § 104A(b).

⁴⁴ The NOI Question #14 states in relevant part: “(14) Does the uncertainty of different regimes under state law make it less practical for rights holders to bring suit under state law?” The NOI Question #16 states: “(16) Under Federal law the owner of the sound recording will generally be, in the first instance, the performer(s) whose performance is recorded, the producer of the recording, or both. Do State laws attribute ownership differently? If so, might that lead to complications?”

may not.⁴⁵ Thus, all issues of subsequent owners or licensees would be put into a completely muddled, and perhaps, unresolvable situation.

As an example, the NRPB's own studies show how the various state statutes and common law provisions vest various rights and provide them to oftentimes different rightsholders for pre-1972 U.S. sound recordings.⁴⁶ 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. In response to QUESTION #17, for example, different states define an "owner" in different ways (and they vest different rights and remedies as well).⁴⁷ Under Alabama law, the initial owner is not addressed in the state's statute – rather, the owner is defined as the "person who owns, or has the exclusive license . . . to reproduce or . . . distribute to the public copies of the original fixations . . . or the person who owns the rights to record or authorize the recording of a live performance." Ala. Code § 13A-8-80. In contrast, under California law, the owner (initially) is the "author of a sound recording" and "has exclusive ownership in that recording until February 14, 2047 . . ." But, if this existing system, understood and upon which the music industry and related industries have relied on for a century, were suddenly overtaken by a new federal one, the transition to new laws from these state law schemes for each sound recording would involve an administrative nightmare to reconcile under any federal system.

In response to QUESTION #17 of the NOI, if federal law were made applicable, vesting of initial ownership would have to be determined on a case-by-case (likely, a recording-by-recording) basis, looking to the facts of each recording to evaluate the owner(s), and including, whether the work might be a work-for-hire (under the "instance and expense" test in effect – pre-1978),⁴⁸ and/or whether a joint ownership scenario might arise between performers, producers and others.⁴⁹

⁴⁵ 17 U.S.C. § 204. Other federal versus state issues would also be left in doubt, raising questions of the sufficiency of writings and executed transfers: for example, nothing in the federal copyright law excludes a defense under the statute of frauds; and, there would or could be differences in the nature of a required writing under state law, the Uniform Commercial Code and copyright law, etc. Another issue not addressed in the NOI is the question of "divisibility" of copyright under the 1909 Act versus the 1976 Act, a thorny problem to reconcile under any considered system of retroactive federal protection.

⁴⁶ For a survey of state laws, see Besek (2005), *supra* note 3; Jaszi, *supra* note 3.

⁴⁷ The NOI Question #17 states in relevant part: "(17) To what extent does State law recognize the work made for hire doctrine with respect to sound recordings?" The question then posits a number of additional questions about state rights and the vesting of those rights.

⁴⁸ *Battleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966) ("While the "works for hire" doctrine has been invoked most frequently in instances involving music publishers, it is applicable whenever an employee's work is produced at the instance and expense of his employer.") (internal citations omitted).

⁴⁹ *See* 17 U.S.C. § 101 ("A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."); 17 U.S.C. § 201 ("[A]uthors of a joint work are co-owners of copyright in the work."). *See also* *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991) ("Examination of whether the putative co-authors ever shared an intent to be co-authors serves the valuable purpose of appropriately confining the bounds of joint authorship arising by operation of copyright law, while

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Evaluating initial ownership, and then by transfers, assignments, corporate mergers or other legal circumstances, current ownership, under this fact-determinative scheme would be an overwhelming task, ripe with errors, challenges and litigation. The end result would likely be a complete freeze on the availability of many pre-1972 U.S. sound recordings –individually and in collections – as these issues, and expensive chain of title inquiries were conducted (and litigated), or in the case of non-commercial works, were not conducted at all (because of the overly difficult legal and administrative costs), and the recordings simply left untouched and unused.

The current system already is rife with cases re-examining “old” law and old rights.⁵⁰ The “transfer” of rights from state and common law to federal law, and the overlay of federal law to pre-existing recordings, entailing initial and subsequent ownership and rights, would exponentially complicate matters.

As QUESTION #18 of the NOI⁵¹ points out, “under federal copyright law, ownership of rights is distinct from ownership of the material object in which the copyrighted work is embodied.” However, some state laws – prior to statutory reversals in the states, and in the 1976 Act by Congress – interpreted transfers of physical ownership of an original copy of a work as a transfer of copyright ownership as well. For example, the Second Circuit in *Ingram v. Bowers*,⁵² in applying New York law, held that specifically with respect to master recordings, the intellectual property associated with such recordings “passed with the property in them.” Bringing pre-1972 U.S. sound recordings under federal copyright law could require reinterpreting agreements – before the state law and congressional reversals (applicable to works, and less likely, recordings) – to determine whether certain intellectual property rights did in fact pass with the physical property (as under the “Pushman doctrine”⁵³ applicable to works of the

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leaving those not in a true joint authorship relationship with an author free to bargain for an arrangement that will be recognized as a matter of both copyright and contract law.”); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000) (“absence of control is strong evidence of the absence of co-authorship,” and “any objective manifestations of an intent to be coauthors” is strong evidence of co-authorship).

⁵⁰ For example, in a recent case in the Southern District of New York, the heirs to Bob Marley lost a claim that they were entitled to copyright renewal rights in sound recordings made pursuant to three agreements entered into between Bob Marley and Island Records under the 1909 Act, because of work-for-hire complexities. *Fifty-Six Hope Road Music Ltd v. UMG Recordings, Inc.*, 2010 U.S. Dist. LEXIS 94500 (S.D.N.Y. Sep. 10, 2010).

⁵¹ The NOI Question #18 states: “(18) Under Federal copyright law, ownership of rights is distinct from ownership of the material object in which the copyrighted work is embodied. Transferring ownership of such an object, including the “original,” *i.e.*, the copy or phonorecord in which the copyrighted work was first fixed, does not convey rights in the copyright. 17 U.S.C. § 202. A transfer of copyright ownership must be made in writing signed by the owner of the rights or her authorized agent. *Id.* 204. Some State laws provide (or for a period of time provided) that transferring the original copy of a work could operate as a transfer of copyright ownership, unless the rightsholder specifically reserved the copyright rights. To what extent have these State laws principles been applied with respect to “master recordings”? How if at all would they affect who would own Federal statutory rights, if pre-1972 sound recordings were brought under Federal law?

⁵² 57 F.2d 65, 66 (2d Cir. 1932).

⁵³ See *Pushman v. New York Graphic Soc’y Inc.*, 287 N.Y. 302 (1942) (abrogated by statute in 1966).

visual arts before 1970 legislative changes). There were many complex and complicated chains of title pertaining to sound recordings that have been litigated over the years – of copyrights and of rights in physical properties. There were also, for example, many past transfers of rights and catalogs that were undertaken for federal tax purposes.

Any “federalization” would likely result in an unusual number of conflicting claims to ownership and might force a re-opening of chain of title issues. Again, the consequences would be steep: a “redistribution” of federal rights in copyright or of ownership interests in the physical materials – and increased litigation for those who attempt to market back-catalog materials, or to retroactively collect on licensed or granted rights under an agreement drafted with an understanding of previously existing state law principles, rather than federal Copyright Act principles.

2. Duration of “New” Federal Copyright Protection

A second major obstacle for any federal legislation would be how to calculate the term of federal rights. Under pre-1978 federal copyright law, copyright term commenced upon “publication with proper notice” – but this notion of notice is totally irrelevant for pre-1972 sound recordings, since the phonograms notice (the “p” in a circle) did not exist until the adoption of the 1971 Act. Additionally, determining the date of “first publication” for very old recordings would be a nearly impossible factual task in many instances. Further, although the first term endured based solely on publication with notice and a “timely” original registration,⁵⁴ any further protection beyond 28 years was based upon the making of a timely renewal registration. Again, for sound recordings, these formalities did not exist (before 1972), and so cannot be “put back” into any federal system of protection.

Some of the states have provided for their own terms of protection for pre-1972 sound recordings – some are modeled after federal law, and some not.⁵⁵

In response to QUESTION #10, QUESTION #11, QUESTION #12, and QUESTION #21 of the NOI,⁵⁶ the commercial impact of bringing such works under federal protection would be very detrimental to rightsholders – where ownership, the scope of rights, and enforceability of protection would be in doubt. In response to QUESTION #21 of the NOI,⁵⁷ the RIAA and A2IM

⁵⁴ See *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30 (1939).

⁵⁵ One state has found that common law copyright protection endures even after the expiration of the term of the copyright in the country of origin. See *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (N.Y. 2005).

⁵⁶ The NOI Question #10 states: “(10) With regard to commercial recordings fixed after 1940: What is the likely commercial impact of bringing these works under Federal copyright law?” The NOI Question #11 states: “(11) Would there be any negative economic impact of [bringing commercial recordings first fixed after 1940 under federal copyright law], e.g., in the scope of rights or the certainty and enforceability of protection?” The NOI Question #12 states: “(12) Would there be any positive economic impact of such a change, e.g., in the scope of rights, or the certainty and enforceability of protection.?”

⁵⁷ The NOI Question #21 states: “(21) If pre-1972 sound recordings are brought under Federal copyright law, should the basic term of protection be the same as for other works –i.e., for the life of the author plus 70 years or, in the
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and their members oppose any “federalization,” but to answer the question, the only ways to create clarity would be to base a term on the year of first fixation of any sound recording, or to fix an end-term (2067) that matches existing state law.

Regarding the impact on current rightsholders, if the existing copyright term would be shortened, then for those commercial recordings that still have viability (the many noted in this filing), there would be significant and clear economic harm to rightsholders who have invested millions of dollars in the creation, retention, preservation, marketing, release and re-release of these materials. There are also constitutional considerations: if the term were set, for example, at 95 years from first fixation, a recording from 1940 would enter the public domain in 2035 – 32 years before the state common law copyright could expire (in 2067) under current law. Such an outcome would certainly result in constitutional “takings” challenges.

3. Termination of Rights

One additional issue related to bringing pre-1972 U.S. sound recordings under federal protection would be the treatment, if any, of statutory termination. Sections 203⁵⁸ and 304⁵⁹ of the Copyright Act provide for the termination of a copyright license or assignment – with different termination timetables, either from the execution of the grant (Section 203), or timed from the “subsistence of copyright” (Section 304).

However, as described above in Section II.B.1, any uncertainty as to the initial and subsequent ownership (and authorship) of a sound recording would further create difficulty in determining who, if anyone, had or has the ability to terminate any grant (under Section 203, only grants executed by an “author” can be terminated), and, including how to treat joint author scenarios, and when, if at all, termination could be noticed, vested, or if it would apply at all.⁶⁰

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case of anonymous and pseudonymous works and works made for hire, for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first? Can different treatment for pre-1972 sound recordings be justified?

⁵⁸ 17 U.S.C. § 203(a) (“In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under [certain] conditions.”) The effect of termination is that “[u]pon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with [certain] limitations.” 17 U.S.C. § 203(b).

⁵⁹ 17 U.S.C. § 304(c) (“In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under [certain] conditions.”).

⁶⁰ Certainly a related issue would be whether any pre-1972 sound recording would be – retroactively – determined to be a work-made-for-hire and thus ineligible for termination. This matter could be added to the problems already associated with initial ownership, work-for-hire – under 1909 Act versus 1976 Act rules etc. It would also raise questions about the disparity of treatment for pre- and post-1972 recordings as termination issues were, or were not, (...continued)

4. Enforcement of Rights

Another in the litany of legal problems associated with “federalization” would be how standing, statutory damages and attorney’s fees, all now requiring a registration, might apply. Would an entire catalog of music have to be suddenly registered for enforcement – for standing (Section 411) and statutory damages and attorney’s fees? Compliance with formalities, or special treatment waiving certain formalities (many already noted like publication with notice, registration, renewal, etc.) would have to be dealt with in any legislation to avoid providing new federal rights devoid of effective remedies – including these two in particular:

(1) Section 411 of the Copyright Act which requires a registration prior to the commencement of civil litigation to enforce copyright in any U.S. work.⁶¹ Thus, absent registrations, U.S. rightsholders would have no standing to enforce their rights.

(2) Section 412 of the Copyright Act which provides eligibility for statutory damages or attorney’s fees, for “timely” registrations, and serves as an absolute bar for untimely ones, in the case of: “(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.” In other words, a work must be registered before a claim to recover statutory damages or attorney’s fees can be made in an infringement action based on that work.

No pre-1972 sound recordings (except the foreign ones under the URAA, beginning in 1996) will have been registered with the U.S. Copyright Office. This formality, suddenly thrust upon rightsholders of pre-1972 recordings (assuming they could sort out the other issues of ownership etc.) would mean an effective granting of new federal rights, pre-emption of all existing state and common law remedies, and, with these new federal rights, no enforcement until registrations were made at huge administrative, legal and filing costs (not to mention any contractual disputes among licensors and licensees as to who would be obligated to register to enforce rights, etc.). There would, of course, also be a huge burden on the Copyright Office having to set up procedures for and then process, the thousands of copyright registrations and recordations for these recordings.

5. Partial “Federalization” Questions

The RIAA and A2IM and their members oppose the notion of full or of partial “federalization” of pre-1972 sound recordings. As such the RIAA and A2IM do not believe

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made applicable under any new federal law (which would also raise “takings” questions for any newly terminating rights).

⁶¹ 17 U.S.C. § 411(a): “[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”

there are any advantages to providing limited (sectional) federal protections as set out in some of the questions in the NOI, such as QUESTION #13⁶² and QUESTION #26⁶³ of the NOI.

The RIAA and A2IM and their members believe that, for the reasons stated, the overwhelming number of legal challenges and issues would outweigh any benefits of partial protection. The restoration of copyright protection of such limited scope (or of any limited scope of rights) would be novel, as would be the simultaneous state and federal protection of different rights to the same works. This novelty would only further complicate matters and likely lead to even more litigation and conflict with regard to individual recordings or catalogs, and, as noted, make access more difficult because of chain of title and related questions and issues.

C. CONTRACT ISSUES

In response to QUESTION #20 of the NOI,⁶⁴ the entire business structure of the music, but also music publishing, film, videogame, and other industries that rely on or license older sound recordings, would be put into a chaotic situation if pre-1972 U.S. sound recordings were to be brought under federal law. Thus, existing rights, remedies, licenses, representations and warranties and other provisions in contracts and licenses could be called into question.

Thus, with regard to QUESTION #11 of the NOI⁶⁵ and the negative economic impact of such a change in federal law, it is important to consider that investment-backed expectations concerning commercialization of a huge body of commercially important recordings, including all the culturally and historically significant music of the 1940s, 1950s and 1960s, are predicated upon the protections provided under state and common law. The RIAA and A2IM-member companies have, in this filing, provided many examples of older commercially viable recordings, that are licensed in hard copy and over digital networks today under existing and complex contracts and other licensing deals. Bringing pre-1972 sound recordings under federal law could render many deals unclear (at best), make others more difficult to interpret, and would likely result in financial losses. Requiring a court to determine the rights and remedies on a contract-

⁶² The NOI Question #13 states in relevant part: “(13) Would there be other advantages or disadvantages in bringing pre-1972 sound recordings within the scope of the section 114 statutory license?”

⁶³ The NOI Question #26 states: “(26) The possibility of bringing pre-1972 sound recordings under Federal law only for limited purposes has been raised. For example, some stakeholders seek to ensure that whether or not pre-1972 sound recordings receive Federal copyright protection, they are in any event subject to the fair use doctrine and the library and archives exceptions found in sections 107 and 108, respectively, of the Copyright Act. Others would like to subject pre-1972 sound recordings to the section 114 statutory license, but otherwise keep them within the protection of State law rather than Federal copyright law. Is it legally possible to bring sound recordings under Federal law for such limited purposes? For example, can (and should) there be a Federal exception (such as fair use) without an underlying Federal right? Can (and should) works that do not enjoy Federal statutory copyright protection nevertheless be subject to statutory licensing under the Federal copyright law? What would be the advantages or disadvantages of such proposals?”

⁶⁴ The NOI Question #20 states: “(20) What other considerations are relevant in assessing the economic impact of bringing pre-1972 sound recordings under federal protection?”

⁶⁵ The NOI Question #11 states: “(11) Would there be any negative impact of such a change, *e.g.*, scope of rights, or the certainty and enforceability of protection?”

by-contract basis would result in a huge – as well as timely and costly – administrative and legal burden and freeze the availability (whether commercial or otherwise) of older recordings. In response to QUESTION #12 of the NOI,⁶⁶ there is not likely to be any clear and proven positive economic impact of making such a change in federal law.

With regard to the treatment, within contracts of existing obligations, changed by later provisions in title 17, there is some, albeit, very limited precedent. Section 104A(f), which provides immunity to “[a]ny person who warrants, promises, or guarantees that a work does not violate an exclusive right granted in Section 106 [17 U.S.C. 106]” for contracts that were made under the assumption that certain works were in the public domain, could provide guidance on how to address contractual liability arising from new federal copyright protections for pre-1972 U.S. sound recordings. Similar provisions could be adopted, but this would be a minor fix for a major problem – the undoing or uncertainties brought on for the many existing contractual relations, chains of title, rights and remedies for existing uses, licenses and the like.

D. CONSTITUTIONAL ISSUES RAISED BY POSSIBLE “NEW” LEGISLATION

Although, there are many alternative means of “federalizing” older recordings, the questions in the NOI suggest putting some older recordings (pre-1923) into the public domain, and providing some remaining federal term of protection (unstated in the NOI) for the other recordings. This filing treats the constitutional questions of these options (which RIAA and A2IM and their members oppose) – since this is what the NOI suggests might be contemplated if Congress decided to amend the law.

The NOI also asks numerous questions about partial (that is, statutory sectional) “federalization” of pre-1972 U.S. sound recordings. As the RIAA and A2IM and their members oppose any partial or full “federalization” they do not distinguish the constitutionality questions, except to note the still further complications brought on by any coexistence of federal and state rights that might exist under a “partial” statutory scheme.⁶⁷

There are really two constitutional (heightened scrutiny) issues that any new legislation to bring pre-1972 U.S. sound recordings under federal law might raise. It is purely speculative to know whether, and how, such legislation might be enacted, and what, if any, transitional provisions, or provisions attempting to ameliorate legal and practical challenges, might exist in a new law. But, on the general notion of such legislation, the filing treats these two issues. The first, and likely challenge, would be a “takings” one; the second, and less clear in general (and, that it might arise in this instance), is a “traditional contours” challenge.

⁶⁶ The NOI Question #12 states: “(12) Would there be any positive economic impact of such a change, *e.g.*, in the scope of rights, or the certainty and enforceability of protection?”

⁶⁷ 17 U.S.C. § 301(a).

1. The Fifth Amendment and “Takings” Considerations

The likely constitutional challenge concerning the “Takings Clause” would arise – if, as the questions in the NOI suggest, some older sound recordings might be placed into the public domain by any new federal copyright law, either immediately upon enactment, or at some future date, by shortening the duration of protection under federal law from the duration currently in existence for these recordings under state and common law. Such protection persists until (at least) February 15, 2067.⁶⁸ In response to QUESTION #22 of the NOI⁶⁹ (whether legislation extending copyright protection retroactively to pre-1972 sound recordings raises “Takings Clause” issues), the RIAA and A2IM believe that it certainly would raise serious constitutional concerns. For example, taking pre-1923, or pre-1930 or pre-1940, recordings (the three sets of dates considered in the NOI), and placing them in the public domain would clearly take the property of rightsholders – who have invested, and continue to invest, significant money, staff, and other labor in the creation, manufacturing, preservation, advertising, promotion, sales and licensing of these recordings. As this filing illustrates, there are many examples of back-catalog materials that have commercial viability, and any “cut-off” in rights would take away these property rights.⁷⁰

The Fifth Amendment’s Takings Clause provides: “nor shall private property be taken for public use without just compensation.” The Supreme Court has found that “a statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his [property] . . .”⁷¹ A regulatory taking involves a government regulation that deprives an owner of *all* economically productive use of his property.⁷² Legislation that would cut off protections for previously state and common law protected recordings would certainly deny rightsholders of all economically viable use of those works. The economic impact is measured on an “as applied” – or case-by-case – basis, so it is difficult to otherwise make broad predictions. It is worth noting that in the instance of “restoration” of previously public domain works (however, different from pre-1972 recordings legislation), almost a decade of litigation followed in the *Golan* case,⁷³ not only because of the “traditional contours” issue (discussed

⁶⁸ 17 U.S.C. § 301(c): “With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303 [17 USC 303], no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.”

⁶⁹ The NOI Question #22 states in relevant part: “[W]ould the legislation encounter constitutional problems (*e.g.*, due process, or Takings Clause issues)?”

⁷⁰ Another likely “takings” challenge would arise, as noted earlier, were any new federal rights to be vested in a different set of rightsholders from the existing rightsholders under state and common law. Under that scenario, this latter set of parties would, in all likelihood, be able to claim that a preemption of their pre-existing rights, without just compensation, is a federal “taking.”

⁷¹ *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 295-296 (1981).

⁷² *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

⁷³ *Golan v. Holder*, 609 F. 3d. 1076 (10th Cir. 2010).

below), but on “takings” issues – where the URAA permitted “reliance parties” to be cut-off from further uses (or in the case of derivative works, subject to a license) after restoration.⁷⁴ The URAA provisions for “reliance parties” included a sell-off period commencing after formal notification, and, in the case of derivative work reliance parties, the ability to continue exploitation of previously produced derivative works, and no others, with the former subject to an agreed-upon license with the restored copyright owner.⁷⁵

The possibility of bringing pre-1972 U.S. sound recordings under federal copyright law, and simultaneously suggesting that some – date certain – recordings would, upon enactment, be in the public domain, poses a strong constitutional “takings” argument with respect to rightsholders of those recordings. It is not clear how or if any fixes providing “just compensation” for rightsholders could be formulated to overcome these problems, unlike in the URAA factual scenario where only a very limited group of potential “users” (and adapters) of the works of others were affected.

2. The Copyright Clause and “Traditional Contours”

The second constitutional question to consider is whether retroactive protection legislation could pass constitutional scrutiny under the relatively new but vague notion of falling within (or outside of) the “traditional contours” of copyright law.⁷⁶ The notion of heightened constitutional scrutiny for changes in federal copyright law (*i.e.*, whether it “altered the traditional contours of copyright protection”) was raised in the context of extending federal copyright terms – by twenty years – for works and sound recordings under “subsisting” federal copyright protection on the date of enactment in October 1998.⁷⁷ That is, copyright terms were only extended for works still under protection in 1998 by federal law. The extended term was

⁷⁴ As constitutional law professor Eugene Volokh testified in the hearings regarding GATT legislation, “where the reliance party has created a derivative work – [this situation] probably does give rise to a taking, because the restoration of copyright has prohibited the owner of the derivative work from doing virtually *anything* with the work. . . .” Statement of Eugene Volokh, UCLA, Hearings on S. 2368 and H.R. 4894 before Senate Committee on the Judiciary, 103d Cong., 2d Sess., at 181 (1994).

⁷⁵ See 17 U.S.C. § 104A(c) (“On or after the date of restoration, any person who owns a copyright in a restored work or an exclusive right therein may file with the Copyright Office a notice of intent to enforce that person’s copyright or exclusive right or may serve such a notice directly on a reliance party.”); 17 U.S.C. § 104A(d)(2) (allowing enforcement of copyright protection against a reliance party if the owner of the restored copyright served the reliance party with notice within 24 months from the date of restoration; and the act of infringement occurred more than twelve months after service of notice to the reliance party).

⁷⁶ *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (“We recognize that the D.C. Circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” 239 F.3d, at 375. But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”).

⁷⁷ Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 112 Stat. 2827, § 102(d) (1998) (amending Section 304 of the Copyright Act to add section (b) which states: “Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective [effective Oct. 27, 1998] shall have a copyright term of 95 years from the date copyright was originally secured;” and extending the renewal period from 47 years to 67 years for certain other works subsisting at the time of enactment).

not applied, nor was any federal protection for works and sound recordings that had entered the public domain in the United States by the expiry of term on that date of enactment in 1998.

As the Supreme Court noted in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), Congress may act within its constitutional authority in providing extended copyright terms so long as “Congress has not altered the traditional contours of copyright protection.” In *Eldred*, the Court considered a constitutional challenge to the Copyright Term Extension Act (“CTEA”), which extended the duration of all subsisting copyrights by 20 years. The challenge came from those who wanted more ready access to works that would have gone into the public domain but for the 1998 amendment. In ruling for the respondents, the Supreme Court found that the CTEA did not violate the “limited times” restriction (because the new term for copyright protection is not perpetual), and held that First Amendment scrutiny was unnecessary, because Congress did not alter the “traditional contours” of copyright law.

The second line of cases for “traditional contours” scrutiny has been in the context of the URAA, where previously unprotected works, as well as foreign sound recordings, (and including previously ineligible works and recordings due to the absence of treaty provisions),⁷⁸ enjoyed the full panoply of federal copyright law protection on January 1, 1996, as a result of a legislative amendment.⁷⁹ Section 514 of the URAA, amended title 17 (at § 104A) to “restore[] protection to virtually all copyrighted works, including sound recordings, from members of the WTO or the Berne Union that are not in the public domain in their source country through the expiration of term but are not protected under copyright law in the United States.”⁸⁰

⁷⁸ 17 U.S.C. § 104A(b); Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, revised at Paris on July 24, 1971, 1161 U.N.T.S. 30; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Oct. 29, 1971).

⁷⁹ Uruguay Round Agreements Act, Pub. L. No. 103-465, 103d Cong., 2d Sess., 108 Stat. 4809 (1994), amending the Copyright Act at 17 U.S.C. § 104A(a)(1)(B) (“Any work in which copyright is restored under this section shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.”). For countries not members of the Berne Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, or the World Trade Organization at the time of enactment, but who later ratified or acceded to one of these treaties, would be subject to a later date of federal copyright protection for their eligible works and sound recordings, coinciding with the date of earliest adherence to one of these treaties.

⁸⁰ Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H.R. REP. NO. 103-316 (Volume 1), 103rd Cong. (1994), at 993. In *Golan v. Gonzales*, brought by users of previously public domain foreign works, the “plaintiffs maintain[ed] that § 514 of the URAA must be subject to *First Amendment* review because it has altered the traditional contours of copyright protection.” 501 F.3d 1179, 1183 (10th Cir. 2007). The plaintiffs argued – and the 10th Circuit agreed – that one of the traditional contours of copyright law is the “principle that once a work enters the public domain, no individual – not even the creator – may copyright it.” *Id.* at 1184. The URAA provisions were, however, after a long and tortured history, ultimately held to be constitutional. In 2001, in *Luck’s Music v. Ashcroft*, a business packaging and selling public domain works, and another preserving and archiving them, brought suit claiming that Section 514’s grant of “retroactive” rights violated the copyright clause, which “requires the public to have free access to copy and use works once they have fallen into the public domain.” *Luck’s Music Library v. Ashcroft*, 321 F.Supp.2d 107 (D.D.C. 2004).

The *Golan* and *Luck's Music* challenges were to restoration, that is, resuscitating previously public domain foreign works in the United States to copyright protection. The *Eldred* challenge was to extended federal protection. The notion of extending federal copyright protection to pre-1972 works, whatever else it might entail, would most likely be: (a) an even shift from state and common law to federal protection; or (b) a reduction from state law rights to federal protection – in either scenario different from restoration or extended existing protection. In sum, 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.

IV. CONCLUSION⁸¹

In short, moving pre-1972 sound recordings under federal law would do great harm to existing rightsholders and would result in so many legal uncertainties and innumerable costs and disputes, that it would be less, not more, likely to result in better access of certain older recordings.

The better course of action for out-of-print commercial and non-commercial works is to encourage more donations of original master materials to archives, and, in the case of out-of-print commercial materials, to achieve more partnerships between rightsholders and public (“Section 108”) libraries and archives to better preserve and make available their materials. The better course of action for all other commercial materials is to let the existing marketplace continue unabated.

Respectfully submitted,

Recording Industry Association of America (RIAA)
American Association of Independent Music (A2IM)

January 31, 2011

⁸¹ The comments of the RIAA and A2IM have answered, or attempted to answer, all of the thirty questions, and subparts, posed in the NOI. However, Question #5 and Question #6 of the NOI, pertaining to archival uses of foreign recordings (#5) and educational institutional uses of older materials for distance education (#6), are questions directed to archives and/or educational institutions, so this filing has not posited a response. In addition, NOI Question #15 (sampling) was not addressed in this comment because it pertains to business practices which we believe would be unaffected by any federal legislation.

Appendix A

Mike Barnes, *UMG Opens Vaults for Library of Congress*, The Hollywood Reporter (Jan. 10, 2011).

Tom Cole, *Library of Congress Receives Largest Single Audio Donation*, NPR (Jan. 10, 2011).

Christopher Morris, *UMG Donates Trove of Recordings to Library of Congress*, Variety (Jan. 10, 2011).

Michelle Norris, Transcript of Interview with Library of Congress' Gene Deanna: *Library of Congress Receives Largest Single Audio Donation*, NPR (Jan 10, 2011).

Larry Rohter, *Library of Congress Gets a Mile of Music*, N.Y. Times (Jan. 9, 2011).

UMG Opens Vaults for Library of Congress

By Mike Barnes

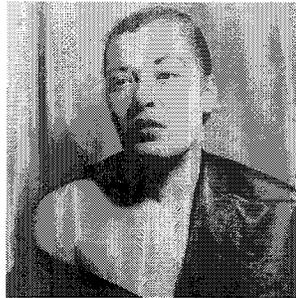
Songs from the likes of Bing Crosby, Louis Armstrong and Billie Holiday are among the more than 200,000 master recordings that Universal Music Group is donating to the Library of Congress, it was announced today.

UMG's gift is the largest single donation received by the Library's audiovisual Recorded Sound Section and the first major collection of studio master materials obtained by the nation's oldest cultural institution.

Also among the collection's thousands of metal and lacquer discs and master mono tapes are released and unreleased versions of recordings by Tommy Dorsey, Jimmy Dorsey, the Andrews Sisters, Connee Boswell, the Mills Brothers, Guy Lombardo, Ella Fitzgerald, Fred Waring, Judy Garland



Songs from the Decca label and artists such as Billie Holiday are among the many recordings being donated by Universal Music Group to the Library of Congress.



and Dinah Washington.

The gift includes Crosby's 1947 version of "White Christmas," Armstrong's "Ain't Misbehavin,'" the Mills Brothers' "Paper Doll,"

Armstrong and Ella Fitzgerald's duet "Frim Fram Sauce," Les Paul's "Guitar Boogie," Josh White's "Jim Crow Train" and recordings from Machito and his Afro-Cuban band.

UMG has one of the world's most extensive music catalogs, and its gift to the Library includes historic masters from such labels as Decca, Mercury, Vocalion and Brunswick dating from the late 1920s through the late '40s.

The collection, which consists of the company's best copies, will be cataloged and digitized at the Library's Packard Campus for Audio Visual Conservation in Culpeper, Va., which will secure their exceptional sonic quality. The Library will stream recordings from the collection on a website to be launched in the spring.

"A surprisingly high percentage of America's

recording heritage since the early part of the 20th century has been lost due to neglect and deterioration. The donation of the UMG archive to the Library of Congress is a major gift to the nation," Librarian of Congress James H. Billington said.

In September, a study released by the Library estimated that only 14 percent of commercially released recordings before 1965 are available from rights-holders, and of music released in the U.S. during the '30s, only about 10 percent can be readily accessed by the public.

"Music is a distinctive feature of any historical period, and this particular collection of masters provides true insight into popular music's humble beginnings and who we are as a culture today," UMG president and COO Zach Horowitz said. "We are delighted to be collaborating with the Library of Congress to preserve and call attention to the groundbreaking musical achievements of these amazing musical pioneers." 

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Library Of Congress Receives Largest Single Audio Donation

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Heard on All Things Considered

text size A A A

January 10, 2011 - MICHELE NORRIS, host:

The Library of Congress today announced the largest donation of audio recordings it's ever received. The gift came from Universal Music Group. The material dates from around 1930 to around 1950 and includes some true American classics. It also marks the first time the library has received commercial masters from a major label.

NPR's Tom Cole reports.

TOM COLE: The place where all of these recordings will wind up sits on a hill in Culpepper, Virginia. Gene DeAnna, head of the Recorded Sound Section of the Library of Congress, leads the way into one of the many rooms where recordings land before they get into the library's vaults.

Mr. GENE DEANNA (Head, Recorded Sound Section, Motion Picture, Broadcast and Recorded Sound Division, Library of Congress): And this is where we first receive collections and do the first initial counts.

COLE: It's a room lined with shelves. An eight by 10 sheet of paper marked simply Universal Collection hangs over a set of shelves.

Mr. DEANNA: So here's a Louis Armstrong "Ain't Misbehavin'" mother. And when I say mother, I mean metal recording. It actually has the negative. It's actually a negative, press it into wax and you get the grooves.

COLE: It has ridges instead of grooves.

The Library is waiting for special styli that can track these metal masters that were used to press the commercial 78 RPM release of Louis Armstrong's recording.

(Soundbite of music, "Ain't Misbehavin'")

COLE: So far, the library has received about 50,000 metal masters, a tractor-trailer load a week, about 20 to 25 pallets of metal discs, since November.

Mr. DEANNA: The majority of the collection are the metal masters, about 200,000. Then there are going to be another 8,000 to 10,000 tape reels and probably twice that, maybe 15,000 lacquer discs.

COLE: It'll take about four months to get all of the material here. Then, DeAnna and his staff of 35 will begin the nuts and bolts work of figuring out what they've got, cleaning it, and digitizing it. The process will take years.

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HOSTS

Jacob Ganz
Frannie Kelley
Tom Cole



The negotiations and legal agreements took about two years to complete. Universal had been storing the discs and tapes at a commercial facility near Boyers, Pennsylvania.

Mr. DEANNA: They've been investing in a half-a-century of storage for some of this material, and it hasn't been touched since it was first issued.

COLE: Most of it is not worth Universal's time and money to even consider releasing to the general public.

Mr. DEANNA: Ninety percent of what we're taking in here are not commercially viable materials for them. That is, to go through the tremendous effort and time to re-master these materials to sell to a very, very small market, it would be probably a losing cause.

COLE: Universal has already issued what'll sell. In fact, only about 14 percent of the music that was released before 1960 is commercially available today.

(Soundbite of song, "White Christmas")

Mr. BING CROSBY (Singer): (Singing) I'm dreaming of a white Christmas...

COLE: The Library got the masters for Bing Crosby's 1947 recording of "White Christmas," the second time Crosby recorded the song.

Mr. ROBERT BAMBERGER: The reason why Bing had to re-record it in 1947 is that the song sold so well that Decca was no longer able to strike copies from the 1942 master.

COLE: Robert Bamberger is a retired policy analyst for the Library of Congress and the co-author of a study last year on the state of audio preservation in the United States, which is in dire condition.

He says Universal made the right decision to donate its masters to the library.

Mr. BAMBERGER: The best interests of preserving recorded sound heritage is by relinquishing these master recordings and placing them where we can all exhale because we know that industry models come and go, corporations come and go, but we hope the Library of Congress will be forever.

COLE: For his part, the library's Gene DeAnna is most excited about what he doesn't know he's got.

Mr. DEANNA: There's so much possibility here of discovery of recordings that really have just been off the sonic landscape of America for so long, and important recordings, familiar sounds but long gone. It's just going to be a treasure to mine for many years for the archive.

COLE: Universal's agreement with the Library of Congress allows for non-commercial streaming on the library's website, a site which the library hopes to have up this spring in collaboration with another major label, Sony-BMG, in a project called the National Jukebox.

Tom Cole, NPR News.

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Library Of Congress Receives Largest Single Audio Donation

11:15 am

January 10, 2011

by TOM COLE



[Enlarge](#)

Louis Armstrong

Courtesy of Decca

The Library of Congress today announced the largest donation of audio recordings it's ever received. The donation came from Universal Music Group and is made up of master recordings — the final metal discs used to press commercial releases; lacquer discs that were cut in the studio to capture full takes

of tunes; and reel-to-reel tapes from the late 1940s. The material dates from around 1930 to around 1950 and marks the first time the Library has received commercial masters from a major label.

They'll be stored under a grass-covered hillside in Culpepper, Va., that once belonged to the Virginia Federal Reserve — built to house enough coin and currency to jumpstart the economy east of the Mississippi in the event of a nuclear attack. Today it's the Packard (named after a donor) Campus of the National Audio-Visual Conservation Center. The Blue Ridge Mountains stand to the west and a red-tailed hawk circles overhead as Gene DeAnna, head of the Recorded Sound Section of the Library of Congress, leads the way inside.

In a room lined with shelves, where donations land for itemizing before they head to the vaults, an 8 by 10 sheet of paper marked simply "Universal Collection" hangs over a set of shelves. DeAnna pulls out a metal master of Louis Armstrong's recording of Fats Waller's "Ain't Misbehavin'." The florescent lights glare off the surface.

"So here's a Louis Armstrong 'Ain't Misbehavin' mother," DeAnna says proudly. "And when I say mother I mean metal recording, mother recording. It's actually a negative — press it into wax and you get the grooves."

It has ridges instead of grooves. The Library is waiting for a shipment of special styli that DeAnna calls "saddle styli," that can track these metal masters by riding on top of either side of the ridges the way a single stylus rides inside the grooves of a 78 rpm disc or an LP.

So far the Library has received about 50,000 metal masters — a tractor trailer load a week — since November.

"The majority of the [Universal] collection are the metal masters — about 200,000. Then there are going to be another 8 to 10,000 tape reels and probably twice that, maybe 15,000 lacquer discs," says DeAnna.

The lacquer discs were used to record in studios before the adoption of reel-to-reel tape. The final metal pressing masters were created from these lacquers.

It'll take about four months to get all of the material to Culpepper. Then DeAnna and a staff of 35 will begin the nuts and bolts work of figuring out what they've got; labelling it properly; deciding what needs immediate care and then digitizing it. The process will take years.

The negotiations and legal agreements took about two years to complete. DeAnna says Universal had been storing the discs and tapes at a commercial facility near Boyers, Penn. "They've been investing in a half a century of storage for some of this material and it hasn't been touched since it was first issued."

And that is basically why Universal wanted to unload it. The negotiations with the Library of Congress began before a fire at Universal Studios in Hollywood damaged or destroyed film and video stored there. DeAnna says the Universal staff he dealt with seemed to have a sense that the clock was ticking.

"[They had a] commitment to getting this done and seeing this content doesn't get lost and doesn't get shuffled away in poor storage, say, because of an economic decision by a business office that's not in touch with the music," DeAnna says. "The people I've worked with are very in touch with the music and a sense of the history of the label ... [they have] a recognition that we need to take care of this because of an understanding of what the reality of the music industry really is and that it's important to get this done before it becomes a crisis."

Most of the collection is not worth Universal's time and money to even consider releasing to the general public.

"90% of what we're taking in here is not commercially viable materials. That is to go through the tremendous effort and time to remaster these materials to sell to a very, very small market. I don't think the record companies are able to sustain that market because the profit margins aren't what they need to be. In prior times, the profit margins didn't need to be so high; they didn't need to sell so many records."

In fact, the Library did a study that revealed that only 14% of the music recorded between the advent of recorded sound in the 1890s and 1960 is commercially available to the general public today.

The Library got the masters for Bing Crosby's 1947 Decca (a label now part of Universal) recording of "White Christmas." It was the second time Crosby recorded the song, says Robert Bamberger, a retired policy analyst for the Library of Congress and the co-author of a study last year on the state of audio preservation in the United States.

"The reason why Bing had to re-record it in 1947 is that the song sold so well that Decca was no longer able to strike copies from the 1942 master."

It wore out. So, even under the care of a label that has a financial interest in a recording, preservation is an issue, says Bamberger. He thinks Universal made the right decision to donate its masters to the Library.

"The best interests of preserving recorded sound heritage is by relinquishing these master recordings and placing them where we can all exhale. Because we know that industry models come and go; corporations come and go. But we hope the Library of Congress will be forever."

For his part, the Library's DeAnna is most excited about what he *doesn't* know he's got.

"There's so much possibility here of discovery of recordings that really have just been off the sonic landscape of America for so long and important recordings, familiar sounds but long gone. It's just gonna be a treasure to mine for many years for the archive."

Universal retains the copyright to the recordings and, as is the case in most donations of this kind, will get digital copies of the Library's preservation work. The label's agreement with the Library of Congress allows for non-commercial streaming on the Library's website — a site the Library hopes to launch this spring. It's a collaboration with another major label — Sony-BMG — a project to be called the National Jukebox.

<http://www.variety.com/article/VR1118029941?refcatid=16>

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Posted: Mon., Jan. 10, 2011, 5:00am PT

UMG donates trove of recordings to Library of Congress

Universal masters include Bing Crosby, Louis Armstrong

By CHRISTOPHER MORRIS

In a musical donation without precedent, Universal Music Group has gifted the Library of Congress' Recorded Sound Section with a mother lode of 200,000 master recordings. The masters -- a trove of mono metal parts, lacquers and quarter-inch tape recorded by the Decca, Brunswick, Vocalion and Mercury labels between 1928 and 1948 -- represent the largest single contribution ever received by the library's audio-visual division and the first major collection obtained by the institution.

The UMG recordings -- comprising both previously released music and unreleased outtakes -- encompass material by Bing Crosby, Louis Armstrong, Billie Holiday, the Dorsey Brothers, the Andrews Sisters, Ella Fitzgerald, Dinah Washington, Jimmy Lunceford, Louis Jordan, Judy Garland and other crucial American artists.

Individual tracks in the collection include such seminal recordings as Crosby's bestselling 1947 version of "White Christmas," the Mills Brothers' "Paper Doll," Armstrong's "Ain't Misbehavin'" and Les Paul's "Guitar Boogie."

More than 5,000 linear feet of physical material -- about a mile, in terms of shelf space -- will be housed, catalogued and digitized at the library's Packard Campus for Audio Visual Conservation, established in Culpeper, Va., in May 2007.

UMG will retain the copyrights on the recordings and will be entitled to exploit the music commercially.

According to Eugene DeAnna, head of the recorded sound division at Packard, plans call for some of the out-of-print and rare material to be streamed on a website to be established by the library this spring.

Vinnie Freda, exec VP of digital logistics and business services at UMG's Universal Music Logistics division, said the idea for the donation arose after he surveyed the company's Iron Mountain vault facility in Boyers, Pa., five years ago. "I saw a bunch of material that had not been touched by human hands for decades," said Freda, who realized it would be cost-prohibitive for UMG to digitize the material. "Two years ago I visited with the library, and we found we had complementary goals here. Our goal was to get it preserved and perhaps have some of this (music) available commercially... Given the economics of the music business, it's hard for us to do this. This is a perfect situation for both of us." UMG's objectives are much in line with the library's: Last year, the latter issued a report excoriating the dire state of musical preservation in this country.

Librarian of Congress James Billington said in a statement, "A surprisingly high percentage of America's recording heritage since the early part of the 20th century has been lost due to neglect and deterioration. The donation of the UMG archive to the Library of Congress is a major gift to the nation that will help maintain the inter-generational connection that is essential to keeping alive, in our collective national memory, the music and sound recordings meaningful to past generations."

The first of some 20-25 semi-tractor trailers full of UMG's material have started to arrive at the Virginia site.

"There's a lot of inventory work to do," said DeAnna, who says that much of the information about the long-bunkered music had to be recovered from one of UMG's antique mainframe computers.

Eight engineers will be working on the project full-time at Packard. The lacquer masters – including some glass-based lacquers cut during World War II – will be the first to be worked on; the Library may have to manufacture special styli to track the early metal masters.

"It's going to be very interesting to see what's there," said DeAnna, who spoke excitedly about one find: an unreleased master that may be a hitherto unknown collaboration between Crosby and the early doo-wop group the Jesters.

DeAnna said, "I'm confident we can start getting some stuff out this year."

Freda said, "Some of (the music) -- even the Crosby and the Andrews Sisters -- is not exploitable," but he added, "We hope to find some hidden gems."

He continued, "Our hope is that this is the first phase of future donations."

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Library of Congress Gets a Mile of Music

By LARRY ROHTER

The Library of Congress has begun taking possession of a huge donation of recordings, some 200,000 metal, glass and lacquer master discs from the period 1926 to 1948 that have been languishing in the subterranean vaults of Universal Music Group, the largest music conglomerate in the United States.

The bequest, which is to be formally announced on Monday, contains music representing every major genre of American popular song of that era — jazz, blues, country and the smooth pop of the pre-rock-'n'-roll period — as well as some light classical and spoken-word selections. One historic highlight is the master recording of Bing Crosby's 1947 version of "White Christmas," which according to Guinness World Records is the best-selling single of all time.

"This is a treasure trove, a mile-plus of material on the shelves, much of it music that has been out of circulation for many years," said Gene DeAnna, head of the recorded sound section of the Motion Picture, Broadcasting and Recorded Sound Division of the Library of Congress. "You can't get any better copies than these, so this represents a major upgrade."

Under the agreement negotiated during discussions that began two years ago the Library of Congress has been granted ownership of the physical discs and plans to preserve and digitize them. But Universal, a subsidiary of the French media conglomerate Vivendi that was formerly known as the Music Corporation of America, or MCA, retains both the copyright to the music recorded on the discs and the right to commercialize that music after it has been digitized.

"The thinking behind this is that we have a very complementary relationship," said Vinnie Freda, executive vice president for digital logistics and business services at Universal Music Logistics. "I've been trying to figure out a way to economically preserve these masters in a digital format, and the library is interested in making historically important material available. So they will preserve the physical masters for us and make them available to academics and anyone who goes to the library, and Universal retains the right to commercially exploit the masters."

The agreement will also permit the Web site of the Library of Congress to stream some of the recordings for

listeners around the world once they are cataloged and digitized, a process that Mr. DeAnna said could take five years or more, depending on government appropriations. But both sides said it had not yet been determined which songs would be made available, a process that could be complicated by Universal's plans to sell some of the digitized material through iTunes.

Universal's bequest is the second time in recent months that a historic archive of popular music has been handed over to a nonprofit institution dedicated to preserving America's recorded musical heritage. Last spring the National Jazz Museum in Harlem acquired nearly 1,000 discs, transcribed from radio broadcasts in the late 1930s and early 1940s by the recording engineer William Savory, featuring some of the biggest names in jazz.

Michael Cuscuna, the jazz record producer and historian who runs Mosaic Records, a label specializing in jazz reissues, said of the Universal donation, "This is very crucial material for us, and we've been assured it will be an active archive that is not going to be tied up in bureaucracy, and that we and others will have access to it."

"Having lived in the vaults for many years," he added, he is aware that "there has been a lot of attrition" to the archives of major labels because of "stupid decisions, acts of nature, and material that has been lost, stolen, or never saved," so a transfer to the Library of Congress is theoretically welcome.

Much of the material has been stored at Iron Mountain, the former limestone mine near Boyers, Pa., that also holds numerous government and corporate records. Universal began delivering the material to a Library of Congress site in Culpeper, Va., just before Christmas, so it is still too early for archivists to know what historic recordings, rarities and curiosities may be lurking in the collection. But a quick look at the lacquer recordings, which are being examined first because they are the most vulnerable, has already given hints of the riches that might be there.

Many of the lacquer discs appear to be backup recordings of studio sessions, including the chatter of performers and producers between takes. "Certainly there are many, many takes, 8 to 10, of some songs," Mr. DeAnna said, "so that you can track the decisions made in the studio and get some sense of what they were deciding, the criteria they were using" to determine how a song should sound.

One such sequence of studio recordings has Bing Crosby instructing backing musicians and singers how he wants to shape a song. Other discs feature Crosby and the guitarist Les Paul. Mr. DeAnna said there was even one session, which would have to be from the 1950s, of Crosby's encounter with the New York City doo-wop group the Jesters.

The Universal Music Group, today the largest group of labels in the beleaguered recording industry, began its life in 1934 as Decca Records, the American affiliate of the British recording company of the same name. Over the years as it was melded first into MCA and then Universal, it acquired or established subsidiary labels like Brunswick, Coral, Vocalion and Mercury, whose recordings from the era of 78 r.p.m. discs are also part of the

archive.

The collection bequeathed to the Library of Congress does not, however, include recordings from the vaults of some of the important blues and soul labels that MCA acquired on its way to becoming the largest of the “big four” record companies. For example master recordings of both Chess Records (and its subsidiary Checker, Cadet and Aristocrat labels) and Motown Records (and its Tamla and Gordy subsidiaries) are excluded from the agreement, at least initially.

“We’re hoping this is a long-term relationship that could span decades,” Mr. Freda said. “If all goes well, our hope is to eventually deliver another tranche, maybe the 1950s and into the early 1960s, and cherry pick from that.”

The exact monetary value of the collection is not known, and a formal assessment has not yet been made. But in addition to the savings that will be gained from no longer having to store the discs, Universal could be in line for a substantial tax write-off as a result of the donation.

“That’s a complicated question for a lot of reasons,” Mr. Freda said. “It’s not a yes or no answer. Universal is a subsidiary of a much larger company, so it’s got a lot of complications. But I can absolutely tell you that without a doubt that was not a consideration of why we did this. To the extent that we get a tax benefit, that will only be an extra plus.”

Besides music by towering figures like Crosby, Louis Armstrong, Billie Holiday, Ella Fitzgerald and Judy Garland, the collection includes songs by stars like the Mills Brothers, Fred Waring, Guy Lombardo and the Andrews Sisters. For connoisseurs of American roots music, there is also country music from Ernest Tubb, bluegrass from Bill Monroe and a wide variety of guitar and piano blues, gospel and jug-band music.

“This is going to be the gift that keeps giving, that keeps our engineers and staff here busy for years,” Mr. DeAnna said. “Our challenge right now is to decide where to start, because the sheer numbers are just staggering.”

This article has been revised to reflect the following correction:

Correction: January 12, 2011

An article on Monday about a large donation of recordings from the Universal Music Group to the Library of Congress misspelled the name of the town in Virginia where the material is being delivered to a Library of Congress site. It is Culpeper, not Culpepper.