



April 12, 2011

David O. Carson, General Counsel
Office of the General Counsel
U.S. Copyright Office
LM-403, James Madison Building
101 Independence Avenue, SE
Washington, DC 20559

***Reply Comments in Response to Notice of Inquiry Concerning Federal
Copyright Protection of Sound Recordings Fixed Before February 15, 1972***

Dear Mr. Carson:

The Society of American Archivists (SAA) notes with pleasure that the comments responding to the Notice of Inquiry Concerning Federal Copyright Protection of Sound Recordings—comments from individuals and organizations that are actively involved in the preservation of sound recordings—echo the arguments made in our original findings: namely, that current copyright legislation impedes efforts to preserve the nation’s audio heritage.

As comments from the Association of Recorded Sound Collections, the Music Library Association, the Belfer Audio Laboratory and Archives at Syracuse University, the Library of Congress, the University of Utah, and Columbia University all note, the complexity of state laws relating to sound recordings, when combined with the absence of clear legal authority to preserve and make accessible such recordings (especially unpublished recordings), hampers the ability of archivists, curators, and librarians to protect the millions of published and unpublished sound recordings in the nation’s cultural repositories.

The comments also provide concrete examples of how making all sound recordings subject to federal law would aid their preservation without harming the interests of copyright owners. Older sound recordings that no longer are commercially available would enter the public domain, increasing the likelihood that they will be preserved. Newer sound recordings would be subject to Section 108 of the Copyright Act. None of the comments received in response to the Notice of Inquiry provides any evidence that subjecting sound

recordings to the exemptions found in Section 108 would in any way harm the interests of copyright owners.

The Notice of Inquiry procedure, therefore, has established clearly what the Copyright Office suspected: that the lack of federal protection for pre-1972 sound recordings is hampering the preservation efforts of the nation's archives and libraries and that providing federal protection to these recordings in order to promote preservation would not hurt the interests of copyright owners.

There is, however, one significant outlier in the comments received by the Copyright Office—the comments submitted by the Recording Industry of America (RIAA) and American Association of Independent Music (A2IM) (henceforth referred to as “RIAA”). The RIAA has failed to address the questions posed by the Copyright Office or to provide any serious information to counter the argument that changes in the law are needed to foster the preservation of recorded sound.

The RIAA's recognition that archives and libraries have played and will continue to play an important, if not premier, role in the preservation of recorded sound is gratifying. RIAA pledges continued support for “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.” This statement makes RIAA's stated opposition to change in federal law all the more surprising.

RIAA's opposition to the preemption of state protection by federal copyright law appears to be based in several misunderstandings. SAA hopes that by reading the comments of individuals and organizations that actively undertake the preservation of sound recordings, often with uncertainty about whether their actions are legal, the RIAA will better understand the errors in its submission. Nevertheless, we feel compelled here to highlight five areas in which we believe the RIAA is badly mistaken.

First, the RIAA, while noting that the preservation of sound recordings is “a worthy goal,” argues that “the means by which this goal is achieved should be left to the marketplace.” There is no marketplace in which the preservation of sound recordings is the primary goal. Preservation is of only secondary interest to recording companies, and is conducted only when there is an economic argument in its favor. That there is no primary “marketplace” for preservation is evidenced in the past by wholesale bulldozing of master recordings, the recycling of other copies in order to capture their silver content, and the reuse of magnetic recordings in order to avoid having to purchase new tapes. Preservation as we understand it is intended to preserve the original recordings in a way that documents the context of their creation; the so-called “preservation” efforts of the sound recording companies highlighted by RIAA are intended only to ensure that assets can be exploited in the future.

This is not to denigrate the efforts of the sound recording companies. We hope that recording companies will expand their efforts to safeguard those assets that still have commercial value so that the preservation activities of archives and libraries can be directed to unpublished or abandoned recordings. For archives and certain other cultural institutions, preservation and access is a primary mission.

Second, the RIAA offers as a model the new cooperative agreements between some RIAA members and the Library of Congress to preserve and make available some of their older sound recordings. They indicate that “RIAA and A2IM and their members are willing to work with libraries, archives, and bona fide collectors... 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.”

The collaborative agreements that some RIAA members have struck with the Library of Congress are admirable, but they cannot take the place of legislation. The RIAA and its members cannot develop consensual agreements for materials to which they have no rights. The idea that RIAA and A2IM can negotiate on behalf of *all* “culturally and historically significant materials” is presumptuous. For example, the RIAA either denies that oral histories (whether conducted by families or archives) are culturally and historically significant materials or misunderstands the meaning of one or all of three terms (“culturally,” “historically,” “significant”). Moreover, for such agreements to be possible, RIAA members must first understand the significance of material in their possession and conclude that working with a cultural institution will not significantly diminish corporate profitability.

SAA is perhaps most puzzled by the third problematic issue in RIAA’s comments, namely the organization’s insistence that “any ‘federalization’ [of sound recording copyrights] ... 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.” We simply don’t understand how unifying what is now a multiplicity of state statutes can create chaos. Federal preemption of state copyrights has the potential to *simplify* vast swaths of current sound recording law that even the RIAA admits constitutes a complex system.

The fourth point raised by the RIAA with which we take issue is the assertion that changes to the law are not needed in order to foster preservation by archivists. RIAA’s comment notes the finding of the National Recording Preservation Study that “were [current] copyright law followed to the letter, little audio preservation would be undertaken.” The RIAA does not challenge this assessment of the current state of the law, but instead argues that no qualified public or private institution has been sued—and suggests that none will be sued by the RIAA—for undertaking a preservation activity. In short, the organization suggests that archives and libraries should continue to engage in technical violations of the law because, at this time, RIAA is not interested in bringing legal action against them.

Once again, RIAA cannot speak for all owners of sound recording copyrights, and so repositories would still face the threat of suit from non-RIAA members. Moreover, the RIAA has been known to change its position on issues, such as the presumed legality of ripping personally owned CDs to mp3 format. There is no assurance that in the future the organization will not change its collective mind about preservation activities. But most of all, it is impossible to have a copyright law that people respect if the contours of that law are subject to the whims of small interest groups. If, as the RIAA suggests, no reputable archives should be threatened for undertaking preservation activity, then the law should be changed to make such threats impossible.

Our fifth and final objection to the RIAA's comments comes in response to the argument advanced in footnote 27 that there are considerations other than copyright that archives face when determining whether to preserve and make accessible unpublished recordings, including ethical concerns and rights of privacy, that would not be solved by federal preemption of state copyright laws. Federal preemption is certainly not a magic wand that would solve all archival problems, but it would simplify one of the major issues that archivists face. If archivists can get certainty in one area, it would increase the likelihood that we would be willing to tackle the other messy issues that at times are associated with our collections.

We will not speak to the legal issues that RIAA raises in opposition to a change in the law, except to repeat our assertion from our initial comments: The harm associated with adding recordings to the public domain that already have been commercialized and that have been abandoned in the marketplace seems small.

Our goal in providing these comments is to speak to the wisdom of normalizing the copyright status of all sound recordings and to stress the benefits to preservation and access that such an action would bring. We are confident that the Copyright Office will be able to develop mechanisms to bring U.S. sound recordings under federal protection that are fair to state copyright owners while at the same time benefitting society as a whole.

Sincerely,

A handwritten signature in cursive script that reads "Helen R. Tibbo".

Helen R. Tibbo
President, 2010 – 2011