

May 15, 2014

## Comments of the Music Library Association

The Music Library Association (MLA) respectfully submits the following comments in response to the notice of inquiry, "Music Licensing Study" (78 FR 14739, Doc. 2014-03). The MLA is the professional association for music libraries and librarianship in the United States. Founded in 1931, it has an international membership of over 800 librarians, musicians, scholars, educators, and members of the book and music trades. Complementing the Association's national and international activities are eleven regional chapters that carry out its programs on the local level. The Music Library Association provides a professional forum for librarians, archivists, and others who support and preserve the world's musical heritage.

Our comments address question No. 24 of the Notice of Inquiry: "Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study."

### **I. Introduction**

The music industry increasingly favors online-only, direct-to-consumer music distribution. Music distribution services such as Apple's iTunes, Amazon's MP3 store, Google Play, Spotify, and Pandora have come to dominate the industry. Most of the music purchased in the U.S. is made available by either a stream or a download, rather than by sale of a physical copy.

As a result of this escalating trend, a growing number of music recordings are offered *only* in online formats. While convenient for the consumer, the nature of this digital music distribution model poses a challenge to libraries, whose mission is to collect, preserve, and provide access to these recordings for generations to come. When music is distributed in physical formats (such as compact discs, cassette tapes, etc.), music libraries are able to meet their objective under the current law, thanks to their ability to legally purchase the works, and to their right to distribute them under first sale doctrine. Together with the fair use doctrine and the library exceptions in Section 108, the first sale doctrine has ensured that music libraries can acquire, lend, and preserve copyrighted works without fear of legal sanctions. However, where music is only available subject to contractual limitations that exclude library functions, as is frequently the case in these digital-only distributions, the applicability of those bedrock legal protections is thrown into doubt. The shift to digital distribution of music, whether by download or by streaming, poses a grave threat to music libraries' ability to continue to carry out their important mission.

The public relies on music libraries to collect and preserve culturally significant works, and to make those works available to support teaching, learning, and intellectual exploration. Most importantly, music libraries are custodians of culturally significant music, ensuring that our shared musical heritage is available to the public long after it has ceased to be commercially valuable. Distributing works under terms that bar acquisition and use by libraries hurts the public. If the law prevents libraries from collecting, preserving, and making available these

recordings, the works may be invisible to scholars, out of reach for patrons, or lost to future generations.

## **II. A growing number of culturally significant recordings is distributed only by licensed stream or download.**

Many critically acclaimed and award-winning albums are available only through digital delivery or streaming services. For example, the influential online music magazine *Pitchfork's* 2012 Top 50 list includes four albums that are online-only releases.<sup>1</sup> Many significant artists have utilized online-only release strategies for mix tapes, singles, and live performances, including Grammy-winning R&B singer Frank Ocean, 1980's pop megastars Duran Duran, punk legends Fugazi, and the experimental hip-hop group, Death Grips, which won SPIN Magazine's Artist of the year for 2012.<sup>2</sup> The Los Angeles Philharmonic's Grammy award-winning performance of Johannes Brahms' Symphony No. 4, conducted by Gustavo Dudamel, is available only via digital download on German record label Deutsche Grammophon's website.<sup>3</sup>

The streaming music service Spotify has many albums which contain artist commentary that is available nowhere else. Some recent examples include *Days are Gone* by HAIM (which debuted at No. 1 on the UK's Billboard album chart in 2013) and *Cole World* by J-Cole (debuted at No. 1 on the Billboard 200 (which tracks album sales across all genres) in 2013). Spotify also has exclusive live albums by artists such as multiple Billboard music award-winning band The Fray, and exclusive singles by significant artists such as multiple Grammy nominee, and BET award-winning rapper M.I.A.

The use of online-only releases, and the move to digital-only distribution generally, will only increase over time. Digital music sales overtook CD sales for the first time in 2012, accounting for 55.9 % of total sales.<sup>4</sup> In 2013, streaming services cut into the digital sale market with companies like Spotify and Pandora receiving a 32% increase in usage.<sup>5</sup> This marked increase in digital downloads and streaming means that in the years to come, music libraries will face more and more challenges in their efforts to collect new and important music releases.

## **III. Access to download- or streaming-only releases often requires agreeing to contracts that do not grant users ownership of the digital copies they purchase, and that strictly limit permissible uses.**

Sound recordings purchased from a digital retailer such as Apple's iTunes Store or Google Play are typically subject to an End User License Agreement, or EULA, which spells out

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<sup>1</sup> *Sound Recording Collecting in Crisis*, UNIVERSITY OF WASHINGTON LIBRARY, (Mar 19, 2014 ), available at <http://guides.lib.washington.edu/content.php?pid=558646&sid=4718312>

<sup>2</sup> *Sound Recording Collecting in Crisis*, *supra* note 1.

<sup>3</sup> Gustavo Dudamel, *Symphony No. 4*, DEUTSCHE GRAMMOPHON, (June 21, 2011), available at <http://www.deutschegrammophon.com/us/cat/4779459>.

<sup>4</sup> *The Nielsen Company & Billboard's 2012 Music Industry Report: Music Purchases at All-Time High*, BUSINESS WIRE, (January 4, 2013), available at <http://www.businesswire.com/news/home/20130104005149/en/Nielsen-Company-Billboard's-2012-Music-Industry-Report#.U1qe-vk7uM4>

<sup>5</sup> *U.S. Music Industry End of Year Review: 2013*, NIELSEN, (January 22, 2014), available at <http://www.nielsen.com/us/en/reports/2014/u-s-music-industry-year-end-review-2013.html>.

exactly how the files can be used. Access to streaming media services like Spotify and Pandora is also subject to contracts, called Terms of Service (TOS) or Terms of Use (TOU), which purport to limit permissible uses. These agreements appear to be binding contracts, and their terms are troubling for libraries.

Most licenses accompanying downloaded or streamed music prohibit lending or otherwise providing public access to the recording, effectively foreclosing any use by a library. For example, Apple iTunes' EULA states that the user agrees "not to modify, rent, lease, loan, sell, distribute, or create derivative works based on the Services, in any manner."<sup>6</sup> Amazon's EULA prohibits such uses by stating, "Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights...."<sup>7</sup> Streaming services such as Spotify prohibit users from, "copying, reproducing, 'ripping', recording or making available to the public any part of the Spotify Services or content delivered."<sup>8</sup> Furthermore, Spotify prohibits its users from, "renting or leasing of any part of the Services."<sup>9</sup> In addition to preventing provision of any kind of access, many EULAs specify that only end users—not intermediaries such as libraries—may even enter into the agreements in the first place.

EULAs and TOS can be especially threatening to libraries because they raise the specter of copyright infringement and the attendant penalties.<sup>10</sup> Unlike ordinary contracts or licenses, when EULA terms attached to copyrighted works are not followed, the licensee not only breaches the contractual agreement, but she may also be infringing copyright,<sup>11</sup> even though her uses would be permissible under the law in a comparable circumstance involving physical media that had been purchased. Unlike ordinary contractual breach, copyright infringement can trigger statutory damages of up to \$150,000 per work infringed.<sup>12</sup>

So far, courts appear to be taking EULAs that accompany purchases of digital goods seriously, treating the transaction as a license rather than a sale. For example, in *F.B.T. Productions, LLC v. Aftermath Records*, the Ninth Circuit held that permanent downloads from Internet third party distributors constituted a licensing of copyrights rather than a sale.<sup>13</sup> The Ninth Circuit concluded that users do not own permanent downloads subject to EULAs with sufficiently robust terms.<sup>14</sup> Similarly, in *Vernor v. AutoDesk* the court found that software sold subject to a EULA is licensed, not purchased, and cannot be re-sold in violation of the EULA. Being a licensee rather than an owner is an important distinction because many defenses to copyright infringement are "unavailable to those who are only licensed to use their copies of

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<sup>6</sup> *Licensed Application End User License Agreement*, Apple Inc. (Apr. 25, 2014), available at <https://www.apple.com/legal/internet-services/itunes/appstore/dev/stdeula/>.

<sup>7</sup> *Amazon Kindle Terms of Use*, Amazon.com Inc. (Apr. 25, 2014), available at [http://www.amazon.com/gp/help/customer/display.html/ref=hp\\_left\\_v4\\_sib?ie=UTF8&nodeId=201014950](http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201014950).

<sup>8</sup> *Spotify Terms and Conditions of Use*, Spotify (Apr. 25, 2014), available at <https://www.spotify.com/us/legal/end-user-agreement/#s5>.

<sup>9</sup> *Id.*

<sup>10</sup> *MDY Indus., LLC v. Blizzard Ent. Inc.*, 2008 WL 2757357, at \*5,6 (D. Ariz. 2008).

<sup>11</sup> *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) ("A licensee infringes the owner's copyright if its use exceeds the scope of its license").

<sup>12</sup> 17 U.S.C. § 504(c); *Frank Music Corp. v. MGM, Inc.*, 772 F.2d 505, 512 n. 5 (9th Cir. 1985).

<sup>13</sup> *F.B.T. Prod., LLC v. Aftermath Records*, 621 F.3d. 958, 965 (9th Cir. 2010).

<sup>14</sup> *Id.*

copyrighted works.”<sup>15</sup> In particular, the First Sale Doctrine does not apply to licensees, but only to owners of lawfully made copies.<sup>16</sup>

EULAs and other licensing agreements replace the public law of copyright with the private law of contracts. By using license agreements rather than sales, music distributors such as Apple, Google, and Spotify, together with their partners in the recording industry, circumvent the first sale doctrine and other protections for the public, undermining the function of libraries in the process.<sup>17</sup> The result is a one-sided parallel copyright regime, which upsets the delicate balance between the needs of copyright holders and those of the public. Licenses written by rightsholders and imposed unilaterally on the public inevitably leave intact all protections for rightsholders while nullifying the rights that copyright law reserves to the public.

Congress has the power to correct this problem by preempting contractual obligations that contravene federal policy. In fact, many federal laws expressly preempt contract terms.<sup>18</sup> For example, Section 203 of the Copyright Act grants authors a statutory right to terminate an exclusive transfer or license of copyright after thirty-five years.<sup>19</sup> It is therefore well within Congressional power to grant a similar exception to address the problem faced by libraries. An exception that immunizes libraries from liability when pursuing their normal collection-building and lending activities with streamed or downloaded works would safeguard the important role of libraries without causing unreasonable harm to rightsholders’ commercial interests.

Though the problem of EULA-bound materials is becoming acute for sound recordings, it represents a serious threat to all libraries in the coming years. If, as we expect, digital formats continue to gain in popularity, the EULAs that frequently accompany these releases could, in time, jeopardize the substantial public benefit that libraries provide to the public and to society at large. Libraries will be gravely harmed if they cannot acquire the current, relevant works their patrons require. If libraries cannot acquire these works, there is a very real risk that they will not be preserved for future generations. Huge swaths of our shared cultural heritage have already been lost forever due to poor stewardship by private owners.<sup>20</sup> It is vital that they be permitted to collect and preserve our musical history as it is written, before it is too late.

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<sup>15</sup> *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010).

<sup>16</sup> See 17 U.S.C. § 109(d) (stating the First Sale defense is only available when, “authorized by the copyright owner” or when a user acquires “possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.”); *Vernor*, 621 F.3d at 1107.

<sup>17</sup> Eric Harbeson, *Born Digital: Works here today, maybe gone tomorrow*, DISTRICT DISPATCH (Jan. 18, 2014), <http://www.districtdispatch.org/2014/01/born-digital-works-today-maybe-gone-tomorrow/>.

<sup>18</sup> Jonathan Band and Deborah Goldman, *Restrictions on the Waiver of Rights*, Association of Research Libraries (2013), <http://www.arl.org/focus-areas/copyright-ip/fair-use/2871-restrictions-on-the-waiver-of-rights#.U3Ud6fldW4k>.

<sup>19</sup> 17 U.S.C. § 203.

<sup>20</sup> *Film Preservation 1993: A Study of the Current State of American Film Preservation. Report of the Librarian of Congress* (Washington, DC: National Film Preservation Board of the Library of Congress, 1993), available at <http://www.loc.gov/film/study.html> (“Current efforts of preservationists begin from the recognition that a great percentage of American film has already been irretrievably lost-- intentionally thrown away or allowed to deteriorate.”).

#### **IV. Conclusion**

Music libraries play an important role in preserving and providing access to culturally significant musical and music-related works. License agreements that limit their ability to collect these works endanger the services that music libraries provide. As the Copyright Office examines the functioning of the current music licensing market, it should recommend a way to preserve the copyright balance and maintain libraries' ability to continue to serve the public's interest.

Respectfully submitted,

Legislation Committee of the Music Library Association

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