

**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

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

Pursuant to the Notice of Inquiry (“Notice”) that the United States Copyright Office (“Office”) published in the Federal Register on November 3, 2010, the Recording Industry of America (“RIAA”), the American Association of Independent Music (“A2IM”), and their member companies submit the following reply comments addressing initial comments pertaining to “the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction.” *See* 75 Fed. Reg. 67777 (Nov. 3, 2010).

The RIAA, A2IM, and their member companies focus on two points in this brief response to some of the initial comments submitted by others:

First, and foremost, RIAA and A2IM continue to recommend that the focus of the study should be on the impact that bringing pre-February 15, 1972 (hereafter “pre-1972”) sound recordings under U.S. Copyright Law (that is, “federalization”) in whole or in part would have – as a practical matter – on the preservation of and access to these recordings.

As the RIAA, A2IM, and their member companies detailed in their initial filing, the best way to achieve the goal of improving preservation of and access to older (especially, commercial) sound recordings – which is the subject and purpose of the Copyright Office study – is through cooperation and private agreements between rightsholders, archives, educational institutions and the like. None of the other commenters noted that two major labels – Sony Music and Universal Music Group – have reached private agreements (separately negotiated and executed within the past two years) 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 for free. For out-of-print commercial recordings, more of these types of agreements, not legal changes, will best further the preservation of and access to older materials.

There were fifty-nine comments received by the Copyright Office in connection with this Notice. Many of the commenters advocated for federalization of pre-1972 sound recordings

claiming, in a conclusory fashion, that legal changes will serve as a significant catalyst to improve preservation of and access to commercial and non-commercial materials.¹ The RIAA and A2IM share the goals of the other commenters, namely, to improve the preservation of and access to all older sound recordings. The RIAA and A2IM simply disagree with the other commenters that legal change will further this goal and believe, to the contrary, that federalization – in whole or in part – will divert attention and resources from more effective means to improve preservation and access, while also creating undue burdens on rightsholders.

For example, many of the other commenters suggested, in general terms, that federalization will “preserve” and make more recordings “available.”² However, they did not specifically address how any such federalization will actually improve preservation. For commercial and non-commercial recordings, preservation can only be furthered by financial resources and better cooperation between rightsholders and archival institutions, rather than legal reforms. Most of the commenters acknowledged, directly or indirectly, that there is “no data that would suggest that archives differentiate between pre-1972 and post-1972 recordings for preservation purposes” (though they “may so differentiate for access purposes”).³ Nor did the commenters pinpoint how federalization will actually improve access for commercial or non-commercial recordings, since that involves resources as well as legal certainty; federalization will do nothing to improve resources or cooperation and will likely result in greater legal uncertainties and costly disputes.

Some of those seeking federalization took the opportunity in their comments to cherry-pick provisions of federal copyright law that they “like” and thus want applied to pre-1972 sound recordings, while ignoring the provisions they do not like and do not wish to apply, without tying these provisions directly to improving preservation or access. In some cases, the commenters simply used the filing to take aim at revisions to federal copyright law that they would like to see implemented with respect to all works (not even the subject matter of the study) and all recordings – whether pre- or post-1972. For example, some of the commenters chose to address in their comments the perceived shortcomings of: (a) fair use;⁴ (b) statutory damages;⁵ (c)

¹ See, e.g., Comment 55, Electronic Frontier Foundation, Federal Copyright Protection for Pre-1972 Sound Recordings NOI, at 1 (Jan. 31, 2011) [hereinafter “EFF Comment”] (concluding – without explaining how – federalization of pre-1972 sound recordings would serve the goal of encouraging the creation of new works and the preservation of those works). It is worth noting that many of the initial comments were received from users of or attorneys for illegal music services (Grooveshark and Limewire) of pre- and post-1972 recordings. These comments deserve scant attention as they neither address the legal issues or complexities of federalization or, for that matter, the rule of law, nor do they address actual preservation and access issues and the relevant realities and hardships that rightsholders and archives face.

² See, e.g., Comment 40, Society of American Archivists, Federal Copyright Protection for Pre-1972 Sound Recordings NOI, at 2 (Jan. 31, 2011) [hereinafter “SAA Comment”] (explaining that federalization will provide “some improvement” for access and “might encourage” preservation efforts if tied to improved access).

³ *Id.*

⁴ Comment 43, Association of Recorded Sound Collections, Federal Copyright Protection for Pre-1972 Sound Recordings NOI, at 2 (Jan. 28, 2011) [hereinafter “ARSC Comment”] (arguing that fair use standards are unclear but that federalization would provide post-1923 sound recordings with “much needed clarity”).

⁵ EFF Comment, *supra* note 1 (arguing against the application of statutory damages).

technological protection measures;⁶ (d) copyright duration;⁷ and (e) third party liability⁸ – without addressing how any revisions to existing law would significantly and practically improve preservation of and access to older commercial or non-commercial recordings (likely, because no such evidence exists).

Additionally, some of the advocates for federalization suggested making all pre-1923 recordings public domain (ignoring or minimizing constitutional issues, as well as the fact that this date is an artifice, based on formalities irrelevant to 1920s recordings).⁹ At least one comment refers to the notion that “the rights to the large majority of pre-1923 recordings are held by one corporation” in describing the restrictions on public access that result.¹⁰ Missing from the comments is any reference to the confidential 2009 Sony Music Agreement with the Library of Congress, which is detailed in RIAA and A2IM’s initial comment. Pursuant to that Agreement, all of Sony Music’s pre-1925 recordings – spanning the entire acoustic recording era (roughly from 1900-1925) – will be made available to the public via a new website created by the Library of Congress, known as the “National Jukebox.” The website 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. Thus, federalization is not needed to preserve and provide access to these pre-1923 commercial out-of-print recordings as suggested by other commenters. It is these types of agreements that provide a simple and quick means of providing access to older commercial out-of-print sound recordings.

Second, many commenters argued that bringing pre-1972 sound recordings under federal law would result in greater certainty because the sound recordings would be treated under a unified system. In their view, this would improve access (but not preservation) or at least the ability of archives and educational institutions to provide such access.¹¹ However, sweeping pre-

⁶ Comment 45, Music Library Association, Federal Copyright Protection for Pre-1972 Sound Recordings NOI (Jan. 31, 2011) [hereinafter MLA Comment] (recommending “amending 17 U.S.C. 1201(1) and (2) to provide for a defense by employees or agents of nonprofit educational institutions, libraries, or archives acting within the scope of their employment for the purposes of circumventing technological protections on materials subject to §108(h) as amended”).

⁷ SAA Comment, at 8 (recommending a 50-year term of copyright, or alternatively a maximum 95-year copyright term from the time of creation, while making all pre-1923 materials public domain).

⁸ See EFF Comment, *supra* note 1, at 13-16.

⁹ See, e.g., ARSC Comment, *supra* note 4, at 2. (“Such a change would definitely make accessible pre-1923 recordings and others that would presumably enter the public domain.”); Comment 40, Society of American Archivists, Federal Copyright Protection for Pre-1972 Sound Recordings NOI, at 4 (Jan. 19, 2011) (arguing that federalization would “immediately inject into the public domain a substantial number of sound recordings,” but also recognizing that pre-1923 recordings “constitute only a small percentage” of SAA-member’s holdings).

¹⁰ See ARSC Comment, *supra* note 4, at 10.

¹¹ See *id.* at 5 (“Bringing pre-1972 sound recordings under federal jurisdiction would foreclose any controversy over [the exceptions and limitations to copyright owners’ exclusive rights.]”); Comment 50, Library of Congress, Federal (continued)

1972 sound recordings under federal copyright law would subject these recordings to an array of complex legal and business issues, including copyright and contract questions relating to initial and subsequent ownership, exclusive rights, termination, duration, compliance with formalities, and effective remedies, as well as potential constitutional questions (all described in the RIAA and A2IM's initial joint comments). Those comments supporting federalization simply conflate a "unified federal system" with a simplified system. In so doing, they sweep aside all of the complex contractual, copyright, and constitutional issues and the myriad hurdles that would have to be overcome over long periods of time and at great expense to rightsholders. Although state laws may treat and protect pre-1972 sound recordings differently, there exists over a hundred years of jurisprudence clarifying rights and obligations, and contractual agreements have been drafted and interpreted in accordance with and based on these state and common law protections. The disruption in (or huge costs in determining) chain of title, the uncertainties of protection, rights, ownership and the like, will chill the dissemination of material, not enhance it. This will push the goals of preservation and access further down the road, while resolution of these myriad issues are litigated and sorted out.

CONCLUSION

In conclusion, changing the law will not overcome existing or future legal hurdles, nor will it make up for a lack of resources, or better cooperation, all of which can actually and significantly improve preservation and access. It will, however, result in many hardships and costs to rightsholders. This is why the RIAA, A2IM, and their member companies recommend a better course of action: for out-of-print commercial and non-commercial works, to encourage more donations of original master materials to archives and a better coordinated national preservation plan (under the auspices of the National Recording Preservation Board of the Library of Congress), and, in the case of out-of-print commercial materials, to seek and encourage more partnerships between rightsholders and public ("Section 108") libraries and archives to better preserve and make available their materials.

(continued)

Copyright Protection for Pre-1972 Sound Recordings NOI (Jan. 31, 2011) (arguing that the difficulty in determining ownership status under state and common law inhibits the ability for institutions to fund preservation activities).