Before the
U.S. 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**

NATIONAL ASSOCIATION OF BROADCASTERS' REPLY COMMENTS

The National Association of Broadcasters ("NAB") hereby submits its reply comments in the above-referenced proceeding. NAB appreciates the opportunity to respond to the Copyright Office's Notice of Inquiry ("NOI") on the legal and policy issues regarding the desirability of bringing sound recordings fixed before February 15, 1972 under federal jurisdiction. As set forth below, NAB does not believe that adopting retroactive federal copyright protection for these recordings is appropriate or desirable. Further, to the extent that this proceeding may determine that inconsistent state laws have actually impeded preservation and access to pre-1972 sound recordings, NAB suggests that such problems might be best remedied by more limited actions by Congress.

NAB is a trade association that advocates for free, local radio and television stations and broadcast networks before Congress, federal agencies, other government entities, and the courts. NAB members are both owners and users of copyrighted works and, as such, recognize the important need to balance the rights of copyright owners against those of copyright users. Accordingly, NAB has a strong interest in the amendment and administration of copyright laws and regulations and their effect not only on broadcasters but also on the listening and viewing public.

I. Creating Retroactive Federal Copyright Protection for Pre-1972 Sound Recordings Will Not Address the Stated Goals of the NOI or Remedy the Concerns Raised by Commenting Parties

Congress directed the Copyright Office to study the effect of federal copyright protection on pre-1972 sound recordings with regard to three main issues: (1) preservation of such sound recordings, (2) public access to such sound recordings, and (3) the economic impact of federal coverage on rights holders.[1]

The vast majority of the comments submitted focus on the concerns of archives, libraries, and educational institutions. While the commenting parties provide extensive (and sometimes fascinating) detail about their real world interaction with pre-1972 sound recordings, none of the comments identify a situation where a copyright owner has actually prevented or threatened to prevent such archival or academic uses.[2]

The most that the comments demonstrate is that certain archives, libraries, and educational institutions feel inhibited in their ability to preserve and provide access to pre-1972 sound recordings. While any resulting self-censorship of preservation behavior by these organizations may be undesirable, there is no evidence that retroactive federal copyright protection, as contemplated in the NOI, would do anything to remedy purported harm that might be caused by those perceptions or to alter the perceptions themselves. Moreover, there are several reasons to believe that such protection could actually increase self-censorship by users of pre-1972 sound recordings.

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[1] H.R. 1105, Public Law 111-8 [Legislative Text and Explanatory Statement] 1769.

[2] RIAA and A2IM's Comments tend to confirm this observation: "…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." RIAA/A2IM Comments at 19.

First, retroactive federal copyright protection would likely include a digital performance right, which would add another layer of complexity and concern regarding the use of pre-1972 sound recordings. Similarly, federal protection would not necessarily have a beneficial impact on pre-1972 sound recordings. For example, the Library of Congress suggests that foreign works currently protected due to federal restoration under Section 104(A) are not more widely used, nor easier to access. In fact, the creation of new rights seemed to inhibit access. Public researchers, required to provide written evidence of permission from the rights holders to a particular recording before a research copy can be made, find themselves unable to comply with such a requirement.[3]

Second, the commenting parties themselves acknowledge that the current federal exemptions that they seek are not sufficient for their desired preservation and access activities. For example, the comments suggest that the federal exemptions under Section 108(b) and (c), as currently written, are insufficient for preservation and access purposes.[4] In addition, the

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[3] "According to the current head of the Recorded Sound Reference Center, no single instance has occurred in the past 12 years in which a researcher has succeeded in gaining written permission to obtain a copy of a foreign recording from the Library's collection. Even when the contact information for rights holders is provided by the Library staff, public researchers encounter such a fog of confusion, denial and misinformation that they either give up or are forced to seek copies available from illegal or unauthorized sources." Library of Congress Comments at 6-7. "If anything, the added complexity of having another category of legal guidelines, e.g., 'neighboring rights' and the difficulty of determining the public domain status of a work in a foreign country, simply add to the challenges faced by the staffs in libraries, archives, etc. who field public requests." *Id.* at 6.

[4] "[I]t must be noted that the current exceptions for making copies allowed under Sections 108 (b) and (c) are of little real benefit to libraries, archives and other institutions that preserve and provide public access to sound recordings. The present limitation of Section 108 (b) to making '…three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation', and Section 108 (c) '…three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen…' are of little practical benefit to archival recorded sound institutions.

* * * * "[I]t is against the 'best practice' standards of professional sound recording preservation to delay preserving a sound recording until it is damaged or deteriorated. Deteriorated or damaged sound recordings are much more costly to preserve or restore than those in good condition. To deliberately delay preserving a culturally, historically or aesthetically important sound recording until it is in a

comments suggest that works for which ownership interests cannot be determined, so-called orphan works, are a significant impediment to library and archival activities.[5] The issue of orphan works has long been a concern of the Copyright Office and of many others in the copyright community. The Copyright Office and Congress have been exploring remedies to the problems concerning orphan works, and the resolution of these issues are best addressed in the context of proceedings dealing specifically with that issue and not in the proceeding at hand.

Third, retroactive federal copyright protection for pre-1972 sound recordings could actually hinder preservation and access activities, as federalization would increase remedies and could increase potential liabilities for infringement, thereby increasing the risk involved in judging the legality of any particular use. Users would be subject to federal statutory damages of up to $150,000 per work for willful infringement[6] rather than the lesser state remedies generally available.

Given that the comments provide no evidence of actual restraint of use of pre-1972 sound recordings, there is no demonstrated, significant actual harm for the proposed federalization to remedy. In fact, in light of the reasons listed above, retroactive federal copyright protection of pre-1972 sound recordings could actually impede the preservation of and access to such works,

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deteriorated condition is a foolhardy practice that could constitute malfeasance on the part of a professional librarian or archivist." Library of Congress Comments at 5. "[C]urrent law states that libraries may only make preservation copies of carriers that have already begun to deteriorate…. Some forms of deterioration are also self-catalytic and cannot be reversed or even paused once they have begun." Comments of Abigail O. Garnett, Palmer School of Library and Information Science.

[5] "The inability to cut through this Gordian Knot of 'orphan' recordings, as they are termed by librarians and archivists, is a major barrier to public access and the institutions that collect and preserve sound recordings." Library of Congress Comments at 7.

[6] 17 U.S.C. 504(c)(2).

in direct opposition to the goals of both the NOI and a significant number of the commenting parties.

II. Retroactive Federal Copyright Protection for Pre-1972 Sound Recordings Would Raise Significant Legal Questions and Complications

In their comments, RIAA and A2IM raise numerous legal concerns about copyright, contract, and, potentially, constitutional issues. They perceive that "federalization" of pre-1972 sound recordings 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." [7]

NAB will not repeat those extensive comments concerning legal, business, and related policy issues. It is sufficient to note that the RIAA/A2IM comments demonstrate that retroactive federal copyright protection for pre-1972 sound recordings would result in, at worst, significant confusion of applicable law and, at best, an enormous amount of legal complexities and controversies.

Moreover, it is not entirely clear whether Congress has the authority to bring works previously not covered by federal copyright under federal protection – an issue that is currently headed for a Supreme Court review.[8] At a minimum, no action would be appropriate before the Supreme Court acts.

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[7] RIAA/A2IM Comments at 5. Although the RIAA/A2IM Comments express concern that current "rightsholders" would bear the entirety of the economic costs associated with sorting out these many issues, it is easy to imagine other parties – such as users of pre-1972 sound recordings or the performing artists featured on such works – bearing extensive costs concerning legal review, litigation, etc.

[8] *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), *cert. granted*, --- S.Ct. ----, 2011 WL 767562 (Mar. 7, 2011) (granting summary judgment for government in challenge to constitutionality of Uruguay Round Agreements Act (URAA) provision restoring copyright protection to foreign works that had fallen into the public domain).

In addition, retroactive protection is outside the constitutional purpose of the Copyright Act. There is no claim, nor can there be, that the imposition of such a royalty would cause the creation of more artistic works, or that it would upset the expectations of copyright holders. Copyright law aims to "promote the Progress of Science and useful Arts," by inducing authors to create works.[9] The reward to an author for his or her work is a merely a "secondary consideration," with the "primary object" being the "release to the public of [the author's] creative genius."[10] The scope of this proceeding is limited to sound recordings first fixed prior to 1972. As such, the universe of subject recordings has long ago been established. These sound recordings were made by rights holders with no expectation of a federal copyright, and retroactive federalization cannot result in more pre-1972 sound recordings. The expectations of the performers and rights holders were settled long ago, as were those of the services using such recordings, and a new right or royalty does nothing to foster the creation of new works or the dissemination of those works to the public. Any such grant of new rights would just be a means of transferring wealth from one party to another without a public interest justification.

III. Any Actual Problems That Are Proven To Be under the Scope of the NOI's Stated Goals Are Best Addressed Narrowly

To the extent that this rulemaking determines that a compelling showing has been made that there are valid and existing problems regarding the negative effect of inconsistent state laws on the preservation of and access to pre-1972 sound recordings, it would be far better for Congress to take actions that are more circumscribed than retroactive federal copyright protection. To the extent that there has been a showing that the concerns raised by commenting

[9] U.S. Const., Art. 1 § 8, cl. 8.

[10] *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (copyright law seeks to "motivate the creative activity of authors" to "allow the public access to the products of their genius after a limited period of exclusive control has expired").

parties have actually inhibited the goals of preservation and access, Congress should explore ways to ensure that certain specific uses are not subject to state prohibitions due to a federal policy interest.

IV. SoundExchange's Comments Mischaracterize the State of the Law Concerning a Public Performance Right in Sound Recordings

The Comments submitted by SoundExchange are a collection of self-serving mischaracterizations of the law concerning a public performance right in sound recordings. Moreover, this proceeding is not the proper venue in which to lobby for a performance right in sound recordings. NAB strongly opposes any attempt to make this proceeding a vehicle by which to create new performance rights in sound recordings, or to extend additional copyright protection to pre-1972 sound recordings at the expense of the reliance that parties have placed on settled expectations as to the legal status of these recordings.

Even though half its board members are members of either RIAA or A2IM, SoundExchange does not support RIAA and A2IM's Comments advocating no federalization of pre-1972 sound recordings, but instead takes an opposite tack, advocating for the extension of federal copyright law to cover the public performance of sound recordings first fixed before 1972. In other words, taken together, the comments of SoundExchange and RIAA/A2IM would have RIAA and A2IM members paid royalties for rights that do not exist.

SoundExchange makes unqualified and unsubstantiated claims that state laws contain digital performance rights analogous to the digital performance right for sound recordings under federal copyright law.[11] Such a conclusion is simply, and egregiously, incorrect.

[11] Such statements include: "All pre-1972 sound recordings are subject to protection under state law, including a state law performance right." SoundExchange Comments at 4. "[T]here is a strong basis for concluding that various state laws create rights in pre-1972 recordings that are analogous to the digital performance right established in 17 U.S.C. § 106(6)." *Id.* at 4-5. The cases SoundExchange cites do not stand for such a proposition and are simply inconsistent with decades of broadcasting industry practice, in

At best, SoundExchange dredges up a few very old cases dealing with unfair competition theories, decided in unique and atypical circumstances where sound recording owners had released records with prohibitions against radio airplay. These cases were highly unusual, since sound recording owners generally go to great lengths to foster radio airplay of their works. Importantly, there was no claim in any of these cases that there was any sort of common law general public performance obligation. Most state statutes, to the extent they relate to performance at all, are designed to prevent bootlegging. In other words, they generally target the distribution (and in some states, performance) of *illegally* reproduced sound recordings. They have not been used, nor should they be used, to prohibit broadcasting of pre-1972 sound recordings.

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NAB respectfully submits that the goals of the NOI and the solutions to any specific problems that may have been proven in the comments are not best addressed through retroactive federal copyright protection. At the core of this study being conducted by the Copyright Office is the question of the "desirability" of bringing sound recordings fixed before February 15, 1972

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which radio and television broadcasters have never paid for the performance of sound recordings on their over-the-air broadcasts. Moreover, the myriad other public venues that perform recorded music would, under SoundExchange's theories, be liable for playing pre-1972 sound recordings, even though such liability has never been enforced in the United States. Additionally, SoundExchange intentionally conflates state unfair competition rights with a performance right: "[J]udicial decisions in various states recognized a property interest in a recorded performance, that violation of that right by an unauthorized transmission can be addressed as unfair competition." *See, e.g.*, Howard A. Abrams, 1 The Law of Copyright § 8:38 (2010) (state laws are "typically criminal statutes making the *unauthorized duplication* of sound recordings illegal"); *People v. Szarvas*, 142 Cal. App. 3d 511, 191 Cal. Rptr. 117 (1983) (prosecution of individual who recorded a selection or entire album of hard-to-find or out-of-print records for a fee); *People v. M & R Records, Inc.*, 106 Misc.2d 1052 (N.Y. Sup. Ct. 1980) (prosecution of defendants who "engaged in a course of conduct in which they 'pirated' and unlawfully marketed sound recordings"); *Broyles v. State*, 552 S.W.2d 144 (Tex. App. 1977) (prosecution of individuals who allegedly "selling a sound recording that each knew had been reproduced without the written consent of the owner of the original recording").

under federal jurisdiction.[12] Given that the comments in the proceeding thus far show that federalization of pre-1972 sound recordings would only create uncertainty and ambiguity where there was none before, such a move would certainly not be desirable.

Respectfully submitted,

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[12] H.R. 1105, Public Law 111-8 [Legislative Text and Explanatory Statement] 1769.