

Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of:

Mandatory Deposit of Electronic Books
and Sound Recordings Available Only Online

Docket No. 2016-3

**COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.**

The Recording Industry Association of America, Inc. (“RIAA”) is pleased to have the opportunity to provide these comments in response to the Copyright Office’s May 17, 2016, Notice of Inquiry (“NOI”) in the above-captioned proceeding. *See* 81 Fed. Reg. 30505 (May 17, 2016). The RIAA is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music produced and sold in the United States.

The NOI seeks comments on a proposal put forward by the Library of Congress (the “Library”) to make online-only books and sound recordings subject to the mandatory deposit requirements of Section 407 of the U.S. Copyright Act. Currently, all online-only works – with the exception of electronic serials or eSerials – are subject to a “longstanding regulatory exemption” from the mandatory deposit requirements of Section 407. NOI at 30505. Electronic serials lost their exemption pursuant to an interim rule adopted in 2010. The Library now seeks to extend that interim rule to online-only books and sound recordings.

The NOI poses four specific questions each of which is addressed below.

1. Please comment on the efficacy of the 2010 interim rule, including whether it adequately addresses the digital collection and preservation needs of the Library of Congress, whether

it has adequately addressed the concerns of affected parties, and whether it is a good framework for further developing section 407.

Because the RIAA and its member companies were not affected by the 2010 interim rule, we have no views on its efficacy nor do we have views concerning how well it addresses the digital collection and preservation needs of the Library of Congress.

We do have concerns as to whether the interim rule adequately addressed the concerns of the affected parties. At the time the interim rule was published, the Federal Register notice, 75 Fed. Reg. 3863 (January 25, 2010) (the “Interim Rule”) identified the following issues that would be addressed through subsequent opportunities for public comment:

- The need for “amendments to address problems or issues yet to be identified.” Interim Rule at 3864. According to the notice, the rule was published as an interim rule because the Office expected that experience issuing and responding to deposit demands would raise issues that should be addressed before the regulation became final.
- Whether rightsholders would be permitted to meet their deposit obligations by providing a website link to the Office. At the time, the Office recognized that this approach would be desirable to publishers of eSerials but said that “it needs to examine the issue in more depth before considering including a link-and-download option in the regulations.” *Id.* at 3866.
- “Standards regarding the specific method of transmission of online-only works will be developed by the appropriate divisions of the Library and the Copyright Office, in consultation with rights-holders as warranted.” *Id.* at 3867.

Submitted by: Susan Chertkof **For:** Recording Industry Association of America, Inc. (RIAA)

- Most importantly, in an earlier notice, published on July 15, 2009, 74 Fed. Reg. 34286, the Office stated “that the Library will . . . establish policies and practices to insure the security and integrity of its electronic collections, and to provide appropriate limited access as allowed by law.” *Id.* at 3867. A number of parties asked for more information concerning “user access restrictions, specifically regarding downloading, distribution and interlibrary loan functionality.” *Id.*

To our knowledge, despite the promise that these issues would be addressed at a subsequent time, no further comments were solicited regarding *any* of the above topics. Indeed, the Copyright Office and the Library were silent on the all-important issue of security until publication of the instant NOI, which requests public comment (in question 3 below) on the subject of security for the first time.

2. Please comment on the Library’s adopted policies as to the interim rule and/or their application to online-only books and/or sound recordings.

The RIAA and its members are strong supporters of the Library’s efforts to preserve the sound recordings that serve as the soundtrack of our modern lives. We are participants in the prestigious National Recording Preservation Board and two of our members, Universal Music Group and Sony Music Entertainment, have entered into voluntary agreements with the Library that made vast collections of historical sound recordings available to the public through the Library’s National Jukebox, which makes historical sound recordings (most of which are no longer commercially available) freely available to the public.

In 2009 Sony Music Entertainment and the Library of Congress entered into a (confidential) agreement that makes publicly available for study and appreciation all of Sony Music’s pre-1925 recordings – that is the entire acoustic recording era (roughly from 1900-

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1925). 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, will 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 collection of 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 a comprehensive database of the historic Victor Records catalog. For more on this project, see <http://adp.library.ucsb.edu/index.php/resources/detail/49#> (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).

A few years later, on January 10, 2011, the Library and the Universal Music Group (“UMG”) released a joint press statement pertaining to a 2010 executed agreement between UMG and the Library 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 Jukebox” website. The UMG masters will be stored at the Library’s Packard Campus in

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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. 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.¹

¹ 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>.

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Although Warner Music Group (“WMG”) has not had occasion to enter into a similar arrangement with the Library of Congress, WMG engages in its own in-house preservation utilizing preservation practices that exceed those of most institutions. Content is digitized at the highest practical resolutions and then stored in three redundant systems that include archive grade optical media, internal online servers, and long term cloud based storage. University graduate students have reviewed WMG’s archiving practices and deemed it one of the best audio archiving processes that they have studied. The other major labels also engage in in-house archiving and most online partners maintain their own digital redundant storage systems that allow for business continuity should there be a loss of service.

Against this backdrop, our members question the need for a government-mandated deposit program for online-only sound recordings. With respect to hard-to-find historical sound recordings our members have already shown themselves to be willing to advance the cause of digital preservation of sound recordings by means of voluntary agreements. With respect to newer, commercially available sound recordings, we agree with the Copyright Office that “many, if not most, published sound recordings are available not only via subscription services, but also for purchase and download. . . . [T]his is distinct from electronic serials, many of which are accessible to end users only through a subscription service.” NOI at 30509. Published sound recordings are even more widely available than the description above. The vast majority of commercially released sound recordings are widely available online through a variety of digital music services, some free and some available for modest subscription prices. Given this ubiquity – which will likely grow in the years to come – we are hard-pressed to see any need to extend the on-demand deposit requirements to online-only sound recordings. Even if the Library believes that it is necessary for it to acquire preservation copies of the sound recordings so widely

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available through commercial services, we believe that private agreements – like the ones that Sony and Universal previously entered into – are a superior acquisition tool than a regulatory mandate. Private agreements are more flexible, can be tailor-made to the materials at issue, can include industry-standard security requirements and can include additional benefits flowing in both directions, such as those described above, that would not be included in a one-size-fits-all regulation. The Library’s own Inspector General recognized this: “[m]andatory deposit rulemakings may yield workable arrangements in some instances; *it is equally possible that negotiated arrangements with private and public entities may be the only way forward.*” Office of the Inspector General, *The Library Needs to Determine an eDeposit and eCollections Strategy* 11 (2015) (emphasis added) (the “2015 Report”), available at <https://www.loc.gov/portals/static/about/documents/e-deposit-and-e-collections-strategy-april-2015.pdf>. The same sentiment was echoed later in the same report: “the Library may also want to consider expanding its use of partnerships with private and public sector third parties, which could offer an alternative to collecting electronic works through copyright registration and/or mandatory deposit.” *Id.* at 15.

Mandatory deposit also seems unnecessary – at least with respect to our members’ sound recordings. Our members currently register the vast majority of their sound recordings with the Copyright Office (including those that are online-only) and regularly submit deposit copies to the Copyright Office under Section 408 of the Copyright Act. 17 U.S.C. § 408.² As made clear in the *Compendium of U.S. Copyright Office Practices, Third Edition* (the “Compendium”), “[i]n most cases, the owner of copyright or exclusive right of publication may satisfy the mandatory

² Given the issues raised by this NOI, we now have concerns about how deposit copies of online-only sound recordings submitted in conjunction with copyright registration applications are stored and secured by the Copyright Office and, to the extent they are transferred to the Library, by the Library. We also have questions regarding the extent to which the public is permitted to access any copies transferred to the Library.

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deposit requirement [of Section 407] by submitting an application to register the work, provided the applicant submits two complete copies or two complete phonorecords of the best edition.”

Compendium § 1511.

We also question whether the time is ripe for the Library to request authority to acquire additional materials for its collection. The 2015 Report by the Library’s Inspector General pointed to a host of personnel, organizational, technological and budgetary concerns that plagued the Library’s eCollection effort. Some of the cited problems appear to have been addressed in the interim but, according to a subsequent report from the Inspector General, many will not be fully addressed until the fourth quarter of 2017. See Office of the Inspector General Semiannual Report to the Congress March 2016 at 12-13, <https://www.loc.gov/about/office-of-the-inspector-general/annual-reports/semi-annual-report-march-2016/>. Anecdotal information is consistent with the Inspector General’s conclusions – the Library reportedly has large backlogs of previously acquired material waiting to be catalogued. Until the Library reaches a point where it has the infrastructure and budget necessary to not only collect but catalog additional works – whether print or born-digital – and ensure the security of the collected works, it should not be expanding its eDeposit and eCollection programs.

Before imposing any additional burdens on sound recording copyright owners, who would be required to deposit – with an under-resourced Library – phonorecords of sound recordings that are already widely available, the Copyright Office and/or Library of Congress should be required to provide a good faith estimate of the cost that such a rule would impose on rightsholders. If rightsholders were required to provide preservation quality phonorecords to the Library in formats that are not generally used in the ordinary course of commerce that could be a very expensive undertaking.

3. Please comment on the information technology, security, and/or other requirements that should apply to the Library's receipt and storage of, and public access to, any online-only books and/or sound recordings collected under section 407.

Due to the ease with which digital phonorecords can be duplicated and distributed electronically across the globe with no loss of sound quality, RIAA and its members have serious concerns about the security that would apply to the Library's receipt and storage of, and public access to, any online-only sound recordings included in the Library's collection, whether pursuant to Section 407 or Section 408 of the Copyright Act. Indeed, the proposed regulation is silent on the security measures that would apply to access as well as to storage of our members' valuable sound recordings.

It is well-established that the recorded music industry has been inundated with digital piracy. Moreover, the industry is in the midst of a transition from ownership models to access models whereby the future of our members' businesses is dependent on a vibrant market for legitimate digital music services. If sound recordings available through the Library – whether on-premises or online (now or in the future) – were managed in a way that patrons could use those recordings for uploading to pirate web sites and unlicensed streaming services or if the Library's collection of sound recordings were made electronically available to the public at large, that could have a devastating impact on our member companies' revenues.

The Office of Inspector General was aware of these issues in its April 2015 Report when it stated that “addressing preservation, security, and access issues could make completing the rulemaking process for these other categories of works [i.e., software, video games, digital music, digital still and moving images, electronic books and magazines] more challenging than was the case for eSerials.” 2015 Report at 6. Elsewhere in that Report, the Inspector General

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stated that “the Library needs an overarching eCollections Strategy for creating a digital platform that meets common requirements for ingesting and *protecting* electronic works.” Id. at 12 (emphasis added). The 2015 Report also notes that “publishers may be reluctant to provide the Library with digital content without a specific agreement on how that content may be accessed.” Id. at 15. It further warns that “the Library needs to ensure that electronic works transferred by the Copyright Office from copyright registration or mandatory deposit for its collections are protected from unauthorized copying and sharing.” Id. at 18. And, it correctly points out that “the repositories that store the Library’s digital materials will need ‘robust security’ to prevent ‘loss, alteration, and unauthorized access.’” Id. at 18 (citation omitted). According to the Report, the Register of Copyrights “noted the security risk associated with the copyright registration of digital works” when she testified before Congress in September, 2014. Id. at 19.

In addition to our general security concerns, we have some specific concerns about the security arrangements and access rules set forth in the NOI. Although the notice makes clear that the Office will seek further public comment “before adopting additional policies governing electronic copying or distribution by electronic transmission,” the implication is that it is a matter of “when” not “if” this question will be raised. When one balances the immense potential for harm to our industry from unauthorized electronic distribution of our content against the ready availability of virtually the entire catalog of modern commercial sound recordings from a multitude of digital music services, it is difficult to understand why the Library should ever permit electronic copying or distribution of our members’ sound recordings.

We are also concerned by the provision in the proposed rule that would permit “Library of Congress authorized users” to “access the electronic works via a secure server over a secure network.” Notice at 30507. In an age where servers are hacked on a regular basis, no electronic

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server is secure. Government servers are no different. In just the last year, hackers stole sensitive information on 19.7 million people who had been subjected to a government background check by the Office of Personnel Management and, in a related breach, hackers compromised the personnel data of 4.2 million federal employees. See Julie Hirschfeld Davis, Hacking of Government Computers Exposed 21.5 Million People, N.Y. Times, July 9, 2015, [http://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html ? _r=0](http://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html?_r=0). Given the inherent vulnerability of servers believed to be secure, we question the need for anyone to have remote access to a server that stores commercially valuable digital sound recordings.³ Further, we believe that any such server should be required to employ industry-standard, state of the art technological protection measures to secure the content – something that can best be accomplished through voluntary deals, where label business and technology executives can negotiate appropriate security specifications with Library representatives and the Library can be required to provide proof of reasonable due diligence before receiving the labels’ valuable digital assets.

Lastly, we have concerns about the terminals through which any sound recordings collected pursuant to a mandatory deposit rule would be accessed by users. In describing the implementation of the eSerials program, the NOI states that users may only access the eSerials via two dedicated terminals in the Microform & Electronic Resources Center (“MERC”), located in the Library of Congress’ Jefferson Building and further states that “the Library has disabled access to the terminals’ USB ports to prevent users from making electronic copies. Internet

³ In the case of digital sound recordings, we even question why members of Congress and their staffs (who are included within the definition of “Library of Congress authorized users”) need remote access to commercial sound recordings in connection with their official duties.

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access on the terminals has also been disabled.” Notice at 30508.⁴ While we view such measures – if adequately maintained and monitored – as steps in the right direction, we note that the proposed rule does not make those measures mandatory; it merely states that access would be “limited, at any one time, to two Library of Congress authorized users.” Notice at 30509. If this proposal goes forward – which it should not – it is imperative that the language about disabling the USB port and disabling Internet access be included in the new regulations. Further, we agree that the current practice, which allows users to access digitized sound recordings from six dedicated terminals, should be changed to two as set forth in the proposed rule.

4. Please provide comments and observations regarding the application of “best edition” requirements to online-only books and/or sound recordings, including whether and how the “best edition” criteria for electronic serials found in part 202 of 37 CFR, appendix B, or the guidelines from the Library’s Recommended Formats Statement, might or might not be adapted to address these additional categories of online-only works.

Before getting into the specific criteria that have been proposed for sound recordings, we note that Maria Pallante, the Register of Copyrights, has questioned the “viability of ‘best edition’ requirements in the digital age.” See Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on Judiciary, 114th Cong. 32 (2015) (statement of Maria A. Pallante, Register of Copyrights). According to the NOI, “no ‘best edition’ criteria exist yet for online-only sound recordings.” NOI at 30509. Yet, rather than separately addressing this issue, which is only tangentially related to the question of whether a mandatory deposit rule is warranted for online-only sound recordings– either through face-to-face meetings with relevant

⁴ The NOI also makes reference to a set of “fair use criteria” kept in a “training manual stored next to the terminal. NOI at 30508. While not germane to the question of extending mandatory deposit to online-only sound recordings, we note that users can apparently make copies of full e-serials from those terminals without interference and that the mentioned fair use criteria have not been made available to either the Copyright Office or the copyright community.

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industry personnel or through its own rulemaking -- the Library seeks to adapt its proposed Recommended Formats Statement, see

<https://www.loc.gov/preservation/resources/rfs/audio.html>, for this purpose and to do so as part of this rulemaking. We regard this as inappropriate from a process perspective, especially given that the best edition criteria established for online-only sound recordings will apply not only to mandatory deposits submitted pursuant to Section 407 but also to deposits that accompany copyright registration applications submitted pursuant to Section 408, which are within the purview of the Copyright Office.

Turning to the Recommended Formats Statement as it applies to digital audio, we have a number of concerns, not all of which are listed below. Our primary concern is with the metadata specified. At present, the Recommended Formats Statement lists a number of data points that are not included in sound recording metadata feeds in the ordinary course of business (e.g., composer, genre, location and date of performance). Moreover, any metadata criteria included as part of any best edition criteria for online-only sound recordings should be based upon the industry-standard DDEX Electronic Release Notification (“ERN”), which is given as the second, not the first, choice for metadata under III.ii.D. We also have concerns about the ordering of the options presented under the heading “Audio, in order of preference.”

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Submitted by: Susan Chertkof **For:** Recording Industry Association of America, Inc. (RIAA)

We appreciate the opportunity to provide our thoughts on the issues raised in the NOI. If we can be of any further assistance to the Office, please do not hesitate to contact us.

Dated: August 18, 2016

Respectfully submitted,

A handwritten signature in cursive script that reads "Susan Chertkof". The signature is written in black ink and is positioned above the typed name and contact information.

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