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Subj: Response to Orphan Works Inquiry Comment OW0669 (by Recording Artist Groups)

I would like to strongly endorse the "Request for the Copyright Office to Issue a Notice of Inquiry Examining Out-of-Print Sound Recording Copyrights" proposed in this filing.

The issue of sound recordings that are kept out-of-print, and therefore unavailable, is far broader and has even deeper cultural ramifications than this filing suggests. I first became aware of this issue during the research for my book *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919.*[1] I identified approximately 800 commercial recordings made in the U.S. by African-Americans during this period, of which 400 appeared to be still under the control of a present-day rights holder (under state not federal law, per the provisions of Title 17, section 301(c)). Of these 400 exactly two – or one-half of one percent – had been reissued by the rights holder, or licensed to be reissued, during the entire CD era. This is a scandalous betrayal of our history perpetrated in the name of "copyright."

This situation did not come about through any lack of interest, as evidenced by the fact that more than one hundred of these recordings have been reissued in foreign countries – where our laws do not apply – or by small, unlicensed (and therefore illegal) entities in the U.S. Far more would be reissued, and those reissues would be more widely available, under a more rational legal structure. This situation is discussed in greater detail in my book.[2]

Subsequently I was commissioned by the Council on Library and Information Resources on behalf of the National Recording Preservation Board at the Library of Congress to conduct a study to determine the proportion of historic pre-1965 sound recordings that are controlled by an existing rights holder, and the degree to which rights holders have made those recordings available, either directly or through licensees. This study is described in my earlier Inquiry Comment (OW0579). The study covered the first 75 years of the U.S. recording industry (1890-1964), and determined that only 14% of the recordings from that period that were of greatest interest to scholars and collectors had been made available by rights holders.

Moreover this proportion was strongly skewed toward more recent periods, notably the early rock era (1955-1964), where it reached about one-third of protected recordings. For most periods prior to the Big Band Era the percent

reissued dropped to less than 10%, and for the early part of the twentieth century it was nearly zero. This, remember, is not a percent of all recordings but rather a percent of those recordings in which present-day scholars and collectors have the greatest interest, as documented by widely used discographies and other publications.

The study also showed very uneven treatment by genre of music. Historic blues and gospel recordings (10% reissued) and recordings by U.S. ethnic minorities (1% reissued) were particularly poorly treated by rights holders.

As with early African-American recordings, non-licensed entities (domestic and foreign) did a far better job of exhuming historic recordings. In the case of historic blues and gospel, rights holders had reissued 10% but non-rights holders had made available an *additional* 54%. Unfortunately since most of these reissues are on foreign labels not widely distributed in the U.S., or from very small U.S. operations, they can be difficult for students and libraries here to find.

As noted in my earlier Comment (OW0579), pre-1972 recordings presently fall under state law. Two points can be made in that regard. Even for the most recent period studied, 1960-1964, rights holder made available only 33% of the historic recordings they controlled. This suggests that substantial numbers of important recordings from the 1970s and 1980s are unavailable as well.

Second, unavailability of recordings from rights holders becomes an even greater issue for periods prior to 1972, increasingly so as you go back in time. The earliest periods are in some ways the most crucial in terms of the need for preservation and cultural understanding, and yet suffer the most from enforced unavailability. I believe this is an issue the Copyright Office must address.

A few other points regarding specific comments in OW0669.

1. A compulsory license to reissue out-of-print material should not be restricted to the artists involved (who may or may not be available, able or willing to reissue). It should be available to anyone. This would benefit artists since a portion of compulsory license fees would flow to them.
2. Digital delivery technology by rights holders is unlikely to alleviate the non-availability situation for the bulk of historic recordings. Many labels have destroyed their older masters (and sometimes even the files that identify those masters). The time and cost of finding suitable copies, transferring them, creating clean digital files, and administering a site that would make them readily available to the general public would involve considerable expense, especially if it involved large numbers of recordings. Transfer and restoration work can be quite laborious.
3. I do not see why a compulsory license should be limited to physical copies. If a rights holder chooses not to make a recording available in any form a non-rights holder should be able to obtain a compulsory license to reissue that recording either in physical or electronic format. If a rights holder makes a recording available in physical form, there would

be no compulsory license. The situation that would obtain if a rights holder makes a recording available only in electronic format deserves further study, to see how the rights holders' priority can be maintained while not subverting the goal of availability.

Canadian Unlocatable Copyright Statute

Elsewhere in its Comment the Record Artist Groups endorse the Canadian Unlocatable Copyright Statute as a model for the U.S.

While there may be some general learning from this statute, I believe it would be unwise and unfair to require users to pay a government fee in order to be able to exploit an orphan work. In the vast majority of cases, where no rights holder ever comes forward, this becomes simply a tax on those who are trying to perform a public good: individuals, associations and archives who seek to preserve and disseminate historic material that no one else will. This work is often done with little funding, sometimes at a loss. To tax these entities "just in case" someone later shows up would be grossly unfair.

In those cases where no rights holder shows up initially, but does so at a later date, the rights holder can then reclaim its rights. The proposal in OW0669 for a two-year window in which the compulsory license holder must cease its marketing (or reach an agreement with the rights holder) seems reasonable.

If an artist can document that he or she had a royalty agreement with a no longer existing company whose recordings are now orphaned, that artist should be entitled to the same royalties from any later entity that reissues the recordings under the provisions of an Orphan Works Law.

Finally, much is made by the Record Artist Groups (and others) of the need to avoid the imposition of "formalities," in order to conform to the Berne Convention. I believe this is an extremely narrow reading of Berne. Berne and related treaties forbid the imposition of formalities as a condition of copyright; but neither of the solutions proposed here, for orphan and for out-of-print works, restrict the ability of the holder to obtain and exploit copyright. The rights holder always has priority over others. These proposals would appear to be consistent with the test set forth in TRIPS, Article 13, requiring that limitations and exceptions to exclusive rights be confined to "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[3]

More broadly the entire "no formalities" provision has been a disaster in my opinion, and should be revisited both in terms of U.S. law and internationally. "Formalities" are required in nearly every other field involving asserted rights (physical property, trademark, contract rights, etc.), and for good reason. The sweeping elimination of such requirements in the field of intellectual property has placed a heavy burden on those trying to preserve and disseminate cultural artifacts, and fostered a climate of legal intimidation. It has actually encouraged piracy, by making it so difficult to reissue material legally. Even

TRIPS, in the aforementioned provision, seemed to recognize that exceptions had to be allowed. This area should be reviewed.

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[1] Tim Brooks, *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919* (University of Illinois Press, 2004)
[2] *ibid.*, 10.
[3] Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), April 15, 1994, art. 13.