

# ETHER TODAY, GONE TOMORROW: 21ST CENTURY SOUND RECORDING COLLECTION IN CRISIS

BY JUDY TSOU AND JOHN VALLIER



Libraries are facing what may be an existential crisis. As more books, videos, and sound recordings are licensed and distributed through online-only means, the amount of such material available for libraries to collect is shrinking. Instead, recordings are available only as a stream or MP3 download via such online distribution sites as iTunes or Amazon.com. These, and similar sites, require individual purchasers to agree to restrictive end-user license agreements (EULAs) that explicitly forbid institutional ownership and such core library functions as lending:

- You shall be authorized to use the Apple Music Service and Apple Music Products only for personal, noncommercial use, except as otherwise authorized by Apple. . . . You agree not to modify, rent, lease, loan, sell, distribute, or create derivative works based on the iTunes Service in any manner. . . .<sup>1</sup>

- Amazon or its content providers grant you a limited, non-exclusive, non-transferable, non-sublicensable license to access and make personal and non-commercial use. . . .<sup>2</sup>

This crisis is especially stark for libraries that collect music recordings. As compact disc sales shrink and online sales expand, a growing portion of our recorded music history is unavailable for libraries to purchase. With CDs and other physical items, libraries—along with individual consumers—were able to *own* their music recordings, which gave them the right to lend them and preserve them for future generations of scholars and fans.

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Judy Tsou is the head of the Music Library and affiliate assistant professor of music history at the University of Washington. Her recent research includes gender and race in music, and issues in music librarianship. She has been active in both the musicological and music librarianship professional societies, having served as presidents of the Society for American Music as well as the U.S. Branch of the International Association of Music Libraries, Archives, and Documentation Centres.

John Vallier is the head, Distributed Media Services at the University of Washington Libraries in Seattle. Before coming to UW in 2006, he was archivist at the UCLA Ethnomusicology Archives and a junior fellow at the American Folk Life Center, Library of Congress.

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URLs cited herein accessed 19 November 2015.

1. iTunes Store, "Terms and Conditions," <http://www.apple.com/legal/internet-services/itunes/us/terms.html>.

2. Amazon.com, "Conditions of Use," [http://www.amazon.com/gp/help/customer/display.html/ref=footer\\_cou?ie=UTF8&nodeId=508088c](http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088c).

### ENVIRONMENTAL SCAN AND FALLOUT

Since 2010 the scale has tipped increasingly toward the online distribution model. Despite a resurgence of niche hipster-led vinyl sales,<sup>3</sup> 2011 online sales skyrocketed, accounting for 50.3 percent of total music sales.<sup>4</sup> In 2013, streaming service sales increased dramatically, by 32 percent for companies such as Spotify and Pandora. The trend continued in 2014, with sales of 326 million digital albums, constituting 68.4 percent of total album sales.<sup>5</sup>

A growing number of music digital sales are available only online, and many of these are critically acclaimed works. Deutsche Grammophon released several Los Angeles Philharmonic recordings that are available only online, including its Grammy-winning recording of Johannes Brahms's Symphony no. 4, conducted by Gustavo Dudamel.<sup>6</sup> Similarly, many popular music artists utilized online releases for mix tapes, bonus tracks, singles, and live performances. This includes Grammy-winning rhythm-and-blues singer Frank Ocean and *Et In Arcadia Edo* by Jagat Skad. Companies like Spotify had many exclusive online-only releases, including what appears to be an exclusive release on Spotify of Prince's song *Stare*. This work became available on TIDAL, Jay Z's high fidelity streaming service, a few weeks after the artist pulled his catalog of music from all other streaming services.<sup>7</sup>

### IMPACT ON LIBRARIES

While possibly convenient for consumers with means, such a distribution model poses a challenge for libraries aiming to provide access and preserve music recordings. When music recordings are distributed in physical formats such as compact discs and LPs, libraries are able to legally purchase the works and to distribute them under first-sale doctrine. Together with the fair use doctrine and the library exceptions for preservation purposes in section 108 of the U.S. Copyright Act, the first-sale doctrine has ensured that music libraries can acquire, lend, and preserve copyrighted works without fear of legal sanctions. When music is

3. Amy Benfer, "Vinyl is Cool Again: That Doesn't Mean Record Collectors Have to Get All Hipster," *The Guardian* (U.S. edition), 21 June 2014, <http://www.theguardian.com/commentisfree/2014/jun/21/vinyl-record-collector-sales-jack-white>.

4. "The Nielsen Company & Billboard's 2011 Music Industry Report," *BusinessWire*, 5 January 2012, <http://www.businesswire.com/news/home/20120105005547/en/Nielsen-Company-Billboard%E2%80%99s-2011-Music-Industry-Report#.VcEfi7X0-9Y>.

5. Figures derived from the Nielsen Sound Scan Report, 2014, <http://www.nielsen.com/content/dam/corporate/us/en/public%20factsheets/Soundscan/nielsen-2014-year-end-music-report-us.pdf>.

6. Listing in the DG catalog at <http://www.deutschegrammophon.com/en/cat/4779459>.

7. Colin Stutz, "Prince Removes Music from Most Streaming Services—except TIDAL," *Billboard*, 1 July 2015, <http://www.billboard.com/articles/news/6613309/prince-removes-music-from-most-streaming-services-except-tidal>.

available only via a license that bars institutional use, however, these core federal legal principles appear to, in effect, be waived in favor of the terms spelled out in the license.<sup>8</sup>

This model—limited licensing of titles to individual consumers—may benefit a music distributor's bottom line, but it does not guarantee access for the long-term. If the popularity and resulting commercial potential of a recording fades, will a distributor cease to provide access to it? Distributors provide access to catalogs of recordings that are popular and meet the needs of many consumers, but scholars, musicians, composers, or even fans may need enduring access to less popular and more obscure recordings, too. Indeed, the world's great public and academic libraries fill that void. These libraries have been built not just by collecting the most common and widely used materials, but more specialized and often obscure works as well. Items most crucial for a scholar's research and a musician's study are often drawn from the obscure, which is much less likely to be made available in perpetuity by a commercial distributor.<sup>9</sup>

Moreover, commercial record and film producers as a whole maintain a poor track record of preserving materials, let alone providing public access to those they do keep. Several specific events, such as a major fire in Universal's backlot in June 2008, point to the vulnerability of these tapes and recordings. This fire "destroyed nearly 100 percent of the archive prints kept here on the lot," according to vice president of Universal, Paul Ginsberg.<sup>10</sup> Academic libraries and archives regard preservation and disaster preparedness as a core value, even if these efforts are costly and require substantial investment of staff and resources. We cannot expect the entertainment industry to put preservation over profitability. A case in point is the willful disposal of old silent films for reuse of the silver in the film, or simply to gain more storage space.<sup>11</sup>

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8. As Kevin Smith notes in a 8 February 2011 blog post about the AIME vs. UCLA streaming video lawsuit, "We routinely assume that 'contracts trump copyright;' libraries are told that all the time regarding the databases they license, and they often pass the message on to users. It is generally correct." See "Contract Preemption: An Issue to Watch," *Scholarly Communications @ Duke*, Duke University Libraries, <http://blogs.library.duke.edu/scholcomm/2011/02/08/contract-preemption-an-issue-to-watch/#sthash.3XFGRdK.dpuf>.

9. There are a handful of commercial entities, such as Alexander Street Press and Naxos, that offer subscriptions of streamed music titles to libraries. While highly valued by librarians and users alike, in the end, libraries do not own these items but merely license them (as is the case with academic journals). Distributors may change their content at any time and without notice. Thus, subscribing to these databases does not guarantee long-term access to the materials. This means that students, scholars, and the public will be limited to purchasing individual pieces on their own, if they are even available for purchase.

10. As reported in "Loss of Universal's Tape and Film Vault Raises Archival Question," *TV Technology*, 9 June 2008, <http://www.tvtechnology.com/news/0086/loss-of-universals-tape-and-film-vault-raises-archival-questions/266623>.

11. "Silent, Still Golden," *Chicago Tribune*, 17 January 2012, [http://articles.chicagotribune.com/2012-01-17/opinion/ct-edit-silent-20120117\\_1\\_silent-film-frederica-sagor-maas-broncho-billy-anderson](http://articles.chicagotribune.com/2012-01-17/opinion/ct-edit-silent-20120117_1_silent-film-frederica-sagor-maas-broncho-billy-anderson).

Some in the music and film industries acknowledge their lack of interest and investment in media preservation, and reliance on educational and governmental archives to preserve and provide access to their historic collections; see, for example, the Library of Congress's *National Jukebox*<sup>12</sup> and UCLA Film and TV Archive's "Paramount Collection."<sup>13</sup> If libraries are prevented from owning—or at the very least acquiring—online-only recordings, the ability to preserve our recorded cultural heritage will become moot.<sup>14</sup>

#### EARLY WORK ON THE ISSUE

What if libraries fail to coordinate their efforts and fall short of acting decisively to correct this issue? The impact could be devastating. As music librarian D. J. Hoek wrote, "Librarians have only a few options, the easiest of which include subscribing to more and more streaming-audio databases as CDs become less available, or . . . giving each of our patrons an iTunes gift card so they can download whatever music they need that our library cannot provide. Either way, these are desperate reactions that are not in the best interest of our libraries or our users."<sup>15</sup> A number of public libraries subscribe to Freegal, a downloadable MP3 service that allows users to download up to three tracks per week from their participating public library. It is hard to imagine that this model is sustainable during an economic downturn, when budgets must be cut. Hoek, who was among the first in the music library community to call attention to this challenge, does suggest an alternative and more favorable route for libraries:

A . . . promising tack may be for the Music Library Association, the American Library Association, the Association for Recorded Sound Collections, and other professional organizations to raise awareness about this matter and then, together, engage the recording industry in discussions to develop a viable means for selecting, acquiring, cataloging, housing, preserving, and coordinating access to sound recordings, just as we have done all along.<sup>16</sup>

Buoyed by Hoek's suggestion that we "engage the recording industry in discussions," in 2010 we (on behalf of the University of Washington Libraries) attempted to negotiate a library exception in the EULAs with

12. *National Jukebox: Historical Recordings from the Library of Congress*, <http://www.loc.gov/jukebox/>.

13. "Paramount," UCLA Film and Television Archive, <http://www.cinema.ucla.edu/collections/paramount>.

14. Even if record companies wanted to preserve their recordings, they may not be able to do so in certain cases. For example, smaller independent labels may not have the technology or resources to do so. This is an area where potential partnership with a preservation-capable academic library or archive may be fruitful.

15. D. J. Hoek, "The Download Dilemma: The Demise of the Compact Disc Signals an Uncertain Future for Library Sound Recording Collections," *American Libraries Magazine*, 27 July 2009, <http://americanlibrariesmagazine.org/2009/07/27/the-download-dilemma/>.

16. *Ibid.*

Amazon.com and Apple, but the effort failed.<sup>17</sup> They explained that it was the recording industry that demanded restrictive language in their EULAs and, therefore, were not able to make an exemption for institutional ownership of online-only recordings. We chose to pursue the purchase of the Los Angeles Philharmonic's recording of Hector Berlioz's *Symphonie fantastique*, available via iTunes, toward making it part of the University of Washington collection.<sup>18</sup> This recording was issued online and not in any physical format such as a compact disc. In 2011, we contacted the Los Angeles Philharmonic about purchasing this recording and were referred to its distributor, Deutsche Grammophon, who in turn referred us to its parent company, Universal Music Group (UMG). UMG responded by stating that such an institutional license would not be possible. After exchanging several e-mails, UMG changed its answer, and agreed to license the material to the University of Washington Libraries, our institution, under the following conditions: that no more than 25 percent of the album's content could be licensed, and the license would be valid for no more than two years. Furthermore, a \$250 processing fee would be charged in addition to an unspecified licensing fee that would have been "more than" the processing fee. Given that the standard cost of a complete iTunes album is \$9.99, we determined UMG's offer to be unreasonable. Perhaps more importantly, having 1.25 movements of this five-part piece is useless to a library or user. We attempted to further negotiate with UMG, but our efforts were rejected.<sup>19</sup>

#### INSTITUTE OF MUSEUM AND LIBRARY SERVICES GRANT

To investigate this issue further, the University of Washington Libraries (UW) collaborated with the Music Library Association (MLA) in conducting a two-year project entitled, "National Forum on Online-Only Music: 21st Century Sound Recording Collection in Crisis."<sup>20</sup> Funded by the Institute of Museum and Library Services (IMLS), the grant supported the hiring of expert consultants, holding planning meetings, bringing stakeholders together in three national forum meetings, analyzing content of the meetings, and developing approaches to the issues.

17. This effort was part of an earlier NEH-funded grant (Digital Humanities Start-up Grant), Collecting Online Music Project, 2010–2011. For more details, see <https://securegrants.neh.gov/publicquery/main.aspx?f=1&gn=HD-51139-10>.

18. Program notes and performance calendar for the work at LA PHIL, <http://www.laphil.com/philpedia/music/symphonie-fantastique-hector-berlioz>.

19. E-mail correspondence between John Vallier (on behalf of Judy Tsou and John Vallier at the University of Washington) during March 2011.

20. The principal investigators of the grant are John Vallier, representing University of Washington, and Judy Tsou, representing the Music Library Association. Originally, the grant was for one year, 2014–15, but because of the possibility to achieve beyond the grant, and underspending, the investigators were able to secure a "no-cost extension" from IMLS for an extra year. This grant follows an NEH sponsored Digital Humanities Start-Up grant on the same topic (see n. 17).

The project was designed to elicit input and consensus from a broad range of participants: academic librarians, public librarians, freedom of information advocates, attorneys, library policy specialists, and music licensing experts. Furthermore, at the final summit meeting with the National Recording Preservation Board (NRPB), the circle of participants was broadened to include music industry representatives from the National Academy of Recording Arts & Sciences (NARAS), Broadcast Music, Inc. (BMI), and other relevant groups who have membership on the NRPB.

In an effort to maximize participation, we held these meetings in conjunction with three conferences: the Music Library Association (MLA) 2014 annual meeting, the American Library Association (ALA) 2014 annual conference, and the National Recording Preservation Board (NRPB) meeting at the Library of Congress. A summary of our activities at each of these meetings follows.

#### **Music Library Association (February 2014): Soliciting Community Input**

We initiated the grant with a set of planning and outreach meetings at the MLA annual meeting on 1 March 2014, in Atlanta, Georgia. In the project's first session, we facilitated a town-hall style "community conversation" on the topic of online-only music. The issue was obviously very important: the attendance was strong, filling a large ballroom in the hotel in spite of competing sessions offered concurrently. The majority of the audience was music librarians from different kinds of music libraries: large and small academic institutions, conservatories, sound archives, and public libraries of all sizes.<sup>21</sup> While we introduced the grant and briefly described the issue, the majority of the hour-plus session was dedicated to hearing from and interacting with audience members. It was a briskly paced and thoughtful discussion. Participants spoke about their concerns with proliferation of online-only music, and the way in which the issue was already beginning to constrain their music library collection development and preservation efforts. Some participants offered ideas for solutions, from trying to negotiate library-friendly agreements with the major labels, to just ignoring the terms and simply burning the online-only files to CD.

To focus the discussion, we held a second project session at the MLA meeting with a targeted group of music librarians and archivists who specialize in sound recordings and copyright. At this working-breakfast

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21. This meeting, and the project as a whole, benefited from the input of the members of MLA's Digital Audio Task Force: Kathleen DeLaurenti, Stephen Davison, Eric Harbeson, Lisa Lazar, Judy Tsou, and John Vallier. Others who contributed include Bonna Boettcher, Deborah Campana, Brenda Nelson-Strauss, and Tammy Ravas.

meeting, we reviewed highlights from the previous day's community conversation, jointly developed the agenda for the upcoming "Pre-Summit" at ALA, and discussed expected outcomes of the grant as a whole. In addition to these two meetings, numerous impromptu and informal conversations about the online-only music issue also took place over the course of the remainder of the MLA meeting, which continued for two more days.

#### **American Library Association (June 2014): Work With Consultants**

The next phase of our project focused on a meeting with consultants who provided detailed and nuanced perspectives on the issue at hand. It was held in conjunction with the ALA preconference activities on 25 June 2014 in Las Vegas, Nevada. The project hired five copyright expert consultants:

- Brandon Butler, practitioner-in-residence at the Glushko-Samuelson Intellectual Property Law Clinic, American University. Butler was formerly the director of public policy initiatives at the Association of Research Libraries (ARL).
- Corynne McSherry, intellectual property director at the Electronic Frontier Foundation (EFF).
- Eli Neiburger, associate director of information technology and production at the Ann Arbor District Library (AADL).
- Kevin Smith, director of copyright and scholarly communications for the Duke University Libraries.
- Peter Hirtle, Senior Policy Advisor to the Cornell University Library, and research fellow at the Berkman Center for Internet and Society. Hirtle was also a member of the Section 108 Study Group.<sup>22</sup>

In addition to the five consultants and the authors (project coinvestigators), experts from a range of backgrounds also joined us: Sam Brylawski, the chair of NRPB with much experience at the Library of Congress and now at University of California–Santa Barbara's sound archive; Stephen Davison, University of California–Los Angeles Library's then head of digital initiatives; Eric Harbeson, University of Colorado, who has expertise in music copyright; Clifford Lynch, the executive director of the Coalition of Networked Information, who led the scholarship on digital preservation and infrastructure and standards development; Brenda Nelson-Strauss, a sound archivist and preservation expert at Indiana University who led the project in creating the *National Recordings Preservation Plan*; Tammy Ravas, the chair of MLA's Legislation Committee; Carrie Russell, the copyright specialist for the American

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22. A recording industry leader, Les Watkins, senior vice president of Music Reports, Inc., was invited to join us, but felt he must withdraw from the project citing a potential conflict of interest.

Library Association (ALA) Office for Information Technology; and Robert Wolven, associate university librarian for bibliographic services and collection development, who leads the BorrowDirect Program at Columbia University, and cochair of ALA's Digital Content Working Group.<sup>23</sup>

In anticipation of the meeting, the five consultants wrote white papers outlining and describing their opinions on the issue.

**National Recording Preservation Board (November 2014):  
Summit with Stakeholders on All Sides**

The National Recording Preservation Board (NRPB) at the Library of Congress (LC) was established through the National Recording Preservation Act of 2000.<sup>24</sup> Although the primary mission of this body is to select sound recordings for LC's National Recording Registry, it also explores many issues related to sound recording preservation and rights. The board consists of representatives from seventeen organizations, including scholarly societies (American Folklore Society, American Musicological Society, and the Society for Ethnomusicology), to libraries and archival associations (ARSC, MLA, LC, and National Archives and Records Administration), to societies of musicians, recording engineers, and rights (ASCAP, American Federation of Musicians, Audio Engineering Society, BMI, National Academy of Popular Music, National Academy of Recording Arts and Sciences, and SESAC), to industry representatives (Country Music Foundation, Digital Media Association, National Association of Recording Merchandisers, and Recording Industry Association of America). We chose to meet with NRPB precisely because its wide representation would allow for a meaningful discussion.

At the advice of Sam Brylawski, chair of the NRPB, we decided not to include the consultants at the NRPB meeting as originally planned. Given the scope of the meeting and the makeup of attendees, Brylawski suggested the consultants' attendance could create an adversarial air. Instead, we presented the issues at the board meeting for discussion among its members. On 21 September 2014, we met at the Library of Congress and acquired promising feedback from NRPB members. They understood the issues, and the chair offered to help our cause. More details will be discussed in the "Actions Taken" section below.

**RECOMMENDATIONS FROM STAKEHOLDERS**

Several recommendations emerged from the discussions and white papers. Since no single recommendation emerged as *the* surefire solution, our consultants advised pursuing a multiprong approach.

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<sup>23</sup>. Danielle Trierweiler was the student assistant at the meeting.

<sup>24</sup>. Public Law 106-474.



### Legislative Reform

Music copyright laws are more complex than copyrights for books. The composer, lyricist, performer, producer, and recording company could all hold a part of the copyright to one single piece of recorded music. Kevin Smith noted that music “ownership is also often so fragmented that even when a licensee is identified, it is very hard for a potential licensor to actually know if the party offering to license rights really is in possession of what they purport to grant.”<sup>25</sup> “Copyright and licensing structure related to recorded music,” Smith continued, “is a mess from top to bottom.”

With this in mind, most consultants agreed that the simplest and most complete solution would be to add exceptions for libraries to the existing copyright law. This would enable music libraries to preserve and provide access to the materials. As several people pointed out, historically, copyright laws have made exceptions in the various provisions for libraries. Among them: §107 (“Limitations on exclusive rights: Fair use”), §108 (“Limitations on exclusive rights: Reproduction by libraries and archives”), §109 (“Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord,” also known as the first-sale doctrine), and §110 (“Limitations on exclusive rights: Exemption of certain performances and displays”), which makes an exemption for playback of audio and video within the context of face-to-face teaching at a nonprofit educational institution.<sup>26</sup>

The exemption and limitations on exclusive rights expressed in many of these sections could be expanded potentially to cover libraries and the collection of online-only music. For example, several participants argued that libraries should be able to ignore licenses that prohibit accessing the music. Similarly, libraries should be given an exemption to “Web archive” online-only music for noncommercial, research purposes. Other rights should include the ability to lawfully fix a music file onto a physical format such as compact discs or a library server. These exceptions should also allow the right to use the music on the premises of the library, like the current use of replacement copies under §108(c), or to stream the music to a single user. And lastly, the library should be able to loan a copy of the music on physical media to an authorized patron. Of course, these exceptions should be limited in some way to prevent any unreasonable risks to the rights owners.<sup>27</sup> An example for limitation to

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25. Kevin L. Smith, “The Problem of Libraries and the Licensing of Born-Digital Music,” white paper written for the IMLS grant project.

26. *Copyright Law of the United States of America*, chapter 1, <http://www.copyright.gov/title17/92chap1.html>.

27. Most of the suggested exceptions are from Peter Hirtle’s white paper, “Preservation of and Access to Online and Licensed Music,” written for this project.

these exceptions may be to issue an embargo on some titles (similar to that of JSTOR) so that the copyright owners will not lose on possible commercial gains, making a minimal impact on the market for the owners. Peter Hirtle pointed out that allowing such exemptions would eliminate the difference between music that is owned by or licensed by a library.

Kevin Smith wrote that the “most plausible solution to the problem . . . would be a provision within the U.S. copyright law that would provide that the exceptions within the statute would survive any attempt in a license or other private contract to undermine them.”<sup>28</sup> In particular, Smith suggested a contract preemption, which is already part of the International Treaty on Limitations and Exceptions. It has been proposed at the World Intellectual Property Organization (WIPO) by some of its members, and is supported by the International Federation of Library Associations (IFLA). The United Kingdom adopted some exceptions and enacted them into law in March 2014. The exceptions concern the educational use of music, including streamed and licensed music.<sup>29</sup> Furthermore, the U.K. law states that acts permitted under copyright law should not be undermined by contracts. According to Smith, It would be advantageous for libraries if the United States also adopted such statutory exceptions in its copyright laws, though chances of this happening are slim; there is no interest among industry representatives in seeing such legislation passed, because the current model works in the entertainment industry’s favor.

Brandon Butler argued that while the concept of such a contract preemption or another sweeping legislative solution appears to be an elegant solution to the issue, getting such legislation passed would be difficult, to say the least. As he notes, “It is important to know that even after the watershed moment of the SOPA blackouts<sup>30</sup> and protests, there is a deep affinity for the content industry among key committee members and committee staff in both houses of Congress and among staff in key agencies.”<sup>31</sup> Although there are congressional members and staffers who are in sympathy with libraries and their users, they are in the minority. There is “a continuing deference” to content providers, “tempered by a grudging respect for the political power of the Internet, and especially

28. Smith, “The Problem of Libraries and the Licensing of Born-Digital Music.”

29. For details of changes in the U.K. copyright laws, see <https://www.gov.uk/government/publications/changes-to-copyright-law>.

30. The technology industry sent a loud message to Congress in a coordinated blackout on Web sites on 18 January 2012 to protest the antipiracy bills, Stop Online Piracy Act (SOPA) and the Protect the IP Act (PIPA). Jenna Worthan, “A Political Coming of Age for the Tech Industry,” *New York Times*, 17 January 2012.

31. Brandon Butler, “Some Conversation Starters Concerning the Problem of Online-Only Music For Libraries,” [5], white paper written for the IMLS grant project.

large Internet companies like Google and Facebook.”<sup>32</sup> In addition to the difficulty of passing library-friendly legislation, Butler warned that there is a danger to advocating for legislative change because, for example, industry representatives could then lobby that §107 be revisited, curtailed, and revised in favor of the industry, not of libraries or their users.

A remaining option would be to make private arrangements with industry representatives. The House Judiciary Committee, the primary legislative body behind copyright policy making, has been trying to establish consensus behind any bill among music industry stakeholders (not including libraries). Any agreement would be tempered, and legislation that gave libraries exemptions would probably be resisted by industry lobbyists.<sup>33</sup>

### Test Case via Fair Use Doctrine and Best Practices

Since legislative reform appears to be an arduous if not impossible route in this climate of congressional coziness with industry lobbyists, Butler and Corynne McSherry both agreed that using the fair use provision to test the legislative waters is the preferred way forward. Butler argued that, “unlike Sections 109 (first sale) and Section 108 (library copying for preservation and distribution), Section 107—the fair use doctrine—is an open and flexible doctrine that may be helpful in this situation even though (or precisely because) it was not foreseen by lawmakers.”<sup>34</sup> McSherry argued that “a substantial portion of the activities at issue here may be lawful fair uses . . . recent fair use cases involving libraries have resulted in favorable outcomes. . . . Judges understand that copyright is supposed to foster the development of the cultural commons, not impede it.”<sup>35</sup> Both McSherry and Butler thought that libraries are simply attempting to fulfill their mission of preserving the cultural heritage, and therefore are sympathetic defendants. Of course, certain conditions must be met to win cases employing the fair use doctrine. Among the first issues questioned by the courts regarding a fair use case is the purpose and character of the use, or whether the use is transformative. If the answer is positive, it often is the determining factor that

32. *Ibid.*

33. A comparable model can be found in the discussions between libraries and the “big six” publishing houses (Hachette, HarperCollins, Macmillan, Penguin, Random House, Simon & Schuster). While the outcome of these talks has been characterized as “mixed” by Robert Wolven, others have struck a harsher tone. On her personal blog, Sarah Houghton, director for the San Rafael Public Library, wrote, “Why in hell are we covering for a bad situation? Who gains from us putting a happy face on the dismal e-book situation in libraries?” Wolven and Houghton both are quoted by Andrew Richard Albanese, “Life with E-Books,” *Publishers Weekly*, 24 August 2012, <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/53703-life-with-e-books.html>.

34. Butler, “Some Conversation Starters,” [2].

35. Corynne McSherry. “Digital Collections: Preservation, Access and Lending,” [1], white paper written for this grant project.

tips the ruling in favor of fair use. Our consultants therefore advised libraries to characterize their activities as transformative when applicable. Butler wrote, “The better job a library does in distinguishing the activities it supports from ordinary consumer enjoyment, the stronger its case will be under this factor.”<sup>36</sup> For example, preservation is a core mission of libraries, and it is an example of transformativeness, as discussed in Association of Research Libraries’ *Code of Best Practices in Fair Use for Academic and Research Libraries*.<sup>37</sup>

While the first factor—the purpose and character of the use—and the question of transformativeness is of key importance in fair use rulings, it is only one of four fair use factors considered. The second factor is the nature of the work used. Music is most likely to be considered a creative work, so it will most likely not be viewed favorably under fair use. In general, however, this factor is not a determinative or decisional one. The third statutory factor is whether the amount of the work used is appropriate for its purpose. If it is viewed through the first factor, the purpose and character of the use, then it could be found in favor of fair use as in the *Sundeman vs. Seajay Society, Inc.* case,<sup>38</sup> where the court held that a scholar’s use of substantial excerpts from an unpublished manuscript in a critical paper was transformative. On the other hand, if this factor is viewed through the fourth factor—effect of the use upon the value or market of the work—the court will likely rule against fair use.<sup>39</sup> The fourth factor addresses the harm it will cause to the commercial market as a result of the library preserving and providing access to the material. When it comes to e-books, recent studies have shown that e-lending in libraries actually leads borrowers to buy more e-books.<sup>40</sup> While no comparable study seems to exist for music recordings and libraries, we can extrapolate from the e-book findings and assume that there would be a similar rise in e-music purchasing among library patrons who streamed or downloaded music from their library. Further buttressing a library’s position on this fourth factor, we could argue that if libraries were able to preserve these materials, the music industry could eventually work with libraries to rerelease the materials if there were sufficient commer-

36. Butler, “Some Conversation Starters,” [4].

37. Coordinated by Association of Research Libraries; Center for Social Media, School of Communications, American University; and Program on Information Justice and Intellectual Property, Washington College of Law, American University, <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

38. For more details, see Yakima Valley Community College, Library and Media Services, “Key Court Case Summaries on Fair Use,” [http://www.yvcclibrary.us/Yakima/COPYRIGHT/key\\_court\\_case\\_summaries.htm](http://www.yvcclibrary.us/Yakima/COPYRIGHT/key_court_case_summaries.htm).

39. Butler, “Some Conversation Starters,” [4].

40. Adam Sockel, “OverDrive Response to Pilot Study on Remote E-Lending in UK,” *OverDrive Blogs*, <http://blogs.overdrive.com/front-page-library-news/2015/06/08/overdrive-response-to-pilot-study-on-remote-e-lending-in-uk/>.

cial demand to do so. Having libraries preserve, store, and when needed provide access to this material for rerelease, both saves the music industry from spending money on preservation costs, and enables them to tap into reemerging markets if so desired.

Using fair use as a defense works only when one has not, of course, agreed to surrender fair use rights. If a library or individual signs a EULA restricting the use, this contract will most likely trump an exemption (as noted above) based on fair use. This is expressed in section 108(f): “Nothing in this section . . . in any way affects . . . any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.” Kevin Smith suggested that “perhaps a provision would need to be written that said that for libraries and archives, defined as they currently are in Section 108(1) of Title 17, sections 107, 108, and 109 of that title, apply to all lawfully-acquired materials regardless of contractual limitations imposed by the seller or other intermediary.”<sup>41</sup>

Although a fair use test case was suggested many times during our meetings, not a single librarian volunteered their institution. This is of course not surprising as we are, generally speaking, cautious. Most librarians noted that their institutions’ legal counsels advise libraries not to push the limits of fair use, let alone trigger a national test case. Peter Hirtle suggested, however, that “actions by music libraries that are in seeming violation of the license terms to which they have agreed may never be the object of legal action.”<sup>42</sup> He cited two examples: a library subscribing to Netflix’s streaming service and using the account to fulfill patron requests (a violation of the license terms), and libraries acquiring iPads and Kindles with licensed materials, and loaning the devices to patrons. None of these actions triggered any lawsuits. Still, it is unlikely such a test case will be filed soon. Clifford Lynch offered that the Recording Industry Association of America (RIAA), the organization that represents the interest of recording companies and artists, would probably not litigate cases where there is no financial gain for the record companies. One participant observed that if copyright law at the federal level cannot be changed, perhaps it should be approached at the state level.<sup>43</sup>

Thus, several participants advocated instead developing a set of best practices for fair use. This set of practices would guide music librarians to push the limit of fair use. All agreed that if such a set of best practices

41. Smith, “The Problem of Libraries and the Licensing,” [2].

42. Peter Hirtle, “Preservation of and Access to Online and Licensed Music,” 7, white paper written for the IMLS grant project.

43. National Recording Preservation Board, Library of Congress, *Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis* (2009), <http://www.clir.org/pubs/reports/pub146>.

is written, it should be posted on the Music Library Association and the Association for Recorded Sound Collections Web sites so that it is widely available to librarians and archivists working with sound recordings.

### **Develop New End-User License Agreements with Willing Partners**

Since the chances of meaningful legislative reform or a test case are slim at this point, developing library-friendly end-users license agreements with willing partners may offer the best way forward. As contracts, EULAs trump the copyright law in terms of fair use, which is our strongest defense; and because current EULAs are very restrictive, libraries may not acquire, lend, or preserve online-only music. Thus, Eli Neiburger argued that “libraries must embrace licensing to have a hope of obtaining, storing, distributing and preserving music.” Libraries, he continued, should “license on their terms that serves the needs of libraries, and negotiate payment for those terms.”<sup>44</sup>

In particular, Neiburger advocated for direct licensing with independent musicians and labels. He contended, and most agreed, that approaching large corporations like Sony or Universal is futile because they will view such revised terms as eroding their market share and encouraging piracy. Alternatively, working directly with smaller, independent labels or the musicians themselves could be fruitful. Neiburger suggested that a direct library license should set a term, cover a specific set of works, authorize unlimited, unencrypted distribution by the library to its authenticated users, be renewable when the license expires, optionally include advanced rights for users, such as explicit use permissions, and optionally allow conversion to a permanent term. He observed that the majority of music recordings have a very short shelf life in terms of generating revenue. The best time to negotiate with the rights owner is soon after the peak sales period; this offers the rights holder a steady, longer-term revenue stream, which may be attractive. Neiburger argued that libraries might want to push for permanent agreements when the license expires, perhaps for an additional expense or just by default with the license expiration. Based on his own experiences, he argued that since businesses are so focused on short-term profits, such “in perpetuity” terms are a relatively easy sell. In the technical realm, he insisted that libraries acquire unencrypted files since it will simplify distribution problems associated with media, and will be hassle-free for users.

Neiburger’s experiences come from his negotiations with Magnatune and others on behalf of the Ann Arbor District Library (AADL). Magna-

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44. Eli Neiburger, “Direct Licensing: A Way Forward,” [1], white paper written for the IMLS grant project.

tune is a music download business with particularly generous licenses that encourage people to use and share their music. Independent labels and lesser-known artists may also be more amenable to license terms that allow libraries to lend and preserve their music. Critics may point out that this is only a small portion of the actual music issued, and may not necessarily be what we want to archive. In taking a long view, however, persuading smaller labels to change their EULAs in support of libraries' core mission may lead to more labels or distributors jumping on the bandwagon. Perhaps, eventually, the large corporations may come along when they see that more money could be made from music that has passed its peak, and that, by and large, the economic impact is positive rather than negative.<sup>45</sup>

Although most participants agree that EULA reform should be one of the most hopeful ways out for libraries to solve the problem at hand, they had differing ideas on how to achieve this. Smith suggested the adoption of "a compulsory license into the law that would allow library collection and services related to digital music regardless of the condition of sale."<sup>46</sup> Such a license would be inflexible, however, and possibly tied to a particular technology; it could not be adapted to new forms of music distribution, and therefore would be obsolete very soon. McSherry suggested that music librarians craft a complementary EULA to be incorporated into existing licenses such as those of Amazon and iTunes. She advised that the language should be simple, and gave the following example: "Notwithstanding the foregoing, nothing in this agreement shall prevent a nonprofit educational institution or archive from reproducing the content for archival or other noncommercial purposes."<sup>47</sup> She also suggested that one could use samples from the Creative Commons licenses as models.<sup>48</sup>

### PRESERVATION

Much of the discussion in our three meetings focused on the long-term preservation of digitally licensed music. Electronic information in other genres, such as electronic journals, has already established third-party collaborative projects in Portico and LOCKSS. Portico,<sup>49</sup> a project of the nonprofit organization ITHAKA, works with publishers to obtain copies of their journals at the time of publication. The articles are converted

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45. In addition to AADL, several other public libraries are leading the way with direct licensing of music files, including Iowa City Public Library and Santa Cruz Public Library.

46. Smith, "The Problem of Libraries and the Licensing," [3].

47. McSherry, "Digital Collections," [4].

48. Creative Commons, "About the Licenses," <http://creativecommons.org/licenses/>.

49. For more information, see Portico, "Our Organization," <http://www.portico.org/digital-preservation/about-us/our-organization>.

into a nonproprietary standard format before being placed in a “dark archive.” Dark archives are generally inaccessible unless triggered by certain events, such as when the publisher can no longer provide access to the journal. LOCKSS,<sup>50</sup> a program based at Stanford University Libraries, provides libraries and publishers with open-source tools to preserve and provide persistent access to scholarly digital material. CLOCKSS (Controlled LOCKSS), a companion to LOCKSS, is another collaborative project between publishers and academic libraries to preserve electronic publications in dark archives, and is geographically distributed. Both LOCKSS and CLOCKSS also employ “trigger events” to allow access to their dark archives’ digital contents. All these projects deal with text published primarily by academic presses and scholarly journals.

As attractive as these models are, there are significant differences between digital music and electronic journals. Libraries have long required licensees to guarantee perpetual access to the journal content. With streaming licenses, this is not yet the practice, partly because the content providers are not necessarily the rights owners of the music.<sup>51</sup> For online-only music, libraries are prevented from purchasing the items altogether, so simply acquiring the music would require one to ignore the accompanying EULA, unless permission were given by the distributor to purchase the items, and to include “a preservation clause in the license that can flex to survive the end of the rightholding [*sic*] entity, or default to a permanent license if the rightholder [*sic*] doesn’t show back up to renegotiate.”<sup>52</sup>

Both Portico and LOCKSS work directly with the publishers of the content, who also act as their own digital distributors. But most music streaming services, such as iTunes, Pandora, and Alexander Street Press, do not exclusively own the rights to the music they stream. Therefore, it is not possible to negotiate solely with them about obtaining rights to preserve the music for the long term. In the case of Naxos, which is the rights holder of most of its streamed music, some negotiations had taken place with individual libraries and library consortia on long-term preservation projects.<sup>53</sup> These and other successful efforts can act as a dark archive, and be made available at trigger events.

Whereas the contents preserved by Portico and LOCKSS are mostly academic journal articles, the market for such journals is on the whole academic libraries,<sup>54</sup> and therefore small compared to the recordings market. Moreover, because there is little incentive for record companies to allow libraries to acquire and lend files, subscription streaming is their

50. LOCKSS: Lots of Copies Keep Stuff Safe, <http://www.lockss.org/>.

51. Naxos is an exception; it does hold rights to a large portion of what it streams from its databases.

52. Neiburger, “Direct Licensing,” [3].

53. The OhioLINK Music Center is one example (see <http://music.ohiolink.edu>).

54. Scholars are likely to use the library’s copies and not purchase their own.



answer for a continuous revenue stream. Even classical music, which has a small market share compared to general music sales, has a much larger following than the narrow focus of academic journal articles.

In the music area, other than the AADL project, there are others that are beginning to work with rights holders to create archives. The Composers Contemporary Web Archive is one such project. It is based at Columbia University, and involves the Borrow Direct Music Library Group.<sup>55</sup> The aim of this project is to preserve the Web sites of contemporary composers in a secure digital archive to guarantee perpetual access. These Web sites could be ephemeral, and important information, including the music, could be lost if not preserved. The group has vowed that the Web sites will be available for free indefinitely. This could serve as a model for working with composers directly to preserve their music and associated information.

The AADL project and the Web archiving initiative demonstrate how it is easier to approach and collaborate with smaller labels and local artists. Often, smaller and independent labels lack the wherewithal to permanently archive their materials. Moreover, if independent labels and small distributors such as Magnatune and others go out of business, individual composers could lose their artistic legacy. These serve as prime examples for collaborating with nonprofit institutions such as university and public libraries to preserve their music for cultural posterity.

Another nonprofit operation, the Internet Archive (IA), is archiving music as well as other digital resources such as books and movies. Of note is the collaboration between the IA and the ARChive of Contemporary Music (in New York) to rip compact discs and distribute the files online.<sup>56</sup> IA is also beginning to collaborate with different institutions, such as Oberlin College in digitizing and preserving its jazz LP recordings, and Afropop Worldwide's DATs.<sup>57</sup> This effort is called Building Libraries Together, and has the goal of building a shared preservation repository of sound recordings, and compiling case studies of various digitization efforts. A secondary goal is to eliminate duplicative audio preservation efforts among institutions. The IA also accepts recordings from individuals, with the same crowdsourcing principle as Wikipedia. Since recordings from individuals are unlikely to use the audio archiving standards recommended by *The Library of Congress National Recordings Preservation Plan*, relying on these recordings as the only archive copy is not a wise

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55. Most are Ivy League libraries (Brown, Columbia, Cornell, Dartmouth, Harvard, Pennsylvania, Princeton, and Yale); other, non-Ivy League libraries in the project are Johns Hopkins, MIT, and Chicago.

56. "Archive of Contemporary Music and the Internet Archive Team Up to Create a Music Library," 28 October 2014, <https://blog.archive.org/2014/10/28/archive-of-contemporary-music/>.

57. For more details, see Jeremy Smith's article elsewhere in this issue of *Notes*.

decision. Universities and other institutions are much more likely to follow this set of professional standards in their audio archiving work. One way to ameliorate this problem is for the Music Library Association or the Association for Recorded Sound Collections (ARSC) to set up a registry of archived recordings that meet this standard. This should also include the items in the Library of Congress's National Recording Registry.

Another seemingly simple preservation solution is to require copyright deposits of online-only music at the Library of Congress as has been done for fixed-format recorded sound. Requiring deposit of a copy of the sound file as a requirement for securing copyright for the music would ensure that almost all music issued in the United States is preserved at the Library of Congress. At this time, however, the Copyright Office does not have the resources to enforce the deposits, nor does the Library of Congress maintain an online deposit system for its Recorded Sound Section, Motion Picture, Broadcasting and Recorded Sound Division.<sup>58</sup> In light of these drawbacks, we recommend that the Copyright Office *require* deposit, a recommendation that echoes one by the chief of Motion Pictures, Broadcasting and Recorded Sound Division of the Library of Congress.<sup>59</sup> Such a requirement would need to be championed within the Copyright Office, and, as of this writing, there are no plans for such a process.

#### PUBLIC RELATIONS AND PUBLIC PRESSURE

At our Las Vegas meeting, many pointed out that librarians are not good at marketing themselves. They urged music librarians to “tell their stories,” to educate the public and to market ourselves. The public may not know that the core mission of libraries is to preserve and provide enduring access to our collective intellectual and cultural heritage. With the lingering publicity of the Napster lawsuits,<sup>60</sup> and RIAA suits against students who were illegally downloading music, it is essential for academic librarians to separate themselves from such controversial activities. It is of paramount importance to stress that libraries are law-abiding bodies and would like to legally obtain (purchase) and provide digital music to their users. Another point to emphasize is that libraries serve students

58. Gene DeAnna, head of Library of Congress's Recorded Sound Section, Motion Picture, Broadcasting and Recorded Sound Division, refers to these limitations in a recent interview with *Fastcompany.com*. See Tina Amirtha, “The Trouble with Digitizing History,” *Fastcompany*, <http://www.fastcompany.com/3048283/the-trouble-with-digitizing-history/>. Bertrum Lyons's comment to this article notes that other divisions within the library do have born-digital deposit systems in place.

59. From Gregory Lukow's comment on the Copyright Office's music licensing inquiry, [http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014\\_3/Library\\_of\\_Congress\\_MLS\\_2014.pdf](http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Library_of_Congress_MLS_2014.pdf).

60. In 2000, the band Metallica sued for copyright infringement against the peer-to-peer file-sharing company, Napster. This suit was followed by several others that Napster also lost.

of all levels, from kindergarten to graduate school. If children do not have access and exposure to broad range of music, it is unlikely that future music consumers will become musicians. In addition, it would be essential to emphasize that the use of music in academic libraries is largely for educational purposes and not for mere entertainment.

Another service that libraries provide, but is often taken for granted, is the excellent metadata that accompany the recorded sound files. Metadata enables the user to find the music in different ways. When provided by commercial content providers, in general, metadata is lacking in detail, making it difficult to retrieve materials. Because creating detailed metadata is expensive, many content providers do minimal cataloging, often leaving out many of the performers, or providing insufficient track listings.

Such efforts would be enhanced if our users pressured the companies to change. Music industry executives might be more likely to agree to a reasonable EULA if they were under public pressure to do so. Music librarians may not be able to mount such a campaign themselves, but partnering—as Corryne McSherry suggested—“with a broad coalition of groups, from digital right groups, such as the Electronic Frontier Foundation, to new author groups such as the Authors Alliance, to musicians representatives such as the Future of Music Coalition . . . should be particularly valuable; it is likely that many are not aware of this problem.”<sup>61</sup> Kevin Smith suggested that we should not just deliver this kind of message to the musicians, but that they should be delivered “hard” so that they can see the impact, and understand that their music will disappear if not preserved by a library.

One of the problems in mounting a public campaign is the lethargic approach toward this issue. The public, by and large, *is* getting what it wants, either through purchasing downloads, subscribing to the ever-popular streaming services, or receiving free downloads from the public library’s subscriptions to content providers. The enormous fees that the libraries must pay for such subscriptions are hidden from the view of users, and they do not anticipate the possibility that it could all disappear one day. An informal survey of music students at the University of Washington between summer and fall of 2014 showed that access is much more important to them than ownership. They were optimistic that online access would not go away, one way or another.<sup>62</sup>

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61. McSherry, “Digital Collections,” [4].

62. An alternative perspective may exist among some consumers. For example, the kerfuffle generated around the fake story that Bruce Willis was suing Apple because he wanted his heirs to own his music collection after his death. While the story was a hoax, the resulting buzz around the issue was real. See “Who Owns Your Downloaded Music after You Die?” *CNET Magazine*, <http://www.cnet.com/news/who-owns-your-downloaded-music-after-you-die/>.

### ACTIONS TAKEN

While grant participants rarely shared identical perspectives on how to ameliorate the online-only music issue, they wholeheartedly did agree on one point: no single solution will work. Instead they argued that proverbially “bucket full” approaches would be needed to counter the issue and its pernicious impact on the essential functions of music libraries and archives. From attempting congressional-level legislative reform and just “doing it” under the guise of fair use, to creating dark archives of recordings and licensing only from library-friendly distributors, participants argued that we initiate a swath of approaches. We are beginning to follow their advice. As noted below, some approaches have fared better than others, and of those that we have pursued, nearly all are in the early stages of development.

#### **Communication Leaning Toward Advocacy**

We have started to publicize the issue to library communities. While we have presented at several national and international conferences about the topic,<sup>63</sup> we have been “preaching to the choir.” Indeed, we have communicated the issue to students and scholars at these conferences, and in more informal settings as well, but our efforts to communicate with a larger base of users has been limited to creating a Web site about the topic. It will take more than just two people to do the job. The Music Library Association could garner much help from music librarians all over the country to help get the message out, and not only regarding the issues in this project, but also to educate the public about the work of a library. In turn, this activism can garner support from the public, and perhaps a grassroots effort to pressure executives of record companies to change the EULAs or legislators to change the laws. Our professional associations can play an important part in this effort.

#### **National Recording Preservation Board**

Sam Brylawski and NRPB have been significant supporters of our efforts. They generously gave time in their busy one-day schedule to present the issue to meeting attendees. The reaction by NRPB members was, by and large, sympathetic. With the help of Sam Brylawski and Brenda Nelson-Strauss, these positive sentiments coalesced into a project for the NRPB Collections Subcommittee, a group that will explore and

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63. A poster session at the International Association of Music Libraries, Archives, and Documentation Centres meeting in Antwerp, Belgium (July 2014); a panel discussion at the American Musicological Society meeting in Milwaukee, Wisconsin (November 2014); a panel at the Music Library Association annual meeting in Denver (February 2015); the Pacific Northwest Chapter meeting of the Music Library Association in Eugene, Oregon (May 2015); and CNI (February 2015), among others.

advocate for solutions to this and other challenges related to the twenty-first-century sound recording collections. Even the RIAA representative on the NRPB joined the subcommittee to work on finding a solution.

### **Legislative Reform**

As noted above, some consultants believed that, against the odds and despite the risks, we should push for some sort of change to the Copyright Act. Several NRPB members also felt this was a prudent course of action, and recommended that we write to the register of copyrights, Maria Pallante, and in an effort to remedy the issue request that she convene a meeting of librarians, scholars, and music industry representatives to discuss potential legislative change. We explored this proposal, and even drafted a letter to the register. But after revisiting what we had learned about the realities of copyright politics in Washington, including at the Copyright Office, we decided that such an approach would not be fruitful. For the reasons discussed above—the lack of rights holder interest in reform, the powerful influence of rights holder groups in Washington, and the risk that any change in the law could just as easily make things worse as make them better—we abandoned this idea, for now, in favor of one that focused on preservation.<sup>64</sup>

### **Preservation First, Access Later**

Based on the input of the consultants, our interests in music preservation, and a particularly substantive conversation with LOCKSS' executive director Victoria Reich, we decided to focus our efforts on creating a dark archive of online-only music. While the idea is a solid one, and underscores our key commitment to providing enduring access to all music materials, we struggled with identifying an institution willing and capable of supporting such an archive. After describing the issue to representatives from the Internet Archive, we seem to have found our partner. While the Internet Archive is focused on providing unregulated access to its hosted content, IA has offered to host online-only music files in a dark archive, so long as the metadata for the files are freely available, and that the files themselves will be made accessible (following the LOCKSS model) when they are no longer commercially distributed. This is a preliminary effort that either MLA or ARSC could spearhead with a registry of items digitized at the recommended preservation standard for

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64. University of Colorado librarian Eric Harbeson has been, on his own time as a private citizen, also making efforts to change the legislative climate in favor of libraries. He has met with his U.S. congressman about the topic, and has even gone so far as to draft model legislation. As of this writing, his efforts have not proceeded beyond that, but we applaud his efforts, and look forward to supporting his approach in any way we can.

sound recordings, regardless of original format. Only when nonprofit institutions are allowed to legally own online-only music will this path work.

### MLA Statement

We worked with the Music Library Association's Legislation Committee to author a set of guidelines for librarians on the issue.<sup>65</sup> The resulting "Statement on Online License-Driven Music Sound Recordings" opens with a description of the issue, and continues by articulating a set of desired outcomes for libraries: acquire the recordings of works at a reasonable price, store and preserve these works locally, and serve these works to their patrons. The statement goes on to recommend that MLA actively lead efforts to successfully address the problem:

- Spearhead efforts to craft model legislation in line with, for example, the "You Own Devices Act" (YODA, 113th Congress, H.R. 5586) written by Representative Blake Farenthold (R-TX) in September of 2014.<sup>66</sup>
- Facilitate the creation of a LOCKSS-style framework where libraries may begin storing known examples of EULA-only works in dark archives, to be made available if and when the legal landscape favors it.
- Compile, maintain, and oversee the ongoing growth of a discography of known examples of EULA-only works.
- Raise awareness of the issue while describing how it impacts our collective user base.

### CONCLUSION

The specter of individually licensed and online-only access looms over the collection of music in the twenty-first century. If our music library community takes a stand and enacts the best practices our professional organization recommends, we can confront this issue together. If we fail to respond, the breadth and depth of materials available to our users will shrink. Library collections will become increasingly irrelevant, eventually becoming little more than anachronistic curiosities. At the same time, the power of for-profit corporate entitlements will grow, perhaps to the point of having editorial oversight of our historical records, and controlling access to what we watch, read, and listen. Distortedly dystopic? Overly Orwellian? Perhaps, but when the stakes are so great, there is little excuse for inaction.

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65. "The Music Library Association's Statement on Online License-Driven Music Sound Recordings" was authored by Kathleen DeLaurenti, Eric Harbeson, Sean Luyk, Rebecca O'Donoghue, Pamela Pagels, Nazareth Pantaloni III, Tammy Ravas, and Jennifer Lee Vaughn

66. "You Own Devices Act," 113th Cong., H.R. 5586 (2014), <https://www.congress.gov/bill/113th-congress/house-bill/5586>.

**ABSTRACT**

Today's music industry increasingly favors online-only, direct-to-consumer distribution. No longer can librarians expect to collect recordings on tangible media where first-sale doctrine applies. Instead, at an ever-increasing rate, librarians are discovering that music recordings are available only via such online distribution sites as iTunes or Amazon .com. These distributors require individual purchasers to agree to restrictive end-user license agreements (EULAs) that explicitly forbid institutional ownership and such core library functions as lending. What does this mean for the future of music libraries? The coauthors present an overview of an Institute of Museum and Library Services (IMLS) funded project tasked with investigating the issue, and recommend a series of next steps designed to build our professional capacity toward addressing the challenge.



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