

**Music Library Association
Digital Audio Collections Task Force 2011
Report to the Board of Directors**

Daniel Boomhower (chair), Deborah Campana, Eric Harbeson, Lisa Lazar, Edwin Quist

I. History/Background

Libraries face grave problems in continuing to shape and preserve collections of digital content, since the ability to acquire such content is increasingly hampered both by license agreements with intermediary content aggregators and by restrictive language in end-user license agreements. The Digital Audio Collections Task Force's dual mission has been to diagnose and to seek remedies to this protean problem. This document outlines some of the problems and identifies possible actions the Music Library Association might take in addressing these problems.

The "License Lockdown"

Historically, libraries have relied upon an ownership model with respect to their collections, wherein they acquired commercial materials in significant numbers and formats. Once acquired, libraries were free under the law and the first sale doctrine to preserve these materials and to make them available to their users. With the advent of online sales of sound recordings, rights holders and distributors have increasingly been distributing content by leasing, rather than selling the content. Using this model of distribution, vendors attach binding end-user license agreements (EULAs) that limit the use of content by prohibiting actions, such as lending, which are existentially critical to libraries. In addition, EULAs frequently allow only end users to enter into the agreements, essentially forbidding libraries (which are not end users) from even acquiring the materials in the first place. For example, the latest shift to online distribution of sound recording formats, the typical EULAs for these recordings, many of which are available only in the form of digital downloads, prevents libraries from acquiring the content and making it available to their patrons. Effectively libraries cannot acquire digital audio content for purposes of access and preservation.¹ While this is primarily a problem for digital audio now, it is likely to become a problem for all formats in the near future.

The Problems:

- Ongoing acquisition and ownership of sound recording content is at risk with the trend toward subscriptions/licensing:

¹This has been described at greater length in D. J. Hoek "The Download Dilemma," *American Libraries* 40, no. 8/9 (August 2009), 54-57 and Sam Brylawski and Rob Bamberger, "The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age," *CLIR Publication* 148 (Washington, DC: Council on Library and Information Resources; Library of Congress, 2010).

- library expenditures on licensed sound recording content through subscription packages are increasing
- licensed content is not owned by libraries
- as is the case with journals, subscriptions are typically for “bundled” sets that are identical for every subscribing library; curation and selection for local needs or cooperative collection development are eliminated.
- libraries are limited to materials that vendors offer; large amounts of material is simply not available for lease or purchase.²
- Libraries are forced to choose between retaining and continuing to acquire redundant physical media, or to continue to renew licenses in perpetuity (for fees which are at the whim of the licensor, who often have no price competition due to their exclusive rights to the material).
- Libraries are unable to share or build collections, as in the past, or to commit to preserving content.
- Preservation and continuing access are in the hands of vendors driven by profit, not library ethics.³
- Digital materials not available in hard copy or via library databases are simply not available to libraries
 - Many materials are available only as download or stream, solely for purchase by individual; number is only increasing.⁴
 - Libraries are unable to serve patrons or fulfill core mission with either content or format.
- Library patrons increasingly expect access to content through an online interfaces.
- Not merely a problem for sound recording media: all digital formats (including books, sheet music, audiovisual works) are, or will be affected.

II. Recommendations

We believe there is no single answer to the problem. As such, we recommend a coordinated, multi-faceted approach in concert with other organizations and individuals. In this MLA should

² For example, Alexander Street Press has acquired exclusive online distribution rights to the entire EMI catalogue, but makes only a fraction of it available.

³ The comments of the Recording Industry Association of America on the question of federalizing pre-1972 sound recordings effectively say as much: “One common misunderstanding is that all commercial recordings...can and should be made available for nominal costs by rightsholders. In fact, the costs, per recording, can be quite prohibitive....[T]aking a catalog of vintage recordings and readying them for digital distribution can cost [sic] millions of dollars with little likelihood of any commercial return.” [RIAA comments, p.8. Available online: <http://www.copyright.gov/docs/sound/comments/initial/20110131-RIAA-and-A2IM.pdf>]

⁴ D. J. Hoek has maintained a list of commercial recordings that are not available in a physical format and have restrictive end-user licenses preventing institutional purchase. Notable examples include the Grammy-winning performance of Berlioz’ *Symphonie Fantastique* by Gustavo Dudamel and the Los Angeles Philharmonic, and the Grammy- and Oscar-winning sound track to the movie *Up*.

use its position as a national professional organization to guide further study of the issue, present a clearinghouse of current developments, and educate its membership on ways to adapt to anticipated changes in the music library landscape.

To facilitate action by MLA, the task force recommends that the Association leadership prioritize and act on the approaches described below through existing committees or the creation of new, focused task forces. Expanding the scope of MLA's efforts in this area would have the benefit of: 1) drawing the Association's large, knowledgeable, and diverse membership, 2) utilizing existing communication channels, and committee structures that can support the task as well as generate additional ideas and possible solutions from crowd-sourcing, 3) creating a better educated membership which would be more likely to advocate effectively for itself, 4) generating a more accurate reading of the problem from a larger pool of people and utilization of more people to research and develop specific angles, and 5) drawing on existing connections to other organizations.

Possible approaches include (in no particular order):

1. Instigate development of a JSTOR model: nonprofit, subscription-based archival repository

Pro:

- Streaming/download access
- Trusted third party preservation

Con:

- Bureaucratic overhead
- Would probably require Ithaka's leadership
- Would not cover all music, only negotiated content
- Subscription model, though more palatable

Possible approaches:

- Create task force to explore options and viability, possibly approach ITHAKA, create a working plan, and advise on specific actions

2. Instigate establishment of a Portico or CLOCKSS-like deep archive

Pro:

- Long-term preservation

Con:

- Lack of access

Example:

- Stanford purchase of Naxos sound files as a sort of deep archive while still actually subscribing to the Naxos product.

Possible approaches:

- Create task force to explore options and viability, possibly approach ITHAKA, create a working plan, and advise on specific actions
- Direct negotiation by MLA to develop model licenses:

- Negotiate directly with vendors to develop mutually beneficial licensing;
- Negotiate directly with artists (esp. big players, like the L.A. Philharmonic) to convince them of the negative impact limiting licenses have on them.

3. Encourage individual institutions to seek solutions independently

Pro:

- Least amount of bureaucratic overhead
- Could allow for future CLOCHSS-like archive

Con:

- Least secure preservation
- Access limited to successful licensing institutions
- May put libraries in competition with each other.
- Power of collective action lost

Examples:

- *OhioLINK Music Center Consortial Licensing*: Digital audio content was sold to the library consortium for local loading under a perpetual license for research and educational uses through streaming access. OhioLINK entered into agreement with Naxos of America, Inc. for over 100,000 tracks and with New World Records, Inc. for a trial batch of approximately 500 tracks on behalf of its entire consortium membership. OhioLINK achieved this by: 1) assuring user-authenticated access to the content, 2) limiting access to streamed content, 3) establishing licensing agreements with the three major performing rights societies (ASCAP, BMI, and SESAC), and 4) investing a sum in the low six figures in pooled funding for the content acquisition. OhioLINK may continue pursuing similar opportunities, but the finances capabilities of its members and of the consortium itself limit such activities. Additional content owners had been approached with equally substantial offers, but as it stands, OhioLINK's success remains extremely limited.
- LOC's Jukebox model: negotiations directly with SONY/BMG for pre-1923 recordings, which have been made freely available to the public in a streaming format.

Possible action:

- Express willingness to support related grant proposals
- Develop model licensing agreements

4. Pursue association-wide legal (including legislative and judicial) efforts:

Pro:

- Least disruptive model, and the most equitable: work to make the law fit what libraries do, rather than the other way around. Libraries work flow is minimally changed. All libraries are able to benefit, rather than a few select systems.
- Allow MLA to ally ourselves with other organizations: obvious allies include ALA, ARL, ACRL, SAM, ARSC, SLA and AALL. It would be a benefit to strike alliances

with non-library organizations, too. For example, open access advocates in the software world (esp. the GNU foundation and the EFF) might be favorable. A broad coalition working in concert might be very effective.

Con:

- Requires significant commitment by MLA in time and (possibly) money.

Possible actions:

- With leadership and consultation by the Legislation Committee, prioritize and pursue following actions:
 - Craft a test case in concert with the advice of specialized counsel
 - The test case could follow several arguments. Among the approaches we could argue are that libraries have an inherent fair use claim when making preservation copies of materials, we could argue that the licenses are unenforceable, or they are not even valid licenses in the first place. The best chance probably is in our fair use argument.
 - File Amicus Curiae briefs in cases which test the first sale doctrine (such as *Vernor v. Autodesk*) in federal court.
 - Seek federal legislation to bring non-negotiable licenses under Title 17.
 - Seek an amendment to 17 USC 108(b) and (c) to allow libraries to make preservation copies of works under non-negotiable licenses, and to make them available on site.
 - Seek amendments to the Uniform Commercial Code (which shapes contract laws in all 50 states), which prevent certain contractual provisions from being enforced against libraries in specific circumstances. Work with the recording industry (RIAA) and vendors (iTunes, Amazon, et al.) to craft mutually agreeable legislation.
 - Take every opportunity in federal rule-making to argue for broad applicability of fair use and supporting laws. Raise the download problem with regulators, especially the Register of Copyrights.
 - Plead in the Court of Public Opinion. Increase awareness of the problem in mainstream media: letters to the editor, articles in diverse journals, interviews, etc.