

Preservation of and Access to Online and Licensed Music

Peter B. Hirtle
Research Fellow
Berkman Center for Internet & Society
Harvard University

Senior Policy Advisor
Cornell University Library

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Distribution methods for music are changing, and these changes are having a profound effect on the practice and function of music libraries. More and more music is only available as digital downloads rather than on physical media. This music is licensed rather than sold. In many cases the licenses from the sound recording companies and/or the distributors of the music preclude even the possibility of libraries acquiring the recordings. Even if a library can license a recording, the terms in the end user license agreement (EULA) may sharply restrict what the library can do with that recording. For example, the exceptions and limitations found in current copyright law that allow libraries to loan copies of may be prohibited in a EULA.

The issue is particularly acute with preservation. Historically, the music industry has had a poor track record when it comes to maintaining copies of its older recordings. Master tapes of recording sessions were often recycled or sent to landfills. Recording companies that wish to secure copies of older recordings that they own have therefore had to turn to libraries and collectors to secure copies. A similar situation exists with book and especially journal publishers; many have had to turn to libraries to get copies of the things they published in order to prepare new digital editions.

Libraries have been able to provide music and print publishers with copies of older works because they could maintain the copies that they have purchased. When music is only available as a digital download and the use of that music is governed by a EULA, the possibility of loss becomes much greater. Many of the current music producers and

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distribution methods are likely to prove to be ephemeral. If libraries do not have copies of the music, it could be lost to future generations. This is one reason why the recent *National Preservation Recording Plan* from the Library of Congress placed great emphasis on the risk posed by downloadable licensed music.

A further preservation risk is associated with music that “lives in the cloud” and is only licensed by music libraries. That music can be altered or even removed by the streaming service providing the music. We know that some music from the first part of the twentieth century is now considered to be racist or at least embarrassing. Nevertheless, it provides important insights into the cultural ethos of the period – and may have influenced more mainstream music. Imagine if it had only been available in streamed formats – and the current distributors concluded that it was inappropriate to continue to include such music in its catalog. The historical record would be impoverished.

Any solution to the perplexing problem of fulfilling traditional library roles of access and preservation with downloaded or streamed music is complicated by the complex set of rights associated with recorded music. Each piece of music has multiple rights holders; the consent of all may be required for any solution to the music library problem. There are first of all the owners of rights in the sound recording itself, which can be the recording company and the performers, and often likely both. There may also be a copyright in the underlying musical work. Those rights owners will have reached an agreement with a distribution service such as iTunes or Amazon that would limit what the distribution service may do with the music. The distribution service may have its own terms governing the use of music from the service. And looming over all of these agreements is the possibility of copyright termination. An agreement among the current rights holders may become void if one of those rights holders change in the future. If music is can only be streamed from an authorized service, the possibility that at some point the music will not be available in the future is great.

The challenges that downloaded and streamed music are real. It is far from clear how best to address the issue. I can envision five possibilities. None are perfect, but perhaps combined action on all five fronts could address the problem.

A. Preservation Services: The Library Model

Electronic academic journals have presented research libraries with challenges similar to those faced by music libraries when attempting to acquire and manage licensed music. Over the past decade, journals have become primarily electronic; many do not

even offer a print version. Libraries license access to those journals. Standard practice has been to include in the licenses clauses authorizing “perpetual access” to the content. What happens, though, if the publisher of the journal should go out of business or simply decides to leave the electronic distribution business? Some publishers include provisions that allow libraries in the event of failure to acquire on media copies of electronic publications. But this presumes that the failure is not catastrophic, i.e., the publisher doesn’t just turn off its servers or shutters its doors.

Faced with the possibility of catastrophic failure of a publisher, the library community has responded with support for 3rd party preservation services. PORTICO, which was initially funded by the Andrew W. Mellon Foundation, works with publishers to get copies of their work at the time of publication. The material is converted into a standard format and placed in an inaccessible “dark archives.” If certain trigger events occur such that the publisher can no longer provide access to the material, PORTICO can open its files to past subscribers. LOCKSS and its companion service CLOCKSS also preserve copies of digital journals on its distributed servers. Again, in the event of a trigger event, the LOCKSS system can allow authorized users to access the digital content.

Could one have a PORTICO- or LOCKSS-like solution for streaming music services? For a number of reasons, it would be very hard:

1. Both services are built around the long-standing practice in libraries of requiring that licenses guarantee perpetual access to licensed content. It is my impression that this is not yet the practice with music streaming services (in part because they cannot secure such rights from the rights holders themselves).
2. Both services also work directly with the publishers of the content, who offer their own digital distribution services. PORTICO’s agreements are with publishers such as Elsevier and not with electronic content aggregators such as EBSCO. In music, few record companies are offering their own streaming services, preferring to work with intermediaries such as Pandora. To the extent that there are music publishers such as Naxos or the Metropolitan Opera who are offering licensed versions of their own music, a PORTICO- or LOCKSS-like service might work. But right now, the Naxos example seems to be the exception and not the rule.
3. The content in PORTICO and LOCKSS consists almost exclusively of academic journals and books that are marketed primarily to an academic audience. There has been little take-up among the trade and popular publishers. Nor has there been any substantial involvement with self-published or small-press imprints. The logistics of negotiating with these rights owners is just too complicated. The

market for “academically-oriented” music is much smaller than for journals, and the import of small distributors is much greater. For the major recording companies, why develop systems that encompass the library loan model when patrons could instead purchase a song for 99 cents?

4. Even though PORTICO is billed as a preservation service, its agreement with publishers stipulates that it must respect any publisher demands regarding content. If a publisher says “change this text” or “pull this article,” the service must obey. With print journals, libraries would occasionally get requests from publishers to alter or withdraw content. Usually at most a note about the request was made in the material, but the objectionable material remained on the shelf as evidence of what was initially published. Libraries may no longer be able to offer that cultural guarantee with electronic material.

For all these reasons, a preservation and access solution based on a PORTICO-like model is likely to be only a partial solution to the music download and licensing problem for music libraries.

B. Legislation: the perfect solution?

The simplest and most complete solution would be to implement in copyright law the exceptions and limitations that music libraries need in order to be able to preserve and provide access to downloadable and streamed music. In theory, the idea is not unreasonable. Ever since the founding of the Republic, libraries have held a special place within society. The special role of libraries in providing public access to information has generated specific exceptions for them in copyright law. Libraries, for example, have an explicitly-articulated set of exceptions in Section 108 of the Copyright Act. In addition, Section 109 allows libraries to loan recorded music and software, a right that is denied to anyone else. The policy rationales that argued in favor of exceptions for libraries for purchased music could be extended to downloaded and streamed music as well.

What would such exceptions entail? Several desirable options come readily to mind:

1. Libraries should be able to ignore copyright rights and license terms on downloaded and/or streamed music. If material is only available under a license and is not available for purchase, the library should be able to download one copy of the work. It would then treat that work as if it had been purchased.
2. There should also be an exception for “web archiving” for music found “in the wild” on the Internet.

The library should have some specific rights under the exceptions. They would include:

1. The right to preserve music acquired under the license, on physical media and/or on a server
2. The right to use the content on the premises of the library, as is currently allowed for replacement copies under 17 U.S.C. § 108(c).
3. The right to stream a copy of the work to single authorized users. This would not be a distribution to the public and would not require the payment of performance royalties.
4. Because the exception is intended to grant to libraries similar rights to downloaded and streamed content that they have now with purchased media, the library should be able to loan a copy of the music on physical media to an authorized patron.

It may be necessary to limit these exceptions in ways that ensure that they do not pose unreasonable risks to rights owners. For example, the last two exceptions could be limited to those works that are not otherwise commercially available for downloading and/or streaming.

The pluses associated with a legislative solution are obvious. First, it would make the differences between owned and licensed content disappear. All content would be treated as if it was owned and the same exceptions would apply to all. It is predicated on the belief that rights owners are not opposed to libraries owning content and making limited use of it, but rather merely that they have not negotiated for that option in their contracts that are trying to create a different kind of market. A limited exception such as is proposed above would have limited impact on the market for a rights owner's works. It ensures that contracts and license terms cannot be used to override the public interest protected in copyright law. The recently enacted revision to copyright law in the United Kingdom provides an example of how this can be done. It notes that acts that are permitted under copyright law should not be undermined or waived by contract.

Of course there are difficulties with a legislative approach as well. Primary among them is the existing assumption in US copyright law that maintains that contracts can trump copyright. This has concrete expression in 17 USC § 108(f): "Nothing in this section... (4) 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." Changing the law to allow libraries to treat licensed content as if it was owned, in opposition to any express license terms, will be difficult. At best, copyright

owners may ask for something in return, for example, performance royalties on any streamed use or perhaps even a “public lending right” payment on each loan. Any restrictions on the use of the content that may be necessary to secure passage of legislation may also negatively impact scholarly use of the material. In order to secure passage of a new exception, would the MLA and other interested groups have to give up too much?

The best way to continue to explore the legislative possibility is to draft model legislation that would include all desired exceptions. The best approach would be to stress principles but not specify too many specifics (since we know that delivery mechanisms and business models will change). The *National Preservation Recording Plan* includes recommendations that could serve as the start for the exercise.

C. Preservation Solution: Copyright Deposit

At least as far as preservation is concerned, the Copyright Office could play a much bigger role. Section 407 of the Copyright Act requires copyright owners to deposit two copies of a published work with the Copyright Office. If copies are not forthcoming, the Register of Copyrights has the authority to demand that copies be provided to the office. These copies are for the use of the Library of Congress and could become the national preservation copy. Deposit of copies could also be a requirement for an action in the proposed “small-claims” copyright court, if formal registration is dropped as a requirement prior to suit.

The advantages of relying on copyright deposit as a solution to at least the preservation issue are clear. Most importantly, the Register of Copyright has the legal authority to act now; no new legislation is required. The Library of Congress’s expertise in audio preservation is increasing; most libraries would feel comfortable that once a digital recording reaches the Library of Congress, it will be preserved. Other nations, most notably Norway, are already using legal deposit as the preferred mechanism for preserving their audio heritage.

There are some difficulties with this approach as well. Foremost among them is that the Register of Copyrights in the past has not shown much interest in asserting her authority to demand deposit of copies. The Office’s (and the Library’s) preferred approach has been to work collaboratively with producers to encourage deposit of material, but not require it. Furthermore, it is unlikely that the Register is even aware of what music has been published and thus is not in a good position to request copies. The *National Preservation Recording Plan* proposes a network of libraries that could alert

the Register to the publication of music that needs to be preserved, but such a network would need to be built. In addition, the absence of an electronic deposit system is a real impediment: record companies should be able to deposit copies of published works electronically with the Copyright Office.

More importantly, while the digital audio files may be preserved, the use that could be made of those files is unclear. Musical works are currently excluded from 17 USC § 108(e), and so a researcher who wished to secure for her personal study, scholarship, or research a copy of a work that was not available commercially would not be able to do so using the library and archives exception. One would have to make a fair use argument, and there are differing court opinions as to the extent of fair use for sound recordings. It could be that a researcher would have to travel to Washington, D.C. to work with the material, an absurd situation since it is easier to move a digital file than it is to move a researcher. Furthermore, one might be able to listen, but only listen, to the music on the premises of the Library of Congress. Researchers often want to do more than just listen. Finally, copyright deposit does little to help other music libraries serve their communities.

Copyright deposit is not the perfect answer to the problem that downloaded and licensed music presents for music libraries. Nevertheless, it should be part of the answer.

D. Litigation Test Case

A fourth approach would be to try to secure in the courts confirmation that the principles and practices of music libraries when it comes to downloaded music and streamed music are acceptable.

It is possible 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. For example, some libraries have elected to have a staff person sign up for a Netflix subscription. The library staff member borrows from Netflix DVDs that are requested by patrons; the library then loans those DVDs to the patron who made the request. This is in apparent violation of the Netflix license terms that specify that one can only borrow material for personal use, but no legal actions against libraries that have adopted this approach has been forthcoming. Similarly, some academic libraries have acquired Netflix streaming accounts and used in classes movies that can be streamed, again seemingly in violation of the license terms. Lastly, some libraries have acquired iPads and Kindles with

licensed content on them. They then loan these physical devices, again in violation of the license terms. None of these actions have prompted lawsuits.

The situation with recorded music is slightly more complicated than the library examples above, however. First of all, the harmed party in the examples above, if there is one, is likely to be the distributor of the material - Netflix, Apple, or Amazon. That is because the primary tort would be a violation of the license terms that attach to the device or service. Music libraries might violate the terms of use associated with iTunes or a licensed service (such as Naxos). They are also likely to be making copies of the work, and thus also infringe on the copyrights embodied in the musical recording. They would thus be open to much more onerous copyright infringement suits from the owners of the music copyrights in addition to contractual violations with the service provider.

It is interesting to speculate what defense could be offered if a rights owner or distributor did bring legal action against a music library for violating the agreement that it signed. It would be nice to believe that the exceptions in copyright could preempt contractual terms, but to date the courts have concluded that contract terms trump copyright. I hope one of the lawyers on this project may be able to think of circumstances in which the unavailability of music recordings with acceptable license terms becomes the grounds for a successful defense.

CONCLUSION

As should be apparent, the issue of how to acquire, preserve, and provide access to music that is only available in downloadable and/or streaming format is complicated. A legislative solution would provide the most comprehensive solution, but is also one of the most difficult to implement. A combination of approaches, therefore, is likely to be the approach that will have to be followed.