



FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS

A REPORT OF THE REGISTER OF COPYRIGHTS

DECEMBER 2011

House Appropriations Committee Print, Omnibus Appropriations Act, 2009
(H.R. 1105; Public Law 111-8)
DIVISION G—LEGISLATIVE BRANCH APPROPRIATIONS ACT, 2009, at 1769

Pre-1972 Sound Recordings.--The Register of Copyrights is directed to conduct a study on the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction. The study is to cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage. As part of this effort, the Register of Copyrights should publish notice of the study and provide a period during which interested persons may submit comments. The Register of Copyrights is to submit a report on the results of this study to the Committees on Appropriations of the House and Senate no later than two years after the enactment of this Act. The report should include any recommendations that the Register considers appropriate.

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The Register of Copyrights of the United States of America

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8359

December 28, 2011

Dear Mr. President:

On behalf of the United States Copyright Office, I am pleased to deliver this Report to Congress, as required in the Explanatory Statement to the Omnibus Appropriations Act of 2009. See Public Law No. 111-8, 123 Stat. 524 (2010), at p. 1769.

As directed by Congress, the Report considers the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction, with consideration given to the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. It also examines the means for accomplishing such coverage. Under current law, sound recordings fixed on or after February 15, 1972 are protected under federal copyright law, but recordings fixed before that date are protected by a patchwork of state statutory and common law.

The Report recommends that federal copyright protection should apply to sound recordings fixed before February 15, 1972. It proposes special provisions to address issues such as copyright ownership, term of protection, termination of transfers and copyright registration.

In reaching the recommendations contained in the Report, the Copyright Office engaged with many stakeholders, including representatives of libraries and archives, the recording industry, performers and musicians, the broadcast, cable and satellite industries, and other interested parties.

The Report is also available on the Copyright Office website at <http://www.copyright.gov/docs/sound/>.

Respectfully,

Maria A. Pallante
Register of Copyrights

Enclosure

The Honorable Joseph Biden
President
United States Senate
Washington, DC 20510



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Respectfully,

A handwritten signature in black ink that reads "Maria A. Pallante".

Maria A. Pallante
Register of Copyrights

Enclosure

The Honorable John Boehner
Speaker of the House
of Representatives
Washington, DC 20515

ACKNOWLEDGMENTS

This Report was prepared under the auspices of the Office of General Counsel, U.S. Copyright Office, with support from the Office of Policy and International Affairs. It is the result of the sustained commitment and professional expertise of several people in these departments, especially David Carson, General Counsel, Chris Weston, Attorney-Advisor, and Steve Ruwe, Attorney-Advisor.

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June, Chris and Steve were the principal authors of the Report. David oversaw the entire process and the preparation of the Report, actively assisted by Chris. Associate Register for Policy and International Affairs Michele Woods and Deputy General Counsel Tanya Sandros played invaluable roles in providing substantive and editorial comments on the Report. Senior Counsel for Policy and International Affairs Karyn Temple Claggett also offered editorial input and was an active participant at the roundtable. Attorney-Advisor Erik Bertin reviewed and proofread the final draft. Christopher Reed, Senior Advisor to the Register, provided both policy and production assistance. Many thanks to legal interns Jenni Wisner and Emily Zandy for their research efforts in reviewing and updating the survey of state criminal antipiracy statutes.

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Maria A. Pallante
Register of Copyrights

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ABBREVIATIONS

A2IM	American Association of Independent Music
ALA	American Library Association
ARL	Association of Research Libraries
ARSC	Association of Recorded Sound Collections
CDA	Communications Decency Act
EFF	Electronic Frontier Foundation
FMC	Future of Music Coalition
LOC	Library of Congress
MLA	Music Library Association
NAB	National Association of Broadcasters
NMPA	National Music Publishers Association
NRPB	National Recording Preservation Board
RIAA	Recording Industry Association of America
SAM	Society of American Music
SAA	Society of American Archivists
TRIPS	Trade-Related Aspects of Intellectual Property Rights
URAA	Uruguay Round Agreements Act
WTO	World Trade Organization



Wax cylinder

EXECUTIVE SUMMARY

In the Omnibus Appropriations Act of 2009, Congress instructed the Register of Copyrights (hereinafter “Copyright Office” or “Office”) to conduct a study on the “desirability and means” of extending federal copyright protection to sound recordings fixed before February 15, 1972 (“pre-1972 sound recordings”). Congress directed the Office to discuss several major points in the study, including: (1) the effect that federal protection would have with respect to the preservation of pre-1972 sound recordings; (2) the effect that federal protection would have with respect to providing public access to the recordings; and (3) the impact that federal protection would have on the economic interests of right holders of the recordings. Congress also requested “any recommendations that the Register considers appropriate.”

Although sound recordings were brought within the scope of federal copyright protection beginning in 1972, protection of pre-1972 sound recordings remains governed by a patchwork of state statutory and common law. States are permitted to continue protection for pre-1972 sound recordings until 2067, at which time all state protection will be preempted by federal law and pre-1972 sound recordings will enter the public domain.

The Copyright Office enjoyed significant input from stakeholders in the course of preparing this report. The Office solicited written comments and reply comments on a panoply of questions, including the current state of preservation and public availability, value in the marketplace, the Constitutional implications of federal protection, and the best methods to avoid harming the legitimate interests of right holders. The Office also held a two-day public roundtable for representatives of libraries and archives, the recording industry, performers, broadcasters and satellite radio, and other interested parties.

Among the conclusions of the Copyright Office is that the goals served by federalizing common law copyright for other types of works in 1976 would be served by bringing pre-1972 sound recordings into the federal statutory scheme as well. Indeed, Congress did not articulate grounds for leaving pre-1972 sound recordings outside the federal scheme and there is very little information as to why it did so. The Copyright Office also concludes that federalization would best serve the interest of libraries, archives and others in preserving old sound recordings and in increasing the availability to the public of old sound recordings. While many librarians and archivists are dissatisfied with the scope of the federal statutory privileges enjoyed by libraries and archives, these exceptions and limitations (sections 107 and 108 in particular) provide more certainty and, in general, more opportunity than state laws to preserve and make available sound recordings from many decades past. Moreover, pre-1972 sound recordings would enjoy the benefit of any future statutory amendments to exceptions and limitations in the Copyright Act, including updates to section 108 or orphan works legislation.

The principal objection offered by record companies – that federalizing protection for pre-1972 sound recordings would cast a cloud over existing ownership of rights in those recordings – is not insurmountable. Congress can address it by expressly providing that the ownership of copyright in the sound recording shall vest in the person who owned the rights under state law just prior to the enactment of the federal statute. Other concerns can also be resolved.

Here are the key points and legislative recommendations in the Report:

- The Copyright Office recommends that federal copyright protection should apply to sound recordings fixed before February 15, 1972, with special provisions to address ownership issues, term of protection, and registration. This will improve the certainty and consistency of copyright law, will likely encourage more preservation and access activities, and should not result in any appreciable harm to the economic interests of right holders.
- Federal copyright protection for pre-1972 sound recordings means that all of the rights and limitations of Title 17 of the U.S. Code applicable to post-1972 sound recordings would apply, including section 106(6) (public performance right for digital audio transmissions), section 107 (fair use), section 108 (certain reproduction and distribution by libraries and archives), section 110 (exemption for certain performances and displays), section 111 (statutory license for cable retransmissions of primary transmissions), section 112 (ephemeral recordings by broadcasters and transmitting organizations), section 114 (statutory license for certain transmissions and exemptions for certain other transmissions), section 512 (safe harbor for Internet service providers), Chapter 10 (digital audio recording devices), and Chapter 12 (copyright protection and management systems), as well as any future applicable rights and limitations (*e.g.*, orphan works) that Congress may choose to enact.
- The initial owner(s) of the federal copyright in a pre-1972 sound recording should be the person(s) who own(s) the copyright under applicable state law at the moment before the legislation federalizing protection goes into effect.
- Section 203 of the Copyright Act should be amended to provide that authors of pre-1972 sound recordings are entitled to terminate grants of transfers or licenses of copyright that are made on or after the date federal protection commences. However, termination of pre-federalization grants made under state law prior to federalization presents serious issues with respect to retroactivity and takings, so the Office does not recommend providing termination rights for grants made prior to federalization of protection.
- The term of protection for sound recordings fixed prior to February 15, 1972, should be 95 years from publication (with “publication” as defined in section 101) or, if the work had not been published prior to the effective date of legislation federalizing protection, 120 years from fixation. However,
 - In no case would protection continue past February 15, 2067, and
 - In cases where the foregoing terms would expire before 2067, a right holder may take the action described below to obtain a longer term.
- For pre-1972 sound recordings other than those published before 1923, a transition period lasting between six and ten years from enactment of federal protection should be established, during which a right holder may make a pre-1972 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner’s intent to secure protection until 2067. If a right holder does this, the term of protection of the sound recording will not expire until 2067,

provided that the recording remains publicly available at a reasonable price during its extended term of protection.

- For sound recordings published before 1923, a transition period lasting three years from enactment of federal protection should be established, during which a right holder may make a pre-1923 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner's intent to secure protection for 25 years after the date of enactment the legislation that federalizes protection. If a right holder does this, the term of protection of the sound recording will not expire until the end of the 25-year period, provided that the recording remains publicly available at a reasonable price during its extended term of protection.
- Regardless of a right holder's actions, all pre-1972 sound recordings should enjoy federal protection at least until the end of the relevant transition period described above.
- Regarding the requirement of timely registration in order to recover statutory damages or attorney's fees in an infringement suit, a transitional period of between three and five years should be established, during which right holders in pre-1972 sound recordings can seek statutory damages and attorney's fees notwithstanding the lack of registration prior to filing suit.
- Adjustments should be made or at least considered with respect to certain other provisions of the Copyright Act to take into account difficulties that owners of rights in pre-1972 sound recordings may encounter. Among those provisions are: section 405 (notice of copyright: omission of notice on certain copies and phonorecords), section 406 (notice of copyright: error in name or date on certain copies and phonorecords), section 407 (deposit of copies or phonorecords for Library of Congress), section 410 (*prima facie* weight of certificate of registration), and section 205 (regarding priority between conflicting transfers recorded in the Copyright Office).



78 rpm shellac disc

I. INTRODUCTION AND BACKGROUND

A. The Pre-1972 Sound Recordings Report

In 2009, Congress directed the Register of Copyrights to conduct a study on the desirability of and means for bringing sound recordings fixed before February 15, 1972 under federal jurisdiction. Specifically,

The study is to cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage. As part of this effort, the Register of Copyrights should publish notice of the study and provide a period during which interested persons may submit comments. The Register of Copyrights is to submit a report on the results of this study to the Committees on Appropriations of the House and Senate no later than two years after the enactment of this Act. The report should include any recommendations that the Register considers appropriate.¹

¹ See 155 CONG. REC. H2397 (daily ed. Feb. 23, 2009) (statement of Rep. Obey, Chairman of the House Committee on Appropriations, regarding H.R. 1105, Omnibus Appropriations Act of 2009). The deadline was extended from March 11, 2011 to December 31, 2011 at the request of the Copyright Office.

After internal study of the issue, in 2010 the Copyright Office issued a Notice of Inquiry² describing the issues to be addressed in the study and inviting the public to submit written comments on relevant questions such as (1) whether libraries currently treat pre-1972³ sound recordings differently from federally copyrighted sound recordings for purposes of preservation and access; (2) whether federalizing protection would improve their ability to preserve and provide access to such recordings; and (3) the likely effects on the commercial value of those recordings, including on the scope of rights, the certainty and enforceability of protection, ownership of rights, and the term of protection. The deadline for initial comments was originally set for December 20, 2010, but was subsequently extended at the request of interested parties until January 31, 2011.⁴ Reply comments were due on April 13, 2011.⁵

The Office received 59 initial comments⁶ and 17 reply comments.⁷ The comments represented organizations and individuals with diverse perspectives and experiences, including:

- **Sound recording libraries and organizations** (*e.g.*, Association of Recorded Sound Collections, Music Library Association, Society for American Music)
- **Other libraries, archives and library and archives associations** (*e.g.*, Library of Congress, American Library Association, Association of Research Libraries, Society of American Archivists)

² 75 Fed. Reg. 67,777 (Nov. 3, 2010). Federal Register notices published by the Copyright Office during this study are included as Appendices A-C.

³ As used in this report, “pre-1972” means before February 15, 1972, when sound recordings first became eligible for federal copyright protection.

⁴ 75 Fed. Reg. 74,749 (Dec. 1, 2010).

⁵ Originally the period for reply comments was set at 30 days, but that deadline too was extended at the request of the parties. See Appendix B; 76 Fed. Reg. 10,405 (Feb. 24, 2011).

⁶ One of the comments, #57, groups together 231 copies of a form letter originated by Grooveshark. The form letter is available on Grooveshark’s website at <http://blog.grooveshark.com/post/2519052858/help-grooveshark-stay-alive> (last checked Dec. 1, 2011).

⁷ Both the initial comments and the reply comments have been posted to the Copyright Office’s website and are available at <http://www.copyright.gov/docs/sound/>. Lists of commenters are attached as Appendices D and E.

- **Recording industry associations** (*e.g.*, American Association of Independent Music, Recording Industry Association of America)
- **Broadcasters and satellite radio** (*e.g.*, National Association of Broadcasters, Sirius XM)
- **Music publishers** (*e.g.*, National Music Publishers Association)
- **Songwriters and musicians organizations** (*e.g.*, Songwriters Guild of America, Future of Music Coalition)
- **Universities and academic institutions** (*e.g.*, University of Louisville, Syracuse University, Tulane University Law School, University of Utah Library)
- **Other organizations concerned about the legal treatment of pre-1972 sound recordings** (*e.g.*, Electronic Frontier Foundation, Starr-Gennett Foundation, Sound Exchange, Inc.)
- **Numerous individuals**

The Copyright Office also organized a two-day public meeting in Washington, D.C. on June 2 and 3, 2011, attended by 19 representatives of 13 organizations, as well as two individuals. These participants included representatives of all of the categories of commenters, and most of the organizations, listed above. (See Appendix F.) The Office subsequently met with several organizations and individuals to further explore some of the issues raised in the comments and in the meetings.

In the course of its research, the Office consulted a number of reports commissioned or sponsored by the National Recording Preservation Board, all published between 2005 and 2010.⁸

⁸ Rob Bamberger and Sam Brylawski, Nat'l Recording Preservation Board of the Library of Congress, *THE STATE OF RECORDED SOUND PRESERVATION IN THE UNITED STATES: A NATIONAL LEGACY AT RISK IN THE DIGITAL AGE 1* (2010) [hereinafter *NRPB REPORT*]; June M. Besek, *COPYRIGHT ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF PRE-1972 COMMERCIAL SOUND RECORDINGS BY LIBRARIES AND ARCHIVES* (CLIR & Library of Congress 2005) [hereinafter, *BESK COMMERCIAL SOUND RECORDINGS STUDY*]; June M. Besek, *COPYRIGHT AND RELATED ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF UNPUBLISHED PRE-1972 SOUND RECORDINGS BY LIBRARIES AND ARCHIVES* (CLIR & Library of Congress 2009) [hereinafter, *BESK UNPUBLISHED SOUND RECORDINGS STUDY*]; Tim Brooks, *SURVEY OF REISSUES OF U.S. RECORDINGS* (CLIR & Library of Congress 2005) [hereinafter, *BROOKS STUDY*]; Program on Information Justice and Intellectual Property, Washington College of Law, American University (under the supervision of Peter Jaszi with the assistance of Nick Lewis), *PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY*

This Report is the result of the Copyright Office’s research and public outreach concerning the legal treatment of pre-1972 sound recordings. The Report (1) explains the process by which the Office undertook its research; (2) describes the comments received as well as the views expressed at the public meetings; and (3) explain the Office’s recommendations and the reasons for them.⁹

B. The Pre-1972 Sound Recordings Issue

The body of pre-1972 sound recordings is vast. Commercially released “popular” recordings come most readily to mind – from Frank Sinatra and Ella Fitzgerald to the Beatles and the Rolling Stones. But pre-1972 commercial recordings encompass a wide range of genres: ragtime and jazz, rhythm and blues, gospel, country and folk music, classical recordings, spoken word recordings and many others.¹⁰ Some remain popular; others have long since faded from memory and are of interest only to scholars. There are, in addition, many unpublished recordings such as journalists’ tapes, oral histories, and ethnographic and folklore recordings. There are also recordings of old radio broadcasts, which were publicly disseminated by virtue of the broadcast, but in many cases are technically unpublished under the standards of the U.S. Copyright Act. These recordings are a rich aspect of this country’s cultural heritage, and it is important to ensure that they will be preserved and accessible for researchers and scholars, as well as to future generations.

NONPROFIT INSTITUTIONS: A 10-STATE ANALYSIS (CLIR & Library of Congress 2009) [hereinafter, JASZI STUDY].

⁹ In citing to the comments and the transcript of the public meeting, this Report follows the following conventions: For an initial comment, the institutional or individual author followed by the page number (*e.g.*, Society of American Archivists (SAA) at 10); for a reply comment, the same structure but with the word “Reply” (*e.g.*, SAA Reply at 6); for a citation to the public meeting transcript, the speaker, the letter T, a number indicating the first or second day, and the page number (*e.g.*, Schwartz T1 at 78).

¹⁰ *See generally* BROOKS STUDY.

Congress brought sound recordings within the scope of federal copyright law for the first time on February 15, 1972. It provided protection on a prospective basis, leaving recordings first fixed before that date under the protection of state law. The issue was revisited during enactment of the 1976 Copyright Act, when Congress federalized protection for works that had been protected by state rather than federal copyright law but preserved the state law regime for pre-1972 sound recordings.¹¹ But Congress did provide some limitations on state law protection for sound recordings: the Copyright Act provides that states are entitled to protect pre-1972 sound recordings until February 15, 2067.¹² At that point, all pre-1972 sound recordings, no matter how old, will enter the public domain in one fell swoop and the dual regimes of protection for sound recordings will disappear.

As a consequence of this legal construct, there is virtually no public domain in the United States for sound recordings and a 55 year wait before this will change.¹³ To put this in perspective, one need only compare the rules of copyright term for other works. For example, a musical composition published in 1922 would have entered the public domain at the end of 1997, but a sound recording of that same musical composition that was fixed the same year will remain protected for another 70 years, until 2067. In fact, sound recordings first fixed in 1922 will enter the public domain the same year as those first fixed between February 15 and December 31, 1972

¹¹ Until the effective date of the 1976 Copyright Act, unpublished works were protected by state common law copyright, which lasted until a work was published. As discussed below, state law (including common law copyright as well as other common law doctrines and statutes) also protected sound recordings, whether or not they were published. *See infra* Chapter II.E.

¹² *See* 17 U.S.C. § 301(c); *see also Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005), discussed below.

¹³ A few individual states have explicitly set shorter terms of protection (*see infra* Chapter II.E.2), but no pre-1972 sound recordings are in the public domain throughout the United States unless they were published between February 15, 1972 and March 1, 1989 without notice and without mitigating circumstances, or unless their right holders have dedicated them to the public domain.

(the first year they were eligible for federal protection). In each case, they will not enter the public domain until the end of 2067.¹⁴

To be clear, it is misleading to speak of state law as a single regime of protection. More accurately, it consists of multiple regimes of protection, sometimes vague and inconsistent, with the scope of rights and of permissible activities often difficult to discern. This patchwork of state protection has frustrated many libraries, archives and educational institutions, which are unclear at best whether they are legally permitted to preserve pre-1972 sound recordings, or provide access to them for researchers and scholars – at least to the same degree as later recordings.¹⁵

¹⁴ To make matters more complicated, it is not always clear which of the two regimes of protection for sound recordings, state or federal (or both), is applicable because, due to copyright restoration in certain circumstances, there are some recordings fixed prior to February 15, 1972 that have federal law protection as well. Foreign sound recordings whose copyrights were “restored” under the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4973 (1994) may begin to enter the public domain only at the end of 2041. *See infra* Chapter II.D.

¹⁵ *See* NRPB REPORT at 131.



Lacquer recorder

II. LEGAL AND LEGISLATIVE HISTORY

A. Federal Copyright Law and Sound Recordings until 1972

Sound recordings as defined under federal copyright law are “works that result from the fixation of a series of musical, spoken, or other sounds, . . . regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied.”¹⁶

Although sound recordings have existed since the mid-nineteenth century,¹⁷ no federal copyright protection was available to them until 1972.¹⁸

As early as 1906, during the revision process that led to the 1909 Copyright Act, representatives of the then-leading record company, Victor Talking Machine Co., urged Congress

¹⁶ 17 U.S.C. § 101. The full definition of sound recordings is: “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied.” *Id.*

¹⁷ According to the NRPB Report, the earliest identifiable sound recording was made in 1860, and the phonograph was invented in 1877. NRPB REPORT at 1, 133.

¹⁸ For a thorough and insightful analysis of the legal status of sound recordings in the United States until 1957, see Barbara A. Ringer, COPYRIGHT LAW REVISION, STUDY NO. 26: THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS, at 21-37 (Feb. 1957) [hereinafter, Ringer], available at <http://www.copyright.gov/history/studies/study26.pdf>.

to grant federal copyright protection to sound recordings.¹⁹ They were unsuccessful in getting such a provision into any of the revision bills introduced from 1906 to 1908. But in 1908, the Supreme Court decided *White-Smith v. Apollo*,²⁰ holding that a piano roll was not a “copy” of the musical composition embodied in it because the composition could not be “read” from the roll with the naked eye. Therefore, according to the Court, the defendant did not infringe the musical composition in creating and reproducing the roll. Record companies apparently realized the inconsistency between the holding in *White-Smith* and their proposal to grant copyright protection for sound recordings (for which mechanical reproductions were the only means of fixation), and they abandoned that proposal.²¹

The 1909 Copyright Act, passed the following year, granted copyright owners of musical compositions rights with respect to mechanical reproductions of their compositions, for example, in records or piano rolls. Congress was concerned, however, that if musical composition owners had exclusive rights, record companies might be able to buy up the rights and monopolize the market with respect to particular musical compositions, so the mechanical right was made subject to a compulsory license. Once a music copyright owner authorized a mechanical reproduction of his composition, others could take advantage of the license to make their own mechanical reproductions, provided that they met the statutory requirements and paid the statutory rate.²²

While the 1909 Act provided protection for copyright holders of musical compositions whose works were reproduced in sound recordings, it included no explicit protection for sound recordings *per se*. As a result, over the subsequent decades the courts and the Copyright Office

¹⁹ See Ringer at 3.

²⁰ *White-Smith Publ’g. Co. v. Apollo Co.*, 209 U.S. 1 (1908), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

²¹ Ringer at 4.

²² An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, 35 Stat. 1075, § 1(e) (1909).

consistently refused to recognize copyright in sound recordings.²³ By the 1940s and 1950s, respected commentators, including Professor Zechariah Chafee²⁴ and Judge Learned Hand,²⁵ had expressed the opinion that there was no constitutional obstacle to protecting a sound recording as the writing of an author, even though its fixation may be unintelligible to the naked eye. They were in agreement, however, that the current law did not provide such protection.

In the absence of federal protection, states provided protection against duplication of sound recordings under common law theories, usually unfair competition or common law copyright, as discussed below.

The first bill to explicitly provide federal copyright protection for sound recordings was introduced in Congress in 1925,²⁶ and copyright revision bills that would have extended copyright protection to sound recordings (with varying restrictions) were introduced regularly thereafter through 1951.²⁷ In all, more than thirty bills to provide sound recordings with some form of copyright protection were introduced during this period, but none passed.²⁸ In a Copyright Office study published in 1957, Barbara Ringer (who later became Register of Copyrights) observed that the opposition to these bills was based on technical deficiencies and concerns about their constitutionality (both as to whether sound recordings were creative, and whether they were

²³ See, e.g., *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926, 927 (W.D.N.Y. 1912) (“music rolls or records are not strictly matters of copyright”). The Court’s holding in *White-Smith Publ’g. Co. v. Apollo* – that a piano roll did not qualify as a copy of the musical composition embodied in it – was adopted in the 1909 Act not only with respect to whether a reproduction was an infringement, but also with respect to whether a reproduction met the fixation requirement. Melville B & David Nimmer, NIMMER ON COPYRIGHT, § 2.03[B][1] (2011) at 2-32 to -33 [hereinafter NIMMER ON COPYRIGHT].

²⁴ Zechariah Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 719, 735 (1945).

²⁵ *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 664 (2d Cir. 1955) (Hand, J. dissenting). The panel agreed that the Constitution permitted Congress to protect sound recordings and that it had chosen not to provide such protection, but Judge Hand dissented on preemption grounds.

²⁶ H.R. 11258, 68th Cong. (2d Sess. 1925).

²⁷ See Ringer at 21-37 for a detailed discussion of efforts to provide copyright protection for sound recordings from 1925-1951.

²⁸ See *id.*; see also Melvin L. Halpern, *The Sound Recording Act of 1971: An End to Piracy on the High ©’s?*, 40 GEO. WASH. L. REV. 964, 975 (1971-1972).

writings). She characterized the arguments on both sides as “dictated by economic self-interest, and revolv[ing] around the problem of radio broadcasting.”²⁹ She observed that there was “practically no direct opposition” to the principle that sound recordings should be protected against unauthorized duplication.³⁰

As work began in earnest on a comprehensive revision of the 1909 Copyright Act, the possibility of protecting sound recordings received renewed attention. Barbara Ringer’s study, “The Unauthorized Duplication of Sound Recordings” was one of several studies commissioned by Congress to lay the groundwork for what became the 1976 Copyright Act. The contemplation was that sound recordings would be included in the copyright revision law that was then under development,³¹ and copyright revision bills in the 1960s and early 1970s included protection for sound recordings, although the scope of that protection varied in the different bills.³²

B. 1971 Sound Recording Amendment

The general copyright revision process became stalled in the late 1960s and early 1970s. Congress, persuaded that the situation concerning sound recordings was becoming urgent, decided to bring sound recordings under the federal copyright law without waiting for the overall revision. On November 15, 1971 it passed the Sound Recording Amendment, which for the first time made sound recordings eligible for federal copyright.³³

There were three principal reasons that Congress moved ahead on sound recordings without waiting for the general revision. First, record and tape piracy had climbed to alarming

²⁹ Ringer at 37.

³⁰ *Id.*

³¹ *See Report of the Register of Copyrights on the General Revision of the Copyright Law* at 18 (1961).

³² *See, e.g., Copyright Law Revision, Part 3, Preliminary Draft for Revised U.S. Copyright Law* § 10 (Sept. 1964); S. 543, 91st Cong. (1st Sess. 1969); H.R. 2512, 90th Cong. (1st Sess. 1967); S. 597, 90th Cong. (1st Sess. 1967).

³³ Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

proportions as the use of audiotapes and audiotape recorders became increasingly popular and made it easier to make and distribute unauthorized recordings on a commercial scale. The House Report accompanying the 1971 Act estimated the annual volume from pirated sales “in excess of \$100 million” as compared with \$300 million annually from legitimate sales of prerecorded tapes.³⁴

Second, although states had begun to pass criminal laws prohibiting the unauthorized commercial duplication and distribution of sound recordings,³⁵ in most states record producers still relied on unfair competition, “where the remedies available are limited.”³⁶ Moreover, the Supreme Court’s decisions in *Sears, Roebuck & Co. v. Stiffel*³⁷ and *Compco v. Day-Brite Lighting, Inc.*³⁸ had cast doubt on the validity of state protection.³⁹ Defendants in record piracy cases were arguing that state laws were preempted by the federal copyright scheme, even though Congress had chosen not to protect sound recordings.⁴⁰

Third, a diplomatic conference to complete a treaty to combat record piracy was scheduled for late 1971, and Congress believed progress on the domestic front would be helpful to U.S. interests.⁴¹

³⁴ H.R. REP. NO. 92-487, 92nd Cong. at 2 (1971).

³⁵ See *infra* Chapter II.E.

³⁶ H.R. REP. NO. 92-487 at 2. For example, state law was far from uniform, and states could not enjoin activities beyond their borders. See Halpern, *The Sound Recording Act of 1971: An End to Piracy on the High ©’s?*, 40 GEO. WASH. L. REV. at 975.

³⁷ 376 U.S. 225, 230 (1964).

³⁸ 376 U.S. 234, 238 (1964).

³⁹ See H.R. REP. NO. 92-487 at 2-3, 12-13; see also *Int’l Tape Mfrs. Assn v. Gerstein*, 344 F. Supp. 38, 49 (S.D. Fla. 1972), *vacated and remanded*, 494 F.2d 25 (5th Cir. 1974); *Tape Indus. Assn. v. Younger*, 316 F. Supp. 340, 346 (C.D. Cal. 1970), *appeal dismissed*, 401 U.S. 902 (1971).

⁴⁰ The preemption issue was not conclusively resolved until after the Sound Recording Amendment was passed, when the Supreme Court decided *Goldstein v. California*, 412 U.S. 546 (1973), discussed below.

⁴¹ See H.R. REP. NO. 92-487 at 3, 11. The diplomatic conference led to the Geneva Convention for the Protection of Producers of Phonograms, Oct. 28, 1971, 25 U.S.T. 309.

The effective date of the Sound Recording Amendment was February 15, 1972,⁴² four months after it was passed. It applied to sound recordings first fixed on or after that date. The law provided only a limited right with respect to sound recordings. Its principal provision was to grant sound recordings a reproduction right analogous to that provided for other works of authorship, thus giving record producers a new tool with which to combat outright duplication. However, the right to reproduce was “limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording.”⁴³ Thus, the new law provided no protection against imitations of the performance. Moreover, it contained a significant temporal restriction: it had a “sunset provision” and protected only sound recordings first fixed on or after February 15, 1972 and before January 1, 1975.⁴⁴ It is apparent that Congress envisioned that protection for sound recordings would be folded into the copyright revision act then under consideration, making any extension of the sound recording amendment unnecessary.

The bill omitted any performance right for sound recordings, which had been a controversial issue in the revision process. At the same time, Congress refused to impose a compulsory license on sound recordings analogous to the one contained in the law for musical compositions, something that the bill’s opponents had sought. In both cases, Congress observed that those issues could be revisited in the general revision of the copyright law.⁴⁵ There was no discussion of Congress’s decision to protect sound recordings only on a prospective basis.

⁴² Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

⁴³ *Id.* § 1(a).

⁴⁴ *See id.* § 3.

⁴⁵ *See* H.R. REP. NO. 92-487 at 5; S. REP. NO. 92-72 at 3 (1971).

Shortly after the 1971 Sound Recording Amendment was enacted, its constitutionality was challenged in *Shaab v. Kleindienst*.⁴⁶ A three-judge district court rejected the plaintiff's main argument that sound recordings do not qualify as the "writings" of "authors."

The following year, the Supreme Court put to rest the question whether states could regulate pre-1972 sound recordings. In *Goldstein v. California*,⁴⁷ the Supreme Court held that California's record piracy law as it applied to pre-1972 sound recordings was not preempted by federal copyright law or the Constitution under its decision in *Sears and Compco*. The Court concluded that Congress had left the area of sound recordings "unattended," and states were free to act with respect to the regulation of pre-1972 sound recordings.⁴⁸ The *Goldstein* case led to the passage of many more state anti-piracy laws with respect to pre-1972 recordings,⁴⁹ and its rationale extended as well to state civil protection.

By the end of 1974 the copyright revision bill still had not become law, so Congress removed the January 1, 1975 sunset date for federal copyright protection of sound recordings.⁵⁰

C. 1976 Copyright Revision Act

The Copyright Revision Act was passed on October 19, 1976. It included sound recordings among the categories of protectable subject matter, although the scope of protection for sound recordings continued to be more limited than that for other works. The reproduction right was (and continues to be) limited to duplication of the actual sounds in the recording.⁵¹

⁴⁶ 345 F. Supp. 589 (D.D.C. 1972).

⁴⁷ 412 U.S. 546 (1973).

⁴⁸ *Id.* at 569-70.

⁴⁹ See Sidney A. Diamond, *Sound Recordings and Phonorecords: History and Current Law*, 1979 U. ILL. L. F. 337, 349 (1979).

⁵⁰ Pub. L. No. 93-573, 88 Stat. 1873 (Dec. 31, 1974).

⁵¹ See 17 U.S.C. § 114(b). There is a similar limitation with respect to the derivative work right in sound recordings. See *id.*

Sound recordings were granted no public performance right in the 1976 Copyright Act, although later enactments provided them with a performance right with respect to certain digital transmissions.⁵²

Thus sound recordings fixed on or after February 15, 1972 were secure in their eligibility for federal copyright protection. The fate of pre-1972 sound recordings, however, was addressed separately in the law.

To create a unitary system of copyright, Congress in the 1976 Act preempted state law that provided rights equivalent to copyright. Specifically, section 301(a) of the Copyright Act provides:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Congress exempted pre-1972 sound recordings from this general preemption provision and treated them separately under section 301(c) of the Copyright Act, which currently provides:

With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

Why Congress decided to maintain two separate systems of protection for sound recordings is unclear.⁵³ There are at least two theories as to why Congress did not bring pre-1972

⁵² Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), as amended by the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2905 (1998) (codified at 17 U.S.C. § 114).

recordings under federal law in 1976. The first is that Congress did not fully understand the implications of amending the bill as it then existed to add section 301(c) – in short, it was simply a mistake. Section 301 in S. 22, the general revision bill introduced in 1975, provided for preemption of state laws equivalent to copyright, but did not specifically exclude state laws concerning pre-1972 sound recordings.⁵⁴ The Justice Department, in the course of the 1975 hearings, had expressed concern that unless Congress excluded pre-1972 sound recordings from the general preemption provision, state anti-piracy laws related to those recordings would be abrogated, and the likely result would be “the immediate resurgence of piracy of pre-February 15, 1972 sound recordings.”⁵⁵ It suggested adding a provision to exclude from the sweep of federal preemption the state laws that protected pre-1972 sound recordings. Apparently in response to this concern, the Senate added such a provision to the pending bill.⁵⁶ Nimmer suggests that both the Justice Department and the Senate “overlooked” the fact that a resurgence of piracy would not

⁵³ Commentary on the early revision bills reflected some uncertainty as to whether any preexisting sound recordings would qualify for federal copyright protection. Against the possibility that at least some might be eligible, Congress included a provision in the revision bill (§ 402(d)) that copyright notice would be required only once the federal law became applicable, so that an otherwise eligible recording would not be barred from protection for failure to use a notice in the past. *See, e.g.*, H.R. REP. NO. 89-2237 at 20, 39 (1966). The sound recording industry urged that preexisting recordings affirmatively be included in the revision bill. *See, e.g., Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. at 519 (1967) (Testimony of Clive Davis, CBS Records); *see id.* at 531-32 (Testimony of Henry Brief, RIAA). In 1969, Senator Harrison Williams offered an amendment to S. 543, the revision bill under consideration by the Senate in the 91st Congress. 115 CONG. REC. 8613, 8617 (Apr. 3, 1969). The amendment was principally designed to add a performance right in sound recordings, but it also included an amendment to section 303 of the draft bill to explicitly protect preexisting sound recordings. The performance rights amendment was accepted and became part of the revision bill in the Senate until 1974. Neither the portion of the amendment designed to include preexisting sound recordings under federal law nor section 402(d) survived the subcommittee vote, but the report provides no explanation. *See* S. REP. NO. 91-1219 at 7 (1970).

⁵⁴ S. 22, 94th Cong., § 301 (1st Sess. 1975).

⁵⁵ *Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary*, Ser. No. 36, Part I at 137-38 (1975) [hereinafter, 1975 House Hearings].

⁵⁶ S. 22, 94th Cong. § 301(b)(4) (2d Sess. 1976).

otherwise have resulted because the revision bill in its then-current form conferred statutory protection on *all* sound recordings.⁵⁷

However, it appears that the Recording Industry Association of America (“RIAA”) and the Copyright Office shared the Justice Department’s view that without the amendment to the preemption provision, pre-1972 sound recordings would be left without protection when the Copyright Revision Act went into effect. RIAA “strongly supported” the Justice Department’s proposed amendment.⁵⁸ The Register of Copyrights agreed that pre-1972 sound recordings “should not all be thrown into the public domain instantly upon the coming into effect of the new law.”⁵⁹ However, she expressed concern that under the Justice Department’s proposed amendment, sound recordings would have perpetual protection under state law, and suggested a revision to provide a future date of February 15, 2047 for preemption to take place.⁶⁰

Subsequently, the House added an end date of February 15, 2047 for state law protection for pre-1972 recordings, together with a provision specifically excluding pre-1972 sound recordings from federal copyright protection.⁶¹

The second theory for why Congress did not bring pre-1972 sound recordings into federal copyright in 1976 is that Congress was simply following a long tradition of including new works

⁵⁷ 1 NIMMER ON COPYRIGHT, § 2.10[B] at 2-178.4.

⁵⁸ 1975 House Hearings at 1397 (1975) (Addendum to Statement of Stanley M. Gortikov, Sept. 11, 1975).

⁵⁹ *Id.* at 1911 (testimony of Barbara Ringer, Register of Copyrights).

⁶⁰ *Id.* Concerning the 2047 end date, the Register stated: “This might seem like a long time, but I would point out that it is in comparison to eternity. . . .” *Id.*

⁶¹ This date of February 15, 2047 allowed state law works created the last day before federal copyright protection went into effect – February 14, 1972 – to enjoy a full 75 years of protection. Seventy-five years was the maximum duration of protection for works copyrighted under the 1909 Act, as provided by the terms of the 1976 Act. Of course, under most state laws there is no expiration date for protection of pre-1972 sound recordings, so a sound recording created in either 1941 or 1971 would remain protected until 2047. When the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) was passed, the date for preemption of state laws protecting sound recordings was extended by 20 years, to February 15, 2067.

under copyright only on a prospective basis.⁶² This was the case, for example, with musical compositions in 1831⁶³ and photographs⁶⁴ in 1865.⁶⁵

It is apparent from the legislative reports concerning the Sound Recording Amendment and the 1976 Copyright Act that Congress well understood it was leaving in place the state law regime for pre-1972 sound recordings, rather than bringing them under federal law. However, nowhere does Congress explain the considerations that, in its view, supported this result. This omission is particularly curious in light of Congress's articulated goal of a unitary system of copyright and its decision to implement that goal by bringing essentially all other works protected by state law copyright regimes into the federal system.

D. 1994 Uruguay Round Agreements Act

Despite this history, there are now some pre-1972 sound recordings that do enjoy federal copyright protection. When Congress implemented the TRIPS Agreement in the Uruguay Round Agreements Act (URAA),⁶⁶ passed in 1994, it "restored" copyright protection to certain works of foreign origin that were in the public domain in the United States on the effective date (which for most works was January 1, 1996).⁶⁷ This was done to comply with U.S. treaty obligations. Many

⁶² See Henry Lee Mann, *As Our Heritage Crumbles Into Dust: The Threat of State Law Protection for Pre-1972 Sound Recordings*, 6 WAKE FOREST INTELL. PROP. L. REV. 45, 51-54 (2006).

⁶³ Act of Feb. 3, 1831, Ch. 16, 4 Stat. 436.

⁶⁴ Act of Mar. 3, 1865, Ch. 126, 13 Stat. 540.

⁶⁵ In 1912 Congress amended the 1909 Copyright Act to include motion pictures, but the law was silent on the question of its applicability to earlier works. Act of Aug. 24, 1912, Ch. 356, 37 Stat. 488.

⁶⁶ The Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994), implemented U.S. obligations under the Trade-Related Aspects of Intellectual Property Rights Agreement, April 15, 1994, 33 I.L.M. 1199, Annex 1C of the Agreement Establishing the World Trade Organization ("TRIPS Agreement"), 33 I.L.M. 1143 (1994).

⁶⁷ This was the date of restoration for works whose source countries were members of the Berne Convention or the WTO on that date; for other countries, it is the date of adherence. See 17 U.S.C. § 104A(h)(2).

of those works had fallen into the public domain for failure to comply with U.S. formalities that used to be conditions for copyright protection, such as renewal registration or affixation of a valid copyright notice. However, among the works for which protection was “restored” were qualifying pre-1972 sound recordings of foreign origin, which had never before been eligible for federal copyright protection.

In order to be eligible for restoration, works had to meet several conditions, including (1) they could not, on the date of restoration, be in the public domain in their home country through expiration of the term of protection; (2) they had to be in the public domain in the United States due to noncompliance with formalities, lack of subject matter protection (as was the case for sound recordings),⁶⁸ or lack of national eligibility; and (3) they had to meet national eligibility standards, *i.e.*, the work had to be of foreign origin.⁶⁹ Specifically, to be restored a work had to have “at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, must have been first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country.”⁷⁰

Restoration occurred automatically on the effective date.⁷¹ As explained above, one of the conditions was that the sound recording in question could not be in the public domain in its home country on the effective date due to expiration of copyright term. Most foreign sound recordings are protected in other countries not by copyright, but under a “neighboring rights” regime which provides a 50-year term of protection.⁷² As a result, most foreign sound recordings

⁶⁸ See 17 U.S.C. § 104A(h)(6)(C)(ii).

⁶⁹ See 17 U.S.C. § 104A(h)(6).

⁷⁰ 17 U.S.C. §104A(h)(6)(D).

⁷¹ 17 U.S.C. §104A(a)(1).

⁷² Some countries offer a longer term of protection for sound recordings, and the number of countries that offer a longer term is about to increase dramatically. Earlier this year, the Council of the European Union issued a directive extending the term of protection for phonograms (sound recordings) to 70 years.

first fixed prior to 1946 were not eligible for restoration. Those that were protected in their home countries on January 1, 1996 got the term they would have received had they been copyrighted in the United States: 75 years from publication, later extended to 95 years.⁷³ This means, for example, that a foreign recording made in 1945 probably would have gone into the public domain in its home country by the end of 1995 and therefore was not eligible for U.S. federal copyright protection.⁷⁴ On the other hand, a foreign recording made in 1947 probably would have gone into the public domain in its home country by the end of 1997, but because its copyright was restored in the United States on January 1, 1996, it received a 75 year term (later extended to 95 years), so it will be protected by U.S. copyright law until the end of 2042.

It is theoretically possible that foreign sound recordings restored to federal copyright protection enjoy concurrent state law protection. Section 301(c) – which saves state laws concerning sound recordings from federal preemption until 2067 – was never amended to exclude foreign recordings.⁷⁵ However, the rationale underlying *Goldstein v. California* was that Congress “has left the area [legal protection of sound recordings] unattended, and no reason exists why the State should not be free to act.”⁷⁶ One might reasonably argue that Congress has not left the legal status of these restored foreign recordings “unattended,” so that state law is preempted by the URAA at least with respect to those recordings. This issue has not been

Directive 2011/77/EU of The European Parliament and of The Council, 2011 O.J. (L. 265) (Sept. 27, 2011). All 27 member states of the European Union are required to implement the new extended term in their domestic laws no later than November 1, 2013. The extension is not retroactive, *i.e.*, it does not apply to sound recordings that are already in the public domain. Thus, a phonorecord first published on September 1, 1961 would not enjoy the newly-extended 70-year term of protection in the EU.

⁷³ See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP. NO. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4290.

⁷⁴ However, such a recording may be eligible for state protection. See *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005), discussed below.

⁷⁵ See 3 NIMMER ON COPYRIGHT, § 8C.03[E] at 8C-10.2 to 8C-10.3.

⁷⁶ 412 U.S. 546, 570 (1973) (footnote omitted).

addressed by the courts, and merely illustrates the potential complications, and inconsistencies, of dual systems of protection.

E. State Law Protection for Pre-1972 Sound Recordings

State law protection for pre-1972 sound recordings is a complicated subject, and this Report provides only a brief overview.⁷⁷ The states provide protection for pre-1972 sound recordings through a patchwork of criminal laws, civil statutes and common law. Early cases relied on common law, principally the tort of unfair competition, to protect sound recordings from unauthorized duplication and sale.⁷⁸ By the 1950s, record piracy had become a serious problem, with pirates openly competing with record companies.⁷⁹ For that reason, attention shifted to legislation imposing criminal sanctions starting in the 1960s.

1. Criminal Record Piracy Statutes

In the 1960s, states began to pass laws making it a criminal offense to duplicate and distribute sound recordings, without authorization, for commercial purposes. New York was the first such state in 1967; California was the second, in 1968.⁸⁰ Several other states followed, and

⁷⁷ For a more extensive overview of state law protection for pre-1972 sound recordings, see JASZI STUDY, BESEK UNPUBLISHED SOUND RECORDINGS STUDY, and BESEK COMMERCIAL SOUND RECORDINGS STUDY. A chart of state criminal laws, prepared initially by ARL and revised and updated by Copyright Office interns, as well as the texts of those laws, are available at www.copyright.gov/docs/sound.

⁷⁸ See, e.g., *Victor Talking Mach. Co. v. Armstrong*, 132 F. 711 (S.D.N.Y. 1904).

⁷⁹ Glenn M. Reisman, *The War Against Record Piracy: An Uneasy Rivalry Between the Federal and State Governments*, 39 ALB. L. REV. 87, 89 (1974).

⁸⁰ See 1968 Cal. Stat. ch. 585, p. 1256, codified as amended in CAL. PENAL CODE § 653h (West 2011); New York Law, L. 1967, ch. 680 § 59, initially codified in N.Y. GEN. BUS. LAW art. 29-D. That section was repealed in 1978 when the law became part of New York's Penal Code, L. 1978, ch. 445, codified in N.Y. PENAL LAW §§ 275.00–275.45 (McKinney 2011).

after the Supreme Court ruled in *Goldstein v. California*⁸¹ in 1973 that state law protection of sound recordings was constitutional, many additional states passed such laws.

a. *Examples of state criminal statutes*

Currently, nearly all states have criminal record piracy laws applicable to pre-1972 sound recordings.⁸² Most state criminal laws prohibit, at a minimum, duplication and sale of recordings done knowingly and willfully with the intent to sell or profit commercially from the copies.⁸³ Many have express exceptions for activities such as broadcasting, archiving, and personal use. It is unclear how many cases are brought under these statutes, but they inform the protection for sound recordings under state law and provide a backdrop for commercial transactions.

Examples from four states – California, Michigan, New York and Tennessee – illustrate some of the different forms of criminal record piracy statutes.

California. California’s criminal record piracy statute provides:

(a) Every person is guilty of a public offense . . . who:

(1) Knowingly and willfully transfers or causes to be transferred any sounds that have been recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with intent to sell or cause to be sold, or to use or cause to be used for commercial advantage or private financial gain through public performance, the article on which the sounds are so transferred, without the consent of the owner.

(2) Transports for monetary or like consideration within [California] or causes to be transported within [California] any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.⁸⁴

⁸¹ 412 U.S. 546.

⁸² 2 NIMMER ON COPYRIGHT, § 8C.03[C] at 8C-8 to -9; JASZI STUDY at 8. According to a survey prepared by the Association of Research Libraries and supplemented and revised by the Copyright Office, only Indiana and Vermont do not have some form of statute criminalizing piracy of sound recordings. See <http://www.copyright.gov/docs/sound/>.

⁸³ State laws generally also protect against creation and distribution of bootleg recordings – sometimes in the same statute that prohibits unauthorized duplication and distribution of existing sound recordings, and sometimes in a separate provision. See, e.g., BESEK UNPUBLISHED SOUND RECORDINGS STUDY, App. A. However, those laws, which relate to the recording of live performances without authorization, are not the focus of this Report.

⁸⁴ CAL. PENAL CODE § 653h(a) (West 2011).

In addition the law provides that

Every person who offers for sale or resale, or sells or resells, or causes the sale or resale, or rents, or possesses for [the purposes specified above], any article described in subdivision (a) with knowledge that the sounds thereon have been so transferred without the consent of the owner is guilty of a public offense.⁸⁵

The statute provides an exemption for persons engaged in radio or television broadcasting who transfer sounds (other than from the sound track of a motion picture) in connection with “broadcast transmission or related uses, or for archival purposes.”⁸⁶

The California law contains an “orphan works” exception for not-for-profit educational institutions or federal or state governmental entities that have as their primary purpose “the advancement of the public’s knowledge and the dissemination of information regarding America’s musical cultural heritage.”⁸⁷ It requires that the educational institution or government entity make “a good faith effort to identify and locate the owner or owners of the sound recordings to be transferred” and “the owner or owners could not be and have not been located.”⁸⁸ It provides that specific efforts must be taken to find the right holder.⁸⁹ Also, it provides that the

⁸⁵ *Id.* § 653h(d). It is also an offense if, for commercial advantage or private financial gain, one knowingly advertises, offers for sale, etc. a recording whose cover or label does not accurately disclose the true name of the manufacturer and artist(s). *Id.* § 653w.

⁸⁶ *Id.* § 653h(g).

⁸⁷ That purpose must be “clearly set forth in the institution’s or entity’s charter, bylaws,” or similar document. *Id.* § 653h(h).

⁸⁸ *Id.*

⁸⁹ “In order to continue the exemption permitted by this subdivision, the institution or entity shall make continuing efforts to locate such owners and shall make an annual public notice of the fact of the transfers in newspapers of general circulation serving the jurisdictions where the owners were incorporated or doing business at the time of initial affixations. The institution or entity shall keep on file a record of the efforts made to locate such owners for inspection by appropriate governmental agencies.” *Id.*

exemption does not relieve an institution or entity of its contractual or other obligation to compensate the owners of sound recordings to be transferred.⁹⁰

Michigan. Michigan's record piracy statute provides:

[A] person, without the consent of the owner, shall not transfer or cause to be transferred sound recorded on a phonograph record, disc, wire, tape, film, or other article on which sound is recorded, with the intent to sell or cause to be sold for profit or used to promote the sale of a product, the article on which the sound is so transferred.⁹¹

...

A person, knowing or having reasonable grounds to know that the sound thereon has been transferred without the consent of the owner, shall not advertise, sell, resell, offer for sale or resale, or possess for the purpose of sale or resale, an article that has been produced in violation of [the provision above].⁹²

The Michigan law contains an exception for persons who transfer sound or cause it to be transferred when:

- (a) Intended for or in connection with radio or television broadcast transmission or related uses.
- (b) For archival, library, or educational purposes.
- (c) Solely for the personal use of the person transferring or causing the transfer and without any compensation being derived by the person from the transfer.⁹³

New York. New York Penal Law provides criminal liability for a person who

1. knowingly, and without the consent of the owner, transfers or causes to be transferred any sound recording, with the intent to rent or sell, or cause to be rented or sold for profit, or used to promote the sale of any product, such article to which such recording was transferred, or
2. transports within this state, for commercial advantage or private financial gain, a recording, knowing that the sounds have been reproduced or transferred without the consent of the owner. . . .⁹⁴

In addition, it is an offense if someone

⁹⁰ *Id.*

⁹¹ MICH. COMP. LAWS ANN. § 752.782 (West 2011).

⁹² *Id.* at §752.783.

⁹³ *Id.* §752.785.

⁹⁴ N.Y. PENAL LAW § 275.05 (McKinney 2011). This offense is entitled "Manufacture of unauthorized recordings in the second degree." If done by someone who has been convicted of the same crime in the past five years, or who manufactures one thousand unauthorized recordings, it may qualify as a first degree offense with enhanced penalties. *Id.* § 275.10.

knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes or possesses for any such purposes, any recording that has been produced or transferred without the consent of the owner. . . .⁹⁵

The term “recording” is broadly defined to include any medium on which sound, images, or both can be recorded.⁹⁶ There are exceptions in the law for (1) any broadcaster who transfers recorded sounds or images in connection with or as part of a radio, TV or cable broadcast, or for the purposes of archival preservation, and (2) for “any person who transfers such sounds or images for personal use, and without profit for such transfer.”⁹⁷ The statute does not define the terms “broadcaster” or “archival preservation,” and there is no case law on this subsection that clarifies those terms.

Tennessee. Under Tennessee law, it is unlawful for any person to:

- (A) Knowingly reproduce for sale or cause to be transferred any recording with intent to sell it or cause it to be sold or use it or cause it to be used for commercial advantage or private financial gain through public performance without the consent of the owner;
- (B) Transport within this state, for commercial advantage or private financial gain, a recording with the knowledge that the sounds on the recording have been reproduced or transferred without the consent of the owner; or
- (C) Advertise, offer for sale, sell or rent, cause the sale, resale or rental of, or possess for one (1) or more of these purposes any recording that the person

⁹⁵ *Id.* § 275.25. If done by someone who has been convicted of the same crime in the past five years, or the commission of that crime involved at least one thousand unauthorized sound recordings or at least one hundred unauthorized audiovisual recordings, it may qualify as a first degree offense with enhanced penalties. *Id.* § 275.30. Failure to disclose the origin of a recording is also an offense. *Id.* § 275.35.

⁹⁶ The definition in full provides:

“Recording” means an original phonograph record, disc, tape, audio or video cassette, wire, film, hard drive, flash drive, memory card or other data storage device or any other medium on which such sounds, images, or both sounds and images are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original.

Id. § 275.00(6).

⁹⁷ *Id.* § 275.45.

knows has been reproduced or transferred without the consent of the owner.⁹⁸

“Recording” for purposes of the statute includes sound recordings in any medium.⁹⁹

Tennessee law provides no statutory exceptions.

b. *Summary of state criminal record piracy provisions*

Commercial/For profit activity: All of the statutes cited above require sales or commercial or “for profit” use or intent as a predicate to liability, and that appears to be true for the great majority of criminal statutes.¹⁰⁰ There are a small number of states, however, that do not explicitly require commercial activity for at least some offenses related to unauthorized use of pre-1972 sound recordings. For example, Alabama’s law makes it a felony to knowingly reproduce sound recordings (*i.e.*, to “transfer or cause to be transferred . . . any sounds recorded”) without the consent of the owner onto any medium “now known or later developed” for recording sounds, with the intent to sell or rent the recordings “for commercial advantage or private financial gain” or “to be used for profit through public performance.”¹⁰¹ On the other hand Alabama also provides, without specific reference to commercial gain, that it is an offense “to manufacture, distribute, transport or wholesale” any recording with knowledge that the sounds or

⁹⁸ TENN. CODE. ANN. § 39-14-139(b)(1)(A–C) (2011).

⁹⁹ The Tennessee statute provides:

“Recording” means a tangible medium on which sounds, images, or both are recorded or otherwise stored, including an original phonograph record, disc, tape, audio or video cassette, wire, film, memory card, flash drive, hard-drive, data storage device, or other medium now existing or developed later on which sounds, images, or both are or can be recorded or otherwise stored, or a copy or reproduction that duplicates, in whole or in part, the original.

TENN. CODE. ANN. § 39-14-139(a)(6) (2011).

¹⁰⁰ See JASZI STUDY at 12 (regarding the meaning of “commercial”).

¹⁰¹ ALA. CODE § 13A-8-81(a)(1) (2011).

performances thereon were transferred without the owner's consent.¹⁰² Georgia law provides that it is unlawful to "transfer or cause to be transferred any sounds or visual images recorded on a phonograph record, disc, wire, tape, videotape, film, or other article on which sounds or visual images are recorded onto any other phonograph record, disc, wire, tape, videotape, film, or article" without the consent of the owner of the master recording.¹⁰³ There is no explicit requirement of commercial gain or intent to profit. However, the law does exclude copies made solely for the personal use of the copier, provided no profit is derived from the copying.¹⁰⁴

Prohibited Activities. The formulation of prohibited activities varies from state to state. Almost all states prohibit the act of duplicating without authorization (often referred to as "transferring the sounds"). Most states also prohibit advertising or offering for sale, and selling or otherwise distributing the unauthorized recordings. Some states also criminalize activities such as transporting sound recordings within the state (or possessing them) with knowledge that they are unauthorized, with intent to sell them.

Exceptions. The nature and number of exceptions available under criminal statutes vary from state to state. Most states have at least a few exceptions, the most common being exceptions for broadcasters to facilitate broadcast transmissions and/or for archival purposes, such as those found in the laws of California, Michigan and New York, discussed above.¹⁰⁵ But "broadcaster" is often undefined and the exception is usually limited to radio and television broadcasting, although in some states cable transmissions are also included.¹⁰⁶

¹⁰² ALA. CODE § 13A-8-81(a)(3) (2011); *see also* JASZI STUDY at 24, 29.

¹⁰³ GA. CODE ANN. § 16-8-60(a)(1) (2011); *see also* IOWA CODE ANN. § 714.15 (West 2011); NEB. REV. STAT. ANN. § 28-1323 (West 2011).

¹⁰⁴ GA. CODE ANN. § 16-8-60(c)(3) (2011).

¹⁰⁵ All ten states surveyed in the Jaszi Study had an exception for broadcasters. *See* JASZI STUDY at 10.

¹⁰⁶ *See, e.g.,* DEL. CODE ANN. tit. 11, § 923(1) (West 2011); FLA. STAT. ANN. § 540.11(6)(a) (West 2011). North Carolina has extended its exception to webcasters. *See* N.C. GEN. STAT. § 14-433(c) (2010); JASZI STUDY at 10.

Many states (such as Michigan, whose statute is described above) also have an exemption for personal nonprofit or noncommercial use, sometimes limited to “in home” use.¹⁰⁷ Several states (such as California and Michigan, cited above) have exceptions for educational or library uses,¹⁰⁸ or for archival preservation that is not limited to broadcasters.¹⁰⁹ And then there are exceptions provided by only one or a very few states, such as for judicial proceedings,¹¹⁰ law enforcement purposes,¹¹¹ and even, in one case, for sound recordings of bird and wild animal calls.¹¹²

Even without a specific exception, in almost all cases activities that are not undertaken for commercial advantage or private financial gain will not be within the scope of potential criminal liability. However, as the Jaszi Study points out, “[t]he word ‘commercial’ . . . is subject to a multitude of interpretations” and it is possible for a nonprofit institution to receive commercial benefits in any number of ways.¹¹³

Nevertheless, there are two important considerations about the criminal laws that provide considerable comfort to users with respect to activities that would be permitted if federal law were applicable. First, criminal laws are strictly construed.¹¹⁴ So, where there is ambiguity, the law is likely to be construed in the user’s favor. Second, criminal laws are enforced by public

¹⁰⁷ See, e.g., COLO. REV. STAT. § 18-4-605(1)(b) (2011); MO. ANN. STAT. § 570.245(2) (West 2011).

¹⁰⁸ See, e.g., NEB. REV. STAT. ANN. § 28-1325(4) (West 2011); W. VA. CODE § 61-3-50 (2011).

¹⁰⁹ See, e.g., NEV. REV. STAT. ANN. § 205.217(3) (West 2010); R.I. GEN. LAWS ANN. § 42-8.1-7 (West 2011).

¹¹⁰ See, e.g., ALASKA STAT. § 45.50.900(b)(2) (2011); S.D. CODIFIED LAWS § 43-43A-4(3) (2011).

¹¹¹ See MASS. GEN. LAWS ch. 266, § 143D (2010).

¹¹² See S.C. CODE ANN. § 16-11-950 (2010).

¹¹³ JASZI STUDY at 12.

¹¹⁴ See, e.g., 73 Am. Jur. 2d Statutes § 194 (2011) (“Statutes imposing a penalty, or penal statutes, are generally subject to a strict construction”).

officials, who are unlikely to bring an action in circumstances that do not amount to commercial piracy.

2. Civil Statutes

A number of states have civil laws that address protection for pre-1972 sound recordings, directly or indirectly. Section 980(a)(2) of the California statute provides civil protection of pre-1972 sound recordings and is a good example:

The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.¹¹⁵

The few cases decided under § 980(a)(2) have viewed the section as conferring an intangible property interest in the sound recordings that can be protected in a misappropriation, conversion or unfair competition claim. They have distinguished the property interest protected by this statute from copyright protection which, under California law, terminates upon publication.¹¹⁶

Other states may provide civil protection under common law, but have statutory limitations on those actions. For example, federal law permits states to protect pre-1972 sound recordings until 2067, but Colorado’s law provides that “no common law copyright shall exist for a period longer than fifty-six years after an original copyright accrues to an owner.”¹¹⁷

California’s civil statute, cited above, provides protection only until 2047.¹¹⁸

¹¹⁵ CAL. CIV. CODE § 980(a)(2) (West 2011).

¹¹⁶ See, e.g., *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 725 (9th Cir. 1984); *A&M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 570 (Ct. App. 1977); see also JASZI STUDY at 34.

¹¹⁷ COLO. REV. STAT. § 18-4-601(1.5) (2011).

¹¹⁸ CAL. CIV. CODE § 980(a)(2) (West 2011). Delaware’s criminal piracy law provides protection only for a period of 50 years from the original fixation of a sound recording, but the law provides that it “shall neither enlarge nor diminish the rights of parties in civil litigation.” DEL. CODE ANN. tit. 11, §§ 923(3), 924 (West 2011).

Those limitations may also address the relationship between private actions and the provisions of state criminal law. Some states specifically provide that there is a private right of action for violation of the state criminal piracy provision.¹¹⁹ A number of state laws specifically preserve civil actions by stating affirmatively that their criminal piracy law is not an exclusive remedy or that it does not abrogate civil actions.¹²⁰ Other states simply provide that the criminal piracy law does not enlarge or diminish civil remedies.¹²¹

A few states specifically prohibit certain types of claims in connection with pre-1972 sound recordings. For example, North Carolina has a statute that abrogates any common law rights to obtain royalties on the commercial use of sound recordings embodying musical performances once copies of the sound recordings are sold.¹²² Essentially, this statute denies any common law performance right in sound recordings.¹²³ South Carolina has a similar law.¹²⁴

¹¹⁹ See, e.g., ALA. CODE § 13A-8-85 (2011); N.C. GEN. STAT. § 14-436 (2010).

¹²⁰ See, e.g., IDAHO CODE ANN. § 18-7607 (2011); LA. REV. STAT. ANN. § 14:223.4 (2011); OR. REV. STAT. ANN. § 164.866 (West 2011).

¹²¹ See, e.g., ARK. CODE ANN. § 5-37-510(f) (2011); TENN. CODE ANN. § 39-14-139(h) (2011); WASH. REV. STAT. ANN. § 19.25.020(3) (West 2011).

¹²² North Carolina's statute provides in full:

When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this State, all asserted common-law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated. Nothing in this section shall be deemed to deny the rights granted any person by the United States copyright laws. The sole intentment of this enactment is to abolish any common-law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions of the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof.

N.C. GEN. STAT. § 66-28 (2010).

¹²³ This statute was apparently passed in response to *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939). See JASZI STUDY at 85-86. Despite this broad language, the North Carolina Court of Appeals in *Liberty/UA, Inc. v. Eastern Tape Corp.*, 180 S.E. 2d 414, 418 (N.C. Ct. App. 1971) held that the effect of

Finally, a number of states also have statutory unfair competition laws that may reach acts of record piracy if there is a likelihood of consumer confusion.¹²⁵

3. Non-Statutory Causes of Action

Most states also have some form of non-statutory civil protection, although the precise nature of that protection varies from state to state. The two most prevalent theories for providing protection are common law copyright and misappropriation/unfair competition,¹²⁶ but courts have also protected sound recordings under other legal theories, such as conversion.¹²⁷ Sometimes people mistakenly refer to all forms of protection collectively as “common law copyright” or “common law protection.” But not all civil protection for sound recordings is common law – see the discussion of civil statutes, above – and a “common law copyright” claim differs from one grounded in unfair competition or conversion, as discussed below.

a. Common law copyright

The Nature of Common Law Copyright. Common law copyright refers to the protection historically provided by state law to unpublished works of authorship. It is not statutory, but is

the statute was to eliminate “any common law right to restrict the use of a recording sold for use in this State” and interpreted “use” to mean “the use for which a recording is intended; *i.e.* the playing of the recording.” The court ruled that playing the recording publicly or privately was permitted, but rerecording it for sale was not.

¹²⁴ See S.C. CODE ANN. § 39-3-510 (2010).

¹²⁵ See, e.g., 815 ILL. COMP. STAT. 510/2 (2011); OHIO REV. CODE ANN. § 4165.02 (West 2011); see also JASZI STUDY at 14.

¹²⁶ “Unfair competition” embraces two principal torts: “passing off” and misappropriation. “Passing off” occurs when someone tries to market goods or services as those of another, to take advantage of the goodwill that the other person has developed in the marketplace. The misappropriation prong is more often applicable to unauthorized use of sound recordings, since generally the seller has no desire to mislead as to the source of the recordings, but rather wants to benefit from – *i.e.*, misappropriate the value of – another’s investment of time, talent and money. Most misappropriation claims are now preempted under section 301 of the Copyright Act, but those with respect to pre-1972 sound recordings survive because of section 301(c).

¹²⁷ See JASZI STUDY at 4, 19.

judge-made law, developed through judicial decisions. For most works, common law copyright protection disappeared in 1978 when the unitary, federal system of copyright took effect and unpublished works were brought under the federal scheme. For pre-1972 sound recordings, however, common law copyright remains relevant.

Traditionally, a work was protected by common law copyright only for as long as it was unpublished.¹²⁸ Upon publication, if a work met the requirements of federal law (*i.e.*, if it was published with a proper notice of copyright), it gained federal copyright protection. Otherwise, it went into the public domain. Sound recordings, however, were ineligible for federal protection until 1972. Rather than allow sound recordings to be thrust into the public domain when copies were distributed, states began amending their laws to ensure continued state protection, even though the recordings were published as defined by federal law. Some states, like New York, have done this by adapting their definition of “publication” so that sound recordings, regardless of how widely distributed copies may have been, would be deemed unpublished and therefore entitled to protection under the principles of common law copyright.¹²⁹ Other states, such as California, simply protected sound recordings that were published or otherwise made widely available under a different legal doctrine, such as unfair competition.¹³⁰

Because common law copyright has long protected unpublished works, one might have reasonably expected states to confirm the application of common law copyright principles to the

¹²⁸ For clarity, the terms “published” and “publication” will be used as defined in federal copyright law unless otherwise specified: “‘Publication’ is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending.” 17 U.S.C. § 101.

¹²⁹ The Supreme Court in *Goldstein* held that federal law concerning publication had no application to state law, indicating that states were free to define publication as they wished for state law purposes. 412 U.S. at 570 n.28.

¹³⁰ See, *e.g.*, *Lone Ranger Television*, 740 F.2d at 726 (copies of radio broadcasts are not eligible for common law copyright protection but may still be protected pursuant to a conversion or unfair competition claim, which “lies outside copyright”).

pre-1972 sound recordings that remain unpublished.¹³¹ The reality is that there is little state law directed to unpublished sound recordings and nearly all of the state law cases involving pre-1972 sound recordings involve commercially published sound recordings.¹³²

Recent Common Law Copyright Cases. The most notable case in recent years involving pre-1972 sound recordings was *Capitol Records, Inc. v. Naxos of America, Inc.*¹³³ At issue were recordings of classical music performances by Pablo Casals, Edwin Fischer and Yehudi Menuhin, originally made in the 1930s. Capitol, with a license from EMI, the successor of the original recording company, remastered the recordings, and was distributing them in the United States. Naxos obtained and restored the recordings in the UK, where they were in the public domain, and began marketing them in the United States in competition with Capitol. Capitol sued in federal court for unfair competition, misappropriation and common law copyright infringement. The district court granted summary judgment to Naxos because the recordings were in the public domain in the UK, where they were originally recorded.

When that decision was appealed, the U.S. Court of Appeals for the Second Circuit concluded that New York law was unclear in some important respects and certified three questions of state law to the New York Court of Appeals (the highest court of the state):

- (1) whether expiration of the term of protection in the country of origin precluded common law copyright protection in New York;
- (2) whether a cause of action for common law copyright infringement includes some or all of the elements of a claim for unfair competition; and
- (3) whether a claim for common law copyright infringement is defeated by a demonstration that plaintiff's work has little market value, and defendant's work

¹³¹ This is, of course, provided that any statute of limitations a state has provided with respect to such works has not lapsed. See, e.g., COLO. REV. STAT. § 18-4-601(1.5) (2011).

¹³² Note, however, that the Jaszi Study examined cases addressing common law copyright, not only with respect to pre-1972 sound recordings, but also as they had developed with respect to unpublished works prior to 1978.

¹³³ 4 N.Y.3d 540, 830 N.E.2d 250, 797 N.Y.S.2d 352 (N.Y. 2005).

can fairly be regarded as a new product, even though it uses components of plaintiff's work.¹³⁴

The New York Court of Appeals accepted the case, and held that foreign sound recordings remain protected under "common law copyright" in New York until 2067, even though they may be in the public domain in their home country. Concerning the second question, the court explained that a common law copyright claim in New York "consists of two elements: (1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by copyright."¹³⁵ It went on to state that "[c]opyright infringement is distinguishable from unfair competition, which in addition to unauthorized copying and distribution requires competition in the marketplace or similar actions designed for commercial benefit."¹³⁶

Concerning the final certified question, the court concluded that even if the original recordings had "slight if any current market" and Naxos's work, because of the remastering, could fairly be regarded as a new product, it would not affect plaintiff's ability to enforce a state law copyright claim.¹³⁷ It ruled that Naxos's remastered recording could still infringe Capitol's copyright "to the extent that it utilizes the original elements of the protected performances."¹³⁸ It also observed in passing, with reference to federal copyright law, that Naxos's recordings were not independent creations and that under the fair use doctrine, reproduction of an entire work is generally infringing.¹³⁹

¹³⁴ *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 484-85 (2d Cir. 2004), *certified question accepted*, 3 N.Y.3d 666, 817 N.E.2d 820, 784 N.Y.S.2d 3 (N.Y. 2004), *and certified question answered*, 4 N.Y.3d 540, 830 N.E.2d 250, 797 N.Y.S.2d 352 (N.Y. 2005).

¹³⁵ 830 N.E.2d at 266.

¹³⁶ *Id.*

¹³⁷ *Id.* at 266-67.

¹³⁸ *Id.* at 267.

¹³⁹ *Id.*

In *EMI Records Ltd. v. Premise Media Corp.*,¹⁴⁰ a New York trial court, ruling on a motion for a preliminary injunction, considered the applicability of the fair use defense to a claim for infringement of common law copyright in a sound recording. Defendants had used an excerpt of John Lennon’s “Imagine,” a pre-1972 sound recording, in a documentary film entitled “Expelled.” The film attempts to counter criticism of the theory of intelligent design. The 99-minute documentary used a 15-second excerpt from Lennon’s 3-minute sound recording.

Plaintiffs argued that under common law copyright, any unauthorized use of a sound recording is actionable. Defendants argued that only a reproduction of the complete recording was an infringement. The court rejected both claims, but ultimately concluded that plaintiffs had established a *prima facie* claim of common law copyright infringement.¹⁴¹ The court observed that New York cases have acknowledged the existence of a fair use defense to common law infringement claims but that no case had actually applied fair use in that context.¹⁴² The court recognized that fair use was generally unavailable as a defense with respect to unpublished works, principally to protect the copyright owner’s right of first publication.¹⁴³ In the case of sound recordings, however, common law copyright protection exists regardless of publication, reasoned the court. “Thus, the erosion of the publication distinction in the context of sound recordings vitiates the underlying rationale preventing application of pre-publication fair use.”¹⁴⁴ Accordingly, the court held that fair use was available as a defense to plaintiffs’ copyright infringement claim.

¹⁴⁰ 2008 N.Y. Misc. Lexis 7485 (N.Y. Sup. Ct. Aug. 8, 2008).

¹⁴¹ *Id.* at *9.

¹⁴² *Id.* at *10.

¹⁴³ *Id.* at *13 (citing *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 551 (1985)).

¹⁴⁴ *Id.* at *14.

The court turned for guidance to the federal law of fair use and specifically to the fair use factors in 17 U.S.C. § 107 and the cases interpreting them.¹⁴⁵ The court ruled that defendants were likely to prevail on their fair use defense, primarily because the use of the sound recording excerpt in the film could be seen as transformative, conveying a critical message about the song and the viewpoint it represents, and because there was little likely market effect from defendants' use. Accordingly, the court denied the preliminary injunction.¹⁴⁶

Although just a trial court decision on a preliminary injunction motion, the *EMI* case illustrates a judicial willingness to recognize a fair use defense in a common law copyright infringement action, at least when recordings have been made available to the public.¹⁴⁷

b. *Unfair competition/misappropriation*

Many states have protected published pre-1972 sound recordings under common law unfair competition principles. The tort of unfair competition has evolved over time. Traditionally, three elements were required to establish the tort: (1) the plaintiff and defendant had to be in competition with one another; (2) the defendant must have “appropriated a business asset that plaintiff had acquired by the investment of skill, money, time and effort”;¹⁴⁸ and (3) the

¹⁴⁵ *Id.* at *18. The statutory factors, set out in 17 U.S.C. § 107, are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

¹⁴⁶ The court also denied defendants' motion to dismiss, holding that plaintiffs had adequately pleaded both common law copyright infringement and unfair competition because they argued, *inter alia*, that defendants used the recording in a manner that falsely suggested to the public that the use was authorized by the right holder. *Id.* at **38, 40.

¹⁴⁷ Fair use developed as a common law doctrine, and only became part of the federal copyright statute in the 1976 Copyright Act. *See, e.g., Folsom v. Marsh*, 9 F. Cas. 342 (D. Mass. 1841).

¹⁴⁸ Ringer at 17.

defendant must have fraudulently “passed off” or “palmed off” the appropriated assets as those of plaintiff, causing the public to be confused as to the source of the goods.¹⁴⁹

Over time the courts in many (but not all) states dispensed with the requirement of “passing off” in cases involving misappropriation in general (and sound recordings in particular), in part because it is difficult to establish: “there is rarely any incentive for the appropriator to represent the recording as anything except exactly what it is.”¹⁵⁰ In order to achieve equitable results, some courts also dispensed with the requirement of competition, because it is difficult for performers to establish that they are in competition with the appropriator. So the core of the tort as it applies to sound recordings is the misappropriation of plaintiff’s business asset.¹⁵¹ Some courts still refer to this tort as unfair competition, others as misappropriation.

The following cases – from California, Illinois, Michigan, New Jersey and North Carolina – illustrate the application of unfair competition principles to sound recordings.¹⁵²

¹⁴⁹ *Id.*; see, e.g., *Victor Talking Mach. Co. v. Armstrong*, 132 F. 711 (S.D.N.Y. 1904).

¹⁵⁰ Ringer at 17. In many cases defendants tried to escape liability by affixing distinctive labels to avoid the charge of passing off, but those efforts were generally unavailing, as courts held that a claim for unfair competition could still lie. *Compare Columbia Broadcasting System, Inc. v. Melody Recordings, Inc.*, 341 A.2d 345 (N.J. App. Div. 1975) and *Capitol Records v. Erickson*, 2 Cal. App. 3d 526 (Ct. App. 1969) with *ABKCO Music, Inc. v. Washington*, 2011 U.S. Dist. LEXIS 120081 (E.D. Mich. Oct. 18, 2011) (discussed below).

¹⁵¹ *Id.* “Passing off” remains a viable cause of action. Common law unfair competition in effect evolved into two principal torts: passing off, which requires a showing of consumer confusion, and misappropriation, which does not.

¹⁵² Prior to *Capitol Records v. Naxos*, New York courts also protected pre-1972 sound recordings on common law unfair competition grounds. See, e.g., *Arista Records, Inc. v. MP3Board, Inc.*, 2002 U.S. Dist. Lexis 16165, at **36-37, 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002) (plaintiff stated a claim for unfair competition under New York law against operator of an internet site that provided users with pirated copies of plaintiff’s pre-1972 musical recordings); *Capitol Records, Inc. v. Greatest Records, Inc.*, 252 N.Y.S.2d 553 (Sup. Ct. 1964) (entering temporary injunction against manufacture and distribution of unauthorized reproductions of Beatles albums and holding, *inter alia*, that the application of state unfair competition law to this field remains intact after the Supreme Court’s decisions in *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting, Inc.*). In several of the cases discussed above, the courts struggled with the question whether *Sears* and *Compco* precluded a state law unfair competition claim with respect to sound recordings, and ultimately concluded that they did not. The Supreme Court in *Goldstein* concluded that those cases did not pose a bar to state protection of sound recordings. 412 U.S. at 569-70.

In *Capitol Records, Inc. v. Erickson*,¹⁵³ the court held that relief on the grounds of unfair competition could be granted in circumstances where someone “unfairly appropriates to his profit the valuable efforts of his competitor” even where the defendant did not “palm off” his products as those of his competitor.¹⁵⁴ The defendant had purchased tapes and recordings sold by the plaintiff, remastered them, and then sold tapes made from the new masters in competition with the plaintiff. The California trial court granted the plaintiff’s motion for a preliminary injunction, and the appellate court affirmed. The plaintiff had argued that labels on the tapes it sold, disclaiming any relationship with the plaintiff or the recording artists, protected it from a claim of unfair competition, a contention rejected by the court. Although there was a question of fact as to whether the labels were effective, the court found that the rights involved were not merely those of the public not to be misled but also rights as between plaintiff and defendant. The court concluded that defendant “unfairly appropriate[d] artistic performances produced by Capitol’s efforts” and “profit[ed] thereby to the disadvantage of Capitol.”¹⁵⁵

In *Capitol Records, Inc. v. Spies*,¹⁵⁶ an Illinois appellate court held that the unauthorized recording and resale of commercial sound recordings constituted wrongful appropriation and unfair competition. The defendant had purchased plaintiff’s records and tapes in retail stores, then made and sold 1500 unauthorized copies. The court cited several cases, including *Capitol Records v. Erickson*, discussed above, in support of its conclusion that defendants had engaged in unfair competition. In the court’s view, the unfairness inhered in the fact that the defendants waited until the recordings, created by the plaintiff at great expense, became popular, and then appropriated the plaintiffs’ products to take advantage of the existing market.

¹⁵³ 2 Cal. App. 3d 526 (Ct. App. 1969).

¹⁵⁴ *Id.* at 537-38.

¹⁵⁵ *Id.* at 537.

¹⁵⁶ 264 N.E.2d 874 (Ill. App. Ct. 1970). For further discussion of this case, see BESEK COMMERCIAL SOUND RECORDINGS STUDY App. n.13 and accompanying text.

In *A&M Records, Inc. v. M.V.C. Distributing Corp.*,¹⁵⁷ the U.S. Court of Appeals for the Sixth Circuit upheld the district court’s ruling that defendant’s alleged conduct constituted unfair competition under the common law of Michigan, rejecting defendant’s claim that plaintiffs lost their common law property rights when they distributed their recording.¹⁵⁸ The defendants had engaged in unauthorized duplication of the plaintiff’s sound recordings, which the defendants distributed under a different label. On the other hand, in *ABKCO Music v. Washington*,¹⁵⁹ decided in October 2011, a Michigan district court concluded that the gist of an unfair competition claim is “that the public is so misled that plaintiff loses some trade by reason of the deception.”¹⁶⁰ The court denied summary judgment to plaintiffs on their claim of unfair competition based on defendants’ use of plaintiffs’ pre-1972 sound recordings in an online audiovisual advertisement for a play. The plaintiffs claimed that the ad led the public to believe that the plaintiffs sponsored or supported the advertisement and the play. But in the court’s view, they provided no evidence to back up their allegations, nor did they cite case law to support a finding that defendants can be liable under a common law unfair competition theory for such conduct.

In *Columbia Broadcasting System Inc. v. Melody Recordings, Inc.*,¹⁶¹ a record piracy case that arose in New Jersey, the court affirmed the trial court’s grant of summary judgment to CBS on common law unfair competition grounds, rejecting the defendants’ claim that because their

¹⁵⁷ 574 F.2d 312 (6th Cir. 1978).

¹⁵⁸ *Id.* at 314.

¹⁵⁹ 2011 U.S. Dist. LEXIS 120081 (E.D. Mich. Oct. 18, 2011).

¹⁶⁰ *Id.* at *30 (citing *Revlon, Inc. v. Regal Pharmacy, Inc.*, 29 F.R.D. 169, 174 (E.D. Mich. 1961)).

¹⁶¹ 341 A.2d 348 (N.J. Super. Ct. App. Div. 1975).

recordings were clearly labeled, there was no palming off and therefore no unfair competition.¹⁶²

The court observed that:

The actionable unfairness of this practice inheres in a combination of factors—the substantial investment of time, labor, money and creative resources in the product by plaintiff, the utilization of the actual product by defendant, the misappropriation or use of the appropriated product by defendant in competition with plaintiff, and commercial damage to plaintiff.¹⁶³

In *Liberty/UA, Inc. v. Eastern Tape Corp.*,¹⁶⁴ a North Carolina appellate court held that record piracy constitutes unfair competition in that state. Defendants had copied plaintiff's records onto tapes and sold the tapes in competition with plaintiff. According to the court, defendants' appropriation of the fruits of plaintiff's initiative, skill, and investment provided them with a significant competitive advantage over plaintiff and damaged plaintiff's business.¹⁶⁵ The court found that "[t]his conduct . . . amounts to unfair competition and is subject to restraint."¹⁶⁶ Defendants also argued that the North Carolina statute mentioned above (which abrogates any common law rights to obtain royalties on the commercial use of sound recordings embodying musical performances once copies of the sound recordings are sold)¹⁶⁷ precluded the court from holding that defendants' conduct constituted unfair competition. The court held that the statute was designed to eliminate any common law right that would restrict playing a recording sold for use in the state. But to hold that the statute permitted duplicating a recording and selling it in

¹⁶² CBS had sued the defendants, who were copying CBS recordings and selling them – with defendants' own distinctive label – to distributors.

¹⁶³ *Id.* at 354. The court also rejected defendants' contention that the Supreme Court's decision in *Goldstein* permitted the states to regulate only through statutes, and not by common law. *Id.* at 351.

¹⁶⁴ 180 S.E.2d 414 (N.C. Ct. App. 1971).

¹⁶⁵ *Id.* at 415-16.

¹⁶⁶ *Id.* at 416.

¹⁶⁷ See N.C. GEN. STAT. § 66-28 (2010). See *supra* note 122 for the full text of the statute.

competition with the original “would, in our opinion, give a construction to the statute that was never intended.”¹⁶⁸

Not all states have civil statutes or reported cases dealing specifically with the unauthorized use of sound recordings, but states generally recognize unfair competition torts, so presumably a cause of action could lie in appropriate circumstances.

c. *Conversion*

The tort of conversion generally applies to the unauthorized and wrongful assumption of control of another’s personal property in a way that seriously interferes with or effectively repudiates the owner’s rights.¹⁶⁹ While in most states conversion applies only to tangible property and not to intellectual property,¹⁷⁰ a few states have recognized conversion claims with respect to the unauthorized duplication and distribution of pre-1972 sound recordings.

For example, in *A & M Records, Inc. v. Heilman*¹⁷¹ defendant duplicated plaintiff’s records and tapes and distributed them without authorization. The California appellate court affirmed judgment for plaintiff, stating defendant’s conduct constituted unfair competition even though there was no “palming off.”¹⁷² The court further concluded that the “misappropriation and sale of the intangible property of another without authority from the owner is conversion.”¹⁷³ Accordingly, the court held that there was a valid basis for placing a constructive trust on the money defendant made from selling copies of plaintiff’s recordings.

¹⁶⁸ *Liberty/UA*, 180 S.E.2d at 418.

¹⁶⁹ 18 Am. Jur. 2d Conversion § 1 (2004).

¹⁷⁰ JASZI STUDY at 19 (citing 1 NIMMER ON COPYRIGHT § 1.01[B][1][i]).

¹⁷¹ 75 Cal. App. 3d 554 (1977).

¹⁷² *Id.* at 564.

¹⁷³ *Id.* at 570.

In *CBS, Inc. v. Garrod*,¹⁷⁴ another record piracy case, the court granted plaintiff's motion for partial summary judgment on its conversion claim, holding that "[i]n Florida, an action for conversion will lie for a 'wrongful taking of intangible interests in a business venture.'"¹⁷⁵

4. Right of Publicity

The right of publicity protects against unauthorized use of someone's identity, which in some cases has been held to include duplication of a voice – at least where the voice is distinctive and recognizable. Many states protect an individual's right of publicity through statutes, common law, or both, although such protection may flow from privacy laws rather than laws specifically denominated "right of publicity." For example, New York protects the right of publicity by means of section 51 of its Civil Rights Law, which prohibits, *inter alia*, use of a person's "name, portrait, picture or voice . . . within [New York] for advertising purposes or for the purposes of trade" without that person's consent.¹⁷⁶ New York does not, however, recognize any common law right of publicity claims. Michigan has no statutory right of publicity, but does recognize common law right of publicity.¹⁷⁷ California provides both statutory protection for the right of publicity (which extends to name, voice, signature, photograph or likeness)¹⁷⁸ and common law protection, which may extend to aspects of an individual's persona that its statute does not reach.¹⁷⁹

¹⁷⁴ 622 F. Supp. 532 (M.D. Fla. 1985), *aff'd*, 803 F.2d 1183 (11th Cir. 1986).

¹⁷⁵ *Id.* at 536 (citing *In re Estate of Corbin*, 391 So.2d 731, 732-33 (Fla. Dist. Ct. App. 1980)). The court also granted summary judgment on plaintiff's other claims, including common law copyright, unfair competition and statutory theft.

¹⁷⁶ N.Y. CIV. RIGHTS LAW § 51 (McKinney 2011). Section 50 of New York's Civil Rights Law is an accompanying criminal provision. *Id.* § 50.

¹⁷⁷ *See, e.g., Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 n.1 (6th Cir. 1983).

¹⁷⁸ CAL. CIV. CODE § 3344 (West 2011).

¹⁷⁹ *See, e.g., White v. Samsung Electronics America*, 971 F.2d 1395, 1398 (9th Cir. 1992) (reversing summary judgment against game show hostess Vanna White in connection with an ad showing a blond

Although a few states, such as New York and California, explicitly include “voice” among the attributes of identity entitled to protection, most do not.¹⁸⁰ Some state laws do not list specific protectable attributes, but extend generally to, for example, “aspect[s] of an individual’s persona.”¹⁸¹ In such cases, a distinctive voice might be entitled to protection even though “voice” is not specifically mentioned in the law. In certain circumstances, state courts have extended protection to forbid sound-alike recordings, thus providing broader protection than federal law provides for copyright-protected sound recordings.¹⁸²

In general the right of publicity protects against use of someone’s identity for advertising or commercial purposes.¹⁸³ Record piracy clearly qualifies as use for commercial purposes, and therefore in some states a right of publicity claim might be asserted based on use of the performer’s voice. Nevertheless, plaintiffs in state law record piracy cases have generally relied instead on common law copyright and unfair competition claims.¹⁸⁴ Presumably this is in part because the right of publicity concerns not the use of a particular sound recording *per se*, but rather the use or imitation of a particular performer’s voice, sometimes in connection with the imitation of a particular recording. The owner of the right of publicity – the performer – will not

robot in conjunction with a game board, and holding that the common law right of publicity “does not require that appropriations of identity be accomplished through particular means to be actionable”).

¹⁸⁰ See, e.g., FLA. STAT. § 540.08 (2011) (protecting name, portrait, photograph, or other likeness); VA. CODE ANN. § 8.01-40(A) (2011) (protecting name, portrait, picture).

¹⁸¹ OHIO REV. CODE ANN. § 2741.02 (West 2011); see also 765 ILL. COMP. STAT. 1075/30 (2011) (protecting a person’s “identity”).

¹⁸² Compare *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (applying common law right of publicity to protect widely known professional singer from deliberate imitation of her distinctive voice in television advertisement) with 17 U.S.C. § 114(b) (exclusive right of the owner of a sound recording is limited to the right to duplicate in a manner that recaptures the actual sounds fixed in the recording).

¹⁸³ See, e.g., FLA. STAT. § 540.08 (2011) (providing protection against use of a person’s name, portrait, photograph or other likeness “for any commercial or advertising purpose”); 765 ILL. COMP. STAT. § 1075/10 (2011) (providing protection against use of an individual’s identity “for commercial purposes”); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2011) (providing protection against use of someone’s name, portrait, picture or voice “for advertising purposes or for purposes of trade”).

¹⁸⁴ For a further discussion of state law rights of publicity in the context of pre-1972 sound recordings, see JASZI STUDY at 20-22.

necessarily be the owner of the common law rights in the recording or have standing to assert an unfair competition claim based on unauthorized use of the recording.

5. Variations among States with Respect to Civil Claims: Rights and Exceptions

There are significant variations among states (and ambiguities in the law within states) concerning (1) the nature of the activities that might be deemed to unfairly compete with another or violate a common law copyright – *i.e.*, whether the “bundle of rights” is similar under state and federal law; and (2) whether exceptions exist under state civil law for certain uses, as they do under federal copyright law.

Concerning the former point, most of the reported cases deal with reproduction and distribution of copies of sound recordings, and it is clear that state law rights extend to such activities. But because most cases involve reproduction and distribution of entire recordings, there is no developed body of law addressing whether a “derivative work right” can be said to exist. A few cases suggest that copying less than an entire recording can be infringing. For example, in *EMI Records, Ltc. v. Premise Media Corp.*,¹⁸⁵ discussed above, the court rejected defendant’s argument that common law copyright protected only against reproduction of an entire sound recording, although it ultimately concluded that defendants’ copying of 15 seconds of plaintiffs’ recording was fair use. In *Bridgeport Music, Inc. v. Justin Combs Publishing*,¹⁸⁶ the court upheld a jury verdict against a defendant that sampled a portion of a pre-1972 sound recording in a new work. And in *Capitol Records v. Naxos*, discussed above, one of the questions certified to the New York Court of Appeals was whether a claim of common law copyright infringement was defeated by showing that plaintiff’s work has little market value and

¹⁸⁵ 2008 N.Y. Misc. LEXIS 7485 (Sup. Ct. Aug. 8, 2008). See discussion *supra* in text accompanying notes 140-146.

¹⁸⁶ 507 F.3d 470 (6th Cir. 2007).

“defendant’s work, although using components of plaintiff’s work, is fairly to be regarded as a ‘new product.’”¹⁸⁷ The court concluded, in the context of common law copyright, that “even assuming that Naxos has created a ‘new product’ due to its remastering efforts that enhance sound quality, that product can be deemed to infringe on Capitol’s copyright to the extent that it utilizes the original elements of the protected performances.”¹⁸⁸

A different result might prevail, however, if the claim were based in unfair competition rather than common law copyright. The federal district court that first heard the *Capitol Records v. Naxos* case dismissed plaintiff’s unfair competition claim for several reasons, among them that Naxos was not merely duplicating the recordings and capitalizing on plaintiff’s efforts, as was the situation in most record piracy cases.¹⁸⁹ Instead, the court concluded that Naxos had invested significant time, effort and money to produce high-quality restorations, of plaintiff’s recordings, which could not have been marketed in their pre-existing state.¹⁹⁰ While the New York Court of Appeals effectively reversed this case, the federal district court decision suggests that a derivative work right is on less certain ground where the asserted claim is unfair competition rather than common law copyright.

In general, state law does not appear to recognize a performance right in sound recordings. The Pennsylvania Supreme Court in *Waring v. WDAS Broad. Station*¹⁹¹ suggested that one could obtain indirect public performance rights in sound recordings through the use of a restrictive legend on the sound recording prohibiting radio broadcast. Yet other states rejected

¹⁸⁷ 830 N.E.2d at 254.

¹⁸⁸ *Id.* at 267.

¹⁸⁹ *Capitol Records, Inc. v. Naxos of America*, 262 F. Supp. 2d 204 (S.D.N.Y. 2003), *summary judgment granted*, 274 F. Supp. 2d 472 (S.D.N.Y. 2003), *question certified*, 372 F.3d 471 (2d Cir.), *certified question accepted*, 3 N.Y.3d 666, 817 N.E.2d 820, 784 N.Y.S.2d 3 (N.Y. 2004), *and certified question answered*, 4 N.Y.3d 540, 830 N.E.2d 250, 797 N.Y.S.2d 352 (N.Y. 2005).

¹⁹⁰ 262 F. Supp. 2d at 214-15.

¹⁹¹ 194 A. 631 (Pa. 1937).

this conclusion. For example, in *RCA Mfg. Co. v. Whiteman*,¹⁹² the Second Circuit declined to follow *Waring v. WDAS* and held that a record company had no power to impose such a restriction on use of the sound recordings because the common law property right in the performances ended with the sale of the records.

In *Waring v. Dunlea*, a federal district court in North Carolina did enforce a restrictive legend on sound recordings.¹⁹³ However, shortly after the case was decided, North Carolina enacted a statute that effectively overruled it.¹⁹⁴ South Carolina also enacted a statute to deny a public performance right in sound recordings.¹⁹⁵

Until 1995 there was no public performance right in sound recordings under federal law, and it does not appear that, in practice, pre-1972 sound recordings had such protection. The current right provided by federal law applies only to digital audio transmissions (not to broadcasts) of copyrighted sound recordings. It is possible that a state court would entertain a claim for unfair competition or common law copyright infringement if, for example, it were faced with a claim that pre-1972 sound recordings were being made available through internet streaming, particularly if it were persuaded that the use was substituting for purchases of the plaintiff's recording. But no such case has yet arisen.¹⁹⁶

¹⁹² 114 F.2d 86, 89-90 (2d Cir. 1940).

¹⁹³ *Waring v. Dunlea*, 26 F. Supp. 338, 339 (E.D.N.C. 1939).

¹⁹⁴ N.C. GEN. STAT. § 66-28 (2010), passed in 1939 and discussed in *Liberty/UA*, 180 S.E. 2d at 418. The court interpreted the statute to deny only public performance rights, but not reproduction rights. *See id.*

¹⁹⁵ S.C. CODE ANN. § 39-3-510 (2011). This law, originally passed in 1942, remains on the books. *See Ringer* at 9; Michael Erlinger, Jr., *An Analog Solution in A Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings*, 16 UCLA ENT. L. REV. 45, 55 (2009).

¹⁹⁶ It appears that at least some webcasters are making royalty payments for the use of pre-1972 sound recordings as part of the statutory royalties they pay to SoundExchange in connection with the digital performance of sound recordings pursuant to sections 112 and 114. SoundExchange at 4. Presumably this is done to diminish the risk that their webcasting of pre-1972 sound recordings might be considered actionable under state law.

As for exceptions, where state law is statutory there may be explicit exceptions, but not of the nature and scope of those provided in federal copyright law, as illustrated above in the discussion of state criminal and civil statutes. Where protection derives from common law, it is difficult to draw any conclusions about available exceptions, since most of the cases involve commercial, for-profit duplication and sale of complete sound recordings that substitute for sales by the right holders. So the courts have had little opportunity to define exceptions. *EMI v. Premise Media* indicates that common law courts are willing to apply the fair use doctrine in appropriate circumstances, but it is a single trial court decision.

6. Availability of Punitive Damages for State Law Claims

In those states that allow punitive damages in tort cases, a plaintiff who is successful on a claim for unfair competition may recover punitive damages.¹⁹⁷ *Nimmer on Copyright* states that punitive damages may also be available for common law copyright claims: “Even though punitive damages are not available for statutory copyright infringement, in the residual domain of common law copyright, exemplary damages may be recovered.”¹⁹⁸ In some cases, punitive damages have been awarded in connection with unauthorized uses of pre-1972 sound recordings. For example, in *Bridgeport Music v. Justin Combs Publishing*,¹⁹⁹ the court affirmed a jury verdict in which defendants were held liable for sampling plaintiff’s pre-1972 sound recording in defendant’s recording. Applying New York law, the Sixth Circuit held that “punitive damages for common law copyright infringement and unfair competition are available ‘where a wrong is

¹⁹⁷ Restatement (3d) of Unfair Competition, § 36, comment (n); Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:96 (4th ed. 2009).

¹⁹⁸ 4-14 NIMMER ON COPYRIGHT § 14.02[C][2]. See, e.g., *Roy Export Co. Establishment v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff’d*, 672 F.2d 1095 (2d Cir.); *Williams v. Weisser*, 273 Cal. App. 2d 726, 743 (1969). In addition, “Under the law of most states, punitive or exemplary damages may be obtained in privacy and publicity suits.” 2 Thomas McCarthy, RIGHTS OF PUBLICITY AND PRIVACY § 11:36 (2d ed).

¹⁹⁹ 507 F.3d 470 (6th Cir. 2007).

aggravated by recklessness or willfulness.”²⁰⁰ However, it vacated the damages award as grossly excessive.²⁰¹ In *GAI Audio of New York, Inc. v. Columbia Broadcasting System, Inc.*, a Maryland appellate court affirmed the jury’s award of punitive damages in a record piracy case where the “acts of unfair competition were practiced intentionally, wantonly and without legal justification or excuse.”²⁰²

7. Summary: Use of Pre-1972 Sound Recordings under State Law

There are several important points to be drawn from this brief discussion. First, state laws that relate to sound recordings are inconsistent. The variations in state criminal laws are discussed above. Concerning civil law, some states have statutes that address the unauthorized use of pre-1972 sound recordings. In most states, common law torts provide protection. Where the basis is unfair competition or misappropriation, the claims that can be brought under state law may be more limited than those that could be brought under federal copyright law, particularly in a state that still requires competition or passing off as part of the tort. The requirement in unfair competition cases that commercial harm to the right holder (and/or commercial benefit to the user) be established also limits possible claims. As a practical matter, many sound recordings will lose protection over time as their commercial value diminishes, even though state law can theoretically protect sound recordings until 2067. A few states terminate protection for sound recordings before 2067, but that may be of little value to users whose uses go beyond the state’s border.

²⁰⁰ *Id.* at 479-80 (quoting *Roy Export Co. v. CBS, Inc.*, 672 F.2d 1095, 1106 (2d Cir. 1982)).

²⁰¹ *See id.* at 486-90. On remand the district court remitted the amount of punitive damages to \$688,500 (twice the amount of compensatory damages) instead of the \$3.5 million the jury had awarded. *Westbound Records, Inc. v. Justin Combs Publishing, Inc.*, 2009 U.S. Dist. LEXIS 29507, **5-8, 2009 WL 943516 (M.D. Tenn. Apr. 3, 2009).

²⁰² 340 A.2d 736, 755 (Md. App. 1975); *see also A&M Records v. Heilman*, 75 Cal. App. 3d 554, 571 (1977) (affirming award of punitive damages in a record piracy case where there was an “intentional pattern of misappropriation of property owned by others” as well as contempt of court).

Common law copyright provides greater protection for right holders, and correspondingly, greater challenges for users. For example, New York has chosen to provide common law protection for pre-1972 sound recordings, whether or not the recordings have been published.

Many other states simply have no civil law directly on point, so it is difficult to know how they might protect pre-1972 sound recordings. Even states that protect published recordings through unfair competition and similar torts may protect unpublished recordings under common law copyright.

One complicating factor is that common law protection is amorphous, and courts often perceive themselves to have broad discretion. So it is sometimes hard to know whether new uses might be problematic. As the Supreme Court of Wisconsin stated in permitting plaintiffs to proceed with an unfair competition claim for record piracy in the face of defendants' argument that the state could act in this area only through the legislature: "We conclude that it is the duty of this court to act in circumstances where it is apparent that a wrong has been committed. . . ." ²⁰³ The court observed that "'unfair competition has evolved as a broad and flexible doctrine with a capacity for further growth to meet changing conditions.'" ²⁰⁴

In short, the protections that state law provides for pre-1972 sound recordings are inconsistent and sometimes vague and difficult to discern. The laws lack clearly delineated exceptions, making it hard for users to predict with assurance the range of activities that are permissible and those that are likely to result in liability. In many states, activities concerning sound recordings that are not conducted for profit and have no commercial impact on the right holder are unlikely to result in liability. But the differences and ambiguities in state laws make it

²⁰³ *Mercury Record Productions, Inc. v. Economic Consultants, Inc.*, 64 Wis.2d 163, 218 N.W.2d 705, 715-16 (Wis. 1974).

²⁰⁴ *Id.* at 716 (quoting *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483, 488 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S.2d 795 (App. Div. 1951)).

difficult to undertake multistate or nationwide activities, particularly for individuals and entities that are risk-averse or that lack the ability to conduct detailed legal analyses for each proposed new use.



Lacquer disc

III. APPRECIATING THE CHALLENGES OF PRESERVATION AND ACCESS

A. The Nature of Pre-1972 Sound Recordings

The recordings addressed in this Report encompass every conceivable sound, from one person talking, to music played by orchestras of over 100 pieces; from a primitive wax cylinder field recording to the detailed sound-picture of a multitrack analog studio recording; from the music of small ethnic enclaves to million-selling pop hits; from improvisation to composition, and so on. Notably, unlike other works of authorship protected by federal copyright law, virtually no pre-1972 sound recordings have entered the public domain throughout the United States. State criminal and civil law appear to protect almost everything back to the very first sound recordings known to exist.

1. Commercial and Noncommercial Recordings

While the first sound recording is now known to have been fixed in 1860 by Frenchman Edourd-Leon Scott de Martinville,²⁰⁵ sound recording in the United States famously began in

²⁰⁵ NRPB REPORT at 1.

1877 with Thomas Edison’s invention of the phonograph.²⁰⁶ However, the sale of recorded sound did not get underway until 1889 when the North American Phonograph Co. first offered recorded music for public sale. It was joined later that year in the marketplace by the new Columbia Phonograph Co.²⁰⁷ Sound recordings in the early years of the industry were manufactured on wax cylinders. Cylinders in the 1890s contained a single selection and sold – like single MP3s do today – for between \$1 and \$2.²⁰⁸ However, most early-1890s cylinders were not heard in private homes but on public phonographs – the predecessors to jukeboxes – for a nickel.²⁰⁹ In the early years of the 20th century, cylinders gave way to discs, which were easier to mass-produce, cheaper, more durable, and could hold twice as much music as an Edison cylinder, and a new breed of celebrity – the recording artist – emerged.²¹⁰ The disc – in varying sizes and durability – remained the primary consumer medium for sound recordings through 1972,²¹¹ although the media upon which the recordings were made went through myriad changes over time before settling on multitrack magnetic tape.

Commercial music recordings tend to dominate discussions of copyright in sound recordings because of their popularity, their tendency to create emotional attachments, and their existence as the basis for a multi-billion dollar international industry, but they account for only a

²⁰⁶ See, e.g., WALTER L. WELCH & LEAH BRODBECK STENZEL BURT, FROM TINFOIL TO STEREO 8-18 (1994).

²⁰⁷ See Tim Brooks, *Columbia Records in the 1890s: Founding the Record Industry*, 10 ASS’N FOR RECORDED SOUND COLLECTIONS JOURNAL, No. 1, 3, 5-6 (1978).

²⁰⁸ See *id.* at 9.

²⁰⁹ See *id.*

²¹⁰ See, e.g., DAVID SUISMAN, SELLING SOUNDS: THE COMMERCIAL REVOLUTION IN AMERICAN MUSIC 125-49 (2009).

²¹¹ Of course, discs, either vinyl or compact, continued to be the primary medium well after 1972, but this report is only concerned with pre-1972 works.

small percentage of all pre-1972 works.²¹² Noncommercial recordings, such as ethnographic field recordings, oral histories, private home recordings, and scientific audio experiments, while not as evident to the general public, are an enormous source of cultural and historical information, and come with their own unique copyright issues.

The first ethnographic recordings were made one year after the first commercial recordings, in 1890. Anthropologist Jesse Walter Fewkes recorded songs and speech from the Passamaquoddy, Zuni, and Hopi tribes with a wind-up Edison cylinder recorder.²¹³ Field recordings from 1890 into the 1930s exist mainly on wax cylinders. With the advent of the portable disc cutter, ethnomusicologists made their transcriptions on discs of varying quality, and once audiotape was made available commercially, it soon became the recording medium of choice – first in reel-to-reel and then in cassette form.²¹⁴ The development of tape recording, and in particular the portable cassette recorder, spurred ethnographic audio collecting to such a large degree that by 2000 approximately 90% of all sound recordings held in folkloric collections were on cassette.²¹⁵

2. Published and Unpublished Works

Not only can pre-1972 sound recordings be either commercial or noncommercial, but they also can be either published or unpublished.²¹⁶ Most commercial recordings are, as one

²¹² See, e.g., Society of American Archivists (SAA) at 1.

²¹³ NRPB REPORT at 16-17.

²¹⁴ See *id.* at 17.

²¹⁵ See *id.* at 18 (citing COUNCIL ON LIBRARY AND INFORMATION RESOURCES, FOLK HERITAGE COLLECTIONS IN CRISIS 59-63 (2001)).

²¹⁶ In this discussion “publication” is used as defined in the federal copyright law:

the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public

would expect, considered to be published works, and most noncommercial recordings are considered to be unpublished. According to the Society for American Archivists, of the 46 million sound recordings housed in American cultural institutions, the majority are unpublished.²¹⁷ Furthermore, such unpublished recordings “far surpass the number of commercially published sound recordings that have ever been released.”²¹⁸ The unpublished nature of most pre-1972 sound recordings raises special concerns. It often makes identification of a sound recording’s right holders difficult. Unpublished works also tend to exist in only one copy and to reside with a single individual or institution, making their preservation and the provision of public access much more important. In addition to “typical” unpublished works – field recordings, oral histories, and other single-copy recordings – there are also what might be called “pre-publication” works, such as those elements of commercial recordings that did not end up becoming part of the distributed version of a work.²¹⁹

In addition, there are some commercial works that are considered unpublished, such as radio broadcasts. Despite their broad reach and significant popularity throughout the 20th and 21st centuries, radio programs have been, and still are, considered “unpublished” under copyright law because, with rare exceptions, they were not distributed in copies. Such works constitute a broad and important source of historical information, from first-hand reports of notable news events, to radio dramas, to one-of-a-kind transcriptions of performances by notable musicians.

performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

This is important to note because, as will be shown below, states often assign different meanings to “publication.” In some states, commercial sound recordings are considered to be technically unpublished even when distributed to the public.

²¹⁷ SAA at 1.

²¹⁸ *See id.*

²¹⁹ *See, e.g.,* NRPB REPORT at 33 (quoting Paul West, vice president, studios and vault operations, digital logistics and business services, Universal Music Group: “Only 65 to 75 percent of what is in our library has ever been released”).

Unfortunately, because they were not distributed in copies, radio broadcasts are comparatively ill-represented in the nation's libraries and archives.²²⁰

3. Availability and Location

Some pre-1972 sound recordings are widely available to consumers through digital downloads, record stores, and new endeavors such as the Sony-Library of Congress “National Jukebox,” where recordings made on thousands of pre-1925 cylinders and discs are posted online for free streaming.²²¹ However, in part due to corporate consolidation and lack of concern over the value of preserving recordings, many current record companies do not own physical copies of those sound recordings to which they own the rights.²²² Thus, these recordings must be sought out in libraries and archives. Other recordings, including many noncommercial and/or unpublished works, are also available to hear in person at archives or music libraries. These institutions hold an estimated 46 million recordings.²²³ For commercial pre-1972 sound recordings, there is much duplication among institutions. But those works residing in institutional collections generally cannot, without permission from their copyright owners, be made widely available through the internet or other channels, since the various state laws do not generally include exceptions permitting such dissemination.²²⁴

²²⁰ See *id.* at 4 (“Many recordings believed to have been made of radio broadcasts are untraceable, and numerous transcription discs of national and local broadcasts have been destroyed.”).

²²¹ The National Jukebox (www.loc.gov/jukebox) is a project that makes thousands of early U.S. sound recordings available to the public for free streaming access. It consists of recordings made by labels now owned by Sony Music Entertainment, which provided the Library of Congress a *gratis* license. The actual recordings are from the collections of the Library's Packard Campus for Audio Visual Conservation, the University of California Santa Barbara, and other partners. The Jukebox was launched on May 10, 2011 with 10,000 recordings from the Victor Talking Machine Company, which date from the 1890-1925 “acoustical” era, and include the classical, popular, religious, spoken word, and “ethnic characterization” genres. More recordings are expected to be added in the coming years.

²²² See, e.g., Library of Congress (LOC) at 6-7.

²²³ NRPB REPORT at 10.

²²⁴ For the application of state sound recording protection to public availability, see *supra* Chapter II.E.

Many pre-1972 commercial sound recordings are in the hands of individual collectors, who hold what is estimated to be the majority of commercially issued sound recordings, including “some of the most significant, as well as rarest” items.²²⁵ While at least one major collector has in the past taped items in his collection for interested listeners,²²⁶ it is unknown how common such a practice is. Certainly private collectors are the sources of many record company reissues, as they have the cleanest or only copies of some titles.²²⁷

Finally, while there are a few significant collections of commercial radio broadcasts residing in libraries and archives in the United States, they are far from complete.²²⁸ Availability of these collections is generally restricted to on-premises listening.²²⁹ As for public radio and local radio stations, they retain thousands of hours of programming in their vaults, although the digitization of these programs has just begun.²³⁰ One additional source for copies of radio broadcasts is private collectors, who are estimated to hold tens of thousands of recordings, many of which are not represented in institutional collections.²³¹

²²⁵ NRPB REPORT at 35-36. The relationship between private collectors and institutions is described below. *See infra* Chapter III.C.1.c.

²²⁶ Eddie Dean, *Desperate Man Blues: Record Collector Joe Bussard Parties Like It's 1929*, WASHINGTON CITY PAPER, Feb. 12, 1999, available at <http://www.washingtoncitypaper.com/articles/16690/desperate-man-blues>.

²²⁷ *See id.*

²²⁸ For example, a significant portion of NBC broadcasts from the 1930s through the 1970s is held at the Library of Congress, and smaller collections of ABC and Mutual Network transcriptions have been saved, but no extensive archive of CBS transcriptions is known to exist. NRPB REPORT at 21-22.

²²⁹ *See id.* at 23, noting that dissemination of the NBC collection at the Library of Congress is “tightly restricted.”

²³⁰ *See id.* at 26-29, describing the holdings of WNYC, WGBH, Pacifica, and WWOZ.

²³¹ *See id.* at 30.

4. Recording Media and Deterioration Rates for Pre-1972 Sound Recordings

All sound recording media, from the earliest to the most recent, are at risk of deterioration or breakage that may render them unplayable. The chart below, prepared by the staff of the Library of Congress Packard Campus for Audio Visual Conservation, outlines the major media that were used to record sound prior to 1972, the major components of each medium's composition, and the chemical and/or physical processes that place them at risk.

Essential to the long-term survival of all audio media, but not listed below, are proper housing – shelving and packaging – of audio media, and appropriate temperature and humidity that do not fluctuate greatly. Improper storage conditions, such as excessive heat or exposure to water, are the most serious threats to long-term survival of all types of sound recordings.²³²

Medium	Period of Primary Use ²³³	Content	Composition	Risks and Challenges
Wax cylinders	1890-1925	Commercial recordings of music and spoken word; ethnographic field recordings; dictation	Wax compound, metallic soap composite	Fungal growth can deteriorate and obstruct grooves. The organic plasticizer can experience exudation, causing crazing, ²³⁴ and shrinkage of playback surface is possible as plasticizer is lost. Wax cylinders are also fragile and susceptible to damage from improper

²³² Dietrich Schüller, *Audio and Video Carriers Recording Principles, Storage and Handling, Maintenance of Equipment, Format and Equipment Obsolescence*, http://www.tape-online.net/docs/audio_and_video_carriers.pdf (2008); Indiana University Digital Library Program, *FACET Formats Document: Format Characteristics and Preservation Problems*, <http://www.dlib.indiana.edu/projects/sounddirections/facet/downloads.shtml> (2007); Bill Klinger, *Cylinder records: Significance, production, and survival*, <http://www.loc.gov/rr/record/nrpb/pdf/klinger.pdf> (2007); AMERICAN FOLK LIFE CENTER, *THE FEDERAL CYLINDER PROJECT: A GUIDE TO FIELD CYLINDER COLLECTIONS IN FEDERAL AGENCIES* (1984).

²³³ Please note that the date ranges here reference approximate years of *primary* use. For instance, wax cylinders were used for dictation into the 1960s, shellac 78-rpm discs were still being manufactured in the early 1960s, and lacquer discs were used to record broadcasts by the NBC radio network until 1970.

²³⁴ Crazing is the making of small cracks on a surface. See *THE AMERICAN COLLEGE DICTIONARY* 283 (1968) (definition of “craze”).

Medium	Period of Primary Use ²³³	Content	Composition	Risks and Challenges
				handling. Extremely fragile.
Celluloid cylinders (including Edison "Blue Amberol" cylinders)	1900-1929	Commercial recordings of music, spoken word, etc.	Nitrocellulose celluloid with plaster, cardboard, and other cores	The plaster core can expand through hydrolysis, making it difficult to mount the cylinder on the playback mandrel and can, in severe cases, cause the celluloid to break or split. The celluloid becomes more brittle with age. Catastrophic failure, such as found in nitrocellulose film, is uncommon.
Shellac discs, 78-rpm discs	1896-1950	Commercial recordings of music, spoken word, etc.	Shellac-bonded mineral powders; other resins also used	Until recently, believed to be chemically stable, though fragile. ²³⁵ Signal can be significantly affected by scratches, surface deformities, and groove wear. Mold or other fungal growth, heat, and water can damage and obscure grooves.
Aluminum discs	1925-1935	"Live" events; radio broadcast transcriptions	Aluminum	Oxidation; scarcity of playback hardware (styluses).
Lacquer and acetate discs	1936-1960	Radio broadcast transcriptions; studio master recordings	Aluminum, glass, or cardboard with a lacquer coating	Lacquer layer susceptible to plasticizer exudation and/or information layer delamination. Aluminum base susceptible to oxidation. Glass based discs, the predominant instantaneous audio medium during World War II, are extremely fragile. Cardboard base susceptible to water damage. Discs susceptible to crazing of lacquer layer regardless of base material.

²³⁵ Discovering some degradation of shellac discs in its collection, the Bibliotheque nationale de France is researching the composition of 78-rpm records. Among the challenges to the project are the great disparity of compositions of recordings of different pressing companies, countries, and time periods. See Nguyen, et al, *Determining the composition of 78-rpm records: Challenge or fantasy?* 42 ASS'N FOR RECORDED SOUND COLLECTIONS JOURNAL, No. 1 (2011).

Medium	Period of Primary Use ²³³	Content	Composition	Risks and Challenges
Wire recordings	1935-1945	Remote recordings of “live events”; oral histories; radio broadcast transcriptions	Steel or stainless steel	Technological obsolescence; mechanical damage to wire (tangling); rusting in rare cases. Early, pre-standardized sizes not compatible with common playback equipment. Playback equipment difficult to obtain and maintain in working order.
Vinyl and polystyrene discs (33-1/3- and 45-rpm)	1948-1990	Commercial recordings of music, spoken word, etc.	Vinyl (co-polymer of polyvinyl chloride and polyvinyl acetate) or polystyrene ²³⁶	Chemically stable, though material is relatively soft. Susceptible to mechanical damage such as scratching and deformation due to improper storage and handling. Polystyrene becomes brittle with age.
Acetate tape	1950s-1960s	Restricted to use in Germany until late 1940s; radio broadcasting and recording industry until mid-1950s; also used in moving image industry and home recording.	Cellulose acetate (e.g., cellulose diacetate, cellulose triacetate)	Becomes brittle with age. Degrades in high humidity; both the tape base and the binders used are highly susceptible to hydrolysis, in extreme cases this is referred to as “vinegar syndrome,” as cellulose acetate is broken down to release acetic acid. Vinegar syndrome causes the tape base to shrink and deform; “cupping” is a common outcome of deformation. The information layer can also separate from the base. Both processes can severely inhibit playback.
Polyester tape, open reel and cartridge (including audio cassettes)	1965-2005	Commercial recordings of music, spoken word, etc.	Polyester tape within plastic shells	Binder hydrolysis and delamination of magnetic layer possible, especially in improper environmental conditions; mechanical failure of cassette shell; technological obsolescence, access to quality playback equipment becoming limited in the US. Stretching and deformation of base film layer possible, though not frequently reported.

²³⁶ The great majority of “LP” discs are vinyl, while most 45-rpm discs are made from polystyrene.

The above chart provides some basis for understanding the urgency of users' preservation concerns, particularly regarding wax cylinders, lacquer and acetate discs, and acetate tape. It is interesting to note that more recently developed media are not necessarily more robust than older media, a point vividly illustrated by a comparison of the risks and challenges of shellac discs with polyester tape. Subsequent chapters will show how the various stakeholders perceive that federalization may (or may not) assist with the preservation and provision of access to pre-1972 sound recordings embodied on the media described above.

B. Preservation of Pre-1972 Sound Recordings

In the 21st Century, the preservation of sound recordings means, for all practical purposes, *digital* preservation – specifically, copying a work from its native format to a digital medium. Preservation is extremely important because sound recordings represent a key component of our cultural heritage, and one that will be lost to posterity if efforts are not undertaken to preserve old recordings and migrate them from what are often volatile and obsolete media to more stable forms of fixation. It is this initial reproduction, and the related downstream potential of distributing multiple perfect copies via the Internet, that invites copyright law into the discussion. If preservation were nothing more than carefully cleaning and storing the original media, copyright would be irrelevant to preservation. But because reproduction onto digital media is becoming the most common means of preserving sound recordings (among other media), copyright issues cannot be avoided.

The nuts-and-bolts of digital preservation are quite complex. As a report by the National Recording Preservation Board describes it:

After capture of the source audio and creation of digital files, systems must protect the files and assure their integrity, which requires periodic migration of the files to new media, validations to assure that copies of the digital files are faithful to the previous generations, and further steps to assure that these files are

accessible in perpetuity. In other words, recorded sound preservation is a chain and process without end.²³⁷

The RIAA and A2IM agree that preservation is complex, noting that preparing a digital reissue includes:

the costs of storage, review in realtime (of analog recording media) for missing or incomplete metadata, data entry, cataloging, conversion/digitization using carefully preserved obsolete equipment and storage media (*i.e.*, preservation), and, related overhead costs including legal fees (for the recordings and/or for clearing underlying rights, such as compositions).²³⁸

Regardless of who is doing it, digital preservation is clearly a difficult endeavor requiring significant resources and technical skill.

1. Current Preservation Activities

For preservation of pre-1972 sound recordings, there are four important entities to survey: record companies, libraries and archives, private collectors, and radio stations.

a. *Libraries and archives*

Preservation of sound recordings by libraries and archives is a primary focus of this Report. These institutions and other stakeholders shared with the Copyright Office a great deal of information about practices, technology, costs, and frustrations with legal analysis. However, it is unclear in the context of “pure” preservation activities²³⁹ whether the date a sound recording was first fixed and its corresponding legal status actually matter to libraries and archives. Some commenters report that the pre- or post-1972 status of a recording does not factor into a decision

²³⁷ NRPB REPORT at 9-10.

²³⁸ RIAA/A2IM at 8.

²³⁹ *I.e.*, activities focusing solely on preservation, without regard to access.

whether to digitize, and some report that it does.²⁴⁰ There are also additional factors bearing upon preservation of sound recordings by libraries and archives, such as the availability of technology and money, specifically grant funding.²⁴¹ And such funding, as will be seen, is in part dependent upon the access that the institution can provide to its preserved works. In addition, librarians and archivists who deal with ethnographic materials must abide by the cultural and religious norms of those whose voices and stories are on the recordings.²⁴²

Much like a record company, a library or archive must have several sound recording preservation specialists in order to create and maintain durable and high quality digital copies. Only a few libraries – notably the Library of Congress and the University of California, Santa Barbara – have sufficient resources to preserve the multiple media types on which pre-1972 sound recordings reside, such as wax cylinders and lacquer discs. In one notable partnership between record companies and the Library of Congress – the National Jukebox – libraries are providing the original recordings and undertaking the digitization, while Sony is providing the permission to use the recordings that it owns. Because Sony now controls the catalogs of the

²⁴⁰ For assertions that the pre-1972 status of a recording does not affect its preservation, *see, e.g.*, Music Library Ass’n (MLA) at 6 (“[W]hile some libraries may consider the date of fixation when considering preservation activities under §108(c), in most cases this would not be an important consideration for preservation activities beyond isolated, single-item duplication.”) and SAA at 2 (“We have no data that would suggest that archives differentiate between pre-1972 and post-1972 recordings for preservation purposes, even when they may so differentiate for access purposes. Because of the complexity of laws governing sound recordings, few archivists are even cognizant of the difference in the legal status of pre-1972 and post-1972 recordings.”). For assertions that preservation decisions are affected by pre-1972 status, *see, e.g.*, Kenneth Crews at 5, n.12 (“I can affirm that some libraries do in fact treat early sound recordings differently because of the lack of federal protection, particularly for the purposes of preserving unique or scarce works.”) and Stephanie Roach at 2 (“the complexity of the inconsistent body of state laws that govern these recordings introduces needless delays – sometimes indefinitely – and hampers decision making regarding preservation and access for collections of pre-1972 sound recordings within archives, libraries, and other cultural heritage institutions in the United States.”).

²⁴¹ NRPB REPORT at 14.

²⁴² NRPB REPORT at 19.

large record companies of the acoustical era – pre-1925 – including that of Columbia, it effectively owns the rights in the majority of commercial recordings of that era.²⁴³

b. Record Companies

According to several comments submitted for this Report, record companies historically have not been concerned with preserving their sound recordings for future use.²⁴⁴ One public meeting participant suggested that preservation is not properly the domain of record companies, who are established to manufacture and sell recordings.²⁴⁵ Nonetheless, in recent years (perhaps spurred by the CD reissue boom in the 1990s), U.S. and foreign record companies have been taking a greater interest in their back catalogs and either reissuing titles themselves or licensing their works to other companies who serve more specialized markets. The decision as to what titles to reissue is driven in large part by what kind of a return on investment can be expected.²⁴⁶ The question of whether a recording was fixed pre- or post-1972 is irrelevant for a record company reissuing its own works.

In their initial comment, RIAA and A2IM detailed the preservation work of some of the larger foreign and domestic record companies. Some of the highlights of the survey include EMI's plans to digitize tens of thousands of recordings released between 1923 and 1940, with approximately 5,500 remastered for commercial purposes; Warner Brothers' goal of digitizing every recording it released since the time of its founding in the late 1940s;²⁴⁷ Sony's partnership

²⁴³ See *supra* note 220; see also Association of Recorded Sound Collections (ARSC) at 6 and <http://www.loc.gov/jukebox/about>.

²⁴⁴ See, e.g., Brooks T1 at 108-09.

²⁴⁵ Loughney T1 at 118 (“the commercial industry, they live within the strictures of the marketplace, and they can only invest in things that they believe will be commercially available, and they are not in the archive business in the sense of doing what libraries do.”).

²⁴⁶ RIAA/A2IM at 8.

²⁴⁷ See *id.* at 8-14; but see ARSC Reply at 7.

with the Library of Congress to digitize and make available for streaming to the public thousands of pre-1925 sound recordings;²⁴⁸ and Universal Music Group’s decision to give its master recordings from 1929 to 1948 to the Library of Congress.²⁴⁹

RIAA and A2IM stressed in their initial comment that the time, effort, and resources required to do a quality reissue “can be prohibitive,” citing “storage, review of analog media for metadata, data entry, cataloging, conversion/digitization using obsolete equipment and storage media, and legal fees.”²⁵⁰ Thus, its members focus on earning a return on their investment in deciding whether and what to preserve.

c. *Private Collectors*

Private collectors were the first sound recording preservationists, in that they collected, cataloged, and maintained in good condition thousands of pre-1972 titles that otherwise would have been discarded or forgotten.²⁵¹ As a general rule, private collections often form the basis of public collections or collections that reside in larger institutional settings. Many private collections, however, are stored in less-than archival-quality conditions, vulnerable to poor handling and environmental damage.²⁵² And, while some private collectors of commercial sound recordings may make digital copies of titles in their collections, this practice is not “true” preservation of the sort practiced under generally accepted norms by librarians who have the professional duty of insuring continued playability and accessibility of the digitized copy.

²⁴⁸ <http://www.loc.gov/jukebox/about>.

²⁴⁹ *Library of Congress Gets a Mile of Music*, N.Y. TIMES, Jan. 9, 2011, <http://www.nytimes.com/2011/01/10/arts/music/10masters.html>.

²⁵⁰ RIAA/A2IM at 8.

²⁵¹ NRPB REPORT at 35-37. The NRPB Report divides private collectors into two groups: “record collectors,” who hold mainly rare, but not unique copies of commercial recordings, and “recorded sound collectors,” who hold both commercial recordings and unique items such as interviews, private recordings, and studio out-takes. *See id.* at 37-38.

²⁵² *See id.* at 38-39.

d. *Radio Stations*

There has been no systematic documentation of radio broadcasts, and few institutions work actively to support radio broadcast preservation. During the most popular years of radio (early 1930s through early 1950s), nobody envisioned an aftermarket for recordings of radio programs. And because most of these broadcasts were done live, there was little financial incentive to record them. In terms of history, the first 15 years of radio – roughly 1920-1935 – have left relatively few sound recordings, and those recordings that were saved were recorded on lacquer-coated discs until the advent of magnetic tape.²⁵³ In later years more recordings were made and retained. For example, the Library of Congress and the University of Wisconsin have significant holdings of NBC radio programs that were recorded on what were called “transcription discs.”

Radio transcriptions were not only made by broadcast networks, but by third party transcription services, which used wire recorders that produced very fragile recordings. The largest resource for radio broadcasts from 1942 to the present is the Armed Forces Radio and Television Service transcriptions collection at the Library of Congress.²⁵⁴ Other sources of radio broadcast recordings are National Public Radio stations, local radio stations, and individual enthusiasts, who hold tens of thousands of tape recordings.²⁵⁵

2. Preservation and the Law

To what extent does the law – both state and federal – permit preservation activities? All digital preservation activities require making copies. Thus, unless a library or archive has

²⁵³ *See id.* at 20-21.

²⁵⁴ *See id.* at 24. AFRTS provided programming for US military forces overseas.

²⁵⁵ *See id.* at 30.

permission from the right holder, copyright law (or related state law doctrines) will determine whether and to what extent the library or archive may lawfully make preservation copies. A discussion of those provisions follows.

a. Federal Law

Although federal copyright law is inapplicable to most pre-1972 sound recordings, it provides an important backdrop for understanding the legal status of pre-1972 sound recordings.

Congress has recognized that the ability of certain research libraries and archives to preserve cultural and historical works for posterity is in the public interest and has included provisions in the Copyright Act that, at the time of enactment, were appropriately tailored for this purpose. The primary provision is section 108, which was first enacted in 1976 and is in need of updating for the digital age. Section 108 was the subject of a major independent report co-sponsored by the Copyright Office and the Library of Congress's National Digital Information Infrastructure and Preservation Program in 2008, and updating it is a current priority of the U.S. Copyright Office.²⁵⁶

Section 108 provides explicit exceptions to and limitations on a right holder's exclusive rights for the benefit of libraries and archives. These exceptions are available only when they are "without any purpose of direct or indirect commercial advantage,"²⁵⁷ and only by institutions open to the public or at least to researchers in a specialized field.

The part of section 108 pertaining specifically to preservation is subsection 108(b). It applies only to *unpublished* copyrighted works and allows libraries or archives to make up to three copies "solely for purposes of preservation and security or for deposit for research use in

²⁵⁶ *Priorities and Special Projects of the United States Copyright Office, October 2011 – October 2013*, at 8 (2011), available at <http://www.copyright.gov/docs/priorities.pdf>.

²⁵⁷ 17 U.S.C. § 108(a)(1). In addition, any copy must include a notice of copyright, or if no copyright notice is found, a legend indicating that the work may be protected by copyright. *Id.*

another library or archives.”²⁵⁸ The work must be currently in the collections of the library or archives, and any copy made in a digital format may not be made available to the public in that format outside the premises of the library or archives. Subsection 108(c) allows libraries and archives to make *replacement* copies of *published* works in their collection that are damaged, deteriorating, lost, or stolen, or the format of which has become obsolete.²⁵⁹ Before a replacement copy is made, however, the library or archives must first make a reasonable effort to determine whether an unused copy is available on the market at a fair price. While subsection 108(c) is explicitly for replacement copying, in practice libraries and archives use it for preservation in the sense that it allows them to keep in circulation copies of works that otherwise would be inaccessible.²⁶⁰ Digital copies made under subsection 108(c), like those made under subsection 108(b), may not be made available outside the premises of the library or archives.

An additional exception applying to published works is section 108(h), which allows libraries, archives, and nonprofit educational institutions under certain conditions to “reproduce, distribute, display, or perform in facsimile or digital form ... for purposes of preservation, scholarship, or research” copies of any published work in its last 20 years of federal copyright protection. This exception is not available if the work is subject to normal commercial exploitation or a copy or phonorecord can be obtained at a reasonable price.

It should be noted here that there is widespread agreement among libraries, archives, and right holders that section 108 is inadequate to address preservation and access issues in the digital realm, although there is a wide variety of views as to how it should be amended.²⁶¹

²⁵⁸ 17 U.S.C. § 108(b).

²⁵⁹ A format is considered obsolete “if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.” 17 U.S.C. § 108(c).

²⁶⁰ Section 108 Study Group, *Section 108 Study Group Report* at 53 (2008). For a discussion of why section 108 treats published and unpublished works differently *see id.* at 18-19.

²⁶¹ *See id.* at i-xiv.

Apart from section 108, libraries and archives may also, in appropriate cases, use the fair use doctrine (section 107 of the Copyright Act) in order to make preservation copies.²⁶² Fair use provides an exception to the Copyright Act’s exclusive rights (reproduction, preparation of derivative works, distribution, public performance, public display, and digital public performance for sound recordings²⁶³) for certain purposes.²⁶⁴ Whether or not a use is fair is a fact-specific inquiry, including consideration of:

(1) the purpose and character of the use including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁶⁵

Determining fair use is not a mechanical process, and whether or not a particular preservation activity is a fair use depends upon the nature of that activity. Some libraries and archives may rely on the flexibility of fair use in evaluating their digitization plans. However, what some see as flexibility others may experience as uncertainty, and this difference in perception is frequently attributable to one’s level of risk aversion. An institution with little appetite for stretching the boundaries of fair use, for example, may appreciate the relative certainty of section 108, despite its restrictions.

²⁶² 17 U.S.C. § 108(f)(4) (“nothing in this section in any way affects the right of fair use as provided by section 107.”)

²⁶³ 17 U.S.C. § 106.

²⁶⁴ Section 107 lists examples of uses that may be fair – criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. However, these uses are not automatically considered fair uses; indeed, the statute clearly states that courts must consider the statutory factors “[i]n determining whether the use made of a work in any particular case is a fair use.” 17 U.S.C. § 107. And other non-enumerated uses may also qualify as fair use.

²⁶⁵ 17 U.S.C. § 107.

b. State Law

In the absence of permission, the various state laws that protect pre-1972 sound recordings generally lack specific provisions allowing libraries and archives to make preservation copies.²⁶⁶ Indeed, the structure of statutory state law protection is fundamentally different than federal law, partaking of many different criminal and civil approaches, with some commonalities among the states and some differences. The two largest differences between state and federal protection of sound recordings are (a) the use in the states of “common law copyright,” meaning law based entirely upon judicial decisions, and not codes enacted by the legislature, and (b) the states’ use of misappropriation/unfair competition laws.

The one facet of state protection of pre-1972 sound recordings that has a modicum of similarity from state to state is found in criminal anti-piracy statutes. A 10-state survey conducted in 2009 found that states tended to follow language pioneered by the California and New York legislatures, namely:

Each of the 10 states has similar requirements of knowledge [that the distribution is taking place] and lack of consent of the owner. Even more important, the statutes in all 10 states contain explicit language stating that the unauthorized use must be made with “intent to sell,” for “commercial profit,” or some other language indicating a commercial nature to the unlawful activity.”²⁶⁷

State law regarding what qualifies as “commercial” is either unknown or unclear.²⁶⁸ However, it would seem that library and archives digitization (divorced from access) is an archetypal example of noncommercial activity. There have been no criminal piracy charges brought against a library or archive in any state, so the exact application of the law as pertaining to pre-1972 sound recordings in a cultural repository remains undeveloped.

²⁶⁶ For a full discussion of the state law landscape, *see supra* Chapter II.E.

²⁶⁷ JASZI REPORT at 9 (internal citations omitted).

²⁶⁸ *See id.* at 12 (“Overall, there seems to be a dearth of case law relating directly to the scope of permitted noncommercial use.”).

Comments by the stakeholders overwhelmingly indicate that it is not any specific provision of any state’s law that affects preservation decisions, but simply the multitude of different laws and the lack of interpretation and analysis that deters preservation activities.²⁶⁹ Some states provide more guidance than others. For example, in 2008 the Supreme Court of New York (a trial court) recognized the federal fair use exception as a defense to a common law claim of infringement of a sound recording.²⁷⁰ It is also useful to note that, to the degree that common law copyright and associated state laws hinder preservation, it appears that technological barriers and lack of funding hinder it significantly as well.²⁷¹

c. *Risk Analysis*

A substantial amount of digital preservation activity occurs regardless of the apparent ambiguity of, and confusion over, state law pertaining to pre-1972 sound recordings. The University of Utah Library commented that it feels more able to digitize under its state’s law than it would under federal law – an example of an entity looking at its state’s legal landscape and determining that, while it is not crystal clear, it is clear enough to justify the risk of forging ahead with digitization.²⁷² In addition, many entities are likely forging ahead without concern one way or the other about state law.²⁷³

²⁶⁹ See, e.g. LOC at 4; Syracuse Univ. Library at 4-5; Roach at 2; *but see* J. Willard Marriott Library, University of Utah at 2 (“According to Utah’s Unauthorized Recording Practices Act, libraries and other collecting institutions in the State of Utah are permitted to copy and distribute pre-1972 recordings.”).

²⁷⁰ *EMI Records Ltd. v. Premise Media Corp.*, 2008 N.Y. Misc. LEXIS 7485, at **14-15 (Sup. Ct. Aug. 8, 2008).

²⁷¹ See, e.g., NRPB REPORT, at 11-14 (discussing barriers to preservation of sound recordings revealed by surveys).

²⁷² See University of Utah at 2-3; *see also* Association of Research Libraries/American Library Association (“ARL/ALA”) Reply (discouraging federal protection for pre-1972 sound recordings, and asserting that, so long as fair use applies, the lack of explicit exceptions and their attendant restrictions in state law is better for preservation).

²⁷³ See SAA at 2 (“Because of the complexity of laws governing sound recordings, few archivists are even cognizant of the difference in the legal status of pre-1972 and post-1972 recordings. Almost all archivists

Certainly, in the general context of copyright law, there are users of copyrighted materials who are risk-averse and those who are not. Libraries and archives tend to be risk-averse,²⁷⁴ a fact which has not been lost on the Copyright Office or the right holders themselves.²⁷⁵ Note, for example, the observations of the RIAA and A2IM, commenting that state protection of pre-1972 sound recordings should not inhibit and is not inhibiting preservation activities, even in cases where libraries and archives may be in technical violation of the law.

When these right holder groups also claimed that “to our knowledge, no public or private institution has been sued (or threatened with a lawsuit) by an RIAA or A2IM member for undertaking preservation activity; nor should any reputable archive be so threatened,”²⁷⁶ that assertion received a mixed response. While the ARL and ALA did not object to the record companies’ assertion,²⁷⁷ SAA and MLA took great exception. They stated that such an attitude fostered disrespect for copyright law,²⁷⁸ and would be little more than cold comfort to libraries and archives who were interested in providing access as well as undertaking preservation.²⁷⁹

C. Public Access to Pre-1972 Sound Recordings

The degree of public access to pre-1972 sound recordings varies widely depending upon the age of the recording, whether it is published or of a commercial nature, its popularity, who is

assume that their ability to ‘format shift’ material for purposes of preservation is a given in existing law, both Federal and state, and act accordingly. If a sound recording is in the collection and it needs to be preserved, archivists will try to preserve it.”).

²⁷⁴ See, e.g., *id.* at 2 (“Congress and the Copyright Office should remove any legal impediments that may discourage libraries and archives from preserving sound recordings.”).

²⁷⁵ See Pallante T1 at 72-73 (“I think part of what you are saying is that librarians and archivists and museum curators shouldn’t be so risk adverse, but I have to tell you that as a former museum attorney myself, you are not going to change that...[T]hey are very risk averse and conservative.”).

²⁷⁶ RIAA/A2IM at 19.

²⁷⁷ ARL/ALA at 3, note 9.

²⁷⁸ SAA Reply at 4.

²⁷⁹ MLA Reply at 4.

providing the access, and how one defines “public access” in the first place. For older recordings, access does not necessarily utilize digital technology. For example, a library may allow listeners to privately study an LP in its listening room, or an individual may purchase a used 45 rpm single at a yard sale. By contrast, when dealing with works preserved through digitization, the question of public access will draw on the digital copy and therefore raise issues about the application of copyright law to the work. Examples of access derived from digital technology include the distribution of copies of a CD by the right holder in the sound recording, to listening to a digital copy transmitted to a library reading room from the library’s network server, to the performance via streaming of an MP3 by a web site.

How broadly one defines the question of public access plays a significant role in determining how much of the pre-1972 recorded patrimony is “available.” For example, in his 2005 Survey of Reissues of U.S. Recordings, Tim Brooks distinguished “availability” of pre-1972 sound recordings (which he defined as meaning one can locate but not necessarily be able to play a copy) from “accessibility” (meaning the recording is available on CD or for purchase or download through the Internet).²⁸⁰ On this basis he determined that, for recordings within the scope of his study released between 1890 and 1964, an average of 14% are made publicly accessible (*i.e.*, reissued) by their right holders.²⁸¹ Apparently not considered by Mr. Brooks are recordings that can be heard solely on-site at a library or archives.²⁸² Under this view, almost all field recordings and other scholarly recordings would be considered inaccessible to the public, as would the vast majority of commercial recordings housed in libraries and archives. Clearly,

²⁸⁰ BROOKS STUDY at 1-2.

²⁸¹ *See id.* at 7. The scope of the Brooks study was “recordings for which there is documented historic interest,” which encompassed “seven major fields of study,” but not, for example, pop vocals. Brylawski T1 at 113-14. All recordings within the scope number about 400,000; the random sample size was 1,500. BROOKS STUDY at 3-4.

²⁸² BROOKS STUDY at 14; Brooks T1 at 197.

however, such recordings enjoy the same level of accessibility that many other works of authorship receive, to those who live near or travel to the libraries and archives housing them.

Another example illustrates the tensions involved in addressing accessibility. One attempt at making early commercial recordings more accessible is the Sony-Library of Congress “National Jukebox” partnership described above.²⁸³ This endeavor allows users to stream at will thousands of acoustical-era recordings to their home computers. Were these recordings protected under federal law, such distribution would certainly qualify as a public performance, which the Copyright Act defines in part as

to transmit or otherwise communicate a performance or display . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.²⁸⁴

However, for certain scholars such a public performance would not qualify as sufficient public access, because they may need to “get your hands on the file and hold the file and use and study the audio file” in order to analyze it.²⁸⁵ “Streaming,” one public roundtable participant maintained, “simply doesn’t cut it.”²⁸⁶

1. Current Activities Providing Public Access

a. *Libraries and Archives*

The 2005 survey of U.S. reissues quotes an expert as saying that of all recordings issued commercially in the United States, probably over 90% exist in some form today.²⁸⁷ That same

²⁸³ See *supra* note 220.

²⁸⁴ 17 U.S.C. § 101.

²⁸⁵ Brooks T1 at 110-12.

²⁸⁶ *Id.* at 110.

²⁸⁷ BROOKS STUDY at 11 (citing Brylawski).

study indicates that right holding record companies are responsible for reissuing 14% of a sub-set of these works, while non-right holders have reissued 22%.²⁸⁸ (Although, by the time this Report is read, these numbers will be more than seven years old, the author of the 2005 report asserts that he has seen no evidence that the percentage of physical reissues has risen.²⁸⁹) Where might the rest of these extant recordings be? One answer is libraries and archives.

To date, many libraries and archives appear to have been fairly conservative in providing public access to the pre-1972 sound recordings (and, for that matter, other works of authorship) in their care. However, if the comments and roundtable remarks from the Office’s proceedings are instructive, what libraries and archives appear to mean by public accessibility seems to be Internet access – from streaming to downloading – and not merely in-person listening. Streaming and downloading may be done with permission,²⁹⁰ without permission (either out of ignorance of the law²⁹¹ or out of disregard for the law), or refrained from altogether.²⁹² This observation from the Library of Congress is representative of views expressed by scholars, librarians, and archivists:

Within the community of librarians and archivists having custody of sound recording collections, when faced with complex or unclear information on the copyright status or ownership of a pre-1972 sound recording relating to a public access request, the “safe” response is “No.”²⁹³

²⁸⁸ See *id.* at 7. Note that the titles reissued by right holders and by non-right holders likely duplicate one another to a certain extent.

²⁸⁹ Brooks T1 at 110. Brooks also stated that online availability to pre-1972 sound recordings has changed, and that were the survey performed today online availability would have to be addressed. However, Brooks averred that “it is the belief of our members in our organization [ARSC] that limited or restricted – we would say heavily restricted – access is not the same thing as availability, certainly not for the purposes that scholars need it or even preservationists, perhaps.” *Id.* Hence, at least in the eyes of archivists, it is doubtful that the recordings being streamed through the National Jukebox would be considered “available.”

²⁹⁰ The National Jukebox is one example of permission-based public access by means of streaming provided by a library, in this case with the cooperation and permission of the right holder.

²⁹¹ SAA at 4.

²⁹² MLA at 6.

²⁹³ LOC at 5.

b. Record Companies

Record companies provide public access to pre-1972 sound recordings through reissuing these recordings on compact disc and as downloads.²⁹⁴ Sometimes an entire album will be reissued intact, and sometimes, particularly for artists popular before the advent of the 33 $\frac{1}{3}$ rpm LP, the reissue will consist of a series of individual songs. As indicated in the previous section, record companies tend to reissue a recording only when they can be relatively sure of a return on their investment, given the costs of preparing a reissue. As the RIAA stated, cost “coupled with uncertainty about the commercial value of the vast majority of the recording, is the principal reason many recordings are not widely available.”²⁹⁵

Still, to the degree that providing public access to a pre-1972 sound recording means issuing a consumer-ready product, record companies appear to reissue *fewer* of their own works than do foreign labels and smaller U.S. ventures who apparently act without authorization.²⁹⁶ Such other labels have, according to Tim Brooks’s survey, reissued 22% of the pre-1972 recordings surveyed, compared to 14% by right holders.²⁹⁷

²⁹⁴ As noted elsewhere, record companies have also cooperated in making very old sound recordings available for streaming through services such as the Library of Congress’s National Jukebox. *See supra* note 220.

²⁹⁵ RIAA/A2IM at 8.

²⁹⁶ BROOKS STUDY at 7-8.

²⁹⁷ *See id.* It is important to note that the Brooks Report does not encompass all commercial sound recordings for the 1890-1964 time period, but instead is restricted to titles with “documented historic interest,” as represented in seven major genres: ragtime and jazz; blues and gospel; country and folk; ethnic; pop, rock, and R&B; classical; and other (including show music and spoken word). *See id.* at 3. This left “large bodies of recordings” outside the survey such as “every pop vocal that was made before 1965.” Brylawski T1 at 113-14. It was also noted at the public meeting that, had the total number of recordings issued in the U.S. been included in the study, the percentage of right-holder reissues would be “significantly less” than 14%. *Id.*

c. *Private Collectors*

Librarians and scholars report that many private collectors are loath to put their collections in the hands of preserving institutions for fear that their lovingly curated 78s will fall into a “black hole” of inaccessibility.²⁹⁸ Since such collections are not particularly accessible in their present locations, the main public access service provided by private collectors is that of lending titles from their collections to record labels to use as masters for digital reissue.²⁹⁹

d. *Radio Stations*

To the degree that radio stations make publicly available their digitally preserved archives, it is likely through private appointments with researchers, or through libraries that have assumed stewardship of their recordings. In making radio broadcasts more accessible to more than just on-site researchers, libraries and archives must address not only copyright concerns but also performer and union contracts that may govern use beyond the initial airing of a program.³⁰⁰

2. Provision of Public Access and the Law

A point of interest among the librarians and archivists who submitted comments and spoke at the roundtable is that preservation activities are inextricable from the goal of providing public access. To some degree this is about the desire to provide access, and the degree to which access is part of the mission of many research or collecting institutions. On a related point, they stressed that access is often a condition of grant money for preservation projects. Such money becomes scarce when there is no potential for public access.³⁰¹

²⁹⁸ See, e.g., NRPB REPORT at 40; Brooks T1 at 83.

²⁹⁹ See Dean, *Desperate Man Blues*, *supra* note 225.

³⁰⁰ NRPB REPORT at 22.

³⁰¹ See, e.g., Cockrell at 1; Roach at 3.

This section of the Report briefly describes the aspects of federal and state law pertaining to the provision of access, specifically access to a preservation copy or other digital copy. Consistent with the ARSC's view that access requires the ability to closely analyze one's own copy of a work, the type of access sought by libraries, archives, and scholarly commenters was by means of digital downloads or physical reissues. Such activities, when done by libraries or archives without the permission of the right holder, are not currently within the scope of section 108 and, as the *Section 108 Study Group Report* demonstrates, including them within a statutory limitation or exception for libraries and archives is a very controversial topic.³⁰²

Of course, one need not concern oneself with legal exceptions allowing for provision of public access if one seeks and receives permission from the right holder. However, with some exceptions, permissions was not a subject raised by most stakeholders, in the written comments or at the public meeting. There was some indication by libraries and archives that permission for use of commercial recordings was difficult to obtain³⁰³ and, of course, that permission for use of many field and ethnographic recordings was simply impossible as the performers had died. Representatives from RIAA suggested that seeking permission remains a productive method for making preservation copies and providing access, especially regarding those early recordings that are now gathered under the Sony corporate umbrella.³⁰⁴ Another right holder pointed out that the National Jukebox preservation and audio streaming partnership between the Library of Congress

³⁰² *Section 108 Report* at 57-60 (“Remote electronic access”).

³⁰³ LOC at 7 (“In the case of both foreign and U.S. owned pre-1972 sound recordings, it is common to encounter rights holders who either no longer own any copies of recordings to which they hold the rights, or no longer have documentation of any kind that verifies their ownership interests. Likewise, it is common in regard to pre-1972 sound recordings of both foreign and U.S. origins, for there to be a lack of institutional memory within companies and/or documentation about the past sale or transfer of ownership of recordings to other parties. The effect on libraries, archives, etc., and members of the research public is confusion caused by cold information trails leading to long dead owners and record companies that have gone out of business.”).

³⁰⁴ Chertkof T1 at 118-19.

and Sony was an example of a productive permission-based agreement for providing access to early sound recordings.³⁰⁵

a. Federal Law

Federal law provides an important backdrop for understanding the legal status of pre-1972 sound recordings, but again it is important to recall that it is currently inapplicable to most pre-1972 sound recordings. As discussed above, section 108 and fair use are the primary provisions of copyright law relied upon by libraries and archives to preserve and provide access to works. But it is the first sale doctrine in section 109 that authorizes the basic lending function of libraries. Section 109 states that,

Notwithstanding the [exclusive right of distribution], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.³⁰⁶

In other words a library is entitled to lend copies that it owns, including copies made under the authority of section 108, subject to the restrictions of that section.

In particular, libraries and archives may not make available to the public, “outside the premises of the library or archives,” a digital preservation copy of an unpublished work or a digital replacement copy of a published work.³⁰⁷ Although under certain conditions libraries may at a user’s request copy a portion of a work in their collections (or even a complete work if it cannot be obtained at a fair price), these exceptions are carefully restricted.³⁰⁸ For example, they extend only to “the isolated and unrelated reproduction or distribution of a single copy or

³⁰⁵ Aronow T1 at 105-06.

³⁰⁶ 17 U.S.C. § 109(a).

³⁰⁷ 17 U.S.C. § 108(b)(2).

³⁰⁸ 17 U.S.C. § 108 (d), (e).

phonorecord of the same material on separate occasions” and do not apply to systematic reproduction of multiple copies.³⁰⁹

However, there is one proviso to the copies-for-users subsections of section 108 that particularly affects libraries and archives with substantial recorded sound collections: those subsections do not apply to, *inter alia*, musical works.³¹⁰ Sound recordings frequently constitute performances of musical works; in other words, musical works are embodied in them. Since it is impossible to copy a sound recording without copying the musical work it embodies, it may not be copied for users pursuant to section 108 if the sound recording embodies a musical work that is still protected by copyright.³¹¹

In contrast, the section 108(h) exception for use of a work in its last 20 years of copyright protection does apply to the reproduction and distribution of sound recordings.

The question of availability of digitized pre-1972 sound recordings also would implicate section 110(2) of the federal copyright law if pre-1972 sound recordings were covered under title 17. This section permits a government body or “accredited nonprofit educational institution” to transmit “reasonable and limited portions” of a sound recording as part of distance education.³¹² Section 110(2) is clearly an “access” provision, but it only provides access to a limited class of users, and under restricted circumstances. Moreover, because it only permits portions of sound recordings to be transmitted, it is of limited use to scholars of such materials.

³⁰⁹ 17 U.S.C. § 108(g).

³¹⁰ 17 U.S.C. § 108(i).

³¹¹ Musical works are still protected by copyright if they were published after 1923 (provided that, if they were published in the United States before 1964, their copyrights were renewed). Prior to the enactment of the Copyright Renewal Act of 1992, title I of the Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264, a work for which copyright was secured prior to 1978 enjoyed an initial term of 28 years, subject to a renewal term only if the person entitled to renew the copyright submitted a renewal application to the Copyright Office during the 28th year of the initial copyright term.

³¹² 17 U.S.C. § 110(2).

b. State Law

Just as the various state laws that protect pre-1972 sound recordings generally lack specific provisions allowing libraries and archives to make preservation copies, they also lack specific provisions permitting libraries and archives to provide access to those copies. The general discussion above of the uncertainty and lack of precedent in state law³¹³ applies as well to any public access activities.

c. Risk Analysis

While libraries may continue to preserve pre-1972 sound recordings in the face of ambiguous and inconsistent state law, they are less likely to provide public access to those recordings. Libraries and archives are particularly concerned about making those sound files generally available over the Internet because they believe that doing so could conceivably expose the posting institution to the laws of all 50 states.³¹⁴

Of course, there will always be situations where an institution may determine that the risk of an infringement claim is relatively remote and that the importance of providing access to its digitized works justifies taking that risk. Such an institution may decide to post its preserved recordings on the Internet. For example, the Society of American Archivists spoke of

a highly-regarded repository that makes available on the Internet rare sound recordings of Jewish music. It does so in the apparent belief that U.S. sound recordings made before 1923 are in the public domain. The good news is that current practice has not harmed any rights owners; the repository has received only acclaim, with no reported complaints.³¹⁵

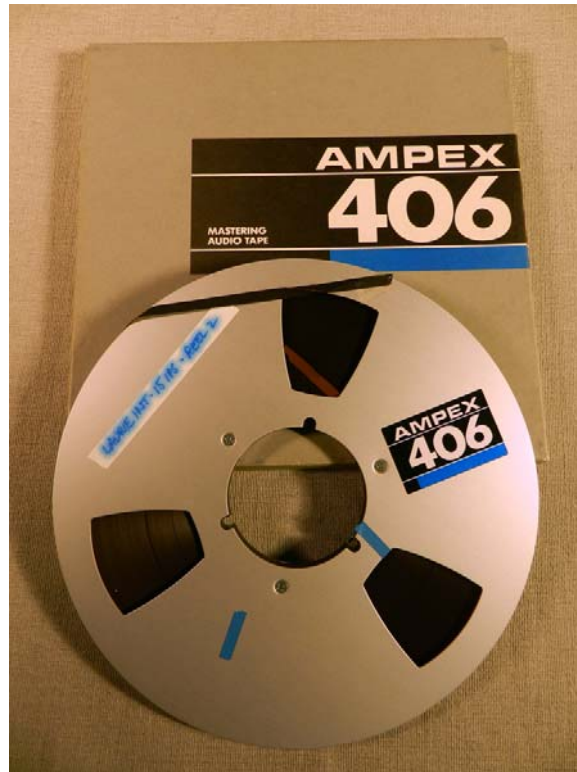
³¹³ See *supra* Chapter III.B.2.b.

³¹⁴ See SAA at 11.

³¹⁵ *Id.* at 4.

In addition, the ARSC reported that the larger the institution, the more likely it is to be risk-averse.³¹⁶

³¹⁶ ARSC at 8.

*Tape reel*

IV. POLICY CONSIDERATIONS

There are many points of public policy to consider in determining the wisdom of federal protection for pre-1972 sound recordings. At the outset, there is the intelligibility of each regime: would federal protection improve the clarity, consistency and certainty of the law protecting pre-1972 sound recordings, or would those values be better achieved by retaining state law protection? The likely effects on preservation and public access must also be considered. All stakeholders support these goals, at least in the abstract, but disagree on how best to promote them. Likewise, stakeholders agree that any change in legal protection should not harm the reasonable economic interests of right holders. But such consensus still begs an important question: what economic interests are reasonable?

There are other questions with respect to the application of Title 17. This Chapter also addresses how section 512 (providing a limitation on liability for online service providers), and

section 114 (providing a statutory license for digital public performance of sound recordings) would interact with provisions providing federal protection for pre-72 sound recordings. Finally, this Chapter considers some alternative protection schemes proposed by stakeholders.

A. Certainty and Consistency in Copyright Law

The majority of the stakeholder comments regarding the potential federalization of pre-1972 sound recordings mentioned the importance of certainty and consistency as policy lodestars by which to guide the recommendations of the Office.³¹⁷ While these are neutral values in the abstract, when applied to a particular issue they can cut more than one way. What appears consistent when measured against one set of facts may be a break from past practice, and thus inconsistent, from another perspective. The historical and policy importance of certainty and consistency (as well as neighboring values such as uniformity) to copyright owners and to users of copyrighted works is discussed below, along with an examination of stakeholders' views on how copyright law's certainty and consistency may be affected by putting pre-1972 sound recordings under federal protection.

1. Importance of Certainty and Consistency

Uniform national application has been a hallmark of copyright law since the first copyright law was enacted in 1790. The goal was underscored and strengthened by the Copyright Act of 1976, which extinguished – with the exception of pre-1972 sound recordings – the concept of state common-law copyright.³¹⁸

³¹⁷ See, e.g., LOC at 4; Aronow T1 at 106.

³¹⁸ See, e.g., ASRC Reply at 9-10 (“Uniformity has been widely recognized as essential to maintaining the marketability and, in the case of historic recordings, the continued existence of creative works. The very purpose behind Article I, Section 8 from which Congress derives its power to promulgate copyright law is inextricably rooted in the need for national uniformity of copyright law.”).

Until the Copyright Act of 1976, federal copyright law protected only published works,³¹⁹ with unpublished works covered in perpetuity by state common-law copyright. This dual system applied to sound recordings along with every other type of work. The 1976 Act, with the goals of (1) promoting national uniformity; (2) eliminating divisions in copyrightable subject matter by publication status; (3) applying the Constitutional rule of “limited times” to unpublished works; and (4) improving international copyright dealings,³²⁰ eliminated state common-law copyright and moved all unpublished works, both past and future, into the federal copyright system. As explained in Chapter II above, this unification measure was not applied to sound recordings fixed before February 15, 1972.

In excluding pre-1972 sound recordings from federal protection, Congress appears to have departed from those goals. Regardless of why Congress made that decision – and the record sheds little light on Congress’s reasons – sound recordings in 1976 became the single inconsistency in what was intended to be a seamless national system of copyright protection. Additionally, what has grown out of that inconsistency is over a hundred years of a state-law regime upon which members of the RIAA and A2IM have come to rely.³²¹ So, while federal protection for pre-1972 sound recordings might be consistent with an overall federal policy of uniformity, it would arguably be *inconsistent* with the experience built up in the sound recording community with respect to state law.

Another issue for consideration is whether federalization of pre-1972 sound recordings would provide greater legal certainty than currently obtains. Most pre-1972 sound recordings are

³¹⁹ There were some narrow exceptions. At the option of the copyright owner, certain works that typically were exploited not by means of publication, but rather by means of public performance or exhibition, were eligible for statutory copyright protection. Such works included lectures, etc., prepared for oral delivery; dramatic, musical, or dramatico-musical compositions; photographs; motion pictures; works of art; and plastic works or drawings. See 17 U.S.C.A. § 12 (repealed 1978).

³²⁰ See S. REP. 94-473, at 112-14 (1975).

³²¹ See RIAA/A2IM at 26 (“This system may be complex, but at least there have been decades of litigation and precedent to resolve ownership issues under [state] laws.”).

protected only under state law, but that just begins the inquiry.³²² In each case one must consider which state's laws apply to the particular activities, what the law is in that state, how the laws apply to preservation and public access, and what defenses are available. In many cases the law is ambiguous.³²³ The issues become more complicated if the intention of the library or archives is to post copies of a work to a broadly accessible website, where potentially multiple states' laws could apply.

It is undoubtedly true that federal law does not provide complete clarity, as the RIAA, A2IM, ARL, ALA, and others assert. Because of the limitations of section 108, libraries and archives increasingly rely on fair use in undertaking digital preservation, and the scope of the fair use doctrine in this context has never been adjudicated. Furthermore, the RIAA and A2IM assert that, after over one hundred years of state-law practice, assessing rights and licenses concerning pre-1972 sound recordings under federal law would lead to great uncertainty in how right holders continue to manage their assets and could potentially unsettle existing contractual relationships.³²⁴

Before addressing whether federal protection of pre-1972 sound recordings would provide greater certainty and consistency, it is worthwhile to consider potential consequences of legal uncertainty. An environment in which rules are ambiguous and differ by region leads to problems of both overprotection and underprotection. Overprotection – where users develop a risk-averse attitude toward socially productive uses of copyrighted works due to the lack of explicit exceptions – has been much discussed among the stakeholders in this study. They have argued that institutions will not undertake preservation and access programs without some

³²² While most pre-1972 sound recordings are protected only under state law, the exception created by the copyright restoration provisions can lead to uncertainty as to which body of law to apply to a particular recording.

³²³ For example, if a library's or archives' activities are looked at through the lens of a criminal law, then a defense that the activities are noncommercial appears likely to prevail. *See supra* Chapter II.E.1.b. Of course, it is far more likely that the activities would be looked at through a civil law lens, in which case the laws of most states offer no clear defenses although in many states the law of unfair competition would require that the defendant be in competition with the right holder. *See supra* Chapter II.E.2-5.

³²⁴ RIAA/A2IM at 24-28.

certainty that doing so will be within the law.³²⁵ Underprotection, in contrast, results when the lack of clarity concerning the scope of rights allows users to make uses that are unfair or unreasonable, but right holders are discouraged by the law's ambiguity from pursuing effective remedies.³²⁶ Unsurprisingly, comments by libraries, archives, and scholars have not stressed this side of the coin. But, particularly when there is little likelihood that more concrete rules and exceptions will be imposed, underprotection may be attractive for users.

A set of rules that are certain and consistent go a long way to eliminating both under- and overprotection, because they make the law itself, rather than the level of risk one is ready to accept, the guiding principle.

2. The Impact of Federalization upon Certainty and Consistency in Copyright Law

a. Users' perspectives on effect of a single set of federal exceptions

Many user groups (libraries, archives, and scholars) noted in their comments a number of ways in which they believe federal protection of pre-1972 sound recordings will improve consistency and certainty in copyright law. They believe that the availability of a single set of exceptions – exceptions with well-developed national jurisprudence – would encourage libraries and archives to make reasonable uses of pre-1972 sound recordings without having to seek permission. “The regularization of the law, the certainty of the law, the bright lines that the law would bring us,” said the ARSC, “outweigh whatever negatives.”³²⁷ They predicted that federal

³²⁵ See, e.g., SAA at 3 (“The danger exists that if archivists come to understand the uncertain legal foundation on which their current behavior rests, they may become hesitant to continue with their preservation activities. Providing a clear legal basis for preservation, therefore, would encourage archivists to be less risk-adverse when it comes to preservation.”).

³²⁶ But see ARL/ALA Reply at 6, providing a more critical view of the current federal exceptions and a more sanguine view of the state law regime.

³²⁷ Brooks T1 at 18-19; see also Lipinski T1 at 59 (“One of the benefits that I see is uniformity and uniformity in the advantage of having a body of case law, for example, of theories that can be readily applied. I think that's a great advantage.”).

protection would produce specific benefits in the areas of preservation and provision of public access, detailed below.

Federal protection of pre-1972 sound recordings would also enable owners and users of those works to benefit from future applicable amendments to the Copyright Act (for example, an amendment to deal with the problem of orphan works, or amendments to section 108). This would not be the case with respect to state protections, and the gap between the treatment of pre-1972 sound recordings and all other works would only increase if such amendments are enacted but pre-1972 sound recordings remained governed by state law.

Not everyone in the library community has concluded that federalization would be beneficial to libraries and archives. The ALA and ARL pointed out that many of the same organizations pressing for federal protection have been critical of the scope of federal exceptions, specifically section 108.³²⁸ They have argued that section 108 is too outdated to be truly useful with respect to preservation and making materials available to users in the digital age.³²⁹ Indeed, the Library of Congress wrote that

As they now exist, Sections 108(b) and (c) [the preservation and replacement provisions, respectively] place recorded sound archivists who perform their duties to the highest professional standards, plus the libraries, archives, museums and other institutions for whom they work, at odds with the word of the law, if not its intention.³³⁰

Fair use would also be available under federalization. However, fair use is flexible – one might say uncertain – by design. It requires a case-by-case analysis, is extremely fact-specific, and for this reason does not lend itself to rules or policies for general application. Indeed, there is some irony in users seeking certainty in a statutory exception that may not allow uses to be made

³²⁸ ARL/ALA Reply at 4-5.

³²⁹ LOC at 5.

³³⁰ *See id.*

with any confidence. Still, the four factors of fair use, along with extensive case law, are not necessarily available under state law.

One final aspect of federal protection that is a potential drawback for users is the availability of statutory damages. Some users were clearly concerned about the possibility of large statutory damage awards, which may be obtained without necessarily demonstrating specific monetary or other losses. On the other hand, the statute does provide protections for libraries, archives and nonprofit educational institutions. Specifically, the Copyright Act provides that statutory damages shall be remitted (*i.e.*, reduced) if the person making the allegedly infringing reproduction reasonably believes it was fair use under section 107 and is an employee or agent of a nonprofit educational institution, library, or archives, acting within the scope of employment.³³¹

b. *Right holders’ perspectives on the move from state to federal law*

RIAA and A2IM predicted that federalization of protection for such recordings would lead to greater uncertainty – not just for right holders, but for users as well. They predicted that federal protection would cause an “administrative nightmare”³³² and result in “significant economic harm”³³³ to right holders. A2IM commented that it was quite comfortable with the current state regime, and that “it’s something we understand,”³³⁴ while Sony Music warned that moving to federal protection risked creating “more uncertainty rather than less uncertainty.”³³⁵ Right holders’ objections to federal protection were phrased largely in terms of the economic

³³¹ See 17 U.S.C. § 504(c)(2). Note, however, that remission only applies to acts of reproduction, not to the infringement of other exclusive rights.

³³² RIAA/A2IM at 26.

³³³ See *id.* at 5.

³³⁴ Bengloff T1 at 33-34.

³³⁵ Aronow T1 at 106.

harm and interference with settled business expectations that might result. These issues are dealt with in detail in Chapter IV.D below.

RIAA also suggested that if pre-1972 sound recordings are brought under federal law, ambiguities concerning the interpretation of sections 107 and 108, coupled with the risk-averse nature of libraries, would result in fewer recordings being made available to the public.³³⁶

Another stakeholder asserted that because federal protection would provide a digital performance right to pre-1972 recordings, it would add another layer of complexity to libraries' and archives' digitization planning.³³⁷

RIAA and A2IM do not, of course, represent all right holders in pre-1972 commercial sound recordings, much less right holders of noncommercial or unpublished recordings. There is at least some evidence that non-affiliated owners may not all share their views. One stakeholder purporting to own the rights in approximately 800 pre-1972 sound recordings commented that it would prefer federal protection to the current state regime because it was “difficult and cost-prohibitive to pursue infringement litigation state-by-state.”³³⁸ It does intuitively make sense that right holders, particularly smaller ones, would prefer federal protection simply on the grounds that it would be easier to manage one's assets on the basis of a single set of laws rather than 50 sets.

Like users, right holders also expressed concerns – albeit quite different ones – about statutory damages. Pre-1972 sound recordings are not currently registered with the Copyright Office (since they are not eligible for copyright protection) but would have to be registered in order to qualify for statutory damages and awards of attorney's fees. This would be a significant

³³⁶ RIAA/A2IM at 20-21.

³³⁷ National Association of Broadcasters (NAB) Reply at 2-3.

³³⁸ VAPAC Music Publishing Reply at 1.

undertaking. Moreover, RIAA indicated that it finds punitive damages available under state law more attractive than the prospect of statutory damages under federal law.³³⁹

c. Application of the DMCA “Safe Harbor” of 17 U.S.C. § 512

Section 512 of title 17, enacted as part of the Digital Millennium Copyright Act, provides certain limitations on liability for copyright infringement by online service providers. However, it is not settled whether the section 512 liability limitations apply to violations of the rights of owners of pre-1972 sound recordings.³⁴⁰ If pre-1972 sound recordings were federalized, service providers would explicitly be entitled to the benefits of the section 512 safe harbor provisions with respect to those recordings.

In response to the Notice of Inquiry, only two stakeholders raised concerns regarding how the section 512 “safe harbor” limitations on liability for copyright infringement by online service providers may apply to the state law protection of pre-1972 sound recordings. The Electronic Frontier Foundation (EFF) noted the importance of the section 512 “safe harbor” provisions to online innovation. It suggested that Congress could not have intended that these provisions would not apply to pre-1972 sound recordings. At the same time it acknowledged that there remains some uncertainty because online service providers cannot easily predict whether a court would find the 512 “safe harbor” provisions applicable to certain copyright infringement claims under state law. It suggested that federalization would clarify that the section 512 “safe harbor” provisions apply to pre-1972 sound recordings.³⁴¹ At the roundtable, RIAA also

³³⁹ Pariser T2 at 456.

³⁴⁰ Courts have split as to the applicability of section 512 to pre-1972 sound recordings. *See infra* Chapter V.A.2.c. However, none of the stakeholders referred to this split in authority.

³⁴¹ EFF at 6-7.

appeared to question whether the section 512 “safe harbor” provisions apply to pre-1972 sound recordings.³⁴²

B. Preservation

1. Importance of Preservation

Preservation of important cultural works is of great importance to the nation generally, and stakeholders interested in pre-1972 sound recordings are in agreement that they should be preserved. Preservation is often undertaken by specialized libraries and archives so that future stakeholders, such as reissue producers and scholars, will have access to a particular aspect of the national cultural patrimony. Preservation is also performed so that stakeholders in the present day may be able to use the recordings. As discussed above, in many cases the media on which these works are recorded are deteriorating,³⁴³ in other cases they are so fragile that the kind of playing necessary for scholarly study is simply unfeasible.³⁴⁴ And, as explained above, preservation of sound recordings today means digitization, which entails reproduction.³⁴⁵

³⁴² Pariser T1 at 276.

³⁴³ J. Willard Marriott Library, University of Utah at 1 (“Many sound recordings produced before 1972 require immediate duplication if they are to be preserved. Significant forms of physical degradation affecting ephemeral sound media – wire recordings, magnetic tape recordings, and acetate transcription discs – include permanent deformation and breaking, tearing, and delamination which can be irreparable. All duplication has to be performed in real time making all preservation projects time consuming and expensive. The media in question are already at high risk of loss simply because they reside on impermanent substrates.”); Buttler T1 at 46-47 (“I do know that some change needs to move forward or, otherwise, we're going to have a significant amount of material that is going to disappear from the historical record, and I don't think that's a good outcome just because we have a law that protects it for a really long time.”).

³⁴⁴ See Loughney T1 at 69-70 (“I can testify to many formats now in the recorded sound collection of the Packard Campus of the Library of Congress that are deteriorating as we speak. These can be transcription disks, these can be wax cylinders, they can be more robust formats that have actually had quite a lot of longevity because they've been durable for four or five decades but are beginning to show signs of oxidation, shrinkage and all the other catalytic chemical reactions that can occur to these formats. Because they were never produced for longevity or for archival purposes; they were produced for home consumption and use in the marketplace, and it was never intended that they last forever.”).

³⁴⁵ See *supra* Chapter III.B. Digitization brings its own set of problems. For example, the recordings must reside on a medium and in a format that can be easily migrated and transferred to more stable platforms as

2. Impact of Federalization upon Library and Archives Preservation Activities

Whether libraries and archives would engage in more preservation as the result of federalizing copyright protection for pre-1972 sound recordings appears to be an open question. Some representatives of libraries and archives contend application of a single set of norms – the federal copyright law – and the availability of the section 107 and 108 exceptions, would lead to more preservation activity with respect to pre-1972 sound recordings. However, opponents of federal protection asserted that it would discourage as much preservation activity as it would encourage, primarily for substantive reasons related to the federal exceptions.

a. *Likelihood of increased preservation*

At the very least, the relative certainty and consistency of federal copyright law provides a structural incentive for increased preservation of pre-1972 sound recordings. If a library, for example, were considering a program to digitize certain out-of-print 1930s 78 rpm phonorecords of Ukrainian music, a decision to forge ahead would be made easier if the library had to consider only federal copyright law, *i.e.*, both the statute and its judicial interpretations. In the current environment, the library (or its counsel, if any) would at minimum have to consult the civil and criminal laws of the state in which it is located, along with the relevant judicial decisions which may not directly address sound recordings.³⁴⁶ With some notable exceptions,³⁴⁷ state civil and

they develop, and that is not beholden to outdated or obscure hardware or software in order to be played. These are far from trivial issues.

³⁴⁶ See, e.g., LOC at 3 (“uncertain legal treatment even for preservation copying . . . makes archive and education officials reluctant to fundraise for, or allocate resources for the acquisition and preservation of the culturally valuable material.”); Syracuse at 4-5 (“any attempt to clear rights for the purpose of archival digitization requires [a library] to research and analyze several different areas of state’s laws – across at least three eras – to determine their applicability, potential exceptions, and possible penalties. Doing this work requires such a tremendous resource allocation that many institutions . . . simply may choose not to make historical works available, thereby leaving a huge gap in the nation’s cultural memory.”).

criminal laws do not include guidance as to what exceptions might apply, whereas federal law provides a library-specific exception (section 108), a well-developed and continuously evolving limitation that has the added benefit of decades of judicial interpretation and commentary (section 107), and the possibility of a robust public domain. To the extent these federal provisions are available, one would have to reasonably conclude that libraries and archives would have more clarity, and therefore more ability to make long term resource allocations, with respect to preservation copying.³⁴⁸

State copyright law does not have anything resembling these exceptions.³⁴⁹ Section 107 – fair use – would be beneficial because courts have already applied it to the digital environment and will continue to do so. In some ways, it serves as a safety net (though by no means a panacea) where certain facts may favor the user over the copyright owner but where the four corners of section 108 are inapplicable. As cases relating to digital copying wind their way through the courts, section 107 will continue to evolve and libraries and archives across the country should be better able to create policies and practices in response. To the extent that these decisions come from appellate courts, libraries and archives throughout the United States could find themselves in a position to create national standards, rather than state-by-state projects, for pre-1972 sound recordings.

Section 108(h) provides an option not available in state law: it permits libraries and archives (and nonprofit educational institutions) to reproduce or distribute copies or phonorecords

³⁴⁷ See, e.g., CALIF. PENAL CODE §§ 653h, 653w (providing limited exceptions for “not-for-profit educational institutions”); see also *EMI Records Ltd. v. Premise Media Corp.*, 2008 N.Y. Misc. LEXIS 7845, at **14-15 (Sup. Ct. Aug. 8, 2008) (recognizing a fair use defense to copyright infringement of sound recordings in New York).

³⁴⁸ SAA at 3 (“Providing a clear legal basis for preservation, therefore, would encourage archivists to be less risk-adverse when it comes to preservation. The explicit and broad preservation exception for unpublished material found in 108(b) would be a definite improvement over the current confused state of the law for the vast number of unpublished sound recordings housed in archival repositories.”).

³⁴⁹ While it is likely that state courts presented with the issue would find that fair use is a defense to common law copyright infringement, we are aware of only a single state trial court case, *EMI Records Ltd. v. Premise Media Corp.*, supra note 140, in which fair use has actually been applied.

of a work for purposes of preservation, scholarship, or research in its last 20 years of federal protection when the work is not subject to normal commercial exploitation and a copy or phonorecord of the work cannot be obtained at a reasonable price. Additionally, some library groups have noted that digitization plans are more likely to receive approval from a library general counsel if based on the applicability of federal exceptions rather than state law.³⁵⁰

Presumably, these federal provisions would lead to better funding for preservation – at least relative to state law. Indeed, some libraries and archives believe that funding for preservation is often contingent on their ability to provide public access. Under this perspective, federal law is preferable.³⁵¹

Moreover, in some circumstances, federalization could result in some pre-1972 sound recordings entering the public domain significantly earlier than 2067.³⁵² This would eliminate the legal barriers to preserving those recordings and making them available over the Internet.

b. *Likelihood of decreased preservation, or no change in preservation activities.*

A number of commenters, both copyright owners and users, contended that federal protection for pre-1972 recordings was unlikely to change the amount of digital preservation, and in fact might discourage it. Some stakeholders commented that federal protection offers no preservation advantages over state protection. They maintained that, because neither state nor federal protection schemes inhibit legitimate preservation activities, moving pre-1972 sound

³⁵⁰ See Brooks T1 at 194 (“Under a consistent regime, whether you like it or not, but a consistent and well understood and well studied [regime], and I think most counsels would understand something about federal law on this level . . . you would have far more certainty at that level about not only whether they could make it available, but if they want to legally make it available, how to go about doing it and what the fair use exceptions are, that kind of thing.”).

³⁵¹ See LOC at 3; Roach at 3 (“by bringing this class of recordings under Federal law, some clarity would be lent to the copyright status of pre-1972 sound recordings. As a result, funding agencies may be more likely to provide grants or other funding to both preservation and access projects.”).

³⁵² See *infra* Chapter VI.D.

recordings under the federal system will make no practical difference.³⁵³ Additionally, RIAA and A2IM stated that the effort involved in amending Title 17 to include pre-1972 sound recordings, and the resolution of the many legal issues, would divert right holders' attention and resources "from more effective means to improve preservation and access" (*i.e.*, partnerships with libraries and archives), hence leading to less preservation overall.³⁵⁴ "Preservation can only be furthered by financial resources and better cooperation between rightsholders and archival institutions," they claimed, "rather than legal reforms."³⁵⁵ This cooperation, maintained the right holder groups, is essential in order to provide libraries and archives with the money and technology they need to engage in best-practices digital preservation.³⁵⁶

ARL and ALA emphasized that the federal exceptions, particularly section 108, would limit preservation activities far more than state law currently does. They asserted that the risk of particular digitization activities being stymied by section 108's limits on the number of copies that can be made, or by its published/unpublished distinctions, was not worth the benefits of federal protection overall.³⁵⁷ While they acknowledged that uses not currently allowed by section 108 might still be permitted by section 107, they pointed out that, regardless of the exception, statutory damages and other remedies not available at state law would apply to digitization activities found to be infringing. This, they asserted, presents risks that must be weighed against whatever rewards are offered by federal protection.³⁵⁸

³⁵³ RIAA/A2IM at 18-19 ("the RIAA and A2IM believe that in fact, since they know of no such instances of litigation for legitimate preservation activities by libraries or archives, that the copyright law – state or federal – is largely not a factor or hindrance, by itself, to preservation activity.").

³⁵⁴ *Id.* at 2.

³⁵⁵ RIAA/A2IM Reply at 2.

³⁵⁶ RIAA/A2IM at 7.

³⁵⁷ ARL/ALA Reply at 4-6 (use of section 108 "risks the loss of important cultural artifacts, and raises the costs of preservation considerably and unnecessarily").

³⁵⁸ *See id.* at 2-3, 6; *see also* NAB Reply at 4 ("retroactive federal copyright protection for pre-1972 sound recordings could actually hinder preservation and access activities, as federalization would increase

C. Public Access

1. Importance of Public Access

Providing some level of access to digitally preserved works is important because without it, preservation is often merely an academic exercise. Obviously, researchers and the public must have access to digitized pre-1972 sound recordings for the furtherance of public knowledge about our cultural patrimony, and for the light that these recordings can shine on the times in which they were recorded – basically, for the reasons we study film, literature, music, and any other product of the mind.³⁵⁹ Access also propels the “progress of science” in that current creators are able to build upon what has come before.

A more nuanced point suggested by several stakeholders in the written and oral comments is that access is the key to obtaining funding for preservation.³⁶⁰ At a practical level, granting organizations are seemingly reluctant to fund projects that will have no visible public benefit.³⁶¹ To the extent a project manager can apply funds not only to the preservation of

remedies and could increase potential liabilities for infringement, thereby increasing the risk involved in judging the legality of any particular use”).

³⁵⁹ One commenter noted that, as a scholar focusing on music of the late 19th Century through the 1930s, he could upload prints and photographs to the web, but not sound recordings, a situation that he found “often blocks the academic sharing of sources in ways that could offer the best grounding for a study’s interpretations; the best sense of key historical, aural contexts for those sources; the best platform from which other scholars might assess, recontextualize, reinterpret, and teach from those sources; and the richest means by which students and the public could explore and learn from documents of our musical past.” Lancefield at 1.

³⁶⁰ See, e.g., LOC at 3 (“preservation funding is often tied to the ability to make material available to the public”); SAA at 3 (“the funding and scope of preservation programs are closely related to the extent to which the preserved items can be made readily available for research use”).

³⁶¹ See MLA at 3 (“donors generally expect tangible results which show the funds were spent wisely. This becomes especially important when seeking follow-up grants or permanent institutional funding. Results are typically measured in terms of the project’s impact: the number of people who have used the materials, the dissertations, articles or books that are generated from it, etc. A digitization project which saves materials for the future but which cannot make them widely accessible, does not tend to be viewed favorably”).

important sound recordings, but also to making them available for the public to listen to, funding is more likely.³⁶²

One example of the importance of public access to receiving grants is the National Endowment for the Humanities (NEH) guidelines for humanities collections and reference resources grants. These describe the NEH's expectation that the products of its grants will be publicly available, preferably through the Internet, and in fact forbid the use of grants for "preservation, organization, or description of materials that are not regularly accessible for research, education, or public programming."³⁶³ The importance of public access to the awarding of NEH grants was emphasized by a program officer who said that for an application, failing to provide for availability of preserved materials would be a "fatal flaw."³⁶⁴

The key question, then, is not "should this be accessible?" but "when should this be accessible, in what way, and to whom?" Sometimes the rights of authors or other interested parties may caution against making preserved works immediately available to the public via the Internet, because of copyright or privacy considerations. At other times, immediate access may be appropriate, but perhaps only to select credentialed researchers, or only on the premises of the custodial institution. In general, some level of access appears to be a goal that all stakeholders in pre-1972 sound recordings can share.³⁶⁵

³⁶² See Brylawski T1 at 51 ("But now as we compete for grants, as our institutions compete for grants with other institutions, those institutions that can provide access to their preserved materials are – we find are the ones that are getting funding. This was brought up in much of the oral testimony at the hearings in Los Angeles and New York that were conducted for the National Recording Preservation Board.").

³⁶³ See <http://www.neh.gov/grants/guidelines/HCRR.html>, last visited Dec. 1, 2011.

³⁶⁴ Phone conversation with Charles Kolb, Senior Program Officer, National Endowment for the Humanities, Division of Preservation and Access, Nov. 10, 2011.

³⁶⁵ See RIAA/A2IM at 4 ("The RIAA and A2IM take great pride and care in the preservation of the recordings in their respective catalogs, and consider it a part of their civic responsibility to work on or assist with the preservation of and access to all historical recordings, whether of commercial interest or not").

2. Impact of Federalization upon Library and Archives Public Access Activities

a. *Types of access expected*

When libraries, archives, and scholars speak of “access” it is not always clear whether they are referring to the entire spectrum of access, from on-premises only to posting on a website, or only to one or the other end of that spectrum. In the proceedings for this Report, some stated definitively that only physical reissues or downloads could meet the access needs of the scholarly community.³⁶⁶ Others provided a range of access possibilities, from making digitized copies available to researchers and making copies for interlibrary loan, to creating digital exhibits and on-line curricula for independent learners.³⁶⁷ In addressing public access, comments from the user community consistently asserted that they had no intention of impinging on commercial activity, which they conceded was the proper sphere of the record companies.³⁶⁸

b. *Likelihood of increased public access*

Not every provision of public access to a work necessarily implicates an exclusive right. Nevertheless, most stakeholders from the user community maintained that federal protection would encourage the provision of public access.³⁶⁹

³⁶⁶ See Brooks T1 at 110-12 (“I would be skeptical of considering streaming with no right to actually use the source sound document as constituting availability. We can debate that, but I would question that. On the other hand, availability through something like iTunes or something where you could actually get your hands on the file and hold the file and use and study the audio file might [constitute availability].”); *but see* Starr-Gennett 7b at 2 (“Our goal as a not-for-profit educational institution is to interpret the contributions of Gennett Records partly by making digital versions of its recordings (as well as the actual records) available to researchers and by streaming the digital versions of the recordings to the general public through our own website or through arrangements with third parties.”).

³⁶⁷ Harbeson T1 at 199-201.

³⁶⁸ Loughney T1 at 203-04 (“It would be a real pressure valve to provide access without stepping on the rights of right holders or potential rights holders who might want to come in and relicense that material and reissue it, which I think is not our business and that’s your business, and we are happy to help you do it.”).

³⁶⁹ See SAA at 5 (“Although the current provisions in Section 108, especially Sections 108(b) and 108(c), are inadequate at providing access in any meaningful way, the availability of provisions of Sections 108(d)

In copyright parlance, “access” can take the form of distribution (when a copy or phonorecord of a work is disseminated to the public “by sale or other transfer of ownership, or by rental, lease, or lending”)³⁷⁰ or public performance (a limited right in the context of sound recordings, which extends only to public performances “by means of a digital audio transmission”).³⁷¹ Streaming, whether interactive or noninteractive, implicates the public performance right. The rights of distribution and public performance are exclusive rights of the copyright owner, although the public performance right for digital audio transmissions is subject to a statutory license for noninteractive transmissions.³⁷²

The distribution right is limited by section 109(a) of the Copyright Act (the “First Sale” exception),³⁷³ which provides that the owner of any copy of a work may sell, lend, or otherwise dispose of it. This is the exception that allows libraries and used bookstores to operate without paying royalties to authors or other right holders – for instance, by lending copies of a CD. There is not, however, a federal exception expressly allowing libraries to publicly perform works over the Internet (*e.g.*, streaming).

Federalizing protection would make access to pre-1972 sound recordings through libraries lawful in many instances in which state law rules are unclear at best. To the degree that access is by means of an on-premises visit – for example, to listen to a non-digitized 78 or LP — federal protection would likely make little difference, since such listening has been going on for decades without any legal difficulties. If access involves listening to digitized sound recordings, such as by means of on-premises listening to an unpublished or replaced work copied under

and 108(e) would provide a definite improvement in access to non-musical sound recordings for local and remote users”); MLA at 6.

³⁷⁰ 17 U.S.C. § 106(3).

³⁷¹ 17 U.S.C. § 106(6).

³⁷² 17 U.S.C. § 114.

³⁷³ 17 U.S.C. § 109(a).

section 108, then federal protection would certainly lead to (or at least make lawful) increased access. It would do so through the application of sections 108(b) and 108(c), which permit on-site access to copies made for preservation and replacement purposes. The same conclusion applies to certain uses of a sound recording in the last 20 years of its term of protection (section 108(h)), and to any uses that are legitimate under the fair use provision. These provisions would encourage the provision of public access, it was argued, by offering relatively clear and unambiguous exceptions that can be understood and implemented by libraries and archives.³⁷⁴

Additionally, federal protection might lead to increased access simply by virtue of putting pre-1972 sound recordings into the federal system. Once there, they will be eligible to benefit from any future changes to copyright law that may themselves directly affect public access, such as orphan works legislation or section 108 reform.

To the extent that federalization would result in some sound recordings entering the public domain before 2067 (discussed below in Chapter VI), access to those recordings would be substantially enhanced.

Much of the commentary from libraries and archives regarding public access under federal protection implicitly assumed that the fair use provision (section 107) would support greater public access.³⁷⁵ The Office feels constrained to note, however, that unlike digital copying for preservation, as a general matter making protected works broadly available – particularly on the Internet – has a weaker claim to fair use since it risks undermining any current or future market for the work. Fair use does not ordinarily permit dissemination of a work in competition with the copyright owner or in ways that adversely affect the potential market for the work. On the other hand, fair use may permit a library, in appropriate circumstances, to make a

³⁷⁴ LOC at 5.

³⁷⁵ *See, e.g.*, LOC at 5.

single copy of a copyrighted recording for a scholar or researcher even where the underlying work remains protected by copyright.

c. Likelihood of decreased public access

Some stakeholders argued that federal protection may lead to decreased rather than increased access to pre-1972 sound recordings.³⁷⁶ Right holders argued that the tendency towards risk-aversion that currently restrains libraries and archives from using the gaps in state law to provide public access to their digitized works would operate in the same way under federal protection. They suggested that the uncertainty of fair use could further inhibit public access because it would hold users back.³⁷⁷ “The better goal” than seeking federal protection, the right holders maintained,

is to encourage donation to public libraries and archives of master materials by record labels – large and small that cannot or are not able (for financial or other reasons) to preserve their own master materials – and to include access to such materials to the extent agreed upon. The same is true for bona fide record collectors and enthusiasts – of niche materials – to get more materials, especially rare cultural and historical materials, into public institutions, and ultimately to the general public.³⁷⁸

D. Economic Impact on Right Holders

The economic impact of federal protection on those who own the rights in pre-1972 sound recordings can be assessed in two ways. One way is to attempt to determine how federal protection will affect the value of pre-1972 sound recordings *per se*. That is, will the fact that a recording is protected by federal and not state law affect its worth in the marketplace? What aspects of federal protection will likely be most determinative? How does the nature of the effect change depending on what recording or group of recordings one is examining?

³⁷⁶ See RIAA/A2IM at 20-21; ARL/ALA at 4-6.

³⁷⁷ RIAA/A2IM at 20-21.

³⁷⁸ *Id.* at 21.

The second way of determining the economic impact of federal protection is to look at how federal protection might affect the settled business expectations of right holders. For example, if a contract is written with the expectation that state law will govern, what happens when the federal statute becomes the underlying law? Additionally, how would the federal rules governing initial ownership, transfer of ownership, termination of transfers and licenses, and registration affect a recording fixed under state law? The stakeholders had many views on these and related issues, which are set forth below.

1. Value of Pre-1972 Sound Recordings

The present value of pre-1972 sound recordings varies substantially. There is a small number (proportionate to the total number of sound recordings made) of commercial recordings that continue to prove remunerative to their owners, such as titles by Louis Armstrong, Bing Crosby, Frank Sinatra, Elvis Presley, and the Beach Boys, and record companies are continuing to reissue sound recordings for niche markets.³⁷⁹ However, the vast majority of pre-1972 sound recordings are either unpublished (such as field recordings) or, if published, have ceased their commercial life.³⁸⁰ In particular, scholars pointed to pre-1925 recordings, stating that “an average of fewer than 4% of historically important pre-1925 recordings have been reissued in any form by right holders, and the revenue from that 4% has to be tiny given the lack of marketing of such reissues.”³⁸¹ They also stated that

Fundamentally, older recordings that are still economically viable are nearly always those made within the lifespan of contemporary record buyers. This has been true throughout the history of the marketing of sound recordings.³⁸²

³⁷⁹ Bengloff T1 at 121-22.

³⁸⁰ *See, e.g.*, SAA at 7.

³⁸¹ ARSC at 3.

³⁸² *Id.* at 4.

a. *Benefits and disadvantages of federal protection*

Stakeholders presented competing views of how federal protection would affect the economic value of pre-1972 sound recordings. Given that most pre-1972 sound recordings likely have little or no economic life at all, the discussion centered on commercially released recordings.

A primary concern about the economic effect of federal protection was the likelihood of early sound recordings entering the public domain, and thus becoming less profitable for their former right holders. ARSC maintained that right holders could still enjoy a modest income from selling public domain works, given that in many cases they would still own the master recordings and could lease these to reputable reissue labels.³⁸³ ARSC also pointed out that public domain reissues could be useful in identifying recordings with unexpected commercial viability, which the former right holder could then exploit.³⁸⁴ MLA cited the competitive trade in public domain books as evidence that earning money through works in the public domain is possible.³⁸⁵ RIAA, however, disagreed, saying that once a recording is available for free downloads, with no copyright for the uploader or the distribution site to worry about, the business model for record companies is extinguished: “there is all but zero value to a record company in a public domain recording.”³⁸⁶

Some stakeholders also maintained that, while the entry of early sound recordings into the public domain might not redound to the profit of the (former) copyright owner, it could create economic value for third-party reissue labels.³⁸⁷ Under this scenario, once libraries and archives

³⁸³ ARSC at 7.

³⁸⁴ *See id.*

³⁸⁵ Harbeson T1 at 179.

³⁸⁶ Pariser T1 at 295.

³⁸⁷ *See* MLA at 10 (“The commercial value of the recording and the commercial value to the current copyright holder are not the same thing. A copyright holder may, for lack of interest or knowledge, fail to exploit a work to its full commercial value. In such a case, the value to the owner would be less than the value of the recording. A measure of the commercial value of the recording should include not only the

preserve and make public domain sound recordings publicly accessible, such access will spur demand for consumer-ready packages of these recordings, which will help third-party labels³⁸⁸ (as well as, one supposes, the “original” labels that chose to compete in this sphere).³⁸⁹

b. *Effect of exclusive rights*

Federal protection would, for the first time, allow pre-1972 sound recordings to enjoy a defined set of unambiguous, though limited, exclusive rights. Specifically, the owner of a copyright in a sound recording enjoys the exclusive rights of reproduction, preparation of derivative works, distribution, and public performance via a digital audio transmission.³⁹⁰ In contrast, the rights conferred by state law are typically either narrower or often ambiguous.³⁹¹ While some states’ civil statutes confer exclusive rights upon owners of copyrightable works,³⁹² most do not. The economic effect of these additional exclusive rights conferred by federal law is that their holders are granted monopoly power over certain actions, and can exercise this power to their financial benefit by selling copies of the recordings, or licensing the rights to make derivative works from the recordings.

revenue it brings to the copyright holder, but all potential revenue that it could command.”); *see also* EFF at 12.

³⁸⁸ *See* MLA at 10-11 (“bringing pre-1972 sound recordings under federal law best satisfies the Constitutional goals of copyright by insuring that as many lawfully-made recordings as possible are available to the public, whether it be through the marketplace or in libraries. Doing so can do no harm to the commercial viability of a recording; indeed, in some cases it may be beneficial by fostering renewed interest and demand.”).

³⁸⁹ Harbeson T1 at 179.

³⁹⁰ 17 U.S.C. § 106. The exclusive right of public display does not apply to sound recordings.

³⁹¹ *See supra*, Chapter II.E.

³⁹² CAL. CIV. CODE § 980(a)(2) (“The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording . . .”).

One notable aspect of federal protection that could well affect the value of pre-1972 sound recordings is the exclusive right “to perform the copyrighted work publicly by means of a digital audio transmission.”³⁹³ This is the legal mechanism, along with section 114, that insures royalty payments (and, in cases falling outside section 114’s exceptions and its statutory license, exclusive rights) to owners of sound recordings that are publicly performed via the Internet or satellite radio. Like the rest of federal copyright law, the public performance right only applies to works protected by federal law. Thus, pre-1972 sound recordings that presently do not earn public performance royalties could become a significant revenue stream once incorporated into the federal statute.³⁹⁴

c. “Long tail” effect on commercial prospects of older recordings

A number of commenters, particularly ARSC, asserted that reissuing early (meaning, for the most part, acoustical-era) recordings is unlikely to be profitable. This point was made in the service of the argument that the movement of such early recordings into the public domain under federal protection would not negatively affect the record companies’ bottom line.³⁹⁵ In response, members of the right holder community maintained that (1) there is no way to truly know what old music styles will become popular again, and (2) it is necessary to retain state protection until 2067 because the so-called “long tail” phenomenon suggests that these older works take longer to earn a return on their investment.³⁹⁶

³⁹³ 17 U.S.C. § 106(6).

³⁹⁴ See Brylawski T1 at 174-75.

³⁹⁵ See ARSC at 4.

³⁹⁶ Bengloff T1 at 31, 33-34; see also Chris Anderson, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (2006).

ASRC, citing to the Brooks Study findings that 4% of pre-1925 recordings have been reissued by right holders, with an increase to 12% for 1925-1939 recordings,³⁹⁷ argued that these numbers showed that right holders historically have not put a lot of stock in the earning potential of early music reissues.³⁹⁸ Both A2IM and NMPA made the point that one can never assume what will ultimately prove commercially viable, particularly for smaller labels catering to niche audiences,³⁹⁹ and that it is too risky to base federal policy upon a presumption as to which pre-1972 sound recordings will have value in the future.⁴⁰⁰

Additionally, A2IM explained that under the “long tail” theory, a large number of heretofore-“niche” cultural products will earn as much as the small number of blockbuster works when viewed over a longer period of time, because it has become easier to exploit niche markets. Hence, it argued, pre-1972 sound recordings that would have been allowed to go out of print in the past are now being kept in the marketplace on the theory that they and their audience will find each other.⁴⁰¹ However, A2IM stated that bringing a high quality recording to market requires a financial investment, and in order for early recordings to earn the requisite return on investment they cannot be allowed to go into the public domain.⁴⁰²

2. Settled Expectations in Business Transactions

The second way in which federal protection might affect the economic value of pre-1972 sound recordings is by upsetting the settled business expectations of major sectors of the music

³⁹⁷ ARSC at 3.

³⁹⁸ *See id.*

³⁹⁹ Bengloff T1 at 121; Rosenthal T1 at 62-63.

⁴⁰⁰ Rosenthal T1 at 62-63.

⁴⁰¹ Bengloff T1 at 31-34.

⁴⁰² *Id.* (“As technology changes, we have to go back and increase the number of kilobytes that are available so our music sounds like it should be sounding, be able to deliver it, bring it to market and a variety of other areas.”).

industry. Stakeholders had very different views on the degree to which settled business practices might be altered, as well as on what economic impact such alteration would cause. All of the commenting parties were united, however, in wanting the least possible amount of disturbance to the current record company business model. Contractual arrangements, ownership, transfer, termination, and registration were among the topics addressed.

a. Existing contractual arrangements

In their written comments, RIAA and A2IM pointed out that many of the pre-1972 sound recordings to which their members own the rights are licensed in both hard copy and in digital form through multiple contracts. These contracts are predicated upon state laws, and the right holders claimed that putting pre-1972 sound recordings under federal protection would “render many deals unclear (at best), make others more difficult to interpret, and would likely result in financial losses.”⁴⁰³ The contents of entire catalogs, they warned, could be tied up in court, with the possibility that the recordings at issue would be withdrawn from public availability.⁴⁰⁴ Beyond financially harming the recording industry and decreasing public access to pre-1972 sound recordings, RIAA also predicted that these complications would divert record companies from engaging in cooperative access programs with libraries and archives.⁴⁰⁵

In response to the expressed concerns about contract uncertainties, user groups stated that the contract issues “would continue to be resolved under state law as they had before” federal protection.

This raises an important point, that the degree to which contracts, as well as ownership, termination, and other matters discussed later in this Chapter are affected will be determined not

⁴⁰³ RIAA/A2IM at 31.

⁴⁰⁴ Schwartz T1 at 23; *see also* Rosenthal T1 at 245-46.

⁴⁰⁵ Schwartz T1 at 23.

by federal protection itself, but by the manner in which it is achieved – specifically, how federal copyright law will apply, and in what cases state laws would continue to control. These questions are addressed in detail in Chapter VI of this Report.

b. *Ownership, including transfer, termination, and registration*

The RIAA and A2IM stressed in their written and oral comments the great degree to which questions of ownership (such as transfer and termination) and related responsibilities (such as registration) would be thrown into chaos upon the institution of federal protection for pre-1972 sound recordings. In other words,

all of the legal uncertainty and what we think would be litigation and other sorts of ways of sorting out how to deal with things like ownership and authorship and term and all that, it just detracts from the economic value of the rights.⁴⁰⁶

Recall that, when discussing preservation and access, libraries and archives were portrayed as overly risk-averse, and claimed they should not be forced to work under such legal uncertainty. In the discussion of how federal protection would affect ownership and related matters, the roles have switched, with record companies claiming they will be unfairly forced to face uncertainty, and user groups claiming that the cited risks being pointed out were overblown or nonexistent.

Regarding initial ownership (and it should be kept in mind that the following discussions will be expanded upon in Chapter VI), right holders expressed concern that what was clear under state laws would be unclear, or even invalidated, once ownership documents and chain of title were examined under federal law.⁴⁰⁷ For example, it was noted that in some states ownership passes with the possession of the physical master recording, a situation that does not exist under federal law.⁴⁰⁸ This conflict, warned the RIAA and A2IM, would lead to uncertainty and even

⁴⁰⁶ Chertkof T1 at 176-77.

⁴⁰⁷ RIAA/A2IM at 26-27.

⁴⁰⁸ RIAA/A2IM at 26; Feaster at 8-9.

litigation in the course of attempting to reconcile the state and federal standards.⁴⁰⁹ Another ownership concern was related to “works-made-for-hire”: would a recording considered to be a work made for hire under state law at the time of its creation have to be reconsidered under the federal copyright law standards?⁴¹⁰ If such a reconsideration created a different ownership interest, how would this affect downstream contracts and licenses?⁴¹¹ These conflicts, warned RIAA and A2IM, would lead to uncertainty and litigation in the course of attempting to reconcile the state and federal standards.⁴¹²

The problems caused by differing interpretations of initial ownership would be compounded, according to the RIAA and A2IM, when considering transfer of title (how can you transfer if you do not know the owner?) and termination of transfers and licenses (when a deal is struck in the absence of a termination provision, is it fair to subsequently seek to terminate the transfer?).

Stakeholders representing users of pre-1972 sound recordings had varied responses to these right holders’ concerns. The SAA pointed out that a similar “federalization” of state-protected works (namely unpublished works) occurred by reason of section 301(a) of the Copyright Act of 1976, and that it was unaware of any cases involving such works that hinged upon state definitions of ownership.⁴¹³ SAA conceded, however, that determining whether or not a recording was a work made for hire would be difficult.⁴¹⁴ ARSC took another position on the work made for hire issue, saying that “early sound recordings were generally made under true

⁴⁰⁹ RIAA/A2IM at 27.

⁴¹⁰ *See id.* at 26.

⁴¹¹ *See id.* at 24-25.

⁴¹² RIAA/A2IM at 27.

⁴¹³ SAA at 7-8.

⁴¹⁴ *See id.* at 8.

employment conditions; these works would, therefore, qualify as works made for hire.”⁴¹⁵ ARSC also pointed out that, for commercial recordings, the vast majority of commercial recordings continue to be owned by a known entity, and that the real problem is in determining who owns orphan and unpublished works.⁴¹⁶ Finally, ARSC also asserted that ownership simply wouldn’t be affected by the advent of federal protection for pre-1972 sound recordings because

federal copyright in a pre-1972 sound recording would vest in the initial owner of the work as determined by the law of the state with the most significant relationship to the sound recordings and the parties, and no divestiture or transfer of rights would result.⁴¹⁷

With respect to termination of transfers and licenses of rights in pre-1972 sound recordings, one stakeholder commented that even if federal protection applies, pre-1923 sound recordings should continue to be exempt from the termination provision on the grounds that termination in general is contrary to free-market principles.⁴¹⁸ Another disagreed, arguing that performers of pre-1972 sound recordings should enjoy the same right of termination that their post-1972 colleagues enjoy.⁴¹⁹

Copyright registration was another issue that right holders raised. Timely registration is required to preserve a copyright holder’s ability to use the registration certificate as *prima facie* evidence of the validity of the copyright and the facts stated in the certificate.⁴²⁰ Timely registration is also required for a copyright owner to be eligible for statutory damages and

⁴¹⁵ ARSC Reply at 18.

⁴¹⁶ ARSC at 4-5.

⁴¹⁷ ARSC Reply at 13.

⁴¹⁸ Hoffman Reply at 1.

⁴¹⁹ Artist’s Reprieve Reply at 1-2.

⁴²⁰ 17 USC § 410(c). The certificate has *prima facie* weight only if registration was made before or within five years after first publication of the work.

attorney's fees as the prevailing party in an infringement suit.⁴²¹ Under section 411 of the Copyright Act, a right holder may not sue for infringement of a U.S. work unless it first registers the work with the U.S. Copyright Office. While some right holders register only just before going to court, the preferred method is to register upon creation or publication,⁴²² which preserves the ability under section 412 to seek an award of statutory damages and attorney's fees. Obviously, no pre-1972 sound recordings have been registered, because federal copyright law does not apply to them. If federal protection applies, will registration become a problematic issue? A2IM noted that

To be able to defend your rights, you have to register your music. It would be a burden in terms of manpower, finances, and a variety of other ways for us to continue to protect our pre-1972 copyrights if they were federalized. A real cost burden.⁴²³

Alternatively, RIAA expressed concern that sudden imposition of a registration requirement would mean that pre-1972 sound recordings would be "devoid of effective remedies" under federal protection.⁴²⁴ In response, ARSC said it would be "delighted" if federal protection produced a torrent of new sound recording registrations because it would "promote predictability and public access to these works, as well as aid in the preservation of historic recordings."⁴²⁵

⁴²¹ A prevailing plaintiff may seek an award of statutory damages and attorney's fees only if the infringed work was registered prior to the commencement of the infringement or within three months after first publication of the work. 17 U.S.C. § 412. Different rules apply to works that have been "preregistered" under section 408(f), but no pre-1972 sound recordings would qualify for preregistration. *See id.*

⁴²² Pariser T1 at 281.

⁴²³ Bengloff T1 at 31.

⁴²⁴ RIAA at 30.

⁴²⁵ ARSC Reply at 18.

c. *Potential for a decrease in availability of pre-1972 sound recordings as result of business burdens*

RIAA and A2IM warned that the burdens caused by a “protracted legislative process” could redirect their members’ resources away from cooperative preservation and access programs such as the Library of Congress’s National Jukebox.⁴²⁶ They also raised the specter of “a freeze on availability of many pre-1972 sound recordings” due to difficulties in tracing ownership.⁴²⁷ Finally, A2IM suggested that the costs of dealing with ownership issues and registration could mean “less and less investment” in indigenous American music of the sort that demonstrates “America’s cultural diversity and tradition.”⁴²⁸

Concerning the potential of a “freeze” on availability of pre-1972 sound recordings, ARSC pointed out that “even traditional categories of works prepared before 1978 require a case-by-case examination to determine the federal rights as of the date of preemption; the complete freeze suggested by the RIAA/A2IM has not resulted from such a requirement.”⁴²⁹ The real source of scarce availability, ARSC said, is the confusion about which state laws apply and how to apply them.⁴³⁰

D. Alternatives to Federalization

Stakeholders were asked to address the possibility of bringing pre-1972 sound recordings under federal law only for limited purposes. The Notice of Inquiry noted that some stakeholders seek to ensure that current state law rights in pre-1972 sound recordings are subject to the fair use doctrine and the library and archives exceptions found in sections 107 and 108, respectively, of

⁴²⁶ RIAA/A2IM at 5.

⁴²⁷ *Id.* at 27.

⁴²⁸ Bengloff T1 at 31-34.

⁴²⁹ ARSC Reply at 13.

⁴³⁰ *See id.* at 14-15.

the Copyright Act. It also noted that some would like to subject pre-1972 sound recordings to the section 114 statutory license, but otherwise keep them within the protection of state law rather than federal copyright law. The Office received a variety of comments in response to the proposals referred to in the notice, as well as some new proposals for alternatives to federalization of pre-1972 sound recordings.

1. Partial Federalization (e.g., only applying sections 107, 108 and/or 114)

The Notice of Inquiry raised the possibility of bringing pre-1972 sound recordings under federal law only for limited purposes, *i.e.*, retaining state law protection for the recordings but subjecting them to the defenses provided by sections 107 and 108 of the Copyright Act and/or to the statutory license provided by section 114 of the Copyright Act.

a. Sections 107 and 108

Several parties, including SAA, LOC, RIAA and A2IM, expressed the view that partial federalization would be inappropriate. SAA offered that partial federalization would not resolve the current complexity that impedes preservation and access for pre-1972 sound recordings, but instead would merely add to the confusion and legal fees.⁴³¹ LOC agreed that partial federalization would lead to more confusion regarding the boundaries of federal and state protection.⁴³² RIAA and A2IM stated their belief that there are no advantages to providing partial federalization, and that overwhelming legal challenges would ensue.⁴³³

ARSC commented that partial federalization that simply applied the fair use doctrine and the library and archives exceptions found in sections 107 and 108 to currently held state rights in

⁴³¹ SAA at 10-11.

⁴³² LOC at 12.

⁴³³ RIAA/A2IM at 30-31.

pre-1972 sound recordings would be “extremely messy” in the real world. It added that such a proposal would unfairly privilege certain institutions, which did not fall within the section 108 criteria.⁴³⁴ ARSC, while supporting full federalization, endorsed partial federalization to the extent necessary to ensure that First Amendment safeguards that are built into the current Copyright Act are applicable to pre-1972 sound recordings. In its view, without the fair use doctrine and the library and archives exceptions found in sections 107 and 108, state copyright laws regarding pre-1972 sound recordings could be subject to invalidation on Constitutional grounds.⁴³⁵ MLA, while generally favoring complete federalization, reluctantly supported partial federalization over the *status quo*.⁴³⁶

b. Section 114

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”)⁴³⁷ which, for the first time, granted to copyright owners of sound recordings an exclusive right to make public performances of their works by means of certain digital audio transmissions, subject to a compulsory license for certain uses of these works codified in section 114 of title 17 of the United States Code. In the Digital Millennium Copyright Act of 1998 (“DMCA”),⁴³⁸ Congress updated section 114 and expanded the scope of the compulsory license.

⁴³⁴ ARSC at 7. In its comment, ARSC identified organizations in Europe, where the “widespread availability of historical public domain recordings ... is precisely because *anyone* can make them available.” *Id.*

⁴³⁵ ARSC Reply at 19-20. However, in its initial comment, ARSC observed that partial federalization that simply applied the fair use doctrine and the library and archives exceptions found in sections 107 and 108 to currently held state rights in pre-1972 sound recordings would be “extremely messy” in the real world. ARSC at 7.

⁴³⁶ MLA at 15-16.

⁴³⁷ Pub. L. No. 104-39, 109 Stat. 336 (1995).

⁴³⁸ Pub. L. No. 105-304, 112 Stat. 2286 (1998). Section 112 of the Copyright Act, 17 U.S.C. § 112, was also amended to provide a statutory license for the making of certain “ephemeral” copies “used solely for the transmitting organization’s own transmissions originating in the United States” under the section 114

The result is that sound recordings are subject to a compulsory license for public performances by means of certain nonexempt, noninteractive digital subscription digital audio transmissions. All other public performances of sound recordings by means of certain digital audio transmissions, including interactive digital transmissions, are subject to an unfettered exclusive right.⁴³⁹ The Office's Notice of Inquiry asked for input on the impact of bringing pre-1972 sound recordings into the section 114 statutory licensing mechanism, perhaps as an alternative to full federalization of protection for pre-1972 sound recordings.⁴⁴⁰

In its comments, SoundExchange stated that, while there is no need to completely federalize pre-1972 sound recordings, there would be a benefit to requiring statutory services to pay under the statutory license for pre-1972 sound recordings presently protected as a matter of state law. It estimated that pre-1972 sound recordings account for 10-15% of usage by services employing the section 114 license. It also observed that some services that publicly perform sound recordings by means of digital audio transmissions are already making statutory royalty payments under the section 114 license for pre-1972 sound recordings. It contended that such payments for public performance of pre-1972 sound recordings are appropriate, and that performances of pre-1972 sound recordings are subject to protection under state law, including a state law performance right.⁴⁴¹

Both NAB and SiriusXM disputed SoundExchange's view that state law provides a public performance right in pre-1972 sound recordings.⁴⁴² NAB explained that SoundExchange was referring to statutory and case law that is designed to address bootlegging and establish

statutory license. Because the section 112 statutory license and the section 114 statutory license go hand in hand, this Report shall not specifically discuss the section 112 license beyond this footnote.

⁴³⁹ 17 U.S.C. § 114.

⁴⁴⁰ Notice of Inquiry at 67780, 67781.

⁴⁴¹ SoundExchange at 4-6.

⁴⁴² SiriusXM Reply at 8-10; NAB Reply at 7-8.

reproduction and distribution rights and claims regarding unfair competition. It asserted that such law does not establish public performance rights.⁴⁴³ SiriusXM added that requiring statutory services to pay under the statutory license for recordings currently protected under state law would provide an undeserved windfall for recordings created and paid for more than 40 years ago, at the expense of services like Sirius XM. It also noted that to the extent that any services are mistakenly making payments for public performance of pre-1972 sound recordings, that SoundExchange should not be accepting or distributing such payments.⁴⁴⁴

2. Limits on Remedies

At the public meeting, RIAA offered the concept of a registry containing data about pre-1972 sound recordings which libraries and archives sought to preserve and to which they sought to provide access.⁴⁴⁵ This concept was also mentioned by Sony Music Entertainment, which suggested the possibility that libraries and archives could publicly state their intention to use certain identified works and have “some kind of potential immunity from litigation or prosecution or statutory damages.”⁴⁴⁶ MLA expressed interest in the value of such a proposal, and at the same time agreed that many details would need to be addressed.⁴⁴⁷

In a discussion with the Office subsequent to the roundtable, the NMPA also raised the concept of limiting remedies for good-faith preservation and public access uses of pre-1972 sound recordings that are determined to be orphan works. As an alternative to a registry, NMPA suggested a requirement of due diligence in the user’s search for the owner of a pre-1972 sound

⁴⁴³ NAB Reply at 7-8.

⁴⁴⁴ SiriusXM Reply at 5-6.

⁴⁴⁵ Chertkof T1 at 153.

⁴⁴⁶ Aronow T1 at 247-49.

⁴⁴⁷ Harbeson T1 at 264.

recording, and suggested that the due diligence standard might vary according to the age of the work. Those who fulfilled the due diligence standard and used pre-1972 sound recordings that were therefore determined to be orphan works would be subject only to limited damages, perhaps only to injunctive relief.⁴⁴⁸

3. No Amendments to Federal Law, but Amendments to State Law Instead

At the public meeting, RIAA offered the possibility of amending state laws to provide explicitly that preservation copying and providing certain types of access for older sound recordings is permissible.⁴⁴⁹ In response to this proposal, MLA raised concerns about the inevitable lack of uniformity that would result from pursuing legislative amendments to state laws to deal with what it perceives as a problem with broader scope. MLA noted that separate provisions in each state would require libraries and archives to operate in a manner that complied with the specifics of all, including the most restrictive, state provisions.⁴⁵⁰ RIAA acknowledged MLA's concerns regarding uniformity, but suggested that amendments to state law were still a good way to begin to address libraries and archives' concerns.⁴⁵¹ It proposed that libraries, and archives and right holders work together to draft a model state law. It indicated that such a model state law could include "state fair use rights," and that the parties could jointly introduce it to the various state legislatures, beginning with the states that are already home to important preservation and archival facilities.⁴⁵²

The concept of a model state law received additional attention in a subsequent roundtable session. Tomas Lipinski of the School of Library and Information Science at Indiana University

⁴⁴⁸ Copyright Office meeting with NMPA (June 21, 2011).

⁴⁴⁹ Schwartz T1 at 95-96.

⁴⁵⁰ Harbeson T1 at 95-97.

⁴⁵¹ Schwartz T1 at 97.

⁴⁵² Chertkof T1 at 145-47.

suggested that approaching state law reforms in a manner similar to the Uniform Commercial Code could help address issues of uniformity in the accommodations provided to libraries and archives from one state to another. Mr. Lipinski acknowledged that the disadvantages of this approach would include the risk of non-adoption or variation, and the fact that some sound recordings would be covered by state law and some sound recordings would continue to be covered by federal law.⁴⁵³ He also clarified that a model state law would need to establish fair use along the lines already established by federal case law.⁴⁵⁴ Dwayne Buttler of University of Louisville acknowledged the value in a model state law approach, especially one that included fair use and accommodations such as those found in section 108. However, he also expressed concerns about accomplishing universal implementation of any model law.⁴⁵⁵ ARL expressed its view that a model state law which filled in details regarding accommodations setting out fair use and other exceptions for libraries and archives would be a wonderful alternative to federalization.⁴⁵⁶ While MLA reiterated its general opposition to solutions that fell short of full federalization, it also noted that state law reforms could help its members considerably, especially if such reforms included state fair use provisions.⁴⁵⁷ RIAA reiterated its support for reforming state laws and expressed optimism about developing a dialogue and working relationship with libraries and archives that can address preservation of and access of pre-72 sound recordings.⁴⁵⁸

⁴⁵³ Lipinski T2 at 474-76.

⁴⁵⁴ Lipinski T2 at 509.

⁴⁵⁵ Buttler T2 at 481.

⁴⁵⁶ Butler T2 at 482.

⁴⁵⁷ Harbeson T2 at 477-78.

⁴⁵⁸ Marks T2 at 485-87.

4. No Amendments to Federal Law, but Use Private Agreements Instead

RIAA and A2IM pointed toward significant progress in the preservation of and access to pre-1972 sound recordings achieved through private two-party agreements, such as the National Jukebox and other private agreements with archives.⁴⁵⁹ Sony Music Entertainment suggested that similar private agreements could yield further positive results and should be pursued in place of federalization.⁴⁶⁰ Representatives of libraries and archives observed that private agreements, while laudable, are too limited in scope, since they address only those parties who enter into private relationships with right holders.⁴⁶¹

In addition to private two-party agreements, RIAA raised the prospect of a third party entity, one that is not as risk-averse as libraries and archives, functioning as a clearinghouse that could provide digital access, in a manner similar to that provided by iTunes, to pre-1972 sound recordings for libraries and archives.⁴⁶² The Society for American Music (SAM) subsequently suggested the possibility of establishing a for-profit or non-profit trust that could receive donations or licenses from right holders that could be used to serve the preservation and access needs of libraries and archives.⁴⁶³ MLA expressed concern with such a plan because of the poor quality of digital files for research purposes.⁴⁶⁴

In the public meeting, RIAA also introduced the notion of a consent-not-to-sue agreement that would be generally offered to libraries and archives for certain uses similar to those that would be included in a model state law.⁴⁶⁵ While several libraries and archive groups

⁴⁵⁹ RIAA/A2IM at 16-17.

⁴⁶⁰ Aronow T1 at 103-04.

⁴⁶¹ ARSC Reply at 3-4.

⁴⁶² Marks T2 at 488.

⁴⁶³ Brylawski T2 at 499-500.

⁴⁶⁴ Harbeson T2 at 503-04.

⁴⁶⁵ Marks T2 at 488.

expressed interest in various private agreement models and a willingness to engage in further dialogue, the consent-not-to-sue proposal did not result in any specific positive or negative feedback from libraries and archive groups.

*Tape deck*

V. DESIRABILITY OF FEDERALIZATION

While there are legitimate policy arguments on both sides of the question, the Copyright Office has determined that on balance, the better course of action is to bring pre-1972 sound recordings under federal jurisdiction.

When Congress abolished state common law copyright and brought almost all works of authorship within the scope of the federal copyright statute in the Copyright Act of 1976, it did so in order to substitute “a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system.” It concluded that “the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship.”⁴⁶⁶

Congress offered four reasons for abolishing the dual system: (1) to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author’s rights under the differing laws and in the separate courts of the various States; (2) because “publication” no longer served as a clear and practical dividing line between common law and statutory protection; (3) to

⁴⁶⁶ H. R. REP. NO. 94-1476, at 129 (1976).

implement the “limited Times” provision of the Copyright Clause, by abrogating the state law system of perpetual copyright for unpublished works; and (4) to “adopt a uniform national copyright system [that] would greatly improve international dealings in copyrighted material.”⁴⁶⁷

It is the first reason offered by Congress in 1976 that is most pertinent to whether pre-1972 sound recordings should be brought into the federal statutory scheme.⁴⁶⁸ National uniformity of copyright law ensures that all users, consumers, intermediaries, and right holders are operating under a single, consistent set of laws. This has been the goal of copyright law since 1790, and federal protection for pre-1972 sound recordings would be the last step in making it a reality. A uniform national law also would ensure that all who operate under it would know what rights and exceptions apply to their activities.

National uniformity and clarity are particularly important in the digital era, when libraries and archives must reproduce works in order to preserve them and in many cases wish to make them publicly accessible by means of distribution of phonorecords or by transmissions of public performances. With a single set of applicable laws, even the most risk-averse institution can make informed decisions as to what laws and what exceptions apply to its activities.

Why Congress did not incorporate pre-1972 sound recordings into the federal statute in 1976 is an interesting question, but neither the stakeholders nor the Copyright Office have an answer to it. In fact, the reasons that compelled Congress to create a unitary federal copyright system in the 1976 Act justify inclusion of pre-1972 sound recordings in that federal system today. The policy considerations addressed above – certainty and consistency, preservation, public access, and avoiding economic harm – all fall on the side of seeking federal protection for pre-1972 sound recordings.

⁴⁶⁷ *Id.* at 129-30.

⁴⁶⁸ However, reasons (3) and (4) are also applicable. Congress abrogated perpetual protection of pre-1972 sound recordings in the Copyright Act of 1976, but implementation of the recommendations set forth below would allow many of those works to enter the public domain before 2067. And bringing pre-1972 sound recordings into the federal statute will complete the process of adopting a national uniform copyright system, thereby facilitating international dealings in copyrighted material.

For those reasons, federalization should apply almost all parts of Title 17 to pre-1972 sound recordings, including for example section 106(6) (public performance right for digital audio transmissions), section 107 (fair use), section 108 (certain reproduction and distribution by libraries and archives), section 110 (exemption for certain performances and displays),⁴⁶⁹ section 111 (statutory license for cable retransmission of primary transmissions), section 112 (ephemeral recordings), section 114 (statutory license for certain transmissions and exemptions for certain other transmissions), section 512 (safe harbor for Internet service providers), Chapter 10 (digital audio recording devices) and Chapter 12 (technological protection and copyright management information). Some parts of Title 17 will require modification to apply to pre-1972 sound recordings because the recordings were initially created, and in some cases exploited, outside the federal system.

To be clear, there are practical issues in implementing federalization, as noted by some stakeholders. However, the Office believes that those objections can be addressed. Likewise, while the Office appreciates the careful thought put into alternatives to federal protection, it finds that the proffered solutions would not go far enough to cure the difficulties caused by the current state-by-state regime.

A. Certainty and Consistency in Copyright Law

Both ARL and ALA have noted, and the Copyright Office agrees, that traditional library and archives activities are unlikely to violate state criminal sound recording piracy statutes. The Office, like the Section 108 Study Group, also believes that the section 108 exceptions for libraries and archives are out of date and should be updated.⁴⁷⁰ However, these points do not compel the conclusion that the uncertainty of state law is preferable to federal protection. In fact,

⁴⁶⁹ Note, however, that most of the subsections of section 110 do not apply to sound recordings. Only sections 110(1), (2), and (5) apply to sound recordings, among other categories of works.

⁴⁷⁰ See *supra* Chapter III.B.2.a.

the reluctance of many sound recording archivists and librarians to preserve and make accessible pre-1972 sound recordings in cases where state law does not explicitly prohibit acts of preservation leads to the opposite conclusion.

The permissible scope of activities in which libraries and archives can engage under state civil law is more ambiguous than under criminal law, due to the variations among the states and the lack of established copyright exceptions.⁴⁷¹ The possibility that a library's activities in one state might subject it to the laws of another state where the scope of protection is different – a significant risk when works are made available online – creates additional uncertainty. Such uncertainty unfairly favors those willing to test legal limits while disfavoring the risk-averse.

Federal protection would not eliminate the uncertainty, but it would equalize rights and exceptions that would be applicable to sound recordings of all vintages. Section 108(h) may be especially helpful: this provision offers a clear exception for libraries and archives to engage in reproduction or distribution activities “for preservation, scholarship, or research” in the last 20 years of the term of protection of any published work.⁴⁷² Given the concern that many commenters expressed regarding the length of copyright protection, this exception should prove quite helpful in providing broader access to many pre-1972 sound recordings.

RIAA and A2IM have asserted that federal protection will actually create more uncertainty for their member companies because of their long-standing reliance upon state law. The Office does not take this reliance lightly. However, (1) the member companies of RIAA and A2IM own but a small fraction of pre-1972 sound recordings (when non-commercial recordings are taken into account), and of these, but a small fraction appear to enjoy any degree of commercial viability, and (2) the record companies are presumably just as familiar with federal copyright law, given their post-1972 recordings, as with state law, and should be able to

⁴⁷¹ It should be kept in mind that civil actions are much more likely than criminal prosecutions in the context of activities by libraries and archives.

⁴⁷² 17 U.S.C. § 108(h).

maneuver within the federal system. Additionally, one must weigh the *possibility* of uncertainty raised by RIAA and A2IM member companies under a federal system with the *actual* and *documented* uncertainty faced by libraries and archives under the multiple state systems. Finally, RIAA and A2IM raised the point that ownership of pre-1972 sound recordings may be difficult to resolve. Ownership challenges are real, but they can be addressed by stating that for all pre-1972 sound recordings newly brought into the federal system, the ownership on the day of enactment will be the same as the ownership on the day prior to enactment. (This would require a simple amendment to the Copyright Act and is further discussed below in Chapter VI.)

Most of the user groups who commented during the study stated that applying federal law would be, without more, a clear benefit simply from the perspective of providing consistent legal guidance. The Office agrees with this position, and believes that it conforms with the intent of Congress in 1976 when it sought to unify all kinds of copyrighted works (but one) under federal law. Moreover, once ensconced within the federal system, pre-1972 sound recordings will benefit from any changes made to Title 17 in the future, such as orphan works legislation or amendments to section 108.⁴⁷³

B. Promotion of Preservation and Appropriate Public Access

The Office believes that preservation of and provision of access to pre-1972 sound recordings, as afforded by federal statutory exceptions to copyright law, would provide an important public benefit. This is particularly true given the fragile physical state of many such recordings and the inaccessibility of so much of the nation's audio heritage. The Office also credits the claims by libraries and archives that reliance upon federal exceptions will lead to more

⁴⁷³ These issues have seen considerable policy study and discussion in recent years and both are priorities of the U.S. Copyright Office. See *Priorities and Special Projects of the United States Copyright Office* at 7-8.

preservation and more public access, both from a structural (certainty and consistency of risk) and substantive (use of the section 108 and fair use exceptions) point of view.

As illustrated in Chapter IV, federal protection will likely save libraries and archives money and resources simply by virtue of providing a single source of law to consult when engaging in preservation or public access activities. Furthermore, the Office credits the argument that a legal advisor, such as a general counsel, will be more likely to approve a project that is consistent with federal norms that have been explicated in a statute and through litigation and commentary, rather than one based on uncertain or amorphous state law.⁴⁷⁴

A second structural element of federal copyright protection that is likely to encourage preservation and public access activities is the probability that if protection is federalized, some sound recordings will enter the public domain within the lifetime of today's practitioners. As explained below in Chapter VI.C., one key aspect of the Office's recommendations is that early sound recordings not available in the marketplace within a reasonable period after the effective date of legislation federalizing protection should enter the public domain at the end of a transition period. In addition, the terms of post-1923 works will expire – again, absent a showing of public availability – on the same schedule as other works of that vintage.

Substantively, the use of section 108 and the fair use exception should encourage more preservation and public access because they provide time-tested rules with which libraries and archives have experience. With respect to section 108, those rules offer specific safe harbors. And fair use offers the flexibility to address situations that do not meet the requirements of a section 108 provision but which nonetheless justify, under particular facts, an exemption from liability. One specific element of section 108 in particular should prove useful: the section 108(b) exception for making preservation copies of unpublished works. Because the majority of pre-1972 sound recordings are unpublished, risk-averse institutions with collections of such

⁴⁷⁴ See *supra* Chapter IV.C.2.a.

works would have clear legal guidance that digitizing for preservation and for deposit with other institutions under the terms of section 108(b) is a permissible activity.

“Access” is a term of art that itself raises complex questions of law and fact. As discussed above in Chapter IV.C, it can mean anything from making sound recordings available for on-premises listening to posting them online for downloading. Some commenters appeared to assume that federal protection, and fair use in particular, would necessarily permit the latter. In the Office’s view, federal protection would simply make providing public access to pre-1972 sound recordings subject to the same principles applicable to other categories of copyrighted works. In the case of sections 108 and 107, they may allow some limited online access, but they would not permit the mass posting of entire works on the Internet for unrestricted downloading or streaming.

The Office believes that all of these considerations are important. Moreover, they are as critical to access as they are to preservation. Federalization would allow preservation of and access to more pre-1972 sound recordings, as well as finally bringing all fixed works of authorship under a federal system. The key question addressed below is how to implement a federalization scheme without harming the economic interests of right holders.⁴⁷⁵

C. Avoiding Economic Harm to Right Holders

In general, the Office believes that federalization along the lines proposed in this Report will not harm the reasonable economic interests of right holders because special provisions can be crafted to confirm ownership and term of protection. By “reasonable,” it should be understood that the Office seeks to preserve right holders’ ability to legitimately exploit economically viable

⁴⁷⁵ Bringing pre-1972 sound recordings into the federal system would also enhance access because online music services and satellite radio services operating under the section 114 statutory license would have clear authorization to make digital transmissions of public performances of those recordings.

assets, but not to prevent third parties from using pre-1972 sound recordings in ways consistent with federal copyright law.

Under a federal scheme, right holders will have their pre-1972 sound recordings subject to the same rights and exceptions as their post-1972 recordings, as well as the same provisions regarding damages and statutory licenses. Federal protection has largely developed in the United States because it is better for right holders, not worse, a fact supported by how strongly the recording industry fought for inclusion of sound recordings in the federal copyright law.⁴⁷⁶ And just as users of protected sound recordings will benefit from any new exceptions and limitations Congress may enact in the future, so too will right holders enjoy additional rights that may develop, and in this case, additional rights that already exist in federal but not state law. The digital public performance right in section 106(6) is the prime example. This right is not explicit in state law and not yet recognized by any state courts but provides revenue for the owners of sound recordings under section 114.

Some right holders have suggested that, should early recordings go into the public domain before 2067, they would be deprived of anticipated revenue, even if such recordings have been commercially dormant for decades. This argument is based upon the “long tail” theory that the ability to keep works commercially available, and reach niche markets, allows the right holder to continue to earn revenue indefinitely. Certainly, the legitimate investments of right holders are important, but most of the recordings that would go into the public domain immediately upon (or soon after) federalization are so old, obscure, and poor-sounding to modern ears that they are mainly of interest to scholars and hobbyists, and would fail to earn a meaningful return on investment for a record company, particularly given the expense of preparing reissues that the RIAA and A2IM noted. History shows, in fact, that record companies have heretofore reissued

⁴⁷⁶ In fact, at least at times during the process that led to the general revision of the copyright law and the enactment of the Copyright Act of 1976, the recording industry supported bringing pre-1972 sound recordings into the federal statute. *See, e.g., Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights of the S. Comm. on the Judiciary, 90th Cong. at 519 (1st Sess. 1967) (Testimony of Clive Davis, CBS Records); see id. at 531-32 (Testimony of Henry Brief, RIAA).*

only a miniscule percentage of early recordings, presumably because it is not profitable to do so.⁴⁷⁷

Indeed, for pre-1925 (acoustical era) recordings, libraries and archives are well-situated to play a role in making available to scholars and enthusiasts those works that most record companies have elected not to reissue. While it is true that popular recordings remain popular longer (was any recording from the 1920s as popular in the 1960s as the Beatles, or the Rolling Stones, or Aretha Franklin, are today?), the likelihood of a profitable major label reissue of acoustical-era recordings appears vanishingly remote. Indeed, the fact that a work may enter the public domain while it is still earning money for its right holder is not necessarily a bad thing. As Professor Elizabeth Townsend Gard observed at the roundtable,

The [way the] system works is that you get a limited monopoly for a particular amount of time, and then when it's over, it goes into public domain. Even if it's making lots of money, it still goes into the public domain.⁴⁷⁸

Under this view, injecting into the public domain a work with earnings potential would not be contrary to copyright law and policy, but entirely consistent with it, even if the recording has some potential to earn a bit of money. The Office is aware that any federalization plan must be consistent not only with copyright law and policy, but also with the takings clause of the Fifth Amendment. That issue is explored below in Chapter VI.B.2.

D. Appropriate Application of Section 114 License and the “Safe Harbors” of 17 U.S.C. § 512 and the Communications Decency Act

The Copyright Office believes that all of the rights, limitations, and exceptions of Title 17 should apply to pre-1972 sound recordings, with the exception of certain sections dealing with

⁴⁷⁷ The Office's recommendation regarding term of protection for pre-1972 sound recordings – *see infra* Chapter VI.B.-C. – would allow right holders to retain copyright protection until 2067 for works that they keep reasonably available to the public until that date.

⁴⁷⁸ Townsend Gard T2 at 430.

issues such as ownership, term of protection, and registration that should be specially modified to achieve the transition from state to federal law. Although some stakeholders, either at the roundtable or at separate meetings with Copyright Office staff, indicated some discomfort with the application of sections 114 and 512 of the Copyright Act to pre-1972 sound recordings, the Office concludes that both provisions should apply to pre-1972 sound recordings after federalization is effective. In contrast to sections 114 and 512, the Office does not believe the safe harbor of section 230(c) of the Communications Decency Act (“CDA”) should apply to digital transmissions of phonorecords or public performances of pre-1972 sound recordings. In any event, federalization would clarify the issue by subjecting the use of sound recordings to the safe harbor of section 512 rather than the broader CDA safe harbor.

1. Section 114

In reviewing the potential application of section 114 to pre-1972 sound recordings, the Office believes that section 114’s statutory royalty requirements should apply to nonexempt, noninteractive digital transmissions of those recordings, thereby providing an additional revenue stream for older artists and works. It would also moot the question of whether state laws should provide a public performance right for pre-1972 sound recordings, a question for which diverse practices have emerged. That is, while some services operating under the section 114 license pay royalties for the transmission of public performances of pre-1972 sound recordings, others do not. It is not clear from the record whether those services pay royalties due to their reading of state law (or out of an abundance of caution due to the uncertainty as to what state law might require), because they do not realize that the rules may be different with respect to pre-1972 sound recordings, or because it is too difficult (or not cost-effective) to determine which sound recordings are not protected by federal copyright law and arguably do not require payment. With federalization of protection for pre-1972 sound recordings, all sound recordings would be treated the same for purposes of Section 114.

The Office thinks it is unreasonable for the age of a sound recording to dictate whether royalties are paid on public performances by means of digital audio transmissions, so long as copyright subsists in that sound recording. Bringing pre-1972 sound recordings within the scope of federal protection would subject them to the statutory license and provide online music services with an easy means to offer lawful public performances of those recordings while offering copyright owners and performers a reliable new source of income.

2. Section 512

The Office sees no reason – and none has been offered – why the section 512 “safe harbor” from liability for monetary and some injunctive relief should not apply to the use of pre-1972 sound recordings. The Office understands and is not unsympathetic to the fact that many copyright owners are dissatisfied with the way in which some courts have interpreted aspects of section 512. It may well be that in light of the quantitative and qualitative changes involving so-called “user-generated content” on the Internet as well as the practical difficulties, for both copyright owners and Internet service providers, of dealing with the unanticipated large volume of “take-down” notices generated in response to massive infringement on the Internet, Congress might want to take another look at section 512 to determine whether it requires updating or other refinements to reflect current conditions. To be clear, section 512 was innovative legislation when it was enacted in 1998 and the concept of providing safe harbors for certain good faith acts on the Internet remains a sound principle. The point for purposes of this Report is that there is no policy justification to exclude older sound recordings from section 512 or other future provisions of law to the extent other sound recordings – and for that matter other works of authorship – remain subject to its provisions.

One court has ruled that section 512 currently applies to pre-1972 sound recordings. However, the ruling in *Capitol Records, Inc. v. MP3tunes* was made on highly questionable

grounds.⁴⁷⁹ The text of section 512(c) states that a “service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider” if the service provider complies with a number of requirements.⁴⁸⁰ The court in *MP3tunes* stated that “[t]he text of the DMCA limits immunity for the ‘infringement of copyrights’ without drawing any distinction between federal and state law.”⁴⁸¹ The court in *MP3Tunes* made this determination despite the fact that section 301(c) states “[w]ith respect to sound recordings first fixed before February 15, 1972, any rights or remedies under the common law or statute of any State shall not be annulled or limited by this title until February 15, 2067.”⁴⁸² The court in *MP3Tunes* correctly observed that “section 301(c) does not prohibit all subsequent regulation of pre-1972 recordings.”⁴⁸³ However, its conclusion that Congress did in fact subsequently regulate pre-1972 sound recordings in section 512(c) is difficult to square.

Section 512(c) does not include any provision explicitly limiting remedies available for owners of pre-1972 sound recordings. Instead, section 512(c) refers to “infringement of copyright”⁴⁸⁴ which is defined in section 501(a) as the violation of “any of the exclusive rights of the copyright owner as provided by sections 106 through 122.”⁴⁸⁵ The fact that the term “infringement of copyright” only refers to infringement of rights protected under title 17, and

⁴⁷⁹ *Capitol Records, Inc. v. MP3tunes, LLC*, ___ F.Supp.2d ___, 2011 U.S. Dist. LEXIS 93351, 2011 WL 5104616 (S.D.N.Y. Oct. 25, 2011).

⁴⁸⁰ 17 U.S.C. § 512(c).

⁴⁸¹ *MP3tunes*, 2011 U.S. Dist. LEXIS 93351, at *27.

⁴⁸² 17 U.S.C. § 301(c).

⁴⁸³ *MP3tunes*, 2011 U.S. Dist. LEXIS 93351, at *27.

⁴⁸⁴ 17 U.S.C. § 512(c).

⁴⁸⁵ 17 U.S.C. § 501(a).

does not include infringement of rights protected under common law or statute of any State, could not be more clear. The statute’s plain text reveals a narrow definition of “copyright infringement” which is buttressed by the language of section 301(c). The court in *MP3Tunes* concluded that such a narrow reading would be at variance with the policy of the DMCA as a whole and would “spawn legal uncertainty” and that therefore such an interpretation should be rejected. However, the court in *MP3Tunes* did not offer any evidence that Congress intended section 512(c) to apply to pre-1972 sound recordings.

The court in *MP3Tunes* not only ignored the plain text of the statute, it also ignored the general rule of statutory construction that exemptions from liability, such as those established in section 512(c), must be construed narrowly, “and any doubts must be resolved against the one asserting the exemption.”⁴⁸⁶ Furthermore, the court’s interpretation of section 512(c) runs afoul of the “cardinal rule” of statutory construction that one section of a statute cannot be interpreted in a manner that implicitly repeals another section.⁴⁸⁷ In light of these rules of statutory construction, any exemption of liability for violations of rights under the common law or statute of any State for pre-1972 sound recordings must be explicit in its intent to override the provisions of section 301(c).

The Office observes that numerous other limitations and exceptions in Title 17, including those in sections 107 and 108, are also express limitations on the right to recover for “infringement of copyright.”⁴⁸⁸ Yet none of these exceptions in the federal copyright statute has ever been applied directly to any claims under state law. In short, it is for Congress, not the courts, to extend the Copyright Act to pre-1972 sound recordings, both with respect to the rights granted under the Act and the limitations on those rights (such as section 512) set forth in the Act.

⁴⁸⁶ *Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000), *aff’d*, 533 U.S. 483 (2001).

⁴⁸⁷ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978); *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 145 (2d Cir. 2002).

⁴⁸⁸ *See also* 17 U.S.C. §§ 110, 111(a), 112, 121(a), (c).

3. Application of the Communications Decency Act

The discussion concerning section 512 is related to another issue that was not raised in the Notice of Inquiry and comments or at the roundtable: whether the safe harbor of section 230(c) of the CDA applies to state law protection for pre-1972 sound recordings. Section 230(c) provides certain immunity from liability for providers and users of “interactive computer services” who publish information provided by others. Specifically, it states that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁸⁹ Concerning its effect on other laws, section 230(e) provides that no liability may be imposed under any state or local law that is inconsistent with section 230. In effect, section 230(e) provides blanket immunity from liability for providers and users of an “interactive computer service” who publish information provided by others. However, section 230(e)(2) of the CDA also provides that the law does not “limit or expand any law pertaining to intellectual property.”⁴⁹⁰

It is not settled whether the CDA limitations on liability apply to claims under state law that may arise from violation of the rights of owners of pre-1972 sound recordings, or whether such claims arise from a “law pertaining to intellectual property” and are thus outside the CDA liability limitations. The U.S. Court of Appeals for the Ninth Circuit, in *Perfect10, Inc. v CCBill, LLC*, held that the carve-out from the immunity provided in the CDA for laws pertaining to intellectual property applies only to federal intellectual property, and that therefore the CDA provides immunity for claims under state laws protecting intellectual property. The court stated that while the scope of federal intellectual property law is relatively well-established, state laws protecting “intellectual property” (including trademark, unfair competition, dilution, right of publicity and trade defamation) are by no means uniform. The court concluded that any

⁴⁸⁹ 47 U.S.C. § 230(c).

⁴⁹⁰ 47 U.S.C. § 230(e)(2).

interpretation of the CDA that failed to immunize Internet service providers from claims arising under these diverse state laws would undermine Congress's goal of fostering the development of the Internet.⁴⁹¹

Several other courts have declined to follow the reasoning of the Ninth Circuit in *Perfect10 v CCBill*, concluding instead that the CDA provides no immunity from claims under state laws protecting intellectual property.⁴⁹² In *Doe v. Friendfinder Network, Inc.*, the District Court for the District of New Hampshire noted that prior to the *Perfect 10* decision, the general consensus was that the CDA did not shield service providers from state intellectual property law.⁴⁹³ Both the *Friendfinder Network* decision and *Atlantic Recording Corp. v. Project Playlist, Inc.* criticized the Ninth Circuit's failure to analyze the text of the statute.⁴⁹⁴ The *Project Playlist* decision noted that the approach taken in *Perfect 10 v. CCBill LLC* appeared to be inconsistent with Ninth Circuit precedent governing statutory interpretation.⁴⁹⁵ The courts in both *Project Playlist* and *Friendfinder Network* found that the language of the statute itself does not suggest that the carve-out from immunity in the CDA applies solely to federal intellectual property law, noting that Congress's use of the modifier "any" in setting forth which laws pertaining to intellectual property were to be carved out from the CDA immunity provisions does not suggest a limitation to federal intellectual property law. On the contrary, the modifier "any" constitutes expansive language and there is no indication that Congress intended a limiting construction.⁴⁹⁶

⁴⁹¹ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007).

⁴⁹² See, e.g., *Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

⁴⁹³ See *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 301-02 .

⁴⁹⁴ See *id.*; *Project Playlist, Inc.*, 603 F. Supp. 2d at 703.

⁴⁹⁵ See *Project Playlist, Inc.*, 603 F. Supp. 2d at 703.

⁴⁹⁶ See *id.*; *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 301-02.

No stakeholders specifically addressed the possible application of the CDA to the state law protection of pre-1972 sound recordings. However, there is little question that if pre-1972 sound recordings were brought under federal law, they would be excluded from the CDA. And as a matter of policy, that is the correct result. Congress properly determined that Internet service providers should not receive the CDA's more comprehensive immunity with respect to infringement of copyrighted works, but should be subject to the more limited safe harbor of section 501. Pre-1972 sound recordings should be treated no differently in this respect than post-1972 sound recordings, or any other works of authorship.

E. Alternatives to Federal Protection

The Copyright Office appreciates stakeholders' efforts to devise ways to encourage preservation and public access to pre-1972 sound recordings without amending the Copyright Act. Those suggestions include "partial federalization" – *i.e.*, applying only selected portions of federal copyright law to pre-1972 sound recordings, limiting remedies for infringement of orphan works, reforming the existing state laws governing pre-1972 sound recordings, confirming that the fair use defense is applicable to claims of violation of state laws protecting sound recordings – and negotiated agreements between record companies and libraries. However, each of the suggested alternatives falls short of federalization in terms of promoting legal uniformity, preservation, and public access.

The Office agrees with those stakeholders who opposed the concept of "partial federalization," or only applying sections 107 and 108 to pre-1972 sound recordings. Such an approach would only increase confusion regarding what parts of pre-1972 sound recording protection are governed by state law and what parts fall under federal law. This result would not promote clarity and consistency. Moreover, the Office sees no benefit in retaining state law rules for all aspects of protection for pre-1972 sound recordings other than certain selected exceptions

and limitations. Pre-1972 sound recordings should either be part of the federal statutory scheme or they should not be part of that scheme.

Regarding the proposal of limiting remedies for good-faith preservation and public access uses of pre-1972 sound recordings that are also orphan works,⁴⁹⁷ the Office agrees that an orphan works provision would be a valuable addition to federalization, but it is not a substitute. An approach consisting only of limiting remedies for this group of works would leave too many non-orphan works unaddressed, and would, like partial federalization, increase confusion as to where to draw the line between federal and state protection.

Reforming state laws rather than amending federal copyright law is simply impractical, given the effort and uncertainty involved in trying to obtain consistent statutory reforms in all fifty states. Such an endeavor would be time-consuming and expensive, and achieving uniformity is highly unlikely. Moreover, even if uniformity in state statutory law were achieved, there would be no way to ensure uniformity in the decisions of the courts of all fifty states.⁴⁹⁸ Additionally, only one state would have to reject a proposed model law for the purpose of the project to falter. Finally, given the Office's strong belief that the correct policy choice is to unify all copyright law under *federal* control, a state-by-state approach would be a major step in the wrong direction.

ALA and ARL have requested that the Office “confir[m] the availability of a flexible fair use doctrine under state law in all 50 states.”⁴⁹⁹ Given that we are aware of only a single state court case – from a trial court – that has actually applied fair use to a common law copyright

⁴⁹⁷ See *supra* Chapter IV.E.2.

⁴⁹⁸ While it is true that various federal district courts and courts of appeals may interpret federal laws differently, the Supreme Court ultimately can resolve those differences. But the Supreme Court has no power to resolve issues of state law, even in cases where the laws of all states are identical.

⁴⁹⁹ ARL/ALA Reply at 1.

claim,⁵⁰⁰ that is a rather ambitious request. Of course, the Copyright Office has no authority to confirm the substance of state law. Nonetheless, the Office believes that, under proper facts, it is likely that any state court would find that fair use is a defense that can be considered and applied under principles of state common law copyright. Note, however, that traditionally fair use was not available for unpublished works⁵⁰¹ – and for the most part state common law copyright has protected only unpublished works. But at least with respect to commercially distributed sound recordings, arguments based on the unpublished nature of a work are not very persuasive. Moreover, because fair use is a judge-made doctrine (merely codified after the fact in the Copyright Act of 1976), there is no reason to believe that state courts considering common law copyright claims would not find that the defense does exist under appropriate circumstances.

As noted above,⁵⁰² common law copyright is not the primary means by which pre-1972 sound recordings are protected under state law. The states more frequently protect those recordings under theories of unfair competition, which typically do not include a fair use defense, and through statutes that include no such defense.⁵⁰³ However, some courts have constructed analogous defenses to torts separate from but similar to copyright.⁵⁰⁴ It seems likely that in any case in which an action by a library or archives would be considered a fair use under federal copyright law, it would also likely be considered permissible under state law.

Finally, the Office applauds the recent agreements between record companies and the Library of Congress. Such agreements, however, should take place against the backdrop of

⁵⁰⁰ *EMI Records*, *supra* note 140.

⁵⁰¹ *See Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *EMI Records*, *supra* note 140.

⁵⁰² Chapter II.E.3.

⁵⁰³ However, as discussed above, many activities that would qualify as fair use under federal law may not even be embraced in the tort. *See id.*

⁵⁰⁴ *See, e.g., Comedy III Prods. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 408, 21 P.3d 797, 106 Cal.Rptr.2d 126 (2001) (recognizing a modified fair use defense to a claim of violation of the right of publicity).

federal protection of all sound recordings, so that federal copyright exceptions can facilitate reasonable uses of recordings that are not covered by a use agreement.



Wire recorder

VI. MEANS OF BRINGING PRE-1972 SOUND RECORDINGS UNDER FEDERAL JURISDICTION

It is not enough to conclude that pre-1972 sound recordings should be protected under federal copyright law. A number of decisions must be made with respect to how they are brought into the federal system, including issues involving ownership, term of protection, and registration. Indeed, an understanding of how these issues are to be addressed is crucial not only to determining whether it is feasible to federalize protection, but also to determining how to do so.

A. Ownership

The Notice of Inquiry identified ownership of rights in pre-1972 sound recordings as a key issue. The Office sought information about how the various state law principles regarding

ownership of sound recordings compare with principles of copyright ownership under federal law. In particular, it requested information on the relevant state law principles of authorship and initial ownership, and how they compare with those of federal copyright law. This inquiry included issues surrounding application of work made for hire principles under state law. It also sought information on the relevant state law principles concerning transfers and how they compare with those under federal law. As discussed above, the Office also expressed a desire for input on how ownership issues might affect termination and reversion rights that are available to works under federal law.⁵⁰⁵

1. Determining Ownership

Under federal law, the owner of rights in a sound recording will generally be, in the first instance, the performer(s) whose performance is recorded, the producer of the recording, or both. In addition, many sound recordings qualify as works made for hire under the Copyright Act of 1976, either because they are works prepared by employees in the scope of their employment, or because they were specially ordered or commissioned, the parties agreed in writing that the works would be works made for hire, and the works fall within one of nine specific categories of works eligible to be commissioned works made for hire.⁵⁰⁶ If a work qualifies as a work made for hire, it is the employer or commissioning party who is the legal author and initial right holder, rather than the individual creator of the work.⁵⁰⁷ Under the 1909 Act, the courts recognized the work for hire doctrine with respect to works created by employees in the course of their employment, and particularly from the mid-1960s on, they recognized commissioned works made for hire, under such standards as whether the work was created at the hiring party's "instance and expense" or

⁵⁰⁵ See *supra* Chapter IV.D.2.b.

⁵⁰⁶ 17 U.S.C. § 101.

⁵⁰⁷ The parties may agree otherwise in a signed writing. 17 U.S.C. § 201(b).

whether the hiring party had the “right to control” or exercised “actual control” over the creation of the work.⁵⁰⁸ The Office sought information about the extent to which laws of the various states recognize the work made for hire doctrine with respect to sound recordings and, if so, the extent to which state laws differ from federal law.

Under federal copyright law, ownership of rights is distinct from ownership of the material object in which the copyrighted work is embodied. Transferring ownership of such an object – including the “original,” *i.e.*, the copy or phonorecord in which the copyrighted work was first fixed – does not convey rights in the copyright.⁵⁰⁹ A transfer of copyright ownership must be made in a writing signed by the owner of the rights or by his or her authorized agent.⁵¹⁰ In contrast, some state laws provide (or for a period of time provided) that transferring the original copy of a work could operate as a transfer of copyright ownership, unless the right holder specifically reserved the copyright rights. This principle is sometimes referred to as the “Pushman doctrine” for one of the earliest cases in which it was applied.⁵¹¹ The Office sought information about the extent to which such state law principles have been applied with respect to “master recordings” and how, if at all, they would affect who would own the federal statutory rights if pre-1972 sound recordings were brought under federal law.

a. *State vs. federal ownership rules*

In their comments and at the roundtable, RIAA and A2IM cautioned that perhaps the most troublesome issue for federal copyright protection for pre-1972 sound recordings would be how to effectuate a transition of the rules regarding the vesting of ownership from existing state

⁵⁰⁸ See NIMMER ON COPYRIGHT § 5.03 (2011).

⁵⁰⁹ 17 U.S.C. § 202.

⁵¹⁰ 17 U.S.C. § 204(a).

⁵¹¹ *Pushman v. New York Graphic Soc’y, Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942).

laws to federal law. They acknowledged that there is precedent for bringing works that are already in existence under federal copyright law at a later time. For example, the URAA restored copyright protection to certain works previously in the public domain (including foreign sound recordings). However, they noted that the URAA provisions restored ownership under federal law and vested it “initially in the author or initial rightholder of the work as determined by the law of the source country of the work.”⁵¹² They pointed out that the question of “changing” ownership of rights from one party to another was not at issue under the URAA, but that it might become contentious in the case of federalized protection for pre-1972 sound recordings.⁵¹³

RIAA and A2IM noted that if current federal law were applicable to pre-1972 sound recordings, vesting of initial ownership would have to be determined on a case-by-case basis. They predicted that such inquiries would require looking at the circumstances under which each recording originated to determine the owner (including, for example, to determine whether the work might be a work made for hire, or one jointly owned by the performers, producers and others). RIAA and A2IM noted that transfers, assignments, other contracts and corporate mergers would raise additional ownership questions. They remarked that the existing rights, remedies, licenses, representations and warranties and other provisions in contracts and licenses could be called into question. They suggested that such costly inquiries would be “ripe [sic] with errors, challenges and litigation,” which would likely result in a complete freeze on the availability of many pre-1972 sound recordings.⁵¹⁴

RIAA and A2IM conceded that there is some, albeit very limited, precedent for dealing with existing contractual obligations that are changed by later provisions in title 17. They suggested that section 104A(f) could provide guidance on how to address contractual liability

⁵¹² RIAA/A2IM at 24 (citing 17 U.S.C. § 104A).

⁵¹³ RIAA/A2IM at 24-27; RIAA/A2IM Reply at 3-4.

⁵¹⁴ RIAA/A2IM at 27.

arising from new federal copyright protections for pre-1972 U.S. sound recordings. That section provides immunity to any person who had, prior to the effective date of restoration of copyright under the URAA, warranted, promised or guaranteed that a work did not violate an exclusive right granted in 17 U.S.C. § 106, under the assumption that the work was in the public domain.⁵¹⁵

They suggested that similar provisions could be adopted, but thought that this would be a minor fix for a major problem – the uncertainties brought on for the many existing contractual relations, chains of title, rights and remedies for existing uses, licenses and the like.⁵¹⁶

RIAA and A2IM pointed out that the system of state statutes and common law governing pre-1972 sound recordings vests a variety of rights, sometimes to different right holders than those who would be copyright owners under current federal law.⁵¹⁷ They acknowledged that the current system may be complex, but also noted that there have been decades of litigation and precedent to resolve ownership issues under the various state laws. They remarked that the existing system is understood and has been relied upon by the music industry and related industries for a century. RIAA and A2IM suggested that if this existing system were suddenly replaced by a new federal regime, the transition to new laws from these state law schemes for each sound recording would be an administrative nightmare.⁵¹⁸ A2IM noted that this would include the cost of updating ownership metadata, which is routinely relied upon in today's marketplace.⁵¹⁹

At the roundtable, NMPA said that several of the concerns raised by RIAA and A2IM are shared by music publishers. It asserted that any changes in ownership of sound recordings could require publishers to change information in their databases “relating to old recordings right across

⁵¹⁵ *See id.* at 32 (citing 17 U.S.C. § 104A(f)).

⁵¹⁶ *See id.* at 31-32.

⁵¹⁷ *See id.* at 26 (citing BESEK, COMMERCIAL SOUND RECORDINGS STUDY); Schwartz T1 at 25.

⁵¹⁸ RIAA/A2IM at 24-27.

⁵¹⁹ Bengloff T1 at 291.

the board,” requiring publishers to devote resources to address the costs of updating their records. NMPA added that uncertainty regarding ownership would be problematic for music publishers’ ability to promptly receive revenue for the use of their musical works by owners of sound recordings.⁵²⁰

ARSC disputed the detrimental effects claimed by RIAA and A2IM. It asserted that state law would continue to govern prior contracts and that ownership would therefore remain the same under federal protection for pre-1972 recordings. It also asserted that the standard term for recording agreements, including standard agreements used by owners of sound recordings to grant master use licenses, is limited in duration, and the term of federal copyright duration would generally extend well beyond the term of current contracts.⁵²¹

ARSC pointed out that RIAA and A2IM failed to offer examples of contracts regarding pre-1972 sound recordings that would be undermined by federal protection. It added that even if such a case did arise, RIAA and A2IM correctly observed that the URAA safeguards in section 104A could provide a model for addressing such issues. ARSC also countered RIAA and A2IM statements that issues of initial ownership would be complicated by federalization. ARSC noted that ownership is not a particularly difficult question for commercial pre-1972 sound recordings, because virtually all such recordings were produced as works made for hire, and are now claimed by corporations rather than by individuals, a point which was also made independently by Patrick Feaster.⁵²² ARSC suggested that any new federal legislation for pre-1972 recordings should

⁵²⁰ Rosenthal T1 at 60-61, 86-87.

⁵²¹ ARSC at 4; ARSC Reply at 21 (citing legal practice guides, e.g., *Recording Agreements*, in 8 ENTERTAINMENT INDUSTRY CONTRACTS (Donald C. Farber & Peter A. Cross eds., 2008) (advising that the term of engagement “can range from a few hours to several years”) and Bonnie Greenberg, *Master Use Licenses*, in 9 ENTERTAINMENT INDUSTRY CONTRACTS (Donald C. Farber & Peter A. Cross eds., 2008) (estimating a term of five years for the use of a sound recording on network television versus three years for exploitation on cable television).

⁵²² ARSC at 4; Feaster at 8-13.

clearly indicate the source law governing the question of whether a work qualifies as a work made for hire.⁵²³

In response to the statement by RIAA and A2IM that evaluating ownership under federalization would require costly case-by-case analysis, which would diminish the availability of many pre-1972 recordings, ARSC pointed out that ownership of already-existing works other than sound recordings under the 1976 Act is determined as of the effective date of the Copyright Act (*i.e.*, ownership is based on the *status quo* that existed just prior to the effective date), and not by retrospective application of the Copyright Act to the date the works were created.⁵²⁴ ARSC suggested that similar treatment could easily be implemented for any federalization of pre-1972 recordings. ARSC noted that although neither federal nor state rights in sound recordings were created under the 1909 Copyright Act, by analogy, prior state law could apply for pre-1972 recordings. Furthermore, it offered that even traditional categories of works prepared before 1978 require a case-by-case examination to determine the federal rights as of the date of preemption, and that no diminished availability of such works has been attributed to such analysis.⁵²⁵

The Starr-Gennett Foundation addressed the difficulty of case-by-case analysis of ownership by pointing out the challenges in determining both the facts surrounding creation of works as well as in the application of various state laws regarding transfers and corporate mergers. It suggested that federalization could ease the impact of current questions regarding ownership status of pre-1972 recordings, implying that federalization would mean that ownership would be determined under federal law.⁵²⁶

⁵²³ ARSC Reply at 13-15.

⁵²⁴ *Id.* at 13-14.

⁵²⁵ *Id.*

⁵²⁶ Starr-Gennett Foundation 7b at 3.

b. *Effect of rule in some states equating physical ownership of master with ownership of all rights*

ARSC stated that it is unaware of state cases that have invoked the Pushman doctrine, equating ownership of the original master recording with ownership of the sound recording. However, ARSC went on to note that a correspondent to the ARSC Journal raised this question in 2006, citing specific statutes of Connecticut, Georgia, Hawaii, Illinois, Alabama, Alaska, Arizona and California that indicate those states recognize some version of this principle. ARSC also acknowledged that it is theoretically possible that courts could apply the principle.⁵²⁷

Patrick Feaster provided an explanation of the historical methods of creation and duplication of pre-1972 sound recordings. This history provided information about the reasons why many state statutes concerning pre-1972 sound recordings equate ownership of the original master recording with ownership of the sound recording. Feaster noted that some sound recordings never had masters because they were never intended for mass duplication. He also pointed out that many masters were destroyed, yet duplicates survive. He suggested that federalization should include a requirement that owners be required to demonstrate ownership of a physical master as a condition to bringing a copyright claim.⁵²⁸

RIAA and A2IM stated that the Pushman doctrine applied to master recordings, at least in some states, and noted that federalization would pose difficulty and increased costs for investigations of chain of title.⁵²⁹

c. *Termination*

Regarding the possibility of termination rights under a federal regime for protection of pre-1972 sound recordings, RIAA and A2IM stated that any uncertainty as to the initial and

⁵²⁷ ARSC at 4 (citing ARSC JOURNAL, Fall 2006 at 211-12).

⁵²⁸ Feaster at 8-13.

⁵²⁹ RIAA/A2IM at 27-28.

subsequent ownership (and authorship) of a sound recording would be exacerbated by the difficulty in addressing issues such as who, if anyone, had or has the ability to terminate any grant, how to treat joint author scenarios, and when and under what circumstances, if at all, works would be eligible for termination.⁵³⁰

Ivan Hoffman stated that any federalization of pre-1972 sound recordings should continue to exempt those recordings from the termination of transfer provisions. He noted that as of now, pre-1972 sound recordings are not subject to termination of transfer provisions and recommended against expanding such provisions to the detriment of current owners.⁵³¹

Artist's Reprieve commented that termination of transfer provisions should extend to federalized pre-1972 sound recordings. It suggested that failure to provide such provisions may result in age discrimination against older artists as a direct result of a federal statute that grants federal copyrights (and permits copyright terminations) to younger artists who recorded post-1978.⁵³² The Office also heard informally from other representatives of recording artists from the pre-1972 era who pointed out the inequity of depriving them of termination rights enjoyed by those who performed on post-1972 sound recordings.

2. Recommendation

The concerns raised by RIAA, A2IM and NMPA deserve serious consideration. However, these concerns are based on the assumption that federalization would occur by incorporating pre-1972 sound recordings into the existing framework of the Copyright Act, without any modifications or accommodations. It appears that the copyright owners' concerns regarding ownership can be addressed by adopting a rule along the lines of ARSC's proposal, providing that ownership of newly federalized pre-1972 sound recordings should be determined

⁵³⁰ *See id.* at 29.

⁵³¹ Hoffman T1 at 228-33.

⁵³² Artist's Reprieve Reply at 1-2.

not by applying existing federal law retrospectively, but by applying state law as it exists as of the effective date of federalization. That is, whoever owned the rights immediately before pre-1972 sound recordings are given federal protection would own those rights when federal protection takes effect.

Determining ownership of pre-1972 sound recordings by deferring to the ownership as of the effective date of federalization would avoid creating new questions regarding ownership but instead would preserve the *status quo*, including any disputes regarding ownership that may or may not exist at the time of enactment. Following this path would prevent the imposition of undue administrative costs or the predicted freeze on the availability of many pre-1972 sound recordings. Determinations of initial ownership would be controlled by existing state laws, including the application of work for hire principles and the Pushman doctrine where it applies, as the rules in existence at the time of transfers and assignments that took place prior to federalization.

Termination rights pose a more difficult question. As both the House and Senate Reports on the Copyright Act of 1976 stated, termination provisions were included in the 1976 Act “because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”⁵³³ The Office has long recognized that “[s]ince authors are often in a relatively poor bargaining position * * * some other provision should be made to permit them to renegotiate their transfers that do not give them a reasonable share of the economic return from their works.”⁵³⁴ As a general matter, the Office strongly supports termination rights as a means to give authors the opportunity to recapture the value of their authorship years after they have assigned the rights.

⁵³³ H.R. REP. NO. 94-1476, at 124 (1976); S. REP. NO. 94-473, at 108 (1975).

⁵³⁴ See *Report of the Register of Copyrights on the General Revision of U.S. Copyright Law* 92 (1961).

However, to recognize termination rights for grants of copyright transfers or licenses that were made prior to the enactment of a statute granting federal copyrights would be unprecedented and would raise significant concerns relating to retroactive legislation and possible takings.⁵³⁵ Because of those concerns, the Office is reluctant to recommend that termination rights should apply to any grants that have already been made with respect to pre-1972 sound recordings.⁵³⁶ However, the termination right in section 203 should be applicable with respect to any grants made by authors after the effective date of any legislation that federalizes protection of pre-1972 sound recordings. In such cases, there could be no concerns about retroactivity or takings, since any post-effective date grants would be subject to the law in existence at that time. Addressing termination in this fashion would preserve the expectations of all parties with respect to pre-federalization grants.

B. Term of Protection

The Notice of Inquiry identified the term of protection for pre-1972 sound recordings and related constitutional considerations as key issues. The Office sought information about how federal law regarding term of protection should apply to pre-1972 sound recordings. If the ordinary federal statutory terms were applied to pre-1972 sound recordings, then all works published prior to 1923 would immediately go into the public domain and many and perhaps most other works would go into the public domain prior to 2067, the date upon which current state protection is set to be preempted. Unlike under current law, works created between 1923 and 1972 and now protected under state law would not necessarily enjoy protection until 2067. Therefore, the Notice inquired whether it would be desirable to provide a term of protection for

⁵³⁵ See U.S. Copyright Office, *Analysis of Gap Grants under the Termination Provisions of Title 17* at 6 (2011), available at <http://www.copyright.gov/reports/gap-grant%20analysis.pdf>.

⁵³⁶ There would presumably be no occasion to recognize termination rights for pre-1978 grants under section 304(c) or (d), since the premise for those provisions is that the authors, rather than the grantees, should obtain the benefit of the extensions of copyright term enacted in 1976 and 1998. No similar extension of term is proposed for pre-1972 sound recordings.

pre-1972 sound recordings that is different than the terms set forth for other works protected by federal copyright law, in order to ensure that federalization of pre-1972 sound recordings would not give rise to potentially successful takings claims under the Fifth Amendment. The Notice further inquired whether federalization would encounter constitutional problems such as due process or takings issues if all pre-1972 recordings were not provided with at least some minimum term of federal protection.

1. Current and Proposed Terms of Protection

Currently, pre-1972 sound recordings may be protected by state law until February 15, 2067, at which point such protection is preempted by federal law. The duration of protection would potentially change if sound recordings were brought under federal copyright law and given the term applicable for other works. Specifically, the term of protection for a published pre-1972 sound recording presumably would be 95 years from publication.⁵³⁷ An unpublished pre-1972 sound recording would have a term of the life of the author plus 70 years unless it is a work made for hire or is anonymous or pseudonymous, in which case the term would be 120 years from creation.⁵³⁸

When unpublished works other than sound recordings were incorporated into the federal copyright statute in 1978, older works were given an adjustment in the term of protection to take into account the fact that the potentially perpetual protection of such works under state law was being abrogated. Section 303 provided, as a transitional matter, that all unpublished works would get at least 25 years of federal protection, until December 31, 2002. Thus, a work created by an author who had died in 1929, 49 years before the effective date of the 1976 Act, might have been expected to enter the public domain at the end of 1979, 50 years after the death of the author. But

⁵³⁷ See 17 U.S.C. § 304.

⁵³⁸ 17 U.S.C. § 303(a).

section 303 provided that copyright would subsist in the work until at least December 31, 2002, and that it would subsist for an additional 25 years – to the end of 2027 – if it was published before the end of 2002.⁵³⁹ If a similar accommodation were to accompany federalization of pre-1972 sound recordings, sound recordings published in 1922 or earlier would not go directly into the public domain, but would continue to enjoy copyright protection for a prescribed period of years.

Most stakeholders proposed some modification of the current terms of protection to pre-1972 sound recordings.

a. *50 years from publication*

Several stakeholders, including Nicola Battista, Feaster, and LOC, suggested a term of 50 years from the date of publication.⁵⁴⁰ Under such a proposal, pre-1923 sound recordings would go directly into the public domain. In support of such a term, LOC noted that virtually all the commercial benefits accruing to right holders from historic sound recordings released in past decades occur within a period of fewer than 70 years.⁵⁴¹ LOC suggested that a term of protection under federal law longer than 50 years has not proved to be an incentive to right holders to keep historic recordings commercially available in the market place. LOC and Battista offered that the current protection for sound recordings until the year 2067 creates a “dead zone” during which culturally and historically important recordings are not commercially available, and are often lost, perhaps forever.⁵⁴² Finally, LOC and Battista noted that for some interested in listening to and researching older recordings, the lack of commercial availability of phonorecords authorized by

⁵³⁹ With the enactment of the Sonny Bono Copyright Term Extension Act in 1998, the additional 25 year period was extended by yet another 20 years, until the end of 2047.

⁵⁴⁰ Battista at 2; Feaster at 1, 7; LOC at 10.

⁵⁴¹ LOC at 10.

⁵⁴² LOC at 10; Battista at 2.

the right holder creates an incentive to seek out copies produced in other countries with shorter terms of copyright protection, where they are already in the public domain.⁵⁴³

b. 50 years from fixation

EFF expressed a preference for a term of 50 years from the date of fixation. Under such a proposal, pre-1923 sound recordings would go directly into the public domain. EFF believed that the general rule of protection, where pre-1972 sound recordings do not enter the public domain until 2067, is too long and should be shortened under federal copyright law. EFF stated its view that 50 years is a reasonable length that is appropriate under the Copyright Clause's "limited times" provision.⁵⁴⁴ It also suggested that making the terms of protection of sound recordings closer to the terms of protection of the underlying works, such as musical compositions, would clarify their status and better facilitate archiving and other productive uses.⁵⁴⁵

SAA also preferred a term of 50 years from the date of fixation, with pre-1923 sound recordings going directly into the public domain. SAA noted that because of the difficulty of establishing whether particular sound recordings were works made for hire, adopting the basic rules regarding term would not be a good solution. SAA pointed out that a term of 50 years from creation would be in compliance with most international agreements.⁵⁴⁶

⁵⁴³ *See id.*

⁵⁴⁴ U.S. CONST. Art. I, § 8. cl. 8.

⁵⁴⁵ EFF at 11-12.

⁵⁴⁶ SAA at 8.

c. *95 years from creation*

MLA suggested that 95 years from creation, regardless of whether the work is published or unpublished, would be a second best alternative to a 50 year term. It expressed the view that all pre-1923 works should fall into the public domain in order to mirror the protection afforded other classes of works.⁵⁴⁷ In making this recommendation, MLA noted that when Congress indicated that pre-1972 sound recordings would enter the public domain in 2067, it clearly chose 2067 (originally 2047, but extended to 2067 in the Copyright Term Extension Act) to ensure a minimum 95 year term for all such recordings. According to the House Report on the 1976 Copyright Act, enacting a provision that takes away subsisting common law rights and substitutes statutory rights would be “fully in harmony with the constitutional requirements of due process” provided that the statutory rights endure for a reasonable period.⁵⁴⁸ MLA reasoned that because Congress has already established a term of at least 95 years of potential protection under state law for pre-1972 sound recordings, Congress must have determined that a 95-year term would comply with the requirements of due process.⁵⁴⁹

d. *Expiration in 2067*

While RIAA and A2IM generally opposed federalization, they expressed the position that the only way to create clarity with regard to term of protection is to base the term on the year of first fixation of any sound recording (because determining the date of “first publication” for very old recordings would be a nearly impossible factual task in many instances), or to fix an end of term (2067) that matches existing law. Under their proposal, all pre-1923 works would continue to enjoy protection until 2067. RIAA and A2IM concluded that legislation that cuts off

⁵⁴⁷ MLA at 12.

⁵⁴⁸ H.R. REP. NO. 94-1476, at 139 (1976).

⁵⁴⁹ MLA at 13.

protections for existing state- and common law-protected recordings would deny right holders of “all economically viable use of those works,” and takings claims would arise.⁵⁵⁰

e. Other alternatives

In their reply comment, Professor Elizabeth Townsend Gard and her 2011 copyright class at Tulane University School of Law suggested that sound recordings created before February 15, 1972 should enjoy a term that endures for 50 years from fixation. However, under their proposal, in no case would the term of copyright in such a work expire before five years from enactment of federalization, and if the work is made available to the public by the copyright holder within five years of enactment, the term of copyright would not expire before February 15, 2067.⁵⁵¹

Professor Townsend Gard and her class pointed toward several benefits of such a term structure. They posited that a significant number of works that have no commercial value or known owner interested in commercialization would enter the public domain and would thus be available for unfettered preservation and access. They pointed out that the structure would allow right holders who saw value in their recordings to secure a term that lasted until 2067 by making the work available to the public during a reasonable transition period. Such owners would not be deprived of any property and no takings concerns would arise. Finally, they noted that the structure, based on date of creation, would reasonably allow the public to determine whether a work was under copyright protection.⁵⁵²

This proposal was the subject of much discussion during the June 3, 2011 roundtable. RIAA raised concerns that a requirement that the work must be made available to the public in order to secure protection until 2067 would lead to costly litigation as to whether that requirement

⁵⁵⁰ RIAA/A2IM at 29,33-34.

⁵⁵¹ Townsend Gard Reply at 22.

⁵⁵² *Id.*

had indeed been met.⁵⁵³ Professor Townsend Gard responded to the litigation concern by noting that there was no significant litigation regarding compliance with section 303(a) after enactment of the 1976 Act.⁵⁵⁴

Professor Townsend Gard suggested that the reasonable transition period in and of itself may suffice to address takings concerns, a suggestion that was strongly disputed by RIAA.⁵⁵⁵ The length of the transition period was also a disputed matter. ARSC stated that as its goal is access and preservation, it would not necessarily object to a reasonable transition period within which an owner may make the work available to the public in order to secure a longer term. At the same time it flatly rejected the notion that a transition period of 25 years was reasonable.⁵⁵⁶

2. Fifth Amendment Takings Claims

Before recommending the term of protection to be provided for pre-1972 sound recordings under federal law, it is necessary to review an additional issue: whether shortening the term of protection currently provided under state law would constitute a “taking” for which compensation must be paid.⁵⁵⁷ Federalization of pre-1972 sound recordings would entail preempting state law protection, which would deprive owners of vested interests currently held under state law and therefore could raise Fifth Amendment takings claims. So long as the state law-based property right is replaced by a federal right of equal strength and duration, no issues should arise, but what would be the result if the federal term of protection were shorter than that which is currently enjoyed under state law?

⁵⁵³ Pariser T2 at 425-26.

⁵⁵⁴ Townsend Gard T2 at 429.

⁵⁵⁵ Pariser T2 at 439-41.

⁵⁵⁶ Brooks T2 at 450-51.

⁵⁵⁷ The Fifth Amendment provides that “No person shall be ... deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.” U.S. CONST. amend. V. *See generally* 1 NIMMER ON COPYRIGHT §1.11.

A takings claim may be facial or it may be “as applied.” In either type of claim, the property must be taken for the “public use.” The Supreme Court has embraced a broad interpretation of “public use” as “public purpose.”⁵⁵⁸ Furthermore, the Court reiterated that its public use jurisprudence has eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.⁵⁵⁹ While there is no reported case law directly addressing whether the sort of alleged taking that may occur under federalization of pre-1972 sound recordings would be for the public use, this Report concludes that federalization would advance preservation of and access to copyrighted works. Such preservation and access appear to be a rational exercise of the Copyright Clause authority to promote the progress of science and useful arts, and a legitimate public purpose.⁵⁶⁰

a. *Facial takings*

A facial challenge requires a court to conclude that the mere enactment of legislation constitutes a taking. The test to be applied in a facial challenge is “fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it ‘denies an owner economically viable use of his [property].’”⁵⁶¹ It is rare for facial takings claims to succeed because it is usually impossible to ascertain the economic impact of legislation until specific applications can be considered.⁵⁶² Not surprisingly, no stakeholders commented on whether federalization would give rise to facial takings claims.

⁵⁵⁸ See *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

⁵⁵⁹ See *id.* at 483.

⁵⁶⁰ See *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003) (Supreme Court’s substantial deference to Congress’s rational exercise of its Copyright Clause authority).

⁵⁶¹ *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 295-96 (1981).

⁵⁶² See *General Agreement On Tariffs And Trade (GATT): Intellectual Property Provisions, Joint Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the*

b. As-applied takings

Reviews of Fifth Amendment as-applied takings claims consider the claim of a particular party who asserts that he or she has been deprived of property as a result of the specific application of the statute to him or her. Such claims are generally assessed under the framework articulated in *Penn Central Transp. Co. v. City of New York*.⁵⁶³ The principal consideration is “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.”⁵⁶⁴ A further consideration is the nature of the governmental action. Interference with property that can be characterized as a physical invasion by government may be more readily found to be a taking than interference that arises from some public program adjusting the benefits and burdens of economic life to promote the common good.⁵⁶⁵ Additional relevant points in analyzing a takings claim include the fact that “a reduction in the value of property is not necessarily equated with a taking;”⁵⁶⁶ statutory provisions that “moderate and mitigate the economic impact” are relevant to the analysis;⁵⁶⁷ and regulation of property rights does not constitute a taking when an individual’s reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulations.⁵⁶⁸

Judiciary and the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 103rd Cong. at 150 (1994)(“GATT Hearing”) (testimony of Christopher Schroeder, Counsel to the Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice).

⁵⁶³ 438 U.S. 104 (1978). This brief discussion of takings is derived from Eva Subotnik and June Besek, Fifth Amendment Considerations: Extending Federal Copyright to Pre-1972 Sound Recordings (unpublished manuscript on file with author).

⁵⁶⁴ *Penn Central*, 438 U.S. at 124.

⁵⁶⁵ *See id.*

⁵⁶⁶ *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

⁵⁶⁷ *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225-26 (1986).

⁵⁶⁸ *See U.S. v. Locke*, 471 U.S. 84, 107-108 (1985) (citing *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (“this

In the 1976 Copyright Act, Congress considered as-applied takings concerns similar to those raised by federalization of pre-1972 sound recordings when it removed perpetual protection for unpublished works and substituted limited terms of federal copyright protection. In the 1976 Act, Congress ensured that all works being brought under federal copyright would enjoy at least 25 years of protection, until the end of 2002.⁵⁶⁹ If works were published on or before that date, they received another 25 years of protection, until 2027, a date that was extended by 20 years in the Sonny Bono Copyright Term Extension Act, thus affording protection until the end of 2047.⁵⁷⁰

The House Report on the 1976 Copyright Act explained the purpose of the provision, 17 U.S.C. § 303:

Theoretically, at least, the legal impact of section 303 would be far reaching. Under it, every “original work of authorship” fixed in tangible form that is in existence would be given statutory copyright protection as long as the work is not in the public domain in this country. The vast majority of these works consist of private material that no one is interested in protecting or infringing, but section 303 would still have practical effects for a prodigious body of material already in existence. Looked at another way, however, section 303 would have a genuinely restrictive effect. Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available. In general, the substituted time limits are those applicable to works created after the effective date of the law; for example, an unpublished work written in 1945 whose author dies in 1980 would be protected under the statute from the effective date through 2030 (50 years after the author’s death).

A special problem under this provision is what to do with works whose ordinary statutory terms will have expired or will be nearing expiration on the effective date. The committee believes that a provision taking away subsisting

Court has never required [Congress] to compensate the owner for the consequences of his own neglect.”)).

⁵⁶⁹ 17 U.S.C. § 303(a) provides:

Duration of copyright: Works created but not published or copyrighted before January 1, 1978
(a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

⁵⁷⁰ Pub. L. No. 105-298, 112 Stat. 2827 (1998).

common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process, but it is necessary to fix a “reasonable period” for this purpose. Section 303 provides that under no circumstances would copyright protection expire before December 31, 2002, and also attempts to encourage publication by providing 25 years more protection (through 2027) if the work were published before the end of 2002.⁵⁷¹

Congress again considered as-applied takings concerns in 1994 in connection with the provisions of URAA,⁵⁷² which restored copyright protection to certain works of foreign origin that were in the public domain in the United States. This restoration arguably usurped the rights of “reliance parties”⁵⁷³ whose rights to use certain public domain works may have been curtailed. In hearings addressing these provisions, Congress was advised that it could successfully address this concern by providing reliance parties with a reasonable period of time during which they could continue certain uses of restored works, and by limiting the liability reliance parties may face for their use of restored works.⁵⁷⁴

Several stakeholders addressed the notion that federalization would bring about as-applied takings claims. RIAA and A2IM observed that if federalization placed older sound recordings into the public domain, either immediately upon enactment or at some future date prior to 2067, it would raise serious takings concerns. They noted that there are many examples of back-catalog materials that have commercial viability, and asserted that reducing the term would cut off property rights in those recordings. They acknowledged that the economic impact of federalization is measured on an as-applied basis, and that it is therefore difficult to make broad predictions of the value of such takings. They noted that when previous copyright legislation, such as the URAA, raised potential takings concerns, provisions were included to

⁵⁷¹ H.R. REP. NO. 94-1476, at 138-39 (1976).

⁵⁷² Pub. L. No. 103-465, 108 Stat. 4809, 4973 (1994).

⁵⁷³ See 17 U.S.C. § 104A(h)(4).

⁵⁷⁴ See 17 U.S.C. § 104A(d); see also *GATT Hearing*, *supra* note 562, at 159 (1994) (testimony of Christopher Schroeder, Counsel to the Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice).

diminish those concerns. In their initial comments, RIAA and A2IM stated that it is not clear how any similar fixes for right holders could be formulated to overcome the takings problems posed by federalization of pre-1972 sound recordings, which would touch a far wider set of right holders than those affected by the URAA.⁵⁷⁵

SAA commented that generally there was no need for additional protection for pre-1972 sound recordings because owners already had a significant, exclusive period of protection to exploit the works. However, SAA acknowledged that there may be some unpublished recordings for which extended protection may be appropriate. SAA suggested that it may be appropriate to treat such works in a manner similar to the way unpublished items were brought under federal copyright protection in the Copyright Act of 1976, where such works were given a minimum term of 25 years of federal protection and an extended term of protection if they were published within that twenty-five year period. However, SAA suggested that the window that is available to secure extended protection should be short – no longer than 5 years – and it should not extend to pre-1923 sound recordings.⁵⁷⁶

ARSC remarked that it did not see any need for federal protection of pre-1923 sound recordings because such works already had a significant period of protection under state law.⁵⁷⁷ It went on to assert in its reply comment that federalization would not result in a total divestiture of rights, and thus no taking would occur. It added that even if a taking were found to exist, any compensation due would be extremely low.⁵⁷⁸ Both ARSC and MLA concluded that pre-1923 recordings are clearly not valued by their owners, as evidenced by the almost complete unavailability of those recordings. They went on to question whether any just compensation is

⁵⁷⁵ RIAA/A2IM at 33-34.

⁵⁷⁶ SAA at 9.

⁵⁷⁷ ARSC at 6.

⁵⁷⁸ ARSC Reply at 22-24.

due for takings of property which has *de minimis* economic value.⁵⁷⁹ MLA added to its takings analysis in its reply comment, stating that right holders whose works may be injected into the public domain by federalization would not lose *all* economically productive use of their property. Instead, MLA maintained that such right holders would not be foreclosed from making use of the works; they just would not have exclusive rights.⁵⁸⁰

At the June 3, 2011 roundtable, much of the discussion regarding takings revolved around whether federalization could be instituted in a manner that provided “just compensation” for the extinguishment of ownership under state law. While “just compensation” is technically a remedial matter to be considered after a finding that a taking has in fact occurred,⁵⁸¹ it is relevant to consider whether provisions included as part of federalization, such as those that would enable right holders to obtain reasonable, investment-backed expectations, would prevent the finding of a taking under the criteria set forth in *Penn Central Transp. Co. v. City of New York*.⁵⁸²

Stakeholders who focused most intently on preservation and access, such as MLA and ARSC, suggested that application of the ordinary federal statutory terms to pre-1972 sound recordings should be sufficient to address any takings concerns. They proposed varying terms that should be available under federalization, which are discussed in further detail above. They also maintained that pre-1923 sound recordings could go immediately into the public domain without significant takings concerns because they had already enjoyed a significant term of protection, and because such works had only *de minimis* value.⁵⁸³

⁵⁷⁹ ARSC at 6; MLA at 13-14.

⁵⁸⁰ MLA Reply at 8-9.

⁵⁸¹ An award of “just compensation” is the fair market value of the property at the time of the taking. *New York v. Sage*, 239 U.S. 57, 61 (1915).

⁵⁸² *Penn Centra* identified the principle criteria for determining a taking as “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” and the nature of the governmental action. 438 U.S. at 124.

⁵⁸³ Brooks T2 at 450-451; Harbeson T2 at 451-53.

Participants representing right holders in pre-1972 sound recordings generally observed that the takings problem is directly proportionate to the degree to which state laws are affected, *i.e.* the more state laws are left intact, the less a taking would exist.⁵⁸⁴ In response to the proposal by Professor Townsend Gard and her Tulane Law School copyright law class, which included suggestions for providing an avenue for right holders to secure protection for works until 2067,⁵⁸⁵ RIAA acknowledged that if sound recording right holders were able to obtain a term of protection that lasted until 2067, federalization would “probably not” present a takings problem.⁵⁸⁶ RIAA also commented that if federal copyright law covered pre-1972 sound recordings until 2067, then such legislation would not have “taken away rights, however grand or *de minimis* they may be, and we don’t have to worry about takings.”⁵⁸⁷

3. Recommendation

The Office recognizes that pre-1972 sound recordings are both numerous and unique, and that the economic impact of altering the current 2067 date for expiration of protection could vary widely. It is reasonable to conclude that at least in some cases, the reduction of term that would result from applying ordinary federal terms could produce a loss of significant economic value. Most pre-1972 sound recordings, however, have little or no economic value. The Office does not wish to advise Congress to protect all pre-1972 sound recordings under federal law until 2067 when only a fraction have economic value, particularly when it would be a significant public benefit to make the others widely available for study and research.

⁵⁸⁴ Pariser T2 at 424.

⁵⁸⁵ Townsend Gard Reply at 22-23.

⁵⁸⁶ Pariser T2 at 460-61.

⁵⁸⁷ *Id.* at 424.

In the past, when Congress considered copyright legislation that might have curtailed parties' vested ownership interests, *e.g.* in the Copyright Act of 1976 and the URAA, it prudently chose to address right holders' reasonable investment-backed expectations in the legislation itself. The Office recommends similar prudent attention to the takings concerns raised here. It recommends providing an avenue for right holders to realize reasonable investment-backed expectations, in order to ensure that no unlawful takings occur as a consequence of federalization.

Federalization would provide a public benefit by enhancing preservation of and access to these old recordings that are an important part of our culture. The Office believes that federalization, in effect, constitutes a "public program adjusting the benefits of public life to promote the common good."⁵⁸⁸ Having considered the views of the various stakeholders on the issue, the Office believes, in principle, that a term of protection for all pre-1972 sound recordings that extends until 2067 is excessive, and that pre-1972 sound recordings should have their term of protection harmonized with that of other works from the same time period. Absent takings clause considerations, the Office would therefore recommend that (1) all published pre-1923 sound recordings enter the public domain immediately, (2) other published pre-1972 sound recordings remain protected by copyright until 95 years after their date of first publication, and (3) unpublished pre-1972 sound recordings enter the public domain 120 years after they were created. However, as noted above, the Office understands the prudence of making adjustments to address takings concerns.

In order to ensure that federalization does not effect an unlawful taking, the Office recommends that all published pre-1972 sound recordings other than those first published before 1923 receive a term of protection of 95 years from publication, and that all unpublished pre-1972 sound recordings receive a term of 120 years from creation. However, in all cases, those recordings would be *eligible* for protection until February 15, 2067, when federal preemption of

⁵⁸⁸ *Penn Central*, 438 U.S. at 124.

state law protection is currently set to expire.⁵⁸⁹ To secure the full term of protection until 2067, the right holder of a pre-1972 sound recording would have to take certain actions during a reasonable transition period, described in the section below.⁵⁹⁰ The required actions include (1) making the work available to the public, and (2) providing notice to the Copyright Office that the work has been made available at a reasonable price and that the right holder intends thereby to secure a full term of protection.

For works first published before 1923, the Office cannot recommend that the term of copyright subsist until 2067. Such a term – of 144 years or more following publication – would be unprecedented and, in the view of the Office, unjustified. Moreover, since all such works are from the acoustical era and are usually of such low quality that relatively few of them are marketable, it is difficult to fathom how the right holder could offer a compelling justification for continuing to own exclusive rights for the next 55 years.⁵⁹¹ While a handful of pre-1923 works may still have some commercial value,⁵⁹² that in and of itself does not justify maintaining copyright protection for another half century. The fact is that all other works published before 1923 have entered the public domain. The Office sees no reason to create an anomaly by offering continued protection of such sound recordings until 2067. On the other hand, Congress recognized in the 1976 Copyright Act that providing at least an additional 25 years of protection for works protected at common law would constitute a “reasonable period” that would satisfy constitutional requirements of due process.⁵⁹³ Following that precedent, the Office believes that

⁵⁸⁹ However, in all cases the term of protection for pre-1972 sound recordings would end no later than February 15, 2067, when federal preemption of state law protection is currently scheduled to end. Thus, the term of protection for an unpublished sound recording fixed in 1971 would end in 2067 rather than in 2091, 120 years after it was fixed. The rationale for this is that under current law, protection will end in 2067, and the Office sees no reason to extend the term even further.

⁵⁹⁰ Chapter VI.C.

⁵⁹¹ See ARSC at 3; Brooks T2 at 347-48.

⁵⁹² See, e.g., Pariser T2 at 425 (recordings by Caruso and Sousa).

⁵⁹³ H.R. REP. NO. 94-1476, at 139 (1976); see 17 U.S.C. § 303(a).

giving owners of rights in sound recordings published before 1923 an opportunity to retain exclusive rights for an additional 25 years after federalization of protection would constitute a similar reasonable period.

The Office therefore recommends that a right holder of a sound recording first published before 1923 should be permitted to obtain an additional 25 years of protection under federal law if, during a reasonable transition period (but one that is somewhat shorter than the transition period for other pre-1972 sound recordings), the right holder makes the work available to the public and notifies the Copyright Office of that fact and of its intent to secure protection for that 25-year period.

Requiring right holders to take some affirmative action to retain their rights in this situation is consistent with the Takings Clause.⁵⁹⁴ In the case of pre-1972 sound recordings, right holders would only lose the benefit of extended protection if they fail to make their works available and provide notice of such use, requirements which are designed to advance the interests of preservation of and public access to sound recordings.

For published pre-1972 sound recordings, the recommended term of 95 years from publication is the term that the recordings would have if they had obtained a federal copyright upon first publication.⁵⁹⁵ For unpublished works, the recommended term of 120 years from creation is the term the works would have received if they were anonymous or pseudonymous works or if they were created as works for hire and had entered the federal copyright system in 1978 along with other unpublished works previously protected under state law.⁵⁹⁶ The Office believes that the 120-year term should apply even if the sound recording was not anonymous,

⁵⁹⁴ See *U.S. v. Locke*, 471 U.S. 84, 107-108 (1985) (citing *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (“this Court has never required [Congress] to compensate the owner for the consequences of his own neglect”)).

⁵⁹⁵ See 17 U.S.C. § 304(a), (b).

⁵⁹⁶ See 17 U.S.C. §§ 303, 302(c).

pseudonymous, or a work made for hire, and notwithstanding the general rule in Title 17 that unpublished works receive a term of the life of the (last surviving) author plus 70 years.⁵⁹⁷ The Office believes that giving all unpublished pre-1972 sound recordings a fixed term of 120 years from creation,⁵⁹⁸ rather than a term based on the year in which the author (or the last surviving co-author) died, is the best approach as a practical matter. This is due to a combination of factors such as the collaborative nature of sound recording authorship, the difficulties in calculating term of protection based upon the life of an author (or, in many cases, multiple authors) who may have died many decades ago, and the likelihood that many pre-1972 sound recordings were created as works for hire.

As indicated above, the process for assessing as-applied takings claims is articulated in *Penn Central Transp. Co. v. City of New York*. The principal consideration is “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.”⁵⁹⁹ In the case of pre-1972 sound recordings, which are numerous and unique, the economic impact will vary widely, but it is reasonable to conclude that reducing the term for certain works may result in a loss of significant economic value.

Therefore, the recommendation includes an avenue for right holders to fulfill reasonable investment-backed expectations in the form of both a reasonable automatic transition term of federal protection and a means to exercise an option to extend protection to 2067 – an option likely to be exercised only for works with commercial value. The Office understands that providing such an opportunity for right holders to “moderate and mitigate the economic impact”

⁵⁹⁷ Sections 303 and 302(a) and (b) of the Copyright Act of 1976 would have provided a term of life of the author plus 50 years, with a minimum term ending at the end of 2002, but the Sonny Bono Copyright Term Extension Act of 1998 extended that term to life plus 70 years. Pub. L. No. 105-298, 112 Stat. 2827, section 102(b)(1) and (2)(1998) (amending 17 U.S.C. § 302(a) and (b)).

⁵⁹⁸ Subject to an absolute end of protection on February 15, 2067 in all cases.

⁵⁹⁹ *Penn Central*, 438 U.S. at 124.

significantly diminishes the legitimacy and likelihood of success of any takings claims that might be asserted.⁶⁰⁰

C. Transition Period

The Notice of Inquiry pointed out that it may be necessary to provide a transition period to accommodate the switch from state protection of pre-1972 sound recordings to federal protection. The Office sought comments on whether provision should be made for recordings for which the statutory term of protection would already have expired, or would be expiring shortly, by providing federal protection for a “reasonable period,” possibly with an opportunity for a further extension of protection if the recordings are made available to the public during that interim period. As indicated above, Congress has in the past determined that taking away subsisting common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process.⁶⁰¹ However, it is necessary to determine what constitutes a “reasonable period.”⁶⁰²

1. Length of Transition Period

There is some precedent on the question of what constitutes a reasonable transition period. Congress addressed the potential effects on vested rights in the 1976 Copyright Act, when it removed perpetual state law protection for unpublished works but provided that all unpublished works would continue to enjoy copyright for at least an additional 25 years. So far as the Office is aware, no takings claims were made as a result of this legislation.

⁶⁰⁰ See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225-26 (1986).

⁶⁰¹ See *supra* Chapter VI.B.2.b.

⁶⁰² To be clear, it is possible that providing a reasonable transitional period may in and of itself serve as providing reasonable just compensation for any taking of common law rights.

The stakeholders in the current proceeding held varying views as to what sort of transition period, if any, would be appropriate in the case of federalization of pre-1972 sound recordings. Professor Townsend Gard expressed the view that either a one-year or five-year transition period would be sufficient.⁶⁰³ ARSC considered a brief transitional period to be acceptable, but cautioned that it would be unreasonable to provide for a term that would extend to 2067.⁶⁰⁴ SAA stated that a five year transition period would be reasonable, but also expressed the view that it would be unreasonable to provide for a term that would extend to 2067.⁶⁰⁵ Several parties said that a transition period of 25 years would be unreasonable and excessive.⁶⁰⁶ In fact, no party endorsed a transition period of 25 years. However, stakeholders representing rights holders maintained their general opposition to federalization or to any shortening of the terms currently enjoyed under state law.

2. What Constitutes “Publicly Available” and “Notice Filed in the Office”

The questions of what would qualify as making a sound recording “publicly available,” and what should be included in the “notice filed in the Office” for purposes of obtaining a term of protection that extends until 2067, were first raised at the roundtable. No stakeholders provided specific proposals. However, several raised concerns that should be considered in setting the requirements for obtaining protection until 2067. These concerns included whether merely making a recording available as a noninteractive stream could qualify as making the work “publicly available;” whether there would be an ongoing obligation for a right holder to state that

⁶⁰³ Townsend Gard Reply at 22-23; Townsend Gard T2 at 438, 440.

⁶⁰⁴ Brooks T2 at 438-39.

⁶⁰⁵ SAA at 9.

⁶⁰⁶ Brooks T2 at 450-51; Harbeson T2 at 451-53.

it is still exploiting a work; the economic and procedural burdens of a notice requirement; and whether a notice requirement would constitute a type of formality.⁶⁰⁷

3. Recommendation

The Office recommends a transition period falling between six and ten years for all pre-1972 sound recordings other than those first published before 1923. Whether the period is closer to six years or closer to ten is a question on which affected parties should provide additional input. Such a transition period is somewhat longer than the range of one to five year transition periods preferred by non-right holder stakeholders and is well short of the 25-year minimum transition period provided in the 1976 Act. In addition, a six year transition period coincides with the existing statute of limitations for a takings claim as set forth in 28 U.S.C. § 2501, which would ensure that no right holder could initiate a takings claim after the opportunity to exercise the option to extend the term has expired. As a practical matter, providing for a transition period of at least six years would force right holders to decide whether to assert a takings claim before the end of the transition period. Few if any are likely to do so, since the option of obtaining the extended term by making the work available and notifying the Copyright Office would not be very burdensome. But providing for a transition period that is sufficiently long that a takings claim must be asserted by the end of that period would also have the benefit of obtaining finality on the takings issue in a relatively short period of time.

Works first published before 1923 warrant special consideration because, relative to other works of authorship under the Copyright Act, they would be in the public domain by now had they been federalized in 1976. Therefore, although a transition period is still prudent to address takings concerns, the Office recommends a shorter transition period of three years. A shorter period is justified for such works in light of (1) the likelihood that very few, if any, right holders will seek to extend the duration of their exclusive rights in those works, and (2) the great age of

⁶⁰⁷ Rosenthal T2 at 401; Schwartz T2 at 402-04; Townsend Gard T2 at 404-05, 408-09.

those recordings and the concomitant need to permit preservation activities unfettered by concerns that such activities might constitute copyright infringement.⁶⁰⁸

Concerning what constitutes making the work sufficiently available to qualify for protection until 2067 (or, in the case of works published before 1923, for an additional 25 years), the Office again recommends that additional input be sought from the affected parties. However, the Office believes that a work should be deemed available only if (1) it is available to the public at a reasonable price, and (2) phonorecords are available to users. The latter point is especially important. The Office does not believe that the requirement of making recordings available to the public should be satisfied merely by providing non-interactive streaming access to the works.⁶⁰⁹ Many stakeholders asserted that making works available only by means of streaming does not provide sufficient access.⁶¹⁰ This suggests that the requirement should be met by distribution of phonorecords of the recordings, which could but need not be achieved solely by means of digital transmissions of phonorecords. As indicated above, the price must be reasonable.

The notice provided to the Office might be as simple as a notice similar to the one prescribed in 17 U.S.C. § 108(h)(2)(C) that a work is subject to normal commercial exploitation or that a copy or phonorecord of the work can be obtained at a reasonable price.⁶¹¹ Alternatively, it might be satisfied by submitting an application to register the copyright in the sound recording, with a statement that the work has been made available to the public at a reasonable price.

⁶⁰⁸ See MLA at 6-7, 10; SAA at 2.

⁶⁰⁹ It may be useful to seek further input as to whether provision of interactive (*i.e.*, “on-demand”) streaming ought to be sufficient to satisfy the requirements to secure protection through 2067. However, for reasons discussed immediately below, the Office is skeptical that such access should be considered sufficient.

⁶¹⁰ A number of commenters pointed out that research often requires the ability to physically handle phonorecords, for example to study them in greater detail, to filter elements out, and to occasionally adjust the rotation speed of cylinder and disk phonorecords. Brylawski T1 at 52; Brooks T1 at 110-12, T2 at 380-82; Loughney T2 at 348-49. It is not clear whether all of those acts, or their equivalents, could be achieved with a downloaded copy. Nevertheless, the Office is not inclined to recommend a requirement that the recordings be distributed in the form of tangible phonorecords.

⁶¹¹ See 37 C.F.R. § 201.39.

Consideration should also be given to whether additional periodic notices should be required, to confirm that the sound recording continues to be available to the public.⁶¹²

D. Registration

1. Stakeholder Concerns about Registration

Owners of copyrighted works who register their works in a timely manner are eligible for statutory damages and attorney's fees. Moreover, registration is a prerequisite for a suit for infringement of copyright in a United States work. While the Notice of Inquiry did not specifically seek input on registration issues, a handful of stakeholders offered views on the effect that federalization would have on copyright owners of pre-1972 sound recordings in light of the registration provisions of the Copyright Act.

RIAA and A2IM questioned whether federalization would require that an entire catalog of sound recordings must be immediately registered in order to ensure their ability to enforce rights in their recordings. They expressed concern that this would be an undue burden on right holders who would have to submit thousands of copyright registrations and recordations for these recordings, and on the Copyright Office, which would have to process them, within a short time after the law went into effect. They cited the requirements of section 411 of the Copyright Act, which establishes registration as a prerequisite for an infringement suit.⁶¹³ They also pointed to

⁶¹² RIAA suggested that a requirement of “you must assert the rights or you lose the rights” is “anathema to copyright law.” Schwartz T2 at 391, 402-04. However, the notice requirement suggested herein, and any possible additional periodic notices, would be required only if a copyright owner wishes to secure the additional benefit of an extraordinarily long term, one that is beyond (1) that which other works enjoy under U.S. copyright law, (2) that provided by the laws of most countries around the world, and (3) that which is required by international obligations. The Copyright Act already offers certain additional benefits that copyright owners may enjoy only if they comply with certain formalities. *See, e.g.*, 17 U.S.C. § 412 (registration as prerequisite for statutory damages and attorney's fees); 17 U.S.C. § 108(h)(2)(c) (notice by copyright owner that a work is subject to normal commercial exploitation or that a copy of the work may be obtained at a reasonable price makes inapplicable the privilege of libraries and archives to reproduce, distribute, display or perform copies or phonorecords of works during the last 20 years of copyright term).

⁶¹³ 17 U.S.C. § 411(a) provides, in pertinent part:

section 412, which sets forth “timely” registration as an eligibility requirement for statutory damages or attorney’s fees.⁶¹⁴ They stated that such provisions would have to be modified to accommodate registrations for pre-1972 sound recordings to avoid providing federal rights devoid of effective remedies.⁶¹⁵ Similar sentiments regarding the burdens of registration were expressed in the roundtable by A2IM and NMPA.⁶¹⁶

In its reply comment, ARSC stated that it would be delighted if federalization encouraged thousands of copyright registrations. It claimed that federal registrations provide a means of enforcing compliance with other requirements of copyright; enhance publicly available information; increase the value of the works to proprietors and users; and aid title searches. It asserted that extending these inducements for registration and deposit to pre-1972 sound

Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

⁶¹⁴ 17 U.S.C. § 412:

In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a), an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement, or an action instituted under section 411(c), no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for—

- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

⁶¹⁵ RIAA/A2IM at 30. They repeated these assertions at the public meeting. Schwartz T1 at 27, 95; Pariser T1 at 234-37, 273-79.

⁶¹⁶ Bengloff T1 at 281-84; Rosenthal T1 at 288-90.

recordings would promote predictability and public access to these works, as well as aid in the preservation of historic recordings.⁶¹⁷

The application of registration requirements as well as other provisions of current law to pre-1972 sound recordings presents legitimate concerns. Specifically: sections 405 and 406 would need to be amended to clarify that the validity of a copyright in a pre-1972 sound recording is not affected by the distribution, before the effective date of the Berne Convention Implementation Act of 1988, of phonorecords of the sound recording without a copyright notice or with a defective copyright notice; section 407 regarding deposit requirements may need to be amended to accommodate instances in which best edition deposits are no longer available; section 410 regarding *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate may need to be altered in recognition of the fact that registration of pre-1972 sound recordings will occur well beyond five years from first publication of the work; and section 205 regarding priority of conflicting transfers may need to be reconsidered in recognition of the fact that for over a century, transfers of ownership of rights in pre-1972 sound recordings have taken place without recording the documents of transfer with the Copyright Office.

2. Recommendation

The Office does not see a need to amend the section 411 requirement of registration as a prerequisite for an infringement suit for pre-1972 sound recordings.⁶¹⁸ If a pre-1972 sound recording is infringed, registration of the copyright could be made easily and quickly. However,

⁶¹⁷ ARSC Reply at 18-19; *see also* Brooks T1 at 239-40.

⁶¹⁸ Some courts have erroneously interpreted section 411(a) as being satisfied merely by submitting an application, fee and deposit to the Copyright Office, rather than by the Office's issuance of a certificate of registration or its refusal to issue a certificate. *See, e.g., Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir.), *cert. denied*, 131 S.Ct. 686 (2010). *But see La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1202-04 (10th Cir. 2005). At most, a transitional amendment providing that, for a period of perhaps three to five years, an owner of a copyright in a pre-1972 sound recording could satisfy the requirements of section 411(a) simply by submitting the required elements to the Copyright Office, would remedy any short-term disadvantage experienced by copyright owners with respect to these newly federalized works.

the Office understands the desirability of modifying section 412 eligibility requirements for statutory damages and attorney's fees for pre-1972 sound recordings. Section 412 provides as a general matter that a copyright owner who prevails on a claim of copyright infringement is eligible to seek an award of statutory damages or attorney's fees if the infringed work was registered prior to the commencement of the infringement or within 3 months after the work was first published. For pre-1972 sound recordings that are infringed on or shortly after the date on which federal protection commences, a "timely" registration under section 412 would be difficult if not impossible to accomplish. To avoid placing an unreasonable burden on right holders to submit registration applications in the first days following the effective date of federal protection for pre-1972 sound recordings, and the resulting burden on the Copyright Office, the Office recommends a transitional provision that would permit, for a period of perhaps three to five years, owners of copyrights in pre-1972 sound recordings to seek statutory damages and attorney's fees notwithstanding their failure to register the copyright prior to the commencement of infringement. Such a provision would encourage registration within a reasonable time but make accommodations for copyright owners – as well as for the registration staff of the Copyright Office – faced with the sudden need to register great numbers of works in a short period of time.

While the Office does not at this time have specific recommendations for dealing with the remaining issues relating to registration of pre-1972 sound recordings, it has suggested in the preceding section how those issues might be resolved. Certainly none of those issues is insuperable, but they may require additional consideration and input from stakeholders.



LP disc

VII. RECOMMENDATIONS

The U.S. Copyright Office hereby makes the following recommendations:

- Federal copyright protection should apply to sound recordings fixed before February 15, 1972, with special provisions to address ownership issues, term of protection, transition period, and registration.
- Federal copyright protection for pre-1972 sound recordings means that all of the rights and limitations of Title 17 of the U.S. Code applicable to post-1972 sound recordings would apply, including section 106(6) (public performance right for digital audio transmissions), section 107 (fair use), section 108 (certain reproduction and distribution by libraries and archives), section 110 (exemption for certain performances and displays),

section 111 (statutory license for cable retransmissions of primary transmissions), section 112 (ephemeral recordings by broadcasters and transmitting organizations), section 114 (statutory license for certain transmissions and exemptions for certain other transmissions), section 512 (safe harbor for Internet service providers), Chapter 10 (digital audio recording devices), and Chapter 12 (copyright protection and management systems), as well as any future applicable rights and limitations (*e.g.*, orphan works) that Congress may choose to enact.

- The initial owner(s) of the federal copyright in a pre-1972 sound recording should be the person(s) who own(s) the copyright under applicable state law at the moment before the legislation federalizing protection goes into effect.
- Section 203 of the Copyright Act should be amended to provide that authors of pre-1972 sound recordings are entitled to terminate grants of transfers or licenses of copyright that are made on or after the date federal protection commences. However, termination of pre-federalization grants made under state law prior to federalization presents serious issues with respect to retroactivity and takings, so the Office does not recommend providing termination rights for grants made prior to federalization of protection.
- The term of protection for sound recordings fixed prior to February 15, 1972, should be 95 years from publication (with “publication” as defined in section 101) or, if the work had not been published prior to the effective date of legislation federalizing protection, 120 years from fixation. However,
 - In no case would protection continue past February 15, 2067, and
 - In cases where the foregoing terms would expire before 2067, a right holder may take the action described below to obtain a longer term.
- For pre-1972 sound recordings other than those published before 1923, a transition period lasting between six and ten years from enactment of federal protection should be

- established, during which a right holder may make a pre-1972 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner's intent to secure protection until 2067. If a right holder does this, the term of protection of the sound recording will not expire until 2067, provided that the recording remains publicly available at a reasonable price during its extended term of protection.
- For sound recordings published before 1923, a transition period lasting three years from enactment of federal protection should be established, during which a right holder may make a pre-1923 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner's intent to secure protection for 25 years after the date of enactment of the legislation that federalizes protection. If a right holder does this, the term of protection of the sound recording will not expire until the end of the 25-year period, provided that the recording remains publicly available at a reasonable price during its extended term of protection.
 - Regardless of a right holder's actions, all pre-1972 sound recordings should enjoy federal protection at least until the end of the relevant transition period described above.
 - Regarding the requirement of timely registration in order to recover statutory damages or attorney's fees in an infringement suit, a transitional period of between three and five years should be established, during which right holders in pre-1972 sound recordings can seek statutory damages and attorney's fees notwithstanding the lack of registration prior to filing suit.
 - Adjustments should be made or at least considered with respect to certain other provisions of the Copyright Act to take into account difficulties that owners of rights in pre-1972 sound recordings may encounter. Among those provisions are: section 405 (notice of copyright: omission of notice on certain copies and phonorecords), section 406

(notice of copyright: error in name or date on certain copies and phonorecords), section 407 (deposit of copies or phonorecords for Library of Congress), section 410 (*prima facie* weight of certificate of registration), and section 205 (regarding priority between conflicting transfers recorded in the Copyright Office).

APPENDIX A INITIAL PUBLIC NOTICE

U.S. National Income and Product Accounts (NIPAs) published by the Bureau of Economic Analysis (BEA). The output data are based on a value-added concept and come from product-side estimates of Gross Domestic Product.

The primary source of hours data is the BLS Current Employment Statistics (CES) program, which collects hours paid for nonsupervisory workers. These data are adjusted using data from the Current Population Survey, the National Compensation Survey, and other sources to account for differences between the desired concept of hours (hours worked for all employed persons) and the CES concept (hours paid for production and nonsupervisory employees).

For detailed industries, annual output measures represent the total value of goods and services produced, and are based primarily on data from the U.S. Census Bureau. These measures use a sectoral output concept, which differs from real gross output in that it excludes output that is shipped to other establishments in the same industry. As with the nonfarm business sector productivity, industry hours are constructed primarily from payroll data from the BLS CES survey, supplemented with data from the CPS and other Federal data sources.

Multifactor productivity is estimated in a conceptual framework based on the economic theory of the firm. This framework guides the construction and interpretation of the measures. For the private business and nonfarm business sectors, value added output is compared to inputs of labor and capital. For detailed industries, sectoral output is compared to capital and labor inputs as well as intermediate inputs of energy, non-energy materials and business services provided by establishments outside of each industry or sector.

III. Desired Focus of Comments

Comments and recommendations are requested from the public on the following aspects of the BLS productivity measurement program:

- The scope and amount of detail covered by and published in the productivity datasets.
- The concepts and frameworks used in measuring outputs, inputs, and productivity.
- The sources of data used in productivity measurement.
- Areas of research that the BLS productivity program should emphasize.

In your recommendations to the productivity program, it would be particularly helpful if you could explain

how the changes would make the data more accurate or more useful.

Signed at Washington, DC, this 28th day of October 2010.

Kimberley Hill,

*Chief, Division of Management Systems,
Bureau of Labor Statistics.*

[FR Doc. 2010-27727 Filed 11-2-10; 8:45 am]

BILLING CODE 4510-24-P

LIBRARY OF CONGRESS

[Docket No. 2010-4]

Copyright Office; Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: Congress has directed the Copyright Office to conduct a study on the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction. Currently, such sound recordings are protected under a patchwork of State statutory and common laws from their date of creation until 2067. This notice requests written comments from all interested parties regarding Federal coverage of pre-1972 sound recordings. Specifically, the Office seeks comments on the likely effect of Federal protection upon preservation and public access, and the effect upon the economic interests of rights holders. The Office also seeks comments on how the incorporation of pre-1972 sound recordings into Federal law might best be achieved.

DATES: Initial written comments must be received in the Office of the General Counsel of the Copyright Office no later than December 20, 2010. Reply comments must be received in the Office of the General Counsel of the Copyright Office no later than December 3, 2010.

ADDRESSES: The Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at <http://www.copyright.gov/docs/sound/comments/comment-submission-index.html>. The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browse button. To meet accessibility standards, each comment must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not

an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted on the Copyright Office Web site, along with names and organizations.

If electronic submission of comments is not feasible, comments may be delivered in hard copy. If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Room LM-401, James Madison Building, 101 Independence Ave., SE., Washington, DC 20559, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

If delivered by a commercial courier, an original and five copies of a comment or reply comment must be delivered to the Congressional Courier Acceptance Site ("CCAS") located at 2nd and D Streets, SE., Washington, DC between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM-403, James Madison Building, 101 Independence Avenue, SE., Washington, DC 20559. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Chris Weston, Attorney Advisor. Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION:

Introduction

The Copyright Office is conducting a study on "the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction." When it enacted the Omnibus Appropriations Act of 2009, Congress directed the Register of Copyrights to conduct such a study and seek comments from interested parties. H. Comm. On Appropriations, H.R. 1105, Public Law 111-8 [Legislative Text and Explanatory Statement] 1769

(Comm. Print 2009). With this notice, the Copyright Office explains the background to the study and seeks public comment on whether pre-1972 sound recordings should be brought within the Federal copyright statute. The Office also poses a number of questions on specific topics relevant to the overall inquiry.

Background

Sound recordings are “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied.” 17 U.S.C. 101. Until 1972, sound recordings were not among the works of authorship protected by the Federal copyright statute; they enjoyed protection only under State law. In 1971, Congress passed the Sound Recording Amendment, which provided that sound recordings first fixed on or after February 15, 1972, would be eligible for protection under Federal copyright law. Sound recordings first fixed prior to that date (pre-1972 sound recordings) continued to be protected under State law.

In 1976, when Congress passed the Copyright Revision Act, it created a unitary system of copyright, by bringing unpublished works (until then protected by State law) under the Federal copyright law, and preempting all State laws that provided rights equivalent to copyright. 17 U.S.C. 301(a). However, it explicitly excluded State laws concerning pre-1972 sound recordings from the general preemption provision, allowing those laws to continue in effect until 2047. 17 U.S.C. 301(c). That date was later extended by the Copyright Term Extension Act (CTEA) until 2067. Public Law 105–298, 112 Stat. 2827 (1998). On February 15, 2067, all State law protection for pre-1972 sound recordings will be preempted by Federal law and will effectively cease.

Thus, there are currently two primary regimes of protection for sound recordings: State law protects pre-1972 recordings, and Federal copyright law protects sound recordings of U.S. origin first fixed on or after February 15, 1972.

Federal law also protects pre-1972 sound recordings of foreign origin that were eligible for copyright restoration under the Uruguay Round Agreements Act (URAA). Public Law 103–465, 108 Stat. 4809, 4973 (1994). This legislation, passed in 1994 in order to implement U.S. obligations under the TRIPS (“Trade Related Aspects of Intellectual Property”) Agreement, “restored”

copyright protection to certain works of foreign origin that were in the public domain in the United States on the effective date, which for most works was January 1, 1996. Because most other countries provide a 50-year term of protection for sound recordings, generally only those foreign sound recordings fixed in 1946 and after were eligible for restoration under the URAA.

One consequence of the continued protection under State law of pre-1972 sound recordings is that there are virtually no sound recordings in the public domain in the United States. Pre-1972 sound recordings, no matter how old, can have State law protection until 2067, so that some sound recordings will conceivably be protected for more than 170 years. Even pre-1972 foreign sound recordings that were ineligible for copyright restoration because their term of protection had expired in their home countries are eligible for State law protection, at least in New York. See *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005). Those sound recordings that do have Federal copyright protection will not enter the public domain for many years. For example, sound recordings copyrighted in 1972 will not enter the public domain until the end of 2067.

State law protection for pre-1972 sound recordings is provided by a patchwork of criminal laws, civil statutes and common law. Almost all States have criminal laws that prohibit duplication and sale of recordings done knowingly and willfully with the intent to sell or profit commercially from the copies. Most States also have some form of civil protection, sometimes under the rubric of “common law copyright,” sometimes under “misappropriation” or “unfair competition,” and sometimes under “right of publicity.” Occasionally these forms of protection are referred to collectively as “common law copyright” or “common law protection,” but in fact not all civil protection for sound recordings is common law—some States have statutes that relate to unauthorized use of pre-1972 sound recordings—and a true “common law copyright” claim differs from a claim grounded in unfair competition or right of publicity. In *Capitol Records, Inc. v. Naxos of America, Inc.*, the New York Court of Appeals (the highest court of the State) explained that a common law copyright claim in New York “consists of two elements: (1) The existence of a valid copyright; and (2) unauthorized reproduction of the work protected by copyright.” *Id.* at 563. It went on to state that “[c]opyright law is distinguishable from unfair competition, which in addition to unauthorized copying and

distribution requires competition in the marketplace or similar actions designed for commercial benefit.” *Id.*

The scope of civil protection varies from State to State, and even within a State there is often uncertainty because there are few court decisions that have defined the scope of the rights and the existence and scope of exceptions. What is permissible in one State may not be in another. This uncertainty is compounded by the unsettled state of the law concerning the activities that subject an entity to a State’s jurisdiction.

In general, Federal law is better defined, both as to the rights and the exceptions, and more consistent than State law. In some respects Federal law provides stronger protection. For example, owners of copyrighted works who timely register are eligible for statutory damages and attorneys fees. 17 U.S.C. 412, 504, and 505. In addition, copyright-protected sound recordings are eligible for protection under 17 U.S.C. 1201, which prohibits circumvention of technological protection that protects access to a copyrighted work. At the same time Federal law provides a more consistent and well-articulated set of exceptions. While some States include exceptions in their laws protecting sound recordings, the Federal “fair use” and library and archives exceptions—17 U.S.C. 107 and 108, respectively—are likely much more robust and effective in providing safety valves for the unauthorized but socially valuable use of copyrighted works.

The Copyright Office Study

Faced with the uncertain patchwork of State laws that cover pre-1972 recordings, libraries, archives and educational institutions have voiced serious concerns about their legal ability to preserve pre-1972 recordings, and provide access to them to researchers and scholars.¹ A 2005 study concluded that copyright owners had, on average, made available on CD only 14 percent of the sound recordings they control that were released from 1890 through 1964.² Reissues of recordings from before World War II are particularly scarce. While the statistics and conclusions from that report are now five years old, the Copyright Office knows of no reason to believe that the

¹ See generally Rob Bamberger and Sam Brylawski, National Recording Preservation Board, *The State of Recorded Sound Preservation in the United States: A National Legacy At Risk in the Digital Age* (2010).

² Tim Brooks, National Recording Preservation Board, *Survey of Reissues of U.S. Recordings 7* (2005). For more recent years in that period, the percentage of recordings that were available reached 33 percent.

situation has changed significantly since that time.

Copies of many recordings from these eras reside in libraries and archives. Their custodians, however, are concerned that without the certainty of Federal copyright exceptions, the reproduction and distribution activities necessary to preserve and provide access to these recordings will lack clear legal bases. As a result, some have urged that consideration be given to bringing pre-1972 sound recordings under Federal copyright law, so that users have to contend with only a single set of laws.

When it directed the Register of Copyrights to conduct a study on the desirability of and means for bringing sound recordings fixed before February 15, 1972 under Federal jurisdiction, Congress specifically stated:

The study is to cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage.

H.R. 1105, Public Law 111–8 [Legislative Text and Explanatory Statement] 1769. As part of the study, the Register is to provide an opportunity for interested parties to submit comments. The Register's report to Congress on the results of the study is to include any recommendations that the Register considers appropriate.

The body of pre-1972 sound recordings is vast. Commercially released "popular" recordings come most readily to mind—from Rudy Vallee to Frank Sinatra and Ella Fitzgerald to the Beatles and the Rolling Stones. But pre-1972 commercial recordings encompass a wide range of genres: ragtime and jazz, rhythm and blues, gospel, country and folk music, classical recordings, spoken word recordings and many others. There are, in addition, many unpublished recordings such as journalists' tapes, oral histories, and ethnographic and folklore recordings. There are also recordings of old radio broadcasts, which were publicly disseminated by virtue of the broadcast, but in many cases are technically unpublished under the standards of the U.S. Copyright Act.

The Copyright Office requests that parties with an interest in the question of whether to protect pre-1972 sound recordings as part of the Federal copyright statute submit their comments on the issue and, in those comments, respond to the specific questions below. A party need only address those issues on which it has information or views,

but the Office asks that all answers be as comprehensive as possible.

Specific Questions

Preservation of and Access to Pre-1972 Sound Recordings

The following questions are meant to elicit information about how Federal protection of pre-1972 sound recordings will affect preservation and public access.

Preservation

1. Do libraries and archives, which are beneficiaries of the limitations on exclusive rights in section 108 of the Copyright Act, currently treat pre-1972 sound recordings differently from those first fixed in 1972 or later ("copyrighted sound recordings") for purposes of preservation activities? Do educational institutions, museums, and other cultural institutions that are not beneficiaries of section 108 treat pre-1972 sound recordings any differently for these purposes?

2. Would bringing pre-1972 sound recordings under Federal law—without amending the current exceptions—affect preservation efforts with respect to those recordings? Would it improve the ability of libraries and archives to preserve these works; and if so, in what way? Would it improve the ability of educational institutions, museums, and other cultural institutions to preserve these works?

Access

3. Do libraries and archives currently treat pre-1972 sound recordings differently from copyrighted sound recordings for purposes of providing access to those works? Do educational institutions, museums, and other cultural institutions treat them any differently?

4. Would bringing pre-1972 sound recordings under Federal law—without amending the current exceptions—affect the ability of such institutions to provide access to those recordings? Would it improve the ability of libraries and archives to make these works available to researchers and scholars; and if so, in what way? What about educational institutions, museums, and other cultural institutions?

5. Currently one group of pre-1972 recordings does have Federal copyright protection—those of foreign origin whose copyrights were restored by law. (See the discussion of the URAA above.) In order to be eligible for restoration, works have to meet several conditions, including: (1) They cannot be in the public domain in their home country through expiration of the term of protection on the date of restoration; (2)

they have to be in the public domain in the United States due to noncompliance with formalities, lack of subject matter protection (as was the case for sound recordings) or lack of national eligibility; and (3) they have to meet national eligibility standards, *i.e.*, the work has to be of foreign origin. 17 U.S.C. 104A(h)(6). In determining whether a work was in the public domain in its home country at the time it became eligible for restoration, one has to know the term of protection in that country; in most countries, sound recordings are protected under a "neighboring rights" regime which provides a 50-year term of protection. As a result, most foreign sound recordings first fixed prior to 1946 are not eligible for restoration. To be of foreign origin, a work has to have "at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, [must have been] first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country." 17 U.S.C. 104A(h)(6)(D).

Does the differing protection for this particular group of recordings lead to their broader use? Have you had any experience with trying to identify which pre-1972 sound recordings are (or may be) so protected? Please elaborate.

6. Are pre-1972 sound recordings currently being treated differently from copyrighted sound recordings when use is sought for educational purposes, including use in connection with the distance education exceptions in 17 U.S.C. 110(2)? Would bringing pre-1972 sound recordings under Federal law affect the ability to make these works available for educational purposes; and if so, in what way?

7. Do libraries and archives make published and unpublished recordings available on different terms? What about educational institutions, museums, and other cultural institutions? Are unpublished works protected by State common law copyright treated differently from unpublished works protected by Federal copyright law? Would bringing pre-1972 sound recordings under Federal law affect the ability to provide access to unpublished pre-1972 sound recordings?

Economic Impact

Likely economic impact is an important consideration in determining whether pre-1972 sound recordings should be brought under Federal law, and how that change might be accomplished. The questions below are intended to elicit information regarding

what revenue expectations copyright owners have with respect to pre-1972 sound recordings, and how these expectations would be affected by bringing these recordings under Federal protection. These questions are also intended to elicit information concerning the determination of ownership in such recordings.

Value of the Recordings

8. Are there commercially valuable sound recordings first fixed before 1923 (e.g., that would be in the public domain if the ordinary Federal term of protection applied) that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.

9. Are there commercially valuable sound recordings first fixed from 1923–1940 that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.

10. With regard to commercial recordings first fixed after 1940: What is the likely commercial impact of bringing these works under Federal copyright law?

11. Would there be any negative economic impact of such a change, e.g., in the scope of rights, or the certainty and enforceability of protection?

12. Would there be any positive economic impact of such a change, e.g., in the scope of rights, or the certainty and enforceability of protection?

13. What would be the economic impact of bringing pre-1972 sound recordings into the section 114 statutory licensing mechanism applicable to certain digital transmissions of sound recordings? Would there be other advantages or disadvantages in bringing pre-1972 sound recordings within the scope of the section 114 statutory license?

14. Does the uncertainty of different regimes under State law make it less practical for rights holders to bring suit under State law? Are you aware of any infringement suits concerning pre-1972 sound recordings brought in the past 10 years?

15. Would business arrangements concerning sampling of sound recordings be affected by bringing pre-1972 recordings under Federal law; and if so, how would they be affected? Are pre-1972 sound recordings currently treated differently with respect to sampling?

Ownership of Rights in the Recordings

It is worthwhile to explore State law principles applicable to authorship and ownership of rights in sound recordings to determine whether there would be any tension with Federal copyright law principles.

16. Under Federal law the owner of the sound recording will generally be, in the first instance, the performer(s) whose performance is recorded, the producer of the recording, or both. Do State laws attribute ownership differently? If so, might that lead to complications?

17. Under Federal law, some copyrighted sound recordings qualify as works made for hire, either because (1) they are works prepared by employees in the scope of their employment, or (2) they were specially ordered or commissioned, if the parties agree in writing that the works will be works made for hire, and the works fall within one of nine specific categories of works eligible to be commissioned works made for hire. 17 U.S.C. 101.³ If a work qualifies as a work made for hire, it is the employer or commissioning party who is the legal author and initial rights holder, rather than the individual creator of the work. Prior to the January 1, 1978, the courts recognized the work for hire doctrine with respect to works created by employees in the course of their employment, and particularly from the mid-1960s on, they recognized commissioned works made for hire, under such standards as whether the work was created at the hiring party's "instance and expense" or whether the hiring party had the "right to control" or exercised "actual control" over the creation of the work.

To what extent does State law recognize the work made for hire doctrine with respect to sound recordings? To what extent does State law recognize commissioned works for hire, and under what standard? Have State laws in this respect changed over time? Is there any likelihood that, if Federal standards were applied, ownership of pre-1972 sound recordings would be attributed differently? Is there any reason to believe that, if pre-1972 sound recordings were to become protected under Federal copyright law, their ownership would then become subject to Federal work-made-for-hire standards?

³The types of works that can qualify as commissioned works for hire include: A contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas. 17 U.S.C. 101(2).

18. Under Federal copyright law, ownership of rights is distinct from ownership of the material object in which the copyrighted work is embodied. Transferring ownership of such an object, including the "original," i.e., the copy or phonorecord in which the copyrighted work was first fixed, does not convey rights in the copyright. 17 U.S.C. 202. A transfer of copyright ownership must be made in a writing signed by the owner of the rights or her authorized agent. *Id.* 204.

Some State laws provide (or for a period of time provided) that transferring the original copy of a work could operate as a transfer of copyright ownership, unless the rights holder specifically reserved the copyright rights. To what extent have these State law principles been applied with respect to "master recordings"? How if at all would they affect who would own the Federal statutory rights, if pre-1972 sound recordings were brought under Federal law?

19. If pre-1972 sound recordings were to be given protection under the Federal copyright statute, how would or should copyright ownership of such recordings be determined? Has the issue arisen with respect to pre-1978 unpublished works that received Federal statutory copyrights when the Copyright Act of 1976 came into effect?

20. What other considerations are relevant in assessing the economic impact of bringing pre-1972 sound recordings under Federal protection?

Term of Protection and Related Constitutional Considerations

Term of Protection

21. If pre-1972 sound recordings are brought under Federal copyright law, should the basic term of protection be the same as for other works—i.e., for the life of the author plus 70 years or, in the case of anonymous and pseudonymous works and works made for hire, for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first? Can different treatment for pre-1972 sound recordings be justified?

22. Currently, States are permitted to protect pre-1972 sound recordings until February 15, 2067. If these recordings were incorporated into Federal copyright law and the ordinary statutory terms applied, then all works fixed prior to 1923 would immediately go into the public domain. Most pre-1972 sound recordings, including all published, commercial recordings, would experience a shorter term of protection. However, as the date of the recording approaches 1972, the terms under

Federal and State law become increasingly similar. For example, a sound recording published in 1940 would be protected until the end of 2035 instead of February 15, 2067; one published in 1970 would be protected until the end of 2065 instead of February 15, 2067. In the case of one category of works—unpublished sound recordings whose term is measured by the life of author—there would actually be an extension of term if the author died after 1997. For example, if the author of an unpublished pre-1972 sound recording died in 2010, that sound recording would be protected under Federal law until the end of 2080.

In the 1976 Copyright Act, Congress made all unpublished works being brought under Federal law subject to the ordinary statutory term that the 1976 Act provided for copyrighted works: life of the author plus 50 years (later extended by the CTEA to life of the author plus 70 years). However, Congress was concerned that for some works, applying the ordinary statutory copyright terms would mean that copyright protection would have expired by the effective date of the 1976 Copyright Act, or would expire soon thereafter. Congress decided that removing subsisting common law rights and substituting statutory rights for a “reasonable period” would be “fully in harmony with the constitutional requirements of due process.” H.R. Rep. No. 94-1476, at 138–39 (1976). Accordingly, the 1976 Copyright Act included a provision that gave all unpublished works, no matter how old, a minimum period of protection of 25 years, until December 31, 2002. 17 U.S.C. 303. If those works were published by that date, they would get an additional term of protection of 25 years, to December 31, 2027 (later extended by the CTEA to 2047).

If pre-1972 sound recordings were brought under Federal copyright law, should a similar provision be made for those recordings that otherwise would have little or no opportunity for Federal copyright protection? If so, what would be a “reasonable period” in this context, and why? If not, would the legislation encounter constitutional problems (*e.g.*, due process, or Takings Clause issues)?

Increasing the Availability of Pre-1972 Sound Recordings

23. If the requirements of due process make necessary some minimum period of protection, are there exceptions that might be adopted to make those recordings that have no commercial value available for use sooner? For example, would it be worthwhile to consider amending 17 U.S.C. 108(h) to

allow broader use on the terms of that provision throughout any such “minimum period?” Do libraries and archives rely on this provision to make older copyrighted works available? If not, why not?

24. Are there other ways to enhance the ability to use pre-1972 sound recordings during any minimum term, should one be deemed necessary?

25. How might rights holders be encouraged to make existing recordings available on the market? Would a provision like that in section 303—an extended period of protection contingent upon publication—be likely to encourage rights holders to make these works publicly available?

Partial Incorporation

26. The possibility of bringing pre-1972 sound recordings under Federal law only for limited purposes has been raised. For example, some stakeholders seek to ensure that whether or not pre-1972 sound recordings receive Federal copyright protection, they are in any event subject to the fair use doctrine and the library and archives exceptions found in sections 107 and 108, respectively, of the Copyright Act. Others would like to subject pre-1972 sound recordings to the section 114 statutory license, but otherwise keep them within the protection of State law rather than Federal copyright law.

Is it legally possible to bring sound recordings under Federal law for such limited purposes? For example, can (and should) there be a Federal exception (such as fair use) without an underlying Federal right? Can (and should) works that do not enjoy Federal statutory copyright protection nevertheless be subject to statutory licensing under the Federal copyright law? What would be the advantages or disadvantages of such proposals?

Miscellaneous Questions

27. Could the incorporation of pre-1972 sound recordings potentially affect in any way the rights in the underlying works (such as musical works); and if so, in what way?

28. What other uses of pre-1972 recordings, besides preservation and access activities by libraries and other cultural institutions, might be affected by a change from State to Federal protection? For example, to what extent are people currently engaging in commercial or noncommercial use or exploitation of pre-1972 sound recordings, without authorization from the rights holder, in reliance on the current status of protection under State law? If so, in what way? Would protecting pre-1972 sound recordings

under Federal law affect the ability to engage in such activities?

29. To the extent not addressed in response to the preceding question, to what extent are people currently refraining from making use, commercial or noncommercial, of pre-1972 sound recordings in view of the current status of protection under State law; and if so, in what way?

30. Are there other factors relevant to a determination of whether pre-1972 sound recordings should be brought under Federal law, and how that could be accomplished?

Dated: October 29, 2010.

David O. Carson,
General Counsel.

[FR Doc. 2010-27775 Filed 11-2-10; 8:45 am]

BILLING CODE P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before December 3, 2010. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be

APPENDIX B

SUPPLEMENTAL PUBLIC NOTICE

Permanent Membership

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 OWCP Rachel P. Leiton, Director, Energy Employees' Occupational Illness Compensation—appointment expires on 09/30/11
 SOL Katherine E. Bissell, Associate Solicitor for Civil Rights and Labor Management—appointment expires on 09/30/11
 SOL Michael D. Felsen, Regional Solicitor, Boston—appointment expires on 09/30/12
 SOL Deborah Greenfield, Deputy Solicitor—appointment expires on 9/30/12

SOL Jeffrey L. Nesvet, Associate Solicitor for Federal Employees' and Energy Workers' Compensation—appointment expires on 09/30/13
 VETS Ismael Ortiz, Jr., Deputy Assistant Secretary—appointment expires on 9/30/12
 WHD Cynthia C Watson, Regional Administrator (Dallas)—appointment expires on 09/30/13

FOR FURTHER INFORMATION CONTACT: Ms. Crystal Scott, Director, Office of Executive Resources, Room C5508, U.S. Department of Labor, Frances Perkins Building, 200 Constitution Ave., NW., Washington, DC 20210, telephone: (202) 693-7628.

Signed at Washington, DC, on 24th day of November 2010.

Hilda L. Solis,
Secretary of Labor.

[FR Doc. 2010-30210 Filed 11-30-10; 8:45 am]

BILLING CODE 4510-23-P

LIBRARY OF CONGRESS**Copyright Office**

[Docket No. 2010-4]

Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of inquiry: Extension of comment period; extension of reply comment period.

SUMMARY: The Copyright Office of the Library of Congress is extending the time in which comments and reply comments can be filed in response to its Notice of Inquiry requesting public input on the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction.

DATES: Initial written comments must be received in the Office of the General Counsel of the Copyright Office no later than January 31, 2011. Reply comments must be received in the Office of the General Counsel of the Copyright Office no later than March 2, 2011.

ADDRESSES: The Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at <http://www.copyright.gov/docs/sound/comments/comment-submission-index.html>. The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as

an attachment via a browse button. To meet accessibility standards, each comment must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted on the Copyright Office Web site, along with names and organizations.

If electronic submission of comments is not feasible, comments may be delivered in hard copy. If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Room LM-401, James Madison Building, 101 Independence Ave., SE., Washington, DC 20559, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

If delivered by a commercial courier, an original and five copies of a comment or reply comment must be delivered to the Congressional Courier Acceptance Site ("CCAS") located at 2nd and D Streets, SE., Washington, DC between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM-403, James Madison Building, 101 Independence Avenue, SE., Washington, DC 20559. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Chris Weston, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: To assist in the preparation of its study on federal protection for pre-1972 sound recordings, the Office published a Notice of Inquiry seeking comments on many detailed questions regarding various aspects of the study. See 75 FR 67777 (November 3, 2010). Initial

comments were due to be filed by December 20, 2010; reply comments were due to be filed by January 19, 2011.

The Copyright Office has received a request from the Recording Industry Association of America to extend the comment period to January 31, 2011, in order to allow sufficient time to gather relevant information from its member companies and to provide the Office with comprehensive comments. Given the need for more factual data regarding pre-1972 sound recordings, and the complexity of the issues raised by the Notice of Inquiry, the Office has decided to extend the deadline for filing comments by a period of 42 days, making initial comments due by January 31, 2011. The period for filing reply comments will be similarly extended, making reply comments due by March 2, 2011.

Dated: November 24, 2010.

David O. Carson,

General Counsel.

[FR Doc. 2010-30213 Filed 11-30-10; 8:45 am]

BILLING CODE 1410-30-P

NUCLEAR REGULATORY COMMISSION

[EA-10-152; Project No. 52-0001; NRC-2010-0368]

In the Matter of Toshiba America Nuclear Energy Corporation and All Other Persons Who Seek or Obtain Access to Safeguards Information Described Herein; Order Imposing Safeguards Information Protection Requirements for Access to Safeguards Information (Effective Immediately)

I

On June 12, 2009, the U.S. Nuclear Regulatory Commission (the Commission or NRC) published a rulemaking in the **Federal Register** (74 FR 28112), that requires applicants for a variety of licensing activities, including nuclear power plant designers, to perform a design-specific assessment of the effects of a large, commercial aircraft impact and to incorporate design features and functional capabilities into the nuclear power plant design to provide additional inherent protection with reduced operator actions. Section V of the **Federal Register** notice contains specific requirements for applicants for new nuclear power reactors. To assist designers in completing this assessment, the Commission has decided to provide the detailed aircraft impact

characteristics that reactor vendors and architect/engineers who have the need to know and who meet the NRC's requirements for the disclosure of such information should use as reasonable input in studies of the inherent capabilities of their designs.

The NRC derived these characteristics from agency analyses performed on operating reactors to support, in part, the development of a broadly effective set of mitigation strategies to combat fires and explosions from a spectrum of hypothetical aircraft impacts. Although the NRC did not select these detailed characteristics as a basis for designing new reactors, the staff is suggesting that designers use them as a starting point for aircraft impact assessments. As stated in the rulemaking, the Commission will specify, in a safeguards information (SGI) guidance document, the detailed aircraft impact characteristics that should be used in a required assessment of the new reactor designs. The agency is working to finalize the form and values of those detailed characteristics. On July 10, 2009, the NRC issued Draft Regulatory Guide (DG)-1176, "Guidance for the Assessment of Beyond-Design-Basis Aircraft Impacts," to assist applicants in the completion of the assessment. The agency did not receive any comments on DG-1176. The staff is currently finalizing the regulatory guide. In addition, the staff recognizes that no national or international consensus has been reached on the selection of appropriate characteristics for such analyses. Therefore, applicants should consider the information preliminary and subject to authorized stakeholder comment. The detailed aircraft characteristics that are the subject of this Order are hereby designated as SGI,¹ in accordance with Section 147 of the Atomic Energy Act of 1954, as amended (AEA).

On October 24, 2008, the NRC revised Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, § 73.21, "Protection of Safeguards Information: Performance Requirements," to include applicants in the list of entities required to protect SGI (73 FR 63546). The NRC is issuing this Order to Toshiba America Nuclear Energy Corporation (TANE) to impose requirements for the protection of SGI in addition to the requirements in the revised 10 CFR 73.21. These additional requirements include nomination of a reviewing official,

¹ SGI is a form of sensitive, unclassified, security-related information that the Commission has the authority to designate and protect under Section 147 of the AEA.

restrictions on the storage of SGI, and access to SGI by certain individuals.

To implement this Order, TANE must nominate an individual, known as the "reviewing official," who will review the results of the Federal Bureau of Investigation (FBI) criminal history records check to make SGI access determinations. The reviewing official must be someone who seeks access to SGI. Based on the results of the FBI criminal history records check, the NRC staff will determine whether this individual may have access to SGI. If the NRC determines that the individual may not be granted access to SGI, the enclosed Order prohibits that individual from obtaining access to any SGI. Once the NRC determines that the nominated individual may have access to SGI, and after TANE has completed the background check on the reviewing official and has determined that he or she is trustworthy and reliable, and has approved the individual as the reviewing official, that reviewing official, and only that reviewing official, can make SGI access determinations for other individuals who have been identified by TANE as having a need to know SGI and who have been fingerprinted and have had a criminal history records check in accordance with this Order. The reviewing official can only make SGI access determinations for other individuals; he or she cannot approve other individuals to act as reviewing officials. If TANE wishes to nominate a new or additional reviewing official, the NRC must first determine whether that individual may have access to SGI before he or she can act in the capacity of a reviewing official.

The regulations at 10 CFR 73.59, "Relief from Fingerprinting, Identification and Criminal History Records Checks and Other Elements of Background Checks for Designated Categories of Individuals," relieve certain categories of individuals from fingerprinting requirements. Those individuals include: (1) Federal, State, and local law enforcement personnel, (2) Agreement State inspectors who conduct security inspections on behalf of the NRC, (3) members of Congress, (4) employees of members of Congress or congressional committees who have undergone fingerprinting for a prior U.S. Government criminal history check, and (5) certain representatives of the International Atomic Energy Agency or certain foreign government organizations. In addition, the NRC has determined that individuals who have had a Favorably-decided U.S. Government criminal history check within the last 5 years or individuals

APPENDIX C **NOTICE OF PUBLIC MEETING**

Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$32 for complete Consent Decree or \$15.75 for the Consent Decree without the appendices (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert E. Maher, Jr.,
Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011-11174 Filed 5-6-11; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Investment Act of 1998 (WIA); Notice of Incentive Funding Availability Based on Program Year (PY) 2009 Performance

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, in collaboration with the Department of Education, announces that four states are eligible to apply for Workforce Investment Act (WIA) (Pub. L. 105-220, 29 U.S.C. 2801 *et seq.*) incentive grant awards authorized by section 503 of the WIA.

DATES: The four eligible states must submit their applications for incentive funding to the Department of Labor by June 23, 2011.

ADDRESSES: Submit applications to the Employment and Training Administration, Office of Policy Development and Research, Division of Strategic Planning and Performance, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210, *Attention:* Karen Staha and Luke Murren, Telephone number: 202-693-3733 (this is not a toll-free number). Fax: 202-693-2766. *E-mail:* staha.karen@dol.gov and murren.luke@dol.gov. Information may also be found at the ETA Performance Web site: <http://www.doleta.gov/performance>.

SUPPLEMENTARY INFORMATION: Four states (see Appendix) qualify to receive a share of the \$10.2 million available for incentive grant awards under WIA

section 503. These funds, which were contributed by the Department of Education from appropriations for the Adult Education and Family Literacy Act (AEFLA), are available for the eligible states to use through June 30, 2013, to support innovative workforce development and education activities that are authorized under title IB (Workforce Investment Systems) or Title II (AEFLA) of WIA, or under the Carl D. Perkins Career and Technical Education Act of 2006 (Perkins IV), 20 U.S.C. 2301 *et seq.*, as amended by Public Law 109-270. In order to qualify for a grant award, a state must have exceeded its performance levels for WIA title IB and adult education (AEFLA). (Due to the lack of availability of PY 2009 performance data under the Carl D. Perkins Vocational and Technical Education Act of 1998 (Perkins III), the Department of Labor and the Department of Education did not consider states' performance levels under the Perkins Act in determining incentive grants eligibility.) The goals included employment after training and related services, retention in employment, and improvements in literacy levels, among other measures. After review of the performance data submitted by states to the Department of Labor and to the Department of Education, each Department determined for its program(s) which states exceeded their performance levels (the Appendix at the bottom of this notice lists the eligibility of each state by program). These lists were compared, and states that exceeded their performance levels for both programs are eligible to apply for and receive an incentive grant award. The amount that each state is eligible to receive was determined by the Department of Labor and the Department of Education, based on the provisions in WIA section 503(c) (20 U.S.C. 9273(c)), and is proportional to the total funding received by these states for WIA Title IB and AEFLA programs.

The states eligible to apply for incentive grant awards and the amounts they are eligible to receive are listed in the following chart:

State	Amount of award
1. Arizona	\$3,000,000
2. Minnesota	3,000,000
3. North Dakota	1,210,964
4. Texas	3,000,000

Dated: May 2, 2011.

Jane Oates,
Assistant Secretary for Employment and Training.

[FR Doc. 2011-11191 Filed 5-6-11; 8:45 am]

BILLING CODE 4510-FN-P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2010-4]

Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of public meeting.

SUMMARY: The Copyright Office will host a public meeting to discuss the desirability and means of bringing sound recordings fixed before February 15, 1972 under Federal jurisdiction. The meeting will provide a forum, in the form of a roundtable discussion, for interested parties to address the legal, policy, and factual questions raised so far regarding pre-1972 sound recordings. It will take place on June 2 and 3, 2011 at the Copyright Office in Washington, DC. In order to participate in the meeting, interested parties should submit a request via the Copyright Office Web site.

DATES: The public meeting will take place on Thursday, June 2, 2011 from 9 a.m. to 5 p.m. and Friday, June 3, 2011 from 9 a.m. to 1:30 p.m. Requests for participation must be received in the Office of the General Counsel of the Copyright Office no later than Monday, May 16, 2011 at 5 p.m. E.D.T.

ADDRESSES: The public meeting will take place in the Copyright Office Hearing Room, Room LM-408 of the Madison Building of the Library of Congress, 101 Independence Ave., SE., Washington, DC. The Copyright Office strongly prefers that requests for participation be submitted electronically. A public meeting page containing a request form is posted on the Copyright Office Web site at <http://www.copyright.gov/docs/sound/>. Persons who are unable to submit a request electronically should contact Attorney-Advisor Chris Weston at 202-707-8380.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Chris Weston, Attorney-Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. *Telephone:* (202) 707-8380. *Telefax:* (202) 707-8366.

SUPPLEMENTARY INFORMATION:**Background**

Congress has directed the U.S. Copyright Office to conduct a study on the desirability and means of bringing sound recordings fixed before February 15, 1972 under Federal jurisdiction. Currently, such sound recordings are protected under a patchwork of state statutory and common laws from their date of creation until 2067. The legislation mandating this study states that it is to:

cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage.

H.R. 1105, Public Law 111–8 [Legislative Text and Explanatory Statement] 1769.

On November 3, 2010, the U.S. Copyright Office published a Notice of Inquiry seeking comments on the question of bringing pre-1972 sound recordings under Federal jurisdiction. 75 FR 67777 (November 3, 2010). The notice provided background as to why state law protection of pre-1972 sound recordings has not been preempted, unlike state law protection of other kinds of potentially copyrightable works. It also discussed the belief of some in the library and archives community that the absence of a Federal protection scheme for sound recordings has impeded the preservation and public availability of these recordings. In an attempt to understand the various effects that federalizing protection for pre-1972 sound recordings might have, the notice posed 30 specific questions to commenters regarding preservation and access, economic impact, term of protection, constitutional considerations, and other aspects of federalization.

The Copyright Office received 58 comments in response to its inquiry, along with 231 copies of a form letter. The Office subsequently received 17 reply comments. All comments, along with the notice of inquiry, are available at <http://www.copyright.gov/docs/sound/>. The comments ran the gamut from general policy arguments to proposals for new legislative language and, as anticipated, illuminate a variety of experiences and perspectives. Some comments raised new legal questions, and others deepened the Office's understanding of the number and variety of pre-1972 sound recordings at issue. The Copyright Office is holding a public meeting in order to permit interested parties to present their views

and discuss areas of agreement and disagreement through a roundtable discussion.

Requests for Participation

The Office has divided up the topics it wishes to discuss into nine sessions—five on June 2, 2011 and four on June 3, 2011—and briefly describes them below. These descriptions only note the major issues for each session and do not necessarily list every subject appropriate for discussion.

Day 1, Session 1—Assessing the Landscape: What are the legal and cultural difficulties—as well as benefits—attributable to state law protection of pre-1972 sound recordings?

Day 1, Session 2—Availability of Pre-1972 Sound Recordings: What is the true extent of public availability of pre-1972 sound recordings? In relation to the overall availability of such recordings, how significant are rights-holder reissue programs and recent donations to the Library of Congress?

Day 1, Session 3—Effects of Federalization on Preservation, Access, and Value: What benefits would federalization have with respect to preservation of and public access to pre-1972 sound recordings? Are those benefits quantifiable (i.e., in economic or cultural terms)? How would federalization affect the economic and cultural value of pre-1972 sound recordings? Are such effects quantifiable?

Day 1, Session 4—Effects of Federalization on Ownership and Business Expectations: What effects would federalization have with respect to ownership status, publication status, contracts, termination rights, registration requirements, and other business aspects of pre-1972 sound recordings? To what extent would these results depend on the manner in which federalization might be effected?

Day 1, Session 5—Effects of Federalization on Statutory Licensing: As a matter of logic, policy, and law, should pre-1972 sound recordings be eligible for the section 114 statutory license? Can and should they be subject to the section 114 statutory license if they are not otherwise brought into the Federal statutory scheme?

Day 2, Session 1—Term of Protection: Assuming that copyright protection for pre-1972 sound recordings is federalized, what are the best options for the term of protection of federalized pre-1972 sound recordings? Should pre-1972 recordings be considered separately? What about unpublished recordings? If federalized pre-1972 sound recordings are given shorter

terms than they had under state law, should term extensions be offered as an incentive to rights-holders who make their recordings publicly available within a specified period of time?

Day 2, Session 2—Constitutional Considerations: Is it appropriate to grant Federal copyright protection to works already created, fixed, and in some cases published? Are there circumstances under which federalization of pre-1972 sound recordings would effect a “taking” under the Fifth Amendment? If so, how could this be addressed in the legislation?

Day 2, Session 3—Alternatives to Federalization: What alternatives to federalization, if any, should be considered and why?

Day 2, Session 4—Summing Up: In light of this public meeting and of the comments received, please sum up your views on (1) whether pre-1972 sound recordings should be brought within the protection of Federal copyright law and (2) in the case of federalization, what adaptations to existing law would be necessary or advisable.

Requests to participate should be submitted online at <http://www.copyright.gov/docs/sound/>. The online form asks for the requestor's name, organization, title, postal mailing address, telephone number, fax number, and an e-mail address, although not all of the information is required. The requestor should also indicate, in order of preference, the sessions in which the requestor wishes to participate. Depending upon the level of interest, the Copyright Office may not be able to seat every participant in every session he or she requests, so it is helpful to know which topics are most important to each participant. In addition, please note that while an organization may bring multiple representatives, only one person per organization may participate in a particular session. A different person from the same organization may, of course, participate in another session.

Requestors who have already submitted a comment, or who will be representing an organization that has submitted a comment, are asked to identify their comments on the request form. Requestors who have not submitted comments should include a brief summary of their views on the topics they wish to discuss, either directly on the request form or as an attachment. To meet accessibility standards, all attachments must be uploaded in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned

document). The name of the submitter and organization (if any) should appear on both the form and the face of any attachments.

Nonparticipants who wish to attend and observe the discussion should note that seating is limited and, for nonparticipants, will be available on a first come, first served basis.

Dated: May 4, 2011.

Maria A. Pallante,

Acting Register of Copyrights.

[FR Doc. 2011-11224 Filed 5-6-11; 8:45 am]

BILLING CODE 1410-30-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (11-045)]

NASA Advisory Council; Task Group of the Science Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Task Group of the NASA Advisory Council (NAC) Science Committee. This Task Group reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, May 25, 2 p.m. to 4 p.m., Local Time.

ADDRESSES: This meeting will take place telephonically and by WebEx. Any interested person may call the USA toll free conference call number 800-369-3194, pass code TAGAGMAY25, to participate in this meeting by telephone. The WebEx link is <https://nasa.webex.com/>, meeting number 993 198 285, and password tagag_May25.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358-4452, fax (202) 358-4118, or mnnorris@nasa.gov.

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes the following topic:

—Organizing Analysis Groups to Serve the Needs of More than One NASA Mission Directorate.

It is imperative that the meeting be held on these dates to accommodate the

scheduling priorities of the key participants.

Dated: May 2, 2011.

P. Diane Rausch,

*Advisory Committee Management Officer,
National Aeronautics and Space Administration.*

[FR Doc. 2011-11163 Filed 5-6-11; 8:45 am]

BILLING CODE 7510-13-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-250 and 50-251; NRC-2011-0094]

Florida Power & Light Company; Turkey Point, Units 3 and 4; Notice of Consideration of Issuance of Amendment to Facility Operating License, and Opportunity for a Hearing and Order Imposing Procedures for Document Access to Sensitive Unclassified Non-Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of license amendment request, opportunity to comment, opportunity to request a hearing, and Commission order.

DATES: A request for a hearing must be filed by July 8, 2011. Any potential party as defined in Title 10 of the Code of Federal Regulations (10 CFR) 2.4 who believes access to Sensitive Unclassified Non-Safeguards Information (SUNSI) is necessary to respond to this notice must request document access by May 19, 2011.

ADDRESSES: Please include Docket ID NRC-2011-0094 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2011-0094. Address questions about NRC dockets to Carol Gallagher 301-492-3668; e-mail Carol.Gallagher@nrc.gov.

You can access publicly available documents related to this notice using the following methods:

- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, *Mail Stop:* TWB-05-B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.
- *NRC's Public Document Room (PDR):* The public may examine, and have copied for a fee, publicly available documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC's Library at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov. The application for amendment, dated October 21, 2010, contains proprietary information and, accordingly, those portions are being withheld from public disclosure. A redacted version of the application for amendment, dated December 14, 2010, is available electronically under ADAMS Accession No. ML103560167.

- *Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at <http://www.regulations.gov> by searching on Docket ID: NRC-2011-0094.

FOR FURTHER INFORMATION CONTACT: Jason C. Paige, Project Manager, Plant Licensing Branch II-2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. *Telephone:* 301-415-5888; *fax number:* 301-415-2102; *e-mail:* Jason.Paige@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or the Commission)

APPENDIX D LIST OF PARTIES SUBMITTING INITIAL COMMENTS

APPENDIX D: INITIAL COMMENTS

Document	Organization/Comment
1	Michael Fitzgerald
2	Bill Hebden
3	Courtney Chartier
4	Phil Gries
5	R. Fay
6	Susan Hoffius
7a	Starr Gennett Foundation
7b	David J. Fulton, Starr-Gennett Foundation
8	Aaron A. Fox
9	Al Schlachtmeyer
10	Alison Stankrauff
11	Tanya Merchant
12	Benjamin Irwin
13	Darren Walters
14	Jean Dickson
15	Zoe Waldron
16	Deborah Campana
17	Dale Cockrell
18	Jodi Allison-Bunnell
19	Michael Burch
20	Lynn Hooker
21	Cristobal Diaz Ayala
22	Cynthia Varady
23	Henry Sapoznik
24	Peggy Davis
25	Sherry L. Mayrent
26	Abigail O. Garnett
27	Brian Lee Corber
28	Doug Pomeroy

29	Mark Slobin
30	Demetrio Wazar
31	Geoff Canyon
32	Louis Zell
33	Julie King
34	Max Cantor
35	Nathan Lambson
36	Maurice Saylor
37	Robert C. Lancefield
38	Nicola Battista
39	Helen R. Tibbo, Society of American Archivists
40	Rachel Evangeline Barham
41	Thad E. Garrett
42	Tim Brooks, Association of Recorded Sound Collections
43	Winston Barham
44	Eric Harbeson, Music Library Association
45	K. Matthew Dames, Syracuse University
46	Kenneth Crews
47	Lizabeth A. Wilson, University of Washington Libraries
48	Patrick Feaster
49	Patrick Loughney, Library of Congress
50	Randy Silverman & Alison Mower, University of Utah
51	Recording Industry Association of America and American Association of Independent Music
52	Stephanie M. Roach
53	Steven R. Englund, Sound Exchange, Inc.
54	Abigail Phillips, Electronic Freedom Foundation
55	Joel Brian Kellum - Comment 1 and Comment 2
56	Alex Cummings
57	Grooveshark form letter
58	Steven Smolian

APPENDIX E LIST OF PARTIES SUBMITTING REPLY COMMENTS

APPENDIX E: REPLY COMMENTS

Document	Organization/Comment
1	James A. Armstrong
2	Ivan Hoffman
3	Ryland Hawkins, Author Services, Inc.
4	Eric N. Burns, Conversation in Black
5	Eric D. Leaner, VAPAC Music Publishing, Inc.
6	Helen R. Tibbo, Society of American Archivists
7	The Association of Research Libraries and the American Library Association
8	Eric Harbeson, The Music Library Association (MLA)
9	Tim Brooks, Association for Recorded Sound Collections
10	Patrick Loughney, The Library of Congress
11	Future of Music Coalition
12	David Oxenford & Jane Mago, National Association of Broadcasters
13	Elizabeth Townsend Gard & the 2011 Copyright Class at Tulane University Law School
14	Recording Industry Association of America and American Association of Independent Music
15	Bruce Rich & Cynthia Greer, Sirius XM Radio, Inc.
16	J. Gregg Gautereaux, Artist's Reprieve LLC
17	Joel Kellum

APPENDIX F LIST OF MEETING PARTICIPANTS

APPENDIX F: PUBLIC MEETING PARTICIPANTS

Gil Aronow, Sony Music Entertainment

Richard Bengloff, American Association of Independent Music

Tim Brooks, Association for Recorded Sound Collections

Sam Brylawski, Society for American Music

Peggy Bulger, American Folklife Center, Library of Congress

Brandon Butler, Association of Research Libraries

Dwayne Buttler, University Libraries, University of Louisville

Susan Chertkof, Recording Industry Assn of America

Michael DeSanctis, SoundExchange, Inc.

Elizabeth Townsend Gard, Tulane University Law School

Eric Harbeson, Music Library Association

Ivan Hoffman, attorney

Adam Holofcener, Future of Music Coalition

Tomas Lipinski, School of Library & Information Science, Indiana University

Patrick Loughney, Library of Congress

Steve Marks, Recording Industry Association of America

David Oxenford, National Association of Broadcasters

Jennifer Pariser, Recording Industry Association of America

Jay Rosenthal, National Music Publishers Association

Charles Sanders, Songwriters Guild of America

Eric Schwartz, Recording Industry Association of America