

TULANE LAW SCHOOL

Elizabeth Townsend-Gard  
Associate Professor of Law

April 11, 2011

Dear Mr. Carson,

Please accept Professor Elizabeth Townsend Gard and the 2011 Copyright class at Tulane University Law School's Response to the Comments submitted to the Copyright Office's Notice of Inquiry regarding pre-1972 sound recordings. Our response focuses primarily on the **potential copyright term** if pre-1972 sound recordings are brought under federal protection.

The Response to the Comments is based in part on the research of Dr. Elizabeth Townsend Gard, Associate Professor of Law, Tulane University Law School, Co-Director of the Tulane Center for IP, Media and Culture and Co-Inventor of the Durationator®.<sup>1</sup> Dr. Townsend Gard has focused her legal scholarship on the question of copyright duration, including unpublished works and copyright restoration of foreign works.<sup>2</sup> She has also spent the last five years devoting a good deal of time research the copyright terms for works country-by-country, which makes up the core element of the soon-to-be completed software tool, the Durationator®.<sup>3</sup> She and her law students (over three dozen) have devoted thousands of hours to the question of duration in many scenarios—historical,<sup>4</sup> theoretical,<sup>5</sup> legal,<sup>6</sup> practical, and comparative, and so it was natural that as part of the Response, the best use of her expertise would be focused on copyright term. While building on Dr. Townsend Gard's work, the Response has been formulated as part of the 2011 Copyright Course<sup>7</sup> and the "Future of Copyright" Speaker Series<sup>8</sup> at

---

<sup>1</sup> Professor Townsend Gard is an Associate Professor and Co-Director of the Tulane Center for IP, Media and Culture, Tulane University Law School. She holds a Ph.D. in European History from UCLA and a J.D./LL.M. in International Trade from the James E. Rogers College of Law, University of Arizona. The Durationator® is the culmination of her experiences as a doctoral student focused on twentieth century war and biography, and her legal research. More information regarding the Durationator® can be found at [www.durationator.com](http://www.durationator.com).

<sup>2</sup> See Elizabeth Townsend Gard, "The Birth of the Unpublished Public Domain and the International Implications," 24 *Cardozo Arts & Ent. L.J.* (2006), Elizabeth Townsend Gard, "Unpublished Work and the Public Domain: The Opening of a New Frontier," 54 *J. Copyright Society of the U.S.A.* (Winter 2007), and *Copyright Law v. Trade Policy: Understanding the Golan Battle within the Tenth Circuit*, 34 *Columbia Journal for Law and the Arts* 2 (Winter 2011), 131-199.

<sup>3</sup> The Durationator® software tool seeks to "make the past usable one query at a time" by providing legal information regarding the copyright term of any given cultural work in any jurisdiction around the world. We are currently in our final summer of intense research/coding and we will begin the testing phase in the late Summer/early Fall 2010. The Tulane Law School Usable Past Copyright Project, and the Durationator® software tool have been funded by a Tulane University Research Enhancement Grant and an IDEA grant from the Office of Technology Transfer at Tulane University.

<sup>4</sup> Along with Professor Townsend Gard, Zachary Christiansen (J.D. expected, 2012) and Evan Dicharry (IP Fellow, Tulane Center for IP, Media and Culture, J.D., 2010) have both devoted great time to our historical research, particularly in an international context.

<sup>5</sup> See W. Ron Gard and Elizabeth Townsend Gard, "Marked by Modernism: Reconfiguring the "Traditional Contours of Copyright Law" for the Twenty-First Century" *Modernism and Copyright*, edited by Paul Saint-Amour, Oxford University Press (2010), 155-172; and W. Ron Gard and Elizabeth Townsend Gard, *The Present (User-Generated Crisis) is the Past (1909 Copyright Act): An Essay Theorizing the "Traditional Contours of Copyright" Language*, 28 *Cardozo Arts and Entertainment Law Journal* 455, (455-499) (Winter 2011).

<sup>6</sup> See The Durationator® at [www.durationator.com](http://www.durationator.com), where we have been coding and analyzing U.S. and foreign laws for many years.

<sup>7</sup> As part of the Spring 2011 Copyright course, thirty-four students and Professor Townsend Gard looked at each comment in detail, and then also research and discussed each of the posed questions from the Notice. After great discussion of ownership, Section 108, and other related issues, the class (with Professor Townsend Gard's suggestion), narrowed its focus to the potential

Tulane University Law, where as part of the course, the 2L, 3L and LL.M. law students reviewed the Comments, did independent research on the questions posed in the Notice, and then had a number of discussions (and voting sessions). The Response presented below represents collaborative work between Professor Townsend Gard and her copyright class.<sup>9</sup>

The class began by looking at each Comment submitted, and asking how each interested party had answered the three general questions posed by the Copyright Office: (1) preservation, (2) public access, and (3) economic impact. Students were assigned individual Comments, and directed to look into both the arguments raised therein and background information on the Comment's author. We then turned to the series of specific questions raised by the Notice, and students were assigned individual questions to research. Finally, we focused on the question of what a potential term would look like, and what potential impediments (i.e. authorship, the Berne Convention etc.) would have to help formulate a workable answer.

I. Summary of Conclusions and Term Suggestion(s)

A. After extensive work, we propose the following changes to the 1976 Copyright Act, if pre-1972 Sound Recordings are brought under federal protection:

1. Repeal of Section 301(c) [to include sound recordings into the federal copyright law]
2. An addition to Section 303 [We have named Section 303(c)]
3. Application of Rule of the Shorter Term to foreign sound recordings
4. For all pre-1972 Sound Recordings: a term of 50 years from fixation.
5. But no earlier than five years from enactment.
6. As an incentive, if the copyright holder has made the sound recording available to the public within the period of enactment, then the term is extended [either]
  - a. 50 years from making available or December 31, 2047 whichever is greater [to match 303(a)],OR
  - b. February 15, 2067.<sup>10</sup>

B. The **statutory language** might be structured in the following manner:

Copyright in Sound Recordings created before February 15, 1972 endures for the term of fifty years from fixation. In no case, however, shall the term of copyright in such a work expire before five years from enactment; and, if the work is made available to the public by the copyright holder within five years of enactment, the term of copyright shall not expire before [December 31, 2047 or February 15, 2067].

The language replicates Section 303(a), but makes a new transition period of five years, an incentive period, and additional years of protection for the copyright holder who makes the work available to the public during the transition period.

---

term for pre-1972 sound recordings, as this seemed to encompass much of the other components as well. Examples of the work done on the comments and individual questions posed can be found in the appendix.

<sup>8</sup> This is the second time Tulane University Law School has held the "Future of Copyright" Speaker series, which this year focused on the career and thoughts of Kenneth Crews, Jane Ginsberg, Nina Paley, Siva Vaidhyanathan, David Carson, and Jule Sigall.

<sup>9</sup> Primary writers include Professor Townsend Gard, Evan Dicharry, Erin Anapol, Zachary Chistainsen, and Jessica Edmondson. Attribution to individual students for specific writings are noted in an accompanying footnote with the text.

<sup>10</sup> Note: These are two legislative choices, rather than choices for a copyright holder.

C. As the text below will explain, we came to the suggestion after reading the Comments, conducting further research, and engaging in serious discussion. While reading, researching, and discussing, we reached several conclusions that would inform our suggestion. Those conclusions are as follows:

1. “Publication” was not a practical marker for pre-1972 sound recordings.
2. Authorship was not always a knowable element.
3. Librarians and others wanted a short term that would bring most non-commercial and no longer commercial works into the public domain quickly.
4. Content owners wanted to continue to exploit commercially viable works.
5. The Copyright law has as its core a balance between owners and users.<sup>11</sup>
6. The Copyright is an incentive-based system, and so incentives for copyright holders and users (once the work is in the public domain) should be part of the statute.
7. Sound recordings would fall under Section 303, because they were not legally allowed to be considered copyrighted or registered under the 1909 Copyright Act.

D. The remainder of the document will discuss: (1) the process of how we came to formulate our proposed Section 303(c), including what the commenters had suggested regarding term; (2) what kinds of questions addressed duration; (3) what problems (e.g. authorship, ownership) we discussed to get to our draft of Section 303(c); and (4) why other solutions would be problematic (i.e. 95 year term, author+ 70, etc.). We conclude by discussing how we can draft the proposed amendment to the 1976 Copyright Act we refer to as Section 303(c).

## II. Questions relating to the Term: Parsing out the Questions

The students and Professor Townsend Gard reviewed all of the questions that had answers that were law-related. (See appendix for sample of the answers). For the focus of the response, the class focuses on the two main questions asked regarding term, which were question 21 and 22:

**Question 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?**

We interpreted this question as whether the copyright term should fall under Section 302, Section 303 or Section 304. Each section refers to a specific category of works, based on its publication and/or creation date. Section 302 applies to works created and published after January 1, 1978.<sup>12</sup> Section 303 focuses on works created but not federally published, copyrighted or registered before January 1, 1978.<sup>13</sup> Section 304 applies to works published before January 1, 1978.<sup>14</sup> Each section carries different terms of protection, with Section 303 incorporating Section 302 into its own framework.

The question, then, is where would sound recordings fit within the current structure of terms for copyrights under the 1976 Copyright Act. Professor Townsend Gard and the law students in the 2011

---

<sup>11</sup> U.S. Constitution, 1.8.8.

<sup>12</sup> 17 U.S.C. § 302.

<sup>13</sup> 17 U.S.C. § 303.

<sup>14</sup> 17 U.S.C. § 304.

Copyright course spent a good time sorting through each possibility. They came to the following conclusions:

- 1) Section 302: not applicable because this applies to works created after January 1, 1978
- 2) Section 303: most logical place for sound recordings, because they were not eligible for federal protection (like most unpublished works) and therefore, had been created but not copyrighted or registered after January 1, 1978. We noted, however, that Section 303 refers back to Section 302 as a measurement for the term (with additional elements that will be discussed below), and that Section 302 categories are highly problematic regarding sound recordings (Who is the author? When was a work considered published? How does one determine whether there are joint authors?) So, while we ultimately believed sound recordings should fit under Section 303, as its own subsection (Section 303(c)), we did not believe using the “Section 302” categories would provide clear, useful markers for determining the term of a sound recording.
- 3) Section 304: many of the Commenters assumed that sound recordings would fit under Section 304, but in fact this is a mistake. First, sound recordings were not eligible as registered or published works under the 1909 Act, and therefore, would not have met the requirements for inclusion within this category. Second, when would a work be considered published? How would one treat an unpublished work? What happens when there is an unpublished work and then a published version of that work—which date would apply? But beyond the logistics, it did not seem to make sense to treat sound recordings retroactively as if they had been part of the 1909 Act, when in fact they had not. Section 303 seemed a better fit for those works that had not been eligible or had not sought protection under 1909 but were now brought in to the federal system through Section 301.

**Question 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.<sup>15</sup>**

Response: This is assuming that the marker is fixation and the term is measured by 95 years from fixation.

**Most pre-1972 sound recordings, including all published, commercial recordings, would experience a shorter term of protection.**

Response: This is assuming a ninety-five year term from fixation.

**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.**

Response: Again, this is assuming a ninety-five year term. How are sound recordings classified as published?

**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**

---

<sup>15</sup> We will answer individual parts of Question 22.

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.

Response: The term would actually mimic all of the 302 categories, and could be a joint authorship or work for hire term (120 years), if it followed Section 303(a).

**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)?**

The Spring 2011 Copyright Course spent a good deal of time discussing the “reasonable term” as a transition period for sound recordings. While Section 303(a), as part of the original 1976 Copyright Act, provided for a 25 year term as a transition period for unpublished works, Section 104A, enacted in 1994,<sup>16</sup> only provided for a one-year term to transition from works that had been in the public domain to works (re)copyrighted, or “restored.”<sup>17</sup> Congress felt that one year was long enough for reliance parties.<sup>18</sup> The class believed (on a gut feeling) that one year would be too short a transition period but that twenty-five years was too long, particularly when works were disintegrating and being neglected, and there were user groups anxious to care, restore, and use them once they entered the public domain. After much debate, the course believed that a five year transition period seemed fair—and gave a long enough incentive period to publish/make available works for an additional term of protection, following in the footsteps of Section 303(a).

Regarding whether a five year (or shorter/longer period) would satisfy the due process and Takings Clause, these questions were beyond the scope of our research.<sup>19</sup> We did note that the one-year period seemed sufficient for Section 104A. So, that was encouraging. Moreover, our suggestion provides for the incentive that if the work is published/made available to the public by the completion of the five year period, the copyright holder obtains protection for the work until Feb 15, 2067. After much debate, the class felt the 2067 date was useful for three reasons: 1) it provided a uniform date in which the remaining pre-1972 sound recordings would all come into the public domain; 2) the date did not rely on determining when a work had been created or published, or on determining authorship; and 3) by actively

---

<sup>16</sup> Public Law Pub. L. No. 103-465, 103d Cong., 2d Sess., 108 Stat. 4809

<sup>17</sup> 17 U.S.C. §104A.

<sup>18</sup> See *id.*

<sup>19</sup> SAA had suggested a five year term as part of their comment, when it came to unpublished sound recordings that the copyright holder may want an opportunity to exploit commercially. Helen R. Tibbo, Society of American Archivists, Comment 40.

making the work available to the public, the copyright holder gained the same term of protection under federal law that had been expected under state law.

### III. The Comments and Copyright Term

Of the fifty-nine comments, only eleven directly discussed the potential term for federalized pre-1972 sound recordings. Many wanted works available in the public domain.<sup>20</sup> For example, Nicola Battista, a journalist, music producer and IP consultant from Italy, expressed her concerns over duration and the public domain, but did not discuss a potential alternative term.

#### A. 50 year term

1. The Electronic Frontier Foundation, the Society of American Archivists, and the Library of Congress, as well as some of the individual-citizen commenters, all proposed terms of fifty years.

##### a. Electronic Frontier Foundation

i. Comment: The EFF suggested a length of fifty years from the date of fixation as their term of first choice.<sup>21</sup> The 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. To the EFF, fifty years is a reasonable length that is appropriate under the Progress Clause's "limited times" proviso.

ii. Response: Based on the constitutional limits set forth under the Progress Clause, fifty years from date of fixation is a reasonable term that satisfies both the copyright holder and those in the public domain.<sup>22</sup> Many feel as though the current term is too long, and under State protection, potentially indefinite and indeterminable in length. It is important to ensure that "the public will not be permanently deprived of the fruits of an artist's labors."<sup>23</sup> Further, the counterargument to copyright owners' concern over negative economic effects of a shorter term is that negative effects are unlikely considering "many of the works in question are at this time commercially unavailable and therefore currently hold little, if any, market value for rights owners."<sup>24</sup> Those advocating a shorter term posit the possibility that through rediscovery, works may actually gain value for the copyright owner, as libraries and archives would make the pre-1972 sound recordings digitally accessible. This comment likewise takes into account the necessity of balancing interests - while the recordings may end up with a shorter term of protection (fifty years, bringing benefit to the public), those with copyright interests in the work will still benefit.<sup>25</sup>

---

<sup>20</sup> Jordan Parker and Stacey Foltz, 2011 Copyright Course, Tulane University Law School, report that seven of the comments they looked at did not specifically mention a term but would like works available in the public domain.

<sup>21</sup> Written by Justin Fielkow, 2011 Copyright Class, Tulane University Law School

<sup>22</sup> Written by Justin Fielkow, 2011 Copyright Class, Tulane University Law School

<sup>23</sup> *Stewart v. Abend*, 495 U.S. 207 (1990).

<sup>24</sup> Abigail Phillips, Electronic Frontier Foundation, Comment 55, available at

<http://www.copyright.gov/docs/sound/comments/initial/20110131-Abigail-Phillips-Electronic-Freedom-Foundation.pdf>.

<sup>25</sup> Justin Fielkow, Response to Comment 55.

## **b. Society of American Archivists**

i. Comment: The SAA suggested 50 years as a first choice, and 95 as a second. The SAA suggested a fifty year term, explaining that it is “found in most international copyright agreements,” and believed that a fifty year term “would ensure harmonization of copyright term that was advanced so strongly by copyright owners as a justification for copyright extension in 1998.”<sup>26</sup> No further discussion was given as to why a fifty year term was preferable.

ii. Response: We did not find a fifty year term for sound recordings in all of the primary international treaties.<sup>27</sup> Moreover, we found from our research on the Durationator® four variations of terms in foreign jurisdictions, with countries like the United Kingdom providing transition provisions with variable terms depending on the date associated with the Sound Recording.<sup>28</sup> Regardless of which term the U.S. chooses (if any), harmonization will not occur, as the world does not have a harmonized view of the term for sound recordings.

## **c. Library of Congress**

i. Comment: Pointing towards the “neighboring rights” systems of many European countries, Patrick Loughney, on behalf of the Library of Congress, suggests a 50 year term for sound recordings. To justify a different term for sound recordings (vis-à-vis other types of works, e.g. literary works), Mr. Loughney points to a statistical study. This study, which considered 400,000 of the most commercially successful U.S. works created between 1890s-1964, found that less than less than 1% of pre-1920 sound recordings are currently made commercially available by their copyright holder. Mr. Loughney believes that this proves that, in the case of sound recordings especially, a lengthy term fails to provide additional incentive, and therefore is unnecessary.

ii. Response: The fact that other countries provide a 50 year term of protection for sound recordings should certainly be taken under consideration. This is especially true considering our own history of disparate treatment of sound recordings (e.g., providing sound recordings with state instead of federal protection). However, Mr. Loughney’s arguments based on incentive are less persuasive. The same argument could likely be made for works in any medium. Statistical studies of other types of works, such as books, and musical compositions, would likely reveal that only a small percentage of pre-1920 works continue to be made available by the copyright holder. Furthermore, the fact that few pre-1920s recordings are currently made available by their copyright holders does not mean that in 40 years, the same will be true for 1960s recordings. While many would agree with Mr. Loughney’s concerns

---

<sup>26</sup> SAA, Question 21.

<sup>27</sup> Reference the international section: See *infra* Part IV.D and accompanying notes.

<sup>28</sup> Reference International Section and Appendix: See *infra* Part IV.D and appendix A-2.

over terms which last longer than their incentives, such concerns spread across the scope of copyrighted subject matters, and do not seem to support disparate term for sound recordings particularly.<sup>29</sup>

**d. Lizabeth Wilson, Dean of University of Libraries, University of Washington**

i. Comment: Lizabeth Wilson, Dean of University Libraries at the University of Washington,<sup>30</sup> proposed a repeal of § 301(c), bringing pre-1972 sound recordings under federal control, and providing a 50 year term for those works.

ii. Response: Like many others, Ms. Wilson proposes a 50 year term. Ms. Wilson represents an important interest in any question of copyright – Librarians. Like others advocating for a 50-year term, Ms. Wilson is concerned with preservation and access. Libraries, archives, collectors, and the like seem to agree upon a 50-year term. However, the music industry and individual copyright owners would likely be unsatisfied; therefore, a 50 year term *alone* might fail to strike the appropriate balance between competing interests.

**e. Patrick Feaster**

i. Comment: Patrick Feaster promotes the idea of a 50-year term for sound recordings as a means of harmonizing US copyright law with much of the rest of the world.

ii. Response: While the 50-year term will certainly, in some respects, bring US law into a greater degree of harmony with many legal systems around the world. However, a pure 50-year term would lead to many works being immediately removed from copyright and a related backlash from copyright holders.<sup>31</sup>

**B. 95 Year term**

1. The Music Library Association and the Society of American Archivists both suggested a ninety-five year term.

**a. The Music Library Association**

i. Comment: The MLA has made the following specific recommendations:  
-striking 17 U.S.C. 301(c);  
-amending 17 U.S.C. 304 to provide for a 95-year copyright term for sound recordings fixed prior to February 15, 1972 but not before January 1, 1923

---

<sup>29</sup> Evan Dichary, IP Fellow, Tulane Center for IP, Media and Culture, Tulane University Law School.

<sup>30</sup> Jessica Edmondson, student, 2011 Copyright Course, Tulane University Law School.

<sup>31</sup> Evan Dichary, IP Fellow, Tulane Center for IP, Media and Culture, Tulane University Law School.



The MLA circumvents the problem of determining date of ‘publication’ of pre-1972 sound recordings by instead focusing on the date of fixation, though it offers no definition for this term. The MLA believes that this will create uniformity in the copyright terms among similar works and provide clarity for librarians and archivists working to preserve and provide access to the sound recordings. The MLA also argues against applying Sec. 302(a) language, 70 years p.m.a., to post-1923 / pre-1972 works. If pre-1972 sound recordings not made for hire were given a copyright term of 70 years p.m.a., it would cause disparity in term lengths between sound recordings and non-sound works with similar circumstances. In some cases, the copyright term for sound recordings would outlast those of other comparable works (which, admittedly, is functionally the case now), while in other cases the sound recording’s copyright would be shorter.

ii. Response: The MLA proposal for a 95 year term has the benefit of providing uniformity and consistency, applying publication term to fixation.<sup>32</sup> A uniform, federal term for all sound recordings seems to have something for everyone: uniformity for libraries, archives, collectors and the like; and if 95 years, a longer term of protection for the music industry. However, those advocating for a 50 year term might not be satisfied with a term that nearly doubles the length of protection which they propose.

#### **b. Society of American Archivists**

i. Comment: As a second choice to a 50 year term, SAA suggested a ninety-five year term as an alternative: “If a 50-year term should prove to be impossible, then pre-1972 sound recordings should have at most a 95-year copyright term dating from the moment of creation, regardless of whether they are published or unpublished. In order to mirror copyright for printed material, all sound recordings made before 1923 should be put into the public domain.”<sup>33</sup>

ii. Response: This would mean pre-1972 sound recordings would fall under Section 304, but with the modification that *creation* rather than publication or fixation would mark the term. Note, SAA makes a distinction between published and unpublished sound recordings, which we found problematic, as definitions varied from state to state, and all sound recordings were not eligible for federal publication upon “publication” under the 1909 Copyright Act.

#### **c. Tim Brooks**

i. Comment: Tim Brooks writes on behalf of the Association for Recorded Sound Collections (ARSC) and his response was endorsed by the Music Library Association, the Society for American Music, and the

---

<sup>32</sup> Comments and Response written by John Norris.

<sup>33</sup> SAA, Comment 40.

Society for Ethnomusicology.<sup>34</sup> Brooks' concerns are primarily preservation and access. He believes that federal protection will provide more certainty for the organizations he represents. Regarding term, Brooks assumes that pre-1923 sound recordings will immediately fall into the public domain. This comment also presumes that most sound recordings would be granted a 95 year term from Section 304. It seems as though Mr. Brooks would like to see a shorter term, akin to protection granted in Europe by neighboring rights (50 years). However, Brooks maintains that duration need not be addressed in order to bring the works under federal protection.<sup>35</sup>

ii. Response: We believe that a 95 year term unworkable to the extent that it relies on § 304. For the same reason, we don't think that the 1923 cut-off date is applicable automatically to all pre-1972 sound recordings.<sup>36</sup>

#### **d. Starr-Garnett Foundation**

i. Comment: “ It is our understanding that recordings made prior to 1923 are in the public domain while those made in 1923 until the Company ceased recording in 1934 are subject to state copyright laws.”<sup>37</sup>

ii. Response: Obviously, 1923 is not the actual term right now, but the term has been bandied about quite a bit, and so it is an honest mistake.

#### **e. Patrick Feaster**

i. Comment: As an alternative to the 50-year term that Patrick Feaster promotes in his comment, he proposes a 95 year term to better unify duration across media types within the United States and to eradicate inconsistencies found across states.

ii. Response: See the response under III(B)(a).

### **C. General “Shortening” of the Term**

1. Both Jean Dickson and Robert Lancefield did not suggest specific terms but instead suggested a general shortening of the term.

#### **a. Jean Dickson**

i. Comment: Jean Dickson,<sup>38</sup> a librarian, researcher of music history and musician, wants to simplify copyright restrictions and shorten copyright duration because, under the current system, it is difficult for small-time

---

<sup>34</sup> Tim Brooks, Comment on Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972, available at <http://www.copyright.gov/docs/sound/comments/initial/20110128-Tim-Brooks-ARSC.pdf>.

<sup>35</sup> Erin M. McLaughlin, law student, 2011 Copyright Course, Tulane University Law School

<sup>36</sup> Erin M. McLaughlin, law student, 2011 Copyright Course, Tulane University Law School

<sup>37</sup> David J. Fulton, Starr-Gennett Foundation, Comment, Comment 19, available at <http://www.copyright.gov/docs/sound/comments/initial/20101127-D-Fulton.pdf>.

<sup>38</sup> Jean Dickson, Comment 14, available at <http://www.copyright.gov/docs/sound/comments/initial/20101109-J-Dickson.pdf>.

musicians to find copyright owners, and it is intimidating for researchers who want to illustrate their findings with recordings.<sup>39</sup>

ii. Response: Ms. Dickson's comment provides further evidence of the wide support for a shortened term. However, we must qualify the specifics.<sup>40</sup>

#### **b. Robert Lancefield**

i. Comment: Robert Lancefield, the Manager of Museum Information Services at Wesleyan University and a musician, did not discuss a specific term for federalized pre-1972 sound recordings. He did suggest, however, that musical works should rise into the public domain after a "reasonable, but not excessive", period of copyright protection. Mr. Lancefield did specifically request that all pre-1923 works "rise" into the public domain upon federalization.

ii. Response: Mr. Lancefield shares in the popular objection to certain sound recordings receiving more than 95 years of protection. Mr. Lancefield's proposal begs the question: What is a reasonable time? 50 years? 70 years? 95 years? Mr. Lancefield seems to endorse a 95 year term. In our proposal, we carefully considered what term we thought would be "reasonable, but not excessive."<sup>41</sup>

#### **D. 50-75 Year Term**

1. One suggested this term.

##### **a. Jodi Allison-Bunnell**

i. Comment: Jodi Allison-Bunnell, Program Manager of the Northwest Digital Archives,<sup>42</sup> supported harmonizing the term with other countries, such as a term of between 50 and 75 years. She also recommends permitting and encouraging the reissue by third parties of "abandoned" recordings, those that remain out of print for extended periods, with appropriate compensation to the copyright owners.<sup>43</sup>

ii. Response: This term supports the general idea that it is beneficial to shorten the term. In terms of the abandoned recordings, we do need to incentivize their use and placing the burden on owners to reassert their copyright. It may also help to make this process easier and more streamlined, rather than dealing on a case-by-case basis.<sup>44</sup>

#### **E. No Change to Current Structure**

---

<sup>39</sup> Jordan Parker and Stacey Foltz, students, 2011 Copyright Course, Tulane University Law School

<sup>40</sup> Jordan Parker and Stacey Foltz, students, 2011 Copyright Course, Tulane University Law School

<sup>41</sup> Aymna Jenna Esmail

<sup>42</sup> Jodi Allison-Bunnell, Program Manager of the Northwest Digital Archives, Comment 18

<sup>43</sup> Jordan Parker and Stacey Foltz, law students, 2011 Copyright Course, Tulane University Law School

<sup>44</sup> Jordan Parker and Stacey Foltz, law students, 2011 Copyright Course, Tulane University Law School

1. The Recording Industry Association of American and the Sound Exchange have both suggested no change to the current structure. It should be noted however, that despite its opposition to federalization, the RIAA suggested that if federalization should take place, the term should either be based on the date of fixation, or set by an end term of 2067.

**a. Recording Industry Association of America**

i. **Comment:** The RIAA argues that federalization of pre-1972 sound recordings would lead to an increased burden upon the rights holders and generate new legal questions related to the contracts that rely on the current law. Instead, the law should be maintained and the industry should pursue preservation on its own.

ii. **Response:** While the RIAA accurately represents positive action on the part of the industry towards preserving works, the argument fails to offer a timely solution to the harm caused to orphaned and abandoned works left deteriorating in private archives and warehouses. Moreover, the library and archive community are anxious to confidently apply Sections 107-122 of the 1976 Copyright Act.

**b. SoundExchange**

i. **Comment:** In the comment from Steven Englund, representing Sound Exchange, only questions 13 and 26 are answered, not 21 and 22 which regard terms. Instead, much like the RIAA, Steven Englund argues that revision of the law would lead to excessive complexities revolving around the contracts, ownership of new rights, and other considerations. As such, Englund argues that federalization of pre-1972 sound recordings would serve to the benefit of copyright holders.

ii. **Response:** See response to RIAA

**F. Additional Suggestions**

1. Patent-like term

**a. Bill Hebden**

i. **Comment:** One commenter, Bill Hebden, a collector of 1920s-1940s music,<sup>45</sup> suggested a term between 20-25 years, modeled after the patent system (although he believes the patent term to be 17 years). Mr. Hebden believes that this shorter term would lead to better preservation of older, less profitable recordings, which would in turn protect future access to these works. In the hands of music collectors, works will be preserved regardless of their market value; and the shorter the copyright term, the sooner the works move into collectors' hands.

---

<sup>45</sup> Bill Hebden, Comment 2, available at <http://www.copyright.gov/docs/sound/comments/initial/20101105-B-Hebden.pdf>.

ii. Response: While Mr. Hebden’s preservation and access concerns are well founded, a patent-like term for pre-1972 sound recordings is infeasible. A patent-like system would require formalities, which are not available because of the Berne Convention. Moreover, the copyright and the patent systems work under different assumptions. The broader rights afforded to patent holders are confined to a shorter term, while the relatively more limited rights of copyright holders (circumscribed by the idea/expression dichotomy and the public’s fair uses) are given a longer term. Thus, while some limit to the copyright term is both desirable (policy concerns of public access) and required (Art. 1 § 8.8’s “limited times” clause), a patent-like term is too limited.

## 2. Limited Window for Owners to Re-Register their Works

### a. Michael Burch

i. Comment: in a one-paragraph comment suggested the following: Federal law should place these recordings into the public domain. While a small percentage of these might be re-released as commercial recordings, most will never be re-released. Unless they are made public domain they will eventually be lost to all time. This does not serve the public interest. Important historical recordings which might be preserved by a historical society or library will become unavailable because finding and licensing from the original owner (if they still exist) will impossible in most cases. As a compromise there could be a limited (e.g. one year) window when the original owners could step forward and re-copyright them. But this must be on a case by case basis and not some vague blanket claim.

ii. Response: Mr. Burch shares Mr. Hebden’s concern over preservation of orphan works, but proposes a different solution. Mr. Burch proposes that pre-1972 sound recordings be brought under federal protection, and that federal law provide for wholesale entrance into the public domain. Wholesale entrance into the public domain clearly implicates the takings clause of the 5<sup>th</sup> amendment, is likely unconstitutional, and is therefore untenable. Perhaps conceding to this very argument, Mr. Burch proposes a compromise: a limited window during which copyright owners could step forward to re-copyright their sound recordings, keeping those works out of the public domain. This window simultaneously avoids the orphan works problem and quells takings concerns. The window bears resemblance to the 1-year grace period given to reliance parties under §104A.<sup>46</sup> Mr. Burch’s response highlights the importance of balancing the rights and interests of different parties.

## IV. Problems to Consider in Choosing a Term

### A. Authorship/Ownership

---

<sup>46</sup> 17 U.S.C. § 104A. Copyright in restored works.

On one hand, some commenters were not concerned with the issues of authorship and/or ownership. For example, the Society of American Archivists wrote that "authorship of pre-1972 sound recordings is unlikely to be a problem if those recordings were to be given Federal protection."<sup>47</sup> As support for this argument, the SAA said they believed that ownership had not been an issue for pre-1978 unpublished works upon their federalization. However, the SAA did not directly answer the Notice's question of how ownership should or would be determined upon federalization. Furthermore, the SAA seemed to blur the concepts of authorship and ownership.

On the other hand, some commenters were very concerned with the issues of authorship and/or ownership. For example, the RIAA called the issue of ownership "perhaps [the] most troubling issue" that would arise upon federalization. The RIAA believed that federalization would cause extreme confusion over ownership rights. For instance, would the 1909 Act or the 1976 Act's definition of ownership apply (different rules for work for hire, and therefore authorship)? Additionally, what will happen when the federal definition of "owner" does not match up with a state's definition? This is bound to happen at least in some instances because different states define "owner" differently (RIAA comment mentions Alabama and California's definitions). The RIAA cautioned that inconsistent federal versus state definitions of authorship/ownership would lead to takings problems. The RIAA admits that the current system, with varying definitions of ownership amongst the states, is complicated; but contends that the courts have it under control ("decades of litigation and precedent [are available] to resolve ownership under these laws"). RIAA maintains that the current system works, and a change to federal control would only complicate things. This line of thought is furthered in the comment by Steven Englund representing Sound Exchange in which it is posited that "[r]eaching back to "federalize" pre-1972 recordings decades after their creation would raise numerous questions concerning matters such as ownership of new rights, effects on contracts, and application of the various formalities that are or have been part of federal copyright law. Resolving these issues would likely be complex and controversial, and any resolution would have the potential to unleash an array of unintended consequences".<sup>48</sup>

Professor Townsend Gard and the 2011 Copyright Course at Tulane University Law School did not take up the questions of authorship or ownership directly. They noted that if authorship posed a problem, Section 302 categories would quickly become highly problematic. They also noted that ownership issues—which are a problem today—would continue to be an issue that must be addressed.<sup>49</sup>

## **B. Publication/Fixation**

We have come to believe that "publication" could not be a marker for term or inclusion under federal law. As SAA noted, "[I]t is very difficult to determine with certainty the publication status of an older sound recording."<sup>50</sup> Publication was not a category that was available for federal protection for sound recordings, and, as our research indicated, publication standards varied from state to state. In other words, the term "publication" had either no meaning for sound recordings (federal) or too varied a meaning (state laws). Peter Jaszi's study<sup>51</sup> provides a nice

---

<sup>47</sup> SAA, Comment 40.

<sup>48</sup> SoundExchange, Comment 54, footnote 1.

<sup>49</sup> NOTE: Law student Jordan Parker addressed Question 18 (ownership of the material object, state law and copyright). His answer in full is included in the Appendix

<sup>50</sup> SAA, Comment 40, Question 22.

<sup>51</sup> The study, commissioned by the National Recording Preservation Board of the Library of Congress, titled Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis was prepared by

synthesis of the problem: “Common law copyright protects an author’s rights to an intellectual creation prior to the publication of that work; thus, common law copyright is often called “the right of first publication.”<sup>52</sup> Generally, works that were considered “published” either gained federal protection, or if proper formalities were not followed, the work then came into the public domain. If a work was protected by state common law, therefore, the work was not considered “published” under federal law (even if a particular state considered it published.) If this is the case, then state definitions of publication would not be relevant for federal protection.<sup>53</sup>

The *Naxos* court came to the same conclusion. The *Capitol v. Naxos* case describes the right of first publication as a property right (publication “divests” owner of common-law property right), and cites a Pennsylvania case that does the same.<sup>54</sup> According to the court, Congress left sound recordings out of 1909 Act because the Supreme Court had said that sound recordings (piano rolls) could not be “published” under federal law.

The RIAA also saw fixation as key. “The only ways to create clarity are to base the term on the year of first fixation, or to set the end term under federal law to match existing state laws (2067). Generally though, changing the existing federal law would be detrimental to rights holders because it would create confusion of what their rights actually are.”<sup>55</sup>

Fixation appears to be a more stable date than publication, and is already implemented in Section 104(b)(3) regarding national origin of sound recordings: “the work is a sound recording that was first fixed in a treaty party.”<sup>56</sup> Note, this falls under “published” works, and no additional specific information is given for unpublished sound recordings (Section 104(a) allows protection of unpublished works without regard to national origin or treaty relations.)

---

the 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.

<sup>52</sup> Jaszi, 4 citing Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings*, Study No. 26, prepared for the Subcommittee on Patents, Trademarks, and Copyrights, 86th Cong., 2d Sess., 4 (February 1957)m 11 (“A common law copyright confers complete protection against unauthorized use, and this protection ordinarily lasts as long as the work remains unpublished.”)

<sup>53</sup> See Appendix A-1 for relevant portions of the Jaszi study regarding common law copyright and sound recordings.

<sup>54</sup> *Capitol Records Inc. v. Naxos of America Inc.*, 4 NY3d 540 (N.Y. 2005). Capitol recorded a lot of songs in the 1930s in England, which has CR duration of 50 years. By the 1990, all the works were in the PD in England. Capitol then remastered them, and sold them in US. Naxos also remastered the same works and sold them in US. Capitol sued for CR infringement after Naxos ignored cease and desist letters. The court answered 3 questions: 1. Does the expiration of the term of CR in the country of origin terminate common law CR in NY? 2. Does a cause of action for common law CR infringement include some or all of the elements of unfair competition? and 3. Is a claim of CR infringement defeated by a defendant showing that the plaintiff’s work has slight if any current market and the defendants work is fairly regarded as a new product? The court goes through the British and US histories of CR law, and talks about the current status of the law regarding pre 72 sound recordings. Then the court says that pre 72 sound recordings are presumptively entitled to common law CR protection in NY. Then the court turns to the questions: 1. Nothing in federal law denies Capitol enforceable rights in original recordings just because the CR has expired in the UK. The Berne Convention, rule of the shorter term, doesn’t apply to sound recordings. Any other laws that have a similar provision also do not apply to pre 72 sound recordings. Therefore, the court concludes that NY provides a common law CR protection to pre 72 recordings until 2067 (at which point federal law preempts) regardless of its status as PD in any other country. 2. Although in the past, common law CR in NY has assumed bad faith when CR infringement has occurred, bad faith or fraud is not an element of a NY common law CR infringement claim and therefore is not synonymous to an unfair competition claim. 3. Just no. See also NY common law CR: 1777, perpetual CR in the absence of abrogation by statute. 1790, Federal CR law enacted, NY court ruled that common law would protect CR up to the point of federal law, but because federal law did not include SR, still perpetual. After 1972 amendment, post 72 sound recordings are protected by federal law, pre 72 recordings protected by NY common law until 2067. Contributed by Jessica Edmondson, 2011 Copyright Course, Tulane University Law School.

<sup>55</sup> RIAA Comment, Question 21. (Pgs. 28-29) RIAA Comment, summary written by John Absher (entire summary is available in the Appendix).

<sup>56</sup> 17 U.S.C. 104(a)(3).

## C. Incentive-based System and Takings

A number of commenters suggested that changing the term without a transition period (in contrast to Section 303(a)) would be justified because “the owners of rights in sound recordings have had a long time to exploit these works commercially.”<sup>57</sup> However, this would be contrary to the spirit of the Constitutional clause and also the Copyright Act itself, which is based on limited monopolies, knowable times, and incentives for copyright holders to exploit their work.

The SAA mistakenly noted that “In our experience, almost no unpublished works were published between 1978 and 2003 in order to secure the extended protection offered by the 1978 Act.” This is a mistake in fact.<sup>58</sup> Moreover, they misconstrued (from our point of view) Kenneth Crews’ remark to wait to publish works until the December 31, 2002 deadline had passed, because it was in the library’s interest not to extend copyright. But the point is that it was in the best interest of copyright holders to publish unpublished works between 1978 and 2002. That was the point of Dr. Crews’ work – to make sure librarians understood the consequence of their publications, if they were an authorized copyright holder.<sup>59</sup>

## D. International

### 1. Multinational Treaties

The Berne Convention does not directly address the term of sound recordings.<sup>60</sup> The Berne Convention does not address the term for sound recordings. The Geneva Convention (1971) in Article 4 requires a minimum term of 25 years from either fixation or publication.<sup>61</sup> The Rome Convention requires a minimum of 20 years.<sup>62</sup> The WIPO

---

<sup>57</sup> SAA, Comment 40, Question 21.

<sup>58</sup> For more information, see See Elizabeth Townsend Gard, “The Birth of the Unpublished Public Domain and the International Implications,” 24 *Cardozo Arts & Ent. L.J.* (2006), Elizabeth Townsend Gard, “Unpublished Work and the Public Domain: The Opening of a New Frontier,” 54 *J. Copyright Society of the U.S.A.* (Winter 2007),

<sup>59</sup> Kenneth Crews, “Do Your Manuscripts Have a Y2K+3 Problem?” *Library Journal* 125 (15 June 2000): 38-40.

<sup>60</sup> Berne, Article 7: (1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in [paragraph \(1\)](#). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in [paragraph \(1\)](#). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by [paragraphs \(2\), \(3\) and \(4\)](#) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

<sup>61</sup> Geneva Convention (1971), Article 4: “The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less



Performances and Phonograms Treaty provides a term of protection for performers of 50 years from fixation in a phonorecord and fifty years from publication, and if not published, fifty years from fixation.<sup>63</sup>

## 2. Foreign Laws (as a comparison)<sup>64</sup>

While foreign laws grant copyright protection in sound recording's differently,<sup>65</sup> there do seem to be some patterns in the protection. There seem to be four different basis for protection: (1) Countries that treat sound recordings the same as other literary, scientific or Artistic works and base protection on an Author's based life plus system;<sup>66</sup> (2) Countries that initially award protection for a term after creation and then an additional equal term from publication, typically 50 years for each term;<sup>67</sup> (3) Countries that award protection for a single term of 50 years after creation<sup>68</sup> and finally; (4) Countries that award protection only for sound recordings that are "published" for a single set term.<sup>69</sup> The European Union has a term of fifty year from creation, and fifty years from publication if publication occurs within the creation term. However, the European Parliament is currently considering revising this law.<sup>70</sup>

The United Kingdom, as a common law country like our own, is a valid basis of comparison. Also like the US, the UK has been forced to develop transitional legislation specifically addressing unpublished works and also copyright duration on sound recordings. The United Kingdom has had three main periods in which protection of sound recordings differs: 1) works recorded before June 1<sup>st</sup> 1957; 2) works recorded between June 1<sup>st</sup> 1957 and August 1<sup>st</sup> 1989; 3) works recorded after August 1<sup>st</sup> 1989. These three time periods are the result of two separate pieces of legislation. The first time period is a result of the enactment of the 1956 copyright act, which did not come into force until June 1<sup>st</sup> 1957. The second date (August 1<sup>st</sup> 1989) is a result of the passage of the Copyright, Designs & Patents Act 1988, where the August 1<sup>st</sup> date is its date it became enforceable.

---

than twenty years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published." [http://www.wipo.int/treaties/en/ip/phonograms/trtdocs\\_wo023.html#P52\\_3792](http://www.wipo.int/treaties/en/ip/phonograms/trtdocs_wo023.html#P52_3792)

<sup>62</sup>The U.S. is not a party to the Rome Convention. See Paul Goldstein and Bernt Hugenholtz, *International Copyright: Principles, Laws and Practice*, 2d, Oxford UP, 2010. Rome Convention, Article 14: The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which:

(a) the fixation was made—for phonograms and for performances incorporated therein;

(b) the performance took place—for performances not incorporated in phonograms;

(c) the broadcast took place—for broadcasts. [http://www.wipo.int/treaties/en/ip/rome/trtdocs\\_wo024.html#P127\\_12121](http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html#P127_12121)

<sup>63</sup> WIPO Performances and Phonograms Treaty, Article 17. [http://www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html)

<sup>64</sup> Written by Zachary Christiansen, 2011 Copyright Class, Tulane University Law School.

<sup>65</sup> For examples of different systems of different countries, see appendix A-2.

<sup>66</sup> Azerbaijan, Brazil, Greece, Kyrgyz, Moldavia, Nepal

<sup>67</sup> Armenia, Barbados, Czech Republic, Denmark, Iceland, Latvia, Norway, Russia, Samoa (the term is 75 years for each), United Kingdom (see above for details on exceptions) Trinidad and Tabago

<sup>68</sup> Albania, Andorra, Bulgaria, Cyprus, Hungary, Lebanon, Turkmenistan, Uzbekistan, Ukraine

<sup>69</sup> Bhutan, Estonia, Lithuania

<sup>70</sup> The original proposal mandated a substitution of 95 years where the various member state legislations refer to 50 years. In this way sound recordings would be protected for 95 years after creation unless published whereby they would be protected for an additional 95 years after this publication. The reasoning behind this move is that there is a plethora of works released between 1957 and 1967 which were set to enter the public domain if no change was made. This legislation gained the approval of the European Parliament and was approved on 4/23/2009 however it was modified to only extend the term to 70 years and is currently waiting approval by the council of ministers.<sup>70</sup>

Under the first period, in regards to works created before June 1<sup>st</sup> 1957, a work is protected for either 50 years from its date of creation or 50 years from its release provided that this release occurred within 50 years of the sound recording.

Under the second period, for works created between June 1<sup>st</sup> 1957 and August 1<sup>st</sup> 1988, the period of protection is as follows. If the work was published during this time period then it receives protection for 50 years after this date of publication. If the work was not published during this time period then it will receive protection for 50 years starting from January 1<sup>st</sup> 1989. Therefore, if the work is never published it would enter the public domain on January 1<sup>st</sup> 2040, however, if a work is published during this period (1989 – January 1<sup>st</sup> 2040) the work will receive protection for 50 years from this publication date.

Under the final period, for works created after August 1<sup>st</sup> 1988, the work will receive protection either for 50 years from the year in which it was recorded, or, if the work is published within 50 years from the date of recordation, 50 years from the date of publication.<sup>71</sup>

### **3. Rule of the Shorter Term: Fixing *Naxos* and Section 104A**

Two events significantly extended the duration of foreign sound recordings in the U.S: the *Naxos* case and the enactment of Section 104A. Adopting the Rule of the Shorter term would meet our obligations under Berne, but also allow foreign sound recordings to come into the U.S. upon the expiration of the term in their home countries.<sup>72</sup> As Paul Goldstein and Bernt Hugenholtz note in *International Copyright: Principles, Law and Practice* (2d Oxford, 2010), under Berne, one important exception to national treatment is the Rule of the Shorter term, or also called Comparison of Terms.<sup>73</sup> Article 7(8) of the Berne Convention assumes Rule of the Shorter Term will be applied, except where “the legislation of the country otherwise provides.”<sup>74</sup> The Rule of the Shorter Term is also included in the E.C. Directive, and many other countries have adopted it as well. According to Goldstein and Hugenholtz, only U.S. and in part Canada do not apply the Rule of the Shorter Term.<sup>75</sup>

Adopting Rule of the Shorter Term for sound recordings would all foreign sound recordings to come in faster to the U.S. public domain. The opportunity for the incentive period would not be available to foreign works, unless those countries adopted similar provisions, encouraging other countries around the world to extend their copyright term for sound recordings. But the term would be no longer than the U.S. term, of course, and with Rule of the Shorter term, much shorter in many cases. For instance, a sound recording from Bhutan, would carry a term in the U.S. of 50 years after publication, and a sound recording from Cyprus would be protected for 50 years after their creation.<sup>76</sup> No additional incentive period would be available for those sound recordings under U.S. law.

---

<sup>71</sup> Written by Zachary Christiansen, 2011 Copyright Course, Tulane University Law School.

<sup>72</sup> For general information on Rule of the Shorter Term, or Comparison of Terms, see Paul Goldstein and Bernt Hugenholtz *International Copyright: Principles, Law and Practice* (2d Oxford, 2010). For discussion, see Elizabeth Townsend Gard, "Unpublished Work and the Public Domain: The Opening of a New Frontier," 54 J. Copyright Society of the U.S.A. (Winter 2007), and Copyright Law v. Trade Policy: Understanding the Golan Battle within the Tenth Circuit, 34 Columbia Journal for Law and the Arts 2 (Winter 2011), 131-199.

<sup>73</sup> Paul Goldstein and Bernt Hugenholtz note in *International Copyright: Principles, Law and Practice* (2d Oxford, 2010).

<sup>74</sup> Berne, Article 7(8).

<sup>75</sup> Paul Goldstein and Bernt Hugenholtz note in *International Copyright: Principles, Law and Practice* (2d Oxford, 2010), 288.

<sup>76</sup> The Copyright Act Of The Kingdom Of Bhutan, 2001. Part 3, § 24(2) at 14.

This is what the Berne Convention envisioned, and so adopting the Rule of the Shorter Term would put us in greater harmonization with the rest of the world.

#### **IV. Analysis of a Potential Term for Pre-1972 Sound Recordings**

##### **A. Introduction**

The 2011 Copyright Course went back to Section 302-304 and looked at the feasibility of where pre-1972 sound recordings would best fit. The course also took into consideration questions of authorship, ownership, takings, international agreements, and what other foreign countries have for sound recording terms. Finally, the class also took into consideration the political divide between libraries and users who want works in the public domain, and content owners who want works protected by copyright.

##### **B. Adding a Section 303(c) to the 1976 Copyright Act**

We began with the presumption that all pre-1972 Sound recordings were unpublished under federal law. Although these works may or may not be considered published or unpublished under individual state laws, because the works had not entered the federal system, we decided to presume that the federal law would treat all pre-1972 sound recordings as “unpublished.”

From that premise, because pre-1972 sound recordings were considered “unpublished” and had not qualified to register under the 1909 Act, the works would fall under Section 303 of the 1976 Copyright Act. We began with a reading of Section 303(a):  
Section 303(a) reads in whole:

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 [17 USC 302]. In no case, however, shall the term of copyright in such a 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.

Unpublished works created but not published before January 1, 1978 (which all sound recordings would presumably qualify under federal (rather than state) law) fall under Section 303(a). The term is measured by Section 302 (life + 70; or 120 years from creation if work for hire or anon. author). So, for example, an unpublished diary by a young girl during the Civil War would have been measured by her death date plus seventy years.

Section 303(a) marked the transition from unpublished works being protected by state law perpetually until “first publication” to the federal system. If Section 301(c) had not been enacted, pre-1972 sound recordings would have fallen under Section 303(a).

But there are two problems with merely adopting Section 303(a):

1. First, the incentive period given in Section 303(a) has now passed. Unpublished works were given a twenty-five year period before the works came into the public domain. The statute reads, “In no case, however, shall the term of copyright in such a work expire before December 31, 2002.” This means that the unpublished civil war diary would not have come into the public domain, even if the author of the work had died in 1900. The unpublished diary had been protected 1900 + 70 year = 1970, but no earlier than December 31, 2002. If a valid copyright holder had published the work for the first

time between 1978 and 2002, the copyright term extended through December 31, 2047.<sup>77</sup> If sound recordings are brought under Section 303(a), copyright holders would not be able to actively avail themselves of the opportunity for an extended period of time, and those that had made the works available to the public during the 1978-2002 period would presumably have an extended term.

2. Second, Section 302 appears to be highly problematic for sound recordings. Who is the author? When is a work for hire? Unpublished works under Section 303(a) may also suffer from this problem, but sound recordings are notorious for authorship-based problems. This is in part why much of the world identifies sound recordings as “neighboring rights” rather than “author-based” rights, because determining who is the author in sound recordings is less “natural” than a poem or even a musical composition.

We eventually returned to Section 303, but in modified form. Before that, however, we explored other possibilities.

### **C. Fifty Year Term**

The fifty year term on its own seems fairly unworkable—this would mean all pre-1972 sound recordings would come into the public domain fifty years after... fixation? Creation? Publication? Making available to the public? We also did the math.  $1972 + 50 = 2022$ . The last of the sound recordings from pre-1972 would come into the public domain in 2022—cutting the current term by forty-five years. As of 2011, using the 50 year term, all sound recordings before 1961 would upon enactment be in the public domain. It appeared to us that there would be significant parties, including the RIAA and SoundExchange, that would object to the shortening of the term. But as a class, we also understood the interest and rationale for fifty years.

### **D. Fifty/Fifty**

A second alternative to the fifty-year term was to model the term on the European Union—fifty years from creation, and if released to the public (made available to the public, publication, etc.) within the fifty years, a new term of fifty years begins from that date.

We found that this proposal would suffer the same fate as the first. Many works would not have the opportunity to be made available to the public under this scheme, because the first fifty years would have already passed for all works before 1961. Here was our computing:

Works created fifty years before 2011 and not made available to the public: in the Public domain, all works before 1961

Works made available: up to 100 years from creation (works 1911 would be covered if made available in last year of first fifty term) Example: Recorded in 1970 (fifty years) and then released for the first time in 2020 (another fifty years).

One would still have to sort out what counted as “made available” or “published”, particularly because it would be judging actions of actors in the past.

### **E. 95 year term**

---

<sup>77</sup> 17 U.S.C. 303(a)

The 95 year term is premised on the idea that sound recordings would fall under 304, but this is an inaccurate assumption. Section 304 addresses works created and published before January 1, 1978. Sound recordings were not considered published under the 1909 Act, and therefore do not automatically qualify. One would have to determine when a work was considered published, and then also determine if a sound recording had not been published whether it would also be governed by Section 304, or rather by Section 303(a).

## F. Foreign Sound Recordings

We propose that all pre-1972 sound recordings are given the same term of protection, regardless of whether they are foreign or domestic, including foreign works restored by Section 104A.

The confusion begins when foreign sound recordings as subject matter for “restoration.” These works had *not gone into the public domain*, as foreign published works had, because they were protected by state common law, as we saw with *Naxos*.<sup>78</sup> Nevertheless, Section 104A included these works (even though 104A has the requirement that the works were in the public domain, which is impossible for sound recordings to meet). The term for works restored under Section 104A is written as

Any work in which copyright is restored under this section shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.<sup>79</sup>

This has always seemed to require a bit of fudging, as sound recordings did not have a term under the 1909 Act, but because the term of published works was the same for all works, the term of (now) 95 years was presumably applied. Placing all pre-1972 sound recordings under Section 303(a) would solve the problem.

Additionally, we suggest applying the Rule of the Shorter Term, regardless of whether the term is found under Section 303 or Section 304 for foreign works. We suggest that if foreign works continue to have the 95 year term, the Rule of the Shorter term, as described in Berne: “In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.”<sup>80</sup> We strongly suggest the adoption of the Rule of the Shorter term.

So, for example, a recording from Albania, which was still under copyright as of January 1, 1996 (the required date for the URAA), would only have the shorter of the term of Albania and the U.S. For a work from Albania, a work first produced in 1960 would carry a term of 50 years, or 2010, rather than the 95 year term of 2055.<sup>81</sup> Moreover, if Section 303(c) was adopted, the same would apply. The term for an Albanian recording would be no longer than 50 years, and would not be eligible for an incentive period through February 15, 2067.

## V. Final Conclusion and Suggestions

---

<sup>78</sup> Insert citation

<sup>79</sup> 17 U.S.C. 104A(a)(1)(b).

<sup>80</sup> Berne, Article 7(8).

<sup>81</sup> Albania - This work is protected for 50 years starting at the end of the year in which the recording was first produced.<sup>81</sup>

## **A. Two Suggestions**

Taking into consideration the materials above, Professor Townsend Gard and the 2011 Spring Copyright Course at Tulane University Law School came up with the following two suggestions as a response to the Comments and the questions posed by the Copyright Office.

### **1. Create a new Section 303(c)**

#### **We propose the following language:**

Copyright in Sound Recordings created before February 15, 1972 endures for the term of fifty years from fixation. In no case, however, shall the term of copyright in such a work expire before five years from enactment; and, if the work is made available to the public by the copyright holder within five years of enactment, the term of copyright shall not expire before February 15, 2067.

#### **Analysis:**

- a. First, the new Section 303(c) would take into consideration the library concerns: most sound recordings are neglected and orphaned. Those works that have no commercial value and no copyright owners interested in their commercialization would come into the public domain after fifty years (after the interim date).
- b. Second, fixation date could be defined as any date known (creation, publication, etc.) or a general period of time (i.e. the 1920s.) We think this is something that would need to be defined in the definition section of the Copyright Act.
- c. Third, modeled after Section 303(a), the class came to believe that there should be a period of time both where copyright holders can continue to exploit the work, and also an incentive period to encourage making the work available to the public. If a version is available to the public during the transition period, the work should be given an additional term of protection. This is how Section 303(a) worked, and during that period we saw a number of new edited collections of diaries, papers, and letters that appeared, which garnered the additional term of protection.
- d. Fourth, the solution allows for copyright holders to take advantage of the extended term. If copyright holders do not take advantage of the extended term, the works come into the public domain at a knowable, identifiable time, as what occurred with unpublished works.
- e. Fifth, the term of protection would not be governed by Section 302, but on a more stable set of knowable terms: fixation plus fifty years, or if published within the five year after enactment period by the copyright holder, the additional term through December 31, 2067 would apply.

#### **Potential Support for this alternative:**

a. SAA: the SAA in its comments suggested either a 50 year term (which this includes) or a 95 year term. The SAA also noted “we recognize that some commercial record companies may have unpublished tapes of recording sessions that they would like to remaster and release. It may be appropriate to allow them to extend their copyright protection to at least 2067 by publishing those tapes, regardless of when they were made.”<sup>82</sup> This alternative would allow both the term extension and the date issues. They also suggested a five year window in which to extend protection, which is one of the suggested we have come up with as well in terms of a transition period.

b. RIAA and SoundExchange. If copyright holders make the work available to the public during the five-year enactment period, the original term of 2067 continues, just as the sound recordings had under state law. Federal law provides more protection, including statutory damages. As long as the works were available during the five year period, the addition term would be granted. That said, Section 107-22 would apply to these works, which will make users and librarians happy as well.

## 2. Rule of the Shorter Term

We believe that the U.S. is at great disadvantage by not adopting the Rule of the Shorter term. The E.C. and nearly every country in the world has adopted this Berne standard.<sup>83</sup> By adopting the Rule of the Shorter term, more foreign works will enter the public domain sooner in the U.S., and the foreign works will not have a greater term in the U.S. than they enjoy at home. Moreover, by adopting Rule of the Shorter Term, other countries will come under pressure to harmonize their sound recording laws to meet our new standards.

We propose the following language as Section 104(e):

COMPARISON OF TERMS. In any case, the term shall be governed by the U.S., where protection is claimed; however, the term shall not exceed the term fixed in the country of origin of the work.<sup>84</sup>

### B. Final Summary

In conclusion, we propose the following changes, with regard to the term of Pre-1972 Sound Recordings:

1. **Repeal Section 301(c)** to include unpublished and published pre-1972 sound recordings under federal law.
2. **Adopt the Rule of the Shorter Term as 104(e)** for foreign works, and at least for sound recordings, to mitigate the damage and problems from Section 104A.

---

<sup>82</sup> SAA, Comment 40.

<sup>83</sup> EC Term Directive, Article 7(1) states: “Where the country of origin of a work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in Article 1.”

<sup>84</sup> Modeled on Berne Convention, Article 7(8).

**3. Add Section 303(a) to adopt 50 year term from fixation, but “no earlier than” with five year incentive scheme for additional term of protection for valid copyright holders.**

Thank you for your time and consideration in reviewing our Response and suggestions for a federal term of protection for Pre-1972 Sound Recordings.

Sincerely,



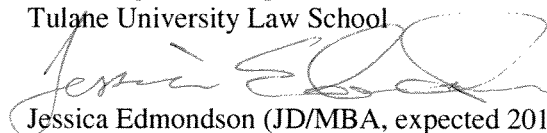
Dr. Elizabeth Townsend Gard  
Associate Professor  
Co-Director, Tulane Center for IP, Media and Culture  
Co-Inventor, Durationator®  
Tulane University Law School



Evan Dicharry (JD, 2010)  
IP Fellow and Durationator® Project Director  
Tulane Center for IP, Media and Culture



Erin Anapol (JD, expected 2012)  
Tulane University Law School



Jessica Edmondson (JD/MBA, expected 2013)  
Tulane University Law School



Zachary Christiansen (JD, expected 2012)  
Tulane University Law School

And the 2011 Copyright Course  
Tulane University Law School

John Absher,	Tulane, 2L
Elizabeth Adams.	Tulane, 3L
Erin Anapol,	Tulane, 2L
Kevin Blodgett,	Tulane, 2L
Jena Bourgeois,	Tulane, 2L
Ross Carlson,	Tulane, 2L
Dan Chiorean,	Tulane, 2L
Zachary Christiansen	Tulane, 2L
George Dandalides,	Tulane, 2L
Jessica Edmondson,	Tulane, 2L
Amyna Esmail,	Tulane, 3L
Bryan Etter,	Tulane, 2L



Justin Fielkow,	Tulane, 2L
Stacey Foltz,	Tulane, 2L
Courtney Halwig,	Tulane, 2L
He (Mavis) Huang,	Tulane, LLM
Stephanie Kennerley,	Tulane, 3L
Nicholas Krienke,	Tulane, 2L
Bingxin Lin,	Tulane, LLM
Cameron Malone,	Tulane, 2L
Diego Marquez,	Tulane, LLM
Erin McLaughlin,	Tulane, 3L
John Norris,	Tulane, 3L
Jordan Parker,	Tulane, 2L
Jason Saltzman,	Tulane, 2L
Steven Sarpy,	Tulane, 2L
Andrew Sensi,	Tulane, 2L
Paul Spradley,	Tulane, 2L
Joseph Suquet,	Tulane, 2L
Ellis Wilder,	Tulane, 2L
Russell Withers,	Tulane, 2L
Teng Yue ,	Tulane, LLM
Wenqi Zheng,	Tulane, LLM

## APPENDIX

### A-1

Excerpt regarding “publication” and common law copyright from

*Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis*

Prepared by the 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

Commissioned for and sponsored by the  
National Recording Preservation Board  
OF THE LIBRARY OF CONGRESS  
September 2009

Pages 15-16

#### 1. Common Law Copyright

Common law copyright protects an author’s rights to an intellectual creation prior to the publication of that work; thus, common law copyright is often called “the right of first publication.”<sup>111</sup> Therefore, an owner of a recording can, on the basis of the common law copyright, prohibit the unauthorized use of the recordings prior to their publication.<sup>112</sup> The important question for common law copyright thus becomes, when is a work published?<sup>113</sup> As discussed above in the history section, the majority view initially held the widespread dissemination (i.e., commercial sale) of the work to be a publication.<sup>114</sup> This is the view the federal government holds regarding works fixed after 1978.<sup>115</sup>

In *Goldstein v. California*, the Supreme Court held that the television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.”). “publication” of a sound recording is a matter left to the states to decide.<sup>116</sup> Therefore, anyone desiring to use a pre-1972 sound recording must examine the relevant state’s common law for how that state defines publication. The states surveyed for this report differ on this matter. Some states, such as North Carolina and Ohio, have retained the initial view that any commercial sale or public distribution amounts to a publication.<sup>117</sup>

However, other states examined for this study, such as Florida and New York, have greatly increased the threshold for finding that publication of the work has occurred. In *CBS, Inc. v. Garrod*,<sup>118</sup> a Florida court stated that “because of the unique nature of the recording business, and the fact that there was no simple method of protecting record producers’ interests until phono-records were protected by the Sound Recording Act of 1972 ... [the plaintiff] did not lose its common law copyright through publication by distribution of its records.”<sup>119</sup> The recent *Naxos* case<sup>120</sup> demonstrates that New York has perhaps

extended this idea that distribution does not amount to publication. There, the court held that the works in issue (1930s-era sound recordings) were unpublished despite the fact that the recordings had been commercially available since the 1930s.<sup>121</sup>

The defense to a claim of infringement of a common law copyright would thus seem to be a claim that the original work has indeed been published, and that the common law copyright protections have therefore been extinguished. However, considering the disparity between how state courts determine the matter, a nonprofit institution may prevail in one state by simply showing that the work in question has been sold in the state, but fail if it presented that same argument in another state. Therefore, nonprofit organizations hoping to use pre-1972 sound recordings should examine the particular laws of the states that may have rights to the work in question.<sup>122</sup>

It should be noted that different jurisdictions may have claims on the same work. For example, Capitol Records asserted its common law copyright to sound recordings in New York, even though the recordings had been produced in the United Kingdom, where they had already entered the public domain.<sup>123</sup>

<sup>110</sup> Cal. Bus. & Prof. Code § 17200.

<sup>111</sup> Biribauer, *supra* note 5, at 612-13; see also Ringer, *supra* note 5, at 11 (“A common law copyright confers complete protection against unauthorized use, and this protection ordinarily lasts as long as the work remains unpublished.”); Schrader, 693 (noting that common law copyright protects an author’s work in the same way that the common law protects physical property from being stolen).

<sup>112</sup> Biribauer, *supra* note 5, at 613.

<sup>113</sup> Ringer, *supra* note 5, at 14.

<sup>114</sup> *Id.* at 14-15

<sup>115</sup> See 1-4 Nimmer on Copyright § 4.06[A][1] (“The public distribution of [a post-1978] phonorecord constitutes a publication of the sound recording embodied therein.”).

<sup>116</sup> Biribauer, *supra* note 5, at 618, 622.

<sup>117</sup> North Carolina has codified common law copyright into N.C. Gen. Stat. § 66-28. Publication occurs when the work is sold in commerce. See *supra* Part I.C (discussion of civil statutes). Regarding Ohio, commentary in dicta of a state court opinion suggests that public performance constitutes publication. See *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454 (1976) (“[T]o employ doubtful logic to hold that public performances do not constitute a publication would terminate the [common law copyright], would be to grant a perpetual right against copying ... which would be even greater than the protection accorded patents or statutory copyrights.”).

<sup>118</sup> 622 F. Supp. 532, 534-35 (D.C. Fla. 1985).

<sup>119</sup> *Id.* at 535.

<sup>120</sup> *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250 (N.Y. 2005).

<sup>121</sup> See *id.* at 560 (finding that public sale “was not sufficient to divest the owner of common law copyright protection”).

<sup>122</sup> See *infra* Part II for a more in-depth consideration of each of the 10 states selected for examination, including a discussion of each state’s common law copyright.

<sup>123</sup> *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250 (N.Y. 2005)

### **Examples of Various Terms of Protections in Foreign Countries**<sup>85</sup>

The following is based on research compiled for the Durationator® software tool, and records the term for sound recordings in a number of countries.

Albania - This work is protected for 50 years starting at the end of the year in which the recording was first produced.<sup>86</sup>

Andora – Sound recordings are protected for 50 years after their creation<sup>87</sup>

Barbados – The work is protected for 50 years after its creation. Unless it is ever made available to the public, after which period it is protected for an additional 50 years. Availability means publication, broadcast, inclusion in a cable program, or in the case of films, being shown to the public, Availability by unauthorized means is disregarded.<sup>88</sup>

Bhutan – Sound recordings are protected for 50 years after their publication.<sup>89</sup>

Cyprus – Sound recordings are protected for 50 years after their creation.<sup>90</sup>

Czech Republic – Sound recordings which are made available to the public are protected for 50 years after the date in which they were made available. Sound recordings which were never made available are protected for 50 years after their creation.<sup>91</sup>

Greece – Sound recordings are protected like all other literary, scientific or artistic works, and receive protection based of a life plus system.

Hungary – Provided that the work was still protected in 1994. The work is protected for 50 years after its creation.<sup>92</sup>

Latvia –The work is protected initially for 50 years after fixation.<sup>93</sup>If the work is published during that period it receives an extra 50 years of protection from date of publication.

Lebanon – Sound recordings are protected for 50 years after they have been fixed in a tangible medium.<sup>94</sup>

---

<sup>85</sup> Compiled by Zachary Christiansen, law student, Tulane University Law School.

<sup>86</sup> Copyright Law (Consolidation). Ch VII.35, pg 13 Accessible at [http://portal.unesco.org/culture/en/files/30328/11422460823al\\_copyright\\_2005\\_en.pdf/al\\_copyright\\_2005\\_en.pdf](http://portal.unesco.org/culture/en/files/30328/11422460823al_copyright_2005_en.pdf/al_copyright_2005_en.pdf)

<sup>87</sup> Draft Law on Copyright and Neighboring Rights, Ch. 3, Art. 28(3) at 24. Accessible at [http://portal.unesco.org/culture/en/files/30323/11422451413ad\\_copyright\\_1999\\_en.pdf/ad\\_copyright\\_1999\\_en.pdf](http://portal.unesco.org/culture/en/files/30323/11422451413ad_copyright_1999_en.pdf/ad_copyright_1999_en.pdf) (last visited Jan. 29, 2010).

<sup>88</sup> Copyright I L.R.O. 1998 ch. 300 (1998) (Barb.) §11.

<sup>89</sup> The Copyright Act Of The Kingdom Of Bhutan, 2001. Part 3, § 24(2) at 14.

<sup>90</sup> Copyright Laws 1976 to 1993 (Cyprus) § 4(2)(i) at 6.

<sup>91</sup> Art 77 Law No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws (Copyright Act)<sup>91</sup>

<sup>92</sup> Ficsor, supra n.2, § 9(1)(a) available at [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=EN&id=5186](http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=5186)

<sup>93</sup> Latvia Law on Copyright and Neighboring Rights (May 11 1993) Section 55(2). Accessible at <http://www.wipo.int/clea/en/details.jsp?id=2935>

<sup>94</sup> Copyright Law at Ch VIII.55 at 11. Accessible at [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=EN&id=2786](http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=2786)

Lithuania – Sound recordings are protected for 50 years after publication or the first communication to the public.<sup>95</sup>

Luxembourg – Sound recordings are protected 50 years from creation if not published and then 50 years from publication if published.<sup>96</sup>

Nepal – Sound recordings are not distinguished from other works and are protected under the traditional life plus system.<sup>97</sup>

Norway – Sound recordings are protected 50 years from creation if not published and then 50 years from publication if published.<sup>98</sup>

Russia – The in Russia is 50 years from creation if not published and then 50 years from publication if published.<sup>99</sup>

Samoa - Sound recordings are protected 75 years from fixation if not published and then 75 years from publication if published.<sup>100</sup>

Turkmenistan – Sound recordings are protected for 50 years starting at the end of the year in which the recording was first produced.<sup>101</sup>

United Kingdom – Sound recordings are protected as a general rule for either 50 years from creation (recording(prior to June 1<sup>st</sup> 1957) or 50 years from publication(release (prior to June 1<sup>st</sup> 1957)) depending on whether the work was published. However if the sound recording was created between June 1<sup>st</sup> 1957 and August 1<sup>st</sup> 1989 but never published, then the work is set to expire in 2040, unless the work is published before then it will be protected for 50 years after that publication date.

Uzbekistan – Sound recordings are protected for 50 years starting at the end of the year in which the recording was first produced.<sup>102</sup>

Ukraine – Sound recordings are protected for 50 years starting at the end of the year in which the recording was first produced.<sup>103</sup>

---

<sup>95</sup> REPUBLIC OF LITHUANIA LAW ON COPYRIGHT AND RELATED RIGHTS ,18 May 1999 No VIII-1185 Vilnius (As new version of 5 March 2005 – No IX-1355) (Last amended on 13 March 2008 – No X-1454), Art. 59(2)

<sup>96</sup> Art. 45.2. Law of April 18, 2001 on Copyright, Neighboring Rights and Databases (as amended on April 18, 2004

<sup>97</sup> Copyright Act, 2059 (2002), Ch 2.10(2) at 6. Accessible at [http://www.ipnepal.gov.np/copyright\\_act\\_2002.pdf](http://www.ipnepal.gov.np/copyright_act_2002.pdf)

<sup>98</sup> Act No. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works, Etc., Chp. 5, § 45, pg 17 available:[http://www.regjeringen.no/upload/KKD/Medier/Acts%20and%20regulations/Aandsverkloven\\_engelsk\\_version\\_nov2008.pdf](http://www.regjeringen.no/upload/KKD/Medier/Acts%20and%20regulations/Aandsverkloven_engelsk_version_nov2008.pdf)

<sup>99</sup> Grazhdanskii Kodeks RF [GK] [Civil Code] art. 1256(1)(1) (Russ.). [http://www.consultant.ru/popular/gkrf4/79\\_2.html](http://www.consultant.ru/popular/gkrf4/79_2.html)

<sup>100</sup> Copyright Act (Samoa) at 15. Accessible at <http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-5/samoa.pdf>

<sup>101</sup> Civil Code of Turkmenistan, part 4, July 17. 1998 with amendments of October 21, 2003 art. 1123

<sup>102</sup> Law on copyright and neighboring rights, March 23, 2006 art. 54. Accessible at <http://www.copyright-watch.org/files/Uzbekistan.pdf>

<sup>103</sup> Law of Ukraine “On Copyright and Related Rights (Consolidation),” Vidomosti Verkhovnoyi Rady Ukrayiny (VVR), Dec. 23, 1993, No. 13, amended Nov. 20, 2003, VVR, 2004, No. 1294-IV, available at [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=EN&id=5115\\_§3\\_art.44](http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=5115_§3_art.44), at 30

Example of Work of Summaries of the Comments

For each Comment, students produced summaries. The following is an example of the work.

John Absher  
RIAA Response Summary

GENERAL SUMMARY

- 1- Preservation Question- RIAA says that preservation of older music is a big concern for recording music labels. However, they believe the concerns of recording music labels can best be addressed privately through contracts. Preservation of older sound recordings should be left to the marketplace. If the marketplace decides it is commercially viable to preserve a recording, then some private company will invest to transfer the old recording into a modern format. Materials that are not commercially viable should be preserved and made available through private arrangements with institutions like libraries and bona fide archivists.
- 2- Public Access Question- RIAA also says that private contracts are better suited to address the concerns of recording labels than legislative changes. Public access to older sound recordings can best be achieved through the marketplace, not the legislation. If the marketplace decides that a song is commercially viable, then a record company will make the investment to make it publicly accessible. For songs that are not commercially viable, there need to be private agreements with institutions like libraries to make them publicly available. That does not mean that every library should have a copy for patrons to listen to. (p.19) RIAA highlights private agreements between Sony Music Group and Universal Music Group and the Library of Congress to make pre-1923 recordings accessible through the Library of Congress website. Lack of legislation is not the reason there is not more access to old records, the reasons are financial. Increased accessibility will come from public and private agreements that spell out the rights of parties with certainty. New legislation will only cause uncertainty among rights holders. Therefore, new laws will make old recordings less accessible. (p. 20)
- 3- Economic Impact Question- Creating new rights under law for older recordings will only increase legal and administrative costs for recording labels to assert the new rights. Legal costs will come from performing new chain of title searches according to the new rights. Also, there will be a period of confusion where rights holders will not know their rights, how to enforce them, or what damages they may receive. How can retroactive rights be registered so that a rights holder can give notice to infringers and receive statutory damages? (p. 30-31) What is the duration of songs where the exact date of creation is uncertain? (p. 26-27) Further, there will be legal costs in the Constitutional challenges that will result. If the federal changes shorten the duration that a rights holder may have had under state law, there will be challenges over the takings clause. (p. 28) All these legal costs could be avoided by keeping laws as they are. The recording labels' resources are better spent making private contracts to preserve and control access to old sound recording. There should be no change to the existing laws.
- 4- RIAA highlights the fact that Congress had two previous opportunities to change the laws on pre-1972 sound recordings and chose not to. They say that the reason Congress didn't make changes then is because they did not want to place new legal and administrative burdens on rights holders. Congress should now respect the decisions of the past Congresses and keep the laws as they are.

## RESPONSES TO THE SPECIFIC QUESTIONS

- 1) The RIAA argues that libraries' preservation activities of pre-1972 recordings are not impacted by the legal status of recordings. Their activities may be limited by their own funding, but not the legal status of the recordings. (P.18)
- 2) Given the reasoning in the response to #1, changing the legal status by federal law will have no effect on the preservation and archiving activities. (p. 20)
- 3) No specific response, but generally the RIAA says that changing the existing laws would negatively affect the archiving activities of libraries by creating additional legal complexities for them to worry about. See response to #4 below.
- 4) Changes to existing federal law would not make pre-1972 sound recordings more accessible to the public. First, because the proposed changes would only create legal confusion over what rights the recording companies and artists have. Libraries are by nature risk averse, and in response to confusion their current archiving activities may freeze up entirely. Also, changing the rights to recordings will not affect the rights to the musical compositions, which only makes the issues facing libraries more complex. Private agreements between recording companies and libraries let the libraries know where they stand and are a better way to support archiving activities. (Pgs. 20-21)
- 5) No response as this question pertains to libraries and archives. (P. 36, Footnote #81)
- 6) No response as this question pertains to libraries and archives. (P. 36, Footnote #81)
- 7) Unpublished works are treated differently than published works, for a number of reasons beyond copyright issues. RIAA gives one example, some sound recordings done for historical purposes ethically may not be made public out of respect for the culture of the groups recorded. (P. 20, Footnote #27)
- 8) In response to the commercial value of sound recordings before 1923, the RIAA merely gives examples of the costs that its member companies have expended to digitize and archive older recordings. RIAA member companies, Sony and Universal Music Group, have made private agreements with the Library of Congress to make pre-1923 recordings available to stream on the internet through the Library of Congress website. It follows that these older recordings are commercially viable and that there are rights tied to the recordings that could be hurt if the recordings came under federal protection or in the public domain. Otherwise the member companies would not be investing to transfer the old recordings into modern media. Also, RIAA emphasizes that with its private agreements, efforts to archive older recordings are taking place without any changes to the existing laws. (Pgs. 9-18)
- 9) Asked the same question as #8, but with regards to recordings made between 1923 and 1940. See Response to #8
- 10) Asked the same question as #8, but with regards to recordings made after 1940. See response to #8.
- 11) There would be negative economic effects on rights holders by changing current federal law. Generally, the confusion of what rights the rights holders have would hurt recording companies. Also, there is a chance that federalization would shorten the duration of copyrights previously held under state law. This would be grounds for Constitutional "Takings" challenges. (Pgs. 28-29, 31)

12) The RIAA sees no positive economic impact in upsetting the established legal structure under which recording companies have operated thus far. It is more likely that access to older recordings will freeze up, from the perspective of recording companies and libraries. (P. 32).

13) Partial protection under revised federal law would not be worth the cost it would create in litigation as previous rights holders look to courts for a definition of their rights under the federal laws. (Pgs. 30-31)

14) If revised federal laws grant retroactive rights, there will certainly be confusion between the new laws and preexisting state and common laws. There would be confusion over who has rights, what those rights are, and how to enforce those rights. (Pgs. 25-26)

15) RIAA does not address the sampling question because they believe their existing business practices would be unaffected by the proposed changes in federal laws. (P. 36, Footnote #81)

16) Changing the existing federal law would create complications with previous state laws. See response to #14. (Pgs. 25-26)

17) Without responding specifically to the question, RIAA acknowledges that state laws differ in the rights they grant. The patchwork of different state laws is complex, but at the end of the day it works. Also, where there is confusion, there are decades of precedent to resolve complex ownership issues. Changing federal law now would disrupt the existing body of case law in the states. (P. 26)

18) Issues dealing with intellectual rights and rights of the material object which embodies the copyrighted work, have been resolved before by state courts. These often involve complex chain of title disputes. Changes to federal law would create confusion going forward, and could possibly re-open chain of title disputes that were previously settled. (Pgs. 27-28)

19) The most troubling issue that additional federal laws would create, is the issue of how preexisting rights under federal and state common law be vested and reconciled with the “new” rights granted under the revised federal law. (Pgs. 24-25)

20) Additional considerations of the potential economic impact of revising federal law would be the costs to other sectors of the entertainment industry that hold contracts relating to sound recordings. A wide range of contracts (i.e. film, video game, and music publishing) could be called into question if the existing legal structure is changed. (P. 31)

21) The only ways to create clarity are to base the term on the year of first fixation, or to set the end term under federal law to match existing state laws (2067). Generally though, changing the existing federal law would be detrimental to rights holders because it would create confusion of what their rights actually are. (Pgs. 28-29)

22) Changing the current rights under state and federal law would lead to Constitutional challenges under the Takings Clause. (P. 33)

23) The RIAA primarily argues that the one way to NOT increase the preservation and access to older recordings, is by changing federal law and upsetting the entire legal structure of the recording industry pre-1972. The RIAA believes the better solution is to allow recording companies to experiment with private agreements with libraries and archives. It highlights the recent agreement between Sony Music and Universal Music Group, with the Library of Congress. (P. 21)

24) See response to #23.



25) See response to #23.

26) Partial protection under revised federal law would not be worth the cost it would create in litigation as previous rights holders look to courts for a definition of their rights under the federal laws. (Pgs. 30-31)

**Example of Work by the Copyright Course Compilation of Comments on Particular Questions**

For some questions, students prepared a summary of responses for a particular question, rather than additional legal research.

The following example was written by Kevin Blodgett.

Question 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?

1.) There is a strong consensus among the authors of the comments that extending the Copyright Act to pre-1972 sound recordings without amending the current exceptions is both possible and necessary. However, several authors note that problems can be expected to occur if pre-1972 sound recordings are brought under the federal jurisdiction of the Copyright Act. While this seems to be the consensus position, the commenters provide only vague insight into how this federal codification would benefit the preservation of pre-1972 sound recordings (e.g., “Doing so will help promote access to these materials, foster their preservation, enhance scholarship and education, and allow us to appreciate and enjoy our recorded sound heritage.” Zoe Waldron, librarian, comment 15). There is insufficient information provided in the comments, and insufficient scholarship in general, discussing the specifics of how this change would benefit the preservation efforts of educational institutions, museums, and other cultural institutions. The comments provide some useful examples of the benefits that can be expected by the change, but further research should be conducted to determine how the change of law would help them avoid suits from copyright owners; how preservation is inhibited by current law, but improved by bringing pre-1972 works under the Copyright Act, etc.

2.) Comments 19, 40, 50, specifically addressed question 2. Numerous comments adopt the position of the Association for Recorded Sound Collections (ARSC), including comments 37, 42, 44. However, the following comments provided helpful insight to question 2:

Comment 17, Dale Cockrell, Interim Director of the Center for Popular Music. Mr. Cockrell gives a very insightful example of how the current common law copyright of various states inhibits the preservation of pre-1972 musical works. He states that, in order to avoid infringement suits, Mr. Cockrell and his colleagues cannot easily determine which pre-1972 sound recordings are in the public domain for digitization projects. As a result, they must assume that most pre-1972 sound recordings are not in the public domain, and only through “time- and money-consuming efforts can we get rights of reproduction (or not).” Furthermore, because his organization, like many of those working under the current pre-1972 sound recording copyright regime, are publicly funded research groups, they do not have the resources to digitize and preserve many of these recorded works. Mr. Cockrell goes on to say that there is “no or very little” money to made under the current copyright regime by a hypothetical rights holder.

Comment 18, Jodi Allison-Bunnell. This comment has a helpful list of the proposed changes that many of the commentators urge be made to the existing copyright law. These changes are: “1.) Place pre-1972 U.S. recordings under a single, understandable national law by repealing section 301(c) of Title 17, U.S. Code, the provision that currently keeps pre-1972 recordings under state law until 2067. 2.) Harmonize the term of coverage for U.S. recordings with that of most foreign countries, i.e. a term of between 50 and

75 years. 3.) Legalize the use of orphan recordings, those for which no owner can be located. 4.) Permit and encourage the reissue by third parties of "abandoned" recordings, those that remain out of print for extended periods, with appropriate compensation to the copyright owners. 5.) Change U.S. copyright laws to allow the use of current technology and best practices in the preservation of sound recordings by non-profit institutions."

Comment 19. David J. Fulton, Starr-Gennett Foundation. Mr. Fulton writes that his not-for-profit organization seeks to digitize pre-1972 sound recordings that are available at the Archives of Traditional Music at Indiana University Bloomington. However, due to "copyright uncertainty, access to these recordings is severely limited, available only at the Bloomington and East (Richmond) campuses of Indiana University. Students and researchers must be physically on these campuses to access the recordings." The Foundation would like to more easily digitize these recordings and make them available to interested parties around the world through the internet and public sites. Mr. Fulton writes that bringing pre-1972 sound recordings under the Copyright Act would incentivize, rather than hinder, their efforts by making the public domain less uncertain, and thus, making it easier for Mr. Fulton and his colleagues to avoid copyright infringement.

Comment 21. Lynn Hooker, Associate Professor. Professor Hooker argues that under the current copyright regime, pre-1972 works are essentially orphaned because no one has economic interests in them. As a result, the conglomerates that own copyrights to these works are unresponsive to researchers who wish to preserve them. Thus, preservation efforts are effectively barred in many instances by the current copyright law. Professor Hooker believes that bringing pre-1972 sound recordings under federal jurisdiction would improve access to these works and improve preservation efforts.

Comment 27. Abigail O. Garnett, student at the Palmer School of Library and Informational Science, Long Island University. The commentator states current copyright law requires pre-1972 recordings to be deteriorating before they can be preserved. This requirement runs the risk of losing large portions of those recordings before libraries can attempt to preserve them. Thus, she argues pre-1972 recordings should be brought under a "single, clearly defined" Federal Protection law.

Comment 31. Demetrio Wazar. Mr. Wazar argues that pre-1972 sound recordings should be brought federal jurisdiction. He also argues that as copyright laws are "clarified and updated to reflect the realities of how content is consumed, companies will create new revenue models and methods that will benefit everyone" and will "help bring media to a greater number of consumers" and "reduce the costs of piracy."

Comment 32. Geoff Canyon. Mr. Canyon also advocates bringing pre-1972 sound recordings under federal jurisdiction. He argues that doing so would provide greater access to works, enable the creation of new revenue models, and reduce piracy. One additional benefit he mentions is that federal law can be more readily updated to "adapt to the fast pace of technology development."

Comment 34. Julie King. The commentator argues that pre-1972 sound recordings should be brought under federal jurisdiction for numerous reasons. For instance, she argues that this change would not diminish copyright holder rights; rather, having one coherent copyright standard would make it easier to prevent piracy, as well as increase distribution of these recordings to increase profit.

Comment 36. Nathan Lambson. "I sincerely believe that the adoption of pre-1972 content into federal law will allow for greater accessibility and preservation of all music because this adoption will simplify the complicated laws which were created when state boundary... I have literally dreamed of the day when my own media will not be subject to fleeting copyright laws, inconvenient terms of use, and limited functionality. The world has been yearning for a better method to disseminate media, as shown by social media, file sharing, bit torrents, p2p networks, and a plethora of other pervasive and frequently

illegitimate practices. Regrettably, our current system hinders the legal use of the greatest technologies that have come from the Information Age, and inadvertently these laws make unethical file sharing practices as tempting as they are. By federalizing these aforementioned laws the economic interests of rights holders will be best served as entrepreneurial start-ups, acting under the clear guidelines of federal law, continue to develop new revenue models that robustly and profitably reward copyright holders for their works in our digital age.”

Comment 38, Robert Lancefield. “Sound recordings fixed before February 15, 1972 categorically should be brought under Federal copyright protection. The likely effect of this upon both preservation and public access would be hugely beneficial to research, scholarship, knowledge-sharing, teaching, and learning. These good effects would be broadly felt, but I will limit my comments here to an area to which I can speak most meaningfully from experience: the value of a public domain in regard to educational access.”

Comment 40. Helen R. Tibbo, The Society for American Archivists. Bringing pre-1972 sound recordings under federal law would enhance preservation by providing a legal basis for preservation. Furthermore, 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 in archival repositories.”“Furthermore, 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. Archivists are more likely to preserve sound recordings if access to those sound recordings is enhanced. Bringing pre-1972 sound recordings under the Federal copyright law as it currently exists would provide some improvement in the opportunities for access and might encourage archives to engage in significantly more preservation efforts.” “It is much less clear whether the unamended Federal exceptions would encourage preservation in educational institutions, museums, and historical societies because currently they are not eligible for the exemptions found in Section 108. Nevertheless, Federal protection would make it certain that fair use applies to sound recordings, and thus would contribute to the willingness of these groups to engage in preservation.”

Comment 43. Tim Brooks, Association of Recorded Sound Collections (ARSC). Argues strongly that pre-1972 sound recordings should be brought under federal protection. Mr. Brooks notes the underlying problem with the current law: “access to all recordings is heavily restricted in the U.S. due to the lack of legal clarity. The law desperately needs clarity, “bright lines” that holders of these recordings (both public and private) can understand. It also needs to insure that attempts to update federal law, such as Orphan Works and Section 108 revision, will apply to pre-1972 sound recordings. It is quite clear that the states are making no real effort to update their laws in this regard.”

Comment 46. Matthew Dames, writing on behalf of Syracuse University’s Library, argues that the current split in copyright law created by s 301(c) of the Copyright Act has proven “burdensome so often that it has threatened the viability of several of our institution’s archival projects, and contributed greatly to indefinitely stalling several others.” For instance, Professor John Laverty, with the assistance of several students and university’s library personnel, sought to preserve and release several pre-1972 sound recordings from the university’s acclaimed Belfer archive; however, they have been unable to do so because copyright clearance for the sound recordings is “virtually impossible” under applicable state law. Furthermore, Syracuse University is hesitant to make its Belfer collection accessible to others because of the uncertain legal status of pre-1972 releases. Ultimately, Mr. Carson recommends provides a similar resolution to the problem: bring pre-1972 sound recordings under Federal jurisdiction and, in particular, make the limitations specified in Sections 107-122 of the Copyright Act applicable to sound recordings. Until this is accomplished, Syracuse University is exposed to severe legal risks because copyright owners have begun to take “unprecedented” steps in suing colleges and universities over perceived violations of copyright law (Cambridge University Press, et al. v. Becker, et al., Civ. Action No.1:OB-CV-1425-ODE (N.D.Ga., April 15, 2008); Assn. for Media Info. & Equip. v. Regents of the University of California, et al., CV10-09378 CBM (C.D.Cal., Dec. 7, 2010). For an analysis of perception and paradigms held by

various copyright stakeholders, see K. Matthew Dames, *When All See the Same Picture: The Piracy Paradigm in U.S. Copyright Law and Policy* (2011)(manuscript on file with author)). Syracuse University, along with other colleges and universities, have as one of their missions the dissemination of teaching, scholarship, and research “within the reasonable bounds of the law.

Comment 47. Kenneth Crews, Director of the Columbia University Copyright Advisory Office. Professor Crews provides a very interesting discussion on some of the implications of extending the federal Copyright Act to include pre-1972 sound recordings, as well as the impact that such an expansion would have on the Copyright Act’s exceptions. Interestingly, he notes that in the majority of states, pre-1972 sound recordings remains entirely unprotected. Furthermore, the states that do provide protections to pre-1972 sound recordings provide significantly less protection than provided by the limitations and exceptions provided by the Copyright Act. Professor Crews warns that bringing these works under federal jurisdiction should be done only after careful review of the exceptions and limitations, and how they may need to be adjusted. The purpose of his comment is not to offer possible substantive revisions of the law, or take a position on such changes. Rather, Professor Crews’s primary purpose is to “underscore the worthiness of undertaking a systematic review.” He then goes on to provide a useful summary of the statutory exceptions codified in § 107, 108, 109, 110.

Comment 48. Elizabeth A. Wilson, the Dean of the University Libraries at the University of Washington wrote in her comment that the current copyright status of pre-1972 sound recordings makes it difficult for libraries to preserve these materials, including oral histories and sound recordings. She argues that the current copyright status of these works inhibit preservation and digitization of these works. To resolve these issues, she makes three suggestions: 1.) Repeal section 301(c) of Titles 17, U.S. Code, thereby bringing sound recordings fixed before February 15, 1972 under Federal jurisdiction; 2.) give sound recordings a copyright term of 50 years; and 3.) develop “orphan works” legislation that would facilitate preservation of and access to pre-1972 sound recordings in cases where the copyright owner cannot be located.

Comment 50. Patrick Loughney, Library of Congress notes two benefits to protecting pre-1972 sound recordings under the Copyright Act: 1.) “it would provide certainty for qualified libraries and archives to undertake needed preservation and cataloging activity;” and 2.) “it would permit clear rules for permissible access by library and archival patrons to these materials.” Furthermore, according to Mr. Loughney, this transition will not ultimately “undermine the legitimate rights or interests of rights holders in their sound recordings (especially for commercial recordings), nor will it harm the rights holders in underlying works.” Additionally, there is a general consensus that the ability to digitize works would be simpler under the Copyright Act, and thus, increase public accessibility to legacy recordings. See e.g., Comment 46 and Comment 51.

Comment 52. Recording Industry Association of America and American Association of Independent Music. Essentially, the RIAA agrees with the goal of increasing preservation of culturally and historically significant pre-1972 sound recordings; however, it believes that the means used to achieve this goal should be left to the marketplace. The RIAA argues that its members, in collaboration with universities, libraries, etc. are already undergoing significant preservation efforts which are more efficient and effective for improving preservation and access than legislative change. Furthermore, the RIAA opposes any “federalization” of pre-1972 sound recordings would subject existing rightsholders, including RIAA and A2IM members, to overwhelmingly burdensome legal, administrative and related problems, and accompanying costs. The RIAA argues that many of these recordings still possess commercial value. It believes the best way to preserve these materials without damaging the rights of these owners, is to “expand existing general and niche markets for them, while at the same time effectively reducing piratical sources.” “Federalization” of these sound recordings would likely constitute “takings” under the 5<sup>th</sup> Amendment and result in expensive litigation. It could also disrupt many contractual agreements,

including those between sound recording owners and licensees.

## A-5

### Example of Question-Based Research Prepared by Students in the 2011 Spring Copyright Course, Tulane University Law School

Each student was assigned one question posed by the Notice in which they were required to do additional research. Below is the kind of research that was done. Once we had all of the research, we discussed the questions as a whole, compared the answers with the Commentors' take on the same questions, and then decided how much information we needed to further pursue questions 21 and 22.

The following answer was written by Jordan Parker, 2L Tulane University Law School.

#### QUESTION 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?

Regarding Pre-1972 Sound Recordings, the Supreme Court held in Goldstein v. California, interpreting California law, that the States are "free to act" regarding the creation of their own copyright laws on sound recordings because when Congress is silent on that issue (412 U.S. 546, 570).

While there once was a time where the rights to sound recordings were inferred from actual physical possession of master recordings; today the physical possession of physical masters is not necessarily indicative of ownership of the sound recording rights.<sup>104</sup>

Regarding Post-1972 Sound Recordings, the 1976 Copyright Act (under Section 202) indicated that ownership of a material object (i.e. "master recording") does not create ownership of the copyright absent written conveyance of rights. According to the Legislative History, the purpose of Section 202 would be to reverse the "common law doctrine exemplified by the decision in Pushman v. New York Graphic Society, Inc., 287 N.Y. 302, 39 N.E.2d 249 (1942)," in which "authors or artists are generally presumed to transfer common law literary property rights when they sell their manuscript or work of art, unless those rights are specifically reserved." H.R.Rep. No. 94-1476, at 124 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5740.

For Master Recordings at common law for pre-1972 recordings, states have created multiple common law theories to protect those recordings. In Goldstein v. California, the Supreme Court—interpreting a California antipiracy statute as applied to sound recordings—affirmed the right of a state-by-state

---

<sup>104</sup> Program on Information Justice and Intellectual Property, Washington College of Law, American University, Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis, (2009), available at <http://www.clijr.org/pubs/reports/pub146/pub146.pdf> at pg 74

approach to common law copyright protection in areas of Congressional silence. 412 US 546, 570 (1973). Furthermore, the court affirmed that the State's antipiracy law effectively acted as an "exercise to grant copyrights" by the State. Id. at 558-559.

Turning to a more modern example, sound recordings in Illinois are protected under anti-piracy laws that makes it a crime for a person who, "Intentionally, knowingly or recklessly transfers or causes to be transferred without the consent of the owner, any sounds or images recorded on any sound or audio visual recording with the purpose of selling or causing to be sold, or using or causing to be used for profit the article to which such sounds or recordings of sound are transferred." 720 ILCS 5/16-7. The statute defines the "owner" as, "the person who owns the master sound recording on which sound is recorded and from which the transferred recorded sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance." Id. Thus, this appears to grant ownership to the owner of the master recording, despite that Section 202 of the Copyright Act indicates that the owner of the material object does not necessarily own the copyright.

However, in the Illinois case of People v. Williams, the Illinois Supreme Court held that the federal Copyright Act preempted Section 16-7(a)(2) of Illinois Compiled Statutes. 235 Ill.2d 178, 198. The court reasoned that in light of the Copyright Act's Preemption provision under Section 301, "Congress intended to make it completely clear that it wanted to preempt all state law protection for sound recordings fixed after February 15, 1972, but leave room for the states to deal with recordings fixed before that date." Id. at 190

As for the reason why Congress did not preempt pre-1972 sound recordings, the court explained that the Department of Justice had warned that such preemption could act to abolish the anti-piracy laws of 29 states relating to pre-1972 sound recordings, on the grounds that these statutes proscribe activities violating rights equivalent to the exclusive rights within the general scope of copyright. Id. at 191. Furthermore, Congress feared that this unintended result could lead to a "resurgence in piracy of pre-February 15, 1972, recordings, since they had not received protection under Congress' 1971 amendment protecting post-February 15, 1972 recordings." Id. at 192.

With regards to the "owner" provision, the court asserted that the person who owns the master recording must still get a license from the copyright owner to distribute the sound recording commercially. Id. at 197. The court sums up that Section 16-7 seeks to protect copyrightable works regardless of whether "the person or entity holding an interest in those works is the original copyright holder or one who has been licensed by the copyright holder to produce and distribute those works." Id. at 197-98.

Turning to New York, Capitol Records, Inc. v. Naxos in America, Inc., held that pre-1972 sound recordings received common-law protection in New York. 4 NY 3d 540, 565 (N.Y. 2005). Providing a detailed history of Copyright, the court noted that under traditional rules of Wheaton v. Peters 33 US 591 (1834), "the act of publication... Divested common law [copy]rights." Id. 551-52(citing 1 Nimmer on Copyright § 4.02 [C], at 4-17). However, the court noted that the sale or records was not a "publication" of the work that served to divest the common law property right. Id. at 553-54. In addition, the New York Court looked back to Goldstein as having changed the common law publication from the Wheaton view "that publication divests common-law rights even in the absence of statutory protection" and replaced it with the rule that "state common-law copyright protection can continue beyond the technical definition of publication in the absence of contrary statutory authority. Id. at 557 (citing 1 Nimmer on Copyright § 4.02 [C], at 4-17 n 23). Under the Copyright Act, Congress left it to the states to define the meaning and effect of "publication" for pre-1972 Id. The Court concluded that under New York common law, the public sale of a sound recording "does not constitute a publication sufficient to divest the owner of common-law copyright protection. Id. at 560.



In Greenfield v. Philles Records, Inc., the New York Court of Appeals spoke approvingly of the Pushman doctrine that “the unconditional transfer of ownership rights to a work of art includes the right to use the work in any manner unless those rights are specifically limited by the terms of the contract.” 98 N.Y.2d 562, 572 (N.Y. 2002) (citations omitted). In the case, the musical group the “Ronettes” licensed their Pre-1972 master recordings to third parties for production and distribution in the United States. Id. at 567. Plaintiffs sued for breach of contract, alleging that their licensing agreement did not provide Philles Records with the right to license master recordings for synchronization and domestic redistribution, and demanded royalties from the sales of compilation albums. Id. The contract had unambiguously given the defendants unconditional ownership rights to the master recordings, but plaintiff argued that that did not bestow the right to exploit the recordings in new markets because the contract was silent on those issues. Id. at 569. Interpreting the parties subjective intent on common-law principles, the court held that Philles Records is entitled to exercise complete ownership rights, subject to payment of applicable royalties due to the Ronettes. Id. at 570.

In light of the New York courts approving treatment of the Pushman doctrine—which Congress preempted with section 202 of the Copyright Act—it appears that some courts are willing to treat the unconditional transfer of ownership rights of a pre-1972 master recording as a transfer of exclusive copyrights. However, Philles Records was still required to pay royalties on the use, so parties can give up ownership of the master while still maintaining some rights to the use of the original master. How bringing sound recordings under Federal Protection could impact those who own federal statutory rights?

Overall, I do not see how bringing pre-1972 sound recordings under Federal Protection would impact those who own statutory rights. Since the only federal statutory rights for sound recordings are for post-1972 works, bringing pre-1972 sound recordings under Federal Protection would not be likely to have impact on those with existing rights other than to harmonize all sound recordings.

However, there would of course be impacts on state laws.

In light of the discussion in People v. Williams, one impact of extending Federal protection to pre-1972 sound recordings would be to preempt state laws that grant equivalent rights to the exclusive rights of the copyright act. 17 USC §301(a) (2000). For example, it would effectively preempt state anti-piracy laws like Illinois’ as applied to pre-1972 sound recordings. Furthermore, states like Illinois that classify the “owner” as the party that owns the original Master Recording would be preempted by Federal Copyright Law that states the owner of the material object (i.e. master recording) is not necessarily the owner of the copyright to that object. 17 USC §202 (2000).

In addition, bringing pre-1972 Sound Recordings under federal law would enact the federal definition of “publication” under the Copyright act as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership.” 17 U.S.C. §101 (2000). This would ultimate impact when common law copyrights would be divested by publication.

For further research, I would highly suggest reading:

“Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis” by the Program on Information Justice and Intellectual Property, Washington College of Law, American University, which is available at <http://www.clir.org/pubs/reports/pub146/pub146.pdf> for a valuable ten-state analysis of common law copyright rules.