The following pages constitute a transcript of the above-captioned meeting, held at the Library of Congress, 101 Independence Avenue, Washington, D.C., before Leslie A. Todd, RPR/CSR, a Notary Public of the District of Columbia, of Capital Reporting Company, beginning at 9:05 a.m.

APPEARANCES

PARTICIPANTS IN MEETING:

TANYA SANDROS
KAREN TEMPLE CLAGGETT
MARIA PALLANTE
DAVID CARSON
CHRIS WESTON
JUNE BESEK
STEPHEN RUWE
ELIZABETH TOWNSEND GARD
PATRICK LOUGHNEY
PEGGY BULGER
DAVID OXENFORD
GIL ARANOW
GIL ARANOW
ERIC SCHWARTZ
SUSAN CHERTKOF
RICHARD BENGLOFF
SAM BRYLAWSKI
TIM BROOKS
CHARLES SANDERS
MS. PALLANTE:  Good morning, everybody.
Welcome to the Copyright Office.  I would like to
welcome everybody to this roundtable on the question
of federalizing pre-1972 sound recordings.
By way of background, and as all of you
know, but for the record, in March 2009, the
legislative branch Appropriations Committee directed
the Copyright Office to conduct a study on the
desirability and means of bringing sound recordings
fixed before February 15, 1972, under federal
jurisdiction.
In thus directing the Office, Congress
specified that this must, quote, cover the effect of
federal coverage on the preservation of such sound
recordings, the effect on public access to those
recordings, and the economic impact of federal
coverage on rights-holders.
The study must also, quote, examine the
means for accomplishing such coverage, end quote, and include any recommendations that the Register of Copyrights considers appropriate.

The background, as you well know, is that pre-1972 sound recordings are still protected by state or common law copyright. The Sound Recording Amendment of 1971 first brought sound recordings fixed in 1972 and after under federal copyright protection. Later, the Copyright Act of 1976 brought all unpublished works into the federal copyright fold, leaving pre-1972 sound recordings the sole remaining copyrightable work covered by state law. State law coverage of pre-1972 sound recordings persists until 2067, with some exceptions, at which point federal law will preempt state law and, assuming current federal term limits remain consistent, these sound recordings will enter the public domain.

State law protection consists of a patchwork of criminal laws, civil statutes, and common law with little harmony among the various state regimes, and with the extent of many protections as yet undetermined. One thing that most state laws have in common is the absence of exceptions such as fair use or exceptions for libraries, archives and educators. Because of this, many preservationists, archivists, librarians and museum experts have voiced -- are concerned about their legal ability to make copies of pre-1972 sound recordings for preservation and for public access. They state that were these recordings subject to federal copyright protection and its exceptions, institutions and hobbyists would have further legal ground to stand on in working with these recordings, due to fair use and Section 108 exceptions. Some preservationists also point out that there is little current availability of pre-1972 sound recordings for the public, particularly those from before World War II. Tim Brooks' 2005 study, in fact, concluded that only 14 percent of the commercial sound recordings released between 1890
and 1964 have been made available digitally by their rights-holders. And this does not take into account orphaned or unpublished recordings. So we are faced, then, in conducting this study with the undeniable fact that, despite marvelous feats of audio preservation, like the National Jukebox, our audio heritage has on the whole been shockingly ill-served. We are also faced with the question of whether federalizing copyright protection of pre-1972 sound recordings will help. And if we conclude that it will, we're faced with the question of what is the best way of implementing solutions without causing other problems. So far in conducting this study we've received 76 written comments, remarkably thoughtful. I along with members of the Office of the General Counsel and the Office of Policy and International Affairs have learned a lot. Comments have prompted other questions, and that's why we are hosting this roundtable this morning. I would like to thank all of you for your participation and for coming this morning. And I'm going to ask my staff to introduce themselves. But before I do that, I want to give the first panel some warning that we intend to have each of you for purposes of setting the tone for the next two days start by giving a five- to six-minute summary, if you can, of how you see the landscape, and I will give a little more introduction to that after we introduce ourselves, but just so you can be thinking about that. So I will start with you, David. MR. CARSON: I'm David Carson. I'm the general counsel here. MS. CLAGGETT: Hi, I'm Karen Temple Claggett. I'm senior counsel for policy and international affairs. MS. SANDROS: Hi, I'm Tanya Sandros. I'm deputy general counsel. MR. WESTON: Hi, I'm Chris Weston, microphone expert. (Laughter.) I'm an attorney in the Office of General Counsel, Copyright Office.
MR. RUWE:  Steven Ruwe, an attorney in the Office of General Counsel.

MS. BESEK:  I'm June Besek with Columbia Law School, and I am a consultant. I do not work for Maria, although independently maybe I do.

MS. PALLANTE:  Maybe not yet, June.

So with that, let's turn to the first session which is assessing the landscape, and we did want to give you just some general announcements as well. We have times slated for the sessions. Those are fluid. If we are having an incredible conversation, we're not going to shut a panel down. On the other hand, if you've said everything you want us to know and we're ahead of schedule, we may move on as well.

So with that, the kinds of questions we're looking for in the first session, which is accessing the landscape, in terms of answers to the questions are: Do libraries and archives treat pre-'72 sound recordings in their collections differently for purposes of preservation and access?

What are the legal obstacles that you face in preserving and making available pre-1972 sound recordings?

What is your particular experience with the laws in the particular states where you come from or your clients come from in allowing or prohibiting these activities?

What kind of legal advice do you give or receive?

And have you any experience with present legal action? And how is the current common law system seen by rights-holders? Are there specific state provisions that are beneficial?

So we could do this one of two ways. I could ask for volunteers to go first or we could go around the room. Does anybody feel ready?

Okay, Pat.

And if I could ask you, for the transcript, to please state your name and your affiliation before you speak. Thank you.

MR. LOUGHNEY:  My name is Pat Loughney. I'm chief of the -- is it on?
My name is Pat Loughney. I'm chief of the Packard Campus for Audio-Visual Conservation at the Library of Congress, and I'm here to speak to the general issue of the landscape of American recorded sound preservation in the United States.

In the year 2000, Congress passed the National Recordings Preservation Act of 2000. Among the provisions of that legislation was the mandate to the Library of Congress to conduct a study of the state of preservation for sound recordings in the United States. That study, which I'm now holding up, was published in August of 2000. It was the first nationwide survey of the state of recorded sound preservation ever conducted in the United States.

And the United States, I would add, historically has produced more sound recordings than the rest of the world combined in the 20th century. And we have an incredibly rich heritage of recorded sound, as you all know. And the library, by default, over a period of 80 years or more, has become not only the national library of all things created in the United States, but particularly it has become a preservation archive.

Now, traditionally libraries provide research access to the public. But the library, as it collected obsolete -- increasingly obsolete historical formats and began to receive grants to set up preservation laboratories in various parts of the library devoted to various interest groups or interest areas of recorded sound began to accumulate recordings that after a while began to exhibit many signs of deterioration or, because of the obsolescence of technology, the inability to transfer and reformat those recordings efficiently and effectively.

And so we began internally over a long period of time to accumulate a lot of information about the need for preservation. In other words, the library began to transform itself from a traditional library into a preservation archive by necessity. And that was efficiently recognized by Congress with the passage of the National Recordings
Preservation Act of 2000. And with that mandate to
not only conduct a study but to actually create a
national plan.

Now, that plan is in the works. It is
being devised as we sit here today. And it is my
hope that it will be released later this year. It
has called upon the expertise and input from experts
and interest groups across the nation.

But what is clear is that there is a huge
national problem that -- we have been wonderfully
creative in our efforts to produce recorded sound,
but we have shown very little interest collectively
as a nation and in a collaborative way to preserving
that heritage, and that is where we are today.

So the Library has found itself, by
default, at the center of that because of the size
of its collections and the breadth of its
collections. And I might add, with the advent on
the commissioning of the Packard Campus for
Audio-Visual Conservation in the year 2000, which is
a $200 million conservation center devoted to not
only the preservation of recorded sound but also to
motion pictures, television and other forms of
audio-visual production in the United States, that
we now have a facility that allows us to look over
the horizon for the first time.

There is no other facility like it in the
world. But what it has allowed the Library to do is
to centralize its collection, to centralize its
preservation resources, and to begin to look at not
only its own collections but to begin looking
nationwide to the gaps, so to speak, to the missing
record to try to find what is going on, and in fact
it is basically a center for the archeology of
recorded sound in the United States.

And with these Congressional mandates and
with this incredibly capable facility, we're now in
a position to begin to provide solid answers to many
questions that have lingered for decades about the
state of preservation, about what survives, about
what does not, about what should be done, about
where the expertise is relating to various formats
in areas of recorded sound preservation and
production throughout the United States, and to
begin to look at harnessing all this expertise and
interest into a national collaborative effort to
salvage what can be salvaged from the past and to
lay down a rational program going forward for what
needs to be done to preserve in a rational way the
nation's recorded sound heritage.

Thank you.

MS. PALLANTE: Thank you, Pat.
So anybody want to go next?
Thanks, Tim.
MR. BROOKS: Hold it down, right?
MS. PALLANTE: Hold it down. Please state
your name and your affiliation.
MR. BROOKS: That is a good way to keep
talks to a minimum. I suppose when your finger
wears out, you stop talking.
I'm Tim Brooks. I'm the chair of the
Copyright Committee -- Copyright and Fair Use
Committee of the Association for Recorded Sound
Collections; also the president-elect of the
association. The association, the ARSC, was founded
many years ago and is a meeting ground for scholars
and for professionals in the archival field,
including some in this room, I suspect -- I know.
And we have been very concerned for many years,
since we're very involved in historic recordings,
both the preservation and the scholarly study, about
the difficulty of both tasks, of preserving them as
well as accessing them.

For myself, I worked on a book for many
years called Lost Sounds, which was about the
earliest Black American recording artists, and,
frankly, my eyes weren't opened to this until I found
that the reasons those were lost sounds is not
because the physical recordings are lost, by and
large. It is more because in this country, and
uniquely in this country, they are precluded from
access. They are under copyright to this day, even
if they were made in 1890. And because of a whole
set of circumstances, economic and otherwise, that
makes them difficult to get at in the commercial
marketplace. That's no one's fault. That is just
the way the system works when you have a commercial system.

So I think, although we will be obviously talking for the next couple of days about the theories, the legalities of this, the Fifth Amendment, the takings and all the technical aspects, it's important to remember, certainly for us, for the scholars and for archivists both, this is about real people, about Harry T. Burley and Booker T. Washington, it's about -- people of color who made recordings early on. Ethnic minorities flooded into the United States in those days and preserved their culture on records, and whose recordings and whose preservation of that culture anywhere else in the world would be free and available for study, for students to understand their backgrounds, but uniquely in this country are not.

What ARSC tried to do was look at this situation and say, There are obvious reasons why we have the system we have. You know, intellectual property is an extremely important component of our economy as well. Our members participate in that. Is there something that we could work out, some way to approach this issue where we do not lock away a large part of our cultural heritage to no one's benefit, of the rights-holders or the users. If it's not available, obviously it's not helping anybody. And do it in a way that doesn't disrupt the economic model that sustains the creators and the corporations and the people that create this, and hopefully will continue to create it going forward.

And we worked out five recommendations. The first of those recommendations, though, is what we're talking about today, is pre-'72 recordings. And that is because -- originally, it was a surprise to us and it was a surprise to a lot of other people, it turns out, although everybody in this room may know it, outside of this room the pre-'72 divide is not well known, however, and in fact pre-'72 recordings are under state law, and state law is what in fact keeps them under copyright in
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13 perpetuity, or at least until 2067 at present, is
14 not well known. now, many people in fact operate
15 under the premise that that is not the case, they're
16 just told it will be public domain, and they're
17 surprised to find out otherwise.
18 so we think that it's an essential first
19 step to look at a way of bringing federal coverage
20 so that we have the other things that federal coverage
21 brings, which, frankly, would be good and bad for
22 all parties in some ways. we do think the good,

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1 though, the regularization of the law, the certainty
2 of the law, the bright lines that the law would bring
3 us outweigh whatever negatives. and if there are
4 negatives, then we are fully willing and interested
5 in looking at ways to ameliorate those.
6 the law hasn't been written, and how it is
7 written is all important. so i think many of the
8 things that were brought up by many parties here
9 deserve careful attention, and in any legislation or
10 any recommendations that are made, they need to be
11 addressed. we do not -- we do not, i would
12 emphasize -- look to undercut the economic viability
13 of current creators. that would be harmful to
14 everybody involved. but we think there is a way to
15 thread this needle without doing that.
16 so basically we've laid out -- and i'll go
17 into more detail later on what our recommendations
18 are. and that's basically what i wanted to say.
19 ms. pallante: thank you very much, tim.
20 next. eric?
21 mr. schwartz: my name is eric schwartz.
22 i'm with the law firm mitchell silberberg & knupp.

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1 i'm here representing the recording industry
2 association of america. the riaa, along with a2im,
3 filed comments, which rich bengloff is here on
4 behalf of a2im and will speak as well.
5 before addressing the legal and cultural
6 pros and cons of state law protection versus what
7 we've been referring to as federalization, i wanted
8 to start with a few brief introductory remarks on
9 the purpose and goal of the study, because i think
10 this goes to the heart of the pros and cons of the
11 state law versus the federal law.
The focus of this study, and I don't need to tell the Copyright Office this, is on the legal and policy issues pertaining to, and this is a quote: The desirability and means of bringing sound recordings fixed before February 15, 1972, under federal jurisdiction. But the Office specifically, quote, sought comments on the likely effect of federal protection upon preservation and public access and the effect upon the economic interests of rights-holders.

The genesis and goal of the study is preservation and access of culturally and historically significant recorded materials. It's not to recommend legal reform. It's not to revise or reform copyright public policy in general or even specific to pre-'72 recordings.

The focus today, the focus of the study should be on something we likely all agree on: How to best achieve the goal of more and better preservation of and access to older materials. A lot of time and money has been devoted to improved preservation and access by the library in the Culpeper center, as Pat mentioned; by the Folklife Center by Peggy; by the National Recording Preservation Board on which I serve; by the archives, educators and collectors. My clients, the members of the RIAA and A2IM, have spent millions of dollars and countless man and woman hours preserving materials, even those with little or no commercial return. Personally I've devoted hundreds of hours pro bono every year since the late 1980s serving first on the National Film Preservation Board since 1988, the Recording Preservation Board, founding the National Film Preservation Foundation and helping with these goals.

In short, we may disagree on how to achieve these goals but not on the goals themselves. And I think it's important to set a tone of cooperation for the study and, frankly, for the discussions today and tomorrow. I mean I'm among friends. I've learned what I know about film preservation from Pat Loughney, and what I know on recorded sound
preservation from Sam Brylawski. I also think more informal discussions would, frankly, help foster these goals.

Having said that, let me turn to the state and common law versus federal law issues, and why the RIAA believes that the pros of retention of state and common law outweigh any benefits of a move toward federalization.

First, let me begin with what I will call the cons of federalization. Looking at the comments, looking at some of the discussion, there's been a conflating of federalization with simplification. Having spent my career in copyright law, at least my paid career in copyright law, my unpaid in preservation, I can tell you that it's never simple. And the change to federalization will not simplify the law. It will, to a large degree, as Tim has alluded to, cause disruption of the economic model. It will result in disruption.

Moving to a federal system will raise serious questions pertaining to ownership rights and remedies, the basic features of copyright law, and that will only tie up catalogs in contract and litigation disputes, not free up materials for broader public access, diverting attention and resources for more practical solutions to better preserve and make accessible older recordings. In short, it would substitute a whole new set of complexities far worse than those presented by the status quo.

The focus of the archives and libraries seeking federalization in their comments is on the exceptions, leap-frogging over the basic issues of ownership rights and remedies. It's not a surprise because, you know, the exceptions are the life blood of the libraries and archives. But the downside is that all the costs of this movement would be borne by the rights-holders.

Also a lot of comments, especially from users, individual users, not library and archival ones, were neither about rights nor exceptions; rather, they equated the movement to federal law from state law as one from protection at all to one
of public domain status, simply making material, you
know, publicly accessible because it's in the public
domain.

The move to a federal system, as we've
noted in our comments -- and I will be brief here
because I know there are other panels on this
subject -- raise copyright, contract and perhaps
constitutional issues.

Let me just highlight a few of them.

The copyright issues and contract issues
begin with the burden on the rights-holders, the
chain of title reviews; the necessity to reopen
contracts and agreements for the purchase and sale
of catalogs; the necessity to evaluate initial
ownership and then transfers of assignments,
corporate mergers and all other legal circumstances
that will probably or might be different from
current ownership under very fact-determinative
schemes which would result in sort of an
overwhelming task rife with errors and costs.

Begin, for example, with initial authorship
and ownership. How would initial ownership vest?
Under work-for-hire rules? Under pre-'78 rules?
Under the post-'76 law?
How would transfer of rights be applied?
Federal copyright law requires a writing for
transfers or assignments. State laws may not. How
are you going to go through the chains of title with
catalogs?

The Recording Preservation Board's own
studies showed how the various state statutes and
common law provisions vest various rights and
provide them to oftentimes different rights-holders
than for pre-'72 sound recordings. So they are
different under the state law, and you're going to
federalize, are you going to take them away from the
different parties and the different definitions of
ownership under these state laws? And that's the
intangible rights.

Of course, you also have tangible, physical
property rights where you have the state laws -- in
one New York case, for example, applying the law
that the transfer of copyright ownership also
passes -- you know, the property passes with the ownership is what I mean to say.

You've got rights and exceptions, of course, that are going to be different. You've got issues of termination. How would they apply? How would these sort of uncertain timetables and the economic uncertainty challenge and change the way materials are made available? Where cost benefit analyses are done based on the life of the term of copyright for making materials ready -- I'm talking commercial materials -- and getting them available, not knowing whether you are now going to have the uncertainty of termination.

You have the duration questions, and I know there's a separate panel on that. And you have compliance with formalities and effective remedies, just as the for instance, and the burden and cost on rights-holders. For rights-holders to be able to enforce their rights under a federalized system, they would have to register their entire catalogs to even begin under Sections 411 and 412 to enforce their rights. You also have, you know, all the other formalities of registration with the administration, administrative and legal costs.

And then, of course, since a lot of comments did suggest why not just take whole swaths of material and put them in the public domain, you have the constitutional takings, traditional contours and other questions, lost rights and revenues for these works, which I'm sort of sweeping into one sentence, but it's sort of a major issue and a major concern.

I think, you know, on this issue looking back being somewhat of a historian of the copyright laws and copyright revisions, Congress had the opportunity in 1972 to provide protection retroactively and prospectively and didn't. Again, in the '76 act, there was the opportunity to go backwards and forwards, and it didn't. It seems to me that now next year would be the fortieth anniversary, the notion of doing it now, the complexities have only gotten that much more complicated.
And the contractual uncertainties. You've got an entire business structure in not only the music industry but in music publishing, film, video game and other industries that rely on and license old sound recordings that would be put under these same sort of uncertain and chaotic situations.

Having said that, the pros of the state law in just a minute. I mean as some of the commenters, ARL and ALA, for example, note they're narrowly tailored rights to the rights-holders' economic interests.

There is certainty with regards to existing contracts and agreements for back catalogs. There is ease of protection for low margin materials like older materials. It allows for the continuing and expanding partnerships between rights-holders and private institutions, something which we focused on in our comments. And I think it's very important to start looking at what has happened since Tim did his study in 2005 with some major donations of materials and just sort of necessity for more of that in the private agreements.

And then last but not least, you have a century of jurisprudence, so at least in the world of uncertainty, to the extent that the state laws, the Office describes them as a patchwork, they are, but at least the state law, common law jurisprudence exists, and the certainty to the extent it has existed has existed as a result.

So those are the reasons why the Recording Industry Association of America opposes the notion of federalization. And that said, I do hope that over the next day and a half and well beyond that that the tone and spirit of cooperation of figuring out how to get more of these recordings both preserved and publicly accessible should be the goal and the goal that we all can agree and focus on.

Thanks.

MS. PALLANTE: Thank you very much, Eric. And I think this is obvious, but I will say it anyway: We're not negotiating, right, in the next day or two. We brought you here for fact-finding so that we can produce the most
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7    comprehensive and accurate study possible. That
8    said, I think we would agree that the more you are
9    all talking among yourselves and to each other
10   informally, the better for us, so well said.
11            So any volunteer to go next?
12            MR. BENGLOFF. Hi. My name is Rich
13   Bengloff. I agree with everything that Eric said,
14   but I want to focus a little more on the business
15   and the economics for a second.
16            The American Association of Independent
17   Music -- I know a third of you here, some on a good
18   basis; some not so good. David, I'm teasing. All
19   kidding aside -- is an association, it's a 501(c)(6)
20   organization. We're a not for profit. We represent
21   the independent music label community in the United
22   States. We have 282 label members from Mountain
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1    Apple in Hawaii to TropiSounds in Miami, which I use
2    sort of to outline what we are. We represent all
3    different genres of music, we represent all
4    different parts of the United States of America, and
5    our label members range from gigantic labels
6    employed -- by our standards -- gigantic labels that
7    employ between 80 and 120 people to small labels
8    that have two or three employees. So we have a big
9    group that we represent.
10            What our community has in common is all the
11   members of our community really love music, and
12   their goal is to create music that they love, market
13   the music that they love, and to try to make a
14   living at the same time. And that's why I want to
15   focus on the business questions that would be raised
16   by any changes that were brought up today.
17            Much of the music being digitized by the
18   independent music label community today is what we
19   would call the long tail, as is often said in the
20   trades. It's music that's jazz, blues, roots. It
21   shows off the music that is uniquely American and it
22   also shows off our cultural diversity. And we are
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1    very proud of that as an organization.
2    It's also music that requires a longer
3    payback, a longer return on investment for the
4    people that create the music to be able to make a
5    living after they acquire it, after they create it,
or after they digitize it to continue to make music
so that it can be brought to market.

To federalize would cause an undue burden
on our community. I think Eric already referred to
it. It used to be that it was optional to register
with the Copyright Office. You could send a letter
to yourself and not open it and keep the postmark
somewhere. Well, we've become a very litigious
society in the digital age, and that's no longer an
option to register your music. To be able to defend
your rights, you have to register your music. It
would be a burden in terms of manpower, finances,
and a variety of other ways for us to continue to
protect our pre-1972 copyrights if they were
federalized. A real cost burden.

Current state law for unauthorized
duplication works to ensure that the services that
use our community's music, independent music label
community, either get permission if required, it's
not statutory, and pay us, unless they are
infringers and then we use the state laws to go
after these people. So we have a system right now
that works pretty well for us. It's something we
understand.

Also, as I said before, it's the long tail
of music that takes a long time to get a return.
State laws with the 2067 expiration date provide
incentives to bring catalog to market, which is I
think what we're here talking about today is to make
access for people.

Some of the things we've seen proposed in
some of the other people's comments that are here
today wouldn't give us the return on investment that
we would need. While these people love the music,
they also, as I said earlier, are trying to make a
living, and some of these periods of times just
won't work for our community to be able to get a
return on their investment.

Plus, it's not a static situation anymore.

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

If we were to federalize, there would be less and less investment in what I call this roots music that is uniquely American that we're all very proud of, which would be the opposite of the common goal we all have today, which is to provide access to America's cultural diversity and tradition.

I would like really to talk about preservation as a separate issue, and obviously we would like support for that. But -- there's other panels where I will address that later today.

The last thing I want to bring up is how this potential change in the law is affecting our community. There's transactions which aren't happening because of the long tail nature of the music. I know at least two of our members were selling catalogs to other members of our community, and now with it uncertain what is going to happen with the pre-1972 copyrights and the work that would then be entailed to redigitize this music and bring it to market -- those are real issues for our community. So we need this settled sooner than later. I would like to thank you all for your time.

MS. PALLANTE: Thank you very much, Richard.

MR. HARBESON: I'm Eric Harbeson. I'm the music special collections librarian at the University of Colorado, and I'm also the chair of the legislation committee for the Music Library Association, and I'm here representing them.

First of all, I want to agree with what Eric said earlier that I think that -- I definitely support a good, honest, thoughtful discussion on the issue. We're very sympathetic to the problems -- I'm sorry, I'm having troubles here -- we're very sympathetic to the many problems that both Eric and Richard brought up with respect to transfer of title, determining how ownership vests, et cetera. I mean it's definitely a complicated process, and we're respectful of that.

However, we also feel that the problem for librarians is complicated now. We have -- Richard
mentioned a very litigious society in which technology is changing very quickly. Despite the fact that it's comparatively uncommon for librarians to be sued over copyright issues, librarians are acutely aware of the problems that copyright poses. Very frequently I see e-mails on our LISTSERV asking about copyright issues that many people frankly would not even consider, would not even think about.

Librarians are very, in general, aware of the copyright law, aware of wanting to respect it, sometimes even to the point of being cautious when they -- when anyone would agree that they don't need to be.

And as a result of that, the mere presence of this law, the mere fact that we do have recordings from the 1890s that are functionally under copyright with no explicit fair use, with the possibility, I believe, with the Penguin versus American Buddha case of long tail laws being enforced all over the country, you know, we may not be even having to worry about our own state law. I'm not a lawyer, I don't know, but I mean that is certainly my interpretation.

We have a library community that has astounding materials in their collection which are truly unique which no one in the RIAA or A2IM can represent. And also laws that essentially consign those recordings to formats which are entirely unstable, which cannot stay on those formats for long. Even if you can keep the recordings on that format, for example, a shellac 78 disk is a pretty stable format if you never play it and if you store it correctly, but who wants a recording that can never be played? We need to be able to get these materials available so that people can listen to them.

If the librarians can't do that, then no one will ever hear these recordings because, as I say, they are unique. I'm talking about oral histories, about archival recordings made in, you know, field recordings. There are many, many collections in the music libraries in the country
that fall under this category.
Now, we are not advocating making uses that
would not be permitted under federal law. I want to
emphasize that. Anything that -- we're not talking
about rampant copying of materials that are
commercially valuable, demonstrably commercially
valuable. We're talking about recordings that
people have forgotten, and the only way that they
will stop forgetting them -- I'm sorry, I'm still
having troubles -- the only way people will stop
forgetting them is if we can make them available.
So, you know, if the recordings were made
available under federal law, if we could apply 107
and, more importantly, 504(c)(2), there would be no
market harm at least. I can't speak to the costs in
transferring titles and selling contracts and things
like that. That is really something I'm not
familiar with. But as far as the market harm, we're
not talking about anything that would be -- that is
not already being protected in sheet music, in
books, in maps. These are all -- they're already
provisions to protect the market under fair use, and
that's really all we're looking for is some parody
with sound recordings.

Thank you.

MS. PALLANTE: Thank you very much. We're
already getting to the point where we will have lots
of opportunity for cross-conversation I can see.
Thank you.

MS. BULGER: I'm Peggy Bulger, and I'm
director of the American Folklife Center at the
Library of Congress, and for those of you who don't
know, the Folklife Center was created by an act of
Congress in 1976 as the American Folklife
Preservation Act was passed. At that time we
inherited the archive of American folk song which
had been created at the Library of Congress in 1928.
Obviously, we have a mother lode of pre-1972
recordings under our care and under our protection.
I actually agree with parts of everything
that has been said by everybody, and I think the
good thing is we are -- as Eric No. 1 said, we are
all here because we want the same goal. It's just
how to get there.

And I guess having worked with the library
and with Pat and Sam and the Recorded Sound
Preservation Board, we've been thinking, our staff
at the Folklife Center, about how in many ways we're
talking apples and oranges. Pre-1972 recordings are
everything from the wax cylinder recordings we have
of Native Americans that may never see the light of
day in terms of being commercially released to all
of the recordings that you all deal with in the
commercial field.

Our recordings that we're particularly
worried about, though, are the recordings that have
never been released commercially. They're made by
anthropologists and musicologists in the field.
They are on formats that are extremely fragile.
They need to be not only preserved but they also
need to be -- be able to be accessible to public
that is crying for that.

And I know, Rich, you know that because, as
you know, there is a real, I guess, a cry from the
public to have these recordings at least be made
available.

We, of course, don't sell our recordings.
We make them available free of charge to the public.
We always will. We really are not in the business
of being a commercial outfit. But we really are
very concerned with the fact that right now there is
no clear protocols. There is no law that governs
what we're doing. We're doing things kind of off
the cuff.

Every library handles it differently.
Every time I go and talk to people about how things
are being handled, we're all trying to do the right
thing, but there is no backup, you know. Those of
you who are lawyers, maybe you feel more comfortable
with that, but those of us who aren't lawyers are
kind of afraid of you guys. I mean lawyers are --
you know, they can sue you.

And I guess so I would just say that, you
know, as we go forward, I would really think about
what is the best way to think about all of these
pre-1972 recordings and to make them available.
And I'm going to throw out just kind of one extra thing, which I don't know if anybody has got it on your radar screen, but I know Karen and I both go to the World Intellectual Property Organization meetings of the intergovernmental committee on genetic resources, traditional knowledge and traditional cultural expressions of folklore, and they're very -- well, it's been seven long years, which is very folkloric in and of itself, but for seven long years we've been in negotiations about an international treaty to protect the intellectual property rights to folklore materials, which includes a heck of a lot of pre-1972 sound recordings.

So that is just something to be thinking about that on the international scale this is also being talked about, and if some kind of international instrument is ever passed, although that's kind of iffy, but if it is, it would affect everyone in this room. It would affect all of us who have pre-1972 recordings that do reflect traditional knowledge.

MS. PALLANTE: David.

MR. OXENFORD: I'm David Oxenford, and I'm here on behalf of the National Association of Broadcasters. Now that I know I'm feared as a lawyer, and on the other side from Rich, when we deal with each other -- and, Rich, I thought we were friends --

MR. BENGOFF: Well, we actually are. We separate business from personal. I'm not a lawyer, so I'm a little afraid too.

MR. OXENFORD: Thank you.

I thought I would provide a different perspective because the NAB is not involved in many of the issues that have been discussed so far this morning and will be discussed really for the next day and a half. Our members as a whole are not involved in the issues of archival, preservation and recordings, but they are involved in making those recordings available to the public and providing access through unique programs that many broadcasters broadcast and many broadcasters and webcasters put on their internet streams. And one
of the issues that we're concerned about, and the
real reason that we're here, is to participate in
the last panel of the day, the one discussing the
performance royalties.
While we actually come out on the same side
as our friends at the RIAA and A2IM in this
proceeding, looking at this proceeding we understand
that there are plenty of identifiable issues that
many of the parties here have spoken to, but we also
see that there are many issues that would be raised
by the federalization of pre-'72 sound recordings.
Issues including bringing them into the 114 and
public performance rights regime that may impose new
obligations that aren't currently imposed on the
use -- the performance of some of these sound
recordings by broadcasters, webcasters, by other
nonprofit organizations that may want to be
streaming these, providing these publicly to the
public.
And so that's principally our reason for
being here today is to listen, to take part in the
discussions that are being had here today, and
hopefully will be going on in the future, working on
ways that everybody can come to situations,
agreements that might be able to address many of the
issues of the librarians and archivists without
upsetting some of the settled expectations that make
some of these sound recordings available, especially
digitally, in ways that if there were increased
costs may not happen in the future.
So at this point we're here basically to
listen, participate, to see where issues come up
that may affect broadcasters, and to offer our
perspectives.
So thank you very much for hosting this and
allowing us to participate.
MS. PALLANTE: Thank you.
MR. BUTTLER: My name is Dwayne Buttler.
I'm the Evelyn Schneider Endowed Chair for Scholarly
Communication at the University of Louisville and a
professor in university libraries. I just have to
say that's an obligation, right?
So mostly what I want to talk about, I want
wanted to echo something that Tim Brooks said. Tim has just done an outstanding job of articulating the issues, and I just really commend his work in this area. And in particular, I'm interested in communicating copyright to the educational community and libraries. I've spoken to thousands of librarians and educators, and one of the things that comes up a lot is exactly what Peggy said, right? We're afraid. And it's an odd structure of law where we're in fear of doing the right thing, and I think the right thing is really the preservation issue. I work with one of the early funded in-depth efforts called Beta Archive, which is a digital preservation effort, and sometimes my community that I talk to knows about the difference between the pre-1972 versus newer than 1972, and sometimes they don't. You know, I have the good fortune of explaining that to them and making them even more afraid than they already were of not complying with copyright law. I think there are significant challenges. I think Richard mentioned it would be an undue burden to change the law on that community. We have a significant burden already that is undue with the laws that exist now on how to preserve these materials. I could echo some of things that Eric said. You know, there are some very articulate, thoughtful people in the library and education community that want to do the right thing, but the law is such a morass now that it's very difficult for them to understand what the right thing is. And I think the comments speak to the idea that we need to make some change. I don't know what that change is. I don't know if I'm in favor of federalization or not because I'm just part of the conversation today. But I do know that some change needs to move forward or, otherwise, we're going to have a significant amount of material that is going to disappear from the historical record, and I don't think that's a good outcome just because we have a law that protects it for a really long time.
MS. PALLANTE:  Thank you.
MR. BUTTLER:  You're welcome.

MS. PALLANTE:  Sam.
MR. BRYLAWSKI:  Thank you. You might cut me off, so be ready.
I'm here representing the Society for American Music, which is historians, musicologists and others who study and buy American music. I'm the co-author of the preservation study that Pat pointed out. I used to be head of the Recorded Sound Section here.

In assessing, you know, trying to step back and not dwell too much on the specific issues, which we will be getting to in the next two days, asking to assess the landscape, you know, I see the landscape as pretty bloody. I see that there's a lot of misunderstandings about copyright law. There's a lot of mistrust of different parties. I think universities, of which most of the members of my organization are affiliated with, are seen as hotbeds of piracy, and there's mistrust on both sides. And I'm very grateful for this venue here to sort of bring out these issues and discuss them.

I think that thinking about what some of you have said, what Eric has said, there are certain things where we just have a difference on the facts, the constitutionality, and our analysis and the analyses of the attorneys we've spoken to don't see that. They see that even putting that 2047 and later 2067 cap constitution -- takings wasn't brought up then, so why is it brought up now? I'm concerned very basically, and this is on a personal standpoint, on people's attitudes toward copyright law in general. I sort of feel that the atmosphere now, this bloody landscape, has caused a general mistrust and dismissal of copyright by users and by the public. I think that copyright wasn't well served by extension, and we're not here to debate the Sonny Bono extension, but on the other hand, a 95-year term seems to us, you know -- seems excessive to most of us, because at this point it's the law for almost everything except for sound recordings -- and don't take your finger off of
that. Ninety-five years is a sufficient time for a record company to be able to exploit their assets and preserve them.

In talking about other things, when -- in going back to some of the things that Eric said, I think having these discussions is very useful for understanding how full federalization, that is, just putting sound recordings under existing copyright law, would hurt companies with these contracts and transfers. I personally don't understand all of that. I would think those disputes could still be made under state law. So I'm looking forward to learning about that.

But I don't believe that federalization will hurt companies, and in fact in many ways it would help companies. I believe that full federalization would provide new revenue streams for just what Mr. Oxenford was talking about, more performance rights for record companies that might even make up for what they might lose in the last few years of bringing down the copyright terms from 2067.

So I'm very fascinated to be in this room where I'm in the position of, I guess, representing an enemy that has created two of the strangest bedfellows I've ever met, the NAB and the RIAA both against performance rights for the first time in history.

That said, one of the great obstacles to preservation in the digital age is access. This didn't used to be the case. It wasn't the case when I began my work at the Library of Congress, which was in the recording laboratory preserving recordings that were made on ten-inch reels, and it wasn't expected that they would be freely available.

But now as we compete for grants, as our institutions compete for grants with other institutions, those institutions that can provide access to their preserved materials are -- we find are the ones that are getting funding. This was brought up in much of the oral testimony at the hearings in Los Angeles and New York that were conducted for the National Recording Preservation
I was an architect of the National Jukebox. I'm very proud of it. The library should be proud of it. I didn't have to do a lot of the work except for cataloging. It's made materials accessible, but the SAM members that I represent want downloads. They want to be able to actually manipulate and go back and hear pre-'72 recordings -- or pre-'23 recordings in the classrooms, to be able to play them, to be able to study them in greater detail. That is enabled by streaming only.

And, finally, just in terms of viability, we -- in addition to believing that performance rights and things like that might come about through federalization, we find that a public domain doesn't necessarily impede making money. The -- one of the submissions -- I guess it was RIAA -- talked about the EMI catalog in Great Britain, the Gramophone Company, having still leasing pre-1960 recordings. Remember in Britain and many countries, there is a 50-year law for sound recordings. But labels like Honest John, which is a CD company, are putting out acoustic and very early electric ethnic music that is basically -- and leasing it from EMI, but basically it's public domain music. So these issues aren't necessarily black and white. But in any case, I'm looking forward to this. I'm going to try to listen and try to hope that we might make some -- meet some common ground, and hope that if we can hear each other's true problems, that is to say, whether it's contracts that would be thrown into chaos or a real need by scholarly communities, educational communities and the public for a public domain, there might be some -- I don't know that I would call it middle ground, but some solution that isn't fully putting recordings under the law of -- that covers post-February 15, 1972, but creates a public domain, creates an ability to preserve, legally to store multiple copies, and we will all go home happy.
Thanks.

MS. PALLANTE: Thank you.

Thomas.

MR. LIPINSKI: My name is Tom Lipinski, and I'm a professor and executive associate dean, which basically means I do all the work but don't get paid the money, at the School of Library and Information Science at Indiana University at the Minneapolis campus.

I'm not here representing that institution. I'm here today, though, as an educator, librarian and archivist, and I guess as a sometime scholar of copyright law. And I'm also here today I guess in a very small hat as a musician in a tradition, very oral tradition of Irish music.

I guess I would echo Dwayne's initial points. Having taught future librarians and archivists and curators about the copyright law at now three different institutions -- University of Wisconsin - Milwaukee, Illinois University and Indiana University -- as well as conducted a number of seminars.

Librarians, archivists, curators, when it comes to the copyright law, I think do try and be very conscious of the law. They start from that perspective. They don't start from how can we get around the law. Certainly there are exceptions.

I'm not going to mention some of the cases in the news, but I think institutionally and individually, they do try and respect the copyright law. They are also very risk adverse. And one of the issues here today, the context that I think that is driving some of the questions of whether state law is a sufficient system, the existing state law, or whether federalization is better or whether there is some third alternative or something different we haven't thought of might be useful as well, is that when you are talking about the creative content and the historical cultural record, there needs to be a system which encourages not only its creation and its exploitation commercially but also its use and access by future generations.

And I think with the present state and the
sort of personality of the library community,
archive community, et cetera, that's not happening.
And it strikes me as a similar situation that was
occurring, and still is occurring, with the issue of
orphan works. And the Copyright Office said in its
report, people not using orphan works, it's not in
the public interest.

And I think we have a similar situation
here in terms of public institutions of shying away
from the full preservation and use and dissemination
of these types of works in the ways that they are
used to doing, which is not to commercially exploit
or necessarily compete with that commercial use of
the work. So I think that moving towards a system,
trying to find some common ground is in the better
public interest.

When one talks about sort of federal versus
state issues, it strikes me just intuitively that
there is a bit of an anomaly in that sound
recordings are not protected by federal copyright.
In a sense they should be. I think owners should be
given those sets of rights. And if we think about
sort of the international viewpoint, this would be a
move towards harmonization. Whether we will ever
get there perfectly is probably uncertain. But
having done some work in comparative copyright
between the European Union and the U.S., we seem to
be very much in step with that.

The state laws I'm sure from the users' and
from the owners' perspective offer the types of
protections that you want, but those laws developed
not in the same sense that the copyright law did in
trying to achieve this balance between owners and
users and move creative content forward in society
and create more of it.

And so you have this combination of
complexity in the sense that there are a number of
different laws: It could be a piracy law, it could
be contract law, it could be a right of publicity
law, it could be a commercial misappropriation. I
mean there are all sorts of things. And then you
have this lack of uniformity. And then even if you
look across the piracy laws from state to state,
they are all slightly different. And it's true that
some states are like, Okay, we have a red delicious
apple and this state has a red delicious apple, so
we can kind of look at apples to apples.
But the problem with many of those laws is
that there's not clear and uniform exceptions for
nonprofits and other public institutions to do the
sorts of things in terms of preservation, as at
least I think they would like to do, and still not
necessarily always harm the market.
So I think those are the challenges that
the state law presents. I think if federalization
were to occur, it would have to occur with a focus
on having an integrated or conscientious, if you
will, approach in that you couldn't just sort of
magically federalize them and not take a look at
some of the other provisions.
For example, this happened in the Distance
Education Reform Section 1 and 2, even the Copyright
Office's own report said, Well, we propose this
change and it's going to make everything great,
except we don't know about sound recordings.
So it seems that what's happened over the
years is every time there has been an amendment or a
revision to the copyright law, sound recordings are
sort of sitting there in the corner. I think as I
e-mailed Chris, This is the 700-pound gorilla, a
legal gorilla sitting in the room. So
federalization I think would need to have those
types of concepts in mind.
One of the benefits that I see is
uniformity and uniformity in the advantage of having
a body of case law, for example, of theories that
can be readily applied. I think that's a great
advantage. Even at the state level, you are still
looking from state to state, and, sure, states look
at one another, and one could argue the same thing
happens with copyright law with the different
district courts, the circuits are looking at one
another, but they are still starting from the same
each language in the statute. And I think that
sense of uniformity might outweigh the current
bloody landscape that we have right now. Thank you.
MS. PALLANTE: Thank you very much.
Jay.
MR. ROSENTHAL: My name is Jay Rosenthal.
I'm general counsel for the National Music
Publishers Association. You may be thinking, Why
are music publishers here at all? And there is a
reason why. But before I get into that, the most
important point I think as far as the overall focus

here is that we are obviously in favor of
preservation. ASCAP already works with the library
in all sorts of ways as provided, and certainly the
opportunity for the library to produce the coolest
concert in Washington actually on a yearly basis
now. And you also get to hear the wit of Paul
Williams, even though he uses the same jokes every
year. He will come back.
The real issue here I think for publishers
is the uncertainty of all of this. We kind of align
ourselves with the recording industry on this point,
especially as it relates to ownership rights. When
we think about two copyright owners of sound
recordings fighting each other, it raises the
specter of two worst words publishers can hear, and
that is a legal hold. And this is something that we
really don't want to jump into blindly or without
some thought. Because this will impact publishing
community, because when you have two parties who are
fighting over authorship rights as it relates to
ownership rights, between state rights and federal,
you oftentimes have the situation of a publisher not
going paid accrued mechanical royalties or other
types of royalties, as well, right across the board.
So that is the main reason that we're
concerned about this. We want to make sure that
this does not raise a whole new reason for not
paying publishers. And there will also be changes
that result in resources and costs relating to
publishers. Publishers have databases in place. We
are looking at international databases, and here we
are with the idea that, well, there may be changes
in ownership rights that may necessitate going back
and changing databases relating to old recordings
right across the board.
Certainly as a general matter, application of some federal laws to pre-‘72 recordings, let's say, could impact publishing rights. It certainly concerns us in all sorts of areas, whether it's copyright. It's specifically things with rights of termination, notice provisions and things like that or others. But it is something certainly that we are worried about.

I don't want to really go on, and we're really here to listen as much as kind of provide our input because what happens here will impact the publishing community in one way or another.

One just quick point that I want to raise and that's already been raised, and that is the issue of commercial viability. I'm not sure what commercial viability means anymore with old recordings, and I tend to think that maybe we underestimate the value of old recordings as it relates to commercial viability. I just bought a CD from Smithsonian Folkways of music from the 1940s, and there are some labels and some of Rich's members, like GuateMaya, I think they're a member, they are totally dedicated to old recordings and repackaging them and putting them out in a commercial way. So I think it's a slippery slope to think that just because it is an old recording that it loses its commercial value. And that's just something we have to keep in mind.

So really the publishing community is here to listen and to add where we can, but we do have some serious concerns about how it will impact us in terms of getting paid and in terms of our internal systems that we have set up and will continue to set up as we move forward.

That's it. Thank you.

MS. PALLANTE: Thank you.

Elizabeth.

MS. GARD: Hi, my name is Elizabeth Townsend Gard. I'm an associate professor at Tulane University Law School and co-director of the Tulane Center of IP, Media and Culture.

We've been working on duration for the last four years in a project called The Durationator.
We've determined copyright status of works. We're doing the core law part. We've looked at every law in the country -- I mean every law in the world, and every component of the U.S. copyright law, except sound recordings because it's too hard.

So when the call came out for this, a lot of people kept asking me what my thoughts were, and I didn't have any.

And so being a little bit lazy, I decided to have my copyright class investigate. So we read every comment, every question, we researched every question and we came up with a proposal. My class voted, we debated, we pretended to be all of you, and we made a 41-page, single-spaced proposal of what we thought would be what you all would compromise on and find reasonable.

We found authorship and ownership impossible. We think you have to face these problems, but it can be solved fairly easily, and we think there is room for compromise between the two groups, and so we made a proposal.

In our proposal of term, we think duration is the most important problem.

Thank you.

MS. PALLANTE: Thank you very much.

I think that leaves you, Charlie.

MR. SANDERS: I'm Charlie Sanders, outside counsel for Songwriters Guild of Americas, which is the nation's and, we suspect, the world's oldest songwriter organization run solely by songwriters. I'm also, although I'm not presenting them here today, a member of the board of the Native American Music Association. I'm an adjunct professor at New York University, and I am a former studio musician.

I think that makes me the only person on this roundtable panel that is here representing creators, which is -- I guess the usual ratio, even though I think that the founders, including Mr. Madison, believed that copyright law was being established to protect the creators.

So if, Peggy, you think you get nervous dealing with this gang, when corporations get together to talk to library people and law
professors, you can't believe the fear that goes through the creative community. There is a concern here, I think as Jay articulated, that this process not be utilized in any way to undermine or create problems for creators in a way that is not intended. Jay mentioned termination rights, and certainly the work-for-hire issue should not be impacted at all by anything that goes on here in these discussions, in any resolutions that may result in a way that prejudices the rights of creators.

I think that that is a crucial point. The work-for-hire issue as it affects the corporations that own sound recordings is going to be a major issue in the near future, and this cannot be used as a device to somehow prejudice the rights of recording artists. I think also we need to keep in mind that the ability of the federal government to help control piracy may somehow be impacted on the ideas and the eventual resolution that you recommend here in these next couple of days, and that's an important consideration. I don't know enough about the success that RIAA has had, especially in terms of street piracy of physical goods, in getting the Justice Department to assist in that process. And, of course, songwriters are helped enormously by the fact that federal and local law enforcement agencies actually do go after pirates. So I would ask, back to Eric Schwartz and others who have spoken on this, what are the benefits that may arise at later roundtables of the kind of unification of laws or federalization, anyway, that might assist the U.S. Justice Department and USTR and Customs in helping control piracy, and that would include I think online piracy. Aside from that, I think that I want to end up by saying that, of course, everybody around this table has expressed the same thought about preservation, and it is crucially important that the cultural heritage that is being protected by so many groups around this table be made as easy as possible
without prejudicing the rights of copyright owners
and creators. And I think that that is especially
true with Native American recordings. I think the
U.S. has a special obligation to help preserve,
insofar as is humanly possible, a culture that we
arguably tried so hard to eviscerate for so many
years. So, I look forward to talking about the
creative perspective as we move along.

MS. PALLANTE: Thank you, Charlie.

Pat, you wanted to --

MR. LOUGHNEY: I would just like to add for
the record on that point that the Library of
Congress in fact has been a creator of content for
quite a long time for both sound recordings and
videos, and it is with humor and sometimes
consternation that we see that content come back
repackaged, relabeled and submitted for copyright,
sometimes over and over again.
So we are aware of this, and we see it of
material that we have actually produced as public
domain material but put it out there, so it's not
unknown to us, your pain.

MR. SANDERS: I would also look forward to
hearing your thoughts on the WIPO protection,
efforts to protect or debate protection of
indigenous music around the world and bring it back
under copyright, and how that somehow folds into
some of the things that may be discussed over the
next two days as well.

MS. PALLANTE: Very good. Thank you all
very much. Those were -- that was a wonderful start
to our two-day program.

We have about a half an hour to have a
conversation, which I think would be great. And I

think my team has a few questions, and I would
courage you to ask questions of each other.
I'll start with just two factual questions
because so much of our program is on legal issues.
Many of the preservation experts mentioned how
fragile your archives are, your sound recordings,
and the question I have, though, specifically is, do
you mean that they will not make it to 2067 without
some kind of intervention? I think we need to know
that number --

MS. BULGER: It won't make it till next year sometimes.

MS. PALLANTE: Pat. Please jump in.

MR. LOUGHNEY: I can testify to many formats now in the recorded sound collection of the Packard Campus of the Library of Congress that are deteriorating as we speak. These can be transcription disks, these can be wax cylinders, they can be more robust formats that have actually had quite a lot of longevity because they've been durable for four or five decades but are beginning to show signs of oxidation, shrinkage and all the other catalytic chemical reactions that can occur to these formats. Because they were never produced for longevity or for archival purposes; they were produced for home consumption and use in the marketplace, and it was never intended that they last forever. And so we see that on a daily basis, and in many cases we are getting to recordings now that are too late to preserve. So it's a serious problem in the Library of Congress.

MS. PALLANTE: Does anybody else want to speak on that point?

MR. SCHWARTZ: I can't speak on the fragility for the libraries or archives, but I did want to sort of triage the issues --

MS. PALLANTE: Well, can I ask you just to hold off if it's not on that point.

MR. SCHWARTZ: It is on that point, because I think in looking at the legal questions, and I know it's anathema to libraries and archives to talk somewhat separately about preservation and access, but for legal purposes it may not be the wrong way to approach this.

We did some research, and I think other labels have as well, and as we stated in the filing, to our knowledge no library or archive has ever been sued, and has never been threatened for any preservation activity. For those who are not archivists or preservationists, and for those who are, correct me, we're talking about the copying of
material from a fragile to a less fragile medium or
format the types of things that are permissible
under 108, also under 107, and the House report
referring to the transfer of -- and film of nitrate
material to acetate and so forth.
So it seems to me, and maybe I will speak
personally, that the legal issues of going from
state law to federal law will have little or no
impact on the ability for archives presently to copy
materials, nor would it necessarily change many
archival current activities.
I hear what Eric, Tom and Dwayne are saying
about the very cautionary approaches that archives
have, you know, of having worked with archives for a
long time and done some legal work with them. I
know that no attorney at an archive ever got fired
for saying no.
And I think that when asked, Can we do
this? Should we do this? Well, there is some
uncertainty whether state law would allow for that
transferring, and so don't do it. But I don't think
that that activity is anything that has or would
necessarily get an archive into trouble for fragile
materials, nor do I think, frankly, that any state
court would make a determination that that activity
is unauthorized. You know, I will stand corrected
if there are those cases.
I do think, therefore, that mostly what
we're talking about here is about access, and, of
course, access takes many forms, as Sam mentioned
and others, between streaming and other types of
activities. Certainly onsite versus not onsite.
MS. PALLANTE: Eric, I think part of what
you are saying is that librarians and archivists and
museum curators shouldn't be so risk adverse, but I
have to tell you that as a former museum attorney
myself, you are not going to change that. And so I
think that's been well laid out, and in my
experience is quite accurate, that there they are
very risk adverse and conservative.
I had another question for you, but you had
one for me.
MR. HARBESON: Well, I was going to respond
to Eric. And since we're both Erics, if you want to call me Eric H, you can free to do that. Or you can just say "Eric," and people won't know whether you are talking about the Music Library Association or the RIAA, and I'm actually okay with that.

So, first of all, to respond to your question about formats, what Patrick said is absolutely true. There are formats that -- the one that comes immediately to mind actually isn't one that is a pre-'72 format, but to give you an idea, a format that was created in the '80s, a digital audiotape. I have a recording engineer at my institution who has four different players -- actually, five different players in his studio just so that he can have a chance of playing a DAT on one of them.

With respect to open reel tapes, if the tape is not stored correctly, and sometimes even if it is, it's liable to get what is known as sticky shed syndrome, in which case if you don't do a proper -- I mean it may or may not appear to be in decent shape, but as soon as you start playing it, the magnetic material will come off of the backing, and you won't be able to play it again. So -- and so that's the strict preservation standpoint.

But as I mentioned in my earlier statement, and to respond to Eric's comment about the preservation versus access things, there are a number of reasons why librarians conflate the two. They are not just -- it's not just a convenience, it's not just a phrase that we repeat like some mantra: If you can't preserve something, then you can't have access to it. That I think everyone will realize. If you can't -- if something deteriorates, then no one can ever have access to it again. The flip side, however, is also true. If you can't provide access to it, you won't be able to preserve it. Maybe you will be able to do it on a one-to-one, maybe a case-by-case basis, I'd be able to take a recording down to my recording engineer and he would be able to migrate it.

But what we're looking at, I have pre-'72 recordings in my vault that are, oh, geez,
probably -- well, hundreds of shelf feet, and this
is a small collection, right, of reel tapes, many of
which need preservation in order to be able to be
played again. That is not something that we will be
able to do on a case-by-case basis. This is
something where we'll need to hire a project
archivist to do transfers, and if we can't get grant
funding for it, we won't be able to preserve it.
As Sam said, or made reference to, a lot of
this is not just about our institutional counsel
saying no. Because you know they will say no. But
it's not just about that. Even if we have a
librarian who knows something about copyright law
and who is able to inform -- who is able to educate
their institutional counsel -- which they are
frequently asked to do, by the way -- about the
issue, and even if the general counsel signs off on
it, we have to apply for grant funding, and the
grant givers will be unlikely to fund a project
where the copyright is uncertain. And especially
when we don't even have -- we can't even reliably
say, Yes, we have their use. They are much more
likely to fund a photo project where they have
108(i) -- or 108(b) and (c) to rely on.
So this isn't just a -- it's not just --
it's a simple thing to -- it seems a simple thing to
switch -- to put -- to draw a line between
preservation and access, but if we can't provide
access, we won't get grant funding, we won't get any
kind of funding even from our institutions to
undertake these projects because, as you know, they
cost a lot of money to do.
MS. PALLANTE: Okay. I think that that
issue is something we are most definitely going to
come back to. Thank you.
Let me ask my other factual questions of
the labels, please.
A couple of the archives have said, Stuff
we have is not stuff that you own or would be able
to exploit, two separate but related issues. Is
that true? Or is that not true? Let me ask it that
way.
MR. BENGLOFF: It's a mixed bag because
it's not clear right now, and actually I have that
in my next set of comments. As I said, I want to
lump preservation and access together with
flexibility. We're willing to -- because I agree
with Eric H. that you can't look at those two issues
separately, that those two issues have to go
together.

MS. PALLANTE: Thank you.

Eric. Eric S.

MR. SCHWARTZ: First, to respond to Eric
the other, on his last point, I think we noted in
our comments the fundraising difficulties of
separating preservation and access in some
instances.

The point I was making is that legally, you
know, if I were proffering an opinion, at least on
the copying part, I would feel pretty safe, but
that's neither here nor there for a moment.

The second point, the one you are asking, I
think it's another triage, and Peggy referred to
apples and oranges, and to separate -- sort of
separate the red delicious or the Jonathan Golds
from the naval oranges here, there is commercial
material and there is noncommercial, and very
loosely defined terms. I think that a lot of the
holdings of the archives, just to define or at least
put a point down on the noncommercial talking about
ethnographic, field recordings, spoken word, some
broadcast materials, things of that nature, that is
a, you know, no question, difficult problem because
the issues that we're talking about in terms of the
concerns, the economic concerns obviously are with
the materials that are owned by the RIAA, and in
Rich's case, the A2IM materials.

The archives have and their holdings are a
combination of things. If I could give a bit of a
historical perspective, yes, I know film and music
are different, but I do see over the long arc of at
least my 20 years of doing this where the archives
and studios were 15 or 20 years ago in the levels of
distrust and the sniping at each other and the
changes that have occurred over time, I think if you
look at what has happened, even just recently, with
donations of materials in the case of Universal
Music Group to the Library of Congress, in the case
of the licensing of the pre-1925 materials by Sony
Music, their entire pre-'25 catalog to the Library
of Congress, you see the sense of cooperation that
is developing.

And so those types of cooperative
agreements for commercial materials -- I'm just
slopping the definitions here -- but are produced by
commercial entities are, I think, being moved
forward a lot more quickly, a lot more effectively
by private agreements than they ever would be by any
sort of legislative reform.

And, again, coming back to the point that
don't conflate the federalization with
simplification, because if you think that the
counsels in your institutions are going to feel good
because the federal law -- it's now all federalized,
but there are these contract questions on chain of
title, do we as the archive even have rights and
title to the physical material to the copyright in
it based on having acquired it from the right
parties? You are going to be in the same position
that -- you know, for the same reasons that we're
noting all of the legal uncertainties about
federalization, both about initial ownership and
about subsequent transfers.

MR. BENGLOFF: I just want to follow one of
Eric's comments and talk about it later, as I said,
and sort of play off one of Jay's comments about
commercial viability. Now, old recordings do have
commercial viability. For the community that A2IM
represents, that's the difference between making a
living and not making a living. So it's very
important to us to not oversimplify, and we often
find people putting out sound recordings that belong
to our members that -- and, you know, it's -- we'll
talk about orphan works, I'm sure, a little bit
later and what a true orphan is.

But I just want to support Eric on that
comment about this oversimplification could put a
lot of people out of business, which will reduce
access to many, many recordings, and many, many
recordings will go out of print and not be available because there won't be any money spent to digitize them and make them available.

MS. PALLANTE: Okay, thanks.

Let me see if my team has any questions or clarifications they would like to ask for.

June, do you have anything? Otherwise, I would greatly encourage conversation. No? Okay.

Sam and then Pat.

MR. BRYLAWSKI: One of the things that I should point out for pre-World War II recordings, and, you know, generally there aren't major archives of them held by American companies. The largest archive I'm aware of any company is that of EMI, the Gramophone Company, which has been very diligent -- you know, they have a 110-year-old policy of retaining every recording they ever issued. I'm not aware of such a policy of other record companies prior to World War II, so there is this dependence on archives, such as Eric H's and Pat Loughney's, and I also worked for one at the University of California.

So I agree with Eric on the cooperation, but the preservation burden has become, particularly the financial part of keeping the copies and paying for them, is now on archives. That is all I want to say on that because we were just talking about where the copies are.

I look forward to talking to Richard about how, you know, federalization really hurts revenues if the materials are still protected, but we will hold off on that.

MS. PALLANTIE: Another time.

MR. BROOKS: There is just one point that I would like to add that hasn't been mentioned here, and it's perhaps unique to sound recordings as opposed to other types of intellectual property, I believe. And that is that when you are speaking about the earliest recordings, which in some ways are the most or certainly in the category of most in danger, that is, the wax cylinders that Pat mentioned, a great proportion of those, and I would
guess from my experience perhaps a majority of them, are not in archives. They are in fact in private hands. There is a very active world out there not represented at this table today of private collectors who actively collect those.

Now, because they were wax cylinders that were made -- and I have a couple hundred myself -- because they were wax cylinders made in the 1890s before duplication procedures were invented, they are often unique recordings, of course, and subject to deterioration. They are in private hands. We would hope that over time those private collections would eventually migrate to more stable institutions which are better set up, obviously, to preserve them over time. But in many cases they don't.

And I know of private collectors of major collections, in fact, who would not consider leaving their -- or willing to donate their collections because of the dark archives fear. Maybe this is rational, maybe it isn't, but it is true that there is a substantial body of feeling out there that once my collection that I laboriously assembled over the years of these extremely rare artifacts finds it way into a library, no matter how well intentioned, that library will have to abide by the laws, and those laws as set up now to the public and to collectors seem to be extremely restrictive, particularly as to access.

So it's keeping out of the hands of those who could best preserve these things recordings that are probably -- well, I know -- are deteriorating in the closets and cupboards and back rooms of private collectors today.

MR. LOUGHNEY: I just wanted to offer an anecdote that I think was in answer to your original question, which is how much of these master or archival materials are held by the rights-owners. In a conversation that I had in the boardroom in New York in January of 2010 at Sony Music Entertainment, the question came up in relation to the Victor, Columbia, and other early labels, mostly the pre-'25 recordings, but also the others, their estimate was that they held less than
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25 percent, and perhaps for some labels considerably less than 25 percent. They had no master archival materials, no master recordings, no metal parts, anything, and those materials are in the collections of the Library of Congress, private collectors, and other recorded sound institutions in the U.S.

And so, for example, the National Jukebox, which was launched with 10,300 recordings certainly provided -- a gratis license by Sony, for which we're extremely grateful, all of the recordings have come out of the collections of the Library of Congress, with perhaps some from the University of California, and all of the work and preservation has been done by the American taxpayer at the Library of Congress, and we're providing free copies, free copies back to the rights-holder in this case because they don't have them.

MS. PALLANTE: Peggy, I'm just saying your name for the transcript.

MS. BULGER: Okay. Yeah, thanks.

Actually, after working for the federal government for 13 years, I understand a healthy skepticism about federalization. However, I really am wondering, and I guess I echo Sam on this, what would be the -- what is the biggest fear? Why would this be an undue burden? Can't we find a way to bring normalization and, you know, one law without having an undue burden on rights-holders? Isn't there a way we can do that?

MS. PALLANTE: Anybody want to answer that?

Jay.

MR. ROSENTHAL: Well, I'm probably not going to answer that, but I think it gets back to just the fear of uncertainty that covers all of this. I mean it's kind of nice to step up and say, Isn't there a way to solve these problems? And yet many of these problems that may result, especially as it relates to the issue of ownership and authorship and all the other things that have been mentioned, it's not here that they are going to be resolved. And I don't know -- it's for a court of law at times, it's for interpretations of law that are not up to us, unless we're going to write...
something that is so broad, you know, some kind of a
law that covers every single, you know, iteration of
problem, then comfort results. Yes.
But I have skepticism that everybody is
going to be able to do that, and as you add the
complexity of each particular problem, you know, and
you start writing more and you start, you know,
working more as a group, you are not going to come
up with really a consensus that works for everybody,
and we're back to the uncertainty issue. That is
really the fear.
Maybe it's overblown to a certain extent,
but in today's day and age with the way that the
ownership of -- and authorship and the songwriters
and artists feel about all of these issues, the one
thing we don't need is more uncertainty over the
rights that we think we do own.
And by the way, I know you talk about the
rights of sound recordings. There certainly could
be a situation where a record label does not own a
certain sound recording that they are using but yet
the underlying musical composition is owned by
somebody, you know, a writer, a publisher or
whatnot. So that has to be kept in the context as
well.
MS. PALLANTE: Elizabeth.
MS. GARD: Okay. So you have to excuse me.
I'm insanely nervous to be here today. It's very
exciting to be here.
But this is what we -- we saw all of these
problems and we studied this for an entire semester,
20 minutes every single session, and did a ton of
research on it. And what we found is that we felt
that if it was 50 years from fixation but with an
incentive period created under Article 303(c), that
a lot of the questions and problems that the
librarians are facing would be solved because you
would not have to worry about ownership or
authorship.
For the other side, for those that are
commercially still viable and interested, it creates
some sort of -- similar to 303(a) but shorter, a
five-year incentive period that as long as it was
commercially available to the public during that
five-year period, then you would be able to claim
the rest of the term until 2067.
And so what we were concerned with was
authorship, but you can't base it on authorship, you
can't base it on ownership, because you don't
know -- you can't do a backward looking of who was
the author, who was the owner. It's incredibly
complicated.
So basing it on fixation, then you get to a
point where you can have -- but you also have an
incentive period, so all of the materials that are
already being made available, even the materials
being made available at the Library of Congress
potentially, would have the full term to 2067, and
that way those that have an interest would come
forward in the way that the copyright law should
incentivize people to make things available in
really great copies, but at the same time allow all
materials that the librarians are so concerned with
to be able to quickly be rescued. So that was what
we came up with.
MR. BENGLOFF: I appreciate that, and I
read very much with interest your comments, by the
way, before I came here and I found them very
interesting.
I don't agree, but I found them very
interesting. And I'm just saying -- what? I'm
sorry.
MS. PALLANTE: Just state your name for the
transcript.
MR. BENGLOFF: Rich Bengloff. I'm sorry.
But from a practicality point of view, in
addition to having to register -- and I do have
solutions later. Don't worry, I'm not going to be
negative. It's in my next section.
But in terms of what you're proposing, it
creates an incentive to register all our copyrights
to be able to defend them in a court of law for
infringement and things of that type, so it's nice
and neat that with 2067 in terms of we know what we
have as opposed to some of yours that will come off
at different times based on when the 50 years -- and
we have a fundamental difference because we believe
the community that A2IM represents that when you transform a pre-'72 recording due to technology and go to more kilobytes and a variety of other -- you have a new recording. And I could bring recordings in here -- I'm not prepared to do that today -- that I could play for you that sound very little like each other, even though they came from the same seed, so to speak.

So I saw you were going for a simplification, but having worked in that area, that's my background is finance -- I'm not a lawyer -- the administration would become somewhat difficult.

MS. PALLANTE: Let's not cut this off other than to say we have a term of protection discussion tomorrow.

MS. GARD: Right, we do. Right. Right.

MS. PALLANTE: And we will come back to you.

Charlie hasn't spoken for a while.

MR. SANDERS: Yeah, Eric Schwartz mentioned something interesting before as a footnote to what Peggy was discussing, and that is the genesis of protection of neighboring rights and how it's kind of an anomaly because I believe in the federal's papers and around the time of the first copyright act, there certainly was widespread agreement that having state law different in 11 or 13 different states was not a good thing.

And it might be enlightening, especially for the library people, if someone could give an explanation of how neighboring rights and the protection of sound recordings developed over time in the United States in regards to that protection, so we at least understand why we have arrived at the landscape upon which we're trying to navigate.

MR. WESTON: You have five minutes.

MS. PALLANTE: I'm sure everybody is getting ready for a break, but there were several hands up.

Sam.

MR. BRYLAWSKI: I want to -- I don't -- I will look forward to hearing from Richard on why
registration would be required if there was some kind of federalization of pre-'72.

I will recount my experiences as head of the Recording Sound Section and author of the study is that even contemporary recordings have a very poor registration rate at the Library of Congress because of the rights that are afforded and not lost when you don't register, and we all recognize the additional rights you get when you do.

When I was here when I worked for the Library, only 50 percent of what was published we believed was actually registered, and when I did a study of seven labels, which are mentioned in this report, I went to go look up the labels and look at the releases, and it was even less than the amount that was actually registered.

So that fact and the idea that I don't quite understand why federalization would absolutely require registration, these are the kinds of impacts which we all want to learn because it isn't the intent in arguing for federalization. It certainly is the intent to have a public domain before we die, but it's not the intent to create an incredible burden on businesses making a living.

MS. PALLANTE: Okay. Copyright Office? June?

Raise your hand if you have something you really want to say before the break.

MS. BESEK: I would like to have Eric respond to that question -- if Eric has a response to that question about whether registrations en masse would be required, I think that would be helpful.

MS. PALLANTE: Great. And I think, Richard, you were really talking about that from a liability perspective --

MR. BENGLOFF: From being able to protect in a lawsuit, yes. We're finding in our -- I'm sorry -- we're finding in our actions if you don't have that, it becomes a much more complex situation.

MS. PALLANTE: Sure. And could I just ask our registration staff who are in the back to raise your hands for people who may not know you so you
may -- keep them up for a second. Feel free to mingle with them.

Eric, did you want to respond?

MR. SCHWARTZ: There have been several questions, but I know we're going to break.

Maria, you and I met doing a study on 411 and 412 and the contentiousness -- that was 20 years ago next year -- and as you and I well know, that issue is a very divisive one for the necessity of registration.

I think the question is a bit of a hypothetical question because you are asking what would a federal law look like if we had federalization. I think the question is, Would we carve out Section 411 for purposes of the pre-'72 sound recordings? We're not. That's just a decision for Congress. But given where that slippery slope of 411 and 412 brought us in the study by the Accord Group in 1992, I can only imagine where that would lead.

I just wanted to switch from that before the break by just simply asking a question for later panels. Peggy mentioned a third way, and I guess the question I would ask, certainly, on preservation and on access questions, is why not amend the state laws to the extent that the holdings are -- many, not all -- and this is the difference I believe between some of the film and some of the recorded sound preservation, again not all, but just sort of some major holdings to begin at -- and since, as I think Tom said, the states do look one to another for these things, why wouldn't states make it clear, for example, that preservation copying is absolutely permissible under state law? Why wouldn't they want to do that? And why wouldn't they want to allow certain types of access for older materials?

So one is the question of why hasn't it been done, and the question is, have they ever attempted this?

MS. PALLANTE: Eric, you get the last say before we break.

MR. HARBESON: Well, actually, I was going to ask Eric Schwartz in response to that how you
would do that and get a uniformity. Are you
thinking of amending the UCC to trump any state
laws? Because, otherwise, you still have 50 states
with 50 different plus territories of -- with 50
different conceptions on how the law should be
enforced, and you do -- when you start dealing with
the internet, you start having to worry about
long-arm statutes.
And so that's -- I would love to know how
we could get uniformity by amending state laws.
MR. SCHWARTZ: Am I saved by the bell or do
I have to answer that?
MS. PALLANTE: You could say you didn't say
it was easy.
MR. SCHWARTZ: I did say it wouldn't be
easy, and that's -- but you have to start somewhere.
MR. LIPINSKI: Two knockdown rules.
MR. SCHWARTZ: You know, look, Tom's point
about federalization and international harmonization
is a good one, and, yes, it would be wonderful and
there has been (inaudible) in the history of Byrne
and the digital treaties and Tryst and all of that
some movement towards harmonization, but we are not
there, not on copyright and certainly not on
neighboring rights, which is frankly the biggest
difference between the U.S. and the rest of the
world is that sound recordings everywhere but the
U.S., more or less, are protected under neighboring
rights laws, not copyright.
And it seems like if there was going to be
the harmonization of the pre and post, the time
would have been in '72 or subsequently in '76.
Charlie's question was the history of protection to
sound recordings. If you look at the legislative
history of the '71 act, what you find is that
federal protection for sound recordings was
accelerated out of the 22-year copyright revision
because of the problems of tape piracy and the
necessity to immediately have protection for
unauthorized reproductions.
And so that is where the federal law
protection begins in the '71 deliberations. Just
break it out of the '76 act and accelerate it, and
it seems like the time for the harmonization would have been then. Doing it now and the 40-year lapse in time with all of the contracts, with all of the consolidation and mergers of catalogs is what makes it so complicated.

MR. BROOKS: I really would like to say something --
MS. PALLANTE: Go ahead.
MR. BROOKS: -- because we addressed it in some detail in our filings. From everything we've seen -- and we had our own attorney look at the representations -- we don't think they are as serious as some may feel. We feel some of them may need to be addressed in any recommendations that are made.

But on the matter of Congress's attention to this and Congress's intent on this, I think it's quite clear that essentially there wasn't any -- or there was very little. Section 301(c), the state law provision, as you know, was inserted into the 1976 Act by a conference committee. It was not studied, it was not debated, it was not publicly vetted in any way, and it was carried through in the term extension act 20 years later, again without any attention to it that we could find anywhere. I would be happy to stand corrected on that if in fact there was serious consideration of what we're talking about today. But in fact, as far as we can tell and our attorney can find, there wasn't.

And to say that it could have been done then, perhaps it was a mistake, perhaps it was a misconception, perhaps it was even intent, but it's 40, 30 years later, and I think we know what has happened as a result, and I really couldn't agree with the idea that somehow this was considered and resolved. It was not really considered.

MS. PALLANTE: Okay. Elizabeth, did you have something?
MS. GARD: Yeah, just two quick questions.
MS. PALLANTE: And then that is it.
MS. GARD: Just to clarify, under international copyright, it's author based in neighboring rights, but neighboring rights is part of copyright law.
And then, secondly, in the time of ’71, we were in a UCC era where we were very anti-retroactivity, and now we are in a burden era, which is very pro-retroactivity. So just to cite the differences in the climate.

MS. PALLANTE: Okay. Thank you.

So we're going to break.

For the folks who are coming to the next session who are not on this panel, we will give you a chance to do the same kind of intro summary that we did this time around. We will -- but shorter, David says. That was not very nice, David.

MR. CARSON: The point being five minutes times the number of people on the panel exhausts the time.

MS. PALLANTE: And if you are on the same panels -- if you are also on the next panel and have different comments, feel free to make those.

Let's come back in 15 minutes.

(Recess.)

MR. CARSON: Okay. Let's get started then.

The next two panels are going to be led by Chris Weston. Chris is the person on our staff who is responsible for most of what you've read from us thus far on this issue. He and June maybe are the two people at the table who really understand just about everything about this, and the rest of us are trying to catch up, and we're hoping you will help us with it.

So I think there are -- I guess -- well, Susan, we're not going to give you any extended time because someone from your organization has already been here, but we did want to give Gil, who is appearing for the first time, just an opportunity -- not to take maybe five minutes but take two or three, if you want, just to give your overall perspective, specifically on this issue, I suppose.

But then we are not going to have -- not exactly the same format we had the first time around. We're going to try to make it more focused, pop specific questions out, and hopefully get a lot more back and forth.

But I will turn it over to Chris, and then
we will start with Gil, and then we will get the discussion going.

MR. WESTON: So, excuse me while I make more of a mess. What we're going to be talking about in this session is availability -- the current availability of pre-1972 sound recordings because there seemed to be some factual disagreements among the comments. And so that's one thing we're going to get into.

And another thing that I want to touch on in here is something that was mentioned before, which is in terms of how sound recordings are used, how helpful is it going forward and thinking about legislation perhaps to look at them in different categories, such as pre-1923, pre-World War II, commercial and noncommercial.

But, first, let's give Gil a chance to introduce himself and tell us a little bit about his views.

MR. ARONOW: Thank you, Chris.

Gil Aronow from Sony Music Entertainment. I just want to say I'm glad to be here to have the opportunity to engage in this discussion, and I appreciate it.

Our position I think was fairly well expressed by the RIAA and Eric Schwartz, and I think it's fairly straightforward. I mean we understand there is a complex legal landscape that is being under consideration for change.

Our view, though, is that there's an existing complex legal landscape that we are relatively comfortable with and can make reasonable risk assessments and valuations of the catalogs that we own based on that, and -- and would prefer, I think on balance, not to upset the apple cart.

We certainly recognize -- and I should say that all these remarks are intended in the spirit that Eric expressed earlier of finding a cooperative solution, and we certainly recognize the importance of preservation and access, and whether you parse them separately or conflate them together, you know, we want to find a way to preserve and make accessible those sound recordings, the entire
history of recording sound.
I note -- let me just go on a tangent for
one minute -- I'm sorry, I just want to address
Pat's comment earlier about being in New York in the
Sony Music boardroom and saying that less than 25
percent of the recorded music that is owned by Sony
Music, those masters -- less than 25 percent of
those pre-World

War II masters are held by Sony Music, and I think
that's factually accurate.
I think the rest of the story, though, Pat,
is that the reason that most of those masters or
many of those masters are no longer held by Sony
Music is our companies donated the metal masters for
munitions in World War II and also donated the
lacquer masters for various war-related purposes.
So we do appreciate that the taxpayers have
borne much of the expense of preserving and making
accessible some of these pre-1925 recordings that we
licensed to the LoC, but part of the reason we don't
have them any more is we're good citizens.
So, further, let me just proceed I guess
with a few other comments I would like to make,
bearing in mind, David, your less than five minutes'
preference.
We do think that the agreement that we made
with the LoC for the National Jukebox is an
excellent example of the possible potential for
either public/private or even private with private
university or public university or other archives

for giving access to at least those recordings that
are controlled by the major record companies. I
can't speak for any of the other major record
companies, but the fact that Universal did its own
deal with the Library of Congress suggests that the
other majors have some inclination towards
cooperation as well.
I just think as a final reference that my
reference earlier to upsetting the apple cart is
exactly what we're talking about. I think we are
potentially in a position where what we're going to
do is create more uncertainty rather than less
uncertainty, and that's really what we're trying to
avoid. Thank you.

MR. WESTON: Thanks.

So I guess now if everybody would like to
take a minute or two to talk about their views on
the current situation of availability in reissues.

MR. BENGLOFF: Chris, could I just make one
clarification when I introduced the organization
based on a comment that Charlie Sanders from SGA
said earlier? The community we represent at A2IM
includes a lot of artist-owned labels. He said he
was the only one here representing creators. I
think Franco and Buffalo, the Hanson Brothers in
Tulsa, Oklahoma, Bernie Speer in New York, Joan Jett
in New York, Slug from the top ten group Atmosphere
in Minnesota, and in Nashville, other than Big
Machine and Curb, I mean our members are the Skaggs
family, John Prine, Ray Stevens, Dolly Parton,
Gillian Welch, et cetera. I just wanted to clarify
who we represent. We do represent an artist
community, because more and more artists are
starting their own labels.

MR. WESTON: Okay. I'm going to break
protocol and give Charlie ten seconds.

MR. SANDERS: I didn't say I was the only
one here representing creators. I said it was the
only one here uncompromised representing --
MR. BENGLOFF: I don't remember that word,
Charlie, but that's okay.

MR. WESTON: The transcript will clear it
all up.

MR. BENGLOFF: I just wanted to clarify
that artists are a big part of our community.

MR. CARSON: We will make a finding in our
final report on that.

MR. BENGLOFF: Actually, you have it. Did
he use the word?

MR. WESTON: So whoever wants to go next.

Tim.

MR. BROOKS: Since I authored the study in
2005 that's been referred to here, I probably should
update you on it.

I would say too before I do that, I'm
a historian, and my understanding of the
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destruction of masters was that for the majors -- they're mostly Columbia or Victor, the two big companies in the early 1900s, Columbia went bankrupt in 1923, and immediately after that electrical recording came in, and many masters that they had held from their early years were destroyed at that time because they were felt to be noncommercial or nonviable.

In the 1960s, I know the gentleman who was hired, a Ph.D. that was hired by Columbia to clean out the Bridgeport archives where the majority of the masters held at that time were destroyed. Victor famously blew up its archives in Camden to make room for land, I guess, in the late 1960s as well.

So while I certainly commend the recording industry for the work they did during World War II, I think it's a bit of a simplification to say that that's the reason that a significant part of the masters don't exist.

The recording industry has changed, and certainly in recent years there is more appreciation for catalog product than there was when those things happened. But, nevertheless, they happened, and that's where much of our history, unfortunately, has gone and why so much is in private hands today and has to be accessed from those.

Regarding the study and its applicability today, the Survey of Reissues, was done in 2005. We tried very hard -- and I'm a survey professional. That's my field. I've chaired several industry organizations that monitor and audit survey/research organizations like Nielsen and so forth and the television industry, and I'm quite familiar with sampling and I taught it.

I do -- and we tried to make this a very rigorous study, as explained in the technical appendixes that are here. And since 2005, I and my colleagues have followed the pace of reissues and the kinds of reissues, especially major historical reissues that come out, and they are reviewed regularly in the ARSC journal. We survey that field. It's not my belief that there's been a significant change in terms of physical reissues.
What has changed is some online availability. And I think if this study were to be done today, one question we would have to address would be what is online availability. It is the belief of our members in our organization that limited or restricted -- we would say heavily restricted -- access is not the same thing as availability, certainly not for the purposes that scholars need it or even preservationists, perhaps. So streaming, for example, simply doesn't cut it.

One of the most famous recordings made by an African American in the early years was Bert Williams' recording of "Nobody," his signature song used in shows and kind of an anthem in that period in 1906. Well, the Columbia studios weren't having a very good day when they made that record, and the speed of the record actually varies throughout the record, and it's been reissued badly many times since then, played at 78 or played at some standard speed. It's only in the last couple of years that some scholars have figured out how to in fact normalize the speed to the timbre of his voice in a way that you actually hear what he was singing, not what the imperfect equipment represented on that bad day in 1906. Even Columbia knew it was a bad day, because six years later they had him remake it with a little more stable equipment.

Well, that's an example of why streaming doesn't do a whole lot of good if you're doing a serious study of these things. It's going to be streamed most likely without that kind of very careful attention to detail, much less many other things.

So whether -- I would be skeptical of considering streaming with no right to actually use the source sound document as constituting availability. We can debate that, but I would question that.

On the other hand, availability through something like iTunes or something where you could actually get your hands on the file and hold the file and use and study the audio file might.

So my impression from what I've seen is that
there is not a great deal of that going on right now
because, again, that's not a commercial model. However,
I do not think that the numbers that are represented
in the 2005 study would be significantly different
from this at all in 2011.
I would welcome anyone who wants to
replicate the study -- all the data is available --
and show that everything is different, but I don't
think simply raising the specter that, well, maybe
things have changed invalidates a very carefully
done statistical study.
So that would be my comment on the
availability as I see it today.
MR. WESTON: Thanks.
Sam.
MR. BRYLAWSKI: I want to say one thing
about Tim's study. It was mentioned this morning
that the study found that 14 percent of pre-1965
recordings are in print by the rights-holders.
Please keep in mind that the study is
restricted to recordings that were considered to be,
quote, historical, unquote, and did not represent
the full body of recordings produced in the United
States before 1965.
Now, what did "historical" mean?
Historical meant those recordings that Tim found
were described in detail in published discographies.
So it was jazz, which is very well documented, and
some spoken word, and then -- it's in the study, I'm
not going to repeat it. But there are large bodies
of recordings that because they weren't represented
discographies, Tim interpreted that, well, scholars
aren't looking at those right now, and these would
include, for instance, every pop vocal that was made
before 1965. They aren't represented in the study.
So if you were to really look at the total
number of recordings that were in print prior to
1965 in 2005, it would be significantly less -- how
much less, I don't know -- than 14 percent because
there were large bodies of works that aren't
represented in the study at all.
MR. LOUGHNEY: I have a couple of things to
say. First of all, I want to acknowledge that I
think the atmosphere today is much different than it
was in the past. And I'm talking about the
relations between the record labels and various
aspects of the industry and the archive world, and I
would be a very ungrateful federal employee if I sat
here and made only a single critical remark about
Sony because they've been incredibly generous in the
sense of working with the Library to help develop
and make the National Jukebox available, and
obviously it couldn't be done without them. And I
think it's visionary, and I want that on the public
record.
And, likewise, the leaders at Universal
Music Group, who have in fact looked at their
archives and have shifted a huge percentage of their
archival master material to the Library. So that
because they have in fact at Sony an awareness of
the cultural patrimony of the United States and how
it needs to be preserved for future generations. So
I want that to be on the record.
But I do think that we're living in an age
when the landscape has changed relative to
preservation and public access needs. Forty years
ago or during the '70s when the copyright law was
being revised, preservation was not considered and
archivists were not in the conversation about what
the law should be and what it should not be and
whether sound recordings before '72 should be
brought under federal law. There was no
consideration.
But now the landscape has changed, because
in fact just at the Library alone we have a $200
million facility that operates on an annual budget
for salary and investment and preservation in the
range of twenty-five to $30 million a year.
And there are other institutions which may
not have that riches of assets and facilities but
who are making investments in librarians,
preservation engineers, they're upgrading facilities
constantly, they're adding collections, and they are
professionalizing the whole area of preservation in
a way that it was never professionalized before.
And that alone is an important change that needs to
And one of the major problems is the copyright law because it impedes the activities of archives, which in the case of the Library has the federal mandate to preserve the recorded cultural heritage of the United States and be sure that it is made available to succeeding generations. And what the work of Tim Brooks and others has revealed is that in fact we have a growing cultural amnesia of recordings produced in earlier generations that have not been kept into the public marketplace by the rights-holders, and as they are forgotten, that link between one generation and the next is lost. And when they sit on a shelf unheard and unavailable because of the difficult restrictions on making them more available, it only adds to that growing sense of amnesia, and it creates the paradox of publicly funded institutions spending taxpayer dollars to preserve recordings that cannot be more widely available.

Again, I need to acknowledge here Sony's recognition of that problem and their willingness to collaborate with the Library to do this in an incredibly inventive way of now making this stuff more available. The fact that it has tapped into a market that was nascent is indicated I think by the fact that after the Jukebox was launched, there were over a million hits within the first 48 hours to that website. And it's my understanding from our IT people that that access, that interest and those links into that website have not diminished rapidly and has in fact stayed fairly steady, which indicates that this is an interest area out there that was unserved by the marketplace.

The final thing I would say is that we have asymmetrical interests. Our mission, along with other archives and libraries in the U.S. that record and preserve and make recorded sound materials available, is we have to serve that research public. And the commercial industry, they live within the strictures of the marketplace, and they can only invest in things that they believe will be commercially available, and they are not in the
archive business in the sense of doing what libraries do.

In that sense, that's what our common ground is, and I think that's why the Sony agreement with the Library is an example of where we can work together going forward, and I think that that in fact sets a very good tone for not only today but going forward on where we can -- where the archive world can work with the rights-holders in finding solutions to these problems.

MR. WESTON: Thanks.

Does anyone else have any introductory comments on this topic?

MS. CHERTKOF: I will just add one point, which is in the Tim Brooks study.

One of the points that was in there is that with respect to commercial sound recordings, I believe he stated that 84 to 90 percent of the owners are identifiable. So from the viewpoint of being able to get permission to make preservation copies or access or any sort of archival uses, the fact that such a high percentage of the owners are identifiable, I think, makes permission a route that libraries and archives can follow.

MR. BENGLOFF: In my opening comments, I said in the next section I would talk a little bit about access and preservation, and I will be quick. In terms of in our filing we had two of our members in the joint filing, Concord Music Group and Countdown Media, talk about their digitation and preservation plans and what they are doing. And I'm not speaking for them, but I know our community would love to get together with you. We have less resources than obviously Sony and Universal, but if we could work something out to do similar type things, we would very much be in favor of that, and we will swap phone numbers today to work on that.

Now, most music started off on independent labels. The genres of music allowed the artists to -- if you just look at the joint filing, Patsy Cline, Miles Davis, Bill Haley and the Comets, Dolly Parton, who happens to be one of our members also down in Nashville, Dolly Records. She's backed as
an independent.

And we agree with you, any delay in
restoration results in a loss due to decay and age,
and we are very afraid of that, and we embrace any
program that would help us financially to prevent
that from happening on an ongoing basis. Just
giving people access doesn't mean it's going to be
fixed. We would accept any government support --
and we do support orphan works. We think in terms
of streaming access -- so I guess we have a
difference there -- for real not-for-profit
organizations, educational institutions, libraries,
museums. Not Google, not a lot of bad actors,
people who want to make money off of it. We
believe -- our community believes in giving back and
sharing their music with all of these different
institutions. We have no interest in suing any
universities. I don't think we ever have. I don't
think any of our members really will.

We do have a value in our B roll. I was at
Pandora last week. I dropped off "Spoken Word"
and -- it was only "Spoken Word." I dropped off ten
comedy segments to be put up on Pandora when I was
out in Oakland last week. Okay. So we don't know
what is valuable today. Pandora has now added a
comedy section. People aren't aware of that now.
So what may not be valuable today may very well be
valuable tomorrow, and especially through what
Pandora does.

And we support the concept of orphan works
to an extent. If there is appropriate due diligence
to ensure the works are really orphan works -- and
the creation of the centralized database to support
institutions like libraries and educational
organizations. So we do want to make sure this
music doesn't disappear, and we want to make sure to
do it at the same time. Though I just have to throw
in again that, you know, people are acquiring
catalogs, they are releasing things. We believe the
private sector in many ways could do things less
expensively.

It's funny, someone mentioned Smithsonian.
Jay did earlier. They happen to be one of our
members, and they have to run from -- Smithsonian recordings is an A2IM member, and they run their business like a private organization, they have budgets and things. I speak to Richard Burgess and the people who work over there. And we have other D.C. members. 18th Street Lounge, which Jay knows well. Thievery Corp., so I guess they are doing something different with them musically now. But -- so we do support all these things. So we support having people have access and we support preservation. I just want to make that clear.

MR. BROOKS: I think it would be very helpful to parse the periods we're talking about because --

MR. WESTON: Well, just before we get into that, which I do want to do, I just want to give

Eric a chance to make an introductory remark.

MR. HARBESON: Well, actually, I wasn't going to make an introductory remark.

I was going to respond to something that Susan said. The 84 to 90 percent is -- well, setting aside for the moment that that is still only 84 to 92 percent, is that 84 to 90 percent of the creators or of the copyright owners? I don't remember that statistic from the report.

And even -- and I'll let Tim respond to that, but I also wanted to point out that that 84 to 90 percent is not -- as Sam said, is not all of the recordings in existence. It's only from the data set. There are many, many recordings that fall under the pre-1972 sound recordings category that the -- the set of all pre-1972 sound recordings that neither the RIAA nor the A2IM represent. Those are, as I mentioned, home recordings made on reel tapes. This is a much bigger field than simply commercial music.

So that's what I wanted to say.

MR. WESTON: And I did want to talk about, you know, separating these into date-limited sectors possibly as a way to figure out where there is -- where there is works that we can identify or classes of works where it can be identified that the record
companies that are represented here could
demonstrate that there is no or practically no
commercial activity or they are in a range where
it's only scholarly interest and things that
scholars really don't have an interest in.

I know that for pre-'23 recordings, I
remember there was an interview with someone from
the Packard Campus who was saying of all the Sony
recordings -- I guess that's pre-'25 -- of all the
Sony recordings that had been put up in National
Jukebox, the only one that had been continuously
infringed from the time it had been made was Caruso.
So it seems that there is a lot of room here for
compromise if we can carve out either along the
commercial -- noncommercial lines or along a
particular date-limited line.
And, Tim, I don't know if that --
MR. BENGLOFF: A lot more is coming into
print. And to speak to Tim's comment, I'm not just
talking about '40s and '50s. One of the two trends
actually that I was talking about was jazz from the
'20s and '30s, and it has been out of print, but now
in the digital age, it's going to be easier to bring
it back, but someone wants to get a return on those.
And there's recognizable names and there is no
reason why someone shouldn't be able to do that.
And to Eric's comment about things that
like are not -- were never with a label, you know,
the way our agreements work, including some of the
old agreements are if you recorded during a certain
period, that belongs to the record label. Now, just
because it didn't possibly get delivered -- you
know, if you look at certain artists' agreements,
certain things do belong to the labels.
That all said, we want to give you access.
We want to preserve and we want to give access, but
we just don't want -- we want to have it for you,
someone who is working with the library, educational
institutions and things of that type.
MR. BROOKS: To answer Eric's question,
since it's sort of hanging out there, the 84 percent
refers to the number of identified recordings of the
1,500 in the sample that we felt we could trace to a
current copyright owner. So it was a record, you know, that Bert Williams' record or whatever the record was, could we trace that to a presumed current owner.

Now, presumed because we don't have the legal records, and there could be some transfer of rights and do-not-include rights, and all that kind of stuff, but a reasonable person test -- that's what the 84 percent was.

The matter that I brought up before of periods, which I think is one that we need to explore, I don't think many in our field are concerned about the survivability of the Patsy Cline records. I love Patsy Cline. I have several of them myself, and I'm sure they will be around for a long time and there were a lot of copies made. Our concern is about recordings that are deteriorating and are unique or very rare recordings, and you have to get back a ways in many cases for that.

So I do think particularly when you go to the acoustic era, which is pre-1925, I doubt -- and I could stand corrected on this -- but I doubt that any of the deals that are being made today are to get control of acoustic catalogs, even acoustic jazz catalogs, for reissue purposes. There was very little of that done in that period. It was like the change from silent movies to sound movies. That was a defining change point in the recording industry.

And as it happens, the 1923 cutoff that exists in the rest of IP is very close to that 1925 cutoff for acoustics.

So one of the things we're most concerned about is actually something that we believe is beyond the time period that you are referring to, justifiably, for recordings that could have commercial value today.

And I would love to discuss, if we could parse the periods that way, what would be the objections, what compromises could be reached, what accommodations could be reached to make access first to that period, and then we could talk about other periods.

MR. WESTON: Thank you.
Pat, you have a comment.

MR. LOUGHNEY: A couple of points. One is to the notion of identifying rights-holders. Any reference librarian at the Library, and I suspect reference librarians around the country, who deal with sound recordings will have many anecdotes about their regular efforts to identify rights-holders and to connect potential users with those rights-holders, and that's a very crucial role that librarians play is connecting a rights-holder with the users, particularly when it gets to people wanting copies of existing recordings. And that's a tremendous problem.

So the current situation of the law is that while the RIAA and A2M members -- A2IM members want to keep things as they are because of the fear of the chaos that would result if those recordings pre-'72 were brought under federal law, the fact is that that chaos exists now for libraries and archives that deal with those recordings. We have lived with it since the '70s when those recordings were brought under federal law, and we live with it on a daily basis.

What we seek is a rational order for how to deal with pre-'72 sound recordings. Because it is not efficient, and as we ascend to a more professional level of preservation and access, we need to have that sort of clarification or we need to have some more efficient working relationship with the community rights-holders out there who, by and large, generally -- and with the present exception of Sony and Universal Music -- have fairly well ignored the interests and the needs of the research and the preservation community who intercedes with users in the public.

The last point I would make is that the role of archives in fact making these recordings that have been obsolete or out of print available to current generations of users has in fact been an interesting and important point to spur new interest in these formerly uninteresting recordings, or at least the ones that were not thought to be commercially viable and had, therefore, then not
been made regularly available. And to me that's something that I think we could explore going forward as a positive benefit to both sides, the rights holder community and the archive community and the public for whom we're speaking here today, is what do future generations need out of these recordings, and I think that's a role that we can play because I think the hits that we are getting now on the National Jukebox shows that there is a high level of interest in some segment of these recordings which have been formerly widely unavailable, and I think that we can learn a lot from that data that we're learning from now. So I would say that we could mutually explore that.

MR. WESTON: Sam.

MR. BRYLAWSKI: Yeah, two things. One is about identifying rights-holders. And just to clarify on what has been said, what Pat said, it's unpublished things which are the most difficult.

And when a reference librarian in trying to advise a researcher or a researcher themselves is looking into trying to legally clear materials, it could be very, very challenging.

And may I refer you, basically, look at the study that June Besek wrote for the National Recording Preservation Board all on unpublished recordings prior to 1972, and it's frightening all the possible rights-holders that there might be that we have no idea, because we're not privy to the original contracts.

The other thing is that I'm encouraging you also to look at not just the chronological segments of pre-'23 or pre-'25 or pre-World War II, but to look at the genres of music. My own -- the members of the Society for American Music, they aren't looking to see a body of work that's in print and available to store for $15 to be public domain. They can afford the $15 and they are happy for that opportunity -- delighted by that opportunity. It's the unbelievable numbers that aren't accessible at all.

One of the largest of which and one of which is coming under increasing study every year
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are what we call ethnic recordings, the pre-World War II recordings that were made by major companies and small companies that were marketed to immigrant groups in the United States. Victor and Columbia and many other libraries had lines of recordings directed specifically to Ukrainian Americans, Jewish Americans, Irish Americans, Serbian Americans and Croatian Americans, a different series for each one of these groups, and these are -- I believe I recall in Tim's study that they are the smallest -- they represent the smallest percentage of recordings that are still in print.

Prior to 1965 -- well, I'm saying this for the record, but I believe it's less than one percent of ethnic recordings that are in print. In my own research as someone who is documenting the output of the Victor Talking Machine Company and RCA Victor, the very first musical theater recordings ever made were a representation of going into a studio with an original cast and an original orchestra and a composer to make original cast recordings, I can't find them because they're ethnic recordings. They were made of lower east side Yiddish musicals with a composer conducting. I found one copy of one 78 of four sides made; the other copy I have no idea where it is. It's probably held privately. You know, it could be in a private collection of someone who doesn't want to donate it, or it may be entirely lost. But those ethnic recordings represent the worst case, and there are other genres that are in Tim's study that are better represented in print legally.

MR. WESTON: I would be interested in hearing from some of the people representing rights-holders. To the degree -- I mean clearly it doesn't seem that anyone wants to admit that here is some music that we can, you know, 99 percent guarantee has no -- you know, we've recouped whatever we are going to recoup at this point. But to the degree that such a thing exists, what do you think -- what is the solution for that? What is the solution for providing access if, you know, there's no remunerative motive for doing it but there is a
lot of scholarly interest?

MR. ARONOW: Maybe I'm just repeating myself, Chris, but the means are the types of private agreements like the ones we have at the LoC, the ones where we are exploring with other institutions that I can't go into any detail on the record, but I'm happy to discuss with you off the record that make the costs of preservation and access either minimal or at least bearable.

And who knows? As Pat was mentioning before, there's plenty of activity around the National Jukebox that suggests that anything that I might off the cuff say, Oh, well, that is not particularly commercial, a pre-1923 acoustic recording. I mean if there were a million people going to a website looking and listening, who is to say?

MR. WESTON: What about for those commercial recordings for which no current owner is locatable?

MS. CHERTKOF: I think for those that -- realistically that the risk associated with those is fairly low. If something wasn't registered and -- if something was registered, it gives you a place to start to track the owner. If you don't have that, then presumably it wasn't registered. If it's not registered, there's no statutory damages available. And if you try to make some use of it and you get a cease and desist letter, you can cease making use of it. It just seems like -- I mean we know they are out there, and there's a whole body of sound recordings that aren't related to our member companies' rights, but we think that the risk is low.

And I guess the other point that I would make is to echo a point that Eric made, which is that perhaps the way to go at this is by looking at state law reform.

MR. HARBESON: For the record, that was Eric Schwartz, not me.

MR. LOUGHENEY: Well, to assume that it is a logical approach to leave things as they are, and to -- but yet craft a national plan to coordinate...
and promote preservation doesn't work. To say that
there has not been any lawsuit that anyone can think
of against an archive for use or for preservation of
a work does not make a rational business plan for a
publicly funded or a privately funded archive to go
forward.
I cannot for my staff or the general
counsel on the Library of Congress say that we want
to make this leap of faith that we start preserving
and make multiple copies beyond what the copyright
law currently says and make them more widely
available or more accessible because in fact I
cannot rationally do that. Due diligence prevents
it.
The other thing is that going state law by
state law still leaves the current chaos that we are
all experiencing in the archive world.
And in terms of identifying rights-holders,
I work in the Library of Congress. I have the
Copyright Office at my elbow. But actually
identifying information, getting a legitimate
copyright search or a credible copyright search done
in a timely manner or done in a way in which we
maybe need hundreds in the course of the week is
just not feasible. There is a lack of staff and
resources to do that.
So there needs to be some sort of, I
believe, rational national playbook by which
archives and the rights-holders can go forward and
sort of identify what the ground rules are for
either access or public domain or whatever it is.
Because with the library having the immense
resources we do, we are hampered by many
difficulties. But for the less well-funded archives
centered in universities or historical societies or
colleges throughout the country, there is no hope.
This is a community that struggles and wastes a huge
amount of its resources just dealing with some of
these due diligence issues that can make an average
archive flounder or make them much less efficient in
terms of serving the public for which is the reason
why they exist.
So I just don't see -- I think it's a
disingenuous argument to say to leave it to state law or we are good citizens, we are not going to sue you if you do something, but we will hold the right to decide whether we can sue you or not. That's just not a rational way to proceed in trying to solve the problems in this area.

MR. BROOKS: If I could just add to that, because I think it's an important point that hasn't really been raised very much. One of the things that came out of this study that certainly I wasn't expecting was that, as Sam mentioned, the bottom line figure was 14 percent of pre-1965 recordings were available from the rights-holder, 22 percent were available from other parties.

Well, who are the other parties? A large -- and we didn't break it out, but a large proportion, perhaps the majority of that, is overseas labels, which obviously do not conform to our laws and which all have much shorter protection periods for recordings than we do. So you get the recordings from England or you get them from Germany. American money is sent overseas basically to buy our heritage back. That doesn't help companies locally. It doesn't help our economy.

The rest of them are sub rosa -- they're by smaller operators who simply either don't understand the law, which as it is is widely misunderstood, and think that these very old recordings are public domain, or people who do their risk assessment and think, Well, it's small, we probably won't get sued for it, and do it anyway.

This goes back to Sam's point about respect for copyright law. And I think it might be worth having a discussion about the approach of continued -- when there's clear violations and clear misunderstandings and clear disrespect of copyright law, is the answer to that to keep making it tougher, keep making it tougher, keep making it tougher? Or does that simply invite even more resistance to it and more disrespect for it? Or does it make sense to somehow rationalize it and say, Look, there is no point in copyright law covering things which are of no economic value to
us. We're just inviting more and more problems when
we do that. Let's parse this so it protects the
things that are valuable to us, Richard, the things
that are important to your members and to your
members, and make sure those are protected and
covered, and that can recoup our investments, and
not muddy the waters by protecting acres and acres
of other things that are not of value to us which
make people wind up disrespecting everything.
Twenty-two percent, fourteen percent.
There is a lot going on out there which simply is
subverting or bypassing American copyright law, and
that is an issue too.

MR. WESTON: Gil, did you have something to
say?

MR. ARONOW: Well, I think I have to say
this is a personal observation rather than one on
behalf of Sony Music. But, nevertheless, it feels a
little bit as if we're both -- the rights-holders
versus the archivists here, rather than that
cooperative spirit that I was referring to earlier.
It seems to me that there is a bit of the
rights-holders saying, and I may be chastised for
classifying it this way, but the rights-holders
saying, you know, We recognize that there are
preservation and access issues for materials that
are not ours, at least not represented at this
table, that the archivists are trying to address.
However, our perception is a bit like you
are trying to use an axe that is federalization of
the pre-’72 sound recordings to do surgery.
And, conversely, I think maybe a little bit
of -- Tim, my perception of what you just said is
that our resistance to federalization is a bit like
using an axe to address the surgery you need done on
your end.

And so that -- my conclusion from all that
is that it brings me back to we need to have a
dialogue, maybe more off the record than on, about
are there -- and to your question, Chris -- are
there categories of things where there might be some
more flexibility? But, you know, that's going to
take some work.
MR. BROOKS: I couldn't agree more. I mean perhaps there is a model in EMI's archive in Europe which in fact is a public charity, and they have turned over their historical masters to another organization in order to address some of the issues that we're facing here. Maybe there is another kind of model, but I would agree with you, that it would seem there might be a way to reach some sort of accommodation on this that accomplishes both sets of goals.

MR. WESTON: Great. Eric Harbeson.

MR. HARBESON: I don't think that -- well, first of all, I want to say that librarians and archivists really do value and respect copyright laws. As I mentioned earlier, we're not -- this is -- our copyright -- our risk aversion does not necessarily come from simply risk aversion. It comes from we are trying to do the right thing.

And as an example, I have heard several cases of people within my organization who have this idea of wanting to do something and then learned about -- assuming that they could go ahead and do some kind of digitization with pre-1923 recordings. Pre-1923 is in the public domain, right? And then they learn about this little, little provision that basically -- that makes that impossible to navigate.

So I don't think that we're really against you. I mean, many of us are rights-holders ourselves. Many of us are members of the RIAA.

I think what is going on is that you are looking at the -- to Gil, if this is sounding to you like using an axe to perform surgery, for me what -- the way I look at what we're trying to do maybe -- metaphors escape me -- but perhaps using a mister to water a flower instead of a garden hose. You know, something more delicate than trying to -- you know, we could be arguing for a straight 50-year neighboring rights. That's not really what we're doing.

You know, Pat is looking for a -- I've been hearing a lot of discussion about how we have risk aversion and we have to -- maybe this is a very low
risk thing and we can go ahead and do this, and if we get a cease and desist order, we stop. We need something that will allow us to make case-by-case decisions but that doesn't burden a system where you have to get a hundred permission letters in the course of a week.

To me, this is sounding a great deal like fair use. It's what's already available in the federal law, and I may be anticipating another panel, but I'm going to be here for all of them, so I apologize in advance if I do that. But this is sounding to me like what is already federally available if I'm wanting to do a project involving sheet music or photographs or maps or videotapes, movies, all of these are subject to federal law except for this particular sound recording.

So I don't think that this seems like -- I don't think that we need an axe to work on the small section of the law. I do think that if we could rely on fair use, on a huge body of case law that tells us what is fair use, you would find that libraries would not be using materials that are being commercially exploited in the same way that they are -- would use things that we judge probably will never have occasion to be commercially available -- commercially viable. Something like an oral history tape, for example, would be very likely, assuming that we have the release forms, something that we would have a pretty good fair use argument for, and so we might go ahead and do it. It's not a -- we -- the fair use -- the fourth factor would definitely be a deterrent from making any substantial commercial use.

On the other hand, I do have to say that, you know, that fair use is a very broad statute, and it's good that way. There are ways that you can make fair uses and make commercial fair uses. The bar is just very much higher. And I don't think that especially with libraries that we would see a lot of commercial use, but it would make it easier to. So...

MR. WESTON: Unless -- I have one more question, but unless anyone has a response.
MS. CHERTKOF: I was just going to respond to the idea about state law reform, and it would be totally possible to draft a model state law that would address some of these issues that could include state fair use rights, for example. And it would be something that libraries and archives and rights-holders could perhaps get behind together and shop it around from state to state.

MR. WESTON: And you could have music too like a traveling road show.

MS. CHERTKOF: Sure. Sure. We could have --

MR. HARBESON: With performing rights.

MS. CHERTKOF: And on the point of fair use, I believe there is also at least one case where there were state fair use rights found, and that there's reason to believe if it ever came up before a court that for equitable reasons that parallel kind of fair use rights would probably be granted by a court.

MR. LOUGHNEY: That begs the question, though, that there is a leadership group or organization who would be interested in traveling and going to all 50 states to get that enacted, and how many years would that take.

MS. CHERTKOF: Well, you could start with the key states, the states where there are big holdings. Virginia would be a good one for you. There are some major archives in major places. California has a few archives. You could start by identifying the five or ten states that are most determinative in terms of where there's holdings and then move it on from there.

MR. LOUGHNEY: Well, those resources are beyond our capability completely.

MR. WESTON: Well, I wanted -- there was one aspect of -- referring to sound recordings that I just wanted to get people's reactions to. Obviously because of the -- we have people from RIAA and A2IM who generously participated in this whole discussion. Our focus has been on commercial
recordings, but as far as the information I received
is that commercial recordings in terms of 372 sound
recordings are absolutely dwarfed in numbers by
noncommercial recordings, by which I mean recordings
that were not made -- I don't mean, you know,
sessions that were -- alternate takes or anything.
I mean things like field recordings, lectures,
recorded sermons, recordings sent by family members
to soldiers, this sort of oral histories is a big
for example. I'm wondering how if people -- is this
something that just folds into the overall orphan
works problem or is there a way we can attack that
just from a sound recording angle?
MR. BRYLAWSKI: I think you'd have major
rights issues unless you were to literally recommend
-- Congress were to pass a law about them. In our
study, the greatest big body of ignored unpublished
sound recordings are radio recordings, off-air
recordings, and all the local stations that made
recordings that are sitting in closets, literally
you hear about them being found, and then even the
networks that have found archives and either donated
them to public archives or are still holding onto
them, my understanding is those are all unpublished
works. And given the number of trade unions
involved in the creations that might be owners of
them, I think it would be very difficult to find
those easier to deal with than commercial. I mean
the nice thing about a commercial recording is there
might be only one or two rights-holders, the music
publisher and the record company. Radio is really
challenging.
MR. BENGLOFF: And that's a problem we have
today. In other words, we go to these digital sites
that are up there now, and they have a recording of
an artist playing in a bar in Texas that had a side
contract during that period with one of our members,
and those same songs are the same songs that they
are selling for a living. So it's -- but, again,
having people have access to these things, we're in
favor of that: Setting up some sort of master
library where people could stream the music and
listen to it online.
If somebody has the money to invest, as long as we retain the right to release it, if in fact we do have the rights given the example I just gave you where they were signed to an agreement, there were rerecording restrictions and things of that type, and then all of a sudden it showed up on Grooveshark because someone in the audience happened to make a copy, that's bothersome to us.

MR. HARBESON: Two things. One is I don't think that you are going to find the ability -- even with the Library of Congress being as enormous as it is, it doesn't have unlimited resources. You are not really going to be able to find a way to create some one master library. The way that things are being -- the large amounts of information that are being processed now is not through single source management but through more like crowd sourcing, if you will. If you have 500 libraries working on a problem, you may have some duplication, but you will get a lot more done. And you will access the unique holdings that each has. Whereas, if you are aiming for a master archives -- first of all, that is not good preservation practice because you have to have more than one -- I mean, it's not enough to have one source working on a preservation problem. I mean, that's one of the first things that you learn in library school. Preservation classes. Anyway, so I really think that the modern world demands that we look at modern solutions, and the crowd sourcing aspect is one of those.

I don't remember the other thing I was going to say. I'm sorry.

MR. WESTON: That's okay. I think Pat and Susan will close us out for this session.

MR. LOUGHNEY: Well, I would just make the observation that the creation of America's recorded sound culture was an industrial-based operation or activity of an enormous scale for a long period of time, well over a century. And these individual licensing agreements that we have with Sony and Universal are marvelous and they are models that need to be studied, but they only benefit the
Library in the sense of an institution. It leaves out the other institutions represented here and many others not represented here. So that's one point. We have to think more broadly because unless we can do that or find a solution that touches everybody or benefits everybody in the recorded sound preservation community, we will never achieve a coordinated collaborative approach to preserving this massive amount of material that has survived.

And I think that's the thing we need to keep in mind that -- in my mind I can't see how going by a state-by-state approach or leaving things as they are will create an atmosphere, no matter how much generosity there is by RIAA and A2IM members to want to work and solve this problem, to leaving it at this landscape of patchwork solutions across America. I just don't see how it's going to support or enable that kind of a collaborative solution that we need.

MS. CHERTKOF: I wanted to make a few points on the noncommercial recordings. The first is that unless the proposal is that basically you take and toss all of those into the public domain, you are still left with a due diligence problem for works after some date, wherever you want to draw that line, so that doesn't eliminate the due diligence problem.

I think also when you start talking about is there a way to separate this into the stuff that people care about and the stuff that people don't care about, you are just getting into a really difficult line-drawing exercise. I mean how do you draw that line? How do you come up with the definitions? How do you know that something that nobody cares about today doesn't become -- you know, there's some rebirth of that genre five years from now and you've taken those rights back.

And on the subject of orphan works, I mean that's been kicking around for a while, and that hasn't been easy. There are all kinds of different factions there, and if that was an easy road to go, that would have already been resolved.
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And I guess the last point that I would make is more of a kind of a constructive idea, which is what about working on some sort of registries here, you know, collectively between rights-holders and libraries and archives where maybe libraries are the ones that have to post what it is they want to use or -- I don't know exactly how it would work, but some sort of registry system or database of stuff that people are looking for and want access to.

MR. WESTON: Thank you.

MR. CARSON: Let's ask people -- the registry thing is an interesting idea. Let's let that percolate over lunch, and maybe in the next panel we can get some reaction to it, among other things.

We're going to give you a full hour, so be back here at 1:25. At least try to be back here at 1:25.

(Lunch recess.)

MR. WESTON: Welcome back from lunch, everybody. We are going to get started with our third session, getting into the meat of things here: Effects of federalization on preservation, access and value of sound recordings.

As before, we are going to start by going around and asking people to give brief one- or two-minute overviews of their opinions on this topic, but we also have two new people who haven't spoken yet, so we're going to give them a little longer to introduce themselves and explain their interest in the topic.

First, we have Brandon Butler from the Association of Research Libraries.

MR. BUTLER: Thanks for having me.

The Association of Research Libraries has 126 members of -- you know, our members are North American research libraries. They are mostly in universities, but they are also people like the Library of Congress and the National Archives, the National Library of Medicine.

So, I guess, our position in a nutshell is that federalization is not just an end but a...
process, and that we should consider not just sort
of what ideal world we would like if we could change
federal law any way we like, but also what could
happen if we start talking about changing federal
law, and what alternatives might be available.
So those -- we will talk more about the
alternatives in a panel tomorrow.
But let me say a little bit about federal
law. So what is wrong with federal law? What are
the risks of federalizing protection for sound
recordings? There are a few, and the biggest one

that really looms for us is statutory damages.
Federal statutory damages are enormous, they can be
enormous, and they change the risk calculus for
institutions. They inflate the risks significantly,
so that it is very difficult to weigh the advantages
of going forward in a rational way. Because it's
very difficult to say is saving this wax cylinder
worth the kind of -- you know, the odds of someone
coming forward as the owner of the wax cylinder are
slim, but if that person comes forward, it could be
like a bet-the-institution kind of problem because
we do big projects in our institutions, we digitize
lots of stuff, and so we could face really big
litigation with really big damages. That's the risk
that we perceive because of statutory damages.

In this context the exceptions to statutory
damages are narrow. So 504(c)(2) only covers
reproduction, not distribution and not public
performance. So if we want to stream, even if we
have a colorable fair use argument, if we are wrong,
we can't point to 504(c)(2) and say, Remit our
statutory damages.

It is great to hear earlier Eric Schwartz
from the RIAA say that state law is really nice in
this respect that it tailors damages narrowly to fit
the offense rather than the way the federal law
tailors remedies or doesn't tailor remedies, and so
ARL has come out with a separate statement generally
saying that we would like to see statutory damages
with respect to libraries phased out, and we're
certain we will hear from the RIAA in support of
that. So statutory damages are there.
And the other problem with federal law is that specific exceptions are narrow and hard to navigate within. So Section 108 has been the subject of lots of discussions in this building even about how outdated it is, how can we change it. And, you know, lots of commentaries -- in our reply comments, we tried to point out that a lot of the folks in this proceeding have said that Section 108 as it is now is not acceptable, that they want as part of the reforms to this -- to federal law to get better exceptions to copyright law generally, not just to say apply federal law to sound recordings from before February 1972, but change copyright law, change the exceptions so that they are better for us, because right now they are not good. Mr. Loughney in his comments said it would be malpractice in some cases to follow Section 108 in the sense that it can require waiting until something is already damaged before you start trying to preserve it, which is very puzzling indeed. So the specific exceptions that many people are saying is -- are very good reasons to want federal protection, those same people are saying that they are not good enough and they should be improved. So we're worried about those aspects of federal law. Federal law brings statutory damages; federal law brings not so great exceptions. Federal law does bring fair use, but we're actually -- and we will talk about this in detail tomorrow -- but I think there's a fairly strong argument to be made that state law should have fair use as well, that the constitutional foundations for state law are -- the constitutional foundations for fair use are sufficiently robust that any state would have to recognize a fair use exception to its common law copyright. So federalization has those problems. And then, again, federalization is a process. So it is a process where groups -- a group like this is going to be assembling again and again, whether it be here or in legislative offices, and talking about what should be the right federalization regime, what should be the right
statutory changes, and there's little reason to be
certain that that process is going to yield an
exciting and useful result.

Here lately, these processes have fallen
short. Section 108 is sort of -- did not -- it
issued a report that I think the consensus is it
hasn't been able to move forward since that report.
The orphan works -- the work on orphan works
similarly kind of came to loggerheads. So, you
know, why do we think that this will work out much
better?

And it's clear that folks on the
rights-holders' side feel pretty strongly that
federalization would significantly disrupt their
business. And so what is the negotiation going to
look like if we tried to get federal protection? I
don't think that -- I worry that it will be more
like the TEACH Act, which again there is pretty good
consensus in our community that the TEACH Act has
not worked out very well, that the limitations and
the sort of Byzantine structure of the TEACH Act
makes it so that fair use ultimately winds up being
the real basis for most policies because the TEACH
Act is very hard to follow.

So buyer beware. We strongly support
preservation and access to this material, but we
think that there's got to be an alternative, and we
look forward to talking about alternatives in
another panel.

MR. WESTON: Thank you.

And we also have Adam Holofcener, if I'm
pronouncing that right, from the Future of Music
Coalition.

MR. HOLOFCENER: The Future of Music
Coalition is basically a research advocacy group for
working musicians based here in Washington, D.C.,
but we kind of deal with the political necessities
for all working musicians domestically.

We kind of have two points that we really
would like to focus on. A lot of it is sort of
joining the great research and study and thought of
others at the table here, but basically we feel that
sort of streamlining sound recordings so that
copyright law can be uniformly applied is beneficial for those institutions such as those that are preserving our cultural heritages, such as libraries, archives, universities.

And, two, that enhanced access to American musical culture captured on fixed medium means greater artistic enrichment for today's creators and new opportunities for rights-holders.

Basically, I think we do understand that the process that Brandon was just talking about is much more complicated than just sort of switching things over so that the institutions that have kind of always held sway over archiving the products of our national heritage to just do that for pre-1972. Sound recordings is complicated, but we do think that the process of federalization could as long as certain of the niceties of the situation are sort of handled gently, which whether they can be or not is unclear, through fair use and other exceptions, I think that we generally support federalization in that area.

Number two -- and that just sort of addresses the streamlining of our copyright law.

Number two, you know, musicians -- the process of creation has sort of always involved an interaction with our past cultural objects, and then sort of the creation and consumption of new options, and we feel very strongly about every working musician's copyright in that that goes towards both parts of their musical products, and we definitely understand the allegations that the rights-holders communities have against damaging in any way that constituency's rights. And while we feel strongly for that, we also feel strongly that the balance be properly struck between the limited monopolies of the creators of sound recordings and the public access.

And a lot of the works I think we are talking about to really sort of build the sonic landscape that sort of the media world that we are dealing with right now, especially from the internet age, is really built on that, so we want to make sure that people do have access to that in a way
through studies done by Tim Brooks that I think not
enough of those works are reaching out to the public
in general.
So that's basically our stance.
MR. WESTON: Thanks.
So as before, if we could just get a
statement, a brief statement, one or two minutes,
from everybody else on the panel, hopefully
addressed specifically to what we anticipate would
be the effects, good, bad or indifferent, of
federalization on activities of preservation and
access and the commercial value of the sound
recordings to the rights-holders.
So anyone can go who wishes to.
Okay, Pat, thanks.

MR. LOUGHNEY: Well, I would briefly say
that in terms of preservation and access, the
bringing of pre-'72 sound recordings under federal
law would create a uniformity of rule and regulation
and practice that would benefit the nation's
preservation organizations.
Through a series of mandates, Congress has
centered the national library, the Library of
Congress into the role of national leadership,
particularly in the area of sound recordings and
motion picture preservation. And I cite again the
National Recording Preservation Act of the year 2000
mandating not only the study but the national plan
that we're now working on.
I think if we're going to look at the
landscape of American recording preservation, if we
are actually going to truly create a collaborative
working relationship among many different types of
institutions, all of whom are engaged in recording
preservation, it is essential that there be some
basic ground rules by which all know what their
obligations and due diligence issues are in relation
to public access and to preservation. We now know
that in fact some of the rules in terms of digital
preservation that is allowed is a real barrier to
true preservation in the major archives.
In terms of access, because of the lack of
clarity in law, under the present circumstance, the
burden is largely on the archives to sort out the
rights issues and the rights-holders and to try to
stay within the boundaries of the law but also
fulfill their mandate to provide public access.
In terms of value, I don't profess to be an
expert in this area, but I do say that the archives
have in fact by their efforts to sustain this kind
of material, to preserve it and to make it
accessible within the limited scope of -- that the
law does allow, which the Library allows in the
recording sound reading room and other uses, that it
has in fact in a very limited but effective way
connected succeeding generations of users to at
least the cultural value of this kind of material,
and I think even in rare instances of commercial
value.
I'm thinking of a recording that was
discovered by a staff person in our music division
of a jazz performance that was recorded on Armed
Forces radio, I believe, that was released by Blue
Note Records and sold, according to Bruce Lundvall,
over almost a half a million units. In other words,
it was a commercial success, it went back to a
label, they issued it, and that was a real
commercial benefit. And to me that's a direct link
to the archival, A, discovery of an archive and
making it available to a rights-holder.
So to me there is an effect by the archival
preservation in the public sector to the benefit of
the commercial sector, and I think that is something
that could grow in the future.
MR. WESTON: Thanks.
Richard.
MR. BENGLOFF: Yeah, I wanted to ask a
couple of questions, if I may. Is that within
the --
MR. WESTON: I think we're trying to --
MR. BENGLOFF: Chris, I will save my
questions.
MR. WESTON: Thank you.
MR. BROOKS: It's quite interesting that
the objections -- some of the objections we hear
from both sides, from the ARL and the ALA, and from
the rights-holders' side are rooted in fear of what might happen. And that's an understandable fear that, you know, any kind of change that you propose or that anyone proposes is always something that you have to be worried about. I come out of the entertainment business world myself, the television industry, and you always approach change cautiously, but that doesn't mean that you don't change, because if you don't, the waves tend to roll over you and, you know, you are worse off than when you began.

Clearly, I think we have to agree on one thing, and that is that the current state of copyright law is causing significant problems to our national heritage. That was documented in multiple studies, and to say otherwise is a little hard to defend.

What the solution -- and most of our friends on both sides of the aisle have said that they would support preservation and access, and they are willing to work towards that -- I think that means that in some sense there is an issue that has to be addressed somehow. Obviously, there are differences in how it should be addressed, but we can start with that agreement.

If that is the case and if in fact those problems stem not just from the pre-'72 issue but from a whole nest of issues that have to do with updating our copyright laws to meet the modern realities of digital preservation, and the kinds of things that Patrick was talking about, then perhaps a recommendation needs to take into account that some major issues regarding this particular area of IP law, of sound recordings, are something that Congress should look at.

To say let's keep the current system because we are afraid that changing it might be bad, where does that get us in 10 years or where does that get us in 20 years? I mean it will only get worse. It can hardly -- it's hard to imagine a situation where it gets better if it's been getting steadily worse for the last 30 years with the changes in technology.
So I would love to work together or have the two sides work together on creative ways to do that which is acceptable, if not loved, by both sides. That's what compromise is. It's giving up something and getting something in return for it. But I don't think that starting from the premise that nothing can change or nothing should change in the basic state of the law, that kind of ignores what is rather blindingly obvious from what we have been hearing from multiple sources here that there is an issue.

So let's talk, and maybe it's segmenting, as I said earlier, by time period where we can't agree on Patsy Cline but we can agree on 1895 cylinders and not conflate the two, or maybe it's another approach. But we do need to address it, and I would hope in any report that comes from this that it not take too narrow a look at this. It's an issue -- it's narrow in the sense that it's sound recordings, it's not other types of IP, but within sound recordings there are some specific problems that Congress has not addressed. And when it has passed laws, it has not had hearings, not had studies, it has not really focused on this area, and it's an area that perhaps even more broadly than pre-'72 needs to be brought to the attention of Congress.

MR. WESTON: Dwayne. Before Dwayne speaks, I just want to ask a question. We can forego the one- or two-minute opening statements if people want to get right into the discussion. Unless there are others who want to make --

MR. CARSON: Those who would like to make an opening summary -- okay. You've got a few people.

MR. BUTTLER: I think that Brandon laid down a very good cautionary tale about the possibilities of federalizing these kinds of works. I don't know -- and I think at the core of that question really is can we define usable uses in some sense right, so whether it comes through federalization or some sort of other framework, it's
really can we clarify how these kinds of works can
be used in meaningful ways.

And I don't think that -- one of the
answers this morning was something like the fact
that no one has been sued seems to clarify the use,
and I don't think the lack of the threat of
litigation really is a good model. I think we
really need to look at framing some kinds of users'
exceptions. So if it becomes a federalization
principle, then I think that you need to look at
other areas of 108 and those kinds of things that
might be affected in that context, and you may need
to refine those in some way.

You know, the limitation in 108 about
digital copies and premises is a fundamental problem
in lots of ways, and I think if you are going to
look at sound recordings and changing that notion of
how those are preserved and accessed, I think you
need to possibly look at exceptions that will
parallel this sort of new kind of framework. And
that's not novel to me. I think that is something
that Kenny Crews had mentioned in his comments.

I also think that having that coherent
understanding of the law, consistent with what
Patrick had said, really will help make that happen,
right, because it really is trying to resolve a
problem that is there. And as Tim pointed out, this
problem is there, and we can't ignore the problem.

And really the question is, How are we going to
resolve that in some legal sense?

The value part of the equation, I want to
say a little bit about that because I look at the
value -- you know, the National Jukebox must be
tremendously valuable because so many people wanted
to look at it right away, and whether that's an
economic quantification of value or not, I don't
know in that sense, but I do think it has tremendous
value, and I think the constitutional framework of
copyright really is not just an economic model.

It's really moving social policy forward; otherwise,
there wouldn't be limited durations and there

wouldn't be some other kinds of limits that are put
on copyright law. So that is my two minutes.
MR. WESTON: Thanks.

Peggy.

MS. BULGER: Yeah, I just wanted to make a couple of observations. The most obvious one is that we keep hearing that the rights-holders are comfortable with the way things are, and we keep hearing from the other side that those of us who are the custodians of culture and organizations are not comfortable and, in fact, very uncomfortable. So I think that we've got to have some kind of change. We are not going to just have the status quo because one side feels like, Well, I'm comfortable, don't change it.

We have some real, real issues because I think that the range of materials that we're trying to protect and we're trying to preserve and have access to is extremely wide, and I do go back to the fact that it's apples and oranges in many cases, but I think that we can grapple with it. We are all adults.

And I think this patchwork of state laws may work for some cases, but I know that on the international level that is not going to cut it. A lot of the piracy that is happening is happening internationally. You go to the international forum, UNESCO, at WIPO, they are not going to listen to Alabama. They want the United States government to have a position. And if we don't have a position, we are really a lot weaker than the other people at the table.

And so to keep saying, Let's just patch it together with the states, I just don't think that's going to work, and we really do have to think about a balance between the rights of the rights-holders and very robust cultural comments, and we're talking about patrimony for the American people.

MR. WESTON: Sam.

MR. BRYLAWSKI: In terms of value, I mean our position is again that a public domain is a value to citizens, and I think it also serves to generate more respect for copyright law than is being exhibited today, by not just the public but by people at this table.
I mean if you've heard how many times people have said on both sides of this issue or all the different sides that we would rather have it the way it is because the official law from contemporary materials doesn't work for preservation, that's rather appalling, I think. In terms of the value of materials if there were federal law, I think it's been said here, but when the Society of American Music is part of the historical recordings, copyright access proposals or HR cap, and one of them is is to have a performance right for sound recordings which pre-'72 recordings do not enjoy now.

So I mean I'm surprised by the stance against federalization in terms of just ignoring the fact that there are -- there would be a lot of new money coming to companies, which I presume is maybe sometimes being given to SoundExchange now but would have to be under federal law. There would be more force in fighting piracy, I would think, under federal law than there is now under state law. But at the same time preservation is served by public domain because we've seen that archives are doing most preservation, they require access agreements to make the materials accessible. And also public domain just means more copies out there and under this sort of now traditional philosophy of copyright locks lots of copies, keeps stuff safe, to have a lot of copies in different hands is very good for the preservation of our culture.

MR. WESTON: Thanks.

Yes, Susan.

MS. CHERTKOF: First, let me say that I would agree with Sam that performance rights for sound recordings would be a very good step forward in terms of the law of sound recordings. As far as the topic for this panel, I just wanted to emphasize on the economic value -- well, let me start by saying, as we've said before, we are in favor of preservation and access and finding some way to work cooperatively with everyone here to bring those goals to fruition, but I do want to emphasize that on the economic value point of view...
that we would have concerns that federalization
would negatively impact economic value, and anything
that was thrust into the public domain, obviously,
would lose all or close to all of its economic value
instantly.
And all of the legal uncertainty and what
we think would be litigation and other sorts of ways
of sorting out how to deal with things like
ownership and authorship and term and all that, it
just detracts from the economic value of the rights.

MR. WESTON: Yes, Eric.

MR. HARBESON: So as far as the -- I wanted
to address the -- all three points: Preservation,
access and value.
The preservation benefit I think to
federalization would be in the uniformity, and we've
talked about that quite a bit.
The availability of uniform laws would make
it much easier to engage in larger preservation
projects. It would allow people to proceed
confidently with projects knowing that they are
following the law, which librarians frankly really
want to do.
The access value, there -- I mean
obviously, as I've said before, it's difficult to
separate preservation from access, but one thing
that is I think strictly an access value which would
help libraries actually would address Section 108.
Five years ago, whenever the last
Section 108 roundtable was in Chicago over 108(d)
and (e), I was in Chicago advocating that 108(i) not
-- that we drop 108(i). Well, 108(i) is interesting
in that it allows -- it excludes musical works from
108(d) and (e). It does not exclude sound
recordings. So one thing that it would allow is for
libraries to make copies under 108(d) and (e) for
works -- sound recordings that are copyrighted but
are where the works are in the public domain.

So, for example, right now we can make
copies of the Dohnanyi recording of Beethoven's
Ninth by the Cleveland Orchestra. Under 108(d) and
(e), as I understand it, because while the sound
recordings is copyrighted, the work is not, and so
108(d) and (e) would be available to us. This is
not the case with the George Szell recording of Beethoven's Ninth because it's not under federal law.

And I do want to speak quickly to the value of the recordings. First of all, I don't really think that a recording loses all of its value when -- even if it enters the public domain. What it does is it -- I will grant you that there is no monopoly right -- there is no monopoly benefit to it, but you can still make money as Penguin Books, Dover Music, Dover Books demonstrate. You are making money off of public domain material. So it's not -- I mean I will grant that you lose some value, but I don't think that it loses all value.

What you may lose from the public domain -- things entering the public domain you would gain by increased access. The rights-holder, perhaps the former rights-holder, may not gain all of that value back, but the public would gain immeasurably by having increased research into materials that had previously been forgotten. That increased access increases value to society, if not just for one rights-holder.

MR. WESTON: Thanks.
Who has not spoken? Richard.
MR. BENGLOFF: I just had two comments, and then I have a bunch of questions which you told me to hold.

What?
MS. CHERTKOF: Push your button.
MR. BENGLOFF: Oh, sorry. Excuse me.
I have two comments, and then some questions which I held while other people made their opening comments.
What my comment is, given Patrick's description of the limited resources, I could tell you the effect of federalization is a lot of the titles that are being put out through my community, which is over 80 percent of the releases, won't come out anymore because there won't be any payback the way we contemplate, especially after hearing this last round of comments by your side.

And I just have a comment. We also see
ourselves as investors and custodians of culture,

very active investors and custodians of culture, so
that line of separation, if my community had heard
you define the groups that way, they would have been
a little bit put off because -- I'm just telling you
because that is how they spend their day. That was
my introduction, their love of music. They are not
making money on my side of the table.

MS. BULGER: I'm sorry. I didn't mean to
intimate that seem --

MR. BENGLOFF: That's okay. I think it's
important.

Adam, my question for you, and I'm just
going to fire off a bunch of them because I'm sort
of -- the tenor of this whole thing has changed
quite a bit since this morning, since lunch, at
least from my perspective. Just sitting here. I
was minding my own business.

Adam, I looked at your website and, you
know, it's funny because highlighted was getting
another bite of the apple, so culture was in your
website, Christian Thompson's piece was not the
highlight. The highlight was artists getting
economic gains by getting another bite of the apple,
which means obviously your position on work for hire
is clear.

I'm just going to go through them all if I
can.

Dwayne, you brought up this morning that
streaming is not enough, and you followed it up that
you wanted to have usage --

What? Oh, I'm sorry if I mixed up the
people. Thank you. Same community. And you wanted
to use --

MR. BUTTLER: We all wear the same socks
too, by the way.

MR. BENGLOFF: 10 to 13, I wear the same
ones.

You said you wanted to use the music in a
meaningful way, and we're thinking of streaming.
Are you guys contemplating mash shops or something?
I mean what exactly do you plan to do with this
music that streaming is not sufficient? I'd just
like to know --

MR. BUTTLER: Which guys are you talking to?

MR. BENGLOFF: Well, I'm talking to you in this particular case, because you're the one who said,
I want to use music --

MR. BUTTLER: It could be either one or both or neither, so I don't know.

MR. BENGLOFF: Well, we object to certain uses of the music if --

MR. BUTTLER: I gathered that.

MR. BENGLOFF: Yeah. No kidding. Well, it's been rapid fire since I've been sitting here.

Public domain was mentioned once this morning. It's now been mentioned six times since we came back from lunch.

A lot of copies is a good thing. By the way, if you want to put in a new law, let's put the AM/FM not just on pre-'72 for people who aren't paying, and --

MR. BRYLAWSKI: I'm sorry, what was that?

I didn't understand what you just said.

UNIDENTIFIED SPEAKER: He wants AM/FM.


There's people not paying on any pre, post or any royalty at this point, the way you defined it.

MR. BRYLAWSKI: Oh, I meant there was no performance right on the law for anything that wasn't under federal law.

MR. BENGLOFF: So, I guess to circle back, Dwayne, I guess the question is, What is a meaningful way?

Adam, this other bite of the apple seemed to disappear from your presentation and, you know, this public domain being a -- you know, I just found a real shift in the -- it was sort of a give-and-take conversation this morning. I've been sitting here quietly since lunch until a second ago, and this doesn't seem like what I came down this morning for in terms of the conversation.
Just sharing. Thanks. Go ahead.

MR. BRYLAWSKI: Yeah, just in terms --
MR. BENGLOFF: I didn't ask you the

question. I asked them the question.
MR. BRYLAWSKI: But you quoted me and
attributed it to them.
MR. BENGLOFF: And I corrected myself, Sam.
I said used in a meaningful way, and I wanted Dwayne
to define what "in a meaningful way" was.
MR. WESTON: Okay. I think Adam has the
floor now.
MR. HOLOFCENER: Yeah, I think that in
terms of having another bite of the apple, there --
I think as Tim was mentioning earlier, there is a
large swath of sound recordings that are involved in
sort of the pre-'72 process. And a lot of the
access that we're talking about involves sound
recordings I think that don't involve certain
artists getting another bite of the apple, and it
might be a little bit difficult, although
interrelated, to sort of conflate -- you know, I
guess you're talking about the termination and the
other bite of the apple that we would like -- and
also to make sure that if there was federalization
that termination as it exists right now as we're
figuring it out in the federal law does apply to
those works. But I think that it's not for all
sound recordings that that would necessarily apply,
and we would want those different sections of sound
recordings to be handled sort of based upon their
particular niceties.
MR. WESTON: And, Sam, you had your hand
up.
MR. BRYLAWSKI: Yeah, well, two things.
I've mentioned public domain several times. If it
was six, I will make it seven or eight now.
But public domain as -- under anything but
a sound recording would be everything prior to 1923,
and 1923 would go into the public domain in either
2018 or 2019. I always get that mixed up. So this
isn't like throwing everything we love and make
money from and throwing it away.
But I mean this sincerely, I would really
like to hear more from Richard on how if there were federalization and whenever -- I don't know whether there is such a thing as partial federalization, but let's just say if sound recordings fell under the same laws that printed music did, how is it that your members would not make money from reissues? We're not talking about 1922, I will give you that, that those thousands of reissues you have of 1922 you might lose, but from 1923 on, I'm serious really about that part. It isn't the intent of any one of the archivists and librarians and scholars that I represent to deprive a company of some substantive income stream. So where would you lose that?

MR. BENGLOFF: I guess I'm trying to understand. The impression I got from these people, especially Eric H, was he wasn't just looking at 1923. Was I incorrect?

MR. HARBESON: In what way?

MR. BENGLOFF: The transaction you described in --

MR. HARBESON: In our comments we actually recommended putting pre-1923 recordings into the public domain, and then vesting a 95-year copyright term to everything 1923 and after. We did concede that --

MR. BENGLOFF: So that would happen pretty soon for anything in '24 and '25.

MR. HARBESON: We did concede that having inconsistent terms would be inconsistent with our proposal, because one of the things that we were observing in our comments was that a work written in 1940 would -- whose author -- written in 1940 whose author -- no, not whose author -- written in 1940 who went through the proper formalities would have a 95-year copyright term, and a sound recording, say an audio book of that book that was recorded the same year would have a 127-year copyright term.

So because we're arguing for parity with other media which enjoy -- this is really only pre-1972 sound recordings, remember, that have this special treatment, we did concede that inconsistent terms would be inconsistent, so we suggested that
possibly having a 95-year term for all pre-1972 sound recordings might be the way to go.

MR. BRYLAWSKI: So that's the same thing I proposed.

MR. BENGLOFF: Oh, 95 years from which date?

MR. HARBESON: That is something that we'd have to --

MR. BENGLOFF: Well, Sam, that is my point. You're not -- you keep throwing back to me 1923, but you are not speaking for the rest of --

MR. WESTON: We're going to have a session on the potential term of protection tomorrow and we will be able to get into that fairly in depth.

MR. BRYLAWSKI: No, it's not too bad. I don't stand to represent everyone at the table, while you don't represent everyone at the table.

MR. BENGLOFF: I certainly don't. I was asking him questions. That is why I wasn't asking you the question.

MR. BRYLAWSKI: Okay. But now I'm asking you a question because you made the statement, and I heard it with the same ears everyone else did: If there was a 95-year term from fixation, so let's say, as I said earlier, pre-1923 would be in the public domain, but 1923 wouldn't go into the public domain until 2018 or 2019, and then it preceded each year, how does that make reissues by A2IM non -- unprofitable? That's my question.

MR. BENGLOFF: I don't -- you are making an assumption that, all right, since I discussed certain things we were willing to before, that becomes your starting point for negotiations.

MR. BRYLAWSKI: I'm not negotiating. I'm trying to get you to elaborate on what you said. You made that remark. You said --

MR. BENGLOFF: No, no, you said earlier --

MR. BRYLAWSKI: No, you made that remark and said --

MR. BENGLOFF: In your opening remark in this session, Sam, everyone -- as you say, everybody heard, just like you said, Sam --

MR. BRYLAWSKI: Go on.
MR. BENGLOFF: -- your remark was, Well, it seems like you at A2IM are willing to do this -- You didn't say A2IM, but you gestured -- and then using that as a start, we could discuss -- and not everyone will be happy with everything on both sides of the thing, you know, that was your discussion. And I'm saying you can't piecemeal it that way, Sam. As far as -- one of those catalogs I told you can't have a deal does have a certain transaction date. And I don't know your background, quite frankly. I didn't read your bio.

MR. WESTON: Well, you know what, Richard --

MR. BENGLOFF: He asked me. He asked me.

MR. WESTON: -- I think all of these -- all of the various options of slicing and considering some things apart from others and terms, everything is on the table here.

MR. BENGLOFF: That's right.

MR. WESTON: So you may not agree with it, but I don't think we can say that it's -- it's unacceptable to discuss it, but I do want to move back away from the term question and focus --

MR. BENGLOFF: He's the one who keeps pushing me on that.

MR. WESTON: I know, but you are the one who I interrupted so I felt I owed you an explanation.

MR. BENGLOFF: Thank you.

MR. WESTON: So I want to move back to the questions of access, and I'm going to go ahead and ask questions.

Now, we've heard that federalization would encourage freedom of public access through its -- you know, through people having more certainty in what the law was and being able to take advantage of the exceptions.

But I would like an example, what kind of access are we talking about, and specifically on what legal basis? Because it's not entirely clear to me.

MR. BENGLOFF: Thank you.

MR. WESTON: That's open to anyone.
MR. BROOKS: Well, you are talking about access, and, again, you have to parse it by years. If the access is to a recording made before January 1st, 1923, then I think it's pretty clear under most proposals at least that's the public domain. That means that anyone can literally make that available. And by the findings in my study, it's fairly clear that there is a large number of people, far more than the rights-holders, principally historians, principally organizations, perhaps even ARSC itself, that would make such recordings available.

And I would point to the finding that while less than 4 percent of pre-1923 recording -- or pre-1925, actually, recordings are made available by rights-holders -- and, you know, I can't calculate this on the fly, but it's probably about 25 percent or so by others --

MR. WESTON: Okay. Let's say it's either post-'23 and not in the public domain or -- I mean pre-1923 and not in the public domain or post-'23 so it's protected.

MR. BROOKS: Okay. Well, for pre-'23, there is a flood that seem to want to make this stuff available, let's put it that way.

As you go forward from 1923, as Sam pointed out, the movement in the public domain would be gradual and year by year, presumably as 1923 itself, that year became public domain, and the same thing would happen to that.

The post-1923 that is still covered by copyright law and would be for a long time, there the encouragement to access is the encouragement of a stable, understandable federal law. Remember we've heard a lot about fear guiding decisions and universities that won't do things because they are not sure what will happen, and advice from counsel, You'd better not do it because we're not sure how this stands now, 50 state laws.

Under a consistent regime, whether you like it or not, but a consistent and well understood and well studied, and I think most counsels would understand something about federal law on this
MR. WESTON: Thanks.

Brandon.

MR. BUTLER: Yeah, so I feel like I should definitely share some of the knowledge that we have gained from a project we have been working on at ARL. We have done a series of interviews and focus groups with librarians over the last year and change about fair use and copyright, and how it's impacting them on the campuses, and we -- this issue didn't come up at all. I should say, first, it just didn't come up. No one mentioned it, not a single person. But the other thing that is interesting is that librarians were just totally confused about federal law across the board, and 108 -- not totally confused, that's not fair -- but there was just this kind of sturm und drang about, gosh, what do these limitations mean? I don't understand them. I can't convince my general counsel to use them. The exceptions in 108 are too narrow for me to get grant funding. All of these concerns occurred at the level of federal law, so, you know, certainty is not in the offing without some revision of federal law itself.

Because 108 -- again, 108 inspires confusion and contempt, and 107 to a similar degree, and part of this project that I'm working on, frankly, is to try to fix that, but we're not going to fix it by changing the law; we're going to fix it by improving understandings of fair use and improving understanding of the law maybe. But confusion is endemic to copyright maybe is my point, and that, you know, it's not going to get -- it's not necessarily going to get better just by having one confusing law rather than fifty.

MR. CARSON: Chris, could you either repeat or rephrase the question?
MR. WESTON: Yes, I'll repeat the question.

The question had two parts. The first was:

What kind of access would you ideally provide to work -- and I will be specific this time -- that is still under copyright?

And the second question would be on what legal basis would you provide that kind of access?

Susan, I think, had her hand up next.

MS. CHERTKOF: Well, I'm sort of confused listening to Tim Brooks. Because I thought that the main concern here was libraries and archives having access and making access available to researchers and academicians and folks like that, but it sounds now like you are talking about trying to create some mechanism for reissues by people other than the original rights-owners, which is more of a commercial kind of exploitation, and I guess I'm just trying to figure out what the whole agenda is.

MR. BROOKS: The full agenda -- should I answer that?

MR. WESTON: I'm sorry. Eric.

MR. HARBESON: I can let Tim respond.

MR. WESTON: Okay. Tim, go ahead.

MR. BROOKS: Just to directly answer, our basic agenda is preservation and access by the public, not academic -- not access by a limited number of people or not access by those who have a certain entree or physical location where they can get to something. I mean the American public should have access to its cultural heritage, students and inner city high schools, no matter where it is.

To that extent, if recording companies for very legitimate commercial reasons do not want to issue something, I don't blame them for this because companies are not set up to do that, they are not structured that way. I've been in enough companies to know that. But if they don't believe it's in their economic interest to do something, then that is where the public sector should be able to step in and make them available.

Now, under federal copyright law post-1923, or whatever the year is it turns out to be at any point in time, there are still restrictions on that,
of course. There are some provisions in copyright law, fair use, that kind of thing that allows some educational purposes, some distribution of things under some circumstances, and it may well be that those need to be revisited and changed in some way. That's another discussion from here. But that's an almost impossible discussion to have with 50 state legislatures.

So our point is that it be available, again not restricted. I'm worried when we narrow access -- as much as I love the Library of Congress, it should not be the only institution in the United States that can do certain things. For example, I don't think Patrick has the budget to do it, nor do I think that it's a fair burden to put on one institution.

Our basic goal, to answer your question, is that in some fashion in a way that doesn't hurt the economic viability of your member companies, the things that you don't choose to make available for legitimate reasons should be available by some other mechanism.

MR. WESTON: I think -- Eric.

MR. HARBESON: So in answer to your first question, the kinds of uses that I see music librarians putting these to will depend to a large extent on what is fair under the 107 doctrine. But the examples would be making research copies of especially archival sound recordings available to people who are doing research. We could perhaps, as I mentioned earlier, provide interlibrary loan companies so that we don't have to risk damaging our original copy in serving libraries that do not have the kind of collections budget.

For example, my library is a loaning library. We loan to other libraries quite a bit more than we borrow from other libraries. We have a very large library, one of the larger ones in the region. A smaller library might be able to avail itself better of our materials if we were able to provide loan copies.

Depending on the nature of the recording, whether it was a fair use or not, we might do things
like have -- create digital exhibits. This is 
something that libraries do quite a bit with other 
materials. We might have -- create -- even I could 
imagine creating curricula to help -- for people to 
take self-courses.
I mean, the point is that the uses that are 
going to be put to this are really up to the 
patrons, and the patrons have quite a bit of 
creativity that we can't really anticipate.
So we're trying to -- in some ways, we're 
going to be responding to what our patrons want,
whether it is for them to do the research that they 
need to do or for us to do research that supports 
their interest.
And as far as the legal basis is concerned, 
in some cases, as I mentioned, we might be able to 
use 108. And in pretty much everything else, I 
imagine us using 107.
We might -- one of things that we might 
want to do is in certain cases where more 
restriction is necessary, we might make copies 
available for distance education. In those cases my 
guess is we would be relying on 110, but if 110(2) 
didn't work out, we would have to rely on 107, but 
there are quite a bit of uses that could be put to 
these recordings. It would still have to pass 
federal -- I mean it would still have to pass muster 
with federal law and federal courts.
MR. WESTON: Thanks.
Patrick.
MR. LOUGHNEY: I would say that the uses 
that we would like to make of this material fall 
within the traditions of libraries dating back to 
colonial times. That is, we provide access to the 
public within the tradition of providing books, 
printed materials, photographs, newspapers and so 
on.
I -- the Library has no ambition to reissue 
anything. It doesn't want to get into the business 
of the Beatles or Elvis Presley or anybody. But we 
have a significant number of recordings that number 
into the hundreds of thousands for which the 
rights-holders hold no physical materials
whatsoever. We are using taxpayers' dollars to not
only store and preserve those materials, but we are
providing limited access on the premises of the
Library now, and when we can find a rights-holders
who will identify themselves and admit that they own
the rights, rather than saying no because they don't
know and saying no is rather than saying maybe or
yes, we want to make it more widely available beyond
that, which is to put it on the internet, beyond
streaming, allow people to have copies that they can
use for noncommercial uses. And I would suggest
that addressing a noncommercial use for this kind of
material within the law as clearly as possible is a
real genuine need that can go a long toward
addressing the needs of recording preservation
archives and libraries in the United States.
So, we want to make it available on a
noncommercial basis to users who will use it
responsibly. We have no interest in providing
pirated copies to anybody, and we are very proud of
our record at the Library, having collected motion
pictures and sound recordings for over 80 years, and
we have had no instances of piracy emanating from
any of the collections at the Library. So that's a
strong tradition that we are very proud of.
But that need is out there and we have to
find that middle ground, and I think noncommercial
use and access is something that has to be
acknowledged and it would relieve that pressure. It
would be a real pressure valve to provide access
without stepping on the rights of rights-holders or
potential rights-holders who might want to come in
and relicense that material and reissue it, which I
think is not our business and that's your business,
And I think if you are asking for the legal support, what is the basis for institutions like libraries that are using the materials, it's based on fair use and the aspect that it's noncommercial, and it's based on the noncommercial aspect that is built into Section 108.

If we were going to ask for pie in the sky, I think in addition there are limitations that exist in law. And a Section 108 study group couldn't get to consensus on digital access, either remote digital access or either physical digital access. And so one could envision under federalization some type of streaming rights but nothing else, and that might not fill the public's needs but it might be a compromise that might need to be made.

The other observation that came to me listening to the discussion now is that when people are looking at the 1923 date and the 2018 date or 2019 date, and that seems to be kind of a moving target, because I don't know if you are a betting person, but I would suspect that 2018 is not going to be our date come 2018. It's going to be pushed out another ten or fifteen years.

So there is certainly a fear that some of the inventory is going to start to fall into the public domain, but I don't know how realistic that fear really is. I would expect that copyright duration will be pushed out again, so that inventory is still going to be protected. And I'm working on the assumption that if federalization occurs, it's going to occur for -- it's going to solve the problem for the material that is sort of in pre-'23 limbo, but it's going to operate under the assumption that there will always be rights-owners, and their rights will always exist, but there will also be exceptions in the copyright law. And that's the balance that creative material is under constitutionally.

And that's why I'm in favor of federalization. It's not going to be easy. There will be some problems to work out, but I think it's more consistent and I will use the term "elegant" in
the sense of making all this stuff -- you know,
we're all star stuff, as Carl Sagan says, and I
think sound recordings are copyright stuff, and they
should be treated somewhat alike.

MR. WESTON: Thanks.

David.

MR. CARSON: We've got at most 20 minutes
left, so I want you to figure out what's left that
you haven't covered and figure out whether you want
to do that rather than go --

MR. WESTON: I just have one thing that had
come up before, and I think Peggy put it really well
earlier, is that right now it appears to be, from my
understanding, that libraries and archives bear a
certain amount of uncertainty, and that the
rights-holders are concerned that under
federalization they would be bearing a certain
amount of uncertainty, perhaps some uncertainty
around the same issues.
And I'm just trying to figure out, as a
policy matter, is there a way to both beneficially
allocate the uncertainty to any -- is there a party
that is better poised to manage that uncertainty?
Is there a party that is more or less deserving of
it? I'm just trying to think about that.

MR. BENGLOFF: Well, I'm still curious -- I
really appreciate it, by the way, Chris and David,
you following up on that. I heard two different
answers of what type of access and what type of
legal basis. I never got an answer over here.
But one party invested, one party spent
money, one party marketed, promoted, made the master
recording and did a variety of things, and the other
party did not.

One party wants to furnish -- I speak only
for myself -- something akin to what I envision,

making things available to the people of our country
on a cultural basis. It seems -- it would be hard
to argue against that, Patrick.

MR. LOUGHNEY: And I should add to that,
there is an investment on the Library side. We are
spending tens of millions of dollars, taxpayers'
dollars, to sustain this material and preserve it.
MR. BENGOFF: Patrick, I hope you heard what I was saying. Another party -- other parties in this discussion have talked about what are you going to do with it; would you -- you know, maybe -- the uses will be up to the patrons was the quote. And I don't want to put words in your mouth, Dwayne, but I got the same feeling -- I didn't write your quote down, but I got the same feeling. Those are very different positions. So trying to get to a place, it's different places.

MR. LOUGHNEY: Well, I don't think that's in dispute. But the point is where is the middle ground here and what is fair to the taxpayers who are actually bearing substantial a burden for storage and materials that don't exist with the rights-holders anymore?

MR. BENGOFF: As a taxpayer, I'm with you, and certainly your question, Chris, one group here are investors in terms of the sound recording, in terms of making them popular, doing marketing, promotion and a variety of other things. The others I don't discount. You know, my son is an educator. I believe in what he does, and it's very important, probably more important than what I do, but that is how I answer your question.

MR. WESTON: Thanks.

I think I saw Eric's hand up.

MR. HARBESON: So another party is investing considerably in recordings that do not fall under the recording industry's umbrella in promoting, in digitizing. We're investors too, so please don't forget that.

I think what I said earlier with respect to patrons is that it's determined by the patrons, not up to the patrons. The patron is why we exist, so if the patrons have needs, we're going to try and fill them in the ways that we can legally.

Now, to Chris's question, as far as the allocation of uncertainty, I don't know how one can split uncertainty. The only thing that I will say is that we're not -- if this were to go the way we want it to, we're not really giving up any uncertainty. We're still holding onto that pretty
carefully.

What we are gaining is not so much -- what
we are getting is a little bit more certainty
because we have a century -- half -- Folsom and
Marsh was what, 1840? -- so 170 years of
jurisprudence on fair use, which is helpful. We
have one case that I know of that involves fair use
at the state level, and that may or may not be
determinative. What we are getting is consistency,
and consistency helps to clear up some of the
uncertainty, if that makes any sense.

I do sympathize with the -- I mean there is
a lot of uncertainty in this in general, and I think
that -- everyone at the table would be well advised
to remember that, and -- but I think that we can get
around it in a way that will allow us to be more

uncertain together.

MR. WESTON: Susan had her hand up next.

MS. CHERTKOF: You had asked the question
about how to allocate uncertainty, and I just want
to point out that, as everyone should be well aware,
our industry is very much under siege. Revenues are
going down year after year. There's massive layoffs
all over our industry.

And if you are talking about reallocating
uncertainty and putting it at our doorstep and
putting us in a position of having to litigate over
ownership and termination rights and authorship and
all the other uncertainties that are going to come
about as a result of federalization, we are just not
in a position to bear that right now. That was the
first point I wanted to make.

The second point is that the more I listen
to this, I get a little concerned that what some of
the library and archive people are saying, they keep
saying they want consistency instead of
inconsistency, but what I really think they are
saying is they want to be exempt from copyright law,
that under state copyright law, there's actually
laws that apply to them, and what they are looking
for in federalization is to either have things
thrown into the public domain, which means that they
are not under copyright protection at all, or they
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are looking to be thrown squarely into existing
exemptions and exemptions that they want to broaden,
so consistency seems to be kind of a code word for
no legal protection.

MR. WESTON: Thanks.
I think Dwayne.

MR. BUTTLER: Wow, so I think that for your
direct question about -- can you tell me the
question again because it's gotten so complicated I
can't remember?

MR. HARBESON: Allocation of uncertainty.

MR. BUTTLER: Allocation of uncertainty,
yes, thank you. Thank you.
If allocation of uncertainty, if there is
an allocation, I think it should go with the
rights-holders, and one of the reasons I think it
should go with the rights-holders is because they
are more closely aligned with the underlying
information that we just don't have access to. So
to some extent they can understand better the kinds
of issues involved that we are just never going to
know.

And I think it's disingenuous to bring up
the investor question because I don't think that
it's really fair to suggest that the library
community has not been heavily involved in this in
no subsidy kind of framework, because they have
invested a billion dollars to protect things through
a century or more that have been sometimes just
sitting there with very narrow uses where people can
walk into the room to say that. You know, so there
is a little bit of characterization that is going
on, and I'm sort of on this side of the table and
I'm all wearing the same socks that I resent a lot.
But I do think that that information
question rests better with the rights-holders than
the library community.

MR. WESTON: Thanks. Peggy.

MS. BULGER: Actually, I think we're using
the words "rights-holders" in a very narrow way
because the people who own the rights to the
recordings in my archive are not RIAA; they are the
people who are on those recordings or their heirs.
So those are the rights-holders, and they are not being served.

So there are different communities here.

Let's just be clear about it. There's the commercial community and there's the noncommercial, all those vast, vast patrimony out there that's not being preserved and made access to because there is one portion, one subset of these recordings that are being served at the moment.

MR. WESTON: Thanks.

I think Eric.

MR. HARBESON: Yeah, I would really like to respond to what Susan said about libraries using consistency as code for we don't want any copyright. With due respect, if you really think that, then you haven't really been listening to what I've been saying all day. Libraries are in this position because we want to follow the law. The problem is that we can't figure out what the law is. You should not have to be an attorney to run a library.

We have a very strong culture in libraries of respecting copyright law and respecting copyright owners. Many of us, most of us are published copyright owners ourselves. Many of the libraries are themselves rights-holders of the sound recordings. My institution owns masters. In our state I believe that makes us the owners of those recordings.

So we're not looking to get rid of copyright. We're not looking to pirate anything. If we did, we would just do it. You know. If we -- if we really were wanting to get away with stuff, why are we coming to this table and arguing for a very subtle change in the law? If we really wanted to copy stuff and get away with it, we would. We're not trying to get ourselves out of copyright law.

MR. WESTON: Okay. Pat.

MR. LOUGHNEY: I think that that has to be agreed to around this table that we're here because we're upholding the law, and I think you can look at the library community as probably paying more attention to the law than many other aspects of American society.
I think it's somewhat appalling that two major organizations representing libraries have come with a statement saying basically -- throwing their hands up that the law is so worthless now that it can't be supported, so let's ignore it and try to put some Band-Aids on various parts around the table.

I believe in the law. I think it has to be fixed, but it has to be centralized and done in a way that is going to serve in a broad way the nation in a way that institutions that are engaged in this activity can follow in a rational manner. To leave it in this sort of helter-skelter way is a disservice, it wastes resources, it prevents public access, it promotes amnesia of our culture and slow deterioration and degradation. Those are the big issues that you have to keep in mind here.

This is not helpful to simply say that we want to be pirates and we are using code words about that. That's an insulting remark.

MR. BUTLER: I just want to say we didn't -- I didn't mean to appall anybody, and our position is not that we don't think that these changes would be great. I just think that this discussion so far has borne out our concern that these processes are often very difficult to complete fruitfully.

MR. WESTON: Okay.

MR. CARSON: I want to go back to the access issue, because I'm still not sure if I got a real clear picture on where people on either side of the table are here.

I mean I hear people want certainty, and that is great, but it ultimately depends on what the certainty is. If certainty means you can't do anything, you probably don't want it. If the certainty is that they can do everything, you sure don't want it.

And I've been trying to listen carefully, maybe not carefully enough, to figure out, all right, what is it you are afraid of, on the one hand? What is it that you want to do that he ought to be afraid of, on the other hand? And the biggest
catalog of uses I got was Eric, and as I took it down, make research copies of archival sound recordings and enable people doing research. I don't think you have a problem with that, do you?

MR. BENGLOFF: For individuals?

MR. CARSON: Yeah.

MR. BENGLOFF: It depends how it's controlled. If all of a sudden a hundred thousand people could download copies, I've got a problem with that.

MR. CARSON: I don't think that's what Eric was talking about.

Was it, Eric?

MR. HARBESON: No.

MR. BENGLOFF: Yeah, but is it going to put limitations in? Are you going --

MR. WESTON: Well, limitations are in the law already.

MR. BENGLOFF: Chris, I thought we were rewriting the law.

MR. WESTON: No, but he was talking about observing 108, the exceptions that are already there.

MR. BENGLOFF: By the way, you are not lawyers. You know code as well or better than I do, sir, so just as an aside. And I'm not a lawyer either.

MR. HARBESON: I do know code as well, yes; I observe it quite often.

MR. BENGLOFF: Yeah, so...

MR. HARBESON: But this is not code for we don't want any copyright law.

Now, I do think that the law is pretty explicit that, at least with 108 copies, the burden -- once we hand off a copy to a patron -- and this is in the law -- is the property of the patron. When it's the property of the patron, then it's really not our responsibility anymore. It's the patron's responsibility, and they are the ones that you need to sue.

But what we're doing -- I mean, if we -- and I can look this up in the law, but if we have any indication from the patron that they are going
to be using it to fund, you know, a small label,
then I don't think that we would be within our
rights to make that copy for them under those
conditions.

But this is in the law. You know, this is
the same law that people -- that producers of sheet
music have to abide by. I mean this is not
exceptional. There is no reason that recordings
need to be any different, let alone the specific
example of pre-1972 recordings. If this were a
problem, then why are there not -- why are the -- as
far as I know, and you can correct me on this, but
there is not a particularly rampant problem with
post-1972 recordings proportionate to the problem of
pre-1972 sound recordings.

MR. CARSON: That's a way of putting the
question, and I'm going to frame the question to the
two representatives of record companies who are at
the table.

Section 108 does apply, and we've heard of
some exceptions, but does apply to post-1972 sound
recordings. Do you guys have a problem with that?
Do you guys have a problem with the way it's been
applied to post-1972 sound recordings? Any horror
stories of what libraries have been doing with
post-1972 sound recordings?

MS. CHERTKOF: Not that I'm aware of. I
think the concern is with the wholesale
federalization of pre-1972 sound recordings and all
of the associated complexities and complications
that that would bring.

MR. CARSON: Let me see if I am hearing you
clearly. What I may be hearing from you, and I want
to make sure I am hearing you, is that as far as
Section 108 is concerned, you are not concerned
about Section 108 applying to pre-1972 sound
recordings. You've got all sorts of other problems
with bringing them into the federal statute, but
Section 108 isn't one of them. Is that what I'm
hearing?

MS. CHERTKOF: Well, we don't want to go
down the road of partial federalization because we
think it's a slippery slope and you get into
line-drawing exercises.

MR. CARSON: Just say "yes" or "no." Yes or no? Do you have a problem if Section 108 applied to pre-1972 sound recordings?

MS. CHERTKOF: Apart from what --

MR. CARSON: Gil is shaking his hand.

Thank you, Gil.

Would you have a problem if fair use applied to pre-1972 sound recordings?

Jenny is shaking her head. Thank you very much.

All right. Anyone here want something more than what fair use and Section 108 would give you? Raise your hand if you want something more than that.

MS. CHERTKOF: We heard more, but they weren't reissues.

MS. PARISER: We heard lots of people have different values.

MR. CARSON: Well, granted, lots of people have different views of what fair use allows, and that's --

MR. MARKS: Well, maybe then the question is is it outside of 108, because we've heard a lot about streaming, making downloads for noncommercial uses, and --

MR. CARSON: Are you taking it back, the shaking of your head, Jenny? You do have a problem with fair use?

MS. PARISER: The problem is the streaming. The problem isn't the archival copy. So it depends on how you read 108, David. If we're talking about 108 in terms of archival copying for preservation, we are right there with you.

MR. CARSON: All right. Well, 108 does have limited opportunities for making copies for other libraries, for patrons. Do you have problems with that?

MS. PARISER: It depends on how those copies are made, as my sometime colleague Rich will tell you.

MR. CARSON: All right. Gee, I thought I had agreement there for about five seconds, and
that's about as long as I had it.

MS. PARISER: Well, there is very little restriction to make -- you know, to put up the borders we need for 108 if there is unlimited streaming. That is where we get into trouble.

MR. WESTON: But there is nothing in 108 that refers to streaming.

MR. MARKS: But we've heard others -- and, Dave, I think this is where your question was going -- I at least heard references to streaming and things beyond 108. And we all know in today's world, a stream is a download in two seconds. So let's not fool ourselves. There's no difference between the two. So that's the world in which we operate, and so that's -- that is an issue for us that is something that we would want to have a meaningful discussion about, and we do find different than just preservation for archive purposes.

MR. CARSON: Our time is up and we're going to close right now, but it is something to think about and it probably won't get resolved in the next however many hours we have, 21 hours, whatever it is.

But, granted, we can all quibble over what 108 means, over what is fair use and so on. But if that is what we are quibbling over, then one thing to think about -- one thing we're going to be thinking about is if that is all we are arguing over, then is it so bad to bring it into the federal scheme?

We will have those arguments in the federal scheme, just like we have them with respect to post-1972 sound recordings, which I'm sure you folks are a lot more worried about than pre-'72 sound recordings as a general proposition. So that's just something to think about.

And with that, we are going to take a 15-minute break and we'll be back at three o'clock.

(Recess.)

MR. CARSON: Our next panel on effects of federalization on ownership and business expectations will be led by Karen Temple Claggett,
who is one of our senior counsel for policy and international affairs.

MS. CLAGGETT: Thank you, David.

As David mentioned, this panel is the effects of federalization on ownership and business expectations.

In the federal registry notice seeking comments for our study, we noted that it's important to consider state law principles that apply to authorship and ownership of rights to sound recordings to determine if there would be any tension with federal copyright principles.

We posed several questions to elicit comments in a few key areas, including how ownership is established, issues that may arise with respect to application of the work-for-hire doctrine, and ownership transfer issues and requirements, such as different rules regarding transfer, including the Pushman doctrine.

Several written comments as well as comments this morning in the overview session gave a very high level description of some of the potential difficulties that could result from federalization with respect to ownership, authorship and contract rights. Commentators have cautioned that federalization would impose a whole new set of complexities and legal uncertainty, and require huge costs and burdens in terms of chain of title, conflicts in litigation over ownership.

For this panel I would like to drill down to identify the real specific issues with respect to each of these areas and try to tease out some of the concrete as opposed to theoretical effects and concerns that might arise from federalization, and whether there are any potential solutions that could help ameliorate the problem.

As with the other panels that we had earlier, we will give everyone an opportunity to do a very short, one- to two-minute statement basically, as I said, identifying the issues and concerns in this area with a specific focus on examples and details.

There is one person I do know who has not
So we will start with him and he will actually have an opportunity to give a slightly larger overview of the issues and have a little bit of a longer time period.

MR. BENGLOFF: Sorry, but in your introduction you said transfer of ownership under the something doctrine.

MS. CLAGGETT: The Pushman doctrine in terms of when -- a very short description of it is just when the ownership in terms of the material object and whether you own the material object, you are the actual owner of the copyright and the work itself.

MR. BENGLOFF: Okay. Thank you.

MR. HOFFMAN: Thank you, Karen. I'm here representing a number of clients who own master recordings going back to the origins of rock and roll classics in the '50s, '60s and '70s and thereafter, but my comments of course are directed to pre-1972.

In terms of ownership and the uncertainty principle, which was being talked about in the earlier panel as well, there is no ownership problem and there is no uncertainty problem. My clients have contract rights that give them in perpetuity ownership of the master recordings.

So in terms of who controls, in terms of who has the right to make money from this and so on, it's very clear. In most instances, granted not all instances, the artist participates in the revenue stream that comes from these recordings. But it's very clear that at this particular point, there is no ownership problem; there is no uncertainty problem.

Where the uncertainty is going to come in is trying to make these master recordings, the sound recordings the subject of the termination of transfer issues, that is the subject of really what I wanted to direct my attention to.

Unlike the musical copyrights that are the subject of these master recordings where authorship is fairly easy to determine, Joe wrote it with Sally
and their names appear on a lead sheet and on the
copyright certificate, and it's done. And when I
say it's easy to determine, I don't think it's a
great secret that rock and rollers don't live
traditional lives. And so I've been involved in
situations where the authors have died, and we're
still seeing sons and daughters and children coming
out of the woodwork, including people who -- women
and men who want to be the putative spouse of the --
or widow or widower.
But specifically in terms of the children,
you could have 30 claimants to a musical copyright,
and as complicated as that is going to be, or is,
it's going to be infinitely more complex when it
comes to sound recordings. Sound recordings have
two kind of components in terms of authorship: The
performing end and, what shall we call it, the
fixation end.
So in terms of the performing end, if
you've got a musical group, and there's four or five
players in that group from the '50s and the '60s,
and maybe or maybe not they didn't have an internal
document between and amongst them, which they
probably didn't, so now you have five or six people
multiplied by a number of factor based upon how many
children or widow or widowers they left, if they had
died, and that creates an infinite amount of
litigation, which I know I've heard from the
preliminary comments is the specter that most people
are going to be talking about here.
Then you've got the fixation end. So
you've got record producers; some of whom are
copyright authors, some of whom may not be copyright
authors. There's a possibility that you may have
engineers who may have contributed a certain
copyrightable element to those sound recordings.
All of whom, if they are no longer alive, leave
heirs, leave children, leave widows, and the
litigation factors go on and on and on.
Complicating that is that pre the 1978
Copyright Act, the definition of "work made for
hire" was very unclear. And so who amongst all of
these people were employees for hire is very, very
Unclear.
So the issue here for the Congress is to --
whether or not to make what is now a certainty, that
is the contract rights that the parties bargained
for way back when, and turn that into a massive
amount of uncertainty.
There is an overarching consideration that
I haven't heard mentioned here today that I feel is
appropriate to talk about, which is in no other area
of the law do the parties lose their rights simply
by the passage of time. We don't take trademark
back, we don't take cars back, we don't take houses
back, but in the copyright law, we take back
copyrights initially from the renewal period issue
and now from the termination of transfer issues.
And every justification that I've ever seen written
about in terms of why this is, is because, Well, we
need to protect recording artists, we need to
protect songwriters, we need to protect authors who
may have early on in their career made a bad deal
for themselves.
Unfortunately, the termination of transfer
provisions and the renewal copyright provisions
before this have no requirement that they have made
a bad deal. It is simply as a result of the passage
of time and whether or not they are alive at the
time that the relevant statute applies.
All of this seems completely incompatible
with what is at least my understanding of free
market capitalism, and so in addition to all of the
other issues that are here, this seems totally
contrary to what our system is all about.
So those are my two cents. I apologize to
the panel and to the room because I will have to
leave early, but I wanted to put my two cents in. I
feel we are going to be in good hands with the RIAA.
Thank you.
MS. CLAGGETT: Thank you, Ivan.
MR. CARSON: Ivan, what time do you have to
leave?
MR. HOFFMAN: I need to be out of here by a
quarter to 3:00 -- quarter to 4:00.
MR. CARSON: Okay. Thanks.
And so with that, I just want to open it up to everyone else to, if you want, to do a very brief one- to two-minute overview in terms of the issues and concerns you have with this issue, specifically with respect to how federalization would affect, either positively, negatively, some of the issues that I mentioned such as ownership, work for hire, and other issues, and if you have specific examples in terms of how that would play out, and potentially whether there are any easy or complex -- if there are as well fixes that we might want to consider in our discussion as well.

Jenny from the RIAA.

So I have a list of about 15 things that are going to go badly, but I will -- but because I only have two minutes, I'm going to talk about just one.

Ivan talked about ownership and work for hire, which is really a subset of the ownership issue. I think he covered the fact that there's going to be a lot of confusion there. We certainly agree with that notion.

Karen, you recall from doing chain of title in litigation how hard that is. It will get worse if the law becomes more uncertain.

But I'm going to talk about the registration problem. So, of course, under a federal regime, as we understand it currently, you need to register your work if you want to prosecute your rights in court. Unless we write a different sort of federal law that doesn't have a registration requirement, presumably that would be a requirement.

Now, there was some discussion I believe in the first panel, and June said, Do you really have to register? Right? Why do you have to register? You have protection even if you don't register.

But the world in which we -- I live, which is the litigation of copyrighted works, everything depends on registration because you can't go to federal court to prosecute your rights without a registration. So regardless of what remedy you are seeking, whether it be statutory damages, an
injunction or actual damages, you don't get through
the door unless you have a registration. So that
would have to be done at some point.
And, of course, there would be a deposit
copy required as well. That is going to be a vast,
vast burden for most copyright owners. It would be
hard enough for the major record labels that the
Recording Industry Association represents for all
the smaller labels, Rich's members, and all of those
who don't even belong to trade associations, it
would be an absolute nightmare.
And even if you had a registration -- if
you somehow waived the registration requirement for
access to litigation, I'm not sure how that would
work, but, okay, you know, we're making up laws,
let's cross out the registration requirement to
commence the litigation, presumably at a minimum you
would need a registration for statutory damages.
That would seem -- that seems to be the quid pro quo
in the law as we currently understand it. You have
to register in order to get statutory damages.
And adding to the burden is that you have
to register quickly, because if you register after
the defendant has already infringed your work, you
don't get statutory damages. As you probably all
know, we just concluded our litigation against
LimeWire. One of the major issues in that
litigation was how can we prove for works that were
registered late -- because even for big record
companies some portion of works are always
registered late -- for works that are registered
late, how are you going to prove that it was,
nevertheless, registered prior to its having been
infringed online by LimeWire?
The effort that went into proving when
those two things happened, registration on the one
hand versus infringement by LimeWire on the other,
and who bore the burden to prove that, got to be the
most tedious, painful and expensive process in the
litigation, save only the chain of title exercise.
So if we're now going to all of a sudden
graft a registration requirement onto a century of
sound recordings that have not been registered in
the ordinary course, it would really -- it would put just the most enormous strain on the copyright owners who need to do it in order to preserve their right.

MS. CLAGGETT: Thanks, Jennifer. Does anyone else have a brief opening statement?

MR. BROOKS: I'm not a lawyer. Unlike some this morning, I'm not afraid of lawyers, perhaps I should be. We did for our submission get an IP attorney to look carefully, I don't know at all 15, but certainly all of the objections that were -- legal objections that were raised in the RIAA's filing. And I would point you to that. I'm not going to try to replicate them here, I can't do that.

But I believe the bottom -- and by the way, that attorney was on the West Coast, and I apologize that she can't be here today, is certainly available to you if you want to talk to her, have a conference call or something like that, I would glad to arrange that.

But the bottom finding was that potential difficulties that are here being characterized as massive or huge or a burden certainly did not look that way in the eyes of another IP attorney who looked at them. I think that's something on which attorneys could disagree, not that that's ever happened before, and that can be perhaps sorted out on a factual basis as opposed to a basis of general statements about it. But I think there is room for perhaps some fact-finding in the area of just how massive or huge or burdensome these things would in fact in reality be.

There was very little citation of law or cases brought forward. The case law that our attorney studied in some detail and which is documented here again did not seem to support that. So I can't answer that myself. We have tried to answer it in writing, and, again, if you want more on that, we will be glad to provide it to you.

On the matter of registration, just as a
citizen, if nothing else, I find it remarkable that
when almost everything in my life needs to be
registered in some way, whether it's my car, my
property or anything, that somehow the idea of
asserting -- and I won't put adjectives in here like
"merely" or something like that because that skews
things -- but the act of asserting that you own
something is a burden that simply can't be beared,

that you must own something without asserting or
registering or letting people know that you own it.
These are formalities that have caused so much grief
in the last 30 years, and I think that especially
when it's limited to only those cases when you wish
to bring litigation -- you have the rights and there
is no question about that, even without registering
as used to be done. But even limited to that it
becomes an unsupportable burden is a little hard for
the ordinary person to really understand in terms of
a world where some kind of registration or some kind
of acknowledgment that you own the property you sit
on or you own, whatever it happens to be, somehow
doesn't apply in this case.

I think it would be enormously helpful to
the American public if at least in some limited way,
litigation perhaps, that there will be some
acknowledgement, some public acknowledgment that I
own this.

MS. CLAGGETT: Does anyone else have an
opening statement that they would like to make?
MS. GARD: So my class, for those that
weren't here this morning, my copyright class, we
studied this problem as part of our -- because David
Carson came as a speaker and we wanted to present
him with our little project. We found ownership and
authorship nearly impossible. That when we were
trying to determine copyright duration, we ruled it
out after three sessions of the entire class
arguing. It was too unstable for determining
duration because authorship -- we can't
retroactively determine authorship, and ownership is
based on authorship, so it was out as a category.
So I will talk more about duration and what
we found, but in terms of ownership, you just can't
reconstruct it after the fact. At least we found
that. But we did find that we had a roadmap with
104(a), and 104(a) is copyright restoration of
foreign works and it includes foreign sound
recordings. This has been in place for about 15
years.

I know you looked at things online. So
104(a) and (b) is what we were looking at, which is
ownership of restored copyright. Now, when they
enacted this it included foreign sound recordings,
so all foreign sounds records, all of them that were
not protected by federal protection. They said any
work in which the copyright was ever owned -- oh,
sorry, where am I? I'm nervous, sorry.
Restoring work vested initially in the
author or initial rights holder of the work as
determined by the law of the source country of the
work.

Now, we suspected that people in our world
wouldn't like the first part about initially vesting
in the author, initial rights-holder. People
wouldn't like that. But we did like the part about
the law of the source country of the work. We
thought this was an incredibly good model to say it
invests initially in the state law where it was --
its home was to begin with. That it wouldn't change
the ownership that was already in place; it would
adopt it as if the individual states were foreign
countries as well and that we would respect that
particular law. And that was a way to get around
ownership.

Because the Pushman doctrine is very messy.
You will now know Pushman, it's insanely messy, and
California and New York didn't like it. So it's
just -- it's a mess. And as you are saying, chain
of title, disastrous, right? And so how do you get
around that? And I think that if you feel
comfortable with state law, which it seems like you
do, keep that part of it. Keep ownership as a
state-based thing and write it in in the way as a
model of 104(a). Now, if that means it's the
current owner as of the date of enactment that that
is where it vests, vest it there and say based on
the state of where it is.
And the other part we had in terms of
registration, we didn't talk about as much. I mean
they would love you, Jennifer. They would adore
what -- they would be amazed at what you are saying
because they are law students, and that's what they
like.
And so I think that the other thing you
need to look to 104(a) for are the NIEs, and I don't
know if you charge people for NIEs or not, but the
notice of intent to enforce, that if you could just
put a whole list of all the -- the NIEs are
nearly -- and you can't actually figure it all out
once you look at them, which probably maybe would be
good for some people, they would like that part of
it. But it seems like if you had just a list, like
you sent in your list -- NIEs -- your notice of
intent to enforce all of these copyrights, that that
would solve it as well, that then if you needed to
do a registration system, as long as it was
documented, we have this. Like we own this, we
claim this, we claim this. That then you could then
maybe in the system, then when you needed to
register, that would be the first step, but you've
already claimed an intent to register without the
burden of all of the -- because the burden of
registration, there is a lot to fill out, so, you
know, maybe that's a way to go say one group.
So those are the two things -- the few
things that our class came up with acting out your
parts over the course of a semester.
MS. CLAGGETT: Thanks, Elizabeth.

Does anybody else have an opening statement
they would like to make?
Jay,
Mr. Rosenthal: First of all, the comments
that were made this morning about the cost and the
uncertainty I think can be stated again.
I just wanted to mention something about,
Mr. Hoffman, you raised your clients' issues
regarding the rock and roll era and the other rock
and roll era. It goes to the points of -- it's even
more burdensome to many publishers, many music
publishers of that era because they are independent, many of them. And I would think if you went through your clients' sound recordings, you might find some major publishers involved, but there is probably a good chance that you also will find a lot of indie publishers involved. So the issue of uncertainty is even more burdensome to them in trying to deal with these problems from a cost standpoint and waiting around for these conflicts to work out.

I have to say also I'm not so sure that the contracts that your clients have wouldn't at least be challenged. They may certainly be valid and may hold up, but opening the door to all of this is one of the problems here of why the uncertainty is so big. There could be many challenges, many questions under state law that go to courts that, again, small labels, publishers have to deal with at the end of the day.

Last -- there was a comment made in the last session, I just wanted to just react to, and that was that the artists aren't represented here. And I think that it's important to understand, first of all, Charlie Sanders was here this morning who does represent artists, 70 percent of all major artists and songwriters as well, so many of his constituencies are artists.

But I think -- it's hard for me to even talk about this because representing artists for all these years, with the labels there is always this antagonism, but I think in reality the labels do represent artists' interests to a large extent. Because of the fights that the artists have had over the years with labels, the relationship is much, much better to a large extent, and I think that we do have to recognize that the labels do really represent the artists' interest in the fact that costs involved will be passed on to artists; income that they could earn certainly is passed on to artists as well.

So I don't want that misperception out there that, no, the artists aren't in the room. To a certain extent, they are, and we should accept that. That's all.
MS. CLAGGETT: Does anyone have any other comments?
MR. ARONOW: Thanks, Karen. I just want to go back to something that David asked earlier, which was for consideration of the concept of some kind of registry or database. I think while we haven't developed a particular position on this at Sony Music, and I haven't really discussed it with my colleagues at the RIAA, it doesn't seem to me that it's out of bounds to think about or have a conversation about creating certainty by having archives or libraries notify in some fashion publicly, whether it's something that is managed by the Copyright Office or online or managed by -- I'll make this up -- SoundExchange, where they could say, Look, we have these recordings; we don't know who the owners are; we intend to make X uses -- and I acknowledge that there was a rather spirited debate about what kind of uses libraries and archives might be entitled to make, so we will leave that to the side for the moment -- but we intend to make library and archival use of these recordings, here's the metadata such as we have it, whether it's the type of recording, the owner, the title, the musical composition, so on and so forth, whatever information you have available, and there is some kind of potential immunity from litigation or prosecution or statutory damages, I don't know. I'm just speculating that we might be able to come up with a structure that provides some of the certainty that the libraries and archives are looking for without the burden necessarily being on the recorded music owners of either maintaining this database or registering millions of sound recordings.

MS. CLAGGETT: Thanks, Gil. I wanted to just kind of throw out one quick question. I want to start with I know that we've talked about just in opening comments a lot of the legal uncertainty and burden that would come from federalization. Jenny also mentioned some of the burden
that already exists in terms of post-72 works, in
terms of proving chain of title or ownership, as
well as pre-'72 works under state law.
So one of my general questions is, how
would federalization actually make things worse,
more negatively impacted, more so than it already
exists under current law in terms of the ownership
question and chain of title question?
MR. HOFFMAN: Not to sound glib, but the
system as it currently exists, if it ain't broke,
don't fix it. And there has been an expectation on
the part of both rights-owners, as well as recording
artists, that for pre-'72 works, contract rights
apply and they will be interpreted under state law.
The federalization cannot serve the
interests of the parties that the termination of
transfer statutes were designed to protect. I don't
mean to harp on the free market question, but
basically if you accept the statements in the
legislative history that this is the basis for
wanting to protect these parties' rights, having
those parties, most of whom do not have deep
pockets, relative to the label, undergo five, six,
eight years' worth of litigation to potentially
claim their rights doesn't seem to be in their best
interest. They have rights under current contracts
to get interest -- income from the exploitation of
the masters.
So, federalization isn't going to help, and
for all of the reasons thus far talked about, is
likely to make things much worse for the very
parties for whom the law was basically passed to
help.
MS. CLAGGETT: Does anyone else have a
MR. HARBESON: And perhaps you said this
and I missed it, but I would be interested to hear
how you would respond to Elizabeth's class's
suggestion of kind of a statute that serves as a
wrapper for the existing state law.
So as I understood the proposal, there
would be a statute that would say, For the purposes
of recordings before February 15, 1972, the existing
state law would apply. Because I will say that this

is something that my committee is very -- we're not

especially versed in, but that was an aspect that we

were all kind of left scratching our heads over

saying, Well, if we can establish title under state

law, why couldn't we write the federal law to

incorporate the way that you claim title under state

law?

MS. CLAGGETT: Does that solve the problem?

MR. HOFFMAN: Let me respond to his

question. I'm not speaking on behalf of the RIAA,

but the RIAA has been going after third-party,

quote/unquote, pirates. I have no problem -- and

I'm not speaking for all of my clients, I'm speaking

for me. I have no problem in federalizing these

recordings for the purpose of protecting them

against unauthorized users. I have a problem in

abrogating contract rights that have been in

existence for 30, 40, 50 years. That's my problem.

So if the question about how state law

applies is with regard to how do we go after

third-party unauthorized users, if you want to make

it all uniform and federalize it, be my guest. But

that doesn't mean that you have to make a blanket

law that says, For all purposes, February 15, 1972

recordings and prior are going to be covered for

termination of transfer or anything else.

And Jennifer's pointed out some of the

other reasons that you've got to carve out a narrow

exception here, or maybe you carve out a broad

exception, and you make the state laws applicable

universally for the purpose of going after third

parties who are depriving not only the master owner

but, in turn, the recording artist of their due

rights as well as the underlying music publishers.

MS. CLAGGETT: Does anyone else have a

response in terms of potential solutions that might

be affected if we actually applied state law in

terms of determining ownership status?

MS. PARISER: Well, the most obvious

element is work for hire, because that's a clear

place where the federal -- where the law has changed

over time, in the federal context and is different
So, you know, you guys all know, right, the '09 act? You've got the incidence and expense test, and then you have the write-in requirement. And if you've got pre-'72 work currently governed by state law, those questions don't really come into play. But if you now federalize it, you now have to sort that out in looking backwards in a way that you never intended to in the first place.

Now, you could --

MR. CARSON: Why? Why do you have to do that?

MS. PARISER: Well, if you don't -- the only way not to do it is so if it's wrapped --

MS. CLAGGETT: Right. Right, that's kind of the question.

MR. CARSON: Why isn't that the obvious answer?

MS. PARISER: It's not the -- well, it could be an answer. To me it's not the obvious answer, because you could -- what you are really kind of saying is we like a little bit of state law, we like the ownership piece of it, but we don't like the duration and we want 108 from federal law, and you want a little bit from column A and a little bit from column B.

And so from our perspective, it's cleaner to take the one thing you really like from federal law, which is 108, and make that a state law doctrine, rather than take the things that you want out of state law and import that into federal.

We would prefer to -- we think it makes more sense from a policy and rights and sort of doctrinal understanding of the way these rights have evolved for the content owners not to shift people's expectation in their economic outcome, but rather simply to fix the state law -- we have one -- as

I've sat here all day understanding it, there is basically one articulable problem that the libraries have, which is they want 108 to apply -- they have two problems. They want 108 for sound recordings whose owners can be identified, and they want an orphan works bill.
And, you know, to us, the way to fix these things is to enact an orphan works bill, not to federalize sound recordings copyright, and to have state law respect something like a 108 regime.

MR. CARSON: Ivan, I know you have to leave in about eight minutes, and I did want to just talk to you a moment about termination. I want to get back to what you are talking about, Jenny.

But since you have to leave and you're the one who raised it, I just want to make an observation that may or may not be valid, but I wanted to get reactions to it. When I look at how the termination provisions in the existing law work, I think, as a general proposition, the termination provisions that were enacted into law apply only prospectively. And by that I mean the termination provisions that were enacted did not look backward, they did not terminate any rights that had already been granted. Does anyone disagree with that?

MR. HOFFMAN: I need clarification on that because on the surface I don't agree.

MR. CARSON: Let's start with Section 203, which became effective January 1st, 1978, and applied only to grants made after January 1st, 1978. We've got no problem there, right?

MR. HOFFMAN: No problem.

MR. CARSON: That wouldn't bother you?

MR. HOFFMAN: No.

MR. CARSON: All right. Then let's go to Section 304, which --

MR. HOFFMAN: Other than conceptually.

MR. CARSON: Yeah, okay, fine. Duly noted. Section 304 then is the only other termination right we have, and what Section 304 says is, with respect to the extended part of the copyright term that as of January 1st, 1978, was tacked on to the copyright term, the original author may terminate that part of the term. So nothing was taken away from the person who had received rights under the preexisting contract. All that it said was if the author had
already given you all the rights to the end of the
copyright term, we've now added something to the
copyright term and we're going to give that back to
the author.

MR. HOFFMAN: Well, okay, then that is
where the disagreement comes in. Because under the
Sonny Bono Act, those rights would have extended my
clients' rights if we're talking about my clients
and not be subject to granting those to the author.

MR. CARSON: Yeah, but until the Sonny Bono
Act was enacted, your clients' rights were going to
go into the public domain. So it didn't take the
rights from your clients; it took from the public
domain and gave them to the authors.

MR. HOFFMAN: But according to --
MR. CARSON: But let's go back to my point.
My point is, as I understand it, the
way the termination -- the only termination rights
that exist, they are only prospective. They didn't
reach back.

Why is it that you assume that if we bring
in pre-1972 sound recordings into the federal
statute, that the way we would apply the termination
rights would reach backwards to deal with contracts
that have already been entered into? Wouldn't that
be a break with what we've ever done in the past
with respect to termination rights?

MR. HOFFMAN: The reason that I have
concerns is because lawyers are the ones who can
think of the most disasters that could possibly
befall, and since the mandate here was not limited,
it was should we cover 1972 and pre-1972 recordings
under the copyright law? It didn't carve out some
of these finite exceptions that you are now talking
about. We'll make it prospectively and so on.

So I'm here to basically say don't do that.
If you want to do this, we can talk about that. But
I don't want to all of a sudden, you know, have all
of my clients' rights abrogated. So that's the
reason for my position there. If you want to talk
about prospective things, that presents some other
issues, if not this particular issue.

MR. CARSON: Okay. So if we follow what I
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think has been the tradition with respect to termination rights, and if you want to go back to renewal term, because that's where it came from, the concept for renewal term, it works the same way, then it strikes me that it wouldn't be illogical if you were to bring pre-'72 sound recordings into the federal statute, that you could revise Section 203 to make clear that it applies only with respect to grants entered into after the effective date of the law that brings the pre-'72 works into the scheme. It works the same way 203 worked in 1978. I'm not sure you even need to do anything with respect to Section 304. But if you do, maybe you do. I would figure it's probably moot at that point. And you wouldn't have a problem because termination would not apply to any pre-1972 sound recordings, and then you have no problem; is that right?

MR. HOFFMAN: What I have heard so far is that there are good reasons to include those sound recordings, good reasons not to include those sound recordings, and the limited participation that I've heard so far is, as the Copyright Office begins its process of thinking through this, to be very circumspect in exactly how they are going to do this.

MR. CARSON: Okay. Then to be clear, at least thus far what I'm hearing from you, there is not an objection to the general notion of bringing them into the '72 act -- bringing pre-'72 sound recordings into the '76 act; it's there are certain things you want to make sure don't happen. They are not subject to termination rights, you don't mess around with ownership. If those things don't happen, then from what I've heard from you so far, you are not concerned.

MR. HOFFMAN: On the basis of the limited way you phrased the question, yes.

MR. CARSON: And then we will have further questions probably after you leave the room on ownership, which may or not give people some peace of mind or at least give people some notions on how they might get peace of mind, but I just wanted to
air that with you while you are still here.

MR. HOFFMAN: All right. Thank you.

MR. CARSON: Karen, sorry for interrupting.

MS. CLAGGETT: Oh, no, no. I mean I think that actually is one of the points. When we were considering the issue, we're not considering it basically at a static state. I mean it is, are there solutions or things that we can do to actually ameliorate any of the problems or concerns that people raise, and it sounds like we now have agreement at least with respect to one party in terms --

MR. CARSON: I wouldn't want to characterize it as agreement, but there is a possibility here.

MS. CLAGGETT: There is a possibility. And going back to I think just on the ownership question -- unless anybody else wants to actually make a comment on the termination issue, but going back on the ownership question and with respect to whether applying state law would be a solution to ameliorate some of the concerns, I don't know if anybody else had any concerns that they wanted to make.

MS. GARD: I just had a short response, and that's that we had that same problem with this notion of picking and choosing, and we finally said we're not picking and choosing; it's more of a sovereignty question.

So we looked back at 104(a) again and said we hadn't included foreign law into the U.S. law before 104(a), but we decided that it was up to the individual country to determine how ownership was going to be determined based on that particular country.

And so I think what we thought was that we were kind of seeing the individual states as like mini-sovereigns in some way, that they had already created their own system, and that we would respect that system and that way it was sort of in that sort of parallel thing. So we had already mucked with our system in terms of bringing in foreign law, but it wouldn't be a much bigger step to bring in state
law on that particular issue.

Just to let you know, because we had this issue of sort of, well, can we just pick and choose? That was one of the questions, Can we just bring in 107 and 108 and still have it under state law, and that is not what we were thinking. We were thinking in terms of semi-sovereignty kind of questions on state law questions.

I just wanted to respond to that.

MS. CLAGGETT: Thanks.

And I think Eric had a comment he wanted to make.

MR. HARBESON: Yeah, first of all, I wanted to say for the record, what we're actually looking for is 107. 108 is, we think, largely broken, so we're not -- we would love to have 108, but 107 is really what we're looking for. An orphan works bill would be great, and actually that is what -- I'm sorry, is it Gil or --

MR. ARONOW: Gil.

MR. HARBESON: It's Gil.

That was kind of what Gil's registry idea was -- seemed to be getting at, and a lot would depend on what the burdens were for reporting and what the -- what the immunities given in return for that would be. I mean that would be a whole different debate, and I think it's largely a debate that happened in the orphan works debate, but that was something that would possibly be interesting to us.

MS. CLAGGETT: Anybody else want to make a comment?

I don't know, Jenny, if you wanted to -- I mean I think you expressed a concern generally with the concept of federalization and perhaps another way that the issue with respect to 107 and 108 might be addressed in terms of applying the state law, you know, applying 107 and 108 to state law.

MR. CARSON: Let's not revisit 107 and 108.

MS. CLAGGETT: No, but I was saying on the flip side, if you are just actually looking at the specific issue of this panel in terms of ownership and not the overall concern with federalization,
does the proposal in terms of applying state law to
determine ownership status, is that one that the
record companies would be willing to consider as a
potential solution?

MS. PARISER: Well, I think our position is
clear that we are not in favor of sort of partial
federalization.

It is difficult to imagine how what we
regard as something of a pastiche is going to make
the world clearer and better and nicer for anybody.
You know, we think this just buys more litigation.
You know, we have precedent around these issues now,
and any change in the law just gets more of it.
And it's hard to imagine that actually
working well in principle. It sounds sort of
superficially kind of appealing. Just leave state
law ownership rights in place and everything else
from federal law goes in. In practice that rarely
seems to work out so cleanly.

On the termination issue, I'm gratified,
David, to hear you all but promise us that there
will not be a retroactive application of
termination --

MR. CARSON: You know me better than that.
MS. PARISER: You are tagging everybody
else with agreements, so I'm getting one from you.
MR. CARSON: Fair enough.
MS. PARISER: But you can't give and take
at the same time. You can't say, Well, I won't give
you termination, but we are chopping 20 years off
your term. Right? So, you know, presently we've
got through 2067, so if you say, Well, the price for
no termination is now 2047 or 2037 or whatever, you
know, it ends up being we're back in the same place.

MR. CARSON: I think we all understand in
part the question is, what is the entire package?
Part of what I'm trying to do, and I'm not
advocating anything. I'm trying to solve
problems -- see if there are ways to solve problems.
I'm trying to look at each individual problem that
people are identifying, and I'm trying to figure
out, is this really a problem or is this their way
to make this a non-problem?
And I'm not trying to do it by waving a magic wand. I mean what I was talking about with respect to termination and what Karen's talking about with respect to ownership, I think there are pretty strong arguments that what we are talking about are consistent with what happened actually in 1978 when we federalized a great deal of law that had been common law, had been state law.

My point about termination was, I think you can make a pretty strong argument that just using basic preexisting doctrine tradition, termination wouldn't apply with respect to any rights that had already been granted prior to the enactment of a new provision bringing these in.

And I think with respect to ownership, Karen is going to explore with you now some questions about whether one would -- there's even any reason to believe that bringing pre-'72 sound recordings into the federal statute would change anything with respect to ownership.

MS. CLAGGETT: Yeah, and I think what you said about -- that was my next question. In terms of how we have had to handle these issues in the past, you know, we handled some of these same issues with respect to unpublished works when they received federal statutory protection under the 1976 Act.

And so my question then generally is, were the same parade of horribles discussed and did they actually come to fruition, or did it in some sense not become an issue or it was an issue that actually was able to be surmounted? And is there anything that we need to look to in terms of how that was handled?

MS. GARD: Well, in my two areas, one is 104(a) and one is 303(a). So I spent way too much time looking at 303(a), which is unpublished works, and that's never ever been anything I ever came across, and I've studied it for about three years. Now, I haven't done any litigation.

But part of it is author-based work, so these are usually diaries, you know, things you can attach the person to. And films, usually it was like the film stuff, there was always stuff that you knew. It's easier in some way to know who the
author is, and it wasn't sound recordings, which is such a mess. But it really isn't an issue with 303(a), at least from my research, which is published works.

MS. CLAGGETT: And to follow up on that, something I wanted to tease out was, is there something that makes sound recordings unique such that it would be a bigger problem than the problem we already had to confront?

MS. PARISER: Well, I mean I think we have a certain amount of invalid analogies here. Unpublished works don't tend to be a huge issue in the sound recording context, certainly for the majors. You know, we're not seeking -- generally speaking, we're not seeking protection and we don't commercialize unpublished works. There are some, and Gil can speak to that obviously. But the works that are the commercial life blood of recording music companies are the ones that are and have been published.

And the analogy to, well, in '78 we federalized, which federalized looking forward, not backward. So retroactive application of federal law is a completely different animal than forward-going application of federal law.

I don't want to, you know, foretell the constitutionality discussion, but, you know, obviously we've got a massive taking problem when you look backward at something and curtail rights versus going forward for rights that have not yet been created.

MS. GARD: So I think under Section 303(a), what it did is it brought unpublished works, state common law works back into the federal system for the first time. And so the takings question did come up then, which will be a panel. And so there was a 25-year period where you could incentivize to get additional time to publish the work.

It was a huge, huge problem, but it happened because the system was working under the 1909 Act, which was that sound -- radio, plays, movies and television -- wasn't considered published, and it was such a mess that it was sort
of a rehaul of it and bringing it into a more civil law system. And so they did have -- it was all -- so 303(a) is works created before 1978 but not published.

And so the answer to the other question is that we do see neighboring rights abroad because you can't figure out who the author of sound recordings is. Is it the person who is speaking? Is it the engineer? Is it the person putting up the money? And so they call it neighboring rights, which means it's not an author-based life-plus system, but it's based on fixation in some countries or publication or making available to the public.

And so we have faced these problems before, and we also faced the problem with 104(a) when we restored copyright to all these foreign works that never had copyright and had been in our system for 70 years.

So it is a familiar problem, and I think that there are some models on how to deal with it. But sound recordings is a big mess because of how they were created, and you don't know who is the author, and that is why not having an author-based system is really important.

MS. PARISER: Right. Also, obviously, the restoration of a work to copyright that was formerly considered PD is obviously a different animal than what we regard as transfer -- changing something that we think enjoys greater rights and protections under state law to something with lesser in federal.

MS. GARD: Yeah, and I think that's the analogy to 303(a). So that you had perpetual protection of unpublished works. And that was what the -- is it the -- I'm not going to say which archive. It was an archive that was caught off guard, and they didn't realize they were losing federal protection until it was too late, and they were shocked, and they would have done something about it to get additional protection. I think that's the greater analogy rather than foreign works that they were just kind of immune to.

MS. CLAGGETT: Does anybody else have any other comments on that issue?
One of the things that I actually did want to follow up, because, Jenny, you mentioned it in your opening statement, was the registration issue and the comment that imposing registration would cause a huge burden or costs on the record companies.

And I think it was alluded to a little bit earlier that obviously registration is not a requirement for copyright but would be limited to situations in which you are actually going to be litigating to enforce your rights.

So a specific question I had was, how huge of a problem would it be if it's limited to situations in which you actually are trying to litigate your rights and it's not a situation in which you are going to go out and have to register all your works immediately?

MS. PARISER: Well, again, I mean here we are kind of Chinese menuing the law. If we're saying, okay, we will -- we will have federalization but we won't have a stricter registration requirement as we do otherwise -- is that not what you're saying?

MS. CLAGGETT: No, no, I'm saying the registration requirement would be the same, but the registration requirement itself under existing law does not require -- that you do not have to have registration in order to have copyright protection. You just have to have registration in order to bring the litigation.

MS. PARISER: From the perspective of the major record companies, you don't operate without a federal registration of your work. That just is the most horrendous policy in the world. In part because registration gives you additional rights that are necessary to protect and commercialize your work.

As I explained in the LimeWire situation, because it -- the opportunity for works to be infringed is so instantaneous at this point, you can't wait for somebody to infringe your work and then go to court and then register and then go to court, because now you've done yourself out of the
opportunity to get statutory damages.

MR. CARSON: How many states give statutory damages right now?

MS. PARISER: Well, none, obviously.

MR. CARSON: Yeah, so why are you disadvantaged by being brought into a federal system which says, By the way, we're going to give you an additional benefit that no state gives you, but you've got to register? This is a disadvantage?

MS. PARISER: Well, am I also going to be allowed to pursue rights for actual damages and punitive damages in addition to -- how -- I'm sorry.

I go to federal court without a registration, and I'm suing for state law copyrights for works that are covered by the federal regime.

So we've -- we're now federalized, right? We're now federalized. Okay. So here is a work from 1970.

Somebody give me an example of work from 1970.

MR. WESTON: "Moondance" by Van Morrison, or -- never mind.

MS. PARISER: There you go. Thank you. And it's been infringed, but it has never been registered yet. All right. So I go to court to sue on it, but I'm suing for state law rights and remedies. No?

MS. CLAGGETT: No, you would be suing federally, but if --

MS. PARISER: But I don't get statutory damages.

MS. CLAGGETT: Right. How would that be different than what the current situation is under state law if you are suing under state law for copyright infringement?

MS. PARISER: Well, it's not -- to me that's a state work. And I'm not -- so does the DMCA apply? Can the defendant make use of a DMCA defense for that work that's now been infringed?

I'm not sure what this -- this work now is sort of like a -- like a two-headed dog. I don't know what rights apply to it, what defenses the service has available to it.
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19   MR. CARSON: But that's -- I get the issue,
20   but that's a different issue.
21   What we're trying to figure out is why
22   having a registration provision which says you can't
23   sue until you are registered -- and I realize there
24   is some burden, I would suggest not that great a
25   burden if all you have to do is register the day
26   before you go to court -- and there's also a
27   provision that says you can get statutory damages
28   and attorney's fees, which I don't think any state
29   would give you under the existing lay of the land,
30   but to do that, yeah, you've got to register prior
31   to the commencement of the act of infringement.
32   And you're suggesting that that's a
33   tremendous disadvantage, and I'm thinking, Gee,
34   you're being offered an advantage which does have
35   some procedural requirements that don't exist at
36   state law, but the procedural requirement for
37   statutory damages gets you something you couldn't
38   get at state law. The registration as a
39   prerequisite for court is a ticket to get into
40   court, but it's not a high price to pay, and you
41   don't go to court that often.
42   So I'm trying to figure out why you're
43   disadvantaged because of registration.
44   MS. PARISER: I guess I'm not seeing what
45   I'm getting here. What am I getting?
46   MS. CLAGGETT: Well, you're getting the
47   ability to have statutory damages and attorney's
48   fees.
49   MS. PARISER: No, I'm not.
50   MS. CLAGGETT: In the situation in which
51   you actually do register in advance. Now, there
52   would be no change in terms of if you registered
53   after the infringement, you would still have
54   basically the same amount of damages that you would
55   have or the same type of damages that you would have
56   available under state law because you don't have
57   statutory damages under state law.
58   MS. PARISER: Okay. So in this new world,
59   in order for me to sue to prosecute Van, I can
60   either register really quickly for all -- for Van
61   and all of his brethren, right, which is a huge
burden --
MS. CLAGGETT: And then you would have the
ability for statutory damages.
MS. PARISER: Statutory damages, right.
Or I can register just as I'm going in the
door to court, in which case I've got the additional
burden of registering as I sue, but no additional
advantages versus the current system where I can now
sue under state law, get my state law remedies
without having to register. So now I have an
additional burden but only additional rights that
are very burdensome to me, and as a record company
I'm not particularly interested in.
MS. CLAGGETT: Well, I do have one
follow-up question that in terms of I guess the
amount of burden, basically the amount of burden
that this would potentially cause.
Is there any way that the record companies
would be able to determine or do they determine now
sound recordings that are the most commercially
viable sound recordings so that they would not have
to register all pre-1972 recordings but those
recordings that are most likely to be exploited and
those recordings that would most likely be subject
to piracy and potential litigation?
MS. PARISER: I suppose --
MS. CLAGGETT: Is the burden really having
to register everything or is there any way to limit
that burden?
MS. PARISER: I wouldn't want to be the
record company lawyer who told some artist that
their work wasn't deemed valuable enough to
register.
MR. CARSON: Let me tell you what I've been
told by the folks in our performing arts
registration division, and maybe it's not true.
It's inconsistent with what you've told us. But
what I have been told ever since I've been here is
that record companies more often than not don't
register their sound recordings. That's what I've
been told. That's the lore in the Copyright Office
which registers the work. Now, maybe they're
mistaken, but that's what we've been told. So if
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that's true --

MS. CLAGGETT: -- all of those sound --

MR. CARSON: Well, a great many are not registered. That's what we're told.

MS. CLAGGETT: They're registered selectively in terms of not automatically --

MS. PARISER: Honestly, that is news to me.

I think the major --

MR. CARSON: Well, it's obvious it's news to you, but part of your premise is, look, we'd have to register it all, that's good practice, and I agree it's good practice, but what I've been told is it's not your industry practice.

MS. PARISER: Right. I mean I can speak to the practice at Sony Music, which Gil can also speak to. Every release that was pressed for commercial distribution went to the in-house copyright department for registration, and the deposit copy is, of course, just the commercial version of the work, and two extra copies got sent along to Washington, and the relevant paperwork was filled out for every single commercial release.

MR. CARSON: Good. Glad to hear it.

MS. PARISER: That's my understanding. I don't think any picking and choosing was being --

MR. BENGLOFF: We were telling our members now -- I mean we started -- some of them weren't registering until about three or four years ago, so they started with their highest velocity titles.

But an infringement is an infringement is an infringement. So if it's -- Wind-up Records is one of our members, so you know Creed and you know Evanescence, but maybe they infringe Seether instead or they infringe someone else.

All we're looking for is that infringement. And it may seem simple to you, but for our community, which is a little different than the major labels, as I said earlier, even if you have 80 employees, we don't have any economies of scale, so if you are adding a person to do this type of work, it's a burden. And $70 may not sound like a lot to you, but --

MR. CARSON: Well, electronically it's $35.
MR. BENGLOFF: Is it $35 each side? Isn't it $35 for the sound recording and $35 for the composition? I'm sorry, maybe I'm learning something new.

MR. CARSON: You can actually do either one. Right?

MS. CLAGGETT: Yeah.

MR. BENGLOFF: Okay. I learned something today. That's great. The members of A2IM are probably smarter than I am, so they probably already know that. But all kidding aside, in some cases, it's a different writer and things.

MR. CARSON: It doesn't matter.

MR. BENGLOFF: There's different -- so you could register 87 writers? You work here, I don't.

MR. CARSON: You got to have the same copyright owner. Same copyright owner, that's the key.

MR. BENGLOFF: Okay. So -- for the sound recordings you are saying?

MR. CARSON: Yes.

MR. BENGLOFF: Okay. All I'm saying is -- how about if you have a side bend and other things on those things?

MR. CARSON: If it doesn't affect ownership, it doesn't affect your ability to put them in the same registration.

MR. BENGLOFF: Okay. Fair enough. So it's work for hire and everything.

It becomes a burden -- I know I get complaints from people, both from a course point of view, and they are probably doing it the right way. I just didn't focus on it. And just administratively getting it done. And the catch-up for some of the labels with the huge catalogs. I mean you're talking -- it's very difficult.

MS. CLAGGETT: I think Eric had his hand up.

MR. HARBESON: Yeah, I want to go back again to Elizabeth's class. I kind of wish I had taken your class. They have good online programs now with and --
MR. WESTON: As long as you are not streaming.

MR. HARBESON: Right.

So the -- one of the parallels that Elizabeth's class brought up was with the UIAA where, of course, there were rights-holders that all of a sudden had to register a number of recorded -- of works, and they were given, I think, what, five years, six years?

MS. GARD: Two.

MR. HARBESON: Oh, was it just two? The lists were -- there were seven or eight different lists that were published by the Copyright Office. And the information on the lists that was published in the federal register was very minimal. I don't know what was involved in filing an NIE, but as Elizabeth said, the information in those lists is practically useless for anyone doing research because you have to -- it's the publisher and the title, so Schirmer is claiming copyright to Opus 24 No. 7, and that's all of the information that you have. That's not especially helpful, because there are lots of composers that might have had an Opus 24 No. 7.

The point is that what I'm trying to posit is that we might have a regime where rights-holders had a period of time to submit label numbers and titles. So Sony -- well, DG633457, for example, and then it lists -- of just that information as a means of establishing registration for the purposes of bringing a lawsuit. Would something like that be a conceivable solution?

MS. PARISER: I think what you're asking is some sort of short form registration?

MR. HARBESON: Yeah. That simplifies things a bit.

MS. PARISER: I don't think the length of the piece of paper that we have to fill out is the real issue. It's simply the burden of having to do it for probably -- I don't know if it would be millions, but certainly many hundreds of thousands of works, plus -- Gil says millions -- plus the cost
of doing that, and the human resources that would be
needed to do it. I think if you made the paper half
as long, it doesn't help that much.

MS. GARD: With 104(a), there were two
provisions. There was the constructive notice and
there was a two-year period where you could send it
into the Copyright Office. There was no evaluation
of it. It wasn't like a trademark evaluation. You
just sent it in, so a lot of the NIEs -- you know,

people are claiming ownership on things that they
actually don't own, like restoration. So you don't
have to claim ownership -- I mean you don't have to
prove ownership on it. You just say, I do that.

And then after the two-year period, there
is constructive notice, which I actually have a
little bit of a problem with because it goes on
perpetually. So if somebody starts to use the work,
you send actual notice, and then they only have a
year to use it.

So there is a potential for a system -- I
don't like that system personally -- but there is a
system that you could have a period of reflective
notice, a five-year period where you allow them to
put things in, but then another additional period of
constructive notice where you say, you know, We are
claiming this and you can't use it. I don't know
how that would work. We didn't look at that part in
the class. That would be too hard for them, but --
it would be too hard for anyone. So, yeah, so that
is the way it works under 104(a), which you all
know.

MS. PARISER: There was one more thing I
wanted to -- you guys probably know this -- but in
many circuits, the 2nd in particular, you need not
just a registration but an actual certificate to
prosecute your rights. So it doesn't completely
work to say, Oh, so-and-so is infringing my work,
I'm going to get me a quickie registration and go
run into court.

So you will need to fix that provision as
well, David, while you are at it. Got a lot of ink
in that one.

MR. CARSON: I'm trying to fix the Ninth
Circuit's misstatement of what the law is in that area.

MS. CLAGGETT: It would expedite registration work in that case as a potential way to avoid it.

MS. PARISER: Potentially, but now it's not $35 or even $70 --

MR. CARSON: It's well under a thousand.

MS. CLAGGETT: Yes, Jay.

MR. ROSENTHAL: I would just like to make a comment on the burden issue of registration, especially as it relates to indie labels.

I think it is a little bit troubling to hear that it's not a burden considering most indie labels and major labels are besieged with other issues and other problems, in particular, the need to send out an unbelievable amount of takedown notices under the DMCA.

And I know that some clients of mine, indie labels, that is what they do almost every day and they still can't keep up with all the ones that they have to. So it's a little bit wrong to say that there is not much of a burden adding registration if you are in the business of pre-'72 recordings and you're doing that. So burden is a tough issue in today's world. I mean I happen to think the DMCA is broken because of that, and it's impossible for copyright owners, especially small and independent copyright owners, to stay on top of that. To add to the burden of registration is not minimal. It's like the cherry on top of the cake when it comes to burden. And I think that you would probably --

MR. BENGLOFF: Absolutely. I get e-mails from members who say, I've spent my morning doing wack-a-mole, and, you know, there's just too much going on in the world. It's the lawyers.

MS. CLAGGETT: I did want to throw out a follow-up question to this, and just are we focusing too much on just one segment of copyrighted or sound recordings that would be at issue here? Peggy alluded to this a little bit earlier.

I know that the recording industry has now said, you
know, it is your standard practice to go ahead and
register all works, so it would be a huge burden.
But in terms of the overall number of works
that would actually be at issue in terms of pre-1972
federalization, such as some of the works that Peggy
mentioned, you know, folklore recordings, types of
sound recordings that are never going to be
commercially exploited, should we be considering the
overall scope of whatever burden it would be as
opposed to just focusing specifically on the burden
to individual record companies.

MR. BENGLOFF: Can I just -- I mean the
topic was on ownership and business expectations, so
lest we forget, I just want to repeat some of my
earlier comments about our return on investment.
We're dealing a lot with the longer tail type items
where we're going to need a lot more time to get our
money back. It's going to take constant updating to
renew technology to put it back through the system
again, and updating your metadata and everything
else. I mean there is just a myriad of things going
on that we have to get a return on.
And this federalization, you know, whether
it be the numbers that my colleagues on the right
are talking about or that Elizabeth's class is
talking about or whatever it may be, that's the
bigger issue. They are both issues here, but since
we've touched on it, I felt compelled to just chime
in again and remind you of some of the things that I
said earlier this morning. Thank you.

MR. ROSENTHAL: I have a rough time with
this commercial viability issue. What is not
commercially viable today in today's world?
MS. CLAGGETT: That's a good question.
MR. ROSENTHAL: Everything is.
MR. BROOKS: Apparently 96 percent of the
things issued before 1925.
MR. BENGLOFF: With all due respect, that's
a six-year-old study, and as I told you earlier, I
just brought ten recordings into Pandora last week
that Pandora had -- they have over half right now of
the non-on-demand streaming radio revenues, which is
a number of over $100 million a year goes through
Pandora. They just started a comedy station. These
recordings were not of great value until Pandora
started it. Now they're going to get into the
rotation, they're going to get sampled, they're
going to get thumbs-up'd and they're going to get
thumbs-down'd.

So, Jay, I'm with you a hundred percent in
terms of what is commercially viable grows every day
because access, which used to be limited to people,
has grown and grown and grown, and the way people
are going to make money from now on is by getting
revenues from a lot of different revenue streams,
some of which we don't know exist today.

MR. BROOKS: I really hope that we can --

MS. CLAGGETT: Eric had his hand up, and
then we will go straight to you, Tim.

MR. HARBESON: And the thing is that people
who are working with pre-1972 books are making
plenty of money. People who made pre-1972 movies
are making plenty of money. What I'm still trying
to figure out is why sound recordings are different.
And why -- I mean historically there is certainly --
I'll defer -- I really want to know why sound
recordings are different than any other kind of
intellectual properties because I don't think that
they are.

MS. CLAGGETT: Can we hold that and come
back to it because I know Tim wanted to respond?

MR. BROOKS: Yeah, I just want to make a
note here.

Part of what was behind this study in the
first place was to put some data on the table
because it's very easy to cite anecdotal evidence or
to make general statements about things. I come
from a world where you need to have data. You need
to know what percent. I mean how much? Nothing is
available. What does that mean? What percent is
that? Or lots of things are good. What does that
mean?

Until you put data against it, all you are
talking about is what we call in research
mother-in-law research or anecdotal research. You
need facts.
I would welcome an update on this study. I really don't think it would show anything significantly different, and I follow this field rather carefully. But to make statements about, you know, we're doing things. Well, what are you doing?

MR. BENGOFF: May I respond?
MS. CLAGGETT: Well, I will let Jenny respond real quick and then you can go.

MR. BENGOFF: I always defer to Jenny.
Go ahead, Jenny.

MR. BROOKS: Yes, as we both will.

MS. PARISER: So I wanted to actually address both points. So to Eric's point, what is different about sound recordings, in a world where there is no piracy and we just have competitors in the marketplace selling what is otherwise public domain works, Penguin Books or an old sound recording, then there is no difference.

But people are still willing to buy a physical -- for the moment people are still willing to buy a physical copy of a Penguin classic or perhaps buy an e-book or something like that.
The minute that you tell an online service not only that a sound recording is very easily available but it isn't even protected by copyright, there is no business model for major record companies anymore because we still have to make money from it, whereas the LimeWires can give it away for absolutely nothing because there is no cost to them anymore. So I really think it is fair to say there is all but zero value to a record company in the public domain sound recording.

To Tim's point, I completely agree that, you know, the data needs to support it. I think the problem we have in the methodology of his work is that it presumes that works that are not currently being commercially exploited are not commercially viable or have no commercial value.

But record companies that are sold, for example, there's a value placed on their catalog of sound recordings, even though some, you know, fairly
substantial minority of the works are not currently
exploited at a given period of time. Those works
are valued and have value, and to simply say that
because they are not being currently exploited they
are valueless is just not right.

MR. BENGLOFF: And to answer your claim
about data, I happen to be a member of the
SoundExchange board, but I'm not sharing their data,
I'm just confirming what's true. I spent a lot of
time with the people at Pandora. Six years ago
their revenues were negligible that they were paying
at the SoundExchange. It was a million or $2
million.

Right now they are sharing data with a
number of entities, including at least one of the
major labels that I know of, and sharing with
myself. Forty percent of their -- of their streams
are independent artists, so last year they paid
somewhere between $55 and $60 million in royalties,
which didn't exist against RTL (phonetic) which
wasn't getting revenue at that point. So that's not
anecdotal; that's a real number. Forty percent is a
real playlist number.

I talk to people from NPD all the time.
Russ Crupnick, I had a long conversation with him.
So it's not -- and I've asked him for
certain things over periods of time, we have a close
relationship. So, yes, that was an anecdotal story
about bringing in those comedies, but I'm saying
there is lot of data behind what has happened over
the last six years.

And, Tim, quite frankly, I don't know the
basis of your research. I have not read your
report, I apologize on that. You today have
expressed somewhat of a bias. I don't know if there
is any bias in the studies. There are studies that
are totally unbiased. There are studies that are
biased. You know, it's not like that's the end all
and be all, and you keep bringing the numbers up,
which to a certain extent may not be biased in any
way, sir, and I apologize if -- but they may, and
there are other studies that are going on all the
time and it is six years ago, and I can tell you in
our industry, not anecdotally, the world has changed
in huge extremes over the last six years.

MR. BROOKS: Are any of those cases you are
talking about pre-1925?

MR. BENGLOFF: I can just tell you we have
people with catalogs, and I actually help our
members get things on to -- you keep focusing on
pre-'25, but your colleagues don't, so you are just
speaking for your one --

MR. BROOKS: Well, that was the figure we
were talking about.

MR. BENGLOFF: I know, but that's the
numbers you keep -- you have a chart in there that
includes post-'95 (sic) --


MR. BENGLOFF: Post-25 numbers. I just
looked at your study, and that's what it --

MR. BROOKS: Sure. It goes to 1965.

MR. BENGLOFF: Right, right, that's what
I'm saying. But you have other colleagues. You
keep doing it as if you this is what you are
agreeing, and that's why I made a point of asking
Eric where he was coming from, and I made a point of
asking --

MS. PARISER: This is where we got into
trouble at the last pass.

MR. BENGLOFF: You keep saying like you are
representing. That's the thing I have a problem
with.

MS. CLAGGETT: We have a couple of hands
that are up, and we actually don't have very much
more time.

So I do have one more question that I
wanted to ask, but the people who are currently
waiting, I think it's Eric and then Elizabeth and
then Jay.

MR. HARBESON: No one is -- we're not
advocating bringing all pre-1972 sound recordings
into the public domain. I just want to make that
clear.

So you are talking about -- Jenny, you were
saying that things are different because Penguin
Books doesn't have any -- doesn't -- in sound
recordings, you can't make any money off of public domain sound recordings. But we're not really talking about sound recordings except for very old sound recordings.

Now, that's another discussion of what the term of copyright should be, but for most of the stuff that I think that you would agree is commercially viable, we're not talking about bringing it into the public domain. We're talking about -- we're actually advocating for a federal regime where you can collect statutory damages even. You know, this is part of our filing.

We're not -- we're not trying to take copyright away from you, so that is why I don't understand how sound recordings are different because certainly there's plenty of piracy going on.

And I just have to say that for -- I have been trying -- the last couple of minutes trying to think of all of the things that I could do in my library with negligible contributions like a couple of million dollars that Pandora gave to SoundExchange. We could go on and --

MS. CLAGGETT: I do want to get the people who have been waiting. I think Elizabeth was next and then maybe Jay.

MS. GARD: So we faced this question too in our class and I wanted to report back. So they completely agree with you, Richard. We believe that everything is valuable, and that in this new digital age we just don't know.

So what the class came up with is this idea that if you are somebody who wants to potentially profit for something, you should just raise your hand, like whether it's NIE or registration or during a period of time or make it available.

Because -- and then if you did that for term, you get 2067, you get the whole thing, because that was the deal you had under the pre -- under the old revision.

But just let us know -- the class, this is
our vision -- just let us know that you want to exploit it. Because if you don't want to exploit it, then let's let the librarians just play with it as much as they want to play with it. Because it's the system of -- a balancing system.

And so the idea was for us, we did a five-year term incentive period, like 303(a), because I'm a copyright professor so we did it in a copyright kind of way, but you could do it lots of different ways. But the idea is that if you had clients or you had people and you said, Look, there is this five-year window, just go to the copyright. You have to pay taxes every year, you have to do some dumb thing like that every year, just go there one time and tell them you want all your stuff, that you are going to claim the ownership of all that stuff. You do it one time, you get the full 2067.

If you don't, well, then you are just being dumb. You know, like that was like a dumb move, and sometimes people are kind of dumb. And that's just what happens.

So that was kind of our idea, is you split the difference, and then all the folklore and all the other stuff that everyone is worried about, no one is going to come and claim that. Then it goes into public domain and everybody's happy.

That was our happiness, but it took us a really long time to get there, and it was really, really aggressive in our class when they were doing all this stuff. So it's -- you are much more civilized.

MS. CLAGGETT: Some people might disagree. I think Jay is actually next and Rich --

MR. ROSENTHAL: I don't know about civilized. But just a very interesting point to this about, you know, somebody should think that something is valuable now and, therefore, they should state it.

A story from SoundExchange. When SoundExchange first started, and they have all these new channels -- you know, they deal with services that have these new channels, and you have XM and Sirius that come up with all these new channels,
including -- for all we know, there could be a pre-1926 recording channel next week. But they have a channel of Hawaiian music, and all of a sudden they got a letter from the guys that recorded Hawaiian music saying that we had never ever received any money since we put this music out 30 years ago for our Hawaiian music. But now that it is part of the services and now that they have these special narrow casted channels, that it has become valuable. So the point here is, how does one know whether something is going to be valuable or not considering that the services today that are out there in this industry are trying to really make everything valuable across the board, and we just wouldn't know. And I think it's very instructive to think that -- you know, to think that we know what is valuable today is just wrong. That's in my estimation.

MR. BENGLOFF: I mean, not anecdotal again, but Nielsen, you know, I talk to those people as well to get their research, and there were about 30,000 releases in 1990 -- well, in 2000 -- I'm sorry, in 2000, and 11 years later they were up to 130,000 releases a year. Those releases in many cases are digital only because the metadata has been prepared by the constituents that our organization represents. So as long as they are getting it available, they throw it up there and make sure it goes to Slacker and Pandora and to all these other services. And just as Jay described, especially for this roots music that was the beginning of my introduction earlier today, and jazz and all these different genres of music, money is rolling in that didn't exist in 2005. These are new revenue streams.

MR. CARSON: We have about four minutes left, and then there is one topic we really haven't touched on or maybe we barely touched, I don't know, but let's try to deal with work for hire in the next four minutes.

MS. CLAGGETT: Yeah. Yeah. I think we
touched on it very, very slightly.
I think, Jenny, you kind of touched on it
the most, so I can throw out the question to you or
to anybody else who also wants to respond.
First, this is just kind of a general
background context question, and that is, how is
work for hire handled under state law and how does
that differ, if at all, as to how it's happened
under federal law?
In four minutes or less. Well, two
minutes, given if others want to speak.
MS. PARISER: I haven't studied this, but
my general understanding is that state law, which,
of course, as we have spent the last day talking
about, cannot really be generalized very, very well.
But doing so anyway, it's something more like the
conception under the '09 Act. It is did this person
show up for work on the premises? Did they get
paid? Was it at the incidence and expense of the

corporation? And not so much about the need for a
writing.
MS. CLAGGETT: Does anyone want to add
anything to that? And that was actually one minute
or less.
MS. PARISER: Well, presumably we have to
talk about that now, right?
MS. CLAGGETT: And I think in terms of your
reference to the 1909 Act, you know, talk about
whether applying that law, if it is similar, to how
it is actually applied under state law would be a
solution.
MR. ARONOW: I just wanted to add a little
bit to what Jenny said, which is to say that --
maybe I'm just echoing the comments I made earlier,
which is that we're -- we are comfortable with the
existing landscape, including its imperfections and
uncertainties. And the very debate that we're
hearing today I think amplifies and justifies what I
think are the concerns that have been expressed by
the RIAA and its members about the fact that a new
regime, whatever it may be, however well intentioned
it may be, is going to throw turmoil into the system
yet again.
And that's very much what we're concerned about and what we came here today to express our concerns about. And at the core of who owns the work, and what is a work for hire -- at the core of that concern is who owns the work and what is work for hire.

MR. BENGLOFF: You can expand that to all labels. Thank you.

MR. CARSON: Not that it gives anyone an ounce of comfort, but I think it's true, and I just want to make sure that it is true that of all the people in the room, of everyone who is advocating any position with respect to the entire subject matter of this study we're engaged in, nobody is suggesting -- or is anybody suggesting that the ground rules should change with respect to ownership if you move things from the state system into the federal system?

I'm not saying it's that simple. I'm not saying we can make it happen. I'm just saying, as a matter of principle or policy, do we have an issue here? Is anyone suggesting that the concerns that are being expressed here are ridiculous and we should change the way that ownership is governed?

I didn't think so, but I just wanted to make sure. And that is not to diminish your concerns, but I just wanted to make sure that that at least is not an issue. Nobody is trying to change the rules. The question is whether it's worth doing what is being proposed given what you think are the best uncertainties as to what is going to happen with respect to the ownership and so on.

So I think that sort of sums it up in a nutshell. Okay. Thanks.

MS. CLAGGETT: Does anybody have any other final comments?

MR. CARSON: No, because we've run over.

MS. CLAGGETT: I didn't have any either.

MR. CARSON: Since we are already 15 minutes behind schedule, it means we will run till 5:15, unless this next session goes shorter than scheduled.

So let's try to get the folks who are on
the final panel of the day, which is on effects of federalization on statutory licensing come to the table, and we will get started right away. And that discussion is going to be led by deputy general counsel Tanya Sandros. (Recess.)

MS. SANDROS: Let's get started with the last panel of the day so we can try to wrap this up about 5:15. Actually, the next panel is also looking at the effects of federalization but on particular provisions in the Copyright Act. So in a sense it's a continuation of what Karen started in the last panel, but we're going to be looking at really the effects on statutory licenses. And for those who aren't quite as familiar with it, let me just at least give you a quick overview of the two licenses that probably are the key focus of today's discussion. The one in Section 114, which governs the statutory license for streaming, making digital transmissions of sound recordings. The law, as most of you know, was changed in 1995, modified in 1998, to bring in performance rights for digital transmissions with respect to post-'72 sound recordings. Since today we've been talking about using federalization of the Copyright Act with respect to '72 as a mechanism to facilitate the preservation and access, should that happen, then there is a question of whether or not people here think in fact we should also bring in statutory licenses at the same time. We have had a lot of discussions today about harmonization, and that seems to make a lot of sense. There may be others who have different viewpoints. We would like to hear that. There was also some earlier discussions today about the economic effects should in fact we federalize pre-'72 sound recordings and what that would mean. I think we will hear more about that this afternoon as well.
And when you think about this, I think one of the other things that has come up today as well, even though the Section 114 license has mostly been used really for commercial purposes. I mean I think no one had thought about streaming under 114 for educational purposes and not commercial purposes. It's really been because people have been putting forth commercial product and pushing that out to the public.

But it does raise a question, and I think Jay spoke to this in the last panel at the very end, just the fact that you are streaming more music and you are offering it to the public, you are actually creating a new audience and you are actually creating more access. And I think we can have a discussion on the access point as well in respect to the statutory license under a federalization plan.

So, we're going to start the same basic way we have been. We will give everyone one or two minutes. I note that we have one new person at the table at this panel, Michael DeSanctis. He's representing SoundExchange.

So, Michael, you actually can begin, and take a bit more time and tell us who SoundExchange is and what their interest is today.

MR. DeSANCTIS: Sure. Thank you very much. And thank you for having today's panel and for letting SoundExchange and myself be part of it. But I will keep my comments short because it's the end of a long day.

SoundExchange, as many people know, is the sole collective recognized by the copyright royalty judges under Section 114 and Section 112, statutory licenses. It's a unique organization, to say the least. Half of its board is copyright owners and the other half are artists. In our role as the collective, SoundExchange maintains accounts for literally tens of thousands of artists and labels, and distributes hundreds of millions of dollars in royalties.

Because of that dynamic, I want to be careful to limit my comments here to SoundExchange's role as that collective, since we have copyright owners here and I'm not sure if we have artists'
representatives, but who certainly have views on
some of these substantive issues, and SoundExchange
does too, but I just wanted to make that point.
SoundExchange obviously thinks that pre-'72
recordings are valuable and are a valuable part of
the public performance marketplace. And certainly
for artists who primarily performed pre-'72 works
and for labels, for small independent labels who
specialize in pre-'72 works, it's extremely
valuable.
If you look at the comments, the written
comments from all sides who spoke to the issues of
the statutory licenses, which was only a couple of
questions of the many that you all asked, there
doesn't seem to be a debate over whether there is
federal protection in remixed and remastered works.
There certainly does seem to be dispute over whether
there is state law protection in the underlying
recordings. We feel very strongly that there is
state law protection. I don't think that that is
something that we all will be able to agree to
today, and I don't think it's necessarily something
that the -- that the Copyright Office would be
determining. Obviously that's, an issue for state
courts and federal courts, interpreting state law.
MR. CARSON: Can I -- when you state law
protection, do you mean of the performance rights?
MR. DeSANCTIS: Yes. Exactly.
MR. CARSON: I don't think anyone is
arguing there is state law protection of some form.
MR. DeSANCTIS: Yes, yes, of the
performance rights.
And we're comfortable with that protection.
Many services are paying for pre-'72 works under the
statutory license or they are getting direct
licenses from record companies. And SoundExchange
is a collective. You know, whenever it collects
funds, it distributes those funds according to the
rules of distribution, and we're very comfortable
with that regime.
One of your questions was, is there a
vehicle -- is there a mechanism for a sort of
partial incorporation into the statutory licenses
short of full federalization? And what we suggested in our comments was a mechanism something like what is currently employed under the AHRA. I think that would -- as we laid out in our comments, we think that's a straightforward mechanism that would be easily applied. We don't -- we raised that in our comments only because you asked if there is a way to do it. But we -- as I said, we are very comfortable with the current state of law.

MS. SANDROS: Does anyone else have an opening statement that they would like to make? Steve.

MR. MARKS: I'm watching people do this all day. It's actually a little harder. It's been a while since lunch. I need some more energy.

MR. CARSON: Now, can you rub your stomach with your other hand?

MR. MARKS: A couple of things. I think Michael was alluding to this. Those of us on the panel here who spoke to the issue of the 114 questions that were asked, I think are all in agreement that there shouldn't be federalization of 114. Notwithstanding -- I mean I think NAB said Eric, I don't think, unless I'm wrong, your comments didn't address this issue.

MR. HARBESON: They did not.

MR. MARKS: So we kind of have agreement that there shouldn't be federalization of 114. Notwithstanding -- I mean I think NAB said that and Jay has said that today and both Rich and his organization, our organization has said that, and SoundExchange as well.

Eric, I don't think, unless I'm wrong, your comments didn't address this issue.

MR. HARBESON: They did not.

MR. MARKS: So we kind of have agreement that, you know, federalizing on the 114, at least among those who are here today, is not the avenue to go down.

You know, for us obviously, and I think, you know, we also agree that there is state law protection. We obviously don't have agreement among the panelists on that issue, and as Michael said, we are not going to achieve that agreement here today.

The 114 issue seems to us to be a, you know, a very small question compared to the other questions that we've been talking about today. But, you know, I would be remiss if I didn't note that if
we're going to start talking about reforming the law
with regard to performances for sound recordings, we
should start with the elephant in the room and not
this very small issue, which is obviously the lack
of a performance right for terrestrial radio.
So from our perspective --
MR. CARSON: Is everyone still in
agreement?
MR. OXENFORD: We can talk about that in a
moment.
MR. MARKS: So those are our opening
thoughts.
MS. SANDROS: David, I'm sure you have a
response.
MR. OXENFORD: Yes. I mean certainly we're
not here to debate the elephant in the room because
that would involve a lot more people and a lot
longer than the 15 or 20 minutes that we have left
before the scheduled ending time.
I'm glad that we are all in agreement that
114 should not apply to pre-'72 sound recordings. I
think I even heard Michael say that that was his
understanding as well, and that they threw out this
idea of the AHRA sort of just because you all asked
for alternate ideas. Again, that seems to me that
if we are going to pursue that sort of idea, that's
a whole 'nother proceeding, not one covered here
under this proceeding that we have in front of us
that we're all speaking at this afternoon.
You know, with that since we are all having
this kumbaya moment, I'm not sure that there is
really a whole lot more to say. Obviously, we don't
agree that there is a performance right under state
law for sound recordings. I think you would find a
lot of Checkers and Johnny Rockets, diners being
very concerned if there was a performance royalty in
pre-'72 sound recordings. A lot of martini bars
that may be playing a lot of the pre-'72 sound
recordings, not realizing that they may have some
liability. I just don't see that that is there.
It's never been enforced. But, again, that is not
something we are debating here today.
We're just talking about whether there
should be federalization of pre-'72 sound recordings, and I think everyone at this panel seems to be unanimous that -- perhaps with Eric's exception, but not necessarily relevant to this topic -- we don't have a dispute.

MS. SANDROS: I think Eric has raised his hand.

MR. DeSANCTIS: Well, because I've already spoken, I'll let Eric go, but I just want to make sure that I get to respond to David's characterization of my remarks.

MS. SANDROS: Absolutely.

MR. HARBESON: I actually -- we do not support partial incorporation in general, to the extent that it weakens our argument in other aspects of this question. As it's been pointed out to us by, I think it was -- well, several of the RIAA folks anyway have pointed out that partial incorporation is difficult to justify, so we do support federalization of pre-1972 sound recordings on the whole, but this is not a particular issue that anyone in my committee or I have any special -- has any specialization in.

So that's the extent to which I might -- might -- disagree with that statement.

MS. SANDROS: Let me just -- okay. Michael.

MR. DeSANCTIS: Yeah, before we get on to another topic, I just want to make it clear that Mr. Oxenford suggested that -- that I had said -- I think what he said was that the statutory license does not cover pre-'72 sound recordings.

What I said was we're -- like the RIAA, we're not advocating for full federalization of pre-'72 works, whether that is within the context of the 114 piece of it or in the larger context. What I did say is that there are federal rights in remixed and remastered and restored derivative works, and I think federal protection does apply to those, and there's no reason why that would not be part of the statutory license currently.

I think there is also state law protections in the underlying pre-'72 works for performances
under state law, and that's obviously where we differ, and many, many services are paying SoundExchange today on pre-'72 works.

MS. SANDROS: Okay. Why don't we start with that. I mean if SoundExchange is collecting money today under basically -- performances, as I understand it, are being conducted under state law, I would like to understand really how you license those for the transmission for the performance, but also what is the legal theory for SoundExchange to take in the money, and once you get the money, what do you do with it?

MR. DeSANCTIS: As a bright line, and I want to be clear about this, when SoundExchange receives money from services, it distributes it according to the rules of distribution. So...

MS. SANDROS: The federal rules, right?

MR. DeSANCTIS: Yes. Yes.

MS. SANDROS: You are talking about applying basically the statutory provisions --

MR. DeSANCTIS: The statutory regime.

MS. SANDROS: Right.

MR. DeSANCTIS: Yes. So when SoundExchange receives money, it does not research all of the funds it gets as to why it is getting it. It, you know, has records as to who the distribution goes to, and it follows the federal distribution rules.

Does that answer the question?

MS. SANDROS: It does. But the follow-up question really goes to the legal significance of them making the payment under what they believe probably is a statutory license when, in fact, it's a pre-'72 work not covered.

Does SoundExchange -- or do the people who make these payments under this regime believe they are actually covering their obligation and won't be sued for infringement?

MR. BENGLOFF: I want to bring up a point I brought up earlier and that Michael had brought up again a little bit ago. Pre-'72 is a physical year, right? We were selling cassettes. I mean there weren't even CDs back then, right? It was vinyl, and cassettes had just started, and there were
eight-tracks and everything else. And it's our belief that all of these recordings have been remixed and certainly digitized, certainly in many cases remastered for a higher sound volume and everything else.

So these recordings, in fact, to at least A2IM's way of thinking -- and I don't want to speak for Steve and the major labels -- these recordings as Michael said earlier, in many cases they've been totally remastered as well in their new works, and we're getting paid for those as a result. I thought the purpose of today's panel, which has been very interesting, and I have to say thank you very much for having me --

MR. CARSON: We really didn't have any choice.

MR. BENGLOFF: That's okay. If you don't want me to come next time, just tell me and I won't, but that is fine.

MR. WESTON: We will just tell you the wrong room.

MR. BENGLOFF: But -- everyone else has been thanking you, so I'm the only one (inaudible), David.

But all kidding aside, I mean the goal here is to make sure as much music gets listened to as possible, right? And that the proper artists and sound recording owners get paid for it. This is newly digitized music within the last 10 to 15 years, the amounts of kilobytes changes, the sound and everything else. I talk to engineers all the time. So they are actually furnishing payments for recordings that in many cases have changed over this period of time. At least that's my view of the world.

MS. SANDROS: Steve.

MR. MARKS: I was just going to add, and Michael can correct me if this is wrong, but SoundExchange has an obligation under the regs to collect and distribute according to reports of use that it receives, and that is what it does. It doesn't make legal determinations on pre- or post-'72 any more than it does about whether
somebody is violating a performance complement. So it does its job based on the regs that govern it and its obligations they're under.

MR. DeSANCTIS: I do agree with that and the questions that Steve raised that SoundExchange does not get into are up to the rights-holders.

MR. OXENFORD: If I may, first of all, on the question of remixed and remastered works, again I think that is something that we are not here to decide today. I'm sure that many of the services that are represented by the NAB and many of the other services would take a different position from those that are expressed by Rich and Michael.

On the question of why their services pay, I think just like there are many librarians who are afraid or the many services that are afraid, and many services that are just unaware of this question about pre-'72 sound recordings, and they are paying for everything that they play, not knowing what the law is.

There are services, though, that are recognizing that pre-'72 sound recordings are not covered by the statute and have made adjustments to what they pay based on that knowledge.

MS. SANDROS: And if they have made that decision that they're not concerned about the statutory licenses, how do they license the work for the transmission?

MR. OXENFORD: Again, I would believe that there is no public performance right under state laws for pre-'72 sound recordings.

MS. SANDROS: Just one other sort of more technical issue. When you do a transmission, though, there is always a reproduction of the work as well, which is the source for the transmission.

So what about the duplication and reproduction right?

MR. OXENFORD: Under some state laws, there are specific exceptions made for reproductions made by broadcasters. In other cases, there are reproductions made in the broadcast, over-the-air transmissions. There are broadcasts -- there are copies made in every other -- many other
reproduction -- I'm sorry, many other public performances that aren't traditionally covered where there are ephemeral copies, copies made in a transitory way that again we would question whether there is a state law reproduction right that is triggered by that as well.

MS. SANDROS: Any other comments?

I just want to go back just to the beginning, because the way this started was we were talking about federalization of pre-'72s on a grand scale, you know, federalization at large. What I hear is that no one at the table today thinks that the 114 license should be part of that should that happen in the future.

My question is, what is the policy reason if you actually took out the 114 with respect to pre-'72s when, in fact, it still covers the post-'72s for the public performance right and the digital transmissions? Is there really a policy basis for distinguishing pre- and post-'72 if everything is under the federal Copyright Act?

MR. MARKS: I'm not sure, but it certainly wouldn't be any more of a distinction than the policy of not having terrestrial radio pay at all.

So again --

MR. OXENFORD: Why did that not surprise me?

MR. MARKS: So, you know, I mean it is what it is in terms of the way the law exists. Could we envision a world where you bring this within 114 and in some way or another? Yeah, that's possible. Do we think it's part and parcel of this kind of proceeding or necessary as part of issues relating to archiving preservation? No.

MS. SANDROS: What about the question of access since we have heard quite a bit today that actually doing transmissions increases access?

MR. MARKS: Well, I think we'll clearly need to have a discussion about the access point. Because we need to better understand I think both sides, you know, what the needs are, the desires are, what our comfort level is. My hope is that the discussions today and tomorrow will give rise to
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15 some discussions between the parties to help figure
16 out some of those issues.
17 So it's hard to answer without -- as goes
18 back to I think David's question at the end of one
19 of the panels, you know, what do the parties really
20 want or what do the other parties maybe object to
21 with regard to certain uses, and I think we need to
22 explore that with Eric and others so that we can
23 talk about it and maybe come back to you with an
24 answer.
25 MS. SANDROS:  David.
26 MR. OXENFORD:  If I may, on both of the
27 questions that you asked.  The policy basis or one
28 of the policy bases is business expectations that we
29 started to discuss in the prior session.  You are
30 not going to encourage the creation of more pre-'72
31 sound recordings by putting on a performance
32 royalty.  Those '72 -- pre-'72 sound recordings were
33 created with no expectation of there being a public
34 performance royalty.  And -- and there has not been
35 one paid for the 40 years that they've existed.  So,
36 in essence, you are just changing the business
37 expectations if you would change the laws at this
38 point.
39 The question of access, there are programs,
40 there are channels created on webcast streams and
41 others that may not exist should new royalty
42 obligations exist for pre-'72 sound recordings.
43 One of the questions I raised this morning
44 when the discussions by some of the libraries and
45 others talked about streaming some of these songs,
46 streaming some of their collections is whether they
47 are considering what would happen under a
48 federalization where they would have public
49 performance royalties perhaps imposed where they may
50 not have those under current law.
51 MR. BENGLOFF:  What Michael said earlier,
52 you know, he said what is going on is analogous to
53 the Audio Home Recording Act in terms of it, and if
54 today's goals are to provide more access, encourage
55 greater use in access, people paying under the
56 statutory license like the HAA and AHRA is
57 facilitating that, and that's -- that's a good thing
that doesn't have to necessarily fall under 114,
just like you said earlier.

MS. SANDROS: Eric, did you have a comment?
MR. HARBESON: Yeah, I just wanted to say quickly that -- as I said earlier but I will just repeat in response to David's comment -- when we're talking about pretty much any use that we're considering, for the most part, we are anticipating 107. However, we haven't really discussed 114 as a possible means of streaming access. But to the extent that it would make things -- we would accept 114 if we also got 107. I mean we're really looking for full federalization. We're not trying to cherry-pick. And so 114 may not benefit us as much, but it's something that we are willing to...

MS. SANDROS: Richard.
MR. CARSON: I just want to make sure I understand the positions of everyone here, and maybe it was made clear and I just didn't get it. But let's assume for the moment -- and this is not necessarily what is going to be the case, by any means -- but let's assume that we end up recommending that Congress federalize pre-1972 sound recordings, go all in. Let's assume Congress is ready to do it.

Is the position of everyone here or of anyone here that even if that's what happens, pre-'72 sound recordings should still be carved out for 114 so that is the one exception? I mean is that what you are saying as well, or are you just saying the other -- what I know you are saying is, if you don't go all in, don't just do 114. Are you also saying if you do go all in, carve 114 out, or if that were to happen, would you say, Fine, 114 is part of it then?

MR. MARKS: It's a hard question to answer because I just can't conceive of that situation.
MR. CARSON: Oh, you make me want to --
MR. MARKS: It -- I think it's something we would have to evaluate at the time, but I mean our position, as we've said a few dozen times here today, is federalization isn't the way to go for all the reasons we've stated.
MR. CARSON: Anyone else have a different point of view?

MS. SANDROS: Just to follow up on David's point, which is where I was going initially, if it was under the federal copyright law, wouldn't that be an advantage to the copyright owners? Don't you see this as another stream of income?

MR. MARKS: I think this gets back to just the balancing of interests on whether getting some additional income potentially there makes up for the downsides that we've identified in, you know, an exercise of federalizing.

MS. SANDROS: But I think it goes to the question about carving out. If it was federalized, you would want 114 to be part of that process?

MR. MARKS: Yeah, again, I can't think of a reason that we wouldn't if, you know, what we were being told was, Everything is going to be done, do you want this carved in or out? I don't know the answer to that. I think we just need to think about it some more.

MS. SANDROS: Any other comments?

Okay. I guess we're done early. I'm not too surprised. We didn't think that this would necessarily engender a lot of discussion, but we wanted to touch on the various issues mentioned and cover all the bases. Thank you.

MR. CARSON: Before you go, just housekeeping matters. We start again tomorrow at nine o'clock to 1:15. Thank you all for putting up with us for an entire day. It's probably been harder for you than it has been for us.

We did want to let you know, particularly for those of you who aren't coming back tomorrow, this isn't the end of our process. This is a part of the process that's important. We want to hear from everyone; we want to go around the table. We want to have a transcript that will be part of what we present to Congress. We present recommendations. It's part of what we look at. It's part of what Congress will look at.

We encourage informal discussions among yourselves. To the extent that we can hear
consensus, maybe not today, maybe not tomorrow, but
maybe in a few weeks, that is great too.

To the extent that anyone feels that
meeting with us one on one is another way to present
your point of view in ways that may not
necessarily -- you can't necessarily do in this kind
of context, we understand that. There aren't
constraints on us in the course of a study for
meeting with people individually, so we more than
welcome that.

We do have a deadline, and as many people
are quite aware, we missed our initial deadline.
We've been told we have until the end of this year,
and we've been told we don't have a day beyond the
end of this year. We are going to meet the
deadline. So that may seem like a long way away,
but with everything we have to do, we are on a
forced march from this point on.

So we are going to want to meet with you if
you want to meet with us, but we want it to happen
soon. If you have more information for us, if there
is an opportunity to get together and come up with
solutions that people can join together on,
compromises, whatever, the sooner the better,
because we really as a practical matter over the
summer have got to reach what our conclusions are
and be very, very far into writing our
recommendations at that point. That is just the way
the process has to work. So this may seem early,
but it's actually fairly late in the process, so
that's important for you to know.

And with that, I hope to see most of you
tomorrow. And for those of you who we don't see,
we're very thankful you came.

(Proceedings adjourned at 5:04 p.m.)
CERTIFICATE OF NOTARY PUBLIC

I, LESLIE A. TODD, the officer before whom the foregoing proceedings were taken, do hereby certify that the proceedings were taken down by me in stenotypy and thereafter reduced to typewriting under my direction; that said transcript is a true record of the proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Dated this 14th day of June 2011.

___________________________
LESLIE A. TODD
Notary Public in and for the District of Columbia

My commission expires:
    November 14, 2013