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 9:08 a.m.

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
ERIC SCHWARTZ
SUSAN CHERTKOF
RICHARD BENGLOFF
SAM BRYLAWSKI
TIM BROOKS
CHARLES SANDERS
TOMAS LIPINSKI
PARTICIPANTS IN MEETING:

JAY ROSENTHAL
DWAYNE BUTTLER
BRANDON BUTLER
ADAM HOLOFCENER
IVAN HOFFMAN
JENNIFER PARISER
MICHAEL DE SANCTIS
STEVE MARKS

PROCEEDINGS

MS. BESEK: Good morning. I'm June Besek, and I think everybody on this first panel was here yesterday so we don't need any of the longer introductions. But I would like to go around and give you all a chance to kind of state your general thoughts about the issue of our first session today, which is term protection.

So the question I would put to you, just to address kind of in general terms as we go around the first time, is if pre-1972 sound recordings were brought under federal copyright law, what would be a fair and appropriate term of protection, taking into account the desirability of keeping federal law reasonably consistent. Because that is one of the objects that people have discussed, the problem with the inconsistency with state law, on the one hand, and then the concerns about unsettling business expectations on the other.

So with that in mind, I would like to know
what you all would think would be a reasonable term
of protection for pre-1972 sound recordings.

MR. BROOKS: Why don't you start with
Elizabeth since she studied this.

MS. BESEK: Okay. Why don't you start.

MS. GARD: Okay. So my background is
copyright duration. My research is in 303(a) and
104, so I'm very excited to meet Eric. Insanely
excited. I have all these like thousand questions,
and he's like a movie star.

Okay.

MR. SCHWARTZ: Where did this come from?

MS. GARD: So what I did --

MS. BESEK: Do you sign autographs?

MS. GARD: It's true. Could you sign my
copy of 104(a)?

So what we've done for the last four years
is code copyright duration for the world, which is a
nearly impossible task, particularly U.S. law, but
foreign law and 104(a) sadly is very, very
difficult. In our process -- so that is that.

So where I'm coming from is looking at this
in the context of our traditional contours of
copyright law, which we also studied quite a bit,
and also what the rest of the world has done on
sound recordings.

So the proposal: So there are three
categories that it potentially can be in. 302:
Well, 302 is works created after 1978, so that one
is out, right, because they're pre-'72 sound
recordings.

The second one is 303. Now, this is where
we as a class voted where we think it should go,
which is works created before 1978 but potentially
published after. And I will explain why in just a
second.

So the terms in 303(a) are usually 302
terms, so life of the author plus 70 years, work for
hire, 95, 120, all of that is in -- that gets
adopted into 303(a). So we don't do that, but we
will come back to that in just a second.

And 304, which is works published before
1978. Now with this one, this is where all these
Pre-1972 Sound Recordings Public Meeting 06-03-2011 edits.txt

1923, 95 years for protection, that is where everybody is getting that. Those are works published before 1978. Sound recordings are not published. That was the way it worked, that it didn't qualify for publication, it didn't qualify for registration, even though in layman's terms it was published, it wasn't legally published. That is because they didn't want sound recordings published. They didn't see how they could do that.

MS. BESEK: Could I just intersect once again? I wonder if we could just go and just do a brief introduction, because I know you have a very detailed proposal that you want to talk about, and I would really like to get into that and talk about it, but I think it would be more useful to go around first and have everybody give their general view and then come back.

MS. GARD: That sounds great.

MS. BESEK: Because I think if we get focused on that really early, we're not going to hear everybody else.


MS. BESEK: I guess at that point, can I ask anybody else if they want to just give a general view of what they think the terms should be?

MR. BROOKS: Well, the general view of ARSC in this, and we're on record about this, is that -- and our members feel strongly about this -- that the statutory terms under federal law are too long, they are out of line with the rest of the world, and should be modified in some way. Not necessarily equal to Europe or something like that but modified. Having said that, however, we realize that it's a very contentious issue. Obviously, our friends on the rights-holders' side, I'm sure, disagree strongly with that, and we don't think that it's an issue that needs to complicate what we're talking about today, which is pre-'72.

So, certainly for the purposes of this hearing and this investigation, we support it being as closely aligned as it can be to the existing
terms, but applied to recordings made before 1972.

So in shorthand, a 95-year term or 120 if not published, those sorts of terms applied to pre-'72 recordings with a 1923 cutout would be something that we could support. I can go into more detail on that, but that's the basic position.

MS. BESEK: Could you just clarify "with the 1923 cutout"?

MR. BROOKS: Yes. As you know, because of a number of historical factors, the rest of IP prior to 1923 is considered almost universally in the public domain. In order to make a clear consistency between copyright laws as applies to sound recordings and as it applies to other IP, we would want that same carveout for sound recordings, even though the historical record didn't develop for sound recordings the way it did for other IP. But to pick any other date is going to erase the bright line and make it very difficult for archivists, who we know are too confused and afraid and all those other things today to deal with this.

Moreover, 1923, by happenstance, happens to align quite closely, not identically, but quite closely with the acoustical recording period, which ended essentially in 1925. So establishing a 1923 cutoff de facto would create a public domain of -- solely of acoustical recordings, which have demonstrably almost nil economic value. They're the silent movies, as I've said, of the sound recording field, so it could serve other purposes as well.

MS. BESEK: Okay. Pat.

MR. LOUGHEGY: Speaking for the Library, in our comments we proposed a 50-year term of protection for pre-'72 sound recordings. But I must confess that that was more to simply put on record in a strong way a sense that there should be a limited term of protection for these materials. The experience of the Library is that we have many tens of thousands of recordings that are out of print for which the Library has the only known copy or for which there are very limited numbers of copies dispersed in other recording archives throughout the United States, and the difficulties that are related
to those in simply making them available to the
research community that wants to have access, that
is beyond just being able to make a listing
appointment to hear it one time only. We really
feel that there has to be more public access.

As to the exact number of years, I confess
that we would consider other suggestions of terms
that might be longer, but I think the big point that
we have to keep in mind is that there has to be a
limited term of protection and that these materials
can move into the public domain and be made
available. I agree with what Tim Brooks said that
materials of the acoustical era have a very limited
commercial interest, and that makes to me a pretty
practical guiding line to provide a harmony with the
term of public domain for other formats of
materials.

MS. BESEK: Okay. Thank you.

Eric.

MR. SCHWARTZ: First, lest people are
wondering what Elizabeth is talking about, we were
talking about the Copyright Office's role in
drafting of Section 104(a) back in the 1990s when I
was here, and the language we were talking about in
GAT restoration, so I appreciate their comments.

MS. BESEK: That was your rock star
platform.

MR. SCHWARTZ: And the rock star here was
Barbara Ringer, who drafted Section 104(a). Not me.
I was just taking notes.

A couple of things. First, let me come
back to something I began with yesterday. The goal
here is to preserve and make accessible materials,
and I think a lot of what happened yesterday, very
good discussions, enjoyable discussions, and, you
know, I'm most of the time observing. But off the
topic I believe on some things -- I realize you have
to do the study and we are going to probe for an
hour and 15 minutes the term. Lest I need to repeat
it, the RIAA -- and Rich isn't here -- A2IM opposes
federalization, so we're talking about theoretical
because they oppose federalization. The only
pinpoint I would make there is that publication, as
Elizabeth said, has no bearing. So any term for older materials has to be based on fixation, not on--it's tough enough with other works determining the date of publication, much less the definition of publication.

Leaving that aside, where I think we get a bit off track and did yesterday, we are spending a lot of time talking about--and I loosely define "commercial" and "noncommercial" materials with no definition purposefully--the noncommercial, the good stuff that the archivists and educators and all want to get their hands on, they have it, want to get--preserve it and make accessible to the public. The ethnographic, the spoken word, you know, that stuff, the issues of term are irrelevant. The real issue is access and preservation, so 107 and 108 type of issues.

And so it seems like a discussion about what the terms shall be, again, in the theoretical if you are having federalization, it's not something that I really truly want to participate in, because it's just--if you oppose federalization, you oppose federalization. And I would rather--you know, we will spend the time if we will spend the time, but focus our attention on, so how do we make these materials accessible with the proper types of access rules?

And we will come to it in the alternatives, including the notion of having a model state law, in which under the states you would have something equivalent to fair use and 108 in which you would be able to do the preservation copying that you need and to make the materials accessible in the ways that archives need to make them or want to make them accessible. Not fully, it's not the same treatment as if these works were in the public domain.

But on the public domain subject, I suppose I have more of a question than a comment, and then I will stop because this is over a minute.

Sony just granted a license to the Library of Congress. I understand Tim's point about streaming is not all the access that archives want. That said, and factually correct me if I'm wrong, if
Victor and Columbia controlled maybe 70 percent of the commercial distribution in the pre-'25 acoustic era, then 70 percent of the commercial material has just been made accessible on the phenomenally successful and, you know, terrific National Jukebox. You can go and get it now and stream it. There it is. So there is your, at least the majority, of your public domain material.

And it seems like we are spending and going to spend a lot of time discussing, Well, you know, this is what it should be, and, yes, we would like for it all to be totally public domain so we cannot just stream it but we can put our hands on it and do these types of things that we would like to do additionally.

But it seems to me, and now I'm speaking personally, like we are spending and are going to spend a lot of time on something that is looking at the wrong end of the telescope here. You know, what we really need to be doing is looking at the access issues generally for the noncommercial material and get ourselves off of -- because, look, watching the debate yesterday, the more you talk about commercial materials, the labels, Rich, RIAA members, are going to say, We don't know the commercial value. There are, you know, reconstituted commercial values for materials now that we never expected; there are new markets for them.

But that's what I -- again, there's a very wide swath here of commercial material released by a label. It doesn't apply in all cases, and there's a lot of other material that is important to get out.

But, again, I think the focus should be on the access issues and less on the term and federalization.

MS. BESEK: Okay. Thanks, Eric.

Opening statements from others? Eric H.

MR. HARBESON: So we proposed in our comments also a 95-year term following the existing law for other works prior to 1972. We felt that this was the best way to achieve the consistency that we're after, works prior -- a book that was published prior to 1972 has a 95-year term, assuming
formalities and the like. We would propose that
there be a 95-year -- a flat 95-year term, and we
assume formalities somehow. I don't know how that
would be legislated. I don't write legislation, so
I will leave that up to people who do that better
than I.

We also did concede that we would like to
see, again for consistency sake, a -- recordings
prior to 1923 enter the public domain. However, we
realize that that will -- even though we feel
that -- what is it? -- 89 years is a long time to
recoup the value of something, that that would
short -- give a little bit of short shift to some
materials prior to 1923 that won't have the full
95-year term. So we would propose a very short
window of materials that had that -- just, in other
words, we would propose a flat 95-year term for
everything with the knowledge that in six years the
things that were before 1923 would enter the public
domain, and works before -- what is it? -- 1917
would enter the public domain right away.

The third prong of our proposal that I
would like to spend a little bit of time on, if I
may, is the issue of -- so a couple of people, a
couple of groups.

MS. PALLANTE: Eric, can I before you enter
your next -- just a point of clarification: When
you say "pre-1923," do you mean things created
before '23 or published if they were published?

MR. HARBESON: I believe in our comments we
proposed date of fixation, because that's the way
that the 301(c) defines works. But we honestly
didn't give that as much thought.

So this question -- a number of groups
proposed 50-year terms in their comments. The Music
Library Association is a member of the HRCAP which
has proposed a 50-year copyright term. We don't
think that this is the place to request that.

However, there are good reasons for
treating sound recordings a little bit differently
in general. And that is the extreme instability of
the media itself. And so, you know, a book that was
published -- I have books in my library that were
put together in 1595. They are in perfect shape.

You will never find a recording lasting that long, ever.

But there's this problem of -- and this
would also -- the 50-year term comes from wanting to
harmonize with the neighboring rights in other
countries so that we can have a little bit more
consistency internationally.

Again, we didn't feel -- we felt that a
50-year term -- proposing a 50-year term would
subject the new law not only to -- it would change
the consistency problem for us, but it would also
possibly subject it to more -- it would definitely
subject it to much stronger takings issues and the
Fifth Amendment.

So what we proposed was, as a way of kind
of threading the needle, amending 108(h) to apply to
sound recordings in the last 45 years of their
copyright term. And what this would mean is that
recordings that are being exploited under the test
that is already in place for all other media be off
limits, but in the case of the stuff that is not
being commercially exploited -- and this would be a
way of getting at what the market has determined is
commercially viable right now, anyway -- we would be
able to have these additional abilities to use this.

Now, I realize that -- use the materials.

I realize that what we are really looking for is
107, and I want to emphasize that. This is not an
important part of our proposal. It was just a way
that we kind of saw to compromise between the people
who were saying we want 50 years and the people who
say we want forever. This was a way to get at that.

MS. BESEK: Can I just ask one point of
clarification, and that is could you go back to what
you were saying again about pre-'23 and recognizing
that they wouldn't have any protection? I didn't
quite follow that.

MR. HARBESON: Well, it wasn't that they
wouldn't have any protection. It was that if right
now -- and I doubt that this will happen, that we
will see any real legislation soon on this, so it
may become moot by the time legislation is
considered. But right now, if pre-'72 -- if pre-'23
sound recordings entered the public domain right
now, the recordings issued in 1922 would not have
enjoyed a full 95-year term. Whereas -- so what
we're proposing is a 95-year term, but there are
these -- and this is getting to the problem of
published works before that would not have had the
same length of term. In order to possibly avoid a
little bit of a problem with owners of 1922
recordings, say the Caruso recording that apparently
is still in print, to give them just a little bit
longer so that everyone could have the 95-year.
MS. BESEK: Okay. Thanks. That is
clearer.
What about the others who haven't done
opening statements?
Brandon.
MR. BUTLER: So I just want to say two
quick things. One is I'm -- we don't have a
detailed proposal on terms, so this will be very
short.
One is I only wanted to be on this panel to
ask one question, and I hope everyone will just
indulge me. And it is this: If 303(a) is not
changed, is it the case that sound recordings, if
given federal protection in other respects, will be
protected through 2047? That is, because they were
not published, they -- okay. You are the person who
can answer it.
MS. GARD: Because they missed the
deadline. They missed the deadline.
No, can I just answer that question?
MS. BESEK: Yes, please do.
MS. GARD: So 303(a) was unpublished works
to transition them from a common law to federal
protection. No works -- it was based on the 302
term, so life plus 70 now. But if you published it
between '78 and 2002, you got an extra amount of
time until 2047, but that has passed so there is no
making up for that unless it was changed. So that
little window is closed.
MR. BUTLER: So they wouldn't be considered
published, and that is why they lose?
MS. BESEK: Well, let me just add that that
is one model that might be considered. But it
wouldn't automatically be applicable. But whatever
was done with sound recordings presumably it would
have to be considered anew.
MR. BUTLER: Can I just add one thing?
I'm not sure why we are sort of talking
about compromising on what the terms should be, you
know, trying to -- we should be talking about what
we think it should be, so I know Eric and other
folks in the library community would really rather
have it be 50 years. And, you know, we're not
bargaining, we're talking about what would be the
ideal. So 50 years I think is perfectly reasonable.
MS. BESEK: Fifty years from what?
MR. BUTLER: Fixation.
MS. BESEK: Let me -- Eric S., I know you
have a point, but let me just go around to the other
people who haven't yet made an initial statement.
MR. BRYLAWSKI: You know, as is expected in
the second and third days of such things, we end up
repeating ourselves a great deal. I don't -- I
respect and consider the rock star a friend, but I
believe that Eric S. -- and I believe the
distinction between published and unpublished is
meaningless because many of the published materials
are held in such small quantities they are in effect
unpublished. I believe that a public domain doesn't
diminish their monetary value to anyone. We can
look at Bear Family records and document records and
Pearl Records and find that a great deal of money is
made by rights-holders and others by public domain
recordings.
So the Society For American Music believes
strongly in a 95-year term. If we were negotiating,
as Brandon would say, we would ask for a smaller
term. The way that copyright extension was in part
argued for parody and conformity with other
countries, we would say, Well, other countries have
a shorter term.
But we are more realistic than that, and I
think you will find that many of us who are part of
-- interested in federalization have been very forthright and honest about just everything we believe, and I think it's just, honestly, it would be great to have 50 years, but 95 years is more logical. I think the confusion would be less over what the terms are.

And as I said yesterday, and I'm repeating myself, copyright yesterday was said by one or two people as being under siege right now, particularly sound recording copyright. I know there are worries of piracy, but we know there are other threats to it too. Just competition for our entertainment dollars and our entertainment hours and lots of things. But I think restricting access to materials for more than 95 years and not having a public domain, at least among the people I represent, the scholars and collectors, and historians in American music, it undermines respect for copyright as a whole and you lose the public in what the real fight should be over piracy and other such blatantly illegal materials by locking up materials and not allowing any access at all.

Ninety-five years seems reasonable. I will say that. I never said that before. Ninety-five years from fixation to have a public domain and have a public domain that moves. I think that the studies that Tim has done and everyone's experience shows that having 1923 go -- pre-1923 go into public domain soon and have it proceed annually after the end of the teens, 2018 or '19, is going to have some effect but not a great deal of effect on receipts of companies, and federalization would bring more receipts through performance rights, which companies do not get now or at least shouldn't be getting. I know they say they are getting some. But that would, I believe, more than make up for any losses in the public domain, and those losses would be mitigated and balanced with great respect by the American public in having a public domain and freeing up these materials.

MS. BESEK: Thanks, Sam.

Jay.

MR. ROSENTHAL: First of all, we join with
the points raised by the RIAA and their suggestions.
First of all, it has to be from fixed -- fixation is
the time you could start counting, but the 2067 year
to us is a very reasonable standard that we should
be using because it matches existing state law, but
it also again brings certainty to everything.
I think that the bigger point is that Eric
raised, and I don't need a picture signed by you,
Eric. If I could get a contract signed somewhere, I
will deal with that.
Effectively access is the point, and that I
think goes right directly to Sam's point about
locking up copyright. I think that the point here
is that we don't want to lock up copyright for these
purposes that we are dealing with here today. And I
also think that everybody recognizes my opinion on
what is commercially viable and that that is
changing daily.
This coming Monday, Apple is going to be
introducing their locker service. I checked last
night. It costs $80 to buy a digitization machine
where you can take old vinyl and digitize it.
Everybody can do it. The whole idea that these old
recordings lose commercial value in the new
technological world that we are in and especially
with the new services that are coming out really has
no meaning.
So I think that we should be looking at
access as the main point, but in terms of term, I
think 2067 is the right term. And copyright is
under -- being besieged, and we can have another
debate on that in a lot of different ways, but we
don't want to lock up access for these purposes.
MS. BESEK: Just a point of clarification.
You mentioned fixation and you mentioned 2067. If
2067 is the term for all sound -- pre-'72 sound
recordings, what is the relevance of fixation --
MR. ROSENTHAL: As an alternative only --
as an alternative way to structure a solution here.
I mean I'm not giving up any dates as far as, you
know, how much time would be added from fixation,
but if the point is -- I think it was raised, date
of publication is impossible to figure. That's the
MS. BESEK: I want to go back to --

MS. GARD: Excuse me. Can I actually tell you my proposal since they all did just -- just the short -- does that make sense? Like I haven't --

MS. BESEK: I would like to just put that out, because I want to talk about the life-plus-70 concept before we go to that, and I think that's looking forward in a way that I -- I want to tie up this kind of term of protection thing.

MS. GARD: Well, I just haven't proposed what term of protection --

MS. BESEK: Okay. All right.

MS. GARD: -- and that's all. Okay.

We propose, looking at all of your comments, a fixation plus -- fixation 50-year term, but no earlier than a particular date by a five-year term, so you don't have a takings problem. And if you do something affirmatively, you get the full term of 2067. So it's modeled after 303(a), which means that if there's an NIE or registration or making it available to the public, something that affirmatively as a copyright holder you say you want that term and that way you would get all the benefits of statutory damages, and that makes all of the materials, even the National Jukebox, that would count for 2067, you get all of the term and the statutory damages during that period of time, and it would mimic 303(a).

So it would be a compromise. It would get a lot more out than Eric H.'s proposal very quickly, but it also would meet the needs of the RIAA in terms of protecting as much as they want to protect. That is our proposal.

MS. BESEK: Okay, thanks. I do want to talk about that substantively.

But I want to ask a couple of questions that I think are related here. One is that nobody has mentioned a term based on life of the author here, and that is, of course, the term for unpublished works that predated the -- that were not published at the effective date of the '76 Act and for individually creative works under the current
act. So I -- I would like your response to any term
that would be based on life of the author.
And the second point is everybody's really
focused on fixation here, and I know that Jay just
addressed a specific period, you know, whether it
should be publication and fixation. Eric also said,
Well, publication has no meaning under state law.
But what about a term geared to the point
at which work was distributed in copies? I'm not
advocating this. I would just like you to look at
both -- you know, what about a term based on
publication? Why is fixation the right date as
opposed to publication? And also why not a
life-plus kind of term here?
Eric.

MR. SCHWARTZ: Eric S. Well, first of all,
I mean -- the notion that what we're doing here is
revisiting term extension is just not something
that's really productive for what we're talking
about.
2067 is the term. Congress made the
decision to reopen it. It just doesn't make
sense -- to require rights-holders only in the sound
recordings era to have to use it or lose it of the
type -- the NIEs, and I'm certainly no rock star,
but in the proposals and the GAT restoration
provisions with the notions of the notices of intent
to enforce, which was something that Barbara Ringer
of the Copyright Office was involved in the
drafting, they were just full of fraudulent filings.
Look at all of the Leni Reifenstahl
filings. As Pat and I know, these are public domain
materials for which, you know, these companies filed
filings and they are in the Copyright Office's
database because the Copyright Office decided that
it wasn't going to review the materials. So
whatever got posted was posted, and people made
claims on materials and there it was. That's not
really an effective or efficient way to do anything.
Your question was about -- I didn't say
that under state laws it's meaningless. All I was
saying was we're not -- the RIAA is opposing
federalization. You asked just in the
theoretical -- if you were going to base a term, frankly, for any works, the notion of published and unpublished is just one of the thorniest areas for those of us who do chain-of-title work, you know, as our daily life. Making determinations and certainly going back 80 years or 90 years and trying to determine whether it was available in copies, whether you are talking about film materials and certainly in sound recordings, is just not something that you can evidence, and so then you are going to have questions about it. And fixation seems to be at least something that has certainty, which is what other countries have done.

One other point just to put it on the record, Eric the other, mentioned the terms around the world. Just to sort of save you the research, if you haven't already done it, I believe that there are somewhere in the neighborhood of 27 countries now that have adopted a term of life plus 70. I think that's the number. And that's not including the European Union, which just coincidentally, if they adopt it, would double that number. So that's -- that at least -- I'm sure that's something that you had asked about before you would include in your report.

MS. BESEK: Okay. Going back to this question of a term based on life or a term based from publication --

Tim, I'm sorry.

MR. BROOKS: I wanted -- I've done a great deal of work in discography of companies, and I know most of the rest of the world of discography and people who have done research on the recording dates and the issue dates of recordings, and at least as regards commercial recordings, I believe that the vast majority of recordings can be dated either way. If they can't be dated precisely in terms of release, they certainly can be dated very closely by scholars on it.

There are -- for many, many years up until 1940s or later, the record companies all issued monthly release lists, and they publicized quite widely their new releases as they came out, and
there were various publications that do this. So it's something that is traceable. Recording dates, if ledgers survive and that kind of thing, they are easy to get. But if they don't, they too can be estimated.

As far as ARSC is concerned, either one of those, as long as it's a certainty, is a workable way to date recordings. And if others feel strongly the date of creation, perhaps for other reasons, we certainly can live with that because, as scholars at least, we feel we can identify quite closely, even for small labels, when things were released and as well as when they were recorded within a close enough frame to be useful for legal purposes.

MR. HARBESON: Our biggest concern with the life-plus-70 model is with the possibility that --

what I think is probably a probability actually -- of that creating a new orphan works problem. As Tim said, it's much more likely that we will be able to trace date of fixation than it is that we would be able to trace chain of title for recordings that people never even knew that they owned in the first place.

We're dealing with recordings where the heirs to the author would probably be their grandchildren, and they may not even realize -- and we may not have the ability to find those grandchildren. So -- or there may be an estate that we are unable to track, so that's our biggest concern is the orphan works problem.

MS. BESEK: Sam.

MR. BRYLAWSKI: I can't speak for the Society For American Music, but I think my personal vote would be for fixation over publication, because I -- I'm not quite as optimistic about Tim about determining a publication date, particularly for exports. I work with a lot of recordings that are made solely for export. I find very little documentation of when they were actually published.

In terms of -- in terms of life plus 70, I would have to ask, you know, motion picture and when
we image people, what their experience with it is,
but I find recordings being so collaborative and
having a number of authors and given the age of so
many, not being privy to any the documents, the
contracts by which they were made, it would be
difficult to -- very often difficult to determine
who the actual author is.

Even in the case of some commercial
recordings, because we know major record companies
did things for hire themselves, you would go in
their studios and you would pay them a couple
hundred dollars to put out a record, and -- for
their personal use as opposed to their catalog.

So I think that it would just be a great
burden on everybody to use that model.

MS. BESEK: Okay. Thanks, Sam.

Pat.

MR. LOUGHNEY: Well, this is a comment that
adds to what Sam said and Eric Harbeson. That the
system now is basically passive. That is,
rights-holders don't have a mandate to make
themselves known in the marketplace. So for
out-of-circulation recordings, particularly, people
wanting to use -- even for research access to have a
copy or to take it and use it for some other use,
are in a -- have a huge burden of trying to discover
current owners, and this is for recordings that go
back several generations, and that is a huge
problem.

I think the existing groups that represent
rights-holders are very competent in knowing
rights-holders for the successful recordings or
things that stay constantly in print. That's not
the problem.

But the problem is for the huge number of
recordings to sit in archives that haven't been in
circulation for decades and trying to discover who
the owners are. And if it's a single owner, it's
difficult. If it's multiple owners, it's massively
difficult.

And so as long as the current system goes
forward where the responsibility and due diligence
is on the potential user and for the rights-holder
to not make themselves available in the marketplace
or keep themselves current in terms of their
address, who their heirs are and so on, it just adds
to the confusion and the chaos that we are all
dealing with in the archival world.

MS. BESEK: Thank you.

Eric Schwartz.

MR. SCHWARTZ: In picking up a thread from
Pat's notion, I mean this is really why the whole
discussion of term is not, I think, really relevant
to what we are trying to do. I mean except for the
place of putting stuff in the public domain, and
leaving aside only for an hour the constitutional
questions, with anything else, the archives and
libraries find themselves in the same due diligence
box, whether it's under federal law or state law.

And I could give a for instance. You take
a field recording that was made, whenever, before
1972. The performers are still alive. By my math,

their term under life plus is going to be beyond
2067. I'm not really sure how we're moving the ball
forward on trying to make this material available
unless we're talking about 107 and 108 type of
access issues. Are they really going to do the due
diligence? The only due diligence that works is to
say this whole category of materials is in the
public domain.

And back to the point, if the pre-'25
commercial material is now available on the
Library's website, we've sort of accomplished it in
some ways. Not in all ways. And we're never going
to do the due diligence on the other material in the
limited resources that the libraries and archives
have on a term under state law and a term under
federal law.

And, you know, back to the commercial/
noncommercial distinction, because I think that is
key, you know, the discussion gets floated about a
50-year from fixation. Unless I'm wrong, I think
two years ago the best selling album was the box set
by the Beatles. Are we really talking about putting
You know, to the extent -- and, frankly, would Congress be considering that or is anyone suggesting that 20 years from now it won't still be the best selling, you know, sets available? It just seems like when you are in the commercial and noncommercial worlds, we really are talking at cross-purposes here with each other, when what we're really trying to do -- and I mean really trying and personally for many years trying to do -- is to get this culturally and historically significant material out to the public in ways that is meaningful, and I'm talking about the noncommercial material, and just stop sort of trying to reinvent the copyright law in the commercial world.

MS. BESEK: Let me ask a follow-up based on something that a few of you said. The 95-year term from fixation is different in some respects from existing law. Is the reluctance to look at a life-plus-70 term an attempt to get at orphan works such that if they were federalized and there was orphan works legislation that term could be considered, or is there something about pre-'72 sound recordings that is inherently different from other types of works that are copyrighted currently?

MR. BROOKS: There is clearly a difference, we believe, in the entire field of sound recordings. That is why there are neighboring rights in other countries. Sound recordings have a shorter economic life than other kinds of IP. Sound recordings have technological changes or trends of those -- unlike the 1500s book that perhaps Eric was referring to. There are multiple reasons why sound recordings logically could be treated differently and are treated differently almost every place other than the United States. That said, we have the system that we have, and from our point of view -- and I realize that there can be others that disagree with us -- why we feel that it's an unreasonably long term, we understand why it is.

We understand that we sometimes unfortunately pass laws by the rule of the exception. If there is one recording back 70 or 80
years, we have to have control of all recordings 70
or 80 years ago in order to mine that one, which is
not a logical public policy position, I don't think,
but from the economic interests of the holder of
that one, they don't care if they control everything
else, they want that one.
So copyright law is a blunt instrument,
unfortunately, and we need to make it a little less
blunt if we are going to have any cultural heritage
left.
So I do think the recordings, yes, they are
different. We need to look at them as they are
different, and that's the expertise of the group
that's sitting here, I think.
And we need to realize -- I just want to
address the streaming issue that's been brought up
several times as a solution to this. And it's not
just a matter of scholars who need to take a
recording and do things with it, whether it is
changing speeds or filtering to find out what was
really happening, but there are multiple other
issues that streaming raises that I think will only
become apparent over time. Some of them are
apparent already. And it's not the easy fix, the
end run that solves these problems.
One, for example, is that as these
contracts have been written and considered by only
the Library of Congress, well, what does that do to
the rest of the library community in the United
States, much less the safety and security of that
material residing on one set of servers and one set
of backups? Is that what our whole cultural
heritage is supposed to rely on because of this need
for control?
What about the streaming itself and
streaming can be captured? Well, streaming can be
captured, but who is going to capture it? Not the
law-abiding institutions and the large societies,
the 501(3)(c)s like my own. So it's going to be
uneven in terms of who gets the benefit of this, the
conditions that are placed on it. We know that
certain recordings are not allowed in this because
of cultural sensitivities, so part of our history is
blocked out, perhaps we feel for good reasons, but
maybe someone else will feel not for such good
reasons. We know that recordings can be recaptured.
In other words, recording owners can withhold things
at will from this if they wish to.

There's a multitude of issues -- I won't go
into them all -- that this raises, and I know this
has been raised as a solution. We don't feel,
certainly from ARSC, that this is, although it's
certainly better than what we have had, in any way a
solution that should be enshrined.

Life plus 70, yes, it is a difficult
concept to actually research and find people and to
get updates and so forth, but there is a certain
fairness there, I have to say, for the creators of
recordings in those minority cases where in fact
individuals own the copyright, which is a minority,
but there are those cases. And I've had some
personal experience with them, and for those people
it's very hard to tell a son or a daughter, even
grandson, that you can't have rights because of the
fact that it's difficult to find you. So life plus

70 I think is appropriate.

MS. BESEK: Okay. I just wanted to ask
about the life-plus-70 issue and why they are
reluctant to do that.

MS. GARD: Well, we haven't found a lot of
countries, although you said that there are many
countries that do this. Europe doesn't do it. They
do it as neighboring rights. It's too messy. It's
just too messy. I don't know who -- how
retroactively you are going to determine who is the
author of the work, if that is what you need to do,
and so it becomes a nearly impossible task in
determining the copyright status of the work.

MS. BESEK: Well, that's -- I mean you are
going to have to figure out who the author is
anyway, aren't you?

MS. GARD: No, not necessarily. No, not
under our system. It's fixation.

MS. BESEK: I meant to ever do anything
with the work.

MS. GARD: Not under our proposal, no.
Only those that come forward and claim their works -- no. It's a totally separate question. I mean you don't necessarily need to know the author of any work unless you want to use the work, and that doesn't relate to term.

MS. BESEK: Right. That was my point exactly. Thanks.

MR. CARSON: But to be fair, if you have a term based on fixation and that term is passed, you don't care who the author is --

MS. GARD: Exactly.

MR. CARSON: -- if it's in the public domain.

MS. BESEK: You made a leap already that there is some term of protection that is going to terminate earlier than 2067 --

MS. GARD: No, I'm not making a leap in any way. I mean the 2067 term doesn't require knowing who the author is either.

MS. BESEK: That, again, is my point. The 2067 term doesn't require that. But if, in fact, you have an earlier term, we are going to change the term --

MS. GARD: The only term that requires it is a life-plus-70 term. Any other term doesn't require knowing who the author is. Right?

MS. BESEK: At some point -- well, I think at some point you are going to need to know who the author is to exploit the work unless --

MS. GARD: Exactly. But this is about term, so I'm focused just on term. Right? And the term doesn't require knowing who the author is, unless it's life plus 70.

MS. BESEK: Unless it's a life plus. And so your view is that it's too hard to know who the author is, so there shouldn't be a life-plus term.

So I guess my question is --

MS. GARD: It's not too hard to know who the author is. It's that you are retroactively determining who the author is. There is no actual legal author of these works because we didn't define who they were under 1909, so you are creating a legal fiction of who the author is by creating a
legal term retroactivity. Right? Because it wasn't 

based on a life-plus system in the past, right? Is

that correct?

MS. BESEK: That's fine. Does anybody else

have a comment?

Pat.

MR. LOUGHNEY: I do, but it's on another

issue that I wanted to address, if that is okay or

if you are ready to move on, or do you want to stay

on this life plus 70?

MS. BESEK: Well, let me ask first if

anybody else has a comment.

Jay, do you have a comment on life plus 70?

MR. ROSENTHAL: Yeah, the life plus 70, I

agree with the point about the authorship issue,

it's so hard. One would assume, though, that you

would take the authorship rules as today and kind of

apply them retroactivity, and even doing that is

unbelievably hard, you know, to be able to figure

out who in fact is an author under the recording

rules that we have today.

The one point -- a couple other quick

points. The issue about going back and

authenticating when something is distributed is

really tough. Maybe you can get some data for

mainstream labels, but certainly not for

non-mainstream labels. Genres that really do

possibly fall into this idea of more culturally

important, the old blues, jazz labels, the old

hillbilly music, it's tough to figure out, you know,

to go back -- I think probably records of studios

may be a little bit more reliable than records of

labels in and of themselves.

And just because we haven't talked much

about streaming, but just as a very -- you know, a

point on the issue of value, I think most folks in

the industry are recognizing streaming is becoming

substitutional to sale. So that just has to be kept

into consideration as we're talking about what you

can and can't do with relation to streaming. I'm

not saying you can't do it, but I think that's why

there is a heightened scrutiny and a heightened

concern on this streaming issue.
And so I would say fixation is probably the most sensible way to go, you know, if we're going to go anywhere.

MS. BESEK: Okay. I will take just a couple more responses on this life plus because I want to move on to another proposal as well. So anybody else on the life-plus issue?

Pat.

MR. LOUGHNEY: I will just say simply, from a practical standpoint, having a fixed term of 95 years or 50 years is a much more practical way from an archive or institutional standpoint to track these issues rather than having life plus because then it does place a burden, a research burden on anyone knowing the birth date, death date of someone, and determining if that is in fact the same person, if it's Mr. Joe Smith, so on and so forth. It's just an added burden of research for anybody doing this kind of work in an archive.

So, to me, I would say a fixed term would provide clarity across the board to users and owners, whereas life plus 70 just simply adds more to the chaotic notion of how long is something under copyright protection.

MS. BESEK: Elizabeth.

MS. GARD: No, that is okay. I'm just worried about the time and there is more to our proposal, so at some point I would like to finish with our proposal.

MS. BESEK: Okay. I would like to talk about a couple of hypotheticals. One of the things that has been proposed in a number of comments is some notion that there would be a term of protection, and then it would be possible for those who are still commercially exploiting to get a term until 2067 by doing something affirmative, either by demonstrating that it was commercially available or by filing something in the Copyright Office. But in that way, those individuals who could really claim that they are commercially exploiting could have that full term that they currently have, but for all other works -- and presumably based on what we've heard in the comments and in the last day, the vast
majority of works would be free for use after whatever term of protection that was. And for the sake of discussion, let's assume that the term would be 95 years. So works would be freely available after 95 years unless there was some affirmative act by the rights-holder that they were continuing to exploit. So I would like to put forth that proposal, which is a modification of yours, Elizabeth, but this is the one I would like to discuss and see what you think of that.

MR. SCHWARTZ: I mean I think we are getting pretty far afield from sort of a general principle of copyright. If we've learned nothing from the Google book deliberations by the courts, the notion of having to sort of opt in, opt out, I mean here you are telling rights-holders that you have rights, but you lose them unless you assert rights. You know, Elizabeth made the point about 108(h), and that is --

MS. GARD: No, I didn't.

MR. SCHWARTZ: Earlier you did.
MR. HARBESON: That was me.

MS. GARD: No, I don't deal with --
MR. SCHWARTZ: Oh, was that Eric? Eric the other. Excuse me.
MS. BESEK: Just for the record, that is Eric Schwartz. I don't know if I said that at the beginning. With the two Erics, it can be a little confusing in the transcript.

MR. SCHWARTZ: That provision, the burden is the other way around, which is that the public library or archive under 108 has to do the test to see whether it's being commercially exploited, and if so, then -- if not in the last 20 years of copyright, they can. And the idea here is that the -- what we're trying to do in this whole exercise, to repeat myself, is to assist the libraries and archives in making material accessible, and any proposal to say to rights-holders of any kind, who were in this case
only of record producers and performers and others,
that you must assert the rights or you lose the
rights is anathema to copyright law.
MS. GARD: Can I -- excuse me. He is
legally wrong on this. Can I respond on this?
MS. BESEK: You can respond briefly, but I
do want to get to other people.
MR. SCHWARTZ: I've lost my rock star
status. It was brief.
MS. GARD: No, just a misguided rock star.
MR. SCHWARTZ: There's always the rise and
the fall, right, the comeback years.
MS. GARD: So 303 is -- it's not akin to
Google books. That is just trying to make it sound
not right. It's akin to 303(a). That's where it
came from. That's where the proposal came from.
That's what people had to do to keep their rights.
That's what every single other group had to do
except for sound recordings, which got written out
of it. So you would have had to do this if you had
not gotten 301(c).
MS. BESEK: If I can just interject,
though. I was not specifically using your proposal.
There are two ways you can --
MS. GARD: No, no, no, I'm just saying --
MS. BESEK: But I want to clarify. I did
suggest that there might be some kind of filing, but
under the Copyright Act for works that were
unpublished as of the beginning of 1978, it was
publication.
MS. GARD: Right. Exactly.
MS. BESEK: So there are different ways you
could do it. It's not one specific one.
MS. GARD: Absolutely. Right.
MS. BESEK: I'm suggesting alternatives
here.
MS. PALLANTE: I think Elizabeth is pretty
(inaudible) others did have to do that.
MS. GARD: Other copyright holders did.
MS. PALLANTE: Your point is it's not
complete anathema.
MS. GARD: No, it's the way the copyright
law works.
MR. Loughney: Why should the Beatles be any different from Mark Twain and Steven Foster.

MS. Gard: Exactly.

MS. Besek: That's a trick question.

MR. Loughney: The earlier question I had -- the statement -- earlier Jay made a comment relative to the fact that new technologies and the possibility of exploiting older recordings is an argument for keeping these things under protection until 2067.

The question I would have for Jay or Eric is what about the body of recordings for which the rights-holders have no physical materials, either because they were lost or destroyed or deteriorated, and the body of those materials that survive in the hands of publicly funded archives that have in fact been restored and preserved at taxpayers' expense? Is there not some sense of ownership or use -- fair use vested in those materials because of the investment of the taxpayers and the long-term storage and preservation of those materials?

And I'm specifically talking about these out-of-print materials for which the rights-holders have no physical copies whatsoever. Where is the fair use? Where does the taxpayer benefit come from out of supporting these materials for decades?

MR. Rosenthal: I think that you would find many estates, whether sons, grandsons, granddaughters, whatever, who continue to have these rights that don't possibly have these kinds of copies, you know, and that, yes, you --

MR. Loughney: I'm talking about Sony Pictures that has only less than 25 percent of the physical elements for the historic labels that they own, such as Victor or Columbia. So let's not do the heirs and the sons. Let's talk about the corporations.

MR. Rosenthal: Well, I think it's wrong to
think when we talk about copyright to continuously focus on the corporations. I think that there are individuals here that own this, and it's much more important to those individuals than at the end of the day it is to many of the corporations in terms of their overall picture and their overall economic well-being.

But the point here is that many rights-holders pass on their rights to labels, and those labels then take the copies, they take whatever they need to make these copies down the road, and they may put them someplace else and they might not have them. And I think it's wrong to put that particular category of a participant, income participant and owner, into a detrimental position because they don't have something physical about it.

The point about the government putting -- MR. LOUGHENEY: But they are out of print, though, and they haven't been producing revenue for decades, but they have been supported at taxpayers' expense in an archive or library which wants to make use of them, even for research purposes or make copies available to researchers --

MR. ROSENTHAL: I totally --

MR. LOUGHENEY: -- what is the right of that institution?

MR. ROSENTHAL: I totally understand the point. I also think that when you say they are out of print, I'm not sure what that means at the end of the day. There are many, many records that --

MR. LOUGHENEY: Out of circulation by the rights-holders.

MR. ROSENTHAL: Well, there are many records that they've stopped printing, but it doesn't mean that they are out of circulation. You know, you can always find old records, and it used to be when Tower was around that you could find these records that might have been out of print for a long time.

MR. LOUGHENEY: I think you're dodging the question.

MS. BESEK: Can I just -- I would like to -- excuse me. There are a lot of issues here.
But I would like to go back and focus on this specific term where if you did something affirmative, whether that would be either some kind of filing a notice or actual publication that you could extend -- "publication" is not the right word, making available -- that you could extend the term until 2067.

I ask this in part because there is the distinction that you just alluded to, Jay, that we can't just focus on the commercial. There are many, many noncommercial ones here too, and we've got to think about how to make those available as well.

So, Sam, did you have a comment directed to that?

MR. BRYLAWSKI: Yes, in part. I mean I'm not going back, I promise, but to speak to what Jay said, the corporations that have records that are locked up, there are individuals with interests in those records, I wholly agree with that. But those individuals are not served when the records remain locked up and out of circulation, and there are no Tower Records to go to anymore to get them either.

However, that said, and back to your question, it's well worth consideration if something is remaining in print, it serves preservation purposes, it serves access purposes, and I would love to see more in print, and would seriously -- would be very open to that. I mean without the terms and knowing the parameters of what you are talking about, I'm not going to say, Oh, yes, that is absolutely --

But I think it's really worth serious consideration, and it would meet the goals of the organization I represent because they are interested in accessibility to historical records. They are not interested in getting them for free if they are out there. They are happy to pay for them.

MS. BESEK: Eric H.

MR. HARBESON: We have not supported what is sometimes called a "use it or lose it" regime.

In part because we don't think that it would be consistent with our treaty obligations under Berne.

However, we do -- the reason that we wrote our
proposal the way that we did is that -- and this is
going to something that's been bothering me
throughout this session, and I want to very quickly
address it. We're not presuming to say that there
is no commercial value in the things that we want
access to and we want to provide access to.
We're not saying that anything that -- we
don't have enough money to digitize and make
available things that have no value. We're not in
the business of doing that. Librarians are in the
business of finding things that have research value
that may not be being, in this case, made available
through other means.
What our proposal is designed to do is to
allow us to find those things that maybe the
rights-holders haven't found the value in but for
which there is still significant research value, if
not economic -- currently economic value as
determined by the market, and making those available
so that research can be done on those.
One of the benefits to that is that the
world has more available -- has more access to these
recordings, and one of the benefits to you about our
proposal -- I'm looking at Eric and Jay here -- is
that we -- when that -- you still have not lost your
copyright -- you have not lost your protection for
these recordings. No. If you find that all of a
sudden someone has done research on a previously
forgotten piece of music which they found in a
library, and all of a sudden, wow, this is gaining
some popularity, there may be a new market here.
You will benefit from that, you know.
So we're -- this is not -- we're not trying
to say to you that your stuff has no value. What
we're trying to do is make it available
 provisionally while you haven't exploited it.
MR. ROSENTHAL: I agree with that, but I
want to address the point about what someone has to
do to affirmatively state that they are still
exploiting something.
Would, for instance, a statement from
SoundExchange with money constitute some kind of an
affirmative exercise of their rights that would
qualify for a longer term? They know it's up there. They are not doing anything specifically affirmatively, but some service out there has the song, they performed it in a noninteractive setting, SoundExchange gets money, and all of a sudden it's there. And the copyright owner, the one who is getting the money, thoroughly believes that they are being exploited, and maybe the world on a certain little level understands that they are still in the 

Would that constitute in your mind some kind of affirmative act? Because if we can make it low enough, I hear you.

MS. BESEK: I don't have a suggestion. I'm looking for suggestions. So if you think it should, that is fine.

MR. ROSENTHAL: I get it.

MS. BESEK: Eric Schwartz and then Elizabeth.

MR. SCHWARTZ: Two points. One, I think Eric the other, my friend Eric, has made the point as well or better than I could about in some ways the irrelevance of the term to what we're doing. The 108 type of notions, even the 108(h) notions, in which if it's not being commercially exploited, then libraries and archives have these rights to do this. Again, look at where the burden is. To the point that Elizabeth was talking about, no, I didn't get the law wrong or the principles wrong. What I was saying is, you know, 23 years after the Berne Implementation Act, I didn't think we would be discussing the notion of reconstituting formalities for rights-holders in order to continue to enjoy their rights. I thought we -- the whole notion of Berne Implementation and before that the half step or more in the '76 Act was to lose that, but to incorporate and take the steam out of the protectability by giving users, and particularly libraries and archives, an elevated user status which they deserve. And the reason they deserve it is because they have been -- as Pat, Sam, Tim, Eric, others, Tom, Dwayne have said, they retain materials, they
catalog materials, they have at times with public
and private monies had to copy materials, and they
have had to do things with those materials that no
one else has done, and in some cases including
rights-holders, because the rights-holders are gone
in many instances.
And so they do have an elevated status, and
that's what 108 doesn't allow and that's the notion.
But it, again, has nothing to do with term. And the
notion that a rights-holder has to continue to file
something, I mean didn't we learn anything from
renewal, and from the automatic renewal provisions
in 1992 of the notion of losing those provisions,
but allowing users and especially libraries and
archives -- 108 libraries or archives to continue to
have more access to material, and I think that's the
focus.
MS. BESEK: Elizabeth, yes.
MS. GARD: Okay. So responding to Jay, we
talked about this a lot in class. We actually had a
more contentious discussion than you guys are having
right now, and our SoundExchange guy was really
upset about this.
So the thing is that we think it should be
as low as possible. We just want to have somebody
say they actually care about this work.
So in terms of Jay -- so we were even
saying anything, anything, anything, anything, anything, show
us anything, any use at all. Because really what
we're trying to do is just get all the works that
Tim cares about who are long dead, long gone, out in
the public domain.
It is not going back. You know it's not
going back. You are just saying that. It is
modeled after something that was available under
Berne. When we did this, we modeled after Berne.
And there are a couple more parts, and I
really want to get to them because we worked very,
very, very hard on this and thought about it because
we cared about what all of you thought.
So in addition to what we're proposing,
we're also proposing that foreign works would be
applied to this, in which they are not now. And the
rule of shorter term would apply so that foreign
works didn't have a greater benefit than domestic
works, and that this would also benefit us abroad
because if we have 2067, first of all, the rule of
shorter term will apply. So even if these works are
in the public domain because the copyright holders
did not come forward, they would still be protected
abroad because of France and their beautiful expiry
term that they get the biggest possible term.
So in some way it gives the U.S. a strong
position in terms of sound recordings. It also
means that we are not chasing after Europe with
their raising of terms, but we are setting a term of
2067 that if they want to meet that term, good luck,
do it. But it isn't -- we're not in a position we
were in with the Sonny Bono copyright act where
we're saying, All right, Europe extended their term,
and now we have to extend our term. We're keeping
it 2067. And so that's really, really important.
But the rule of shorter term is really,
really important too, and that fixes the Naxos
problem, which is, I suspect, why we're here in part
is because of Naxos, and so that needs to be
considered as well, that that allows for a lot more
power in American context, which we don't have right
now. Right now we're just sort of trailing behind.
But that's the full proposal.
MS. BESEK: Okay. Pat.
MR. LOUGHNEY: I just simply want to say
that I do think, in answer to Eric Schwartz, that
the issue of term is relevant, that it is, in fact,
important because we are living in an atmosphere and
in a time when there are pressures to extend the
term of copyright protection. And I think one of
the tactics used in that ever-onward pressure is to
look at differentials and the term of protection for
different formats and different countries and use
the explanation of harmony as a goal that we're all
trying to achieve. While we are inching forward
this longer and longer term of protection, I think
we are getting farther away from the idea of the
founding fathers who very clearly understood the
importance of having limited terms of protection for
copyright, and sound recordings are a way -- much
farther down the road in terms of protection than
any other format.

MS. BESEK: I think that is true. That is
why I'm trying to get at this question of we do have
2067 on the record, although I will point out that
not all states provide a term that is that long, but
some do.
But in any case, going back to this issue
of how can we weed out, how can we protect the ones
that are being commercially exploited and allow the
other ones to be used more broadly? We've heard a
†00408
couple of suggestions about what might be factors.
You know, evidence from SoundExchange, just
something put on the record indicating that there is
a willingness or interest to exploit by the owner.
Is there anything else that people can
offer as to what should be the indication that
somebody gets that longer term? If that's the way
we're going.
Should it be enough to do what Elizabeth is
suggesting, just file something and say, It's me,
I'm here, and that's it?

MS. GARD: And under 303(a), you didn't
have to file anything. So that's not an obligation.
You just had to publish it. There was no formality
requirement.

MS. BESEK: Right. That's what --

MS. GARD: It doesn't necessarily need to
be a formality requirement here either. It's just
making it available to the public or something that
indicates that it's available so that -- I mean the
libraries don't want to keep making copies of all
this stuff. Like if it's available, then it's
†00409
available. That was the proposal, not a formality
requirement and not an opt in. Just make it
available.


MR. HARBESON: Actually, I just wanted to
respond to Pat and Eric regarding the relevance of
the term. Is that out of line or did you want to
continue?

MS. BESEK: Well, if we could, we've only
got a couple of minutes left, so if we could focus
on this issue of what should trigger the remaining
term to 2067.

MR. HARBESON: Well, yeah, I raised my hand
because no one else had been raising their hand, but
I do want to point out that we do have -- we
represent librarians, but the librarians represent
the patrons, we do have -- and there is a value in
having a public domain for the value of creating new
works.

And it's important to remember that while
the majority of books published still are probably
in the public domain in history, sound recordings,
none of the -- there is no availability of public
domain to make things like mashups and other
derivative works that are essential to the creation
of new styles of works.

So I just want to make sure that that is on
the record as saying there is a reason to have a
public domain and every other medium has to have it
too.

MS. BESEK: Eric Schwartz.

MR. SCHWARTZ: Just to respond to two
things that Elizabeth said. I mean, for the record,
the U.S. government at least -- well, the Copyright
Office's position during the GAT restoration
provisions was not to restore works only for foreign
works. It was to provide restoration for both U.S.
and foreign, but, alas, the Copyright Office was
outvoted by the rest of the U.S. government, and the
restoration provisions were applied only to foreign
works and sort of narrowly defined foreign works.

So lest you lose faith in the Copyright
Office, the notion there was to be equal. And I
will leave it to the Copyright Office to discuss the
rule of the shorter term and the U.S.'s proposition
that the U.S. applies longer terms and does not
short terms in the U.S. from works in other
countries. Given the fight that the U.S. government
and the copyright industries generally have in
anti-piracy matters in other countries, I think the
last thing that either the industries or the
U.S. government would want to do is to propose the
notion of a shorter term in the U.S. given the
mischief that that would result in other countries
shorting -- shortening, I will put in quotes, the
term, denying protectability and using the rule of
the shorter term because of confusions about U.S.
law or anything else. It just is a recipe for
disaster.
MS. BESEK: Okay. I want to try to wrap
this up because we have the next panel coming, but
let me have the three people that have their hands
raised speak.
So, Sam.
MR. BRYLAWSKI: Well, of course, if there
were a 95-year term, while shorter, it would be
longer than any foreign term I'm aware of for sound
recordings.
But to go specifically to your question
about how one would look at a, for want of a better
term, lose or use, SoundExchange does indeed keep
very good records. I think that we should
encourage -- we as a group should encourage
collaboration between organizations like
SoundExchange, which keep track of rights-holders.
The lack of formalities is a big burden on
archives. The fact that pre-'72 recordings -- Tim
said we can find 90 percent of the owners, but
10 percent of the owners not being able to find is
very difficult. I can even point to the ones in
Tim's study that are hardest to track down in any
case. I promise, I'm not asking for formalities.
But the idea of using SoundExchange for
something like that, and I appreciate that music
publishers -- Jay has sort of said something about
being open to that type of thing. But I disagree
with Jay. I think that to be actually called
accessible, it would have to be in an interactive
way through SoundExchange. It wouldn't just be out
there on some sort of Pandora or passive streaming
service, but I think SoundExchange could be used to
determine these things.
MS. BESEK: Jay.
MR. ROSENTHAL: I am a little concerned
about the idea that a copyright owner who has
expectations about their duties for what they have
to do for that duty to change to get a longer term,
and they miss out on this notice because they don't
get the Copyright Office dues letter or read The
Washington Post or whatever.
It's tough for me to think that, yes, in
general, most people might be notified of something
like that, most owners might be notified, but
certainly some will not, and then we're right back
to the problem of why formalities like this do cause
problems is because people fall through the cracks.
And generally in my experience, the people that fall
through the cracks are the ones with the least
resources and yet still have some rights that are
very, very dear to them in one way or another. So
that is my main concern.
MS. BESEK: To some degree, that would be a
function of how long the window was, I would assume.
Wait. Elizabeth, and then we have to wrap
up.
MS. GARD: Well, I think that you all
missed really like the killer of all of this.
So, Eric, you are so awesome. What you
just said --
MR. SCHWARTZ: Rock star again.
MS. GARD: I just don't think the rest of
the crowd understood what you said. So what he said
was that restored works, which would include foreign
works, is that the Copyright Office advocated this,
including U.S. works, but that Congress shut it
down.
MR. SCHWARTZ: No.
MS. GARD: Which means -- right? That's
what you just said.
MR. SCHWARTZ: It was the other agencies of
the U.S. government.
MS. GARD: Okay. Whatever. They're all --
I don't even know any of the buildings in this town.
I don't. I got lost, really lost, yesterday.
But the point is that if it had gone the
way the Copyright Office wanted it to, sound
recordings would have been federalized, because they
would have been federalized under 104. Because
foreign sound recordings were federalized under 104(a). And what Eric just said is that that's what he wanted, that is what the Copyright Office wanted.

MR. SCHWARTZ: No.

MS. GARD: I know you guys. I know you are freaking out. This is what you just said, which was the Copyright Office wanted domestic and foreign restoration, which would have included sound recordings. So I think that's a really important point for all of you to think about and research and do more research on, because if that's the case, they would have been restored in the same manner as foreign sound recordings.

MS. BESEK: I was going to have Elizabeth finish, but I think I have to let Eric have a chance to respond.

MR. SCHWARTZ: Thank you. What happened was in the discussions on GAT restoration, the Copyright Office represented by the then-acting register Barbara Ringer and I, we had discussions with the U.S. government about the possibility of restoration of works. We never got to the discussion of the restoration of sound recordings because the U.S. government essentially said that the GAT implementation act would be passed on their fast track, there would be one up or down vote on the entire piece of legislation. And at the risk of losing any votes for restoring U.S. works, not even having the discussion of sound recordings, it was too risky a proposition, and it was off the table, which is why I said that it was for U.S. works, and "works" meaning not including sound recordings. That said, we never got past the initial meetings at the U.S. Trade Representative's office and with the Department of Commerce and other government agencies because the protectability for U.S. works, including sound recordings, was off the table.

Then the only discussion was whether to include foreign works and sound recordings, given that the Berne -- excuse me -- given that the TRIPS Agreement incorporated by reference Articles 1 through 18 and for sound recordings did the same
with regard to the Article 18 obligation to restore
protectability, both for works and sound recordings.
That was how the foreign sound recordings got the
unique protection. End of story.

MS. BESEK: Okay. Thanks, Eric.

And thank you everybody for participating
in this panel. It's just really a warm-up for the
next one on constitutional considerations. So for
those of you who are participating in the next
panel, if you could come up because we don't
technically have a break now, and I know we want to
go right into the next panel.

(Brief recess.)

MR. RUWE: Everyone from the panel is
seated. My name is Steven Ruwe. This panel is on
the constitutional considerations with a focus on
whether or not federalizing pre-'72 sound recordings
presents constitutional concerns. As the federal
registry notice and the comments have reflected, the
most prominent issue that has been identified is
whether federalization would affect takings. I
expect most of the time allowed will focus on the
issue of whether and to what extent takings is an
issue and a following discussion of how those
concerns might be addressed. There were some
comments that raised other constitutional issues.
If there is time, we will get to them, but the focus
I would expect it to be on takings.

As the previous panels, we will give a
couple of minutes. I believe everyone here has had
their longer introduction, so one or two minutes to
express your general view on this subject.
Whoever would like to start.

MS. GARD: I don't have as much to say on
this, so I won't be as grumpy or as aggressive,
which is not me, if you know me at all.
So we don't have that much to say about
this, but there are two models, and I want to start
it off with that. One is 104(a), which gave a
one-year period for people who were using public
domain works to use them before it became
infringement. That was passed, that is what Eric
worked on. So they gave a one-year period for
people -- if a work had been in the public domain
for 70 years and you were using it, you had a
one-year period to use the work or you can negotiate
a license with the copyright holder, the new
copyright holder. That's one model.
We rejected that model because we thought
it was kind of mean and people like Jay wouldn't
like that.
So the second model is the 303(a) model,
which we did to be in compliance with Berne, even
though Eric wanted to pretend that wasn't the case,
and that was a 25-year period. It was 1978 to 2002,
and there was a transition period where works that
were in the public domain -- I'm sorry, works that
were perpetually protected under state law, as long
as you didn't publish them, were now federalized,
and it gave a 25-year period to further incentivize
people to create a published work, it gave a term
until 2047.
When we looked at -- now, this is an area
that I researched way too many times in my life, so
we did a lot of work on this in the class, and what
we came up with, we thought that the two areas that
people would be in contention about were what would
be the trigger for additional protection, the 2067,
and we decided to do a 2067 term.
But the terms of the taking question, we
had put it at five years because the SAA in their
brief had said, Well, if there was some way that
people could commercially exploit it, we should give
them about five years to figure out if that is what
they needed to do. So we got that from the SAA.
And so we thought that the takings problem
is a problem we think that if you just let it --
just throw things in the public domain. We've never
seen that in the history of copyright law where you
just throw things in the public domain. But a short
period between one year, which probably not anyone
likes, but around five years, particularly since 25
years from 1978 is about five years in 2011 was our
Hipster (phonetic) digital students' feeling that
time moves faster, and that is sort of where we
were.
So there was a takings problem if you just throw -- inject things into the public domain, but we thought they could be solved. And there are already a lot of Congressional hearings on this, and takings -- the takings question has been looked at quite a bit, so it's nothing new.

MR. RUWE: Anyone else?

Eric.

MR. HARBESON: As Elizabeth -- first of all, I have to say constitutional law is not something I've studied. I just have to say that. So I don't have a whole lot of -- no one on my committee actually has a whole lot of experience with Fifth Amendment case law or any of the things that may have been -- that might be discussed in a common law class.

So what we have available to us is the text of the law, of the Constitution obviously, and things that people have written about it. As we understand it, there are a couple of things that are important. One is -- and this is where there would be a burden to show commercial viability because one of the things that happens is there has to -- for there to be a taking is there has to be value. If the value is de minimis, there isn't a taking.

If that's the case, and I -- if that is the case, then what we have I think is a -- this becomes very, very relevant to copyright term. If we have a 95-year copyright term from date of fixation, then the takings problem becomes, I think, very hard to make because the recordings that were published prior to 1917, 1916, I think it would be very hard to make a case that that constitutes anything more than a de minimis taking.

If we start to go into putting more recent things into the public domain as we get closer and closer to the present, obviously it will become more and more -- it will be easier to show financial loss. So we don't think that, at least under our proposal, that there's a serious takings problem.

MR. RUWE: I, again, want to extend the introductory time. I would otherwise go to the specific question that is raised by Eric's -- well,
the notion that it would be de minimis. As a
general matter, that might be the case, but when it
gets to specific works, that might not be the case.
And, Jennifer, would you like to respond?
MS. PARISER: Sure. I don't know if this
is in the nature of a response to that or a general
comment, but take it how you will.
So Eric articulated this, but -- in the
context of term, but I'm going to try to knit it
together with the constitutional issue as well.
So, from our perspective, this whole
exercise is about giving libraries and archives the
ability to digitize and make works accessible that
they apparently at the moment have trouble doing
because of fears of litigation from the state law.
This isn't about trying to fix the problem some
perceive of copyrights being too long or any other
things that people are unhappy about in the
copyright law. So, in so doing, therefore, let's
not monkey around with term.
Currently, sound recordings enjoy
protection through 2067. Let's just leave it there.
Right? Isn't that the simple way of doing this?
You leave it at 2067, then we don't have to worry
about authors or fixation, registration, formalities
or any other thing. Just leave it to 2067. Then we
haven't taken away rights, however grand or
de minimis they may be, and we don't have to worry
about takings. You have far less of a federalism
problem, and you can, you know, inject possibly some
of the 107, 108 fair use concepts that the libraries
need. And, you know, the sound recordings owners
are unhappy, but they are not mortally wounded, and
they don't really have a leg to go run into the
Supreme Court and say that there's been takings.
If, by contrast, some other formula is
imposed, then there will be, relative to the world
as it exists right now, less rights for sound
recording owners. Now, the less you shave off what
we currently have, the smaller the takings. Of
course, that's a truism.
But there are plenty of -- I don't think 95
years is the right answer because there are some
works from the earliest periods that still have a
great deal of value. Caruso has been mentioned.
Sousa. I mean there are household names, sound
recording folks, out there whose works are quite
valuable, and we can't say that just because they
are old they are valueless or that a taking of them
would be de minimis. And why do we want to have
that litigation? And, you know, just don't do that.
And, you know, Elizabeth's proposal is
fantastic and fascinating, and I would have loved to
have been a student in that class, but the notion of
imposing, you know, kind of a
put-your-hand-up-if-you-want-to-exploit-this-work
kind of concept to trigger the time period will be
just an enormous boon to copyright lawyers, because
what will constitute a sufficient act, no matter --
we can set the bar however high or low you want to
set it, but as soon as there is a bar, there is
litigation about the bar. Right? Has it been
cleared? Whatever it is. So I just think that's
another opportunity to clog the courts with
litigation over something that we needn't do. And
that's what I have to say about that.

MR. RUWE: Eric.

MR. HARBESON: Well, I don't think that any
takings case ever has involved a pittance of -- like
a true pittance. I mean I will grant that there is
certainly a social and cultural value in the
recordings of Sousa and Caruso, even though Sousa
himself didn't actually conduct those recordings,
but that's another story.

There is cultural value in them. There is
also economic value. And I think that what you find
is that the cultural and the social value when --
we're not taking away, by putting something in the
public domain, a rights-holder's ability to exploit
the work. What we're talking away is the ability to
exploit it as a monopoly. And, yes, that does take
away a certain -- it does take a little bit of the
edge off of your commercial advantage. I will grant
that. I really will.

On the other hand, what is the value to
society if people are going through these old
catalogs and saying, Well, I think I can make some money off of this Sousa recording that is from 1910 and distribute it to the public so that people can record it, so the people can enjoy it.

This is the value of having a public domain. This is why books and movies even and maps, charts, musical works, eventually enter the public domain is they -- it's one of the reasons. And I think that in the larger scheme of things, for every Caruso -- I mean I would not think that there would be more than a couple of dozen really good cases of pre-1916 recordings that would even be considered as possible takings from a monetary standpoint. And I question even whether the Caruso recordings sell well enough to be more than a de minimis taking. And yet there are thousands and thousands of cylinders that -- and actually probably piano rolls would be considered sound recordings under this too -- that would be immediately benefitting the general public, and I think that that is what a takings argument has to look at, doesn't it? The value -- isn't this the Kelo versus City of New London case in -- rewrapped?

MR. RUWE: Go ahead, Elizabeth, you wanted to --

MS. GARD: Well, I'm going to go back to what Jennifer has been talking about.

First of all, I disagree with why we're here. I think that why we're here is that there was a call from the Copyright Office to question whether we federalize pre-'72 sound recordings and not whether we make agreements with libraries on 108 or 107. Those are the last questions. And so it's broader.

And so I put on my hat as a graduate student who goes to the library, and I want to actually be able to use those works. And so it isn't just the relationship between the RIAA and the libraries because it's going to still mean that I can't really do anything with the works. So I think it's bigger than that. I think it's just bigger than just the libraries and having access to materials. And if you don't have the users in mind, the users are just going to feel like
they weren't at the table, and they literally
weren't at the table. We don't have the mashup
people, we don't have the Nina Paleys, we don't have
all of those people who are freaking out over sound
recordings. They are not here. We have the more
rational librarians. So that's the first thing.
The second thing is, in terms -- because of
that federalization requires you to look at terms,
it requires you to look at takings, it requires you
to look at ownership, and it is messy. I know that.
And it is scary. I do understand that. But it's
necessary if you are going to federalize it and also
respond to the problems that are in place.
Now, the last thing about the copyright
lawyers thing, if there were more copyright lawyers,
my students will be very happy because there are no
copyright lawyers -- scholars at the moment. But we
just didn't see that with 303(a).
Now, there may be -- the problem -- so this
is a question, and I think the RIAA -- I mean you
guys are like the people -- my poor students are
like, You're like the scariest, right? So I think
you can handle it. I really do. I think that you
can deal with the problem. You have a lot of
experience.
So that was sort of my response in terms of
the takings.
The last part, you are not supposed to
squeeze out every benefit value out of something and
then throw it into the public domain like it's
garage. That's not the way the system works. The
system works is that you get a limited monopoly for
a particular amount of time, and then when it's
over, it goes into public domain. Even if it's
making lots of money, it still goes into the public
domain.
And so there may be some really valuable
things that all kinds of people published -- I mean
there's lots of -- Wuthering Heights, right? Lots
of money made off of all of these ridiculous
classics. And so that's not really an issue of how
much value is left or not left.
It isn't, in terms of the Constitution,
limited times -- we want 108 because we believe in limited times. So limited times is what it is all about, not necessarily value. It's the limited time that you get the economic value, and then once it's done, it's done. And sometimes there will be a few that they don't all their value out, and that's just -- you can do some other things, contract law, or do it through something else. But I think to sort of say -- and I see Eric saying, Well, there may be value, and sort of backtracking a little bit, and that's not -- it's just not how the system works. The system isn't about sort of deeming as much value out of something. It's out of value at a particular period of time, and then everybody else gets to do that with the value. So I just wanted to sort of clarify that. And the Kelo, I don't think that applies at all. Any of the property cases, I would say don't worry about them.

MR. RUWE: Jay, you haven't spoken.
MR. ROSENTHAL: First of all, I mean in terms of what the public domain is all about and viewed it as being an incentive to the artist to create. I think that maybe you are focusing a little bit different on who is the rock star here. I've known a lot of rock stars and I know Eric, you know, and I'm sorry to tell you this, but you are not even close. I mean, but I love you anyway, and it's great and all that.

MR. HARBESON: They are talking about Eric Schwartz. I know I'm not a rock star.
MR. ROSENTHAL: No. No, that is clear. And it's funny you mentioned mashups. I'm just trying to think of girl talk on this panel. Very interesting. But we can have a whole session on girl talk and whether that is good or bad, but putting --

MR. CARSON: Okay. 1:15.
MR. ROSENTHAL: -- here is what -- I want to focus on this issue. I just see this as an
uncertainty issue that the publishers are very concerned about, and I tell you if there is any issue that at least smells like a class action lawsuit is going to be coming down the road, this is it. And that's where the question becomes how much uncertainty does it bring and how much are other players, like music publishers put into a bad position because of that, so I do agree with the RIAA and A2IM on this point that this is a real issue, whether right or wrong, and, boy, we can argue about what has value or not, and what is de minimis and, you know, Caruso and whatever, but this is one of great concern as it relates to the issue of potential litigation down the road.

MR. RUWE: Tim.

MR. BROOKS: Yes. The Association for Recorded Sound Collections since the very beginning of our investigation of this issue has been hearing the term "takings." "Takings," as if it's some sort of flaming sword that with one word can smite the public domain and whatever else we're trying to do. As we look into it and heard from more people and heard from attorneys on it, we found, as I think you are hearing today, that it's not as clear as that. Takings is enshrined in the Constitution, but it's enshrined in a way that takings have to be for the public good. Preservation has been widely accepted as a rationale and justification for takings, and property is taken, many things are taken for preservation purposes. I don't think anybody would dispute that. The matter of without just compensation, we can have lawsuits. I suspect whether or not -- no matter what we do today, there will be lawyers filing class action lawsuits en masse. It is a profession that is not under siege in any way. And certainly will not be cast into great expansion by anything we do here.

So, takings, we think is an issue, and we've commissioned our own attorney, we've submitted our comments on that with citations about the fact that this is not the issue that it seems to be. If it stimulates some lawsuits, it may. Everything
will. I don't think that's a reason not to do the thing that is right.

This is a panel hopefully of experts on recorded sound who are recommending to policymakers what we feel is, as experts in this field, is what the law should be, and we shouldn't be negotiating from what we think somebody is going to disagree with. Sonny Bono thought, I understand, that copyright should be perpetual, and there should never be any public domain. And I'm sure some of your rock star friends would feel that way as well.

We're not here to argue with Thomas Jefferson and the founders of the Constitution about whether there should be such a thing as the public domain. We are here to deal with the field of recorded sound and how different it is from other intellectual property.

So from ARSC's point of view -- again, we can make our attorneys available to you if you want to hear their point of view on it -- that the takings issue is not an issue that should stop this from proceeding.

MR. RUWE: Okay. To go on from that thought is if it's an undefined compensation that may become due at some point, wouldn't it be better to affirmatively address the compensation in some sort of proposal as opposed to just saying it's de minimis and that unknown bill might come due --

MR. BROOKS: Well, just to answer that question, I think if there is going to be litigation and if somebody is going to say, Well, I lost my Caruso, that is important to me, then that has to be adjudicated. It's easy to throw out a name that everybody recognizes and say, Well, you've heard of Caruso; therefore, it must valuable. But as Eric H. points out, how many units did Caruso ship last year, to put it rather bluntly in terms of the current industry. Just because you've heard of a name does not mean that it is in fact commercially valuable.

And I'd point back that 96 percent of this stuff is not even exploited at all and the 4 percent that is exploited by our research, it isn't
exploited with 4 percent of the money. It's stuff
that has never placed on the charts. It's
never -- acoustic recordings have never shown any
sign of post-1925 value. Maybe in '26 they did, but
they certainly haven't in the last half century.
There is no evidence that's been advanced
by the copyright holders other than general
statements that, You've heard of Caruso, it must be
valuable. I think that would have to be
adjudicated. I think if they really believe that,
then they have to make that case and make it with
data and not general statements. But for the
purposes of this, if they can make the case that
somehow it's something of value, there is long
precedent for compensating them appropriately to
that.

MR. RUWE: I go back to, would you like to
address that need to compensate in a legislative
proposal or just provide the idea that, well, you
can go to the courts and --

MR. BROOKS: I would say the latter, but I
am open to suggestion on that.

MS. GARD: I don't think there is any
historical precedent for that. I mean 104(a) didn't
have that, and in 303(a), I think as long as you
have a particular term, then you will be fine. I
just don't think that it's really an issue as long
as -- unless you dump everything into the public
domain immediately, which I don't think is going to
happen.

MR. RUWE: So under your analysis, there
wouldn't be anything that would be dumped
immediately into the public domain, or would you
again look towards a reasonable period of time of
federal protection for everything including pre-'23,
pre-1916, whatever --

MS. GARD: It won't have to be even a year.
I mean if you do it for one year, you get through
the takings problem.

MR. BROOKS: Yeah, we have no issue with
some sort of brief transitional period. We don't
want to further complicate the law by having
transitional periods that undermine the whole point
and take everything out to 2067 or something like that. But we don't want to be unrealistic in that, and, yes, there can be some reasonable brief transition so that people know what's happening.

The reality -- we keep talking about theories here. The reality that is that pre-1923 recordings, I'll say it again, are not being exploited, have not been exploited for the last half century or more, are almost impossible to find outside of foreign sources, which obviously do exploit them, or illegal sources here.

So we're dealing with something, if they want to bring a suit -- some rock star fellow wants to bring a suit on that, they can, but I think you could sell tickets to that case. Defending that is going to be difficult because you can't fight a court case on you've heard of the name; therefore, it is valuable. You have to have facts on something like that.

So I think we're making more of it than it's likely to in fact impact on reality.

MR. RUWE: Jennifer.

MS. PARISER: I don't think you fix the takings problem just by putting a transition period in. That lessens it to a certain extent, obviously. As I said in the beginning, the less harm you do, the less of a problem you've caused. But a transition period doesn't fix the whole takings problem. The fact that there was 25 years for 303 --

MS. GARD: One year for 401 -- 104.

MS. PARISER: Right, there was a year for 104, because there are reliance parties using otherwise public domain works. They are not copyright owners. They are just people who were making commercial use of something that they didn't own and had no rights in.

The 303 people were actual copyright holders, a more analogous situation. They got 25 years, and remember that is 25 years for more current works. And you can, I suppose, argue this either way. But I would argue the fact that these are older works, older parties are longer, more
difficult group of heirs, more dispersed
corporations that have gone out of business, means
you need more time for them to come out of the
woodwork, figure out what is going on, understand
their rights and be able to assert them.

Typically it is -- you know, on the record

companies' side, you get claims for the older works
much further down the road, claims for royalties for
older works much further down the road than you do
for newer works. The people who are alive and well
and currently recording manage to find your
royalties office within a few months of the
statement being issued. It's the older -- it's the
owners of the older works who come in sometimes 10
years later to say, Hey, you owe me on that
recording.

On the how much is it all worth, yes,
perhaps if you own a single sound recording of a
Caruso work, maybe that is in the scheme of things
not all that grand relative to the public benefit
we're talking about here. But we're talking about
the collective public benefit versus the collective
injury. Collectively the injury being done to all
of those sound recording copyright owners is large.
That is why they are here fighting it. You know,
this isn't academic for us. The record companies
feel that this is actually quite valuable, which is
why they are concerned about losing the years for
the exploitation.

I just wanted to ask something
I just didn't understand. When you talked about the
transitional provision under the '76 Act, I thought
you said, but maybe I misunderstood, that that
referred to more current works?

Well, 303 is talking about
works that were unpublished through 1978, right. So
I guess there are early, very early works in that
range, but there's also really current ones too.
And so it's sort of an amalgam -- that 25-year
period is an amalgam of all the works that had been
previously unpublished.

Yeah, I think -- and this is
something I would have to go back -- but I thought
you get life plus 70, and if life plus 70 has
expired, then you get that extra period of
protection so you get some protection. Well, it
would have been life plus 50 at the time it was
passed.

MS. PARISER: Yes. I was only speaking
about the 25 years to publish. That transition
period in 303.

MR. CARSON: But that didn't cut short a
term you otherwise would have had based on life plus
70.

MS. PARISER: Yes.

MR. CARSON: So if you had work that had
been created in any few decades prior to 1978 and it
was unpublished, 2002 is meaningless.

MR. PARISER: That's right. David, that's
why --

MR. CARSON: So I don't know why you say
that has any bearing on lot more recent works.

MS. PARISER: I'm only responding to
Elizabeth's point that that is some sort of
reference point for a transition period. Of course,
in reality 303 is really more of a formalities
precedent, I suppose, because if you were able to
publish within that period, you got your full term
of protection. So it did less damage than the --
one of the proposals we're hearing about now. That
is one of the reasons I think we don't have takings
jurisprudence around 303 is because it's really not
very much of a takings relative to what we're now
talking about.

MS. GARD: Can I just respond?

First of all, it went from perpetual
copyright to a limited term, so it was a takings and
it was for any unpublished work anywhere in the
world that was unpublished. So I mean old stuff,
like everything in the world that had not been
published. So that's the first part of it.

The second part is that 104(a) -- I mean
this is really important, so what 104(a) did is that
if you had a work that was in a public domain,
anybody could use or do anything with it. Movie
studios, your artists use it, lots and lots of
works. Seventy years that it was in the public domain, you had one year to use it. So those were copyright holders that were harmed, not -- and it wasn't like they were using -- it wasn't their stuff that they were using. They took a short story and they made a movie out of it. They are now infringing after a year because it was in the public domain.

I don't think that the MPA and the RIAA realize how much stuff could potentially be infringing that you guys have because it was in the public domain that now is infringing because of 104(a). I don't think that's ever been fully tweaked out. But this means that -- that is exactly the same situation here in some way. It's perpetual copyright or 2067 cut short, and there are people that own it or depend on it that now can't. And so one year, 25 years, 5 years, 100 years, as long as there is some sort of time period, at least from the Congressional records, you are through the takings problem. And so that's the analysis. But to say like they didn't have the right to use it, they totally had the right to use the public domain work. That's the whole point. Almost all of your music is based on some sort of public domain iffy thing and then -- right? That's how it all works, right?

MR. ROSENTHAL: No, that is not how it works, but we won't get into it.

MS. GARD: But the point is that there are lots and lots of works that are dependent on both scenarios.

MR. RUWE: Jay.

MR. ROSENTHAL: Yeah, just to address your point directly about the compensation -- I think that's what you were asking about -- I just want to make a point that it's a slippery slope in terms of trying to access value. Just using the word "shipped" is fascinating in today's day and age. I'm not quite sure whether that has much meaning any more as it
relates to value.
Just a short -- an anecdote -- I know that anecdotes aren't really looked upon well here. We didn't do a study on this. But a record label guy told me one day that they are focusing more now on old classical music, and the reason is is that because they feel that classical music aficionados and fans don't know how to legally download. Why are they doing that? Whatever reason it is, they are. So that has to be taken into account when you think about what is value. All I'm trying to say it's a slippery slope trying to think of what kind of compensation you are going to give to a copyright owner because of this alleged taking.

MR. BROOKS: Life is a slippery slope.
MR. ROSENTHAL: It is a slippery slope. I hear you.
MR. RUWE: There seems to be some acceptance that in the '76 Act that 25 years was a reasonable amount of time. Is that something that could work in this situation? Is it still reasonable?

MR. BROOKS: Could you clarify?
MR. RUWE: Well, talking about a window of time, a reasonable time if you are extinguishing common law rights, substituting federal rights. In the legislative history at the time that Chapter 3 was done, it was 25 years, no takings claims came about. Does that mean it's reasonable? It seemingly was reasonable then, at least in some's views. Would it be reasonable in a current proposal?

MR. BROOKS: For the pre-'23 recordings?
MR. RUWE: Yes.
Jennifer.
MS. PARISER: Okay. So 25 years -- first of all, 303 doesn't apply to sound recordings, so --

MR. RUWE: But you --
MS. PARISER: -- so it never became necessary for the --

MR. RUWE: For your clients.
MS. PARISER: -- for my clients to sue
under that statute.

MR. CARSON: They are much more reasonable than everybody else.

MS. PARISER: I think we'll agree that we are more unreasonable that some of the other copyright owners out there. And, you know, hey, if 303 applied to us, there might be a Supreme Court decision on takings.

And, you know, the fact that there hasn't been litigation yet around that, I think it's -- I suppose that somebody who owned a copyright who is affected by it had standing when that statute was enacted, but, you know, I think -- I don't know that they are necessarily waiting around. But they still have time. I mean anybody who -- I think anybody whose rights are still in place, you know, could sue at the expiration of those rights.

MS. GARD: They were perpetual.

MS. PARISER: They were perpetual. The point is, I don't think the fact that nobody has litigated around 303 means that there wasn't a takings problem. Takings and takings jurisprudence changes over time. It's very -- you know, I don't think, you know, in this town I'm telling tails out of school to say that something like takings is very influenced by the favor with which the business community is held in the Supreme Court at a given moment in time. A court that is more conservative and more favorably disposed towards business interests will see a takings issue more than a different sort of a court.

So, you know, is this a takings problem?

I'm not really sure. As I've said before, the less harm you do to term, the less of a takings problem there is. I don't think that you can say, Well, if we -- you know, we have a phase-in period or we -- you know, whatever, that it just per se is not takings.

And as for your earlier question about whether you bake compensation into the statute --

MR. RUWE: The notion is would this reasonable time provide just compensation?

MS. PARISER: Any shortening of the
duration that currently exists can't be compensated
by a phase-in period. That makes it less damaging
but it doesn't compensate for a shortening of the
period. That can only be done with compensation.
But I don't know how you compensate it. That's even
harder than figuring out chain of title.
MR. RUWE: Tim.
MR. BROOKS: Just briefly. To answer your
question directly, we would have a considerable
issue with 25 years in which Reverend Myers can't be
heard and the Fisk Jubilee Singers can't be heard,
and all these Greek and Jewish and other immigrant
groups can't be heard on the altar of a principle
that in general we don't want to do it.
If there is some kind of regime whereby
those things which are pre-1923 are still made
available -- I hate to bring in "use it or lose it"
kind of thing -- but for a transition mechanism, all
we want is access -- access and preservation, those
are the two goals. Then perhaps they want to keep
Caruso in print for another five years or six years
to extend that to 95 years, yes, or even longer,
that's a possibility.
But I really object to the idea of
silencing so much of American history because of
considerations of rights-holders who have shown
absolutely no economic reason to access or make
available this stuff. We are crushing American
history on this business of points of law which
aren't serving a purpose.
MR. RUWE: Eric, then Elizabeth.
MR. HARBESON: My recollection of the
transition term was that it was in part justified by
the fact that had the transition period not been in
place, certain publications or certain unpublished
works wouldn't have been able to enjoy a full
copyright protection term.
Am I remembering that correctly?
MS. GARD: Yeah, if you hadn't done the
transition period, anything that was longer than
life plus 70, say like Abigail Adams, would have
gone into the public domain. I mean so it would
have gone from perpetual to public domain. And so
there was the idea that you needed a transition period, but that you would enjoy federal protection for 25 years, and then an incentive period to then also gain a longer term.

MR. HARBESON: Right. Now, sound recordings -- one of our points is that sound recordings already have enjoyed considerable copyright protection for -- in some cases 120 years already. Not federal copyright protection but common law copyright protection anyway. It doesn't make sense to us to advocate that now somehow we have to give a transition period where the recordings can enjoy federal copyright protection when they have already enjoyed a term longer than any other medium enjoys.

I mean, Jay's clients publish public domain music. There is a lot of money being made in Beethoven. I could go and publish my own Beethoven music. I might take a little bit from Jay. But the point is, you know, after stuff enters the public domain, you can still make money on it. But to assert that the -- because we have -- the reasoning for having a transition term doesn't make as much sense to me in this case than it did for 303(a) because of the reasoning -- the situation is different, I think.

MR. RUWE: Elizabeth.

MS. GARD: Yes, I advocate a one-year term as a place to start. That is what 104(a) does, and so that's what we've been doing. That's our latest model is 1994 and 104(a). And if it was good at that point, I suspect that a one-year transition is fine now as well. I don't think it's as generous -- I mean my class is more generous than I am and they have suggested a five-year term. But I think one year is plenty, and that seems to be what is in vogue.

MR. RUWE: I think it's useful to look at those past examples during which claims did not accrue, but in this situation where we have people who are familiar with the works, what could provide just compensation? What sort of -- and it's not just -- is there an added scope of protection that
would be available under federal law that might
also -- in addition to just purely time that is
available under federal protection, could that be
viewed as just compensation?
MS. GARD: No.
MR. RUWE: Not just reasonable time but
reasonable time during which you have possibly
additional value.
MS. GARD: I don't think that the
government is in the business of giving people -- I
mean you think about all the takings cases. It's
not really in the business of giving people for
things that -- because -- because the laws change

that that -- I mean that is why the takings -- that
is why the Copyright Office -- I mean copyright laws
look the way it does is time is all that they are
really giving. They are not giving actual money. I
don't think it's actually ever given money.
MR. RUWE: I wasn't saying money, but
value.
MS. GARD: What do you mean by "value"?
MR. RUWE: Well, is there a greater scope
of protection if these works were brought under
federal law than the protection currently afforded
the common law?
MS. GARD: Yes. They get all kinds of
things: They get statutory damages, they get
attorneys' fees, they get the whole package. You
get the whole package.
MR. MARKS: Don't assume that we want those
things. Don't assume that we think that protection
under federal law is necessarily better --
MS. GARD: No, no, he asked what else you
got, and I said you get attorneys' fees and --
MR. MARKS: But getting statutory damages
as opposed to the damages that we can get through
state law, all I'm assuming is don't assume that
those things are necessarily better for us.
MS. PARISER: Right. I mean we talked
about this --
MS. GARD: I don't know anything about what
you guys do.
MS. PARISER: We talked about this
yesterday a bit. I mean, yes, if you're giving me more than what you are taking away, then, you know, I've got no reason to complain, but what I've heard so far is not giving me a warm feeling.

You know, yesterday we talked about the tradeoff between statutory damages versus state law damages. We didn't really drill down into this very much, but under state law, you can sue for actual damages plus punitive damages, which can be quite considerable.

The tradeoff is I give those things up and I get statutory damages instead, and the right to ask for attorneys' fees, which are almost universally denied if I've gotten a substantial statutory award, that's not necessarily a deal that I want to make. That's why we're here to a certain extent is that federalization, that federalization grant of rights doesn't compensate for what is being taken away under state law, in particular the shortened term.

So, you know, is it just compensation? Not really because statutory damages isn't even the equal in so many cases to actual plus punitives, and you've cut the term off. So I'm still in the red.

MR. RUWE: No response?

Is there another way that this could be approached to provide just compensation?

Jennifer.

MS. PARISER: I think we will take radio royalties.

MR. RUWE: David.

MR. OXENFORD: There is a reason I was on the panel.

MS. PARISER: For that moment.

MR. OXENFORD: I don't think we're offering.

MR. RUWE: Eric.

MR. HARBESON: In all seriousness, I don't think that that would be just compensation either. That would be a trade. There might be a takings issue there too.

MR. RUWE: So --

MR. BROOKS: I'm actually not sure why we
are debating what the just compensation should be if we haven't established the value of what it is that compensation, whether it's regulatory or otherwise, is for. Clearly, there seems to be a difference of opinion here about what the value of the things that passed in the public domain would be. Some of us feel that value is de minimis, and we think we have facts on our side for that. Obviously, rights-holders feel otherwise. I think it's incumbent on them to prove that. I'm not sure this is the forum in which to do that.

I think this recommendation here should be on the basis that if there were to be -- and it has to be demonstrated and it has to be quantified -- value there, then that becomes the place at which you decide about compensation. Maybe that is something in the next few weeks that the industry can quantify rather than making general statements, and then it can be addressed.

But here we seem to be going around and around on a difference of opinion of whether there is really -- we are picking up the discards in the back of the building and there really is no value here at all. There is a non-divisibility doctrine here that says you can't lose some value; you have to lose all value. Can they show that they are losing all value here? So it's just not very productive, I don't think.

MS. GARD: I completely agree with Tim. Also, property law, I mean it's hard to get compensation. I mean go to court. This is really in the -- I mean you lose your little pink house and you still don't get very much compensation. I mean like this is not -- and we've already discussed -- I mean we've gone down this road twice with copyright law and they didn't find any takings. I don't think it's really a big issue. It doesn't seem to me -- I mean it would be interesting to see if there's a new argument to be made, but it's a really difficult one to actually surmount because of what you are saying. I completely agree with what Tim is saying.

MR. RUWE: I want to turn back to one of the proposals that has been made about -- or what
about the possibility of getting the full term by filing a notice? Is that something that would provide -- presumably you are not denying anything at that point. You are getting the full term that you currently -- it's available to you, you get the full term that you currently expect.

MS. PARISER: So 2067.

MR. RUWE: With an assertion of your interest in obtaining that full term.

MS. PARISER: You know, candidly, that would be less of a problem for the major corporations than it would for others.

MR. RUWE: Would it present a takings problem? Not whether they like it or not. Is it a takings problem?

MS. PARISER: I think probably not. I think you've got a -- now we're in the discussion that Eric was talking about, about whether the copyright law wants to embrace that kind of formality, quote/unquote.

With respect to Elizabeth, who said that's the way the copyright law works, well, it works that way in some places of the Copyright Act and not others. It worked that way in 303, but I think that is somewhat of an exception, certainly to the way that the copyright law is developing to get away from formalities.

If I have to file a piece of paper to enjoy the full term of protection, well, I guess we'll manage to get that done. But I don't know that everybody who is a smaller player in this field would be in the same position to do that.

MR. RUWE: Elizabeth.

MS. GARD: Yeah, I want to make it clear. We never advocated registration because it would violate Berne. We can't have a -- I mean I guess it wouldn't be for domestic. That is all Fifth Amendment stuff. I don't know. You have to ask Chris.

But it really was just some form of making -- it was a very European sort of making available -- everything that you have is online and so much stuff is already out there that it really
was a much lower burden than registering or anything
else. It was just an assertion of some sort online,
like whatever we -- whatever way it was, the easiest
way possible, even the RIAA asserts we -- or
whatever. But it was just a way to get the other
stuff, the stuff that Tim cares about, out in the
public domain because it was a compromise that we
saw in our class of how different interests could be
served and not as an entitlement for the RIAA.

So it would be sort of figuring out for you
guys what is the easiest way to meet it so that your
stuff stays protected until 2067. And Tim's stuff
goes in the public domain in 50 years. So it was --
that was the idea, and not, not a registration. I
mean that's just a disaster. There's tons and
tons -- too much, too hard, so it was a much lower
burden than that.

MR. RUWE: Eric.
MR. HARBESON: We don't actually feel that
a 2067 expiration term is reasonable for anything
other than sound recordings made in 1972.
MR. RUWE: Chris, did you have a question?
MR. WESTON: This is slightly off topic,
but it sounds like that might be appropriate at this
point. And this has just been something that I've
been curious about. Takings aside, I was wondering
on the part of the record companies, what are the
policy reasons why sound recordings should have a
longer copyright term than every other type of
copyright work; in other words, the works from
before 1923? I mean I understand, you know, you
have it and you don't want to give it up, but I'm
wondering as a policy reason, why should that be?
MS. PARISER: Well, there's a lot of policy
kind of swirling around here. First, there is the
fact that -- this isn't perhaps that satisfying to
you -- but the fact that that is the way it has been
means that companies have developed business
expectations around it. They have license deals
that take into consideration the term of copyright.
You know, the business model of a license these days
takes into -- licenses the entire catalog, takes
into consideration a particular term of copyright.
It's all sort of part and parcel of the way these companies operate. So that's number one. Number two, sound recordings have only been protected by federal copyright since 1972. They don't have a public --

MR. WESTON: Do you find that to be an inferior method of protection to state protection?

MS. PARISER: Well, it's not necessarily -- largely it's inferior because of the term, but there are ways in which it's superior. But even, even under federal law, there are ways in which sound recordings are vastly disadvantaged relative to other copyrights. The most notable being we don't enjoy a right of public performance. So, on the whole, as I said before, I will take public performance if you are cutting my term down. So there you are.

MR. WESTON: Okay. Thanks.

MS. BESEK: We've been talking about the takings issue from the perspective of takings from the owners of rights in sound recordings, but some of the comments raised the possibility that there might be a constitutional issue with respect to users who were acting in reliance on perhaps weaker protections under state law and assuming they could do certain things that would not be permitted if sound recordings were federalized. And I just wanted to know if any of you had a view on whether there is an issue on the other side with respect to users who have been doing some things that they would no longer be able to do if it were federalized?

MR. RUWE: Jay.

MR. ROSENTHAL: Could you give me an example? What do you mean?

MS. BESEK: This actually comes from a couple set of comments, one of which I know was EFF, for example. But that there are -- in fact, under state law, in some of the states there is only a right in the nature of unfair competition against competitive uses. So you, the user, might be making a kind of use that's not a competitive use, but it might not fall in a permitted area, it might not be
one of the exceptions that we would be allowed to do
under federal law. Actually, this might be the case
even for some kinds of library uses, to tell you the
truth.
So the question is, is this something that
we should be concerned about? I'm just throwing
this open. Do you think there are those kinds of
uses? Do you know of any such uses like this that
we ought to be thinking about?
MS. PARISER: Nothing comes to mind, and I
think it's an interesting hypothetical, but I think
the premise of all of this is the notion that,
rightly or wrongly, there will be the view held, at
least by the libraries, that state law is more
protective rather than less. That is why they are
concerned. That is why their general counsels are
giving them conservative advice.
If there is an individual out there who has
a contrary view and is making some use based on
that, now it's hard to say that's necessarily wrong,
there's a lot of states out there, but I think the
working presumption we're all going on here is that,
at least
hypothetically -- the working assumption people have
is that state law is more respectful of common law
copyrights than federal would be.
MR. OXENFORD: We made the comments in our
reply that there may be that potential with respect
to the public performance issue where there is not a
public performance in pre-'72 sound recordings in
our opinion under state law, but I think that was
fully vetted yesterday during our session yesterday
afternoon.
MR. RUWE: Jay, do you have --
MR. ROSENTHAL: Could you be talking about
a -- I'm trying to think of what your example here
is -- of a sound recording that might have a longer
term than maybe someone who wants to use it would
expect in the context of the creation of a
derivative work? A digital sample, is that what you
are thinking of here? I'm trying to get a grasp
on --
MS. BESEK: I should say this is not my
thinking. This was something that was brought up in
the comments, but as I think about what might be a
possible scenario, I suppose you could have a
situation where somebody created a derivative work
but isn't doing it in a competitive situation. And
while it's true that if you take the states all
together and you have to look at the most
restrictive, then you could argue that the states
are more restrictive. But if the conduct is
localized, there are definitely some states that you
could see as being significantly -- having
significantly less protection for sound recordings
than federal copyright law would provide.
MR. ROSENTHAL: If we are talking about
library usage, I'm very sympathetic to some kind of
protection. If we're talking about using Caruso as
a digital sample, which absolutely is a fascinating
thought, I have very little. I think that there we
get into the type of usage that we're talking about.
Nevertheless, I think it's an issue. I hear what
you are saying is that there are expectations on
both sides, and if someone uses a work in a way they
believe is legal, and yet we step in and somehow
place on it, you know, this new paradigm that it is
no longer legal, there should be some kind of, you
know, tradeoff there in terms of what kind of
remedies and what could be done. And there is some
history in copyright law that deals with that issue,
especially derivative work creations.
MR. RUWE: Eric.
MR. HARBESON: I think that the
hypothetical actually came out of the recording
institute's comments. Bringing up the traditional
contours argument in Golan versus Holder which is in
the Supreme Court next term.
And I should say that we're actually
sympathetic to the plaintiff in that case,
especially in this -- this is a case where you had
works that were taken that had been in the public
domain and left the public domain, and that is
certainly changing the traditional contours of
copyright. As far as I know that's never been done.
I think what is different about this case
is -- and, again, I'm not a con law scholar --
but I think what is different about this case is
this is an example of Congress being given the
authority to establish copyrights in the first
place, to -- and to preempt state laws. So I do
think that that makes a difference in this case,
because in Golan you had federal law reversing the
public domain in federal law. In this case you have
federal law trumping state law.
I don't know of any examples of people
making use of sympathetic state laws to -- as
reliance parties to something that might one day
come under copyright. I would be interested to know
if anyone else does. Tim may know.
However -- yeah, I mean I don't know of any
examples of that. I think that that would be
difficult given the recent case law regarding -- I
don't know how you could have a presence in the
world where you could be sued in any of 50 states
rather than just the state that you are in.
Colorado, my home state, is actually a very
sympathetic law -- set of laws to us. As I
understand, we have a 50-year term. That doesn't
help me especially because I have -- I do have to
worry about other state laws.
And I don't know how you would address
cases where you actually have a -- someone who has
made a business model out of exploiting some of
this. As I said, I don't know of any examples, but
1 I -- I don't know, maybe there is room in 107 for
people who have been doing this for a long time. I
would be -- if there is such a case, I would think
that that would be a sympathetic use case.
MR. RUWE: You've gone into the area of
other than takings constitutional issues. We do
want to take the opportunity to rejoin our previous
schedule, so if anyone would like to take a brief
moment to address either one of the other
constitutional issues that have been raised and
comment or final thoughts on the takings issue, I
welcome that. Is that a yes or a no?
MS. GARD: No. Done.
MR. CARSON: Worn out?
MR. CARSON: We are going to start the third session of the day. We can almost see the light at the end of the tunnel, I think.
The third session is on alternatives to federalization, and I take that to mean, are there other ways to accomplish the goals that proponents of federalization have, ways other than federalizing protection for sound recordings. So I think we will start this by going around the room and letting people give sort of a brief introduction of their perspective on that point and see where the conversation goes after that.

MR. LIPINSKI: Can I just ask a clarifying question first so that we know what we are comparing this discussion to? And when we are talking about federalization, are we talking about the full array of Section 106 rights? Or something less or picking and choosing?

MR. CARSON: No, we are talking about not bringing protection for pre-'72 sound recordings into Title 17 of the U.S. Code, not making them subject to federal protection, keeping them with the states, but is there some other way, nevertheless, to accommodate the needs that people like you have come to us saying we really need to --

MR. LIPINSKI: Right. But the alternative of federalization would mean the full 106 array of rights. Or not?

MR. CARSON: Well, I don't think anyone has defined a specific plan for federalization. We've heard various suggestions on what should happen. For example, since you talked about the full array of rights, there are certain people at this table who -- and we've heard this many times -- have a different point of view on whether those rights should include public performance for sound
recordings.
So there are differences of opinion as to what full federalization would mean. I think we've heard some of that already. Now, we're saying, fine, let's assume we are not going to deal with this in Title 17 of the U.S. Code, is there some other way, nevertheless, to accommodate the needs that many people have come to us and many people around this table are suggesting need to be met?

MR. LIPINSKI: Sure. Fair enough. I just wanted to make sure. So I wanted to --

MR. CARSON: Go ahead. You've have the floor.

MR. LIPINSKI: So now I have got my lawyer's hat on, which is just, okay, this is an interesting problem, and if we can't go the federal route, how else do we solve it?

And it seemed that a lot of the other reports that have been done have talked about some of the issues of inconsistency from state to state and how that is jeopardizing one of the goals here, which is preservation and access, but it's a much broader case of, you know, is it -- in my mind, it's a federalization versus states' rights issue. Do you want to go the state route or do you want to go to federalization?

So if you are going to go the states' rights route, it would seem that an obvious choice to talk about would be some type of a model uniform law, you know, something sort of ala en Cassell that spreads bread and butter on uniform laws.

And, obviously, one -- I will just go through a quick list, I won't take time -- but a plus would be obviously that it would solve that problem of variation from state to state. And you might even come up with a more precedential based way of interpreting that.

If you look at say something like the UCC and the UCC Recorder, those statutes are pretty much the same from state to state, and the judges really, even though still persuasive precedent, still look strongly from state to state, because they are all dealing with the basic core of uniform law.
Some of the minuses would be that you still have the risk of non-adoption or variation. That is true in the UCC. It's painfully true in something like UCEDA where you have two states that have now adopted it, and it seems a pretty cold menu to eat in a lot of the other states. Another negative would be you still have a dual system for the same type of work. You would still have some sound recordings under state law and you'd have some sound recordings under the federal system in terms of the pre and post too, and so you are not sort of solving the inconsistent problem in a complete way. And I suppose one other minus would be that -- maybe it goes to Elizabeth's point -- which is that a point of the copyright law is to encourage creativity. Once the creativity is there, there is a limited monopoly, but it is limited. At some point that creative work goes into the public domain. And unless you are going to draft a model law that has some very terminable end points, you are still going to have this overextended or extended duration period problem. And maybe the uniform law can solve that. You know, the advantage would be that it can work in the specific types of exceptions that some of us here have been requesting. But, again, there's no guarantee that it's going to be adopted in exactly the same way by all 50 states or all jurisdictions you have. MR. CARSON: You are suggesting that perhaps a uniform law might actually describe a term which might be something short of 2067. Maybe the RIAA is rethink the uniform law. Anybody else like to -- okay. Eric. MR. HARBESEN: Well, as -- I feel like I'm going to start sounding like my friends over in the industry who have been saying all -- yesterday and today they've been saying, Well, we don't support this, but... So we don't support this, but if we could come up with a system of state laws, I won't say that that won't help us. I agree with Tom that it
would not solve all of the problems, but it would --
I mean it could help us considerably. It would make

it much more easy for us to go to our general
counsels and point to a law that is enforceable that
we can rely on and that we can point to when we're
looking for grants and such.
One thing that we would -- it would help a
great deal if we could have some kind of indication
in that state law of the existence of fair use. If
there were library provisions, that would be even
better, but really what we're going for is fair use,
because that's the kinds of uses -- we don't want to
make unfair uses. So there's really what we're
going for.
And another option which I haven't really
thought about for longer than about a minute, so
take it for what it's worth, is rather than looking
at taking 301(c) away, amending it so that the --
and, I'm sorry, you are really not going to like
this -- but amending --
MR. CARSON: It's bound to happen
eventually, Steve.
MR. HARBESON: Amending 301(c) to -- rather
than have a fixed state of 2067, but to have it be a
time-based -- a fixed term. And this is different
from what we've been proposing in that what it would
do is it would give you the state law for as long as
you had the law, but then it would ensure that
things passed into the public domain.
So, next year, recordings that have been
recorded in 1917 would enter the public domain, but
the recordings that had been recorded in 1918 would
still -- you would still have your state law. That
would, I think, help with your chain of title
problems and the other complexities that would --
that you've been bringing up that didn't relate to
the term in the constitutional thing. So, as I say,
this is -- I came up with this about a minute ago,
so take it as half-baked.
MR. CARSON: I wonder if you would like to
take another minute or two thinking about it because
I'm not sure I understood it.
MR. HARBESON: So 301(c) -- let's see if I
Pre-1972 Sound Recordings Public Meeting  06-03-2011 edits.txt

20   can find it quickly -- rather than saying that for
21   works subject to -- in works fixed prior to February
22   15, 1972, that these works are subject to state law
23   until 2067, when they enter the public domain, you
24   can say that with respect to sound recordings fixed
25   before February 15, 1972, any rights or remedies
26   under the common law or statute shall not be
27   annulled or limited by this title until 95 years
28   after, or some other length, 95 years after the
29   point of fixation.
30             MR. MARKS:  Then it would be federal at
31    that point.
32             MR. HARBESON:  Then it would be in the
33    public domain.  But until then it would be under the
34    state law.  So -- many of the complaints that the
35    RIAA and A2IM brought in their comments was the
36    complexities of negotiating chain of title,
37    contracts and the like.
38            And I did warn you that you wouldn't like
39    it.  But at the very least that would be alleviated.
40    It would not help you holding a monopoly on an 1890
41    cylinder, but it would help you at least with that
42    little aspect.
43             MR. CARSON:  Okay.  I just want to get
44    people's basic propositions on the table before we
45    start responding to people.  So anyone else -- I
46    think, Dwayne, you had your hand up first.
47             MR. BUTTLER:  I think that Tom made lots of
48    good points about a model law.  You know, I'm not
49    convinced because I worry about the patchwork system
50    and how we deal with those states that don't have
51    any law at all.  How we deal with the more
52    restrictive/least restrictive kinds of issues.  But
53    I think if we are talking about alternatives, that
54    is certainly one alternative to bring some
55    uniformity to it.
56            I'm inclined to think more about the
57    possibility that we look again at that use kind of
58    question and, you know, certainly we have preemption
59    with respect to owner rights in copyright law, or at
60    least equivalent kinds of things.  Whether -- a
61    couple of courts have looked at fair use and some
62    common law sense have applied it to like
MR. CARSON: I'm guessing that is not so different than perhaps what we're going to hear from Brandon.

MR. BUTLER: No, it's not. That is right.

So I'm going to be rising in defense of state law.

My basic position is that state law is actually not so bad. That what would be a really wonderful alternative to federalization would be that we do some diligence to fill in the details, but that if you read Professor Besek's two reports, Professor Jaszi and his clients' reports, and then I had our very talented law student spend a couple of days doing a classic summer law student project and putting together a 50-state Excel spreadsheet, which I felt very bad asking for, but I wanted it -- but there are trends and commonalities across state law, and many of those trends are friendly. In fact, I would say all of those trends are friendly to library uses; that is, the contours of state statutory -- explicit statutory protection are the kinds of protection that I wish existed at the federal level. They protect your commercial interests and they let you attack -- "you" being the RIAA for the folks listening at home -- it protects the commercial interests of folks that have commercial interests by penalizing commercial activities that compete. Those are the statutory -- and so, by and large, libraries will escape from any kind of statutory, you know, unauthorized distribution type of problems, and that's -- you know, you can look at again Professor Besek's studies and Professor Jaszi's studies to see that.

And so the only remaining question is common law copyright. And I actually -- because I've been looking at this again for a little over a year now, we've been investigating fair use at the
federal level and how it's operating right now, and
I believe very strongly in the power of fair use.
And as Eric said, libraries don't want to make
unfair uses. And we think fair use constitutionally
ought to apply at the state level.

And so what we -- because, again, it's been
said by the Supreme Court that the fair use doctrine
is part of the sort of escape valves in copyright
that ensure that the copyright monopoly is not an
infringement on legitimate first amendment interests
like parody and critique and scholarship, right? So
that presumably would also apply against the states
because it's incorporated, right? So
cstitutionally they could not forbid fair uses.
So what we would like, as an alternative to
federalization from the Copyright Office as part of
this process, we would love to see, because you guys
are the pros and the experts, one more study that
would -- because those first three were still
tentative and incomplete and so on, but they show
trends that are so promising in terms of what state
law really is, that we think an authoritative
statement that said fair use is constitutionally --
is very likely that a reasonable common law judge at
the state level will apply fair use for library
uses, on which June has already essentially said
that, but we like to hear it more authoritatively
based on a real 50-state survey, then I think we
would be in business. I think we could do a lot of
what we want.
And it was also really interesting to hear
that statutory damages are not all that exciting for
some of the rights-holders in some contexts, but
they are very scary for us. So if you guys aren't
really fired up to get them and we aren't really
fired up to be subject to them, then I think
everybody in the room could agree that a states law
system where there are no statutory damages is a
pretty good thing.

MR. CARSON: They are fired up to get
punitive damages. How do you feel about that?
MR. BUTLER: Try and get them against a
library. It's not going to happen. It's not going
to happen. Thank you.

    MR. CARSON: Steve.

    MR. MARKS: All right. Well, given that our comments were all about no federalization, we've been salivating for this panel, waiting a day and a half to get to the alternatives so we could talk about it.

    You know, obviously, I'm not going to go through all of list of reasons why we don't think federalization doesn't work because we've done that ad nauseam for a couple of days now.

    But -- and the one thing I would just note additionally is that it's clearly not a panacea for the others around the table here. It's not a magic bullet kind of thing where we've just, you know, noticed or objected because there's some ancillary harm to us. There's we think real ancillary harm, but it's also only helpful to a certain extent in any event. So we think it makes a lot of sense, therefore, to be looking at alternatives.

    And what I've heard around the table for the most part so far has been positive. I mean the model state law idea was something that we began to -- that just kind of occurred in the normal course of thinking yesterday as the discussions started going because it does really appear to us that the issue here is not so much about state law versus federal law but about ensuring that certain kinds of uses are accommodated by whatever law governs.

    And we very much would look forward to having a dialogue with those around the table about, you know, what those uses are to the extent, even under federal law, they are not exactly what you need or want. You know, in a model state law context, it would allow us and give us the opportunity to have a dialogue about what is it that we really want. If we're writing on a blank slate or a slate that is not completed yet, maybe there is something that we can come up with together to address the things that don't currently even exist in federal law. So we think that the model state law approach is very promising for that reason, and
we very much want to have that kind of dialogue.

We also thought of a couple of other things, and, you know, I will note with the usual conditional statement that any lawyer in my position gives, which is we haven't talked to any of our members about this. But we thought of a couple of other ideas that we very much want to talk with our members about, and especially if there are things that you think make sense.

One thing we thought of, and this kind of builds -- some of these build on the theme that we had in our comments about having the marketplace actively trying to address these things. And it doesn't necessarily -- it can be things like the Sony, Universal and all the other kinds of agreements we talked about. But it could also be something like setting up a clearing house, maybe it's RIAA and A2IM, setting something up that has a framework for a consent not to sue for the kinds of uses that we agree on. So that while maybe we're, you know, getting -- we're waiting for the legislatures and the state to pass what we've agreed on as something that we would like to have them enact, we could have copyright owners raise their hands and say, We're fine with this, we consent not to sue. And we can build -- you know, we and A2IM and other organizations like that can play a role in kind of coordinating that on behalf of copyright owners. So that was one thing that we thought of.

There was a comment that was made -- and I can't remember who made it at the beginning -- but alluding to universities and piracy, and we didn't highlight that in our comments, but the thing that it made me think of was the fact that a lot of the concerns and things that we've been talking about around the table here over the last day and a half are about preserving the national treasures that I think we all recognize should be preserved and all agree on. And it's kind of looking back, you know, whatever, 70, 80, 90 years, whatever the time frame is.

One of the things that we often point out when we're talking about the challenges that face
our industry is that aside from the economic loss to
any particular company or a particular person, there
is a harm to our culture from piracy because things
will not get created that otherwise would get
created. And, therefore, the things that 60 or 70
or 80 years from now people that are sitting in your
shoes will be concerned about may not have as much
to be concerned about as a result of what is
happening to our industry.

And it just struck us that there is an
overlap in interest there, therefore, at least with
the universities. And we've been working with
universities on piracy-related issues and have had a
very constructive dialogue and relationship.
But there may be another angle to this that
our members see a certain benefit and have,
therefore, an incentive to address your concerns,
and vice versa as a result of that.
So I think we should explore that
overlapping interest and figure out whether that
provides some additional incentives for both sides
to figure out some solutions to this.
Finally, we thought that there may be an
opportunity to go to a private distributor of music,
I mean whether it's iTunes or somebody else, who may
be interested in providing access to some of these
things. So I mean this gets to some of the
commercial/noncommercial issues that we've talked
about in this -- and I will parrot what Eric said
about using those terms loosely -- but to the extent
that the issue is not about getting permission or
finding somebody to get permission for things that
are clearly owned by our members or Rich's members
or other copyright owners but things are orphaned,
there may be an opportunity for another private
party to play a role in providing access to those.
And maybe some of those private parties are not --
would see the benefits of doing so and are not as
risk averse as some of the constituencies around
this table, just because of the nature of their
business. And that's not meant as a positive or
negative, it's just meant as kind of a fact as you
all were stating that the framework within which you
work. So, we think that there may be a dialogue
there that could help.

And the last thing I will say, even though
I said "finally" a second ago, is the orphan works
piece of this does seem to be something that needs
to be looked at, because a lot of what has been
described as the problem is an orphan works problem.
And it's something that there's been a lot of
discussion about in the -- you know, in recent
years. There probably will be again. And it
strikes me that that forum is another forum to try
and help address some of these issues.

So those are some just initial thoughts
that kind of came to us over the course of the last
day. I'm sure there are others that we can all
think of, and we look forward to having a
constructive and meaningful dialogue with everybody
about these and other things.

MR. CARSON: Steve, can the orphan works
question really be addressed very effectively at the
state level?

MR. MARKS: I'm not sure of the answer,
because when we talked about this internally, that
was the first thing that came up. You know, orphan
works is about things that are covered by federal
copyright, how do you deal with, but maybe it
provides some kind of template, to the extent we
haven't figured it out in a model state law context
for dealing with those kinds of things and to deal
with the states.

So I'm not sure exactly, you know, how
it's -- you know, how that discussion about what is
covered by federal copyright and, therefore, how
orphan works would be applied in that context works
here, but at the very least is a very relevant
conversation, I think, to what has been going on
here. I mean maybe we figure -- we figure out a
template first. I don't know, you know, which is
going to go first, but depending on where that
dialogue goes and the assumption that that issue is
going to be taken up again sometime soon.

MR. CARSON: Okay. I have a couple more
questions, and then we will go back to the table,
for you, Steve.
Would the uniform or model law you are
talking about have a fair use provision that looks a
lot like what we have in the federal statute?
MR. MARKS: I think that that would
certainly be on the table. I mean I think that the
first discussion we have is, what are the kinds of
uses that need to be accommodated? So whether it's
a fair use provision like 107 or something that is
more specific to the kinds of things that we're
talking about here, you know, 107 itself is very
ambiguous, you've got to apply it to certain sets of
facts. Well, we know what the facts are as a
general matter here, so let's sit around the table
and try and talk those through.
So I think we're open to having that
discussion on what the uses are and then figuring
out how best to implement those in a model
statement.
MR. CARSON: One final question. I just
wanted your reaction to Brandon's prediction that
state courts are generally going to conclude that
fair use is part of state common law copyright. Any
reaction to that?
MR. MARKS: Well, I think that -- I don't
know if this answers your question generally, but
it's certainly our sense that the kinds of uses --
and I think we said this yesterday that we've been
talking about here -- are generally -- that the risk
of liability under state law is not very great, and
we read the same studies and, you know, you look at
the law and it's not apparent to us that the risk is
very great.
But that just gets us back into the whole,
you know, how much risk is there, how much risk is a
library or a university willing or another archivist
willing to take given the status of state law. So
that is why I think sitting down and talking through
the uses and getting more specific about those may
be a very good way for us to start so that that
uncertainty doesn't exist even under state law.
MR. CARSON: Anyone else have a general
comment before we talk about what has been put on
the table already?

Yes.

MR. BROOKS: Yes, ARSC in its comment was not in favor of partial federalization or a state solution for a number of reasons. One of which is that in almost any scenario that we can imagine, the Copyright Office would wind up, or Congress would, picking winners and losers. There would be some who would be favored by that.

If 108 provisions, for example, were somehow enforced without other types of federalization, well, where does that leave organizations like my own or the Society for American Music or the Society for the Preservation of Jazz Record Collectors or other 501(c)(3)s which are clearly dedicated to preservation and study and scholarship and yet are not an archive, so to speak? And you get into a whole morass of decisions about that and who is favored and who is not favored, which we don't think makes a whole lot of sense.

So, in terms of that, we don't think that partial federalization is -- it would be a mess, frankly. A model state law, well, as Eric H. has pointed out, who is our rock star, by the way, has pointed out --

MR. BUTLER: He has a pony tail.

MR. BROOKS: -- even with very favorable laws in his home state, that doesn't necessarily help him. There are 50 states out there and you can almost be certain that a model of law or something recommended, not enforced federally, across the states is going to be treated differently in different states. And some states, some have referred to an arms race between states to who could be the toughest.

In an internet age where you have to deal with internet distribution that is difficult to control who streams and downloads or whatever, all you need is one or two major states which break ranks and decide, no, they don't want this thing, for whatever their local politics are, to disrupt the whole system nationally.

I will remind you that Naxos after that
case in New York state, which we're told applies
only to New York state, withdrew its historical
catalog from the entire United States. It simply
wasn't practicable to market on a state-by-state
basis what is in fact an interstate product.
So for all of those reasons, we do not
think this is a good solution. Having said that, we
are certainly welcome to listen, and if someone can
come up with some ideas -- I haven't heard reaction to the idea
of an EMI-style trust where earlier recordings are
turned over to a third independent party, that isn't
pure public domain but at the same time does not
retain the kind of total control and restricted
access that we're hearing from the industry. Is
there something in that area?
We're certainly open to considering things
like that, but I think it has to be spelled out
-- and it has to accomplish the goals that
we're talking about of true access, not you can peek
but you can't really have it.
MR. CARSON: Sam.
MR. BRYLAWSKI: I think in terms of Society
for American Music and myself, the preference is for
full federalization, but if partial -- if that is
not achievable, I think there are partial solutions.
Eric's one that he proposed, which is basically have
a federal 95-year term, which is essentially what he
said, 95 years from fixation and everything else
remains the same in state law, I would think that
the ARL, that Brandon, even though he has expressed
preference for state laws, would approve of that. I
don't know whether your preference for state laws
likes the term as well.
MR. BUTLER: That's right.
MR. BRYLAWSKI: You didn't speak to your
views on the terms in the state law.
In any case, that is one that I think would
be seriously considered. And to, you know, by the
same token, in terms of the harm to our culture by
piracy, there is a harm to our culture in the lack
of accessibility or the oppressive means in which
accessibility is denied.
By that I mean that the theory that some
day something might be valuable so we don't want to have a public domain until 2067 for anything, you know, John Philip Sousa recordings were brought up this morning as something viable. I'm not aware of a John Philip Sousa recording in print. I remember one in the Columbia Records 100-year box set, but I don't remember any other that I can buy anywhere. That said, there are solutions. The idea of what Steve Marks has just said about a private party that might post early recordings and combine that with what Tim has suggested, I don't know what -- how the EMI trust works or what the model would be, but to have a private party that offers a historical iTunes where companies might actually donate rights to a historical iTunes, and it might be a nonprofit or it might be a profit, it may be if not a subset of iTunes, a competitor of iTunes, whatever it is, where certain recordings that have been inaccessible -- and we know that iTunes, by the way, doesn't take every recording that is offered to them. Member companies have expressed to me, member companies of the RIAA have said we tried to get these whole things on iTunes. Apple wouldn't take them.

So there's a place for things like that. Maybe they are actually sold to the public, and the receipts, if they don't go to the company, they get marked as a tax deductible contribution to the company. What I would like to see is some of the receipts go to support the National Recording Preservation Board, which is not a board but a foundation, a 501(c)(3) foundation, which has had no offers of any contributions by anyone in the industry so far. Maybe one might be indirect like that where historical recordings are sold in some way and some piece of it goes to preservation. That would make me personally very happy. We are not interested in denying profits to companies. We like to see these things sold. But they are not being sold now, and if they could be sold that way, it would be fantastic. I'm reminded throughout the last two days of the movie, "The Loved One," 1960s, which was
advertised as the movie with something to offend everyone. When I heard this morning from the RIAA that they might consider a shorter copyright term in return for a performance right, some members of the HRCAP have come out in support of performing rights. But I don't think that is going to make everyone at this table happy. But it might be considered, some of these quid quo pros, to see certain increased access that doesn't necessarily entail reduced receipts to those with rights to them or a tax deduction to those who contribute rights to recordings that are getting only a minimal return through a historical iTunes or other kind of online distribution system.

MR. CARSON: Actually, our time is up, but I don't want to cut this short. We probably underestimated --

MR. BRYLAWSKI: Well, my finger was sore anyway.

MR. CARSON: So what I want to do with this, I mean we've got, I think -- well, we've got a bunch of proposals on the table, I guess. What I'm going to do is I'm just going to go around the table to each of you and let each of you respond to anything you've heard thus far, and that may be as far as we can go, but that's the fair way I think to try to get people's reactions to what has been put on the table.

So let's start with David.

MR. OXENFORD: Our interest obviously here is very limited. We thought that federalization was not necessary to begin with. We thought that there were plenty of opportunities to respond to the issues, and I think we saw a lot of common ground from sort of our 10,000-foot position here, and I think that the parties should be able to get together and work out some sort of alternative along the lines that Steve and Brandon and Tom and everyone else has suggested. So we don't have any specific reactions beyond that.


MR. HARBESON: We are here to solve a problem. We're not necessarily wedded to our
pre-1972 sound recordings public meeting 06-03-2011 edits.txt

8 proposal. We do think that -- many of the proposals
9 that Steve brought up are ones that we would be
10 interested in looking at. On the surface, they
11 sound good. The question is in the details. And I
12 don't know -- I would be interested to be at the
13 discussions about the details, because that would be
14 where it would start to get contentious.
15 The reason that we like federalization is
16 that we know what we're getting. We know what we're
17 getting both from the good and the bad, and we
18 frankly are willing to accept both.
19 One example of something that we would find
20 troublesome is the iTunes-like proposal. Well,
21 there are two things that are concerning me about
22 that. One is if -- the quality of the recordings on
23 iTunes is not sufficient for many users. Libraries
24 are often able to make much better recordings that
25 are much more tailored to the needs of their
26 patrons. And that might serve a higher level
27 research need than iTunes can.
28 The other thing about iTunes is something
29 like that we would have to be very careful -- we
30 would have to be very careful about the terms of use
31 because, at the present, libraries can't use iTunes
32 recordings.
33 There are recordings like the Los Angeles
34 Philharmonic's Grammy award-winning recording of the
35 Symphonie Fantastique of Gustavo Dudamel is download-
36 only and unavailable to libraries, and that is a
37 big, big problem for us, because of the terms of
38 use. So we would want to be very careful about
39 unintended consequences.
40
41 MR. CARSON: Tim.
42 MR. BROOKS: Yeah, I think there is some
43 very interesting discussion and some suggestions,
44 unlike, unfortunately, some of our sessions, of
45 possible ways forward. I do think the devil is in
46 the details. That is very clear. And a solution of
47 this kind which might look very good to the RIAA
48 people, you know, has to look good to us too. It
49 can't look good to only one party.
50 I would, though, come back to the public
51 domain. The idea and the concept of a public domain
is one of the few things that is extremely clear in
this murky world that we've been living in in the
last day and a half. Everybody understands it. The
librarians understand it, the artists understand it,
you and I understand it. So to not have a public
domain for sound recordings, in the United States
uniquely, to not have one and to have something else
that somehow continues the regime of no public
domain seems to me to be hard to defend, frankly.
And why under any circumstance does anyone
have to ask for permission to reproduce or use or
mashup an 1895 cylinder, you know, made by a black
quartet that was 100-and-some-odd years ago? Just I
think the American public would understand, and even
artists would understand, that kind of extreme that
even something like that can't be in the public
domain is a little hard to defend.

I have to be leery of proposals which
deny the existence of a public domain in the United
States for the foreseeable future. Many of us think
2067 probably won't be 2067, or it may be. So I
would say that that is one issue that we have, but
we're open.

Thank you.
MR. CARSON: Sam, anything else?
MR. BRYLAWSKI: Yes. At the risk of being
a broken record, obviously I agree with what Tim
just said and won't repeat it.
And what Eric stated about the restrictions
on most online services that prohibit institutions
from archiving these recordings and making them
accessible to the students or their constituents is
a very specific problem. It's addressed
specifically in the recording study that was done
for the National Recording Preservation Board.
In theory, I like a model state law, but
I grew up in Washington and watched sausage made
into -- by legislative bodies here all my life, and
to think about 50 or more -- sausage made in 50 or
more legislative bodies, I can't say I'm
particularly optimistic about how that would turn
out, but it would be interesting to see it begin
in any case.
I think everything else I've said this morning. Thanks.

MR. CARSON: Steve.

MR. MARKS: Yeah, just a couple of things.

One is I want to emphasize we weren't putting these on the table as things, ideas, and then walk out of the room and then think that we had done our job in putting them on. We really are interested in a meaningful dialogue on them and do have the same commitment to preserving the treasures that we've been talking about. So I want to make that clear.

A couple of things on the model law. I think the way that we were envisioning it was that we would be going arm and arm to the legislature. So this wouldn't be the kind of thing where, you know, we would go to each state and say we need something, and then try and work it out at each state legislature to say, you know, all of the interested parties have come up with this solution. And if there are other interested parties that we think aren't at the table that need to be, we should think about that.

But the notion that the legislature is going to deny us the ability to move forward with something like that, I mean, I think we are just in a much stronger position doing it together and on that basis, and that's really what we envision.

The issues of public domain, the only thing I would say about that is I would just caution about, you know, trying to reach beyond what we were here to discuss. We could debate the public domain issue a lot, and yet I don't think that it needs to be solved as a way to necessarily address the issues that Congress was concerned about and asked for as part of this study. Because if we can address all of those things in the context of the private or, you know, quasi-governmental dialogue, however this goes forward that we have, we don't need to reach -- you know, there are a whole host of other issues. I
mean you've got public domain. We've been talking
half-jokingly, but everybody knows we're serious,
about the scope of performance rights and sound
recordings. You know, if we throw up the issues
like that, it's going to impede I think our progress
in something that we could accomplish together.

MR. CARSON: Tom.

MR. LIPINSKI: Just two quick points, maybe
to the details in the devil and fair use.

When I say "fair use," I'm talking about
the precedential fair use that has been built up in
court decisions, and the reality is, is that most of
those cases are really commercial use cases, and the
use is still fair in half of those cases. So I mean
that would be something that would need to be on the
table for anyone to talk about crafting a state
model exception.

The other is that I had a second wacky idea
written, but I didn't bring it up until Steve
actually was sort of into that, which was to have
some third-party private person, who is not risk
averse, take the assignment. And you can't really
legislate it, but maybe if we have a second round of
talks, we can invite someone from Google here and
they might want to do Google Music instead of Google
Books, and just take all of these recordings and
just make them all available and come up with some
sort of business model that allows that if you
really want the whole copy, you have to pay for it.
But if you just want to listen to it or just want to
read it, if you are Google Books, there it is. It
seems to be the obvious sort of dinosaur that is
marching through type of materials, and I don't
think that is going to end at Google Books. What is
next?

MR. CARSON: Okay, Brandon.

MR. BUTLER: All right. So just a couple
of things. On the question of a model law, I worry
because we've been sort of down the road of trying
to negotiate specific exceptions before, and, you
know, there are -- you know, we get in a room and
what is the meaning of the exceptions, are they
floors or ceilings, there is all that kind of fun
stuff. So that was sort of the route of the
emphasis on fair use.
So if we want to be very clear about
specific exceptions and a model code being floors
and fair use being there as a catchall that is never
preempted by those floors and so on, maybe we can
get in a room, but that needs to be clear because
we've had guidelines before and those are not
working out.
Tim and Sam both talked about
non-libraries. And I don't want to -- and so, you
know, obviously I represent libraries, but I don't
want to give what I believe is -- I don't want you
to have the impression that I'm advocating for a
solution that only works for my clients.
There will always be uncertainty, and to
act under uncertainty you have to consider the risks
if you are wrong. And so a big part of our proposal
is that statutory damages inflate those risks in
ways that are irrational.
And so especially for Tim and Sam and their
non-library constituents, consider the fact that
statutory damages are there in the offing if you go
federalization, because they are not going to -- no
one is going to let those come off the table, even
though it's a pain to get them because you have to
register. So just consider that.
I mean I think acting under state law, if
you again read Professor Besek's incredible reports,
read Jaszi, which I'm sure you have, and I came away
from those feeling fairly confident that the risk is
actually under state law much more proportional to
the reward that you get from engaging in valid
preservation scholarship, those kinds of activities.
So even without -- you will get a lot of clarity for
the public domain stuff, but everything that is not
in the public domain, you will have that axe hanging
over you. So consider that for the non-library
folks that statutory damages is still in the mix.
MR. CARSON: Before we go to Dwayne, Steve,
Brandon sort of reposed a question I had posed to
you, or implicitly anyway. So apart from figuring
out specific exemptions that might be appropriate to
deal with the needs that various people have brought
to the table in the last day and a half, does your
organization -- do your members have any views on
whether just good old-fashioned, plain vanilla fair
use ought to be something that would be in that
model law?

MR. MARKS: As soon as I speak with them, I
will let you know.

MR. CARSON: Okay. Dwayne.

MR. BUTTLER: I'm not sure what I think at
this point. I generally think that there needs to
be some limit on the time that they are protected,
no matter what choice that we go, whether it's
federalization or state law. You know, we're in an
alternatives-to-federalization conversation, so I've
sort of been framing it that way.

I didn't hear -- I think Chris Weston asked
the question this morning about what the policy
rationale is for continuing to protect things
indefinitely, and I didn't really hear an answer to
that, but I've heard a lot of answers to why we
shouldn't really have them protected forever because
they are going to disappear. And that's an
important thing to remember is they are just not
going to be there at all in any way.

And I think Tim has made the case that in
lots of situations, they are either missing and/or
not economically viable. Pat has talked about the
idea that some of the masters don't even exist other
than in a private kind of environment. So I think
any of those choices have to contemplate all of
those kinds of questions.

I'm a little concerned about the private
relationship questions for a lot of reasons because,
you know, preservation and access aren't
equivalents, and I'm not a preservationist, but I do
know that they like multiple copies in different
geographical locations. And access has some
limitations that Eric pointed out because MP3 is not
in the same sort of detail as lots of other formats,
so we have to consider that factor.

Plus, I have not found a single contract
from the software information industry or anyone
else in the last 30 years or so that has really
favored my interest generally.

And talking about the question of fair use,
you know, invariably they try to preempt the
application of that in all situations, and, you
know, we can't deal with that question as a
meaningful way to disseminate information in the
future.

My preemption question was can we preempt
state law, and I would even go down the track of can
we preempt contract law in some situations simply
because there is no relevant justification for
limiting some kinds of fair uses even by contract
terms. So, you know, that amalgamation question is
sort of embedded in that comment in lots of
different ways. So that is it for me.

MR. CARSON: Okay. Thanks very much. Wish
we had more time for this, but we are already eating
into our final panel time. So let's take like a
two-minute break, and then let everyone on the final
panel come to the table.

(Brief recess.)

MR. CARSON: All right. Shall we get
started?

All right. So, I am going to give everyone
an opportunity to sort of give a closing remark,
and, frankly, given the time frame, if we do that,
we won't have enough time for myself, but I wanted
to pose a couple of questions.

First of all, is there anyone here who is
proposing to federalize protection for pre-'72 sound
recordings for the reason other than the belief that
it will make it easier for libraries and archives
and similar institutions to preserve sound
recordings and greater access?

Another way of putting that is, is that the
only reason we are here? Is our mandate simply to
look at it from that perspective or is it a broader
mandate? Should we be looking at it as a broader
mandate?

Eric, you've got your hand up.

MR. HARBESON: We are interested in having
a public domain. We benefit from that for a number
of reasons, not just that our patrons are very
interested in having a public domain for purposes of
their own.

MR. BROOKS: And we feel the same way. We
also believe, and perhaps this is implicit in your
statement, that the basic purpose here is to make
available to the public, to Americans, their
cultural heritage. That is what it's about. The
libraries and archives and our associations are all
intermediaries in that. But the end user here, I
think that Eric H. referred to a little while ago,
is students and the public, which we feel is being
ill-served by the current regime.

MR. CARSON: Pat, was your hand up?
MR. LOUGHNEY: Eric first, then I.
MR. SCHWARTZ: I think I read yesterday the
language that Congress had presented in terms of the
study, then the purpose and the goal. I think the
purpose and the goal was a purpose -- for the
purpose of preservation and access of the pre-'72
materials, not to revisit -- which has been a common
theme, you know, beating a dead horse -- to do lots
of other things in copyright law and policy.

Look, some of the other comments weren't
directed at all to pre-'72 sound recordings or sound
recordings at all but at issues that others are
concerned with about copyright law generally, and I
don't think those are at all relevant.

MR. CARSON: So, Eric, do you see no
connection between copyright term and access?
MR. SCHWARTZ: For practical reasons, not
so much. I mean, yes, we have already discussed,
and I don't want to revisit, the pre-'25, pre-'23
issues.

I just think that, frankly, if we are
trying to get practical and real solutions that that
sidetracks us into areas of revisiting term
extension and other things, and I just don't think
that that gets us in a helpful place.

MR. WESTON: Can I just make a slight
factual point? The study says --

MR. CARSON: Not the study, the language of
the bill.

MR. WESTON: No, the study we wrote
already, but that's a secret.

MR. CARSON: Even from me.

MR. WESTON: The study is to cover -- and
this is what I would like to emphasize -- the effect
of federal coverage on the preservation of such
sound recordings. So it's not a general study about
how to better preserve and provide access to these
things. Obviously, that's part of it. It is the
effect of federal coverage, and when you get into
the effect of federal coverage, you have no choice
but to examine things such as takings, such as term
length, such as 114. So, trust me, we would have
loved this to be easier, but I'm afraid that our
mandate didn't allow that.

MR. CARSON: Well, just to be clear, Chris
is not speaking for the Office there. We have not
figured out what our mandate is. The reason for my
question is to try to get some help on that. Chris
has given one possible way of looking at it, though.

Pat.

MR. LOUGHNEY: In terms of the big picture,
my feeling is that we are here to address a historic
problem that has evolved over the past century,
which is that the production of America's recorded
sound popular culture has been clearly in the hands
of private citizens and the private sector, but that
the responsibility for sustaining that material,
 preserving it at a high level of preservation and
making it available to future generations has slowly
migrated to the responsibility of the public sector,
largely the Library of Congress, university-based
archives, museum-based archives and other
institutions of various kinds spread across the
country.

The costs related to the storage of the
preservation are enormous and growing. The
responsibilities are mandated at federal law for the
library, state law, and institutional mandates that
have evolved over that long period of time, and are
legitimate and I think without question. But that
has created an enormous imbalance in terms of
responsibility. And also in terms of what does the
public get out of that process for its investing
through taxpayers' dollars into the sustaining of storage and preservation in terms of access. And to me, that has boiled down into I think the notion that by bringing these pre-'72 sound recordings under federal law it will be the most efficient, most effective and the most harmonizing way to solve this problem in a single stroke.

MR. CARSON: Tom.

MR. LIPINSKI: Well, I mean if you are going to look at the statutory language and you talk about preservation, there are lots of ways that it can be preserved. It doesn't have to be libraries and archives. I mean there are even private individuals that could be considered preservation. And not to get into what your mandate is, what you are trying to figure out, but your call talks about the policy and legal and factual questions regarding federalization. So when I look at this, I see this as an opportunity to correct, which always appeared to me to be a very strange anomaly in the copyright law, that you have got post-'72 sound recordings protected and federalized, and pre-'72 not. And it would seem that one of the reasons why, even though I proposed a state model law, I still would prefer federalization if I had my choice because I think it's more consistent with the constitutional contents of copyright and how we look at creative works.

MR. CARSON: Brandon.

MR. BUTLER: Yes, so on the idea of the scope of the project here, I just want to defend my preferred answer that it is within your scope to do this. Because federalization, your -- your mandate is to cover the effect of federal coverage on the preservation of such sound recordings and so on, and one effect would be to change the penalties and the benefits from the -- the ones that exist at the state level to the ones that exist at the federal level.

So I mean it would be well within your mandate to talk about those to say more, although it may seem to you, as you've already said a lot, to
say more about the state level. Even though this is about the prospect of federal level protection, I think you could describe state level protection better, especially fair use.

MR. CARSON: Anyone else on that? Okay.

Now, many of the people around the table are here specifically because they represent institutions which are involved in preservation and making things accessible. And many of them have told us that they would like to see this brought into the federal statute because they then get the protections under the federal law.

On the other hand, I've heard some dissatisfaction with the scope of what federal law does for you, and for some of you, I think I may have heard, You know what, we are willing to accept that because we still think it is better.

But I guess the other thing I'm trying to figure out is, to what degree are people asking us not only to consider a recommendation that pre-'72 sound recordings be brought within the scope of federal copyright law, but to go beyond that and suggest, Oh, by the way, you need to amp up some of the exemptions that institutions like libraries, archives and others have.

Is that part of what we're supposed to be doing, and should we be trying to beef up some of what is already federal law in terms of our recommendations, or is this just really about pouring this stuff into federal law and leaving all that other stuff for another day?

Sam.

MR. BRYLAWSKI: Well, you asked for it. I mean Eric talked about revisiting and going over old laws. We have intentionally kept 108 concerns off the table. So I mean I'm not going to bring them up again. Pat brought them up once, the idea particularly for a sound recording that legally under federal law you cannot preserve an item until it's actually deteriorating. And with a sound recording, deterioration is audible; therefore, until it has a scratch, a skip or a squeak, you can't preserve it is -- this invites disobedience of
the law. And this is a problem I think throughout all these things. But I know you don't want to get into 108 because you already have a study and, you know, whatever. I say "whatever" in that I wish I saw some effect of the study. I'm sure you do as well. You know, but this is a concern.

But when these things aren't addressed, you actually are inviting not -- you don't intend to -- people to ignore the law. And to go back, this is what not having a public domain does. When Brandon said to me with state laws you have very -- you don't have the statutory damages you do under federal law, well, my first reaction is that my constituents don't break the law. I mean this isn't a concern, particularly if there were federalization and there was a public domain.

However, without a public domain, the law will be broken. You know, we are -- and I say "we" and I mean the Society for American Music is, they are educators, they are graduate students, they are scholars, and they are lovers of American music, both amateur and professional historians. You know who the members of ARSC and the Music Library Association are together, and we don't agree on all these issues as you heard, and this goes for ARL too, we are some of the largest consumers of sound recordings as a group in terms of annual expenditures, let's say annual expenditures of people over 40 that you are going to find.

But the industry risks losing us with an overreach to not have a public domain, the things in which we sort of feel we should be sympathetic for, rights for artists, rights for companies who are investing, you just sort of say, Well, the playing field is not level, who really cares anymore. It doesn't mean people are going to go out and start running BitTorrent businesses, but it's sort of just a lack of care. I think there's a real danger in that. I'm seeing that.

But to go back to your original questions, yes, 108 is a very great concern to preservation. It makes lawbreakers of all of us. The preservation study says that. It's a fact. You can't preserve
things if you want to preserve them in the best quality they have legally under 108.

MR. CARSON: Eric.

MR. HARBESON: We actually are not -- with the sole exception of our proposal to amend 108(h), which was really, as I mentioned, kind of a threading the needle kind of proposal, we are really not asking for anything other than straight federalization because, for all the same reasons that Sam mentioned, we rarely use 108. Music libraries -- I mean 108(i) keeps all but public domain -- public domain music works out of 108(d) and (e). 108(b) and (c) are not especially useful for a variety of reasons. Sometimes we can use it, but most of the time we are relying on 107, and if we have federalization, we will have 107. If you want to fix 108, we would welcome it, but I know that's not what you are trying to do.

MR. CARSON: We want to, but are we going to do it in this process?

Brandon.

MR. BUTLER: That's exactly right. So I would say that is kind of the heart of our position is if we're going to do federalization, half a loaf is worse than no loaf at all. If we want -- I mean we could have written very different comments that would have said, We endorse federalization conditional on XYZ. And we didn't think that that was going to be very productive, because the XYZ would have been completely contentious. And those are --

MR. CARSON: Unlike everything else that we've been talking about.

MR. BUTLER: Right, even more so. And the XYZs are demonstrably contentious because they're in 108, and that was contentious, and the report didn't work out the way anybody wanted it to and so on. So that's the heart of our point is -- and if you get federalization without those changes to 108, my experience, again talking 65 to librarians for an hour apiece all summer last summer anonymously for a study we put out, is federal law is not providing certainty. It may provide a lot of
things, but it's not providing certainty. And we
could improve it to help it provide certainty, but I
don't think that's going to happen. That is why I
think fair use at the state level is the better
option.

MR. CARSON: Tom, and then we will go to
Eric.

MR. LIPINSKI: Well, I think that, you
know, look at all these processes, these
opportunities, so that if you are talking about
federalization, and I made all my comments these
last two days and everything I thought about this
proposal is with a full -- potentially the full
array of 106 rights going with the owners of these
works, so that you would be talking about
performance rights now.

So to give an example of problems that if
you are not going to look at some other provisions,
you are okay, to use Brandon's analogy, we will get
a half a loaf that is going to be moldy. Because,
okay, look at 110.1, I'm a teacher in a classroom
and I can play an entire musical work because I have
full performance rights in there to play the
underlying musical work. Now sound recordings are
brought under protection, I'm still going to have
that right.

But then go to Section 110.2, and you've
got the digital issues because they are now
protected. So you are going to have these alignment
problems that you want to make sure, because now if
sound recordings are protected under performance
rights in a teaching environment, and they don't
always teach, but to show you sort of the anomalies
that happen when you sort of create or propose a law
and you don't sort of take a look at these other
details, you are going to have a situation where now
that sound recording is limited to reasonable
limited portions, which doesn't really make any
sense if I'm a music teacher and I need to play the
entire piece to demonstrate something to my class.

So I would say that if you are going to do
something like this at all, try and do it as
perfectly as possible, if that's at all possible.
MR. CARSON: We do everything perfectly, right?

Eric.

MR. SCHWARTZ: I was just going to say, look, I don't suggest that public domain doesn't play a place, but -- or have a place. What I'm saying is I think we were brought here for two goals. One, you have to do a study, but more importantly, there's a legitimate problem that needs to be addressed.

We can have, with all due respect to the Office -- and I really thank them for bringing us all together because I think that is frankly the most helpful thing that has happened, the study, your report and all of that will be extremely valuable pulling this all together.

But the fact that you bring the parties together to try to address the legitimate problem of preservation and access of pre-'72 materials is, for me, the reason to be here is the goal. If we want to get into contentious areas, we can all talk about what model federal copyright laws should look like, and with or without public performance rights and everything else, and it would be fun and interesting, but it doesn't get us to any solution in the short term, the near term, or the long term for solving the problem of how to better preserve and how to make more accessible the materials that are housed in these archives.

I did yesterday in my opening remarks make reference, for good reason, to collectors and others who have also retained materials and public libraries and archives and not-for-profits as well. It seems, though, that in any grand legislative change, you are going to have litigation. And the two nuts in federalization that you just can't overcome, with all due respect to Elizabeth -- and I'm pointing in her direction; she is now I think on a plane -- one is chain of title and initial authorship/ownership. I don't think incorporating the notions of state laws -- some of these state laws didn't exist until the '60s, so you are going to sort of retroactively apply all of
these other issues of subsequent ownership and
authorship and transfers.
You know, the constitutional takings
questions, I mean in that discussion there was the
discussion of Golan. Golan to me is the perfect
eexample, because those of us in the Copyright Office
then who tried to put our heads together with others
in the government to come up with a solution find
that 17 years after that legislative reform, it's
still in the courts and still being litigated. And
any time you are going to make massive federal
change, you are just not going to overcome the chain
of title issue, the constitutional takings issue.
You are going to have litigation.
If we want to solve the problem, what was
the most heartening of anything that's happened in
the last day and a half was listening to the last
panel and listening to the way in which we talk
about the solutions, and there is no one solution.
The answer is yes to all, except federalization, in
terms of the model law and incorporating in real and
practical terms that the preservation copying that
is necessary, the certainty that archives and
libraries and others need to hear about transferring
to stable medium and all the things that need to be
done can be done.
And so the counsels in these institutions
don't scratch their head and say, Well, I don't know
what -- you know, even what it says. You know, the
issue, and Steve raised it, is, do you have sort of
a 107-like language in which it's more open-ended or
do you prefer it where it's more specific? But in
any way you make clear that the preservation
copying, which is first and foremost here, can and
should be done, and should be done immediately.
And then, secondly, are the access issues,
and there is no question, given what I will call the
somewhat low point of these deliberations, is the
difference of opinion on what access means, and here
you have the questions of there too. Do you have
the specific examples or do you leave it open-ended
and have the agreement to disagree?
I think there are other things that can be
done in the immediate. At the conference June Besek and Jane Ginsberg had last year at Columbia, I turned to a room of about 100 law students and said, What we need -- what the archives and libraries need is a core of law students to go out there and help the libraries and archives. Because the biggest obstacle to some of these issues is frankly that the counsels in the institutions are not copyright experts, don't have time to be copyright experts, and as I said yesterday, they are going to say no because that's the easy answer. And to the extent you can break off specific collections and specific areas where you want to just get material available and have them do due diligence and come back to the counsel, you know, witness Elizabeth's class and the sorts of ways in which students can do some good thinking on issues, you can help to make those materials available immediately. You know, you don't need state law, you don't need federal law. You just do the type of risk assessment that rights-holders have to do all the time when they make their material available. And by the way, they are a much bigger litigation target than anyone else. I think you want to keep these discussions going in some sort of task force, or whatever, that goes both before and beyond the study, because we've all done, and I did them here, the studies that, you know, as much hard work goes into them, is sort of the end of the process and, unfortunately, not the beginning. I think that some of the other notions on orphan works that have been discussed, you have to continue to think about ways to do that, and Steve said maybe you just incorporate some of those things into the model laws. I think the -- you look to some of the private parties to try to get materials available more quickly, more rapidly, and the ideas that were discussed. But I don't think there's a single solution, and I think that if we sit around and try instead in the first five minutes of this panel to say, Well, let's pull back -- and I'm not saying
that is what you are doing -- but let's look at what
108 should look like in a perfect world. No. Let's
go to the model law and let's jump to the thing that
we can immediately, whether we start in New York
state or California or Indiana or wherever we do it,
Kentucky, wherever you do it, you start immediately
and you have some immediate results both on
preservation and on access so that you can see that
we are fixing the problem.

That's what I think the purpose of -- I
mean notwithstanding what Chairman Obi thought in
the incorporation of the language into the
appropriations bill to start this study, that I
think is the reason that those who asked for this
study wanted this study, not to perfect the law but
to address the problem of preservation and access,
which is something everyone in the room has agreed
is the goal and something we want to do, and I would
hope that that's what we would focus on.

MR. CARSON: Sounds like a good closing
statement. We've got ten minutes which the ten or
so of you have time to give us your final thoughts.
I won't hold you to one minute. I'm just telling
each of you that to the extent you go over that,
we're going to go over and you are holding everyone
hostage. So tell us what you think you need to tell
us just in wrapping up.

Jay, we will start with you and go around
the room.

MR. ROSENTHAL: Thanks. First of all,
thank you for allowing me here, even though my
constituency is a little bit different than
everybody else's.

One of the reasons I'm here obviously is
just to make the point that behind every sound
recording is a musical composition and publishers or
songwriters acting as publishers, and that what
happens here does impact them. And that we just
want to make sure that the broad sweep of this
proposal, whether it's a study or whatever the heck
it is, really doesn't impact them with unintended
consequences both in a business and legal level.
That's point number 1.
The second point is we've been fighting over things bigger than just publishing and sound recordings and all that, and there are people from other sides of this issue. I certainly don't want, you know, to in any way to demonize the libraries and those in favor of preservation as being, let's say, anti-artist or anti-creator. We both have our constituencies. You are very much concerned, as I am, in preservation. My interest is making sure that the songwriter writes the next song, and that means incentive, that means innovation, that means the validity of copyright and how that plays out in all of its ways.

I have to say I hope we don't go down the road, if we're talking about third parties, of using Google -- YouTube, Google, I don't know. We are in litigation. I don't want to say any more. But effectively the issue of technology does play here, and I wonder if at one point or another we should have people here who are all under 30 to kind of give us a sense of what is up there. Technically, for all you know, every single sound recording you want to preserve could be up there already in one way or another. So your view of this might change a bit if you are recognizing that it's already out there, besides the point of the value of it all. Yes, there is a value issue. But we have to understand technology as to how it's rolling down the road here, and that is something that I haven't heard much about and how that fits into this federalization.

I also want to say as a last point, you keep coming back to fair use. And is this what we are talking about here? On a certain level, I think it is. There isn't one music publisher I know who is against preservation, who is against the role of the libraries and what they want to do, and archivists, and that we really maybe should look at this in that context. What they are afraid of is what fair use could turn into. Certainly when there are policy issues out there and policy recommendations about
expanding fair use to include peer-to-peer mashups, digital samples, yeah, that's a different fair use. And that's something that maybe federalization would make all creators and all those who own content cringe a little bit if you phrase this. But I do understand your point and I do agree that, yeah, we are trying to have something here that gives them comfort, that they're not going to get sued for what they have to do, and that I am all in favor of in one way or another, however the heck we do it. Thank you.

MR. OXENFORD: I think I will save you 30 seconds. I gave essentially my summary in the end of the last session. Given the surprising unanimity of feelings at the last session yesterday, I don't think I have anything more that I need to say at this point. MR. CARSON: Thank you, David. Eric. MR. HARBESON: I also think I said pretty much everything I was going to say in previous panels. We feel that federalization makes a great deal of sense because we cannot find a single reason why it makes sense from a policy point of view to have a special law for this very specific class of works when any other class of work is subject to federal law and has a public domain and statutory fair use. So we think that this makes a great deal of sense. How we do it -- we are wanting to solve the problem. So how we do it is up in the air. We think that federalization makes sense, but we're happy to listen to other proposals and take part.

MR. BROOKS: Yes, I'm certainly as a historian, if nothing else, extremely pleased to see this kind of dialogue on this issue. I do not think, unless I'm missing something, that from the point of view of copyright law that the preservation and access to our national heritage of sound recordings has ever been addressed quite this way before. It certainly wasn't in 1998 or 1976 or any of the previous legislative junctures. So simply by having this study and by
putting it on paper and by seriously discussing it, I think the Copyright Office has done a great service here, and the Congress has done a great service by mandating it. Our positions have been laid out pretty clearly. We think that federalization, as that term has come to be known, of some sort and certainly a public domain is something that we need in this country.

I just want to say to your last question of does this go beyond a simple federalization, you have to look at other parts of copyright law. We tried to keep our proposals as clean as possible, difficult, but as clean as possible of other issues, for that reason because there were many other contentious issues and we didn't want this to be a forum for that. Having said that, just listening to the discussion here, there seemed to be some other parts of copyright law regarding recordings which are uniquely changed in their character once pre-'72 recordings, were they to be brought in. So, for example, I think the term question, some would like a 50-year term or something like that, that's not particularly relevant to bringing pre-'72 -- maybe desirable, but we would not complicate this by addressing that. However, Section 108 preservation was fashioned and debated in an era when it was to apply to post-'72 recordings. The more valuable, certainly, recordings of the recording industry, those that produce the most revenue for them, and 108 was looked at through that prism. Now, we're looking at preservation exceptions in terms of a very different set of recordings, going back to, you know, the last century, or the century before the last century actually where that is not the case. This is preservation of a different kind. And it's incremental as you go back. So looking at 108 or raising a flag about 108 and that kind of thing, maybe that does make sense in terms of what we are accomplishing here
because that uniquely impacts preservation of these
most in need of preservation materials. So
basically, yes, I would say to that selectively and
carefully looking at some other aspects of copyright
law probably would make sense.

In terms of the overall, though, I would
urge and hope that whatever report comes out of this
does come out from a point of view of what experts
in this field think should be our regime in the
United States, not to have a kind of a
pre-Congressional political horse-trading kind of
debate here. This isn't the Congress. They will
and should look to us around this table on both
sides as the people who are most knowledgeable about
this issue that I can guarantee they are not
knowledgeable about to make the recommendations,
then politically they'll decide.

MR. BRYLAWSKI: I'm grateful for what you
are doing too. I don't envy you at all.
I learned a lot here. There is some
answers I wish I had gotten, but it's been very
illuminating. The Society for American Music and
its members do believe in federalization. We think
this is a matter of really leveling the playing
field. And if you don't level the playing field,
you don't solve any of the problems that have come
up. You probably make matters worse, and I believe
you encourage cheating in the game, which I don't
like to see. Thanks for all this.

MR. CARSON: Pat.

MR. LOUGHNEY: Well, I, too, want to add my
thanks to the Copyright Office staff for this labor
of producing this study, and also I think for
creating an atmosphere that brought all the players
into this room.

I completely agree with Eric Schwartz that
it has created opportunities for introductions and
to open up opportunities for further dialogue that
will go beyond today, which I think will be really,
really essential to solving a lot or maybe all of
the problems that are in this room. So I look
forward to carrying that forward.

I would conclude by saying that the Library
is in the position of having a Congressional mandate
of its own to produce a national plan leading to the
coordination, a national level coordination of
preservation of America's recorded sound culture.
It's a very big mandate. It's something that I look
forward as a generational effort. Looking back to
what began with film preservation in the 1980s and
how long it's taken over the last 30 years to
accomplish what has been achieved there, it is truly
going to take several decades. But today is the
time to lay that foundation.

It is going to require the collaboration of
rights-holders, of archives holding materials across
the United States regardless of their size or
regardless of their institutional profile, and it is
going to take a greater understanding of what is the
legitimate use of these recordings on the parts of
the public. And they are woefully ignorant,
unfortunately.

And I think the national plan is going to
rely on its effectiveness for having a more common
understanding of what copyright law is and how it
applies to sound recordings. And for that reason, I
argue for doing it through the federal approach,
bringing pre-'72 sound recordings under federal law,
because I think it creates an atmosphere of creating
that national level playing field, as Sam referred
to.

I think to do otherwise creates an
atmosphere where we begin to abandon America's
historic approach to copyright law, moving toward
perpetual copyright law and moving toward to carving
out exemptions for various interest groups, whoever
they might be going forward. And I think that's a
very dangerous precedent.

I think the law was devised for a very
rational reason at the time. It was enshrined in
the very first section of the Constitution for
important purposes because the founders understood
its importance to them as creators, and I think we
risk a great deal on the downside if we begin to
continue drifting away from that and looking at
solving this problem on the state law. I just don't
Pre-1972 Sound Recordings Public Meeting  06-03-2011 edits.txt

think it would be conducive to the Library of Congress's mandate from Congress to create and coordinate and implement a national plan for preservation. Thank you.

MR. CARSON: Anything to add, Eric?

MR. SCHWARTZ: No, I gave my summary. I just want to thank my colleagues around the table in addition to the Copyright Office. I think it's just been a very valuable conversation, a lot of information, and, you know, I hope the beginning of the dialogue and not the end.

MR. CARSON: Tom.

MR. LIPINSKI: I will just say, yes, I'm out of the closet, I'm a federalist, and so I do believe that's the fair way to go. I do believe in copyright.

And I'm still not convinced, though -- though I know a lot of people tried to convince us -- but why the pre-'72 sound recordings ought to stick out, and I guess my main theme of the consistency under the Constitution and to treat all this body of creative work the same. And even though I'm not in the music industry, it still seems that copyright industries from different contents issues in the '76 Act seem to be thriving.

So I'm -- I have confidence that ditch markets can still thrive and develop if the pre-'72 recordings were federalized, and if some of them ended up going public domain sooner than 2067.

MR. BUTLER: So I want to say, as only a lawyer could say, that what this problem doesn't need is more lawyers.

MR. CARSON: Probably just law students.

MR. BUTLER: We will take law students. I think law students could handle it. So I just want to end by emphasizing the -- that Eric mentioned that introducing a model state law would be the way to go forward, so for right now we could really get started like tomorrow. But, in fact, in doing the kind of scholarship that I've asked for would be even faster; that is, if there is solid opinion among the library world that fair use is available
at a state level, we don't need a model law, and it's a constitutional issue and state legislatures could frankly pass a bad model law, and we would still beat them. Right? We would say, Sorry, you can't infringe on fair use.

So what we need is lawyers and that is what you guys have, and it would be really a wonderful public service towards solving this problem, if we could have a really comprehensive legal opinion about state law. Thank you.

MR. CARSON: Before we go to Dwayne, something I meant to ask in the last session: You mentioned you had a law student go through all 50 state laws and do an Excel spreadsheet. I'm not sure how much you're willing to share with us of the results, but given that as far as I know, there is only one state court case, and that's in a trial court, that has found that fair use applies to common law copyright, did you find anything more that you could share with us -- and I'm not saying orally right now, but you could share with us -- in that research that might shed more light on the subject of the extent to which states recognize either fair use or other exceptions that would do a lot of what people here want to have done?

MR. BUTLER: In terms of case law, we didn't find a lot more, and I'm not hopeful that there is a lot more. But in terms of statutory law, we found that the trends that are outlined in the two Besek reports and the Jaszi report, bear out across all 50 states; that is, there are only a handful of different kinds of record piracy type laws, there are only two or three, and in my quick count, the vast majority, like 40 out of 50, couldn't possibly apply to libraries. You could not sue a library for record piracy under a state statute.

And the other ten, they're weird. You know, who knows. That's why I'm looking to you guys to sort out the weirdness. And, again, this is something we did in a couple of days. But there are all kinds of -- there are all kinds of diligence -- and this is another thing I
wanted to say -- there are all kinds of things of
different diligence in working in the world of
copyright. There will never not be diligence and
there will never not be risks, but a 50-state survey
is like the most standard of kind of diligence you
can do.

And it always seems strange to me that --
the idea that there are 50 different states is so
paralyzing to libraries, because I worked at a law
firm one summer and we figured out all 50 state laws
about fax spam, you know, it can be done.

MR. CARSON: Well, seriously, if you can
share with us any of what your law clerk came up
with, that might help us in understanding the
terrain of the state level, which is obviously a key
part of this whole picture.

MR. BUTLER: Absolutely.

MR. CARSON: Great. Thank you.

MR. BUTTLER: I also want to add my thanks
to the Copyright Office. This has just been a
fascinating conversation in many different ways.
I'm a bit of a copyright junky as some of you may
know. And this kind of conversation is incredibly
important.

I'm interested mostly in the piece -- you
know, it may be a sad commentary, but I don't
represent anybody per se. Oftentimes I feel like
saying when I click on the microphone what Patrick
said, because he does such a good job of
articulating the big issues.

So I'm going to look at sort of the
fundamental principle that is in my mind is the idea
that I see the issues with state law, I see the
issues of federal law, but I'm still a believer in
that federal information policy that's predicated on
the 1976 Act. So in some sense, I think that we
need some understanding in some federal realm
because I do think it's anomalous in some ways to
have them treated differently.

I think the public domain is incredibly
important in all senses of the word, and that I
think that we need to think about in any way to
embed that in some concept of sound recordings.
But I think the way I started yesterday was by echoing something that Tim Brooks had said, this is about real people. And what I have to do a lot is I have to talk to real people in libraries and educators that deal with copyright. So in any kind of formulation, I think it's incredibly important to recognize that legal sophistication and resources are not readily accessible, and it's not always universally counsel saying no. Sometimes there is nobody to ask.

And, you know, one of the realities is that the law has to apply in some uniform, legitimate way, and Sam has brought this up several times, that the law of copyright has been -- its credibility is eroding pretty rapidly just because of the overreaching and the lack of understanding what it means. We can sit around this room for days and not agree on anything about one provision.

So in that sense, I would just urge you to think about who has to apply this law in lots of situations and how they can understand it.

MR. CARSON: I want to reiterate and reinforce what I said at the end of the day yesterday. We've got a deadline at the end of this year, and that sounds like a long way off, but it's not at all a long way off. We're taking the end of this roundtable as the starting gun, and we are off and running. We're meeting this afternoon to start drawing some tentative conclusions. No conclusion is a final conclusion until the report is final, and every conclusion is very tentative until we write it up and read it and see if it makes any sense, and oftentimes I have found you think you know the answer, and then you write it up and see if it holds together and it doesn't. So who knows?

But we don't have a lot of time to get more input from you. We want more input from you, whether it's individual, jointly, to the extent you guys can get together or any subset of you guys can get together and come up with what you think are solutions that work for everyone, that's really great. But come to us in October, and we're going to say, That is really nice, we're proofreading it.
So you don't have a lot of time and we don't have a lot of time. We want more communication with you. We want more ideas. We want to hear consensus if we can. But we're moving forward and we're moving forward full speed ahead because we've really got to start now and got to start making at least tentative decisions right now or in the next handful of weeks in order to get this thing done and to get Congress a full and credible report.

MR. SCHWARTZ: Could you share the contact information of the participants? That would probably --

MR. CARSON: Anybody have any problem with that?

All right. Chris will make sure that everyone who came here gets everyone else's contact information.

MR. BROOKS: Are you the contact person?

MR. CARSON: Chris Weston is the first person to be your first point of contact, yeah. Chris, when he shares it, you will have his e-mail address right there. And Chris will give you his phone number so if you want to give him a call, that is fine too.

And, seriously, we are -- we will be pleased to meet with you. We will be disappointed if some of you don't come and meet with us, because we know, as has been expressed to us by some people, that sometimes you can tell us things in private that you can't tell us when there is a reporter sitting over there taking down every word, and the people who on the other side of an issue can hear everything you say.

So, however it happens, we would love to hear more from you. But, again, please make it sooner and not later. Thank you.

(Whereupon, the proceedings were concluded at 1:25 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 17th day of June 2011.

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

My commission expires:

November 14, 2013