

00339

1 LIBRARY OF CONGRESS
2 U.S. COPYRIGHT OFFICE
3
4 PRE-1972 SOUND RECORDINGS PUBLIC MEETING
5
6 WASHINGTON, D.C.
7 FRIDAY, JUNE 3, 2011
8
9 VOLUME II (Pgs. 339 - 558)

10
11 The following pages constitute a transcript of
12 the above-captioned meeting, held at the Library of
13 Congress, 101 Independence Avenue, Washington, D.C.,
14 before Leslie A. Todd, RPR/CSR, a Notary Public of the
15 District of Columbia, of Capital Reporting Company,
16 beginning at 9:08 a.m.

17

18

19

20

21

22

♀00340

1 A P P E A R A N C E S
2 PARTICIPANTS IN MEETING:
3 TANYA SANDROS
4 KAREN TEMPLE CLAGGETT
5 MARIA PALLANTE
6 DAVID CARSON
7 CHRIS WESTON
8 JUNE BESEK
9 STEPHEN RUWE
10 ELIZABETH TOWNSEND GARD
11 PATRICK LOUGHNEY
12 PEGGY BULGER
13 DAVID OXENFORD
14 GIL ARANOW
15 ERIC SCHWARTZ
16 SUSAN CHERTKOF
17 RICHARD BENGLOFF
18 SAM BRYLAWSKI
19 TIM BROOKS
20 CHARLES SANDERS
21 TOMAS LIPINSKI

22 ERIC HARBESON

♀00341

1 A P P E A R A N C E S (Continued)

2 PARTICIPANTS IN MEETING:

3 JAY ROSENTHAL

4 DWAYNE BUTTLER

5 BRANDON BUTLER

6 ADAM HOLOFCENER

7 IVAN HOFFMAN

8 JENNIFER PARISER

9 MICHAEL DE SANCTIS

10 STEVE MARKS

11

12

13

14

15

16

17

18

19

20

21

22

♀00342

1 P R O C E E D I N G S

2 MS. BESEK: Good morning. I'm June Besek,

3 and I think everybody on this first panel was here

4 yesterday so we don't need any of the longer

5 introductions. But I would like to go around and

6 give you all a chance to kind of state your general

7 thoughts about the issue of our first session today,

8 which is term protection.

9 So the question I would put to you, just to

10 address kind of in general terms as we go around the

11 first time, is if pre-1972 sound recordings were

12 brought under federal copyright law, what would be a

13 fair and appropriate term of protection, taking into

14 account the desirability of keeping federal law

15 reasonably consistent. Because that is one of the

16 objects that people have discussed, the problem with

17 the inconsistency with state law, on the one hand,

18 and then the concerns about unsettling business

19 expectations on the other.

20 So with that in mind, I would like to know

21 what you all would think would be a reasonable term
22 of protection for pre-1972 sound recordings.

♀00343

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

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

4 MS. GARD: Okay. So my background is
5 copyright duration. My research is in 303(a) and
6 104, so I'm very excited to meet Eric. Insanely
7 excited. I have all these like thousand questions,
8 and he's like a movie star.

9 Okay.

10 MR. SCHWARTZ: Where did this come from?

11 MS. GARD: So what I did --

12 MS. BESEK: Do you sign autographs?

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

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

20 So where I'm coming from is looking at this
21 in the context of our traditional contours of
22 copyright law, which we also studied quite a bit,

♀00344

1 and also what the rest of the world has done on
2 sound recordings.

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

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

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

18 And 304, which is works published before
19 1978. Now with this one, this is where all these

20 1923, 95 years for protection, that is where
21 everybody is getting that. Those are works
22 published before 1978. Sound recordings are not
♀00345

1 published. That was the way it worked, that it
2 didn't qualify for publication, it didn't qualify
3 for registration, even though in layman's terms it
4 was published, it wasn't legally published. That is
5 because they didn't want sound recordings published.
6 They didn't see how they could do that.

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

15 MS. GARD: That sounds great.

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

19 MS. GARD: That sounds great. Happy to.
20 Sure.

21 MS. BESEK: I guess at that point, can I
22 ask anybody else if they want to just give a general

♀00346

1 view of what they think the terms should be?

2 Tim.

3 MR. BROOKS: Well, the general view of ARSC
4 in this, and we're on record about this, is that --
5 and our members feel strongly about this -- that the
6 statutory terms under federal law are too long, they
7 are out of line with the rest of the world, and
8 should be modified in some way. Not necessarily
9 equal to Europe or something like that but modified.

10 Having said that, however, we realize that
11 it's a very contentious issue. Obviously, our
12 friends on the rights-holders' side, I'm sure,
13 disagree strongly with that, and we don't think that
14 it's an issue that needs to complicate what we're
15 talking about today, which is pre-'72.

16 So, certainly for the purposes of this
17 hearing and this investigation, we support it being
18 as closely aligned as it can be to the existing

19 terms, but applied to recordings made before 1972.
20 So in shorthand, a 95-year term or 120 if not
21 published, those sorts of terms applied to pre-'72
22 recordings with a 1923 cutout would be something

¶00347

1 that we could support. I can go into more detail on
2 that, but that's the basic position.

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

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

18 Moreover, 1923, by happenstance,
19 happens to align quite closely, not identically, but
20 quite closely with the acoustical recording period,
21 which ended essentially in 1925. So establishing a
22 1923 cutoff de facto would create a public domain

¶00348

1 of -- solely of acoustical recordings, which have
2 demonstrably almost nil economic value. They're the
3 silent movies, as I've said, of the sound recording
4 field, so it could serve other purposes as well.

5 MS. BESEK: Okay. Pat.

6 MR. LOUGHNEY: Speaking for the Library, in
7 our comments we proposed a 50-year term of
8 protection for pre-'72 sound recordings. But I must
9 confess that that was more to simply put on record
10 in a strong way a sense that there should be a
11 limited term of protection for these materials. The
12 experience of the Library is that we have many tens
13 of thousands of recordings that are out of print for
14 which the Library has the only known copy or for
15 which there are very limited numbers of copies
16 dispersed in other recording archives throughout the
17 United States, and the difficulties that are related

18 to those in simply making them available to the
19 research community that wants to have access, that
20 is beyond just being able to make a listing
21 appointment to hear it one time only. We really
22 feel that there has to be more public access.

♀00349

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

13 MS. BESEK: Okay. Thank you.

14 Eric.

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

21 MS. BESEK: That was your rock star
22 platform.

♀00350

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

4 A couple of things. First, let me come
5 back to something I began with yesterday. The goal
6 here is to preserve and make accessible materials,
7 and I think a lot of what happened yesterday, very
8 good discussions, enjoyable discussions, and, you
9 know, I'm most of the time observing. But off the
10 topic I believe on some things -- I realize you have
11 to do the study and we are going to probe for an
12 hour and 15 minutes the term. Lest I need to repeat
13 it, the RIAA -- and Rich isn't here -- A2IM opposes
14 federalization, so we're talking about theoretical
15 because they oppose federalization. The only
16 pinpoint I would make there is that publication, as

17 Elizabeth said, has no bearing. So any term for
18 older materials has to be based on fixation, not
19 on -- it's tough enough with other works determining
20 the date of publication, much less the definition of
21 publication.

22 Leaving that aside, where I think we get a
♀00351

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

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

22 And we will come to it in the alternatives,
♀00352

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

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

12 Sony just granted a license to the Library
13 of Congress. I understand Tim's point about
14 streaming is not all the access that archives want.
15 That said, and factually correct me if I'm wrong, if

16 Victor and Columbia controlled maybe 70 percent of
17 the commercial distribution in the pre-'25 acoustic
18 era, then 70 percent of the commercial material has
19 just been made accessible on the phenomenally
20 successful and, you know, terrific National Jukebox.
21 You can go and get it now and stream it. There it
22 is. So there is your, at least the majority, of

♀00353

1 your public domain material.

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

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

22 But that's what I -- again, there's a very

♀00354

1 wide swath here of commercial material released by a
2 label. It doesn't apply in all cases, and there's a
3 lot of other material that is important to get out.

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

7 MS. BESEK: Okay. Thanks, Eric.

8 Opening statements from others? Eric H.

9 MR. HARBESON: So we proposed in our
10 comments also a 95-year term following the existing
11 law for other works prior to 1972. We felt that
12 this was the best way to achieve the consistency
13 that we're after, works prior -- a book that was
14 published prior to 1972 has a 95-year term, assuming

15 formalities and the like. We would propose that
16 there be a 95-year -- a flat 95-year term, and we
17 assume formalities somehow. I don't know how that
18 would be legislated. I don't write legislation, so
19 I will leave that up to people who do that better
20 than I.

21 We also did concede that we would like to
22 see, again for consistency sake, a -- recordings

¶00355

1 prior to 1923 enter the public domain. However, we
2 realize that that will -- even though we feel
3 that -- what is it? -- 89 years is a long time to
4 recoup the value of something, that that would
5 short -- give a little bit of short shift to some
6 materials prior to 1923 that won't have the full
7 95-year term. So we would propose a very short
8 window of materials that had that -- just, in other
9 words, we would propose a flat 95-year term for
10 everything with the knowledge that in six years the
11 things that were before 1923 would enter the public
12 domain, and works before -- what is it? -- 1917
13 would enter the public domain right away.

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

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

22 MR. HARBESON: I believe in our comments we

¶00356

1 proposed date of fixation, because that's the way
2 that the 301(c) defines works. But we honestly
3 didn't give that as much thought.

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

9 However, there are good reasons for
10 treating sound recordings a little bit differently
11 in general. And that is the extreme instability of
12 the media itself. And so, you know, a book that was
13 published -- I have books in my library that were

14 put together in 1595. They are in perfect shape.
15 You will never find a recording lasting that long,
16 ever.

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

22 Again, we didn't feel -- we felt that a

♀00357

1 50-year term -- proposing a 50-year term would
2 subject the new law not only to -- it would change
3 the consistency problem for us, but it would also
4 possibly subject it to more -- it would definitely
5 subject it to much stronger takings issues and the
6 Fifth Amendment.

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

18 Now, I realize that -- use the materials.
19 I realize that what we are really looking for is
20 107, and I want to emphasize that. This is not an
21 important part of our proposal. It was just a way
22 that we kind of saw to compromise between the people

♀00358

1 who were saying we want 50 years and the people who
2 say we want forever. This was a way to get at that.

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

8 MR. HARBESON: Well, it wasn't that they
9 wouldn't have any protection. It was that if right
10 now -- and I doubt that this will happen, that we
11 will see any real legislation soon on this, so it
12 may become moot by the time legislation is

13 considered. But right now, if pre-'72 -- if pre-'23
14 sound recordings entered the public domain right
15 now, the recordings issued in 1922 would not have
16 enjoyed a full 95-year term. Whereas -- so what
17 we're proposing is a 95-year term, but there are
18 these -- and this is getting to the problem of
19 published works before that would not have had the
20 same length of term. In order to possibly avoid a
21 little bit of a problem with owners of 1922
22 recordings, say the Caruso recording that apparently

♀00359

1 is still in print, to give them just a little bit
2 longer so that everyone could have the 95-year.

3 MS. BESEK: Okay. Thanks. That is
4 clearer.

5 What about the others who haven't done
6 opening statements?

7 Brandon.

8 MR. BUTLER: So I just want to say two
9 quick things. One is I'm -- we don't have a
10 detailed proposal on terms, so this will be very
11 short.

12 One is I only wanted to be on this panel to
13 ask one question, and I hope everyone will just
14 indulge me. And it is this: If 303(a) is not
15 changed, is it the case that sound recordings, if
16 given federal protection in other respects, will be
17 protected through 2047? That is, because they were
18 not published, they -- okay. You are the person who
19 can answer it.

20 MS. GARD: Because they missed the
21 deadline. They missed the deadline.

22 No, can I just answer that question?

♀00360

1 MS. BESEK: Yes, please do.

2 MS. GARD: So 303(a) was unpublished works
3 to transition them from a common law to federal
4 protection. No works -- it was based on the 302
5 term, so life plus 70 now. But if you published it
6 between '78 and 2002, you got an extra amount of
7 time until 2047, but that has passed so there is no
8 making up for that unless it was changed. So that
9 little window is closed.

10 MR. BUTLER: So they wouldn't be considered
11 published, and that is why they lose?

12 MS. BESEK: Well, let me just add that that
13 is one model that might be considered. But it
14 wouldn't automatically be applicable. But whatever
15 was done with sound recordings presumably it would
16 have to be considered anew.

17 MR. BUTLER: Can I just add one thing?
18 I'm not sure why we are sort of talking
19 about compromising on what the terms should be, you
20 know, trying to -- we should be talking about what
21 we think it should be, so I know Eric and other
22 folks in the library community would really rather

♀00361

1 it be 50 years. And, you know, we're not
2 bargaining, we're talking about what would be the
3 ideal. So 50 years I think is perfectly reasonable.

4 MS. BESEK: Fifty years from what?

5 MR. BUTLER: Fixation.

6 MS. BESEK: Let me -- Eric S., I know you
7 have a point, but let me just go around to the other
8 people who haven't yet made an initial statement.
9 Either Jay or Sam.

10 MR. BRYLAWSKI: You know, as is expected in
11 the second and third days of such things, we end up
12 repeating ourselves a great deal. I don't -- I
13 respect and consider the rock star a friend, but I
14 believe that Eric S. -- and I believe the
15 distinction between published and unpublished is
16 meaningless because many of the published materials
17 are held in such small quantities they are in effect
18 unpublished. I believe that a public domain doesn't
19 diminish their monetary value to anyone. We can
20 look at Bear Family records and document records and
21 Pearl Records and find that a great deal of money is
22 made by rights-holders and others by public domain

♀00362

1 recordings.

2 So the Society For American Music believes
3 strongly in a 95-year term. If we were negotiating,
4 as Brandon would say, we would ask for a smaller
5 term. The way that copyright extension was in part
6 argued for parody and conformity with other
7 countries, we would say, Well, other countries have
8 a shorter term.

9 But we are more realistic than that, and I
10 think you will find that many of us who are part of

11 -- interested in federalization have been very
12 forthright and honest about just everything we
13 believe, and I think it's just, honestly, it would
14 be great to have 50 years, but 95 years is more
15 logical. I think the confusion would be less over
16 what the terms are.

17 And as I said yesterday, and I'm repeating
18 myself, copyright yesterday was said by one or two
19 people as being under siege right now, particularly
20 sound recording copyright. I know there are worries
21 of piracy, but we know there are other threats to it
22 too. Just competition for our entertainment dollars

♀00363

1 and our entertainment hours and lots of things. But
2 I think restricting access to materials for more
3 than 95 years and not having a public domain, at
4 least among the people I represent, the scholars and
5 collectors, and historians in American music, it
6 undermines respect for copyright as a whole and you
7 lose the public in what the real fight should be
8 over piracy and other such blatantly illegal
9 materials by locking up materials and not allowing
10 any access at all.

11 Ninety-five years seems reasonable. I will
12 say that. I never said that before. Ninety-five
13 years from fixation to have a public domain and have
14 a public domain that moves. I think that the
15 studies that Tim has done and everyone's experience
16 shows that having 1923 go -- pre-1923 go into public
17 domain soon and have it proceed annually after the
18 end of the teens, 2018 or '19, is going to have some
19 effect but not a great deal of effect on receipts of
20 companies, and federalization would bring more
21 receipts through performance rights, which companies
22 do not get now or at least shouldn't be getting. I

♀00364

1 know they say they are getting some. But that
2 would, I believe, more than make up for any losses
3 in the public domain, and those losses would be
4 mitigated and balanced with great respect by the
5 American public in having a public domain and
6 freeing up these materials.

7 MS. BESEK: Thanks, Sam.

8 Jay.

9 MR. ROSENTHAL: First of all, we join with

10 the points raised by the RIAA and their suggestions.
11 First of all, it has to be from fixed -- fixation is
12 the time you could start counting, but the 2067 year
13 to us is a very reasonable standard that we should
14 be using because it matches existing state law, but
15 it also again brings certainty to everything.

16 I think that the bigger point is that Eric
17 raised, and I don't need a picture signed by you,
18 Eric. If I could get a contract signed somewhere, I
19 will deal with that.

20 Effectively access is the point, and that I
21 think goes right directly to Sam's point about
22 locking up copyright. I think that the point here

♀00365

1 is that we don't want to lock up copyright for these
2 purposes that we are dealing with here today. And I
3 also think that everybody recognizes my opinion on
4 what is commercially viable and that that is
5 changing daily.

6 This coming Monday, Apple is going to be
7 introducing their locker service. I checked last
8 night. It costs \$80 to buy a digitization machine
9 where you can take old vinyl and digitize it.
10 Everybody can do it. The whole idea that these old
11 recordings lose commercial value in the new
12 technological world that we are in and especially
13 with the new services that are coming out really has
14 no meaning.

15 So I think that we should be looking at
16 access as the main point, but in terms of term, I
17 think 2067 is the right term. And copyright is
18 under -- being besieged, and we can have another
19 debate on that in a lot of different ways, but we
20 don't want to lock up access for these purposes.

21 MS. BESEK: Just a point of clarification.
22 You mentioned fixation and you mentioned 2067. If

♀00366

1 2067 is the term for all sound -- pre-'72 sound
2 recordings, what is the relevance of fixation --

3 MR. ROSENTHAL: As an alternative only --
4 as an alternative way to structure a solution here.
5 I mean I'm not giving up any dates as far as, you
6 know, how much time would be added from fixation,
7 but if the point is -- I think it was raised, date
8 of publication is impossible to figure. That's the

9 point.

10 MS. BESEK: I want to go back to --

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

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

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

21 MS. BESEK: Okay. All right.

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

♀00367

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

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

20 That is our proposal.

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

♀00368

1 But I want to ask a couple of questions
2 that I think are related here. One is that nobody
3 has mentioned a term based on life of the author
4 here, and that is, of course, the term for
5 unpublished works that predated the -- that were not
6 published at the effective date of the '76 Act and
7 for individually creative works under the current

8 act. So I -- I would like your response to any term
9 that would be based on life of the author.

10 And the second point is everybody's really
11 focused on fixation here, and I know that Jay just
12 addressed a specific period, you know, whether it
13 should be publication and fixation. Eric also said,
14 Well, publication has no meaning under state law.

15 But what about a term geared to the point
16 at which work was distributed in copies? I'm not
17 advocating this. I would just like you to look at
18 both -- you know, what about a term based on
19 publication? Why is fixation the right date as
20 opposed to publication? And also why not a
21 life-plus kind of term here?

22 Eric.

♀00369

1 MR. SCHWARTZ: Eric S. Well, first of all,
2 I mean -- the notion that what we're doing here is
3 revisiting term extension is just not something
4 that's really productive for what we're talking
5 about.

6 2067 is the term. Congress made the
7 decision to reopen it. It just doesn't make
8 sense -- to require rights-holders only in the sound
9 recordings era to have to use it or lose it of the
10 type -- the NIEs, and I'm certainly no rock star,
11 but in the proposals and the GAT restoration
12 provisions with the notions of the notices of intent
13 to enforce, which was something that Barbara Ringer
14 of the Copyright Office was involved in the
15 drafting, they were just full of fraudulent filings.

16 Look at all of the Leni Reifenstahl
17 filings. As Pat and I know, these are public domain
18 materials for which, you know, these companies filed
19 filings and they are in the Copyright Office's
20 database because the Copyright Office decided that
21 it wasn't going to review the materials. So
22 whatever got posted was posted, and people made

♀00370

1 claims on materials and there it was. That's not
2 really an effective or efficient way to do anything.

3 Your question was about -- I didn't say
4 that under state laws it's meaningless. All I was
5 saying was we're not -- the RIAA is opposing
6 federalization. You asked just in the

7 theoretical -- if you were going to base a term,
8 frankly, for any works, the notion of published and
9 unpublished is just one of the thorniest areas for
10 those of us who do chain-of-title work, you know, as
11 our daily life. Making determinations and certainly
12 going back 80 years or 90 years and trying to
13 determine whether it was available in copies,
14 whether you are talking about film materials and
15 certainly in sound recordings, is just not something
16 that you can evidence, and so then you are going to
17 have questions about it. And fixation seems to be
18 at least something that has certainty, which is what
19 other countries have done.

20 One other point just to put it on the
21 record, Eric the other, mentioned the terms around
22 the world. Just to sort of save you the research,

♀00371

1 if you haven't already done it, I believe that there
2 are somewhere in the neighborhood of 27 countries
3 now that have adopted a term of life plus 70. I
4 think that's the number. And that's not including
5 the European Union, which just coincidentally, if
6 they adopt it, would double that number. So
7 that's -- that at least -- I'm sure that's something
8 that you had asked about before you would include in
9 your report.

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

13 Tim, I'm sorry.

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

♀00372

1 scholars on it.

2 There are -- for many, many years up until
3 1940s or later, the record companies all issued
4 monthly release lists, and they publicized quite
5 widely their new releases as they came out, and

6 there were various publications that do this. So
7 it's something that is traceable. Recording dates,
8 if ledgers survive and that kind of thing, they are
9 easy to get. But if they don't, they too can be
10 estimated.

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

20 MS. BESEK: Eric H.

21 MR. HARBESON: Our biggest concern with the
22 life-plus-70 model is with the possibility that --
♀00373

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

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

16 MS. BESEK: Sam.

17 MR. BRYLAWSKI: I can't speak for the
18 Society For American Music, but I think my personal
19 vote would be for fixation over publication, because
20 I -- I'm not quite as optimistic about Tim about
21 determining a publication date, particularly for
22 exports. I work with a lot of recordings that are

♀00374

1 made solely for export. I find very little
2 documentation of when they were actually published.

3 In terms of -- in terms of life plus 70, I
4 would have to ask, you know, motion picture and when

5 we image people, what their experience with it is,
6 but I find recordings being so collaborative and
7 having a number of authors and given the age of so
8 many, not being privy to any the documents, the
9 contracts by which they were made, it would be
10 difficult to -- very often difficult to determine
11 who the actual author is.

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

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

20 MS. BESEK: Okay. Thanks, Sam.

21 Pat.

22 MR. LOUGHNEY: Well, this is a comment that
♀00375

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

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

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

♀00376

1 And so as long as the current system goes
2 forward where the responsibility and due diligence
3 is on the potential user and for the rights-holder

4 to not make themselves available in the marketplace
5 or keep themselves current in terms of their
6 address, who their heirs are and so on, it just adds
7 to the confusion and the chaos that we are all
8 dealing with in the archival world.

9 MS. BESEK: Thank you.

10 Eric Schwartz.

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

20 And I could give a for instance. You take
21 a field recording that was made, whenever, before
22 1972. The performers are still alive. By my math,
♀00377

1 their term under life plus is going to be beyond
2 2067. I'm not really sure how we're moving the ball
3 forward on trying to make this material available
4 unless we're talking about 107 and 108 type of
5 access issues. Are they really going to do the due
6 diligence? The only due diligence that works is to
7 say this whole category of materials is in the
8 public domain.

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

17 And, you know, back to the commercial/
18 noncommercial distinction, because I think that is
19 key, you know, the discussion gets floated about a
20 50-year from fixation. Unless I'm wrong, I think
21 two years ago the best selling album was the box set
22 by the Beatles. Are we really talking about putting
♀00378

1 that stuff in the public domain in any sort of a
2 serious discussion?

3 You know, to the extent -- and, frankly,
4 would Congress be considering that or is anyone
5 suggesting that 20 years from now it won't still be
6 the best selling, you know, sets available? It just
7 seems like when you are in the commercial and
8 noncommercial worlds, we really are talking at
9 cross-purposes here with each other, when what we're
10 really trying to do -- and I mean really trying and
11 personally for many years trying to do -- is to get
12 this culturally and historically significant
13 material out to the public in ways that is
14 meaningful, and I'm talking about the noncommercial
15 material, and just stop sort of trying to reinvent
16 the copyright law in the commercial world.

17 MS. BESEK: Let me ask a follow-up based on
18 something that a few of you said. The 95-year term
19 from fixation is different in some respects from
20 existing law. Is the reluctance to look at a
21 life-plus-70 term an attempt to get at orphan works
22 such that if they were federalized and there was

♀00379

1 orphan works legislation that term could be
2 considered, or is there something about pre-'72
3 sound recordings that is inherently different from
4 other types of works that are copyrighted currently?

5 Tim.

6 MR. BROOKS: There is clearly a difference,
7 we believe, in the entire field of sound recordings.
8 That is why there are neighboring rights in other
9 countries. Sound recordings have a shorter economic
10 life than other kinds of IP. Sound recordings have
11 technological changes or trends of those -- unlike
12 the 1500s book that perhaps Eric was referring to.

13 There are multiple reasons why sound
14 recordings logically could be treated differently
15 and are treated differently almost every place other
16 than the United States. That said, we have the
17 system that we have, and from our point of view --
18 and I realize that there can be others that disagree
19 with us -- why we feel that it's an unreasonably
20 long term, we understand why it is.

21 We understand that we sometimes
22 unfortunately pass laws by the rule of the

♀00380

1 exception. If there is one recording back 70 or 80

2 years, we have to have control of all recordings 70
3 or 80 years ago in order to mine that one, which is
4 not a logical public policy position, I don't think,
5 but from the economic interests of the holder of
6 that one, they don't care if they control everything
7 else, they want that one.

8 So copyright law is a blunt instrument,
9 unfortunately, and we need to make it a little less
10 blunt if we are going to have any cultural heritage
11 left.

12 So I do think the recordings, yes, they are
13 different. We need to look at them as they are
14 different, and that's the expertise of the group
15 that's sitting here, I think.

16 And we need to realize -- I just want to
17 address the streaming issue that's been brought up
18 several times as a solution to this. And it's not
19 just a matter of scholars who need to take a
20 recording and do things with it, whether it is
21 changing speeds or filtering to find out what was
22 really happening, but there are multiple other

♀00381

1 issues that streaming raises that I think will only
2 become apparent over time. Some of them are
3 apparent already. And it's not the easy fix, the
4 end run that solves these problems.

5 One, for example, is that as these
6 contracts have been written and considered by only
7 the Library of Congress, well, what does that do to
8 the rest of the library community in the United
9 States, much less the safety and security of that
10 material residing on one set of servers and one set
11 of backups? Is that what our whole cultural
12 heritage is supposed to rely on because of this need
13 for control?

14 What about the streaming itself and
15 streaming can be captured? Well, streaming can be
16 captured, but who is going to capture it? Not the
17 law-abiding institutions and the large societies,
18 the 501(3)(c)s like my own. So it's going to be
19 uneven in terms of who gets the benefit of this, the
20 conditions that are placed on it. We know that
21 certain recordings are not allowed in this because
22 of cultural sensitivities, so part of our history is

♀00382

1 blocked out, perhaps we feel for good reasons, but
2 maybe someone else will feel not for such good
3 reasons. We know that recordings can be recaptured.
4 In other words, recording owners can withhold things
5 at will from this if they wish to.

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

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

♀00383

1 70 I think is appropriate.

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

5 Elizabeth.

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

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

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

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

22 MS. GARD: Not under our proposal, no.

¶00384

1 Only those that come forward and claim their
2 works -- no. It's a totally separate question. I
3 mean you don't necessarily need to know the author
4 of any work unless you want to use the work, and
5 that doesn't relate to term.

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

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

11 MS. GARD: Exactly.

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

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

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

20 MS. BESEK: That, again, is my point. The
21 2067 term doesn't require that. But if, in fact,
22 you have an earlier term, we are going to change the

¶00385

1 term --

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

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

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

12 MS. BESEK: Unless it's a life plus. And
13 so your view is that it's too hard to know who the
14 author is, so there shouldn't be a life-plus term.
15 So I guess my question is --

16 MS. GARD: It's not too hard to know who
17 the author is. It's that you are retroactively
18 determining who the author is. There is no actual
19 legal author of these works because we didn't define
20 who they were under 1909, so you are creating a
21 legal fiction of who the author is by creating a

22 legal term retroactivity. Right? Because it wasn't
♀00386

1 based on a life-plus system in the past, right? Is
2 that correct?

3 MS. BESEK: That's fine. Does anybody else
4 have a comment?

5 Pat.

6 MR. LOUGHNEY: I do, but it's on another
7 issue that I wanted to address, if that is okay or
8 if you are ready to move on, or do you want to stay
9 on this life plus 70?

10 MS. BESEK: Well, let me ask first if
11 anybody else has a comment.

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

13 MR. ROSENTHAL: Yeah, the life plus 70, I
14 agree with the point about the authorship issue,
15 it's so hard. One would assume, though, that you
16 would take the authorship rules as today and kind of
17 apply them retroactivity, and even doing that is
18 unbelievably hard, you know, to be able to figure
19 out who in fact is an author under the recording
20 rules that we have today.

21 The one point -- a couple other quick
22 points. The issue about going back and

♀00387

1 authenticating when something is distributed is
2 really tough. Maybe you can get some data for
3 mainstream labels, but certainly not for
4 non-mainstream labels. Genres that really do
5 possibly fall into this idea of more culturally
6 important, the old blues, jazz labels, the old
7 hillbilly music, it's tough to figure out, you know,
8 to go back -- I think probably records of studios
9 may be a little bit more reliable than records of
10 labels in and of themselves.

11 And just because we haven't talked much
12 about streaming, but just as a very -- you know, a
13 point on the issue of value, I think most folks in
14 the industry are recognizing streaming is becoming
15 substitutional to sale. So that just has to be kept
16 into consideration as we're talking about what you
17 can and can't do with relation to streaming. I'm
18 not saying you can't do it, but I think that's why
19 there is a heightened scrutiny and a heightened
20 concern on this streaming issue.

21 And so I would say fixation is probably the
22 most sensible way to go, you know, if we're going to

♀00388

1 go anywhere.

2 MS. BESEK: Okay. I will take just a
3 couple more responses on this life plus because I
4 want to move on to another proposal as well.

5 So anybody else on the life-plus issue?

6 Pat.

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

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

♀00389

1 MS. BESEK: Elizabeth.

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

6 MS. BESEK: Okay. I would like to talk
7 about a couple of hypotheticals. One of the things
8 that has been proposed in a number of comments is
9 some notion that there would be a term of
10 protection, and then it would be possible for those
11 who are still commercially exploiting to get a term
12 until 2067 by doing something affirmative, either by
13 demonstrating that it was commercially available or
14 by filing something in the Copyright Office. But in
15 that way, those individuals who could really claim
16 that they are commercially exploiting could have
17 that full term that they currently have, but for all
18 other works -- and presumably based on what we've
19 heard in the comments and in the last day, the vast

20 majority of works would be free for use after
21 whatever term of protection that was.

22 And for the sake of discussion, let's

♀00390

1 assume that the term would be 95 years. So works
2 would be freely available after 95 years unless
3 there was some affirmative act by the rights-holder
4 that they were continuing to exploit.

5 So I would like to put forth that proposal,
6 which is a modification of yours, Elizabeth, but
7 this is the one I would like to discuss and see what
8 you think of that.

9 Eric.

10 MR. SCHWARTZ: I mean I think we are
11 getting pretty far afield from sort of a general
12 principle of copyright. If we've learned nothing
13 from the Google book deliberations by the courts,
14 the notion of having to sort of opt in, opt out, I
15 mean here you are telling rights-holders that you
16 have rights, but you lose them unless you assert
17 rights.

18 You know, Elizabeth made the point about
19 108(h), and that is --

20 MS. GARD: No, I didn't.

21 MR. SCHWARTZ: Earlier you did.

22 MR. HARBESON: That was me.

♀00391

1 MS. GARD: No, I don't deal with --

2 MR. SCHWARTZ: Oh, was that Eric? Eric the
3 other. Excuse me.

4 MS. BESEK: Just for the record, that is
5 Eric Schwartz. I don't know if I said that at the
6 beginning. With the two Erics, it can be a little
7 confusing in the transcript.

8 MR. SCHWARTZ: That provision, the burden
9 is the other way around, which is that the public
10 library or archive under 108 has to do the test to
11 see whether it's being commercially exploited, and
12 if so, then -- if not in the last 20 years of
13 copyright, they can.

14 And the idea here is that the -- what we're
15 trying to do in this whole exercise, to repeat
16 myself, is to assist the libraries and archives in
17 making material accessible, and any proposal to say
18 to rights-holders of any kind, who were in this case

19 only of record producers and performers and others,
20 that you must assert the rights or you lose the
21 rights is anathema to copyright law.

22 MS. GARD: Can I -- excuse me. He is
♀00392

1 legally wrong on this. Can I respond on this?

2 MS. BESEK: You can respond briefly, but I
3 do want to get to other people.

4 MR. SCHWARTZ: I've lost my rock star
5 status. It was brief.

6 MS. GARD: No, just a misguided rock star.

7 MR. SCHWARTZ: There's always the rise and
8 the fall, right, the comeback years.

9 MS. GARD: So 303 is -- it's not akin to
10 Google books. That is just trying to make it sound
11 not right. It's akin to 303(a). That's where it
12 came from. That's where the proposal came from.
13 That's what people had to do to keep their rights.
14 That's what every single other group had to do
15 except for sound recordings, which got written out
16 of it. So you would have had to do this if you had
17 not gotten 301(c).

18 MS. BESEK: If I can just interject,
19 though. I was not specifically using your proposal.
20 There are two ways you can --

21 MS. GARD: No, no, no, I'm just saying --

22 MS. BESEK: But I want to clarify. I did
♀00393

1 suggest that there might be some kind of filing, but
2 under the Copyright Act for works that were
3 unpublished as of the beginning of 1978, it was
4 publication.

5 MS. GARD: Right. Exactly.

6 MS. BESEK: So there are different ways you
7 could do it. It's not one specific one.

8 MS. GARD: Absolutely. Right.

9 MS. BESEK: I'm suggesting alternatives
10 here.

11 MS. PALLANTE: I think Elizabeth is pretty
12 (inaudible) others did have to do that.

13 MS. GARD: Other copyright holders did.

14 MS. PALLANTE: Your point is it's not
15 complete anathema.

16 MS. GARD: No, it's the way the copyright
17 law works.

18 MS. PALLANTE: So your point is generally
19 (inaudible).

20 MR. SCHWARTZ: Yeah. Yes.

21 MS. GARD: Right. It's not. It's not.

22 That's the way copyright law works.

♀00394

1 MR. LOUGHNEY: Why should the Beatles be
2 any different from Mark Twain and Steven Foster.

3 MS. GARD: Exactly.

4 MS. BESEK: That's a trick question.

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

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

22 And I'm specifically talking about these

♀00395

1 out-of-print materials for which the rights-holders
2 have no physical copies whatsoever. Where is the
3 fair use? Where does the taxpayer benefit come from
4 out of supporting these materials for decades?

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

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

16 MR. ROSENTHAL: Well, I think it's wrong to

17 think when we talk about copyright to continuously
18 focus on the corporations. I think that there are
19 individuals here that own this, and it's much more
20 important to those individuals than at the end of
21 the day it is to many of the corporations in terms
22 of their overall picture and their overall economic

♀00396

1 well-being.

2 But the point here is that many
3 rights-holders pass on their rights to labels, and
4 those labels then take the copies, they take
5 whatever they need to make these copies down the
6 road, and they may put them someplace else and they
7 might not have them. And I think it's wrong to put
8 that particular category of a participant, income
9 participant and owner, into a detrimental position

10 because they don't have something physical about it.

11 The point about the government putting --

12 MR. LOUGHNEY: But they are out of print,
13 though, and they haven't been producing revenue for
14 decades, but they have been supported at taxpayers'
15 expense in an archive or library which wants to make
16 use of them, even for research purposes or make
17 copies available to researchers --

18 MR. ROSENTHAL: I totally --

19 MR. LOUGHNEY: -- what is the right of that
20 institution?

21 MR. ROSENTHAL: I totally understand the
22 point. I also think that when you say they are out

♀00397

1 of print, I'm not sure what that means at the end of
2 the day. There are many, many records that --

3 MR. LOUGHNEY: Out of circulation by the
4 rights-holders.

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

12 MR. LOUGHNEY: I think you're dodging the
13 question.

14 MS. BESEK: Can I just -- I would like
15 to -- excuse me. There are a lot of issues here.

16 But I would like to go back and focus on this
17 specific term where if you did something
18 affirmative, whether that would be either some kind
19 of filing a notice or actual publication that you
20 could extend -- "publication" is not the right word,
21 making available -- that you could extend the term
22 until 2067.

♀00398

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

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

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

16 However, that said, and back to your
17 question, it's well worth consideration if something
18 is remaining in print, it serves preservation
19 purposes, it serves access purposes, and I would
20 love to see more in print, and would seriously --
21 would be very open to that. I mean without the
22 terms and knowing the parameters of what you are

♀00399

1 talking about, I'm not going to say, Oh, yes, that
2 is absolutely --

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

9 MS. BESEK: Eric H.

10 MR. HARBESON: We have not supported what
11 is sometimes called a "use it or lose it" regime.
12 In part because we don't think that it would be
13 consistent with our treaty obligations under Berne.
14 However, we do -- the reason that we wrote our

15 proposal the way that we did is that -- and this is
16 getting to something that's been bothering me
17 throughout this session, and I want to very quickly
18 address it. We're not presuming to say that there
19 is no commercial value in the things that we want
20 access to and we want to provide access to.

21 We're not saying that anything that -- we
22 don't have enough money to digitize and make

¶00400

1 available things that have no value. We're not in
2 the business of doing that. Librarians are in the
3 business of finding things that have research value
4 that may not be being, in this case, made available
5 through other means.

6 What our proposal is designed to do is to
7 allow us to find those things that maybe the
8 rights-holders haven't found the value in but for
9 which there is still significant research value, if
10 not economic -- currently economic value as
11 determined by the market, and making those available
12 so that research can be done on those.

13 One of the benefits to that is that the
14 world has more available -- has more access to these
15 recordings, and one of the benefits to you about our
16 proposal -- I'm looking at Eric and Jay here -- is
17 that we -- when that -- you still have not lost your
18 copyright -- you have not lost your protection for
19 these recordings. No. If you find that all of a
20 sudden someone has done research on a previously
21 forgotten piece of music which they found in a
22 library, and all of a sudden, wow, this is gaining

¶00401

1 some popularity, there may be a new market here.
2 You will benefit from that, you know.

3 So we're -- this is not -- we're not trying
4 to say to you that your stuff has no value. What
5 we're trying to do is make it available
6 provisionally while you haven't exploited it.

7 MR. ROSENTHAL: I agree with that, but I
8 want to address the point about what someone has to
9 do to affirmatively state that they are still
10 exploiting something.

11 Would, for instance, a statement from
12 SoundExchange with money constitute some kind of an
13 affirmative exercise of their rights that would

14 qualify for a longer term? They know it's up there.
15 They are not doing anything specifically
16 affirmatively, but some service out there has the
17 song, they performed it in a noninteractive setting,
18 SoundExchange gets money, and all of a sudden it's
19 there. And the copyright owner, the one who is
20 getting the money, thoroughly believes that they are
21 being exploited, and maybe the world on a certain
22 little level understands that they are still in the

♀00402

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

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

8 MR. ROSENTHAL: I get it.

9 MS. BESEK: Eric Schwartz and then
10 Elizabeth.

11 MR. SCHWARTZ: Two points. One, I think
12 Eric the other, my friend Eric, has made the point
13 as well or better than I could about in some ways
14 the irrelevance of the term to what we're doing.
15 The 108 type of notions, even the 108(h) notions, in
16 which if it's not being commercially exploited, then
17 libraries and archives have these rights to do this.
18 Again, look at where the burden is.

19 To the point that Elizabeth was talking
20 about, no, I didn't get the law wrong or the
21 principles wrong. What I was saying is, you know,
22 23 years after the Berne Implementation Act, I

♀00403

1 didn't think we would be discussing the notion of
2 reconstituting formalities for rights-holders in
3 order to continue to enjoy their rights. I thought
4 we -- the whole notion of Berne Implementation and
5 before that the half step or more in the '76 Act was
6 to lose that, but to incorporate and take the steam
7 out of the protectability by giving users, and
8 particularly libraries and archives, an elevated
9 user status which they deserve.

10 And the reason they deserve it is because
11 they have been -- as Pat, Sam, Tim, Eric, others,
12 Tom, Dwayne have said, they retain materials, they

13 catalog materials, they have at times with public
14 and private monies had to copy materials, and they
15 have had to do things with those materials that no
16 one else has done, and in some cases including
17 rights-holders, because the rights-holders are gone
18 in many instances.

19 And so they do have an elevated status, and
20 that's what 108 doesn't allow and that's the notion.
21 But it, again, has nothing to do with term. And the
22 notion that a rights-holder has to continue to file

♀00404

1 something, I mean didn't we learn anything from
2 renewal, and from the automatic renewal provisions
3 in 1992 of the notion of losing those provisions,
4 but allowing users and especially libraries and
5 archives -- 108 libraries or archives to continue to
6 have more access to material, and I think that's the
7 focus.

8 MS. BESEK: Elizabeth, yes.

9 MS. GARD: Okay. So responding to Jay, we
10 talked about this a lot in class. We actually had a
11 more contentious discussion than you guys are having
12 right now, and our SoundExchange guy was really
13 upset about this.

14 So the thing is that we think it should be
15 as low as possible. We just want to have somebody
16 say they actually care about this work.

17 So in terms of Jay -- so we were even
18 saying anything, anything, anything, anything, show
19 us anything, any use at all. Because really what
20 we're trying to do is just get all the works that
21 Tim cares about who are long dead, long gone, out in
22 the public domain.

♀00405

1 It is not going back. You know it's not
2 going back. You are just saying that. It is
3 modeled after something that was available under
4 Berne. When we did this, we modeled after Berne.

5 And there are a couple more parts, and I
6 really want to get to them because we worked very,
7 very, very hard on this and thought about it because
8 we cared about what all of you thought.

9 So in addition to what we're proposing,
10 we're also proposing that foreign works would be
11 applied to this, in which they are not now. And the

12 rule of shorter term would apply so that foreign
13 works didn't have a greater benefit than domestic
14 works, and that this would also benefit us abroad
15 because if we have 2067, first of all, the rule of
16 shorter term will apply. So even if these works are
17 in the public domain because the copyright holders
18 did not come forward, they would still be protected
19 abroad because of France and their beautiful expiry
20 term that they get the biggest possible term.

21 So in some way it gives the U.S. a strong
22 position in terms of sound recordings. It also

♀00406

1 means that we are not chasing after Europe with
2 their raising of terms, but we are setting a term of
3 2067 that if they want to meet that term, good luck,
4 do it. But it isn't -- we're not in a position we
5 were in with the Sonny Bono copyright act where
6 we're saying, All right, Europe extended their term,
7 and now we have to extend our term. We're keeping
8 it 2067. And so that's really, really important.

9 But the rule of shorter term is really,
10 really important too, and that fixes the Naxos
11 problem, which is, I suspect, why we're here in part
12 is because of Naxos, and so that needs to be
13 considered as well, that that allows for a lot more
14 power in American context, which we don't have right
15 now. Right now we're just sort of trailing behind.

16 But that's the full proposal.

17 MS. BESEK: Okay. Pat.

18 MR. LOUGHNEY: I just simply want to say
19 that I do think, in answer to Eric Schwartz, that
20 the issue of term is relevant, that it is, in fact,
21 important because we are living in an atmosphere and
22 in a time when there are pressures to extend the

♀00407

1 term of copyright protection. And I think one of
2 the tactics used in that ever-onward pressure is to
3 look at differentials and the term of protection for
4 different formats and different countries and use
5 the explanation of harmony as a goal that we're all
6 trying to achieve. While we are inching forward
7 this longer and longer term of protection, I think
8 we are getting farther away from the idea of the
9 founding fathers who very clearly understood the
10 importance of having limited terms of protection for

11 copyright, and sound recordings are a way -- much
12 farther down the road in terms of protection than
13 any other format.

14 MS. BESEK: I think that is true. That is
15 why I'm trying to get at this question of we do have
16 2067 on the record, although I will point out that
17 not all states provide a term that is that long, but
18 some do.

19 But in any case, going back to this issue
20 of how can we weed out, how can we protect the ones
21 that are being commercially exploited and allow the
22 other ones to be used more broadly? We've heard a
♀00408

1 couple of suggestions about what might be factors.
2 You know, evidence from SoundExchange, just
3 something put on the record indicating that there is
4 a willingness or interest to exploit by the owner.

5 Is there anything else that people can
6 offer as to what should be the indication that
7 somebody gets that longer term? If that's the way
8 we're going.

9 Should it be enough to do what Elizabeth is
10 suggesting, just file something and say, It's me,
11 I'm here, and that's it?

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

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

17 MS. GARD: It doesn't necessarily need to
18 be a formality requirement here either. It's just
19 making it available to the public or something that
20 indicates that it's available so that -- I mean the
21 libraries don't want to keep making copies of all
22 this stuff. Like if it's available, then it's

♀00409

1 available. That was the proposal, not a formality
2 requirement and not an opt in. Just make it
3 available.

4 MS. BESEK: Okay. Eric.

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

9 MS. BESEK: Well, if we could, we've only

10 got a couple of minutes left, so if we could focus
11 on this issue of what should trigger the remaining
12 term to 2067.

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

20 And it's important to remember that while
21 the majority of books published still are probably
22 in the public domain in history, sound recordings,
♀00410

1 none of the -- there is no availability of public
2 domain to make things like mashups and other
3 derivative works that are essential to the creation
4 of new styles of works.

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

9 MS. BESEK: Eric Schwartz.

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

20 So lest you lose faith in the Copyright
21 Office, the notion there was to be equal. And I
22 will leave it to the Copyright Office to discuss the
♀00411

1 rule of the shorter term and the U.S.'s proposition
2 that the U.S. applies longer terms and does not
3 short terms in the U.S. from works in other
4 countries. Given the fight that the U.S. government
5 and the copyright industries generally have in
6 anti-piracy matters in other countries, I think the
7 last thing that either the industries or the
8 U.S. government would want to do is to propose the

9 notion of a shorter term in the U.S. given the
10 mischief that that would result in other countries
11 shorting -- shortening, I will put in quotes, the
12 term, denying protectability and using the rule of
13 the shorter term because of confusions about U.S.
14 law or anything else. It just is a recipe for
15 disaster.

16 MS. BESEK: Okay. I want to try to wrap
17 this up because we have the next panel coming, but
18 let me have the three people that have their hands
19 raised speak.

20 So, Sam.

21 MR. BRYLAWSKI: Well, of course, if there
22 were a 95-year term, while shorter, it would be
♀00412

1 longer than any foreign term I'm aware of for sound
2 recordings.

3 But to go specifically to your question
4 about how one would look at a, for want of a better
5 term, lose or use, SoundExchange does indeed keep
6 very good records. I think that we should
7 encourage -- we as a group should encourage
8 collaboration between organizations like
9 SoundExchange, which keep track of rights-holders.

10 The lack of formalities is a big burden on
11 archives. The fact that pre-'72 recordings -- Tim
12 said we can find 90 percent of the owners, but
13 10 percent of the owners not being able to find is
14 very difficult. I can even point to the ones in
15 Tim's study that are hardest to track down in any
16 case. I promise, I'm not asking for formalities.

17 But the idea of using SoundExchange for
18 something like that, and I appreciate that music
19 publishers -- Jay has sort of said something about
20 being open to that type of thing. But I disagree
21 with Jay. I think that to be actually called
22 accessible, it would have to be in an interactive

♀00413

1 way through SoundExchange. It wouldn't just be out
2 there on some sort of Pandora or passive streaming
3 service, but I think SoundExchange could be used to
4 determine these things.

5 MS. BESEK: Jay.

6 MR. ROSENTHAL: I am a little concerned
7 about the idea that a copyright owner who has

8 expectations about their duties for what they have
9 to do for that duty to change to get a longer term,
10 and they miss out on this notice because they don't
11 get the Copyright Office dues letter or read The
12 Washington Post or whatever.

13 It's tough for me to think that, yes, in
14 general, most people might be notified of something
15 like that, most owners might be notified, but
16 certainly some will not, and then we're right back
17 to the problem of why formalities like this do cause
18 problems is because people fall through the cracks.
19 And generally in my experience, the people that fall
20 through the cracks are the ones with the least
21 resources and yet still have some rights that are
22 very, very dear to them in one way or another. So

♀00414

1 that is my main concern.

2 MS. BESEK: To some degree, that would be a
3 function of how long the window was, I would assume.

4 Wait. Elizabeth, and then we have to wrap
5 up.

6 MS. GARD: Well, I think that you all
7 missed really like the killer of all of this.

8 So, Eric, you are so awesome. What you
9 just said --

10 MR. SCHWARTZ: Rock star again.

11 MS. GARD: I just don't think the rest of
12 the crowd understood what you said. So what he said
13 was that restored works, which would include foreign
14 works, is that the Copyright Office advocated this,
15 including U.S. works, but that Congress shut it
16 down.

17 MR. SCHWARTZ: No.

18 MS. GARD: Which means -- right? That's
19 what you just said.

20 MR. SCHWARTZ: It was the other agencies of
21 the U.S. government.

22 MS. GARD: Okay. Whatever. They're all --

♀00415

1 I don't even know any of the buildings in this town.

2 I don't. I got lost, really lost, yesterday.

3 But the point is that if it had gone the
4 way the Copyright Office wanted it to, sound
5 recordings would have been federalized, because they
6 would have been federalized under 104. Because

7 foreign sound recordings were federalized under
8 104(a). And what Eric just said is that that's what
9 he wanted, that is what the Copyright Office wanted.

10 MR. SCHWARTZ: No.

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

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

¶00416

1 MR. SCHWARTZ: Thank you. What happened
2 was in the discussions on GAT restoration, the
3 Copyright Office represented by the then-acting
4 register Barbara Ringer and I, we had discussions
5 with the U.S. government about the possibility of
6 restoration of works. We never got to the
7 discussion of the restoration of sound recordings
8 because the U.S. government essentially said that
9 the GAT implementation act would be passed on their
10 fast track, there would be one up or down vote on
11 the entire piece of legislation. And at the risk of
12 losing any votes for restoring U.S. works, not even
13 having the discussion of sound recordings, it was
14 too risky a proposition, and it was off the table,
15 which is why I said that it was for U.S. works, and
16 "works" meaning not including sound recordings.

17 That said, we never got past the initial
18 meetings at the U.S. Trade Representative's office
19 and with the Department of Commerce and other
20 government agencies because the protectability for
21 U.S. works, including sound recordings, was off the
22 table.

¶00417

1 Then the only discussion was whether to
2 include foreign works and sound recordings, given
3 that the Berne -- excuse me -- given that the TRIPS
4 Agreement incorporated by reference Articles 1
5 through 18 and for sound recordings did the same

6 with regard to the Article 18 obligation to restore
7 protectability, both for works and sound recordings.
8 That was how the foreign sound recordings got the
9 unique protection. End of story.

10 MS. BESEK: Okay. Thanks, Eric.

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

18 (Brief recess.)

19 MR. RUWE: Everyone from the panel is
20 seated. My name is Steven Ruwe. This panel is on
21 the constitutional considerations with a focus on
22 whether or not federalizing pre-'72 sound recordings

♀00418

1 presents constitutional concerns. As the federal
2 registry notice and the comments have reflected, the
3 most prominent issue that has been identified is
4 whether federalization would affect takings. I
5 expect most of the time allowed will focus on the
6 issue of whether and to what extent takings is an
7 issue and a following discussion of how those
8 concerns might be addressed. There were some
9 comments that raised other constitutional issues.
10 If there is time, we will get to them, but the focus
11 I would expect it to be on takings.

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

16 Whoever would like to start.

17 MS. GARD: I don't have as much to say on
18 this, so I won't be as grumpy or as aggressive,
19 which is not me, if you know me at all.

20 So we don't have that much to say about
21 this, but there are two models, and I want to start
22 it off with that. One is 104(a), which gave a

♀00419

1 one-year period for people who were using public
2 domain works to use them before it became
3 infringement. That was passed, that is what Eric
4 worked on. So they gave a one-year period for

5 people -- if a work had been in the public domain
6 for 70 years and you were using it, you had a
7 one-year period to use the work or you can negotiate
8 a license with the copyright holder, the new
9 copyright holder. That's one model.

10 We rejected that model because we thought
11 it was kind of mean and people like Jay wouldn't
12 like that.

13 So the second model is the 303(a) model,
14 which we did to be in compliance with Berne, even
15 though Eric wanted to pretend that wasn't the case,
16 and that was a 25-year period. It was 1978 to 2002,
17 and there was a transition period where works that
18 were in the public domain -- I'm sorry, works that
19 were perpetually protected under state law, as long
20 as you didn't publish them, were now federalized,
21 and it gave a 25-year period to further incentivize
22 people to create a published work, it gave a term

♀00420

1 until 2047.

2 When we looked at -- now, this is an area
3 that I researched way too many times in my life, so
4 we did a lot of work on this in the class, and what
5 we came up with, we thought that the two areas that
6 people would be in contention about were what would
7 be the trigger for additional protection, the 2067,
8 and we decided to do a 2067 term.

9 But the terms of the taking question, we
10 had put it at five years because the SAA in their
11 brief had said, Well, if there was some way that
12 people could commercially exploit it, we should give
13 them about five years to figure out if that is what
14 they needed to do. So we got that from the SAA.

15 And so we thought that the takings problem
16 is a problem we think that if you just let it --
17 just throw things in the public domain. We've never
18 seen that in the history of copyright law where you
19 just throw things in the public domain. But a short
20 period between one year, which probably not anyone
21 likes, but around five years, particularly since 25
22 years from 1978 is about five years in 2011 was our

♀00421

1 Hipster (phonetic) digital students' feeling that
2 time moves faster, and that is sort of where we
3 were.

4 So there was a takings problem if you just
5 throw -- inject things into the public domain, but
6 we thought they could be solved. And there are
7 already a lot of Congressional hearings on this, and
8 takings -- the takings question has been looked at
9 quite a bit, so it's nothing new.

10 MR. RUWE: Anyone else?

11 Eric.

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

20 So what we have available to us is the text
21 of the law, of the Constitution obviously, and
22 things that people have written about it. As we

♀00422

1 understand it, there are a couple of things that are
2 important. One is -- and this is where there would
3 be a burden to show commercial viability because one
4 of the things that happens is there has to -- for
5 there to be a taking is there has to be value. If
6 the value is de minimis, there isn't a taking.

7 If that's the case, and I -- if that is the
8 case, then what we have I think is a -- this becomes
9 very, very relevant to copyright term. If we have a
10 95-year copyright term from date of fixation, then
11 the takings problem becomes, I think, very hard to
12 make because the recordings that were published
13 prior to 1917, 1916, I think it would be very hard
14 to make a case that that constitutes anything more
15 than a de minimis taking.

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

22 MR. RUWE: I, again, want to extend the

♀00423

1 introductory time. I would otherwise go to the
2 specific question that is raised by Eric's -- well,

3 the notion that it would be de minimis. As a
4 general matter, that might be the case, but when it
5 gets to specific works, that might not be the case.

6 And, Jennifer, would you like to respond?

7 MS. PARISER: Sure. I don't know if this
8 is in the nature of a response to that or a general
9 comment, but take it how you will.

10 So Eric articulated this, but -- in the
11 context of term, but I'm going to try to knit it
12 together with the constitutional issue as well.

13 So, from our perspective, this whole
14 exercise is about giving libraries and archives the
15 ability to digitize and make works accessible that
16 they apparently at the moment have trouble doing
17 because of fears of litigation from the state law.
18 This isn't about trying to fix the problem some
19 perceive of copyrights being too long or any other
20 things that people are unhappy about in the
21 copyright law. So, in so doing, therefore, let's
22 not monkey around with term.

♀00424

1 Currently, sound recordings enjoy
2 protection through 2067. Let's just leave it there.
3 Right? Isn't that the simple way of doing this?
4 You leave it at 2067, then we don't have to worry
5 about authors or fixation, registration, formalities
6 or any other thing. Just leave it to 2067. Then we
7 haven't taken away rights, however grand or
8 de minimis they may be, and we don't have to worry
9 about takings. You have far less of a federalism
10 problem, and you can, you know, inject possibly some
11 of the 107, 108 fair use concepts that the libraries
12 need. And, you know, the sound recordings owners
13 are unhappy, but they are not mortally wounded, and
14 they don't really have a leg to go run into the
15 Supreme Court and say that there's been takings.

16 If, by contrast, some other formula is
17 imposed, then there will be, relative to the world
18 as it exists right now, less rights for sound
19 recording owners. Now, the less you shave off what
20 we currently have, the smaller the takings. Of
21 course, that's a truism.

22 But there are plenty of -- I don't think 95

♀00425

1 years is the right answer because there are some

2 works from the earliest periods that still have a
3 great deal of value. Caruso has been mentioned.
4 Sousa. I mean there are household names, sound
5 recording folks, out there whose works are quite
6 valuable, and we can't say that just because they
7 are old they are valueless or that a taking of them
8 would be de minimis. And why do we want to have
9 that litigation? And, you know, just don't do that.

10 And, you know, Elizabeth's proposal is
11 fantastic and fascinating, and I would have loved to
12 have been a student in that class, but the notion of
13 imposing, you know, kind of a
14 put-your-hand-up-if-you-want-to-exploit-this-work
15 kind of concept to trigger the time period will be
16 just an enormous boon to copyright lawyers, because
17 what will constitute a sufficient act, no matter --
18 we can set the bar however high or low you want to
19 set it, but as soon as there is a bar, there is
20 litigation about the bar. Right? Has it been
21 cleared? Whatever it is. So I just think that's
22 another opportunity to clog the courts with

♀00426

1 litigation over something that we needn't do. And
2 that's what I have to say about that.

3 MR. RUWE: Eric.

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

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

21 On the other hand, what is the value to
22 society if people are going through these old

♀00427

1 catalogs and saying, Well, I think I can make some
2 money off of this Sousa recording that is from 1910
3 and distribute it to the public so that people can
4 record it, so the people can enjoy it.
5 This is the value of having a public
6 domain. This is why books and movies even and maps,
7 charts, musical works, eventually enter the public
8 domain is they -- it's one of the reasons. And I
9 think that in the larger scheme of things, for every
10 Caruso -- I mean I would not think that there would
11 be more than a couple of dozen really good cases of
12 pre-1916 recordings that would even be considered as
13 possible takings from a monetary standpoint. And I
14 question even whether the Caruso recordings sell
15 well enough to be more than a de minimis taking.
16 And yet there are thousands and thousands of
17 cylinders that -- and actually probably piano rolls
18 would be considered sound recordings under this
19 too -- that would be immediately benefitting the
20 general public, and I think that that is what a
21 takings argument has to look at, doesn't it? The
22 value -- isn't this the Kelo versus City of New

♀00428

1 London case in -- rewrapped?

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

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

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

13 And so I put on my hat as a graduate
14 student who goes to the library, and I want to
15 actually be able to use those works. And so it
16 isn't just the relationship between the RIAA and the
17 libraries because it's going to still mean that I
18 can't really do anything with the works.

19 So I think it's bigger than that. I think
20 it's just bigger than just the libraries and having
21 access to materials. And if you don't have the
22 users in mind, the users are just going to feel like

¶00429

1 they weren't at the table, and they literally
2 weren't at the table. We don't have the mashup
3 people, we don't have the Nina Paleys, we don't have
4 all of those people who are freaking out over sound
5 recordings. They are not here. We have the more
6 rational librarians. So that's the first thing.

7 The second thing is, in terms -- because of
8 that federalization requires you to look at terms,
9 it requires you to look at takings, it requires you
10 to look at ownership, and it is messy. I know that.
11 And it is scary. I do understand that. But it's
12 necessary if you are going to federalize it and also
13 respond to the problems that are in place.

14 Now, the last thing about the copyright
15 lawyers thing, if there were more copyright lawyers,
16 my students will be very happy because there are no
17 copyright lawyers -- scholars at the moment. But we
18 just didn't see that with 303(a).

19 Now, there may be -- the problem -- so this
20 is a question, and I think the RIAA -- I mean you
21 guys are like the people -- my poor students are
22 like, You're like the scariest, right? So I think

¶00430

1 you can handle it. I really do. I think that you
2 can deal with the problem. You have a lot of
3 experience.

4 So that was sort of my response in terms of
5 the takings.

6 The last part, you are not supposed to
7 squeeze out every benefit value out of something and
8 then throw it into the public domain like it's
9 garage. That's not the way the system works. The
10 system works is that you get a limited monopoly for
11 a particular amount of time, and then when it's
12 over, it goes into public domain. Even if it's
13 making lots of money, it still goes into the public
14 domain.

15 And so there may be some really valuable
16 things that all kinds of people published -- I mean
17 there's lots of -- Wuthering Heights, right? Lots
18 of money made off of all of these ridiculous
19 classics. And so that's not really an issue of how
20 much value is left or not left.

21 It isn't, in terms of the Constitution,

22 limited times -- we want 108 because we believe in
♀00431

1 limited times. So limited times is what it is all
2 about, not necessarily value. It's the limited time
3 that you get the economic value, and then once it's
4 done, it's done. And sometimes there will be a few
5 that they don't all their value out, and that's
6 just -- you can do some other things, contract law,
7 or do it through something else.

8 But I think to sort of say -- and I see
9 Eric saying, Well, there may be value, and sort of
10 backtracking a little bit, and that's not -- it's
11 just not how the system works. The system isn't
12 about sort of deeming as much value out of
13 something. It's out of value at a particular period
14 of time, and then everybody else gets to do that
15 with the value.

16 So I just wanted to sort of clarify that.
17 And the Kelo, I don't think that applies at all.
18 Any of the property cases, I would say don't worry
19 about them.

20 MR. RUWE: Jay, you haven't spoken.

21 MR. ROSENTHAL: First of all, I mean in
22 terms of what the public domain is all about and

♀00432

1 what copyright law is all about, I have always
2 viewed it as being an incentive to the artist to
3 create.

4 I think that maybe you are focusing a
5 little bit different on who is the rock star here.
6 I've known a lot of rock stars and I know Eric, you
7 know, and I'm sorry to tell you this, but you are
8 not even close. I mean, but I love you anyway, and
9 it's great and all that.

10 MR. HARBESON: They are talking about Eric
11 Schwartz. I know I'm not a rock star.

12 MR. ROSENTHAL: No. No, that is clear.

13 And it's funny you mentioned mashups. I'm
14 just trying to think of girl talk on this panel.
15 Very interesting. But we can have a whole session
16 on girl talk and whether that is good or bad, but
17 putting --

18 MR. CARSON: Okay. 1:15.

19 MR. ROSENTHAL: -- here is what -- I want
20 to focus on this issue. I just see this as an

21 uncertainty issue that the publishers are very
22 concerned about, and I tell you if there is any

♀00433

1 issue that at least smells like a class action
2 lawsuit is going to be coming down the road, this is
3 it. And that's where the question becomes how much
4 uncertainty does it bring and how much are other
5 players, like music publishers put into a bad
6 position because of that, so I do agree with the
7 RIAA and A2IM on this point that this is a real
8 issue, whether right or wrong, and, boy, we can
9 argue about what has value or not, and what is de
10 minimis and, you know, Caruso and whatever, but this
11 is one of great concern as it relates to the issue
12 of potential litigation down the road.

13 MR. RUWE: Tim.

14 MR. BROOKS: Yes. The Association for
15 Recorded Sound Collections since the very beginning
16 of our investigation of this issue has been hearing
17 the term "takings." "Takings," as if it's some sort
18 of flaming sword that with one word can smite the
19 public domain and whatever else we're trying to do.

20 As we look into it and heard from more
21 people and heard from attorneys on it, we found, as
22 I think you are hearing today, that it's not as

♀00434

1 clear as that. And takings is enshrined in the
2 Constitution, but it's enshrined in a way that
3 takings have to be for the public good.
4 Preservation has been widely accepted as a rationale
5 and justification for takings, and property is
6 taken, many things are taken for preservation
7 purposes. I don't think anybody would dispute that.

8 The matter of without just compensation, we
9 can have lawsuits. I suspect whether or not -- no
10 matter what we do today, there will be lawyers
11 filing class action lawsuits en masse. It is a
12 profession that is not under siege in any way. And
13 certainly will not be cast into great expansion by
14 anything we do here.

15 So, takings, we think is an issue, and
16 we've commissioned our own attorney, we've submitted
17 our comments on that with citations about the fact
18 that this is not the issue that it seems to be. If
19 it stimulates some lawsuits, it may. Everything

20 will. I don't think that's a reason not to do the
21 thing that is right.

22 This is a panel hopefully of experts on
♀00435

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

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

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

20 MR. RUWE: Okay. To go on from that
21 thought is if it's an undefined compensation that
22 may become due at some point, wouldn't it be better

♀00436

1 to affirmatively address the compensation in some
2 sort of proposal as opposed to just saying it's
3 de minimis and that unknown bill might come due --

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

16 And I'd point back that 96 percent of this
17 stuff is not even exploited at all and the 4 percent
18 that is exploited by our research, it isn't

19 exploited with 4 percent of the money. It's stuff
20 that has never placed on the charts. It's
21 never -- acoustic recordings have never shown any
22 sign of post-1925 value. Maybe in '26 they did, but

♀00437

1 they certainly haven't in the last half century.
2 There is no evidence that's been advanced
3 by the copyright holders other than general
4 statements that, You've heard of Caruso, it must be
5 valuable. I think that would have to be
6 adjudicated. I think if they really believe that,
7 then they have to make that case and make it with
8 data and not general statements. But for the
9 purposes of this, if they can make the case that
10 somehow it's something of value, there is long
11 precedent for compensating them appropriately to
12 that.

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

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

19 MS. GARD: I don't think there is any
20 historical precedent for that. I mean 104(a) didn't
21 have that, and in 303(a), I think as long as you
22 have a particular term, then you will be fine. I

♀00438

1 just don't think that it's really an issue as long
2 as -- unless you dump everything into the public
3 domain immediately, which I don't think is going to
4 happen.

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

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

14 MR. BROOKS: Yeah, we have no issue with
15 some sort of brief transitional period. We don't
16 want to further complicate the law by having
17 transitional periods that undermine the whole point

18 and take everything out to 2067 or something like
19 that. But we don't want to be unrealistic in that,
20 and, yes, there can be some reasonable brief
21 transition so that people know what's happening.

22 The reality -- we keep talking about

♀00439

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

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

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

17 MR. RUWE: Jennifer.

18 MS. PARISER: I don't think you fix the
19 takings problem just by putting a transition period
20 in. That lessens it to a certain extent, obviously.
21 As I said in the beginning, the less harm you do,
22 the less of a problem you've caused. But a

♀00440

1 transition period doesn't fix the whole takings
2 problem. The fact that there was 25 years for 303
3 --

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

5 MS. PARISER: Right, there was a year for
6 104, because there are reliance parties using
7 otherwise public domain works. They are not
8 copyright owners. They are just people who were
9 making commercial use of something that they didn't
10 own and had no rights in.

11 The 303 people were actual copyright
12 holders, a more analogous situation. They got 25
13 years, and remember that is 25 years for more
14 current works. And you can, I suppose, argue this
15 either way. But I would argue the fact that these
16 are older works, older parties are longer, more

17 difficult group of heirs, more dispersed
18 corporations that have gone out of business, means
19 you need more time for them to come out of the
20 woodwork, figure out what is going on, understand
21 their rights and be able to assert them.

22 Typically it is -- you know, on the record

♀00441

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

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

♀00442

1 the exploitation.

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

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

14 MS. BESEK: Yeah, I think -- and this is
15 something I would have to go back -- but I thought

16 you get life plus 70, and if life plus 70 has
17 expired, then you get that extra period of
18 protection so you get some protection. Well, it
19 would have been life plus 50 at the time it was
20 passed.

21 MS. PARISER: Yes. I was only speaking
22 about the 25 years to publish. That transition

♀00443

1 period in 303.

2 MR. CARSON: But that didn't cut short a
3 term you otherwise would have had based on life plus
4 70.

5 MS. PARISER: Yes.

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

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

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

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

♀00444

1 very much of a takings relative to what we're now
2 talking about.

3 MS. GARD: Can I just respond?

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

10 The second part is that 104(a) -- I mean
11 this is really important, so what 104(a) did is that
12 if you had a work that was in a public domain,
13 anybody could use or do anything with it. Movie
14 studios, your artists use it, lots and lots of

15 works. Seventy years that it was in the public
16 domain, you had one year to use it. So those were
17 copyright holders that were harmed, not -- and it
18 wasn't like they were using -- it wasn't their stuff
19 that they were using. They took a short story and
20 they made a movie out of it. They are now
21 infringing after a year because it was in the public
22 domain.

♀00445

1 I don't think that the MPA and the RIAA
2 realize how much stuff could potentially be
3 infringing that you guys have because it was in the
4 public domain that now is infringing because of
5 104(a). I don't think that's ever been fully
6 tweaked out.

7 But this means that -- that is exactly the
8 same situation here in some way. It's perpetual
9 copyright or 2067 cut short, and there are people
10 that own it or depend on it that now can't. And so
11 one year, 25 years, 5 years, 100 years, as long as
12 there is some sort of time period, at least from the
13 Congressional records, you are through the takings
14 problem. And so that's the analysis.

15 But to say like they didn't have the right
16 to use it, they totally had the right to use the
17 public domain work. That's the whole point. Almost
18 all of your music is based on some sort of public
19 domain
20 iffy thing and then -- right? That's how it all
21 works, right?

22 MR. ROSENTHAL: No, that is not how it

♀00446

1 works, but we won't get into it.

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

5 MR. RUWE: Jay.

6 MR. ROSENTHAL: Yeah, just to address your
7 point directly about the compensation -- I think
8 that's what you were asking about -- I just want to
9 make a point that it's a slippery slope in terms of
10 trying to access value.

11 Just using the word "shipped" is
12 fascinating in today's day and age. I'm not quite
13 sure whether that has much meaning any more as it

14 relates to value.

15 Just a short -- an anecdote -- I know that
16 anecdotes aren't really looked upon well here. We
17 didn't do a study on this. But a record label guy
18 told me one day that they are focusing more now on
19 old classical music, and the reason is is that
20 because they feel that classical music aficionados
21 and fans don't know how to legally download. Why
22 are they doing that? Whatever reason it is, they

♀00447

1 are. So that has to be taken into account when you
2 think about what is value.

3 All I'm trying to say it's a slippery slope
4 trying to think of what kind of compensation you are
5 going to give to a copyright owner because of this
6 alleged taking.

7 MR. BROOKS: Life is a slippery slope.

8 MR. ROSENTHAL: It is a slippery slope. I
9 hear you.

10 MR. RUWE: There seems to be some
11 acceptance that in the '76 Act that 25 years was a
12 reasonable amount of time. Is that something that
13 could work in this situation? Is it still
14 reasonable?

15 MR. BROOKS: Could you clarify?

16 MR. RUWE: Well, talking about a window of
17 time, a reasonable time if you are extinguishing
18 common law rights, substituting federal rights. In
19 the legislative history at the time that Chapter 3
20 was done, it was 25 years, no takings claims came
21 about. Does that mean it's reasonable? It
22 seemingly was reasonable then, at least in some's

♀00448

1 views. Would it be reasonable in a current
2 proposal?

3 MR. BROOKS: For the pre-'23 recordings?

4 MR. RUWE: Yes.

5 Jennifer.

6 MS. PARISER: Okay. So 25 years -- first
7 of all, 303 doesn't apply to sound recordings, so --

8 MR. RUWE: But you --

9 MS. PARISER: -- so it never became
10 necessary for the --

11 MR. RUWE: For your clients.

12 MS. PARISER: -- for my clients to sue

13 under that statute.

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

16 MS. PARISER: I think we'll agree that we
17 are more unreasonable than some of the other
18 copyright owners out there. And, you know, hey, if
19 303 applied to us, there might be a Supreme Court
20 decision on takings.

21 And, you know, the fact that there hasn't
22 been litigation yet around that, I think it's -- I

♀00449

1 suppose that somebody who owned a copyright who is
2 affected by it had standing when that statute was
3 enacted, but, you know, I think -- I don't know that
4 they are necessarily waiting around. But they still
5 have time. I mean anybody who -- I think anybody
6 whose rights are still in place, you know, could sue
7 at the expiration of those rights.

8 MS. GARD: They were perpetual.

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

22 So, you know, is this a takings problem?

♀00450

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

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

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

11 MS. PARISER: Any shortening of the

12 duration that currently exists can't be compensated
13 by a phase-in period. That makes it less damaging
14 but it doesn't compensate for a shortening of the
15 period. That can only be done with compensation.
16 But I don't know how you compensate it. That's even
17 harder than figuring out chain of title.

18 MR. RUWE: Tim.

19 MR. BROOKS: Just briefly. To answer your
20 question directly, we would have a considerable
21 issue with 25 years in which Reverend Myers can't be
22 heard and the Fisk Jubilee Singers can't be heard,
♀00451

1 and all these Greek and Jewish and other immigrant
2 groups can't be heard on the altar of a principle
3 that in general we don't want to do it.

4 If there is some kind of regime whereby
5 those things which are pre-1923 are still made
6 available -- I hate to bring in "use it or lose it"
7 kind of thing -- but for a transition mechanism, all
8 we want is access -- access and preservation, those
9 are the two goals. Then perhaps they want to keep
10 Caruso in print for another five years or six years
11 to extend that to 95 years, yes, or even longer,
12 that's a possibility.

13 But I really object to the idea of
14 silencing so much of American history because of
15 considerations of rights-holders who have shown
16 absolutely no economic reason to access or make
17 available this stuff. We are crushing American
18 history on this business of points of law which
19 aren't serving a purpose.

20 MR. RUWE: Eric, then Elizabeth.

21 MR. HARBESON: My recollection of the
22 transition term was that it was in part justified by
♀00452

1 the fact that had the transition period not been in
2 place, certain publications or certain unpublished
3 works wouldn't have been able to enjoy a full
4 copyright protection term.

5 Am I remembering that correctly?

6 MS. GARD: Yeah, if you hadn't done the
7 transition period, anything that was longer than
8 life plus 70, say like Abigail Adams, would have
9 gone into the public domain. I mean so it would
10 have gone from perpetual to public domain. And so

11 there was the idea that you needed a transition
12 period, but that you would enjoy federal protection
13 for 25 years, and then an incentive period to then
14 also gain a longer term.

15 MR. HARBESON: Right. Now, sound
16 recordings -- one of our points is that sound
17 recordings already have enjoyed considerable
18 copyright protection for -- in some cases 120 years
19 already. Not federal copyright protection but
20 common law copyright protection anyway. It doesn't
21 make sense to us to advocate that now somehow we
22 have to give a transition period where the

♀00453

1 recordings can enjoy federal copyright protection
2 when they have already enjoyed a term longer than
3 any other medium enjoys.

4 I mean, Jay's clients publish public domain
5 music. There is a lot of money being made in
6 Beethoven. I could go and publish my own Beethoven
7 music. I might take a little bit from Jay.

8 But the point is, you know, after stuff
9 enters the public domain, you can still make money
10 on it. But to assert that the -- because we have --
11 the reasoning for having a transition term doesn't
12 make as much sense to me in this case than it did
13 for 303(a) because of the reasoning -- the situation
14 is different, I think.

15 MR. RUWE: Elizabeth.

16 MS. GARD: Yes, I advocate a one-year term
17 as a place to start. That is what 104(a) does, and
18 so that's what we've been doing. That's our latest
19 model is 1994 and 104(a). And if it was good at
20 that point, I suspect that a one-year transition is
21 fine now as well. I don't think it's as generous --
22 I mean my class is more generous than I am and they

♀00454

1 have suggested a five-year term. But I think one
2 year is plenty, and that seems to be what is in
3 vogue.

4 MR. RUWE: I think it's useful to look at
5 those past examples during which claims did not
6 accrue, but in this situation where we have people
7 who are familiar with the works, what could provide
8 just compensation? What sort of -- and it's not
9 just -- is there an added scope of protection that

10 would be available under federal law that might
11 also -- in addition to just purely time that is
12 available under federal protection, could that be
13 viewed as just compensation?

14 MS. GARD: No.

15 MR. RUWE: Not just reasonable time but
16 reasonable time during which you have possibly
17 additional value.

18 MS. GARD: I don't think that the
19 government is in the business of giving people -- I
20 mean you think about all the takings cases. It's
21 not really in the business of giving people for
22 things that -- because -- because the laws change
♀00455

1 that that -- I mean that is why the takings -- that
2 is why the Copyright Office -- I mean copyright laws
3 look the way it does is time is all that they are
4 really giving. They are not giving actual money. I
5 don't think it's actually ever given money.

6 MR. RUWE: I wasn't saying money, but
7 value.

8 MS. GARD: What do you mean by "value"?

9 MR. RUWE: Well, is there a greater scope
10 of protection if these works were brought under
11 federal law than the protection currently afforded
12 the common law?

13 MS. GARD: Yes. They get all kinds of
14 things: They get statutory damages, they get
15 attorneys' fees, they get the whole package. You
16 get the whole package.

17 MR. MARKS: Don't assume that we want those
18 things. Don't assume that we think that protection
19 under federal law is necessarily better --

20 MS. GARD: No, no, he asked what else you
21 got, and I said you get attorneys' fees and --

22 MR. MARKS: But getting statutory damages
♀00456

1 as opposed to the damages that we can get through
2 state law, all I'm assuming is don't assume that
3 those things are necessarily better for us.

4 MS. PARISER: Right. I mean we talked
5 about this --

6 MS. GARD: I don't know anything about what
7 you guys do.

8 MS. PARISER: We talked about this

9 yesterday a bit. I mean, yes, if you're giving me
10 more than what you are taking away, then, you know,
11 I've got no reason to complain, but what I've heard
12 so far is not giving me a warm feeling.

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

19 The tradeoff is I give those things up and
20 I get statutory damages instead, and the right to
21 ask for attorneys' fees, which are almost
22 universally denied if I've gotten a substantial

♀00457

1 statutory award, that's not necessarily a deal that
2 I want to make. That's why we're here to a certain
3 extent is that federalization, that federalization
4 grant of rights doesn't compensate for what is being
5 taken away under state law, in particular the
6 shortened term.

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

11 MR. RUWE: No response?

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

14 Jennifer.

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

17 MR. RUWE: David.

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

20 MS. PARISER: For that moment.

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

♀00458

1 MR. RUWE: Eric.

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

6 MR. RUWE: So --

7 MR. BROOKS: I'm actually not sure why we

8 are debating what the just compensation should be if
9 we haven't established the value of what it is that
10 compensation, whether it's regulatory or otherwise,
11 is for. Clearly, there seems to be a difference
12 of opinion here about what the value of the things
13 that passed in the public domain would be.

14 Some of us feel that value is de minimis,
15 and we think we have facts on our side for that.
16 Obviously, rights-holders feel otherwise. I think
17 it's incumbent on them to prove that. I'm not sure
18 this is the forum in which to do that.

19 I think this recommendation here should be
20 on the basis that if there were to be -- and it has
21 to be demonstrated and it has to be quantified --
22 value there, then that becomes the place at which
♀00459

1 you decide about compensation. Maybe that is
2 something in the next few weeks that the industry
3 can quantify rather than making general statements,
4 and then it can be addressed.

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

14 MS. GARD: I completely agree with Tim.

15 Also, property law, I mean it's hard to get
16 compensation. I mean go to court. This is really
17 in the -- I mean you lose your little pink house and
18 you still don't get very much compensation. I mean
19 like this is not -- and we've already discussed -- I
20 mean we've gone down this road twice with copyright
21 law and they didn't find any takings. I don't think
22 it's really a big issue. It doesn't seem to me -- I

♀00460

1 mean it would be interesting to see if there's a new
2 argument to be made, but it's a really difficult one
3 to actually surmount because of what you are saying.
4 I completely agree with what Tim is saying.

5 MR. RUWE: I want to turn back to one of
6 the proposals that has been made about -- or what

7 about the possibility of getting the full term by
8 filing a notice? Is that something that would
9 provide -- presumably you are not denying anything
10 at that point. You are getting the full term that
11 you currently -- it's available to you, you get the
12 full term that you currently expect.

13 MS. PARISER: So 2067.

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

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

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

22 MS. PARISER: I think probably not. I

¶00461

1 think you've got a -- now we're in the discussion
2 that Eric was talking about, about whether the
3 copyright law wants to embrace that kind of
4 formality, quote/unquote.

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

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

17 MR. RUWE: Elizabeth.

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

¶00462

1 Chris.

2 But it really was just some form of
3 making -- it was a very European sort of making
4 available -- everything that you have is online and
5 so much stuff is already out there that it really

6 was a much lower burden than registering or anything
7 else. It was just an assertion of some sort online,
8 like whatever we -- whatever way it was, the easiest
9 way possible, even the RIAA asserts we -- or
10 whatever. But it was just a way to get the other
11 stuff, the stuff that Tim cares about, out in the
12 public domain because it was a compromise that we
13 saw in our class of how different interests could be
14 served and not as an entitlement for the RIAA.

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

♀00463

1 MR. RUWE: Eric.

2 MR. HARBESON: We don't actually feel that
3 a 2067 expiration term is reasonable for anything
4 other than sound recordings made in 1972.

5 MR. RUWE: Chris, did you have a question?

6 MR. WESTON: This is slightly off topic,
7 but it sounds like that might be appropriate at this
8 point. And this has just been something that I've
9 been curious about. Takings aside, I was wondering
10 on the part of the record companies, what are the
11 policy reasons why sound recordings should have a
12 longer copyright term than every other type of
13 copyright work; in other words, the works from
14 before 1923? I mean I understand, you know, you
15 have it and you don't want to give it up, but I'm
16 wondering as a policy reason, why should that be?

17 MS. PARISER: Well, there's a lot of policy
18 kind of swirling around here. First, there is the
19 fact that -- this isn't perhaps that satisfying to
20 you -- but the fact that that is the way it has been
21 means that companies have developed business
22 expectations around it. They have license deals

♀00464

1 that take into consideration the term of copyright.
2 You know, the business model of a license these days
3 takes into -- licenses the entire catalog, takes
4 into consideration a particular term of copyright.

5 It's all sort of part and parcel of the way these
6 companies operate. So that's number one.
7 Number two, sound recordings have only been
8 protected by federal copyright since 1972. They
9 don't have a public --

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

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

22 MR. WESTON: Okay. Thanks.

♀00465

1 MS. BESEK: We've been talking about the
2 takings issue from the perspective of takings from
3 the owners of rights in sound recordings, but some
4 of the comments raised the possibility that there
5 might be a constitutional issue with respect to
6 users who were acting in reliance on perhaps weaker
7 protections under state law and assuming they could
8 do certain things that would not be permitted if
9 sound recordings were federalized.

10 And I just wanted to know if any of you had
11 a view on whether there is an issue on the other
12 side with respect to users who have been doing some
13 things that they would no longer be able to do if it
14 were federalized?

15 MR. RUWE: Jay.

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

18 MS. BESEK: This actually comes from a
19 couple set of comments, one of which I know was EFF,
20 for example. But that there are -- in fact, under
21 state law, in some of the states there is only a
22 right in the nature of unfair competition against

♀00466

1 competitive uses. So you, the user, might be making
2 a kind of use that's not a competitive use, but it
3 might not fall in a permitted area, it might not be

4 one of the exceptions that we would be allowed to do
5 under federal law. Actually, this might be the case
6 even for some kinds of library uses, to tell you the
7 truth.

8 So the question is, is this something that
9 we should be concerned about? I'm just throwing
10 this open. Do you think there are those kinds of
11 uses? Do you know of any such uses like this that
12 we ought to be thinking about?

13 MS. PARISER: Nothing comes to mind, and I
14 think it's an interesting hypothetical, but I think
15 the premise of all of this is the notion that,
16 rightly or wrongly, there will be the view held, at
17 least by the libraries, that state law is more
18 protective rather than less. That is why they are
19 concerned. That is why their general counsels are
20 giving them conservative advice.

21 If there is an individual out there who has
22 a contrary view and is making some use based on
♀00467

1 that, now it's hard to say that's necessarily wrong,
2 there's a lot of states out there, but I think the
3 working presumption we're all going on here is that,
4 at least
5 hypothetically -- the working assumption people have
6 is that state law is more respectful of common law
7 copyrights than federal would be.

8 MR. OXENFORD: We made the comments in our
9 reply that there may be that potential with respect
10 to the public performance issue where there is not a
11 public performance in pre-'72 sound recordings in
12 our opinion under state law, but I think that was
13 fully vetted yesterday during our session yesterday
14 afternoon.

15 MR. RUWE: Jay, do you have --

16 MR. ROSENTHAL: Could you be talking about
17 a -- I'm trying to think of what your example here
18 is -- of a sound recording that might have a longer
19 term than maybe someone who wants to use it would
20 expect in the context of the creation of a
21 derivative work? A digital sample, is that what you
22 are thinking of here? I'm trying to get a grasp

♀00468

1 on --

2 MS. BESEK: I should say this is not my

3 thinking. This was something that was brought up in
4 the comments, but as I think about what might be a
5 possible scenario, I suppose you could have a
6 situation where somebody created a derivative work
7 but isn't doing it in a competitive situation. And
8 while it's true that if you take the states all
9 together and you have to look at the most
10 restrictive, then you could argue that the states
11 are more restrictive. But if the conduct is
12 localized, there are definitely some states that you
13 could see as being significantly -- having
14 significantly less protection for sound recordings
15 than federal copyright law would provide.

16 MR. ROSENTHAL: If we are talking about
17 library usage, I'm very sympathetic to some kind of
18 protection. If we're talking about using Caruso as
19 a digital sample, which absolutely is a fascinating
20 thought, I have very little. I think that there we
21 get into the type of usage that we're talking about.
22 Nevertheless, I think it's an issue. I hear what

♀00469

1 you are saying is that there are expectations on
2 both sides, and if someone uses a work in a way they
3 believe is legal, and yet we step in and somehow
4 place on it, you know, this new paradigm that it is
5 no longer legal, there should be some kind of, you
6 know, tradeoff there in terms of what kind of
7 remedies and what could be done. And there is some
8 history in copyright law that deals with that issue,
9 especially derivative work creations.

10 MR. RUWE: Eric.

11 MR. HARBESON: I think that the
12 hypothetical actually came out of the recording
13 institute's comments. Bringing up the traditional
14 contours argument in Golan versus Holder which is in
15 the Supreme Court next term.

16 And I should say that we're actually
17 sympathetic to the plaintiff in that case,
18 especially in this -- this is a case where you had
19 works that were taken that had been in the public
20 domain and left the public domain, and that is
21 certainly changing the traditional contours of
22 copyright. As far as I know that's never been done.

♀00470

1 I think what is different about this case

2 is -- and, again, I'm not a con law scholar --
3 but I think what is different about this case is
4 this is an example of Congress being given the
5 authority to establish copyrights in the first
6 place, to -- and to preempt state laws. So I do
7 think that that makes a difference in this case,
8 because in Golan you had federal law reversing the
9 public domain in federal law. In this case you have
10 federal law trumping state law.

11 I don't know of any examples of people
12 making use of sympathetic state laws to -- as
13 reliance parties to something that might one day
14 come under copyright. I would be interested to know
15 if anyone else does. Tim may know.

16 However -- yeah, I mean I don't know of any
17 examples of that. I think that that would be
18 difficult given the recent case law regarding -- I
19 don't know how you could have a presence in the
20 world where you could be sued in any of 50 states
21 rather than just the state that you are in.

22 Colorado, my home state, is actually a very
♀00471

1 sympathetic law -- set of laws to us. As I
2 understand, we have a 50-year term. That doesn't
3 help me especially because I have -- I do have to
4 worry about other state laws.

5 And I don't know how you would address
6 cases where you actually have a -- someone who has
7 made a business model out of exploiting some of
8 this. As I said, I don't know of any examples, but
9 I -- I don't know, maybe there is room in 107 for
10 people who have been doing this for a long time. I
11 would be -- if there is such a case, I would think
12 that that would be a sympathetic use case.

13 MR. RUWE: You've gone into the area of
14 other than takings constitutional issues. We do
15 want to take the opportunity to rejoin our previous
16 schedule, so if anyone would like to take a brief
17 moment to address either one of the other
18 constitutional issues that have been raised and
19 comment or final thoughts on the takings issue, I
20 welcome that. Is that a yes or a no?

21 MS. GARD: No. Done.

22 MR. CARSON: Worn out?

♀00472

1 MS. GARD: Totally. We are done?

2 MR. RUWE: We are done.

3 (Recess.)

4 MR. CARSON: We are going to start the
5 third session of the day. We can almost see the
6 light at the end of the tunnel, I think.

7 The third session is on alternatives to
8 federalization, and I take that to mean, are there
9 other ways to accomplish the goals that proponents
10 of federalization have, ways other than federalizing
11 protection for sound recordings.

12 So I think we will start this by going
13 around the room and letting people give sort of a
14 brief introduction of their perspective on that
15 point and see where the conversation goes after
16 that.

17 Yeah, Tom.

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

♀00473

1 and choosing?

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

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

12 My question is, if we are talking about
13 alternatives to federalization, I want to clarify
14 what that federalization array of rights means.

15 MR. CARSON: Well, I don't think anyone has
16 defined a specific plan for federalization. We've
17 heard various suggestions on what should happen.
18 For example, since you talked about the full array
19 of rights, there are certain people at this table
20 who -- and we've heard this many times -- have a
21 different point of view on whether those rights
22 should include public performance for sound

¶00474

1 recordings.

2 So there are differences of opinion as to
3 what full federalization would mean. I think we've
4 heard some of that already. Now, we're saying,
5 fine, let's assume we are not going to deal with
6 this in Title 17 of the U.S. Code, is there some
7 other way, nevertheless, to accommodate the needs
8 that many people have come to us and many people
9 around this table are suggesting need to be met?

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

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

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

18 And it seemed that a lot of the other
19 reports that have been done have talked about some
20 of the issues of inconsistency from state to state
21 and how that is jeopardizing one of the goals here,
22 which is preservation and access, but it's a much

¶00475

1 broader case of, you know, is it -- in my mind, it's
2 a federalization versus states' rights issue. Do
3 you want to go the state route or do you want to go
4 to federalization?

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

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

16 If you look at say something like the UCC
17 and the UCC Recorder, those statutes are pretty much
18 the same from state to state, and the judges really,
19 even though still persuasive precedent, still look
20 strongly from state to state, because they are all
21 dealing with the basic core of uniform law.

22 Some of the minuses would be that you still

¶00476

1 have the risk of non-adoption or variation. That is
2 true in the UCC. It's painfully true in something
3 like UCEDA where you have two states that have now
4 adopted it, and it seems a pretty cold menu to eat
5 in a lot of the other states.

6 Another negative would be you still have a
7 dual system for the same type of work. You would
8 still have some sound recordings under state law and
9 you'd have some sound recordings under the federal
10 system in terms of the pre and post too, and so you
11 are not sort of solving the inconsistent problem in
12 a complete way.

13 And I suppose one other minus would be
14 that -- maybe it goes to Elizabeth's point -- which
15 is that a point of the copyright law is to encourage
16 creativity. Once the creativity is there, there is
17 a limited monopoly, but it is limited. At some
18 point that creative work goes into the public
19 domain.

20 And unless you are going to draft a model
21 law that has some very terminable end points, you
22 are still going to have this overextended or

¶00477

1 extended duration period problem. And maybe the
2 uniform law can solve that. You know, the advantage
3 would be that it can work in the specific types of
4 exceptions that some of us here have been
5 requesting. But, again, there's no guarantee that
6 it's going to be adopted in exactly the same way by
7 all 50 states or all jurisdictions you have.

8 MR. CARSON: You are suggesting that
9 perhaps a uniform law might actually describe a term
10 which might be something short of 2067. Maybe the
11 RIAA is rethinking the uniform law.

12 Anybody else like to -- okay. Eric.

13 MR. HARBESON: Well, as -- I feel like I'm
14 going to start sounding like my friends over in the
15 industry who have been saying all -- yesterday and
16 today they've been saying, Well, we don't support
17 this, but...

18 So we don't support this, but if we could
19 come up with a system of state laws, I won't say
20 that that won't help us. I agree with Tom that it

21 would not solve all of the problems, but it would --
22 I mean it could help us considerably. It would make

♀00478

1 it much more easy for us to go to our general
2 counsels and point to a law that is enforceable that
3 we can rely on and that we can point to when we're
4 looking for grants and such.

5 One thing that we would -- it would help a
6 great deal if we could have some kind of indication
7 in that state law of the existence of fair use. If
8 there were library provisions, that would be even
9 better, but really what we're going for is fair use,
10 because that's the kinds of uses -- we don't want to
11 make unfair uses. So there's really what we're
12 going for.

13 And another option which I haven't really
14 thought about for longer than about a minute, so
15 take it for what it's worth, is rather than looking
16 at taking 301(c) away, amending it so that the --
17 and, I'm sorry, you are really not going to like
18 this -- but amending --

19 MR. CARSON: It's bound to happen
20 eventually, Steve.

21 MR. HARBESON: Amending 301(c) to -- rather
22 than have a fixed state of 2067, but to have it be a

♀00479

1 time-based -- a fixed term. And this is different
2 from what we've been proposing in that what it would
3 do is it would give you the state law for as long as
4 you had the law, but then it would ensure that
5 things passed into the public domain.

6 So, next year, recordings that have been
7 recorded in 1917 would enter the public domain, but
8 the recordings that had been recorded in 1918 would
9 still -- you would still have your state law. That
10 would, I think, help with your chain of title
11 problems and the other complexities that would --
12 that you've been bringing up that didn't relate to
13 the term in the constitutional thing. So, as I say,
14 this is -- I came up with this about a minute ago,
15 so take it as half-baked.

16 MR. CARSON: I wonder if you would like to
17 take another minute or two thinking about it because
18 I'm not sure I understood it.

19 MR. HARBESON: So 301(c) -- let's see if I

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
♀00480

1 until 2067, when they enter the public domain, you
2 can say that with respect to sound recordings fixed
3 before February 15, 1972, any rights or remedies
4 under the common law or statute shall not be
5 annulled or limited by this title until 95 years
6 after, or some other length, 95 years after the
7 point of fixation.

8 MR. MARKS: Then it would be federal at
9 that point.

10 MR. HARBESON: Then it would be in the
11 public domain. But until then it would be under the
12 state law. So -- many of the complaints that the
13 RIAA and A2IM brought in their comments was the
14 complexities of negotiating chain of title,
15 contracts and the like.

16 And I did warn you that you wouldn't like
17 it. But at the very least that would be alleviated.
18 It would not help you holding a monopoly on an 1890
19 cylinder, but it would help you at least with that
20 little aspect.

21 MR. CARSON: Okay. I just want to get
22 people's basic propositions on the table before we
♀00481

1 start responding to people. So anyone else -- I
2 think, Dwayne, you had your hand up first.

3 MR. BUTTLER: I think that Tom made lots of
4 good points about a model law. You know, I'm not
5 convinced because I worry about the patchwork system
6 and how we deal with those states that don't have
7 any law at all. How we deal with the more
8 restrictive/least restrictive kinds of issues. But
9 I think if we are talking about alternatives, that
10 is certainly one alternative to bring some
11 uniformity to it.

12 I'm inclined to think more about the
13 possibility that we look again at that use kind of
14 question and, you know, certainly we have preemption
15 with respect to owner rights in copyright law, or at
16 least equivalent kinds of things. Whether -- a
17 couple of courts have looked at fair use and some
18 common law sense have applied it to like

19 copyrightable works. I wonder if we could look at
20 the notion that there are some bilateral treatment
21 of exceptions and ownership rights in the preemption
22 realm where you push fair use and Section 108 and
♀00482

1 those kinds of things into the state law realm and
2 try to use those as a mechanism to temper some of
3 the more onerous restrictive environments.

4 MR. CARSON: I'm guessing that is not so
5 different than perhaps what we're going to hear from
6 Brandon.

7 MR. BUTLER: No, it's not. That is right.
8 So I'm going to be rising in defense of state law.

9 My basic position is that state law is
10 actually not so bad. That what would be a really
11 wonderful alternative to federalization would be
12 that we do some diligence to fill in the details,
13 but that if you read Professor Besek's two reports,
14 Professor Jaszi and his clients' reports, and then I
15 had our very talented law student spend a couple of
16 days doing a classic summer law student project and
17 putting together a 50-state Excel spreadsheet, which
18 I felt very bad asking for, but I wanted it -- but
19 there are trends and commonalities across state law,
20 and many of those trends are friendly. In fact, I
21 would say all of those trends are friendly to
22 library uses; that is, the contours of

♀00483

1 state statutory -- explicit statutory protection are
2 the kinds of protection that I wish existed at the
3 federal level. They protect your commercial
4 interests and they let you attack -- "you" being the
5 RIAA for the folks listening at home -- it protects
6 the commercial interests of folks that have
7 commercial interests by penalizing commercial
8 activities that compete. Those are the statutory --
9 and so, by and large, libraries will escape from any
10 kind of statutory, you know, unauthorized
11 distribution type of problems, and that's -- you
12 know, you can look at again Professor Besek's
13 studies and Professor Jaszi's studies to see that.

14 And so the only remaining question is
15 common law copyright. And I actually -- because
16 I've been looking at this again for a little over a
17 year now, we've been investigating fair use at the

18 federal level and how it's operating right now, and
19 I believe very strongly in the power of fair use.
20 And as Eric said, libraries don't want to make
21 unfair uses. And we think fair use constitutionally
22 ought to apply at the state level.

♀00484

1 And so what we -- because, again, it's been
2 said by the Supreme Court that the fair use doctrine
3 is part of the sort of escape valves in copyright
4 that ensure that the copyright monopoly is not an
5 infringement on legitimate first amendment interests
6 like parody and critique and scholarship, right? So
7 that presumably would also apply against the states
8 because it's incorporated, right? So
9 constitutionally they could not forbid fair uses.

10 So what we would like, as an alternative to
11 federalization from the Copyright Office as part of
12 this process, we would love to see, because you guys
13 are the pros and the experts, one more study that
14 would -- because those first three were still
15 tentative and incomplete and so on, but they show
16 trends that are so promising in terms of what state
17 law really is, that we think an authoritative
18 statement that said fair use is constitutionally --
19 is very likely that a reasonable common law judge at
20 the state level will apply fair use for library
21 uses, on which June has already essentially said
22 that, but we like to hear it more authoritatively

♀00485

1 based on a real 50-state survey, then I think we
2 would be in business. I think we could do a lot of
3 what we want.

4 And it was also really interesting to hear
5 that statutory damages are not all that exciting for
6 some of the rights-holders in some contexts, but
7 they are very scary for us. So if you guys aren't
8 really fired up to get them and we aren't really
9 fired up to be subject to them, then I think
10 everybody in the room could agree that a states law
11 system where there are no statutory damages is a
12 pretty good thing.

13 MR. CARSON: They are fired up to get
14 punitive damages. How do you feel about that?

15 MR. BUTLER: Try and get them against a
16 library. It's not going to happen. It's not going

17 to happen. Thank you.

18 MR. CARSON: Steve.

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

♀00486

1 about it.

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

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

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

♀00487

1 kinds of uses are accommodated by whatever law
2 governs.

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

16 we very much want to have that kind of dialogue.

17 We also thought of a couple of other
18 things, and, you know, I will note with the usual
19 conditional statement that any lawyer in my position
20 gives, which is we haven't talked to any of our
21 members about this. But we thought of a couple of
22 other ideas that we very much want to talk with our

♀00488

1 members about, and especially if there are things
2 that you think make sense.

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

♀00489

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

13 One of the things that we often point out
14 when we're talking about the challenges that face

15 our industry is that aside from the economic loss to
16 any particular company or a particular person, there
17 is a harm to our culture from piracy because things
18 will not get created that otherwise would get
19 created. And, therefore, the things that 60 or 70
20 or 80 years from now people that are sitting in your
21 shoes will be concerned about may not have as much
22 to be concerned about as a result of what is

♀00490

1 happening to our industry.

2 And it just struck us that there is an
3 overlap in interest there, therefore, at least with
4 the universities. And we've been working with
5 universities on piracy-related issues and have had a
6 very constructive dialogue and relationship.

7 But there may be another angle to this that
8 our members see a certain benefit and have,
9 therefore, an incentive to address your concerns,
10 and vice versa as a result of that.

11 So I think we should explore that
12 overlapping interest and figure out whether that
13 provides some additional incentives for both sides
14 to figure out some solutions to this.

15 Finally, we thought that there may be an
16 opportunity to go to a private distributor of music,
17 I mean whether it's iTunes or somebody else, who may
18 be interested in providing access to some of these
19 things. So I mean this gets to some of the
20 commercial/noncommercial issues that we've talked
21 about in this -- and I will parrot what Eric said
22 about using those terms loosely -- but to the extent

♀00491

1 that the issue is not about getting permission or
2 finding somebody to get permission for things that
3 are clearly owned by our members or Rich's members
4 or other copyright owners but things are orphaned,
5 there maybe is an opportunity for another private
6 party to play a role in providing access to those.
7 And maybe some of those private parties are not --
8 would see the benefits of doing so and are not as
9 risk averse as some of the constituencies around
10 this table, just because of the nature of their
11 business. And that's not meant as a positive or
12 negative, it's just meant as kind of a fact as you
13 all were stating that the framework within which you

14 work. So, we think that there may be a dialogue
15 there that that could help.

16 And the last thing I will say, even though
17 I said "finally" a second ago, is the orphan works
18 piece of this does seem to be something that needs
19 to be looked at, because a lot of what has been
20 described as the problem is an orphan works problem.
21 And it's something that there's been a lot of
22 discussion about in the -- you know, in recent

♀00492

1 years. There probably will be again. And it
2 strikes me that that forum is another forum to try
3 and help address some of these issues.

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

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

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

22 So I'm not sure exactly, you know, how

♀00493

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

11 MR. CARSON: Okay. I have a couple more
12 questions, and then we will go back to the table,

13 for you, Steve.

14 Would the uniform or model law you are
15 talking about have a fair use provision that looks a
16 lot like what we have in the federal statute?

17 MR. MARKS: I think that that would
18 certainly be on the table. I mean I think that the
19 first discussion we have is, what are the kinds of
20 uses that need to be accommodated? So whether it's
21 a fair use provision like 107 or something that is
22 more specific to the kinds of things that we're

♀00494

1 talking about here, you know, 107 itself is very
2 ambiguous, you've got to apply it to certain sets of
3 facts. Well, we know what the facts are as a
4 general matter here, so let's sit around the table
5 and try and talk those through.

6 So I think we're open to having that
7 discussion on what the uses are and then figuring
8 out how best to implement those in a model
9 statement.

10 MR. CARSON: One final question. I just
11 wanted your reaction to Brandon's prediction that
12 state courts are generally going to conclude that
13 fair use is part of state common law copyright. Any
14 reaction to that?

15 MR. MARKS: Well, I think that -- I don't
16 know if this answers your question generally, but
17 it's certainly our sense that the kinds of uses --
18 and I think we said this yesterday that we've been
19 talking about here -- are generally -- that the risk
20 of liability under state law is not very great, and
21 we read the same studies and, you know, you look at
22 the law and it's not apparent to us that the risk is

♀00495

1 very great.

2 But that just gets us back into the whole,
3 you know, how much risk is there, how much risk is a
4 library or a university willing or another archivist
5 willing to take given the status of state law. So
6 that is why I think sitting down and talking through
7 the uses and getting more specific about those may
8 be a very good way for us to start so that that
9 uncertainty doesn't exist even under state law.

10 MR. CARSON: Anyone else have a general
11 comment before we talk about what has been put on

12 the table already?

13 Yes.

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

21 If 108 provisions, for example, were
22 somehow enforced without other types of

♀00496

1 federalization, well, where does that leave
2 organizations like my own or the Society for
3 American Music or the International Association of
4 Jazz Record Collectors or other 501(c)(3)s which are
5 clearly dedicated to preservation and study and
6 scholarship and yet are not an archive, so to speak?
7 And you get into a whole morass of decisions about
8 that and who is favored and who is not favored,
9 which we don't think makes a whole lot of sense.

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

15 MR. BUTLER: He has a pony tail.

16 MR. BROOKS: -- even with very favorable
17 laws in his home state, that doesn't necessarily
18 help him. There are 50 states out there and you can
19 almost be certain that a model of law or something
20 recommended, not enforced federally, across the
21 states is going to be treated differently in
22 different states. And some states, some have

♀00497

1 referred to an arms race between states to who could
2 be the toughest.

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

10 I will remind you that Naxos after that

11 case in New York state, which we're told applies
12 only to New York state, withdrew its historical
13 catalog from the entire United States. It simply
14 wasn't practicable to market on a state-by-state
15 basis what is in fact an interstate product.

16 So for all of those reasons, we do not
17 think this is a good solution. Having said that, we
18 are certainly welcome to listen, and if someone can
19 come up with some ideas -- I haven't heard reaction to the idea
20 of an EMI-style trust where earlier recordings are
21 turned over to a third independent party, that isn't
22 pure public domain but at the same time does not

♀00498

1 retain the kind of total control and restricted
2 access that we're hearing from the industry. Is
3 there something in that area?

4 We're certainly open to considering things
5 like that, but I think it has to be spelled out
6 -- and it has to accomplish the goals that
7 we're talking about of true access, not you can peek
8 but you can't really have it.

9 MR. CARSON: Sam.

10 MR. BRYLAWSKI: I think in terms of Society
11 for American Music and myself, the preference is for
12 full federalization, but if partial -- if that is
13 not achievable, I think there are partial solutions.
14 Eric's one that he proposed, which is basically have
15 a federal 95-year term, which is essentially what he
16 said, 95 years from fixation and everything else
17 remains the same in state law, I would think that
18 the ARL, that Brandon, even though he has expressed
19 preference for state laws, would approve of that. I
20 don't know whether your preference for state laws
21 likes the term as well.

22 MR. BUTLER: That's right.

♀00499

1 MR. BRYLAWSKI: You didn't speak to your
2 views on the terms in the state law.

3 In any case, that is one that I think would
4 be seriously considered. And to, you know, by the
5 same token, in terms of the harm to our culture by
6 piracy, there is a harm to our culture in the lack
7 of accessibility or the oppressive means in which
8 accessibility is denied.

9 By that I mean that the theory that some

10 day something might be valuable so we don't want to
11 have a public domain until 2067 for anything, you
12 know, John Philip Sousa recordings were brought up
13 this morning as something viable. I'm not aware of
14 a John Philip Sousa recording in print. I remember
15 one in the Columbia Records 100-year box set, but I
16 don't remember any other that I can buy anywhere.

17 That said, there are solutions. The idea
18 of what Steve Marks has just said about a private
19 party that might post early recordings and combine
20 that with what Tim has suggested, I don't know
21 what -- how the EMI trust works or what the model
22 would be, but to have a private party that offers a
♀00500

1 historical iTunes where companies might actually
2 donate rights to a historical iTunes, and it might
3 be a nonprofit or it might be a profit, it may be if
4 not a subset of iTunes, a competitor of iTunes,
5 whatever it is, where certain recordings that have
6 been inaccessible -- and we know that iTunes, by the
7 way, doesn't take every recording that is offered to
8 them. Member companies have expressed to me, member
9 companies of the RIAA have said we tried to get
10 these whole things on iTunes. Apple wouldn't take
11 them.

12 So there's a place for things like that.
13 Maybe they are actually sold to the public, and the
14 receipts, if they don't go to the company, they get
15 marked as a tax deductible contribution to the
16 company. What I would like to see is some of the
17 receipts go to support the National Recording
18 Preservation Board, which is not a board but a
19 foundation, a 501(c)(3) foundation, which has had no
20 offers of any contributions by anyone in the
21 industry so far. Maybe one might be indirect like
22 that where historical recordings are sold in some
♀00501

1 way and some piece of it goes to preservation. That
2 would make me personally very happy.

3 We are not interested in denying profits to
4 companies. We like to see these things sold. But
5 they are not being sold now, and if they could be
6 sold that way, it would be fantastic.

7 I'm reminded throughout the last two days
8 of the movie, "The Loved One," 1960s, which was

9 advertised as the movie with something to offend
10 everyone. When I heard this morning from the RIAA
11 that they might consider a shorter copyright term in
12 return for a performance right, some members of the
13 HRCAP have come out in support of performing rights.
14 But I don't think that is going to make everyone at
15 this table happy.

16 But it might be considered, some of these
17 quid quo pros, to see certain increased access that
18 doesn't necessarily entail reduced receipts to those
19 with rights to them or a tax deduction to those who
20 contribute rights to recordings that are getting
21 only a minimal return through a historical iTunes or
22 other kind of online distribution system.

♀00502

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

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

6 MR. CARSON: So what I want to do with
7 this, I mean we've got, I think -- well, we've got a
8 bunch of proposals on the table, I guess.

9 What I'm going to do is I'm just going to
10 go around the table to each of you and let each of
11 you respond to anything you've heard thus far, and
12 that may be as far as we can go, but that's the fair
13 way I think to try to get people's reactions to what
14 has been put on the table.

15 So let's start with David.

16 MR. OXENFORD: Our interest obviously here
17 is very limited. We thought that federalization was
18 not necessary to begin with. We thought that there
19 were plenty of opportunities to respond to the
20 issues, and I think we saw a lot of common ground
21 from sort of our 10,000-foot position here, and I
22 think that the parties should be able to get

♀00503

1 together and work out some sort of alternative along
2 the lines that Steve and Brandon and Tom and
3 everyone else has suggested. So we don't have any
4 specific reactions beyond that.

5 MR. CARSON: Okay. Eric.

6 MR. HARBESON: We are here to solve a
7 problem. We're not necessarily wedded to our

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
♀00504

1 iTunes is not sufficient for many users. Libraries
2 are often able to make much better recordings that
3 are much more tailored to the needs of their
4 patrons. And that might serve a higher level
5 research need than iTunes can.

6 The other thing about iTunes is something
7 like that we would have to be very careful -- we
8 would have to be very careful about the terms of use
9 because, at the present, libraries can't use iTunes
10 recordings.

11 There are recordings like the Los Angeles
12 Philharmonic's Grammy award-winning recording of the
13 Symphonie Fantastique of Gustavo Dudamel is download-
14 only and unavailable to libraries, and that is a
15 big, big problem for us, because of the terms of
16 use. So we would want to be very careful about
17 unintended consequences.

18 MR. CARSON: Tim.

19 MR. BROOKS: Yeah, I think there is some
20 very interesting discussion and some suggestions,
21 unlike, unfortunately, some of our sessions, of
22 possible ways forward. I do think the devil is in
♀00505

1 the details. That is very clear. And a solution of
2 this kind which might look very good to the RIAA
3 people, you know, has to look good to us too. It
4 can't look good to only one party.

5 I would, though, come back to the public
6 domain. The idea and the concept of a public domain

7 is one of the few things that is extremely clear in
8 this murky world that we've been living in in the
9 last day and a half. Everybody understands it. The
10 librarians understand it, the artists understand it,
11 you and I understand it. So to not have a public
12 domain for sound recordings, in the United States
13 uniquely, to not have one and to have something else
14 that somehow continues the regime of no public
15 domain seems to me to be hard to defend, frankly.

16 And why under any circumstance does anyone
17 have to ask for permission to reproduce or use or
18 mashup an 1895 cylinder, you know, made by a black
19 quartet that was 100-and-some-odd years ago? Just I
20 think the American public would understand, and even
21 artists would understand, that kind of extreme that
22 even something like that can't be in the public

♀00506

1 domain is a little hard to defend.

2 So I have to be leery of proposals which
3 deny the existence of a public domain in the United
4 States for the foreseeable future. Many of us think
5 2067 probably won't be 2067, or it may be. So I
6 would say that that is one issue that we have, but
7 we're open.

8 Thank you.

9 MR. CARSON: Sam, anything else?

10 MR. BRYLAWSKI: Yes. At the risk of being
11 a broken record, obviously I agree with what Tim
12 just said and won't repeat it.

13 And what Eric stated about the restrictions
14 on most online services that prohibit institutions
15 from archiving these recordings and making them
16 accessible to the students or their constituents is
17 a very specific problem. It's addressed
18 specifically in the recording study that was done
19 for the National Recording Preservation Board.

20 In theory, I like a model state law, but
21 I grew up in Washington and watched sausage made
22 into -- by legislative bodies here all my life, and

♀00507

1 to think about 50 or more -- sausage made in 50 or
2 more legislative bodies, I can't say I'm
3 particularly optimistic about how that would turn
4 out, but it would be interesting to see it begin
5 in any case.

6 I think everything else I've said this
7 morning. Thanks.

8 MR. CARSON: Steve.

9 MR. MARKS: Yeah, just a couple of things.
10 One is I want to emphasize we weren't putting these
11 on the table as things, ideas, and then walk out of
12 the room and then think that we had done our job in
13 putting them on. We really are interested in a
14 meaningful dialogue on them and do have the same
15 commitment to preserving the treasures that we've
16 been talking about. So I want to make that clear.

17 A couple of things on the model law. I
18 think the way that we were envisioning it was that
19 we would be going arm and arm to the legislature.
20 So this wouldn't be the kind of thing where, you
21 know, we would go to each state and say we need
22 something, and then try and work it out at each

♀00508

1 state and be arguing about the thing. The idea
2 would be we come together in advance, figure out
3 what that thing looked like that we were all very
4 supportive of, and then, you know, across all our
5 communities be able to approach a state legislature
6 to say, you know, all of the interested parties have
7 come up with this solution. And if there are other
8 interested parties that we think aren't at the table
9 that need to be, we should think about that.

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

15 The issues of public domain, the only thing
16 I would say about that is I would just caution
17 about, you know, trying to reach beyond what we were
18 here to discuss. We could debate the public domain
19 issue a lot, and yet I don't think that it needs to
20 be solved as a way to necessarily address the issues
21 that Congress was concerned about and asked for as
22 part of this study. Because if we can address all

♀00509

1 of those things in the context of the private or,
2 you know, quasi-governmental dialogue, however this
3 goes forward that we have, we don't need to reach --
4 you know, there are a whole host of other issues. I

5 mean you've got public domain. We've been talking
6 half-jokingly, but everybody knows we're serious,
7 about the scope of performance rights and sound
8 recordings. You know, if we throw up the issues
9 like that, it's going to impede I think our progress
10 in something that we could accomplish together.

11 MR. CARSON: Tom.

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

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

22 The other is that I had a second wacky idea

♀00510

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

18 MR. CARSON: Okay, Brandon.

19 MR. BUTLER: All right. So just a couple
20 of things. On the question of a model law, I worry
21 because we've been sort of down the road of trying
22 to negotiate specific exceptions before, and, you

♀00511

1 know, there are -- you know, we get in a room and
2 what is the meaning of the exceptions, are they
3 floors or ceilings, there is all that kind of fun

4 stuff. So that was sort of the route of the
5 emphasis on fair use.

6 So if we want to be very clear about
7 specific exceptions and a model code being floors
8 and fair use being there as a catchall that is never
9 preempted by those floors and so on, maybe we can
10 get in a room, but that needs to be clear because
11 we've had guidelines before and those are not
12 working out.

13 Tim and Sam both talked about
14 non-libraries. And I don't want to -- and so, you
15 know, obviously I represent libraries, but I don't
16 want to give what I believe is -- I don't want you
17 to have the impression that I'm advocating for a
18 solution that only works for my clients.

19 There will always be uncertainty, and to
20 act under uncertainty you have to consider the risks
21 if you are wrong. And so a big part of our proposal
22 is that statutory damages inflate those risks in
♀00512

1 ways that are irrational.

2 And so especially for Tim and Sam and their
3 non-library constituents, consider the fact that
4 statutory damages are there in the offing if you go
5 federalization, because they are not going to -- no
6 one is going to let those come off the table, even
7 though it's a pain to get them because you have to
8 register. So just consider that.

9 I mean I think acting under state law, if
10 you again read Professor Besek's incredible reports,
11 read Jaszi, which I'm sure you have, and I came away
12 from those feeling fairly confident that the risk is
13 actually under state law much more proportional to
14 the reward that you get from engaging in valid
15 preservation scholarship, those kinds of activities.
16 So even without -- you will get a lot of clarity for
17 the public domain stuff, but everything that is not
18 in the public domain, you will have that axe hanging
19 over you. So consider that for the non-library
20 folks that statutory damages is still in the mix.

21 MR. CARSON: Before we go to Dwayne, Steve,
22 Brandon sort of reposed a question I had posed to
♀00513

1 you, or implicitly anyway. So apart from figuring
2 out specific exemptions that might be appropriate to

3 deal with the needs that various people have brought
4 to the table in the last day and a half, does your
5 organization -- do your members have any views on
6 whether just good old-fashioned, plain vanilla fair
7 use ought to be something that would be in that
8 model law?

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

11 MR. CARSON: Okay. Dwayne.

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

19 I didn't hear -- I think Chris Weston asked
20 the question this morning about what the policy
21 rationale is for continuing to protect things
22 indefinitely, and I didn't really hear an answer to

♀00514

1 that, but I've heard a lot of answers to why we
2 shouldn't really have them protected forever because
3 they are going to disappear. And that's an
4 important thing to remember is they are just not
5 going to be there at all in any way.

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

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

22 Plus, I have not found a single contract

♀00515

1 from the software information industry or anyone

2 else in the last 30 years or so that has really
3 favored my interest generally.

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

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

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

♀00516

1 (Brief recess.)

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

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

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

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

20 Eric, you've got your hand up.

21 MR. HARBESON: We are interested in having
22 a public domain. We benefit from that for a number

♀00517

1 of reasons, not just that our patrons are very
2 interested in having a public domain for purposes of
3 their own.

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

14 MR. CARSON: Pat, was your hand up?

15 MR. LOUGHNEY: Eric first, then I.

16 MR. SCHWARTZ: I think I read yesterday the
17 language that Congress had presented in terms of the
18 study, then the purpose and the goal. I think the
19 purpose and the goal was a purpose -- for the
20 purpose of preservation and access of the pre-'72
21 materials, not to revisit -- which has been a common
22 theme, you know, beating a dead horse -- to do lots
♀00518

1 of other things in copyright law and policy.

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

7 MR. CARSON: So, Eric, do you see no
8 connection between copyright term and access?

9 MR. SCHWARTZ: For practical reasons, not
10 so much. I mean, yes, we have already discussed,
11 and I don't want to revisit, the pre-'25, pre-'23
12 issues.

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

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

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

22 MR. WESTON: No, the study we wrote

¶00519

1 already, but that's a secret.

2 MR. CARSON: Even from me.

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

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

20 Pat.

21 MR. LOUGHNEY: In terms of the big picture,
22 my feeling is that we are here to address a historic

¶00520

1 problem that has evolved over the past century,
2 which is that the production of America's recorded
3 sound popular culture has been clearly in the hands
4 of private citizens and the private sector, but that
5 the responsibility for sustaining that material,
6 preserving it at a high level of preservation and
7 making it available to future generations has slowly
8 migrated to the responsibility of the public sector,
9 largely the Library of Congress, university-based
10 archives, museum-based archives and other
11 institutions of various kinds spread across the
12 country.

13 The costs related to the storage of the
14 preservation are enormous and growing. The
15 responsibilities are mandated at federal law for the
16 library, state law, and institutional mandates that
17 have evolved over that long period of time, and are
18 legitimate and I think without question. But that
19 has created an enormous imbalance in terms of
20 responsibility. And also in terms of what does the
21 public get out of that process for its investing

22 through taxpayers' dollars into the sustaining of

¶00521

1 storage and preservation in terms of access.

2 And to me, that has boiled down into I
3 think the notion that by bringing these pre-'72
4 sound recordings under federal law it will be the
5 most efficient, most effective and the most
6 harmonizing way to solve this problem in a single
7 stroke.

8 MR. CARSON: Tom.

9 MR. LIPINSKI: Well, I mean if you are
10 going to look at the statutory language and you talk
11 about preservation, there are lots of ways that it
12 can be preserved. It doesn't have to be libraries
13 and archives. I mean there are even private
14 individuals that could be considered preservation.

15 And not to get into what your mandate is,
16 what you are trying to figure out, but your call
17 talks about the policy and legal and factual
18 questions regarding federalization. So when I look
19 at this, I see this as an opportunity to correct,
20 which always appeared to me to be a very strange
21 anomaly in the copyright law, that you have got
22 post-'72 sound recordings protected and federalized,

¶00522

1 and pre-'72 not. And it would seem that one of the
2 reasons why, even though I proposed a state model
3 law, I still would prefer federalization if I had my
4 choice because I think it's more consistent with the
5 constitutional contents of copyright and how we look
6 at creative works.

7 MR. CARSON: Brandon.

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

18 So I mean it would be well within your
19 mandate to talk about those to say more, although it
20 may seem to you, as you've already said a lot, to

21 say more about the state level. Even though this is
22 about the prospect of federal level protection, I

♀00523

1 think you could describe state level protection
2 better, especially fair use.

3 MR. CARSON: Anyone else on that? Okay.

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

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

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

♀00524

1 archives and others have.

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

8 Sam.

9 MR. BRYLAWSKI: Well, you asked for it. I
10 mean Eric talked about revisiting and going over old
11 laws. We have intentionally kept 108 concerns off
12 the table. So I mean I'm not going to bring them up
13 again. Pat brought them up once, the idea
14 particularly for a sound recording that legally
15 under federal law you cannot preserve an item until
16 it's actually deteriorating. And with a sound
17 recording, deterioration is audible; therefore,
18 until it has a scratch, a skip or a squeak, you
19 can't preserve it is -- this invites disobedience of

20 the law. And this is a problem I think throughout
21 all these things. But I know you don't want to get
22 into 108 because you already have a study and, you

♀00525

1 know, whatever. I say "whatever" in that I wish I
2 saw some effect of the study. I'm sure you do as
3 well. You know, but this is a concern.

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

14 However, without a public domain, the law
15 will be broken. You know, we are -- and I say "we"
16 and I mean the Society for American Music is, they
17 are educators, they are graduate students, they are
18 scholars, and they are lovers of American music,
19 both amateur and professional historians. You know
20 who the members of ARSC and the Music Library
21 Association are together, and we don't agree on all
22 these issues as you heard, and this goes for ARL

♀00526

1 too, we are some of the largest consumers of sound
2 recordings as a group in terms of annual
3 expenditures, let's say annual expenditures of
4 people over 40 that you are going to find.

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

15 But to go back to your original questions,
16 yes, 108 is a very great concern to preservation.
17 It makes lawbreakers of all of us. The preservation
18 study says that. It's a fact. You can't preserve

19 things if you want to preserve them in the best
20 quality they have legally under 108.

21 MR. CARSON: Eric.

22 MR. HARBESON: We actually are not -- with
♀00527

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

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

17 Brandon.

18 MR. BUTLER: That's exactly right. So I
19 would say that is kind of the heart of our position
20 is if we're going to do federalization, half a loaf
21 is worse than no loaf at all. If we want -- I mean
22 we could have written very different comments that

♀00528

1 would have said, We endorse federalization
2 conditional on XYZ. And we didn't think that that
3 was going to be very productive, because the XYZ
4 would have been completely contentious. And those
5 are --

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

8 MR. BUTLER: Right, even more so. And the
9 XYZs are demonstrably contentious because they're in
10 108, and that was contentious, and the report didn't
11 work out the way anybody wanted it to and so on.

12 So that's the heart of our point is -- and
13 if you get federalization without those changes to
14 108, my experience, again talking 65 to librarians
15 for an hour apiece all summer last summer
16 anonymously for a study we put out, is federal law
17 is not providing certainty. It may provide a lot of

18 things, but it's not providing certainty. And we
19 could improve it to help it provide certainty, but I
20 don't think that's going to happen. That is why I
21 think fair use at the state level is the better
22 option.

♀00529

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

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

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

22 But then go to Section 110.2, and you've

♀00530

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

14 So I would say that if you are going to do
15 something like this at all, try and do it as
16 perfectly as possible, if that's at all possible.

17 MR. CARSON: We do everything perfectly,
18 right?

19 Eric.

20 MR. SCHWARTZ: I was just going to say,
21 look, I don't suggest that public domain doesn't
22 play a place, but -- or have a place. What I'm
♀00531

1 saying is I think we were brought here for two
2 goals. One, you have to do a study, but more
3 importantly, there's a legitimate problem that needs
4 to be addressed.

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

11 But the fact that you bring the parties
12 together to try to address the legitimate problem of
13 preservation and access of pre-'72 materials is, for
14 me, the reason to be here is the goal. If we want
15 to get into contentious areas, we can all talk about
16 what model federal copyright laws should look like,
17 and with or without public performance rights and
18 everything else, and it would be fun and
19 interesting, but it doesn't get us to any solution
20 in the short term, the near term, or the long term
21 for solving the problem of how to better preserve
22 and how to make more accessible the materials that
♀00532

1 are housed in these archives.

2 I did yesterday in my opening remarks make
3 reference, for good reason, to collectors and others
4 who have also retained materials and public
5 libraries and archives and not-for-profits as well.

6 It seems, though, that in any grand
7 legislative change, you are going to have
8 litigation. And the two nuts in federalization that
9 you just can't overcome, with all due respect to
10 Elizabeth -- and I'm pointing in her direction; she
11 is now I think on a plane -- one is chain of title
12 and initial authorship/ownership. I don't think
13 incorporating the notions of state laws -- some of
14 these state laws didn't exist until the '60s, so you
15 are going to sort of retroactively apply all of

16 these other issues of subsequent ownership and
17 authorship and transfers.

18 You know, the constitutional takings
19 questions, I mean in that discussion there was the
20 discussion of Golan. Golan to me is the perfect
21 example, because those of us in the Copyright Office
22 then who tried to put our heads together with others

♀00533

1 in the government to come up with a solution find
2 that 17 years after that legislative reform, it's
3 still in the courts and still being litigated. And
4 any time you are going to make massive federal
5 change, you are just not going to overcome the chain
6 of title issue, the constitutional takings issue.
7 You are going to have litigation.

8 If we want to solve the problem, what was
9 the most heartening of anything that's happened in
10 the last day and a half was listening to the last
11 panel and listening to the way in which we talk
12 about the solutions, and there is no one solution.
13 The answer is yes to all, except federalization, in
14 terms of the model law and incorporating in real and
15 practical terms that the preservation copying that
16 is necessary, the certainty that archives and
17 libraries and others need to hear about transferring
18 to stable medium and all the things that need to be
19 done can be done.

20 And so the counsels in these institutions
21 don't scratch their head and say, Well, I don't know
22 what -- you know, even what it says. You know, the

♀00534

1 issue, and Steve raised it, is, do you have sort of
2 a 107-like language in which it's more open-ended or
3 do you prefer it where it's more specific? But in
4 any way you make clear that the preservation
5 copying, which is first and foremost here, can and
6 should be done, and should be done immediately.

7 And then, secondly, are the access issues,
8 and there is no question, given what I will call the
9 somewhat low point of these deliberations, is the
10 difference of opinion on what access means, and here
11 you have the questions of there too. Do you have
12 the specific examples or do you leave it open-ended
13 and have the agreement to disagree?

14 I think there are other things that can be

15 done in the immediate. At the conference June Besek
16 and Jane Ginsberg had last year at Columbia, I
17 turned to a room of about 100 law students and said,
18 What we need -- what the archives and libraries need
19 is a core of law students to go out there and help
20 the libraries and archives. Because the biggest
21 obstacle to some of these issues is frankly that the
22 counsels in the institutions are not copyright

♀00535

1 experts, don't have time to be copyright experts,
2 and as I said yesterday, they are going to say no
3 because that's the easy answer.

4 And to the extent you can break off
5 specific collections and specific areas where you
6 want to just get material available and have them do
7 due diligence and come back to the counsel, you
8 know, witness Elizabeth's class and the sorts of
9 ways in which students can do some good thinking on
10 issues, you can help to make those materials
11 available immediately. You know, you don't need
12 state law, you don't need federal law. You just do
13 the type of risk assessment that rights-holders have
14 to do all the time when they make their material
15 available. And by the way, they are a much bigger
16 litigation target than anyone else.

17 I think you want to keep these discussions
18 going in some sort of task force, or whatever, that
19 goes both before and beyond the study, because we've
20 all done, and I did them here, the studies that, you
21 know, as much hard work goes into them, is sort of
22 the end of the process and, unfortunately, not the

♀00536

1 beginning.

2 I think that some of the other notions on
3 orphan works that have been discussed, you have to
4 continue to think about ways to do that, and Steve
5 said maybe you just incorporate some of those things
6 into the model laws.

7 I think the -- you look to some of the
8 private parties to try to get materials available
9 more quickly, more rapidly, and the ideas that were
10 discussed. But I don't think there's a single
11 solution, and I think that if we sit around and try
12 instead in the first five minutes of this panel to
13 say, Well, let's pull back -- and I'm not saying

14 that is what you are doing -- but let's look at what
15 108 should look like in a perfect world. No. Let's
16 go to the model law and let's jump to the thing that
17 we can immediately, whether we start in New York
18 state or California or Indiana or wherever we do it,
19 Kentucky, wherever you do it, you start immediately
20 and you have some immediate results both on
21 preservation and on access so that you can see that
22 we are fixing the problem.

♀00537

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

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

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

21 MR. ROSENTHAL: Thanks. First of all,
22 thank you for allowing me here, even though my

♀00538

1 constituency is a little bit different than
2 everybody else's.

3 One of the reasons I'm here obviously is
4 just to make the point that behind every sound
5 recording is a musical composition and publishers or
6 songwriters acting as publishers, and that what
7 happens here does impact them. And that we just
8 want to make sure that the broad sweep of this
9 proposal, whether it's a study or whatever the heck
10 it is, really doesn't impact them with unintended
11 consequences both in a business and legal level.
12 That's point number 1.

13 The second point is we've been fighting
14 over things bigger than just publishing and sound
15 recordings and all that, and there are people from
16 other sides of this issue. I certainly don't want,
17 you know, to in any way to demonize the libraries
18 and those in favor of preservation as being, let's
19 say, anti-artist or anti-creator. We both have our
20 constituencies. You are very much concerned, as I
21 am, in preservation. My interest is making sure
22 that the songwriter writes the next song, and that

♀00539

1 means incentive, that means innovation, that means
2 the validity of copyright and how that plays out in
3 all of its ways.

4 I have to say I hope we don't go down the
5 road, if we're talking about third parties, of using
6 Google -- YouTube, Google, I don't know. We are in
7 litigation. I don't want to say any more.

8 But effectively the issue of technology
9 does play here, and I wonder if at one point or
10 another we should have people here who are all under
11 30 to kind of give us a sense of what is up there.
12 Technically, for all you know, every single sound
13 recording you want to preserve could be up there
14 already in one way or another.

15 So your view of this might change a bit if
16 you are recognizing that it's already out there,
17 besides the point of the value of it all. Yes,
18 there is a value issue. But we have to understand
19 technology as to how it's rolling down the road
20 here, and that is something that I haven't heard
21 much about and how that fits into this
22 federalization.

♀00540

1 I also want to say as a last point, you
2 keep coming back to fair use. And is this what we
3 are talking about here? On a certain level, I think
4 it is. There isn't one music publisher I know who
5 is against preservation, who is against the role of
6 the libraries and what they want to do, and
7 archivists, and that we really maybe should look at
8 this in that context.

9 What they are afraid of is what fair use
10 could turn into. Certainly when there are policy
11 issues out there and policy recommendations about

12 expanding fair use to include peer-to-peer mashups,
13 digital samples, yeah, that's a different fair use.
14 And that's something that maybe federalization would
15 make all creators and all those who own content
16 cringe a little bit if you phrase this.

17 But I do understand your point and I do
18 agree that, yeah, we are trying to have something
19 here that gives them comfort, that they're not going
20 to get sued for what they have to do, and that I am
21 all in favor of in one way or another, however the
22 heck we do it. Thank you.

♀00541

1 MR. OXENFORD: I think I will save you 30
2 seconds. I gave essentially my summary in the end
3 of the last session. Given the surprising unanimity
4 of feelings at the last session yesterday, I don't
5 think I have anything more that I need to say at
6 this point.

7 MR. CARSON: Thank you, David.
8 Eric.

9 MR. HARBESON: I also think I said pretty
10 much everything I was going to say in previous
11 panels. We feel that federalization makes a great
12 deal of sense because we cannot find a single reason
13 why it makes sense from a policy point of view to
14 have a special law for this very specific class of
15 works when any other class of work is subject to
16 federal law and has a public domain and statutory
17 fair use. So we think that this makes a great deal
18 of sense.

19 How we do it -- we are wanting to solve the
20 problem. So how we do it is up in the air. We
21 think that federalization makes sense, but we're
22 happy to listen to other proposals and take part.

♀00542

1 MR. BROOKS: Yes, I'm certainly as a
2 historian, if nothing else, extremely pleased to see
3 this kind of dialogue on this issue. I do not
4 think, unless I'm missing something, that from the
5 point of view of copyright law that the preservation
6 and access to our national heritage of sound
7 recordings has ever been addressed quite this way
8 before. It certainly wasn't in 1998 or 1976 or any
9 of the previous legislative junctures.

10 So simply by having this study and by

11 putting it on paper and by seriously discussing it,
12 I think the Copyright Office has done a great
13 service here, and the Congress has done a great
14 service by mandating it.

15 Our positions have been laid out pretty
16 clearly. We think that federalization, as that term
17 has come to be known, of some sort and certainly a
18 public domain is something that we need in this
19 country.

20 I just want to say to your last question of
21 does this go beyond a simple federalization, you
22 have to look at other parts of copyright law. We
♀00543

1 tried to keep our proposals as clean as possible,
2 difficult, but as clean as possible of other issues,
3 for that reason because there were many other
4 contentious issues and we didn't want this to be a
5 forum for that.

6 Having said that, just listening to the
7 discussion here, there seemed to be some other parts
8 of copyright law regarding recordings which are
9 uniquely changed in their character once pre-'72
10 recordings, were they to be brought in.

11 So, for example, I think the term question,
12 some would like a 50-year term or something like
13 that, that's not particularly relevant to bringing
14 pre-'72 -- maybe desirable, but we would not
15 complicate this by addressing that.

16 However, Section 108 preservation was
17 fashioned and debated in an era when it was to apply
18 to post-'72 recordings. The more valuable,
19 certainly, recordings of the recording industry,
20 those that produce the most revenue for them, and
21 108 was looked at through that prism.

22 Now, we're looking at preservation
♀00544

1 exceptions in terms of a very different set of
2 recordings, going back to, you know, the last
3 century, or the century before the last century
4 actually where that is not the case. This is
5 preservation of a different kind. And it's
6 incremental as you go back.

7 So looking at 108 or raising a flag about
8 108 and that kind of thing, maybe that does make
9 sense in terms of what we are accomplishing here

10 because that uniquely impacts preservation of these
11 most in need of preservation materials. So
12 basically, yes, I would say to that selectively and
13 carefully looking at some other aspects of copyright
14 law probably would make sense.

15 In terms of the overall, though, I would
16 urge and hope that whatever report comes out of this
17 does come out from a point of view of what experts
18 in this field think should be our regime in the
19 United States, not to have a kind of a
20 pre-Congressional political horse-trading kind of
21 debate here. This isn't the Congress. They will
22 and should look to us around this table on both

♀00545

1 sides as the people who are most knowledgeable about
2 this issue that I can guarantee they are not
3 knowledgeable about to make the recommendations,
4 then politically they'll decide.

5 MR. BRYLAWSKI: I'm grateful for what you
6 are doing too. I don't envy you at all.

7 I learned a lot here. There is some
8 answers I wish I had gotten, but it's been very
9 illuminating. The Society for American Music and
10 its members do believe in federalization. We think
11 this is a matter of really leveling the playing
12 field. And if you don't level the playing field,
13 you don't solve any of the problems that have come
14 up. You probably make matters worse, and I believe
15 you encourage cheating in the game, which I don't
16 like to see. Thanks for all this.

17 MR. CARSON: Pat.

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

♀00546

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

8 I would conclude by saying that the Library

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

20 It is going to require the collaboration of
21 rights-holders, of archives holding materials across
22 the United States regardless of their size or

♀00547

1 regardless of their institutional profile, and it is
2 going to take a greater understanding of what is the
3 legitimate use of these recordings on the parts of
4 the public. And they are woefully ignorant,
5 unfortunately.

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

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

22 I think the law was devised for a very

♀00548

1 rational reason at the time. It was enshrined in
2 the very first section of the Constitution for
3 important purposes because the founders understood
4 its importance to them as creators, and I think we
5 risk a great deal on the downside if we begin to
6 continue drifting away from that and looking at
7 solving this problem on the state law. I just don't

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

12 MR. CARSON: Anything to add, Eric?

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

19 MR. CARSON: Tom.

20 MR. LIPINSKI: I will just say, yes, I'm
21 out of the closet, I'm a federalist, and so I do
22 believe that's the fair way to go. I do believe in
♀00549

1 copyright.

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

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

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

19 MR. CARSON: Probably just law students.

20 MR. BUTLER: We will take law students. I
21 think law students could handle it. So I just want
22 to end by emphasizing the -- that Eric mentioned
♀00550

1 that introducing a model state law would be the way
2 to go forward, so for right now we could really get
3 started like tomorrow. But, in fact, in doing the
4 kind of scholarship that I've asked for would be
5 even faster; that is, if there is solid opinion
6 among the library world that fair use is available

7 at a state level, we don't need a model law, and
8 it's a constitutional issue and state legislatures
9 could frankly pass a bad model law, and we would
10 still beat them. Right? We would say, Sorry, you
11 can't infringe on fair use.

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

17 MR. CARSON: Before we go to Dwayne,
18 something I meant to ask in the last session: You
19 mentioned you had a law student go through all 50
20 state laws and do an Excel spreadsheet. I'm not
21 sure how much you're willing to share with us of the
22 results, but given that as far as I know, there is

¶00551

1 only one state court case, and that's in a trial
2 court, that has found that fair use applies to
3 common law copyright, did you find anything more
4 that you could share with us -- and I'm not saying
5 orally right now, but you could share with us -- in
6 that research that might shed more light on the
7 subject of the extent to which states recognize
8 either fair use or other exceptions that would do a
9 lot of what people here want to have done?

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

22 And the other ten, they're weird. You

¶00552

1 know, who knows. That's why I'm looking to you guys
2 to sort out the weirdness. And, again, this is
3 something we did in a couple of days.

4 But there are all kinds of -- there are all
5 kinds of diligence -- and this is another thing I

6 wanted to say -- there are all kinds of things of
7 different diligence in working in the world of
8 copyright. There will never not be diligence and
9 there will never not be risks, but a 50-state survey
10 is like the most standard of kind of diligence you
11 can do.

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

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

22 MR. BUTLER: Absolutely.

♀00553

1 MR. CARSON: Great. Thank you.

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

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

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

♀00554

1 I think the public domain is incredibly
2 important in all senses of the word, and that I
3 think that we need to think about in any way to
4 embed that in some concept of sound recordings.

5 But I think the way I started yesterday was
6 by echoing something that Tim Brooks had said, this
7 is about real people. And what I have to do a lot
8 is I have to talk to real people in libraries and
9 educators that deal with copyright. So in any kind
10 of formulation, I think it's incredibly important to
11 recognize that legal sophistication and resources
12 are not readily accessible, and it's not always
13 universally counsel saying no. Sometimes there is
14 nobody to ask.

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

♀00555

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

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

18 But we don't have a lot of time to get more
19 input from you. We want more input from you,
20 whether it's individual, jointly, to the extent you
21 guys can get together or any subset of you guys can
22 get together and come up with what you think are

♀00556

1 solutions that work for everyone, that's really
2 great. But come to us in October, and we're going
3 to say, That is really nice, we're proofreading it.

4 So you don't have a lot of time and we
5 don't have a lot of time. We want more
6 communication with you. We want more ideas. We
7 want to hear consensus if we can. But we're moving
8 forward and we're moving forward full speed ahead
9 because we've really got to start now and got to
10 start making at least tentative decisions right now
11 or in the next handful of weeks in order to get this
12 thing done and to get Congress a full and credible
13 report.

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

17 MR. CARSON: Anybody have any problem with
18 that?

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

22 MR. BROOKS: Are you the contact person?

♀00557

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

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

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

19 (Whereupon, the proceedings were
20 concluded at 1:25 p.m.)

21

22

♀00558

1 CERTIFICATE OF NOTARY PUBLIC
2 I, LESLIE A. TODD, the officer before

3 whom the foregoing proceedings were taken, do
4 hereby certify that the proceedings were taken down
5 by me in stenotypy and thereafter reduced to
6 typewriting under my direction; that said
7 transcript is a true record of the proceedings;
8 that I am neither counsel for, related to, nor
9 employed by any of the parties to the action in
10 which these proceedings were taken; and, further,
11 that I am not a relative or employee of any counsel
12 or attorney employed by the parties hereto, nor
13 financially or otherwise interested in the outcome
14 of this action.

15
16 Dated this 17th day of June 2011.

17
18

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

19
20 My commission expires:
21 November 14, 2013