

31 January, 2011

To: David O. Carson, General Counsel  
U.S. Copyright Office  
Library of Congress  
Washington, D.C.

Re: NOI: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

Comments submitted on behalf of The Music Library Association (MLA), with the endorsement of the Association for Recorded Sound Collections (ARSC) and the Society of American Music (SAM)

**Comments submitted by:**

Eric Harbeson, chair  
Legislation Committee  
Music Library Association

The Music Library Association respectfully submits the following comments pursuant to the Notice of Inquiry, “Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972” (75 FR 67777-81, Doc. 2010-4). The MLA is the professional association for music libraries and librarianship in the United States. Founded in 1931, it has an international membership of over 800 librarians, musicians, scholars, educators, and members of the book and music trades. Complementing the Association’s national and international activities are eleven regional chapters that carry out its programs on the local level. The Music Library Association provides a professional forum for librarians, archivists, and others who support and preserve the world’s musical heritage.

**General Comments**

The MLA supports bringing all sound recordings published prior to February 15, 1972 (“Pre-1972 Sound Recordings”) under federal jurisdiction as a necessary step toward allowing libraries to continue the important work they have been doing in preserving of our cultural heritage and making it available to the public. Much of America’s recorded history is at great risk of disappearing due to deterioration, and libraries and archives must be allowed to safeguard this history for future generations. However, as we shall discuss, efforts to do so have been hampered by the lack of a uniform set of laws, a problem which incorporation, done correctly, would solve.

Incorporation of all sound recordings into federal law would be a great help to these efforts in several ways. The first is that librarians, and those they serve, would benefit from more consistency and clarity in the law. The current system of laws governing sound recordings under state law is so complex as to be virtually impenetrable. Prior to the 2005 decision in *Capitol v. Naxos*,<sup>1</sup> it was assumed by many (correctly or not) that copyright infringement actions could not be brought against pre-1972 sound recordings, and so digitization programs could safely be conducted on recordings in obsolete formats. Since *Naxos*, confusion over the laws governing sound recordings has proliferated. The laws under which a legal action can be brought vary greatly from state to state, and it is not even always clear which state's laws are applicable. With the exception of the 2009 in-depth study on the copyright laws of ten states supervised by Peter Jaszi, there are no reliable resources which a librarian can consult in matters concerning state sound recordings laws.<sup>2</sup>

Librarians, on the whole, are very mindful of copyright and are frequently advocates for the observance of copyright laws. Frequently copyright holders themselves, librarians very often play an important role in educating the public on the importance of respecting copyright laws, insofar as their patrons prove ill-informed on the subject. However, in the case of sound recordings laws, it is a very complicated, often insurmountable task for librarians to ascertain what the law is. Few librarians have direct access to their institution's already-busy legal counsel; in still fewer cases does the institution retain counsel with copyright expertise.<sup>3</sup> Indeed, MLA members often report that they are called upon to educate their institutional counsel on copyright matters. However, even for librarians trained in legal research, state laws governing copyrights are difficult to identify, and once found, the available literature and case law discussing those laws is at best sparse. As a result, librarians are put into the position of having to make decisions based on little or no concrete information. At the same time, a librarian who makes an incorrect legal decision regarding pre-1972 sound recordings could face penalties which are in many ways more severe than those provided for by federal law. Depending on the state, these penalties could include substantial fines, jail time, or both.

If in-house counsel is not available, librarians frequently turn to colleagues—very often other librarians—with specialized knowledge of copyright, or to online resources such as the Music Library Association's email list, its online *Copyright Guide for Music Librarians*,<sup>4</sup> or the American Library Association's Copyright Advisory Network.<sup>5</sup> But in

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<sup>1</sup> See *Capitol Records, Inc. v Naxos of America, inc.* 2005 NY Slip Op 02570 [4 NY3d 540]

<sup>2</sup> See Program on Information Justice and Intellectual Property, American University, *Protection for Pre-1972 Sound Recordings under State law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis*, (Washington, DC: Council on Library and Information Resources, 2009). Accessed 20 January 2011, <http://www.clir.org/pubs/abstract/pub146abst.html>

<sup>3</sup> "Many [librarians] described university counsel offices that were too busy with other pressing legal concerns to answer library questions, whose answers did not necessarily give full weight to library mission, or both." Association of Research Libraries, et al., *Fair Use Challenges in Academic Research Libraries*, (Dec. 20, 2010). Accessed 20 January 2011, <http://www.arl.org/pp/ppcopyright/codefairuse/index.shtml>.: (p.6)

<sup>4</sup> <http://copyright.musiclibraryassoc.org/>

<sup>5</sup> <http://librarycopyright.net/>

regards to researching state sound recordings laws, this proves to be of limited value since the laws' complexities mean few would be able to field questions beyond their home state. In addition to removing the confusion generated by conflicting state laws, an important benefit of folding sound recordings laws into Title 17 would be to allow for much better information sharing among similarly situated professionals.

Without reliable legal information, librarians cannot properly preserve and provide access to their collections. Under these circumstances, too many librarians choose a cautious course, opting not to pursue programs necessary for the management of their collections. Others might decide to pursue preservation programs anyway, despite the possibility that their programs may not be legally sanctioned under state laws. Responsible librarians should not be forced to choose between obeying the law and preserving the recorded heritage placed in their care.

A second reason we support bringing pre-1972 sound recordings under federal law is that confusion surrounding the copyright status of these recordings has made pursuit of funding for preservation projects—including projects determined by librarians to be legal under the applicable state laws—very difficult. At this historical juncture, proper preservation of analog sound recordings requires conversion to a digital format, and digitization with optimally minimal compression, especially from obsolete formats, is expensive. Large-scale digitization of audio collections is often prohibitively expensive even for the best-endowed institutions.

Libraries wishing to preserve their aging sound recordings are at a great disadvantage when pursuing funding for those projects. On the one hand, donors are unlikely to give money to projects whose copyright status is in question. On the other, donors generally expect tangible results which show the funds were spent wisely. This becomes especially important when seeking follow-up grants or permanent institutional funding. Results are typically measured in terms of the project's impact: the number of people who have used the materials, the dissertations, articles or books that are generated from it, etc. A digitization project which saves materials for the future but which cannot make them widely accessible, does not tend to be viewed favorably. Initiatives for photographs or sheet music, which are normally made available to the public online, might generate tens of thousands of site visits per month, bringing visibility to the project (and the donors). Without the ability to offer comparable results, sound recordings libraries are unable to compete for the funds necessary to undertake such projects.<sup>6</sup>

Bringing all sound recordings under federal jurisdiction will bring a significant body of sound recordings (those fixed prior to 1923) into the public domain, allowing libraries and archives to preserve those recordings which are at the greatest risk. The information and storage systems built to support these projects could then be used to support

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<sup>6</sup> “Whether or not a collection will be broadly accessible, once digitized, may be the deciding factor for funding agencies that are interested in supporting that collection's preservation.” Rob Bamberger and Sam Brylawski, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age*, (Washington, DC: Council on Library and Information Resources, 2010). Accessed 20 January 2011, <http://www.clir.org/pubs/abstract/pub148abst.html>: (p. 119).

preservation efforts for other obsolete formats, unique or deteriorating exemplars, unpublished recordings, or others as the law would allow.

Federal preemption of sound recordings laws would also allow libraries to make use of the exceptions and mitigations built-in to the law by Congress in large part to support the work of libraries. Most importantly, libraries would have access to fair use defenses and exemptions provided under §108. While at least one state court has recognized a common law fair use defense similar to that codified by §107, it is unclear whether courts in other jurisdictions will follow suit.<sup>7</sup>

Finally, we believe that sound recordings should be brought under federal law because this would constitute better law-making through alignment with relevant existing law. Sound recordings are functionally identical to other works currently subject to federal copyright with respect to degree of originality and creative effort required to produce them. As with audiovisual works, sound recordings often involve the work of many people in their creation. Like audiovisual works, sound recordings often contain multiple underlying works, each of which is subject to its own copyright protection. A record album such as “Sergeant Pepper’s Lonely Hearts Club Band” is a compilation of works, and the copyright need not be any different from other, already-copyrighted compilations such as Maya Angelou’s “Poetry for Young People.” The Beatles’ recording of “Yesterday” is fundamentally a derivative of the underlying musical work, one of many which have since been recorded. All the tools needed for protection of pre-1972 sound recordings already exist in Title 17. Indeed, Congress recognized that sound recordings do not require perpetual, state-level protection when it invoked preemption over post-1972 sound recordings.

While Congress specifically did not preempt pre-1972 sound recordings in the 1976 copyright act, their reasoning for not doing so remains puzzling after all these years. The House Report (No. 94-1476) states that Congress’ chief concern was that preemption for sound recordings might “be read as abrogating the anti-piracy laws now existing in 29 states...” and that it would lead to a “resurgence of piracy of [pre-1972 sound recordings].” However, if this were the case, why did Congress apply copyright to sound recordings at all? Surely, piracy is not limited to pre-1972 sound recordings! While the House Report does not answer this question, we take the fact that they did so for some recordings as strong evidence that preemption would have been justified for all recordings.

In the very same report, Congress cites James Madison’s opinion that the Constitution’s copyright clause was added specifically to “promote national uniformity and to avoid the practical difficulties of determining and enforcing an author’s rights under the differing laws and in the separate courts of the various States.” Yet, in the act of not preempting sound recordings, it was taking an active step towards the “anachronistic, uncertain, impractical, and highly complicated dual system” they were explicitly trying to leave behind. We see no logical or policy-based reason why pre-1972 sound recordings deserve *sui generis* rules.

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<sup>7</sup> See *EMI Records, Ltd., et al., v. Premise Media Corp.* 2008 NY Slip Op 33157(U)

## Recommendations

Specifically, we recommend:

- 1) striking 17 U.S.C. 301(c);
- 2) amending 17 U.S.C. 304 to provide for a 95-year copyright term for sound recordings fixed prior to February 15, 1972 but not before January 1, 1923;
- 3) amending 17 U.S.C. 108(h) to provide for preservation and scholarship activities by libraries and archives with respect to sound recordings in the last 45 years of their term; and
- 4) amending 17 U.S.C. 1201(1) and (2) to provide for a defense by employees or agents of nonprofit educational institutions, libraries, or archives acting within the scope of their employment for the purposes of circumventing technological protections on materials subject to §108(h) as amended.

Failing this recommendation, we recommend amending 17 U.S.C. 301(c) to provide partial federal preemption for libraries and archives for the purposes of §§107–110, and 504.

## Specific Questions

### Preservation and Access

For more than a decade, it has been understood in the library world that “preservation is access, and access is preservation.”<sup>8</sup> While we understand the Copyright Office’s desire to separate the questions of access and preservation, the reality for librarians is that the two are fundamentally intertwined. To provide preservation for materials is to make them accessible, to allow them to be used by library patrons. By the same token, making items available to the public—providing access to them—is the only way in which preservation activities can be justified. Access generates interest, which results in further support for preservation. Preservation, in turn, makes materials safely available for the public to access. Because we regard access and preservation as inseparable, we are answering the similar questions under each category together.

*1. Do libraries and archives, which are beneficiaries of the limitations on exclusive rights in section 108 of the Copyright Act, currently treat pre-1972 sound recordings differently from those first fixed in 1972 or later (“copyrighted sound recordings”) for purposes of preservation activities? Do educational institutions, museums, and other cultural institutions that are not beneficiaries of section 108 treat pre-1972 sound recordings any differently for these purposes?*

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<sup>8</sup> Patricia Battin, “From Preservation to Access: Paradigm for the Nineties,” *IFLA Journal* 19 no. 4 (1993): p. 367

*3. Do libraries and archives currently treat pre-1972 sound recordings differently from copyrighted sound recordings for purposes of providing access to those works? Do educational institutions, museums, and other cultural institutions treat them any differently?*

(Response to questions 1 and 3)

Most large-scale recordings preservation projects libraries might wish to pursue—projects which are desperately needed in many libraries—would likely be aimed almost exclusively at pre-1972 recordings. Many of the recordings that are most in need of preservation are those which were fixed on obsolete formats such as cylinder records, shellac discs, 78 RPM discs, reel-to-reel tapes, etc. These, with the notable exception of Digital Audio Tape (DAT), were used during periods before 1972. As a result, while some libraries may consider the date of fixation when considering preservation activities under §108(c), in most cases this would not be an important consideration for preservation activities beyond isolated, single-item duplication. In the case of preservation copies made under §108(b), where, because of the nature of unpublished recordings, a library or archives is likely to be dealing with unique or very rare materials, it is more likely that systematic preservation for copyrighted sound recordings might be desirable. In this case, whether a library will treat the recordings differently varies by institution, though many institutions will treat all recordings the same, either because they do not know the law, or because complexities of the law make the administrative burden of doing otherwise too expensive or time-consuming. This often means taking the most conservative possible approach, with the result that such projects may not be undertaken.

*2. Would bringing pre-1972 sound recordings under federal law—without amending the current exceptions—affect preservation efforts with respect to those recordings? Would it improve the ability of libraries and archives to preserve these works; and if so, in what way? Would it improve the ability of educational institutions, museums, and other cultural institutions to preserve these works?*

*4. Would bringing pre-1972 sound recordings under federal law—without amending the current exceptions—affect the ability of such institutions to provide access to those recordings? Would it improve the ability of libraries and archives to make these works available to researchers and scholars; and if so, in what way? What about educational institutions, museums, and other cultural institutions?*

(Response to questions 2 and 4)

There is no question that bringing sound recordings under federal law would carry benefits for libraries' efforts to preserve and provide access to sound recordings.

Under our recommendation, pre-1923 sound recordings would immediately enter the public domain. This would give libraries the ability to safely begin preservation programs for these oldest of sound recordings and make those recordings available through online

programs such as those which have been created for photographs and other formats. In some cases, a library's collections of pre-1923 sound recordings may contain the last extant copies of the recordings in question (it is not uncommon for libraries to be called upon to supply copies of items for publishers which no longer have copies of one or more of their own works). There are already examples of such projects; however, in many cases these projects have been developed in spite of the possibility that doing so is illegal under the governing state laws. Librarians in these cases have been forced to choose between respecting the applicable laws and properly caring for their collections.

In the process of developing these digitization projects, libraries would develop the infrastructure necessary for large-scale audio preservation which could then be applied to collections of recordings which may be fair uses under §107 or otherwise authorized by law or copyright holders. Libraries would be able to compete for grant funds and institutional budgets to support these projects.

Currently, nearly all pre-1972 sound recordings are subject to state laws. Most states have enacted criminal and/or civil laws governing duplication of these recordings, and the statutory language of most of these implicitly requires a commercial use. Indeed, while interpretations of "commercial use" vary, it is possible that many of the applications for which libraries would wish to duplicate pre-1972 Sound Recordings may already be legal depending on the state in which the library is located. The requirement that a use be commercial in order to be proscribed, if defined explicitly, might even provide a more reliable tool for libraries than do current federal exceptions such as those in §§107–110. However, "commercial use" is rarely explicitly defined, with missteps carrying potentially severe penalties. This is complicated further by the confusion over which state's laws are applicable, and over which of that state's laws will apply: state common law for sound recordings may appear in any of a number of places, including laws governing misappropriation, anti-piracy, theft, and even right of publicity. The result is that, even in cases where they are aware that pre-1972 sound recordings are not subject to federal law, librarians or their legal counsel will shy away from uses which may otherwise be permitted. We believe that the considerable confusion surrounding state laws—including the inconsistency with which each state's laws treat sound recordings, and uncertainty over how "commercial use" will be interpreted by state courts—overcomes any possible benefit to libraries under the current system.

*5. Currently one group of pre-1972 recordings does have federal copyright protection—those of foreign origin whose copyrights were restored by law. (See the discussion of the URAA above.) ...Does the differing protection for this particular group of recordings lead to their broader use? Have you had any experience with trying to identify which pre-1972 sound recordings are (or may be) so protected? Please elaborate.*

While in theory libraries could benefit from being able to use this subset of pre-1972 sound recordings under federal law, the reality is that the exception to the law is not well-enough known or documented to benefit libraries in any meaningful way. For those libraries who know of this subset, researching an individual recording's copyright status

under the URAA is both too time-consuming and too cumbersome to be practical except in isolated instances. So while libraries might legally take advantage of such recordings, practically it makes much more sense for most libraries to treat the recordings as they would all pre-1972 sound recordings. An exception might be a library collection which focuses on foreign-made sound recordings, when the collection could be determined, as a whole, to be subject to federal copyright under the URAA. In such cases, the library and its patrons might very well benefit from the collection's copyright status. However, we know of no examples where this has been the case.

*6. Are pre-1972 sound recordings currently being treated differently from copyrighted sound recordings when use is sought for educational purposes, including use in connection with the distance education exceptions in 17 U.S.C. 110(2)? Would bringing pre-1972 sound recordings under federal law affect the ability to make these works available for educational purposes; and if so, in what way?*

Some states do have exemptions for educational uses of pre-1972 sound recordings, but the language does not necessarily permit uses which would be allowed under §110(2)—especially when distance education and streaming are involved. For example, the law in Montana includes an exception to copying sound recordings without the rights holder's consent with an intent to sell and distribute them: “Sections 30-13-141 through 30-13-147 do not apply to... any person who transfers a single copy of such sounds for *bona fide* educational purposes, provided that no person directly or indirectly derives any pecuniary gain from such transfer.”<sup>9</sup> However, a strict reading of this law would preclude nearly every digital use. The nature of digital copying is such that it nearly always involves making several copies, even if only one is ever used at a given time, and any use for distance education would be impossible because transmission would create more copies still. Furthermore, the definition of “direct or indirect pecuniary gain” can be a moving target, with many possible interpretations. As a result, this statute would be difficult to apply or interpret, whereas the uses might be clearly permitted or prohibited in a comparable situation under §110(2) or §107.

As another example, the California Penal Code states that its criminal statute “does not apply to any not-for-profit educational institution or any federal or state governmental entity, if the institution or entity has as a primary purpose the advancement of the public's knowledge and the dissemination of information regarding America's musical cultural heritage.”<sup>10</sup> However, it imposes significant burdens of public notice, such as the requirement to post notices in newspapers, which serves to discourage, rather than encourage, use of a recording for educational uses even after good faith efforts by the library have shown the recording to be unavailable in the marketplace. Meanwhile, as Jaszi has said, fair use may or may not be available as a defense under California common law, and there remain civil laws such as misappropriation, unfair competition, and right of privacy/publicity under which actions might be brought.<sup>11</sup> If brought under

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<sup>9</sup> Mont. Code Ann., 30-13-146

<sup>10</sup> Cal. Penal Code §653h(h)

<sup>11</sup> Jaszi (2009), *supra* at 35



federal law, libraries and archives in educational institutions, as well as their patrons, would benefit both from the added clarity and from the ability to make use of sound recordings for educational purposes, including distance education activities, by the availability of §§107 and 110.

*7. Do libraries and archives make published and unpublished recordings available on different terms? What about educational institutions, museums, and other cultural institutions? Are unpublished works protected by state common law copyright treated differently from unpublished works protected by federal copyright law? Would bringing pre-1972 sound recordings under federal law affect the ability to provide access to unpublished pre-1972 sound recordings?*

Owing to their nature as being either rare or unique, unpublished materials are normally handled on a different basis when providing access. These materials normally end up in libraries' "special collections" or archival repositories. Access to the physical items in library special collections and archives tends to be more restrictive, with the items normally not leaving the premises and often requiring special handling and supervision. In order to provide safe access to the information contained in items which are especially high-use, fragile, or valuable, a best practice among libraries is to make digital surrogates of the item and to make the surrogates available online. Incorporation of pre-1972 sound recordings would make possible similar efforts for these recordings.

In addition to unpublished special collections and archival holdings, many college and university music libraries contain unpublished, institutionally-produced recordings of student recitals and concerts, and many of these were recorded prior to February 15, 1972. Many, though not all music libraries provide access to these recordings on similar terms as published recordings. However, unless there are formal license agreements or institutional policies in place for such events to be recorded and deposited in a music library, the legal justification for libraries providing access to these materials can be vague. In such cases, placing the pre-1972 sound recordings under federal copyright protection would provide more uniformity and consistency, and would open the possibility of providing access under exceptions such as those identified in §§107–110.

Value of the Recordings.

*8. Are there commercially valuable sound recordings first fixed before 1923 (e.g., that would be in the public domain if the ordinary federal term of protection applied) that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.*

9. *Are there commercially valuable sound recordings first fixed from 1923-1940 that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.*

10. *With regard to commercial recordings first fixed after 1940: What is the likely commercial impact of bringing these works under federal copyright law?*

(Response to Questions 8–10)

The commercial value of the recording and the commercial value to the current copyright holder are not the same thing. A copyright holder may, for lack of interest or knowledge, fail to exploit a work to its full commercial value. In such a case, the value to the owner would be less than the value of the recording. A measure of the commercial value of the recording should include not only the revenue it brings to the copyright holder, but all potential revenue that it could command. That value can change as the consumer base grows or shrinks, or as its interests change.

According to the 2005 study conducted by Tim Brooks for the National Recordings Preservation Board, among recordings published prior to 1920, the percentage of recordings reissued by the rights holder “approaches zero.”<sup>12</sup> After 1920 the percentage increases somewhat, but still remains at or below 15 percent through 1939.<sup>13</sup> Brooks’ report suggests strongly that while there is value to the recordings, that value is not being exploited by the rights holders because they have little or no commercial incentive to do so. As a result, those recordings are often difficult or impossible for library patrons to access. At the same time, while the copyright holders’ “real-world incentives” to reissue early sound recordings are limited, there exists a proven demand for the recordings, which has been successfully exploited by third parties overseas.<sup>14</sup>

While it is unlikely that bringing pre-1923 recordings into the public domain will add commercial value to the recording for the current copyright holder, Brooks’ study suggests that it also is not likely to take value away, since all but a small fraction of the recordings are essentially abandoned. However, it is very likely that bringing these recordings into the public domain will bring value to the recordings themselves as third parties in niche markets issue new releases of the recordings. This comes with an accompanying benefit to researchers and scholars, and to the public at large.

For recordings published after 1923, libraries’ use of sound recordings under federal law is unlikely to have any negative impact on the value of the recording to the copyright holder. Libraries’ use of recordings under federal law would be subject to the many safeguards already in place which provide very strong protections to the copyright holder

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<sup>12</sup> Tim Brooks, *Survey of Reissues of U.S. Recordings*, (Washington, DC: Council on Library and Information Resources, 2005). Accessed 20 January 2011, <http://www.clir.org/pubs/reports/pub133/contents.html>: p.13.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 14.

(protections which, as the Copyright Office has noted in the NOI, are in some ways stronger than comparable state laws). Any fair use made of the materials would have to be either sufficiently transformative, sufficiently trivial to the existing market for the recording, or both, to be considered non-infringing.

In addition, libraries' ability to safely preserve all pre-1972 sound recordings would bring more access to more recordings by scholars and enthusiasts of recorded music. It is likely that, as a direct result of greater library preservation/access efforts, new interest would be generated in older recordings, many of which have been forgotten or have long since lost the attention of their copyright owner. The increased scholarship could well lead to revived commercial interest in recordings and more re-issues available to the public. We take the position that bringing pre-1972 sound recordings under federal law best satisfies the Constitutional goals of copyright by insuring that as many lawfully-made recordings as possible are available to the public, whether it be through the marketplace or in libraries. Doing so can do no harm to the commercial viability of a recording; indeed, in some cases it may be beneficial by fostering renewed interest and demand.

14. *Does the uncertainty of different regimes under state law make it less practical for rights holders to bring suit under state law? Are you aware of any infringement suits concerning pre-1972 sound recordings brought in the past 10 years?*

The case of *EMI Records, Ltd., et al., v. Premise Media Corp* is instructive in that it is the first and only case we know of where a court has found the existence of a common law fair use defense under a state law.<sup>15</sup> Prior to this case it was not clear whether such a defense could be brought at all; however, the ruling in *EMI*, by its exceptional nature, demonstrates the uncertainty faced by those who wish to make a fair use of a recording. This case, though it has not been challenged, is not binding even in the state of New York. And though most states have followed New York's lead in the creation of sound recordings laws, there is no certainty that their courts would accept the ruling in *EMI*, which relied heavily on the state's own common as well as statutory law. While this does not directly address the question of the difficulty in bringing suit under state law (libraries are unlikely to be plaintiffs in such a lawsuit), it does speak to the difficulty in predicting a defense. Without the ability to predict one's defenses, risk management decisions become either impossible or skewed toward the overly-cautious.

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<sup>15</sup> *EMI v. Premise Media, supra*.

## Term of Protection.

21. *If pre-1972 sound recordings are brought under federal copyright law, should the basic term of protection be the same as for other works—i.e., for the life of the author plus 70 years or, in the case of anonymous and pseudonymous works and works made for hire, for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first? Can different treatment for pre-1972 sound recordings be justified?*

If post-1923/pre-1972 sound recordings were brought under federal law, the appropriate copyright term would be a fixed term of 95 years. One of the primary benefits of incorporating pre-1972 sound recordings into federal law is the unification of copyright term lengths. However, this is made complicated by the fact that copyright terms have changed since 1972. All currently copyrighted works published prior to 1978 were copyrighted under the 1909 Copyright Act (as amended), and Congress incorporated those terms in §304, allowing a maximum copyright term of 95 years regardless of whether the work was made for hire. The copyright term under the 1976 Copyright Act (as amended) includes the possibility of a term of 70 years *post mortem auctoris* for works not made for hire.

While it may be tempting to apply the terms specified in §302(a) to pre-1972 sound recordings, this would be problematic by being both contradictory and unfair. The current term for single and joint authors was not available to other works copyrighted under the 1909 Copyright Act, and so pre-1972 sound recordings should be no different. If pre-1972 sound recordings not made for hire were given a copyright term of 70 years *p.m.a.*, it would cause disparity in term lengths between sound recordings and non-sound works with similar circumstances. In some cases, the copyright term for sound recordings would outlast those of other comparable works (which, admittedly, is functionally the case now), while in other cases the sound recording's copyright would be shorter. For example, if §302(a) applied to pre-1972 sound recordings, the copyright term for a book published in 1935 whose author died in 1940 would be 95 years, while a sound recording from the same date and author would have only a 75-year term. On the other hand, a recording published in 1950, whose author is still living, would have a copyright term of at least 130 years, expiring not before 2080, while the comparable musical work would have a 95-year term, expiring on Jan. 1, 2046. In addition to being unfair, the assignment of differing terms to comparable works would increase confusion and lose many benefits of harmonization.

Sound recordings have already been subjected to retroactive limitation of copyright term, so what we propose would not be without precedent. Prior to the 1976 Copyright Act, pre-1972 sound recordings enjoyed a truly perpetual copyright term. No state that we know of had enacted any limitation on the copyright term of sound recordings.<sup>16</sup> Congress specifically ended that perpetual copyright by indicating that pre-1972 sound recordings would enter the public domain in 2067, and they clearly chose 2067 (as amended by the *Copyright Term Extension Act*) because it ensured a minimum 95-year term for all such recordings. According to the House Report, Congress' intent with its special clause for unpublished materials in §303 was to "fix a 'reasonable period'" for the purpose of works which would otherwise be deprived of such. Evidently, by fixing the date of preemption to ensure a minimum of 95 years, Congress has already determined that a 95-year term would comply with the requirements of due process. We see no reason why a longer term can be justified.

22. *...If pre-1972 sound recordings were brought under federal copyright law, should a similar provision be made for those recordings that otherwise would have little or no opportunity for federal copyright protection? If so, what would be a "reasonable period" in this context, and why? If not, would the legislation encounter constitutional problems (e.g., due process, or Takings Clause issues)?*

Congress was correct to be concerned about the application of ordinary statutory terms to unpublished works, because of the potential for unfairly shortened terms. However, while there may well have been a valid concern about violating due process in incorporation of unpublished materials, the present case is materially different in that all such recordings will already have enjoyed significant protection under state law. While it is true that, under our proposal, sound recordings published prior to 1923 would have no opportunity to enjoy federal copyright protection, we argue that protection under state and common law has, with rare exception, been at least as restrictive as federal law, and so can be considered equivalent for the purposes of calculating copyright terms. It would be absurd to argue that, despite having been subject to state law for 100 years, a recording ought to be granted an additional term of coverage if incorporated because otherwise it would never have had the opportunity to enjoy *federal* copyright protection. If sound recordings were incorporated into federal law, with no additional protection, in no case will creators have enjoyed exclusive rights to their creations for less than 87 years.

We see no reason why additional protection should be needed for pre-1923 sound recordings, though in this case the takings issue is admittedly less clear, since recordings published between 1915 and 1923 could receive a slightly shorter term depending on the effective date of the legislation. Indeed, allowing a 95-year term for all recordings might

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<sup>16</sup> Some states have enacted laws formally ending copyright terms in 2067 in order to comply with federal preemption; however, none that we know of did so prior to the 1976 copyright act. California currently terminates its protection in 2047. Cal. Civ. Code §980(a)(2). This law, having been passed in order to formally comply with federal preemption, was passed prior to the Copyright Term Extension Act when 2047 was also the date of federal preemption. It is highly likely that the California Legislature will amend its law to reflect the current date of preemption well in advance of 2047. We know of no other states whose terms end prior to 2067.

well make things simpler and cleaner. However, for purposes of consistency with the rest of the law, we favor maintaining 1923 as the date prior to which all works are in the public domain, and believe that it would pass constitutional muster. The Fifth Amendment's requirement of just compensation for takings requires that there be a commercial value to the property being taken. The vast majority of these recordings, as demonstrated by Brooks (2005), are commercially unexploited, and so any harm to the original owners would be *de minimis*. At the same time, as we have discussed elsewhere, the value to the public—in the creation of a body of public domain recordings—would be enormous.

Furthermore, while it is not essential to our argument, it is important to remember the constitutional purpose of copyright when considering the question of incorporation. Federal copyright did not exist for sound recordings prior to 1972, and so a copyright term extending to 2067 clearly was not an important incentive for creation of the recording in the first place. Copyright is different from other property rights in that it is not a natural right, but one that is granted by Congress at its discretion. Harmonizing laws governing copyright terms which were already retroactively granted, and which therefore serve no function in “[promoting] the progress of science and the useful arts,” should be well within the boundaries of the Fifth Amendment.

#### Increasing the Availability of Pre-1972 Sound Recordings.

*23. If the requirements of due process make necessary some minimum period of protection, are there exceptions that might be adopted to make those recordings that have no commercial value available for use sooner? For example, would it be worthwhile to consider amending 17 U.S.C. 108(h) to allow broader use on the terms of that provision throughout any such “minimum period?” Do libraries and archives rely on this provision to make older copyrighted works available? If not, why not?*

We recommend amending 17 U.S.C. 108(h) to allow for broader use by libraries and archives. Based on our recommended fixed 95-year term for pre-1972 sound recordings, we recommend amending §108(h) to include sound recordings that are in the last 45 years of their copyright term.

Different rules for sound recordings under §108(h) are justified by the fact that sound recordings, unlike paper-based manifestations of works, are made on notoriously fragile media. Analog materials deteriorate every time they are played; digital materials retain their data integrity perfectly, but are stored on materials with much shorter life-spans than their analog counterparts. In both cases, the materials may need preservation long before they reach obsolescence as it is defined in §108(c). For example, a library may have copies of 33rpm vinyl recordings from the 1950s which, though in pristine condition, may be in dire need of preservation due to their rarity. Such recordings would not qualify as “damaged, deteriorating, lost, stolen or...obsolete,” but would still be quite

vulnerable.<sup>17</sup> If such a recording were not commercially exploited as specified in §108(h), then, under the amended §108(h), libraries would be able to take steps necessary to ensure the recording's survival. Importantly, this would also allow libraries to make the recordings widely accessible, without the restrictions on digital copies found in §108(b)(2) and §108(c)(2). As we have discussed, wide access is crucial to securing support for preservation.

As a result of the shortened life spans, the need for preservation begins much earlier in the life of a sound recording. While a print object may be expected to survive considerably longer than 95 years without extraordinary measures, this is not necessarily true for sound recordings. As long as a recording is being commercially exploited, it is likely that the copyright owner is taking the necessary steps to insure that it will continue to remain viable. However, if a commercial recording is no longer being exploited on the market, we believe that libraries should be able to take necessary steps to ensure that the recording does not disappear.

We believe a 45 year transition term is justified by the fact that this would, in some ways, harmonize our sound recordings term with those of other WIPO countries. The copyright term for sound recordings in the United Kingdom, for example, is 50 years. By providing for limited exceptions for libraries and archives in the last 45 years of a sound recordings term, we would synchronize more closely with our treaty partners without the need to take the troublesome and very difficult step of shortening terms for sound recordings.

### Partial Incorporation

*26. The possibility of bringing pre-1972 sound recordings under federal law only for limited purposes has been raised. For example, some stakeholders seek to ensure that whether or not pre-1972 sound recordings receive federal copyright protection, they are in any event subject to the fair use doctrine and the library and archives exceptions found in sections 107 and 108, respectively, of the Copyright Act. Others would like to subject pre-1972 sound recordings to the section 114 statutory license, but otherwise keep them within the protection of state law rather than federal copyright law.*

*Is it legally possible to bring sound recordings under federal law for such limited purposes? For example, can (and should) there be a federal exception (such as fair use) without an underlying federal right? Can (and should) works that do not enjoy federal statutory copyright protection nevertheless be subject to statutory licensing under the federal copyright law? What would be the advantages or disadvantages of such proposals?*

One of the very important benefits of incorporation is the ability of libraries and archives to avail themselves of the various exceptions built into federal law, such as those found in sections 107–110. We are very concerned that libraries and archives be able to make use

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<sup>17</sup> This would not preclude copying under §107; however, as we have discussed, there is no certainty that fair use is available under current law. Due to the uncertainty which stills surrounds fair use, we would prefer to see this provision made explicit in §108.

of §§107 and 108 especially, and would certainly favor partial incorporation for that purpose over the status quo. But we would greatly prefer a situation which does not rely on partial incorporation.

In addition to our opinion that partial incorporation would at best be legally messy and might subject the new law to a constitutional challenge, we support full incorporation because our interest is not limited to the activities which might be undertaken by libraries themselves. Libraries and their patrons benefit from scholarship, often on the part of private individuals or for-profit entities, which draws on material whose copyright has expired. In addition, libraries and archives are often beneficiaries of the collecting and preservation efforts of private scholars, audio engineers, audio enthusiasts and others who help preserve our audio heritage. These private individuals, often acting out of no interest other than love of the medium and frequently at considerable personal expense, have preserved many historically important audio materials—materials which even the owner might have lost. These recordings often end up in libraries where they might be made available for public use. At present, however, many libraries feel compelled to restrict access to these materials or to refuse them altogether. To the extent that these private efforts would be legal under federal law, we strongly favor allowing them to continue the important work they are doing. In many cases, this would not be possible under partial incorporation, because the latter would presumably do nothing to address the problem of term limits for sound recordings, or the accompanying production of a healthy body of public domain material from which to draw.

#### Miscellaneous Questions

*27. Could the incorporation of pre-1972 sound recordings potentially affect in any way the rights in the underlying works (such as musical works); and if so, in what way?*

We can think of no way in which the incorporation of pre-1972 sound recordings would affect the rights in underlying works. While bringing pre-1972 sound recordings under federal protection would subject both recordings and their underlying musical works to the same set of federal laws, the underlying works fixed in these recordings are either already protected by federal copyright law or in the public domain. Incorporation would change neither case. Not only is this legally true, as is clearly stated in §103(b), but it is also perceptually true, since librarians and archivists widely recognize the multiple layers of copyright present in sound recordings and other compilations and derivative works. Moreover, because publication of sound recordings does not constitute publication of underlying works (17 U.S.C. 303(b)), it is likely that many of those works will, in fact, continue to be protected until well after the copyrights expire for the sound recordings in which they are embedded.

We wish to thank the Copyright Office for the opportunity to comment on this very important issue.