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EXECUTIVE SUMMARY

In the Omnibus Appropriations Act of 2009, Congress instructed the Register of Copyrights (hereinafter “Copyright Office” or “Office”) to conduct a study on the “desirability and means” of extending federal copyright protection to sound recordings fixed before February 15, 1972 (“pre-1972 sound recordings”). Congress directed the Office to discuss several major points in the study, including: (1) the effect that federal protection would have with respect to the preservation of pre-1972 sound recordings; (2) the effect that federal protection would have with respect to providing public access to the recordings; and (3) the impact that federal protection would have on the economic interests of right holders of the recordings. Congress also requested “any recommendations that the Register considers appropriate.”

Although sound recordings were brought within the scope of federal copyright protection beginning in 1972, protection of pre-1972 sound recordings remains governed by a patchwork of state statutory and common law. States are permitted to continue protection for pre-1972 sound recordings until 2067, at which time all state protection will be preempted by federal law and pre-1972 sound recordings will enter the public domain.

The Copyright Office enjoyed significant input from stakeholders in the course of preparing this report. The Office solicited written comments and reply comments on a panoply of questions, including the current state of preservation and public availability, value in the marketplace, the Constitutional implications of federal protection, and the best methods to avoid harming the legitimate interests of right holders. The Office also held a two-day public roundtable for representatives of libraries and archives, the recording industry, performers, broadcasters and satellite radio, and other interested parties.

Among the conclusions of the Copyright Office is that the goals served by federalizing common law copyright for other types of works in 1976 would be served by bringing pre-1972 sound recordings into the federal statutory scheme as well. Indeed, Congress did not articulate grounds for leaving pre-1972 sound recordings outside the federal scheme and there is very little information as to why it did so. The Copyright Office also concludes that federalization would best serve the interest of libraries, archives and others in preserving old sound recordings and in increasing the availability to the public of old sound recordings. While many librarians and archivists are dissatisfied with the scope of the federal statutory privileges enjoyed by libraries and archives, these exceptions and limitations (sections 107 and 108 in particular) provide more certainty and, in general, more opportunity than state laws to preserve and make available sound recordings from many decades past. Moreover, pre-1972 sound recordings would enjoy the benefit of any future statutory amendments to exceptions and limitations in the Copyright Act, including updates to section 108 or orphan works legislation.

The principal objection offered by record companies – that federalizing protection for pre-1972 sound recordings would cast a cloud over existing ownership of rights in those recordings – is not insurmountable. Congress can address it by expressly providing that the ownership of copyright in the sound recording shall vest in the person who owned the rights under state law just prior to the enactment of the federal statute. Other concerns can also be resolved.

Here are the key points and legislative recommendations in the Report:

- The Copyright Office recommends that federal copyright protection should apply to sound recordings fixed before February 15, 1972, with special provisions to address ownership issues, term of protection, and registration. This will improve the certainty and consistency of copyright law, will likely encourage more preservation and access activities, and should not result in any appreciable harm to the economic interests of right holders.
- Federal copyright protection for pre-1972 sound recordings means that all of the rights and limitations of Title 17 of the U.S. Code applicable to post-1972 sound recordings would apply, including section 106(6) (public performance right for digital audio transmissions), section 107 (fair use), section 108 (certain reproduction and distribution by libraries and archives), section 110 (exemption for certain performances and displays), section 111 (statutory license for cable retransmissions of primary transmissions), section 112 (ephemeral recordings by broadcasters and transmitting organizations), section 114 (statutory license for certain transmissions and exemptions for certain other transmissions), section 512 (safe harbor for Internet service providers), Chapter 10 (digital audio recording devices), and Chapter 12 (copyright protection and management systems), as well as any future applicable rights and limitations (*e.g.*, orphan works) that Congress may choose to enact.
- The initial owner(s) of the federal copyright in a pre-1972 sound recording should be the person(s) who own(s) the copyright under applicable state law at the moment before the legislation federalizing protection goes into effect.
- Section 203 of the Copyright Act should be amended to provide that authors of pre-1972 sound recordings are entitled to terminate grants of transfers or licenses of copyright that are made on or after the date federal protection commences. However, termination of pre-federalization grants made under state law prior to federalization presents serious issues with respect to retroactivity and takings, so the Office does not recommend providing termination rights for grants made prior to federalization of protection.
- The term of protection for sound recordings fixed prior to February 15, 1972, should be 95 years from publication (with “publication” as defined in section 101) or, if the work had not been published prior to the effective date of legislation federalizing protection, 120 years from fixation. However,
 - In no case would protection continue past February 15, 2067, and
 - In cases where the foregoing terms would expire before 2067, a right holder may take the action described below to obtain a longer term.
- For pre-1972 sound recordings other than those published before 1923, a transition period lasting between six and ten years from enactment of federal protection should be established, during which a right holder may make a pre-1972 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner’s intent to secure protection until 2067. If a right holder does this, the term of protection of the sound recording will not expire until 2067,

provided that the recording remains publicly available at a reasonable price during its extended term of protection.

- For sound recordings published before 1923, a transition period lasting three years from enactment of federal protection should be established, during which a right holder may make a pre-1923 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner's intent to secure protection for 25 years after the date of enactment the legislation that federalizes protection. If a right holder does this, the term of protection of the sound recording will not expire until the end of the 25-year period, provided that the recording remains publicly available at a reasonable price during its extended term of protection.
- Regardless of a right holder's actions, all pre-1972 sound recordings should enjoy federal protection at least until the end of the relevant transition period described above.
- Regarding the requirement of timely registration in order to recover statutory damages or attorney's fees in an infringement suit, a transitional period of between three and five years should be established, during which right holders in pre-1972 sound recordings can seek statutory damages and attorney's fees notwithstanding the lack of registration prior to filing suit.
- Adjustments should be made or at least considered with respect to certain other provisions of the Copyright Act to take into account difficulties that owners of rights in pre-1972 sound recordings may encounter. Among those provisions are: section 405 (notice of copyright: omission of notice on certain copies and phonorecords), section 406 (notice of copyright: error in name or date on certain copies and phonorecords), section 407 (deposit of copies or phonorecords for Library of Congress), section 410 (*prima facie* weight of certificate of registration), and section 205 (regarding priority between conflicting transfers recorded in the Copyright Office).