# Federalizing Pre-1972 Sound Recordings: An Analysis of the Current Debate

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## I. INTRODUCTION

On February 16, 2067, the Rolling Stones—having profited off of sales of their 1971 hit single "Brown Sugar" for ninety-six years—will lose their copyright to the public domain. If you think that a century of copyright protection is still not long enough for one of the "500 Greatest Songs of All Time,"[1] consider the following: The Beatles' 1964 hit "A Hard Day's Night," Elvis' "Hound Dog" (1956), Bing Crosby's "White Christmas" (1942), Duke Ellington's "It Don't Mean a Thing (If It Ain't Got That Swing)" (1932), and every song ever recorded by Louis Armstrong, Jelly Roll Morton, and Sidney Bechet will also enter the public domain on February 16, 2067.

In fact, no work ever recorded by anyone, anywhere, before February 15, 1972, will enter the public domain in the United States before February 16, 2067. This is true not just for songs, but for every

1. *500 Greatest Songs of All Time: The Rolling Stones, 'Brown Sugar,'* ROLLING STONE (Dec. 9, 2004), http://www.rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407/the-rolling-stones-brown-sugar-19691231.

sort of sound recording, including spoken word and other sound effects. Even the very first sounds ever captured by Thomas Edison's phonograph in 1877 will not enter the public domain until February 16, 2067.

This is due to a little-known exception to the general rules governing term of copyright law protection. This exception exempts sound recordings fixed before February 15, 1972, from federal preemption until February 15, 2067.[2] In other words, pre-1972 sound recordings are entitled to perpetual state-law protection through that date and, therefore, will not enter the public domain until February 16, 2067.

Many people, particularly archivists and librarians, view this situation as untenable.[3] The fact that preservation and fair-use laws are especially uncertain in the context of sound recordings only makes matters worse. Addressing this criticism, in 2011, the United States Copyright Office began investigating the possibility of federalizing all pre-1972 sound recordings. The Copyright Office's investigation took the form of a study entitled "A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction."[4] The Study consisted of a notice of inquiry, two sets of comments from the public (original and reply comments), and a roundtable discussion of several discrete issues held in Washington, D.C.. Released in December 2011, the resulting final report, entitled "Federal Copyright Protection for Pre-1972 Sound Recordings," recommended federalization.[5]

Providing federal protection for pre-1972 sound recordings would require resolving many open legal issues. Though certain components of the existing federal copyright law, such as exclusive rights and fair use,[6] would clearly apply to the federalized recordings, whether other existing components, such as the rules governing term and ownership, would apply is unclear.[7] Many have suggested they should, thus allowing term for sound recordings to be brought into line with term for other works of authorship, like movies, books, and musical compositions. However,

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2. 17 U.S.C. § 301(c) (2006).

3. *See infra* Part IV.B.1-3.

4. *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, U.S. COPYRIGHT OFFICE (Dec. 28, 2011), http://www.copyright.gov/docs/sound [hereinafter Copyright Office Study].

5. U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS (2011), *available at* http://www.copyright.gov/docs/sound/pre-72-report.pdf.

6. 17 U.S.C. §§ 106-107.

7. *Id.*

careful consideration of the issue quickly reveals that this suggestion is easier said than done.

The Copyright Office's Study was designed to explore the potential problems posed by federalization. The Study included a notice of inquiry, comprised of various questions that might arise if pre-1972 recordings were brought under federal jurisdiction.[8] This Article examines one of those questions in particular: If pre-1972 sound recordings were brought under federal jurisdiction, how long would their copyright last? Term is an essential component of the copyright system: it provides the temporal limits of the exclusive property rights belonging to the copyright holder.[9] And here at Tulane University Law School, copyright term is one of the elements of copyright law in which we specialize.[10]

Currently, term for pre-1972 sound recordings is governed by ambiguous and inconsistent state laws.[11] It is often difficult to determine which state's law applies, and what the law of that state is. Even where state laws can be determined, they are difficult to reconcile.[12] For example, the term of protection is fifty-six years in Colorado,[13] until 2047 in California,[14] and until 2067 in New York.[15] To illustrate: The Beatles' "A Hard Day's Night" (1964) will be protected in Colorado until 2020, in California until 2047, and in New York until 2067. Federalizing pre-1972 sound recordings would preempt and therefore replace this patchwork state-law system with a standardized term of protection. But what would the new term of protection be? Answering this question is no easy task.

Professor Elizabeth Townsend Gard, a coauthor of this Article, will be the first to attest to the fact that working with copyright term can be complicated. Much of Professor Townsend Gard's scholarship has focused on the issue of term, or duration. She and her team of over three-dozen law students have devoted the last five years to researching

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8. Notice of Inquiry, 75 Fed. Reg. 67,777 (Nov. 3, 2010).

9. The United States Constitution prescribes a finite term for patent and copyright protection. *See* U.S. CONST., art. I, § 8, cl. 8 ("limited times").

10. We have been working extensively on a global project focused on copyright term called the Durationator® Copyright Experiment. We have researched the term of copyright for every country of the world and are in the process of coding our results.

11. *See* 17 U.S.C. § 301(c) (exempting pre-1972 sound recordings from federal preemption).

12. *See generally* U.S. COPYRIGHT OFFICE, *supra* note 5, at 20-47.

13. COLO. REV. STAT. § 18-4-601(1) (2002).

14. CAL. CIV. CODE § 980(a)(2) (West 2005).

15. *See* Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 263 (N.Y. 2005) (holding that federal law mandates that New York common law protection for sound recordings will end on February 15, 2067).

the world's various copyright terms, country by country,[16] expending thousands of hours looking into the issue of duration in many scenarios—historical, theoretical, practical, and comparative. To date, they have researched laws from every country in the world and spent extensive time on U.S. law. While Professor Townsend Gard and her team have worked on terms for various types of works, they had, until 2011, yet to tackle term of sound recordings. The Copyright Office's Study presented the perfect opportunity to accept the challenge.

Shortly after the Copyright Office began its Study, a second, complementary catalyst occurred. In the Spring of 2011, Professor Townsend Gard organized the "Future of Copyright" Speaker Series at Tulane University Law School.[17] One of the guest speakers was David Carson, then General Counsel of the U.S. Copyright Office, who would soon be working on the Copyright Office's federalization study. In preparation for Mr. Carson's visit, Professor Townsend Gard's Spring 2011 copyright class ("the class") decided not only to research the implications of federalizing all pre-1972 sound recordings, but also to draft its own legislative proposal and present it in the form of a reply comment.

Under Professor Townsend Gard's direction, the class collectively considered the issue of federalization; explored all of the law-related questions raised in the notice of inquiry; reviewed all of the comments responding to the notice;[18] engaged in group discussions on the issue of term; voted on a legislative recommendation; and prepared its own reply comment, which formed the basis of this Article.[19] The class' reply comment focused on a question posed in the Copyright Office's Notice of Inquiry regarding term of protection. Every student in the class participated in drafting the reply comment, either through research, discussion, and/or writing.[20] During Mr. Carson's visit, before he

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16. Professor Townsend Gard and her students have been working on a computer application called "The Durationator®," which allows users, by answering a series of questions, to determine the term of protection of any copyrighted work.

17. *See generally Conversations with Renowned Professors and Practitioners on the Future of Copyright (Part II)*, 14 TUL. J. TECH. & INTELL. PROP. 1, 3 (2011).

18. *See Comments: Federal Copyright Protection for Pre-1972 Sound Recordings*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/docs/sound/comments/initial/ [hereinafter *Comments*] (last visited Nov. 12, 2012).

19. *See Reply Comments: Federal Copyright Protection for Pre-1972 Sound Recordings*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/docs/sound/comments/reply/ (scroll down to Document 13; follow link to "Elizabeth Townsend Gard & the 2011 Copyright Class at Tulane University Law School") (last visited Nov. 12, 2012).

20. In addition to giving credit where credit is due, the authors wish to emphasize the collaborative nature of this Article in hopes of highlighting the potential of an innovative, cooperative class environment. This group has proven that through a flexible and forward-

delivered his lecture, two students, Erin Anapol and Jessica Edmundson, presented the class' findings and proposal to him. Then in June 2011, Professor Townsend Gard represented the class at the Copyright Office's roundtable discussions in Washington, D.C., and presented the proposal to the public.

Mr. Carson's visit and the Copyright Office's Study inspired the authors to write this Article. This Article is the result of the collaborative work of Professor Elizabeth Townsend Gard, Erin Anapol, and the class.

Expanding on the students' initial effort, this Article seeks to place the issue of term as applied to pre-1972 recordings properly within its larger context. The Article not only covers the Copyright Office's Study, but also evaluates the Copyright Office's Report, and addresses more recent events, including sound recording term extensions in Europe. In short, this Article examines term for pre-1972 sound recordings from a variety of angles and then ultimately evaluates the U.S. Copyright Office's final legislative proposal.

In response to the Copyright Office's Study, this Article suggests that the current system is inequitable and that federalization of pre-1972 sound recordings is both desirable and possible. Part II provides background information on the legal issues surrounding pre-1972 sound recordings. Part III provides a short history of copyright protection of sound recordings. Part IV examines the Copyright Office's Study, focusing on its discussion of term as represented in the notice of inquiry and comments from interested members of the public. Part V explains the various issues involved in choosing a term for a federal copyright system for pre-1972 sound recordings. Part VI then presents a proposal for transitioning from the current system of inconsistent state laws to a unified federal term of protection. Part VII then discusses the most recent developments in this area of the law, including a public meeting concerning the Copyright Office's Study, a recently proposed bill in the United States House of Representatives,[21] and a recently passed EU directive.[22] Finally, in Part VIII, the Article summarizes the 2012 *Copyright Office Report* and then compares the Copyright Office's term proposal to that of the authors in order to shed light on the complexities and choices involved in creating a term of protection for federalized pre-1972 sound recordings. In the end, we believe our proposal has several advantages over the Copyright Office's. Under our framework, we

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thinking approach to teaching and learning, law students can progress from mere passive observers to active participants in the law.

21. H.R. REP. NO. 112-2933 (2011).

22. Council Directive 2011/77, 2011 O.J. (L 265) (EU).

believe that more works come into the public domain faster, that term can be determined more easily, and that rights holders have clearer guidelines on how to maximize their term of protection.

## II. HISTORY

In order to fully appreciate the issue of federalization, it is important to understand the history of copyright protection for sound recordings. Sound recordings have not always been included in the subject matter of copyright. While the phonograph was invented in 1877,[23] it was not until 1972—nearly one hundred years later—that sound recordings first received federal copyright protection.[24]

Today, under the 1976 Copyright Act, copyrightable subject matter includes any "original work[] of authorship fixed in any tangible medium of expression."[25] This is a broad definition that includes sound recordings. However, historically, the subject matter of copyright was more limited. Under the 1790 Copyright Act, the first federal copyright law, only books, maps, and charts were protected.[26] Under the 1909 Act, the first general revision of the federal copyright law, copyrightable subject matter was extended to include "all the writings of an author."[27] While "writings of an author" included previously unprotected categories such as musical compositions, it still did not include sound recordings.[28]

While sound recordings did not receive federal copyright protection under the 1790 and 1909 Acts, sound recordings were not altogether unprotected; in fact, a "dual system" of copyright protection was in place. Under this dual system, both federal and state laws governed copyright, with federal law covering published works and state law covering unpublished works.[29] Accordingly, even where federal law did not provide copyright protection, it was possible that state law could. For sound recordings, this was in fact the case. Sound recordings generally came to be considered unpublished works and were therefore eligible for state law protection. So although federal law did not provide protection

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23. Holly M. Sharp, Comment, *The Day the Music Died: How Overly Extended Copyright Terms Threaten the Very Existence of Our Nations Earliest Musical Works*, 57 EMORY L.J. 279 (2007).

24. *See* Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective as of Feb. 15, 1972).

25. 17 U.S.C. § 102(a) (2006).

26. Copyright Act of 1790 § 1, 1 Stat. 124 (1790) (repealed 1831).

27. *See* Copyright Act of 1909 § 4, 35 Stat. 1075 (repealed 1976).

28. *See id.* § 5.

29. *See* CRAIG JOYCE ET AL., COPYRIGHT LAW 21 (8th ed. 2010).

against their unauthorized duplication, state laws, such as those prohibiting misappropriation and unfair competition, did.[30]

Though state law protection was available, it proved problematic. Reliance on state law resulted in a lack of uniformity, which led to confusion and inconsistency: confusion over which state's law governed and inconsistency between federal and state law and amongst the various laws of the different states. Each state was free to create its own copyright law, and this led to ineffective enforcement and insufficient relief.[31] The disparate treatments of sound recordings under state laws concerned copyright holders and Congress alike and served as a main justification, first, for providing federal protection for sound recordings and, later, for preemption of state copyright laws.[32]

Reliance on state law also presented another problem: term, or duration. While Congress is bound by the Constitution's "limited times" clause, the states are not.[33] In other words, perpetual copyright protection, while forbidden under federal law, is available under state law. But while duration presented a serious problem, the issue of perpetual protection was overshadowed by the lack of uniformity, which was itself sufficient to motivate the call for federal protection.

With the dual scheme under scrutiny, Congress began the process of guaranteeing federal protection for sound recordings.[34] Congress had first considered adding sound recordings to the categories of federally protected subject matter in 1925.[35] However, the idea did not gain traction until the 1960s, when Congress began preparing for the second general revision of the federal copyright law. At that time, the growing popularity of cassette tapes and the corresponding problem of piracy also contributed to the move to federal protection.[36]

The development of cassette-tape technology made the duplication of sound recordings easy and inexpensive. This led to a surge in unauthorized duplication and resale—that is, piracy. Piracy decreased record companies' profits, artists' royalties, and federal, state, and local

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30. James H. Napper, III, *Life as Art: How Technology and the Infusion of Music into Daily Life Spurred the Sound Recordings Act of 1971*, 12 TUL. J. TECH. & INTELL. PROP. 161, 172 (2009).

31. *Id.* at 178 ("[W]ith fifty different states, each with their own distinct theory of unfair competition, there was no way for the record industry to receive effective relief from state courts . . . . Even if a record company were able to enjoin a pirate in one state, the pirate could simply move to another state and renew his operations.").

32. *See id.* at 177-79.

33. *See* U.S. CONST. art. I, § 8, cl. 8.

34. Napper, *supra* note 30, at 172.

35. *Id.* at 169-70.

36. *See id.* at 183.

sales tax revenues.[37] But because sound recordings were not federally protected subject matter, piracy did not violate federal copyright law. As inconsistent state-law protections proved insufficient, the need for federal protection for sound recordings became urgent. The piracy threat became so pressing that while the general revision of the Copyright Act stalled for unrelated reasons, federal protection for sound recordings moved forward.[38]

In 1971, with the passage of an amendment to the 1909 Act, sound recordings first received federal copyright protection. The amendment, also known as the "Sound Recordings Act of 1971," added sound recordings to the categories of protectable subject matter.[39] Notably, however, this addition was not retroactive. Only sound recordings fixed *on or after* February 15, 1972—the date on which the 1971 amendment took effect—received federal copyright protection.[40] Sound recordings fixed *before* February 15, 1972 remained governed by state law.[41] Though this split in protection seems odd today, such a division was consistent with the 1909 Act's dual system of copyright protection.

Not long thereafter, in 1976, Congress passed the second general revision of the Copyright Act, which remains in effect today.[42] The 1976 Act carried forward the 1971 amendment's protection for post-1972 sound recordings.[43] But the 1976 Act also provided for preemption of state copyright laws.[44] In § 301 of the 1976 Act, Congress abrogated the old dual copyright system and created a new, almost entirely federal system of copyright, without addressing the issue of pre-1972 sound recordings.[45]

Pre-1972 sound recordings could have been subject to federal protection under § 301. Instead, 301(c) specifically exempts pre-1972 sound recordings from preemption until February 15, 2067.[46] Why were pre-1972 sound recordings, and these works only, exempted from preemption? Initial drafts of § 301 contained no exemption.[47] However,

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37. *Id.* at 177-78.
38. *Id.* at 183.
39. Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective as of Feb. 15, 1972).
40. *Id.*
41. *See id.*
42. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-1332 (2006)).
43. 17 U.S.C § 115.
44. *See id.* § 301.
45. *Id.*
46. *Id.*
47. 5 PATRY ON COPYRIGHT § 18:8 (2011).

after the Department of Justice voiced concerns that preemption would abrogate state antipiracy laws, aggravating the growing piracy problem, § 301(c) was added.[48]

With the addition of § 301(c) came the loss of federal protection for pre-1972 sound recordings. Instead, these works remain governed by state law. Under the law as it currently stands, pre-1972 sound recordings will remain under state law protection until 2067, when preemption will occur and all protection will end.[49]

## III. State Law Versus Federal Law

As discussed *supra*, § 301 of the Copyright Act preempts all state copyright laws except those governing sound recordings fixed before February 15, 1972 (pre-1972 sound recordings). Therefore, those works are currently governed by a patchwork state law system, exempt from preemption by and the application of federal law.[50] Why is it that, of all copyrightable subject matter, sound recordings are singled out for special treatment? And why only those fixed before February 15, 1972? What impact has this differential treatment had upon copyright owners and users? Can the results be justified? Or are the results unjustifiable, so as to warrant legislative amendment? And if legislative action is founded, by what means should it be achieved?

This Article seeks to answer these questions. This is the issue of federalization: bringing pre-1972 sound recordings under federal protection. Though the topic of federalization has previously received considerable attention from the academic community,[51] in light of a study recently conducted by the Copyright Office, the subject now warrants renewed consideration.

For the past two years, at Congress's direction, the Copyright Office has been conducting a "Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction."[52] The Study was commissioned to examine the desirability and means of bringing pre-1972 sound recordings under federal protection. The result of the Study was the *Report on Federal Copyright Protection for Pre-1972 Sound Recordings*, issued by the

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48. *Id.* Though the Justice Department proposed a complete exemption, the House Judiciary Committee decided to include an outside date, when preemption would kick in, and which would avoid perpetual protection. *Id.*

49. *See id.*; 2 McCarthy on Trademarks and Unfair Competition § 10:64 (2011).

50. *See* 17 U.S.C. § 301.

51. *See, e.g.*, Napper, *supra* note 30; Sharp, *supra* note 23.

52. *Copyright Office Study*, *supra* note 4.

Copyright Office in December 2011. In the report, federalization received its first official seal of approval.[53]

While federalization raises a variety of issues, this Article focuses only on the issue of duration, or term. However, duration itself raises a variety of questions. For example, where within the current federal statutory scheme would the provisions governing duration of pre-1972 recordings appear? Sections 302 through 305 of the current federal Copyright Act govern duration.[54] If pre-1972 recordings were currently governed by federal law, they would likely fall under § 303,[55] works created but not published before January 1, 1978. Because pre-1972 sound recordings were not eligible for federal protection, they could not be considered "published" in a legal sense. Under the 1909 Act, many widely distributed works were considered unpublished—for example, Martin Luther King, Jr.'s "I Have a Dream" speech, radio broadcasts, and even television shows.[56] Accordingly, attempting now to retroactively determine whether individual recordings were "published" would be nonsensical. It would therefore be reasonable to view pre-1972 sound recordings as unpublished in the legal sense and falling under § 303.

But determining where within the current statutory scheme the provision governing term of pre-1972 recordings should appear is just the threshold question. What will be the substance of such a provision? For example, from what date will the term begin to run—creation, fixation, or publication? The remainder of this Article will discuss the journey of Professor Townsend Gard and the class in answering these questions and many more through writing their reply comment, participating in the roundtable discussions, and evaluating the Copyright Office report itself.

## IV. THE COPYRIGHT OFFICE'S STUDY

This Part of the Article examines the Copyright Office's Study by mapping Professor Townsend Gard and her Copyright class's participation in its initial stages. It discusses the notice of inquiry and the comments—both of which led up to the class's formulation of its own original legislative proposal.

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53. U.S. COPYRIGHT OFFICE, *supra* note 5.
54. 17 U.S.C. §§ 302-305.
55. *See infra* Part IV.A.1.
56. Copyright Act of 1909, §§ 4-5, 35 Stat. 1075 (repealed 1976).

### A. *Notice of Inquiry*

In 2009, Congress directed the Register of Copyrights to conduct a study on the desirability and means of federalizing pre-1972 sound recordings.[57] Congress further directed the Register of Copyrights to seek comments from interested parties.[58] On December 1, 2010, the Copyright Office launched the study by publishing a notice of inquiry.[59] The notice called for comments on how federalization of pre-1972 recordings might affect preservation of and public access to these works, and the impact on the economic interests of parties holding the rights to these works ("rights holders").[60] The notice also requested comments on the best means for achieving federalization.[61]

In addition to these general requests, the notice posed thirty specific questions. The questions fell within one of five categories: (1) Preservation of and Access to Pre-1972 Sound Recordings; (2) Economic Impact; (3) Term of Protection and Related Constitutional Considerations; (4) Partial Incorporation; and (5) Miscellaneous Questions.[62] Only Questions 21 and 22 concerned term.

In order to prepare their own reply comment, Professor Townsend Gard and the class reviewed and researched all of the law-related questions (some of the questions concerned nonlegal issues) as class exercises, but then decided to focus their attention and research on these two term-related questions. Under the direction and guidance of Professor Townsend Gard, and having only just learned the basics of copyright duration, the class turned to Questions 21 and 22:

#### 1. Question 21: Federal Term of Protection for Pre-1972 Sound Recordings

Question 21 of the Copyright Office's Notice of Inquiry reads as follows:

> 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

57. *Copyright Office Study*, *supra* note 4.
58. *Id.*
59. Notice of Inquiry, 75 Fed. Reg. 67,777 (Nov. 3, 2010).
60. *Copyright Office Study*, *supra* note 4.
61. *Id.*
62. According to the Notice, commenting parties only need to address the issues on which they have information or an opinion, but should try to be as comprehensive as possible. Interested parties were given until January 31, 2011, to submit initial written comments to the Office of the General Counsel of the Copyright Office.

> 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?[63]

Essentially, Question 21 asks whether the federal term of protection for pre-1972 sound recordings should fall under § 302, § 303, or § 304 of the 1976 Copyright Act. These sections separate works based on their publication and/or creation date. Section 302 applies to works created and published after January 1, 1978.[64] Section 303 focuses on works created but not federally published, copyrighted, or registered before January 1, 1978.[65] Section 304 applies to works published before January 1, 1978.[66] Each section carries different terms of protection, with § 303 incorporating by reference § 302's terms of protection.[67]

The pertinent question, then, is this: Upon federalization, where would sound recordings fit within the current statutory scheme? The class first determined that pre-1972 could not fit under § 302, because that section only applies to works created on or after January 1, 1978.[68] Close consideration of the other two options led the class to conclude that, despite several commenters' opinions to the contrary,[69] § 303 was the best fit.

Many of the comments assumed that pre-1972 sound recordings would fit under § 304, but this would be a mistake.[70] Section 304 provides the term of protection for "subsisting copyrights." Works with subsisting copyrights are those that received federal copyright protection before January 1, 1978. Pre-1972 sound recordings, while created before January 1, 1978, were—and so far remain—ineligible for federal copyright protection.[71] Though other pre-1972 works might hold subsisting copyrights, pre-1972 sound recordings categorically cannot. Accordingly, placing these works in § 304 would be improper, as it would render the federalizing legislation retroactive at worst and a legal fiction at best.

Instead, § 303, governing works created but unprotected before 1978, is the most logical place for a new provision governing pre-1972

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63. Notice of Inquiry, 75 Fed. Reg. 67,777.
64. 17 U.S.C. § 302 (2006).
65. *See id.* § 303.
66. *See id.* § 304.
67. *See id.* § 303(a).
68. *See id.* § 302.
69. *See infra* Part IV.B.
70. *See infra* Part IV.B.2.
71. 17 U.S.C. § 301.

sound recordings. Pre-1972 sound recordings belong in this section because, due to their ineligibility for federal protection, they were created but not copyrighted before January 1, 1978.

After much discussion, the class voted and decided that § 303 is the correct place for pre-1972 sound recordings, this does not compel the conclusion that § 303's current substantive terms must govern. Section 303 incorporates § 302's term determinants, and application of § 302's determinants to sound recordings would be highly problematic. That is, § 302 relies on factors such as authorship, joint authorship, and publication in order to determine term.[72] Application of these factors to sound recordings begs the questions: Who is the author? Were there joint authors? When was the recording published? In the case of sound recordings, the answers to these questions are particularly elusive. Therefore, amending § 303 to add a new subsection specifically designed for pre-1972 sound recordings is the appropriate solution. Accordingly, the class suggested that pre-1972 sound recordings would be governed by their own, new subsection: 303(c).

2. Question 22: Pre-1923 Sound Recordings

Question 22 begins as follows:

> Currently, States are permitted to protect pre-1972 sound recordings until February 15, 2067. If these recordings were incorporated into Federal copyright law and the ordinary statutory terms applied, then all works fixed prior to 1923 would immediately go into the public domain [assuming they were categorized under Section 304]. Most pre-1972 sound recordings, including all published, commercial recordings, would experience a shorter term of protection. However, as the date of the recording approaches 1972, the terms under Federal and State law become increasingly similar. For example, a sound recording published in 1940 would be protected until the end of 2035 instead of February 15, 2067; one published in 1970 would be protected until the end of 2065 instead of February 15, 2067. In the case of one category of works—unpublished sound recordings whose term is measured by the life of author—there would actually be an extension of term if the author died after 1997. For example, if the author of an unpublished pre-1972 sound recording died in 2010, that sound recording would be protected under Federal law until the end of 2080.[73]

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72. *See id.* § 302(a) ("Copyright in a work created on or after January 1, 1978 . . . endured for a term consisting of the life of the *author* and seventy years." (emphasis added)), § 303(b) (defining the term for a "joint work"), § 303(c) ("In the case of an anonymous work, pseudonymous work, or a work made for hire, the copyright endures for the term of 95 years from the year of its first *publication* . . . ." (emphasis added)).

73. Notice of Inquiry, 75 Fed. Reg. 67,777 (Nov. 3, 2010).

> In the 1976 Copyright Act, Congress made all unpublished works brought under federal law subject to the ordinary statutory term that the 1976 Act provided for copyrighted works: life of the author plus fifty years (later extended by the CTEA [Copyright Term Extension Act] to life of the author plus seventy years).[74] However, Congress was concerned that for some works, applying the ordinary statutory copyright terms would mean that copyright protection would have expired by the effective date of the 1976 Copyright Act, or would expire soon thereafter. Congress decided that removing subsisting common law rights and substituting statutory rights for a "reasonable period" would be "fully in harmony with the constitutional requirements of due process."[75] Accordingly, the 1976 Copyright Act included a provision that gave all unpublished works, no matter how old, a minimum period of protection of 25 years, until December 31, 2002.[76] If those works were published by that date, they would get an additional term of protection of 25 years, to December 31, 2027 (later extended by the CTEA to 2047).[77]

It should first be noted that the question includes several assumptions. For example, it assumes that federalized recordings would fall under § 304 rather than § 303. Under § 304, all pre-1923 recordings would enter the public domain. If, however, federalized recordings fell under § 303, then all works, including those recorded before 1923, would be eligible for additional protection during the transition period.

Second, Question 22 also assumes a term of ninety-five years from fixation. Third, it assumes that it is easy to determine whether and when a sound recording was published. Lastly, it assumes availability of a "life-plus" term, and overestimates the value of such a term, because many sound recordings are works-for-hire and therefore would not be measured by a life-plus term even if one were available.[78]

Assumptions aside, Question 22 essentially asks: Should a transition period, similar to that contained in § 303(a), be provided for pre-1972 sound recordings? The question continues:

> 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,

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74. H.R. REP. NO. 94-1476; 17 U.S.C. § 302(a).

75. H.R. REP. NO. 94-1476, at 138-39.

76. 17 U.S.C. § 303.

77. Notice of Inquiry, 75 Fed. Reg. 67,781.

78. *Compare* 17 U.S.C. § 301(a) (prescribing the default rule of a life-plus term for works created after January 1, 1978) *with id.* § 301(c) (creating an exception for works-for-hire, of the shorter of 95 years from publication or 120 years from creation).

would the legislation encounter constitutional problems (e.g., due process or Takings Clause issues)?[79]

A transition period should be included in any federalizing legislation. The real issue is what the length of this period should be. In determining the length of a reasonable transition period, § 303(a) and § 104A are instructive. Section 303(a) provided, as part of the original 1976 Copyright Act, a twenty-five-year transition period for unpublished works.[80] But § 104A, enacted in 1994, only provided for a one-year transition period for works that had been in the public domain and were (re)copyrighted, or "restored."[81] In § 104A, Congress felt that one year was long enough for reliance parties.[82]

The class voted and after much discussion decided that one year would be too short a transition period, but that over twenty-five years would be too long. This conclusion is particularly appropriate considering that many of these works are neglected and disintegrating and users are anxious to care, restore, and use these works once they enter the public domain. However, the question then becomes: where within the range of one to twenty-five years is the appropriate transition length? Upon careful consideration (again with discussion, research, and voting), the class came up with the idea of a five-year transition period. The Copyright Office would end up suggesting a six- to ten-year term, which will be discussed *infra*.[83] In reality, either the class's or the Copyright Office's proposed term would provide ample time for the rights holders to publish or otherwise make available the works in exchange for an additional term of protection (following in the footsteps of § 303(a)).[84]

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79. Notice of Inquiry, 75 Fed. Reg. at 67,777. *See generally* U.S. CONST., amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.") The Copyright Office suggests that such a provision would be "fully in harmony with the constitutional requirements of due process." *Id.* (citing H.R. REP. NO. 94-1476, at 138-39).

80. H.R. REP. NO. 94-1476; 17 U.S.C. § 303.

81. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified in pertinent part at 17 U.S.C. § 104A).

82. *See id.*

83. *See infra* Part VIII.A.

84. Regarding whether a five-year (or shorter/longer) period would satisfy the due process and takings clauses, these questions are beyond the scope of this Article. However, the authors note that a one-year period was sufficient for § 104A. *See* Golan v. Holder, 132 S. Ct. 873, 883 (2012). Moreover, a five-year period can provide sufficient incentive for publishing or otherwise making available the work. For example, according to this Article's legislative proposal, if the recording is published or otherwise made available to the public by the end of a five-year transition period, the copyright holder would obtain protection for the work until February 15, 2067. *See infra* Part VI.

## *B. A Review of the Comments*

The next step of the class's inquiry was to read and analyze each of the fifty-eight comments submitted to the U.S. Copyright Office. Our proposal would then reflect the needs and issues we saw in the comments themselves. We asked ourselves: What were commenters suggesting for the term and why? To answer these questions, the class engaged in mock roundtable exercises, debating various terms and their justifications. Then, after much deliberation, we attempted to draft a legislative proposal that would appeal to (and frustrate) all parties equally.

Of the fifty-eight initial comments, only eleven directly discuss the issue of the potential term.[85] Though few of the comments contain specific term proposals, many urged that the works be made available in the public domain. Those that do contain specific term proposals can be organized into the following groups: (1) comments proposing a 50-year term, (2) comments proposing a 95-year term, (3) comments proposing a general "shortening" of the term, (4) comments proposing no change to the current term, and (5) comments with additional term suggestions.

The following is a review of these initial comments, focusing on how they address the issue of term. The review places the comments into the above-listed groups, summarizes each comment's contentions concerning term, and then responds to those contentions.[86]

### 1. Comments Proposing a Fifty-Year Term

Until recently, a fifty-year term existed in all countries of the European Union, lasting fifty years from publication (or, alternatively, fifty years from creation).[87] For many commenters, fifty years provided a means of allowing as many sound recordings as possible to come into the public domain. The Electronic Frontier Foundation (EFF), the Society of American Archivists (SAA), the Library of Congress, and several individuals all propose a fifty-year term; however, they all differ in their opinions on the date from which the term should be measured: creation, fixation, or publication. Creation and fixation are likely easier to

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85. *See* discussion *supra* Part IV.B.

86. The following portion of this Article was initially authored by the students of Professor Townsend Gard's Spring 2011 Copyright class. In class, students were assigned different comments to read, summarize, and prepare responses to. The students' contributions were then organized into groups and integrated into a reply comment. Though the students' contributions have been adapted for purposes of this Article, the students are credited in the footnotes corresponding to the portions that they helped prepare. Note, the views expressed in the "Our Response" subsections are those of the individual student authors.

87. Council Directive 2006/116, 2006 O.J. (L 372) 12, 14 (EC).

determine than publication, which can be tricky because, for example, no definition of publication existed in 1890 or 1920 for sound recordings, and under the 1909 Act, sound recordings were explicitly excluded from the definition.

As a class, we looked at each comment to understand why these three organizations felt fifty years was the proper term. EFF preferred a more aggressive term of fifty years from the *date of fixation*.[88] This means that everything *fixed* before 1962 would enter the public domain. This would result in a dramatic reduction of the term of protection—by fifty-seven years if measured from 2012. Moreover, EFF provided for no transition or incentive period, as has previously been available when other kinds of unpublished work came under federal protection.[89] For these reasons, EFF's suggestion demonstrates an extreme end of the spectrum.

The SAA also suggested a fifty-year term as its first choice, and ninety-five as its second. Helen Tibbo, writing for SAA explained:

> There must be different treatment for pre-1972 sound recordings. The best solution would be to afford them the 50-year term of copyright found in most international copyright agreements. This would ensure the harmonization of copyright term that was advanced so strongly by copyright owners as a justification for copyright extension in 1998.[90]

The SAA recognized the difficulty of determining whether a sound recording has been published or remained unpublished, and also who counts as an author. The SAA, however, did not include how exactly the fifty-year term would be calculated. Interestingly, the SAA's alternative is a ninety-five-year term, where the term would be based on the moment of creation. Tibbo explained:

> If a 50-year term should prove to be impossible, then pre-1972 sound recordings should have at most a ninety-five-year copyright term dating from the moment of creation, regardless of whether they are published or unpublished. In order to mirror copyright for printed material, all sound recordings made before 1923 should be put into the public domain.[91]

So SAA suggested *creation* rather than publication as the marker.[92]

Finally, the Library of Congress, represented by Patrick Loughney, also advocated a fifty-year term, pointing to the "neighboring rights"

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88. *Comments*, *supra* note 18 (scroll down to Document 54; follow link to "Abigail Phillips, Electronic Freedom Foundation").

89. *See id.*

90. *Id.* (scroll down to Document 39; follow link to "Helen R. Tibbo, Society of American Archivists").

91. *Id.*

92. *Id.*

systems of many European countries.[93] To justify a different term for sound recordings (vis-à-vis other copyrightable subject matter, for example, literary works), Mr. Loughney referenced a statistical study. This study, which considered 400,000 of the most commercially successful U.S. works created between the 1890s and 1964, found that less than 1% of pre-1920 sound recordings are currently made commercially available by their copyright holders.[94] Mr. Loughney believed that this proves that, in the case of sound recordings especially, a lengthy term fails to provide additional incentive and therefore is unnecessary.[95]

The fact that other countries provide sound recordings with a different, fifty-year term should be taken into consideration. This is particularly true considering the United States' own history of disparate treatment for sound recordings (for example, providing sound recordings with state, instead of federal, protection). However, Mr. Loughney's argument might be made for works of any medium. Statistical studies of other types of works, such as books and musical compositions, would likely reveal that only a small percentage of pre-1920 works continue to be made available by the copyright holder. Furthermore, the fact that few pre-1920s recordings are currently made available by their rights holders does not mean that in forty years the same will be true for 1960s recordings. While many would agree with Mr. Loughney's concern over terms that last longer than their incentives, his argument holds true for all copyrightable subject matter and therefore does not seem to support a disparate term for sound recordings.[96]

Lizabeth Wilson, Dean of University Libraries at the University of Washington, proposes a repeal of § 301(c), bringing pre-1972 sound recordings under federal control and providing a fifty-year term for those works.[97] Like others advocating for a fifty-year term, Ms. Wilson was concerned with preservation and access. Librarians, archivists, collectors, and the like all seem to agree upon a fifty-year term.[98] However, the music industry and individual copyright owners would likely be unsatisfied with such a short term of protection. Accordingly, a

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93. *Id.* (scroll down to Document 49; follow link to "Patrick Loughney").

94. *Id.*

95. *Id.*

96. Interview with Evan Dichary, IP Fellow, Tulane Center for IP, Media and Culture, Tulane University Law School, in New Orleans, La. (Spring 2011).

97. *Comments*, *supra* note 18 (scroll down to Document 47; follow link to "Lizabeth A. Wilson, University of Washington Libraries").

98. *See, e.g.*, *id.*

*simple* fifty-year term might fail to strike the appropriate balance between the competing interests.[99]

Patrick Feaster, a cultural historian who studies pre-1910 sound recordings, also preferred a fifty-year term.[100] Mr. Feaster wrote to endorse the Historical Recording Coalition for Access and Preservation's (HRCAP's) recommendation of a term comparable to those in other countries.[101] Mr. Feaster promoted this term as a means of harmonizing U.S. copyright law with that of much of the rest of the world.

2. Comments Proposing a Ninety-Five-Year Term

The Music Library Association (MLA) made the following specific recommendations: (1) striking § 301(c) and (2) amending § 304 to provide for a ninety-five-year copyright term for sound recordings fixed prior to February 15, 1972, but not before January 1, 1923.[102] Notice that they believe that sound recordings should be placed in § 304, as works published before 1978. This is problematic, as previously discussed.[103] Not only was there no publication standard for pre-1972 sound recordings, but many works have never been circulated to the public; and therefore, a private home recording would be treated as "published" along with a multiplatinum Frank Sinatra recording. But the MLA then circumvented the problem of determining the date for "publication" by relying instead on the date of fixation, which they believed would create uniformity among terms for different works, and provide clarity for librarians and archivists working to preserve and provide access to recordings.[104] Additionally, the MLA argued against applying § 302(a)'s life-plus-seventy term to pre-1972 sound recordings.[105] According to their comment, giving pre-1972 recordings a life-plus-seventy term would be unfair because this term was unavailable to other pre-1972 works under the 1909 Act.[106] The MLA further argued that the life-plus term for sound recordings would undermine international harmonization efforts and recommended that pre-1923 recordings be ineligible for the

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99. David Carson, *Conversations with Renowned Professors and Practitioners on the Future of Copyright Law (Part VII)*, 14 TUL. J. TECH. & INTELL. PROP. 69, 75 (2011).

100. *Comments*, *supra* note 18 (scroll down to Document 48; follow link to "Patrick Feaster"). Mr. Feaster also alternatively suggested a ninety-five year term.

101. *Id.*

102. *Comments*, *supra* note 18 (scroll down to Document 44; follow link to "Eric Harbeson, Music Library Association").

103. *See supra* Part IV.A.

104. *Comments*, *supra* note 18 (scroll down to Document 44; follow link to "Eric Harbeson, Music Library Association").

105. *Id.*

106. *Id.*

ninety-five-year term.[107] In other words, the MLA believed that upon federalization pre-1923 works should immediately enter the public domain in conformity with the general rule under federal copyright law that pre-1923 works are in the public domain.[108]

The SAA, whose arguments for a fifty-year term were discussed *supra*, argued in the alternative for a ninety-five-year term. If a ninety-five-year term were adopted, the SAA further proposed that "in order to mirror copyright for printed material, all sound recordings made before 1923 should be put into the public domain."[109] Under this proposal, pre-1972 sound recordings would fall under § 304, but with the modification that *creation* rather than publication or fixation would mark the beginning of the term. Notably, SAA points to the distinction between published and unpublished sound recordings.[110] This distinction is problematic, because definitions for publication vary from state to state, and all sound recordings were ineligible for federal protection upon "publication" under the 1909 Copyright Act.[111] Also under this proposal, pre-1923 recordings would immediately enter the public domain.

3. Comments Proposing a General "Shortening" of the Term

Several comments did not include specific term proposals, but instead suggested a general shortening of the term. Jean Dickson—a librarian, researcher of music history, and musician—wanted to simplify copyright restrictions and shorten copyright duration because the current system makes it too difficult for researchers and small-time musicians who want to use recordings to find their copyright owners.[112] Ms. Dickson's comment provides further evidence of the wide support for a shortened term. However, this general advice must be qualified to create a specific proposal.[113]

Robert Lancefield, the Manager of Museum Information Services at Wesleyan University and a musician, did not discuss a specific term for federalized pre-1972 sound recordings. He did suggest, however, that musical works should enter the public domain after a "reasonable, but

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107. *Id.*
108. *Id.*
109. *Id.* (scroll down to Document 39; follow link to "Helen R. Tibbo, Society of American Archivists").
110. *Id.*
111. Copyright Act of 1909, §§ 4-5, 35 Stat. 1075 (repealed 1976).
112. *Comments*, *supra* note 18 (scroll down to Document 14; follow link to "Jean Dickson").
113. Interview with Jordan Parker and Stacey Foltz, Students, Tulane University Law School Copyright Class, in New Orleans, La. (Spring 2011).

not excessive," period of copyright protection.[114] Mr. Lancefield proposed that all pre-1923 recordings enter the public domain upon federalization.[115] Along with many others, Mr. Lancefield objected to certain sound recordings receiving more than ninety-five years of protection, but he seemed to generally endorse a ninety-five-year term.[116] His proposal begs the question: What is a "reasonable, but not excessive" term of protection? Fifty years? Seventy years? Ninety-five years?

Jodi Allison-Bunnell, Program Manager of the Northwest Digital Archives, supported a term of between fifty and seventy-five years, which would harmonize the U.S. term with those of other countries.[117] She also recommended permitting and encouraging the reissue by third parties of "abandoned" recordings, those that remain out of print for extended periods, with appropriate compensation to the copyright owners.[118] Ms. Allison-Bunnell's support for a fifty to seventy-five-year term amounts to a general shortening of the term suggestion. Her argument for permitting reissue of abandoned works balances the concerns of preservation and access with the economic interests of rights holders.[119]

### 4. Comments Proposing No Change to the Current Term

The Recording Industry Association of America (RIAA) and Sound Exchange wanted to maintain the status quo.[120] The RIAA argues that federalization of pre-1972 sound recordings would lead to an increased burden on rights holders and generate new legal questions related to contracts executed in reliance on the current law.[121] Instead of federalization, the RIAA believes current law should be maintained and

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114. *Comments*, *supra* note 18 (scroll down to Document 37; follow link to "Robert C. Lancefield").

115. *Id.*

116. Interview with Amyna Jenna Esmail, Student, Tulane University Law School Copyright Class, in New Orleans, La. (Spring 2011).

117. *Comments*, *supra* note 18 (scroll down to Document 18; follow link to "Jodi Allison-Bunnell").

118. *Id.*

119. Interview with Jordan Parker and Stacey Foltz, Students, Tulane University Law School 2011 Copyright Class, in New Orleans, La. (Spring 2011).

120. *See Comments*, *supra* note 18 (scroll down to Document 51; follow link to "Recording Industry Association of America and American Association of Independent Music"). Note, however, that despite its opposition to federalization, the RIAA suggested that if federalization should take place, the term should either be based on the date of fixation or end in 2067. *See id.*

121. *Id.*

the industry should pursue preservation efforts on its own.[122] The RIAA wrote from the perspective of the rights holders and therefore was primarily concerned with the economic impact of federalization.[123] Steven Englund, representing Sound Exchange, focused his analysis on Questions 13 and 26 (regarding economic impact and partial incorporation) and did not respond to Questions 21 and 22 (regarding term).[124] Much like the RIAA, Steven Englund argued that revision of the law would lead to excessive complexities revolving around contracts and ownership rights.[125]

Some comments contained unique term suggestions. For example, individual-commenter Bill Hebden proposed a patent-like term, and Michael Burch proposed automatic entry into the public domain upon federalization. Bill Hebden, a collector of 1920s-to-1940s music, suggested a term between twenty and twenty-five years, modeled after the patent system.[126] Mr. Hebden believes that this shorter term would lead to better preservation of older, less profitable recordings, which would in turn protect future access to these works.[127] He argued that in the hands of music collectors, works would be preserved regardless of their market value; and the shorter the copyright term, the sooner the works move into collectors' hands. While Mr. Hebden's preservation and access concerns are well founded, a patent-like term for pre-1972 sound recordings is infeasible. A patent-like system would require formalities that are unavailable in light of the Berne Convention.[128] Moreover, the copyright and patent systems operate under different assumptions. The broader rights afforded to patent holders are confined to a shorter term,[129] while the relatively more limited rights of copyright holders (circumscribed by the idea/expression dichotomy and fair use) are given a longer term.[130] Thus, while some limit to the copyright term is both desirable and required, a patent-like term is too limited.[131]

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122. *Id.*

123. *Id.*

124. *Comments*, *supra* note 18 (scroll down to Document 53; follow link to "Steven R. England, Sound Exchange Inc.").

125. *See id.*

126. *Comments*, *supra* note 18 (scroll down to Document 2; follow link to "Bill Hebden"). Mr. Hebden suggests a term modeled after the patent system, but he believes the patent term to be seventeen years. The actual patent term is twenty years. 35 U.S.C. § 154(a) (2006).

127. *Comments*, *supra* note 18 (scroll down to Document 2; follow link to "Bill Hebden").

128. Berne Convention for the Protection of Literary and Artistic Works, art. 5(2), Sept. 9, 1886, 1161 U.N.T.S. 3 (as revised on July 24, 1971, and amended on Sept. 28, 1979).

129. 35 U.S.C § 154(a)(2).

130. 17 U.S.C § 102(b) (2006); *see also id.* §§ 107, 301.

131. Access and preservation concerns make a limited term desirable, and the Patent and Copyright Clause of the Constitution requires a limited term. *See* U.S. CONST. art. I, § 8, cl. 8.

Michael Burch proposed that upon enactment of federalizing legislation, all pre-1972 recordings automatically enter the public domain.[132] As a compromise, Mr. Burch suggested a limited window (for example, one year) during which the copyright owner could step forward to claim continued protection.[133] Mr. Burch shared Mr. Hebden's preservation concerns, but proposed a different solution: a wholesale entrance into the public domain upon federalization.[134] However, wholesale entrance into the public domain abrogates the rights of copyright holders and, without "just compensation," implicates the takings clause of the Fifth Amendment and therefore is likely unconstitutional.[135] Having possibly foreseen this very argument, Mr. Burch proposed a compromise: a limited window during which copyright owners could step forward to recopyright their sound recordings, keeping those works out of the public domain.[136] This window simultaneously avoids the orphan works[137] and takings problems, and it bears resemblance to the one-year grace period given to reliance parties under § 104A.[138] While Mr. Burch's response may not strike the appropriate balance between copyright holders and the public interest, it nonetheless highlights the importance of weighing the rights and interests of different parties.

## V. PROBLEMS TO CONSIDER IN CHOOSING A TERM

A review of the comments exposes several problems to consider in choosing a term. These include: (1) how to determine authorship/ ownership, (2) whether term should run from the date of publication or fixation, (3) whether a transition/incentive period is advisable (or perhaps required), and (4) how foreign and international law might influence domestic law. Professor Townsend Gard and the class carefully analyzed these issues before drafting their legislative proposal. The following is a synopsis of that analysis.

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132. *See Comments*, *supra* note 18 (scroll down to Document 19; follow link to "Michael Burch"). Mr. Burch's credentials are not given in the comment.

133. *Id.*

134. *See id.*

135. U.S. CONST., amend. V.

136. *Comments*, *supra* note 18 (scroll down to Document 19; follow link to "Michael Burch").

137. The "orphan work" problem involves the inability of potential licensees of copyrighted works to obtain permission from the copyright holder due to lack of sufficient identifying or contact information. *See* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), *available at* http://www.copyright.gov/orphan/orphan-report.pdf.

138. 17 U.S.C. § 104A (2006) (copyright in restored works).

### *A. Authorship/Ownership*

First, the federal definitions for authorship and ownership are not entirely consistent with state definitions, which themselves vary.[139] Moreover, many, including the RIAA, worry that federalizing sound recordings will suddenly change who owns the sound recording.[140] As discussed *infra*, the Copyright Office suggests leaving ownership up to the states.[141] Changing these definitions could deprive current rights holders of their interests in these works, which stands to upset settled contractual relationships and, more importantly, poses a takings problem.[142] Any solution to the term problem should take this potential takings problem into account, because if the term for federalized recordings is based on §§ 302 or 303, then term will be determined by the definition of authorship/ownership.[143]

### *B. Publication/Fixation*

Second, it is unclear whether the term for federalized recordings should be based upon publication or fixation—i.e., whether the term should begin to run from the date on which the recording was published or the date on which it was physically transcribed. Or should protection depend on if it has been published at all?

This Article takes the position that publication is not a practical marker for either term or inclusion under federal law. In the case of pre-1972 sound recordings, "publication" either has too many disparate definitions or has no meaning at all. If "publication" is defined by state law, then its meaning is inconsistent, because different states have adopted different definitions.[144] If it is defined by federal law, then it means nothing at all, because works that federal law considered to be "published" should have already passed into the public domain.[145] Because defining "publication" is so problematic, "fixation"—the definition of which is based primarily on the Patent and Copyright

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139. *Compare* 17 U.S.C. § 201 (defining "ownership of copyright") *with* CAL. CIV. CODE § 980 (West 2005).

140. *See Comments*, *supra* note 18.

141. *See infra* Part VIII.A.

142. *See supra* note 135 and accompanying text.

143. *See* 17 U.S.C. §§ 302(a) (incorporating the terms provided by § 302), 303(a) (calculating term using the life of the author plus seventy years), 303(b) (providing the term for "works-for-hire").

144. *Compare* Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 264 (N.Y. 2005) (defining "publication" under New York common law), *with* Waring v. WDAS Broad. Station, 327 Pa. 433, 443 (1937) (defining "publication" under Pennsylvania common law).

145. *See supra* Part III; 17 U.S.C. § 101.

Clause of the Constitution[146]—poses no similar problems and should thus serve as the marker.

### C. *Transition/Incentive Period*

Third, any proposed federalizing legislation should include a transition period, during which rights holders are given, in exchange for making their work available to the public, the incentive of a longer period of protection. Though many of the comments' proposals did not include such a period, an incentive period is a valuable means of avoiding the takings problem. With an incentive period, rights holders could receive the same term of protection under federal law as under state law, provided that they make the recording available to the public. An incentive period, therefore, would both protect the economic interests of rights holders and promote preservation and access.

### D. *Foreign/International Law*

Should foreign and international law be considered in choosing a term? And if so, to what extent? This issue is composed of several considerations: (1) international treaties addressing term for sound recordings, (2) foreign laws governing term for sound recordings, and (3) a concept called "rule of the shorter term."

#### 1. Multinational Treaties

A review of several international treaties reveals a lack of a uniform approach to duration for sound recordings. The Berne Convention does not directly address the term for sound recordings.[147] The Geneva Convention requires a minimum term of twenty-five years from either fixation or publication.[148] The Rome Convention requires a minimum of twenty years.[149] The WIPO Performances and Phonograms Treaty provides for fifty-year terms.[150] Without clear international agreement on

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146. U.S. CONST., art. 1, § 8, cl. 8.

147. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 128. The United States is a party to this Convention. Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified at 17 U.S.C. § 101 note (Effective Date of 1988 Amendment)).

148. *See* Geneva Universal Copyright Convention art. 4, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178.

149. *See* Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), art. 14, Oct. 26, 1961, 496 U.N.T.S. 43.

150. WIPO Performances and Phonograms Treaty, art. 17, Dec. 20, 1996, 36 I.L.M. 76. WIPO provides separate terms for performers and for producers. Performers are entitled to a

the minimum standards for protecting sound recordings, we must look to examples from foreign national laws.

2. Foreign Laws

Each foreign country also provides different terms of protection for sound recordings. Though foreign law is far from consistent, there appears to be some patterns in the protections for sound recordings. There are three different bases for protecting sound recordings under current foreign laws: (1) countries that initially award protection for a term after creation and then an additional equal term from publication, typically fifty years for each;[151] (2) countries that award protection for a single term of fifty years after creation;[152] and (3) countries that award protection only for sound recordings that are "published" for a single set term.[153]

In addition to laws of individual countries, European Union law should also be considered. EU law treats sound recordings differently from other works, providing recordings with their own unique term of protection.[154] Until recently, EU law provided sound recordings with a fifty-year term of protection.[155] However, the European Parliament has

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term of fifty years from fixation. Producers are entitled to a term of fifty years from publication, or if unpublished, then fifty years from fixation. *Id.*

151. *See, e.g.*, Ligi Nr. 9380, datë 28.4.2005 për të drejtën e autorit dhe tëdrejtat e tjera të lidhura me të [Law No. 9380 of April 28, 2005, on Copyright & Related Rights], No. 9380, art. 62 (Alb.), *available at* http://www.wipo.int/edocs/lexdocs/laws/en/al/al054en.pdf; Müəlliflik Hüququ və Əlaqəli Hüquqlar haqqında Azərbaycan Respublikasının Qanunu [Law of the Republic of Azerbaijan on Copyright and Related Rights], 1996, art. 39(1) (Azer.), *available at* http://www.
wipo.int/edocs/lexdocs/laws/en/az/az003en.pdf (as last amended by Law No. 1079-IIIQD of September 30, 2010); The Copyright Act, 1998, Cap. 300, art. 11(1) (Barb.), *available at* http://www.wipo.int/edocs/lexdocs/laws/en/bb/bb009en.pdf; Bekendtgørelse af lov om ophavsret [The Consolidated Act on Copyright], 2010, No. 202, art. 66(1) (Den.), *available at* http://www.wipo.int/edocs/lexdocs/laws/en/dk/dk150en.pdf.

152. *See, e.g.*, Lei N° 9.610 de 19 de Fevereiro de 1998, Law No. 9610 Art. 96, DIÁRIO OFICIAL DA UNIÃO, de 29.2.1998 (Braz.), *available at* http://www.wipo.int/edocs/lexdocs/laws/en/az/az003en.pdf; The Copyright Laws of 1976 to 1993, 1976, No. 59, as last amended, §4(2)(iii) (Cyprus), *available at* http://www.wipo.int/edocs/lexdocs/laws/el/cy/cy045el.pdf; القـــانون رقـم 75 لعـام 1999 بشـــأن حمايـة الملكيـــة الادبيـــة والفنيـــة [Law 75 of 3 Apr. 1999 (Protection of Literary and Artistic Property)], § 55 (Leb.), *available at* http://www.wipo.int/edocs/lexdocs/laws/en/lb/lb001en.pdf.

153. *Copyright Act of 1968* (Cth) art. 93 (Austl.) (consolidated as of June 1, 2011), *available at* http://www.wipo.int/wipolex/en/details.jsp?id=9726; The Copyright (Consolidation) Act, 1999, No. 49, Acts of Parliament, 1999, §27 (India), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=128098.

154. Council Directive 2006/116, 2006 O.J. (L 372) 12, 14 (EC).

155. *Id.*

recently amended the law, lengthening the term of protection to seventy years.[156] This amendment is discussed further in Part VI, *infra*.

### 3. The Rule of the Shorter Term: Fixing *Naxos* and § 104A

The final issue is what is known as the "rule of the shorter term"—where a country agrees to protect foreign works domestically under either its own term of protection or the term of protection of the country of origin of the foreign work, whichever is shorter.[157] The New York State Court of Appeals' decision in *Capitol Records, Inc. v. Naxos of America, Inc.* brought to light the problem. In applying § 104A and recognizing that rule of the shorter term does not apply to sound recordings under Berne, the Court of Appeals of New York held that sound recordings in the public domain in the United Kingdom were nevertheless protected under New York law through February 3, 2067.[158] To correct the extension, the United States could adopt the rule of the shorter term. Adopting the rule of the shorter term would both satisfy U.S. treaty obligations under the Berne Convention and provide the benefit of allowing foreign sound recordings to enter the U.S. public domain, in parity with protection in their home country. Many other countries have already adopted the rule of the shorter term.[159] Should the United States adopt it, foreign sound recordings could enter the domestic public domain more quickly, because these works would enter the public domain in the United States upon the end of protection in their home countries.[160]

As this Article's legislative recommendation will show, the rule of the shorter term could be adopted through the federalizing legislation.[161] The transition/incentive period would not be available to foreign works, unless those countries adopted similar provisions encouraging other countries around the world to extend their copyright term for sound

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156. Council Directive 2011/77, 2011 O.J. (L 265) (EU).

157. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 128, art. 5(4)(a). Essentially, under rule of the shorter term, if an author in country *A* publishes a work, it will be protected in country *B* for either country *A*'s or country *B*'s term of protection, whichever is shorter.

158. Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250 (N.Y. 2005).

159. *See* PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 228 (2d ed. 2010).

160. *Id.* (providing general information on rule of shorter term or comparison of terms); *see also* Elizabeth Townsend Gard, *Copyright Law v. Trade Policy: Understanding the Golan Battle within the Tenth Circuit*, 34 COLUM. J.L. & ARTS 131 (2011) (engaging in a more detailed discussion); Elizabeth Townsend [Gard], *Unpublished Work and the Public Domain: The Opening of a New Frontier*, 54 J. COPYRIGHT SOC'Y U.S. 439 (2007).

161. *See* discussion *infra* Part VI.A.

recordings. But the term would be no longer than the U.S. term, of course, and in many cases much shorter. For instance, according to this Article's proposal, a sound recording from Australia would carry a U.S. term of seventy years after publication, and a sound recording from Cyprus would be protected for fifty years from creation.[162] No additional incentive period would be available for those sound recordings under U.S. law.

This is what the Berne Convention envisioned.[163] Adopting the rule of the shorter term would help harmonize U.S. and foreign law. The rule of the shorter term is advisable, and with implementing legislation to federalize pre-1972 sound recordings, it is also attainable.

## VI. TULANE PROPOSAL

Careful consideration of all of the issues discussed above led to the following legislative proposal.

### A. *Recommended Means of Federalization*

Sound recordings fixed before February 15, 1972, should be brought under federal protection and subject to Title 17 of the United States Code with the following five amendments. First, § 301(c), which currently exempts pre-1972 sound recordings from preemption, should be repealed. Second, § 303(c) should be added to govern duration of pre-1972 sound recordings. Third, rule of the shorter term should be applied to foreign sound recordings. Fourth, all pre-1972 sound recordings should have a general term of protection of fifty-years from fixation (measured from the date of publication or creation, whichever comes later). Fifth, a transition period of five years, before the end of which no term shall expire, should be established. As an incentive, if the rights holders make the work available to the public within this five-year transition period, then the term is extended to February 15, 2067.

In the end, we felt that our proposal would meet the needs of many communities. The library community would find all of the protections that federalization affords, including § 108.[164] Works over which the library community expressed the most concern—older works, including unpublished works like original, unique field recordings and sound

162. *See supra* notes 152-153 and accompanying text.
163. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 128, pmbl.
164. 17 U.S.C. § 108 (2006) (providing an exception to use of copyrighted materials for libraries).

recordings whose owners were long ago lost—would come into the public domain fifty years after fixation. Only those that had an active owner would gain protection through the original 1976 Copyright term under state law—or through February 15, 2067. Authors who are not interested in the continued protection of their works are absolved of responsibility; those who care to continue to protect their works are given the opportunity for a very long term of protection. No notice is required under this system, which merely requires making the work available to the public within a set period of time. However, registering the work with the U.S. Copyright Office—that is, providing constructive notice that the copyright holder is taking advantage of the additional term of protection (beyond fifty years from fixation)—serves as a marker for additional remedies, such as statutory damages and attorney's fees.

### B. *Statutory Language*

Section 303(c) might be structured in the following manner:

> Copyright in a Sound Recording created before February 15, 1972, endures for the term of fifty years from fixation (measured from the date of creation or publication, whichever comes later). In no case, however, shall the term of copyright protection in such a work expire before [five years from enactment of the federalizing legislation]; and, if the copyright holder makes the work available to the public before [the end of the five-year period], the term of copyright shall not expire before February 15, 2067.

Note that the language the class chose is modeled after § 303(a), which provided a transition period for unpublished works that had previously been protected perpetually by state law until "first publication." The class felt that pre-1972 sound recordings, having not been eligible for publication, would fit under works created before 1978 but not published and therefore would fall under § 303.

## VII. AFTER THE REPLY BRIEF

### A. *Public Meeting*

On May 9, 2011, the Copyright Office released a notice of public meeting, which scheduled a series of roundtable sessions to discuss the various legal, policy, and factual questions raised by federalization.[165] These sessions were held on June 2 and 3, 2011.[166]

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165. Meeting Notice, 76 Fed. Reg. 26,769 (May 9, 2011).

166. *Pre-1972 Sound Recordings Public Meeting Transcripts*, U.S. COPYRIGHT OFFICE (June 2-3, 2011), http://www.copyright.gov/docs/sound/meeting/transcript-06-02-2011.pdf (day 1), http://www.copyright.gov/docs/sound/meeting/transcript-06-03-2011.pdf (day 2).

One of these sessions, titled "Term of Protection," focused on the issue of duration. June Besek, Professor at Columbia Law School and consultant, moderated this session.[167] The topics of discussion included the questions: What would be a "reasonable" term? Should the term be measured from the date of fixation, publication, or the life of the author? If federalization adopted a shorter term than the current term of protection, should it offer an extension as an incentive to rights holders to make recordings available within a certain period of time?[168]

Twenty-seven people participated in the session. The participants represented a range of interests. For example, Eric Harbeson from the MLA, Tim Brooks from the ARSC, Eric Schwartz representing the RIAA, and the coauthor of this Article, Professor Elizabeth Townsend Gard from Tulane University Law School, were in attendance.

Like the comments, the roundtable revealed a variety of perspectives on term. Suggestions ranged from fifty years, to ninety-five years, to retention of the current term.[169] Many parties felt that fixation should determine the start date of the term, while others wanted to rely on publication, and still others felt as though a life-plus system could be workable.[170] As for a transition/incentive period, some parties thought this was preferable, while others characterized it as a prohibited "opt-out" approach to copyright protection.[171]

The session on term brought to light duration's important role in the federalization conversation. Determining the appropriate term for protection of federalized pre-1972 sound recordings requires consideration of various complex issues. The roundtable discussion highlighted the competing interests at stake and the need to approach federalization in a way that properly balances these interests. While the discussion did not reach a consensus, it nonetheless provided valuable information to the Copyright Office for use in preparation of its report.

### *B. Two Recent Developments*

Between the public meeting and the U.S. Copyright Office's final report, several notable developments have taken place. These include a

167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*; *see also* The Authors Guild v. Google Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (holding that under 17 U.S.C. § 201(e) parties may not "expropriate [copy]rights of individuals involuntarily" under an "opt-out" provision of a settlement agreement in a class action copyright infringement suit).

bill introduced in the House of Representatives and a directive passed by the European Union.

1. House Bill

On September 14, 2011, Representative Jared Polis (District of Colorado) introduced the Sound Recording Simplification Act.[172] The bill proposes amending § 301 of the Copyright Act to bring pre-1972 recordings under federal protection by striking § 301(c).[173] Representative Polis cited his concerns over preservation and uniformity as his reasons for introducing the bill.[174] On September 14, 2011, the bill was referred to the House Committee on the Judiciary and then to the Subcommittee on Intellectual Property, Competition, and the Internet.[175]

While the bill's ends are desirable, its means are deficient. Striking § 301(c) would indeed bring pre-1972 sound recordings under federal protection, but it would leave many questions—such as ownership, publication, and, of course, duration—unanswered. Furthermore, it would likely create a takings problem, because it provides no transition period.[176]

2. EU Directive

On September 27, 2011, the European Union adopted Directive 2011/77/EU, which amended Directive 2006/116/EC on the term of copyright protection and related rights.[177] Directive 2011/77/EU extended the term of protection for sound recordings from fifty years to seventy years.[178] The Directive also included some additional measures designed to protect performers, including a twenty-percent fund for session musicians paid for by record companies; a "use it or lose it" clause, enforceable by performers against record companies; and a

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172. H.R. 2933, 112th Cong. (2011).

173. *Id.*

174. Anandashankar Mazumdar, *Bill Would Give Pre-1972 Sound Recordings Protection Under Federal Copyright Act*, PAT., TRADEMARK & COPYRIGHT L. DAILY (BNA) (Sept. 21, 2011), http://www.bna.com/bill-give-pre1972-n12884903541/.

175. *Bill Summary & Status, 112th Congress (2011-2012), H.R. 2933: All Congressional Actions*, THOMAS, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:hr2933: (last visited Nov. 15, 2012).

176. *See supra* notes 79, 84 and accompanying text.

177. Council Directive 2011/77, 2011 O.J. (L 265) (EU).

178. *Id.*

"clean slate" provision, to prevent record companies from taking unfair advantage of the term extension.[179]

The Directive was designed to further several policies. First, it was designed to ensure that performers continue to receive remuneration through the end of their lives.[180] Second, it was designed to bring the term of protection of recordings more in line with that of other media (life-plus-seventy years).[181] Third, it was designed to ensure that performers profit from their work.[182] Finally, the Directive was designed to strengthen the position of performers vis-à-vis record companies.[183]

Notably, the European Commission had originally proposed extending the term to ninety-five years. However, the European Union rejected this proposal in favor of the seventy-year term.[184] The Member States have until November 1, 2013, to bring into force laws necessary to comply with the Directive.[185]

Adoption of this directive challenges proposals utilizing a fifty-year term. Several proposals presented in the comments, including the proposal contained in this Article, suggest a fifty-year term, reasoning that such a term would harmonize domestic law with international law. That argument was based at least in part on Directive 2006/116/EC, which provided for a fifty-year term of protection for sound recordings and was amended by Directive 2011/77/EU. Therefore, term proposals utilizing a fifty-year term would now require a seventy-year term. This new directive illustrates the dangers inherent in relying on foreign law in drafting domestic law.

## VIII. THE COPYRIGHT OFFICE'S REPORT

### A. *Summary of the Report*

On December 28, 2011, the Copyright Office issued its *Report on Federal Copyright Protection for Pre-1972 Sound Recordings*.[186] In its report, the Office first introduces the issue of federalization;[187] then

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179. *Memo 11/595: Directive of the European Parliament and of the Council Amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights—Frequently Asked Questions*, Brussels European Council (Sept. 12, 2011), http://ec.europa.eu/internal_market/copyright/docs/term/110910_memo_copyright_performers_en.pdf.

180. Council Directive 2011/77, 2011 O.J. (L 265) 1 (EU).

181. *Id.* at 2, 3.

182. *Id.* at 2.

183. *Id.*

184. *Id.* at 3.

185. *Id.* at 4.

186. U.S. COPYRIGHT OFFICE, *supra* note 5.

187. *Id.* at 1.

summarizes the legal history of pre-1972 sound recordings;[188] then discusses the issues of preservation and access, policy considerations, the desirability of federalization, and various proposed means for federalization;[189] and finally, concludes with a legislative recommendation. The legislative recommendation consists of the general recommendation that pre-1972 sound recordings be brought under federal protection, and then specific proposals for the means for federalization, including term.[190]

The Office recommends federalization by the following means: First, the rights and limitations contained in title 17 of the United States Code should generally apply to pre-1972 sound recordings.[191] Additionally, Congress should enact special provisions for pre-1972 sound recordings to address issues such as ownership, registration, and term.[192] Second, initial ownership should be determined by the state law applicable at the moment before federalizing legislation takes effect.[193] Section 203 should be amended to allow termination of transfers made on or after the date on which federalization takes effect, but not those made prior to federalization.[194] Third, a three- to five-year transition period should be allowed during which rights holders could seek statutory damages and attorney's fees notwithstanding lack of registration.[195]

Finally, and of key importance to this Article, the term of protection for pre-1972 sound recordings should be ninety-five years from publication, or for works which are unpublished at the time of federalization, 120 years from fixation.[196] However, in no case would protection continue past February 15, 2067.[197] In cases where term would expire before 2067, a rights holder may take additional actions to obtain a longer term.[198] For recordings not published before 1923, a rights holder could make the work available to the public in exchange for a

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188. *Id.* at 7.

189. *Id.* at 50, 81, 120, 139.

190. *Id.* at 120.

191. *Id.* at 139.

192. *Id.* at viii.

193. *Id.* at 140.

194. *Id.* Section 203 establishes the conditions under which, "[i]n the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination." 17 U.S.C. § 203(a) (2006).

195. 17 U.S.C. § 412 (requiring timely registration in order to receive statutory damages and attorney's fees in an infringement suit).

196. U.S. COPYRIGHT OFFICE, *supra* note 5, at 163.

197. *Id.* at 163-64 & n.589.

198. *Id.* at 164.

longer term of protection, continuing until 2067.[199] The transition period would begin when federalizing legislation takes effect and would last from six to ten years.[200] During the transition period, in order to receive the longer term, the rights holder must (1) make (and leave) the work available to the public at a reasonable price, and (2) file a notice with the copyright office confirming the work's availability at a reasonable price and stating the owner's intent to secure protection until 2067.[201]

For recordings published before 1923, a rights holder would have a three-year transition period, beginning on the effective date of the federalizing legislation, during which the rights holder may make the work available to the public in exchange for a twenty-five-year term of protection.[202] The rights holder would also be required to keep the work available to the public at a reasonable price and file a notice stating his or her intent to protect the work for twenty-five years.[203] In no case would protection expire before the end of the relevant transition period.

### *B. Reflections on the Report's Term Proposal*

The Copyright Office's term proposal embraces several aspects of this Article's term proposal. For example, like this Article's proposal, the Copyright Office's proposal rejects a life-plus term.[204] Also like this Article's term proposal, the Copyright Office's term proposal contains transition periods during which the rights holder may make the work available to the public in exchange for a longer term of protection.[205]

But the Copyright Office's proposal also contains notable differences from this Article's proposal. For example, while this Article proposes a fifty-year term based on fixation, the Copyright Office proposes a ninety-five-year based on publication or a 120-year term if the work is unpublished.[206] The Copyright Office's term therefore relies on publication, which, as discussed, may be problematic due to the difficulty of determining a work's publication status.[207] While the Copyright Office's proposal did not address all of the problems posed by reliance on publication, it did address the important issue of defining

199. *Id.*
200. *Id.* at 169.
201. *Id.* at 164.
202. *Id.* at x.
203. *Id.* at 170.
204. *Id.* at 166, 176.
205. *See id.* at 176-77.
206. *See id.* at 176.
207. *See supra* Part V.C.

publication: federal law (§ 101) should provide the definition of "publication."[208]

There are also some particularly interesting choices in the proposal. First, the Copyright Office makes clear that all of federal copyright law applies to pre-1972 sound recordings. This move seems to signal that protections for fair use, library uses, and even classroom uses would be included—something very important to the library community.[209]

Second, under the Copyright Office's proposal, initial ownership is decided the moment before federal law takes effect and is based on state copyright law.[210] A considerable amount of discussion occurs in the report regarding foreign works and the restoration under § 104A, where the country of origin determines who receives the additional time of copyright.[211] However, ownership is determined by the state under which copyright is claimed in the sound recording. This approach assures that ownership does not change hands merely because a new federal system is in place—a serious concern of some rights holders. By keeping the status quo in place, this approach also resolves the issue of how to determine ownership, which has always been a difficult question (and one we did not tackle in depth).[212] With this approach, the Copyright Office does not have to participate in the politics surrounding ownership or be in the business of determining ownership for each sound recording.

A third interesting choice is that regarding termination of transfer. The report's discussion of this issue serves as another signal that the Copyright Office is trying to create the most reasonable solution for both rights holders and librarians. Building on the Copyright Office's work on § 203, the Office's recommendation for pre-1972 sound recordings makes clear that no transfers that occur before federalization will be eligible for termination—again, an interesting move that would probably assuage the fears of rights holders worried that suddenly federal termination of transfer rights would apply to sound recordings.[213]

Even the term itself is an interesting compromise, because we see vestiges of our proposal and the logic behind it, but we also see problems with the Copyright Office's proposal. First, the term is set at ninety-five years from publication for works published after 1923 and 120 years for

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208. U.S. COPYRIGHT OFFICE, *supra* note 5, at 176 (referencing 17 U.S.C. § 101).

209. *See id.* at 175-76.

210. *See id.* at 164.

211. *See id.* at 33-34.

212. As explained *supra*, this Article does not tackle the issue of ownership in depth, but instead focuses on term of protection.

213. *See* U.S. COPYRIGHT OFFICE, *supra* note 5, at 165.

unpublished works.[214] This brings parity to other published and unpublished works of the same era and is more generous than our proposal, which was fifty years from fixation. But then one is left determining retroactively whether a sound recording is published or unpublished—a difficult task.

Then there are several exceptions to the general rule. The longest term of protection remains until February 15, 2067.[215] The proposal provides an incentive wherein a rights holder could claim the full original term by making the work available to the public. In effect, the longest available end-date for the protection of all pre-1972 sound recordings would be February 15, 2067. We were quite pleased to see this adoption, a blending of § 304 and § 303(a). First, it provides a uniform date on which all the remaining pre-1972 sound recordings would enter the public domain. Second, it does not rely on determining when a work was created or published for the end date, or on determining authorship and the death date of an author. Third, by actively making the work available to the public, the copyright holder gains the same term of protection under federal law that had been expected under state law. The period of time we suggested for this transition period was five years; the Copyright Office suggested six to ten, in order for the statute of limitations for a taking to prescribe.[216]

The Copyright Office also requires notice, filed with the Copyright Office itself, that the work was made available to the public, in order to assert the extended time period.[217] We are concerned about this, because it seems to put in place a formalities requirement, and the Berne Convention prohibits formalities imposed on foreign authors as a prerequisite to copyright protection.[218] Even if this proposal applies only to domestic sound recordings, the formalities requirement still runs into a problem: if foreign works are not included, as in the case of pre-1923 works, then domestic works are treated better than foreign works, violating national treatment.[219] If foreign works are included and eligible for federalization, then a notice requirement, as a formality, would violate the Berne Convention.

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214. *Id.* at 163.

215. *Id.* at 163-64.

216. *Id.* at 169.

217. *Id.* at 170.

218. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 128, art. 5(2).

219. *Id.* art. 5(1).

The report stipulates that the recording must be available at a "reasonable price during its extended term of protection."[220] "Reasonable" price is problematic: What constitutes reasonable price? Who is to decide? What happens if a price is considered unreasonable? Could copyright protection be lost? Additionally, the idea that a work is available "during" its extended term also seems fairly burdensome. What happens if the work is not available during a period of the term? Is copyright lost?

For unpublished post-1923 works, the term is 120 years from creation, again in line with pre-1978 works under § 304.[221] Our proposal would use fixation for all works, whether published or unpublished, and set the term at fifty years. One hundred and twenty years locks up a good deal of material that many copyright holders may have no attachment or interest in. One hundred and twenty years does not help librarians concerned with making available works that hold interest for scholars and hobbyists. One hundred and twenty years is a long time to wait. Instead, our proposal would have made many unpublished works created over fifty years ago available in the public domain after the five-year waiting period. Of all of the differences, this is the most dramatic.

The most creative choice the U.S. Copyright Office made concerns pre-1923 works. For sound recordings created and/or published before 1923, all works come into the public domain upon federalization. However, the Copyright Office proposes a three-year window where rights holders could make the sound recording available to the public and receive an additional term of protection for twenty-five years.[222] Interestingly, the term is twenty-five years from the date of enactment of the legislation, rather than based on the date of registration/notice to the Copyright Office.[223] Therefore, within a three-year period of time after enactment, all sound recordings from before 1923 would have a certain status: either they would be in the public domain in the United States or they would be protected until a particular date—twenty-five years after the enactment of the law. To secure the additional term, the rights holder would be required to make the work available to the public "at a reasonable price during its extended term of protection" and file a notice with the U.S. Copyright Office.[224]

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220. U.S. COPYRIGHT OFFICE, *supra* note 5, at 170.
221. *Id.* at 181.
222. *Id.* at 193.
223. *Id.*
224. *Id.*

What is strangely missing from the Report is any discussion of foreign pre-1972 sound recordings and how they would fit into the new federal scheme. Some have been federalized by § 104A. Would these new rules apply to foreign sound recordings as well? Moreover, § 104A seems to focus only on published works; does it also include unpublished foreign sound recordings? What about pre-1923 sound recordings? Would they be eligible for the additional term of protection upon notice and making the work available to the public within the United States?

Pre-1923 sound recordings present a number of problems in particular. First, the proposed legislation could possibly only apply to domestic pre-1972 sound recordings, with the justification that § 104A covers foreign sound recordings. However, § 104A presumably grants protection for ninety-five years for published and 120 years for unpublished sound recordings. This would mean that for published sound recordings, no pre-1923 works would be eligible for federal protection. Sound recordings as a category of § 104A has always been problematic. But suppose that foreign pre-1972 sound recordings *were* protected by the federalizing legislation. Then the formalities requirements would violate Berne.[225]

Despite the differences, our proposal and the Copyright Office's Report are generally in accordance with respect to policy considerations. The Copyright Office and the authors of this Article agree first that federalization is desirable.[226] We also both believe that federalizing legislation should provide for a generally shorter term of protection, coupled with a transition period during which the rights holder may make the work available to the public in exchange for the longer term of protection.[227] Moreover, additional time up to February 15, 2067, should be given only as an incentive and not automatically, which is something that we have seen before with § 303(a) and the transition from state to federal law with other kinds of unpublished works. However, our proposal applied this to all categories. We were pleased that the Copyright Office included this traditional contour of copyright law within its recommendation.

Admittedly, the Office's and the authors' legislative recommendations differ. However, we believe that, at least with respect to some of these differences, ours is the better approach. To begin with, our proposal of a base term of fifty years from fixation with the option of an

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225. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 128, art. 5(2).

226. U.S. COPYRIGHT OFFICE, *supra* note 5, at 120.

227. *See id.* at 163-65.

extended term of protection through February 15, 2067, in exchange for the rights holder making a recording available to the public provides a uniform, simple, and clear means of determining the copyright status of pre-1972 sound recordings–at least in comparison to the Copyright Office's suggestions. Our work at Tulane has convinced us that simple, clear rules regarding duration are necessary to avoid ambiguity regarding a work's copyright status.

We also prefer our approach to incentives. While the U.S. Copyright Office's proposal includes incentives, our proposal gives all rights holders the same, simple incentive scheme, similar to § 303(a): if you make the work available to the public within a specified period of time, then you get longer protection.

While we like that the U.S. Copyright Office set a clear term limit for pre-1923 works, and prohibited all works from extending beyond 2067, we think clear term limits for all works are better. Under our proposal, a work is either in the public domain fifty years after fixation, or the work is made available to the public within the transition period and receives protection through February 15, 2067.

Despite our differences, the authors and the Copyright Office ultimately agree that federalization of pre-1972 sound recordings is desirable to address concerns of uniformity, preservation, and access. Furthermore, we share the belief that, through narrow tailoring, federalization can be accomplished without harming the reasonable economic interests of rights holders.[228]

In the end, Professor Townsend Gard and the class had an amazing experience participating in the U.S. Copyright Office's call for comments for pre-1972 sound recordings. We believe a simple, straightforward, and balanced approach is key in implementing a term of copyright on these subsisting works, and urge that the distinction between published and unpublished not be used as a marker. We also hope for a shorter term, with a simple incentive mechanism to obtain the full original term lasting through February 15, 2067. We think more work needs to be done regarding the status of foreign works and the relationship between the restoration of foreign sound recordings under § 104A and the proposed legislation. We also see potential problems with national treatment and formalities under the Berne Convention. Finally, we encourage the adoption of "rule of the shorter term."[229] In the end, we strongly support federalizing protection for pre-1972 sound recordings, with the goal of

228. *Id.* at 121, 126.

229. *See supra* Part V.D.3, VI.A.

bringing more clarity and certainty regarding term to the copyright system.