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Comments of EFF in Response to Notice of Inquiry: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

(http://www.copyright.gov/docs/sound/)

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The Electronic Frontier Foundation (EFF) submits this response to the Copyright Office's Notice of Inquiry regarding the desirability and means of bringing sound recordings fixed prior to February 15, 1972, under federal jurisdiction. EFF welcomes the opportunity to comment on this important and timely topic.

EFF is a member-supported nonprofit organization devoted to defending free speech, innovation, privacy, and consumer rights in the digital world. As part of this mission, we are committed to ensuring that copyright law hews to its traditional purpose of promoting the development of a vibrant cultural commons. We believe copyright laws and policies should encourage the creation of new works and also protect the lawful archiving, sharing and re-use of those works. We conclude that according federal copyright protection to pre-1972 sound recordings generally serves this goal. However, we note that there are certain costs associated with a transition from state protection, and we discuss strategies for mitigating those costs.

General Comments

Introduction

When the Framers drafted the Progress Clause,[1] they charged Congress and the courts with developing a protection scheme that encourages authors and artists to produce creative works "for the general public good."[2] In the Tenth Circuit's words,

> By encouraging creative expression through limited monopolies, the Copyright Clause "promot[es] broad public availability of literature, music, and the other arts." ... These imaginative works inspire new creations, which in turn inspire others, hopefully, ad infinitum. This cycle is what makes copyright "the engine of free expression."[3]

Thus, copyrights were understood not as an end in themselves, but rather as part of a larger goal: promoting and sustaining a vibrant cultural commons. That goal is reinforced, in turn, by the First Amendment interest in protecting and promoting free speech.

Preserving the balance between protection and expression is not a simple endeavor. As the Supreme Court has pointed out:

> [Because the] task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product ... involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas,

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[1] U.S. CONST., art. I, § 8, cl. 8. This provision also is referred to variously as the "Copyright Clause," "Patent Clause," and "Intellectual Property Clause." Because neither the term "copyright," "patent," nor "intellectual property" appears in the constitutional language, we follow the lead of plaintiffs in the *Golan* litigation and use the term "Progress Clause." *See Golan v. Holder*, 611 F. Supp. 2d 1165, *rev'd*, 609 F.3d 1076 (10th Cir. 2010), *petition for cert. filed*, No. 10-545 (Oct. 20, 2010).

[2] *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (*citing Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

[3] *Golan v. Gonzales*, 503 F.3d 1179, 1183 (10th Cir. 2007) (*citing Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) and *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

> information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.[4]

While Congress and the federal courts have spent centuries revising and refining copyright law to this end, state legislatures and judiciaries have not. Federal copyright law incorporates express exceptions and limitations (as embodied, for example, in the fair use doctrine) that rarely have settled counterparts in state common and statutory law, or if they do, are much less developed under those regimes. Added to this is the complicating fact that each state has its own set of laws that may or may not align with those of its neighbors. Finally, most states operate under common-law copyright regimes, which lend themselves to greater ambiguity than statutory systems of law. As summarized in a study commissioned by the National Recording Preservation Board and the Library of Congress,

> "Common law copyright is not a unitary doctrine. The fact that common law copyright is primarily a judge-made doctrine means that it will change over time, and the fact that it is a state law doctrine means that its content will vary from state to state. Further, courts have had little opportunity to flesh out common law copyright's bare bones on such important points as standards for protection, proof of infringement and remedies for infringement." Similarly, they have had little opportunity to flesh out exceptions.[5]

The result is much greater legal uncertainty under state protection schemes. Unanswered questions abound, such as whether a library can copy a historically important sound recording in order to preserve it as part of our cultural heritage, or whether an online service provider may be liable if its users infringe pre-1972 sound

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[4] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

[5] JUNE M. BESEK, COPYRIGHT ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF PRE-1972 COMMERCIAL SOUND RECORDINGS BY LIBRARIES AND ARCHIVES, § 3.5 (Council on Library and Info. Res. and the Library of Congress 2005) (citing Paul Goldstein, *Copyright*, § 15.5 at 15:39 (Aspen, 2nd ed., 2004)).

recording copyrights. And while First Amendment principles apply equally to the states (via the 14th amendment), clear paths for asserting rights of free expression are not there.

This kind of uncertainty chills speech and innovation. Moreover, in the absence of express safeguards such as fair use, uncertainties resident in state regimes impede the archiving and distribution of pre-1972 sound recordings, thereby inhibiting scholarship and other lawful re-uses of the works.[6] Federal jurisdiction, on the other hand, would offer a legal protection scheme for pre-1972 sound recordings in which clear checks on copyright exclusivities allow creative expression and add-on innovation to flourish. We recognize that constitutional concerns may arise in the face of this transition, and therefore we propose below recommendations designed to ensure that the equilibrium between copyright interests, free expression, and other constitutional guarantees is maintained. With these mitigating factors in place, we believe that the countervailing interests in preservation, access, and innovation outweigh the concerns and costs of transition. Accordingly, we recommend bringing the corpus of pre-1972 sound recordings under federal jurisdiction, in conjunction with our various suggestions.

State copyright laws lack explicit exceptions and limitations providing essential checks on copyright exclusivity, thereby deterring expression and innovation

The exceptions and limitations to copyright owners' exclusive rights that are incorporated into federal law ensure that copyright fosters, rather than inhibits, free expression and a thriving cultural commons. Given their constitutional underpinnings, the principles behind these carve-outs should carry weight in state courts as well as federal.[7]

[6] The particular deterrents for libraries and archives to preserving and sharing recordings is explained in more detail in comments filed by the Association for Recorded Sound Collections.
[7] In addition, copyright case law exhibits numerous examples of federal law being used to interpret state law or federal law itself establishing principles designed to affect or alter the

However, the lack of statutory incorporation or established precedent under state laws for these principles makes it extraordinarily difficult to predict how they would fare before a judge. At least two courts recently have wrangled with the question.[8] Bringing pre-1972 sound recordings under federal jurisdiction would foreclose any controversy over this important point.

Critical federal limitations on copyright protection include the fair use doctrine, the explicit copying-for-preservation dispensation for libraries and archives, and the safe harbors for internet and online service providers, among others.[9] These exceptions create express freedoms to use copyright-protected content in different ways for public benefit. Relying on fair use, educational institutions and documentary filmmakers can, for example, excerpt a sound recording in the classroom or in a biopic to demonstrate the timbre of a particular singer's voice. Similarly, the section 108 "reproduction by libraries and archives" exemption allows libraries and archives to copy a protected work—for example, a post-1972 historical radio broadcast that has been fixed on obsolete media—without liability for the purpose of preserving the sound recording for posterity and making it available to the public and to researchers in the field.

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interpretation of state law. *See, for example*, 17 U.S.C. §§ 301(c), 303(b) (2010) (resetting term and status of state copyright protection through federal legislation); *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 558. 564 (N.Y. 2005) (demonstrating that Congress amended 17 U.S.C. section 303 for the express purpose of frustrating aspects of common-law copyright that could cause a lapse in protection for pre-1972 sound recordings of musical works; and, in relying on federal law to interpret state law claims, finding "no justification for adopting a different [from federal law] rule of state law"); BESEK, *supra* note 4 (noting that "courts in common law cases 'frequently consult counterpart provisions in the Copyright Act to fill in doctrinal interstices'") (citing Paul Goldstein, *Copyright*, § 15.5 at 15:39 (Aspen, 2nd ed., 2004)); *UMG v. Escape Media*, Index No. 100152/2010, IAS Part 39 (N.Y. Sup. Ct.) (involving state common-law copyright claims based on federal law principles of secondary liability).

[8] *See, e.g., UMG v. Escape Media*, Index No. 100152/2010 (pending ruling on motion to dismiss plaintiff's affirmative defenses); *Atlantic Recording Corp. v. Project Playlist*, Inc., 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

[9] *See* 17 U.S.C. §§ 107, 108, 512 (2010).

Safe harbors from copyright liability for service providers are among the more recent additions to the body of express limitations on copyright under federal law.[10] Enacted as part of the Digital Millennium Copyright Act (DMCA), these safe harbors were specifically designed to limit copyright's potential chilling effect on online innovation and expression. Congress recognized that:

> [W]ithout clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet. In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability. For example, service providers must make innumerable electronic copies by simply transmitting information over the Internet. Certain electronic copies are made to speed up the delivery of information to users.... In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.[11]

As a result of this legislation, platforms such as YouTube and Flickr, which depend on the safe harbors to survive potentially fatal liability, have been able to grow and flourish.

Fair use, and the related statutory reproduction exception for libraries and archives,[12] exist to preserve principles of free expression within the exclusive protections afforded to rights holders.[13] First Amendment safeguards such as these can be invoked wherever impediments to expression are present, including under state protection regimes, lack of codification notwithstanding. Likewise, the existence of a body of

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[10] 17 U.S.C. § 512.
[11] S. REP. NO. 105-190, at 8 (1998).
[12] 17 U.S.C. §§ 107, 108.
[13] *See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003)*; *Latimer v. Roaring Toyz, Inc.*, 6012 F.3d 1224, 1239 (11th Cir. 2010); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001).

copyrighted works for which DMCA-like safe harbors may not apply raises exactly the innovation-chilling liability fears among service providers that Congress sought to remove.[14] Indeed, Congress could not have intended that protections deemed critical to online innovation would be undone in the context of pre-1972 sound recordings. Nevertheless, service providers cannot easily predict whether a court would find them immune from certain copyright infringement claims under state law. Thus, even though the First Amendment and other incentives behind the DMCA safe harbors are equally compelling under state jurisdiction, expression and innovation are stifled.[15] The

With its established principles of fair use, archiving exemptions, and service provider safe harbors from certain liabilities for *all* protected works, federal jurisdiction would foster the creative expression that copyright is designed to achieve. Copyright exceptions and limitations promise safe passage to individuals, libraries, archives, educational institutions, documentary filmmakers, service providers and others who want

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[14] Additional factors suggesting that Congress did not intend this outcome include: (1) the DMCA establishes that service providers are not required to monitor their services, therefore it would be inconsistent with Congressional purpose if a failure to monitor could result in infringement claims regarding pre-1972 sound recordings; (2) the statute is written to protect qualifying service providers "from liability for *all* monetary relief for direct, vicarious and contributory infringement," *i.e.*, not limited to relief under federal statutes. *Viacom Intern. Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 520, 526 (S.D.N.Y. 2010) (citing S. REP. NO. 105-190 at 40) (emphasis added); (3) pre-DMCA federal common law already provided for service provider immunity in the absence of volition. *See Religious Technology Center v. Netcom*, 907 F. Supp. 1361 (N.D. Cal 1995).

[15] Separately, it is unclear if state copyright currently encompasses theories of secondary liability. There appears to be little if any precedent for secondary infringement claims under state regimes. New York common law and California statutory law, for example, explicitly provide for only direct liability. *See Capitol Records*, 4 N.Y.3d at 563 (defining the elements of a copyright infringement claim under New York common law); CAL. CIV. CODE §§ 980 *et seq.* (2011). A ten-state survey commissioned by the National Recording Preservation Board of the Library of Congress mentioned no jurisprudence related to secondary copyright liability. *See* PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY NONPROFIT INSTITUTIONS: A 10-STATE ANALYSIS (Council on Library and Information Resources and the Library of Congress 2009).

to engage in permitted uses of copyright works. Pursuant to principles of free expression, statutory intent, and others, uses of copyrighted works that are permitted under federal law should be equally defensible in state court.

Legal uncertainty inherent in the current state copyright-protection scheme chills creative expression and innovation

The absence of defined exceptions and limitations to copyright, together with the capriciousness of a common-law system and confusion of fifty distinct state regimes, creates an environment of legal uncertainty that has produced a forceful chilling effect on the preservation and making accessible of historical sound recordings fixed before 1972. Underscoring this point, the Associate Librarian for Library Services of the Library of Congress wrote in her forward to a study looking at potential legal defenses for nonprofits against pre-1972 sound recording copyright infringement claims,

> [T]he legal issues related to dissemination of pre-1972 recordings, and all recordings, are complex. Having these analyses of potential legal defenses is useful, but the mere need to consider "potential defenses" has a chilling effect on all institutions without the legal resources and wherewithal to undertake legal risks.[16]

Unlike statutory law, common law is judge-made and therefore subject to change. While this may be advantageous in view of the possibility of claiming defenses that have no precursor under the law, the unpredictability of the outcome acts a deterrent to actions that might lead to asserting such defenses in the first place. Preservation and distribution of pre-1972 sound recordings are a casualty of this legal indeterminacy.

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[16] Deanna B. Marcum, Associate Librarian for Library Services, Library of Congress, *Forward* to PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY NONPROFIT INSTITUTIONS: A 10-STATE ANALYSIS (Council on Library and Information Resources and the Library of Congress 2009).

Multiplied by fifty, the uncertainty and consequent fear of legal risk creates an even greater chilling effect. Indeed, Congress specifically acknowledged this issue when it conceived the 1976 Copyright Act. According to Marybeth Peters, former Register of Copyrights, a major goal of the 1976 Act was to "[p]romote national uniformity. One of the fundamental purposes behind the copyright clause in the U.S. Constitution was to avoid the difficulties of determining and enforcing an author's rights under different state laws. Today national uniformity is more essential than ever because of the advanced methods of disseminating an author's work."[17]

In order to reproduce and distribute a particular historical sound recording with some confidence as to noninfringement, a library would be faced with the time-consuming task of finding answers to a host of obscure, often unresolvable questions about the work. Primary, and most challenging, are questions of which state's laws govern protection of the work, and whether those laws address the contemplated use. Further, if more than one legal regime could apply, how are potential contradictions to be reconciled? Beyond these fundamental questions are others such as, Is the pre-1972 sound recording of foreign origin and therefore protected under federal copyright pursuant to the Uruguay Round Agreements Act?[18] Even if the answer to this question is yes, does state copyright protection nevertheless also apply?[19] If the sound recording is a work of joint authorship for which one copyright owner is a foreign national and one a U.S. citizen, what then? And so on.

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[17] Marybeth Peters, *General Guide to the Copyright Act of 1976*, Ch. 2:1, p. 7 (United States Copyright Office, Library of Congress 1977).
[18] 17 U.S.C. § 104A.
[19] 17 U.S.C. § 104A(h)(6)(D).

Thus, while it may be perfectly legal for a given entity to make archival copies of pre-1972 sound recordings, absent clear answers to these questions, that preservation and access may never occur. Federal jurisdiction over pre-1972 sound recordings would help remedy the problem by replacing the current haze of confusion with the explicit statutory exceptions to and limitations on copyright protection that exist under federal law.[20]

Constitutional concerns arising from a transition to federal jurisdiction can be addressed by augmenting First Amendment safeguards

Certain aspects of bringing pre-1972 sound recordings under federal jurisdiction—modified term of protection, effects on reliance parties, promotion of creative expression through the Progress Clause "limited purpose"—raise constitutional concerns that must be considered. However, these concerns can be reconciled with the immediate importance of preserving and sharing our national heritage, as highlighted by the Register of Copyrights in this Notice of Inquiry, and the overarching importance of harmonizing the dual constitutional goals of copyright protection and speech, provided care is taken to effect the transition in a manner that respects the traditional Progress Clause balance. To this end, and calling attention to the principle that First Amendment scrutiny is warranted where "the traditional contours of copyright protection" are altered,[21] we make recommendations for augmenting First Amendment interests under a federal protection scheme for pre-1972 sound recordings.

Modified term of protection

[20] Of course, some questions that contribute to legal uncertainty will nevertheless be present even under federal law, for example, the question of who owns the underlying composition; whether a work is in the public domain, and if not, who the copyright owner is; and whether a particular use qualifies as "fair."

[21] *Eldred v. Ashcroft*, 537 U.S. 186, 122 (2003); *Golan v. Gonzales*, 503 F.3d 1179, 1188, 1197 (10th Cir. 2007).

Pre-1972 sound recordings enjoy an extraordinarily long term of protection. The general rule is that they do not enter the public domain until 2067 (although as discussed below this may not be the case in every instance).[22] Thus, applying federal copyright law to pre-1972 sound recordings would necessarily shorten the term of protection for these works. In our view, a shorter term than for other copyrighted works is justified for this corpus. We suggest as a reasonable length fifty years from date of fixation.

The term of copyright protection is constitutionally limited. The Progress Clause imposes a "limited times" check on Congress's authority to grant monopoly protection "so that the public will not be permanently deprived of the fruits of an artist's labors."[23] While the Supreme Court has held that the current term of copyright protection passes constitutional muster,[24] the term set by the Copyright Act for pre-1972 sound recordings is far longer. In addition, the indefiniteness of the calculation (any sound recording fixed at any time prior to 2067) and variability of the length (determined by the date of fixation of the sound recording, therefore neither a congressionally defined "limited time" nor consistent for different works) would seem to challenge the limited term requirement. Moreover, pursuant to Section 303(b) of the Copyright Act, the term of protection is already extended beyond what it would be otherwise under some state copyright regimes.[25]

While some subset of copyright owners may object to a shortened term for pre-1972 sound recordings, we believe it is entirely appropriate under the Progress Clause's

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[22] *See* 17 U.S.C. § 301(c).
[23] *Stewart v. Abend*, 495 U.S. 207 (1990).
[24] *Eldred v. Reno*, 537 U.S. 186 (2003).
[25] Section 303(b) provides that sound recordings of musical works shall not be deemed published until January 1, 1978, the effective date of the 1976 Copyright Act. At common law, copyright protection typically ended upon publication of the work.

"limited times" proviso. It is unlikely in most cases that a shortened time would have a net negative impact on the economic value of the works. Many of the works in question are at this time commercially unavailable and therefore currently hold little, if any, market value for rights owners. One study found an average of only 14 percent of historic sound recordings fixed between 1980 and 1964 to be reissued and available from their copyright owners through commercial channels at the time the study was conducted.[26] Not surprisingly, the numbers decrease as works get older, from 33 percent average in 1964 to an average of a little over 1 percent for the period from 1914 to 1890.[27] Indeed, assuming that bringing the works within federal copyright jurisdiction means that libraries and archives will make such recordings digitally accessible, many recordings may gain in value through re-discovery. Thus, while the sound recordings may end up with a shorter term of protection, those with copyright interests in the works may nonetheless benefit substantially.

Further, most sound recordings embody an underlying, separately copyrightable musical composition or written work. Aside from interviews, improvisational jazz performances and related works, the creation date of a composition will virtually always precede the fixation date of a sound recording of that composition. Thus, long protection terms for pre-1972 sound recordings will often tie up use of certain phonorecords that would be otherwise fully in the public domain. Reconciling the terms of protection for pre-1972 sound recordings to be closer to the terms of the compositions to which they are attached will clarify their status and facilitate archiving as well as new productive uses.

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[26] TIM BROOKS, SURVEY OF REISSUES OF U.S. RECORDINGS tbl. 4 (Council on Library and Information Resources and Library of Congress 2005).
[27] *Id.*

We believe a federal protection term that injects these works sooner into the public domain will help to stimulate preservation of and access to these essential components of our cultural heritage.

Effects on reliance parties

Bringing pre-1972 sound recordings under federal jurisdiction may create harms to "reliance parties," who use protected works in reliance on a particular copyright status or on an aspect of copyright protection under state law that would not apply under federal jurisdiction.

First, according federal jurisdiction to pre-1972 sound recordings may conceivably result in the removal of some works from the public domain. Section 301 of the Copyright Act provides that sound recordings fixed before February 15, 1972, are not protected by federal copyright laws.[28] Copyright owners may, however, assert protection under state copyright regimes until the year 2067, at which point the works will go into the public domain.[29] Section 303(b) further provides that sound recordings *of musical works* fixed prior to January 1, 1978 (the effect date of the 1976 Copyright Act) are deemed unpublished at least until that date.[30] This statutory language addresses a historical tenet of common-law copyright (though no longer true of all state regimes), which provides that copyright protection ends when a work is published. Taken together, these principles of federal and state copyright law suggest that in those states where statutory or common-law protection ends upon publication of a work, there may be sound recordings of non–musical works—for example, radio broadcasts, speeches, and the

[28] 17 U.S.C. § 301(c).
[29] *Id.*
[30] 17 U.S.C. § 303(b).

like—that have passed into the public domain. The result of bringing these works under federal jurisdiction would be to put freely available sound recordings back under copyright. The constitutionality of public domain resurrection is currently in question.[31]

Second, state copyright laws may provide defenses to infringement that do not exist under federal law and would be lost in the transition. Thus, according federal jurisdiction could effectively take away some usage rights in creative works. In both circumstances, people or institutions using pre-1972 sound recordings in a way that is defensible under state law—either because of public domain status or because of an explicit limitation on that law—would be harmed by a transition to federal jurisdiction.

With appropriate measures in place, however, we believe the free speech benefits of federal jurisdiction for pre-1972 sound recordings outweigh the potential costs. In order to mitigate specific harms to reliance parties, we recommend implementing a registration scheme for pre-1972 sound recordings that draws on certain elements of the Uruguay Round Agreements Act.[32] Mandatory within this scheme would be:

- Notice from rights holders to the public and specifically to reliance parties who use pre-1972 sound recordings of an intention to exploit the copyright in such a work;
- Affording reliance parties a reasonable window of time after receipt of notice to cease use of a work or come to an agreement with the copyright owner; or, if the reliance party is using the copyrighted work based on public domain status or a state law defense, dispensation for continued use of the work without added conditions; and
- Terms allowing for continued use of a pre-1972 sound recording by reliance parties that have a valid copyright in a derivative work of that sound recording.

[31] *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), *petition for cert. filed*, No. 10-545 (Oct. 20, 2010).
[32] 17 U.S.C. § 104A. We note, however, that the Uruguay Round Agreements Act left open a number of questions around implementation, and we urge the Copyright Office and Congress to avoid those same oversights if pre-1972 sound recordings are to be brought under federal copyright jurisdiction.

In addition, we note that the numbers of public domain pre-1972 sound recordings, if any, are likely very small, and moreover, public domain status or infringement defenses that are limited to a particular state may not help archivists and others who wish to distribute works digitally.

Reliance parties also risk being harmed by the transition to a copyright protection scheme that includes statutory damages that are likely far more severe than any remedies available under state law. Apart from the specific impact on reliance parties, statutory damages themselves have a chilling effect on free expression and activity related to the goal of promoting preservation and distribution of pre-1972 sound recordings on which this Notice of Inquiry is in part based.

The potential for excessive damages can stifle creativity and innovation for fear of liability even where copyright infringement is deemed to be only a small risk. In addition, it may motivate speech-chilling litigation—not only from the promise of a potential windfall but also from the ability to use the threat of damages to coerce quick settlements.

For example, statutory damages provisions have helped encourage the emergence of "copyright trolls," i.e., plaintiffs whose business model is suing multiple defendants in order to exact as many settlements as possible. EFF currently represents several defendants in cases of this kind brought by Righthaven LLC, a Nevada company that has brought more than two hundred similar copyright lawsuits in the past year. Righthaven's strategy is to search the Internet for blogs and websites that have copies of some or all of a news article (generally from the *Las Vegas Review-Journal*), purport to purchase the copyright to the article from the newspaper, register the copyright, and then sue the

blogger or site owner. The threat of up to $150,000 in statutory damages coupled with the costs of defense has encouraged targets to settle even where they had meritorious defenses. Thus, statutory damage allowances can chill the creative expression even of those who undertake only a small risk of copyright liability.

We believe the chilling effects on preservation and access of high statutory damages are best defeated by removing the availability of federal statutory damages in litigation over pre-1972 sound recordings. At a minimum, statutory damages should be excluded where reliance parties use a work based on public domain status, where reliance parties use a work based on a state law defense, and where the copyrighted work at issue is out-of-print.

Promotion of creative expression through the Progress Clause "limited purpose"

The recommendations above will help address another apparent conflict. The Progress Clause provides that Congress may grant limited monopolies for the limited purpose of encouraging creative works and thereby "promot[ing] the Progress of Science and useful Arts."[33] Congress's authority to accord full federal protection under the Progress Clause to a finite corpus of *already created* works does not easily align with this purpose. Furthermore, retroactive legislation "is not favored in the law" and must survive additional constitutional scrutiny.[34] Nevertheless, we believe federal copyright protection for pre-1972 sound recordings will offset existing barriers to preservation and access, and

[33] U.S. CONST., art. I, sec. 8, cl. 8.
[34] *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988); *see also General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (holding that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions").

serve copyright's broader purpose of fostering free expression and a flourishing cultural commons.

Conclusion

The current scheme of state law copyright protection for pre-1972 sound recordings has resulted in a chilling effect on creative expression and add-on innovation. Bringing these recordings under federal jurisdiction is an important step in resurrecting the constitutional balance between copyright and free expression for this body of works.