

00001

1 LIBRARY OF CONGRESS
2 U.S. COPYRIGHT OFFICE

3

4

5 PRE-1972 SOUND RECORDINGS PUBLIC MEETING

6

7 WASHINGTON, D.C.

8

THURSDAY, JUNE 2, 2011

9

10 VOLUME I (Pgs. 1 - 338)

11

12 The following pages constitute a transcript of
13 the above-captioned meeting, held at the Library of
14 Congress, 101 Independence Avenue, Washington, D.C.,
15 before Leslie A. Todd, RPR/CSR, a Notary Public of the
16 District of Columbia, of Capital Reporting Company,
17 beginning at 9:05 a.m.

18

19

20

21

22

♀00002

1 A P P E A R A N C E S

2 PARTICIPANTS IN MEETING:

3 TANYA SANDROS

4 KAREN TEMPLE CLAGGETT

5 MARIA PALLANTE

6 DAVID CARSON

7 CHRIS WESTON

8 JUNE BESEK

9 STEPHEN RUWE

10 ELIZABETH TOWNSEND GARD

11 PATRICK LOUGHNEY

12 PEGGY BULGER

13 DAVID OXENFORD

14 GIL ARANOW

15 GIL ARANOW

ERIC SCHWARTZ

16 SUSAN CHERTKOF

17 RICHARD BENGLOFF

18 SAM BRYLAWSKI

19 TIM BROOKS

20 CHARLES SANDERS

21 TOMAS LIPINSKI

22

♀00003

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

2 PARTICIPANTS IN MEETING:

3 ERIC HARBESON

4 JAY ROSENTHAL

5 DWAYNE BUTTLER

6 BRANDON BUTLER

7 ADAM HOLOFCENER

8 IVAN HOFFMAN

9 JENNIFER PARISER

10 MICHAEL DE SANCTIS

11 STEVE MARKS

12

13

14

15

16

17

18

19

20

21

22

♀00004

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

2 MS. PALLANTE: Good morning, everybody.

3 Welcome to the Copyright Office. I would like to
4 welcome everybody to this roundtable on the question
5 of federalizing pre-1972 sound recordings.

6 By way of background, and as all of you
7 know, but for the record, in March 2009, the
8 legislative branch Appropriations Committee directed
9 the Copyright Office to conduct a study on the
10 desirability and means of bringing sound recordings
11 fixed before February 15, 1972, under federal
12 jurisdiction.

13 In thus directing the Office, Congress
14 specified that this must, quote, cover the effect of
15 federal coverage on the preservation of such sound
16 recordings, the effect on public access to those
17 recordings, and the economic impact of federal
18 coverage on rights-holders.

19 The study must also, quote, examine the

20 means for accomplishing such coverage, end quote,
21 and include any recommendations that the Register of
22 Copyrights considers appropriate.

♀00005

1 The background, as you well know, is that
2 pre-1972 sound recordings are still protected by
3 state or common law copyright.

4 The Sound Recording Amendment of 1971 first
5 brought sound recordings fixed in 1972 and after
6 under federal copyright protection. Later, the
7 Copyright Act of 1976 brought all unpublished works
8 into the federal copyright fold, leaving pre-1972
9 sound recordings the sole remaining copyrightable
10 work covered by state law.

11 State law coverage of pre-1972 sound
12 recordings persists until 2067, with some
13 exceptions, at which point federal law will preempt
14 state law and, assuming current federal term limits
15 remain consistent, these sound recordings will enter
16 the public domain.

17 State law protection consists of a
18 patchwork of criminal laws, civil statutes, and
19 common law with little harmony among the various
20 state regimes, and with the extent of many
21 protections as yet undetermined.

22 One thing that most state laws have in

♀00006

1 common is the absence of exceptions such as fair use
2 or exceptions for libraries, archives and educators.
3 Because of this, many preservationists, archivists,
4 librarians and museum experts have voiced -- are
5 concerned about their legal ability to make copies
6 of pre-1972 sound recordings for preservation and
7 for public access. They state that were these
8 recordings subject to federal copyright protection
9 and its exceptions, institutions and hobbyists would
10 have further legal ground to stand on in working
11 with these recordings, due to fair use and Section
12 108 exceptions.

13 Some preservationists also point out that
14 there is little current availability of pre-1972
15 sound recordings for the public, particularly those
16 from before World War II. Tim Brooks' 2005 study,
17 in fact, concluded that only 14 percent of the
18 commercial sound recordings released between 1890

19 and 1964 have been made available digitally by their
20 rights-holders. And this does not take into account
21 orphaned or unpublished recordings.

22 So we are faced, then, in conducting this
♀00007

1 study with the undeniable fact that, despite
2 marvelous feats of audio preservation, like the
3 National Jukebox, our audio heritage has on the
4 whole been shockingly ill-served. We are also faced
5 with the question of whether federalizing copyright
6 protection of pre-1972 sound recordings will help.
7 And if we conclude that it will, we're faced with
8 the question of what is the best way of implementing
9 solutions without causing other problems.

10 So far in conducting this study we've
11 received 76 written comments, remarkably thoughtful.
12 I along with members of the Office of the General
13 Counsel and the Office of Policy and International
14 Affairs have learned a lot. Comments have prompted
15 other questions, and that's why we are hosting this
16 roundtable this morning.

17 I would like to thank all of you for your
18 participation and for coming this morning.

19 And I'm going to ask my staff to introduce
20 themselves. But before I do that, I want to give
21 the first panel some warning that we intend to have
22 each of you for purposes of setting the tone for the

♀00008

1 next two days start by giving a five- to six-minute
2 summary, if you can, of how you see the landscape,
3 and I will give a little more introduction to that
4 after we introduce ourselves, but just so you can be
5 thinking about that.

6 So I will start with you, David.

7 MR. CARSON: I'm David Carson. I'm the
8 general counsel here.

9 MS. CLAGGETT: Hi, I'm Karen Temple
10 Claggett. I'm senior counsel for policy and
11 international affairs.

12 MS. SANDROS: Hi, I'm Tanya Sandros. I'm
13 deputy general counsel.

14 MR. WESTON: Hi, I'm Chris Weston,
15 microphone expert. (Laughter.)

16 I'm an attorney in the Office of General
17 Counsel, Copyright Office.

18 MR. RUWE: Steven Ruwe, an attorney in the
19 Office of General Counsel.

20 MS. BESEK: I'm June Besek with Columbia
21 Law School, and I am a consultant. I do not work
22 for Maria, although independently maybe I do.

♀00009

1 MS. PALLANTE: Maybe not yet, June.
2 So with that, let's turn to the first
3 session which is assessing the landscape, and we did
4 want to give you just some general announcements as
5 well. We have times slated for the sessions. Those
6 are fluid. If we are having an incredible
7 conversation, we're not going to shut a panel down.
8 On the other hand, if you've said everything you
9 want us to know and we're ahead of schedule, we may
10 move on as well.

11 So with that, the kinds of questions we're
12 looking for in the first session, which is accessing
13 the landscape, in terms of answers to the questions
14 are: Do libraries and archives treat pre-'72 sound
15 recordings in their collections differently for
16 purposes of preservation and access?

17 What are the legal obstacles that you face
18 in preserving and making available pre-1972 sound
19 recordings?

20 What is your particular experience with the
21 laws in the particular states where you come from or
22 your clients come from in allowing or prohibiting

♀00010

1 these activities?

2 What kind of legal advice do you give or
3 receive?

4 And have you any experience with present
5 legal action? And how is the current common law
6 system seen by rights-holders? Are there specific
7 state provisions that are beneficial?

8 So we could do this one of two ways. I
9 could ask for volunteers to go first or we could go
10 around the room. Does anybody feel ready?

11 Okay, Pat.

12 And if I could ask you, for the transcript,
13 to please state your name and your affiliation
14 before you speak. Thank you.

15 MR. LOUGHNEY: My name is Pat Loughney.
16 I'm chief of the -- is it on?

17 My name is Pat Loughney. I'm chief of the
18 Packard Campus for Audio-Visual Conservation at the
19 Library of Congress, and I'm here to speak to the
20 general issue of the landscape of American recorded
21 sound preservation in the United States.

22 In the year 2000, Congress passed the
♀00011

1 National Recordings Preservation Act of 2000. Among
2 the provisions of that legislation was the mandate
3 to the Library of Congress to conduct a study of the
4 state of preservation for sound recordings in the
5 United States. That study, which I'm now holding
6 up, was published in August of 2000. It was the
7 first nationwide survey of the state of recorded
8 sound preservation ever conducted in the United
9 States.

10 And the United States, I would add,
11 historically has produced more sound recordings than
12 the rest of the world combined in the 20th century.
13 And we have an incredibly rich heritage of recorded
14 sound, as you all know. And the library, by
15 default, over a period of 80 years or more, has
16 become not only the national library of all things
17 created in the United States, but particularly it
18 has become a preservation archive.

19 Now, traditionally libraries provide
20 research access to the public. But the library, as
21 it collected obsolete -- increasingly obsolete
22 historical formats and began to receive grants to
♀00012

1 set up preservation laboratories in various parts of
2 the library devoted to various interest groups or
3 interest areas of recorded sound began to accumulate
4 recordings that after a while began to exhibit many
5 signs of deterioration or, because of the
6 obsolescence of technology, the inability to
7 transfer and reformat those recordings efficiently
8 and effectively.

9 And so we began internally over a long
10 period of time to accumulate a lot of information
11 about the need for preservation. In other words,
12 the library began to transform itself from a
13 traditional library into a preservation archive by
14 necessity. And that was efficiently recognized by
15 Congress with the passage of the National Recordings

16 Preservation Act of 2000. And with that mandate to
17 not only conduct a study but to actually create a
18 national plan.

19 Now, that plan is in the works. It is
20 being devised as we sit here today. And it is my
21 hope that it will be released later this year. It
22 has called upon the expertise and input from experts

♀00013

1 and interest groups across the nation.

2 But what is clear is that there is a huge
3 national problem that -- we have been wonderfully
4 creative in our efforts to produce recorded sound,
5 but we have shown very little interest collectively
6 as a nation and in a collaborative way to preserving
7 that heritage, and that is where we are today.

8 So the Library has found itself, by
9 default, at the center of that because of the size
10 of its collections and the breadth of its
11 collections. And I might add, with the advent on
12 the commissioning of the Packard Campus for
13 Audio-Visual Conservation in the year 2000, which is
14 a \$200 million conservation center devoted to not
15 only the preservation of recorded sound but also to
16 motion pictures, television and other forms of
17 audio-visual production in the United States, that
18 we now have a facility that allows us to look over
19 the horizon for the first time.

20 There is no other facility like it in the
21 world. But what it has allowed the Library to do is
22 to centralize its collection, to centralize its

♀00014

1 preservation resources, and to begin to look at not
2 only its own collections but to begin looking
3 nationwide to the gaps, so to speak, to the missing
4 record to try to find what is going on, and in fact
5 it is basically a center for the archeology of
6 recorded sound in the United States.

7 And with these Congressional mandates and
8 with this incredibly capable facility, we're now in
9 a position to begin to provide solid answers to many
10 questions that have lingered for decades about the
11 state of preservation, about what survives, about
12 what does not, about what should be done, about
13 where the expertise is relating to various formats
14 in areas of recorded sound preservation and

15 production throughout the United States, and to
16 begin to look at harnessing all this expertise and
17 interest into a national collaborative effort to
18 salvage what can be salvaged from the past and to
19 lay down a rational program going forward for what
20 needs to be done to preserve in a rational way the
21 nation's recorded sound heritage.

22 Thank you.

♀00015

1 MS. PALLANTE: Thank you, Pat.

2 So anybody want to go next?

3 Thanks, Tim.

4 MR. BROOKS: Hold it down, right?

5 MS. PALLANTE: Hold it down. Please state
6 your name and your affiliation.

7 MR. BROOKS: That is a good way to keep
8 talks to a minimum. I suppose when your finger
9 wears out, you stop talking.

10 I'm Tim Brooks. I'm the chair of the
11 Copyright Committee -- Copyright and Fair Use
12 Committee of the Association for Recorded Sound
13 Collections; also the president-elect of the
14 association. The association, the ARSC, was founded
15 many years ago and is a meeting ground for scholars
16 and for professionals in the archival field,
17 including some in this room, I suspect -- I know.
18 And we have been very concerned for many years,
19 since we're very involved in historic recordings,
20 both the preservation and the scholarly study, about
21 the difficulty of both tasks, of preserving them as
22 well as accessing them.

♀00016

1 For myself, I worked on a book for many
2 years called Lost Sounds, which was about the
3 earliest Black American recording artists, and,
4 frankly, my eyes weren't opened to this until I found
5 that the reasons those were lost sounds is not
6 because the physical recordings are lost, by and
7 large. It is more because in this country, and
8 uniquely in this country, they are precluded from
9 access. They are under copyright to this day, even
10 if they were made in 1890. And because of a whole
11 set of circumstances, economic and otherwise, that
12 makes them difficult to get at in the commercial
13 marketplace. That's no one's fault. That is just

14 the way the system works when you have a commercial
15 system.

16 So I think, although we will be obviously
17 talking for the next couple of days about the
18 theories, the legalities of this, the Fifth
19 Amendment, the takings and all the technical
20 aspects, it's important to remember, certainly for
21 us, for the scholars and for archivists both, this
22 is about real people, about Harry T.

♀00017

1 Burley and Booker T. Washington, it's about --
2 people of color who made recordings early on.
3 Ethnic minorities flooded into the United States in
4 those days and preserved their culture on records,
5 and whose recordings and whose preservation of that
6 culture anywhere else in the world would be free and
7 available for study, for students to understand
8 their backgrounds, but uniquely in this country are
9 not.

10 What ARSC tried to do was look at this
11 situation and say, There are obvious reasons why we
12 have the system we have. You know, intellectual
13 property is an extremely important component of our
14 economy as well. Our members participate in that.
15 Is there something that we could work out, some way
16 to approach this issue where we do not lock away a
17 large part of our cultural heritage to no one's
18 benefit, of the rights-holders or the users. If
19 it's not available, obviously it's not helping
20 anybody. And do it in a way that doesn't disrupt
21 the economic model that sustains the creators and
22 the corporations and the people that create this,

♀00018

1 and hopefully will continue to create it going
2 forward.

3 And we worked out five recommendations.
4 The first of those recommendations, though, is what
5 we're talking about today, is pre-'72 recordings.
6 And that is because -- originally, it was a surprise
7 to us and it was a surprise to a lot of other
8 people, it turns out, although everybody in this
9 room may know it, outside of this room the pre-'72
10 divide is not well known, however, and in fact
11 pre-'72 recordings are under state law, and state
12 law is what in fact keeps them under copyright in

13 perpetuity, or at least until 2067 at present, is
14 not well known. Now, many people in fact operate
15 under the premise that that is not the case, they're
16 just told it will be public domain, and they're
17 surprised to find out otherwise.

18 So we think that it's an essential first
19 step to look at a way of bringing federal coverage
20 so that we have the other things that federal coverage
21 brings, which, frankly, would be good and bad for
22 all parties in some ways. We do think the good,

♀00019

1 though, the regularization of the law, the certainty
2 of the law, the bright lines that the law would bring
3 us outweigh whatever negatives. And if there are
4 negatives, then we are fully willing and interested
5 in looking at ways to ameliorate those.

6 The law hasn't been written, and how it is
7 written is all important. So I think many of the
8 things that were brought up by many parties here
9 deserve careful attention, and in any legislation or
10 any recommendations that are made, they need to be
11 addressed. We do not -- we do not, I would
12 emphasize -- look to undercut the economic viability
13 of current creators. That would be harmful to
14 everybody involved. But we think there is a way to
15 thread this needle without doing that.

16 So basically we've laid out -- and I'll go
17 into more detail later on what our recommendations
18 are. And that's basically what I wanted to say.

19 MS. PALLANTE: Thank you very much, Tim.
20 Next. Eric?

21 MR. SCHWARTZ: My name is Eric Schwartz.
22 I'm with the law firm Mitchell Silberberg & Knupp.

♀00020

1 I'm here representing the Recording Industry
2 Association of America. The RIAA, along with A2IM,
3 filed comments, which Rich Bengloff is here on
4 behalf of A2IM and will speak as well.

5 Before addressing the legal and cultural
6 pros and cons of state law protection versus what
7 we've been referring to as federalization, I wanted
8 to start with a few brief introductory remarks on
9 the purpose and goal of the study, because I think
10 this goes to the heart of the pros and cons of the
11 state law versus the federal law.

12 The focus of this study, and I don't need
13 to tell the Copyright Office this, is on the legal
14 and policy issues pertaining to, and this is a
15 quote: The desirability and means of bringing sound
16 recordings fixed before February 15, 1972, under
17 federal jurisdiction. But the Office specifically,
18 quote, sought comments on the likely effect of
19 federal protection upon preservation and public
20 access and the effect upon the economic interests of
21 rights-holders.

22 The genesis and goal of the study is

♀00021

1 preservation and access of culturally and
2 historically significant recorded materials. It's
3 not to recommend legal reform. It's not to revise
4 or reform copyright public policy in general or even
5 specific to pre-'72 recordings.

6 The focus today, the focus of the study
7 should be on something we likely all agree on: How
8 to best achieve the goal of more and better
9 preservation of and access to older materials. A
10 lot of time and money has been devoted to improved
11 preservation and access by the library in the
12 Culpeper center, as Pat mentioned; by the Folklife
13 Center by Peggy; by the National Recording
14 Preservation Board on which I serve; by the
15 archives, educators and collectors.

16 My clients, the members of the RIAA and
17 A2IM, have spent millions of dollars and countless
18 man and woman hours preserving materials, even those
19 with little or no commercial return. Personally
20 I've devoted hundreds of hours pro bono every year
21 since the late 1980s serving first on the National
22 Film Preservation Board since 1988, the Recording

♀00022

1 Preservation Board, founding the National Film
2 Preservation Foundation and helping with these
3 goals.

4 In short, we may disagree on how to achieve
5 these goals but not on the goals themselves. And I
6 think it's important to set a tone of cooperation
7 for the study and, frankly, for the discussions
8 today and tomorrow. I mean I'm among friends. I've
9 learned what I know about film preservation from Pat
10 Loughney, and what I know on recorded sound

11 preservation from Sam Brylawski. I also think more
12 informal discussions would, frankly, help foster
13 these goals.

14 Having said that, let me turn to the state
15 and common law versus federal law issues, and why
16 the RIAA believes that the pros of retention of
17 state and common law outweigh any benefits of a move
18 toward federalization.

19 First, let me begin with what I will call
20 the cons of federalization. Looking at the
21 comments, looking at some of the discussion, there's
22 been a conflating of federalization with

♀00023

1 simplification. Having spent my career in copyright
2 law, at least my paid career in copyright law, my
3 unpaid in preservation, I can tell you that it's
4 never simple. And the change to federalization will
5 not simplify the law. It will, to a large degree,
6 as Tim has alluded to, cause disruption of the
7 economic model. It will result in disruption.

8 Moving to a federal system will raise
9 serious questions pertaining to ownership rights and
10 remedies, the basic features of copyright law, and
11 that will only tie up catalogs in contract and
12 litigation disputes, not free up materials for
13 broader public access, diverting attention and
14 resources for more practical solutions to better
15 preserve and make accessible older recordings. In
16 short, it would substitute a whole new set of
17 complexities far worse than those presented by the
18 status quo.

19 The focus of the archives and libraries
20 seeking federalization in their comments is on the
21 exceptions, leap-frogging over the basic issues of
22 ownership rights and remedies. It's not a surprise

♀00024

1 because, you know, the exceptions are the life blood
2 of the libraries and archives. But the downside is
3 that all the costs of this movement would be borne
4 by the rights-holders.

5 Also a lot of comments, especially from
6 users, individual users, not library and archival
7 ones, were neither about rights nor exceptions;
8 rather, they equated the movement to federal law
9 from state law as one from protection at all to one

10 of public domain status, simply making material, you
11 know, publicly accessible because it's in the public
12 domain.

13 The move to a federal system, as we've
14 noted in our comments -- and I will be brief here
15 because I know there are other panels on this
16 subject -- raise copyright, contract and perhaps
17 constitutional issues.

18 Let me just highlight a few of them.

19 The copyright issues and contract issues
20 begin with the burden on the rights-holders, the
21 chain of title reviews; the necessity to reopen
22 contracts and agreements for the purchase and sale
♀00025

1 of catalogs; the necessity to evaluate initial
2 ownership and then transfers of assignments,
3 corporate mergers and all other legal circumstances
4 that will probably or might be different from
5 current ownership under very fact-determinative
6 schemes which would result in sort of an
7 overwhelming task rife with errors and costs.

8 Begin, for example, with initial authorship
9 and ownership. How would initial ownership vest?
10 Under work-for-hire rules? Under pre-'78 rules?
11 Under the post-'76 law?

12 How would transfer of rights be applied?
13 Federal copyright law requires a writing for
14 transfers or assignments. State laws may not. How
15 are you going to go through the chains of title with
16 catalogs?

17 The Recording Preservation Board's own
18 studies showed how the various state statutes and
19 common law provisions vest various rights and
20 provide them to oftentimes different rights-holders
21 than for pre-'72 sound recordings. So they are
22 different under the state law, and you're going to

♀00026

1 federalize, are you going to take them away from the
2 different parties and the different definitions of
3 ownership under these state laws? And that's the
4 intangible rights.

5 Of course, you also have tangible, physical
6 property rights where you have the state laws -- in
7 one New York case, for example, applying the law
8 that the transfer of copyright ownership also

9 passes -- you know, the property passes with the
10 ownership is what I mean to say.

11 You've got rights and exceptions, of
12 course, that are going to be different. You've got
13 issues of termination. How would they apply? How
14 would these sort of uncertain timetables and the
15 economic uncertainty challenge and change the way
16 materials are made available? Where cost benefit
17 analyses are done based on the life of the term of
18 copyright for making materials ready -- I'm talking
19 commercial materials -- and getting them available,
20 not knowing whether you are now going to have the
21 uncertainty of termination.

22 You have the duration questions, and I know
♀00027

1 there's a separate panel on that. And you have
2 compliance with formalities and effective remedies,
3 just as the for instance, and the burden and cost on
4 rights-holders. For rights-holders to be able to
5 enforce their rights under a federalized system,
6 they would have to register their entire catalogs to
7 even begin under Sections 411 and 412 to enforce
8 their rights. You also have, you know, all the
9 other formalities of registration with the
10 administration, administrative and legal costs.

11 And then, of course, since a lot of
12 comments did suggest why not just take whole swaths
13 of material and put them in the public domain, you
14 have the constitutional takings, traditional
15 contours and other questions, lost rights and
16 revenues for these works, which I'm sort of sweeping
17 into one sentence, but it's sort of a major issue
18 and a major concern.

19 I think, you know, on this issue looking
20 back being somewhat of a historian of the copyright
21 laws and copyright revisions, Congress had the
22 opportunity in 1972 to provide protection

♀00028

1 retroactively and prospectively and didn't. Again,
2 in the '76 act, there was the opportunity to go
3 backwards and forwards, and it didn't. It seems to
4 me that now next year would be the fortieth
5 anniversary, the notion of doing it now, the
6 complexities have only gotten that much more
7 complicated.

8 And the contractual uncertainties. You've
9 got an entire business structure in not only the
10 music industry but in music publishing, film, video
11 game and other industries that rely on and license
12 old sound recordings that would be put under these
13 same sort of uncertain and chaotic situations.

14 Having said that, the pros of the state law
15 in just a minute. I mean as some of the commenters,
16 ARL and ALA, for example, note they're narrowly
17 tailored rights to the rights-holders' economic
18 interests.

19 There is certainty with regards to existing
20 contracts and agreements for back catalogs. There
21 is ease of protection for low margin materials like
22 older materials. It allows for the continuing and

♀00029

1 expanding partnerships between rights-holders and
2 private institutions, something which we focused on
3 in our comments. And I think it's very important to
4 start looking at what has happened since Tim did his
5 study in 2005 with some major donations of materials
6 and just sort of necessity for more of that in the
7 private agreements.

8 And then last but not least, you have a
9 century of jurisprudence, so at least in the world
10 of uncertainty, to the extent that the state laws,
11 the Office describes them as a patchwork, they are,
12 but at least the state law, common law jurisprudence
13 exists, and the certainty to the extent it has
14 existed has existed as a result.

15 So those are the reasons why the Recording
16 Industry Association of America opposes the notion
17 of federalization. And that said, I do hope that
18 over the next day and a half and well beyond that
19 that the tone and spirit of cooperation of figuring
20 out how to get more of these recordings both
21 preserved and publicly accessible should be the goal
22 and the goal that we all can agree and focus on.

♀00030

1 Thanks.

2 MS. PALLANTE: Thank you very much, Eric.

3 And I think this is obvious, but I will say
4 it anyway: We're not negotiating, right, in the
5 next day or two. We brought you here for
6 fact-finding so that we can produce the most

7 comprehensive and accurate study possible. That
8 said, I think we would agree that the more you are
9 all talking among yourselves and to each other
10 informally, the better for us, so well said.

11 So any volunteer to go next?

12 MR. BENGLOFF. Hi. My name is Rich
13 Bengloff. I agree with everything that Eric said,
14 but I want to focus a little more on the business
15 and the economics for a second.

16 The American Association of Independent
17 Music -- I know a third of you here, some on a good
18 basis; some not so good. David, I'm teasing. All
19 kidding aside -- is an association, it's a 501(c)(6)
20 organization. We're a not for profit. We represent
21 the independent music label community in the United
22 States. We have 282 label members from Mountain

¶00031

1 Apple in Hawaii to TropiSounds in Miami, which I use
2 sort of to outline what we are. We represent all
3 different genres of music, we represent all
4 different parts of the United States of America, and
5 our label members range from gigantic labels
6 employed -- by our standards -- gigantic labels that
7 employ between 80 and 120 people to small labels
8 that have two or three employees. So we have a big
9 group that we represent.

10 What our community has in common is all the
11 members of our community really love music, and
12 their goal is to create music that they love, market
13 the music that they love, and to try to make a
14 living at the same time. And that's why I want to
15 focus on the business questions that would be raised
16 by any changes that were brought up today.

17 Much of the music being digitized by the
18 independent music label community today is what we
19 would call the long tail, as is often said in the
20 trades. It's music that's jazz, blues, roots. It
21 shows off the music that is uniquely American and it
22 also shows off our cultural diversity. And we are

¶00032

1 very proud of that as an organization.

2 It's also music that requires a longer
3 payback, a longer return on investment for the
4 people that create the music to be able to make a
5 living after they acquire it, after they create it,

6 or after they digitize it to continue to make music
7 so that it can be brought to market.

8 To federalize would cause an undue burden
9 on our community. I think Eric already referred to
10 it. It used to be that it was optional to register
11 with the Copyright Office. You could send a letter
12 to yourself and not open it and keep the postmark
13 somewhere. Well, we've become a very litigious
14 society in the digital age, and that's no longer an
15 option to register your music. To be able to defend
16 your rights, you have to register your music. It
17 would be a burden in terms of manpower, finances,
18 and a variety of other ways for us to continue to
19 protect our pre-1972 copyrights if they were
20 federalized. A real cost burden.

21 Current state law for unauthorized
22 duplication works to ensure that the services that
♀00033

1 use our community's music, independent music label
2 community, either get permission if required, it's
3 not statutory, and pay us, unless they are
4 infringers and then we use the state laws to go
5 after these people. So we have a system right now
6 that works pretty well for us. It's something we
7 understand.

8 Also, as I said before, it's the long tail
9 of music that takes a long time to get a return.
10 State laws with the 2067 expiration date provide
11 incentives to bring catalog to market, which is I
12 think what we're here talking about today is to make
13 access for people.

14 Some of the things we've seen proposed in
15 some of the other people's comments that are here
16 today wouldn't give us the return on investment that
17 we would need. While these people love the music,
18 they also, as I said earlier, are trying to make a
19 living, and some of these periods of times just
20 won't work for our community to be able to get a
21 return on their investment.

22 Plus, it's not a static situation anymore.

♀00034

1 As technology changes, we have to go back and
2 increase the number of kilobytes that are available
3 so our music sounds like it should be sounding, be
4 able to deliver it, bring it to market and a variety

5 of other areas.

6 If we were to federalize, there would be
7 less and less investment in what I call this roots
8 music that is uniquely American that we're all very
9 proud of, which would be the opposite of the common
10 goal we all have today, which is to provide access
11 to America's cultural diversity and tradition.

12 I would like really to talk about
13 preservation as a separate issue, and obviously we
14 would like support for that. But -- there's other
15 panels where I will address that later today.

16 The last thing I want to bring up is how
17 this potential change in the law is affecting our
18 community. There's transactions which aren't
19 happening because of the long tail nature of the
20 music. I know at least two of our members were
21 selling catalogs to other members of our community,
22 and now with it uncertain what is going to happen

♀00035

1 with the pre-1972 copyrights and the work that would
2 then be entailed to redigitize this music and bring
3 it to market -- those are real issues for our
4 community. So we need this settled sooner than
5 later. I would like to thank you all for your time.

6 MS. PALLANTE: Thank you very much,
7 Richard.

8 Eric.

9 MR. HARBESON: I'm Eric Harbeson. I'm the
10 music special collections librarian at the
11 University of Colorado, and I'm also the chair of
12 the legislation committee for the Music Library
13 Association, and I'm here representing them.

14 First of all, I want to agree with what
15 Eric said earlier that I think that -- I definitely
16 support a good, honest, thoughtful discussion on the
17 issue. We're very sympathetic to the problems --
18 I'm sorry, I'm having troubles here -- we're very
19 sympathetic to the many problems that both Eric and
20 Richard brought up with respect to transfer of
21 title, determining how ownership vests, et cetera.
22 I mean it's definitely a complicated process, and

♀00036

1 we're respectful of that.

2 However, we also feel that the problem for
3 librarians is complicated now. We have -- Richard

4 mentioned a very litigious society in which
5 technology is changing very quickly. Despite the
6 fact that it's comparatively uncommon for librarians
7 to be sued over copyright issues, librarians are
8 acutely aware of the problems that copyright poses.
9 Very frequently I see e-mails on our LISTSERV asking
10 about copyright issues that many people frankly
11 would not even consider, would not even think about.

12 Librarians are very, in general, aware of
13 the copyright law, aware of wanting to respect it,
14 sometimes even to the point of being cautious when
15 they -- when anyone would agree that they don't need
16 to be.

17 And as a result of that, the mere presence
18 of this law, the mere fact that we do have
19 recordings from the 1890s that are functionally
20 under copyright with no explicit fair use, with the
21 possibility, I believe,
22 with the Penguin versus American Buddha case of long

♀00037

1 tail laws being enforced all over the country, you
2 know, we may not be even having to worry about our
3 own state law. I'm not a lawyer, I don't know, but
4 I mean that is certainly my interpretation.

5 We have a library community that has
6 astounding materials in their collection which are
7 truly unique which no one in the RIAA or A2IM can
8 represent. And also laws that essentially consign
9 those recordings to formats which are entirely
10 unstable, which cannot stay on those formats for
11 long.

12 Even if you can keep the recordings on that
13 format, for example, a shellac 78 disk is a pretty
14 stable format if you never play it and if you store
15 it correctly, but who wants a recording that can
16 never be played? We need to be able to get these
17 materials available so that people can listen to
18 them.

19 If the librarians can't do that, then no
20 one will ever hear these recordings because, as I
21 say, they are unique. I'm talking about oral
22 histories, about archival recordings made in, you

♀00038

1 know, field recordings. There are many, many
2 collections in the music libraries in the country

3 that fall under this category.

4 Now, we are not advocating making uses that
5 would not be permitted under federal law. I want to
6 emphasize that. Anything that -- we're not talking
7 about rampant copying of materials that are
8 commercially valuable, demonstrably commercially
9 valuable. We're talking about recordings that
10 people have forgotten, and the only way that they
11 will stop forgetting them -- I'm sorry, I'm still
12 having troubles -- the only way people will stop
13 forgetting them is if we can make them available.

14 So, you know, if the recordings were made
15 available under federal law, if we could apply 107
16 and, more importantly, 504(c)(2), there would be no
17 market harm at least. I can't speak to the costs in
18 transferring titles and selling contracts and things
19 like that. That is really something I'm not
20 familiar with. But as far as the market harm, we're
21 not talking about anything that would be -- that is
22 not already being protected in sheet music, in

♀00039

1 books, in maps. These are all -- they're already
2 provisions to protect the market under fair use, and
3 that's really all we're looking for is some parody
4 with sound recordings.

5 Thank you.

6 MS. PALLANTE: Thank you very much. We're
7 already getting to the point where we will have lots
8 of opportunity for cross-conversation I can see.
9 Thank you.

10 MS. BULGER: I'm Peggy Bulger, and I'm
11 director of the American Folklife Center at the
12 Library of Congress, and for those of you who don't
13 know, the Folklife Center was created by an act of
14 Congress in 1976 as the American Folklife
15 Preservation Act was passed. At that time we
16 inherited the archive of American folk song which
17 had been created at the Library of Congress in 1928.
18 Obviously, we have a mother lode of pre-1972
19 recordings under our care and under our protection.

20 I actually agree with parts of everything
21 that has been said by everybody, and I think the
22 good thing is we are -- as Eric No. 1 said, we are

♀00040

1 all here because we want the same goal. It's just

2 how to get there.

3 And I guess having worked with the library
4 and with Pat and Sam and the Recorded Sound
5 Preservation Board, we've been thinking, our staff
6 at the Folklife Center, about how in many ways we're
7 talking apples and oranges. Pre-1972 recordings are
8 everything from the wax cylinder recordings we have
9 of Native Americans that may never see the light of
10 day in terms of being commercially released to all
11 of the recordings that you all deal with in the
12 commercial field.

13 Our recordings that we're particularly
14 worried about, though, are the recordings that have
15 never been released commercially. They're made by
16 anthropologists and musicologists in the field.
17 They are on formats that are extremely fragile.
18 They need to be not only preserved but they also
19 need to be -- be able to be accessible to public
20 that is crying for that.

21 And I know, Rich, you know that because, as
22 you know, there is a real, I guess, a cry from the
♀00041

1 public to have these recordings at least be made
2 available.

3 We, of course, don't sell our recordings.
4 We make them available free of charge to the public.
5 We always will. We really are not in the business
6 of being a commercial outfit. But we really are
7 very concerned with the fact that right now there is
8 no clear protocols. There is no law that governs
9 what we're doing. We're doing things kind of off
10 the cuff.

11 Every library handles it differently.
12 Every time I go and talk to people about how things
13 are being handled, we're all trying to do the right
14 thing, but there is no backup, you know. Those of
15 you who are lawyers, maybe you feel more comfortable
16 with that, but those of us who aren't lawyers are
17 kind of afraid of you guys. I mean lawyers are --
18 you know, they can sue you.

19 And I guess so I would just say that, you
20 know, as we go forward, I would really think about
21 what is the best way to think about all of these
22 pre-1972 recordings and to make them available.

♀00042

1 And I'm going to throw out just kind of one
2 extra thing, which I don't know if anybody has got
3 it on your radar screen, but I know Karen and I both
4 go to the World Intellectual Property Organization
5 meetings of the intergovernmental committee on
6 genetic resources, traditional knowledge and
7 traditional cultural expressions of folklore, and
8 they're very -- well, it's been seven long years,
9 which is very folkloric in and of itself, but for
10 seven long years we've been in negotiations about an
11 international treaty to protect the intellectual
12 property rights to folklore materials, which
13 includes a heck of a lot of pre-1972 sound
14 recordings.

15 So that is just something to be thinking
16 about that on the international scale this is also
17 being talked about, and if some kind of
18 international instrument is ever passed, although
19 that's kind of iffy, but if it is, it would affect
20 everyone in this room. It would affect all of us
21 who have pre-1972 recordings that do reflect
22 traditional knowledge.

♀00043

1 MS. PALLANTE: David.

2 MR. OXENFORD: I'm David Oxenford, and I'm
3 here on behalf of the National Association of
4 Broadcasters. Now that I know I'm feared as a
5 lawyer, and on the other side from Rich, when we
6 deal with each other -- and, Rich, I thought we were
7 friends --

8 MR. BENGLOFF: Well, we actually are. We
9 separate business from personal. I'm not a lawyer,
10 so I'm a little afraid too.

11 MR. OXENFORD: Thank you.

12 I thought I would provide a different
13 perspective because the NAB is not involved in many
14 of the issues that have been discussed so far this
15 morning and will be discussed really for the next
16 day and a half. Our members as a whole are not
17 involved in the issues of archival, preservation and
18 recordings, but they are involved in making those
19 recordings available to the public and providing
20 access through unique programs that many
21 broadcasters broadcast and many broadcasters and
22 webcasters put on their internet streams. And one

¶00044

1 of the issues that we're concerned about, and the
2 real reason that we're here, is to participate in
3 the last panel of the day, the one discussing the
4 performance royalties.

5 While we actually come out on the same side
6 as our friends at the RIAA and A2IM in this
7 proceeding, looking at this proceeding we understand
8 that there are plenty of identifiable issues that
9 many of the parties here have spoken to, but we also
10 see that there are many issues that would be raised
11 by the federalization of pre-'72 sound recordings.
12 Issues including bringing them into the 114 and
13 public performance rights regime that may impose new
14 obligations that aren't currently imposed on the
15 use -- the performance of some of these sound
16 recordings by broadcasters, webcasters, by other
17 nonprofit organizations that may want to be
18 streaming these, providing these publicly to the
19 public.

20 And so that's principally our reason for
21 being here today is to listen, to take part in the
22 discussions that are being had here today, and

¶00045

1 hopefully will be going on in the future, working on
2 ways that everybody can come to situations,
3 agreements that might be able to address many of the
4 issues of the librarians and archivists without
5 upsetting some of the settled expectations that make
6 some of these sound recordings available, especially
7 digitally, in ways that if there were increased
8 costs may not happen in the future.

9 So at this point we're here basically to
10 listen, participate, to see where issues come up
11 that may affect broadcasters, and to offer our
12 perspectives.

13 So thank you very much for hosting this and
14 allowing us to participate.

15 MS. PALLANTE: Thank you.

16 MR. BUTTLER: My name is Dwayne Buttler.
17 I'm the Evelyn Schneider Endowed Chair for Scholarly
18 Communication at the University of Louisville and a
19 professor in university libraries. I just have to
20 say that's an obligation, right?

21 So mostly what I want to talk about, I want

22 to give a little bit different perspective. I

♀00046

1 wanted to echo something that Tim Brooks said. Tim
2 has just done an outstanding job of articulating the
3 issues, and I just really commend his work in this
4 area. And in particular, I'm interested in
5 communicating copyright to the educational community
6 and libraries. I've spoken to thousands of
7 librarians and educators, and one of the things that
8 comes up a lot is exactly what Peggy said, right?
9 We're afraid.

10 And it's an odd structure of law where
11 we're in fear of doing the right thing, and I think
12 the right thing is really the preservation issue. I
13 work with one of the early funded in-depth efforts
14 called Beta Archive, which is a digital preservation
15 effort, and sometimes my community that I talk to
16 knows about the difference between the pre-1972
17 versus newer than 1972, and sometimes they don't.
18 You know, I have the good fortune of explaining that
19 to them and making them even more afraid than they
20 already were of not complying with copyright law.

21 I think there are significant challenges.

22 I think Richard mentioned it would be an undue

♀00047

1 burden to change the law on that community. We have
2 a significant burden already that is undue with the
3 laws that exist now on how to preserve these
4 materials.

5 I could echo some of things that Eric said.
6 You know, there are some very articulate, thoughtful
7 people in the library and education community that
8 want to do the right thing, but the law is such a
9 morass now that it's very difficult for them to
10 understand what the right thing is. And I think the
11 comments speak to the idea that we need to make some
12 change. I don't know what that change is. I don't
13 know if I'm in favor of federalization or not
14 because I'm just part of the conversation today.
15 But I do know that some change needs to move forward
16 or, otherwise, we're going to have a significant
17 amount of material that is going to disappear from
18 the historical record, and I don't think that's a
19 good outcome just because we have a law that
20 protects it for a really long time.

21 MS. PALLANTE: Thank you.

22 MR. BUTTLER: You're welcome.

♀00048

1 MS. PALLANTE: Sam.

2 MR. BRYLAWSKI: Thank you. You might cut
3 me off, so be ready.

4 I'm here representing the Society for
5 American Music, which is historians, musicologists
6 and others who study and buy American music. I'm
7 the co-author of the preservation study that Pat
8 pointed out. I used to be head of the Recorded
9 Sound Section here.

10 In assessing, you know, trying to step back
11 and not dwell too much on the specific issues, which
12 we will be getting to in the next two days, asking
13 to assess the landscape, you know, I see the
14 landscape as pretty bloody. I see that there's a
15 lot of misunderstandings about copyright law.
16 There's a lot of mistrust of different parties. I
17 think universities, of which most of the members of
18 my organization are affiliated with, are seen as
19 hotbeds of piracy, and there's mistrust on both
20 sides. And I'm very grateful for this venue here to
21 sort of bring out these issues and discuss them.

22 I think that thinking about what some of

♀00049

1 you have said, what Eric has said, there are certain
2 things where we just have a difference on the facts,
3 the constitutionality, and our analysis and the
4 analyses of the attorneys we've spoken to don't see
5 that. They see that even putting that 2047 and
6 later 2067 cap constitution -- takings wasn't
7 brought up then, so why is it brought up now?

8 I'm concerned very basically, and this is
9 on a personal standpoint, on people's attitudes
10 toward copyright law in general. I sort of feel
11 that the atmosphere now, this bloody landscape, has
12 caused a general mistrust and dismissal of copyright
13 by users and by the public. I think that copyright
14 wasn't well served by extension, and we're not here
15 to debate the Sonny Bono extension, but on the other
16 hand, a 95-year term seems to us, you know -- seems
17 excessive to most of us, because at this point it's
18 the law for almost everything except for sound
19 recordings -- and don't take your finger off of

20 that. Ninety-five years is a sufficient time for a
21 record company to be able to exploit their assets
22 and preserve them.

♀00050

1 In talking about other things, when -- in
2 going back to some of the things that Eric said, I
3 think having these discussions is very useful for
4 understanding how full federalization, that is, just
5 putting sound recordings under existing copyright
6 law, would hurt companies with these contracts and
7 transfers. I personally don't understand all of
8 that. I would think those disputes could still be
9 made under state law. So I'm looking forward to
10 learning about that.

11 But I don't believe that federalization
12 will hurt companies, and in fact in many ways it
13 would help companies. I believe that full
14 federalization would provide new revenue streams for
15 just what Mr. Oxenford was talking about, more
16 performance rights for record companies that might
17 even make up for what they might lose in the last
18 few years of bringing down the copyright terms from
19 2067.

20 So I'm very fascinated to be in this room
21 where I'm in the position of, I guess, representing
22 an enemy that has created two of the strangest

♀00051

1 bedfellows I've ever met, the NAB and the RIAA both
2 against performance rights for the first time in
3 history.

4 That said, one of the great obstacles to
5 preservation in the digital age is access. This
6 didn't used to be the case. It wasn't the case when
7 I began my work at the Library of Congress, which
8 was in the recording laboratory preserving
9 recordings that were made on ten-inch reels, and it
10 wasn't expected that they would be freely available.

11 But now as we compete for grants, as our
12 institutions compete for grants with other
13 institutions, those institutions that can provide
14 access to their preserved materials are -- we find
15 are the ones that are getting funding. This was
16 brought up in much of the oral testimony at the
17 hearings in Los Angeles and New York that were
18 conducted for the National Recording Preservation

19 Board. And so I think a robust -- and, you know, I
20 say robust -- a moving public domain, not tomorrow
21 1955 goes in the public domain, but it would be nice
22 if 1922 were to.

♀00052

1 I was an architect of the National Jukebox.
2 I'm very proud of it. The library should be proud
3 of it. I didn't have to do a lot of the work except
4 for cataloging. It's made materials accessible, but
5 the SAM members that I represent want downloads.
6 They want to be able to actually manipulate and go
7 back and hear pre-'72 recordings -- or pre-'23
8 recordings in the classrooms, to be able to play
9 them, to be able to study them in greater detail.
10 That is enabled by streaming only.

11 And, finally, just in terms of viability,
12 we -- in addition to believing that performance
13 rights and things like that might come about through
14 federalization, we find that a public domain doesn't
15 necessarily impede making money. The -- one of the
16 submissions -- I guess it was RIAA -- talked about
17 the EMI catalog in Great Britain, the Gramophone
18 Company, having -- still leasing pre-1960
19 recordings. Remember in Britain and many countries,
20 there is a 50-year law for sound recordings. But
21 labels like Honest John, which is a CD company, are
22 putting out acoustic and very early electric ethnic

♀00053

1 music that is basically -- and leasing it from EMI,
2 but basically it's public domain music. So these
3 issues aren't necessarily black and white.

4 But in any case, I'm looking forward to
5 this. I'm going to try to listen and try to hope
6 that we might make some -- meet some common ground,
7 and hope that if we can hear each other's true
8 problems, that is to say, whether it's contracts
9 that would be thrown into chaos or a real need by
10 scholarly communities, educational communities and
11 the public for a public domain, there might be
12 some -- I don't know that I would call it middle
13 ground, but some solution that isn't fully putting
14 recordings under the law of -- that covers
15 post-February 15, 1972, but creates a public domain,
16 creates an ability to preserve, legally to store
17 multiple copies, and we will all go home happy.

18 Thanks.

19 MS. PALLANTE: Thank you.

20 Thomas.

21 MR. LIPINSKI: My name is Tom Lipinski, and

22 I'm a professor and executive associate dean, which
♀00054

1 basically means I do all the work but don't get paid
2 the money, at the School of Library and Information
3 Science at Indiana University at the Minneapolis
4 campus.

5 I'm not here representing that institution.

6 I'm here today, though, as an educator, librarian
7 and archivist, and I guess as a sometime scholar of
8 copyright law. And I'm also here today I guess in a
9 very small hat as a musician in a tradition, very
10 oral tradition of Irish music.

11 I guess I would echo Dwayne's initial
12 points. Having taught future librarians and
13 archivists and curators about the copyright law at
14 now three different institutions -- University of
15 Wisconsin - Milwaukee, Illinois University and
16 Indiana University -- as well as conducted a number
17 of seminars.

18 Librarians, archivists, curators, when it
19 comes to the copyright law, I think do try and be
20 very conscious of the law. They start from that
21 perspective. They don't start from how can we get
22 around the law. Certainly there are exceptions.

♀00055

1 I'm not going to mention some of the cases in the
2 news, but I think institutionally and individually,
3 they do try and respect the copyright law.

4 They are also very risk adverse. And one
5 of the issues here today, the context that I think
6 that is driving some of the questions of whether
7 state law is a sufficient system, the existing state
8 law, or whether federalization is better or whether
9 there is some third alternative or something
10 different we haven't thought of might be useful as
11 well, is that when you are talking about the
12 creative content and the historical cultural record,
13 there needs to be a system which encourages not only
14 its creation and its exploitation commercially but
15 also its use and access by future generations.

16 And I think with the present state and the

17 sort of personality of the library community,
18 archive community, et cetera, that's not happening.
19 And it strikes me as a similar situation that was
20 occurring, and still is occurring, with the issue of
21 orphan works. And the Copyright Office said in its
22 report, people not using orphan works, it's not in
♀00056

1 the public interest.
2 And I think we have a similar situation
3 here in terms of public institutions of shying away
4 from the full preservation and use and dissemination
5 of these types of works in the ways that they are
6 used to doing, which is not to commercially exploit
7 or necessarily compete with that commercial use of
8 the work. So I think that moving towards a system,
9 trying to find some common ground is in the better
10 public interest.

11 When one talks about sort of federal versus
12 state issues, it strikes me just intuitively that
13 there is a bit of an anomaly in that sound
14 recordings are not protected by federal copyright.
15 In a sense they should be. I think owners should be
16 given those sets of rights. And if we think about
17 sort of the international viewpoint, this would be a
18 move towards harmonization. Whether we will ever
19 get there perfectly is probably uncertain. But
20 having done some work in comparative copyright
21 between the European Union and the U.S., we seem to
22 be very much in step with that.

♀00057

1 The state laws I'm sure from the users' and
2 from the owners' perspective offer the types of
3 protections that you want, but those laws developed
4 not in the same sense that the copyright law did in
5 trying to achieve this balance between owners and
6 users and move creative content forward in society
7 and create more of it.

8 And so you have this combination of
9 complexity in the sense that there are a number of
10 different laws: It could be a piracy law, it could
11 be contract law, it could be a right of publicity
12 law, it could be a commercial misappropriation. I
13 mean there are all sorts of things. And then you
14 have this lack of uniformity. And then even if you
15 look across the piracy laws from state to state,

16 they are all slightly different. And it's true that
17 some states are like, Okay, we have a red delicious
18 apple and this state has a red delicious apple, so
19 we can kind of look at apples to apples.

20 But the problem with many of those laws is
21 that there's not clear and uniform exceptions for
22 nonprofits and other public institutions to do the
♀00058

1 sorts of things in terms of preservation, as at
2 least I think they would like to do, and still not
3 necessarily always harm the market.

4 So I think those are the challenges that
5 the state law presents. I think if federalization
6 were to occur, it would have to occur with a focus
7 on having an integrated or conscientious, if you
8 will, approach in that you couldn't just sort of
9 magically federalize them and not take a look at
10 some of the other provisions.

11 For example, this happened in the Distance
12 Education Reform Section 1 and 2, even the Copyright
13 Office's own report said, Well, we propose this
14 change and it's going to make everything great,
15 except we don't know about sound recordings.

16 So it seems that what's happened over the
17 years is every time there has been an amendment or a
18 revision to the copyright law, sound recordings are
19 sort of sitting there in the corner. I think as I
20 e-mailed Chris, This is the 700-pound gorilla, a
21 legal gorilla sitting in the room. So
22 federalization I think would need to have those
♀00059

1 types of concepts in mind.

2 One of the benefits that I see is
3 uniformity and uniformity in the advantage of having
4 a body of case law, for example, of theories that
5 can be readily applied. I think that's a great
6 advantage. Even at the state level, you are still
7 looking from state to state, and, sure, states look
8 at one another, and one could argue the same thing
9 happens with copyright law with the different
10 district courts, the circuits are looking at one
11 another, but they are still starting from the same
12 exact language in the statute. And I think that
13 sense of uniformity might outweigh the current
14 bloody landscape that we have right now. Thank you.

15 MS. PALLANTE: Thank you very much.

16 Jay.

17 MR. ROSENTHAL: My name is Jay Rosenthal.

18 I'm general counsel for the National Music
19 Publishers Association. You may be thinking, Why
20 are music publishers here at all? And there is a
21 reason why. But before I get into that, the most
22 important point I think as far as the overall focus

♀00060

1 here is that we are obviously in favor of
2 preservation. ASCAP already works with the library
3 in all sorts of ways as provided, and certainly the
4 opportunity for the library to produce the coolest
5 concert in Washington actually on a yearly basis
6 now. And you also get to hear the wit of Paul
7 Williams, even though he uses the same jokes every
8 year. He will come back.

9 The real issue here I think for publishers
10 is the uncertainty of all of this. We kind of align
11 ourselves with the recording industry on this point,
12 especially as it relates to ownership rights. When
13 we think about two copyright owners of sound
14 recordings fighting each other, it raises the
15 specter of two worst words publishers can hear, and
16 that is a legal hold. And this is something that we
17 really don't want to jump into blindly or without
18 some thought. Because this will impact publishing
19 community, because when you have two parties who are
20 fighting over authorship rights as it relates to
21 ownership rights, between state rights and federal,
22 you oftentimes have the situation of a publisher not

♀00061

1 getting paid accrued mechanical royalties or other
2 types of royalties, as well, right across the board.

3 So that is the main reason that we're
4 concerned about this. We want to make sure that
5 this does not raise a whole new reason for not
6 paying publishers. And there will also be changes
7 that result in resources and costs relating to
8 publishers. Publishers have databases in place. We
9 are looking at international databases, and here we
10 are with the idea that, well, there may be changes
11 in ownership rights that may necessitate going back
12 and changing databases relating to old recordings
13 right across the board.

14 Certainly as a general matter, application
15 of some federal laws to pre-'72 recordings, let's
16 say, could impact publishing rights. It certainly
17 concerns us in all sorts of areas, whether it's
18 copyright. It's specifically things with rights of
19 termination, notice provisions and things like that
20 or others. But it is something certainly that we
21 are worried about.

22 I don't want to really go on, and we're

♀00062

1 really here to listen as much as kind of provide our
2 input because what happens here will impact the
3 publishing community in one way or another.

4 One just quick point that I want to raise
5 and that's already been raised, and that is the
6 issue of commercial viability. I'm not sure what
7 commercial viability means anymore with old
8 recordings, and I tend to think that maybe we
9 understate the value of old recordings as it relates
10 to commercial viability.

11 I just bought a CD from Smithsonian
12 Folkways of music from the 1940s, and there are some
13 labels and some of Rich's members, like GuateMaya, I
14 think they're a member, they are totally dedicated
15 to old recordings and repackaging them and putting
16 them out in a commercial way. So I think it's a
17 slippery slope to think that just because it is an
18 old recording that it loses its commercial value.
19 And that's just something we have to keep in mind.

20 So really the publishing community is here
21 to listen and to add where we can, but we do have
22 some serious concerns about how it will impact us in

♀00063

1 terms of getting paid and in terms of our internal
2 systems that we have set up and will continue to set
3 up as we move forward.

4 That's it. Thank you.

5 MS. PALLANTE: Thank you.

6 Elizabeth.

7 MS. GARD: Hi, my name is Elizabeth
8 Townsend Gard. I'm an associate professor at Tulane
9 University Law School and co-director of the Tulane
10 Center of IP, Media and Culture.

11 We've been working on duration for the last
12 four years in a project called The Durationator.

13 We've determined copyright status of works. We're
14 doing the core law part. We've looked at every law
15 in the country -- I mean every law in the world, and
16 every component of the U.S. copyright law, except
17 sound recordings because it's too hard.

18 So when the call came out for this, a lot
19 of people kept asking me what my thoughts were, and
20 I didn't have any.

21 And so being a little bit lazy, I decided
22 to have my copyright class investigate. So we read
♀00064

1 every comment, every question, we researched every
2 question and we came up with a proposal. My class
3 voted, we debated, we pretended to be all of you,
4 and we made a 41-page, single-spaced proposal of
5 what we thought would be what you all would
6 compromise on and find reasonable.

7 We found authorship and ownership
8 impossible. We think you have to face these
9 problems, but it can be solved fairly easily, and we
10 think there is room for compromise between the two
11 groups, and so we made a proposal.

12 In our proposal of term, we think duration
13 is the most important problem.

14 Thank you.

15 MS. PALLANTE: Thank you very much.

16 I think that leaves you, Charlie.

17 MR. SANDERS: I'm Charlie Sanders, outside
18 counsel for Songwriters Guild of Americas, which is
19 the nation's and, we suspect, the world's oldest
20 songwriter organization run solely by songwriters.
21 I'm also, although I'm not presenting them here
22 today, a member of the board of the Native American
♀00065

1 Music Association. I'm an adjunct professor at New
2 York University, and I am a former studio musician.

3 I think that makes me the only person on
4 this roundtable panel that is here representing
5 creators, which is -- I guess the usual ratio, even
6 though I think that the founders, including
7 Mr. Madison, believed that copyright law was being
8 established to protect the creators.

9 So if, Peggy, you think you get nervous
10 dealing with this gang, when corporations get
11 together to talk to library people and law

12 professors, you can't believe the fear that goes
13 through the creative community.
14 There is a concern here, I think as Jay
15 articulated, that this process not be utilized in
16 any way to undermine or create problems for creators
17 in a way that is not intended. Jay mentioned
18 termination rights, and certainly the work-for-hire
19 issue should not be impacted at all by anything that
20 goes on here in these discussions, in any
21 resolutions that may result in a way that prejudices
22 the rights of creators.

♀00066

1 I think that that is a crucial point. The
2 work-for-hire issue as it affects the corporations
3 that own sound recordings is going to be a major
4 issue in the near future, and this cannot be used as
5 a device to somehow prejudice the rights of
6 recording artists.

7 I think also we need to keep in mind that
8 the ability of the federal government to help
9 control piracy may somehow be impacted on the ideas
10 and the eventual resolution that you recommend here
11 in these next couple of days, and that's an
12 important consideration. I don't know enough about
13 the success that RIAA has had, especially in terms
14 of street piracy of physical goods, in getting the
15 Justice Department to assist in that process. And,
16 of course, songwriters are helped enormously by the
17 fact that federal and local law enforcement agencies
18 actually do go after pirates.

19 So I would ask, back to Eric Schwartz and
20 others who have spoken on this, what are the
21 benefits that may arise at later roundtables of the
22 kind of unification of laws or federalization,

♀00067

1 anyway, that might assist the U.S. Justice
2 Department and USTR and Customs in helping control
3 piracy, and that would include I think online
4 piracy.

5 Aside from that, I think that I want to end
6 up by saying that, of course, everybody around this
7 table has expressed the same thought about
8 preservation, and it is crucially important that the
9 cultural heritage that is being protected by so many
10 groups around this table be made as easy as possible

11 without prejudicing the rights of copyright owners
12 and creators. And I think that that is especially
13 true with Native American recordings. I think the
14 U.S. has a special obligation to help preserve,
15 insofar as is humanly possible, a culture that we
16 arguably tried so hard to eviscerate for so many
17 years. So, I look forward to talking about the
18 creative perspective as we move along.

19 MS. PALLANTE: Thank you, Charlie.
20 Pat, you wanted to --

21 MR. LOUGHNEY: I would just like to add for
22 the record on that point that the Library of
♀00068

1 Congress in fact has been a creator of content for
2 quite a long time for both sound recordings and
3 videos, and it is with humor and sometimes
4 consternation that we see that content come back
5 repackaged, relabeled and submitted for copyright,
6 sometimes over and over again.

7 So we are aware of this, and we see it of
8 material that we have actually produced as public
9 domain material but put it out there, so it's not
10 unknown to us, your pain.

11 MR. SANDERS: I would also look forward to
12 hearing your thoughts on the WIPO protection,
13 efforts to protect or debate protection of
14 indigenous music around the world and bring it back
15 under copyright, and how that somehow folds into
16 some of the things that may be discussed over the
17 next two days as well.

18 MS. PALLANTE: Very good. Thank you all
19 very much. Those were -- that was a wonderful start
20 to our two-day program.

21 We have about a half an hour to have a
22 conversation, which I think would be great. And I
♀00069

1 think my team has a few questions, and I would
2 encourage you to ask questions of each other.

3 I'll start with just two factual questions
4 because so much of our program is on legal issues.
5 Many of the preservation experts mentioned how
6 fragile your archives are, your sound recordings,
7 and the question I have, though, specifically is, do
8 you mean that they will not make it to 2067 without
9 some kind of intervention? I think we need to know

10 that number --

11 MS. BULGER: It won't make it till next
12 year sometimes.

13 MS. PALLANTE: Pat. Please jump in.

14 MR. LOUGHNEY: I can testify to many
15 formats now in the recorded sound collection of the
16 Packard Campus of the Library of Congress that are
17 deteriorating as we speak. These can be
18 transcription disks, these can be wax cylinders,
19 they can be more robust formats that have actually
20 had quite a lot of longevity because they've been
21 durable for four or five decades but are beginning
22 to show signs of oxidation, shrinkage and all the

♀00070

1 other catalytic chemical reactions that can occur to
2 these formats. Because they were never produced for
3 longevity or for archival purposes; they were
4 produced for home consumption and use in the
5 marketplace, and it was never intended that they
6 last forever. And so we see that on a daily basis,
7 and in many cases we are getting to recordings now
8 that are too late to preserve. So it's a serious
9 problem in the Library of Congress.

10 MS. PALLANTE: Does anybody else want to
11 speak on that point?

12 Eric.

13 MR. SCHWARTZ: I can't speak on the
14 fragility for the libraries or archives, but I did
15 want to sort of triage the issues --

16 MS. PALLANTE: Well, can I ask you just to
17 hold off if it's not on that point.

18 MR. SCHWARTZ: It is on that point, because
19 I think in looking at the legal questions, and I
20 know it's anathema to libraries and archives to talk
21 somewhat separately about preservation and access,
22 but for legal purposes it may not be the wrong way

♀00071

1 to approach this.

2 We did some research, and I think other
3 labels have as well, and as we stated in the filing,
4 to our knowledge no library or archive has ever been
5 sued, and has never been threatened for any
6 preservation activity. For those who are not
7 archivists or preservationists, and for those who
8 are, correct me, we're talking about the copying of

9 material from a fragile to a less fragile medium or
10 format the types of things that are permissible
11 under 108, also under 107, and the House report
12 referring to the transfer of -- and film of nitrate
13 material to acetate and so forth.

14 So it seems to me, and maybe I will speak
15 personally, that the legal issues of going from
16 state law to federal law will have little or no
17 impact on the ability for archives presently to copy
18 materials, nor would it necessarily change many
19 archival current activities.

20 I hear what Eric, Tom and Dwayne are saying
21 about the very cautionary approaches that archives
22 have, you know, of having worked with archives for a
♀00072

1 long time and done some legal work with them. I
2 know that no attorney at an archive ever got fired
3 for saying no.

4 And I think that when asked, Can we do
5 this? Should we do this? Well, there is some
6 uncertainty whether state law would allow for that
7 transferring, and so don't do it. But I don't think
8 that that activity is anything that has or would
9 necessarily get an archive into trouble for fragile
10 materials, nor do I think, frankly, that any state
11 court would make a determination that that activity
12 is unauthorized. You know, I will stand corrected
13 if there are those cases.

14 I do think, therefore, that mostly what
15 we're talking about here is about access, and, of
16 course, access takes many forms, as Sam mentioned
17 and others, between streaming and other types of
18 activities. Certainly onsite versus not onsite.

19 MS. PALLANTE: Eric, I think part of what
20 you are saying is that librarians and archivists and
21 museum curators shouldn't be so risk adverse, but I
22 have to tell you that as a former museum attorney
♀00073

1 myself, you are not going to change that. And so I
2 think that's been well laid out, and in my
3 experience is quite accurate, that there they are
4 very risk adverse and conservative.

5 I had another question for you, but you had
6 one for me.

7 MR. HARBESON: Well, I was going to respond

8 to Eric. And since we're both Erics, if you want to
9 call me Eric H, you can free to do that. Or you can
10 just say "Eric," and people won't know whether you
11 are talking about the Music Library Association or
12 the RIAA, and I'm actually okay with that.

13 So, first of all, to respond to your
14 question about formats, what Patrick said is
15 absolutely true. There are formats that -- the one
16 that comes immediately to mind actually isn't one
17 that is a pre-'72 format, but to give you an idea, a
18 format that was created in the '80s, a digital
19 audiotape. I have a recording engineer at my
20 institution who has four different players --
21 actually, five different players in his studio just
22 so that he can have a chance of playing a DAT on one

♀00074

1 of them.

2 With respect to open reel tapes, if the
3 tape is not stored correctly, and sometimes even if
4 it is, it's liable to get what is known as sticky
5 shed syndrome, in which case if you don't do a
6 proper -- I mean it may or may not appear to be in
7 decent shape, but as soon as you start playing it,
8 the magnetic material will come off of the backing,
9 and you won't be able to play it again. So -- and
10 so that's the strict preservation standpoint.

11 But as I mentioned in my earlier statement,
12 and to respond to Eric's comment about the
13 preservation versus access things, there are a
14 number of reasons why librarians conflate the two.
15 They are not just -- it's not just a convenience,
16 it's not just a phrase that we repeat like some
17 mantra: If you can't preserve something, then you
18 can't have access to it. That I think everyone will
19 realize. If you can't -- if something deteriorates,
20 then no one can ever have access to it again.

21 The flip side, however, is also true. If
22 you can't provide access to it, you won't be able to

♀00075

1 preserve it. Maybe you will be able to do it on a
2 one-to-one, maybe a case-by-case basis, I'd be able
3 to take a recording down to my recording engineer
4 and he would be able to migrate it.

5 But what we're looking at, I have pre-'72
6 recordings in my vault that are, oh, geez,

7 probably -- well, hundreds of shelf feet, and this
8 is a small collection, right, of reel tapes, many of
9 which need preservation in order to be able to be
10 played again. That is not something that we will be
11 able to do on a case-by-case basis. This is
12 something where we'll need to hire a project
13 archivist to do transfers, and if we can't get grant
14 funding for it, we won't be able to preserve it.

15 As Sam said, or made reference to, a lot of
16 this is not just about our institutional counsel
17 saying no. Because you know they will say no. But
18 it's not just about that. Even if we have a
19 librarian who knows something about copyright law
20 and who is able to inform -- who is able to educate
21 their institutional counsel -- which they are
22 frequently asked to do, by the way -- about the

¶00076

1 issue, and even if the general counsel signs off on
2 it, we have to apply for grant funding, and the
3 grant givers will be unlikely to fund a project
4 where the copyright is uncertain. And especially
5 when we don't even have -- we can't even reliably
6 say, Yes, we have their use. They are much more
7 likely to fund a photo project where they have
8 108(i) -- or 108(b) and (c) to rely on.

9 So this isn't just a -- it's not just --
10 it's a simple thing to -- it seems a simple thing to
11 switch -- to put -- to draw a line between
12 preservation and access, but if we can't provide
13 access, we won't get grant funding, we won't get any
14 kind of funding even from our institutions to
15 undertake these projects because, as you know, they
16 cost a lot of money to do.

17 MS. PALLANTE: Okay. I think that that
18 issue is something we are most definitely going to
19 come back to. Thank you.

20 Let me ask my other factual questions of
21 the labels, please.

22 A couple of the archives have said, Stuff

¶00077

1 we have is not stuff that you own or would be able
2 to exploit, two separate but related issues. Is
3 that true? Or is that not true? Let me ask it that
4 way.

5 MR. BENGLOFF: It's a mixed bag because

6 it's not clear right now, and actually I have that
7 in my next set of comments. As I said, I want to
8 lump preservation and access together with
9 flexibility. We're willing to -- because I agree
10 with Eric H. that you can't look at those two issues
11 separately, that those two issues have to go
12 together.

13 MS. PALLANTE: Thank you.

14 Eric. Eric S.

15 MR. SCHWARTZ: First, to respond to Eric
16 the other, on his last point, I think we noted in
17 our comments the fundraising difficulties of
18 separating preservation and access in some
19 instances.

20 The point I was making is that legally, you
21 know, if I were proffering an opinion, at least on
22 the copying part, I would feel pretty safe, but

♀00078

1 that's neither here nor there for a moment.

2 The second point, the one you are asking, I
3 think it's another triage, and Peggy referred to
4 apples and oranges, and to separate -- sort of
5 separate the red delicious or the Jonathan Golds
6 from the naval oranges here, there is commercial
7 material and there is noncommercial, and very
8 loosely defined terms. I think that a lot of the
9 holdings of the archives, just to define or at least
10 put a point down on the noncommercial talking about
11 ethnographic, field recordings, spoken word, some
12 broadcast materials, things of that nature, that is
13 a, you know, no question, difficult problem because
14 the issues that we're talking about in terms of the
15 concerns, the economic concerns obviously are with
16 the materials that are owned by the RIAA, and in
17 Rich's case, the A2IM materials.

18 The archives have and their holdings are a
19 combination of things. If I could give a bit of a
20 historical perspective, yes, I know film and music
21 are different, but I do see over the long arc of at
22 least my 20 years of doing this where the archives

♀00079

1 and studios were 15 or 20 years ago in the levels of
2 distrust and the sniping at each other and the
3 changes that have occurred over time, I think if you
4 look at what has happened, even just recently, with

5 donations of materials in the case of Universal
6 Music Group to the Library of Congress, in the case
7 of the licensing of the pre-1925 materials by Sony
8 Music, their entire pre-'25 catalog to the Library
9 of Congress, you see the sense of cooperation that
10 is developing.

11 And so those types of cooperative
12 agreements for commercial materials -- I'm just
13 stopping the definitions here -- but are produced by
14 commercial entities are, I think, being moved
15 forward a lot more quickly, a lot more effectively
16 by private agreements than they ever would be by any
17 sort of legislative reform.

18 And, again, coming back to the point that
19 don't conflate the federalization with
20 simplification, because if you think that the
21 counsels in your institutions are going to feel good
22 because the federal law -- it's now all federalized,

♀00080

1 but there are these contract questions on chain of
2 title, do we as the archive even have rights and
3 title to the physical material to the copyright in
4 it based on having acquired it from the right
5 parties? You are going to be in the same position
6 that -- you know, for the same reasons that we're
7 noting all of the legal uncertainties about
8 federalization, both about initial ownership and
9 about subsequent transfers.

10 MR. BENGLOFF: I just want to follow one of
11 Eric's comments and talk about it later, as I said,
12 and sort of play off one of Jay's comments about
13 commercial viability. Now, old recordings do have
14 commercial viability. For the community that A2IM
15 represents, that's the difference between making a
16 living and not making a living. So it's very
17 important to us to not oversimplify, and we often
18 find people putting out sound recordings that belong
19 to our members that -- and, you know, it's -- we'll
20 talk about orphan works, I'm sure, a little bit
21 later and what a true orphan is.

22 But I just want to support Eric on that

♀00081

1 comment about this oversimplification could put a
2 lot of people out of business, which will reduce
3 access to many, many recordings, and many, many

4 recordings will go out of print and not be available
5 because there won't be any money spent to digitize
6 them and make them available.

7 MS. PALLANTE: Okay, thanks.

8 Let me see if my team has any questions or
9 clarifications they would like to ask for.

10 June, do you have anything?

11 Otherwise, I would greatly encourage
12 conversation. No? Okay.

13 Sam and then Pat.

14 MR. BRYLAWSKI: One of the things that I
15 should point out for pre-World War II recordings,
16 and, you know, generally there aren't major archives
17 of them held by American companies. The largest
18 archive I'm aware of any company is that of EMI, the
19 Gramophone Company, which has been very diligent --
20 you know, they have a 110-year-old policy of
21 retaining every recording they ever issued. I'm not
22 aware of such a policy of other record companies

♀00082

1 prior to World War II, so there is this dependence
2 on archives, such as Eric H's and Pat Loughney's,
3 and I also worked for one at the University of
4 California.

5 So I agree with Eric on the cooperation,
6 but the preservation burden has become, particularly
7 the financial part of keeping the copies and paying
8 for them, is now on archives. That is all I want to
9 say on that because we were just talking about where
10 the copies are.

11 I look forward to talking to Richard about
12 how, you know, federalization really hurts revenues
13 if the materials are still protected, but we will
14 hold off on that.

15 MS. PALLANTE: Another time.

16 MR. BROOKS: There is just one point that I
17 would like to add that hasn't been mentioned here,
18 and it's perhaps unique to sound recordings as
19 opposed to other types of intellectual property, I
20 believe. And that is that when you are speaking
21 about the earliest recordings, which in some ways are
22 the most or certainly in the category of most in

♀00083

1 danger, that is, the wax cylinders that Pat
2 mentioned, a great proportion of those, and I would

3 guess from my experience perhaps a majority of them,
4 are not in archives. They are in fact in private
5 hands. There is a very active world out there not
6 represented at this table today of private
7 collectors who actively collect those.

8 Now, because they were wax cylinders that
9 were made -- and I have a couple hundred myself --
10 because they were wax cylinders made in the 1890s
11 before duplication procedures were invented, they
12 are often unique recordings, of course, and subject
13 to deterioration. They are in private hands. We
14 would hope that over time those private collections
15 would eventually migrate to more stable institutions
16 which are better set up, obviously, to preserve them
17 over time. But in many cases they don't.

18 And I know of private collectors of major
19 collections, in fact, who would not consider leaving
20 their -- or willing to donate their collections
21 because of the dark archives fear. Maybe
22 this is rational, maybe it isn't, but it is true

♀00084

1 that there is a substantial body of feeling out
2 there that once my collection that I laboriously
3 assembled over the years of these extremely rare
4 artifacts finds its way into a library, no matter how
5 well intentioned, that library will have to abide by
6 the laws, and those laws as set up now to the public
7 and to collectors seem to be extremely restrictive,
8 particularly as to access.

9 So it's keeping out of the hands of
10 those who could best preserve these things recordings
11 that are probably -- well, I know -- are
12 deteriorating in the closets and cupboards and back
13 rooms of private collectors today.

14 MR. LOUGHNEY: I just wanted to offer an
15 anecdote that I think was in answer to your original
16 question, which is how much of these master or
17 archival materials are held by the rights-owners.

18 In a conversation that I had in the
19 boardroom in New York in January of 2010 at Sony
20 Music Entertainment, the question came up in
21 relation to the Victor, Columbia, and other early
22 labels, mostly the pre-'25 recordings, but also the

♀00085

1 others, their estimate was that they held less than

2 25 percent, and perhaps for some labels considerably
3 less than 25 percent. They had no master archival
4 materials, no master recordings, no metal parts,
5 anything, and those materials are in the collections
6 of the Library of Congress, private collectors, and
7 other recorded sound institutions in the U.S.

8 And so, for example, the National Jukebox,
9 which was launched with 10,300 recordings certainly
10 provided -- a gratis license by Sony, for which
11 we're extremely grateful, all of the recordings have
12 come out of the collections of the Library of
13 Congress, with perhaps some from the University of
14 California, and all of the work and preservation has
15 been done by the American taxpayer at the Library of
16 Congress, and we're providing free copies, free
17 copies back to the rights-holder in this case
18 because they don't have them.

19 MS. PALLANTE: Peggy, I'm just saying your
20 name for the transcript.

21 MS. BULGER: Okay. Yeah, thanks.

22 Actually, after working for the federal

♀00086

1 government for 13 years, I understand a healthy
2 skepticism about federalization. However, I really
3 am wondering, and I guess I echo Sam on this, what
4 would be the -- what is the biggest fear? Why would
5 this be an undue burden? Can't we find a way to
6 bring normalization and, you know, one law without
7 having an undue burden on rights-holders? Isn't
8 there a way we can do that?

9 MS. PALLANTE: Anybody want to answer that?
10 Jay.

11 MR. ROSENTHAL: Well, I'm probably not
12 going to answer that, but I think it gets back to
13 just the fear of uncertainty that covers all of
14 this. I mean it's kind of nice to step up and say,
15 Isn't there a way to solve these problems? And yet
16 many of these problems that may result, especially
17 as it relates to the issue of ownership and
18 authorship and all the other things that have been
19 mentioned, it's not here that they are going to be
20 resolved. And I don't know -- it's for a court of
21 law at times, it's for interpretations of law that
22 are not up to us, unless we're going to write

♀00087

1 something that is so broad, you know, some kind of a
2 law that covers every single, you know, iteration of
3 problem, then comfort results. Yes.

4 But I have skepticism that everybody is
5 going to be able to do that, and as you add the
6 complexity of each particular problem, you know, and
7 you start writing more and you start, you know,
8 working more as a group, you are not going to come
9 up with really a consensus that works for everybody,
10 and we're back to the uncertainty issue. That is
11 really the fear.

12 Maybe it's overblown to a certain extent,
13 but in today's day and age with the way that the
14 ownership of -- and authorship and the songwriters
15 and artists feel about all of these issues, the one
16 thing we don't need is more uncertainty over the
17 rights that we think we do own.

18 And by the way, I know you talk about the
19 rights of sound recordings. There certainly could
20 be a situation where a record label does not own a
21 certain sound recording that they are using but yet
22 the underlying musical composition is owned by

♀00088

1 somebody, you know, a writer, a publisher or
2 whatnot. So that has to be kept in the context as
3 well.

4 MS. PALLANTE: Elizabeth.

5 MS. GARD: Okay. So you have to excuse me.
6 I'm insanely nervous to be here today. It's very
7 exciting to be here.

8 But this is what we -- we saw all of these
9 problems and we studied this for an entire semester,
10 20 minutes every single session, and did a ton of
11 research on it. And what we found is that we felt
12 that if it was 50 years from fixation but with an
13 incentive period created under Article 303(c), that
14 a lot of the questions and problems that the
15 librarians are facing would be solved because you
16 would not have to worry about ownership or
17 authorship.

18 For the other side, for those that are
19 commercially still viable and interested, it creates
20 some sort of -- similar to 303(a) but shorter, a
21 five-year incentive period that as long as it was
22 commercially available to the public during that

¶00089

1 five-year period, then you would be able to claim
2 the rest of the term until 2067.

3 And so what we were concerned with was
4 authorship, but you can't base it on authorship, you
5 can't base it on ownership, because you don't
6 know -- you can't do a backward looking of who was
7 the author, who was the owner. It's incredibly
8 complicated.

9 So basing it on fixation, then you get to a
10 point where you can have -- but you also have an
11 incentive period, so all of the materials that are
12 already being made available, even the materials
13 being made available at the Library of Congress
14 potentially, would have the full term to 2067, and
15 that way those that have an interest would come
16 forward in the way that the copyright law should
17 incentivize people to make things available in
18 really great copies, but at the same time allow all
19 materials that the librarians are so concerned with
20 to be able to quickly be rescued. So that was what
21 we came up with.

22 MR. BENGLOFF: I appreciate that, and I

¶00090

1 read very much with interest your comments, by the
2 way, before I came here and I found them very
3 interesting.

4 I don't agree, but I found them very
5 interesting. And I'm just saying -- what? I'm
6 sorry.

7 MS. PALLANTE: Just state your name for the
8 transcript.

9 MR. BENGLOFF: Rich Bengloff. I'm sorry.

10 But from a practicality point of view, in
11 addition to having to register -- and I do have
12 solutions later. Don't worry, I'm not going to be
13 negative. It's in my next section.

14 But in terms of what you're proposing, it
15 creates an incentive to register all our copyrights
16 to be able to defend them in a court of law for
17 infringement and things of that type, so it's nice
18 and neat that with 2067 in terms of we know what we
19 have as opposed to some of yours that will come off
20 at different times based on when the 50 years -- and
21 we have a fundamental difference because we believe

22 the community that A2IM represents that when you
♀00091

1 transform a pre-'72 recording due to technology and
2 go to more kilobytes and a variety of other -- you
3 have a new recording. And I could bring recordings
4 in here -- I'm not prepared to do that today -- that
5 I could play for you that sound very little like
6 each other, even though they came from the same
7 seed, so to speak.

8 So I saw you were going for a
9 simplification, but having worked in that area,
10 that's my background is finance -- I'm not a
11 lawyer -- the administration would become somewhat
12 difficult.

13 MS. PALLANTE: Let's not cut this off other
14 than to say we have a term of protection discussion
15 tomorrow.

16 MS. GARD: Right, we do. Right. Right.

17 MS. PALLANTE: And we will come back to
18 you.

19 Charlie hasn't spoken for a while.

20 MR. SANDERS: Yeah, Eric Schwartz mentioned
21 something interesting before as a footnote to what
22 Peggy was discussing, and that is the genesis of
♀00092

1 protection of neighboring rights and how it's kind
2 of an anomaly because I believe in the federal's
3 papers and around the time of the first copyright
4 act, there certainly was widespread agreement that
5 having state law different in 11 or 13 different
6 states was not a good thing.

7 And it might be enlightening, especially
8 for the library people, if someone could give an
9 explanation of how neighboring rights and the
10 protection of sound recordings developed over time
11 in the United States in regards to that protection,
12 so we at least understand why we have arrived at the
13 landscape upon which we're trying to navigate.

14 MR. WESTON: You have five minutes.

15 MS. PALLANTE: I'm sure everybody is
16 getting ready for a break, but there were several
17 hands up.

18 Sam.

19 MR. BRYLAWSKI: I want to -- I don't -- I
20 will look forward to hearing from Richard on why

21 registration would be required if there was some
22 kind of federalization of pre-'72.

♀00093

1 I will recount my experiences as head of
2 the Recording Sound Section and author of the study
3 is that even contemporary recordings have a very
4 poor registration rate at the Library of Congress
5 because of the rights that are afforded and not lost
6 when you don't register, and we all recognize the
7 additional rights you get when you do.

8 When I was here when I worked for the
9 Library, only 50 percent of what was published we
10 believed was actually registered, and when I did a
11 study of seven labels, which are mentioned in this
12 report, I went to go look up the labels and look at
13 the releases, and it was even less than the amount
14 that was actually registered.

15 So that fact and the idea that I don't
16 quite understand why federalization would absolutely
17 require registration, these are the kinds of impacts
18 which we all want to learn because it isn't the
19 intent in arguing for federalization. It certainly
20 is the intent to have a public domain before we die,
21 but it's not the intent to create an incredible
22 burden on businesses making a living.

♀00094

1 MS. PALLANTE: Okay. Copyright Office?
2 June?

3 Raise your hand if you have something you
4 really want to say before the break.

5 MS. BESEK: I would like to have Eric
6 respond to that question -- if Eric has a response
7 to that question about whether registrations en
8 masse would be required, I think that would be
9 helpful.

10 MS. PALLANTE: Great. And I think,
11 Richard, you were really talking about that from a
12 liability perspective --

13 MR. BENGLOFF: From being able to protect
14 in a lawsuit, yes. We're finding in our -- I'm
15 sorry -- we're finding in our actions if you don't
16 have that, it becomes a much more complex situation.

17 MS. PALLANTE: Sure. And could I just ask
18 our registration staff who are in the back to raise
19 your hands for people who may not know you so you

20 may -- keep them up for a second. Feel free to
21 mingle with them.

22 Eric, did you want to respond?

♀00095

1 MR. SCHWARTZ: There have been several
2 questions, but I know we're going to break.

3 Maria, you and I met doing a study on 411
4 and 412 and the contentiousness -- that was 20 years
5 ago next year -- and as you and I well know, that
6 issue is a very divisive one for the necessity of
7 registration.

8 I think the question is a bit of a
9 hypothetical question because you are asking what
10 would a federal law look like if we had
11 federalization. I think the question is, Would we
12 carve out Section 411 for purposes of the pre-'72
13 sound recordings? We're not. That's just a
14 decision for Congress. But given where that
15 slippery slope of 411 and 412 brought us in the
16 study by the Accord Group in 1992, I can only
17 imagine where that would lead.

18 I just wanted to switch from that before
19 the break by just simply asking a question for later
20 panels. Peggy mentioned a third way, and I guess
21 the question I would ask, certainly, on preservation
22 and on access questions, is why not amend the state

♀00096

1 laws to the extent that the holdings are -- many,
2 not all -- and this is the difference I believe
3 between some of the film and some of the recorded
4 sound preservation, again not all, but just sort of
5 some major holdings to begin at -- and since, as I
6 think Tom said, the states do look one to another
7 for these things, why wouldn't states make it clear,
8 for example, that preservation copying is absolutely
9 permissible under state law? Why wouldn't they want
10 to do that? And why wouldn't they want to allow
11 certain types of access for older materials?

12 So one is the question of why hasn't it
13 been done, and the question is, have they ever
14 attempted this?

15 MS. PALLANTE: Eric, you get the last say
16 before we break.

17 MR. HARBESON: Well, actually, I was going
18 to ask Eric Schwartz in response to that how you

19 would do that and get a uniformity. Are you
20 thinking of amending the UCC to trump any state
21 laws? Because, otherwise, you still have 50 states
22 with 50 different plus territories of -- with 50

♀00097

1 different conceptions on how the law should be
2 enforced, and you do -- when you start dealing with
3 the internet, you start having to worry about
4 long-arm statutes.

5 And so that's -- I would love to know how
6 we could get uniformity by amending state laws.

7 MR. SCHWARTZ: Am I saved by the bell or do
8 I have to answer that?

9 MS. PALLANTE: You could say you didn't say
10 it was easy.

11 MR. SCHWARTZ: I did say it wouldn't be
12 easy, and that's -- but you have to start somewhere.

13 MR. LIPINSKI: Two knockdown rules.

14 MR. SCHWARTZ: You know, look, Tom's point
15 about federalization and international harmonization
16 is a good one, and, yes, it would be wonderful and
17 there has been (inaudible) in the history of Byrne
18 and the digital treaties and Tryst and all of that
19 some movement towards harmonization, but we are not
20 there, not on copyright and certainly not on
21 neighboring rights, which is frankly the biggest
22 difference between the U.S. and the rest of the

♀00098

1 world is that sound recordings everywhere but the
2 U.S., more or less, are protected under neighboring
3 rights laws, not copyright.

4 And it seems like if there was going to be
5 the harmonization of the pre and post, the time
6 would have been in '72 or subsequently in '76.
7 Charlie's question was the history of protection to
8 sound recordings. If you look at the legislative
9 history of the '71 act, what you find is that
10 federal protection for sound recordings was
11 accelerated out of the 22-year copyright revision
12 because of the problems of tape piracy and the
13 necessity to immediately have protection for
14 unauthorized reproductions.

15 And so that is where the federal law
16 protection begins in the '71 deliberations. Just
17 break it out of the '76 act and accelerate it, and

18 it seems like the time for the harmonization would
19 have been then. Doing it now and the 40-year lapse
20 in time with all of the contracts, with all of the
21 consolidation and mergers of catalogs is what makes
22 it so complicated.

♀00099

1 MR. BROOKS: I really would like to say
2 something --

3 MS. PALLANTE: Go ahead.

4 MR. BROOKS: -- because we addressed it in
5 some detail in our filings. From everything we've seen -- and
6 we had our own attorney look at the representations
7 -- we don't think they are as serious as some
8 may feel. We feel some of them may need to be addressed
9 in any recommendations that are made.

10 But on the matter of Congress's attention
11 to this and Congress's intent on this, I think it's
12 quite clear that essentially there wasn't any -- or
13 there was very little. Section 301(c), the state law
14 provision, as you know, was inserted into the 1976
15 Act by a conference committee. It was not studied,
16 it was not debated, it was not publicly vetted in
17 any way, and it was carried through in the term
18 extension act 20 years later, again without any
19 attention to it that we could find anywhere. I
20 would be happy to stand corrected on that if in fact
21 there was serious consideration of what we're
22 talking about today. But in fact, as far as we can

♀00100

1 tell and our attorney can find, there wasn't.

2 And to say that it could have been done
3 then, perhaps it was a mistake, perhaps it was a
4 misconception, perhaps it was even intent, but it's
5 40, 30 years later, and I think we know what has
6 happened as a result, and I really couldn't agree
7 with the idea that somehow this was considered and
8 resolved. It was not really considered.

9 MS. PALLANTE: Okay. Elizabeth, did you
10 have something?

11 MS. GARD: Yeah, just two quick questions.

12 MS. PALLANTE: And then that is it.

13 MS. GARD: Just to clarify, under
14 international copyright, it's author based in
15 neighboring rights, but neighboring rights is part
16 of copyright law.

17 And then, secondly, in the time of '71, we
18 were in a UCC era where we were very
19 anti-retroactivity, and now we are in a burden era,
20 which is very pro-retroactivity. So just to cite
21 the differences in the climate.

22 MS. PALLANTE: Okay. Thank you.

♀00101

1 So we're going to break.

2 For the folks who are coming to the next
3 session who are not on this panel, we will give you
4 a chance to do the same kind of intro summary that
5 we did this time around. We will -- but shorter,
6 David says. That was not very nice, David.

7 MR. CARSON: The point being five minutes
8 times the number of people on the panel exhausts the
9 time.

10 MS. PALLANTE: And if you are on the same
11 panels -- if you are also on the next panel and have
12 different comments, feel free to make those.

13 Let's come back in 15 minutes.

14 (Recess.)

15 MR. CARSON: Okay. Let's get started then.

16 The next two panels are going to be led by
17 Chris Weston. Chris is the person on our staff who
18 is responsible for most of what you've read from us
19 thus far on this issue. He and June maybe are the
20 two people at the table who really understand just
21 about everything about this, and the rest of us are
22 trying to catch up, and we're hoping you will help

♀00102

1 us with it.

2 So I think there are -- I guess -- well,
3 Susan, we're not going to give you any extended time
4 because someone from your organization has already
5 been here, but we did want to give Gil, who is
6 appearing for the first time, just an opportunity --
7 not to take maybe five minutes but take two or
8 three, if you want, just to give your overall
9 perspective, specifically on this issue, I suppose.

10 But then we are not going to have -- not exactly the
11 same format we had the first time around. We're
12 going to try to make it more focused, pop specific
13 questions out, and hopefully get a lot more back and
14 forth.

15 But I will turn it over to Chris, and then

16 we will start with Gil, and then we will get the
17 discussion going.

18 MR. WESTON: So, excuse me while I make
19 more of a mess. What we're going to be talking
20 about in this session is availability -- the current
21 availability of pre-1972 sound recordings because
22 there seemed to be some factual disagreements among

♀00103

1 the comments. And so that's one thing we're going
2 to get into.

3 And another thing that I want to touch on
4 in here is something that was mentioned before,
5 which is in terms of how sound recordings are used,
6 how helpful is it going forward and thinking about
7 legislation perhaps to look at them in different
8 categories, such as pre-1923, pre-World War II,
9 commercial and noncommercial.

10 But, first, let's give Gil a chance to
11 introduce himself and tell us a little bit about his
12 views.

13 MR. ARONOW: Thank you, Chris.

14 Gil Aronow from Sony Music Entertainment.
15 I just want to say I'm glad to be here to have the
16 opportunity to engage in this discussion, and I
17 appreciate it.

18 Our position I think was fairly well
19 expressed by the RIAA and Eric Schwartz, and I think
20 it's fairly straightforward. I mean we understand
21 there is a complex legal landscape that is being
22 under consideration for change.

♀00104

1 Our view, though, is that there's an
2 existing complex legal landscape that we are
3 relatively comfortable with and can make reasonable
4 risk assessments and valuations of the catalogs that
5 we own based on that, and -- and would prefer, I
6 think on balance, not to upset the apple cart.

7 We certainly recognize -- and I should say
8 that all these remarks are intended in the spirit
9 that Eric expressed earlier of finding a cooperative
10 solution, and we certainly recognize the importance
11 of preservation and access, and whether you parse
12 them separately or conflate them together, you know,
13 we want to find a way to preserve and make
14 accessible those sound recordings, the entire

15 history of recording sound.

16 I note -- let me just go on a tangent for
17 one minute -- I'm sorry, I just want to address
18 Pat's comment earlier about being in New York in the
19 Sony Music boardroom and saying that less than 25
20 percent of the recorded music that is owned by Sony
21 Music, those masters -- less than 25 percent of
22 those pre-World

♀00105

1 War II masters are held by Sony Music, and I think
2 that's factually accurate.

3 I think the rest of the story, though, Pat,
4 is that the reason that most of those masters or
5 many of those masters are no longer held by Sony
6 Music is our companies donated the metal masters for
7 munitions in World War II and also donated the
8 lacquer masters for various war-related purposes.

9 So we do appreciate that the taxpayers have
10 borne much of the expense of preserving and making
11 accessible some of these pre-1925 recordings that we
12 licensed to the LoC, but part of the reason we don't
13 have them any more is we're good citizens.

14 So, further, let me just proceed I guess
15 with a few other comments I would like to make,
16 bearing in mind, David, your less than five minutes'
17 preference.

18 We do think that the agreement that we made
19 with the LoC for the National Jukebox is an
20 excellent example of the possible potential for
21 either public/ private or even private with private
22 university or public university or other archives

♀00106

1 for giving access to at least those recordings that
2 are controlled by the major record companies. I
3 can't speak for any of the other major record
4 companies, but the fact that Universal did its own
5 deal with the Library of Congress suggests that the
6 other majors have some inclination towards
7 cooperation as well.

8 I just think as a final reference that my
9 reference earlier to upsetting the apple cart is
10 exactly what we're talking about. I think we are
11 potentially in a position where what we're going to
12 do is create more uncertainty rather than less
13 uncertainty, and that's really what we're trying to

14 avoid. Thank you.

15 MR. WESTON: Thanks.

16 So I guess now if everybody would like to
17 take a minute or two to talk about their views on
18 the current situation of availability in reissues.

19 MR. BENGLOFF: Chris, could I just make one
20 clarification when I introduced the organization
21 based on a comment that Charlie Sanders from SGA
22 said earlier? The community we represent at A2IM

♀00107

1 includes a lot of artist-owned labels. He said he
2 was the only one here representing creators. I
3 think Franco and Buffalo, the Hanson Brothers in
4 Tulsa, Oklahoma, Bernie Speer in New York, Joan Jett
5 in New York, Slug from the top ten group Atmosphere
6 in Minnesota, and in Nashville, other than Big
7 Machine and Curb, I mean our members are the Skaggs
8 family, John Prine, Ray Stevens, Dolly Parton,
9 Gillian Welch, et cetera. I just wanted to clarify
10 who we represent. We do represent an artist
11 community, because more and more artists are
12 starting their own labels.

13 MR. WESTON: Okay. I'm going to break
14 protocol and give Charlie ten seconds.

15 MR. SANDERS: I didn't say I was the only
16 one here representing creators. I said it was the
17 only one here uncompromised representing --

18 MR. BENGLOFF: I don't remember that word,
19 Charlie, but that's okay.

20 MR. WESTON: The transcript will clear it
21 all up.

22 MR. BENGLOFF: I just wanted to clarify

♀00108

1 that artists are a big part of our community.

2 MR. CARSON: We will make a finding in our
3 final report on that.

4 MR. BENGLOFF: Actually, you have it. Did
5 he use the word?

6 MR. WESTON: So whoever wants to go next.
7 Tim.

8 MR. BROOKS: Since I authored the study in
9 2005 that's been referred to here, I probably should
10 update you on it.

11 I would say too before I do that, I'm
12 a historian, and my understanding of the

13 destruction of masters was that for the majors -- they're
14 mostly Columbia or Victor, the two big companies in
15 the early 1900s, Columbia went bankrupt in 1923,
16 and immediately after that electrical recording came
17 in, and many masters that they had held from their
18 early years were destroyed at that time because they
19 were felt to be noncommercial or nonviable.

20 In the 1960s, I know the gentleman who was
21 hired, a Ph.D. that was hired by Columbia to clean
22 out the Bridgeport archives where the majority of
♀00109

1 the masters held at that time were destroyed.
2 Victor famously blew up its archives in Camden to
3 make room for land, I guess, in the late 1960s as
4 well.

5 So while I certainly commend the recording
6 industry for the work they did during World War II,
7 I think it's a bit of a simplification to say that
8 that's the reason that a significant part of the
9 masters don't exist.

10 The recording industry has changed, and
11 certainly in recent years there is more appreciation
12 for catalog product than there was when those
13 things happened. But, nevertheless, they happened,
14 and that's where much of our history, unfortunately,
15 has gone and why so much is in private hands today
16 and has to be accessed from those.

17 Regarding the study and its applicability
18 today, the Survey of Reissues, was done in 2005.
19 We tried very hard -- and I'm a survey professional.
20 That's my field. I've chaired several industry
21 organizations that monitor and audit survey/research
22 organizations like Nielsen and so forth and the
♀00110

1 television industry, and I'm quite familiar with
2 sampling and I taught it.

3 I do -- and we tried to make this a very
4 rigorous study, as explained in the technical
5 appendixes that are here. And since 2005, I and my
6 colleagues have followed the pace of reissues and
7 the kinds of reissues, especially major historical
8 reissues that come out, and they are reviewed
9 regularly in the ARSC journal. We survey
10 that field. It's not my belief that there's been a
11 significant change in terms of physical reissues.

12 What has changed is some online availability.
13 And I think if this study were to be done
14 today, one question we would have to address would
15 be what is online availability. It is the belief of
16 our members in our organization that limited or
17 restricted -- we would say heavily restricted -- access
18 is not the same thing as availability, certainly not
19 for the purposes that scholars need it or even
20 preservationists, perhaps. So streaming, for
21 example, simply doesn't cut it.

22 One of the most famous recordings made by
♀00111

1 an African American in the early years was Bert
2 Williams' recording of "Nobody," his signature song
3 used in shows and kind of an anthem in that period
4 in 1906. Well, the Columbia studios weren't having
5 a very good day when they made that record, and the
6 speed of the record actually varies throughout the
7 record, and it's been reissued badly many times
8 since then, played at 78 or played at some standard
9 speed. It's only in the last couple of years that
10 some scholars have figured out how to in fact
11 normalize the speed to the timbre of his voice in a
12 way that you actually hear what he was singing, not
13 what the imperfect equipment represented on that bad
14 day in 1906. Even Columbia knew it was a bad day,
15 because six years later they had him remake it with
16 a little more stable equipment.

17 Well, that's an example of why streaming
18 doesn't do a whole lot of good if you're doing a
19 serious study of these things. It's going to be
20 streamed most likely without that kind of very
21 careful attention to detail, much less many other
22 things.

♀00112

1 So whether -- I would be skeptical of
2 considering streaming with no right to actually use
3 the source sound document as constituting
4 availability. We can debate that, but I would
5 question that.

6 On the other hand, availability through
7 something like iTunes or something where you could
8 actually get your hands on the file and hold the
9 file and use and study the audio file might.

10 So my impression from what I've seen is that

11 there is not a great deal of that going on right now
12 because, again, that's not a commercial model. However,
13 I do not think that the numbers that are represented
14 in the 2005 study would be significantly different
15 from this at all in 2011.

16 I would welcome anyone who wants to
17 replicate the study -- all the data is available --
18 and show that everything is different, but I don't
19 think simply raising the specter that, well, maybe
20 things have changed invalidates a very carefully
21 done statistical study.

22 So that would be my comment on the

♀00113

1 availability as I see it today.

2 MR. WESTON: Thanks.

3 Sam.

4 MR. BRYLAWSKI: I want to say one thing
5 about Tim's study. It was mentioned this morning
6 that the study found that 14 percent of pre-1965
7 recordings are in print by the rights-holders.

8 Please keep in mind that the study is
9 restricted to recordings that were considered to be,
10 quote, historical, unquote, and did not represent
11 the full body of recordings produced in the United
12 States before 1965.

13 Now, what did "historical" mean?
14 Historical meant those recordings that Tim found
15 were described in detail in published discographies.
16 So it was jazz, which is very well documented, and
17 some spoken word, and then -- it's in the study, I'm
18 not going to repeat it. But there are large bodies
19 of recordings that because they weren't represented
20 discographies, Tim interpreted that, well, scholars
21 aren't looking at those right now, and these would
22 include, for instance, every pop vocal that was made

♀00114

1 before 1965. They aren't represented in the study.

2 So if you were to really look at the total
3 number of recordings that were in print prior to
4 1965 in 2005, it would be significantly less -- how
5 much less, I don't know -- than 14 percent because
6 there were large bodies of works that aren't
7 represented in the study at all.

8 MR. LOUGHNEY: I have a couple of things to
9 say. First of all, I want to acknowledge that I

10 think the atmosphere today is much different than it
11 was in the past. And I'm talking about the
12 relations between the record labels and various
13 aspects of the industry and the archive world, and I
14 would be a very ungrateful federal employee if I sat
15 here and made only a single critical remark about
16 Sony because they've been incredibly generous in the
17 sense of working with the Library to help develop
18 and make the National Jukebox available, and
19 obviously it couldn't be done without them. And I
20 think it's visionary, and I want that on the public
21 record.

22 And, likewise, the leaders at Universal
♀00115

1 Music Group, who have in fact looked at their
2 archives and have shifted a huge percentage of their
3 archival master material to the Library. So that
4 because they have in fact at Sony an awareness of
5 the cultural patrimony of the United States and how
6 it needs to be preserved for future generations. So
7 I want that to be on the record.

8 But I do think that we're living in an age
9 when the landscape has changed relative to
10 preservation and public access needs. Forty years
11 ago or during the '70s when the copyright law was
12 being revised, preservation was not considered and
13 archivists were not in the conversation about what
14 the law should be and what it should not be and
15 whether sound recordings before '72 should be
16 brought under federal law. There was no
17 consideration.

18 But now the landscape has changed, because
19 in fact just at the Library alone we have a \$200
20 million facility that operates on an annual budget
21 for salary and investment and preservation in the
22 range of twenty-five to \$30 million a year.

♀00116

1 And there are other institutions which may
2 not have that riches of assets and facilities but
3 who are making investments in librarians,
4 preservation engineers, they're upgrading facilities
5 constantly, they're adding collections, and they are
6 professionalizing the whole area of preservation in
7 a way that it was never professionalized before.
8 And that alone is an important change that needs to

9 be acknowledged.

10 And one of the major problems is the
11 copyright law because it impedes the activities of
12 archives, which in the case of the Library has the
13 federal mandate to preserve the recorded cultural
14 heritage of the United States and be sure that it is
15 made available to succeeding generations.

16 And what the work of Tim Brooks and others
17 has revealed is that in fact we have a growing
18 cultural amnesia of recordings produced in earlier
19 generations that have not been kept into the public
20 marketplace by the rights-holders, and as they are
21 forgotten, that link between one generation and the
22 next is lost. And when they sit on a shelf unheard
♀00117

1 and unavailable because of the difficult
2 restrictions on making them more available, it only
3 adds to that growing sense of amnesia, and it
4 creates the paradox of publicly funded institutions
5 spending taxpayer dollars to preserve recordings
6 that cannot be more widely available.

7 Again, I need to acknowledge here Sony's
8 recognition of that problem and their willingness to
9 collaborate with the Library to do this in an
10 incredibly inventive way of now making this stuff
11 more available. The fact that it has tapped into a
12 market that was nascent is indicated I think by the
13 fact that after the Jukebox was launched, there were
14 over a million hits within the first 48 hours to
15 that website. And it's my understanding from our IT
16 people that that access, that interest and those
17 links into that website have not diminished rapidly
18 and has in fact stayed fairly steady, which
19 indicates that this is an interest area out there
20 that was unserved by the marketplace.

21 The final thing I would say is that we have
22 asymmetrical interests. Our mission, along with
♀00118

1 other archives and libraries in the U.S. that record
2 and preserve and make recorded sound materials
3 available, is we have to serve that research public.
4 And the commercial industry, they live within the
5 strictures of the marketplace, and they can only
6 invest in things that they believe will be
7 commercially available, and they are not in the

8 archive business in the sense of doing what
9 libraries do.

10 In that sense, that's what our common
11 ground is, and I think that's why the Sony agreement
12 with the Library is an example of where we can work
13 together going forward, and I think that that in
14 fact sets a very good tone for not only today but
15 going forward on where we can -- where the archive
16 world can work with the rights-holders in finding
17 solutions to these problems.

18 MR. WESTON: Thanks.

19 Does anyone else have any introductory
20 comments on this topic?

21 MS. CHERTKOF: I will just add one point,
22 which is in the Tim Brooks study.

♀00119

1 One of the points that was in there is that
2 with respect to commercial sound recordings, I
3 believe he stated that 84 to 90 percent of the
4 owners are identifiable. So from the viewpoint of
5 being able to get permission to make preservation
6 copies or access or any sort of archival uses, the
7 fact that such a high percentage of the owners are
8 identifiable, I think, makes permission a route that
9 libraries and archives can follow.

10 MR. BENGLOFF: In my opening comments, I
11 said in the next section I would talk a little bit
12 about access and preservation, and I will be quick.
13 In terms of in our filing we had two of our members
14 in the joint filing, Concord Music Group and
15 Countdown Media, talk about their digitation and
16 preservation plans and what they are doing. And I'm
17 not speaking for them, but I know our community
18 would love to get together with you. We have less
19 resources than obviously Sony and Universal, but if
20 we could work something out to do similar type
21 things, we would very much be in favor of that, and
22 we will swap phone numbers today to work on that.

♀00120

1 Now, most music started off on independent
2 labels. The genres of music allowed the artists
3 to -- if you just look at the joint filing, Patsy
4 Cline, Miles Davis, Bill Haley and the Comets, Dolly
5 Parton, who happens to be one of our members also
6 down in Nashville, Dolly Records. She's backed as

7 an independent.

8 And we agree with you, any delay in
9 restoration results in a loss due to decay and age,
10 and we are very afraid of that, and we embrace any
11 program that would help us financially to prevent
12 that from happening on an ongoing basis. Just
13 giving people access doesn't mean it's going to be
14 fixed. We would accept any government support --
15 and we do support orphan works. We think in terms
16 of streaming access -- so I guess we have a
17 difference there -- for real not-for-profit
18 organizations, educational institutions, libraries,
19 museums. Not Google, not a lot of bad actors,
20 people who want to make money off of it. We
21 believe -- our community believes in giving back and
22 sharing their music with all of these different

¶00121

1 institutions. We have no interest in suing any
2 universities. I don't think we ever have. I don't
3 think any of our members really will.

4 We do have a value in our B roll. I was at
5 Pandora last week. I dropped off "Spoken Word"
6 and -- it was only "Spoken Word." I dropped off ten
7 comedy segments to be put up on Pandora when I was
8 out in Oakland last week. Okay. So we don't know
9 what is valuable today. Pandora has now added a
10 comedy section. People aren't aware of that now.
11 So what may not be valuable today may very well be
12 valuable tomorrow, and especially through what
13 Pandora does.

14 And we support the concept of orphan works
15 to an extent. If there is appropriate due diligence
16 to ensure the works are really orphan works -- and
17 the creation of the centralized database to support
18 institutions like libraries and educational
19 organizations. So we do want to make sure this
20 music doesn't disappear, and we want to make sure to
21 do it at the same time. Though I just have to throw
22 in again that, you know, people are acquiring

¶00122

1 catalogs, they are releasing things. We believe the
2 private sector in many ways could do things less
3 expensively.

4 It's funny, someone mentioned Smithsonian.
5 Jay did earlier. They happen to be one of our

6 members, and they have to run from -- Smithsonian
7 recordings is an A2IM member, and they run their
8 business like a private organization, they have
9 budgets and things. I speak to Richard Burgess and
10 the people who work over there. And we have other
11 D.C. members. 18th Street Lounge, which Jay knows
12 well. Thievery Corp., so I guess they are doing
13 something different with them musically now.

14 But -- so we do support all these things.
15 So we support having people have access and we
16 support preservation. I just want to make that
17 clear.

18 MR. BROOKS: I think it would be very
19 helpful to parse the periods we're talking about
20 because --

21 MR. WESTON: Well, just before we get into
22 that, which I do want to do, I just want to give

♀00123

1 Eric a chance to make an introductory remark.

2 MR. HARBESON: Well, actually, I wasn't
3 going to make an introductory remark.

4 I was going to respond to something that
5 Susan said. The 84 to 90 percent is -- well,
6 setting aside for the moment that that is still only
7 84 to 92 percent, is that 84 to 90 percent of the
8 creators or of the copyright owners? I don't
9 remember that statistic from the report.

10 And even -- and I'll let Tim respond to
11 that, but I also wanted to point out that that 84 to
12 90 percent is not -- as Sam said, is not all of the
13 recordings in existence. It's only from the data
14 set. There are many, many recordings that fall
15 under the pre-1972 sound recordings category that
16 the -- the set of all pre-1972 sound recordings that
17 neither the RIAA nor the A2IM represent. Those are,
18 as I mentioned, home recordings made on reel tapes.
19 This is a much bigger field than simply commercial
20 music.

21 So that's what I wanted to say.

22 MR. WESTON: And I did want to talk about,

♀00124

1 you know, separating these into date-limited sectors
2 possibly as a way to figure out where there is --
3 where there is works that we can identify or classes
4 of works where it can be identified that the record

5 companies that are represented here could
6 demonstrate that there is no or practically no
7 commercial activity or they are in a range where
8 it's only scholarly interest and things that
9 scholars really don't have an interest in.

10 I know that for pre-'23 recordings, I
11 remember there was an interview with someone from
12 the Packard Campus who was saying of all the Sony
13 recordings -- I guess that's pre-'25 -- of all the
14 Sony recordings that had been put up in National
15 Jukebox, the only one that had been continuously
16 infringed from the time it had been made was Caruso.
17 So it seems that there is a lot of room here for
18 compromise if we can carve out either along the
19 commercial -- noncommercial lines or along a
20 particular date-limited line.

21 And, Tim, I don't know if that --

22 MR. BENGLOFF: A lot more is coming into
♀00125

1 print. And to speak to Tim's comment, I'm not just
2 talking about '40s and '50s. One of the two trends
3 actually that I was talking about was jazz from the
4 '20s and '30s, and it has been out of print, but now
5 in the digital age, it's going to be easier to bring
6 it back, but someone wants to get a return on those.
7 And there's recognizable names and there is no
8 reason why someone shouldn't be able to do that.

9 And to Eric's comment about things that
10 like are not -- were never with a label, you know,
11 the way our agreements work, including some of the
12 old agreements are if you recorded during a certain
13 period, that belongs to the record label. Now, just
14 because it didn't possibly get delivered -- you
15 know, if you look at certain artists' agreements,
16 certain things do belong to the labels.

17 That all said, we want to give you access.
18 We want to preserve and we want to give access, but
19 we just don't want -- we want to have it for you,
20 someone who is working with the library, educational
21 institutions and things of that type.

22 MR. BROOKS: To answer Eric's question,
♀00126

1 since it's sort of hanging out there, the 84 percent
2 refers to the number of identified recordings of the
3 1,500 in the sample that we felt we could trace to a

4 current copyright owner. So it was a record, you
5 know, that Bert Williams' record or whatever the
6 record was, could we trace that to a presumed
7 current owner.

8 Now, presumed because we don't have the
9 legal records, and there could be some transfer of
10 rights and do-not-include rights, and all that kind
11 of stuff, but a reasonable person test -- that's
12 what the 84 percent was.

13 The matter that I brought up before of
14 periods, which I think is one that we need to
15 explore, I don't think many in our field are
16 concerned about the survivability of the Patsy Cline
17 records. I love Patsy Cline. I have several of
18 them myself, and I'm sure they will be around for a
19 long time and there were a lot of copies made. Our
20 concern is about recordings that are deteriorating
21 and are unique or very rare recordings, and you have
22 to get back a ways in many cases for that.

♀00127

1 So I do think particularly when you go to
2 the acoustic era, which is pre-1925, I doubt -- and
3 I could stand corrected on this -- but I doubt that
4 any of the deals that are being made today are to
5 get control of acoustic catalogs, even acoustic jazz
6 catalogs, for reissue purposes. There was very
7 little of that done in that period. It was like the
8 change from silent movies to sound movies. That was
9 a defining change point in the recording industry.
10 And as it happens, the 1923 cutoff that exists in
11 the rest of IP is very close to that 1925 cutoff for
12 acoustics.

13 So one of the things we're most concerned
14 about is actually something that we believe is
15 beyond the time period that you are referring to,
16 justifiably, for recordings that could have
17 commercial value today.

18 And I would love to discuss, if we could
19 parse the periods that way, what would be the
20 objections, what compromises could be reached, what
21 accommodations could be reached to make access first
22 to that period, and then we could talk about other

♀00128

1 periods.

2 MR. WESTON: Thank you.

3 Pat, you have a comment.

4 MR. LOUGHNEY: A couple of points. One is
5 to the notion of identifying rights-holders. Any
6 reference librarian at the Library, and I suspect
7 reference librarians around the country, who deal
8 with sound recordings will have many anecdotes about
9 their regular efforts to identify rights-holders and
10 to connect potential users with those
11 rights-holders, and that's a very crucial role that
12 librarians play is connecting a rights-holder with
13 the users, particularly when it gets to people
14 wanting copies of existing recordings. And that's a
15 tremendous problem.

16 So the current situation of the law is that
17 while the RIAA and A2M members -- A2IM members want
18 to keep things as they are because of the fear of
19 the chaos that would result if those recordings
20 pre-'72 were brought under federal law, the fact is
21 that that chaos exists now for libraries and
22 archives that deal with those recordings. We have

♀00129

1 lived with it since the '70s when those recordings
2 were brought under federal law, and we live with it
3 on a daily basis.

4 What we seek is a rational order for how to
5 deal with pre-'72 sound recordings. Because it is
6 not efficient, and as we ascend to a more
7 professional level of preservation and access, we
8 need to have that sort of clarification or we need
9 to have some more efficient working relationship
10 with the community rights-holders out there who, by
11 and large, generally -- and with the present
12 exception of Sony and Universal Music -- have fairly
13 well ignored the interests and the needs of the
14 research and the preservation community who
15 intercedes with users in the public.

16 The last point I would make is that the
17 role of archives in fact making these recordings
18 that have been obsolete or out of print available to
19 current generations of users has in fact been an
20 interesting and important point to spur new interest
21 in these formerly uninteresting recordings, or at
22 least the ones that were not thought to be

♀00130

1 commercially viable and had, therefore, then not

2 been made regularly available. And to me that's
3 something that I think we could explore going
4 forward as a positive benefit to both sides, the
5 rights holder community and the archive community
6 and the public for whom we're speaking here today,
7 is what do future generations need out of these
8 recordings, and I think that's a role that we can
9 play because I think the hits that we are getting
10 now on the National Jukebox shows that there is a
11 high level of interest in some segment of these
12 recordings which have been formerly widely
13 unavailable, and I think that we can learn a lot
14 from that data that we're learning from now. So I
15 would say that we could mutually explore that.

16 MR. WESTON: Sam.

17 MR. BRYLAWSKI: Yeah, two things. One is
18 about identifying rights-holders. And just to
19 clarify on what has been said, what Pat said, it's
20 unpublished things which are the most difficult.
21 And when a reference librarian in trying to advise a
22 researcher or a researcher themselves is looking

♀00131

1 into trying to legally clear materials, it could be
2 very, very challenging.

3 And may I refer you, basically, look at the
4 study that June Besek wrote for the National
5 Recording Preservation Board all on unpublished
6 recordings prior to 1972, and it's frightening all
7 the possible rights-holders that there might be that
8 we have no idea, because we're not privy to the
9 original contracts.

10 The other thing is that I'm encouraging you
11 also to look at not just the chronological segments
12 of pre-'23 or pre-'25 or pre-World War II, but to
13 look at the genres of music. My own -- the members
14 of the Society for American Music, they aren't
15 looking to see a body of work that's in print and
16 available to store for \$15 to be public domain.
17 They can afford the \$15 and they are happy for
18 that opportunity -- delighted by that opportunity.
19 It's the unbelievable numbers that aren't accessible
20 at all.

21 One of the largest of which and one of
22 which is coming under increasing study every year

♀00132

1 are what we call ethnic recordings, the pre-World
2 War II recordings that were made by major companies
3 and small companies that were marketed to immigrant
4 groups in the United States. Victor and Columbia
5 and many other libraries had lines of recordings
6 directed specifically to Ukrainian Americans, Jewish
7 Americans, Irish Americans, Serbian Americans and
8 Croatian Americans, a different series for each one
9 of these groups, and these are -- I believe I recall
10 in Tim's study that they are the smallest -- they
11 represent the smallest percentage of recordings that
12 are still in print.

13 Prior to 1965 -- well, I'm saying this for
14 the record, but I believe it's less than one percent
15 of ethnic recordings that are in print.

16 In my own research as someone who is
17 documenting the output of the Victor Talking Machine
18 Company and RCA Victor, the very first musical
19 theater recordings ever made were a representation
20 of going into a studio with an original cast and an
21 original orchestra and a composer to make original
22 cast recordings, I can't find them because they're

♀00133

1 ethnic recordings. They were made of lower east
2 side Yiddish musicals with a composer conducting. I
3 found one copy of one 78 of four sides made; the
4 other copy I have no idea where it is. It's
5 probably held privately. You know, it could be in a
6 private collection of someone who doesn't want to
7 donate it, or it may be entirely lost. But those
8 ethnic recordings represent the worst case, and
9 there are
10 other genres that are in Tim's study that are better
11 represented in print legally.

12 MR. WESTON: I would be interested in
13 hearing from some of the people representing
14 rights-holders. To the degree -- I mean clearly it
15 doesn't seem that anyone wants to admit that here is
16 some music that we can, you know, 99 percent
17 guarantee has no -- you know, we've recouped
18 whatever we are going to recoup at this point. But
19 to the degree that such a thing exists, what do you
20 think -- what is the solution for that? What is the
21 solution for providing access if, you know, there's
22 no remunerative motive for doing it but there is a

¶00134

1 lot of scholarly interest?

2 MR. ARONOW: Maybe I'm just repeating
3 myself, Chris, but the means are the types of
4 private agreements like the ones we have at the LoC,
5 the ones where we are exploring with other
6 institutions that I can't go into any detail on the
7 record, but I'm happy to discuss with you off the
8 record that make the costs of preservation and
9 access either minimal or at least bearable.

10 And who knows? As Pat was mentioning
11 before, there's plenty of activity around the
12 National Jukebox that suggests that anything that I
13 might off the cuff say, Oh, well, that is not
14 particularly commercial, a pre-1923 acoustic
15 recording. I mean if there were a million people
16 going to a website looking and listening, who is to
17 say?

18 MR. WESTON: What about for those
19 commercial recordings for which no current owner is
20 locatable?

21 MS. CHERTKOF: I think for those that --
22 realistically that the risk associated with those is

¶00135

1 fairly low. If something wasn't registered and --
2 if something was registered, it gives you a place to
3 start to track the owner. If you don't have that,
4 then presumably it wasn't registered. If it's not
5 registered, there's no statutory damages available.
6 And if you try to make some use of it and you get a
7 cease and desist letter, you can cease making use of
8 it. It just seems like -- I mean we know they are
9 out there, and there's a whole body of sound
10 recordings that aren't related to our member
11 companies' rights, but we think that the risk is
12 low.

13 And I guess the other point that I would
14 make is to echo a point that Eric made, which is
15 that perhaps the way to go at this is by looking at
16 state law reform.

17 MR. HARBESON: For the record, that was
18 Eric Schwartz, not me.

19 MR. LOUGHNEY: Well, to assume that it is a
20 logical approach to leave things as they are, and
21 to -- but yet craft a national plan to coordinate

22 and promote preservation doesn't work. To say that
♀00136

1 there has not been any lawsuit that anyone can think
2 of against an archive for use or for preservation of
3 a work does not make a rational business plan for a
4 publicly funded or a privately funded archive to go
5 forward.

6 I cannot for my staff or the general
7 counsel on the Library of Congress say that we want
8 to make this leap of faith that we start preserving
9 and make multiple copies beyond what the copyright
10 law currently says and make them more widely
11 available or more accessible because in fact I
12 cannot rationally do that. Due diligence prevents
13 it.

14 The other thing is that going state law by
15 state law still leaves the current chaos that we are
16 all experiencing in the archive world.

17 And in terms of identifying rights-holders,
18 I work in the Library of Congress. I have the
19 Copyright Office at my elbow. But actually
20 identifying information, getting a legitimate
21 copyright search or a credible copyright search done
22 in a timely manner or done in a way in which we

♀00137

1 maybe need hundreds in the course of the week is
2 just not feasible. There is a lack of staff and
3 resources to do that.

4 So there needs to be some sort of, I
5 believe, rational national playbook by which
6 archives and the rights-holders can go forward and
7 sort of identify what the ground rules are for
8 either access or public domain or whatever it is.
9 Because with the library having the immense
10 resources we do, we are hampered by many
11 difficulties. But for the less well-funded archives
12 centered in universities or historical societies or
13 colleges throughout the country, there is no hope.
14 This is a community that struggles and wastes a huge
15 amount of its resources just dealing with some of
16 these due diligence issues that can make an average
17 archive flounder or make them much less efficient in
18 terms of serving the public for which is the reason
19 why they exist.

20 So I just don't see -- I think it's a

21 disingenuous argument to say to leave it to state
22 law or we are good citizens, we are not going to sue

♀00138

1 you if you do something, but we will hold the right
2 to decide whether we can sue you or not. That's
3 just not a rational way to proceed in trying to
4 solve the problems in this area.

5 MR. BROOKS: If I could just add to that,
6 because I think it's an important point that hasn't
7 really been raised very much. One of the things
8 that came out of this study that certainly I wasn't
9 expecting was that, as Sam mentioned, the bottom
10 line figure was 14 percent of pre-1965 recordings
11 were available from the rights-holder, 22 percent
12 were available from other parties.

13 Well, who are the other parties? A
14 large -- and we didn't break it out, but a large
15 proportion, perhaps the majority of that, is
16 overseas labels, which obviously do not conform to
17 our laws and which all have much shorter protection
18 periods for recordings than we do. So you get the
19 recordings from England or you get them from
20 Germany. American money is sent overseas basically
21 to buy our heritage back. That doesn't help
22 companies locally. It doesn't help our economy.

♀00139

1 The rest of them are sub rosa -- they're by
2 smaller operators who simply either don't understand
3 the law, which as it is is widely
4 misunderstood, and think that these very old
5 recordings are public domain, or people who do their
6 risk assessment and think, Well, it's small, we
7 probably won't get sued for it, and do it anyway.

8 This goes back to Sam's point about respect
9 for copyright law. And I think it might be worth
10 having a discussion about the approach of continued
11 -- when there's clear violations and clear
12 misunderstandings and clear disrespect of copyright
13 law, is the answer to that to keep making it
14 tougher, keep making it tougher, keep making it
15 tougher? Or does that simply invite even more
16 resistance to it and more disrespect for it? Or
17 does it make sense to somehow rationalize it and
18 say, Look, there is no point in copyright law
19 covering things which are of no economic value to

20 us. We're just inviting more and more problems when
21 we do that. Let's parse this so it protects the
22 things that are valuable to us, Richard, the things

♀00140

1 that are important to your members and to your
2 members, and make sure those are protected and
3 covered, and that can recoup our investments, and
4 not muddy the waters by protecting acres and acres
5 of other things that are not of value to us which
6 make people wind up disrespecting everything.

7 Twenty-two percent, fourteen percent.
8 There is a lot going on out there which simply is
9 subverting or bypassing American copyright law, and
10 that is an issue too.

11 MR. WESTON: Gil, did you have something to
12 say?

13 MR. ARONOW: Well, I think I have to say
14 this is a personal observation rather than one on
15 behalf of Sony Music. But, nevertheless, it feels a
16 little bit as if we're both -- the rights-holders
17 versus the archivists here, rather than that
18 cooperative spirit that I was referring to earlier.

19 It seems to me that there is a bit of the
20 rights-holders saying, and I may be chastised for
21 characterizing it this way, but the rights-holders
22 saying, you know, We recognize that there are

♀00141

1 preservation and access issues for materials that
2 are not ours, at least not represented at this
3 table, that the archivists are trying to address.

4 However, our perception is a bit like you
5 are trying to use an axe that is federalization of
6 the pre-'72 sound recordings to do surgery.

7 And, conversely, I think maybe a little bit
8 of -- Tim, my perception of what you just said is
9 that our resistance to federalization is a bit like
10 using an axe to address the surgery you need done on
11 your end.

12 And so that -- my conclusion from all that
13 is that it brings me back to we need to have a
14 dialogue, maybe more off the record than on, about
15 are there -- and to your question, Chris -- are
16 there categories of things where there might be some
17 more flexibility? But, you know, that's going to
18 take some work.

19 MR. BROOKS: I couldn't agree more. I mean
20 perhaps there is a model in EMI's archive in Europe
21 which in fact is a public charity, and they have
22 turned over their historical masters to another

♀00142

1 organization in order to address some of the issues
2 that we're facing here. Maybe there is another kind
3 of model, but I would agree with you, that it would
4 seem there might be a way to reach some sort of
5 accommodation on this that accomplishes both sets of
6 goals.

7 MR. WESTON: Great. Eric Harbeson.

8 MR. HARBESON: I don't think that -- well,
9 first of all, I want to say that librarians and
10 archivists really do value and respect copyright
11 laws. As I mentioned earlier, we're not -- this
12 is -- our copyright -- our risk aversion to
13 litigation does not necessarily come from simply
14 risk aversion. It comes from we are trying to do
15 the right thing.

16 And as an example, I have heard several
17 cases of people within my organization who have this
18 idea of wanting to do something and then learned
19 about -- assuming that they could go ahead and do
20 some kind of digitization with pre-1923 recordings.
21 Pre-1923 is in the public domain, right? And then
22 they learn about this little, little provision that

♀00143

1 basically -- that makes that impossible to navigate.

2 So I don't think that we're really against
3 you. I mean, many of us are rights-holders
4 ourselves. Many of us are members of the RIAA.

5 I think what is going on is that you are
6 looking at the -- to Gil, if this is sounding to you
7 like using an axe to perform surgery, for me what --
8 the way I look at what we're trying to do maybe --
9 metaphors escape me -- but perhaps using a mister to
10 water a flower instead of a garden hose. You know,
11 something more delicate than trying to -- you know,
12 we could be arguing for a straight 50-year
13 neighboring rights. That's not really what we're
14 doing.

15 You know, Pat is looking for a -- I've been
16 hearing a lot of discussion about how we have risk
17 aversion and we have to -- maybe this is a very low

18 risk thing and we can go ahead and do this, and if
19 we get a cease and desist order, we stop. We need
20 something that will allow us to make case-by-case
21 decisions but that doesn't burden a system where you
22 have to get a hundred permission letters in the

♀00144

1 course of a week.

2 To me, this is sounding a great deal like
3 fair use. It's what's already available in the
4 federal law, and I may be anticipating another
5 panel, but I'm going to be here for all of them, so
6 I apologize in advance if I do that. But this is
7 sounding to me like what is already federally
8 available if I'm wanting to do a project involving
9 sheet music or photographs or maps or videotapes,
10 movies, all of these are subject to federal law
11 except for this particular sound recording.

12 So I don't think that this seems like -- I
13 don't think that we need an axe to work on the small
14 section of the law. I do think that if we could
15 rely on fair use, on a huge body of case law that
16 tells us what is fair use, you would find that
17 libraries would not be using materials that are
18 being commercially exploited in the same way that
19 they are -- would use things that we judge probably
20 will never have occasion to be commercially
21 available -- commercially viable. Something like an
22 oral history tape, for example, would be very

♀00145

1 likely, assuming that we have the release forms,
2 something that we would have a pretty good fair use
3 argument for, and so we might go ahead and do it.
4 It's not a -- we -- the fair use -- the fourth
5 factor would definitely be a deterrent from making
6 any substantial commercial use.

7 On the other hand, I do have to say that,
8 you know, that fair use is a very broad statute, and
9 it's good that way. There are ways that you can
10 make fair uses and make commercial fair uses. The
11 bar is just very much higher. And I don't think
12 that especially with libraries that we would see a
13 lot of commercial use, but it would make it easier
14 to. So...

15 MR. WESTON: Unless -- I have one more
16 question, but unless anyone has a response.

17 Susan.

18 MS. CHERTKOF: I was just going to respond
19 to the idea about state law reform, and it would be
20 totally possible to draft a model state law that
21 would address some of these issues that could
22 include state fair use rights, for example. And it
♀00146

1 would be something that libraries and archives and
2 rights-holders could perhaps get behind together and
3 shop it around from state to state.

4 MR. WESTON: And you could have music too
5 like a traveling road show.

6 MS. CHERTKOF: Sure. Sure. We could
7 have --

8 MR. HARBESON: With performing rights.

9 MS. CHERTKOF: And on the point of fair
10 use, I believe there is also at least one case where
11 there were state fair use rights found, and that
12 there's reason to believe if it ever came up before
13 a court that for equitable reasons that parallel
14 kind of fair use rights would probably be granted by
15 a court.

16 MR. LOUGHNEY: That begs the question,
17 though, that there is a leadership group or
18 organization who would be interested in traveling
19 and going to all
20 50 states to get that enacted, and how many years
21 would that take.

22 MS. CHERTKOF: Well, you could start with
♀00147

1 the key states, the states where there are big
2 holdings. Virginia would be a good one for you.
3 There are some major archives in major places.
4 California has a few archives. You could start by
5 identifying the five or ten states that are most
6 determinative in terms of where there's holdings and
7 then move it on from there.

8 MR. LOUGHNEY: Well, those resources are
9 beyond our capability completely.

10 MR. WESTON: Well, I wanted -- there was
11 one aspect of -- referring to sound recordings that
12 I just wanted to get people's reactions to.
13 Obviously because of the -- we have people from RIAA
14 and A2IM who generously participated in this whole
15 discussion. Our focus has been on commercial

16 recordings, but as far as the information I received
17 is that commercial recordings in terms of 372 sound
18 recordings are absolutely dwarfed in numbers by
19 noncommercial recordings, by which I mean recordings
20 that were not made -- I don't mean, you know,
21 sessions that were -- alternate takes or anything.
22 I mean things like field recordings, lectures,

♀00148

1 recorded sermons, recordings sent by family members
2 to soldiers, this sort of oral histories is a big
3 for example. I'm wondering how if people -- is this
4 something that just folds into the overall orphan
5 works problem or is there a way we can attack that
6 just from a sound recording angle?

7 MR. BRYLAWSKI: I think you'd have major
8 rights issues unless you were to literally recommend
9 -- Congress were to pass a law about them. In our
10 study, the greatest big body of ignored unpublished
11 sound recordings are radio recordings, off-air
12 recordings, and all the local stations that made
13 recordings that are sitting in closets, literally
14 you hear about them being found, and then even the
15 networks that have found archives and either donated
16 them to public archives or are still holding onto
17 them, my understanding is those are all unpublished
18 works. And given the number of trade unions
19 involved in the creations that might be owners of
20 them, I think it would be very difficult to find
21 those easier to deal with than commercial. I mean
22 the nice thing about a commercial recording is there

♀00149

1 might be only one or two rights-holders, the music
2 publisher and the record company. Radio is really
3 challenging.

4 MR. BENGLOFF: And that's a problem we have
5 today. In other words, we go to these digital sites
6 that are up there now, and they have a recording of
7 an artist playing in a bar in Texas that had a side
8 contract during that period with one of our members,
9 and those same songs are the same songs that they
10 are selling for a living. So it's -- but, again,
11 having people have access to these things, we're in
12 favor of that: Setting up some sort of master
13 library where people could stream the music and
14 listen to it online.

15 If somebody has the money to invest, as
16 long as we retain the right to release it, if in
17 fact we do have the rights given the example I just
18 gave you where they were signed to an agreement,
19 there were rerecording restrictions and things of
20 that type, and then all of a sudden it showed up on
21 Grooveshark because someone in the audience happened
22 to make a copy, that's bothersome to us.

♀00150

1 MR. HARBESON: Two things. One is I don't
2 think that you are going to find the ability -- even
3 with the Library of Congress being as enormous as it
4 is, it doesn't have unlimited resources. You are
5 not really going to be able to find a way to create
6 some one master library. The way that things are
7 being -- the large amounts of information that are
8 being processed now is not through single source
9 management but through more like crowd sourcing, if
10 you will.

11 If you have 500 libraries working on a
12 problem, you may have some duplication, but you will
13 get a lot more done. And you will access the unique
14 holdings that each has. Whereas, if you are aiming
15 for a master archives -- first of all, that is not
16 good preservation practice because you have to have
17 more than one -- I mean, it's not enough to have one
18 source working on a preservation problem. I mean,
19 that's one of the first things that you learn in
20 library school. Preservation classes.

21 Anyway, so I really think that the modern
22 world demands that we look at modern solutions, and

♀00151

1 the crowd sourcing aspect is one of those.

2 I don't remember the other thing I was
3 going to say. I'm sorry.

4 MR. WESTON: That's okay. I think Pat and
5 Susan will close us out for this session.

6 MR. LOUGHNEY: Well, I would just make the
7 observation that the creation of America's recorded
8 sound culture was an industrial-based operation or
9 activity of an enormous scale for a long period of
10 time, well over a century. And these individual
11 licensing agreements that we have with Sony and
12 Universal are marvelous and they are models that
13 need to be studied, but they only benefit the

14 Library in the sense of an institution. It leaves
15 out the other institutions represented here and many
16 others not represented here. So that's one point.

17 We have to think more broadly because
18 unless we can do that or find a solution that
19 touches everybody or benefits everybody in the
20 recorded sound preservation community, we will never
21 achieve a coordinated collaborative approach to
22 preserving this massive amount of material that has

♀00152

1 survived.

2 And I think that's the thing we need to
3 keep in mind that -- in my mind I can't see how
4 going by a state-by-state approach or leaving things
5 as they are will create an atmosphere, no matter how
6 much generosity there is by RIAA and A2IM members to
7 want to work and solve this problem, to leaving it
8 at this landscape of patchwork solutions across
9 America. I just don't see how it's going to support
10 or enable that kind of a collaborative solution that
11 we need.

12 MS. CHERTKOF: I wanted to make a few
13 points on the noncommercial recordings. The first
14 is that unless the proposal is that basically you
15 take and toss all of those into the public domain,
16 you are still left with a due diligence problem for
17 works after some date, wherever you want to draw
18 that line, so that doesn't eliminate the due
19 diligence problem.

20 I think also when you start talking about
21 is there a way to separate this into the stuff that
22 people care about and the stuff that people don't

♀00153

1 care about, you are just getting into a really
2 difficult line-drawing exercise. I mean how do you
3 draw that line? How do you come up with the
4 definitions? How do you know that something that
5 nobody cares about today doesn't become -- you know,
6 there's some rebirth of that genre five years from
7 now and you've taken those rights back.

8 And on the subject of orphan works, I mean
9 that's been kicking around for a while, and that
10 hasn't been easy. There are all kinds of different
11 factions there, and if that was an easy road to go,
12 that would have already been resolved.

13 And I guess the last point that I would
14 make is more of a kind of a constructive idea, which
15 is what about working on some sort of registries
16 here, you know, collectively between rights-holders
17 and libraries and archives where maybe libraries are
18 the ones that have to post what it is they want to
19 use or -- I don't know exactly how it would work,
20 but some sort of registry system or database of
21 stuff that people are looking for and want access
22 to.

♀00154

1 MR. WESTON: Thank you.

2 MR. CARSON: Let's ask people -- the
3 registry thing is an interesting idea. Let's let
4 that percolate over lunch, and maybe in the next
5 panel we can get some reaction to it, among other
6 things.

7 We're going to give you a full hour, so be
8 back here at 1:25. At least try to be back here at
9 1:25.

10 (Lunch recess.)

11 MR. WESTON: Welcome back from lunch,
12 everybody. We are going to get started with our
13 third session, getting into the meat of things here:
14 Effects of federalization on preservation, access
15 and value of sound recordings.

16 As before, we are going to start by going
17 around and asking people to give brief one- or
18 two-minute overviews of their opinions on this
19 topic, but we also have two new people who haven't
20 spoken yet, so we're going to give them a little
21 longer to introduce themselves and explain their
22 interest in the topic.

♀00155

1 First, we have Brandon Butler from the
2 Association of Research Libraries.

3 MR. BUTLER: Thanks for having me.

4 The Association of Research Libraries has
5 126 members of -- you know, our members are North
6 American research libraries. They are mostly in
7 universities, but they are also people like the
8 Library of Congress and the National Archives, the
9 National Library of Medicine.

10 So, I guess, our position in a nutshell is
11 that federalization is not just an end but a

12 process, and that we should consider not just sort
13 of what ideal world we would like if we could change
14 federal law any way we like, but also what could
15 happen if we start talking about changing federal
16 law, and what alternatives might be available.

17 So those -- we will talk more about the
18 alternatives in a panel tomorrow.

19 But let me say a little bit about federal
20 law. So what is wrong with federal law? What are
21 the risks of federalizing protection for sound
22 recordings? There are a few, and the biggest one

♀00156

1 that really looms for us is statutory damages.
2 Federal statutory damages are enormous, they can be
3 enormous, and they change the risk calculus for
4 institutions. They inflate the risks significantly,
5 so that it is very difficult to weigh the advantages
6 of going forward in a rational way. Because it's
7 very difficult to say is saving this wax cylinder
8 worth the kind of -- you know, the odds of someone
9 coming forward as the owner of the wax cylinder are
10 slim, but if that person comes forward, it could be
11 like a bet-the-institution kind of problem because
12 we do big projects in our institutions, we digitize
13 lots of stuff, and so we could face really big
14 litigation with really big damages. That's the risk
15 that we perceive because of statutory damages.

16 In this context the exceptions to statutory
17 damages are narrow. So 504(c)(2) only covers
18 reproduction, not distribution and not public
19 performance. So if we want to stream, even if we
20 have a colorable fair use argument, if we are wrong,
21 we can't point to 504(c)(2) and say, Remit our
22 statutory damages.

♀00157

1 It is great to hear earlier Eric Schwartz
2 from the RIAA say that state law is really nice in
3 this respect that it tailors damages narrowly to fit
4 the offense rather than the way the federal law
5 tailors remedies or doesn't tailor remedies, and so
6 ARL has come out with a separate statement generally
7 saying that we would like to see statutory damages
8 with respect to libraries phased out, and we're
9 certain we will hear from the RIAA in support of
10 that. So statutory damages are there.

11 And the other problem with federal law is
12 that specific exceptions are narrow and hard to
13 navigate within. So Section 108 has been the
14 subject of lots of discussions in this building even
15 about how outdated it is, how can we change it.
16 And, you know, lots of commentaries -- in our reply
17 comments, we tried to point out that a lot of the
18 folks in this proceeding have said that Section 108
19 as it is now is not acceptable, that they want as
20 part of the reforms to this -- to federal law to get
21 better exceptions to copyright law generally, not
22 just to say apply federal law to sound recordings

¶00158

1 from before February 1972, but change copyright law,
2 change the exceptions so that they are better for
3 us, because right now they are not good.

4 Mr. Loughney in his comments said it would
5 be malpractice in some cases to follow Section 108
6 in the sense that it can require waiting until
7 something is already damaged before you start trying
8 to preserve it, which is very puzzling indeed. So
9 the specific exceptions that many people are saying
10 is -- are very good reasons to want federal
11 protection, those same people are saying that they
12 are not good enough and they should be improved.

13 So we're worried about those aspects of
14 federal law. Federal law brings statutory damages;
15 federal law brings not so great exceptions. Federal
16 law does bring fair use, but we're actually -- and
17 we will talk about this in detail tomorrow -- but I
18 think there's a fairly strong argument to be made
19 that state law should have fair use as well, that
20 the constitutional foundations for state law are --
21 the constitutional foundations for fair use are
22 sufficiently robust that any state would have to

¶00159

1 recognize a fair use exception to its common law
2 copyright.

3 So federalization has those problems.

4 And then, again, federalization is a
5 process. So it is a process where groups -- a group
6 like this is going to be assembling again and again,
7 whether it be here or in legislative offices, and
8 talking about what should be the right
9 federalization regime, what should be the right

10 statutory changes, and there's little reason to be
11 confident that that process is going to yield an
12 exciting and useful result.

13 Here lately, these processes have fallen
14 short. Section 108 is sort of -- did not -- it
15 issued a report that I think the consensus is it
16 hasn't been able to move forward since that report.
17 The orphan works -- the work on orphan works
18 similarly kind of came to loggerheads. So, you
19 know, why do we think that this will work out much
20 better?

21 And it's clear that folks on the
22 rights-holders' side feel pretty strongly that
♀00160

1 federalization would significantly disrupt their
2 business. And so what is the negotiation going to
3 look like if we tried to get federal protection? I
4 don't think that -- I worry that it will be more
5 like the TEACH Act, which again there is pretty good
6 consensus in our community that the TEACH Act has
7 not worked out very well, that the limitations and
8 the sort of Byzantine structure of the TEACH Act
9 makes it so that fair use ultimately winds up being
10 the real basis for most policies because the TEACH
11 Act is very hard to follow.

12 So buyer beware. We strongly support
13 preservation and access to this material, but we
14 think that there's got to be an alternative, and we
15 look forward to talking about alternatives in
16 another panel.

17 MR. WESTON: Thank you.

18 And we also have Adam Holofcener, if I'm
19 pronouncing that right, from the Future of Music
20 Coalition.

21 MR. HOLOFCENER: The Future of Music
22 Coalition is basically a research advocacy group for
♀00161

1 working musicians based here in Washington, D.C.,
2 but we kind of deal with the political necessities
3 for all working musicians domestically.

4 We kind of have two points that we really
5 would like to focus on. A lot of it is sort of
6 joining the great research and study and thought of
7 others at the table here, but basically we feel that
8 sort of streamlining sound recordings so that

9 copyright law can be uniformly applied is beneficial
10 for those institutions such as those that are
11 preserving our cultural heritages, such as
12 libraries, archives, universities.

13 And, two, that enhanced access to American
14 musical culture captured on fixed medium means
15 greater artistic enrichment for today's creators and
16 new opportunities for rights-holders.

17 Basically, I think we do understand that
18 the process that Brandon was just talking about is
19 much more complicated than just sort of switching
20 things over so that the institutions that have kind
21 of always held sway over archiving the products of
22 our national heritage to just do that for pre-1972.

♀00162

1 Sound recordings is complicated, but we do think
2 that the process of federalization could as long as
3 certain of the niceties of the situation are sort of
4 handled gently, which whether they can be or not is
5 unclear, through fair use and other exceptions, I
6 think that we generally support federalization in
7 that area.

8 Number two -- and that just sort of
9 addresses the streamlining of our copyright law.

10 Number two, you know, musicians -- the
11 process of creation has sort of always involved an
12 interaction with our past cultural objects, and then
13 sort of the creation and consumption of new options,
14 and we feel very strongly about every working
15 musician's copyright in that that goes towards both
16 parts of their musical products, and we definitely
17 understand the allegations that the rights-holders
18 communities have against damaging in any way that
19 constituency's rights. And while we feel strongly
20 for that, we also feel strongly that the balance be
21 properly struck between the limited monopolies of
22 the creators of sound recordings and the public

♀00163

1 access.

2 And a lot of the works I think we are
3 talking about to really sort of build the sonic
4 landscape that sort of the media world that we are
5 dealing with right now, especially from the internet
6 age, is really built on that, so we want to make
7 sure that people do have access to that in a way

8 through studies done by Tim Brooks that I think not
9 enough of those works are reaching out to the public
10 in general.

11 So that's basically our stance.

12 MR. WESTON: Thanks.

13 So as before, if we could just get a
14 statement, a brief statement, one or two minutes,
15 from everybody else on the panel, hopefully
16 addressed specifically to what we anticipate would
17 be the effects, good, bad or indifferent, of
18 federalization on activities of preservation and
19 access and the commercial value of the sound
20 recordings to the rights-holders.

21 So anyone can go who wishes to.

22 Okay, Pat, thanks.

♀00164

1 MR. LOUGHNEY: Well, I would briefly say
2 that in terms of preservation and access, the
3 bringing of pre-'72 sound recordings under federal
4 law would create a uniformity of rule and regulation
5 and practice that would benefit the nation's
6 preservation organizations.

7 Through a series of mandates, Congress has
8 centered the national library, the Library of
9 Congress into the role of national leadership,
10 particularly in the area of sound recordings and
11 motion picture preservation. And I cite again the
12 National Recording Preservation Act of the year 2000
13 mandating not only the study but the national plan
14 that we're now working on.

15 I think if we're going to look at the
16 landscape of American recording preservation, if we
17 are actually going to truly create a collaborative
18 working relationship among many different types of
19 institutions, all of whom are engaged in recording
20 preservation, it is essential that there be some
21 basic ground rules by which all know what their
22 obligations and due diligence issues are in relation

♀00165

1 to public access and to preservation. We now know
2 that in fact some of the rules in terms of digital
3 preservation that is allowed is a real barrier to
4 true preservation in the major archives.

5 In terms of access, because of the lack of
6 clarity in law, under the present circumstance, the

7 burden is largely on the archives to sort out the
8 rights issues and the rights-holders and to try to
9 stay within the boundaries of the law but also
10 fulfill their mandate to provide public access.

11 In terms of value, I don't profess to be an
12 expert in this area, but I do say that the archives
13 have in fact by their efforts to sustain this kind
14 of material, to preserve it and to make it
15 accessible within the limited scope of -- that the
16 law does allow, which the Library allows in the
17 recording sound reading room and other uses, that it
18 has in fact in a very limited but effective way
19 connected succeeding generations of users to at
20 least the cultural value of this kind of material,
21 and I think even in rare instances of commercial
22 value.

¶00166

1 I'm thinking of a recording that was
2 discovered by a staff person in our music division
3 of a jazz performance that was recorded on Armed
4 Forces radio, I believe, that was released by Blue
5 Note Records and sold, according to Bruce Lundvall,
6 over almost a half a million units. In other words,
7 it was a commercial success, it went back to a
8 label, they issued it, and that was a real
9 commercial benefit. And to me that's a direct link
10 to the archival, A, discovery of an archive and
11 making it available to a rights-holder.

12 So to me there is an effect by the archival
13 preservation in the public sector to the benefit of
14 the commercial sector, and I think that is something
15 that could grow in the future.

16 MR. WESTON: Thanks.
17 Richard.

18 MR. BENGLOFF: Yeah, I wanted to ask a
19 couple of questions, if I may. Is that within
20 the --

21 MR. WESTON: I think we're trying to --

22 MR. BENGLOFF: Chris, I will save my

¶00167

1 questions.

2 MR. WESTON: Thank you.

3 MR. BROOKS: It's quite interesting that
4 the objections -- some of the objections we hear
5 from both sides, from the ARL and the ALA, and from

6 the rights-holders' side are rooted in fear of what
7 might happen. And that's an understandable fear
8 that, you know, any kind of change that you propose
9 or that anyone proposes is always something that you
10 have to be worried about.

11 I come out of the entertainment business
12 world myself, the television industry, and you
13 always approach change cautiously, but that doesn't
14 mean that you don't change, because if you don't,
15 the waves tend to roll over you and, you know, you
16 are worse off than when you began.

17 Clearly, I think we have to agree on one
18 thing, and that is that the current state of
19 copyright law is causing significant problems to our
20 national heritage. That was documented in multiple
21 studies, and to say otherwise is a little hard to
22 defend.

♀00168

1 What the solution -- and most of our
2 friends on both sides of the aisle have said that
3 they would support preservation and access, and they
4 are willing to work towards that -- I think that means that in some
5 sense there is an issue that has to be addressed
6 somehow. Obviously, there are differences in how it
7 should be addressed, but we can start with that
8 agreement.

9 If that is the case and if in fact those
10 problems stem not just from the pre-'72 issue but
11 from a whole nest of issues that have to do with
12 updating our copyright laws to meet the modern
13 realities of digital preservation, and the kinds of
14 things that Patrick was talking about, then perhaps
15 a recommendation needs to take into account that
16 some major issues regarding this particular area of
17 IP law, of sound recordings, are something that
18 Congress should look at.

19 To say let's keep the current system
20 because we are afraid that changing it might be bad,
21 where does that get us in 10 years or where does
22 that get us in 20 years? I mean it will only get

♀00169

1 worse. It can hardly -- it's hard to imagine a
2 situation where it gets better if it's been getting
3 steadily worse for the last 30 years with the
4 changes in technology.

5 So I would love to work together or have
6 the two sides work together on creative ways to do
7 that which is acceptable, if not loved, by both
8 sides. That's what compromise is. It's giving up
9 something and getting something in return for it.
10 But I don't think that starting from the premise
11 that nothing can change or nothing should change in
12 the basic state of the law, that kind of ignores
13 what is rather blindingly obvious from what we have
14 been hearing from multiple sources here that there
15 is an issue.

16 So let's talk, and maybe it's segmenting,
17 as I said earlier, by time period where we can't
18 agree on Patsy Cline but we can agree on 1895
19 cylinders and not conflate the two, or maybe it's
20 another approach. But we do need to address it, and
21 I would hope in any report that comes from this that
22 it not take too narrow a look at this.

♀00170

1 It's an issue -- it's narrow in the sense
2 that it's sound recordings, it's not other types of
3 IP, but within sound recordings there are some
4 specific problems that Congress has not addressed.
5 And when it has passed laws, it has not had
6 hearings, not had studies, it has not really focused
7 on this area, and it's an area that perhaps even
8 more broadly than pre-'72 needs to be brought to the
9 attention of Congress.

10 MR. WESTON: Dwayne.

11 Before Dwayne speaks, I just want to ask a
12 question. We can forego the one- or two-minute
13 opening statements if people want to get right into
14 the discussion. Unless there are others who want to
15 make --

16 MR. CARSON: Those who would like to make
17 an opening summary -- okay. You've got a few
18 people.

19 MR. BUTTLER: I think that Brandon laid
20 down a very good cautionary tale about the
21 possibilities of federalizing these kinds of works.
22 I don't know -- and I think at the core of that

♀00171

1 question really is can we define usable uses in some
2 sense right, so whether it comes through
3 federalization or some sort of other framework, it's

4 really can we clarify how these kinds of works can
5 be used in meaningful ways.

6 And I don't think that -- one of the
7 answers this morning was something like the fact
8 that no one has been sued seems to clarify the use,
9 and I don't think the lack of the threat of
10 litigation really is a good model. I think we
11 really need to look at framing some kinds of users'
12 exceptions. So if it becomes a federalization
13 principle, then I think that you need to look at
14 other areas of 108 and those kinds of things that
15 might be affected in that context, and you may need
16 to refine those in some way.

17 You know, the limitation in 108 about
18 digital copies and premises is a fundamental problem
19 in lots of ways, and I think if you are going to
20 look at sound recordings and changing that notion of
21 how those are preserved and accessed, I think you
22 need to possibly look at exceptions that will

♀00172

1 parallel this sort of new kind of framework. And
2 that's not novel to me. I think that is something
3 that Kenny Crews had mentioned in his comments.

4 I also think that having that coherent
5 understanding of the law, consistent with what
6 Patrick had said, really will help make that happen,
7 right, because it really is trying to resolve a
8 problem that is there. And as Tim pointed out, this
9 problem is there, and we can't ignore the problem.
10 And really the question is, How are we going to
11 resolve that in some legal sense?

12 The value part of the equation, I want to
13 say a little bit about that because I look at the
14 value -- you know, the National Jukebox must be
15 tremendously valuable because so many people wanted
16 to look at it right away, and whether that's an
17 economic quantification of value or not, I don't
18 know in that sense, but I do think it has tremendous
19 value, and I think the constitutional framework of
20 copyright really is not just an economic model.
21 It's really moving social policy forward; otherwise,
22 there wouldn't be limited durations and there

♀00173

1 wouldn't be some other kinds of limits that are put
2 on copyright law. So that is my two minutes.

3 MR. WESTON: Thanks.

4 Peggy.

5 MS. BULGER: Yeah, I just wanted to make a
6 couple of observations. The most obvious one is
7 that we keep hearing that the rights-holders are
8 comfortable with the way things are, and we keep
9 hearing from the other side that those of us who are
10 the custodians of culture and organizations are not
11 comfortable and, in fact, very uncomfortable.

12 So I think that we've got to have some kind
13 of change. We are not going to just have the status
14 quo because one side feels like, Well, I'm
15 comfortable, don't change it.

16 We have some real, real issues because I
17 think that the range of materials that we're trying
18 to protect and we're trying to preserve and have
19 access to is extremely wide, and I do go back to the
20 fact that it's apples and oranges in many cases, but
21 I think that we can grapple with it. We are all
22 adults.

♀00174

1 And I think this patchwork of state laws
2 may work for some cases, but I know that on the
3 international level that is not going to cut it. A
4 lot of the piracy that is happening is happening
5 internationally. You go to the international forum,
6 UNESCO, at WIPO, they are not going to listen to
7 Alabama. They want the United States government to
8 have a position. And if we don't have a position,
9 we are really a lot weaker than the other people at
10 the table.

11 And so to keep saying, Let's just patch it
12 together with the states, I just don't think that's
13 going to work, and we really do have to think about
14 a balance between the rights of the rights-holders
15 and very robust cultural comments, and we're talking
16 about patrimony for the American people.

17 MR. WESTON: Sam.

18 MR. BRYLAWSKI: In terms of value, I mean
19 our position is again that a public domain is a
20 value to citizens, and I think it also serves to
21 generate more respect for copyright law than is
22 being exhibited today, by not just the public but by

♀00175

1 people at this table.

2 I mean if you've heard how many times
3 people have said on both sides of this issue or all
4 the different sides that we would rather have it the
5 way it is because the official law from contemporary
6 materials doesn't work for preservation, that's
7 rather appalling, I think.

8 In terms of the value of materials if there
9 were federal law, I think it's been said here, but
10 when the Society of American Music is part of the
11 historical recordings, copyright access proposals or
12 HR cap, and one of them is is to have a performance
13 right for sound recordings which pre-'72 recordings
14 do not enjoy now.

15 So I mean I'm surprised by the stance
16 against federalization in terms of just ignoring the
17 fact that there are -- there would be a lot of new
18 money coming to companies, which I presume is maybe
19 sometimes being given to SoundExchange now but would
20 have to be under federal law. There would be more
21 force in fighting piracy, I would think, under
22 federal law than there is now under state law.

♀00176

1 But at the same time preservation is served
2 by public domain because we've seen that archives
3 are doing most preservation, they require access
4 agreements to make the materials accessible. And
5 also public domain just means more copies out there
6 and under this sort of now traditional philosophy of
7 copyright locks lots of copies, keeps stuff safe, to
8 have a lot of copies in different hands is very good
9 for the preservation of our culture.

10 MR. WESTON: Thanks.

11 Yes, Susan.

12 MS. CHERTKOF: First, let me say that I
13 would agree with Sam that performance rights for
14 sound recordings would be a very good step forward
15 in terms of the law of sound recordings.

16 As far as the topic for this panel, I just
17 wanted to emphasize on the economic value -- well,
18 let me start by saying, as we've said before, we are
19 in favor of preservation and access and finding some
20 way to work cooperatively with everyone here to
21 bring those goals to fruition, but I do want to
22 emphasize that on the economic value point of view

♀00177

1 that we would have concerns that federalization
2 would negatively impact economic value, and anything
3 that was thrust into the public domain, obviously,
4 would lose all or close to all of its economic value
5 instantly.

6 And all of the legal uncertainty and what
7 we think would be litigation and other sorts of ways
8 of sorting out how to deal with things like
9 ownership and authorship and term and all that, it
10 just detracts from the economic value of the rights.

11 MR. WESTON: Yes, Eric.

12 MR. HARBESON: So as far as the -- I wanted
13 to address the -- all three points: Preservation,
14 access and value.

15 The preservation benefit I think to
16 federalization would be in the uniformity, and we've
17 talked about that quite a bit.

18 The availability of uniform laws would make
19 it much easier to engage in larger preservation
20 projects. It would allow people to proceed
21 confidently with projects knowing that they are
22 following the law, which librarians frankly really

♀00178

1 want to do.

2 The access value, there -- I mean
3 obviously, as I've said before, it's difficult to
4 separate preservation from access, but one thing
5 that is I think strictly an access value which would
6 help libraries actually would address Section 108.

7 Five years ago, whenever the last
8 Section 108 roundtable was in Chicago over 108(d)
9 and (e), I was in Chicago advocating that 108(i) not
10 -- that we drop 108(i). Well, 108(i) is interesting
11 in that it allows -- it excludes musical works from
12 108(d) and (e). It does not exclude sound
13 recordings. So one thing that it would allow is for
14 libraries to make copies under 108(d) and (e) for
15 works -- sound recordings that are copyrighted but
16 are where the works are in the public domain.

17 So, for example, right now we can make
18 copies of the Dohnanyi recording of Beethoven's
19 Ninth by the Cleveland Orchestra. Under 108(d) and
20 (e), as I understand it, because while the sound
21 recordings is copyrighted, the work is not, and so
22 108(d) and (e) would be available to us. This is

¶00179

1 not the case with the George Szell recording of
2 Beethoven's Ninth because it's not under federal
3 law.

4 And I do want to speak quickly to the value
5 of the recordings. First of all, I don't really
6 think that a recording loses all of its value
7 when -- even if it enters the public domain. What
8 it does is it -- I will grant you that there is no
9 monopoly right -- there is no monopoly benefit to
10 it, but you can still make money as Penguin Books,
11 Dover Music, Dover Books demonstrate. You are
12 making money off of public domain material. So it's
13 not -- I mean I will grant that you lose some value,
14 but I don't think that it loses all value.

15 What you may lose from the public domain --
16 things entering the public domain you would gain by
17 increased access. The rights-holder, perhaps the
18 former rights-holder, may not gain all of that value
19 back, but the public would gain immeasurably by
20 having increased research into materials that had
21 previously been forgotten. That increased access
22 increases value to society, if not just for one

¶00180

1 rights-holder.

2 MR. WESTON: Thanks.

3 Who has not spoken? Richard.

4 MR. BENGLOFF: I just had two comments, and
5 then I have a bunch of questions which you told me
6 to hold.

7 What?

8 MS. CHERTKOF: Push your button.

9 MR. BENGLOFF: Oh, sorry. Excuse me.

10 I have two comments, and then some
11 questions which I held while other people made their
12 opening comments.

13 What my comment is, given Patrick's
14 description of the limited resources, I could tell
15 you the effect of federalization is a lot of the
16 titles that are being put out through my community,
17 which is over 80 percent of the releases, won't come
18 out anymore because there won't be any payback the
19 way we contemplate, especially after hearing this
20 last round of comments by your side.

21 And I just have a comment. We also see

22 ourselves as investors and custodians of culture,

¶00181

1 very active investors and custodians of culture, so
2 that line of separation, if my community had heard
3 you define the groups that way, they would have been
4 a little bit put off because -- I'm just telling you
5 because that is how they spend their day. That was
6 my introduction, their love of music. They are not
7 making money on my side of the table.

8 MS. BULGER: I'm sorry. I didn't mean to
9 intimate that seem --

10 MR. BENGLOFF: That's okay. I think it's
11 important.

12 Adam, my question for you, and I'm just
13 going to fire off a bunch of them because I'm sort
14 of -- the tenor of this whole thing has changed
15 quite a bit since this morning, since lunch, at
16 least from my perspective. Just sitting here. I
17 was minding my own business.

18 Adam, I looked at your website and, you
19 know, it's funny because highlighted was getting
20 another bite of the apple, so culture was in your
21 website, Christian Thompson's piece was not the
22 highlight. The highlight was artists getting

¶00182

1 economic gains by getting another bite of the apple,
2 which means obviously your position on work for hire
3 is clear.

4 I'm just going to go through them all if I
5 can.

6 Dwayne, you brought up this morning that
7 streaming is not enough, and you followed it up that
8 you wanted to have usage --

9 What? Oh, I'm sorry if I mixed up the
10 people. Thank you. Same community. And you wanted
11 to use --

12 MR. BUTTLER: We all wear the same socks
13 too, by the way.

14 MR. BENGLOFF: 10 to 13, I wear the same
15 ones.

16 You said you wanted to use the music in a
17 meaningful way, and we're thinking of streaming.
18 Are you guys contemplating mash shops or something?
19 I mean what exactly do you plan to do with this
20 music that streaming is not sufficient? I'd just

21 like to know --

22 MR. BUTTLER: Which guys are you talking

♀00183

1 to?

2 MR. BENGLOFF: Well, I'm talking to you in
3 this particular case, because you're the one who
4 said,

5 I want to use music --

6 MR. BUTTLER: It could be either one or
7 both or neither, so I don't know.

8 MR. BENGLOFF: Well, we object to certain
9 uses of the music if --

10 MR. BUTTLER: I gathered that.

11 MR. BENGLOFF: Yeah. No kidding. Well,
12 it's been rapid fire since I've been sitting here.

13 Public domain was mentioned once this
14 morning. It's now been mentioned six times since we
15 came back from lunch.

16 A lot of copies is a good thing. By the
17 way, if you want to put in a new law, let's put the
18 AM/FM not just on pre-'72 for people who aren't
19 paying, and --

20 MR. BRYLAWSKI: I'm sorry, what was that?
21 I didn't understand what you just said.

22 UNIDENTIFIED SPEAKER: He wants AM/FM.

♀00184

1 MR. BENGLOFF: Yeah, AM/FM -- royalty for
2 AM/FM radio play. Performance rights. I thought --
3 you said people who aren't paying on pre-'72.
4 There's people not paying on any pre, post or any
5 royalty at this point, the way you defined it.

6 MR. BRYLAWSKI: Oh, I meant there was no
7 performance right on the law for anything that
8 wasn't under federal law.

9 MR. BENGLOFF: So, I guess to circle back,
10 Dwayne, I guess the question is, What is a
11 meaningful way?

12 Adam, this other bite of the apple seemed
13 to disappear from your presentation and, you know,
14 this public domain being a -- you know, I just found
15 a real shift in the -- it was sort of a
16 give-and-take conversation this morning. I've been
17 sitting here quietly since lunch until a second ago,
18 and this doesn't seem like what I came down this
19 morning for in terms of the conversation.

20 Just sharing. Thanks. Go ahead.

21 MR. BRYLAWSKI: Yeah, just in terms --

22 MR. BENGLOFF: I didn't ask you the
♀00185

1 question. I asked them the question.

2 MR. BRYLAWSKI: But you quoted me and
3 attributed it to them.

4 MR. BENGLOFF: And I corrected myself, Sam.
5 I said used in a meaningful way, and I wanted Dwayne
6 to define what "in a meaningful way" was.

7 MR. WESTON: Okay. I think Adam has the
8 floor now.

9 MR. HOLOFCENER: Yeah, I think that in
10 terms of having another bite of the apple, there --
11 I think as Tim was mentioning earlier, there is a
12 large swath of sound recordings that are involved in
13 sort of the pre-'72 process. And a lot of the
14 access that we're talking about involves sound
15 recordings I think that don't involve certain
16 artists getting another bite of the apple, and it
17 might be a little bit difficult, although
18 interrelated, to sort of conflate -- you know, I
19 guess you're talking about the termination and the
20 other bite of the apple that we would like -- and
21 also to make sure that if there was federalization
22 that termination as it exists right now as we're

♀00186

1 figuring it out in the federal law does apply to
2 those works. But I think that it's not for all
3 sound recordings that that would necessarily apply,
4 and we would want those different sections of sound
5 recordings to be handled sort of based upon their
6 particular niceties.

7 MR. WESTON: And, Sam, you had your hand
8 up.

9 MR. BRYLAWSKI: Yeah, well, two things.
10 I've mentioned public domain several times. If it
11 was six, I will make it seven or eight now.

12 But public domain as -- under anything but
13 a sound recording would be everything prior to 1923,
14 and 1923 would go into the public domain in either
15 2018 or 2019. I always get that mixed up. So this
16 isn't like throwing everything we love and make
17 money from and throwing it away.

18 But I mean this sincerely, I would really

19 like to hear more from Richard on how if there were
20 federalization and whenever -- I don't know whether
21 there is such a thing as partial federalization, but
22 let's just say if sound recordings fell under the

♀00187

1 same laws that printed music did, how is it that
2 your members would not make money from reissues?

3 We're not talking about 1922, I will give
4 you that, that those thousands of reissues you have
5 of 1922 you might lose, but from 1923 on, I'm
6 serious really about that part. It isn't the intent
7 of any one of the archivists and librarians and
8 scholars that I represent to deprive a company of
9 some substantive income stream. So where would you
10 lose that?

11 MR. BENGLOFF: I guess I'm trying to
12 understand. The impression I got from these people,
13 especially Eric H, was he wasn't just looking
14 at 1923. Was I incorrect?

15 MR. HARBESON: In what way?

16 MR. BENGLOFF: The transaction you
17 described in --

18 MR. HARBESON: In our comments we actually
19 recommended putting pre-1923 recordings into the
20 public domain, and then vesting a 95-year copyright
21 term to everything 1923 and after. We did concede
22 that --

♀00188

1 MR. BENGLOFF: So that would happen pretty
2 soon for anything in '24 and '25.

3 MR. HARBESON: We did concede that having
4 inconsistent terms would be inconsistent with our
5 proposal, because one of the things that we were
6 observing in our comments was that a work written in
7 1940 would -- whose author -- written in 1940 whose
8 author -- no, not whose author -- written in 1940
9 who went through the proper formalities would have a
10 95-year copyright term, and a sound recording, say
11 an audio book of that book that was recorded the
12 same year would have a 127-year copyright term.

13 So because we're arguing for parity with
14 other media which enjoy -- this is really only
15 pre-1972 sound recordings, remember, that have this
16 special treatment, we did concede that inconsistent
17 terms would be inconsistent, so we suggested that

18 possibly having a 95-year term for all pre-1972
19 sound recordings might be the way to go.

20 MR. BRYLAWSKI: So that's the same thing I
21 proposed.

22 MR. BENGLOFF: Oh, 95 years from which
♀00189

1 date?

2 MR. HARBESON: That is something that we'd
3 have to --

4 MR. BENGLOFF: Well, Sam, that is my point.
5 You're not -- you keep throwing back to me 1923, but
6 you are not speaking for the rest of --

7 MR. WESTON: We're going to have a session
8 on the potential term of protection tomorrow and we
9 will be able to get into that fairly in depth.

10 MR. BRYLAWSKI: No, it's not too bad. I
11 don't stand to represent everyone at the table,
12 while you don't represent everyone at the table.

13 MR. BENGLOFF: I certainly don't. I was
14 asking him questions. That is why I wasn't asking
15 you the question.

16 MR. BRYLAWSKI: Okay. But now I'm asking
17 you a question because you made the statement, and I
18 heard it with the same ears everyone else did: If
19 there was a 95-year term from fixation, so let's
20 say, as I said earlier, pre-1923 would be in the
21 public domain, but 1923 wouldn't go into the public
22 domain until 2018 or 2019, and then it preceded each

♀00190

1 year, how does that make reissues by A2IM non --
2 unprofitable? That's my question.

3 MR. BENGLOFF: I don't -- you are making an
4 assumption that, all right, since I discussed
5 certain things we were willing to before, that
6 becomes your starting point for negotiations.

7 MR. BRYLAWSKI: I'm not negotiating. I'm
8 trying to get you to elaborate on what you said.
9 You made that remark. You said --

10 MR. BENGLOFF: No, no, you said earlier --

11 MR. BRYLAWSKI: No, you made that remark
12 and said --

13 MR. BENGLOFF: In your opening remark in
14 this session, Sam, everyone -- as you say, everybody
15 heard, just like you said, Sam --

16 MR. BRYLAWSKI: Go on.

17 MR. BENGLOFF: -- your remark was, Well, it
18 seems like you at A2IM are willing to do this -- You
19 didn't say A2IM, but you gestured -- and then using
20 that as a start, we could discuss -- and not
21 everyone will be happy with everything on both sides
22 of the thing, you know, that was your discussion.

♀00191

1 And I'm saying you can't piecemeal it that
2 way, Sam. As far as -- one of those catalogs I told
3 you can't have a deal does have a certain
4 transaction date. And I don't know your background,
5 quite frankly. I didn't read your bio.

6 MR. WESTON: Well, you know what,
7 Richard --

8 MR. BENGLOFF: He asked me. He asked me.

9 MR. WESTON: -- I think all of these -- all
10 of the various options of slicing and considering
11 some things apart from others and terms, everything
12 is on the table here.

13 MR. BENGLOFF: That's right.

14 MR. WESTON: So you may not agree with it,
15 but I don't think we can say that it's -- it's
16 unacceptable to discuss it, but I do want to move
17 back away from the term question and focus --

18 MR. BENGLOFF: He's the one who keeps
19 pushing me on that.

20 MR. WESTON: I know, but you are the one
21 who I interrupted so I felt I owed you an
22 explanation.

♀00192

1 MR. BENGLOFF: Thank you.

2 MR. WESTON: So I want to move back to the
3 questions of access, and I'm going to go ahead and
4 ask questions.

5 Now, we've heard that federalization would
6 encourage freedom of public access through its --
7 you know, through people having more certainty in
8 what the law was and being able to take advantage of
9 the exceptions.

10 But I would like an example, what kind of
11 access are we talking about, and specifically on
12 what legal basis? Because it's not entirely clear
13 to me.

14 MR. BENGLOFF: Thank you.

15 MR. WESTON: That's open to anyone.

16 MR. BROOKS: Well, you are talking about
17 access, and, again, you have to parse it by years.
18 If the access is to a recording made before
19 January 1st, 1923, then I think it's pretty clear
20 under most proposals at least that's the public
21 domain. That means that anyone can literally make
22 that available. And by the findings in my study,

♀00193

1 it's fairly clear that there is a large number of
2 people, far more than the rights-holders,
3 principally historians, principally organizations,
4 perhaps even ARSC itself, that would make such
5 recordings available.

6 And I would point to the finding that while
7 less than 4 percent of pre-1923 recording -- or
8 pre-1925, actually, recordings are made available by
9 rights-holders -- and, you know, I can't calculate
10 this on the fly, but it's probably about 25
11 percent or so by others --

12 MR. WESTON: Okay. Let's say it's either
13 post-'23 and not in the public domain or -- I mean
14 pre-'23 and not in the public domain or post-'23 so
15 it's protected.

16 MR. BROOKS: Okay. Well, for pre-'23,
17 there is a flood that seem to want to make this
18 stuff available, let's put it that way.

19 As you go forward from 1923, as Sam pointed
20 out, the movement in the public domain would be
21 gradual and year by year, presumably as 1923 itself,
22 that year became public domain, and the same thing

♀00194

1 would happen to that.

2 The post-1923 that is still covered by
3 copyright law and would be for a long time, there
4 the encouragement to access is the encouragement of
5 a stable, understandable federal law. Remember
6 we've heard a lot about fear guiding decisions and
7 universities that won't do things because they are
8 not sure what will happen, and advice from counsel,
9 You'd better not do it because we're not sure how
10 this stands now, 50 state laws.

11 Under a consistent regime, whether you like
12 it or not, but a consistent and well understood and
13 well studied, and I think most counsels would
14 understand something about federal law on this

15 level, we can certainly find out, you would have far
16 more certainty at that level about not only whether
17 they could make it available, but if they want to
18 legally make it available, how to go about doing it
19 and what the fair use exceptions are, that kind of
20 thing. So that certainty would encourage, we feel,
21 access.

22 MR. WESTON: Thanks.

¶00195

1 Brandon.

2 MR. BUTLER: Yeah, so I feel like I should
3 definitely share some of the knowledge that we have
4 gained from a project we have been working on at
5 ARL. We have done a series of interviews and focus
6 groups with librarians over the last year and change
7 about fair use and copyright, and how it's impacting
8 them on the campuses, and we -- this issue didn't
9 come up at all. I should say, first, it just didn't
10 come up. No one mentioned it, not a single person.

11 But the other thing that is interesting is
12 that librarians were just totally confused about
13 federal law across the board, and 108 -- not totally
14 confused, that's not fair -- but there was just this
15 kind of sturm und drang about, gosh, what do these
16 limitations mean? I don't understand them. I can't
17 convince my general counsel to use them. The
18 exceptions in 108 are too narrow for me to get grant
19 funding. All of these concerns occurred at the
20 level of federal law, so, you know, certainty is not
21 in the offing without some revision of federal law
22 itself.

¶00196

1 Because 108 -- again, 108 inspires
2 confusion and contempt, and 107 to a similar degree,
3 and part of this project that I'm working on,
4 frankly, is to try to fix that, but we're not going
5 to fix it by changing the law; we're going to fix it
6 by improving understandings of fair use and
7 improving understanding of the law maybe.

8 But confusion is endemic to copyright maybe
9 is my point, and that, you know, it's not going to
10 get -- it's not necessarily going to get better just
11 by having one confusing law rather than fifty.

12 MR. CARSON: Chris, could you either repeat
13 or rephrase the question?

14 MR. WESTON: Yes, I'll repeat the question.

15 The question had two parts. The first was:
16 What kind of access would you ideally provide to
17 work -- and I will be specific this time -- that is
18 still under copyright?

19 And the second question would be on what
20 legal basis would you provide that kind of access?

21 Susan, I think, had her hand up next.

22 MS. CHERTKOF: Well, I'm sort of confused
♀00197

1 listening to Tim Brooks. Because I thought that the
2 main concern here was libraries and archives having
3 access and making access available to researchers
4 and academicians and folks like that, but it sounds
5 now like you are talking about trying to create some
6 mechanism for reissues by people other than the
7 original rights-owners, which is more of a
8 commercial kind of exploitation, and I guess I'm
9 just trying to figure out what the whole agenda is.

10 MR. BROOKS: The full agenda -- should I
11 answer that?

12 MR. WESTON: I'm sorry. Eric.

13 MR. HARBESON: I can let Tim respond.

14 MR. WESTON: Okay. Tim, go ahead.

15 MR. BROOKS: Just to directly answer, our
16 basic agenda is preservation and access by the
17 public, not academic -- not access by a limited
18 number of people or not access by those who have a
19 certain entree or physical location where they can
20 get to something. I mean the American public should
21 have access to its cultural heritage, students and
22 inner city high schools, no matter where it is.

♀00198

1 To that extent, if recording companies for
2 very legitimate commercial reasons do not want to
3 issue something, I don't blame them for this because
4 companies are not set up to do that, they are not
5 structured that way. I've been in enough companies
6 to know that. But if they don't believe it's in
7 their economic interest to do something, then that
8 is where the public sector should be able to step in
9 and make them available.

10 Now, under federal copyright law post-1923,
11 or whatever the year is it turns out to be at any
12 point in time, there are still restrictions on that,

13 of course. There are some provisions in copyright
14 law, fair use, that kind of thing that allows some
15 educational purposes, some distribution of things
16 under some circumstances, and it may well be that
17 those need to be revisited and changed in some way.
18 That's another discussion from here. But that's an
19 almost impossible discussion to have with 50 state
20 legislatures.

21 So our point is that it be available, again
22 not restricted. I'm worried when we narrow

♀00199

1 access -- as much as I love the Library of Congress,
2 it should not be the only institution in the United
3 States that can do certain things. For example, I
4 don't think Patrick has the budget to do it, nor do
5 I think that it's a fair burden to put on one
6 institution.

7 Our basic goal, to answer your question, is
8 that in some fashion in a way that doesn't hurt the
9 economic viability of your member companies, the
10 things that you don't choose to make available for
11 legitimate reasons should be available by some other
12 mechanism.

13 MR. WESTON: I think -- Eric.

14 MR. HARBESON: So in answer to your first
15 question, the kinds of uses that I see music
16 librarians putting these to will depend to a large
17 extent on what is fair under the 107 doctrine. But
18 the examples would be making research copies
19 of especially archival sound recordings available to
20 people who are doing research. We could perhaps, as
21 I mentioned earlier, provide interlibrary loan
22 companies so that we don't have to risk damaging our

♀00200

1 original copy in serving libraries that do not have
2 the kind of collections budget.

3 For example, my library is a loaning
4 library. We loan to other libraries quite a bit
5 more than we borrow from other libraries. We have a
6 very large library, one of the larger ones in the
7 region. A smaller library might be able to avail
8 itself better of our materials if we were able to
9 provide loan copies.

10 Depending on the nature of the recording,
11 whether it was a fair use or not, we might do things

12 like have -- create digital exhibits. This is
13 something that libraries do quite a bit with other
14 materials. We might have -- create -- even I could
15 imagine creating curricula to help -- for people to
16 take self-courses.

17 I mean, the point is that the uses that are
18 going to be put to this are really up to the
19 patrons, and the patrons have quite a bit of
20 creativity that we can't really anticipate.

21 So we're trying to -- in some ways, we're
22 going to be responding to what our patrons want,
♀00201

1 whether it is for them to do the research that they
2 need to do or for us to do research that supports
3 their interest.

4 And as far as the legal basis is concerned,
5 in some cases, as I mentioned, we might be able to
6 use 108. And in pretty much everything else, I
7 imagine us using 107.

8 We might -- one of things that we might
9 want to do is in certain cases where more
10 restriction is necessary, we might make copies
11 available for distance education. In those cases my
12 guess is we would be relying on 110, but if 110(2)
13 didn't work out, we would have to rely on 107, but
14 there are quite a bit of uses that could be put to
15 these recordings. It would still have to pass
16 federal -- I mean it would still have to pass muster
17 with federal law and federal courts.

18 MR. WESTON: Thanks.

19 Patrick.

20 MR. LOUGHNEY: I would say that the uses
21 that we would like to make of this material fall
22 within the traditions of libraries dating back to
♀00202

1 colonial times. That is, we provide access to the
2 public within the tradition of providing books,
3 printed materials, photographs, newspapers and so
4 on.

5 I -- the Library has no ambition to reissue
6 anything. It doesn't want to get into the business
7 of the Beatles or Elvis Presley or anybody. But we
8 have a significant number of recordings that number
9 into the hundreds of thousands for which the
10 rights-holders hold no physical materials

11 whatsoever. We are using taxpayers' dollars to not
12 only store and preserve those materials, but we are
13 providing limited access on the premises of the
14 Library now, and when we can find a rights-holders
15 who will identify themselves and admit that they own
16 the rights, rather than saying no because they don't
17 know and saying no is rather than saying maybe or
18 yes, we want to make it more widely available beyond
19 that, which is to put it on the internet, beyond
20 streaming, allow people to have copies that they can
21 use for noncommercial uses. And I would suggest
22 that addressing a noncommercial use for this kind of

♀00203

1 material within the law as clearly as possible is a
2 real genuine need that can go a long toward
3 addressing the needs of recording preservation
4 archives and libraries in the United States.

5 So, we want to make it available on a
6 noncommercial basis to users who will use it
7 responsibly. We have no interest in providing
8 pirated copies to anybody, and we are very proud of
9 our record at the Library, having collected motion
10 pictures and sound recordings for over 80 years, and
11 we have had no instances of piracy emanating from
12 any of the collections at the Library. So that's a
13 strong tradition that we are very proud of.

14 But that need is out there and we have to
15 find that middle ground, and I think noncommercial
16 use and access is something that has to be
17 acknowledged and it would relieve that pressure. It
18 would be a real pressure valve to provide access
19 without stepping on the rights of rights-holders or
20 potential rights-holders who might want to come in
21 and relicense that material and reissue it, which I
22 think is not our business and that's your business,

♀00204

1 and we are happy to help you do it.

2 MR. WESTON: Okay. Thanks.

3 Unless -- oh, I'm sorry. Tom.

4 MR. LIPINSKI: I was just going to say, to
5 follow up on what Patrick had to say, one of the
6 problems that Peter's study pointed out among the
7 state laws was that the exceptions, when they
8 existed for nonprofits, aren't really clear. That
9 idea of commercial versus noncommercial is kind of

10 fuzzy.

11 And I think if you are asking for the legal
12 support, what is the basis for institutions like
13 libraries that are using the materials, it's based
14 on fair use and the aspect that it's noncommercial,
15 and it's based on the noncommercial aspect that is
16 built into Section 108.

17 If we were going to ask for pie in the sky,
18 I think in addition there are limitations that exist
19 in law. And a Section 108 study group couldn't get
20 to consensus on digital access, either remote
21 digital access or either physical digital access.
22 And so one could envision under federalization some

♀00205

1 type of streaming rights but nothing else, and that
2 might not fill the public's needs but it might be a
3 compromise that might need to be made.

4 The other observation that came to me
5 listening to the discussion now is that when people
6 are looking at the 1923 date and the 2018 date or
7 2019 date, and that seems to be kind of a moving
8 target, because I don't know if you are a betting
9 person, but I would suspect that 2018 is not going
10 to be our date come 2018. It's going to be pushed
11 out another ten or fifteen years.

12 So there is certainly a fear that some of
13 the inventory is going to start to fall into the
14 public domain, but I don't know how realistic that
15 fear really is. I would expect that copyright
16 duration will be pushed out again, so that inventory
17 is still going to be protected. And I'm working on
18 the assumption that if federalization occurs, it's
19 going to occur for -- it's going to solve the
20 problem for the material that is sort of in pre-'23
21 limbo, but it's going to operate under the
22 assumption that there will always be rights-owners,

♀00206

1 and their rights will always exist, but there will
2 also be exceptions in the copyright law. And that's
3 the balance that creative material is under
4 constitutionally.

5 And that's why I'm in favor of
6 federalization. It's not going to be easy. There
7 will be some problems to work out, but I think it's
8 more consistent and I will use the term "elegant" in

9 the sense of making all this stuff -- you know,
10 we're all star stuff, as Carl Sagan says, and I
11 think sound recordings are copyright stuff, and they
12 should be treated somewhat alike.

13 MR. WESTON: Thanks.

14 David.

15 MR. CARSON: We've got at most 20 minutes
16 left, so I want you to figure out what's left that
17 you haven't covered and figure out whether you want
18 to do that rather than go --

19 MR. WESTON: I just have one thing that had
20 come up before, and I think Peggy put it really well
21 earlier, is that right now it appears to be, from my
22 understanding, that libraries and archives bear a
♀00207

1 certain amount of uncertainty, and that the
2 rights-holders are concerned that under
3 federalization they would be bearing a certain
4 amount of uncertainty, perhaps some uncertainty
5 around the same issues.

6 And I'm just trying to figure out, as a
7 policy matter, is there a way to both beneficially
8 allocate the uncertainty to any -- is there a party
9 that is better poised to manage that uncertainty?
10 Is there a party that is more or less deserving of
11 it? I'm just trying to think about that.

12 MR. BENGLOFF: Well, I'm still curious -- I
13 really appreciate it, by the way, Chris and David,
14 you following up on that. I heard two different
15 answers of what type of access and what type of
16 legal basis. I never got an answer over here.

17 But one party invested, one party spent
18 money, one party marketed, promoted, made the master
19 recording and did a variety of things, and the other
20 party did not.

21 One party wants to furnish -- I speak only
22 for myself -- something akin to what I envision,
♀00208

1 making things available to the people of our country
2 on a cultural basis. It seems -- it would be hard
3 to argue against that, Patrick.

4 MR. LOUGHNEY: And I should add to that,
5 there is an investment on the Library side. We are
6 spending tens of millions of dollars, taxpayers'
7 dollars, to sustain this material and preserve it.

8 MR. BENGLOFF: Patrick, I hope you heard
9 what I was saying. Another party -- other parties
10 in this discussion have talked about what are you
11 going to do with it; would you -- you know, maybe --
12 the uses will be up to the patrons was the quote.

13 And I don't want to put words in your
14 mouth, Dwayne, but I got the same feeling -- I
15 didn't write your quote down, but I got the same
16 feeling. Those are very different positions. So
17 trying to get to a place, it's different places.

18 MR. LOUGHNEY: Well, I don't think that's
19 in dispute. But the point is where is the middle
20 ground here and what is fair to the taxpayers who
21 are actually bearing substantial a burden for
22 storage and materials that don't exist with the

♀00209

1 rights-holders anymore?

2 MR. BENGLOFF: As a taxpayer, I'm with you,
3 and certainly your question, Chris, one group here
4 are investors in terms of the sound recording, in
5 terms of making them popular, doing marketing,
6 promotion and a variety of other things.

7 The others I don't discount. You know, my
8 son is an educator. I believe in what he does, and
9 it's very important, probably more important than
10 what I do, but that is how I answer your question.

11 MR. WESTON: Thanks.

12 I think I saw Eric's hand up.

13 MR. HARBESON: So another party is
14 investing considerably in recordings that do not
15 fall under the recording industry's umbrella in
16 promoting, in digitizing. We're investors too, so
17 please don't forget that.

18 I think what I said earlier with respect to
19 patrons is that it's determined by the patrons, not
20 up to the patrons. The patron is why we exist, so
21 if the patrons have needs, we're going to try and
22 fill them in the ways that we can legally.

♀00210

1 Now, to Chris's question, as far as the
2 allocation of uncertainty, I don't know how one can
3 split uncertainty. The only thing that I will say
4 is that we're not -- if this were to go the way we
5 want it to, we're not really giving up any
6 uncertainty. We're still holding onto that pretty

7 carefully.

8 What we are gaining is not so much -- what
9 we are getting is a little bit more certainty
10 because we have a century -- half -- Folsom and
11 Marsh was what, 1840? -- so 170 years of
12 jurisprudence on fair use, which is helpful. We
13 have one case that I know of that involves fair use
14 at the state level, and that may or may not be
15 determinative. What we are getting is consistency,
16 and consistency helps to clear up some of the
17 uncertainty, if that makes any sense.

18 I do sympathize with the -- I mean there is
19 a lot of uncertainty in this in general, and I think
20 that -- everyone at the table would be well advised
21 to remember that, and -- but I think that we can get
22 around it in a way that will allow us to be more

¶00211

1 uncertain together.

2 MR. WESTON: Susan had her hand up next.

3 MS. CHERTKOF: You had asked the question
4 about how to allocate uncertainty, and I just want
5 to point out that, as everyone should be well aware,
6 our industry is very much under siege. Revenues are
7 going down year after year. There's massive layoffs
8 all over our industry.

9 And if you are talking about reallocating
10 uncertainty and putting it at our doorstep and
11 putting us in a position of having to litigate over
12 ownership and termination rights and authorship and
13 all the other uncertainties that are going to come
14 about as a result of federalization, we are just not
15 in a position to bear that right now. That was the
16 first point I wanted to make.

17 The second point is that the more I listen
18 to this, I get a little concerned that what some of
19 the library and archive people are saying, they keep
20 saying they want consistency instead of
21 inconsistency, but what I really think they are
22 saying is they want to be exempt from copyright law,

¶00212

1 that under state copyright law, there's actually
2 laws that apply to them, and what they are looking
3 for in federalization is to either have things
4 thrown into the public domain, which means that they
5 are not under copyright protection at all, or they

6 are looking to be thrown squarely into existing
7 exemptions and exemptions that they want to broaden,
8 so consistency seems to be kind of a code word for
9 no legal protection.

10 MR. WESTON: Thanks.

11 I think Dwayne.

12 MR. BUTTLER: Wow, so I think that for your
13 direct question about -- can you tell me the
14 question again because it's gotten so complicated I
15 can't remember?

16 MR. HARBESON: Allocation of uncertainty.

17 MR. BUTTLER: Allocation of uncertainty,
18 yes, thank you. Thank you.

19 If allocation of uncertainty, if there is
20 an allocation, I think it should go with the
21 rights-holders, and one of the reasons I think it
22 should go with the rights-holders is because they

♀00213

1 are more closely aligned with the underlying
2 information that we just don't have access to. So
3 to some extent they can understand better the kinds
4 of issues involved that we are just never going to
5 know.

6 And I think it's disingenuous to bring up
7 the investor question because I don't think that
8 it's really fair to suggest that the library
9 community has not been heavily involved in this in
10 no subsidy kind of framework, because they have
11 invested a billion dollars to protect things through
12 a century or more that have been sometimes just
13 sitting there with very narrow uses where people can
14 walk into the room to say that. You know, so there
15 is a little bit of characterization that is going
16 on, and I'm sort of on this side of the table and
17 I'm all wearing the same socks that I resent a lot.

18 But I do think that that information
19 question rests better with the rights-holders than
20 the library community.

21 MR. WESTON: Thanks. Peggy.

22 MS. BULGER: Actually, I think we're using

♀00214

1 the words "rights-holders" in a very narrow way
2 because the people who own the rights to the
3 recordings in my archive are not RIAA; they are the
4 people who are on those recordings or their heirs.

5 So those are the rights-holders, and they are not
6 being served.

7 So there are different communities here.
8 Let's just be clear about it. There's the
9 commercial community and there's the noncommercial,
10 all those vast, vast patrimony out there that's not
11 being preserved and made access to because there is
12 one portion, one subset of these recordings that are
13 being served at the moment.

14 MR. WESTON: Thanks.
15 I think Eric.

16 MR. HARBESON: Yeah, I would really like to
17 respond to what Susan said about libraries using
18 consistency as code for we don't want any copyright.

19 With due respect, if you really think that,
20 then you haven't really been listening to what I've
21 been saying all day. Libraries are in this position
22 because we want to follow the law. The problem is
♀00215

1 that we can't figure out what the law is. You
2 should not have to be an attorney to run a library.

3 We have a very strong culture in libraries
4 of respecting copyright law and respecting copyright
5 owners. Many of us, most of us are published
6 copyright owners ourselves. Many of the libraries
7 are themselves rights-holders of the sound
8 recordings. My institution owns masters. In our
9 state I believe that makes us the owners of those
10 recordings.

11 So we're not looking to get rid of
12 copyright. We're not looking to pirate anything.
13 If we did, we would just do it. You know. If we --
14 if we really were wanting to get away with stuff,
15 why are we coming to this table and arguing for a
16 very subtle change in the law? If we really wanted
17 to copy stuff and get away with it, we would. We're
18 not trying to get ourselves out of copyright law.

19 MR. WESTON: Okay. Pat.

20 MR. LOUGHNEY: I think that that has to be
21 agreed to around this table that we're here because
22 we're upholding the law, and I think you can look at

♀00216

1 the library community as probably paying more
2 attention to the law than many other aspects of
3 American society.

4 I think it's somewhat appalling that two
5 major organizations representing libraries have come
6 with a statement saying basically -- throwing their
7 hands up that the law is so worthless now that it
8 can't be supported, so let's ignore it and try to
9 put some Band-Aids on various parts around the
10 table.

11 I believe in the law. I think it has to be
12 fixed, but it has to be centralized and done in a
13 way that is going to serve in a broad way the nation
14 in a way that institutions that are engaged in this
15 activity can follow in a rational manner. To leave
16 it in this sort of helter-skelter way is a
17 disservice, it wastes resources, it prevents public
18 access, it promotes amnesia of our culture and slow
19 deterioration and degradation. Those are the big
20 issues that you have to keep in mind here.

21 This is not helpful to simply say that we
22 want to be pirates and we are using code words about
♀00217

1 that. That's an insulting remark.

2 MR. BUTLER: I just want to say we
3 didn't -- I didn't mean to appall anybody, and our
4 position is not that we don't think that these
5 changes would be great. I just think that this
6 discussion so far has borne out our concern that
7 these processes are often very difficult to complete
8 fruitfully.

9 MR. WESTON: Okay.

10 MR. CARSON: I want to go back to the
11 access issue, because I'm still not sure if I got a
12 real clear picture on where people on either side of
13 the table are here.

14 I mean I hear people want certainty, and
15 that is great, but it ultimately depends on what the
16 certainty is. If certainty means you can't do
17 anything, you probably don't want it. If the
18 certainty is that they can do everything, you sure
19 don't want it.

20 And I've been trying to listen carefully,
21 maybe not carefully enough, to figure out, all
22 right, what is it you are afraid of, on the one
♀00218

1 hand? What is it that you want to do that he ought
2 to be afraid of, on the other hand? And the biggest

3 catalog of uses I got was Eric, and as I took it
4 down, make research copies of archival sound
5 recordings and enable people doing research. I
6 don't think you have a problem with that, do you?

7 MR. BENGLOFF: For individuals?

8 MR. CARSON: Yeah.

9 MR. BENGLOFF: It depends how it's
10 controlled. If all of a sudden a hundred thousand
11 people could download copies, I've got a problem
12 with that.

13 MR. CARSON: I don't think that's what Eric
14 was talking about.

15 Was it, Eric?

16 MR. HARBESON: No.

17 MR. BENGLOFF: Yeah, but is it going to put
18 limitations in? Are you going --

19 MR. WESTON: Well, limitations are in the
20 law already.

21 MR. BENGLOFF: Chris, I thought we were
22 rewriting the law.

♀00219

1 MR. WESTON: No, but he was talking about
2 observing 108, the exceptions that are already
3 there.

4 MR. BENGLOFF: By the way, you are not
5 lawyers. You know code as well or better than I do,
6 sir, so just as an aside. And I'm not a lawyer
7 either.

8 MR. HARBESON: I do know code as well, yes;
9 I observe it quite often.

10 MR. BENGLOFF: Yeah, so...

11 MR. HARBESON: But this is not code for we
12 don't want any copyright law.

13 Now, I do think that the law is pretty
14 explicit that, at least with 108 copies, the
15 burden -- once we hand off a copy to a patron -- and
16 this is in the law -- is the property of the patron.
17 When it's the property of the patron, then it's
18 really not our responsibility anymore. It's the
19 patron's responsibility, and they are the ones that
20 you need to sue.

21 But what we're doing -- I mean, if we --
22 and I can look this up in the law, but if we have

♀00220

1 any indication from the patron that they are going

2 to be using it to fund, you know, a small label,
3 then I don't think that we would be within our
4 rights to make that copy for them under those
5 conditions.

6 But this is in the law. You know, this is
7 the same law that people -- that producers of sheet
8 music have to abide by. I mean this is not
9 exceptional. There is no reason that recordings
10 need to be any different, let alone the specific
11 example of pre-1972 recordings. If this were a
12 problem, then why are there not -- why are the -- as
13 far as I know, and you can correct me on this, but
14 there is not a particularly rampant problem with
15 post-1972 recordings proportionate to the problem of
16 pre-1972 sound recordings.

17 MR. CARSON: That's a way of putting the
18 question, and I'm going to frame the question to the
19 two representatives of record companies who are at
20 the table.

21 Section 108 does apply, and we've heard of
22 some exceptions, but does apply to post-1972 sound
♀00221

1 recordings. Do you guys have a problem with that?
2 Do you guys have a problem with the way it's been
3 applied to post-1972 sound recordings? Any horror
4 stories of what libraries have been doing with
5 post-1972 sound recordings?

6 MS. CHERTKOF: Not that I'm aware of. I
7 think the concern is with the wholesale
8 federalization of pre-1972 sound recordings and all
9 of the associated complexities and complications
10 that that would bring.

11 MR. CARSON: Let me see if I am hearing you
12 clearly. What I may be hearing from you, and I want
13 to make sure I am hearing you, is that as far as
14 Section 108 is concerned, you are not concerned
15 about Section 108 applying to pre-1972 sound
16 recordings. You've got all sorts of other problems
17 with bringing them into the federal statute, but
18 Section 108 isn't one of them. Is that what I'm
19 hearing?

20 MS. CHERTKOF: Well, we don't want to go
21 down the road of partial federalization because we
22 think it's a slippery slope and you get into
♀00222

1 line-drawing exercises.

2 MR. CARSON: Just say "yes" or "no." Yes
3 or no? Do you have a problem if Section 108 applied
4 to pre-1972 sound recordings?

5 MS. CHERTKOF: Apart from what --

6 MR. CARSON: Gil is shaking his hand.

7 Thank you, Gil.

8 Would you have a problem if fair use
9 applied to pre-1972 sound recordings?

10 Jenny is shaking her head. Thank you very
11 much.

12 All right. Anyone here want something more
13 than what fair use and Section 108 would give you?
14 Raise your hand if you want something more than
15 that.

16 MS. CHERTKOF: We heard more, but they
17 weren't reissues.

18 MS. PARISER: We heard lots of people have
19 different values.

20 MR. CARSON: Well, granted, lots of people
21 have different views of what fair use allows, and
22 that's --

♀00223

1 MR. MARKS: Well, maybe then the question
2 is is it outside of 108, because we've heard a lot
3 about streaming, making downloads for noncommercial
4 uses,
5 and --

6 MR. CARSON: Are you taking it back, the
7 shaking of your head, Jenny? You do have a problem
8 with fair use?

9 MS. PARISER: The problem is the streaming.
10 The problem isn't the archival copy. So it depends
11 on how you read 108, David. If we're talking about
12 108 in terms of archival copying for preservation,
13 we are right there with you.

14 MR. CARSON: All right. Well, 108
15 does have limited opportunities for making copies
16 for other libraries, for patrons. Do you have
17 problems with that?

18 MS. PARISER: It depends on how those
19 copies are made, as my sometime colleague Rich will
20 tell you.

21 MR. CARSON: All right. Gee, I thought I
22 had agreement there for about five seconds, and

¶00224

1 that's about as long as I had it.

2 MS. PARISER: Well, there is very little
3 restriction to make -- you know, to put up the
4 borders we need for 108 if there is unlimited
5 streaming. That is where we get into trouble.

6 MR. WESTON: But there is nothing in 108
7 that refers to streaming.

8 MR. MARKS: But we've heard others -- and,
9 Dave, I think this is where your question was
10 going -- I at least heard references to streaming
11 and things beyond 108. And we all know in today's
12 world, a stream is a download in two seconds. So
13 let's not fool ourselves. There's no difference
14 between the two. So that's the world in which we
15 operate, and so that's -- that is an issue for us
16 that is something that we would want to have a
17 meaningful discussion about, and we do find
18 different than just preservation for archive
19 purposes.

20 MR. CARSON: Our time is up and we're going
21 to close right now, but it is something to think
22 about and it probably won't get resolved in the next

¶00225

1 however many hours we have, 21 hours, whatever it
2 is.

3 But, granted, we can all quibble over what
4 108 means, over what is fair use and so on. But if
5 that is what we are quibbling over, then one thing
6 to think about -- one thing we're going to be
7 thinking about is if that is all we are arguing
8 over, then is it so bad to bring it into the federal
9 scheme?

10 We will have those arguments in the federal
11 scheme, just like we have them with respect to
12 post-1972 sound recordings, which I'm sure you folks
13 are a lot more worried about than pre-'72 sound
14 recordings as a general proposition. So that's just
15 something to think about.

16 And with that, we are going to take a
17 15-minute break and we'll be back at three o'clock.

18 (Recess.)

19 MR. CARSON: Our next panel on effects of
20 federalization on ownership and business
21 expectations will be led by Karen Temple Claggett,

22 who is one of our senior counsel for policy and

♀00226

1 international affairs.

2 MS. CLAGGETT: Thank you, David.

3 As David mentioned, this panel is the
4 effects of federalization on ownership and business
5 expectations.

6 In the federal registry notice seeking
7 comments for our study, we noted that it's important
8 to consider state law principles that apply to
9 authorship and ownership of rights to sound
10 recordings to determine if there would be any
11 tension with federal copyright principles.

12 We posed several questions to elicit
13 comments in a few key areas, including how ownership
14 is established, issues that may arise with respect
15 to application of the work-for-hire doctrine, and
16 ownership transfer issues and requirements, such as
17 different rules regarding transfer, including the
18 Pushman doctrine.

19 Several written comments as well as
20 comments this morning in the overview session gave a
21 very high level description of some of the potential
22 difficulties that could result from federalization

♀00227

1 with respect to ownership, authorship and contract
2 rights. Commentators have cautioned that
3 federalization would impose a whole new set of
4 complexities and legal uncertainty, and require huge
5 costs and burdens in terms of chain of title,
6 conflicts in litigation over ownership.

7 For this panel I would like to drill down
8 to identify the real specific issues with respect to
9 each of these areas and try to tease out some of the
10 concrete as opposed to theoretical effects and
11 concerns that might arise from federalization, and
12 whether there are any potential solutions that could
13 help ameliorate the problem.

14 As with the other panels that we had
15 earlier, we will give everyone an opportunity to do
16 a very short, one- to two-minute statement
17 basically, as I said, identifying the issues and
18 concerns in this area with a specific focus on
19 examples and details.

20 There is one person I do know who has not

21 been in any other panels, and that is Ivan Hoffman.

22 So we will start with him and he will actually have

♀00228

1 an opportunity to give a slightly larger overview of
2 the issues and have a little bit of a longer time
3 period.

4 MR. BENGLOFF: Sorry, but in your
5 introduction you said transfer of ownership under
6 the something doctrine.

7 MS. CLAGGETT: The Pushman doctrine in
8 terms of when -- a very short description of it is
9 just when the ownership in terms of the material
10 object and whether you own the material object, you
11 are the actual owner of the copyright and the work
12 itself.

13 MR. BENGLOFF: Okay. Thank you.

14 MR. HOFFMAN: Thank you, Karen.

15 I'm here representing a number of clients
16 who own master recordings going back to the origins
17 of rock and roll classics in the '50s, '60s and '70s
18 and thereafter, but my comments of course are
19 directed to pre-1972.

20 In terms of ownership and the uncertainty
21 principle, which was being talked about in the
22 earlier panel as well, there is no ownership problem

♀00229

1 and there is no uncertainty problem. My clients
2 have contract rights that give them in perpetuity
3 ownership of the master recordings.

4 So in terms of who controls, in terms of
5 who has the right to make money from this and so on,
6 it's very clear. In most instances, granted not all
7 instances, the artist participates in the revenue
8 stream that comes from these recordings. But it's
9 very clear that at this particular point, there is
10 no ownership problem; there is no uncertainty
11 problem.

12 Where the uncertainty is going to come in
13 is trying to make these master recordings, the sound
14 recordings the subject of the termination of
15 transfer issues, that is the subject of really what
16 I wanted to direct my attention to.

17 Unlike the musical copyrights that are the
18 subject of these master recordings where authorship
19 is fairly easy to determine, Joe wrote it with Sally

20 and their names appear on a lead sheet and on the
21 copyright certificate, and it's done. And when I
22 say it's easy to determine, I don't think it's a

♀00230

1 great secret that rock and rollers don't live
2 traditional lives. And so I've been involved in
3 situations where the authors have died, and we're
4 still seeing sons and daughters and children coming
5 out of the woodwork, including people who -- women
6 and men who want to be the putative spouse of the --
7 or widow or widower.

8 But specifically in terms of the children,
9 you could have 30 claimants to a musical copyright,
10 and as complicated as that is going to be, or is,
11 it's going to be infinitely more complex when it
12 comes to sound recordings. Sound recordings have
13 two kind of components in terms of authorship: The
14 performing end and, what shall we call it, the
15 fixation end.

16 So in terms of the performing end, if
17 you've got a musical group, and there's four or five
18 players in that group from the '50s and the '60s,
19 and maybe or maybe not they didn't have an internal
20 document between and amongst them, which they
21 probably didn't, so now you have five or six people
22 multiplied by a number of factor based upon how many

♀00231

1 children or widow or widowers they left, if they had
2 died, and that creates an infinite amount of
3 litigation, which I know I've heard from the
4 preliminary comments is the specter that most people
5 are going to be talking about here.

6 Then you've got the fixation end. So
7 you've got record producers; some of whom are
8 copyright authors, some of whom may not be copyright
9 authors. There's a possibility that you may have
10 engineers who may have contributed a certain
11 copyrightable element to those sound recordings.
12 All of whom, if they are no longer alive, leave
13 heirs, leave children, leave widows, and the
14 litigation factors go on and on and on.

15 Complicating that is that pre the 1978
16 Copyright Act, the definition of "work made for
17 hire" was very unclear. And so who amongst all of
18 these people were employees for hire is very, very

19 unclear.

20 So the issue here for the Congress is to --
21 whether or not to make what is now a certainty, that
22 is the contract rights that the parties bargained

♀00232

1 for way back when, and turn that into a massive
2 amount of uncertainty.

3 There is an overarching consideration that
4 I haven't heard mentioned here today that I feel is
5 appropriate to talk about, which is in no other area
6 of the law do the parties lose their rights simply
7 by the passage of time. We don't take trademark
8 back, we don't take cars back, we don't take houses
9 back, but in the copyright law, we take back
10 copyrights initially from the renewal period issue
11 and now from the termination of transfer issues.
12 And every justification that I've ever seen written
13 about in terms of why this is, is because, Well, we
14 need to protect recording artists, we need to
15 protect songwriters, we need to protect authors who
16 may have early on in their career made a bad deal
17 for themselves.

18 Unfortunately, the termination of transfer
19 provisions and the renewal copyright provisions
20 before this have no requirement that they have made
21 a bad deal. It is simply as a result of the passage
22 of time and whether or not they are alive at the

♀00233

1 time that the relevant statute applies.

2 All of this seems completely incompatible
3 with what is at least my understanding of free
4 market capitalism, and so in addition to all of the
5 other issues that are here, this seems totally
6 contrary to what our system is all about.

7 So those are my two cents. I apologize to
8 the panel and to the room because I will have to
9 leave early, but I wanted to put my two cents in. I
10 feel we are going to be in good hands with the RIAA.
11 Thank you.

12 MS. CLAGGETT: Thank you, Ivan.

13 MR. CARSON: Ivan, what time do you have to
14 leave?

15 MR. HOFFMAN: I need to be out of here by a
16 quarter to 3:00 -- quarter to 4:00.

17 MR. CARSON: Okay. Thanks.

18 MS. CLAGGETT: And thank you, Ivan.
19 And so with that, I just want to open it up
20 to everyone else to, if you want, to do a very brief
21 one- to two-minute overview in terms of the issues
22 and concerns you have with this issue, specifically

♀00234

1 with respect to how federalization would affect,
2 either positively, negatively, some of the issues
3 that I mentioned such as ownership, work for hire,
4 and other issues, and if you have specific examples
5 in terms of how that would play out, and potentially
6 whether there are any easy or complex -- if there
7 are as well fixes that we might want to consider in
8 our discussion as well.

9 Jenny from the RIAA.

10 MS. PARISER: So I have a list of about
11 15 things that are going to go badly, but I will --
12 but because I only have two minutes, I'm going to
13 talk about just one.

14 Ivan talked about ownership and work for
15 hire, which is really a subset of the ownership
16 issue. I think he covered the fact that there's
17 going to be a lot of confusion there. We certainly
18 agree with that notion.

19 Karen, you recall from doing chain of title
20 in litigation how hard that is. It will get worse
21 if the law becomes more uncertain.

22 But I'm going to talk about the

♀00235

1 registration problem. So, of course, under a
2 federal regime, as we understand it currently, you
3 need to register your work if you want to prosecute
4 your rights in court. Unless we write a different
5 sort of federal law that doesn't have a registration
6 requirement, presumably that would be a requirement.

7 Now, there was some discussion I believe in
8 the first panel, and June said, Do you really have
9 to register? Right? Why do you have to register?
10 You have protection even if you don't register.

11 But the world in which we -- I live, which
12 is the litigation of copyrighted works, everything
13 depends on registration because you can't go to
14 federal court to prosecute your rights without a
15 registration. So regardless of what remedy you are
16 seeking, whether it be statutory damages, an

17 injunction or actual damages, you don't get through
18 the door unless you have a registration. So that
19 would have to be done at some point.

20 And, of course, there would be a deposit
21 copy required as well. That is going to be a vast,
22 vast burden for most copyright owners. It would be

♀00236

1 hard enough for the major record labels that the
2 Recording Industry Association represents for all
3 the smaller labels, Rich's members, and all of those
4 who don't even belong to trade associations, it
5 would be an absolute nightmare.

6 And even if you had a registration -- if
7 you somehow waived the registration requirement for
8 access to litigation, I'm not sure how that would
9 work, but, okay, you know, we're making up laws,
10 let's cross out the registration requirement to
11 commence the litigation, presumably at a minimum you
12 would need a registration for statutory damages.
13 That would seem -- that seems to be the quid pro quo
14 in the law as we currently understand it. You have
15 to register in order to get statutory damages.

16 And adding to the burden is that you have
17 to register quickly, because if you register after
18 the defendant has already infringed your work, you
19 don't get statutory damages. As you probably all
20 know, we just concluded our litigation against
21 LimeWire. One of the major issues in that
22 litigation was how can we prove for works that were

♀00237

1 registered late -- because even for big record
2 companies some portion of works are always
3 registered late -- for works that are registered
4 late, how are you going to prove that it was,
5 nevertheless, registered prior to its having been
6 infringed online by LimeWire?

7 The effort that went into proving when
8 those two things happened, registration on the one
9 hand versus infringement by LimeWire on the other,
10 and who bore the burden to prove that, got to be the
11 most tedious, painful and expensive process in the
12 litigation, save only the chain of title exercise.

13 So if we're now going to all of a sudden
14 graft a registration requirement onto a century of
15 sound recordings that have not been registered in

16 the ordinary course, it would really -- it would put
17 just the most enormous strain on the copyright
18 owners who need to do it in order to preserve their
19 right.

20 MS. CLAGGETT: Thanks, Jennifer.

21 Does anyone else have a brief opening
22 statement?

♀00238

1 Tim.

2 MR. BROOKS: I'm not a lawyer. Unlike some
3 this morning, I'm not afraid of lawyers, perhaps I
4 should be. We did for our submission get an IP
5 attorney to look carefully, I don't know at all 15,
6 but certainly all of the objections that were --
7 legal objections that were raised in the RIAA's
8 filing. And I would point you to that. I'm not
9 going to try to replicate them here, I can't do
10 that.

11 But I believe the bottom -- and by the way,
12 that attorney was on the West Coast, and I apologize
13 that she can't be here today, is certainly available
14 to you if you want to talk to her, have a conference
15 call or something like that, I would glad to
16 arrange that.

17 But the bottom finding was that potential
18 difficulties that are here being characterized as
19 massive or huge or a burden certainly did not look
20 that way in the eyes of another IP attorney who
21 looked at them. I think that's something on which
22 attorneys could disagree, not that that's ever

♀00239

1 happened before, and that can be perhaps sorted out
2 on a factual basis as opposed to a basis of
3 general statements about it. But I think there is
4 room for perhaps some fact-finding in the area of
5 just how massive or huge or burdensome these things
6 would in fact in reality be.

7 There was very little citation of law or
8 cases brought forward. The case law that our attorney
9 studied in some detail and which is documented here
10 again did not seem to support that. So I can't
11 answer that myself. We have tried to answer it in
12 writing, and, again, if you want more on that, we
13 will be glad to provide it to you.

14 On the matter of registration, just as a

15 citizen, if nothing else, I find it remarkable that
16 when almost everything in my life needs to be
17 registered in some way, whether it's my car, my
18 property or anything, that somehow the idea of
19 asserting -- and I won't put adjectives in here like
20 "merely" or something like that because that skews
21 things -- but the act of asserting that you own
22 something is a burden that simply can't be beared,

♀00240

1 that you must own something without asserting or
2 registering or letting people know that you own it.
3 These are formalities that have caused so much grief
4 in the last 30 years, and I think that especially
5 when it's limited to only those cases when you wish
6 to bring litigation -- you have the rights and there
7 is no question about that, even without registering
8 as used to be done. But even limited to that it
9 becomes an unsupportable burden is a little hard for
10 the ordinary person to really understand in terms of
11 a world where some kind of registration or some kind
12 of acknowledgment that you own the property you sit
13 on or you own, whatever it happens to be, somehow
14 doesn't apply in this case.

15 I think it would be enormously helpful to
16 the American public if at least in some limited way,
17 litigation perhaps, that there will be some
18 acknowledgement, some public acknowledgment that I
19 own this.

20 MS. CLAGGETT: Does anyone else have an
21 opening statement that they would like to make?

22 MS. GARD: So my class, for those that

♀00241

1 weren't here this morning, my copyright class, we
2 studied this problem as part of our -- because David
3 Carson came as a speaker and we wanted to present
4 him with our little project. We found ownership and
5 authorship nearly impossible. That when we were
6 trying to determine copyright duration, we ruled it
7 out after three sessions of the entire class
8 arguing. It was too unstable for determining
9 duration because authorship -- we can't
10 retroactively determine authorship, and ownership is
11 based on authorship, so it was out as a category.

12 So I will talk more about duration and what
13 we found, but in terms of ownership, you just can't

14 reconstruct it after the fact. At least we found
15 that. But we did find that we had a roadmap with
16 104(a), and 104(a) is copyright restoration of
17 foreign works and it includes foreign sound
18 recordings. This has been in place for about 15
19 years.

20 I know you looked at things online. So
21 104(a) and (b) is what we were looking at, which is
22 ownership of restored copyright. Now, when they

♀00242

1 enacted this it included foreign sound recordings,
2 so all foreign sounds records, all of them that were
3 not protected by federal protection. They said any
4 work in which the copyright was ever owned -- oh,
5 sorry, where am I? I'm nervous, sorry.

6 Restoring work vested initially in the
7 author or initial rights holder of the work as
8 determined by the law of the source country of the
9 work.

10 Now, we suspected that people in our world
11 wouldn't like the first part about initially vesting
12 in the author, initial rights-holder. People
13 wouldn't like that. But we did like the part about
14 the law of the source country of the work. We
15 thought this was an incredibly good model to say it
16 invests initially in the state law where it was --
17 its home was to begin with. That it wouldn't change
18 the ownership that was already in place; it would
19 adopt it as if the individual states were foreign
20 countries as well and that we would respect that
21 particular law. And that was a way to get around
22 ownership.

♀00243

1 Because the Pushman doctrine is very messy.
2 You will now know Pushman, it's insanely messy, and
3 California and New York didn't like it. So it's
4 just -- it's a mess. And as you are saying, chain
5 of title, disastrous, right? And so how do you get
6 around that? And I think that if you feel
7 comfortable with state law, which it seems like you
8 do, keep that part of it. Keep ownership as a
9 state-based thing and write it in in the way as a
10 model of 104(a). Now, if that means it's the
11 current owner as of the date of enactment that that
12 is where it vests, vest it there and say based on

13 the state of where it is.

14 And the other part we had in terms of
15 registration, we didn't talk about as much. I mean
16 they would love you, Jennifer. They would adore
17 what -- they would be amazed at what you are saying
18 because they are law students, and that's what they
19 like.

20 And so I think that the other thing you
21 need to look to 104(a) for are the NIEs, and I don't
22 know if you charge people for NIEs or not, but the
♀00244

1 notice of intent to enforce, that if you could just
2 put a whole list of all the -- the NIEs are
3 nearly -- and you can't actually figure it all out
4 once you look at them, which probably maybe would be
5 good for some people, they would like that part of
6 it. But it seems like if you had just a list, like
7 you sent in your list -- NIEs -- your notice of
8 intent to enforce all of these copyrights, that that
9 would solve it as well, that then if you needed to
10 do a registration system, as long as it was
11 documented, we have this. Like we own this, we
12 claim this, we claim this. That then you could then
13 maybe in the system, then when you needed to
14 register, that would be the first step, but you've
15 already claimed an intent to register without the
16 burden of all of the -- because the burden of
17 registration, there is a lot to fill out, so, you
18 know, maybe that's a way to go say one group.

19 So those are the two things -- the few
20 things that our class came up with acting out your
21 parts over the course of a semester.

22 MS. CLAGGETT: Thanks, Elizabeth.

♀00245

1 Does anybody else have an opening statement
2 they would like to make?

3 Jay.

4 MR. ROSENTHAL: First of all, the comments
5 that were made this morning about the cost and the
6 uncertainty I think can be stated again.

7 I just wanted to mention something about,
8 Mr. Hoffman, you raised your clients' issues
9 regarding the rock and roll era and the other rock
10 and roll era. It goes to the points of -- it's even
11 more burdensome to many publishers, many music

12 publishers of that era because they are independent,
13 many of them. And I would think if you went through
14 your clients' sound recordings, you might find some
15 major publishers involved, but there is probably a
16 good chance that you also will find a lot of indie
17 publishers involved. So the issue of uncertainty is
18 even more burdensome to them in trying to deal with
19 these problems from a cost standpoint and waiting
20 around for these conflicts to work out.

21 I have to say also I'm not so sure that the
22 contracts that your clients have wouldn't at least

♀00246

1 be challenged. They may certainly be valid and may
2 hold up, but opening the door to all of this is one
3 of the problems here of why the uncertainty is so
4 big. There could be many challenges, many questions
5 under state law that go to courts that, again, small
6 labels, publishers have to deal with at the end of
7 the day.

8 Last -- there was a comment made in the
9 last session, I just wanted to just react to, and
10 that was that the artists aren't represented here.
11 And I think that it's important to understand, first
12 of all, Charlie Sanders was here this morning who
13 does represent artists, 70 percent of all major
14 artists and songwriters as well, so many of his
15 constituencies are artists.

16 But I think -- it's hard for me to even
17 talk about this because representing artists for all
18 these years, with the labels there is always this
19 antagonism, but I think in reality the labels do
20 represent artists' interests to a large extent.
21 Because of the fights that the artists have had over
22 the years with labels, the relationship is much,

♀00247

1 much better to a large extent, and I think that we
2 do have to recognize that the labels do really
3 represent the artists' interest in the fact that
4 costs involved will be passed on to artists; income
5 that they could earn certainly is passed on to
6 artists as well.

7 So I don't want that misperception out
8 there that, no, the artists aren't in the room. To
9 a certain extent, they are, and we should accept
10 that. That's all.

11 MS. CLAGGETT: Does anyone have any other
12 comments?

13 Gil.

14 MR. ARONOW: Thanks, Karen.

15 I just want to go back to something that
16 David asked earlier, which was for consideration of
17 the concept of some kind of registry or database.

18 I think while we haven't developed a
19 particular position on this at Sony Music, and I
20 haven't really discussed it with my colleagues at
21 the RIAA, it doesn't seem to me that it's out of
22 bounds to think about or have a conversation about

♀00248

1 creating certainty by having archives or libraries
2 notify in some fashion publicly, whether it's
3 something that is managed by the Copyright Office or
4 online or managed by -- I'll make this up --
5 SoundExchange, where they could say, Look, we have
6 these recordings; we don't know who the owners are;
7 we intend to make X uses -- and I acknowledge that
8 there was a rather spirited debate about what kind
9 of uses libraries and archives might be entitled to
10 make, so we will leave that to the side for the
11 moment -- but we intend to make library and archival
12 use of these recordings, here's the metadata such as
13 we have it, whether it's the type of recording, the
14 owner, the title, the musical composition, so on and
15 so forth, whatever information you have available,
16 and there is some kind of potential immunity from
17 litigation or prosecution or statutory damages, I
18 don't know. I'm just speculating that we might be
19 able to come up with a structure that provides some
20 of the certainty that the libraries and archives are
21 looking for without the burden necessarily being on
22 the recorded music owners of either maintaining this

♀00249

1 database or registering millions of sound
2 recordings.

3 MS. CLAGGETT: Thanks, Gil.

4 I wanted to just kind of throw out one
5 quick question. I want to start with I know that
6 we've talked about just in opening comments a lot of
7 the legal uncertainty and burden that would come
8 from federalization.

9 Jenny also mentioned some of the burden

10 that already exists in terms of post-72 works, in
11 terms of proving chain of title or ownership, as
12 well as pre-'72 works under state law.

13 So one of my general questions is, how
14 would federalization actually make things worse,
15 more negatively impacted, more so than it already
16 exists under current law in terms of the ownership
17 question and chain of title question?

18 MR. HOFFMAN: Not to sound glib, but the
19 system as it currently exists, if it ain't broke,
20 don't fix it. And there has been an expectation on
21 the part of both rights-owners, as well as recording
22 artists, that for pre-'72 works, contract rights

♀00250

1 apply and they will be interpreted under state law.

2 The federalization cannot serve the
3 interests of the parties that the termination of
4 transfer statutes were designed to protect. I don't
5 mean to harp on the free market question, but
6 basically if you accept the statements in the
7 legislative history that this is the basis for
8 wanting to protect these parties' rights, having
9 those parties, most of whom do not have deep
10 pockets, relative to the label, undergo five, six,
11 eight years' worth of litigation to potentially
12 claim their rights doesn't seem to be in their best
13 interest. They have rights under current contracts
14 to get interest -- income from the exploitation of
15 the masters.

16 So, federalization isn't going to help, and
17 for all of the reasons thus far talked about, is
18 likely to make things much worse for the very
19 parties for whom the law was basically passed to
20 help.

21 MS. CLAGGETT: Does anyone else have a
22 response? Eric.

♀00251

1 MR. HARBESON: And perhaps you said this
2 and I missed it, but I would be interested to hear
3 how you would respond to Elizabeth's class's
4 suggestion of kind of a statute that serves as a
5 wrapper for the existing state law.

6 So as I understood the proposal, there
7 would be a statute that would say, For the purposes
8 of recordings before February 15, 1972, the existing

9 state law would apply. Because I will say that this
10 is something that my committee is very -- we're not
11 especially versed in, but that was an aspect that we
12 were all kind of left scratching our heads over
13 saying, Well, if we can establish title under state
14 law, why couldn't we write the federal law to
15 incorporate the way that you claim title under state
16 law?

17 MS. CLAGGETT: Does that solve the problem?

18 MR. HOFFMAN: Let me respond to his
19 question. I'm not speaking on behalf of the RIAA,
20 but the RIAA has been going after third-party,
21 quote/unquote, pirates. I have no problem -- and
22 I'm not speaking for all of my clients, I'm speaking
♀00252

1 for me. I have no problem in federalizing these
2 recordings for the purpose of protecting them
3 against unauthorized users. I have a problem in
4 abrogating contract rights that have been in
5 existence for 30, 40, 50 years. That's my problem.

6 So if the question about how state law
7 applies is with regard to how do we go after
8 third-party unauthorized users, if you want to make
9 it all uniform and federalize it, be my guest. But
10 that doesn't mean that you have to make a blanket
11 law that says, For all purposes, February 15, 1972
12 recordings and prior are going to be covered for
13 termination of transfer or anything else.

14 And Jennifer's pointed out some of the
15 other reasons that you've got to carve out a narrow
16 exception here, or maybe you carve out a broad
17 exception, and you make the state laws applicable
18 universally for the purpose of going after third
19 parties who are depriving not only the master owner
20 but, in turn, the recording artist of their due
21 rights as well as the underlying music publishers.

22 MS. CLAGGETT: Does anyone else have a
♀00253

1 response in terms of potential solutions that might
2 be affected if we actually applied state law in
3 terms of determining ownership status?

4 MS. PARISER: Well, the most obvious
5 example is work for hire, because that's a clear
6 place where the federal -- where the law has changed
7 over time, in the federal context and is different

8 from state law.

9 So, you know, you guys all know, right, the
10 '09 act? You've got the incidence and expense test,
11 and then you have the write-in requirement.

12 And if you've got pre-'72 work currently
13 governed by state law, those questions don't really
14 come into play. But if you now federalize it, you
15 now have to sort that out in looking backwards in a
16 way that you never intended to in the first place.

17 Now, you could --

18 MR. CARSON: Why? Why do you have to do
19 that?

20 MS. PARISER: Well, if you don't -- the
21 only way not to do it is so if it's wrapped --

22 MS. CLAGGETT: Right. Right, that's kind
♀00254

1 of the question.

2 MR. CARSON: Why isn't that the obvious
3 answer?

4 MS. PARISER: It's not the -- well, it
5 could be an answer. To me it's not the obvious
6 answer, because you could -- what you are really
7 kind of saying is we like a little bit of state law,
8 we like the ownership piece of it, but we don't like
9 the duration and we want 108 from federal law, and
10 you want a little bit from column A and a little bit
11 from column B.

12 And so from our perspective, it's cleaner
13 to take the one thing you really like from federal
14 law, which is 108, and make that a state law
15 doctrine, rather than take the things that you want
16 out of state law and import that into federal.

17 We would prefer to -- we think it makes
18 more sense from a policy and rights and sort of
19 doctrinal understanding of the way these rights have
20 evolved for the content owners not to shift people's
21 expectation in their economic outcome, but rather
22 simply to fix the state law -- we have one -- as

♀00255

1 I've sat here all day understanding it, there is
2 basically one articulable problem that the libraries
3 have, which is they want 108 to apply -- they have
4 two problems. They want 108 for sound recordings
5 whose owners can be identified, and they want an
6 orphan works bill.

7 And, you know, to us, the way to fix these
8 things is to enact an orphan works bill, not to
9 federalize sound recordings copyright, and to have
10 state law respect something like a 108 regime.

11 MR. CARSON: Ivan, I know you have to leave
12 in about eight minutes, and I did want to just talk
13 to you a moment about termination.

14 I want to get back to what you are talking
15 about, Jenny.

16 But since you have to leave and you're the
17 one who raised it, I just want to make an
18 observation that may or may not be valid, but I
19 wanted to get reactions to it.

20 When I look at how the termination
21 provisions in the existing law work, I think, as a
22 general proposition, the termination provisions that
¶00256

1 were enacted into law apply only prospectively. And
2 by that I mean the termination provisions that were
3 enacted did not look backward, they did not
4 terminate any rights that had already been granted.

5 Does anyone disagree with that?

6 MR. HOFFMAN: I need clarification on that
7 because on the surface I don't agree.

8 MR. CARSON: Let's start with Section 203,
9 which became effective January 1st, 1978, and
10 applied only to grants made after January 1st, 1978.
11 We've got no problem there, right?

12 MR. HOFFMAN: No problem.

13 MR. CARSON: That wouldn't bother you?

14 MR. HOFFMAN: No.

15 MR. CARSON: All right. Then let's go to
16 Section 304, which --

17 MR. HOFFMAN: Other than conceptually.

18 MR. CARSON: Yeah, okay, fine. Duly noted.

19 Section 304 then is the only other
20 termination right we have, and what Section 304 says
21 is, with respect to the extended part of the
22 copyright term that as of January 1st, 1978, was
¶00257

1 tacked on to the copyright term, the original author
2 may terminate that part of the term.

3 So nothing was taken away from the person
4 who had received rights under the preexisting
5 contract. All that it said was if the author had

6 already given you all the rights to the end of the
7 copyright term, we've now added something to the
8 copyright term and we're going to give that back to
9 the author.

10 MR. HOFFMAN: Well, okay, then that is
11 where the disagreement comes in. Because under the
12 Sonny Bono Act, those rights would have extended my
13 clients' rights if we're talking about my clients
14 and not be subject to granting those to the author.

15 MR. CARSON: Yeah, but until the Sonny Bono
16 Act was enacted, your clients' rights were going to
17 go into the public domain. So it didn't take the
18 rights from your clients; it took from the public
19 domain and gave them to the authors.

20 MR. HOFFMAN: But according to --

21 MR. CARSON: But let's go back to my point.

22 My point is, as I understand it, the

♀00258

1 way the termination -- the only termination rights
2 that exist, they are only prospective. They didn't
3 reach back.

4 Why is it that you assume that if we bring
5 in pre-1972 sound recordings into the federal
6 statute, that the way we would apply the termination
7 rights would reach backwards to deal with contracts
8 that have already been entered into? Wouldn't that
9 be a break with what we've ever done in the past
10 with respect to termination rights?

11 MR. HOFFMAN: The reason that I have
12 concerns is because lawyers are the ones who can
13 think of the most disasters that could possibly
14 befall, and since the mandate here was not limited,
15 it was should we cover 1972 and pre-1972 recordings
16 under the copyright law? It didn't carve out some
17 of these finite exceptions that you are now talking
18 about. We'll make it prospectively and so on.

19 So I'm here to basically say don't do that.
20 If you want to do this, we can talk about that. But
21 I don't want to all of a sudden, you know, have all
22 of my clients' rights abrogated. So that's the

♀00259

1 reason for my position there. If you want to talk
2 about prospective things, that presents some other
3 issues, if not this particular issue.

4 MR. CARSON: Okay. So if we follow what I

5 think has been the tradition with respect to
6 termination rights, and if you want to go back to
7 renewal term, because that's where it came from, the
8 concept for renewal term, it works the same way,
9 then it strikes me that it wouldn't be illogical if
10 you were to bring pre-'72 sound recordings into the
11 federal statute, that you could revise Section 203
12 to make clear that it applies only with respect to
13 grants entered into after the effective date of the
14 law that brings the pre-'72 works into the scheme.
15 It works the same way 203 worked in 1978.

16 I'm not sure you even need to do anything
17 with respect to Section 304. But if you do, maybe
18 you do. I would figure it's probably moot at that
19 point. And you wouldn't have a problem because
20 termination would not apply to any pre-1972 sound
21 recordings, and then you have no problem; is that
22 right?

♀00260

1 MR. HOFFMAN: What I have heard so far is
2 that there are good reasons to include those sound
3 recordings, good reasons not to include those sound
4 recordings, and the limited participation that I've
5 heard so far is, as the Copyright Office begins its
6 process of thinking through this, to be very
7 circumspect in exactly how they are going to do
8 this.

9 MR. CARSON: Okay. Then to be clear, at
10 least thus far what I'm hearing from you, there is
11 not an objection to the general notion of bringing
12 them into the '72 act -- bringing pre-'72 sound
13 recordings into the '76 act; it's there are certain
14 things you want to make sure don't happen. They are
15 not subject to termination rights, you don't mess
16 around with ownership. If those things don't
17 happen, then from what I've heard from you so far,
18 you are not concerned.

19 MR. HOFFMAN: On the basis of the limited
20 way you phrased the question, yes.

21 MR. CARSON: And then we will have further
22 questions probably after you leave the room on

♀00261

1 ownership, which may or not give people some peace
2 of mind or at least give people some notions on how
3 they might get peace of mind, but I just wanted to

4 air that with you while you are still here.

5 MR. HOFFMAN: All right. Thank you.

6 MR. CARSON: Karen, sorry for interrupting.

7 MS. CLAGGETT: Oh, no, no. I mean I think

8 that actually is one of the points. When we were

9 considering the issue, we're not considering it

10 basically at a static state. I mean it is, are

11 there solutions or things that we can do to actually

12 ameliorate any of the problems or concerns that

13 people raise, and it sounds like we now have

14 agreement at least with respect to one party in

15 terms --

16 MR. CARSON: I wouldn't want to

17 characterize it as agreement, but there is a

18 possibility here.

19 MS. CLAGGETT: There is a possibility. And

20 going back to I think just on the ownership

21 question -- unless anybody else wants to actually

22 make a comment on the termination issue, but going

♀00262

1 back on the ownership question and with respect to

2 whether applying state law would be a solution to

3 ameliorate some of the concerns, I don't know if

4 anybody else had any concerns that they wanted to

5 make.

6 MS. GARD: I just had a short response, and

7 that's that we had that same problem with this

8 notion of picking and choosing, and we finally said

9 we're not picking and choosing; it's more of a

10 sovereignty question.

11 So we looked back at 104(a) again and said

12 we hadn't included foreign law into the U.S. law

13 before 104(a), but we decided that it was up to the

14 individual country to determine how ownership was

15 going to be determined based on that particular

16 country.

17 And so I think what we thought was that we

18 were kind of seeing the individual states as like

19 mini-sovereigns in some way, that they had already

20 created their own system, and that we would respect

21 that system and that way it was sort of in that sort

22 of parallel thing. So we had already mucked with

♀00263

1 our system in terms of bringing in foreign law, but

2 it wouldn't be a much bigger step to bring in state

3 law on that particular issue.

4 Just to let you know, because we had this
5 issue of sort of, well, can we just pick and choose?
6 That was one of the questions, Can we just bring in
7 107 and 108 and still have it under state law, and
8 that is not what we were thinking. We were thinking
9 in terms of semi-sovereignty kind of questions on
10 state law questions.

11 I just wanted to respond to that.

12 MS. CLAGGETT: Thanks.

13 And I think Eric had a comment he wanted to
14 make.

15 MR. HARBESON: Yeah, first of all, I wanted
16 to say for the record, what we're actually looking
17 for is 107. 108 is, we think, largely broken, so
18 we're not -- we would love to have 108, but 107 is
19 really what we're looking for. An orphan works bill
20 would be great, and actually that is what -- I'm
21 sorry, is it Gil or --

22 MR. ARONOW: Gil.

♀00264

1 MR. HARBESON: It's Gil.

2 That was kind of what Gil's registry idea
3 was -- seemed to be getting at, and a lot would
4 depend on what the burdens were for reporting and
5 what the -- what the immunities given in return for
6 that would be. I mean that would be a whole
7 different debate, and I think it's largely a debate
8 that happened in the orphan works debate, but that
9 was something that would possibly be interesting to
10 us.

11 MS. CLAGGETT: Anybody else want to make a
12 comment?

13 I don't know, Jenny, if you wanted to -- I
14 mean I think you expressed a concern generally with
15 the concept of federalization and perhaps another
16 way that the issue with respect to 107 and 108 might
17 be addressed in terms of applying the state law, you
18 know, applying 107 and 108 to state law.

19 MR. CARSON: Let's not revisit 107 and 108.

20 MS. CLAGGETT: No, but I was saying on the
21 flip side, if you are just actually looking at the
22 specific issue of this panel in terms of ownership

♀00265

1 and not the overall concern with federalization,

2 does the proposal in terms of applying state law to
3 determine ownership status, is that one that the
4 record companies would be willing to consider as a
5 potential solution?

6 MS. PARISER: Well, I think our position is
7 clear that we are not in favor of sort of partial
8 federalization.

9 It is difficult to imagine how what we
10 regard as something of a pastiche is going to make
11 the world clearer and better and nicer for anybody.
12 You know, we think this just buys more litigation.
13 You know, we have precedent around these issues now,
14 and any change in the law just gets more of it.

15 And it's hard to imagine that actually
16 working well in principle. It sounds sort of
17 superficially kind of appealing. Just leave state
18 law ownership rights in place and everything else
19 from federal law goes in. In practice that rarely
20 seems to work out so cleanly.

21 On the termination issue, I'm gratified,
22 David, to hear you all but promise us that there

♀00266

1 will not be a retroactive application of
2 termination --

3 MR. CARSON: You know me better than that.

4 MS. PARISER: You are tagging everybody
5 else with agreements, so I'm getting one from you.

6 MR. CARSON: Fair enough.

7 MS. PARISER: But you can't give and take
8 at the same time. You can't say, Well, I won't give
9 you termination, but we are chopping 20 years off
10 your term. Right? So, you know, presently we've
11 got through 2067, so if you say, Well, the price for
12 no termination is now 2047 or 2037 or whatever, you
13 know, it ends up being we're back in the same place.

14 MR. CARSON: I think we all understand in
15 part the question is, what is the entire package?
16 Part of what I'm trying to do, and I'm not
17 advocating anything. I'm trying to solve
18 problems -- see if there are ways to solve problems.
19 I'm trying to look at each individual problem that
20 people are identifying, and I'm trying to figure
21 out, is this really a problem or is this their way
22 to make this a non-problem?

♀00267

1 And I'm not trying to do it by waving a
2 magic wand. I mean what I was talking about with
3 respect to termination and what Karen's talking
4 about with respect to ownership, I think there are
5 pretty strong arguments that what we are talking
6 about are consistent with what happened actually in
7 1978 when we federalized a great deal of law that
8 had been common law, had been state law.

9 My point about termination was, I think you
10 can make a pretty strong argument that just using
11 basic preexisting doctrine tradition, termination
12 wouldn't apply with respect to any rights that had
13 already been granted prior to the enactment of a new
14 provision bringing these in.

15 And I think with respect to ownership,
16 Karen is going to explore with you now some
17 questions about whether one would -- there's even
18 any reason to believe that bringing pre-'72 sound
19 recordings into the federal statute would change
20 anything with respect to ownership.

21 MS. CLAGGETT: Yeah, and I think what you
22 said about -- that was my next question. In terms
♀00268

1 of how we have had to handle these issues in the
2 past, you know, we handled some of these same issues
3 with respect to unpublished works when they received
4 federal statutory protection under the 1976 Act.

5 And so my question then generally is, were
6 the same parade of horrors discussed and did they
7 actually come to fruition, or did it in some sense
8 not become an issue or it was an issue that actually
9 was able to be surmounted? And is there anything
10 that we need to look to in terms of how that was
11 handled?

12 MS. GARD: Well, in my two areas, one is
13 104(a) and one is 303(a). So I spent way too much
14 time looking at 303(a), which is unpublished works,
15 and that's never ever been anything I ever came
16 across, and I've studied it for about three years.
17 Now, I haven't done any litigation.

18 But part of it is author-based work, so
19 these are usually diaries, you know, things you can
20 attach the person to. And films, usually it was
21 like the film stuff, there was always stuff that you
22 knew. It's easier in some way to know who the

¶00269

1 author is, and it wasn't sound recordings, which is
2 such a mess. But it really isn't an issue with
3 303(a), at least from my research, which is
4 published works.

5 MS. CLAGGETT: And to follow up on that,
6 something I wanted to tease out was, is there
7 something that makes sound recordings unique such
8 that it would be a bigger problem than the problem
9 we already had to confront?

10 MS. PARISER: Well, I mean I think we have
11 a certain amount of invalid analogies here.
12 Unpublished works don't tend to be a huge issue in
13 the sound recording context, certainly for the
14 majors. You know, we're not seeking -- generally
15 speaking, we're not seeking protection and we don't
16 commercialize unpublished works. There are some,
17 and Gil can speak to that obviously. But the works
18 that are the commercial life blood of recording
19 music companies are the ones that are and have been
20 published.

21 And the analogy to, well, in '78 we
22 federalized, which federalized looking forward, not

¶00270

1 backward. So retroactive application of federal law
2 is a completely different animal than forward-going
3 application of federal law.

4 I don't want to, you know, foretell the
5 constitutionality discussion, but, you know,
6 obviously we've got a massive taking problem when
7 you look backward at something and curtail rights
8 versus going forward for rights that have not yet
9 been created.

10 MS. GARD: So I think under Section 303(a),
11 what it did is it brought unpublished works, state
12 common law works back into the federal system for
13 the first time. And so the takings question did
14 come up then, which will be a panel. And so there
15 was a 25-year period where you could incentivize to
16 get additional time to publish the work.

17 It was a huge, huge problem, but it
18 happened because the system was working under the
19 1909 Act, which was that sound -- radio, plays,
20 movies and television -- wasn't considered
21 published, and it was such a mess that it was sort

22 of a rehaul of it and bringing it into a more civil
♀00271

1 law system. And so they did have -- it was all --
2 so 303(a) is works created before 1978 but not
3 published.

4 And so the answer to the other question is
5 that we do see neighboring rights abroad because you
6 can't figure out who the author of sound recordings
7 is. Is it the person who is speaking? Is it the
8 engineer? Is it the person putting up the money?
9 And so they call it neighboring rights, which means
10 it's not an author-based life-plus system, but it's
11 based on fixation in some countries or publication
12 or making available to the public.

13 And so we have faced these problems before,
14 and we also faced the problem with 104(a) when we
15 restored copyright to all these foreign works that
16 never had copyright and had been in our system for
17 70 years.

18 So it is a familiar problem, and I think
19 that there are some models on how to deal with it.
20 But sound recordings is a big mess because of how
21 they were created, and you don't know who is the
22 author, and that is why not having an author-based

♀00272

1 system is really important.

2 MS. PARISER: Right. Also, obviously, the
3 restoration of a work to copyright that was formerly
4 considered PD is obviously a different animal than
5 what we regard as transfer -- changing something
6 that we think enjoys greater rights and protections
7 under state law to something with lesser in federal.

8 MS. GARD: Yeah, and I think that's the
9 analogy to 303(a). So that you had perpetual
10 protection of unpublished works. And that was what
11 the -- is it the -- I'm not going to say which
12 archive. It was an archive that was caught off
13 guard, and they didn't realize they were losing
14 federal protection until it was too late, and they
15 were shocked, and they would have done something
16 about it to get additional protection. I think
17 that's the greater analogy rather than foreign works
18 that they were just kind of immune to.

19 MS. CLAGGETT: Does anybody else have any
20 other comments on that issue?

21 One of the things that I actually did want
22 to follow up, because, Jenny, you mentioned it in

♀00273

1 your opening statement, was the registration issue
2 and the comment that imposing registration would
3 cause a huge burden or costs on the record
4 companies.

5 And I think it was alluded to a little bit
6 earlier that obviously registration is not a
7 requirement for copyright but would be limited to
8 situations in which you are actually going to be
9 litigating to enforce your rights.

10 So a specific question I had was, how huge
11 of a problem would it be if it's limited to
12 situations in which you actually are trying to
13 litigate your rights and it's not a situation in
14 which you are going to go out and have to register
15 all your works immediately?

16 MS. PARISER: Well, again, I mean here we
17 are kind of Chinese menuing the law. If we're
18 saying, okay, we will -- we will have federalization
19 but we won't have a stricter registration
20 requirement as we do otherwise -- is that not what
21 you're saying?

22 MS. CLAGGETT: No, no, I'm saying the

♀00274

1 registration requirement would be the same, but the
2 registration requirement itself under existing
3 law does not require -- that you do not have to have
4 registration in order to have copyright protection.
5 You just have to have registration in order to bring
6 the litigation.

7 MS. PARISER: From the perspective of the
8 major record companies, you don't operate without a
9 federal registration of your work. That just is the
10 most horrendous policy in the world. In part
11 because registration gives you additional rights
12 that are necessary to protect and commercialize your
13 work.

14 As I explained in the LimeWire situation,
15 because it -- the opportunity for works to be
16 infringed is so instantaneous at this point, you
17 can't wait for somebody to infringe your work and
18 then go to court and then register and then go to
19 court, because now you've done yourself out of the

20 opportunity to get statutory damages.

21 MR. CARSON: How many states give statutory
22 damages right now?

♀00275

1 MS. PARISER: Well, none, obviously.

2 MR. CARSON: Yeah, so why are you
3 disadvantaged by being brought into a federal system
4 which says, By the way, we're going to give you an
5 additional benefit that no state gives you, but
6 you've got to register? This is a disadvantage?

7 MS. PARISER: Well, am I also going to be
8 allowed to pursue rights for actual damages and
9 punitive damages in addition to -- how -- I'm sorry.
10 I go to federal court without a registration, and
11 I'm suing for state law copyrights for works that
12 are covered by the federal regime.

13 So we've -- we're now federalized, right?
14 We're now federalized. Okay. So here is a work
15 from 1970.

16 Somebody give me an example of work from
17 1970.

18 MR. WESTON: "Moondance" by Van Morrison,
19 or -- never mind.

20 MS. PARISER: There you go. Thank you.

21 And it's been infringed, but it has never
22 been registered yet. All right. So I go to court

♀00276

1 to sue on it, but I'm suing for state law rights and
2 remedies. No?

3 MS. CLAGGETT: No, you would be suing
4 federally, but if --

5 MS. PARISER: But I don't get statutory
6 damages.

7 MS. CLAGGETT: Right. How would that be
8 different than what the current situation is under
9 state law if you are suing under state law for
10 copyright infringement?

11 MS. PARISER: Well, it's not -- to me
12 that's a state work. And I'm not -- so does the
13 DMCA apply? Can the defendant make use of a DMCA
14 defense for that work that's now been infringed?
15 I'm not sure what this -- this work now is sort of
16 like a -- like a two-headed dog. I don't know what
17 rights apply to it, what defenses the service has
18 available to it.

19 MR. CARSON: But that's -- I get the issue,
20 but that's a different issue.

21 What we're trying to figure out is why
22 having a registration provision which says you can't

♀00277

1 sue until you are registered -- and I realize there
2 is some burden, I would suggest not that great a
3 burden if all you have to do is register the day
4 before you go to court -- and there's also a
5 provision that says you can get statutory damages
6 and attorney's fees, which I don't think any state
7 would give you under the existing lay of the land,
8 but to do that, yeah, you've got to register prior
9 to the commencement of the act of infringement.

10 And you're suggesting that that's a
11 tremendous disadvantage, and I'm thinking, Gee,
12 you're being offered an advantage which does have
13 some procedural requirements that don't exist at
14 state law, but the procedural requirement for
15 statutory damages gets you something you couldn't
16 get at state law. The registration as a
17 prerequisite for court is a ticket to get into
18 court, but it's not a high price to pay, and you
19 don't go to court that often.

20 So I'm trying to figure out why you're
21 disadvantaged because of registration.

22 MS. PARISER: I guess I'm not seeing what

♀00278

1 I'm getting here. What am I getting?

2 MS. CLAGGETT: Well, you're getting the
3 ability to have statutory damages and attorney's
4 fees.

5 MS. PARISER: No, I'm not.

6 MS. CLAGGETT: In the situation in which
7 you actually do register in advance. Now, there
8 would be no change in terms of if you registered
9 after the infringement, you would still have
10 basically the same amount of damages that you would
11 have or the same type of damages that you would have
12 available under state law because you don't have
13 statutory damages under state law.

14 MS. PARISER: Okay. So in this new world,
15 in order for me to sue to prosecute Van, I can
16 either register really quickly for all -- for Van
17 and all of his brethren, right, which is a huge

18 burden --

19 MS. CLAGGETT: And then you would have the
20 ability for statutory damages.

21 MS. PARISER: Statutory damages, right.

22 Or I can register just as I'm going in the

♀00279

1 door to court, in which case I've got the additional
2 burden of registering as I sue, but no additional
3 advantages versus the current system where I can now
4 sue under state law, get my state law remedies
5 without having to register. So now I have an
6 additional burden but only additional rights that
7 are very burdensome to me, and as a record company
8 I'm not particularly interested in.

9 MS. CLAGGETT: Well, I do have one
10 follow-up question that in terms of I guess the
11 amount of burden, basically the amount of burden
12 that this would potentially cause.

13 Is there any way that the record companies
14 would be able to determine or do they determine now
15 sound recordings that are the most commercially
16 viable sound recordings so that they would not have
17 to register all pre-1972 recordings but those
18 recordings that are most likely to be exploited and
19 those recordings that would most likely be subject
20 to piracy and potential litigation?

21 MS. PARISER: I suppose --

22 MS. CLAGGETT: Is the burden really having

♀00280

1 to register everything or is there any way to limit
2 that burden?

3 MS. PARISER: I wouldn't want to be the
4 record company lawyer who told some artist that
5 their work wasn't deemed valuable enough to
6 register.

7 MR. CARSON: Let me tell you what I've been
8 told by the folks in our performing arts
9 registration division, and maybe it's not true.

10 It's inconsistent with what you've told us. But
11 what I have been told ever since I've been here is
12 that record companies more often than not don't
13 register their sound recordings. That's what I've
14 been told. That's the lore in the Copyright Office
15 which registers the work. Now, maybe they're
16 mistaken, but that's what we've been told. So if

17 that's true --

18 MS. CLAGGETT: -- all of those sound --

19 MR. CARSON: Well, a great many are not
20 registered. That's what we're told.

21 MS. CLAGGETT: They're registered
22 selectively in terms of not automatically --

♀00281

1 MS. PARISER: Honestly, that is news to me.
2 I think the major --

3 MR. CARSON: Well, it's obvious it's news
4 to you, but part of your premise is, look, we'd have
5 to register it all, that's good practice, and I
6 agree it's good practice, but what I've been told is
7 it's not your industry practice.

8 MS. PARISER: Right. I mean I can speak to
9 the practice at Sony Music, which Gil can also speak
10 to. Every release that was pressed for commercial
11 distribution went to the in-house copyright
12 department for registration, and the deposit copy
13 is, of course, just the commercial version of the
14 work, and two extra copies got sent along to
15 Washington, and the relevant paperwork was filled
16 out for every single commercial release.

17 MR. CARSON: Good. Glad to hear it.

18 MS. PARISER: That's my understanding. I
19 don't think any picking and choosing was being --

20 MR. BENGLOFF: We were telling our members
21 now -- I mean we started -- some of them weren't
22 registering until about three or four years ago, so

♀00282

1 they started with their highest velocity titles.
2 But an infringement is an infringement is an
3 infringement. So if it's -- Wind-up Records is one
4 of our members, so you know Creed and you know
5 Evanescence, but maybe they infringe Seether instead
6 or they infringe someone else.

7 All we're looking for is that infringement.
8 And it may seem simple to you, but for our
9 community, which is a little different than the
10 major labels, as I said earlier, even if you have 80
11 employees, we don't have any economies of scale, so
12 if you are adding a person to do this type of work,
13 it's a burden. And \$70 may not sound like a lot to
14 you, but --

15 MR. CARSON: Well, electronically it's \$35.

16 MR. BENGLOFF: Is it \$35 each side? Isn't
17 it \$35 for the sound recording and \$35 for the
18 composition? I'm sorry, maybe I'm learning
19 something new.

20 MR. CARSON: You can actually do either
21 one. Right?

22 MS. CLAGGETT: Yeah.

♀00283

1 MR. BENGLOFF: Okay. I learned something
2 new today. That's great. The members of A2IM are
3 probably smarter than I am, so they probably already
4 know that.

5 But all kidding aside, in some cases, it's
6 a different writer and things.

7 MR. CARSON: It doesn't matter.

8 MR. BENGLOFF: There's different -- so you
9 could register 87 writers? You work here, I don't.

10 MR. CARSON: You got to have the same
11 copyright owner. Same copyright owner, that's the
12 key.

13 MR. BENGLOFF: Okay. So -- for the sound
14 recordings you are saying?

15 MR. CARSON: Yes.

16 MR. BENGLOFF: Okay. All I'm saying is --
17 how about if you have a side bend and other things
18 on those things?

19 MR. CARSON: If it doesn't affect
20 ownership, it doesn't affect your ability to put
21 them in the same registration.

22 MR. BENGLOFF: Okay. Fair enough. So it's

♀00284

1 work for hire and everything.

2 It becomes a burden -- I know I get
3 complaints from people, both from a course point of
4 view, and they are probably doing it the right way.
5 I just didn't focus on it. And just
6 administratively getting it done. And the catch-up
7 for some of the labels with the huge catalogs. I
8 mean you're talking -- it's very difficult.

9 MS. CLAGGETT: I think Eric had his hand
10 up.

11 MR. HARBESON: Yeah, I want to go back
12 again to Elizabeth's class. I kind of wish I had
13 taken your class. They have good online programs
14 now with and --

15 MR. WESTON: As long as you are not
16 streaming.

17 MR. HARBESON: Right.

18 So the -- one of the parallels that
19 Elizabeth's class brought up was with the UIAA
20 where, of course, there were rights-holders that all
21 of a sudden had to register a number of recorded --
22 of works, and they were given, I think, what, five
¶00285

1 years, six years?

2 MS. GARD: Two.

3 MR. HARBESON: Oh, was it just two? The
4 lists were -- there were seven or eight different
5 lists that were published by the Copyright Office.
6 And the information on the lists that was published
7 in the federal register was very minimal. I don't
8 know what was involved in filing an NIE, but as
9 Elizabeth said, the information in those lists is
10 practically useless for anyone doing research
11 because you have to -- it's the publisher and the
12 title, so Schirmer is claiming copyright to Opus 24
13 No. 7, and that's all of the information that you
14 have. That's not especially helpful, because there
15 are lots of composers that might have had an Opus 24
16 No. 7.

17 The point is that what I'm trying to posit
18 is that we might have a regime where rights-holders
19 had a period of time to submit label numbers and
20 titles. So Sony -- well, DG633457, for example, and
21 then it
22 lists -- of just that information as a means of
¶00286

1 establishing registration for the purposes of
2 bringing a lawsuit. Would something like that be a
3 conceivable solution?

4 MS. PARISER: I think what you're asking is
5 some sort of short form registration?

6 MR. HARBESON: Yeah. That simplifies
7 things a bit.

8 MS. PARISER: I don't think the length of
9 the piece of paper that we have to fill out is the
10 real issue. It's simply the burden of having to do
11 it for probably -- I don't know if it would be
12 millions, but certainly many hundreds of thousands
13 of works, plus -- Gil says millions -- plus the cost

14 of doing that, and the human resources that would be
15 needed to do it. I think if you made the paper half
16 as long, it doesn't help that much.

17 MS. GARD: With 104(a), there were two
18 provisions. There was the constructive notice and
19 there was a two-year period where you could send it
20 into the Copyright Office. There was no evaluation
21 of it. It wasn't like a trademark evaluation. You
22 just sent it in, so a lot of the NIEs -- you know,

♀00287

1 people are claiming ownership on things that they
2 actually don't own, like restoration. So you don't
3 have to claim ownership -- I mean you don't have to
4 prove ownership on it. You just say, I do that.

5 And then after the two-year period, there
6 is constructive notice, which I actually have a
7 little bit of a problem with because it goes on
8 perpetually. So if somebody starts to use the work,
9 you send actual notice, and then they only have a
10 year to use it.

11 So there is a potential for a system -- I
12 don't like that system personally -- but there is a
13 system that you could have a period of reflective
14 notice, a five-year period where you allow them to
15 put things in, but then another additional period of
16 constructive notice where you say, you know, We are
17 claiming this and you can't use it. I don't know
18 how that would work. We didn't look at that part in
19 the class. That would be too hard for them, but --
20 it would be too hard for anyone. So, yeah, so that
21 is the way it works under 104(a), which you all
22 know.

♀00288

1 MS. PARISER: There was one more thing I
2 wanted to -- you guys probably know this -- but in
3 many circuits, the 2nd in particular, you need not
4 just a registration but an actual certificate to
5 prosecute your rights. So it doesn't completely
6 work to say, Oh, so-and-so is infringing my work,
7 I'm going to get me a quickie registration and go
8 run into court.

9 So you will need to fix that provision as
10 well, David, while you are at it. Got a lot of ink
11 in that one.

12 MR. CARSON: I'm trying to fix the Ninth

13 Circuit's misstatement of what the law is in that
14 area.

15 MS. CLAGGETT: It would expedite
16 registration work in that case as a potential way to
17 avoid it.

18 MS. PARISER: Potentially, but now it's not
19 \$35 or even \$70 --

20 MR. CARSON: It's well under a thousand.

21 MS. CLAGGETT: Yes, Jay.

22 MR. ROSENTHAL: I would just like to make a
♀00289

1 comment on the burden issue of registration,
2 especially as it relates to indie labels.

3 I think it is a little bit troubling to
4 hear that it's not a burden considering most indie
5 labels and major labels are besieged with other
6 issues and other problems, in particular, the need
7 to send out an unbelievable amount of takedown
8 notices under the DMCA.

9 And I know that some clients of mine, indie
10 labels, that is what they do almost every day and
11 they still can't keep up with all the ones that they
12 have to. So it's a little bit wrong to say that
13 there is not much of a burden adding registration if
14 you are in the business of pre-'72 recordings and
15 you're doing that.

16 So burden is a tough issue in today's
17 world. I mean I happen to think the DMCA is broken
18 because of that, and it's impossible for copyright
19 owners, especially small and independent copyright
20 owners, to stay on top of that. To add to the
21 burden of registration is not minimal. It's like
22 the cherry on top of the cake when it comes to

♀00290

1 burden. And I think that you would probably --

2 MR. BENGLOFF: Absolutely. I get e-mails
3 from members who say, I've spent my morning doing
4 wack-a-mole, and, you know, there's just too much
5 going on in the world. It's the lawyers.

6 MS. CLAGGETT: I did want to throw out a
7 follow-up question to this, and just are we focusing
8 too much on just one segment of copyrighted or sound
9 recordings that would be at issue here?

10 Peggy alluded to this a little bit earlier.

11 I know that the recording industry has now said, you

12 know, it is your standard practice to go ahead and
13 register all works, so it would be a huge burden.

14 But in terms of the overall number of works
15 that would actually be at issue in terms of pre-1972
16 federalization, such as some of the works that Peggy
17 mentioned, you know, folklore recordings, types of
18 sound recordings that are never going to be
19 commercially exploited, should we be considering the
20 overall scope of whatever burden it would be as
21 opposed to just focusing specifically on the burden
22 to individual record companies.

♀00291

1 MR. BENGLOFF: Can I just -- I mean the
2 topic was on ownership and business expectations, so
3 lest we forget, I just want to repeat some of my
4 earlier comments about our return on investment.
5 We're dealing a lot with the longer tail type items
6 where we're going to need a lot more time to get our
7 money back. It's going to take constant updating to
8 renew technology to put it back through the system
9 again, and updating your metadata and everything
10 else. I mean there is just a myriad of things going
11 on that we have to get a return on.

12 And this federalization, you know, whether
13 it be the numbers that my colleagues on the right
14 are talking about or that Elizabeth's class is
15 talking about or whatever it may be, that's the
16 bigger issue. They are both issues here, but since
17 we've touched on it, I felt compelled to just chime
18 in again and remind you of some of the things that I
19 said earlier this morning. Thank you.

20 MS. CLAGGETT: Jay.

21 MR. ROSENTHAL: I have a rough time with
22 this commercial viability issue. What is not

♀00292

1 commercially viable today in today's world?

2 MS. CLAGGETT: That's a good question.

3 MR. ROSENTHAL: Everything is.

4 MR. BROOKS: Apparently 96 percent of the
5 things issued before 1925.

6 MR. BENGLOFF: With all due respect, that's
7 a six-year-old study, and as I told you earlier, I
8 just brought ten recordings into Pandora last week
9 that Pandora had -- they have over half right now of
10 the non-on-demand streaming radio revenues, which is

11 a number of over \$100 million a year goes through
12 Pandora. They just started a comedy station. These
13 recordings were not of great value until Pandora
14 started it. Now they're going to get into the
15 rotation, they're going to get sampled, they're
16 going to get thumbs-up'd and they're going to get
17 thumbs-down'd.

18 So, Jay, I'm with you a hundred percent in
19 terms of what is commercially viable grows every day
20 because access, which used to be limited to people,
21 has grown and grown and grown, and the way people
22 are going to make money from now on is by getting

♀00293

1 revenues from a lot of different revenue streams,
2 some of which we don't know exist today.

3 MR. BROOKS: I really hope that we can --

4 MS. CLAGGETT: Eric had his hand up, and
5 then we will go straight to you, Tim.

6 MR. HARBESON: And the thing is that people
7 who are working with pre-1972 books are making
8 plenty of money. People who made pre-1972 movies
9 are making plenty of money. What I'm still trying
10 to figure out is why sound recordings are different.
11 And why -- I mean historically there is certainly --
12 I'll defer -- I really want to know why sound
13 recordings are different than any other kind of
14 intellectual properties because I don't think that
15 they are.

16 MS. CLAGGETT: Can we hold that and come
17 back to it because I know Tim wanted to respond?

18 MR. BROOKS: Yeah, I just want to make a
19 note here.

20 Part of what was behind this study in the
21 first place was to put some data on the table
22 because it's very easy to cite anecdotal evidence or

♀00294

1 to make general statements about things. I come
2 from a world where you need to have data. You need
3 to know what percent. I mean how much? Nothing is
4 available. What does that mean? What percent is
5 that? Or lots of things are good. What does that
6 mean?

7 Until you put data against it, all you are
8 talking about is what we call in research
9 mother-in-law research or anecdotal research. You

10 need facts.

11 I would welcome an update on this study. I
12 really don't think it would show anything
13 significantly different, and I follow this field
14 rather carefully. But to make statements about, you
15 know, we're doing things. Well, what are you doing?
16 How many are doing? What is 96 percent?

17 MR. BENGLOFF: May I respond?

18 MS. CLAGGETT: Well, I will let Jenny
19 respond real quick and then you can go.

20 MR. BENGLOFF: I always defer to Jenny.
21 Go ahead, Jenny.

22 MR. BROOKS: Yes, as we both will.

♀00295

1 MS. PARISER: So I wanted to actually
2 address both points. So to Eric's point, what is
3 different about sound recordings, in a world where
4 there is no piracy and we just have competitors in
5 the marketplace selling what is otherwise public
6 domain works, Penguin Books or an old sound
7 recording, then there is no difference.

8 But people are still willing to buy a
9 physical -- for the moment people are still willing
10 to buy a physical copy of a Penguin classic or
11 perhaps buy an e-book or something like that.

12 The minute that you tell an online service
13 not only that a sound recording is very easily
14 available but it isn't even protected by copyright,
15 there is no business model for major record
16 companies anymore because we still have to make
17 money from it, whereas the LimeWires can give it
18 away for absolutely nothing because there is no cost
19 to them anymore. So I really think it is fair to
20 say there is all but zero value to a record company
21 in the public domain sound recording.

22 To Tim's point, I completely agree that,

♀00296

1 you know, the data needs to support it. I think the
2 problem we have in the methodology of his work is
3 that it presumes that works that are not currently
4 being commercially exploited are not commercially
5 viable or have no commercial value.

6 But record companies that are sold, for
7 example, there's a value placed on their catalog of
8 sound recordings, even though some, you know, fairly

9 substantial minority of the works are not currently
10 exploited at a given period of time. Those works
11 are valued and have value, and to simply say that
12 because they are not being currently exploited they
13 are valueless is just not right.

14 MR. BENGLOFF: And to answer your claim
15 about data, I happen to be a member of the
16 SoundExchange board, but I'm not sharing their data,
17 I'm just confirming what's true. I spent a lot of
18 time with the people at Pandora. Six years ago
19 their revenues were negligible that they were paying
20 at the SoundExchange. It was a million or \$2
21 million.

22 Right now they are sharing data with a
♀00297

1 number of entities, including at least one of the
2 major labels that I know of, and sharing with
3 myself. Forty percent of their -- of their streams
4 are independent artists, so last year they paid
5 somewheres between \$55 and \$60 million in royalties,
6 which didn't exist against RTL (phonetic) which
7 wasn't getting revenue at that point. So that's not
8 anecdotal; that's a real number. Forty percent is a
9 real playlist number.

10 I talk to people from NPD all the time.
11 Russ Crupnick, I had a long conversation with him.

12 So it's not -- and I've asked him for
13 certain things over periods of time, we have a close
14 relationship. So, yes, that was an anecdotal story
15 about bringing in those comedies, but I'm saying
16 there is lot of data behind what has happened over
17 the last six years.

18 And, Tim, quite frankly, I don't know the
19 basis of your research. I have not read your
20 report, I apologize on that. You today have
21 expressed somewhat of a bias. I don't know if there
22 is any bias in the studies. There are studies that
♀00298

1 are totally unbiased. There are studies that are
2 biased. You know, it's not like that's the end all
3 and be all, and you keep bringing the numbers up,
4 which to a certain extent may not be biased in any
5 way, sir, and I apologize if -- but they may, and
6 there are other studies that are going on all the
7 time and it is six years ago, and I can tell you in

8 our industry, not anecdotally, the world has changed
9 in huge extremes over the last six years.

10 MR. BROOKS: Are any of those cases you are
11 talking about pre-1925?

12 MR. BENGLOFF: I can just tell you we have
13 people with catalogs, and I actually help our
14 members get things on to -- you keep focusing on
15 pre-'25, but your colleagues don't, so you are just
16 speaking for your one --

17 MR. BROOKS: Well, that was the figure we
18 were talking about.

19 MR. BENGLOFF: I know, but that's the
20 numbers you keep -- you have a chart in there that
21 includes post-'95 (sic) --

22 MR. BROOKS: '25. What chart.

♀00299

1 MR. BENGLOFF: Post-25 numbers. I just
2 looked at your study, and that's what it --

3 MR. BROOKS: Sure. It goes to 1965.

4 MR. BENGLOFF: Right, right, that's what
5 I'm saying. But you have other colleagues. You
6 keep doing it as if you this is what you are
7 agreeing, and that's why I made a point of asking
8 Eric where he was coming from, and I made a point of
9 asking --

10 MS. PARISER: This is where we got into
11 trouble at the last pass.

12 MR. BENGLOFF: You keep saying like you are
13 representing. That's the thing I have a problem
14 with.

15 MS. CLAGGETT: We have a couple of hands
16 that are up, and we actually don't have very much
17 more time.

18 So I do have one more question that I
19 wanted to ask, but the people who are currently
20 waiting, I think it's Eric and then Elizabeth and
21 then Jay.

22 MR. HARBESON: No one is -- we're not

♀00300

1 advocating bringing all pre-1972 sound recordings
2 into the public domain. I just want to make that
3 clear.

4 So you are talking about -- Jenny, you were
5 saying that things are different because Penguin
6 Books doesn't have any -- doesn't -- in sound

7 recordings, you can't make any money off of public
8 domain sound recordings. But we're not really
9 talking about sound recordings except for very old
10 sound recordings.

11 Now, that's another discussion of what the
12 term of copyright should be, but for most of the
13 stuff that I think that you would agree is
14 commercially viable, we're not talking about
15 bringing it into the public domain. We're talking
16 about -- we're actually advocating for a federal
17 regime where you can collect statutory damages even.
18 You know, this is part of our filing.

19 We're not -- we're not trying to take
20 copyright away from you, so that is why I don't
21 understand how sound recordings are different
22 because certainly there's plenty of piracy going on

¶00301

1 in the -- I mean the MPAA is certainly complaining
2 about piracy. I don't see how anything would be
3 different.

4 And I just have to say that for -- I have
5 been trying -- the last couple of minutes trying to
6 think of all of the things that I could do in my
7 library with negligible contributions like a couple
8 of million dollars that Pandora gave to
9 SoundExchange. We could go on and --

10 MS. CLAGGETT: I do want to get the people
11 who have been waiting. I think Elizabeth was next
12 and then maybe Jay.

13 MS. GARD: So we faced this question too in
14 our class and I wanted to report back. So they
15 completely agree with you, Richard. We believe that
16 everything is valuable, and that in this new digital
17 age we just don't know.

18 So what the class came up with is this idea
19 that if you are somebody who wants to potentially
20 profit for something, you should just raise your
21 hand, like whether it's NIE or registration or
22 during a period of time or make it available.

¶00302

1 Because -- and then if you did that for term, you
2 get 2067, you get the whole thing, because that was
3 the deal you had under the pre -- under the old
4 revision.

5 But just let us know -- the class, this is

6 our vision -- just let us know that you want to
7 exploit it. Because if you don't want to exploit
8 it, then let's let the librarians just play with it
9 as much as they want to play with it. Because it's
10 the system of -- a balancing system.

11 And so the idea was for us, we did a
12 five-year term incentive period, like 303(a),
13 because I'm a copyright professor so we did it in a
14 copyright kind of way, but you could do it lots of
15 different ways. But the idea is that if you had
16 clients or you had people and you said, Look, there
17 is this five-year window, just go to the copyright.
18 You have to pay taxes every year, you have to do
19 some dumb thing like that every year, just go there
20 one time and tell them you want all your stuff, that
21 you are going to claim the ownership of all that
22 stuff. You do it one time, you get the full 2067.

♀00303

1 If you don't, well, then you are just being dumb.
2 You know, like that was like a dumb move, and
3 sometimes people are kind of dumb. And that's just
4 what happens.

5 So that was kind of our idea, is you split
6 the difference, and then all the folklore and all
7 the other stuff that everyone is worried about, no
8 one is going to come and claim that. Then it goes
9 into public domain and everybody's happy.

10 That was our happiness, but it took us a
11 really long time to get there, and it was really,
12 really aggressive in our class when they were doing
13 all this stuff. So it's -- you are much more
14 civilized.

15 MS. CLAGGETT: Some people might disagree.

16 I think Jay is actually next and Rich --

17 MR. ROSENTHAL: I don't know about
18 civilized. But just a very interesting point to
19 this about, you know, somebody should think that
20 something is valuable now and, therefore, they
21 should state it.

22 A story from SoundExchange. When

♀00304

1 SoundExchange first started, and they have all these
2 new channels -- you know, they deal with services
3 that have these new channels, and you have XM and
4 Sirius that come up with all these new channels,

5 including -- for all we know, there could be a
6 pre-1926 recording channel next week. But they have
7 a channel of Hawaiian music, and all of a sudden
8 they got a letter from the guys that recorded
9 Hawaiian music saying that we had never ever
10 received any money since we put this music out 30
11 years ago for our Hawaiian music. But now that it
12 is part of the services and now that they have these
13 special narrow casted channels, that it has become
14 valuable.

15 So the point here is, how does one know
16 whether something is going to be valuable or not
17 considering that the services today that are out
18 there in this industry are trying to really make
19 everything valuable across the board, and we just
20 wouldn't know. And I think it's very instructive to
21 think that -- you know, to think that we know what
22 is valuable today is just wrong. That's in my

♀00305

1 estimation.

2 MR. BENGLOFF: I mean, not anecdotal again,
3 but Nielsen, you know, I talk to those people as
4 well to get their research, and there were about
5 30,000 releases in 1990 -- well, in 2000 -- I'm
6 sorry, in 2000, and
7 11 years later they were up to 130,000 releases a
8 year. Those releases in many cases are digital only
9 because the metadata has been prepared by the
10 constituents that our organization represents. So
11 as long as they are getting it available, they throw
12 it up there and make sure it goes to Slacker and
13 Pandora and to all these other services.

14 And just as Jay described, especially for
15 this roots music that was the beginning of my
16 introduction earlier today, and jazz and all these
17 different genres of music, money is rolling in that
18 didn't exist in 2005. These are new revenue
19 streams.

20 MR. CARSON: We have about four minutes
21 left, and then there is one topic we really haven't
22 touched on or maybe we barely touched, I don't know,

♀00306

1 but let's try to deal with work for hire in the next
2 four minutes.

3 MS. CLAGGETT: Yeah. Yeah. I think we

4 touched on it very, very slightly.

5 I think, Jenny, you kind of touched on it
6 the most, so I can throw out the question to you or
7 to anybody else who also wants to respond.

8 First, this is just kind of a general
9 background context question, and that is, how is
10 work for hire handled under state law and how does
11 that differ, if at all, as to how it's happened
12 under federal law?

13 In four minutes or less. Well, two
14 minutes, given if others want to speak.

15 MS. PARISER: I haven't studied this, but
16 my general understanding is that state law, which,
17 of course, as we have spent the last day talking
18 about, cannot really be generalized very, very well.
19 But doing so anyway, it's something more like the
20 conception under the '09 Act. It is did this person
21 show up for work on the premises? Did they get
22 paid? Was it at the incidence and expense of the
♀00307

1 corporation? And not so much about the need for a
2 writing.

3 MS. CLAGGETT: Does anyone want to add
4 anything to that? And that was actually one minute
5 or less.

6 MS. PARISER: Well, presumably we have to
7 talk about that now, right?

8 MS. CLAGGETT: And I think in terms of your
9 reference to the 1909 Act, you know, talk about
10 whether applying that law, if it is similar, to how
11 it is actually applied under state law would be a
12 solution.

13 MR. ARONOW: I just wanted to add a little
14 bit to what Jenny said, which is to say that --
15 maybe I'm just echoing the comments I made earlier,
16 which is that we're -- we are comfortable with the
17 existing landscape, including its imperfections and
18 uncertainties. And the very debate that we're
19 hearing today I think amplifies and justifies what I
20 think are the concerns that have been expressed by
21 the RIAA and its members about the fact that a new
22 regime, whatever it may be, however well intentioned
♀00308

1 it may be, is going to throw turmoil into the system
2 yet again.

3 And that's very much what we're concerned
4 about and what we came here today to express our
5 concerns about. And at the core of who owns the
6 work, and what is a work for hire -- at the core of
7 that concern is who owns the work and what is work
8 for hire.

9 MR. BENGLOFF: You can expand that to all
10 labels. Thank you.

11 MR. CARSON: Not that it gives anyone an
12 ounce of comfort, but I think it's true, and I just
13 want to make sure that it is true that of all the
14 people in the room, of everyone who is advocating
15 any position with respect to the entire subject
16 matter of this study we're engaged in, nobody is
17 suggesting -- or is anybody suggesting that the
18 ground rules should change with respect to ownership
19 if you move things from the state system into the
20 federal system?

21 I'm not saying it's that simple. I'm not
22 saying we can make it happen. I'm just saying, as a
♀00309

1 matter of principle or policy, do we have an issue
2 here? Is anyone suggesting that the concerns that
3 are being expressed here are ridiculous and we
4 should change the way that ownership is governed?

5 I didn't think so, but I just wanted to
6 make sure. And that is not to diminish your
7 concerns, but I just wanted to make sure that that
8 at least is not an issue. Nobody is trying to
9 change the rules. The question is whether it's
10 worth doing what is being proposed given what you
11 think are the best uncertainties as to what is going
12 to happen with respect to the ownership and so on.

13 So I think that sort of sums it up in a
14 nutshell. Okay. Thanks.

15 MS. CLAGGETT: Does anybody have any other
16 final comments?

17 MR. CARSON: No, because we've run over.

18 MS. CLAGGETT: I didn't have any either.

19 MR. CARSON: Since we are already 15
20 minutes behind schedule, it means we will run till
21 5:15, unless this next session goes shorter than
22 scheduled.

♀00310

1 So let's try to get the folks who are on

2 the final panel of the day, which is on effects of
3 federalization on statutory licensing come to the
4 table, and we will get started right away.

5 And that discussion is going to be led by
6 deputy general counsel Tanya Sandros.

7 (Recess.)

8 MS. SANDROS: Let's get started with the
9 last panel of the day so we can try to wrap this up
10 about 5:15.

11 Actually, the next panel is also looking at
12 the effects of federalization but on particular
13 provisions in the Copyright Act.

14 So in a sense it's a continuation of what
15 Karen started in the last panel, but we're going to
16 be looking at really the effects on statutory
17 licenses.

18 And for those who aren't quite as familiar
19 with it, let me just at least give you a quick
20 overview of the two licenses that probably are the
21 key focus of today's discussion.

22 The one in Section 114, which governs the
♀00311

1 statutory license for streaming, making digital
2 transmissions of sound recordings. The law, as most
3 of you know, was changed in 1995, modified in 1998,
4 to bring in performance rights for digital
5 transmissions with respect to post-'72 sound
6 recordings.

7 Since today we've been talking about using
8 federalization of the Copyright Act with respect to
9 '72 as a mechanism to facilitate the preservation
10 and access, should that happen, then there is a
11 question of whether or not people here think in fact
12 we should also bring in statutory licenses at the
13 same time.

14 We have had a lot of discussions today
15 about harmonization, and that seems to make a lot of
16 sense. There may be others who have different
17 viewpoints. We would like to hear that. There was
18 also some earlier discussions today about the
19 economic effects should in fact we federalize
20 pre-'72 sound recordings and what that would mean.
21 I think we will hear more about that this afternoon
22 as well.

♀00312

1 And when you think about this, I think one
2 of the other things that has come up today as well,
3 even though the Section 114 license has mostly been
4 used really for commercial purposes. I mean I think
5 no one had thought about streaming under 114 for
6 educational purposes and not commercial purposes.
7 It's really been because people have been putting
8 forth commercial product and pushing that out to the
9 public.

10 But it does raise a question, and I think
11 Jay spoke to this in the last panel at the very end,
12 just the fact that you are streaming more music and
13 you are offering it to the public, you are actually
14 creating a new audience and you are actually
15 creating more access. And I think we can have a
16 discussion on the access point as well in respect to
17 the statutory license under a federalization plan.

18 So, we're going to start the same basic way
19 we have been. We will give everyone one or two
20 minutes. I note that we have one new person at the
21 table at this panel, Michael DeSanctis. He's
22 representing SoundExchange.

♀00313

1 So, Michael, you actually can begin, and
2 take a bit more time and tell us who SoundExchange
3 is and what their interest is today.

4 MR. DeSANCTIS: Sure. Thank you very much.
5 And thank you for having today's panel and for
6 letting SoundExchange and myself be part of it. But
7 I will keep my comments short because it's the end
8 of a long day.

9 SoundExchange, as many people know, is the
10 sole collective recognized by the copyright royalty
11 judges under Section 114 and Section 112, statutory
12 licenses. It's a unique organization, to say the
13 least. Half of its board is copyright owners and
14 the other half are artists. In our role as the
15 collective, SoundExchange maintains accounts for
16 literally tens of thousands of artists and labels,
17 and distributes hundreds of millions of dollars in
18 royalties.

19 Because of that dynamic, I want to be
20 careful to limit my comments here to SoundExchange's
21 role as that collective, since we have copyright
22 owners here and I'm not sure if we have artists'

¶00314

1 representatives, but who certainly have views on
2 some of these substantive issues, and SoundExchange
3 does too, but I just wanted to make that point.

4 SoundExchange obviously thinks that pre-'72
5 recordings are valuable and are a valuable part of
6 the public performance marketplace. And certainly
7 for artists who primarily performed pre-'72 works
8 and for labels, for small independent labels who
9 specialize in pre-'72 works, it's extremely
10 valuable.

11 If you look at the comments, the written
12 comments from all sides who spoke to the issues of
13 the statutory licenses, which was only a couple of
14 questions of the many that you all asked, there
15 doesn't seem to be a debate over whether there is
16 federal protection in remixed and remastered works.
17 There certainly does seem to be dispute over whether
18 there is state law protection in the underlying
19 recordings. We feel very strongly that there is
20 state law protection. I don't think that that is
21 something that we all will be able to agree to
22 today, and I don't think it's necessarily something

¶00315

1 that the -- that the Copyright Office would be
2 determining. Obviously that's, an issue for state
3 courts and federal courts, interpreting state law.

4 MR. CARSON: Can I -- when you state law
5 protection, do you mean of the performance rights?

6 MR. DeSANCTIS: Yes. Exactly.

7 MR. CARSON: I don't think anyone is
8 arguing there is state law protection of some form.

9 MR. DeSANCTIS: Yes, yes, of the
10 performance rights.

11 And we're comfortable with that protection.
12 Many services are paying for pre-'72 works under the
13 statutory license or they are getting direct
14 licenses from record companies. And SoundExchange
15 is a collective. You know, whenever it collects
16 funds, it distributes those funds according to the
17 rules of distribution, and we're very comfortable
18 with that regime.

19 One of your questions was, is there a
20 vehicle -- is there a mechanism for a sort of
21 partial incorporation into the statutory licenses

22 short of full federalization? And what we suggested

♀00316

1 in our comments was a mechanism something like what
2 is currently employed under the AHRA. I think that
3 would -- as we laid out in our comments, we think
4 that's a straightforward mechanism that would be
5 easily applied. We don't -- we raised that in our
6 comments only because you asked if there is a way to
7 do it. But we -- as I said, we are very comfortable
8 with the current state of law.

9 MS. SANDROS: Does anyone else have an
10 opening statement that they would like to make?

11 Steve.

12 MR. MARKS: I'm watching people do this all
13 day. It's actually a little harder. It's been a
14 while since lunch. I need some more energy.

15 MR. CARSON: Now, can you rub your stomach
16 with your other hand?

17 MR. MARKS: A couple of things. I think
18 Michael was alluding to this. Those of us on the
19 panel here who spoke to the issue of the 114
20 questions that were asked, I think are all in
21 agreement that there shouldn't be federalization of
22 114. Notwithstanding -- I mean I think NAB said

♀00317

1 that and Jay has said that today and both Rich and
2 his organization, our organization has said that,
3 and SoundExchange as well.

4 Eric, I don't think, unless I'm wrong, your
5 comments didn't address this issue.

6 MR. HARBESON: They did not.

7 MR. MARKS: So we kind of have agreement
8 that, you know, federalizing on the 114, at least
9 among those who are here today, is not the avenue to
10 go down.

11 You know, for us obviously, and I think,
12 you know, we also agree that there is state law
13 protection. We obviously don't have agreement among
14 the panelists on that issue, and as Michael said, we
15 are not going to achieve that agreement here today.

16 The 114 issue seems to us to be a, you
17 know,
18 a very small question compared to the other
19 questions that we've been talking about today. But,
20 you know, I would be remiss if I didn't note that if

21 we're going to start talking about reforming the law
22 with regard to performances for sound recordings, we

♀00318

1 should start with the elephant in the room and not
2 this very small issue, which is obviously the lack
3 of a performance right for terrestrial radio.

4 So from our perspective --

5 MR. CARSON: Is everyone still in
6 agreement?

7 MR. OXENFORD: We can talk about that in a
8 moment.

9 MR. MARKS: So those are our opening
10 thoughts.

11 MS. SANDROS: David, I'm sure you have a
12 response.

13 MR. OXENFORD: Yes. I mean certainly we're
14 not here to debate the elephant in the room because
15 that would involve a lot more people and a lot
16 longer than the 15 or 20 minutes that we have left
17 before the scheduled ending time.

18 I'm glad that we are all in agreement that
19 114 should not apply to pre-'72 sound recordings. I
20 think I even heard Michael say that that was his
21 understanding as well, and that they threw out this
22 idea of the AHRA sort of just because you all asked

♀00319

1 for alternate ideas. Again, that seems to me that
2 if we are going to pursue that sort of idea, that's
3 a whole 'nother proceeding, not one covered here
4 under this proceeding that we have in front of us
5 that we're all speaking at this afternoon.

6 You know, with that since we are all having
7 this kumbaya moment, I'm not sure that there is
8 really a whole lot more to say. Obviously, we don't
9 agree that there is a performance right under state
10 law for sound recordings. I think you would find a
11 lot of Checkers and Johnny Rockets, diners being
12 very concerned if there was a performance royalty in
13 pre-'72 sound recordings. A lot of martini bars
14 that may be playing a lot of the pre-'72 sound
15 recordings, not realizing that they may have some
16 liability. I just don't see that that is there.
17 It's never been enforced. But, again, that is not
18 something we are debating here today.

19 We're just talking about whether there

20 should be federalization of pre-'72 sound
21 recordings, and I think everyone at this panel seems
22 to be unanimous that -- perhaps with Eric's

♀00320

1 exception, but not necessarily relevant to this
2 topic -- we don't have a dispute.

3 MS. SANDROS: I think Eric has raised his
4 hand.

5 MR. DeSANCTIS: Well, because I've already
6 spoken, I'll let Eric go, but I just want to make
7 sure that I get to respond to David's
8 characterization of my remarks.

9 MS. SANDROS: Absolutely.

10 MR. HARBESON: I actually -- we do not
11 support partial incorporation in general, to the
12 extent that it weakens our argument in other aspects
13 of this question. As it's been pointed out to us
14 by, I think it was -- well, several of the RIAA
15 folks anyway have pointed out that partial
16 incorporation is difficult to justify, so we do
17 support federalization of pre-1972 sound recordings
18 on the whole, but this is not a particular issue
19 that anyone in my committee or I have any special --
20 has any specialization in.

21 So that's the extent to which I might --
22 might -- disagree with that statement.

♀00321

1 MS. SANDROS: Let me just -- okay.
2 Michael.

3 MR. DeSANCTIS: Yeah, before we get on to
4 another topic, I just want to make it clear that
5 Mr. Oxenford suggested that -- that I had said -- I
6 think what he said was that the statutory license
7 does not cover pre-'72 sound recordings.

8 What I said was we're -- like the RIAA,
9 we're not advocating for full federalization of
10 pre-'72 works, whether that is within the context of
11 the 114 piece of it or in the larger context. What
12 I did say is that there are federal rights in
13 remixed and remastered and restored derivative
14 works, and I think federal protection does apply to
15 those, and there's no reason why that would not be
16 part of the statutory license currently.

17 I think there is also state law protections
18 in the underlying pre-'72 works for performances

19 under state law, and that's obviously where we
20 differ, and many, many services are paying
21 SoundExchange today on pre-'72 works.
22 MS. SANDROS: Okay. Why don't we start

¶00322

1 with that. I mean if SoundExchange is collecting
2 money today under basically -- performances, as I
3 understand it, are being conducted under state law,
4 I would like to understand really how you license
5 those for the transmission for the performance, but
6 also what is the legal theory for SoundExchange to
7 take in the money, and once you get the money, what
8 do you do with it?

9 MR. DeSANCTIS: As a bright line, and I
10 want to be clear about this, when SoundExchange
11 receives money from services, it distributes it
12 according to the rules of distribution. So...

13 MS. SANDROS: The federal rules, right?

14 MR. DeSANCTIS: Yes. Yes.

15 MS. SANDROS: You are talking about
16 applying basically the statutory provisions --

17 MR. DeSANCTIS: The statutory regime.

18 MS. SANDROS: Right.

19 MR. DeSANCTIS: Yes. So when SoundExchange
20 receives money, it does not research all of the
21 funds it gets as to why it is getting it. It, you
22 know, has records as to who the distribution goes

¶00323

1 to, and it follows the federal distribution rules.

2 Does that answer the question?

3 MS. SANDROS: It does. But the follow-up
4 question really goes to the legal significance of
5 them making the payment under what they believe
6 probably is a statutory license when, in fact, it's
7 a pre-'72 work not covered.

8 Does SoundExchange -- or do the people who
9 make these payments under this regime believe they
10 are actually covering their obligation and won't be
11 sued for infringement?

12 MR. BENGLOFF: I want to bring up a point I
13 brought up earlier and that Michael had brought up
14 again a little bit ago. Pre-'72 is a physical year,
15 right? We were selling cassettes. I mean there
16 weren't even CDs back then, right? It was vinyl,
17 and cassettes had just started, and there were

18 eight-tracks and everything else. And it's our
19 belief that all of these recordings have been
20 remixed and certainly digitized, certainly in many
21 cases remastered for a higher sound volume and
22 everything else.

♀00324

1 So these recordings, in fact, to at least
2 A2IM's way of thinking -- and I don't want to speak
3 for Steve and the major labels -- these recordings
4 as Michael said earlier, in many cases they've been
5 totally remastered as well in their new works, and
6 we're getting paid for those as a result. I thought
7 the purpose of today's panel, which has been very
8 interesting, and I have to say thank you very much
9 for having me --

10 MR. CARSON: We really didn't have any
11 choice.

12 MR. BENGLOFF: That's okay. If you don't
13 want me to come next time, just tell me and I won't,
14 but that is fine.

15 MR. WESTON: We will just tell you the
16 wrong room.

17 MR. BENGLOFF: But -- everyone else has
18 been thanking you, so I'm the only one (inaudible),
19 David.

20 But all kidding aside, I mean the goal here
21 is to make sure as much music gets listened to as
22 possible, right? And that the proper artists and

♀00325

1 the sound recording owners get paid for it. This is
2 newly digitized music within the last 10 to 15
3 years, the amounts of kilobytes changes, the sound
4 and everything else. I talk to engineers all the
5 time. So they are actually furnishing payments for
6 recordings that in many cases have changed over this
7 period of time. At least that's my view of the
8 world.

9 MS. SANDROS: Steve.

10 MR. MARKS: I was just going to add, and
11 Michael can correct me if this is wrong, but
12 SoundExchange has an obligation under the regs to
13 collect and distribute according to reports of use
14 that it receives, and that is what it does. It
15 doesn't make legal determinations on pre- or
16 post-'72 any more than it does about whether

17 somebody is violating a performance complement. So
18 it does its job based on the regs that govern it and
19 its obligations they're under.

20 MR. DeSANCTIS: I do agree with that and
21 the questions that Steve raised that SoundExchange
22 does not get into are up to the rights-holders.

♀00326

1 MR. OXENFORD: If I may, first of all, on
2 the question of remixed and remastered works, again
3 I think that is something that we are not here to
4 decide today. I'm sure that many of the services
5 that are represented by the NAB and many of the
6 other services would take a different position from
7 those that are expressed by Rich and Michael.

8 On the question of why their services pay,
9 I think just like there are many librarians who are
10 afraid or the many services that are afraid, and
11 many services that are just unaware of this question
12 about pre-'72 sound recordings, and they are paying
13 for everything that they play, not knowing what the
14 law is.

15 There are services, though, that are
16 recognizing that pre-'72 sound recordings are not
17 covered by the statute and have made adjustments to
18 what they pay based on that knowledge.

19 MS. SANDROS: And if they have made that
20 decision that they're not concerned about the
21 statutory licenses, how do they license the work for
22 the transmission?

♀00327

1 MR. OXENFORD: Again, I would believe that
2 there is no public performance right under state
3 laws for pre-'72 sound recordings.

4 MS. SANDROS: Just one other sort of more
5 technical issue. When you do a transmission,
6 though, there is always a reproduction of the work
7 as well, which is the source for the transmission.
8 So what about the duplication and reproduction
9 right?

10 MR. OXENFORD: Under some state laws, there
11 are specific exceptions made for reproductions made
12 by broadcasters. In other cases, there are
13 reproductions made in the broadcast, over-the-air
14 transmissions. There are broadcasts -- there are
15 copies made in every other -- many other

16 reproduction -- I'm sorry, many other public
17 performances that aren't traditionally covered where
18 there are ephemeral copies, copies made in a
19 transitory way that again we would question whether
20 there is a state law reproduction right that is
21 triggered by that as well.

22 MS. SANDROS: Any other comments?

♀00328

1 I just want to go back just to the
2 beginning, because the way this started was we were
3 talking about federalization of pre-'72s on a grand
4 scale, you know, federalization at large. What I
5 hear is that no one at the table today thinks that
6 the 114 license should be part of that should that
7 happen in the future.

8 My question is, what is the policy reason
9 if you actually took out the 114 with respect to
10 pre-'72s when, in fact, it still covers the
11 post-'72s for the public performance right and the
12 digital transmissions? Is there really a policy
13 basis for distinguishing pre- and post-'72 if
14 everything is under the federal Copyright Act?

15 MR. MARKS: I'm not sure, but it certainly
16 wouldn't be any more of a distinction than the
17 policy of not having terrestrial radio pay at all.
18 So again --

19 MR. OXFORD: Why did that not surprise
20 me?

21 MR. MARKS: So, you know, I mean it is what
22 it is in terms of the way the law exists. Could we

♀00329

1 envision a world where you bring this within 114 and
2 in some way or another? Yeah, that's possible. Do
3 we think it's part and parcel of this kind of
4 proceeding or necessary as part of issues relating
5 to archiving preservation? No.

6 MS. SANDROS: What about the question of
7 access since we have heard quite a bit today that
8 actually doing transmissions increases access?

9 MR. MARKS: Well, I think we'll clearly
10 need to have a discussion about the access point.
11 Because we need to better understand I think both
12 sides, you know, what the needs are, the desires
13 are, what our comfort level is. My hope is that the
14 discussions today and tomorrow will give rise to

15 some discussions between the parties to help figure
16 out some of those issues.

17 So it's hard to answer without -- as goes
18 back to I think David's question at the end of one
19 of the panels, you know, what do the parties really
20 want or what do the other parties maybe object to
21 with regard to certain uses, and I think we need to
22 explore that with Eric and others so that we can

♀00330

1 talk about it and maybe come back to you with an
2 answer.

3 MS. SANDROS: David.

4 MR. OXENFORD: If I may, on both of the
5 questions that you asked. The policy basis or one
6 of the policy bases is business expectations that we
7 started to discuss in the prior session. You are
8 not going to encourage the creation of more pre-'72
9 sound recordings by putting on a performance
10 royalty. Those '72 -- pre-'72 sound recordings were
11 created with no expectation of there being a public
12 performance royalty. And -- and there has not been
13 one paid for the 40 years that they've existed. So,
14 in essence, you are just changing the business
15 expectations if you would change the laws at this
16 point.

17 The question of access, there are programs,
18 there are channels created on webcast streams and
19 others that may not exist should new royalty
20 obligations exist for pre-'72 sound recordings.

21 One of the questions I raised this morning
22 when the discussions by some of the libraries and

♀00331

1 others talked about streaming some of these songs,
2 streaming some of their collections is whether they
3 are considering what would happen under a
4 federalization where they would have public
5 performance royalties perhaps imposed where they may
6 not have those under current law.

7 MR. BENGLOFF: What Michael said earlier,
8 you know, he said what is going on is analogous to
9 the Audio Home Recording Act in terms of it, and if
10 today's goals are to provide more access, encourage
11 greater use in access, people paying under the
12 statutory license like the HAA and AHRA is
13 facilitating that, and that's -- that's a good thing

14 that doesn't have to necessarily fall under 114,
15 just like you said earlier.

16 MS. SANDROS: Eric, did you have a comment?

17 MR. HARBESON: Yeah, I just wanted to say
18 quickly that -- as I said earlier but I will just
19 repeat in response to David's comment -- when we're
20 talking about pretty much any use that we're
21 considering, for the most part, we are anticipating
22 107. However, we haven't really discussed 114 as a

♀00332

1 possible means of streaming access. But to the
2 extent that it would make things -- we would accept
3 114 if we also got 107. I mean we're really looking
4 for full federalization. We're not trying to
5 cherry-pick. And so 114 may not benefit us as much,
6 but it's something that we are willing to...

7 MS. SANDROS: Richard.

8 MR. CARSON: I just want to make sure I
9 understand the positions of everyone here, and maybe
10 it was made clear and I just didn't get it. But
11 let's assume for the moment -- and this is not
12 necessarily what is going to be the case, by any
13 means -- but let's assume that we end up
14 recommending that Congress federalize pre-1972 sound
15 recordings, go all in. Let's assume Congress is
16 ready to do it.

17 Is the position of everyone here or of
18 anyone here that even if that's what happens,
19 pre-'72 sound recordings should still be carved out
20 for 114 so that is the one exception? I mean is
21 that what you are saying as well, or are you just
22 saying the other -- what I know you are saying is,

♀00333

1 if you don't go all in, don't just do 114. Are you
2 also saying if you do go all in, carve 114 out, or
3 if that were to happen, would you say, Fine, 114 is
4 part of it then?

5 MR. MARKS: It's a hard question to answer
6 because I just can't conceive of that situation.

7 MR. CARSON: Oh, you make me want to --

8 MR. MARKS: It -- I think it's something we
9 would have to evaluate at the time, but I mean our
10 position, as we've said a few dozen times here
11 today, is federalization isn't the way to go for all
12 the reasons we've stated.

13 MR. CARSON: Anyone else have a different
14 point of view?

15 MS. SANDROS: Just to follow up on David's
16 point, which is where I was going initially, if it
17 was under the federal copyright law, wouldn't that
18 be an advantage to the copyright owners? Don't you
19 see this as another stream of income?

20 MR. MARKS: I think this gets back to just
21 the balancing of interests on whether getting some
22 additional income potentially there makes up for the
♀00334

1 downsides that we've identified in, you know, an
2 exercise of federalizing.

3 MS. SANDROS: But I think it goes to the
4 question about carving out. If it was federalized,
5 you would want 114 to be part of that process?

6 MR. MARKS: Yeah, again, I can't think of a
7 reason that we wouldn't if, you know, what we were
8 being told was, Everything is going to be done, do
9 you want this carved in or out? I don't know the
10 answer to that. I think we just need to think about
11 it some more.

12 MS. SANDROS: Any other comments?

13 Okay. I guess we're done early. I'm not
14 too surprised. We didn't think that this would
15 necessarily engender a lot of discussion, but we
16 wanted to touch on the various issues mentioned and
17 cover all the bases. Thank you.

18 MR. CARSON: Before you go, just
19 housekeeping matters. We start again tomorrow at
20 nine o'clock to 1:15. Thank you all for putting up
21 with us for an entire day. It's probably been
22 harder for you than it has been for us.

♀00335

1 We did want to let you know, particularly
2 for those of you who aren't coming back tomorrow,
3 this isn't the end of our process. This is a part
4 of the process that's important. We want to hear
5 from everyone; we want to go around the table. We
6 want to have a transcript that will be part of what
7 we present to Congress. We present recommendations.
8 It's part of what we look at. It's part of what
9 Congress will look at.

10 We encourage informal discussions among
11 yourselves. To the extent that we can hear

12 consensus, maybe not today, maybe not tomorrow, but
13 maybe in a few weeks, that is great too.

14 To the extent that anyone feels that
15 meeting with us one on one is another way to present
16 your point of view in ways that may not
17 necessarily -- you can't necessarily do in this kind
18 of context, we understand that. There aren't
19 constraints on us in the course of a study for
20 meeting with people individually, so we more than
21 welcome that.

22 We do have a deadline, and as many people
♀00336

1 are quite aware, we missed our initial deadline.
2 We've been told we have until the end of this year,
3 and we've been told we don't have a day beyond the
4 end of this year. We are going to meet the
5 deadline. So that may seem like a long way away,
6 but with everything we have to do, we are on a
7 forced march from this point on.

8 So we are going to want to meet with you if
9 you want to meet with us, but we want it to happen
10 soon. If you have more information for us, if there
11 is an opportunity to get together and come up with
12 solutions that people can join together on,
13 compromises, whatever, the sooner the better,
14 because we really as a practical matter over the
15 summer have got to reach what our conclusions are
16 and be very, very far into writing our
17 recommendations at that point. That is just the way
18 the process has to work. So this may seem early,
19 but it's actually fairly late in the process, so
20 that's important for you to know.

21 And with that, I hope to see most of you
22 tomorrow. And for those of you who we don't see,

♀00337

1 we're very thankful you came.

2 (Proceedings adjourned at 5:04 p.m.)

3

4

5

6

7

8

9

10

