THE DAY THE MUSIC DIED: HOW OVERLY EXTENDED COPYRIGHT TERMS THREATEN THE VERY EXISTENCE OF OUR NATION'S EARLIEST MUSICAL WORKS[†]

INTRODUCTION

In the liner notes to his *Blues Odyssey* album, former Rolling Stones bassist Bill Wyman writes, "Listening to the Blues has taught me so much about history, social issues and even life itself . . . . We can think about the Blues, write about them and talk about them, but ultimately we all need to listen to them."[1]

Therein lies the problem. In order to listen to these works, as Wyman suggests, the public must first have access to them. Unfortunately, current laws governing the copyrights of early American sound recordings impede this invaluable access.[2] American copyright laws extend copyright protection of sound recordings until 2067, in contrast to other countries where sound recording copyrights last only fifty years from the time of creation.[3] The overextended copyrights of early American sound recordings[4] give recording owners sole discretion over whether to make these recordings available to the public.[5]

Most copyright owners choose not to make these recordings available—in fact, copyright holders have only reissued approximately ten percent of pre-

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1 BILL WYMAN, BLUES ODYSSEY (Document Records Nov. 6, 2001) [hereinafter BLUES ODYSSEY].

2 *See* TIM BROOKS, SURVEY OF REISSUES OF U.S. RECORDINGS 12–13 (2005); *All Things Considered: Copyright Laws Severely Limit Availability of Music* (National Public Radio broadcast Jan. 9, 2006) (transcript on file with author) [hereinafter *All Things Considered*].

3 *See* JUNE M. BESEK, COPYRIGHT ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF PRE-1972 COMMERCIAL SOUND RECORDINGS BY LIBRARIES AND ARCHIVES 18 (2005), *available at* http://www.clir.org/pubs/reports/pub135/contents.html.

4 This Comment addresses copyright in sound recordings created prior to 1972. The Copyright Act of 1976 gives the power to govern copyrights of pre-1972 sound recordings to states until 2067. 17 U.S.C. § 301(c) (2006).

5 Section 106(3) of the Copyright Act gives copyright owners the right "to distribute copies or phonorecords of the copyrighted work to the public." 17 U.S.C. § 106(3) (2006).

World War II sound recordings.[6] When copyright owners forgo their rights to reissue such works, they threaten the existence of these historical recordings. Reissues are essential to the restoration and preservation of early sound recordings.[7] Because sound-carrying materials in older formats disintegrate over time, these works must be restored to avoid complete deterioration.[8] Otherwise, "historical recordings are at risk of physical loss as well as of passing, unnoticed, from the nation's aural memory."[9]

If a copyright owner chooses not to reissue early American recordings in formats that the public can access,[10] the only other legal option to preserve these recordings is for a third party to reissue the work.[11] However, this alternative is quite taxing, requiring a third party to determine who owns the rights to each recording and then to track down the copyright owner for a license to reissue.[12] The current process is further complicated by the fact that it is common for ownership of older recordings to have changed hands several times during the recording's existence.[13] Moreover, even if the third party tracks down the copyright owner, the owner is under no obligation to grant a license to reissue.[14]

Bill Wyman bypassed the hardships of the copyright-licensing process by enlisting a foreign production company, Document Records, to produce his vintage *Blues Odyssey* compilation album.[15] Because Document Records is

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6 BROOKS, *supra* note 2, at 13.

7 *See* James H. Billington, *Foreword* to NATIONAL RECORDING PRESERVATION BOARD, CAPTURING ANALOG SOUND FOR DIGITAL PRESERVATION: REPORT OF A ROUNDTABLE DISCUSSION OF BEST PRACTICES FOR TRANSFERRING ANALOG DISCS AND TAPES, at iv (2006) [hereinafter CAPTURING ANALOG SOUND] ("[A]nalog recordings are deteriorating and must be reformatted while they are still playable."), *available at* http://www.clir.org/pubs/ reports/pub137/pub137.pdf.

8 *Id.*

9 Samuel Brylawski & Abby Smith, *Foreword* to BROOKS, *supra* note 2, at v.

10 Many early recordings were formatted on long-playing (LP) discs or 78-rpm recordings. In order for most members of the public to listen to these works now, they must be reissued in CD format. *Id.*

11 *See All Things Considered*, *supra* note 2.

12 *See* BROOKS, *supra* note 2, at 14 ("The first task for a third party wishing to reissue a recording is to find the rights holder. This can be difficult or effectively impossible.").

13 *See All Things Considered*, *supra* note 2 (discussing the difficulty of determining the copyright owners of older sound recordings as a result of possible reversion clauses).

14 A copyright owner has the exclusive right "to reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1) (2006).

15 *See* BLUES ODYSSEY, *supra* note 1 (describing how Bill Wyman asked Document Records to produce a CD which would be part of his life-long ambition).

located in Europe, it is not subject to American copyright laws.[16] Therefore, Document Records, and other foreign entities, can release American sound recordings made in the early 1900s without obtaining permission from the copyright owners.[17] For Wyman to sell the same compilation in the American market, he would have to track down every copyright owner and negotiate licenses for the right to reissue each individual recording included on the CD.[18] Thus, producing his compilation under American copyright law would be much more difficult, if not impossible.

If the copyrights in the sound recordings that Wyman sought to reissue had expired, he would have had free access to the recordings, thereby alleviating the difficulties of producing his album in the U.S. market. Unfortunately, such free access is unlikely because most historical sound recordings have copyrights that extend another six decades.[19] According to the current copyright laws, recordings created prior to 1972 remain under the protection of individual states' copyright laws until 2067.[20] While state laws may vary in their means of protection, "these laws are universally interpreted to grant permanent ownership of recordings to the [copyright owners] until such time as federal copyright takes over in 2067."[21]

In addition to overly extending the copyrights of these works to 2067, "[t]he [state] laws governing sound recordings made before 1972 are not simple and . . . may in fact impede effective preservation."[22] State laws provide various degrees of protection to pre-1972 sound recordings through different combinations of criminal piracy laws, civil statues granting ownership rights, and common law rights regarding unfair competition and misappropriation.[23]

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16 *See* BROOKS, *supra* note 2, at 13 ("[A] label such as Europe's Document Records, which has made available thousands of rare, pre-World War II American blues and gospel records not reissued by rights holders themselves, could not exist in the United States because of copyright restrictions.").

17 *See id*. at 13.

18 Due to the current status of copyright laws, most early twentieth-century sound recordings are still under the control of their copyright owners. *See id.* at 4–5 (explaining that eighty-four percent of original copyright owners of sound recordings created before 1965 retain copyright protection). Therefore, if a third party such as Wyman wanted to reissue one of these recordings, he would first have to obtain the permission of the current owner. *See All Things Considered*, *supra* note 2.

19 *See* 17 U.S.C. § 301(c) ("With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067.").

20 *Id.*

21 BROOKS, *supra* note 2, at 12.

22 James H. Billington, *Foreword* to BESEK, *supra* note 3, at vi.

23 *See* BESEK, *supra* note 3, at 21.

Varying state laws and overly extended copyright terms highlight the need for uniform sound recording copyright protection. However, a regime of uniform protection must extend to more than the interests of the copyright owners—it must also consider the public's interest in the preservation of, and access to, these older recordings. This Comment proposes that Congress implement a compulsory licensing system for reissuing pre-1972 sound recordings. The proposed system effects a compromise between the copyright owners' and the public's interests. This proposal protects the copyright owner by guaranteeing compensation for the reissue of a sound recording, while also securing public access to the historical work.

Part I of this Comment explores the development of copyright law and the eventual extension of copyright to sound recordings. Part II discusses the overly extended copyright terms for pre-1972 sound recordings and their impact on the preservation of these works. Part III highlights the lack of uniformity among state copyright laws for these recordings. Part IV reviews the possibility of applying the fair use doctrine to reissues and concludes that this proposal fails because reissues do not serve a unique purpose. Finally, Part V proposes to standardize this area of copyright law and preserve these valuable works to serve the interests of both copyright owners and the public.

I. HISTORICAL DEVELOPMENT OF COPYRIGHT LAW AND SOUND RECORDING PROTECTION

A. *Brief History of Copyright Law*

The Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[24] Emphasizing the importance of this clause, President George Washington told the First Congress that "[t]here is nothing which can better deserve your patronage than the promotion of science and literature."[25] Thereafter, Congress drafted the first copyright statute in 1790, which established uniform copyright protection throughout the United States.[26]

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[24] U.S. CONST. art. I, § 8, cl. 8.

[25] EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 14 (2000).

[26] Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

At the same time, common law also provided copyright protection wholly apart from the 1790 Act.[27] Mounting tension between the federal statute and state common law was finally resolved by the Supreme Court in *Wheaton v. Peters*.[28] The *Wheaton* Court held that common law copyright under state law existed for unpublished works, while statutory copyright under federal law protected published works.[29] Therefore, state law governed a copyrightable work until the moment of publication, at which point the 1790 Act preempted copyright protection under the common law.[30]

Although the 1790 Act underwent several revisions,[31] in 1905, President Theodore Roosevelt encouraged Congress to completely revise the copyright laws to meet the changing demands of modern processes.[32] In response to Roosevelt's request, Congress enacted the Copyright Act of 1909.[33] That Act expanded copyright protection to "all writings of an author" from the moment of publication;[34] state common law continued to protect unpublished works. This dichotomy between state and federal law lasted until the adoption of the Copyright Act of 1976.[35]

Congress amended the 1909 Act several times to accommodate technological advances but, despite various interest groups' efforts, never substantially overhauled it.[36] In 1976, Congress finally authorized a copyright revision project, which ultimately produced the Copyright Act of 1976.[37] That Act, which currently governs United States copyright protection, protects both published and unpublished works that are "fixed in any tangible medium of expression," thereby bridging the divide that publication previously created

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27 *See* 1 MELVINE B. NIMMER, NIMMER ON COPYRIGHT § 1.01 (1978).

28 33 U.S. (8 Pet.) 591 (1834).

29 *See generally id.*; *see also* NIMMER, *supra* note 27, at § 1.01[A].

30 *See* Nimmer, supra note 27, at § 1.01[A].

31 Congress revised the Act in 1831 and 1870, in addition to several significant amendments. *See* MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 7 (4th ed. 2005).

32 Theodore Roosevelt, December 1905 Message to Congress, *reprinted in* ALAN LATMAN ET AL., COPYRIGHT FOR THE EIGHTIES 7 (2d ed. 1985) (quoting President Roosevelt: "Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection . . . . A complete revision of them is essential.").

33 Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (current version at 17 U.S.C. (2006)).

34 *Id.* at § 4.

35 1 NIMMER, *supra* note 27, at § 1.01.

36 Notably, the Sound Recording Act of 1971 amendment granted federal protection to sound recordings. Sound Recordings Act of 1971, Pub. L. No. 92-140, 3, 85 Stat. 391, 391 (1971) (current version at 17 U.S.C. § 5(n) (2006)).

37 LEAFFER, *supra* note 31, at 9.

between federal law and state common law.[38] In addition, the Act recognized protection of sound recordings made after 1972.[39]

B. Development of Sound Recording Protection

One hundred years after the invention of recorded sound, the Copyright Act of 1976 finally afforded protection to sound recordings.[40] The first Copyright Act did not protect recorded music because at the time of its enactment, recorded sound was not yet possible.[41] However, the advent of the phonograph in 1877 marked the beginning of recorded sound and, thus, the birth of sound recording copyright issues.[42] Performers could now reproduce the sounds of prior performances.[43]

Around the same time, Frenchman Henri Fourneaux invented the player piano.[44] That device recorded the performances of pianists onto piano rolls.[45] As piano rolls and phonorecords became more prevalent, new legal issues surfaced regarding the meaning of "copies" within the Copyright Act.[46]

The Supreme Court first addressed these issues in *White-Smith Music Publishing Co. v. Apollo Co.*[47] There, the Court held that piano rolls did not infringe the plaintiff's copyrighted sheet music.[48] According to the Court, the piano rolls were part of the machine that produced music, rather than "copies or publications of the copyrighted music" within the meaning of the Copyright Act.[49] Because they were not "copies," by definition, the piano rolls could not infringe the copyright in the underlying musical work.[50] Importantly, however, Justice Holmes declared in his concurrence that a musical composition "ought

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[38] 17 U.S.C. § 102(a); *see also id.* § 301 (preempting common law copyright explicitly).

[39] *See* 17 U.S.C. § 301(c). For an analysis of the import of this addition, see *infra* Part I.B.

[40] *See id.* § 102(a)(7).

[41] Sidney A. Diamond, *Sound Recordings and Phonorecords: History and Current Law*, 1979 U. ILL. L. REV. 337, 337 (1979).

[42] *Id.*; *see also* SAMUELS, *supra* note 25, at 32–33 (discussing the history of sound recording copyright law).

[43] Diamond, *supra* note 41, at 337.

[44] SAMUELS, *supra* note 25, at 33.

[45] *Id.* at 34. Piano rolls are perforated paper rolls that direct a player piano to strike keys, allowing the piano to play music without a human piano player.

[46] *See, e.g.*, White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 17 (1908) (holding that perforated piano rolls did not constitute "copies" of copyrighted sheet music).

[47] *Id.*

[48] *Id.* at 18.

[49] *Id.*

[50] *Id.*

to be held a copy, or if the statute is too narrow ought to be made so by a further act."[51]

In 1909, only one year after *White-Smith*, Congress sided with Justice Holmes and extended protection to mechanical copies of musical compositions in the 1909 Act.[52] The 1909 Act did not include sound recordings as separate copyrightable works[53] because Congress determined that sound recordings did not constitute "writings of an author."[54] Consequently, these works failed to meet the constitutional standard required for copyright protection.[55]

The question remained as to whether sound recordings had sufficient originality[56] since the works involved "the 'purely mechanical' reproduction of sounds."[57]

Although Congress did not protect sound recordings under the 1909 Act, federal law did not preempt common law in this area, leaving states free to extend copyright protection to sound recordings.[58] Generally, state laws provided protection under three categories: (1) criminal record-piracy laws; (2) common law rights of unfair competition and misappropriation; and (3) civil statutes granting ownership rights.[59] In large part, states created these laws to guard against record piracy.[60]

The piracy threat began to plague record companies in the early 1950s.[61] Piracy resulted from the lack of copyright coverage for sound recordings.[62]

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[51] *Id.* at 20 (Holmes, J., concurring).

[52] Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1075, 1080–1081 (1909) (current version at 17 U.S.C. (2006)).

[53] *Id.*

[54] Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 524 (2006).

[55] *See* U.S. CONST. art. I, § 8, cl. 8 (granting to Congress the power to protect "writings of an author" with copyright).

[56] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("To qualify for copyright protection, a work must be original to the author.").

[57] Ponte, *supra* note 54, at 524–25 (citing H.R. Rep. No. 487, at 2–3 (1971)).

[58] *See* Copyright Act of 1909, ch. 320, 23–24, 35 Stat. 1075, 1080–1081 (1909).

[59] BESEK, *supra* note 3, at 21.

[60] *Id.* In fact, the threatening increase of record piracy ultimately led to the federal protection of sound recordings. *See* Ponte*, supra* note 54, at 525 (discussing the history of sound recording protection).

[61] Note, *Piracy on Records*, 5 STAN. L. REV. 433, 433 (1953).

[62] *See id.* at 435–36; Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CAL. L. REV. 2187, 2197 (2000).

Capitalizing on the lack of sound recording protection, "pirates" used the gap in copyright protection to assert the legality of record piracy.[63]

"Pirating" involves the practice of re-recording a phonorecord without permission[64] and then selling the duplicates.[65] During the time when sound recordings had no copyright protection, pirating was extremely profitable due to the significant cost savings inherent in a process that bypassed the work's creator.[66] The pirate avoided paying for the original costs of the recording, such as studio expenses, musicians' fees, and royalties to featured artists.[67] Furthermore, because an unauthorized duplicator could copy and sell records already considered "hits," he evaded "the losses on unsuccessful releases that [were] a constant financial burden on the legitimate sound recording production company."[68]

In an effort to halt mounting piracy, record companies began taking action by aggressively litigating against pirates.[69] Although California and New York enacted statutes forbidding record piracy, most other jurisdictions required record companies to seek relief on the theory of unfair competition.[70] For example, in *Capitol Records, Inc. v. Erickson*,[71] the defendant copied previously produced, recorded, and marketed performances.[72] The defendant then sold these unauthorized re-recordings to the public.[73] The court held that the defendant unfairly appropriated artistic performances and affirmed an injunction.[74]

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63 Note, *supra* note 61, at 439. This Comment recognizes that "piracy" is a loaded term. Copying a work has become equated with "pirating" a work. However, the two are not the same. Pirating has a negative connotation because it involves freeloading off another's hard work.

64 As this Comment explains in Part I.C, a phonorecord contains both an underlying work (i.e., a musical work, or in the case of a book-on-tape, a literary work), and a performance of that work, the latter of which is known as the "sound recording." Therefore, today there are at least two copyrights in the typical phonorecord. *See* 17 U.S.C. § 101 (2006).

65 *See* Note, *supra* note 61, at 433–34.

66 *See id*. at 434.

67 Diamond, *supra* note 41, at 345–46.

68 *Id.* at 346.

69 Merges, *supra* note 63, at 2197.

70 H.R. REP. NO. 92-487, at 2 (1971).

71 2 Cal. App. 3d 526 (1969).

72 *Id.* at 527–29.

73 *Id.*

74 *Id.* at 538. According to the court,

> [P]ermitting such appropriation would discourage invention and free competition—and that those engaged in the recording industry, would be inclined not to utilize their skill and efforts, and expend large amounts of money, in producing unique recordings, but would wait for a recording

In addition to pursuing litigation, recording companies lobbied Congress, urging federal legislative reform.[75] State legislatures also pushed for more protection, finding common law remedies inadequate to deter the widespread prevalence of "music piracy."[76]

Piracy reached epidemic proportions with the invention of the inexpensive and efficient tape recorder.[77] The tape recorder allowed individuals to make cheap copies of music with ease.[78] By 1971, legislative reports estimated that piracy activity exceeded one hundred million dollars,[79] and the large increase in unauthorized duplication of records was certain to continue with the growing availability and affordability of cassette players.[80]

Congress finally responded with the Sound Recording Amendment of 1971, granting sound recording copyright protection for all records made after February 15, 1972.[81] The purpose of this limited copyright was to provide legal protection against unauthorized duplication and piracy of sound recordings.[82] This protection carried forward into the Copyright Act of 1976.[83]

While the Copyright Act of 1976 protects sound recordings created after 1972, sound recordings created before 1972 remain under state common law.[84] Federal copyright does not preempt states' governance over pre-1972 sound recordings until 2067.[85] Although each state independently grants copyrights

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> to be produced, and then duplicate it and sell it, at maximum profit and with minimum effort and expense.

Id.

75 *See* Merges*, supra* note 63, at 2197*;* SAMUELS, *supra* note 25, at 45.

76 Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 260 (N.Y. 2005).

77 *See* Merges, *supra* note 63, at 2197 (discussing the repercussions of the cassette tape player's growing popularity in the 1960s and how such technology affected the number of piracy incidents).

78 *See id.* ("It was suddenly cheap and easy to make copies of recorded music, and many pirate firms sprang up to do just that.").

79 *See* H.R. REP. NO. 92-487, at 2 (1971) (noting that the pirating of records and tapes deprived not only the record producers of substantial income, but also the performing artists and musicians).

80 *Id.* at 6.

81 *See* Merges, *supra* note 63, at 2198; SAMUELS, *supra* note 25, at 45.

82 *See* H.R. REP. NO. 92-487, at 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567.

83 *See* 17 U.S.C. § 102 (2006) (providing copyright protection to sound recordings as "works of authorship").

84 *See* Goldstein v. California, 412 U.S. 546, 570 (1973) (noting that because Congress "has left the area unattended, no reason exists why the State should not be free to act").

85 17 U.S.C. § 301(c) (2006).

for pre-1972 sound recordings, most states extend the copyright term of these works until the federal preemption date in 2067.[86]

C. Sound Recording Defined

To comprehend the implications of the extensive copyright terms afforded to pre-1972 sound recordings, one must first understand what a sound recording entails. Section 101 of the Copyright Act defines "sound recordings" as:

> [W]orks that result from the fixation of a series of musical, spoken, or other sounds, but do including the sounds accompanying a motion picture or other audio visual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.[87]

Because this "fixation of sounds" is a captured performance,[88] the performance captured in a sound recording contains two copyrights—the copyright in the sound recording and the copyright in the underlying work.[89]

Consider the soundtrack to the 2001 film *I Am Sam*, which includes new sound recordings of Beatles songs by modern artists.[90] The producers initially wanted to include the original Beatles' recordings, but were dissuaded by the high costs of obtaining the rights to use these recordings.[91] Instead, the producers of *I Am Sam* commissioned other popular artists, such as Sarah McLachlan and Ben Harper, to re-record the Beatles songs.[92] While producers needed copyright permission to use the underlying musical compositions of these songs, once the producers reproduced the works, they automatically gained copyright protection over the re-recordings. An underlying composition, such as "Blackbird" or "Strawberry Fields Forever," "may be

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[86] *See* BROOKS, *supra* note 2, at 12 ("State laws vary, and there is no known summary of their current coverage of sound recordings. However, these laws are universally interpreted to grant permanent ownership of recordings to the creating entities until such time as federal copyright law takes over in 2067.").

[87] 17 U.S.C. § 101.

[88] LEAFFER, *supra* note 31, at 139.

[89] *See* BARBARA HOFFMAN, ED., EXPLOITING IMAGES AND IMAGE COLLECTIONS IN THE NEW MEDIA—GOLD MINE OR LEGAL MINEFIELD? 179 (1999) (explaining that sound recordings and their underlying compositions are separate works with their own distinct copyrights).

[90] I AM SAM, ORIGINAL MOTION PICTURE SOUNDTRACK (New Line Cinema Jan. 8, 2002).

[91] *Reel Times*, L.A. TIMES, June 19, 2005, Section: Movies (discussing the high costs associated with obtaining the rights to use Beatles recordings and how movie producers avoid these costs).

[92] SARAH MCLACHLAN, *Blackbird*, *on* I AM SAM, *supra* note 92; BEN HARPER, *Strawberry Fields Forever*, *on* I AM SAM, *supra* note 90.

performed repeatedly by different persons in different ways, thus creating several independent sound recordings."[93] As the soundtrack to *I Am Sam* illustrates, often a different person owns the sound recording and underlying work. If a person wishes to use a copyright-protected recording, he must seek permission to use both the recording and the underlying song.

A copyright in a sound recording affords its owner certain exclusive rights.[94] A sound recording owner has the right to reproduce the copyrighted work in copies or phonorecords, to prepare derivative works based upon the copyrighted work, and to distribute copies or phonorecords of the copyrighted work.[95] Yet, these rights are more limited than the rights afforded to owners of other copyrighted works. For instance, the exclusive right of reproduction only protects an owner's rights[96] against reproductions "that directly or indirectly recapture the *actual sounds fixed in the recording*."[97] Consequently, the copyright in a sound recording does not protect its owner from imitations of the work.[98] Therefore, in an infringement inquiry, "the only issue is whether the actual sound recording has been used without authorization."[99]

II. OVER-EXTENDED COPYRIGHTS THREATEN THE PRESERVATION OF PRE-1972 SOUND RECORDINGS

As discussed, the Copyright Act of 1976 provides federal copyright protection to sound recordings created after February 15, 1972.[100] For recordings created before this date, common law governs.[101] Originally, § 301(c) required that "[w]ith respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15,

[93] Diamond, *supra* note 41, at 340.
[94] *See* 17 U.S.C. § 114(a) (2006) (delineating a copyright owner's exclusive rights).
[95] *Id.*
[96] *Compare id.* § 114(b) (limiting the exclusive right of a copyright owner of a sound recording), *with id.* § 106 (listing exclusive rights of copyright owners).
[97] *Id.* § 114(b) (emphasis added).
[98] *See id.* (explaining that section 114(b) does "not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording").
[99] Bridgeport Music v. Dimension Films, 410 F.3d 792, 798 n.6 (6th Cir. 2005) (quoting BRADLEY C. ROSEN, 22 CAUSES OF ACTION § 12 (2d ed. 2003)); *see also id.* ("Substantial similarity is not an issue.").
[100] *See* 17 U.S.C. § 301(c) (2006).
[101] *Id.*

2047."[102] However, in 1998, the Sonny Bono Copyright Term Extension Act[103] extended this exemption from federal preemption date by twenty years.[104] As a result, state common law now governs pre-1972 sound recording copyrights until 2067.[105]

A. The Consequences of Copyright Owners' Failure to Reissue

Through the copyright term extension, Congress originally hoped to encourage sound recording copyright holders to reissue recordings in formats accessible to the public.[106] Otherwise, Congress feared that the recordings would deteriorate, noting that "[t]he physical condition of many of our Nation's important sound recordings is at risk due to the lack of proper restoration and preservation."[107] In 2003, the Supreme Court acknowledged Congress's purpose underlying the Sonny Bono Copyright Extension Act, citing a House Report that explained that "longer terms would encourage copyright holders to invest in the restoration and public distribution of their works."[108]

The restoration of early sound recordings is essential to their ultimate existence.[109] Because sound-carrying materials in older formats disintegrate over time, these works must be restored to avoid complete deterioration.[110] A report issued by the Library of Congress affirms this belief, observing that "[i]t is alarming to realize that nearly all recorded sound is in peril of disappearing or becoming inaccessible within a few generations."[111]

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102 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§101–1101 (1988)).

103 Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (to be codified at 17 U.S.C. §§ 108, 203, 301–304).

104 *See id.* § 102; *see* BROOKS, *supra* note 2, at 13 (explaining that pre-1972 sound recordings will enter the public domain at this time unless the current law changes and extends the copyright term beyond 2067).

105 *See* 17 U.S.C. § 301(c) (2006).

106 *See* H.R. REP. NO. 105-452, at 4 (1998).

107 146 CONG. REC. H6849 (2000).

108 Eldred v. Ashcroft, 537 U.S. 186, 207 (2003) (citing H.R. REP. NO. 105-452, at 4 (1998)). The Court also noted that famous artists, such as Bob Dylan and Carlos Santana, claimed that such an extension would provide more incentive for them to create. *Id.* at 207 n.15.

109 *See* CAPTURING ANALOG SOUND, supra note 7, at 3.

110 James H. Billington, *Foreword* to CAPTURING ANALOG SOUND, *supra* note 7, at iv.

111 Abby Smith & Samuel Brylawski, *Preface* to CAPTURING ANALOG SOUND, *supra* note 7, at v .

One way to restore a sound recording is to reissue the work in a digital format.[112] Digitally reformatting sound recordings eliminates the problems associated with early copies of sound recordings on cylinder, 78-rpm, or LP formats—all of which require special apparatuses to play.[113] Most listeners do not have the playback equipment required to listen to recordings issued in these obsolete formats.[114] Until these works are reissued in a more current format, such as a CD or DVD, they are virtually inaccessible to the listening public.[115] Digital reissues preserve the originality of sound recordings and allow for easy public access with modern technology.[116]

B. Congress's False Hopes for Sound Recording Preservation

Contrary to Congress's original hopes, extending copyright protection did not persuade copyright owners to digitally reissue sound recordings.[117] Instead, copyright protection has only increased the length of time that copyright owners may neglect the declining conditions of some of America's earliest recordings.[118] Unless copyright owners permit reissues of their works, a number of America's earliest recordings are at risk of deteriorating.[119] For example, some recordings created over a century ago still have valid copyright protection.[120] Prior to 1920, African-American artists recorded approximately 800 commercial recordings.[121] Copyrights still exist for around 400 of these recordings.[122] Of the 400 copyrighted recordings, rights holders have reissued

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[112] *See* CAPTURING ANALOG SOUND, *supra* note 7, at 2 ("[L]eading audio engineers and audio preservationists believe that the future of audio preservation is in the digital arena.").

[113] *See* BROOKS, *supra* note 2, at 1.

[114] *See* Smith & Brylawski, *supra* note 112, at v ("Our continued ability to hear recorded sound[ ] depend[s], first and foremost, on technologies that capture audio signal on obsolete formats—such as wire recordings, cylinders, instantaneous lacquer discs—and migrate or reformat them onto current technologies.").

[115] *See* BROOKS, *supra* note 2, at 1 (explaining that because these works are in "antique" formats, they cannot be played on modern equipment).

[116] *See generally* CAPTURING ANALOG SOUND, *supra* note 109.

[117] *See* BROOKS, *supra* note 2, at 13 ("Ten percent or less of listed recordings have been made available by rights holders for most periods prior to World War II. For periods before 1920, the percentage approaches zero.").

[118] *See id.* ("Inasmuch as the first commercial recordings were made around 1890, this is a de facto term of between 95 and 177 years.").

[119] *See generally* CAPTURING ANALOG SOUND, *supra* note 109 (forecasting the potential deterioration of non-reissued works).

[120] *See* BROOKS, *supra* note 2, at 13.

[121] Interview by Jerry Jazz Musician website with Tim Brooks, Author of LOST SOUNDS: BLACKS AND THE BIRTH OF THE RECORDING INDUSTRY, 1890–1919, (May 10, 2004), http://www.jerryjazzmusician.com/linernotes/tim_brooks.html (last visited Nov. 30, 2007) [hereinafter Interview with Tim Brooks].

[122] *Id.*

only two recordings, or one half of one percent.[123] Because these works are still under copyright, if copyright owners choose not to reissue the remaining 398 recordings—or grant licenses to reissue to third parties—America stands to lose these historic works.[124]

Unfortunately, historical significance does not drive a copyright owner's decision to reissue. Instead, finances often inform an owner's decision.[125] Rights holders prefer to reissue recordings that appeal to their current consumers,[126] and because the majority of these customers are baby boomers, copyright owners most often reissue recordings created within the life-span of these consumers.[127] As a result, "rights holders virtually ignore earlier periods, no matter how historically important recordings from those periods may be."[128] Indeed, copyright owners have failed to reissue over eighty percent of the historic recordings that they control.[129]

C. Alternatives if the Copyright Owner Does Not Reissue

Unless a copyright owner either donates the sound recording to the public domain or grants a license to reissue to a third party, the owner retains the right to reissue the recording until 2067.[130] This section describes why neither of these options is likely to preserve sound recordings.

1. Donating to the Public Domain

To date, few pre-1972 works have entered the public domain.[131] "With the exception of recordings of a few companies whose assets have been abandoned or donated to the public, there are virtually no public domain U.S. sound recordings."[132] For example, the companies of Thomas Edison conveyed

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123 *Id.*

124 *See generally* BROOKS, *supra* note 2.

125 The rights holders of these works are generally recording companies such as Sony BMG, EMI, and Universal Group, who are concerned, first and foremost, with making a profit. *See* BESEK, *supra* note 3, at 19; *see also* BROOKS, *supra* note 2, at 8.

126 *See* BROOKS, *supra* note 2, at 8.

127 *All Things Considered*, *supra* note 2.

128 BROOKS, *supra* note 2, at 8.

129 *Id.* at 7.

130 *See generally* 17 U.S.C. § 301(c) (2006). Copyright protection expires in 2067, at which time the work would enter the public domain. *Id.* Until then, copyright owners control the right to reissue sound recordings. *See id.*

131 BROOKS, *supra* note 2, at 13.

132 Abby Smith & Samuel Brylawski, *Foreword* to BROOKS, *supra* note 2, at v–vi.

recordings to the U.S. government in 1950.[133] To date, however, no other major company has donated its recording rights to the public.[134]

2. *Reissue by Third Party*

If the copyright holder does not donate the work to the public domain, the only other means of preservation is a reissue by a third party. For a third party to reissue an early American sound recording, he must first determine who owns the rights to the recording.[135] Tracing ownership often presents a challenging task.[136] While the original copyright owner is usually a record company, there could be a reversion clause under a governing contract where the rights revert to the artist.[137] Alternatively, the record company may have assigned rights to another company.[138]

Even if the third party is able to locate the copyright owner, he must still consider the financial commitment of the license to reissue.[139] Unfortunately, the expense of this license may hinder or even defeat the third party's reissuing attempt.[140] As the Vice President of Rhino Entertainment, a company that specializes in "archival reissues," Glen Swartz understands firsthand the difficulties involved in reissuing sound recordings.[141] In an interview regarding sound recording copyrights, Schwartz explained that although copyright owners may offer his company a license to reissue, most holders typically require that his company guarantee a certain level of record sales.[142] Often these targets are unobtainable for older recordings, which, despite being historically significant, are unlikely to sell in mass quantities.[143]

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133 BROOKS, *supra* note 2, at 26.
134 *Id.*
135 *See All Things Considered*, *supra* note 2 (discussing how parties other than the sound recording copyright owner can reissue the recordings).
136 BROOKS, *supra* note 2, at 14 (explaining that twenty-five percent of the labels in the sample were untraceable).
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *See* Rhino Entertainment, http://www.rhino.com/about/index.lasso (last visited Feb. 18, 2007). Rhino Entertainment is the division of Warner Music Group that handles reissues. *See All Things Considered*, *supra* note 2.
142 Rhino Entertainment, *supra* note 141.
143 *See All Things Considered*, *supra* note 2. In the interview, Sam Valoski, an archivist, explains that copyright owners "say to you, 'Yes, we'd love to license this to you, but you have to guarantee 15,000 in record sales or maybe even more, 25,000.' And as lovely as this Al Jolson recording from 1913 is, it's unlikely it's going to sell 15,000 copies." *Id.*

III. COMMON LAW PROTECTION OF SOUND RECORDINGS

To further complicate matters, even if the third party can locate the current rights holder, the boundaries of the owner's rights hinge on whether the recording was created prior to 1972.[144] As discussed, the Copyright Act of 1976 only provides federal protection to sound recordings made on or after February 15, 1972.[145] Therefore, all pre-1972 sound recordings fall under state common law until February 15, 2067, the date of federal preemption.[146] Because each state individually grants common law copyrights, there is neither uniformity nor predictability in common law copyright protection.[147] Generally, states provide copyright protection to pre-1972 sound recordings through some combination of (1) common law copyright; (2) civil statutes issuing ownership rights; or (3) unfair competition and misappropriation claims.[148] A comprehensive study of every state's law is beyond the scope of this Comment; however, this Part considers several states whose laws are representative of the various approaches.

A. *New York's Common Law Copyright*

New York does not have a civil statute protecting against the infringement of a sound recording copyright.[149] Therefore, the protection of sound recordings created before 1972 depends on common law copyright.[150] In *Capitol Records v. Naxos*, the New York Court of Appeals, upon a certified question from the Second Circuit, considered the scope of New York's common law copyright infringement for pre-1972 sound recordings.[151] The court held that a copyright infringement action is proper if the sound recording has a valid copyright and the defendant has reproduced the work without authorization.[152] The court explained that a cause of action for copyright

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144 *See supra* Part I.B.
145 *Id.*
146 *See* 17 U.S.C. §§ 108, 203, 301–304 (2006).
147 *See* BROOKS, *supra* note 2, at 12.
148 BESEK, *supra* note 3, at 21.
149 Capitol Records, Inc. v. Naxos of Am., Inc., 372 F.3d 471, 477 (2d Cir. 2004).
150 *Id.* ("Because the original recordings were fixed before February 15, 1972, they are neither protected nor preempted by federal copyright law, and [the plaintiff's] copyright claim therefore depends on state law protection.").
151 Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 263 (N.Y. 2005).
152 *Id.* at 266.

infringement does not include elements of unfair competition.[153] Consequently, in New York, it is irrelevant whether a defendant acted in bad faith or engaged in misappropriation. In fact, New York common law copyright seems to deny any defense to infringement, even when the defendant's infringing act actually benefits the public.[154]

Naxos II significantly impacted the protectability of pre-1972 sound recordings. While the decision is limited to New York, other jurisdictions may follow its lead.[155] Some critics fear that *Naxos II* has granted major record labels "a veritably unlimited monopoly over any economically valuable pre-1972 sound recording."[156] Therefore, when a company like the defendant in *Naxos II* wishes to reissue a recording, it will be dissuaded by the fear of copyright infringement liability. By excluding elements of unfair competition in an action for infringement, New York common law eliminates the consideration of whether the defendant, in good faith, has preserved and reissued a recording effectively that may otherwise disappear forever.[157] Instead, if a defendant makes any unauthorized use, even if that use benefits the public while not harming the plaintiff,[158] the defendant is liable.[159]

B. California's Sound Recording Civil Statute

In contrast to New York and most other states, California has a civil statute granting copyright protection to sound recordings.[160] California's civil statute section 980(a)(2) provides:

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[153] *See id.* ("Copyright is distinguishable from unfair competition which in addition to unauthorized copying and distribution requires competition in the marketplace or similar actions designed for commercial benefit.").

[154] The defendant in *Naxos* tried to preserve the sound recordings at issue by remastering them from old shellac records into compact discs. *Id.*

[155] *Cf.* Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA. L. REV. 731, 765 (2003) (describing the effect of *Allied Maintenance Corp. v. Allied Mechanical Trades, Inc.*, 369 N.E.2d 1162 (1977), a New York Court of Appeals decision, on the development of the dilution doctrine in trademark law).

[156] Henry Lee Mann, *As Our Heritage Crumbles into Dust: The Threat of State Law Protection for Pre-1972 Sound Recordings*, 6 WAKE FOREST INTELL. PROP. L.J. 45, 61 (2006).

[157] Most early sound recordings are on materials that will deteriorate if not restored. *See* James H. Billington, *Foreward* to CAPTURING ANALOG SOUND, *supra* note 7, at iv.

[158] In the federal *Naxos* litigation, the defendant took action to preserve sound recordings of historical interest. *See* Capitol Records, Inc. v. Naxos of Am., Inc., 274 F. Supp. 2d 472 (S.D.N.Y. 2003). Furthermore, "it did not misappropriate Capitol's labor and expenditures, but rather sought to profit from its own efforts and ingenuity." *Id.*

[159] *Naxos*, 830 N.E.2d at 266.

[160] Research of state laws for this Comment did not point to any other state with a civil statute granting copyright protection to sound recordings. Furthermore, in all the states surveyed in COPYRIGHT ISSUES

> The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.[161]

California amended the statute in 1982 to harmonize state copyright law with federal copyright law.[162] But even with California's issuance of section 980(a)(2), the specifics of the State's sound recording copyright protection are unclear. To date, there are few cases decided under this statute.[163] Consequently, several unresolved issues persist with regard to the meaning and interpretation of section 980(a)(2).[164]

Interpreting section 980(a)(2) requires California courts to delineate the boundaries of pre-1972 sound recording copyrights and the infringement cause of action for these works. California could grant protection similar to that of sound recording copyrights in New York, in which copyright infringement exists anytime a party makes an unauthorized use of a sound recording copyright, or it may protect sound recordings under unfair competition and misappropriation laws.[165]

RELEVANT TO DIGITAL PRESERVATION, states exclusively protected sound recordings through common law. BESEK, *supra* note 3, at 23.

[161] CAL. CIV. CODE § 980(a)(2) (2006).

[162] *See id.*

[163] *See* BESEK, *supra* note 3, at 47. *But see, e.g.*, Lone Ranger Television, Inc. v. Program Radio Corp., 740 F.2d 718, 725 (9th Cir. 1984) (holding section 980(a)(2) conferred an intangible property interest to the owners of sound recordings); Bridge Publ'ns, Inc. v. Vien, 827 F.Supp. 629, 632 (S.D. Cal. 1993) (holding the defendant violated section 980(a)(2) by making unauthorized copies of the recordings created prior to February 15, 1972).

[164] First, the statute does not include an exemption for not-for-profit, educational, or governmental institutions. Therefore, it is unclear whether the statute precludes unfettered use by such organizations. Second, according to the Federal Copyright Act of 1976, state law protection can extend until 2067. However, in California, sound recording copyrights only last until 2047. *See* Cal. Civ. Code § 980(a)(2).

[165] *See* Capitol Records, Inc. v. Naxos of Am., 830 N.E.2d 250, 266 (N.Y. 2005) ("Copyright infringement is distinguishable from unfair competition, which in addition to unauthorized copying and distribution requires competition in the marketplace or similar actions designed for commercial benefit . . . .") (citing Roy Export Co. Establishment of Vaduz, Leichtenstein v. Columbia Broadcasting Sys., Inc., 672 F.2d 1095, 1105 (2d Cir. 1982); G. Ricordi & Co. v. Haendler, 194 F.2d 914, 916 (2d Cir. 1952); Capitol Records, Inc. v. Wings Digital Corp., 218 F. Supp. 2d 280, 286 (E.D.N.Y. 2002); Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 793 (N.Y. Sup. 1950)).

While California's civil statute offers little guidance regarding the scope of its coverage, previous California copyright cases suggest that courts should assess unauthorized duplication of sound recordings according to unfair competition and misappropriation standards. In *Capitol Records, Inc. v. Erickson*,[166] the California Court of Appeals determined that the defendant had unfairly appropriated the artistic performances produced by the plaintiff and that the defendant thereby profited to the disadvantage of the plaintiff.[167] Accordingly, the court held that such conduct constituted unfair competition.[168] In another California appellate case, the defendant duplicated recorded performances that the plaintiff had created.[169] The court held that the defendant's conduct was a "classic example of the unfair business practice of misappropriation of the valuable efforts of another."[170] Therefore, although California did not fully expand the application of its civil statute, it may interpret section 980(a)(2) to protect sound recordings under the theories of unfair competition and misappropriation.[171]

C. State Claims of Unfair Competition and Misappropriation

If California considers unfair competition and misappropriation when evaluating infringement claims of pre-1972 sound recording copyrights, its copyright protection will become comparable to the protection afforded by most other states.[172] For example, the Supreme Court of Wisconsin, in *Mercury Record Productions, Inc. v. Economic Consultants, Inc.*,[173] granted protection to sound recordings on the basis of unfair competition.[174] According to the court, "Recognizing a cause of action in unfair competition for the plaintiffs gives the plaintiffs protection against defendants' appropriation, the larceny, of the plaintiffs' efforts."[175]

Other jurisdictions have also held defendants liable for sound recording copyright infringement on the basis of unfair competition. In *Columbia*

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166 2 Cal. App. 3d 526 (1969).
167 *Id.* at 537
168 *Id.* (noting that "permitting such appropriation would discourage invention and free competition").
169 A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, 560 (1977).
170 *Id.*
171 *See id.*
172 BESEK, *supra* note 3, at 21–23.
173 218 N.W.2d 705 (Wis. 1974).
174 *Id.* at 714.
175 *Id.*

Broadcasting System, Inc. v. Custom Recording Co.,[176] the Supreme Court of South Carolina granted an injunction on the basis of unlawful competition, stating that "[d]efendants are surely 'reaping where they have not sown'" by acquiring the plaintiff's sound recordings and then re-recording the material to sell in competition with the plaintiff.[177] The defendants made no independent investment in the sound recordings.[178] According to the court, these "parasitic acts" infringed the plaintiff's rights.[179] Similarly, in *Columbia Broadcasting System, Inc. v. Melody Recordings, Inc.*,[180] the appellate court of New Jersey noted that:

> Other courts, as well, have recognized that unfair competition occurs where, as here, defendants have not endeavored, through their own input, to create a comparable sound recording or even a good facsimile of an original recorded musical composition, but rather have used or taken *in toto* the original recorded musical performance of another by rerecording it, and then realized a substantial profit on the sale of the duplicate.[181]

Each of these states protects pre-1972 sound recordings through unfair competition and misappropriation laws. Unlike New York's assessment of the common law copyright claim, states typically consider whether the defendant harbors malicious intent or bad faith. Courts in these states determine whether the defendant unfairly capitalized on the plaintiff's efforts to create the recording.[182] Accordingly, "[t]he wrong is not in the copying, but in the appropriation, of the plaintiff's time, effort, and money."[183]

D. Copyright Laws Overseas

While state courts struggle with regulating copyright protection of pre-1972 sound recordings, foreign countries do not face the same challenge.[184] Most foreign countries' copyright terms exist for 50 years from the creation of the recording, rather than in 2067.[185] Many early American recordings that remain

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[176] 189 S.E.2d 305 (S.C. 1972).
[177] *Id.* at 312.
[178] *Id.* (explaining that the defendants avoided the initial costs of creating the sound recordings at issue by literally copying the sound recordings at issue).
[179] *Id.* at 312.
[180] 341 A.2d 348 (N.J. Super. Ct. App. Div. 1975) (internal citations omitted).
[181] *Id.* at 354–55.
[182] *See, e.g.*, *Mercury Record Prods., Inc. v. Econ. Consultants, Inc.*, 218 N.W.2d 705, 710 (Wis. 1974).
[183] *Id.*
[184] *See* BESEK, *supra* note 3, at 18.
[185] *See id.*

under copyright protection in the United States have already entered the public domain in foreign countries.[186] Under the Berne Convention, a treaty to which the United States is a signatory, copyright protection follows the "rule of the shorter term."[187] According to this rule, member countries need only protect works of foreign authors to the same extent that they protect works in their country of origin.[188] Therefore, the "rule of the shorter term" allows people in foreign countries to lawfully reissue a majority of pre-1972 sound recordings still under copyright protection in the United States.[189]

Foreign companies are taking advantage of the "rule of the shorter term" by reissuing American sound recordings and selling the reissues over the internet.[190] For example, Document Records has reissued thousands of early American blues and gospel records without the permission of the copyright holders.[191] Companies that illegally import sound recording reissues into the United States often suffer no repercussions.[192] As one commentator has noted, many "major labels turn a blind eye to these imports because sales are slim and labels are far more concerned about unauthorized downloading of contemporary titles."[193]

IV. RESOLVING THE COPYRIGHT CHAOS SURROUNDING PRE-1972 SOUND RECORDINGS

The copyrights of pre-1972 recordings effectively create a monopoly among copyright holders. The current laws are inadequate to combat sound recording owners' overreaching control. Because of varying sound recording copyright laws among states, and even between the United States and other countries, activities that are legal within the borders of one state or country may constitute infringing activity in another.[194] However, the resulting

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186 *See id.*

187 H.R. REP. No. 105-452, at 4 (1998).

188 *Id.*

189 *Id.*

190 *See generally* Interview with Tim Brooks, *supra* note 121 (explaining that consumers can purchase imports over the internet through retailers such as Amazon.com); BLUES ODYSSEY, *supra* note 1.

191 *See All Things Considered*, *supra* note 2.

192 *See id.*

193 *Id.*

194 *See* Mann, *supra* note *156*, at 54 ("[A] potential infringer may simply conduct the infringing activities of copying and distribution outside of its borders in a state that has more lenient laws or weaker enforcement."); *see also* BROOKS, *supra* note 2, at 8 (explaining that because foreign labels are not subject to U.S. copyright laws, they can produce reissues without legal implications).

problem is more than one of inconsistent laws. Current legislation threatens the ultimate existence of historical recordings by hindering their preservation.[195] Laws initially enacted to encourage the reissuing of recordings have failed—copyright owners reissue, on average, only one historic recording for every six historic recordings that they control.[196]

Recognizing the need to preserve the "nation's audio heritage," advocates in both the public and private sectors suggest "a coordinated national effort to address the preservation challenge."[197] However, defining this "coordinating national effort" remains the first challenge. While the need for a solution is clear, the actual solution is less obvious. An effective solution should both satisfy the interests of copyright owners and the public as well as ensure predictability and efficiency.

This Comment first considers the possibility of categorizing reissues as transformative uses and, therefore, fair use according to copyright laws.[198] Yet, because of the limitations of this approach, this Comment offers an original solution that creates a unique compromise between the rights of the copyright holder and the interests of the public—a compulsory licensing system for reissues. Implementing a compulsory license for pre-1972 sound recordings standardizes the treatment of reissues and decreases the growing monopoly of copyright holders.

A. *Reissuing Exempted Under the Fair Use Exception*

Recently, some courts have held that if a duplication of a work serves a purpose separate from that of the original work, it does not constitute infringement.[199] Rather, the duplicative work is "transformative" and thus

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[195] *See supra* Part II.A.

[196] BROOKS, *supra* note 2, at 7 (explaining that copyright owners reissue less than fifteen percent of the historic recordings that they own).

[197] CAPTURING ANALOG SOUND, *supra* note 7, at 3.

[198] Transformative use is use of a copyrighted work that serves a fundamentally different character or purpose from the original work. Transformative use is a permitted exception to copyright infringement. Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).

[199] *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003) (holding that use of thumbnail images constituted fair use because the operator had a different purpose unrelated to copyright protection); Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 544 (6th Cir. 2004) (holding that use of a printer chip constituted fair use because the company had a different purpose); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 611 (2d Cir. 2006) (finding a transformative purpose and use separate from what was protected by copyright).

subject to an exception to copyright laws, called "fair use."[200] The doctrine of fair use permits copying that would otherwise be infringement based on a four-factor balancing test.[201] These factors include (1) the purpose and character of the use; (2) the nature of the original copyrighted work; (3) the amount and substantiality of the copyrighted work that is used; and (4) the effect of the use on the potential markets for the original work.[202]

While each factor affects the finding of fair use, the purpose and character of the use is often the focus of a court's analysis.[203] In its analysis of a work's purpose and character, the Supreme Court in *Campbell v. Acuff-Rose Music* explained the importance of "transformative use."[204] According to the Court, "the more transformative the new work, the less . . . the significance of other factors, like commercialism, that may weigh against a finding of fair use."[205] The Court defined transformative use as creating a work of a fundamentally different character or purpose from the original work.[206]

Claiming that its use was transformative, and therefore fair, the defendant in *Kelly v. Arriba Soft Corp*.[207] successfully argued that exact thumbnail replications of the plaintiff's photographic images constituted fair use.[208] The defendant in *Kelly* reproduced copyrighted images in their entirety.[209] The Court found that the defendant's use served a purpose distinct from the purpose of the original work.[210] The original images were "intended to inform and to engage the viewer in an aesthetic experience,"[211] whereas the defendant's replications of the images helped organize images on an internet search engine and provide easier access to these images.[212]

Similarly, a person reissuing a sound recording without copyright permission may claim that while the reissue is identical in the arrangement of

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200 *See, e.g.*, *Kelly*, 366 F.3d at 822.

201 *See* 17 U.S.C. § 107 (2006); *see also* LEAFFER, *supra* note 31, at 427–28.

202 *See* 17 U.S.C. § 107.

203 *See* Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006) ("The heart of the fair use inquiry is into the first specified statutory factor identified as 'the purpose and character of the use.'") (quoting 17 U.S.C. § 107).

204 510 U.S. 569, 579 (1994).

205 *Id.* at 579.

206 *See id.* (explaining that transformative use is that which "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

207 336 F.3d 811 (9th Cir. 2003).

208 *Id.* at 822.

209 *Id.* at 818.

210 *Id.*

211 *Id.*

212 *Id.* at 818–19.

sounds on the recording, its purpose contrasts with that of the original recording. Reissuing furthers the purpose of preservation, which differs from the original recording's purpose of capturing original artistic expression. To preserve by way of reissuing, an individual must expend considerable effort converting the work from its original, archaic format to one compatible with current technology.[213] The reissue contributes to the original expression by recapturing the sound onto a physical format accessible to the public.

While this proposition has initial appeal, it ultimately fails. A reissue does not serve a purpose that is sufficiently unique from the original work's purpose. Rather, it is merely the original work retransmitted into a different medium.[214] For example, in *UMG Recordings v. MP3.com, Inc.*,[215] the court held that retransmitting an audio CD into the computer MP3 format did not transform the work.[216]

V. PROPOSED SOLUTION: IMPLEMENTING COMPULSORY LICENSE TO REISSUE

Although courts have provided some guidance in determining the copyright boundaries involved in reissuing a sound recording, this matter is better left for Congress. As the Supreme Court explained, "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[217] Congress should step in and regulate the growing disorder and confusion surrounding pre-1972 sound recording copyrights.

Congress can exercise its power under the Copyright Clause by implementing a system of compulsory licenses. Typically, an individual must negotiate a license with a copyright owner to use a copyrighted work.[218] Market conditions dictate the terms of the licensing agreement.[219] However,

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[213] *See generally* CAPTURING ANALOG SOUND, *supra* note 7 (addressing the challenges involved with preserving recorded sound).

[214] *See Kelly*, 336 F.3d at 820 ("Courts have been reluctant to find fair use when an original work is merely transmitted in a different medium.").

[215] 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

[216] *Id.* at 351. According to the court, retransmitting the work into another medium is "an insufficient basis for any legitimate claim of transformation." *Id.*

[217] Eldred v. Ashcroft, 537 U.S. 186, 212 (1990); *see also* Stewart v. Abend, 495 U.S. 207, 230 (1990) ("it is not our role to alter the delicate balance Congress has labored to achieve"); Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966) ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.").

[218] LEAFFER, *supra* note 31, at 293.

[219] *Id.*

on six occasions, Congress has superseded the market-based copyright system by creating compulsory licensing regimes.[220] Congress has even required compulsory licenses for musical compositions,[221] thereby opening the door for compulsory licensing of pre-1972 sound recordings.

A. The Musical Work Compulsory License

Once a copyright owner distributes a sound recording to the public, any person may obtain a compulsory license for the underlying musical composition.[222] A copyright owner cannot deny its issuance.[223] The Copyright Act requires that the license-seeker serve a Notice of Intent on the copyright owner, or if the copyright owner is unknown, the potential licensee must file the Notice with the Copyright Office.[224] Assuming that the potential licensee abides by the requirements and pays the necessary royalties,[225] the Copyright Office will issue the license.[226]

B. Criticisms of Compulsory Licensing

Following the framework of compulsory licenses for musical works, Congress should implement a similar compulsory licensing system for reissuing pre-1972 sound recordings. However, because compulsory licensing challenges the underpinnings of copyright law,[227] "any proposal to introduce

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[220] Compulsory licenses currently exist for mechanical reproductions, cable system transmissions, ephemeral recordings, digital transmission of public performances, jukebox performances of recorded music, and the non-commercial broadcasting of certain works. 17 U.S.C. §§ 111–12, 114, 116, 118 (2006).

[221] As noted, a musical work contains two copyrights: the copyright of the sound recording and the copyright of the underlying composition. In 1909, Congress granted a compulsory license only for the underlying work of the sound recording—the musical composition. *See* Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (current version at 17 U.S.C. (2006)). However, the audio recording of the work is not subject to a compulsory license.

[222] 17 U.S.C. § 115(a)(1).

[223] LEAFFER, *supra* note 31, at 293.

[224] A person seeking a compulsory license must file the Notice either "before or within thirty days after making, and before distributing any phonorecords of the work." 17 U.S.C. § 115(b)(1).

[225] The licensee must pay royalties to the copyright owner, unless the name and address of the owner are unknown. In such an instance, the licensee pays no royalties. *See id.* § 115(c)(1).

[226] *See* LEAFFER, *supra* note 31, at 293. However, it is important to note that the compulsory license does involve certain restrictions. The Copyright Office will grant a license only if the primary purpose of the license is distribution to the public for private use. 17 U.S.C. § 115(a)(1). Furthermore, the licensee "shall not change the basic melody or character of the work." *Id.* § 115(a)(2).

[227] *See* Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1128 (1977) ("[C]opyright law is founded on the notion that privately bargained prices are preferable to publicly administered rates.").

compulsory licensing bears the heavy burden of showing that the benefits to be derived from compulsory licensing outweigh the costs."[228]

When Congress previously considered implementing a sound recording compulsory license, two central arguments persuaded the House and Senate to reject the idea.[229] First, opponents argued that compulsory licensing for sound recordings was unjust because it permitted an individual to perfectly duplicate the finished product without contributing any additional effort.[230] In contrast, the compulsory license for musical works only provides access to the "raw material" of a musical performance—the musical work.[231] The licensed party must still arrange the performance and recording of the composition.[232]

Second, in addition to potential freeloading problems, Congress also feared that compulsory licensing would allow "record pirates" to selectively reissue only those songs likely to become hits.[233] Third parties would reap the benefits of copyright owners' successes while avoiding any loss associated with the copyright owners' failed releases.[234] Furthermore, licensees could undercut the copyright owners' sales prices for these works, thus diminishing owners' potential profits.[235]

Even though Congress rejected sound recording compulsory licenses, it recognized that such a license may be a favorable solution if copyright owners were not independently making sound recording collections available to the public.[236] Congress foreshadowed the current situation concerning pre-1972 sound recordings. Copyright owners are not making many of America's earliest sound recordings available to the consuming public.[237] Because copyright owners are not reissuing America's earliest recordings adequately, Congress should reconsider the compulsory license.

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[228] *Id.* at 1136–37.

[229] *See* H.R. REP. NO. 92-487, at 3 (1971) (considering whether a compulsory license was an adequate solution for the unauthorized duplications of sound recordings). Both the House and Senate rejected the compulsory license solution and instead passed the Sound Recording Amendment of 1971 which granted limited copyright protection for sound recordings. *Id.*

[230] *Id*. at 4.

[231] *Id*. (referring to the copyright musical composition as the "raw material" of a sound recording) (citing S. Rep. No. 92-72 at 5 (1971)).

[232] *See* H.R. REP. No. 92-487, at 4 (1971).

[233] *See id.*

[234] *See id.* at 5; Diamond, *supra* note 41, at 346.

[235] H.R. REP. No. 92-487, at 5 (1971).

[236] *Id.* at 4 ("We recognize that in some cases the consuming public may be able to obtain selections . . . not available from regular sources.").

[237] *See supra* Part II.B.

C. Compulsory Licensing Proposal for Pre-1972 Sound Recordings

This Comment proposes the application of a modified form of the compulsory license for musical compositions to pre-1972 recordings. This proposal modifies the scope of the license and the procedure for a copyright owner to object to such a license. First, the sound recording license is limited in scope to only pre-1972 recordings. Second, the proposed procedure that grants or denies the license allows the copyright owner to object. These modifications strike a favorable balance between the copyright owner's rights and the public's right to access and use historical sound recordings.

1. Availability and Scope of the Compulsory License

First, the proposed license would only include sound recordings issued prior to 1972, whereas the license for musical works covers all works, regardless of when they were created.[238] Varying state regulations regarding pre-1972 recordings produce a muddled area of copyright law. The Supreme Court touched on this issue in *Goldstein v. California*,[239] explaining that sound recording infringement in one state may be permitted activity in another.[240] Because of the inconsistent state approaches to copyright protection, pre-1972 sound recordings need a standardized compulsory license.

Second, the proposed compulsory license would only allow the licensee to reissue those recordings that are currently in formats that the public cannot access with modern equipment.[241] Because many pre-1972 recordings exist in deteriorating formats, they must be reissued to ensure their preservation.[242] This compulsory license offers parties other than the copyright owner the opportunity to reissue, and thereby preserve, the recording. However, in reissuing the work, a licensee would not be permitted to change "the basic melody or fundamental character of the work."[243] He would only be able to reformat and restore the recording as originally made.

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[238] 17 U.S.C. § 115(a)(1) (2006). Copyrights in sound recordings issued after 1972 will expire before the works completely deteriorate. These works do not face the same preservation issues because, unlike pre-1972 sound recordings, their copyright terms have not been overextended.

[239] 412 U.S. 546 (1973) ("[I]ndividuals who wish to purchase a copy of a work protected in their own State will be able to buy unauthorized copies in other States where no protection exists.").

[240] *Id.* at 558.

[241] For example, early sound recordings on cylinder, 78-rpm, or even LP format require special apparatuses to play. Brylawski & Smith, *supra* note 9, at v.

[242] *See supra* Part II.B.

[243] 17 U.S.C. § 115.

2. *Notice of Intent to Obtain Compulsory License*

An individual seeking a compulsory license under the current system must serve a Notice of Intent on the copyright owner.[244] Unlike previous compulsory licensing schemes, under which the copyright owner could not deny the issuance of the license, this proposal would grant the copyright owner an opportunity to object. Upon receipt of notification, the owner would have a sixty-day period to inform the Copyright Office of his objection. An objection must set forth particularized grounds. Examples of sufficient grounds for objection include (1) the copyright owner's specified plan to reissue the recording; and (2) the copyright owner's plan to sell the recording to a designated party who has specified plans to reissue. In either situation, the Copyright Office would not grant the compulsory license.[245]

These examples of sufficient grounds for objection are not exclusive. The copyright owner may also object to the issuance of the compulsory license based on other extenuating circumstances unique to the particular recording or the copyright holder himself. In such situations, the Copyright Office would review the arguments and make a final determination as to whether to issue the compulsory license.

Because the primary purpose of this proposal is to preserve and to provide public access to historical recordings, any decision regarding a licensing request must be founded on this rational. For example, if the copyright owner submits evidence of his intention to reissue the recording as part of a compilation CD, his right to reissue should have priority. However, if the copyright owner objects because he may "one day" wish to reissue this recording, such a vague assertion of his right would carry less weight. If the copyright owner provides no specific details as to his future intention to reissue, the Copyright Office should deny his objection. Thus, under the latter circumstances, the compulsory license would be issued.

If the Copyright Office grants the objection and does not issue a compulsory license, the copyright holder has two years to reissue the sound recording. Should the copyright holder not reissue within this period, an

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[244] Unlike the mechanical compulsory license in which notice is sufficient either "before or within thirty days after making, and before distributing any phonorecords of the work," notice for the sound recording compulsory license would occur before the individual reissues the work. *Id.* § 115(b)(1).

[245] A copyright holder may demonstrate that plans are "in the immediate future" by either having actual dates or time estimates of when the action will occur. If the copyright holder gives time estimates, these estimates must be reasonable and obtainable.

interested party could refile or renew a request for the compulsory license. In this instance, if the petitioner could show that the copyright holder had not diligently committed to the basis offered for the objection, the compulsory license would automatically issue in favor of the petitioner.[246] Moreover, the compulsory licensing fee would be reduced.

3. *Royalty Payable Under the Compulsory License*

In addition to the compulsory licensing fee, the copyright owner would also be entitled to royalties.[247] Because the music industry is already familiar with the royalty fees structure set forth in § 115(c) in the Copyright Act, the determination of royalties under this proposal mirrors that of § 115(c). Consistent with § 115(c), "the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, which amount is larger."[248]

D. *Responses to Possible Criticisms of This Proposal*

1. *Licensing Process is Inefficient*

While some may argue that this proposed process is inefficient because the notice requirement and the copyright owner's opportunity to object slow the process, any possible inefficiency is outweighed by the competing ownership rights of the copyright holder and the rights of the public to preserve sound recordings. Compulsory licensing often undermines copyright law because it essentially strips the copyright owner of control of his copyright. Yet, compulsory licensing is necessary to ensure the preservation of pre-1972 sound recordings. With the proposed licensing scheme, copyright holders still retain some rights, but do not have total control over the decision to reissue the recording.[249]

Furthermore, current copyright owners seem less concerned with their ownership rights of pre-1972 sound recordings. Many holders sit on these rights, never reissuing the work in formats that today's consuming public can

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[246] The copyright holder would not have the opportunity to object a second time to the issuance of the compulsory license. The copyright owner would lose rights in favor of the public interest to reissue the recording.

[247] Entitlement to royalties assumes that the copyright owner can be located and identified.

[248] 17 U.S.C. § 115(c)(2).

[249] *See* Part V.C.

access.[250] In fact, many copyright holders "turn a blind eye" to imported reissues of older recordings because they are more focused on the profit potential of contemporary hits.[251]

Considering current copyright holders' failure to reissue pre-1972 sound recordings, it is unlikely that a copyright owner would object to the compulsory license Notice unless he has a vested interest in retaining the exclusive right to reissue. Otherwise, if the owner objects but does not reissue the recording, he would still lose control of the work in addition to receiving a reduced licensing fee. Therefore, this Comment's proposal protects both the copyright holder and the sound recordings, thereby aligning economic incentives with substantive policy goals. On the one hand, this proposal encourages a copyright holder to protect his property interests proactively by reissuing and marketing economically valuable sound recordings. On the other hand, this proposal facilitates the protection and distribution of other early sound recordings, thereby preserving them for future audiences.

2. *License Permits Freeloading*

This proposed licensing scheme also addresses and eliminates Congress's earlier concerns regarding a compulsory license program for sound recordings. First, because the proposed compulsory license grants the licensee the right to *reissue* the work[252] rather than duplicate it, the licensee would not be able to freeload off the copyright owner's work. Reissuing older sound recordings can require considerable effort and even specialized expertise.[253] For example, to reissue a recording originally on disc format, one must choose the correct stylus size.[254] In fact, many audio specialists believe that choosing the correct stylus is the most important factor in creating accurate sound reproduction.[255] However, determining the best stylus "is a skill that comes only with experience and with expert listening comparisons."[256] Therefore, like the

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250 *All Things Considered*, *supra* note 2; Brylawski & Smith, *supra* note 9, at v.

251 *All Things Considered, supra* note 2.

252 The licensee would be permitted to reissue the work which would, in turn, allow him to sell the work in a format accessible to the public.

253 *See* CAPTURING ANALOG SOUND, *supra* note 7, at 4 ("The distinct physical characteristics of each [audio] disc type require different, often highly specialized, techniques to coax the sound from the carrier.").

254 A stylus is "a cutting tool used to produce an original record grove during disc recording." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2272 (3d ed. 1986).

255 CAPTURING ANALOG SOUND, *supra* note 7, at 5.

256 *Id.*

compulsory license for musical works, the compulsory license for sound recordings requires considerable effort on the licensee's part.

3. *License to Reissue Only "Hits"*

The proposed licensing scheme alleviates Congress's concerns that a compulsory license would permit third parties to selectively reissue only "hit" recordings. The added notice requirement gives the copyright owner a chance to object to a compulsory license and reserve his or her right to reissue the work. Therefore, if a reissue is likely to earn a substantial profit, the copyright owner retains the initial right to create the reissue or sell the right to reissue to an interested third party.

CONCLUSION

This Comment's proposed licensing scheme offsets the presently overextended copyright terms of pre-1972 sound recordings. It also remedies the inconsistent and unpredictable results that the various state laws create. If the current system is not amended, many of America's oldest sound recordings will likely deteriorate beyond use. Such a result would devastate not only the existence of early American sound recordings, but also the heritage of this country. Pre-1972 sounds recordings "have played an important role in the cultural, social, and political life of the United States,"[257] and they have influenced the music of greats, including Bob Dylan[258] and the Rolling Stones.[259] The unique situation surrounding pre-1972 sound recordings demands the immediate attention of lawmakers as sound recording formats become more challenging to preserve. The compulsory licensing scheme set forth in this Comment provides Congress with a favorable and workable solution. It allows other interested parties to reissue pre-1972 sound recordings, without copyright permission, thereby removing the fate of these works from the sole control of copyright owners. Without such a license, these third parties must otherwise wait until February 15, 2067 to reissue the recordings, when the works enter the public domain. Unfortunately, by this time, it may too late. As discussed previously, these recordings likely will deteriorate beyond preservation. Congress must take action to preserve these

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[257] Brylawski & Smith, *supra* note 9, at v.

[258] *See* Bob Dylan Roots, http://www.bobdylanroots.com/blues.html (last visited Nov. 4, 2007).

[259] *See, e.g.*, BLUES ODYSSEY, *supra* note 1 (discussing Rolling Stones bassist Bill Wyman's musical influences).

works. Otherwise, for some of our Nation's earliest recorded sound, February 15, 2067 may just be "the day the music died."

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