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Reconciling Copyright "Restoration" for Pre-1972 Foreign Sound Recordings with the Classics Protection and Access Act

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IP Theory

**RECONCILING
COPYRIGHT
“RESTORATION”
FOR PRE-1972
FOREIGN SOUND
RECORDINGS
WITH THE
CLASSICS
PROTECTION AND
ACCESS ACT**

Volume 12 | Issue 1

Tyler Trent Ochoa
2022-2023

Reconciling Copyright “Restoration” for Pre-1972 Foreign Sound
Recordings
with the Classics Protection and Access Act*

Tyler T. Ochoa**

Abstract

When Congress first added sound recordings to the Copyright Act, it acted prospectively only: sound recordings fixed on or after February 15, 1972, received federal statutory copyright protection, while sound recordings fixed before February 15, 1972, were left to the vagaries of state law. This historic inequity was corrected in 2018 with enactment of the Classics Protection and Access Act (CPA), which provides *sui generis* protection to pre-1972 sound recordings that is similar, but not identical, to federal copyright protection. But there is a subset of pre-1972 sound recordings that already had federal copyright protection before the CPA was enacted: namely, sound recordings of foreign origin that were granted copyright under the umbrella of copyright “restoration” in the Uruguay Round Amendments Act of 1994. This raises an obvious question that Congress did not expressly address: is the new *sui generis* protection provided by the CPA a substitute for the existing copyright protection that such foreign sound recordings already enjoyed, or is it supplemental to the existing copyright protection that such foreign sound recordings already enjoyed, or does it simply not apply to such foreign sound recordings at all? This article examines the three alternatives and concludes that Congressional clarification is needed. Absent such clarification, it is possible that foreign sound recordings are simply not covered by the CPA at all, rendering its protections for digital music providers ineffective and depriving foreign sound recordings of the term extension provided by the CPA.

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2022]

IP THEORY

This article is dedicated to Professor Marshall Leaffer: a friend, a colleague in academia, a co-author on our copyright casebook, and an inspiration to me throughout our careers as law professors. It concerns the intersection of two of our mutual subjects of interest and expertise: U.S. copyright law, and international copyright and neighboring rights protection.

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I. INTRODUCTION

When Congress first added sound recordings to the Copyright Act, it acted prospectively only: sound recordings fixed on or after February 15, 1972, received federal statutory copyright protection,¹ while sound recordings fixed before February 15, 1972, were left to the vagaries of state law.² This historic inequity was corrected in 2018 with enactment of the Classics Protection and Access Act (CPA),³ which provides *sui generis* protection to pre-1972 sound recordings that is similar, but not identical, to federal copyright protection.⁴

But there is a subset of pre-1972 sound recordings that already had federal copyright protection before the CPA was enacted: namely, sound recordings of foreign origin that were granted copyright under the umbrella of copyright “restoration” in the Uruguay Round Agreements Act of 1994 (URAA).⁵ This raises an obvious question that Congress did not expressly address: is the new *sui generis* protection provided by the CPA a substitute for the existing copyright protection that such foreign sound recordings already enjoyed, or is it supplemental to the existing copyright protection that such foreign sound recordings already enjoyed, or does it simply not apply to such foreign sound recordings at all?

¹ See Sound Recording Amendment Act, Pub. L. No. 92-140, § 1(a), 85 Stat. 391, 391 (1971). Section 3 provided that “This Act shall take effect four months after its enactment,” or February 15, 1972; and that title 17, as amended, “shall apply only to sound recordings fixed, published, and copyrighted on or after the effective date of this Act . . . and nothing in title 17 . . . shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.” *Id.* § 3, 85 Stat. at 392.

² See H.R. REP. NO. 92-487, at 13 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 1566, 1578 (“The bill does not apply retroactively and . . . thus does not deal with recorded performances already in existence. Instead[,] it leaves to pending or future litigation the validity of state common law or statutes governing the unauthorized copying of existing recordings.”).

³ Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, tit. II, § 201, 132 Stat. 3676, 3728 (2018).

⁴ See 17 U.S.C. § 1401(a)(1) (2018). For an analysis of the protection provided by the CPA, see Tyler Ochoa, *An Analysis of Title II of Public Law 115-264: The Classics Protection and Access Act* (Guest Blog Post), TECH. & MKTG. L. BLOG (Oct. 24, 2018), <https://blog.ericgoldman.org/archives/2018/10/an-analysis-of-title-ii-of-public-law-115-264-the-classics-protection-and-access-act-guest-blog-post.htm> [https://perma.cc/B2MH-ZW9H].

⁵ Uruguay Round Agreements Act, Pub. L. No. 103-465, tit. V, § 514(a), 108 Stat. 4809, 4976 (1994) (codified as amended at 17 U.S.C. § 104A) [hereinafter URAA]. The term “restored work” is defined to include foreign sound recordings fixed before February 15, 1972, in 17 U.S.C. § 104A(h)(6)(C)(ii).

Part II of this Article sets forth the history of copyright protection for sound recordings in the United States, and neighboring rights protection for sound recordings in other countries, prior to the URAA. Part III examines the copyright restoration provisions of the URAA with regard to foreign pre-1972 sound recordings. Part IV analyzes the Classics Protection and Access Act that provided parallel *sui generis* federal protection to all pre-1972 sound recordings, which shows that Congress simply did not consider the potential overlap of such protection with the existing copyright protection for foreign pre-1972 sound recordings at all. Part V discusses the three possible resolutions to the issue, and Part VI concludes.

II. BACKGROUND: LEGAL PROTECTION FOR SOUND RECORDINGS⁶

A. U.S. Copyright Law

U.S. copyright law distinguishes between a musical work (the notes and words, in whatever form they occur) and a sound recording (a fixation of any sounds, usually a particular recorded performance of a musical work).⁷ The copyright in a musical work is owned initially by the composer and the lyricist (as a work of joint authorship)⁸ and is usually assigned to a music publisher.⁹ The copyright in a sound recording is owned in theory by the performer(s) and the sound engineer(s),¹⁰ and in practice is usually

⁶ Readers who are already familiar with the treatment of sound recordings under U.S. copyright law and international neighboring rights may skip to Part III.

⁷ 17 U.S.C. § 102(a) (2018) lists eight categories of “works of authorship” that are eligible for copyright protection, including subsection (a)(2) (“musical works, including any accompanying words”) and subsection (a)(7) (“sound recordings”). Section 101 defines “sound recordings” as “works that result from the fixation of a series of musical, spoken, or other sounds, . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” 17 U.S.C. § 101 (2018).

⁸ 17 U.S.C. § 201(a) (2018) (“Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.”); 17 U.S.C. § 101 (2018) (“A ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”).

⁹ See DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 220–23 (Simon & Schuster 10th ed. 2019).

¹⁰ H.R. REP. NO. 92-487, at 4 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 1566, 1569 (“performers, arrangers, and recording experts are needed to produce the finished creative work in the form of a distinctive sound recording”); *id.* at 5, 1971 U.S.C.C.A.N. at 1570 (“The copyrightable elements in a sound recording will usually, though not always, involve

assigned to the producer or record label.¹¹ A sound recording is treated as a “derivative work” of a preexisting musical work (even if they were created simultaneously).¹² Thus, there are two different copyrights, and two different owners, both fixed in one master recording (a “phonorecord” within the meaning of federal law).¹³

Musical works have expressly been eligible for federal statutory copyright since 1831.¹⁴ At the time, of course, sound recordings did not exist, so musical works were registered in the form of sheet music and were protected only against unauthorized reproduction and sale.¹⁵ Congress did not grant a public performance right in musical works until 1897.¹⁶

In 1908, the U.S. Supreme Court held that a piano roll (a roll of perforated paper that caused a player piano to perform the notes of a musical work) was *not* a “copy” of a musical work, and that making and

‘authorship’ both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.”).

¹¹ *Id.* at 5, 1971 U.S.C.C.A.N. at 1570 (“[T]he [statute] does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.”); see PASSMAN, *supra* note 9, at 75–80.

¹² 17 U.S.C. § 101 (2018) (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a musical arrangement, . . . sound recording, . . . or any other form in which a work may be recast, transformed, or adapted.”). See *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 155, 165 (1985) (sound recordings of a “song” are derivative works); *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1197 (10th Cir. 2005) (“A sound recording is a derivative work in relation to the musical work recorded therein”) (*quoting* M.B. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.10[A] n.8 (1991)).

¹³ 17 U.S.C. § 101 (2018) (defining “phonorecords” as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed The term ‘phonorecords’ includes the material object in which the sounds are first fixed”).

¹⁴ See Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436 (granting rights to “the author or authors of any . . . musical composition”). Even before 1831, however, musical works in the form of sheet music were protected as “books.” *Bach v. Longman*, 98 Eng. Rep. 1274 (K.B. 1777); Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005).

¹⁵ *Cf.* *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 31 (1908) (“Congress has dealt with the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original.”); *id.* at 34 (defining “a copy of a musical composition” as “a written or printed record of it in intelligible notation”).

¹⁶ Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

selling piano rolls was therefore not an infringement.¹⁷ The following year, Congress reversed that decision in the 1909 Copyright Act, granting to the copyright owner of a musical work the exclusive right to make so-called “mechanical reproductions” (what we now call “phonorecords”) of the musical work.¹⁸ But the “mechanical reproductions” were not themselves eligible for federal statutory copyright.¹⁹ That meant that if there was an unauthorized reproduction of such a recording, the musical work copyright owner could sue (if the work was registered under federal copyright law), but the owner of the master recording (the producer or record label) could not recover damages under federal law for such a use.

In the absence of federal copyright protection, producers of sound recordings turned to state law—both statutory and common law—for protection against record piracy (commercial duplication of phonograph records onto cassette tapes for sale).²⁰ In *Goldstein v. California*,²¹ the U.S. Supreme Court held that such state laws were valid and were not preempted by federal law. In the meantime, however, Congress had enacted the Sound Recording Amendment Act of 1971,²² which, as noted above, made sound recordings fixed on or after February 15, 1972, eligible for federal statutory copyright.²³ Federal copyright protection for 1972-and-later sound recordings was carried forward in the 1976 Copyright Act.²⁴ Congress also ratified the *Goldstein* decision in section 301(c) of the 1976 Act, which stated: “With respect to sound recordings fixed before February 15, 1972,

¹⁷ *White-Smith*, 209 U.S. at 37–38.

¹⁸ Copyright Act of 1909, ch. 320, § 25(e), 35 Stat. 1075, 1081–82. Congress then mitigated the potential anti-competitive effects of that choice by creating a compulsory license: once the copyright owner had permitted the use of its music to make a “mechanical reproduction,” any other person could make a different “mechanical reproduction” without permission by notifying the copyright owner and paying a statutory royalty of two cents per copy. *Id.* § 1(e), 35 Stat. at 1075–76. See Howard B. Abrams, *Copyright’s First Compulsory License*, 25 SANTA CLARA COMPUT. & HIGH TECH. L.J. 215, 217–21 (2010).

¹⁹ *Capitol Recs., Inc. v. Mercury Recs. Corp.*, 221 F.2d 657, 659–62 (2d Cir. 1955).

²⁰ See, e.g., CAL. PENAL CODE § 653h (as enacted in 1968); CAL. CIV. CODE § 980(a)(2); *Mercury Records*, 221 F.2d at 662–63 (New York common law). The *Erie* prediction in *Mercury Records* was confirmed in *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005).

²¹ 412 U.S. 546 (1973).

²² Act of Oct. 15, 1971, Pub. L. No. 92-140, §1(a), 85 Stat. 391, 391 (limiting the reproduction of copyrighted sound recordings).

²³ See *supra* text accompanying note 1.

²⁴ 17 U.S.C. § 102(a)(7) (enacted in Pub. L. No. 94-553, §102(a)(7), 90 Stat. 2541, 2545); but see former 17 U.S.C. § 301(c) (enacted in Pub. L. No. 94-553, § 301(c), 90 Stat. 2541, 2572) (“no sound recording fixed before February 15, 1972, shall be subject to copyright under this title”).

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, 2047.”²⁵ The sunset date was later extended to February 15, 2067, by the Sonny Bono Copyright Term Extension Act of 1998.²⁶

When sound recordings were added to the federal copyright act in 1972, however, Congress gave them less protection than that provided to other kinds of copyrighted works. Authors of most copyrightable works receive five exclusive rights: the right to reproduce the work, to prepare derivative works based on the work, to publicly distribute copies of the work, to publicly perform the work, and to publicly display the work.²⁷ But broadcasters had enough lobbying power to block any action in Congress if it required them to pay more royalties.²⁸ As a result, Congress did *not* give sound recording copyright owners an exclusive right of public performance.²⁹ Moreover, the reproduction and adaptation rights are limited to duplication or electronic manipulation of the actual fixed sounds.³⁰ Unlike every other kind of copyrighted work, sound recordings are *not* protected against imitation or simulation; instead, sound-alike recordings are expressly permitted.³¹

Sound recording copyright owners were never happy with the legislative compromise that excluded them from a public performance right.

²⁵ 17 U.S.C. § 301(c) (1976) (enacted in Pub. L. No. 94-553, §301(c), 90 Stat. 2541, 2572).

²⁶ Act of Oct. 27, 1998, Pub. L. No. 105-298, § 102(a), 112 Stat. 2827, 2827 (amending statute to extend copyright term).

²⁷ See 17 U.S.C. § 106 (2018) (enacted in Pub. L. No. 94-553, 90 Stat. 2541). As enacted, section 106 did not include clause (6); that subsection was added in 1995. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336, 337.

²⁸ See KEVIN PARKS, *MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX* 157 (ABA 2012).

²⁹ See 17 U.S.C. § 114(a) (1976) (enacted in Pub. L. No. 94-553, §114(a), 90 Stat. 2541, 2560) (“The exclusive rights of the owner of copyright in a sound recording are limited to rights specified by clauses (1), (2), and (3) of section 106, and do *not* include any right of performance under section 106(4).”). The policy argument was that radio airplay served as free advertising for the sale of phonograph records. PARKS, *supra* note 28, at 157.

³⁰ See 17 U.S.C. § 114(b) (2018) (limiting the reproduction right “to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording”; and limiting the adaptation right “to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality”).

³¹ See *id.* (“The exclusive rights of the owner of copyright in a sound recording . . . do 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.”).

In 1995, however, with digital broadcasting on the horizon, Congress enacted another compromise, granting to sound recording copyright owners the exclusive right “to perform the copyrighted work publicly by means of a digital audio transmission.”³² But this right was accompanied with further limitations: FCC-licensed broadcast transmissions are exempt,³³ and subscription services (such as satellite radio) and other non-interactive streaming services get the benefit of a compulsory license.³⁴ Only interactive services, such as Spotify, must obtain negotiated licenses from sound recording copyright owners.³⁵

Thus, in 1994, when the United States was negotiating the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as part of the Uruguay Round of the General Agreement on Tariffs and Trade,³⁶ the United States did not yet have any type of public performance right for sound recordings. But because the United States exports more sound recordings than it imports, it had an economic interest in encouraging other countries to adopt strong legal protection for sound recordings. Thus, in the Uruguay Round Agreements Act (URAA), the U.S. decided to grant copyrights to foreign pre-1972 sound recordings for the first time, under the guise of copyright “restoration,” in the hopes that other countries would reciprocate.³⁷

B. International Protection for Sound Recordings

The U.S. joined the Berne Convention, the major international treaty concerning copyright, effective March 1, 1989.³⁸ But the Berne Convention does not require member nations to provide copyright protection to sound recordings because, with the prominent exception of Anglo-American countries, most countries do not recognize “copyright” or “author’s rights,”

³² 17 U.S.C. § 106(6) (2018).

³³ *See id.* § 114(d)(1).

³⁴ *See id.* § 114(d)(2).

³⁵ *See id.* § 114(d)(3).

³⁶ Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement], https://www.wto.org/english/docs_e/legal_e/31bis_trips_e.pdf [<https://perma.cc/A22Y-68XE>] (as amended on Jan. 23, 2017).

³⁷ *See infra* Part III.

³⁸ *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne Convention], <https://wipolex.wipo.int/en/text/283698> [<https://perma.cc/7QGX-WNQS>] (last visited July 17, 2022).

as such, in sound recordings.³⁹ Instead, rights in sound recordings, or “phonograms” in international parlance,⁴⁰ are treated separately under a regime of so-called “neighboring rights.”⁴¹

The international agreements governing neighboring rights provide legal protection to performers and to producers of phonograms (as well as broadcasting organizations), but they do *not* provide any rights to sound engineers.⁴² For example, the Rome Convention requires member states to give performers the right to prevent the broadcasting or communication to the public of their unfixed performances, the fixation of their unfixed performances, and the reproduction of their fixed performances.⁴³ It also requires member states to give producers of phonograms “the right to authorize or prohibit the direct or indirect reproduction of their phonograms,”⁴⁴ and the right (shared with performers) to receive a single equitable remuneration for the broadcasting or communication to the public of their phonograms.⁴⁵ These rights must last at least twenty years after the end of the year in which performance, fixation, or broadcast occurs.⁴⁶

³⁹ See SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* §19.01 (Oxford Univ. Press 2d ed. 2006); *Capitol Recs., Inc. v. Naxos of Am, Inc.*, 372 F.3d 471, 479 (2d Cir. 2004) (“[N]either the Berne Convention nor the U.C.C. [Universal Copyright Convention] applies to sound recordings.”).

⁴⁰ A “phonogram” is defined as “any exclusively aural fixation of sounds of a performance or of other sounds.” Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms art. 1(a), Oct. 29, 1971, 25 U.S.T. 309, T.I.A.S. 7808, 866 U.N.T.S. 67 [hereinafter Geneva Phonograms Convention], <https://wipolex.wipo.int/en/text/288582> [<https://perma.cc/79LV-BQ64>] (last visited July 17, 2022).

⁴¹ RICKETSON & GINSBURG, *supra* note 39, at §19.01.

⁴² The implicit assumption is that sound engineers are employees of the producers of phonograms and that the producers own the rights, either as works made for hire or by assignment.

⁴³ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations art. 7(1), Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention], <https://wipolex.wipo.int/en/text/289757> [<https://perma.cc/ZEK7-2XD2>]. The Rome Convention defines “performers” as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.” *Id.* art. 3(a).

⁴⁴ *Id.* art. 10.

⁴⁵ *Id.* art. 12.

⁴⁶ *Id.* art. 14.

Because the United States still lacks a general public performance right for sound recordings, it is not a member of the Rome Convention.⁴⁷ The United States is, however, a member of the Geneva Phonograms Convention, which requires member states to give producers of phonograms the right to prevent the making, importation, and distribution of “duplicates” (i.e., reproductions) of their phonograms,⁴⁸ which rights must also last for at least twenty years from the end of the year in which the phonogram was first fixed or first published.⁴⁹

Concurrently with the URAA, the United States became a member of the TRIPS Agreement, which requires member states to give performers the right to prevent the fixation of their unfixed performances, any reproduction of such fixation, and the broadcasting or communication to the public of their live performances;⁵⁰ and to give producers of phonograms “the right to authorize or prohibit the direct or indirect reproduction of their phonograms.”⁵¹ These rights must last at least fifty years from the end of the calendar year in which the fixation or performance took place.⁵² The TRIPS Agreement also requires member states to grant broadcasting organizations the right to prohibit any fixation of their broadcasts, any reproductions of those fixations, and the communication to the public of television broadcasts of those fixations.⁵³ Those rights must last for at least twenty years from the end of the calendar year in which the broadcast took place.⁵⁴

⁴⁷ As of January 1, 2022, there are 96 member states of the Rome Convention, including Australia, Japan, the United Kingdom, and all EU member nations except Malta. See WIPO, *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations: Status on September 15, 2020*, <https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/rome.pdf> [<https://perma.cc/C5UW-CWK6>].

⁴⁸ Geneva Phonograms Convention, *supra* note 40, art. 2. A “duplicate” is defined as “an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram.” *Id.* art. 1(c). *Cf.* 17 U.S.C. § 101 (2018) (defining “phonorecords” as “material objects in which sounds . . . are fixed . . . includ[ing] the material object in which the sounds are first fixed”).

⁴⁹ Geneva Phonograms Convention, *supra* note 40, art. 4.

⁵⁰ TRIPS Agreement, *supra* note 36, art. 14(1).

⁵¹ *Id.* art. 14(2).

⁵² *Id.* art. 14(5).

⁵³ *Id.* art. 14(3). In the alternative, a member state may grant a copyright in the subject matter of the broadcast, if it provides the same minimum protection. *Id.* The limitation of the public communication right to television broadcasts undoubtedly was to accommodate the United States, which requires consent of the sound recording copyright owner to reproduce a sound recording as part of a television broadcast (a so-called “synch” license), but does *not* grant a sound recording copyright owner a general public performance right.

⁵⁴ *Id.* art. 14(5).

Shortly after the URAA the United States negotiated and joined the WIPO Performances and Phonograms Treaty (WPPT),⁵⁵ which requires member states to grant performers five exclusive rights: the right to prevent the unauthorized fixation, broadcasting, or communication to the public of their unfixed performances;⁵⁶ the reproduction of their fixed performances;⁵⁷ the public distribution of copies of their fixed performances;⁵⁸ the commercial rental of copies of their fixed performances;⁵⁹ and the right of making their fixed performances available to the public (e.g., by streaming).⁶⁰ These rights must last at least fifty years from the end of the year in which the performances was fixed.⁶¹ The WPPT also requires member states to grant producers of phonograms the exclusive rights of reproduction,⁶² public distribution,⁶³ commercial rental,⁶⁴ and making available of their phonograms to the public.⁶⁵ These rights must last for the longer of fifty years from the end of the year in which the phonogram was fixed, or fifty years from the end of the year in which the phonogram was published.⁶⁶ Finally, the WPPT grants a toothless right, requiring that both performers and producers “shall enjoy . . . a single equitable remuneration” for the broadcasting or communication to the public of their published sound recordings,⁶⁷ but expressly allowing member countries to “not apply these provisions at all.”⁶⁸

⁵⁵ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203, 36 I.L.M. 76, S. Treaty Doc. No. 105-17 (1997) [hereinafter WPPT], <https://wipolex.wipo.int/en/text/295578> [<https://perma.cc/7BZY-J7W5>].

⁵⁶ *Id.* art. 6.

⁵⁷ *Id.* art. 7.

⁵⁸ *Id.* art. 8(1). The public distribution right is subject to the first-sale doctrine, also known as the doctrine of exhaustion. *Id.* art. 8(2).

⁵⁹ *Id.* art. 9(1). If commercial rental does not “giv[e] rise to the material impairment” of the reproduction right, a country may maintain “a system of equitable remuneration” instead, if it had adopted such a system prior to April 15, 1994. *Id.* art. 9(2).

⁶⁰ *Id.* art. 10.

⁶¹ *Id.* art. 17(1).

⁶² *Id.* art. 11.

⁶³ *Id.* art. 12(1). As with performers, the public distribution right is subject to the first-sale doctrine, also known as the doctrine of exhaustion. *Id.* art. 12(2).

⁶⁴ *Id.* art. 13(1). As with performers, a country may maintain “a system of equitable remuneration” instead, if it had adopted such a system prior to April 15, 1994, so long as the commercial rental does not “giv[e] rise to the material impairment” of the reproduction right. *Id.* art. 13(2).

⁶⁵ *Id.* art. 11.

⁶⁶ *Id.* art. 17(2).

⁶⁷ *Id.* art. 15(1).

⁶⁸ *Id.* art. 15(3).

III. COPYRIGHT RESTORATION FOR FOREIGN PRE-1972 SOUND RECORDINGS

A. *The Statutory Requirements*

Article 18 of the Berne Convention requires countries to protect “all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.”⁶⁹ If the term of protection in the source country has expired, however, “that work shall not be protected anew.”⁷⁰ Member countries are given a great deal of discretion to decide how to implement this principle.⁷¹

When the United States joined the Berne Convention, effective March 1, 1989,⁷² it made no effort to implement Article 18. To the contrary, the Berne Convention Implementation Act expressly made it clear that the Berne Convention was *not* self-executing, and that foreign works could claim protection *only* on the basis of domestic law.⁷³ To drive the point home, Congress added the following language to section 104 of the Copyright Act:

No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the

⁶⁹ Berne Convention, *supra* note 38, art. 18(1).

⁷⁰ *Id.* art. 18(2).

⁷¹ *Id.* art. 18(3) (“The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, *each in so far as it is concerned*, the conditions of application of this principle.”) (emphasis added). See generally Daniel Gervais, Golan v. Holder: *A Look at the Constraints Imposed by the Berne Convention*, 64 VAND. L. REV. EN BANC 147 (2011).

⁷² See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §13(a), 102 Stat. 2853, 2861 (modifying U.S. copyright law in line with the Berne Convention); Berne Convention and “Berne Implementation Act of 1988”, 53 Fed. Reg. 48,748 (Dec. 2, 1988) (specifying the date of entry into force).

⁷³ See *id.* § 2(a), 102 Stat. at 2853.

provisions of the Berne Convention, or the adherence of the United States thereto.⁷⁴

Five years later, however, the United States and other nations signed agreements creating the World Trade Organization (WTO), including the TRIPS Agreement.⁷⁵ The TRIPS Agreement made all of the provisions of the Berne Convention (except for Article *6bis* on moral rights) enforceable between nations through the dispute resolution procedures of the World Trade Organization.⁷⁶ Consequently, to avoid violating the TRIPS Agreement, and to encourage other nations to provide reciprocal protection to U.S. works, the United States decided to “implement” Article 18 in the Uruguay Round Agreements Act (URAA).⁷⁷

Section 514 of the URAA “restored” the copyright in works of foreign origin that had entered the public domain in the United States but were still under copyright in their source countries. As codified in section 104A of the Copyright Act, it provides: “Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration.”⁷⁸ After some confusion, Congress clarified that for works from WTO member nations, the “date of restoration” was January 1, 1996.⁷⁹ In *Golan v. Holder*,⁸⁰ the U.S. Supreme Court held that granting copyright protection to works that were in the public domain in the United States (so-called copyright “restoration”) did *not* violate either the Patent and Copyright Clause of the Constitution or the First Amendment.⁸¹

⁷⁴ See *id.* § 4(a)(3), 102 Stat. at 2855 (codified at 17 U.S.C. § 104(c)).

⁷⁵ See *supra* notes 50–54 and accompanying text.

⁷⁶ TRIPS Agreement, *supra* note 36, art. 9(1) (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article *6bis* of that Convention or of the rights derived therefrom.”); *id.* art. 64 (“The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to . . . the settlement of disputes under this Agreement . . .”).

⁷⁷ Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976 (codified as amended at 17 U.S.C. § 104A).

⁷⁸ 17 U.S.C. § 104A(a)(1) (2018).

⁷⁹ 17 U.S.C. § 104A(h)(2)(A) (2018).

⁸⁰ 565 U.S. 302 (2012).

⁸¹ *Id.* at 308, 327 (Copyright Clause), 327–29 (First Amendment). See generally Tyler T. Ochoa, *Is the Public Domain Irrevocable? An Introduction to Golan v. Holder*, 64 VAND. L. REV. EN BANC 123 (2011); Howard B. Abrams, Eldred, *Golan and Their Aftermath*, 60 J. COPYRIGHT SOC’Y U.S.A. 491 (2013).

A “restored work” must satisfy all of the following four elements: First, the work must have “at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country.”⁸² (An “eligible country” is a country with whom the United States has copyright relations, either because it is a member of the Berne Convention or the WTO, it adheres to the WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty, or by Presidential proclamation.⁸³) Second, if the work is published, it must have been “first published in an eligible country and not published in the United States during the 30-day period following [such] publication.”⁸⁴ Third, the work must not be “in the public domain in its source country through expiration of term of protection.”⁸⁵ Fourth, the work must have been “in the public domain in the United States” for one of the following three reasons: “(i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements; (ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or (iii) lack of national eligibility.”⁸⁶

Consequently, on January 1, 1996, all sound recordings fixed before February 15, 1972, that satisfied the first three elements were granted a federal statutory copyright in the United States for the first time.⁸⁷ Note that this provision went far beyond anything required by the Berne Convention, which does not apply to sound recordings at all.⁸⁸ Instead, the United States hoped that granting copyright retroactively to foreign sound recordings would encourage foreign nations to reciprocate by granting legal protection retroactively to U.S. sound recordings.

⁸² 17 U.S.C. § 104A(h)(6)(D) (2018).

⁸³ 17 U.S.C. § 104A(h)(3) (2018). “[I]f the source country for the work is an eligible country solely by virtue of its adherence to the WIPO Performances and Phonograms Treaty,” then the work must be a sound recording. 17 U.S.C. § 104A(h)(6)(E) (2018). That restriction was added by the Digital Millennium Copyright Act of 1998. Digital Millennium Copyright Act, Pub. L. No. 105-304, §102(c)(3)(C), 112 Stat. 2860, 2862 (1998).

⁸⁴ 17 U.S.C. § 104A(h)(6)(D) (2018). The Berne Convention provides that “A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.” Berne Convention, *supra* note 38, art. 3(4).

⁸⁵ 17 U.S.C. § 104A(h)(6)(B) (2018).

⁸⁶ 17 U.S.C. § 104A(h)(6)(C) (2018).

⁸⁷ Although section 104A refers to these as “restored copyrights” and “restored works,” no sound recordings fixed before February 15, 1972, had previously been eligible for a federal statutory copyright, so these works were receiving copyright protection for the first time.

⁸⁸ See *supra* notes 39–41 and accompanying text.

B. Applying the Statutory Requirements

In assessing how many sound recordings received a federal statutory copyright in this manner, a few comments on each of the elements is in order. First, a “restored work” must have “at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country.”⁸⁹ The term “rightholder” is defined as “the person[] (A) who, with respect to a sound recording, first fixes a sound recording with authorization, or (B) who has acquired rights from the person described in subparagraph (A) by means of any conveyance or by operation of law.”⁹⁰ The definition is intentionally vague: it does not specify who “the person who first fixes a sound recording” is.⁹¹ Is it the performers who perform on the recording? Is it the sound engineers who set up the microphones, adjust the mixing board, and press the “record” button? Is it the producer who hires and pays the performers and sound engineers, either as employees or as independent contractors? Moreover, the definition does not specify the persons whose “authorization” the initial rightholder must have. Does it simply mean that the initial rightholder has the authorization of the copyright owner of any underlying musical or literary work? Or does it mean that the initial rightholder must (also) have the authorization of all other persons who contributed to the recording (the performers and sound engineers)?

Fortunately, international law gives us a clue as the meaning of the term “rightholder.” § 104A specifies that “[a] restored work vests initially in the author or initial rightholder of the work *as determined by the law of the source country of the work.*”⁹² Since the “source country” cannot be the United States,⁹³ we must look to foreign law to determine who the “author or initial rightholder” of a sound recording is. And since most foreign countries reserve the term “author” for copyright-eligible works, and treat sound recordings (or “phonograms”) only under so-called “neighboring rights,”⁹⁴ we must look to neighboring rights treaties to elicit the meaning of the term “initial rightholder.”

⁸⁹ 17 U.S.C. § 104A(h)(6)(D) (2018).

⁹⁰ *Id.* § 104A(h)(7).

⁹¹ *Id.*

⁹² *Id.* § 104A(b) (emphasis added).

⁹³ *Id.* § 104A(h)(8) (“The ‘source country’ of a restored work is[] (A) a nation other than the United States . . .”). There are different rules for determining the “source country” of a restored work, depending on whether the work is published or unpublished. *Id.*

⁹⁴ See *supra* notes 39–41 and accompanying text.

Both the Rome Convention and the Geneva Phonograms Convention define a “producer of phonograms” as “the person who, or the legal entity which, first fixes the sounds of a performance or other sounds.”⁹⁵ The WIPO Performances and Phonograms Treaty defines the “producer of a phonogram” as “the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds.”⁹⁶ Using the transitive property of grammar, one can infer that, in most foreign countries, the “initial rightholder” is the *producer* of the phonogram (rather than the performers or the sound engineers). Moreover, the Rome Convention, the WPPT, and the TRIPS Agreement all require that performers be granted the right to authorize the first fixation of their performances. Therefore, one can infer that, in most foreign countries, the producer who “first fixes a sound recording” must obtain the “authorization” of the performer(s), in addition to the authorization of the copyright owner of the musical or literary work being performed.

Second, if the work is published, it must have been “first published in an eligible country and not published in the United States during the 30-day period following [such] publication.”⁹⁷ Under the 1976 Act, a sound recording is “published” when “phonorecords” of it are distributed “to the public by sale or other transfer of ownership, or by rental, lease, or lending.”⁹⁸ Thus, the initial release date of a sound recording is the date of first publication.

The source of the second limitation is Article 3 of the Berne Convention, which extends protection not only to works of “authors who are nationals of one of the countries of the Union,”⁹⁹ but also to “works first published in one of those countries, or simultaneously in a country outside

⁹⁵ Rome Convention, *supra* note 43, art. 3(c); Geneva Phonograms Convention, *supra* note 40, art. 1(b).

⁹⁶ WPPT, *supra* note 55, art. 2(d).

⁹⁷ 17 U.S.C. § 104A(h)(6)(D) (2018). The Berne Convention provides that “[a] work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.” Berne Convention, *supra* note 38, art. 3(4).

⁹⁸ *Id.* § 101 (definition of “publication”). *See also* Rome Convention, *supra* note 43, art. 3(d) (defining “publication as “the offering of copies of a phonogram to the public in reasonable quantity”). For historical reasons that are not germane here, the United States distinguishes between “copies” of a work (material objects in which a work is fixed) and “phonorecords” of a sound recording (material objects in which only sounds are fixed). 17 U.S.C. § 101 (2018) (definition of “copies”).

⁹⁹ Berne Convention, *supra* note 38, art. 3(1)(a).

the Union and in a country of the Union.”¹⁰⁰ The Berne Convention further provides that “[a] work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.”¹⁰¹ The Rome Convention has the same definition for “simultaneous publication” of phonograms.¹⁰² Thus, if a sound recording was first “published” in the United States, or if it was “simultaneously” published in the United States and another country, then the sound recording is *not* eligible for copyright restoration. (Note that many sound recordings were released simultaneously in both the United States and Canada, so this limitation disqualifies those recordings from copyright restoration.)

Third, on the date of restoration, the work must not have been “in the public domain in its source country through expiration of term of protection.”¹⁰³ The “source country” for a restored work depends on whether the work was published or unpublished (presumably on the date of restoration). If the sound recording was unpublished on that date, the “source country” is the eligible country in which the rightholder was a national or domiciliary, or in which the majority of the foreign rightholders were nationals or domiciliaries.¹⁰⁴ If the majority of rightholders were not foreign, then the “source country” is “the nation other than the United States which has the most significant contacts with the work.”¹⁰⁵ If the sound recording was published on the date of restoration, then the “source country” is “the eligible country in which the work [was] first published”;¹⁰⁶ but, “if [it was] published on the same day in 2 or more eligible countries, the eligible country which has the most significant contacts with the work” is the “source country.”¹⁰⁷

Once the “source country” of a sound recording has been identified, one must determine whether its term of protection was still in effect on the

¹⁰⁰ *Id.* art. 3(1)(b).

¹⁰¹ *Id.* art. 3(4).

¹⁰² Rome Convention, *supra* note 43, art. 5(2) (“If a phonogram was first published in a non-contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State.”). The United States rejects this definition: if a sound recording was published simultaneously in the United States (a non-contracting State) and in another country, then the sound recording is considered a “United States work,” see 17 U.S.C. § 101 (2018), defining “United States work”, and it is *not* eligible for copyright restoration.

¹⁰³ 17 U.S.C. § 104A(h)(6)(B) (2018).

¹⁰⁴ *Id.* § 104A(h)(8)(B)(i).

¹⁰⁵ *Id.* § 104A(h)(8)(B)(ii).

¹⁰⁶ *Id.* § 104A(h)(8)(C)(i).

¹⁰⁷ *Id.* § 104A(h)(8)(C)(ii).

date of restoration (January 1, 1996). As noted above,¹⁰⁸ however, both the Rome Convention and the Geneva Phonograms Convention only require twenty years of protection from the end of the year in which the sound recording was fixed or first published.¹⁰⁹ For sound recordings whose “source country” had a twenty-year term, the term of protection for all pre-1972 sound recordings would have expired before the date of restoration, so this condition would not have been satisfied.¹¹⁰

Before 1996, however, the EU had adopted a uniform term of protection for sound recordings (phonograms) of fifty years from the date of fixation;¹¹¹ and “if the phonogram [was] lawfully published or lawfully communicated to the public during this period,” the term was fifty years from the earlier of the date of first publication or the date of first public communication.¹¹² Thus, sound recordings whose “source country” was in the EU (or another eligible country that had a similar term) and that were fixed on or after January 1, 1946, and before February 15, 1972, were granted a U.S. copyright as a “restored work.” In addition, sound recordings that were first published or communicated to the public in such countries on or after January 1, 1946, and before February 15, 1972, were granted a U.S. copyright as a “restored work,” so long as that publication or communication occurred within fifty years of its first fixation.

It is impossible to say how many sound recordings meet all of these conditions, in part because it is difficult to determine exact release dates in various countries (to comply with the condition that a recording not be simultaneously released in the United States); but there are a number of prominent examples. Several early sound recordings by the Beatles appear to be “restored works,” including *I Saw Her Standing There*,¹¹³ *Twist and*

¹⁰⁸ See *supra* notes 46–49 and accompanying text.

¹⁰⁹ Rome Convention, *supra* note 43, art. 14; Geneva Phonograms Convention, *supra* note 40, art. 4.

¹¹⁰ The exception is that a foreign sound recording fixed before February 15, 1972, but that was first published on or after January 1, 1976, would still be eligible for copyright restoration.

¹¹¹ Council Directive 93/98/EEC of Oct. 29, 1993, Harmonizing the Term of Protection of Copyright and Certain Related Rights, art. 3(2), 1993 O.J. (L 290) 9, 11–12 (EU).

¹¹² *Id.*

¹¹³ *I Saw Her Standing There* was released in the United Kingdom on March 22, 1963, but it was not released in the United States until December 26, 1963. *I Saw Her Standing There*, WIKIPEDIA, https://en.wikipedia.org/wiki/I_Saw_Her_Standing_There [<https://perma.cc/Q932-79WN>].

Shout,¹¹⁴ *All My Loving*,¹¹⁵ and *Please Mr. Postman*.¹¹⁶ (Most subsequent Beatles singles and albums, however, were released in the United States within thirty days of their release in the United Kingdom, making them ineligible to be “restored works.”) Most of the tracks on two albums by the Rolling Stones, *The Rolling Stones*¹¹⁷ and *Aftermath*,¹¹⁸ appear to be restored works. (Again, however, most of the subsequent Rolling Stones albums were released in the United States within thirty days of their release in the United Kingdom.) Edith Piaf’s original recording of her signature song *La Vie en Rose* appears to be a restored work.¹¹⁹ Also, a large number of classical music recordings first released in Europe by labels such as Deutsche Grammophon, Philips, EMI, and Melodiya are likely restored works.¹²⁰

C. Duration of Copyright for Restored Pre-1972 Sound Recordings

¹¹⁴ The Beatles’ recording of *Twist and Shout* was released in the United Kingdom on March 22, 1963, but it was not released in the United States until March 2, 1964. *Twist and Shout*, WIKIPEDIA, https://en.wikipedia.org/wiki/Twist_and_Shout#The_Beatles'_version [<https://perma.cc/J5FU-2VDT>].

¹¹⁵ *All My Loving* was released in the United Kingdom on November 22, 1963, but it was not released in the United States until January 20, 1964. *All My Loving*, WIKIPEDIA, https://en.wikipedia.org/wiki/All_My_Loving [<https://perma.cc/DT7J-J8HH>].

¹¹⁶ The Beatles’ recording of *Please Mr. Postman* was released in the United Kingdom on November 22, 1963, but it was not released in the United States until April 10, 1964. *Please Mr. Postman*, WIKIPEDIA, https://en.wikipedia.org/wiki/Please_Mr._Postman#The_Beatles_version [<https://perma.cc/27B3-26VV>]. The Beatles’ recording of *Roll Over Beethoven* has the same release dates. *Roll Over Beethoven*, WIKIPEDIA, https://en.wikipedia.org/wiki/Roll_Over_Beethoven#The_Beatles [<https://perma.cc/ML7C-GLVJ>].

¹¹⁷ *The Rolling Stones* was released in the United Kingdom on April 16, 1964, but it was not released in the United States (under the title *England’s Newest Hit Makers*) until May 30, 1964, with one track deleted and another track substituted. *The Rolling Stones (Album)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The_Rolling_Stones_\(album\)](https://en.wikipedia.org/wiki/The_Rolling_Stones_(album)) [<https://perma.cc/N8E2-LGZ2>].

¹¹⁸ *Aftermath* was released in the United Kingdom on April 15, 1966, but it was not released in the United States until July 2, 1966, with four tracks deleted and one track added. *Aftermath (Rolling Stones Album)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Aftermath_\(Rolling_Stones_album\)](https://en.wikipedia.org/wiki/Aftermath_(Rolling_Stones_album)) [<https://perma.cc/6YDH-TLFZ>].

¹¹⁹ Piaf first recorded *La Vie en Rose* on January 4, 1947, and Columbia Records first released it in France in February 1947; but it had not yet been released in the United States when she began her U.S. concert tour in October 1947. *La Vie En Rose (Lied)*, WIKIPEDIA, [https://de.wikipedia.org/wiki/La_vie_en_rose_\(Lied\)](https://de.wikipedia.org/wiki/La_vie_en_rose_(Lied)) [<https://perma.cc/T3NX-VG5J>].

¹²⁰ For example, Nina Dorliac-Richter, the widow of pianist Sviatoslav Richter, filed a Notice of Intent to Enforce Restored Copyrights for literally hundreds of Richter’s sound recordings. See Copyright Restoration of Works in Accordance with the Uruguay Round Agreements Act, 63 Fed. Reg. 19,288, 19,297–99 (Apr. 17, 1998).

The term of protection for restored works is “the remainder of the term that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.”¹²¹ In 1996, sound recordings fixed before February 15, 1972, and published before 1978 were entitled to an initial term of twenty-eight years and a renewal term of forty-seven years, for a total of seventy-five years from first publication.¹²² Sound recordings that were fixed before February 15, 1972, but that remained unpublished through the end of 1977 were entitled to the same term as works fixed on or after January 1, 1978; and if such works were published before the end of 2002, they were entitled to a minimum term at least through the end of 2027.¹²³ Assuming most such sound recordings were works made for hire, the term was seventy-five years from the date of first publication or 100 years from creation, whichever expired earlier.¹²⁴

In 1998, two years after the initial date of restoration, Congress extended the terms of all existing copyrights by twenty years.¹²⁵ As none of the initial terms had expired for any restored foreign sound recordings, all such recordings benefitted from the 1998 term extension. Thus, the term of protection for most pre-1972 sound recordings that qualified as “restored works” is now ninety-five years from first publication.¹²⁶ If the recording remained unpublished on January 1, 1978, however, the term is either the shorter of ninety-five years from first publication or 120 years from fixation (if the sound recording is a work made for hire),¹²⁷ or life of the longest surviving author plus seventy years (if the sound recording is *not* a work made for hire).¹²⁸ In either case, if the foreign pre-1972 sound recording

¹²¹ 17 U.S.C. § 104A(a)(1)(B) (2018).

¹²² 17 U.S.C. § 304(a) (1996) (copyrights in their first term on January 1, 1978); 17 U.S.C. § 304(b) (1996) (copyrights in renewal term or renewed before January 1, 1978).

¹²³ *Id.* § 303.

¹²⁴ *Id.* § 302(c).

¹²⁵ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 108, 203, 301–04).

¹²⁶ 17 U.S.C. § 304(a) (2018) (copyrights in their first term on January 1, 1978); *id.* § 304(b) (copyrights in renewal term on or renewed before January 1, 1978); *id.* § 303(a) (sound recordings that remained unpublished on January 1, 1978); *id.* § 302(c) (previously unpublished sound recordings that were works made for hire and were subsequently published).

¹²⁷ *Id.* § 303(a); *id.* § 302(c).

¹²⁸ *Id.* § 303(a); *id.* § 302(b).

was first published in 1978–2002, then the copyright term is subject to a statutory minimum term, until at least December 31, 2047.¹²⁹

IV. *SUI GENERIS* PROTECTION FOR PRE-1972 SOUND RECORDINGS

In 1995, Congress granted an exclusive right to publicly perform a copyrighted sound recording by means of digital audio transmission.¹³⁰ That right, however, applied only to sound recordings fixed on or after February 15, 1972, plus those foreign sound recordings fixed before that date that qualified for restored copyrights. Domestic sound recordings fixed before February 15, 1972, did not qualify because they were protected only by state law.¹³¹

Only one state, California, expressly protected pre-1972 sound recordings by statute.¹³² Other states provided common-law protection to pre-1972 sound recordings.¹³³ By common consensus, however, state law did not grant public performance rights to sound recordings.¹³⁴ As streaming became a more prominent means of exploiting sound recordings, that discrepancy between federal and state protection started to become more problematic.

In August 2013, Flo & Eddie, Inc., a corporation that owns the rights in sound recordings by the 1960s band “The Turtles,” began a

¹²⁹ *Id.* § 303(a).

¹³⁰ *Id.* § 106(6).

¹³¹ See H.R. REP. NO. 92-487, at 13 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1578 (“The bill does not apply retroactively and . . . thus does not deal with recorded performances already in existence. Instead[,] it leaves to pending or future litigation the validity of state common law or statutes governing the unauthorized copying of existing recordings.”).

¹³² See CAL. CIV. CODE § 980(a)(2) (West 2022) (“The author 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 . . . an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.”).

¹³³ See, e.g., *Capitol Recs., Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250 (N.Y. 2005).

¹³⁴ See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 70 N.E.3d 936, 944 (N.Y. 2016) (“[C]ommon-law copyright of sound recordings consists only in the power to prevent others from *reproducing* the copyrighted work; that limited right does not include control over other rights in the work, such as public performance. Since the 1940s, the recording and broadcasting industries appear to have acted in conformity with that premise, as evidenced by the apparent absence of any attempt by sound recording copyright owners to assert control over the right of public performance.”) (emphasis added by the court) (internal quotation marks and citation omitted).

quixotic campaign to seek royalties under state law for digital transmissions of pre-1972 sound recordings. I have described the history of that effort in more detail elsewhere.¹³⁵ Although Flo & Eddie ultimately were unsuccessful in getting any court to recognize public performance rights under state law,¹³⁶ the attention that their campaign brought to the issue prompted Congress to act. On October 11, 2018, the Classics Protection and Access Act (CPA) was signed into law, as Title II of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018.¹³⁷

The CPA enacted 17 U.S.C. § 1401, which provides:

Anyone who, on or before the last day of the applicable transition period under paragraph (2), and without the consent of the rights owner, engages in covered activity with respect to a sound recording fixed before February 15, 1972, shall be subject to the remedies provided . . . to the same extent as an infringer of copyright¹³⁸

“Covered activity” is defined as “any activity that the copyright owner of a sound recording would have the exclusive right to do or authorize under section 106 or 602, . . . if the sound recording were fixed on or after February 15, 1972.”¹³⁹ Thus, the copyright owner of a pre-1972 sound recording effectively now has the exclusive rights of reproduction, adaptation, and distribution, and public performance by means of digital audio transmission,¹⁴⁰ as well as the exclusive right to import or export unlawful copies.¹⁴¹

¹³⁵ See Tyler Ochoa, *A Seismic Ruling Undone: California’s Sound Recording Copyright Statute Does Not Include Public Performance Rights—Flo & Eddie v. Sirius XM* (Guest Blog Post), TECH. & MKTG. L. BLOG (Aug. 30, 2021), <https://blog.ericgoldman.org/archives/2021/08/a-seismic-ruling-undone-californias-sound-recording-copyright-statute-does-not-include-public-performance-rights-flo-eddie-v-sirius-xm.htm> [https://perma.cc/M2WK-SXZ8].

¹³⁶ See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 70 N.E.3d 936 (N.Y. 2016); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 229 So. 3d 305 (Fla. 2017); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 9 F.4th 1167 (9th Cir. 2021) (applying California law).

¹³⁷ Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 201, 132 Stat. 3676, 3728.

¹³⁸ 17 U.S.C. § 1401(a)(1) (2018).

¹³⁹ *Id.* § 1401(l)(1).

¹⁴⁰ *Id.* § 106(1), (2), (3), (6). Sound recordings lack a general public performance right or a public display right. *Id.* § 106(4), (5).

¹⁴¹ *Id.* § 602(a)(1)–(2). See *Quality King Distribs., Inc. v. L’Anza Rsch. Int’l, Inc.*, 523 U.S. 135 (1998) (section 602 is subject to the first-sale doctrine codified in section 109);

The term of protection provided to pre-1972 sound recordings is ninety-five years from the date of first publication (the maximum term allowed to pre-1978 works under existing copyright law), plus a “transition period” of between three and fifteen years.¹⁴² The “transition period” is three years after the date of enactment for sound recordings published before 1923;¹⁴³ five years for sound recordings first published in 1923–1946;¹⁴⁴ and fifteen years for sound recordings first published in 1947–1956.¹⁴⁵ All other sound recordings get a transition period that expires on February 15, 2067.¹⁴⁶ As with other copyrighted works, all terms are extended to December 31 of the year in which they otherwise would expire; except that no protection is provided to pre-1972 sound recordings after February 15, 2067.¹⁴⁷

Thus, sound recordings first published before 1923 entered the public domain on January 1, 2022.¹⁴⁸ Sound recordings first published between 1923 and 1946 get 100 years of protection. Sound recordings first published between 1947 and 1956 get 110 years of protection. Sound recordings first published between 1957 and 1972 are protected until February 15, 2067, resulting in a variable terms of protection of between 110 years and 95 years. Finally, sound recordings that remained unpublished on February 15, 1972, are protected until February 15, 2067 (even if they were published by the rights owner in the meantime).

Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013) (for purposes of the first-sale doctrine, copies “lawfully made under this title” include copies manufactured abroad, as long as they were made “in compliance with” the U.S. Copyright Act).

¹⁴² 17 U.S.C. § 1401(a)(2)(A) (2018).

¹⁴³ *Id.* § 1401(a)(2)(B)(i). “Publication” is defined as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” *Id.* § 101 (definition of “publication”); *see also id.* § 1401(f)(6) (“Any term used in this section that is defined in section 101 shall have the meaning given that term in section 101.”).

¹⁴⁴ *Id.* § 1401(a)(2)(B)(ii).

¹⁴⁵ *Id.* § 1401(a)(2)(B)(iii).

¹⁴⁶ *Id.* § 1401(a)(2)(B)(iv).

¹⁴⁷ *Id.* § 1401(a)(2)(A).

¹⁴⁸ The Association for Recorded Sound Collections (ARSC) reports that an estimated 400,000 recordings entered the public domain on January 1, 2022. (From that universe, a panel of seven experts nominated over 60 historical recordings and selected 10 as the most “notable.”) *See Ten Notable Pre-1923 Recordings*, ASS’N FOR RECORDED SOUND COLLECTIONS, <http://www.arsc-audio.org/publicdomainpre23.html> [<https://perma.cc/2ZJR-ADSS5>].

The “transition periods” are not the only differences between federal copyright protection and the *sui generis* protection provided by § 1401. For example, those familiar with copyright law know that a plaintiff cannot recover statutory damages or attorney’s fees unless it has registered the copyright before the infringement commenced (or, for infringement of a published work, within ninety days of first publication).¹⁴⁹ Because § 1401 does not give pre-1972 sound recordings a federal copyright, those sound recordings cannot be registered in the usual manner. Thus, the CPA provides that section 412 does not apply.¹⁵⁰ Instead, the CPA provides for a “filing requirement” to permit a rights owner to recover statutory damages and attorney’s fees. Under the CPA, “an award of statutory damages or of attorneys’ fees . . . may be made with respect to an unauthorized use of a [pre-1972] sound recording . . . only if (I) the rights owner has filed with the Copyright Office a schedule that specifies the title, artist, and rights owner of the sound recording”; and (II) the use occurs more than 90 days after that information “is indexed into the public records of the Copyright Office.”¹⁵¹

The initial rights owner of the pre-1972 sound recording is determined by state law, as it existed before the date of enactment.¹⁵² Unlike copyright owners, rights owners do *not* have to register (or file a schedule) with the Copyright Office before filing an action for a violation of § 1401.¹⁵³ If the pre-1972 sound recording “is not being commercially exploited by or under the authority of the rights owner,” a person who has made a reasonable, good faith search for the sound recording without success,¹⁵⁴ and who satisfies certain procedural prerequisites,¹⁵⁵ may make a noncommercial use of the pre-1972 sound recording.¹⁵⁶ There is no similar

¹⁴⁹ 17 U.S.C. § 412 (2018).

¹⁵⁰ *Id.* § 1401(f)(5)(C).

¹⁵¹ *Id.* § 1401(f)(5)(A)(i). The CPA also contains an alternative limitation on statutory damages and attorneys’ fees that depends both on action by the transmitting entity and inaction by the rights owner. *Id.* § 1401(f)(5)(B). Apparently, the alternative limitation was intended as a transitional measure that would only apply during the first 180 days after enactment. S. REP. NO. 115-339, at 19 (2018). Because of the way the statute is worded, however, it appears that the alternative applies to any “transmitting entity” that filed its contact information with the Copyright Office during the 180-day period. *Id.*

¹⁵² 17 U.S.C. § 1401(l)(2)(A) (2018). Transfers occurring after the date of enactment, however, are governed by sections 201(d) and (e) and section 204 of the Copyright Act. *Id.* §§ 1401(h)(1)(A), 1401(l)(2)(B). Section 204 requires that any transfers of an exclusive right must be made in a writing signed by the transferor. *Id.* § 204(a).

¹⁵³ *Id.* § 1401(h)(1)(B).

¹⁵⁴ *Id.* § 1401(c)(1)(A).

¹⁵⁵ *Id.* § 1401(c)(1)(B) (filing of notice of intended use with the Copyright Office); *id.* § 1401(c)(1)(C) (rights owner does not object within 90 days after the notice is indexed).

¹⁵⁶ *Id.* § 1401(c)(1).

exception for copyrighted works (including “restored works”), although the person could argue that such a “noncommercial” use should be considered a fair use.¹⁵⁷

Finally, under § 108(h), a library or archives may reproduce and use a copyrighted work “for purposes of preservation, scholarship, or research” during the last twenty years of its term,¹⁵⁸ if the work is not being commercially exploited, and a copy or phonorecord cannot be obtained at a reasonable price.¹⁵⁹ For pre-1972 sound recordings, however, this exception for use by libraries and archives applies during the *entire* remaining term of protection.¹⁶⁰

V. RECONCILING COPYRIGHT RESTORATION WITH *SUI GENERIS* PROTECTION

All sound recordings fixed before February 15, 1972, are eligible for the *sui generis* protection provided by § 1401, while only certain pre-1972 sound recordings of foreign origin qualified for a so-called “restored” copyright under § 104A. As noted above, the major differences between the two types of protection are duration (term of protection), formalities (filing and registration requirements), and the exceptions for noncommercial use of orphan works and uses by libraries and archives.

As a result of these differences, the question naturally arises: under current law, do pre-1972 sound recordings of foreign origin receive protection only under § 104A, only under § 1401, or under both statutes? The answer to this question is surprisingly unclear. There are legitimate textual arguments that can be made in favor of all three alternatives.

¹⁵⁷ Under 17 U.S.C. § 107(1) (2018), a use “for nonprofit educational purposes” is more likely to be a fair use than a use “of a commercial nature,” but that is only one factor to be considered, and a court might well interpret “noncommercial” use under § 1401 differently (more broadly) than “nonprofit educational” use under § 107.

¹⁵⁸ *Id.* § 108(h)(1).

¹⁵⁹ *Id.* § 108(h)(2) (A)–(B).

¹⁶⁰ *Id.* § 1401(f)(1)(B).

A. Option A: Pre-1972 Sound Recordings Are Protected Only Under Section 1401

One can argue that Congress intended the *sui generis* protection for pre-1972 sound recordings to repeal and replace the copyright protection that a limited subset of those recordings previously enjoyed under § 104A. The argument for this option is the text of § 301(c), as amended by the Classics Protection and Access Act: “Notwithstanding the provisions of section 303, and in accordance with chapter 14, *no sound recording fixed before February 15, 1972, shall be subject to copyright under this title.*”¹⁶¹ In other words, even if a pre-1972 sound recording previously *had* a federal statutory copyright under § 104A, that federal statutory copyright has now been replaced by the protection provided “in accordance with chapter 14.”

Section 303 provides the copyright term for “a work created before January 1, 1978, but not theretofore in the public domain or copyrighted.”¹⁶² Sound recordings that were fixed before February 15, 1972, were not “copyrighted” before January 1, 1978, because such recordings were not eligible for copyright; and they were not “in the public domain” before January 1, 1978, because they had protection against reproduction and distribution under state law. Thus, in the absence of § 301(c), any pre-1972 sound recordings that had copyright protection under § 104A would be entitled to the term provided in § 303. Under this interpretation, § 301(c) makes it clear that pre-1972 sound recordings do *not* get the term of protection provided for in § 303. Instead, they get the term of protection provided for in § 1401.

Nonetheless, there are objections to this interpretation. In particular, except for the reference to § 1401, the same language has been part of Title 17 since the 1976 Copyright Act came into effect, on January 1, 1978. At that time, § 301(a) read:

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, 2047. The preemptive provisions of

¹⁶¹ *Id.* § 301(c) (emphasis added).

¹⁶² *Id.* § 303(a). The vast majority of such works were works created before January 1, 1978, but not published or registered as unpublished works before that date. Such works had been protected by state law (so-called common-law copyright) before January 1, 1978. On that date, the common-law copyright in such works was preempted by § 301(a) and replaced with a federal statutory copyright.

subsection (a) shall apply to . . . any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

At that time, the meaning was clear: sound recordings fixed on or after February 15, 1972, got a federal statutory copyright, while sound recordings fixed before February 15, 1972, did *not* get a federal copyright and were protected *only* by state law and *only* until February 15, 2047 (75 years after 1972). On that day, all state-law protection for pre-1972 sound recordings would be preempted, and those recordings would enter the public domain.

When copyright restoration was enacted in the Uruguay Round Agreements Act (URAA) on December 8, 1994, § 301(c) was not amended; it still contained exactly the same language. Nonetheless, several canons of statutory interpretation suggest that amended § 104A took precedence of the holdover language of § 301(c). First, a newly enacted statute generally takes precedence over an older one.¹⁶³ Second, a specific statute (here, a statute concerning *some* pre-1972 sound recordings of foreign origin) usually takes precedence over a general one (here, one that applied to pre-1972 sound recordings generally).¹⁶⁴ Third, if § 301(c) took precedence over § 104A, it would have rendered the newly enacted provision concerning “sound recordings fixed before February 15, 1972” superfluous, and an interpretation that renders a statute superfluous is to be avoided, if possible.¹⁶⁵ (Conversely, giving precedence to § 104A would not have rendered § 301(c) wholly superfluous, because § 301(c) still applied to sound recordings that were not of foreign origin.)

Consequently, it seems clear that the language of § 301(a) did *not* prevent those foreign sound recordings that qualified under § 104A from

¹⁶³ “If the new provisions and the . . . unchanged portions of the original section cannot be harmonized, the new provisions should prevail as the latest declaration of legislative will.” 1A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 22:34 (7th ed. 2021) [hereinafter SINGER & SINGER].

¹⁶⁴ “[I]f two statutes or provisions conflict, the general statute or provision must yield to the specific statute or provision involving the same subject.” *Id.* § 46.5.

¹⁶⁵ “Courts should construe a statute, if possible, so no term is rendered superfluous or meaningless.” *Id.* § 21:1. *See also* Alaska Stock, LLC v. Houghton Mifflin Harcourt Pub. Co., 747 F.3d 673, 681 (9th Cir. 2014) (“We should not adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.”) (internal quotations and citation omitted).

receiving a federal statutory “copyright under this title.” If that was the case, why should we not continue to interpret § 301(c) in the same way? Section 301(c) was amended in 1998 to extend the date of federal preemption to February 15, 2067 (ninety-five years after 1972), but the language otherwise remained the same. No one argued at the time that the amendment somehow divested pre-1972 foreign sound recordings of their copyrights. If that was true in 1998, why would it not be true today?

The response is that the canons of statutory interpretation no longer point in the same direction. In 2018, § 301(c) was amended by the Classics Protection and Access Act, the same statute that enacted § 1401. Since a newly enacted statute generally takes precedence over an older one, there is now a much stronger argument that *amended* § 301(c) took away or divested the federal statutory copyrights of foreign sound recordings and replaced them with the *sui generis* protection provided “in accordance with chapter 14.” Granted, the second canon (the specific takes precedence over the general) still points in the other direction; but the counter to that canon is that there is no longer any good reason to treat foreign pre-1972 sound recordings differently from domestic pre-1972 sound recordings. In 1994, Congress was trying to comply with Article 18 of the Berne Convention, which applies only to foreign works, while leaving the *status quo* unaltered for domestic works. A distinction between foreign and domestic sound recordings makes sense in that context. In 2018, however, Congress was trying to give *sui generis* protection to pre-1972 sound recordings that would be similar to the copyright protection already provided to 1972-and-later sound recordings. Although some pre-1972 recordings of foreign origin already *had* a federal statutory copyright, in this context Congress plausibly might have thought it made more sense to treat *all* pre-1972 sound recordings the same, rather than distinguishing on the basis of domestic or foreign origin.¹⁶⁶

The third canon also carries less weight than before. In 1994, it was the *newly enacted* provision on pre-1972 sound recordings that would have been rendered superfluous by the holdover language of § 301(c), and it would have left those foreign sound recordings with no protection whatsoever. Today, however, a provision that is more than two decades old would be rendered superfluous by the *newly amended* language of § 301(c);

¹⁶⁶ See SINGER & SINGER, *supra* note 163, § 51:5 (“[I]f two statutes conflict, the general statute must yield to the specific statute involving the same subject, regardless of whether it was passed prior to the general statute, *unless* the legislature intended to make the general act controlling, [or] the general act deals comprehensively with [the] subject”) (emphasis added).

and it would be replaced with *sui generis* protection that is nearly (but not quite) identical to the existing copyright that is being divested. The argument is that Congress impliedly repealed a single clause in § 104A and replaced it with the *sui generis* protection of § 1401.¹⁶⁷

It's a nice argument, but there are two additional objections. First, there is not a single indication anywhere in the legislative history that Congress even thought about the existing copyrights that certain foreign sound recordings enjoyed, one way or the other. Second, when enacting new provisions relating to copyright over the years, Congress has gone to great lengths to avoid due process problems by preserving the *status quo* while legislating prospectively only.¹⁶⁸ The notion that Congress would simply repeal and replace entire category of property rights without clearly saying so, and with no indication that it gave the matter careful thought, should give one pause. Nonetheless, the express language of § 301(c) certainly makes this option a plausible interpretation.

B. Option B: Pre-1972 Sound Recordings Are Protected Under Section 1401, Which Supplements the Protection Granted to Foreign Sound Recordings Under Section 104A

The argument that both statutes apply is that Congress did not repeal or amend § 104A when it enacted § 1401 in the Classics Protection and Access Act. Nothing in the new statute expressly says that it limits or divests the “restored” copyrights that already existed. Under this interpretation, the amended language of § 301(c) simply carries forward the old language without substantive change, adding an acknowledgement of the newly enacted § 1401, but without intending to limit, divest, or repeal any existing copyright protection.¹⁶⁹

¹⁶⁷ See SINGER & SINGER, *supra* note 163, § 22:22 (“Repeal by implication occurs when an act not purporting to repeal any prior act is wholly or partially inconsistent with a prior statute, or covers the subject of a prior act or section *and is a substitute act*. The latest declaration of the legislature prevails. The inconsistent provisions of the prior statute . . . are treated as repealed.”) (emphasis added).

¹⁶⁸ For example, in enacting § 104A, Congress included provisions to ensure the rights of so-called “reliance parties,” those who were using the work in reliance on its former public domain status. 17 U.S.C. § 104A(c), (d)(2)–(4), (h)(4) (2018). *Cf.* SINGER & SINGER, *supra* note 163, § 40:20 (“[M]ost statutes relating to property are carefully drafted to apply only to future property interests, thus avoiding a denial of due process.”).

¹⁶⁹ This appears to be the position of the U.S. Copyright Office. *See* Noncommercial Use of Pre-1972 Sound Recordings that Are Not Being Commercially Exploited, 84 Fed. Reg. 14,242, 14,250 (Apr. 9, 2019) (to be codified at 37 C.F.R. pt. 201) (“[S]ection 1401 provides *sui generis* protection running parallel to any copyright protection afforded to foreign Pre-1972 Sound Recordings under section 104A.”).

This interpretation is supported by the fact that there is nothing in the legislative history that suggests that Congress intended to divest, remove, or replace any existing copyrights on pre-1972 sound recordings.¹⁷⁰ Moreover, “[c]opyrights are a form of property,”¹⁷¹ so that taking away existing copyright protection from pre-1972 sound recordings might be a “taking” of property that violates the Fifth Amendment.¹⁷²

While a full analysis of the takings issue is beyond the scope of this article,¹⁷³ there are substantial reasons to question whether the 2018 Act should be considered a “taking.” A “taking” of private property occurs only if there is a complete “appropriation” of property, or if a regulation deprives the owner of all economically beneficial use of his or her property;¹⁷⁴ and such a “taking” violates the Constitution only if there is no “just compensation.”¹⁷⁵ Even if we assume that the CPA deprived the owners of foreign pre-1972 sound recordings of their existing copyright protection, the same legislation provided significant “compensation” in the form of § 1401.¹⁷⁶ Section 1401 provides the same exclusive rights that copyright

¹⁷⁰ Noncommercial Use of Pre-1972 Sound Recordings that Are Not Being Commercially Exploited, 84 Fed. Reg. 1661, 1670 (Feb. 5, 2019) (to be codified at 37 C.F.R. pt. 201) (“[S]ection 1401 and the legislative history do not reference foreign recordings specifically, or refer to or revise section 104A, and there is no evidence of congressional intent to extinguish copyright protection granted to foreign Pre-1972 Sound Recordings under section 104A.”).

¹⁷¹ *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020).

¹⁷² U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

¹⁷³ For discussions of takings jurisprudence as applied to copyrights and patents, see, e.g., Note, *Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973 (2015); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689 (2007); Davida H. Isaacs, *Not All Property Is Created Equal: Why Courts Resist Applying the Takings Clause to Patents, and Why They Are Right To Do So*, 15 GEO. MASON L. REV. 1 (2007); Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After College Savings v. Florida Prepaid*, 37 SAN DIEGO L. REV. 637 (2000); Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529 (1998); Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEX. L. REV. 685 (1989).

¹⁷⁴ See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017); *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 771–72 (Tex. 2021).

¹⁷⁵ *Jim Olive*, 624 S.W.3d at 771.

¹⁷⁶ Cf. *Zoltek Corp. v. United States*, 442 F.3d 1345, 1353 (Fed. Cir. 2006) (Takings Clause does not apply to patents because 28 U.S.C. §1498(a) provides a remedy for government use), *vacated on reh'g*, 672 F.3d 1309, 1327 (Fed. Cir. 2012) (en banc) (declining to reach the issue).

protection does: reproduction, adaptation, public distribution, and public performance by means of digital audio transmission.¹⁷⁷ The filing requirements of § 1401 are less onerous than the comparable registration requirements applicable to ordinary copyrights.¹⁷⁸ Section 1401 is subject to a special exception for “noncommercial use” of orphan works, but only if the owner does not object in writing after receiving constructive notice of the use.¹⁷⁹ Thus, the major difference between copyright protection under § 104A and *sui generis* protection under § 1401 is the term of protection.

Section 104A provides that restored copyrights “shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.”¹⁸⁰ As noted above, the term of protection for most restored sound recordings is ninety-five years from the date of first publication.¹⁸¹ In all cases, the term of protection under § 1401 is equal to or longer than ninety-five years. The extra duration (the “transition periods”) could be considered “compensation” for the substitution of *sui generis* protection for federal copyright protection. Thus, in most cases it is unlikely that substituting § 1401 for a “restored” copyright would be a Fifth Amendment violation.¹⁸²

There might be one conflict that could produce a takings clause violation, however: ownership. Section 104A provides that initial ownership is “determined by the law of the source country of the work.”¹⁸³ Section 1401, by contrast, specifies that initial ownership is to be determined “under the law of any State, as of the day before the date of enactment of this section.”¹⁸⁴ Although the reference to “the law of any State” *could* be interpreted broadly enough to include foreign states as well

¹⁷⁷ 17 U.S.C. § 1401 (2018). *Cf.* 17 U.S.C. § 106 (2018).

¹⁷⁸ *See supra* notes 148-150 and accompanying text.

¹⁷⁹ 17 U.S.C. § 1401(c) (2018).

¹⁸⁰ 17 U.S.C. § 104A(a)(1)(B) (2018).

¹⁸¹ *See supra* Part III.C.

¹⁸² If, however, the substitution resulted in a shortening of the copyright term (as would be the case for some *unpublished* pre-1972 sound recordings of foreign origin), that would likely violate the Takings Clause. *Cf.* *Eldred v. Ashcroft*, 537 U.S. 186, 226 (2003) (Stevens, J., dissenting) (“It would be manifestly unfair if, after issuing a patent, the Government . . . sought to modify the bargain by shortening the term of the patent in order to accelerate public access to the invention. The fairness considerations that underlie [our] constitutional protections . . . would presumably disable Congress from making such a retroactive change in the public’s bargain with an inventor without providing compensation for the taking.”).

¹⁸³ 17 U.S.C. § 104A(b) (2018).

¹⁸⁴ *Id.* § 1401(l)(2)(A).

as domestic ones, that interpretation is extremely dubious.¹⁸⁵ If State law and foreign law were in conflict, then substituting § 1401 for § 104A might result in a change of ownership of the rights in the sound recording, which very likely *would* be a Takings Clause violation.¹⁸⁶ The author suspects this is more of a theoretical possibility than a real one, as most states' choice-of-law provisions would likely point to the law of a foreign country for works first fixed or first published in a foreign country.¹⁸⁷ Nonetheless, even the possibility that a foreign rightsholder might be divested of his or her copyright argues in favor of overlapping protection, which could be owned by different parties.

¹⁸⁵ Section 101 provides that the word "State" "includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress." 17 U.S.C. § 101 (2018). Although section 101 also says that the term "including" is "inclusive and not limitative," *id.*, the primary use of the word "State" in the Copyright Act is the provision that (unsuccessfully) attempted to waive the sovereign immunity of "[a]ny State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity." 17 U.S.C. § 511(a) (2018) (held unconstitutional in *Allen v. Cooper*, 140 S. Ct. 994 (2020)). Given that Congress enacted the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11 (2018), a special statute governing the sovereign immunity of "a foreign state," in the *same year* that it enacted the Copyright Act, it is extremely unlikely that Congress intended the capitalized term "State" to include foreign states.

¹⁸⁶ See *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."); see also 17 U.S.C. § 201(e) (2018) ("When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously transferred voluntarily . . . , no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title."); SINGER & SINGER, *supra* note 163, § 41:6 ("Courts frequently state that a statute cannot have retroactive application where that would interfere with, impair, or divest vested rights.").

¹⁸⁷ See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 (2d Cir. 1998) ("[T]he usual rule is that the interests of the parties in property are determined by the law of the state with the most significant relationship to the property and the parties.") (internal quotation marks and citation omitted) (applying Russian law to determine ownership of copyright in works first published in Russia, even though the alleged infringement occurred in the United States). Cf. CAL. CIV. CODE § 946 (West 2022) ("If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile."); *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1146, 1149 (9th Cir. 2002) (applying the law of Great Britain to a right of publicity claim by the estate of Diana, Princess of Wales).

C. Option C: Foreign Pre-1972 Sound Recordings Are Protected Only Under Section 104A, Because Section 1401 Applies Only to Domestic Pre-1972 Sound Recordings

Finally, there is also a textual argument that the two statutes do *not* overlap at all, because § 104A only applies to pre-1972 sound recording of foreign origin, while newly enacted § 1401 only applies to pre-1972 sound recordings for domestic origin.

The case for non-overlap of protection relies on the fact that Congress carefully specified exactly which sections of the Copyright Act would also apply to § 1401 and excluded all others. For example, § 1401 provides that pre-1972 sound recordings are subject to the exceptions and limitations in § 107 (fair use), § 108 (libraries and archives), § 109 (first-sale doctrine), § 110 (public performances), and § 112(f) (ephemeral copies for governmental bodies and nonprofit educational institutions).¹⁸⁸ Section 1401 is also subject to the exception in § 114(d)(1) (FCC-licensed over-the-air transmissions) and the compulsory license in § 112(e) and § 114(d)(2) (subscription transmissions and webcasting).¹⁸⁹ Congress also specified that § 1401 was subject to § 507 (statute of limitations)¹⁹⁰ and § 512 (safe harbors for online service providers).¹⁹¹ Finally, the definitions of § 101 apply to § 1401.¹⁹²

To emphasize that *only* these sections apply to § 1401, Congress expressly provided that “*no provision of this title shall apply to or limit the remedies available under this section except as otherwise provided in this section.*”¹⁹³

Among the “provision[s] of this title” that do *not* apply to § 1401 are § 104 and § 104A. Section 104 defines the “national origin” of works eligible for protection. Unpublished works “are subject to protection under this title without regard to the nationality or domicile of the author.”¹⁹⁴ Published works are “subject to protection under this title” if “one or more of the authors is a national or domiciliary of the United States, or . . . of a treaty party,”¹⁹⁵ or if “the work is first published in the United States or in a

¹⁸⁸ 17 U.S.C. § 1401(f)(1)(A) (2018).

¹⁸⁹ *Id.* § 1401(b).

¹⁹⁰ *Id.* § 1401(f)(2).

¹⁹¹ *Id.* § 1401(f)(3).

¹⁹² *Id.* § 1401(f)(6)(B).

¹⁹³ *Id.* § 1401(f)(6)(A) (emphasis added).

¹⁹⁴ *Id.* § 104(a).

¹⁹⁵ *Id.* § 104(b)(1).

foreign nation that, on the date of first publication, is a treaty party.”¹⁹⁶ A sound recording is also protected if it “was first fixed” in a “treaty party.”¹⁹⁷ A treaty party is a nation with whom the United States has entered into an “international agreement” concerning copyright.¹⁹⁸

Because § 104 is *not* identified as one of the sections that apply to § 1401, and because “*no provision of this title shall apply to or limit the remedies available under this section except as otherwise provided in this section[.]*”¹⁹⁹ the conclusion is that § 104 does *not* apply to § 1401. That could mean that pre-1972 sound recordings are protected without regard to national origin at all, (i.e., that it doesn’t matter where the recordings were published or first fixed). But there is a presumption that Congress intends to legislate only within the borders of the United States unless the statute clearly indicates otherwise.²⁰⁰ Consequently, one could conclude that § 1401 *only* applies to pre-1972 sound recordings that were fixed or first published *in the United States*. In other words, sound recordings that were fixed and first published *outside* the United States aren’t governed by § 1401 at all.

Under this interpretation, there is no overlap: domestic sound recordings are governed only by § 1401, and foreign sound recordings are governed (if at all) only by § 104A. But this interpretation has several drawbacks. The first drawback is a textual one: § 1401 does not say that § 104 and § 104A do not apply *at all*; it says that they do not “apply to or limit *the remedies available* under this section.”²⁰¹ Moreover, this language is contained in § 1401(f), which is titled “Limitations on remedies.”²⁰² Together, this suggests that Congress was trying to be expansive by *avoiding limits on the remedies available* for a violation of § 1401, rather than intentionally imposing a domestic restriction on a section that

¹⁹⁶ *Id.* § 104(b)(2).

¹⁹⁷ *Id.* § 104(b)(3).

¹⁹⁸ *Id.* § 101 (definitions of “treaty party” and “international agreement”).

¹⁹⁹ *Id.* § 1401(f)(6)(A) (emphasis added).

²⁰⁰ See SINGER & SINGER, *supra* note 163, § 71:9 (“A longstanding principle of American law instructs that legislation of Congress, unless a contrary intent appears, applies only within the territorial jurisdiction of the United States, and, ordinarily, the statutes of a state have no force beyond its boundaries.”); *WesternGeco, LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (“Courts presume that federal statutes apply only within the territorial jurisdiction of the United States.”) (internal quotation marks and citation omitted).

²⁰¹ 17 U.S.C. § 1401(f)(6)(A) (2018) (emphasis added).

²⁰² *Id.* § 1401(f).

otherwise would apply to the use of domestic and foreign sound recordings alike.

Second, this interpretation possibly leaves a lacuna: foreign sound recordings that do *not* qualify under § 104A are left uncovered by *either* statutory regime. Given that the purpose of Congress was to grant federal protection to pre-1972 sound recordings that would be equivalent to the copyright protection given to later sound recordings,²⁰³ and that copyright applies to both domestic and foreign sound recordings,²⁰⁴ it seems unlikely that Congress would have excluded foreign copyrights from what was presumably intended to be a comprehensive system.

Third, this interpretation would violate the principle of “national treatment,” which is an important principle in international intellectual property agreements.²⁰⁵ The principle of national treatment is a non-discrimination principle: it provides that a nation must treat foreign nationals no less favorably than it treats its own nationals.²⁰⁶ Although the Berne Convention does not apply to sound recordings,²⁰⁷ both the TRIPS Agreement and the WIPO Performances and Phonograms Treaty promise national treatment with regard to sound recordings.²⁰⁸ This principle would be violated if the U.S. granted domestic owners of pre-1972 sound recordings more favorable treatment than foreign owners of pre-1972 sound recordings. There is an exception to national treatment in the Berne Convention known as the “rule of the shorter term”: if the source country of

²⁰³ See *Classics Protection and Access Act*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/> [<https://perma.cc/7882-PBSW>] (“The new law also applies a statutory licensing regime similar to that which applies to post-1972 sound recordings, e.g., the statutory licenses for non-interactive digital streaming services, including Internet radio, satellite radio, and cable TV music services.”).

²⁰⁴ 17 U.S.C. § 104(b) (2018).

²⁰⁵ In addition to the international IP agreements noted below, the Rome Convention also recognizes the principle of national treatment; but the United States is not a member of the Rome Convention. See Rome Convention, *supra* note 43, arts. 2, 4, 5(1), 6(1).

²⁰⁶ See, e.g., Berne Convention, *supra* note 38, art. 5(1) (“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals . . .”).

²⁰⁷ See *supra* notes 39–41 and accompanying text.

²⁰⁸ TRIPS Agreement, *supra* note 36, art. 3(1) (“Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property . . .”); WPPT, *supra* note 55, art. 4(1) (“Each Contracting Party shall accord to nationals of other Contracting Parties . . . the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty . . .”).

the work has a shorter term of copyright than the country in which protection is sought, the latter country may elect to use the shorter term for works from the source country, instead of the longer term that it grants to domestic works.²⁰⁹ However, the rule of the shorter term only applies to works covered by the Berne Convention; there is no similar exception for sound recordings in either TRIPS or the WPPT.²¹⁰ Thus, this interpretation would violate the canon of statutory construction that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”²¹¹ As a result, this interpretation is the least likely to be adopted by a court.

D. Choosing the Best Option

As we have seen, the answer to the overlap (and potential conflict) between § 104A and § 1401 cannot be answered by the text alone. There are plausible textual interpretations supporting all three options. It cannot be answered by reference to the legislative history, which is devoid of any mention of sound recordings of foreign origin at all. Instead, the question must be resolved by the slipperiest of interpretive instruments: public policy. Which interpretation best complies with the supposed “intent” of Congress, to the extent it can be gleaned from the breadcrumbs that Congress has provided?

Owners or rightholders of foreign pre-1972 sound recordings will certainly argue in favor of overlapping protection (Option B). That way, the foreign rightholder would get the protection of a federal copyright during the initial ninety-five-year term of protection, and they would get the benefit of *sui generis* protection during the remaining “transition period” provided by § 1401. This solution is even more preferable if there is more than a theoretical possibility that the initial rightholder under foreign law is different from the initial domestic rightholder under State law: the former would be entitled to the protection of a federal copyright, while the latter would be entitled only to *sui generis* protection. Although it is highly unlikely that Congress even considered the possibility that a State might grant rights in a sound recording of foreign origin to someone other than the

²⁰⁹ Berne Convention, *supra* note 38, art. 7(8) (“[T]he term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.”).

²¹⁰ The WPPT lists only one exception to the principle of national treatment, in article 4(2), which implies there are no other exceptions.

²¹¹ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

foreign rightholder, certainly if it *had* considered such a scenario it would have wanted to avoid the possibility of a due process violation.

But other than the possibility of a conflict of ownership, it seems much cleaner to simply treat all pre-1972 sound recordings under a single *sui generis* statutory regime (Option A), rather than continuing to recognize a statutory copyright in qualifying sound recordings of foreign origin. One can argue that if a rightholder wants to benefit from the extended “transition period” under § 1401, it ought to have to relinquish its claim to a statutory copyright. This solution also better fits with the amended text of § 301(c), which otherwise has to be ignored.

Even if both statutes are deemed to apply (Option B), the remedies provided for their violation are the same, except there are no criminal penalties for violations of § 1401.²¹² It is highly unlikely that Congress intended duplicative remedies under two different statutory regimes (except perhaps in the unlikely case that there were different rightholders under state law and foreign law). If faced with overlapping claims by a single rightholder, at a minimum a court should hold that the rightholder may recover only a single monetary award, and not double damages and profits. There is no good reason to believe that Congress intended to provide duplicative remedies to the owners of pre-1972 sound recordings of foreign origin.²¹³

VI. CONCLUSION

How likely is this issue to arise in real life? If a defendant tries to take advantage of the exception for noncommercial use of an orphan work in § 1401(c), in theory a foreign rightholder with a “restored” copyright could argue that there is no such exception for copyrighted works. The defendant would argue for Option A, while the rightholder would win under Options B or C. By definition, however, such a case would only arise if the defendant had made a good-faith effort to locate the rightholder and failed, and the rightholder did not learn about the proposed use until more than

²¹² See 17 U.S.C. § 1401(a)(1) (2018) (stating that violators “shall be subject to the remedies provided in sections 502 through 505 . . . to the same extent as an infringer of copyright”).

²¹³ One could argue, however, that this would explain the otherwise cryptic language in subsection 1401 that “no provision of this title [including section 104A] shall apply to or limit *the remedies available under this section* except as otherwise provided in this section.” *Id.* § 1401(f)(6)(A) (emphasis added).

ninety days after the defendant's notice of intention was indexed in the records of the Copyright Office.²¹⁴ Such a convoluted situation seems highly unlikely to arise.

Similarly, a library or archives might decide to reproduce, distribute, or perform a foreign pre-1972 sound recordings "for purposes of preservation, scholarship, or research" under the exception in § 108(h).²¹⁵ For a copyrighted work, this exception only applies during the last twenty years of its term;²¹⁶ but for the *sui generis* protection for pre-1972 sound recordings, it applies during the entire remaining term,²¹⁷ which could be up to forty-five years. If the issue arose before the last twenty years of the term, again the defendant (the library or archives) would argue for Option A, and the rightholder would argue for Options B or C. This exemption does *not* apply, however, if "the work is subject to normal commercial exploitation"²¹⁸ or if "a copy or phonorecord of the work can be obtained at a reasonable price."²¹⁹ If neither of those things are true, it seems unlikely a rightholder would object to the premature invocation of this exception.

The issue is somewhat more likely to arise during the "transition period" for a foreign pre-1972 sound recording. If a defendant wanted to avoid paying royalties during the transition period, it could try to argue that the copyright protection provided in § 104A had expired, and that there was no overlap in protection under Option C. The rightholder would then respond that it is entitled to royalties under either Option A or Option B. But given that there is a compulsory license for the public performance of sound recordings by means of digital audio transmission,²²⁰ it is unlikely that a defendant would object to paying royalties for the public performance of such a work. A conflict would more likely arise if a defendant wanted to reproduce and sell copies of the recording. Given the movement of the music world to digital streaming, one suspects it would have to be a foreign sound recording that is uniquely valuable.

Thus, it is entirely possible that the issue will never be litigated. If so, this article will remain a purely intellectual exercise. Nonetheless, the

²¹⁴ See *id.* § 1401(c)(1)(A)–(C).

²¹⁵ *Id.* § 108(h)(1).

²¹⁶ *Id.*

²¹⁷ *Id.* § 1401(f)(1)(B).

²¹⁸ *Id.* § 108(h)(2)(A).

²¹⁹ *Id.* § 108(h)(2)(A).

²²⁰ See *id.* § 114(d)(2). This compulsory license expressly applies to the *sui generis* right as well. See *id.* § 1401(b)(1)–(2).

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possibility of future litigation should not entirely be ignored. The best solution would be for Congress to expressly consider the issue and decide which of the three options it deems best from a public policy perspective. (The author's preference is for Option A, but I can understand how constitutional concerns might lead Congress to adopt Option B.) Absent a Congressional fix, if the issue does arise, the author hopes that this article will provide guidance to the unfortunate litigants who find themselves in the position of having to navigate this exceedingly complex labyrinth of statutory interpretation.