I. Introduction

The following information is a summary of key points that will be examined in significant detail in the accompanying “White Paper” on the subject of copyright duration. Understanding the duration of copyright protection for works under U.S. law is essential for determining when a work may enter the public domain and therefore be available for use without copyright restrictions. The ability to identify and use works in the public domain is important for facilitating the development of the Digital Music Library.

On the other hand, this summary and the white paper will also demonstrate that the law of copyright duration in the U.S. is in unduly complex. One can identify categories of works that might clearly be in the public domain, but other categories of works will depend on individual investigation of the circumstances of their creation, publication, and compliance with notice and registration requirements. Further, this summary addresses only U.S. copyright law. Some works may be subject to other legal conditions to their use, such as a person’s right of privacy, or a business’s trademark interests. Uses of works outside the jurisdiction of the United States will also implicate the laws of other countries.

Especially in the case of musical works, one must be cognizant of generally two (and perhaps more) copyrights applicable to each work. A new composition is a copyrightable work, with its individual duration of protection; the recorded performance
of that work is yet a new copyrightable work, and it will generally have a separate calculation for the term of protection.

Future studies in furtherance of the DML project will examine other means for using works without violating the rights of the copyright owners, and will explore possible avenues for ameliorating the complexity in the law that Congress has created over the years.

For now, however, the following is a summary of key points related to the rules of copyright duration. Except where otherwise noted, these points generally refer to works that are created in the United States and that are used in the U.S. and governed by U.S. law. In general, under U.S. law, most foreign works are treated in a manner similar to U.S. works; important differences in that treatment are specifically noted.

II. Summary of Findings

Works created on or after 1 January 1978 enjoy automatic copyright protection for an extensive period of years—generally for the life of the author, plus seventy years—and will at the earliest enter the public domain at the end of the year 2048.

Comment: This generous protection is good news for copyright owners, but it clearly means that published and unpublished works created today will long remain under copyright protection. If a contemporary work is deemed to have been made “for hire,” the copyright lasts for a different term of years—at least ninety-five years—but it will also clearly have copyright protection for many more years.

Works first published in the U.S. before 1923 are in the public domain.

Comment: A work that can be identified as having been created and published before 1923 will be in the public domain. For example, an early classical composition is likely without copyright protection, although a more recent arrangement of it may be protectible. As noted below, a sound recording of the work is actually without federal copyright protection, if it was made before 1972. Thus, a Beethoven composition that is recorded in 1970 will lack federal copyright protection in the U.S.

Works published between the beginning of 1923 and the end of 1977 may have copyright protection for a maximum of ninety-five years.

Comment: For example, a work first published in the U.S. in 1923 will enter the public domain after 2018. In each subsequent year, additional works published ninety-five years before will also enter the public domain. We are in effect living with a “cap” on the public domain for published works until we begin the year
2019. The maximum term is possible only if the work has complied with the formalities of notice and renewal.

Works published before 1978 without formal copyright notice entered the public domain upon publication; most foreign works are exempt and have had their copyrights restored.

Comment: This rule is an important source of public-domain works, but its application requires a factual investigation into whether the published versions of the work failed to include a proper copyright notice. This rule previously applied to all works, but Congress was required under multinational treaties to exempt foreign works and to give them the maximum term of protection even if they failed to include formalities.

Works published in and after 1923 and before the end of 1964 with a formal copyright notice entered the public domain after the first term of twenty-eight years unless the copyrights were renewed; most foreign works are exempt and have had their copyrights restored.

Comment: Another source of public-domain works is that class of early publications that received the first term of protection by use of a proper notice, but failed to secure the additional term through renewal registration of the work with the U.S. Copyright Office. The need to register renewals has been eliminated, so the rule only applies to works published during the defined span of years. Application of this rule requires research in the registration records of the Copyright Office. Some records are available online; others are listed in published catalogs; others are available only at the Copyright Office in Washington, D.C. Again, most foreign works are now exempt from the renewal requirement.

Works published between 1978 and March 1989 with a missing or defective notice that was not corrected entered the public domain upon publication; most foreign works are exempt and have had their copyrights restored.

Comment: This rule is perhaps the most ethereal to apply. For a short period of years, notices were required, and defective notices could be cured. The only assurance for the researcher is that one possible method for a “cure” required registration of the work; an examination of records at the Copyright Office has the potential for revealing whether the copyright has been lost or preserved.

In 2003, unpublished works created by authors who have been deceased for seventy years will enter the public domain; in each subsequent year, additional works by authors who had died seventy years before will also enter the public domain.

Comment: The “cap” on the public domain for unpublished works will end as early as 1 January 2003. Beginning in 2003 researchers can begin identifying unpublished works from authors who had died seventy years before. One needs
to be cautious about works that are published anytime before 2003; those works may be eligible for additional years of protection. This rule of law nevertheless will provide an important opportunity for preserving and disseminating archival materials.

III. Works Exempt from Copyright Protection

As noted above, some general rules about works that are exempt from copyright protection can help identify categories of materials that are in the public domain. The law includes several possibilities for exempt works, but the following provisions are most significant.

*Sound recordings made before 15 February 1972 are not eligible for copyright protection in the U.S. and are in the public domain; most foreign works are exempt and have had their copyrights restored.*

Comment: The law changed slowly to encompass the new technology of sound recordings, leaving many decades of works without federal protection. This provision applies only to the recording; the underlying composition may well be protected, and thus a specific recording may not be entirely free of copyright protection. In accordance with the multinational treaties mentioned earlier, Congress was required to exempt most foreign recordings from this rule and to give foreign recordings—even from before 1972—the full term of protection. Accordingly, the Beethoven composition recorded in the U.S. in 1970 has no U.S. federal copyright protection, but the same work recorded at the same time in Germany is likely protected in the U.S.

*Works of the U.S. government are exempt from copyright protection in the U.S.*

Comment: It is tempting to think that this rule is significant only for recordings of the U.S. Marines Marching Band, but it may well have more significant application. Recordings of music, speeches, and other activities made by various government agencies may well have been exempt at their inception from any rights under copyright law. Again, the underlying composition or other work may still have separate copyright protection if it is also not a work of the U.S. Government.

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