BEFORE THE
U.S. COPYRIGHT OFFICE

Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited	**Docket No. 2018-8**

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the Notice of Inquiry (NOI) published by the U.S. Copyright Office in the Federal Register on October 16, 2018, regarding the noncommercial use of pre-1972 sound recordings that are not being commercially exploited.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

Title II of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA) ensures that the owners of pre-1972 sound recordings and the artists whose performances are recorded on these sound recordings can share in the commercial value of those recordings when streamed online. At the same time, it recognizes that—given the historical treatment of pre-72 sound recordings—there is a universe of sound recordings which have lost commercial value, or have never had commercial value, yet may today provide historical or cultural value.

The exclusive rights afforded by copyright law do more than incentivize creation and distribution of sound recordings. They also incentivize investment in preservation and access to commercial sound recordings. As noted in comments filed by the RIAA and A2IM during the Copyright Office's 2011 study on pre-72 sound recordings, "[w]ith regard to these commercial recordings, the best way to expand the marketplace for and provide further public access to them, is to allow existing rightsholders to continue to protect and use their recordings under present law, to expand existing general and niche markets for them, while at the same time effectively

reducing piratical sources."[1] In addition, record labels have engaged in, and continue to engage in, private ventures with cultural institutions to preserve and provide public access to their back-catalog and out-of-print commercial recordings.

For noncommercial sound recordings—for example, "ethnographic field recordings, oral histories, private home recordings, and scientific audio experiments"[2]—Title II of the MMA establishes the same limitations and exceptions to encourage preservation, access, and scholarship that apply to copyrighted works, such as fair use and §108, and creates an exception for certain noncommercial uses of works that are not being commercially exploited that is the subject of this NOI. It is with this context in mind that we offer our comments below.

General Comments

Before responding to the specific questions asked in the NOI regarding steps for a "good faith, reasonable search" and filing requirements for a notice of noncommercial use and a notice objecting to such use, we wish to make a few general points.

First, the Copyright Office should make clear that the regulations and interpretation of terms in Section 1401 apply only to the application of provisions in that section. Congress created these provisions to address the unique circumstance of this category of copyrightable subject matter. Prior to the MMA, pre-72 sound recordings were protected solely by state law—protection that has been preempted as to every other category of copyrightable subject matter under the 1976 Copyright Act. The MMA marks the first time pre-72 sound recordings have been brought under the umbrella of federal protection. And their protection remains distinct from those categories of works protected by federal copyright since they are instead protected by a sui generis right under Section 1401. Consequently, any applications of this section should apply only to this unique situation and should not extend to other areas of copyright protection.[3]

Second, the Office should make explicit the presumption that the exception for certain noncommercial uses of pre-72 sound recordings should only be used when a rights owner cannot be identified or located. The MMA legislative history states, "[b]ecause all pre-1972 recordings are at least 46 years old, and some date back well more than a century, this process is provided primarily to enable use of older recordings *where it may not be clear to a user how to contact the rights owner to ask for permission*.[4]" (Emphasis added). Thus, the process established by the statute presumes, as it should, that a potential user has tried and was unsuccessful in identifying and locating the rights owner of the work that they are seeking to use. Not only should the Office make this presumption clear to users, but it should emphasize that this exception should be used

[1] Recording Industry Association of America and American Association of Independent Music, *Comments on Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* (Jan. 31, 2011).
[2] Maria Pallante, *Federal Copyright Protection for Pre-72 Sound Recordings: A Report of the Register of Copyrights*, at 52 (2011), https://www.copyright.gov/docs/sound/pre-72-report.pdf.
[3] Specifically, we would note that any conclusions made in determining what constitutes a "good faith, reasonable search" for commercial exploitation of a pre-72 sound recording does not have any bearing on the meaning or scope of the "reasonable investigation" requirement within Section 108(h), given both the differences in statutory language and the distinctions noted in this paragraph. *See* 17 U.S.C. § 108(h)(1).
[4] Chairmen and Ranking Members of the House and Senate Committees on the Judiciary: *Document on H.R. 1551*, 115th Cong. 25-27 (2018), *available at* http://www.judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf.

only as a last resort. It should not be used to circumvent the normal licensing process or as a substitute for requesting permission from rights owners who can be contacted.

Third, the Office should clarify and advise on how bad faith or deficient notices will be policed. It should, at a minimum, have a mechanism in place that enables the Office to filter out notices that are patently deficient. It is important for the Office to ensure that users cannot simply go through the motions of filing and, even if that filing is insufficient, be able to take advantage of the noncommercial-use safe harbor. At the very least, a user's notice must include sufficient information to enable a rights owner to know that a notice involves a work that they own, so that they are able to decide whether to opt out.

Fourth, the Office should use a "checklist" approach, rather than guidelines, when establishing the standards for what constitutes a "good faith, reasonable search." This approach will promote consistency among searches and certainty for users. The checklist should represent the *minimum* requirements of a reasonable search and recognize that each individual case will be different and will likely require additional steps. As we mention below, each good faith, reasonable search should be exhaustive. The Office should encourage users to take additional steps rather than merely completing the bare minimum requirements.

Finally, the Office should make clear that each user must conduct their own good faith, reasonable search and that users cannot rely on the searches of others. The goal of each search is to discover whether there is commercial exploitation of a work,[5] not to help create a list of works that are not currently being commercially exploited. That is, a notice of noncommercial use for a particular pre-72 sound recording should not create a blanket exception for all future noncommercial uses of that sound recording.

We submit the additional following comments in response to the specific questions asked in the NOI.

A. Good Faith, Reasonable Search

1. *What would constitute a reasonable search of the Office's database of Pre-1972 Schedules, which will index information including the name of the rights owner, title, and featured artist for each sound recording filed on a schedule?*

The goal of any reasonable search should be to establish with reasonable certainty that a work is or is not being commercially exploited, so a search of the Office's database of pre-72 schedules should include a minimum requirement that a user search for each piece of identifying information that the user has on the pre-72 sound recording they seek to use. This information may include the name of the rights owner, title of the sound recording, any featured artists—

[5] We would note that we believe commercial exploitation of a pre-72 sound recording includes all releases and re-releases of the sound recording, whether or not it be a remixed or remastered version of the recording. However, to the extent remixed or remastered recordings contain original authorship, such recordings are not eligible for the clearance process under 1401(c).

including both stage name and real name if applicable—but also any other information the user possesses that could reasonably aid in finding commercial exploitation of a work.[6]

We recognize that searches and search results made using the Office's current IT will be somewhat rudimentary initially, perhaps with search results in alpha-numerical order, but as the Office continues to modernize its system, we expect that the search capabilities will become more robust. Specifically, we would urge the Office to incorporate search technology that returns the most relevant and popular search results at the top. The Office's database also should, at a minimum, offer fuzzy logic search capabilities, and/or the ability to search using wildcards, as soon as it is technologically capable of providing this function. In the meantime, and as the database's technology continues to modernize, users should be expected to search for reasonable variations of the identifying information they possess (e.g., typical spelling variations of words in the title of the pre-72 sound recording).

Additionally, it should be noted that searching the Office's database of pre-72 schedules is a component of satisfying a "good faith, reasonable search" per the statute,[7] meaning that a user must always search the database, whether or not the Office is experiencing technical difficulties. However, the Office should caution users that solely searching that database, even if it is a reasonable search, is not sufficient to constitute a "good faith, reasonable search" and, standing alone, will not allow a user to take advantage of the noncommercial-use safe harbor under the statute. A "good faith, reasonable search" in this era of technology and resources necessarily includes searching several other resources.

2. *Please suggest specific "services offering a comprehensive set of sound recordings for sale or streaming" that users should be asked to reasonably search before qualifying for the safe harbor.*

There are several types of services that a user should be required to reasonably search before qualifying for the noncommercial-use safe harbor including, but not limited to, all major commercial streaming services, user-generated content sites, and online marketplaces. Given the dynamic nature of the marketplace for such works, the list of services will be continuously changing and remain relatively open-ended. Thus, any search of services offering the recordings for sale or streaming would require the use of additional services, like search engines, to assist the user in identifying and locating relevant services to search, and must be a component of any reasonable search.

In addition, searching informational sites and other databases would assist users in finding additional information about a work and its rights owner that could lead to more fruitful searches on the services listed in the statute. For example, a user can search a site such as the Internet Movie Database (IMDb) to see whether a particular pre-72 sound recording has been used in the soundtrack of a movie and, with that additional information, the user can search a

[6] The statute states that schedules filed by the rights owner will include title, artist, rights owner and "other information, as practicable, as the Register of Copyrights prescribes by regulation." *Id.* at § 1401(f)(5)(A)(I)(i). Thus, the database could contain more to be searched for than the title, artist, and rights owner and a reasonable search should explore that.

[7] The statute requires the user to make a good faith, reasonable search of both the Office's database and "services offering a comprehensive set of sound recordings for sale or streaming." *Id.* at § 1401(c)(1)(A).

streaming service (e.g., Netflix, Hulu, etc.) for that movie to determine if it is being commercially exploited. For these reasons, we believe that a reasonable search for commercial exploitation of a pre-72 sound recording includes the use of search engines; music information databases, such as those maintained by SoundExchange, the PROs, and, when it becomes operational, the Mechanical Licensing Collective database; and other informational databases and sites, such as Discogs, Allmusic, and IMDb. We also direct the Office's attention to our members' comments who offer additional specific services for users to search.

> 4. *Is it reasonable to expect a user's search to encompass music distribution services, such as CD Baby, TuneCore, or The Orchard?*
> 7. *How many sources should a user be required to search before qualifying for the safe harbor? In responding, please consider that the Office must promulgate a ''reasonable'' list of steps, but in a way that does not overlook commercialization of Pre-1972 sound recordings.*

In response to Questions 4 and 7, we think that a reasonable search is one that is exhaustive and fact dependent, though not one necessarily defined by the number of sources searched. At a minimum, searches should be made on all services of mass appeal as well as all relevant niche services, which would include the music distribution services referenced in Question 4. We also believe that SoundExchange's ISRC search tool should be searched, as it provides a vast library of information concerning sound recordings that are submitted by rights owners and their authorized representatives to SoundExchange for the purpose of collecting royalties, which is a form of commercial exploitation. We are confident that these requirements will still yield a reasonable list of steps, as it is relatively quick and easy to conduct searches through these sources.

> 8. *Please describe specific steps that should constitute a reasonable search on an identified service. Should the steps be service-specific or would a single list of steps be adequate for any identified source? Is the description of a qualifying search described by the 2008 bill referenced above useful in defining whether a user has conducted a reasonable search to determine whether a work is being commercially exploited?*

A single list of general steps would provide more consistency and adaptability over the long run than service-specific steps. The first general step should be a threshold requirement that the user search for and contact the rights owner, as the search for commercial exploitation rests on the presumption that the rights owner cannot be identified or located. If this threshold search results in identifying or locating the rights owner, then the user should be required to contact the owner as a first attempt to determine if the work is being commercially exploited. Additionally, we urge that the steps include a documentation requirement. Users must document the steps they have taken up to that point and the search terms that they used, and also provide screenshots of the searches conducted on the various services. As for the additional steps, we reiterate that the search should be exhaustive and in furtherance of discovering whether there is a commercial exploitation of a work.

B. Filing of Notices of Pre-1972 Noncommercial Use and Pre-1972 Opt-Out Notices

2. *To what extent should a user be required to specify the nature of the use, such as the expected audience, duration of the use, and whether it will be online or limited to a particular geographic area?*

A user should be required to specify the nature of the use to the same extent as any licensee seeking to negotiate a license privately would. A rights owner cannot make an informed decision about whether they want to opt out of the use if they are not fully aware of the type and scope of the intended use. To that point, a user should be required to sufficiently identify the work that they intend to use and how they intend to use it, including a description of their basis for determining that the use is noncommercial. Users should also be required to disclose whether they are an individual or an entity and, if an entity, the type of entity they are operating as. Additionally, the Office should ask users to state whether there is another work embodied within the pre-72 sound recording, such as a musical composition or literary work, and, if there is, whether the user has the license to use those works or if the use is otherwise authorized by law.[8]

3. *How should the user be required to certify or describe the steps taken for a search to constitute a ''good faith, reasonable search''? How detailed should any description be?*

A user should be required to describe the steps taken for a search in their notice of intended noncommercial use and certify the information provided in the notice. The search for commercial exploitation of a work proposed in the statute relies on the presumption that the user is unable to identify or locate the rights owner, so the threshold step for certification should require the user to indicate the steps taken in attempt to locate the rights holder. The user should then document the step-by-step process of the search for commercial exploitation of the work, including which services were searched and which search terms were used. As previously mentioned, the user should provide screenshots of each step of the user's search as part of that documentation as well.

A reasonable search implies that the search be done recently. Thus, the certification of a reasonable search requires that each step and screenshot of the search process include a time and date. We propose that a search be conducted within 90 days of filing a notice to be reasonable, a time frame that is equivalent to the amount of time a rights owner has to opt out of a noncommercial use once notice is filed. Finally, users should be required to certify filings under penalty of perjury.

[8] This information is important for a user to note because the noncommercial-use safe harbor in Section 1401 only relieves liability for certain noncommercial uses of the pre-72 sound recording, it does not have an effect on the ability to use other works embodied within that sound recording. Thus, the Office should caution users that qualifying for the noncommercial-use safe harbor might shield them from being liable to the right owners of a sound recording, but it will not shield them from being liable to rights owners of an underlying musical composition, literary work, or other works embodied within the sound recording.

Conclusion

The Copyright Alliance thanks the Copyright Office for the opportunity to share our views on this NOI. We welcome the opportunity to participate further or answer any follow up questions.

Respectfully submitted,

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