



**BEFORE THE
U.S. COPYRIGHT OFFICE**

**Noncommercial Use of Pre-1972 Sound
Recordings That Are Not Being
Commercially Exploited**

Docket No. 2018-8

REPLY COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following reply 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.

As a threshold matter, we ask that the Copyright Office exercise prudence in crafting regulations here so as not to cause irreparable harm to owners of pre-1972 sound recordings. Limitations and exceptions to exclusive rights should be construed narrowly. This is especially true when the limitation was created as part of a significant change in existing law, as is the case here. The Office always retains the ability to modify its regulations in the future.

With that in mind, we offer responses to the following comments:

- *Electronic Frontier Foundation: “the Office should craft a safe harbor and reporting requirements that maximize the use of the new noncommercial use procedure”*
Public Knowledge: “The goal is not a perfect or exhaustive search, but instead to strike a practical balance between the interests of rights owners and potential users”

These comments improperly place the burden of this limitation on the owner of sound recordings under this Section. The default rule for any exclusive right given to authors is that it is not dependent on the exercise of those rights.¹ When a new limitation is created that departs from this default rule, the burden is appropriately placed on the beneficiary of that limitation.

As several commenters point out, this limitation may not be the only limitation available for certain uses—some uses may also be permitted under fair use, Section 108, or other existing limitation or exception. That said, the Copyright Office should certainly ensure that the burden

¹ This is generally true of any property right; in addition, as the Supreme Court has pointed out, the “right to refrain from speaking at all” also serves important First Amendment values. See *Harper & Row, Publishers Inc. v. Nation Enterprises*, 471 US 539, 559-560 (1985).

on users is appropriate and reasonable. We believe most searches for commercial exploitation will be able to be done online, quickly and easily.

- *Public Knowledge: “the Copyright Office does not have any role under the statute in approving, denying, or reviewing notices based on their sufficiency or content”*

We agree with the comments from A2IM and RIAA that accepting a notice of noncommercial use does not indicate a legal conclusion that the use is noncommercial.² However, the Copyright Office does clearly have authority to deny facially invalid notices. No one would suggest the Copyright Office is under any obligation to accept and index a blank piece of paper, or a copy of last week’s newspaper. Like any official engaged in a ministerial function, the Office retains discretion to “construe the statute and exercise judgment in determining”³ whether a particular notice meets the requirements of the statute.

The statute provides that a person engaging in a noncommercial use must file “a notice identifying the sound recording and the nature of the use in the Copyright Office” in order to be shielded from liability, and that such notice be made “in accordance with the regulations issued by” the Register of Copyrights, which “establish the form, content, and procedures for the filing of notices”. At a minimum, this provides the Copyright Office with the discretion to reject notices which on their face are not sufficient to identify the sound recording—thus not providing *notice* to the owner of the sound recording—and nature of the use or do not adhere to the form, content, and procedures established by the Register through regulations.

- *Music Library Association: “recommends that the Copyright Office require the rights holders to provide the hashes, with APIs, of all pre-1972 sound recordings indexed in the legislated Musical Works Database”*

This suggestion would be both unduly burdensome for rights owners and outside the scope of the Copyright Office’s authority.

- *Public Knowledge: “Non-interactive services should be excluded from the safe harbor because they are not usefully searchable for specific tracks”*
Electronic Frontier Foundation: “services like Pandora and SiriusXM ... do not offer granular searches for particular recordings. These should not be included because there is no straightforward way to verify the commercial use of a particular recording on those services”

There is no statutory basis for excluding commercial exploitation by non-interactive services. The statute explicitly requires a search for sound recordings on any service “offering a comprehensive set of sound recordings for sale or streaming.” However, users can, as

² American Association of Independent Music and Recording Industry Association of America Initial Comment at 16.

³ COMM. ON THE JUDICIARY, 86TH CONG., REP. ON COPYRIGHT LAW REVISION 94 (Comm. Print 1960), available at <https://www.copyright.gov/history/studies/study18.pdf>.

SoundExchange states in its comments, search SoundExchange’s ISRC database for sound recordings being commercially exploited on non-interactive services.⁴

- *Library Copyright Association: “it is likely that any regulations of general applicability developed by the Copyright Office under section 1401(c) would be more burdensome than what the libraries determine to be a reasonable investigation under section 108(h)”*

There is no support for the assertion that a “reasonable investigation” would be less burdensome than a “good faith, reasonable search.” For one, the term “investigation” is broader than the term “search.” At the very least, the legislative history does not support LCA’s comment. The House Report explanation of subsection 108(e), which also contains the term “reasonable investigation” for the reproduction, distribution, public display, and public performance upon user request—entire work, says:

“The scope and nature of a reasonable investigation to determine that an unused copy cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if the owner can be located at the address listed in the copyright registration), or an authorized reproducing service.”⁵

In addition, the Library Copyright Association’s statement that section 108(h)’s requirement that the exception is only available if a copy of the sound recording cannot be obtained at a reasonable price is “typically ... the case for a work not subject to normal commercial exploitation” is incorrect and would render the language of 108(h)(2)(b) superfluous. As one scholar has observed, “One reading is that normal commercial exploitation refers to new copies, and ‘reasonable copy’ may refer to used copies.”⁶ We believe the record should include a statement from the Copyright Office making these points clear.

⁴ SoundExchange Initial Comment at 3 (“Its repertoire database currently contains information concerning over 27 million unique sound recordings, including pre-1972 recordings, and the database is updated daily with additional recordings. Since 2016, SoundExchange has provided public access to the database free of charge through its ISRC Search tool at <https://isrc.soundexchange.com/#!/search>”).

⁵ H.R. REP. NO. 94-1476 (1976).

⁶ Elizabeth Townsend Gard, *Creating a Last Twenty (L20) Collection: Implementing Section 108(h) in Libraries, Archives and Museums*, (October 2, 2017), available at <https://ssrn.com/abstract=3049158> or <http://dx.doi.org/10.2139/ssrn.3049158>.

Conclusion

The Copyright Alliance thanks the Copyright Office for the opportunity to share our reply comments. We welcome the opportunity to participate further or answer any follow up questions.

Respectfully submitted,

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