



**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 Proposed Rulemaking](#) (NPRM) published by the U.S. Copyright Office in the Federal Register on February 5, 2019, 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.

General comments

The Copyright Alliance commends the Copyright Office for crafting a balanced rule that aligns with the statutory requirements and takes into account the rights of sound recording owners and interests of potential users. In particular, we applaud the Office for taking the checklist-based approach that the Copyright Alliance supported in our initial comments. We also agree with its decision to not permit a user to rely on a search conducted by a third party and to limit a Notice of Noncommercial Use (NNU) to a proposed use for only one pre-72 Sound Recording unless all of the sound recordings include the same featured artist and were released on the same pre-1972 album or unit of publication (with one caveat, which we discuss below).

Below, we offer responses to several of the questions the Copyright Office raised in its NPRM and provide additional comments on other issues raised by the NPRM.

Questions raised in NPRM

Whether proposed rule should address whether users should be able to use officially-supported APIs to search and locate pre-72 sound recordings on streaming services.

The question of whether the rule itself should address the use of APIs officially supported by music services by users to engage in the search and location of pre-72 sound recordings raises concerns that such search capabilities will enable bulk submissions of NNUs, placing a burden on rights owners comparable to the burden placed on individual songwriters and music publishers when reviewing bulk Notices of Intention to Obtain Compulsory License under 17 USC § 115. We see no reason why the rule needs to encourage APIs or other specific means for searching.

Comments on search requirement for ethnographic sound recordings, given that it was the result of submissions during the reply comment phase of the NOI, and thus no opportunity for public response was available.

We have no views on this requirement but wanted to note that the Copyright Office declined to adopt our recommendation to require users to contact rights owners directly as part of a good faith search yet did adopt a similar requirement here with respect to ethnographic recordings of Alaska Native or American Indian tribes or communities.

Other issues raised by NPRM

Good faith, reasonable search

We strongly urge the Copyright Office to make a search of the SoundExchange ISRC lookup tool as part of a good faith, reasonable search mandatory under the rule. This is an easy step for users to take that reduces their need to engage in duplicative searches while increasing the likelihood of finding that a work is being commercially exploited, particularly on noninteractive services (which, as several commenters noted in their comments, do not often have native search capabilities).¹

Likewise, it is essential that the Copyright Office add a YouTube search as an additional separate step. YouTube is the largest and most-frequently accessed online

¹ E.g., Public Knowledge initial comments at 6: “Non-interactive services should be excluded from the safe harbor because they are not usefully searchable for specific tracks”; EFF initial comments at 4: “Other 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

music service, and Congress expressly intended that the good faith, reasonable search should include user-generated services. The Conference Report for the Music Modernization Act states, "To determine whether a pre-1972 recording is being commercially exploited by or under the authority of the copyright owner, it is important that a user seeking to rely on subsection (c) make a robust search, *including user-generated services* and other services available in the market at the time of the search, before requesting permission through a Copyright Office filing." (emphasis added).² At the very least, any rule should expressly provide for searching the largest user-generated service to be consistent with the intent of the statute.

We understand that user-generated services may include both unauthorized and authorized copies of works and that it may not always be readily apparent to a user whether a work on such a service is being commercially exploited by the authority of the rights owner. However, YouTube does indicate in many cases when a work has been licensed.³ In addition, rights owners who have access to YouTube's ContentID tools do have the option of discovering and monetizing copies of their works which have been uploaded by third parties—and in many instances such works, though being commercially exploited on YouTube, would not be available on other authorized services. Thus, a search of YouTube would locate sound recordings being commercially exploited by the rights owner which would otherwise not be located.⁴

We also suggest that a search of Bandcamp be included as a separate step of a good faith, reasonable search. Since 2008, Bandcamp has provided a platform for independent artists to commercialize their music through downloads, physical sales, and subscription streaming. Among the thousands of labels that use Bandcamp are a number of reissue labels, which rerelease older music, including sound recordings made before 1972.⁵ It is likely that a good deal of these recordings are available exclusively on Bandcamp, meaning the service would be the only place a user could discover that they are being commercially exploited. At the same time, because Bandcamp does not provide the same breadth of recordings as mainstream services such as Amazon, Apple, Spotify, it is important that a search of Bandcamp be in addition to, and not in lieu of, a search of those services.

Form, content, and procedures for a user to file an NNU

In principle, as we stated in our initial comments, a good faith reasonable search should require that a user contact a known rights owner to see if a sound recording is being commercially exploited. We understand that the Copyright Office rejected this

² Report and Section by Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees at 25 (October 19, 2018).

³ See YouTube Help, "Music in this video", <https://support.google.com/youtube/answer/7680188>.

⁴ A search of YouTube is also more likely to turn up less mainstream recordings and recordings in niche genres.

⁵ See, e.g., Bandcamp Daily, *Raiders of the Lost Ark*, (June 23, 2015), <https://daily.bandcamp.com/2015/06/23/raiders-of-the-lost-arks/> (profiling six reissue labels that have recently started using Bandcamp).

search requirement under the NPRM because it concluded the statute does not explicitly require it. At the very least, we strongly urge the Copyright Office to include prominent language on any online forms and instructions to recommend that users contact known rights owners, along with the benefits of doing so—for example, contacting rights owners would provide users with additional legal certainty, or it may open the door to the possibility that a rights owner might be willing to provide access to additional recordings or supplementary information for the user’s project. Notwithstanding the above, there is no reason not to encourage rights owners from contacting users to make a counter-offer for uses that they might otherwise opt-out of based on the proposal in the NNU—for example, a rights owner might want a modest licensing fee, or require some other reasonable condition like attribution or other terms. To facilitate such negotiations, the Copyright Office should require users to provide both an email address and physical address, and optionally a phone number, on NNUs that they file.

The Copyright Office should require users to state the current or last-known rights owner to the extent that information is known or can be reasonably discovered. This requirement would greatly assist rights owners—particularly those with large catalogs—in being able to determine when one of their recordings is the subject of an NNU. In addition, as comments from ABKCO Music & Records, A2IM, and RIAA, point out, merely listing track title and artist on an NNU will in some cases provide inadequate notice, since some artists may have recorded the same track for different record labels. As with other information provided in NNUs, the Copyright Office should clarify to third parties that it does not verify the validity or accuracy of information on NNUs, and third parties may not rely on the information.

The Copyright Office should also require more from users than merely certifying that they’ve engaged in a good faith, reasonable search. While the Copyright Office rejected the recommendation that users provide screenshots to evidence their searches, we believe it would still be very useful for users to provide some indication of their efforts, such as a list of the search terms that they used or other evidence of their searches. Because monitoring and responding to NNUs will place a burden on rights owners (including a fee for filing an opt-out notice), it is reasonable to provide some assurances that users have not engaged in inadequate searches. At the very least, the Copyright Office should provide clear language to users that if a use is subsequently challenged in court, users would need to demonstrate they engaged in a good faith, reasonable search, so they should document their search and retain that documentation.

As noted in our general comments, while we generally agree with the Copyright Office’s decision to not permit a user to rely on a search conducted by a third party and to limit a NNU to a proposed use for only one pre-72 sound recording unless all of the sound recordings include the same featured artist and were released on the same pre-1972 album or unit of publication, we do recommend one exception. The proposed rule allowing more than one sound recording on an NNU should be limited to studio albums and not include greatest hits or compilation albums, which in many cases include recordings owned by multiple rights owners.

The Copyright Office should clarify in its rule that users are required to specify the time frame (i.e., the start and end date) of a proposed use in an NNU.

We agree that that the indexing of an NNU by the Copyright Office does not indicate a legal determination that a proposed use is noncommercial. The Copyright Office should provide conspicuous notice to this effect to users on the NNU form and instructions.

Finally, the Copyright Office should monitor for repeat filings that are the same or substantially the same and consider revisiting its processes in the future to determine if changes to the rule are needed because of frivolous repeat filings.

Form, content, and procedures for a rights owner to file an opt-out notice

The NPRM proposes that “if the Register becomes aware of abuse or fraudulent pre-1972 Opt-Out Notices from a certain filer, she shall have the discretion to reject all submissions from that filer for up to one year.”⁶ We acknowledge the Copyright Office’s concerns about abuse and fraud and appreciate the Office’s well-intended attempt to address these concerns while minimizing burdens on rights owners. However, we ultimately believe this provision must be deleted from the final rule because it is not supported by the statutory language and will have adverse practical implications.

First, as to the practical implications, a rights owner can opt-out of a NNU without needing any justification, so the circumstances where there would be abuse or fraud present are, at best, exceedingly narrow. Second, the “lock-out” mechanism proposed in the rule would be unduly prejudicial to rights owners, as it would prevent them from opting out of the use of works they own exclusive rights to. While the Copyright Office proposes the same mechanism to police fraudulent or abusive filing of NNUs by users, and users could potentially be burdened, the harms are not equivalent—users would lose the ability to take advantage of an exception to a right, while rights owners would lose the right itself. Because of this, the penalties would cause disproportionate harms to rights owners compared to users. Presumably, there is a small number of rights owners owning a large proportion of sound recordings, while the universe of users is potentially large. We assume any individual user will be filing a small number of NNUs, while any individual rights owner may need to respond to multiple NNUs. In addition, if a rights owner is “locked out” due to the penalty, there is a risk that users may opportunistically file large numbers of NNUs for that rights owner’s recordings, knowing there is no chance of an opt-out being filed.

Most importantly, we do not see anything in the statutory language that would support the creation of a “lock-out” mechanism such as the Copyright Office proposes.⁷

⁶ 84 Fed. Reg. at 1675.

⁷ While our comments here specifically address the “lock-out” mechanism for rights owners filing opt-outs, if the Copyright Office is convinced that the arguments are just as applicable to the user lock-out for abusive or fraudulent filing of NNUs, we do not object to the Copyright Office eliminating that proposal as well.

The law does allow civil monetary penalties for certain fraudulent filing of NNUs or opt-out notices.⁸ But what the Copyright Office proposes is separate and distinct from those penalties. Beyond the lack of support in the statute, the proposal lacks a level of detail about how its “lock-out” mechanism would work in practice—would the Register, for example, communicate to the affected rights owner or user the basis for its decision? Would its decisions be reviewable or appealable, and how would that review work?

We urge the Copyright Office to eliminate the “lock-out” provisions from its final rule because of these concerns. To the extent the Office is concerned about opt-out notices that are knowingly filed by individuals or entities which are not the rights owners of the recordings identified in NNUs, we offer the suggestion that where the Office believes an opt-out has not come from the bona fide rights owner, that it attempts to correspond with the filer to establish that they own the rights and take appropriate action from there. The Office can also monitor the filing of NNUs and opt-outs for potential fraud and abuse and revisit at a later time whether additional deterrents are needed.

We are concerned about the proposed \$75 fee for filing opt-out notices and the burden it will place on the enjoyment and exercise of pre-72 sound recording owners’ rights. We understand and appreciate the Copyright Office’s need to recover its costs in administering its statutory duties (though we question whether processing an opt-out notice would in practice cost \$75). But the fee places a burden on pre-72 sound recording owners—in some cases those will be major labels, but in many cases they will be individual owners and smaller entities; e.g., nonprofit historical institutions, “mom and pop” reissue labels, heirs, or Alaska Native and American Indian tribal entities.⁹ Thus, we have a strong interest in minimizing the burden this exception may place on them.

Ideally, there would be no fee involved with opting out of a NNU, but to the extent that is not feasible, we offer the following suggestions.

In principle, the burden of administering this exception should fall primarily on the user seeking to benefit from it rather than the rights owner seeking to maintain her exclusive rights. For this reason, the Copyright Office should consider building the cost of opt-out notices into the fee for filing NNUs.

The Office should also consider allowing rights owners to respond to multiple NNUs on a single opt-out notice. We recommended (and the Office agreed) that individual NNUs are needed for each sound recording (except in the case of albums comprised of tracks by the same recording artist). This ensures that sound recording owners, who have the burden of monitoring filed NNUs, receive appropriate notice. The same concern is not present for the filing of opt-out notices: presumably the Office will be able to notify putative users when an opt-out notice has been filed, regardless of whether other uses appear on the same opt-out notice.

⁸ 17 USC § 1401(c)(6).

⁹ At the same time, it should not be assumed that all NNU filers will be individuals or small, nonprofit entities—larger nonprofits with ample resources will likely take advantage of the §1401 exception, and, because the exception is only limited to noncommercial uses, not noncommercial users, we can anticipate even for-profit corporations filing NNUs.

Miscellaneous

We strongly object to the suggestion in footnote 53 that the Copyright Office may consider a renewal requirement for pre-72 schedules. There is no statutory authority for such a requirement. The Conference Report (at p. 15) in fact notes that pre-72 recordings “have existed and been commercially exploited for many decades without compliance with such formalities, and it would not be feasible to apply those formalities now.”

We disagree that the applicability of 17 USC § 1401(c) to foreign pre-72 sound recordings restored under Section 104(a) is uncertain. Sound recordings restored under Section 104(a) enjoy full federal copyright protection. Works protected under Section 1401, by contrast, are subject to a *sui generis* right. The exception in Section 1401(c) applies only to works protected under Section 1401, not to works protected by copyright. In addition, owners of works restored under Section 104(a) may file a Notice of Intent to Enforce (NIE) with the Copyright Office to enable remedies for infringement as against reliance parties. The Office should consider communicating to users through NNU online forms and instructions both as to (1) the fact that certain pre-72 sound recordings may be protected by copyright under Section 104(a) and thus not subject to the limitation in 1401(c), and (2) the existence of the Copyright Office’s records of NIE’s for restored works which would show whether a particular pre-72 sound recording is a restored work under Section 104(a) (though at the same time cautioning that the absence of a particular sound recording does not necessarily mean the sound recording is not a restored work under Section 104(a)).

We applaud the Copyright Office for including wildcard searching and encourage the implementation of similar search capabilities throughout its systems as it continues to modernize.

Conclusion

The Copyright Alliance thanks the Copyright Office for the opportunity to share our views on this NPRM. We look forward to answering any further questions the Office may have.

Respectfully submitted,

Keith Kupferschmid

Chief Executive Officer
Copyright Alliance
1331 H Street, NW, Suite 701
Washington, D.C., 20005

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