Submitted by Todd Dupler on behalf of the Recording Academy

Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of: **Notice of Proposed Rulemaking Regarding the Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited** **March 7, 2019**	**Docket No. 2018-8**

Comments of the Recording Academy

INTRODUCTION

The Recording Academy appreciates the opportunity to submit these comments to the U.S. Copyright Office in response to its Notice of Proposed Rulemaking (NPRM) regarding the noncommercial use exception to unauthorized uses of pre-1972 sound recordings. The Recording Academy ("Academy"), best known for celebrating artistic excellence through the annual GRAMMY Awards, represents thousands of performers, songwriters, producers, and engineers. The Academy is the only music trade association that represents all music professionals. It represents only individuals and has no company or corporate members.

GENERAL COMMENTS

The Academy applauds the Copyright Office for carefully considering all of the diverse viewpoints that were reflected in the comments submitted pursuant to the Notice of Inquiry (NOI). The NPRM represents a measured effort to allow potential users to effectively avail themselves of the special exception for noncommercial use of pre-1972 sound recordings created by Title II of the Music Modernization Act while still ultimately respecting – and protecting – the rights of artists, creators, and copyright holders.

The Academy supports and affirms several provisions of the proposed rule, many of which reflect recommendations included in its own reply comments to the NOI submitted on December 11, 2018 (Reply Comments). Specifically, the proposed rule provides a specific checklist of steps that a potential user must take to demonstrate a good faith, reasonable search. The steps outlined in the NPRM are simple, reasonable, and not burdensome. The steps are also thoughtfully sequenced so that a potential user is more likely to find a commercial use quickly and with a minimal amount of effort. Finally, the checklist covers a diverse range of potential commercial exploitation, including interactive streaming, non-interactive streaming, and physical sales. Although the checklist is deficient in two specific areas discussed in detail below, as a whole the checklist provides a framework for a thorough and comprehensive search to determine if a work is being commercially exploited.

In addition, the proposed rule includes a search of the SoundExchange ISRC database as a necessary step in conducting an effective search. As the Copyright Office states in the NPRM, "the database provides indicia of exploitation on a wide expanse of music services." Specifically, searching the ISRC database satisfies the need to determine if a sound recording is being exploited on non-interactive digital streaming services. As noted in the Academy's Reply Comments, non-interactive services represent a significant segment of the market for pre-1972 sound recordings.[1]

Finally, the proposed rule provides that a potential user must provide a description of the desired noncommercial use when filing the Notice of Noncommercial Use (NNU) with the Copyright Office. Specifically, the NPRM states that the description should detail "the proposed use clearly and accurately, with enough detail to provide the rights owner with enough information to meaningfully evaluate the use." The Academy agrees that this requirement is important and will enable rights holders to make a fully informed decision about whether to opt out of the noncommercial use.

SEARCHES NOT REQUIRED IN THE NPRM

Although the Academy generally supports the checklist framework established by the NPRM for conducting a search, the proposed rule does fall short in a few key areas. Notably, the NPRM does not include a search of services that distribute user generated content (UGC) such as YouTube. As noted by the Academy in its Reply Comments, Congress plainly considered UGC platforms as part of a good faith, reasonable search.[2] Excluding such platforms from the search prescribed in the final rule is a clear disregard of Congressional intent. As noted in the Academy's Reply Comments and reiterated in

[1] Recording Academy Reply at 3.

[2] *Id.* at 4.

the NPRM, a report prepared on behalf of the Chairmen and Ranking Members of the Senate and House Judiciary Committees states that a user should "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).[3] The NPRM acknowledges this directive but proceeds to ignore it without adequate justification.

The rationale for Congress' emphasis on UGC platforms is easy to discern. In 2018, YouTube accounted for almost half of all on-demand music streaming globally, more than every other streaming service combined.[4] While a search of major search engines, as stipulated in the proposed rule, may potentially yield a result for a sound recording featured on YouTube, a user can very easily search YouTube directly. In the NPRM, the Copyright Office asserts that YouTube may host content that has not been authorized by the rights holder. The prevalence and proliferation of unauthorized copyrighted content on YouTube is a separate problem worthy of consideration by the Copyright Office and lawmakers. Nevertheless, in this context, a music service that represents half of the entire streaming marketplace cannot be dismissed, particularly when that dismissal also represents a rejection of congressional direction. In addition, YouTube's Content ID system provides an avenue for a rights holder to authorize the commercial use of a sound recording that has not otherwise been authorized for such use. Accordingly, the Academy strongly urges the Copyright Office to add a search of YouTube as one additional step in the checklist in the final rule.

In addition, the NPRM only requires the search of one of the major subscription streaming services. The Recording Academy noted in its Reply Comments that subscription streaming services often secure exclusive streaming rights for certain artists or catalogs of music. Because of this common business practice, searching only one subscription service is not sufficient to conduct a full search. In the NPRM, the Copyright Office specifically requests comment on whether users should be required to search a greater number of services. At a minimum, the final rule should require potential users to search at least two subscription streaming services. Even Public Knowledge conceded in its initial comments that searching two services was reasonable.[5]

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[3] *Report and Section by Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees* (October 19, 2018), https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf.

[4] Roy Trakin, *IFPI Report Finds Streaming Continues to Rise, YouTube Dominates Online Listening,* Variety (October 9, 2018), https://variety.com/2018/music/news/ifpi-report-streaming-youtube-online-listening-1202974035/.

[5] *See* Public Knowledge Initial at 8 ("users should be required to search no more than one to two services to determine commercial availability.").

Adding these two simple searches to the steps outlined in the NPRM would not render the checklist burdensome or complicated. At most, these searches would add minutes, not hours, to a potential user's search activity. As the Academy stated in its Reply Comments, "Given the tremendous value of the benefit the user will receive – a royalty-free license to use a sound recording – taking the time to engage in a thorough search is not unreasonable."[6]

FEE FOR OPT-OUT NOTICE

The Recording Academy is also concerned about the proposed fee of $75 for a rights holder to file an Opt-Out Notice in response to a NNU. While $75 per filing may be a manageable financial burden for a major record label, the same may not be true for a smaller independent label or for artists (or their estates) that control the rights to their recordings. A filing fee makes sense for the prospective user who wishes to take advantage of this generous exception, which is in effect a royalty-free license. But it makes less sense for a rights holder who is simply seeking to protect their rights by opting out of the noncommercial use. The Copyright Office understandably seeks to recoup the costs of administering this new provision of the law. The burden of these costs should fall on the users who will benefit from it, not on rights holders.

Thank you again for the opportunity to comment on this process.

Respectfully Submitted,

Todd Dupler

Senior Director, Advocacy & Public Policy
Recording Academy
1200 G Street NW, Suite 950
Washington, D.C. 20005

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[6] Recording Academy Reply at 4.