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 Inquiry Regarding the Noncommercial Use Exception to Unauthorized Uses of Pre-1972 Sound Recordings	**Docket No. 2018-8**
December 11, 2018	

Reply Comments of the Recording Academy

INTRODUCTION

The Recording Academy appreciates the opportunity to submit reply comments to the U.S. Copyright Office on the Notice of Inquiry 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.

BACKGROUND

Title II of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (Public Law No: 115-264), also known as the "Classics Protection and Access Act," rectifies an historic injustice for recording artists and musicians who recorded music prior to February 15, 1972. Although the Digital Performance Right in Sound Recordings Act of 1995 created a limited performance right for sound recordings in digital audio transmissions, artists who recorded music prior to 1972 have not always enjoyed the benefits of that limited right.

Because sound recordings were not brought into federal copyright law until 1972, some digital services exploited this loophole to use some of our most iconic music, recorded prior to 1972, without paying any royalties to the artists who created it. The ambiguity led to lawsuits and settlements to establish that digital music services should compensate artists for pre-1972 recordings. But our great legacy artists should not have to fight in court on a state-by-state basis to get the compensation they deserve.

Thankfully, Title II of the Music Modernization Act removes the legal uncertainty that deprived America's great legacy artists of compensation by closing the pre-1972 loophole. The new law requires digital radio to pay royalties for all the music it plays under the same statutory license applied to sound recordings made after 1972 or under direct licensing agreement with the copyright owner. Artists will directly receive 50 percent of the royalties through SoundExchange.

A key compromise made in Title II is to allow an exception for the noncommercial use of pre-1972 sound recordings. It is a grant of a royalty-free license. Importantly, this extraordinary exception is limited only to sound recordings that are not being commercially exploited.

GENERAL COMMENTS

In the initial round of comments, Public Knowledge and the Electronic Frontier Foundation (EFF) urges the Copyright Office to make the process for using the noncommercial use exception as easy as possible. EFF goes so far as to conclude that the Copyright Office "should craft a safe harbor and reporting requirements that maximize the use of the new noncommercial use procedure." Similarly, Public Knowledge states that the Copyright Office should "strike a practical balance between the interests of rights owners and potential users." But there is nothing in the statute itself or in the legislative history that promotes such an understanding. On the contrary, the rights of the copyright owner are preeminent. The potential user must first determine that a sound recording is not being commercially exploited. Even after such a determination is made, the rights owner still has the ability to opt out of the noncommercial use.

The primary purpose of Title II is to ensure that recording artists and rights holders finally receive remuneration for the commercial exploitation of their pre-1972 work. Accordingly, the Copyright Office's interest is not in promoting the noncommercial use of those pre-1972 recordings, its interest is in protecting the rights of artists and rights holders in accordance with the statute. The interpretation of Title II suggested by Public Knowledge and EFF would effectively turn the statute on its head. The Copyright Office should guard against defining the non-commercial use provision of Title II so broadly that it swallows the new right that has been created.

GOOD FAITH, REASONABLE SEARCH

In their respective comments, the Electronic Frontier Foundation and Public Knowledge each advance the idea that a potential user should not have to search for a recording among non-interactive digital streaming services. Public Knowledge, for example, states that non-interactive services "are not usefully searchable for specific tracks." It goes on to assert that "Users often cannot discover independently whether any given song is available on the platform except by listening to hours of non-interactive streaming music, during which time the desired track may (or may not) be played." Similarly, EFF states that "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."

Excluding entirely non-interactive services that utilize the Section 114 statutory license would immediately render a search to determine if a track is being commercially exploited both unreasonable and in bad faith. The non-interactive streaming market is a significant platform for the use of pre-1972 recordings. Furthermore, the exploitation of pre-1972 recordings without compensation to the artists and rights holders was the primary impetus for Title II. Legendary recording artist, songwriter, and producer Booker T. Jones highlighted this issue in his testimony before the House Judiciary Committee in support of the CLASSICS Act[1] on January 26, 2018:

> Let's look at just one example. SiriusXM offers dozens of music channels where you can hear recordings made before 1972. They have a dedicated 40s channel, a 50s channel, a 60s channel, and many others that profit from classic works created before 1972. The availability of all of that classic rock, blues, jazz, and soul music is a key selling point for SiriusXM's customers and has helped the company attract over 32 million subscribers. So SiriusXM uses this catalog of great music to bring in billions of dollars in revenue, but they don't pay anything for the privilege of using the recorded track.[2]

It's impossible to conduct a good faith, reasonable search to determine whether a sound recording is being commercially exploited without including the non-interactive services that represent such a significant segment of the market for pre-1972 recordings.

Fortunately, there is a reasonable solution to satisfy this necessary due diligence. SoundExchange, the organization that collects and distributes royalties under the Section 114 license, provides free, public access to search its repertoire database. In its comments, SoundExchange demonstrates how simple it is to use the online IRSC Search tool for the database and states definitively that "The recordings listed in SoundExchange's repertoire database are being commercially exploited by their rights owners under the statutory licenses, and hence cannot be cleared for noncommercial use through the process provided by Section 1401(c)." In short, SoundExchange's ISRC Search tool is indispensable to a good faith, reasonable search.

The inclusion of a track in the repertoire database is itself an indication that the track is being commercially exploited. Accordingly, searching the database provides an easy, efficient method for a potential user to cover the non-interactive segment of the music streaming marketplace. Checking the SoundExchange database is not by itself

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[1] Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act, H.R. 3301, 115th Cong. (2017)

[2] *Music Policy Issues: A Perspective from Those Who Make It: Hearing Before the H. Comm. On the Judiciary*, 115th Cong. (2018) (statement of Booker T. Jones, Recording Artist, Songwriter, Producer).

sufficient to conduct a full search of the music marketplace, but it should be one requisite component of a full search. A2IM and RIAA also point out that searchable playlists for SiriusXM are available on Dogstar Radio. This provides yet another avenue for conducting a good faith search of the non-interactive streaming market and demonstrates that calls to ignore non-interactive streaming are misguided.

In addition, Public Knowledge suggests that "the Office require that users search no more than one to two services." Such a weak, narrow search would not represent good faith and would not be reasonable. Although a broad catalog of music is increasingly available across all major streaming platforms, exclusive streaming arrangements still occur. For example, Garth Brooks' catalog of music is only available exclusively on Amazon,[3] while Beyoncé's 2016 release *Lemonade* was released exclusively on Tidal.[4] Although these artists do not represent pre-1972 catalogs, they do illustrate that various business arrangements still occur in the marketplace. Furthermore, it's important to note that a good faith, reasonable search must also include user-uploaded streaming platforms such as YouTube. As A2IM and RIAA noted in footnote 4 of their joint comments, such platforms were contemplated by Congress as an example of commercial exploitation.[5]

In contrast to the very limited and inadequate search suggested by Public Knowledge, A2IM and RIAA propose a nine-step search process in their initial comments. Taken together, these various searches cover the full range of potential commercial exploitation, including streaming, downloads, physical sales, and synchronization. The steps as laid out in the A2IM/RIAA comments demonstrate that a potential user can engage in a systematic, comprehensive search with minimum effort. Nearly all of the steps outlined by A2IM and RIAA can be accomplished online in a relatively short period of time. 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.

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[3] Melinda Newman, *Garth Brooks Reveals Amazon Streaming Deal Details: Exclusive*, Billboard (October 19, 2016), https://www.billboard.com/articles/news/7549052/garth-brooks-streaming-amazon-music-unlimited-exclusive.

[4] Dan Rys, *Beyoncé's 'Lemonade' Release: Tidal Has Streaming Exclusive 'In Perpetuity,' Purchase Exclusive Ends at 10 P.M.,* Billboard (April 24, 2016), https://www.billboard.com/articles/news/7341800/how-long-beyonce-lemonade-tidal-streaming-exclusive.

[5] "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." *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.

CONCLUSION

Title II of the Music Modernization Act is critically important to members of the Recording Academy, many of whom have been deprived for years of meaningful income for their work. Some stakeholders have suggested that the Copyright Office must consider a false dichotomy between rights holders and artists on one hand and potential users of their work on the other. The Academy respectfully asks that you consider the words of former Register of Copyrights Barbara Ringer, when she testified before Congress in 1975: "the public interest is badly served when authors are badly served."[6] In short, copyright owners and artists themselves represent the public interest. This principle should guide the Copyright Office's decisions regarding the implementation of the Music Modernization Act.

Thank you again for the opportunity to provide input into this process. The Recording Academy stands ready to participate further or provide any additional information.

Respectfully Submitted,

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[6] *Copyright Law Revision: Hearing on H.R. 2223 Before the Subcomm. On Courts, Civil Liberties and the Admin. of Justice of the H.Comm. on the Judiciary*, 94th Cong. 116 (1975) (statement of Barbara Ringer, Register of Copyrights).