

**Before the
Library of Congress
United States Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000**

In the Matter of Noncommercial Use of
Pre-1972 Sound Recordings That Are Not
Being Commercially Exploited: Notice of
Proposed Rulemaking

Docket No. 2018–8

COMMENTS OF PUBLIC KNOWLEDGE

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Public Knowledge appreciates the opportunity to comment in the above-captioned proceeding.

While we applaud the Office for declining to adopt some of the most extreme search parameters (such as YouTube, IMDb, and PRO databases) suggested by industry commenters, and appreciate its efforts to balance the competing interests of various stakeholders, the proposed rules go well beyond the boundaries of what is authorized by the statute. In its proposed requirements that a user must satisfy to qualify for the safe harbor definition of a reasonable search, the Office disregards unambiguous Congressional intent and substitutes its own judgment for what it apparently regards as a more reasonable set of search categories. This could subject the proposed rule to legal challenge and uncertainty.

In addition, we have a number of other concerns about the contents of the NPRM, which are detailed below. Most importantly, we are gravely concerned that the proposed filing fee for the notice of noncommercial use will largely defeat the basic purposes of the statutory provision, by imposing a significant per-work, per-use cost that will render uneconomical most uses of otherwise-unavailable and uncommercialized recordings. At a minimum, the amount of the fee appears excessive and unjustified.

I. The NPRM's Search Requirements Contradict The Unambiguously Expressed Intent Of Congress

In defining the contours of the safe harbor, the NPRM would require searches of several categories not contemplated by the statute, including search engines, SoundExchange's ISRC database, and physical product retailers. The Copyright Office has no statutory authority to

require any of these as part of the 1401(c)(4) safe harbor.¹ The Supreme Court has held that an agency may not make an “addition to the statute of something which is not there.”²

The Office was tasked with promulgating a safe harbor that describes a “good faith, reasonable search **under paragraph (1)(A)**”--a section which in turn *only* requires users to conduct a search “(i) in the records of schedules filed in the Copyright Office as described in subsection (f)(5)(A); and (ii) on services offering a comprehensive set of sound recordings for sale or streaming.” Nowhere does the statute specify that a user must search all possible, or even likely, venues of commercial activity. And contrary to the NPRM’s misreading of the statute,³ section 1401(c) neither requires nor authorizes broader searches “to determine whether” a sound recording is being exploited “on services offering a comprehensive set of sound recordings for sale or streaming.” Instead, the express language of the statute only requires reasonable searches in the two categories listed in section 1401(c)(1)(A) “**in order to determine whether** the sound

¹ This is especially true for the proposed 201.37(c)(1)(v), requiring users to search major sellers of physical product. The most generous reading of the search engine and ISRC requirements are that they serve as a reasonable proxy for locating works on “services offering a comprehensive set of sound recordings for sale or streaming.” The use of the word “services” is plainly a proxy for digital outlets. Unlike online providers of streaming and digital downloads, physical retailers are not referred to as such in any conventional or reasonably expected situations. Not surprisingly, both the Music Modernization Act and other provisions in Title 17 expressly reflect this common usage of the word “service” to refer to outlets that transmit music to customers in some electronic form as opposed to providing a market for physical copies. See, e.g., Pub. L. 115-264 (defining “service” to mean “any site, facility, or offering by or through which sound recordings of musical works are digitally transmitted to members of the public”).

² *U.S. v. Calamaro*, 354 U.S. 351 (1957). See also *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36 (1st Cir., 2015) (“Where Congress has spoken with specificity, an agency may not promulgate regulations that are an attempted addition to the statute of something which is not there, even if the intent behind the attempted addition is consistent with the intent behind the authorizing statute”) (internal quotations removed); *City of Tucson v. Commissioner*, 820 F.2d 1283 (D.C. Cir., 1987) (Treasury Department attempts to craft a regulation more reasonably “straightforward” than the statutory text were “not a reasonable implementation of the legislative mandate, but rather an impermissible enlargement by an unnatural construction of the statutory language.”); *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) (when “the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation.”); *Comm’r v. Acker*, 361 U.S. 87, 92 (1959) (finding that a regulation which constituted an addition to the tax code is not permitted by law); *City of Tucson v. Commissioner*, 820 F.2d 1283, 1288 (1987) (noting that courts regularly annul regulations that “attempt[] to enlarge the scope of the statute”) (internal quotations removed).

³ NPRM at 1667.

recording is being commercially exploited by or under the authority of the rights owner” (emphasis added). And the reasonable steps that the Copyright Office may require under section 1401(c)(3)(A) are necessarily and expressly limited to the universe of search obligations under section 1401(c)(1)(A). There is no ambiguity here whatsoever.

“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843. An agency’s desire to seek “compromise” among stakeholders does not expand the scope of its mandate, and “the desire to make everyone happy” is not a legally cognizable source of authority. The resulting regulation must exist fully and comfortably within the explicit bounds of the statutory grant. By straying outside the unambiguous parameters set by Congress, the NPRM exceeds the Copyright Office’s authority under the Music Modernization Act, and may subject the rule to legal challenge.

II. The Office’s Proposed Search Requirements are Extremely Likely to be Duplicative

Even assuming that the Office has the authority to require searches of general web search engines and/or the SoundExchange ISRC database, in addition to a direct search of digital music services themselves, the proposed requirements are excessive and unjustified in other ways. Most importantly, the proposed search steps, taken together, are extremely likely to be duplicative of one another--a flaw that the Office wisely recognizes as problematic and which it apparently is trying to minimize.⁴

⁴ E.g., NPRM at 1663 (expressly discussing goal of “reduc[ing] the likelihood of duplicative searching”).

The high risk of duplicative searching, to the point that it will likely be inevitable for almost all users, is most apparent in a comparison of the results of web searching and IRSC database searching to searches on major streaming services. If a user searches on either Google or the IRSC database, they are extremely likely--perhaps practically certain--to find commercial exploitation of any recording that would also appear in a direct search of a streaming service. We are not aware of any evidence to the contrary, and in support of this conclusion, we searched for every song identified on Billboard's list of number-one singles (by physical retail sales) for both 1945⁵ and 1955.⁶ In every instance, the song was readily found in SoundExchange's IRSC database when searching by artist name and track title, and when the same information was searched on Google, the results also immediately identified the recording as available on multiple streaming services. For example, a search for "Don't Fence Me In" by Bing Crosby and the Andrews Sisters returned the following, which is representative of the results for other recordings:

⁵ See https://en.wikipedia.org/wiki/List_of_Billboard_number-one_singles_of_1945.

⁶ See https://en.wikipedia.org/wiki/List_of_Billboard_number-one_singles_of_1955.



don't fence me in bing crosby andrews sisters



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About 21,400,000 results (0.61 seconds)



Don't Fence Me In - Bing Crosby & The Andrews Sisters - YouTube

<https://www.youtube.com/watch?v=vMnLoOnrwbq>

Lyrics

Oh, give me land, lots of land under starry skies above
Don't fence me in
Let me ride through the wide open country that I love
Don't fence me in... [More](#)

Available on



Spotify



Play Music



Deezer



iHeartRadio

Artist: [Bing Crosby](#)

TV Show: [The Singing Detective](#)

Genre: Pop

Awards: [Grammy Hall of Fame](#)

Other recordings of this song

Hollywood Canteen - Don't Fence Me In
The Andrews Sisters · 1944



Don't Fence Me In
Roy Rogers · 1944



Don't Fence Me In
Gene Autry · 1982



[View 5+ more](#)

At a minimum, if the Copyright Office is going to persist in requiring searches of general search engines and/or the IRSC database, there does not appear to be any justification for also requiring direct searches of a streaming service itself. With the extreme likelihood of duplication, adding the latter on top of the former will only serve to add time and potential subscription fees to every user's burdens, without producing any substantial offsetting benefit to rightsholder interests.

III. The Congressional Report Is Not Official Legislative History And Does Not Carry Any Persuasive Weight

We note that while the Office refers back to multiple statutory provisions to justify its authority to provide guidance on the meaning of “non-commercial use,” it undertakes no such exercise to explain its apparent authority to expand the language of the statute's search requirements. Its justification, instead, appears limited to a desire to seek “consensus,” as well as a “congressional report” compiled and published by former Representative Bob Goodlatte.

As we pointed out at length in our reply comments, this document is not a persuasive source of authority to anything beyond the personal opinions of Representative Goodlatte. It is manifestly *not* a conference report, because there never *was* a conference on the Act. Nor could it have informed members at the time they voted upon the bill, because there is no indication that this “report” was part of the Congressional record, or even existed, prior to the final passage of the Act in both the House and Senate. It was generated completely *post hoc*, and as the Seventh Circuit notes, “[s]tatements and thoughts that not only *did not* but also *could not* have come to the attention of Congress at the time do not reveal the process of deliberations.”⁷ The Supreme Court has specifically held that “Subsequent writings may be nothing but wishful thinking, and unless they are uttered as part of the process of enacting a later law (and therefore show

⁷ *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1439 (7th Cir. 1988).

assumptions on which Congress as a whole acted at least once) they are of no account.”⁸ The Goodlatte Letter is no more controlling in its interpretations of section 1401 than a member’s personal blog post.

The only context in which the Office can responsibly rely on the Goodlatte Letter is if it were to simultaneously canvass the recollections and representations of many other Senators and Representatives involved in the negotiations--focusing primarily on the architects of the safe harbor, Senators Ron Wyden and Chris Coons.

Setting aside the procedural, legal, and persuasive deficiencies of the Goodlatte Letter, it is well established that legislative history cannot override the plain text of a statute.⁹ This is the *especially* the case when the entirety of the “persuasive” language cited amounts to one solitary word.¹⁰

IV. At a Minimum, the Office Must Make Clear To Users That They Need Not Comply With the Safe Harbor to Comply with the Statute

The Office, if it insists on pressing forward with the rule as currently drafted, must ensure that it does not, in communicating with users and processing their NNUs, conflate the requirements of the safe harbor and with those of the exemption. The exemption requires **only** a search of the Pre-72 Schedules and “services offering a comprehensive set of sound recordings for sale or streaming.”¹¹ In other words, *all* users must comply with 201.37(c)(1)(i), and some

⁸ *Quern v. Mandley*, 436 U.S. 725, 736 (1978) (“Subsequent writings may be nothing but wishful thinking, and unless they are uttered as part of the process of enacting a later law (and therefore show assumptions on which Congress as a whole acted at least once) they are of no account.”); see also *Covalt* at 1438 (“[S]ubsequent legislative history’ is not helpful as a guide to understanding a law. Even the contemporaneous committee reports may be the work of those who could not get their thoughts into the text of the bill.”).

⁹ *See, e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (“Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.”).

¹⁰ In this case, “robust.” NPRM at 1663.

¹¹ 17 U.S.C. § 1401(c)(1)(A).

permutation of (iii) or (iv) (focusing only on a work's availability for download). Compliance with any other enunciated requirements is optional, so long as the user wishes specifically to qualify for a safe harbor protection. It is thus important that the Copyright Office not reject NNUs for not meeting every step of the safe harbor checklist; the NNU process is required for *all* users of the 1401 exemption, not merely those seeking safe harbor. However, as currently drafted under the proposed rules, the Office would seemingly reject every notice that does not include a certification that the user performed all of the searches required to qualify for the safe harbor under section 1401(c)(4)(B).¹² This defect must be fixed in the final rules.

V. The Proposed Filing Fees for Notices of Non-Commercial Use are Excessive, Unjustified, and Unreasonable

Although there is no express grant of authority for a filing fee for NNUs, the NPRM proposes that filers be required to pay \$75 in order for each NNU to be accepted. We have several major concerns with this proposal.

First, the Office does not appear to have given any consideration to the effect of any fee--let alone one in that amount--on filings for the uses and purposes intended by section 1401(c). By their nature, these noncommercial uses will neither be motivated by, nor likely result in, significant or foreseeable financial revenues or other material rewards. Thus, unlike the filing fees associated with commercial uses, there is a much higher risk that a substantial fee will be uneconomical for many users and/or otherwise deter the use of this provision. The result is that a fee could severely diminish the number of pre-1972 sound recordings that could be made available and/or used under section 1401(c), and which might otherwise lie unavailable and unused. Congress plainly intended to mitigate this risk and make uncommercialized recordings

¹² See NPRM at 1677 (proposing language for 37 CFR 201.37(d)(1) and (d)(2)(vi)).

more widely available by including section 1401(c) in the first place, and the Office must weigh this risk from the proposed filing fee.

Second, the proposed fee of \$75 is excessive and unjustified, for several different reasons:

- The NPRM compares the NNU fee to the fee for a notice of intention to make and distribute phonorecords under section 115, which is also set at \$75. But the more analogous fee in the Copyright Office’s current schedules would be for the notice of use of sound recordings under the section 112 and 114 statutory licenses. That latter fee is set at \$40, and there is no apparent justification for why the proposed NNU fee is higher.
- Under section 708, the Office must set any fee for “other services . . . based on the cost of providing the service.” Nothing in the NPRM comes anywhere close to an actual analysis or prediction of the costs of accepting NNUs as a justification for the proposed fee amount.

VI. Conclusion

Public Knowledge appreciates the opportunity to comment on the proposed rule. We look forward to further discussing our concerns with the Office, and reviewing the Office’s response to our concerns in promulgating the final rule.¹³

¹³ See *Reytblatt v. United States NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997) (“An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.”); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973); *St. James Hospital v. Heckler*, 760 F.2d 1460, 1470 (7th Cir. 1985) (rules which fail to respond to significant arguments raised in comment are arbitrary and capricious).