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

Docket No. 2018–8

COMMENTS OF PUBLIC KNOWLEDGE

Meredith Rose
Policy Counsel
Public Knowledge
1818 N St. NW, Suite 410
Washington, DC 20036

November 26, 2018

Public Knowledge appreciates the opportunity to comment on the Notice of Inquiry ("NOI") in the above-captioned matter.

General Principles and Considerations

In designing the safe harbor, and the Copyright Office should keep in mind several guiding principles, which cut across many of the specific questions asked in the NOI.

1) The search burdens imposed on a user must be reasonable and proportional.

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. This imperative comes from the express language of the Classics Protection and Access Act[1] (a title that itself reflects the intended balance). In order to determine whether a recording is being commercially exploited, the statute does not require an open-ended search for all possible manifestations and indicators of commercialization, but instead limits the search burden on a user to two specific places: (i) in the "records of schedules" filed at the Office by rights owners for pre-1972 recordings, and (ii) "on services offering a comprehensive set of sound recordings for sale or streaming."[2] The search results and ultimate conclusions need not be absolutely correct; instead, the user must make a "good faith, reasonable" effort.[3] And the search requirements of the safe harbor are necessarily even more selective, reflecting a particular subset of the larger universe of potential search methods that are "sufficient, but not necessary" to qualify as a good faith, reasonable search.[4]

In deciding what "reasonable" steps to require for the safe harbor, the Copyright Office's lodestar must be proportionality. This means that the burdens on the user from a particular search requirement (in time, effort, expense, and discouragement from making more works available through the noncommercial use mechanism) should be compared to the potential benefit to rights owners (primarily, in terms of the likelihood of discovering commercial exploitation of a recording). Search steps should only be required when their necessity and benefits to rights owners outweigh their costs. Note also that the marginal costs and benefits of an additional search step must be evaluated in the context of other requirements. For example, if these benefits of searching one particular service are essentially duplicative of others, it is difficult to imagine any justification for requiring that additional search.

---

[1] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 201.
[2] 17 U.S.C. § 1401(c)(1)(A).
[3] *Id.*
[4] *Id.* § 1401(c)(4)(B).

2) ***The number of pre-1972 sound recordings that are still being commercially exploited are vastly outnumbered by those that have no commercial value or interest.***

The imperative of proportionality reflects not only the balance in the statute, but also the underlying reality of orphan works. As the Copyright Office has repeatedly recognized, this is an endemic problem in the U.S. copyright system, with its combination of long copyright terms and absence of formalities.[5] The older a copyrighted work gets, the higher the risk that it will be orphaned. When a user is unable to make a desired use of a typical orphan work, the deadweight loss to society is undeniable, given the absence of plausible benefit to the rights owner.[6] The noncommercial use mechanism in the Classics Protection and Access Act is designed to mitigate such losses, but it can only achieve this goal through proportionality, limiting the search burdens so that they do not render the exception useless in practice.

As the Office found in its report on pre-1972 recordings, while their value "varies substantially … the vast majority of pre-1972 sound recordings are either unpublished (such as field recordings) or, if published, have ceased their commercial life."[7] As a consequence, while false negatives are of course possible in user searches for ongoing commercial exploitation of these recordings, they will very likely be rare. Instead, the far more typical risk will be an orphaned and/or commercially ignored recording going unused.

3) ***Rights owners have several other layers of protection in the non-commercial use mechanism, beyond the requirement that a recording is not being commercially exploited.***

This would be a significantly different inquiry if rights owner interests in this use mechanism relied entirely on the restriction to recordings not being commercially exploited. But that is not the case. Instead, rights owners also have recourse in multiple other provisions:

- A use must be "noncommercial" in nature, which on its face will exclude many of the typical licensed activities from which a rights owner might earn substantial revenue.[8]
- The exception for the use only extends to the particular user who files the notice, and the particular use described in the notice. The rights owner otherwise maintains her exclusive rights.[9]

---

[5] *E.g.*, U.S. Copyright Office, Orphan Works and Mass Digitization 10 (2015).
[6] *Id.* 33-35.
[7] U.S. Copyright Office, Pre-1972 Sound Recordings, 101 (2011) (emphasis added).
[8] 17 U.S.C. § 1401(c)(1).
[9] *See id.* § 1401(c)(1)(A).

- A rights owner has 90 days to opt out of any non-commercial use at their discretion, even when it meets all of the other requirements.[10]

In addition, the owners of commercially valuable pre-1972 recordings have a strong incentive to make the required filings necessary to recover statutory damages and attorneys' fees. These records operate as another de facto opt-out from the noncommercial use mechanism.[11] Thus, the actual risk of a false negative is vanishingly small, and the allocation of burdens should reflect that balance.

4) The requirements of the safe harbor should be broadly applicable and accessible to a wide variety of potential users.

Search requirements should not be so onerous that they would deter users from availing themselves of the safe harbor, or so technical that the safe harbor would only be meaningfully available to specialists or well-resourced institutions. As it formulates the safe harbor, the Office should ask itself whether each requirement could be reasonably applied to an average consumer, casual hobbyist, or small community nonprofit. If the answer at any point is "no," then the Office should search for alternatives that make it meaningfully accessible to those low-resource groups.

The safe harbor represents only a *delineated subset* of searches that would fulfill that requirement, offered as a useful guidepost for users who do not have the particularized background to know beforehand where to look and for how long. As such, the Office should refrain from requiring specialized technology or search methods that are used primarily by large institutional actors. For example, while audio fingerprinting can be used to accurately identify and locate individual tracks, it is a complex technology that is unknown to (and out of reach of) most potential users, and as such is inappropriate for the current safe harbor.

Responses to Specific Questions Posed in the NOI

A1. What would constitute a reasonable search of the Office's database of Pre-1972 Schedules, which will index information including the name of the rights owner, title, and featured artist for each sound recording filed on a schedule?

As mentioned above, the average non-specialist searches for recordings based on featured artist and track title information. This practice should underpin the safe harbor for two reasons.

[10] *Id.* § 1401(c)(1)(C).
[11] *See id* § 1401(c)(1)(A)(i).

First, broad parameters cast a wider net, and increase the likelihood of a user "catching" the correct result in their search. By contrast, more granular input requirements increase the likelihood of user error or data mismatch that results in a false negative. Any user who engages in a good-faith examination of broad-parameter search results, in an attempt to determine which (if any) is applicable should be deemed to have conducted a "reasonable search" of the Pre-1972 Schedules.

Second, it is important to note that Public Knowledge supports the creation of a more robust, data-rich search of schedules that will provide parameters such as recording year (or range of years), label information, and lyrics data (to assist in in identifying potentially mis-named tracks) to searchers who wish to utilize them. However, while these parameters are useful, they represent a level of detail about the sought-after recording that is not immediately available to a non-specialist user. As a result, these parameters should not be required as part of a "reasonable search" of the Pre-1972 Schedules.

A2. Please suggest specific ''services offering a comprehensive set of sound recordings for sale or streaming'' that users should be asked to reasonably search before qualifying for the safe harbor.

For reasons that are explained below, we propose that the Office require that users search no more than one to two services. The largest digital delivery services serve as a reasonable proxy for commercial availability. These include Apple Music, with over 45 million tracks;[12] Amazon Music Unlimited, with over 40 million tracks;[13] and Spotify, with over 35 million tracks.[14] Although the iTunes music store boasts a substantial catalog, recent reports have suggested that it will close in 2019, making it inappropriate to include in a safe harbor.[15]

A3. Which criteria should be used to identify music streaming services that should be searched, now and in the future?

---

[12] Lexy Savvides and Vanessa Hand Orellana, *Spotify vs. Apple Music: Which is the best music service?*, CNet (Oct. 7, 2018), https://www.cnet.com/news/spotify-vs-apple-music-which-is-the-best-music-service-compared-comparison/.

[13] Tom Bruce, *Spotify vs Amazon Music vs Apple Music vs YouTube Music: Which is the best music-streaming service?*, Expert Reviews (Jul. 20, 2018), https://www.expertreviews.co.uk/technology/1405999/spotify-vs-amazon-music-vs-apple-music-vs-youtube-music-which-is-the-best-music-streaming.

[14] Savvides, *supra*.

[15] Paul Resnikoff, *Apple Is Shutting Down iTunes Music Downloads on March 31st, 2019, Sources Say*, Digital Music News (Apr. 6, 2018), https://www.digitalmusicnews.com/2018/04/06/apple-shutting-itunes-music-downloads/.

The structure of the safe harbor should be based around the dual principles of reasonableness and proportionality. The services identified in the safe harbor should be chosen to create a reasonable likelihood that a user will locate a track if it's commercially available, while avoiding unnecessary costs associated with redundant searches.

a. Accessibility to users without a specialist background

As mentioned above, services included in the safe harbor should be widely known to non-specialists, with search functions available to individual users.

b. The uniqueness and depth of pre-1972 offerings

It is difficult to know whether major services offer meaningfully different selections of pre-1972 works. Major delivery services share largely redundant modern catalogs with one another (save for occasional periods of exclusivity for new releases); if legacy offerings are similarly homogeneous, then the value of added searches beyond the first decreases sharply, while the likelihood of user error from engaging in repetitive, time-consuming searches increases.

In order to make an informed decision about the appropriate services to include in the safe harbor, the Office should request additional information regarding the size and content of the legacy catalogs from those services being considered for inclusion. This information will assist the Office in determining whether the *corpora* of works available through these services are sufficiently divergent from one another to warrant separate searches. The Office can revisit this requirement in the future as necessary, as services add (or subtract) legacy works from their offerings.

c. Interactivity

Non-interactive services should be excluded from the safe harbor because they are not usefully searchable for specific tracks. When a user searches for a track on a non-interactive service, they are by *design* not given access to the subject of their search, but are often funnelled into playlists of related music based on that search. 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.

d. Free-to-search

It would be inappropriate for the Copyright Office to require that a user search the catalog of a service where a subscription is required to access the search function. such a requirement would disproportionately impose costs on low-resource and nonprofit users.

A4. Is it reasonable to expect a user's search to encompass music distribution services, such as CD Baby, TuneCore, or The Orchard?

Under the express language of the statute, the search burdens are limited to (i) the Pre-1972 Schedules and (ii) "services offering a comprehensive set of sound recordings for sale or streaming."[16] Music distribution services such as those mentioned meet neither of these criteria; they do not directly offer recordings for sale or streaming, nor do they offer a comprehensive set of recordings. CD Baby focuses on currently-active independent artists with a recent catalog,[17] while TuneCore and The Orchard do not appear to offer any search function at all through their online portals. Moreover, TuneCore and The Orchard specifically advertise themselves as intermediaries who can *place* music on major delivery platforms,[18] making their addition to any search requirements redundant.

Per both the express language and intent of the safe harbor, consumer-facing services that offer music "for sale or streaming" must be sufficient to avail oneself of the safe harbor. Artist-oriented distribution and publishing services, business-to-business licensing services, and synchronization rights searches are all inappropriate to include in a safe harbor.

A5. Are there other sources to which the Office should look that may demonstrate commercialization of physical copies of recordings, e.g., vinyl records or compact discs?

The statute requires that in order for a work to be commercially available, it must be available "by authorization of the rights holder." This excludes used, resold, or antique copies from consideration in determining commercial availability. However, the landscape of retail marketplaces makes it difficult, if not impossible, for unsophisticated users to determine whether a copy is being commercially distributed "by authorization of the rights holder," or whether it has been exhausted through prior sale. This opens the door to a cascading series of complications; music retail outlets are dwindling, and physical media sold through online storefronts (such as Amazon) is often a mix of direct-from-label sales, third-party retail, and resale copies.

This milieu makes it difficult or impossible to determine whether a given physical copy is being made available under the prowess of the rights holder, or whether it has been placed in limited circulation by a third party. The danger in this case is that of creating a false positive for

---

[16] Pub. Law. No. 115-264, § 1401(c)(1)(A)(ii).
[17] About CD Baby, CD Baby, https://store.cdbaby.com/about (last visited Nov. 26, 2018).
[18] TuneCore's central pitch to musicians is that it can "[g]et your music on Spotify, iTunes, Tidal, Google Play, Amazon Music & more." TuneCore, https://www.tunecore.com/ (last visited Nov. 26, 2018). The Orchard describes itself as "the industry's leading independent distributor and label services company, … reach[ing] digital and physical retailers worldwide." *Music*, The Orchard, https://www.theorchard.com/music/ (last visited Nov. 26, 2018).

commercial availability, which would foreclose the inquiry in a way that a false negative would not.

A7. How many sources should a user be required to search before qualifying for the safe harbor?

As noted above, barring a finding that major music services offer a substantially divergent back catalog of legacy recordings, users should be required to search no more than one to two services to determine commercial availability.

A8. Please describe specific steps that should constitute a reasonable search for a recording on an identified service.

To be useful, the safe harbor must be structured to be available to the average consumer without specialized knowledge of the music industry or licensing law. Common sense and standard consumer practice--not exhaustive navigation of a complex licensing and distribution regime--must guide the Office in designing a safe harbor.

When consumers search for a work, they do so on the basis of commonly available information such as track title and artist name. In cases where one of these parameters is not known, they often search based on variations of that parameter. A reasonable search, for a consumer or individual user, is one that reflects this common practice.

Although many more advanced technologies (such as digital fingerprinting and detailed metadata search) are available to institutional or other specialist users, these should not be required (nor expected) of the average consumer.

B1. Should the Office provide guidelines as to what constitutes a ''noncommercial'' use, and if so, what?

No. The statute provides no role for the Copyright Office in determining the boundaries of commercial versus non-commercial use. Determination of edge cases or "gray" areas would be properly left to the courts.

B2. To what extent should a user be required to specify the nature of the use, such as expected audience, duration of the use, and whether it will be online or limited to a particular geographic area?

Because the Office does not have any role under the statute in approving or denying notices, any description of the proposed use should be limited to a short and plain description that is reasonably sufficient to apprise the rights owner of the purpose and practical extent of the use. Specific details--such as expected audience or duration--are relevant only to a specific subset of potential uses (such as public performance) and not others (digital archiving and preservation).

B3. How should the user be required to certify or describes the steps taken for a search to constitute a "good faith, reasonable search"?

We have included below a suggested format for the nature and content of the disclosures. However, as noted above, the Copyright Office does not have any role under the statute in approving, denying, or reviewing notices based on their sufficiency or content. Rights holders retain the ability to opt out of a use, and the legally-binding affirmation that a potential user has undertaken the steps listed in the safe harbor is sufficient to meet the requirements of the statute. Potential users will presumably be required to swear that they have undertaken the specific steps outlined in the safe harbor; any questions about the actual extent to which they complied with those steps is more properly addressed by courts, and not by the Copyright Office.

Conclusion

Public Knowledge thanks the Copyright Office for the opportunity to submit the foregoing comments. If there are any remaining questions, please contact the undersigned attorney at the address indicated in the signature.

Respectfully submitted,

/s Meredith Rose
Policy Counsel
Public Knowledge
1818 N St. NW, Suite 410
Washington, DC 20036
(202) 861-0020
mrose@publicknowledge.org

November 26, 2018

Appendix: Suggested Safe Harbor Notice Format

I hereby affirm that I plan on using the below-named audio recording(s) for a noncommercial purpose.

Title: _____
Alternate title (if known): _____
Artist/author: _____

Include below a brief, plain-language description of the use which you intend to make of the work:

_____
_____

I have searched the following services (select and list dates of search, which must be conducted within 30 days of one another AND of filing this notice):

[ ] U.S. Copyright Office records of schedules filed under 17 U.S.C. § 1401(f)(5)(A) [REQUIRED] - Date:_____

AND (select at least 1 of the following):

[ ] Amazon Music Unlimited - Date: _____
[ ] Spotify - Date: _____
[ ] Apple Music - Date: _____

I conducted the above searches by (select at least one):
[ ] Artist name/title
[ ] Other relevant metadata (please describe): _____

I affirm that, as of the listed search dates, I did not find the recording in the above services as indicated.

Print Full Name:_____
Signature: _____
Date: _____