

## LIBRARY OF CONGRESS

## Copyright Office

## 37 CFR Part 201

[Docket No. 2018–8]

**Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited****AGENCY:** U.S. Copyright Office, Library of Congress.**ACTION:** Final rule.

**SUMMARY:** The U.S. Copyright Office is issuing a final rule regarding the Classics Protection and Access Act, title II of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act. In connection with the establishment of federal remedies for unauthorized uses of sound recordings fixed before February 15, 1972 (“Pre-1972 Sound Recordings”), Congress established an exception for certain noncommercial uses of Pre-1972 Sound Recordings that are not being commercially exploited. To qualify for this exception, a user must file a notice of noncommercial use after conducting a good faith, reasonable search to determine whether the Pre-1972 Sound Recording is being commercially exploited, and the rights owner of the sound recording must not object to the use within 90 days. After soliciting three rounds of public comments through a notice of inquiry and a notice of proposed rulemaking, the Office is issuing final regulations identifying the specific steps that a user should take to demonstrate she has made a good faith, reasonable search. The rule also details the filing requirements for the user to submit a notice of noncommercial use and for a rights owner to submit a notice opting out of such use.

**DATES:** Effective May 9, 2019.

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**SUPPLEMENTARY INFORMATION:****I. Background**

Title II of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act, H.R. 1551 (“MMA”), the Classics Protection and Access Act, created chapter 14 of the copyright law, title 17, United States Code, which, among other things, extends remedies for copyright infringement to owners of sound

recordings fixed before February 15, 1972 (“Pre-1972 Sound Recordings”). Under the provision, rights owners are eligible to recover statutory damages and/or attorneys’ fees for the unauthorized use of their Pre-1972 Sound Recordings if certain requirements are met. To be eligible for these remedies, rights owners must typically file schedules listing their Pre-1972 Sound Recordings (“Pre-1972 Schedules”) with the U.S. Copyright Office (the “Office”), which are indexed into the Office’s public records.<sup>1</sup> This requirement is “designed to operate in place of a formal registration requirement that normally applies to claims involving statutory damages.”<sup>2</sup>

The MMA also creates a new mechanism for users to obtain authorization to make noncommercial uses of Pre-1972 Sound Recordings that are not being commercially exploited. Under section 1401, a person may file a notice with the Copyright Office proposing a specific noncommercial use after taking steps to determine whether the recording is, at that time, being commercially exploited by or under the authority of the rights owner.<sup>3</sup> Specifically, before determining that the recording is not being commercially exploited, a person must first undertake a “good faith, reasonable search” of both the Pre-1972 Schedules indexed by the Copyright Office and music services “offering a comprehensive set of sound recordings for sale or streaming.”<sup>4</sup> At that point, the potential user may file a notice identifying the Pre-1972 Sound Recording and nature of the intended noncommercial use with the Office (a “notice of noncommercial use” or “NNU”), and this notice is also indexed into the Office’s public records.<sup>5</sup>

In response, the rights owner of the Pre-1972 Sound Recording may file a notice with the Copyright Office “opting out” of (*i.e.*, objecting to) the requested noncommercial use (“Pre-1972 Opt-Out Notice”), and a user nonetheless engaging in such use may be subject to liability under section 1401(a).<sup>6</sup> A rights owner has 90 days from the date the NNU is indexed into the Office’s public records to file a Pre-1972 Opt-Out Notice.<sup>7</sup> If, however, the rights owner does not opt-out within 90 days, the user may engage in the noncommercial

use of the Pre-1972 Sound Recording without violating section 1401(a).<sup>8</sup>

The MMA requires the Copyright Office to issue regulations identifying the “specific, reasonable steps that, if taken by a [noncommercial user of a Pre-1972 Sound Recording], are sufficient to constitute a good faith, reasonable search” of the Office’s records and music services to support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited.<sup>9</sup> A user following these “specific, reasonable steps” will satisfy the statutory requirement of conducting a good faith search, even if the sound recording is later discovered to be commercially exploited.<sup>10</sup> Other searches may also satisfy this statutory requirement, but the user would need to independently demonstrate how she met the requirement if challenged.<sup>11</sup> The Office must also issue regulations “establish[ing] the form, content, and procedures” for users to file NNUs and rights owners to file Pre-1972 Opt-Out Notices.<sup>12</sup>

On October 16, 2018, the Office issued a notice of inquiry (“NOI”) soliciting comments regarding the specific steps a user should take to demonstrate she has made a good faith, reasonable search; the filing requirements for the user to submit an NNU; and the filing requirements for a rights owner to submit a Pre-1972 Opt-Out Notice objecting to such use.<sup>13</sup> On February 5, 2019, the Office issued a notice of proposed rulemaking (“NPRM”) soliciting comments on proposed regulations regarding these same issues.<sup>14</sup> In response to the NPRM, the Office received nine comments, discussed further below.<sup>15</sup>

Having reviewed and carefully considered the comments, the Office now issues a final rule.<sup>16</sup>

<sup>8</sup> *Id.* at 1401(c)(1).<sup>9</sup> *Id.* at 1401(c)(3)(A).<sup>10</sup> *Id.* at 1401(c)(4)(B).<sup>11</sup> *Id.* at 1401(c)(4)(A)–(B).<sup>12</sup> *Id.* at 1401(c)(3)(B), (5)(A).<sup>13</sup> 83 FR 52176 (Oct. 16, 2018) (“NOI”). Twenty-five comments were received in response to the NOI.<sup>14</sup> 84 FR 1661 (Feb. 5, 2019) (“NPRM”).<sup>15</sup> The comments received in response to the NOI and NPRM are available online at <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=COLC-2018-0008>. References to these comments are by party name (abbreviated where appropriate), followed by “Initial,” “Reply,” or “NPRM Comment,” as appropriate.<sup>16</sup> Public Knowledge alludes to the Office’s need to address concerns raised in its written comments. Public Knowledge NPRM Comment at 10 n.13. The Office believes the NPRM and final rule reflect careful and appropriate consideration of comments as required under the Administrative Procedure Act.<sup>1</sup> 17 U.S.C. 1401(f)(5)(A)(i)(I)–(III).<sup>2</sup> H.R. Rep. No. 115–651, at 16 (2018); *see* S. Rep. No. 115–339, at 18 (2018).<sup>3</sup> 17 U.S.C. 1401(c)(1)(A)–(B).<sup>4</sup> *Id.* at 1401(c)(1)(A).<sup>5</sup> *Id.* at 1401(c)(1)(B), (C).<sup>6</sup> *Id.* at 1401(c)(1). The Office notes that a rights owner may opt out of the proposed use for any reason.<sup>7</sup> *Id.* at 1401(c)(1)(C).

## II. Final Rule

The final rule governs three specific areas: (i) The “specific, reasonable steps that, if taken by a [noncommercial user of a Pre-1972 Sound Recording], are sufficient to constitute a good faith, reasonable search” to support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited; (ii) the form, content, and procedures for a user, having made such a search, to file an NNU; and (iii) the form, content, and procedures for a rights owner to file a Pre-1972 Opt-Out Notice.<sup>17</sup>

As described in more detail by the NPRM, the Office confirms that the noncommercial use exception under section 1401(c) is supplementary and does not negate other exceptions and limitations that may be available to a prospective user, including fair use and the exceptions for libraries and archives.<sup>18</sup> Regarding fair use specifically, the Office notes that although certain noncommercial uses may constitute fair use, not all may be fair; instead, courts will balance the purpose and character of the use against the other fair use factors.<sup>19</sup> Similarly, the Office confirms that the noncommercial use exception should not affect application of the section 108(h) exception available for libraries and archives performing a reasonable investigation regarding the availability of published works in the last twenty years of their copyright term.<sup>20</sup>

In addition to promulgating this rule, the Copyright Office intends to prepare additional public resources regarding Pre-1972 Sound Recordings and the new noncommercial use exception, such as a public circular.

### A. Good Faith, Reasonable Search

The proposed rule identified five steps (six in the case of Alaska Native and American Indian ethnographic sound recordings) that, if taken, would support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited.<sup>21</sup> The final rule

largely adopts the proposed rule, with some adjustments in response to public comment, including one additional step. Consistent with the statute’s directive to provide “specific” steps that are “sufficient, but not necessary” to demonstrate a Pre-1972 Sound Recording is not being commercialized, the rule adopts a “checklist” approach for users to search across categories rather than an “open-ended” approach to better provide certainty to users.<sup>22</sup> Users should progressively search through a set number of categories if and until a match is found, with a match evidencing commercial exploitation of the Pre-1972 Sound Recording.<sup>23</sup> The categories to be searched are listed in recommended search order, to reduce the likelihood of duplicative searching.<sup>24</sup> In cases where the type of recording (e.g., classical music or ethnographic sound recordings) warrants searching an additional resource or more particularized search criteria, these criteria are included on a tailored basis, as applicable to a particular genre.<sup>25</sup>

The comments received overwhelmingly praised the proposed rule, describing it as “balanced,”<sup>26</sup> “measured,”<sup>27</sup> “thoughtful and realistic,”<sup>28</sup> and a “common-sense approach.”<sup>29</sup> A number of stakeholders favored the Office’s “checklist” approach;<sup>30</sup> for example, EFF stated that the “proposed five- or six-step search methodology for identifying commercial exploitation is generally reasonable,”<sup>31</sup> and A2IM and RIAA “believe the checklist-based approach aptly balances users’ need for simplicity

with rights owners’ need for thoroughness.”<sup>32</sup>

The final rule preserves this basic framework, with a few adjustments discussed below, including an additional step for locating uses on YouTube authorized by the rightsholder. In sum, the final rule requires searching the following:

1. The Copyright Office’s database of Pre-1972 Schedules;
2. One of the following major search engines: Google, Yahoo!, or Bing;
3. One of the following major streaming services: Amazon Music Unlimited, Apple Music, Spotify, or TIDAL;
4. YouTube, for authorized uses;
5. The SoundExchange ISRC database;
6. Amazon.com, and, where the prospective user reasonably believes the recording implicates a listed niche genre, an additional listed online retailer of physical product; and
7. In the case of ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes, searching through contacting the relevant tribe, association, and/or holding institution.

As reflected by the bulk of the comments received, the Office concludes that the final rule steps are reasonable to expect of an individual user, yet exhaustive enough to qualify that user for a safe harbor as to the search’s sufficiency from the perspective of rights owners’ interests. As noted in the NPRM, the Office is concerned that limiting sources to be searched to only the most commercially popular services might obscure perspectives of smaller, less mainstream creators and independent services who play a vital role in ensuring that a diverse array of cultural contributions are created and made available to the public.<sup>33</sup> The final rule attempts to account for the diversity of models while prioritizing services with intuitive search capabilities and minimizing resources where a subscription is required to access the search function; the categories to be searched—with the potential exception of certain interactive streaming services, which are statutorily required to be included—are all available at no cost to the user.

To further ensure the specific steps are reasonable and not duplicative, the final rule clarifies that the user only needs to keep progressively searching the categories of sources until she has located the sound recording (*i.e.*, once she finds the sound recording in one category, which evidences commercial exploitation, she can stop searching), or

<sup>17</sup> 17 U.S.C. 1401(c)(3)(A), (B). The final rule also confirms that 37 CFR 201.4 does not govern the filing of NNUs and Pre-1972 Opt-Out Notices. Similarly, the final rule makes a technical edit to reflect that the filing of notices of use of sound recordings under statutory license (17 U.S.C. 112(e), 114) are not governed by 37 CFR 201.4.

<sup>18</sup> NPRM at 1662–63 & n.19 (noting many comments urging this approach). See 17 U.S.C. 1401(f)(1)(A); *id.* at 1401(c)(2)(C), (c)(5)(B).

<sup>19</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584–85 (1994) (noting “the commercial or nonprofit educational character of a work is ‘not conclusive’” to fair use (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984))); H.R. Rep. No. 94–1476, at 66 (1976) (same).

<sup>20</sup> NPRM at 1662–63.

<sup>21</sup> *Id.* at 1663–68; 17 U.S.C. 1401(c)(3)(A).

<sup>22</sup> NPRM at 1663.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1663, 1669.

<sup>26</sup> Copyright Alliance NPRM Comment at 1 (“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.”).

<sup>27</sup> Recording Academy NPRM Comment at 1 (the proposed rule “represents a measured effort to allow potential users to effectively avail themselves” of the noncommercial use exception; “applaud[ing] the Office for carefully considering all of the diverse viewpoints that were reflected in the comments . . .”).

<sup>28</sup> Future of Music Coalition (“FMC”) NPRM Comment at 1 (“we are grateful for the thoughtful and realistic approach”).

<sup>29</sup> A2IM & RIAA NPRM Comment at 2.

<sup>30</sup> See, e.g., Copyright Alliance NPRM Comment at 1 (“we applaud the Office for taking the checklist-based approach”); Recording Academy at 2 (“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.”).

<sup>31</sup> EFF NPRM Comment at 1.

<sup>32</sup> A2IM & RIAA NPRM Comment at 2.

<sup>33</sup> NPRM at 1663; see FMC Reply at 1–2; Copyright Alliance Initial at 1 (discussing relationship between “existing general and niche markets”); A2IM & RIAA Reply at 9.

exhausted her search options by searching each of the successive categories without finding the sound recording (*i.e.*, finding no commercial exploitation).<sup>34</sup> Public Knowledge contends that “the proposed search steps, taken together, are extremely likely to be duplicative of one another.”<sup>35</sup> The steps in the final rule, however, are purposely listed in recommended order of searching, with the understanding that searches of the Office’s database of Pre-1972 Schedules and search engines may render searching on a streaming service or other service (*i.e.*, subsequent search categories) unnecessary.<sup>36</sup>

For example, a search for “Eleanor Rigby” in the Copyright Office’s database currently returns one result for this Beatles recording, and also provides contact information for Capitol Records as the listed rights owner. A prospective user will therefore learn at step one that the safe harbor is unavailable for this recording, and also how to contact the rights owner to potentially negotiate a permissive use. Similarly, taking Public Knowledge’s example, if a user searches “Don’t Fence me In” by Bing Crosby and the Andrews Sisters on *Google.com*, and the results show the recording being commercially exploited on services offering sound recordings for sale or streaming, the user does not need to continue onto the next steps.<sup>37</sup> But, where search engine results do not show the recording being commercially exploited on a section 1401(c)(1)(A) service, the user should proceed to the next steps, which the Office has concluded, based on the public comments and its own research, lack an “extreme likelihood of duplication” for those rarer recordings that are not readily located through the initial steps.<sup>38</sup> The Office also concludes that

the steps are generally reasonable, in part because they can be conducted relatively quickly to provide certainty for a potentially long-lasting safe harbor, using publicly available resources “without creating an account or paying a fee.”<sup>39</sup>

In addition to the broadly positive comments received and other specific suggestions from other commenters (including broad-ranging comments from NCAI) that are discussed below in reference to particular steps, Public Knowledge raises additional general objections to the proposed rule. Public Knowledge contends that the Office lacks authority to include searches of “search engines, SoundExchange’s ISRC database, and physical product retailers” as part of a search “on services offering a comprehensive set of sound recordings for sale or streaming.”<sup>40</sup> As noted in the NPRM, searches of a search engine and the ISRC lookup tool are expected to serve as a reasonable proxy for searches on a wide array of the statutorily identified services that offer a comprehensive set of sound recordings for sale or streaming, in an effort to avoid duplicative searching.<sup>41</sup> As explained in the NPRM, the Office does not read section 1401(c) so narrowly as to preclude searching resources—such as the SoundExchange ISRC lookup tool or major search engines—that are used “to determine whether” a Pre-1972 Sound

singles,” *see* Public Knowledge NPRM Comment at 6). In the former scenario, the user will quickly stop searching, but the rule is necessarily more concerned with the latter cases, as the statute asks users to search multiple “services,” suggesting a more robust search is appropriate to capture less broad but nonetheless bona fide commercial exploitations. *See* FMC Ex Parte Letter at 1 (stating the statute was “written to protect the full diversity of rightsholders, big and small, famous and obscure,” and that Billboard number one singles “don’t represent a reasonable proxy for the full diversity of impacted recordings”).

<sup>39</sup> EFF NPRM Comment at 2. It is not clear which step Public Knowledge believes requires “subscription fees”; as explained in the NPRM, the Office took the suggestion of Public Knowledge and others to craft steps that minimize or eliminate the need for users to establish paid subscription accounts, despite persuasive comments from rightsholder groups suggesting that it would not be inappropriate to require such searching before engaging in the proposed uses. *Compare* Public Knowledge NPRM Comment at 7 with NPRM at 1664 & n.40. Instead, the Office included steps such as the ISRC database and search engine searching to provide a similar level of comprehensiveness while minimizing potential user burdens.

<sup>40</sup> Public Knowledge NPRM Comment at 2–4.

<sup>41</sup> NPRM at 1665, 1667; *see also* Public Knowledge NPRM Comment at 5 (claiming that searching on Google or the ISRC database tool is “extremely likely—perhaps practically certain—to find commercial exploitation of any recording that would also appear in a direct search of a streaming service.”). *Cf.* Public Knowledge Initial at 2 (suggesting search requirements should be “proportional”).

Recording is being commercially exploited on services offering a comprehensive set of sound recordings for sale or streaming.<sup>42</sup> Such cross-platform tools can quickly reveal information relevant to whether a recording is being used on a variety of services unequivocally involved in commercially exploiting these sound recordings. To exclude reliance upon these sources would hamper the Office’s ability to craft a smaller list of “specific, reasonable steps” that a user may take before filing a NNU.<sup>43</sup> As such, the rule does not stray outside of the statutory language; each step is to be used as a finding aid for the statutory category of “services offering a comprehensive set of sound recordings for sale or streaming,” rather than expanding this category. As noted in the NPRM, the Office has concluded that it is more reasonable (and less burdensome, more intuitive, cost-effective, and overall user-friendly) to ask users to conduct one search engine search that captures multiple streaming services, rather than individually searching multiple additional interactive services, and to ask users to search the ISRC database, rather than any of the over 3,100 non-interactive services that are exploiting Pre-1972 Sound Recordings.<sup>44</sup>

Next, and as noted in the NPRM, the noncommercial use exception is not intended to displace the important role of licensed transactions to facilitate the use of Pre-1972 Sound Recordings.<sup>45</sup>

<sup>42</sup> 17 U.S.C. 1401(c)(1)(A) (emphasis added). *Compare* Public Knowledge NPRM Comment at 2 n.1 (“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.’”).

<sup>43</sup> For example, a Google search for the 1947 Famous Blue Jay Singer’s recording “I’m Bound for Canaan Land” reveals the work available through Play Music and Deezer, two services the Office is not requiring to be searched. Similarly, a search for the 1950 Kings of Harmony recording “God Shall Wipe All Tears Away” reveals that the recording is available for purchase through Apple Music, Amazon.com, and sites such as singers.com. It appears, however, that those recordings would not presently be returned in a search of the Office’s database, Spotify, or authorized YouTube results, and so the search engine step is an expedient way of confirming that the sound recording is in fact being commercially exploited through section 1401(c)(1)(A) services, rather than the Office requiring users to subscribe to and search these additional services.

<sup>44</sup> *See* NPRM at 1665–66. Put another way, given the current marketplace, it does not appear “reasonable” for the Office to ignore these additional interactive and non-interactive streaming and for-sale services in crafting the list of steps, and so the Office has picked a reasonable way to search these services, as the statute requires.

<sup>45</sup> *Id.* at 1664. *See, e.g.*, A2IM & RIAA Initial at 1–2 (suggesting that in many cases, voluntary licensing may prove more efficient within a short timeframe than this exception); Copyright Alliance Initial at 2–3; SoundExchange Initial at 2.

<sup>34</sup> *See* Hunter NPRM Comment at 2 (“It is unclear if the rule requires the person searching to look at each category, or to search the categories in order until they have found the recording, or exhausted their options.”).

<sup>35</sup> Public Knowledge NPRM Comment at 4–5; Public Knowledge Ex Parte Letter at 1.

<sup>36</sup> NPRM at 1665. *See also* FMC Ex Parte Letter at 1 (suggesting “that a search is not duplicative just because it yields the same results on multiple platforms—as soon as a positive result is found, the searcher is able to stop.”).

<sup>37</sup> Public Knowledge NPRM Comment at 6. “Don’t Fence Me In” is currently unlisted in the Office’s database, but the top *Google.com* result shows it “available on” Play Music, Deezer, and iHeartRadio. Google, <https://www.google.com/search?client=firefox-b-d&q=%22don%27t+fence+me+in%22+andrews+sisters> (last visited Mar. 29, 2019).

<sup>38</sup> Public Knowledge may conflate the likelihood of duplicated results for broadly exploited recordings with the likelihood of duplication for less pervasively available recordings (as shown by its choice to search for “Billboard number one

Copyright Alliance, supported by A2IM and RIAA, suggests that the Office require a user to directly notify a rights owner if that owner can be located.<sup>46</sup> While the Office strongly supports resolving uses through voluntary agreements, requiring prospective users to generally contact rights owners appears outside the scope of this rulemaking. The statute asks the Office to promulgate a list of “specific, reasonable steps” that would constitute a search for a given sound recording in the Office’s records and on services offering a comprehensive set of sound recordings for sale or streaming.<sup>47</sup> With the exception of the special case of ethnographic sound recordings, where undisputed comments suggest the available ownership information for these recordings is particularly poor, the Office has concluded that searching the listed services is the more reasonable approach. The Office does, however, encourage users to contact rights owners that can be identified (including even after learning that a work is being commercially exploited) to facilitate permissive uses of these recordings, including for licensed fees.

Finally, the Office reaffirms its commitment to periodically updating this list of specific steps to take into account changes in the music marketplace.<sup>48</sup> A2IM and RIAA request that the Office “publish [notices of inquiry] at some regular interval seeking public input on whether the list of specific steps” needs updating, or “establish a mechanism by which rights owners and/or users can petition the Office to seek review of the existing list of specific steps and consider whether updates are warranted.”<sup>49</sup> Like other agencies, the Office accepts petitions

proposing rule changes.<sup>50</sup> Given the extensive comments aired in this rulemaking, the Office anticipates the current rule to hold for the near term. But should market changes render the list of specific search steps in the final rule unworkable, the Office encourages stakeholders to petition the Office for changes at that time, and the Office will also take initiative to refresh this list should it become aware of the need to adjust in response to material changes in the marketplace.<sup>51</sup>

#### i. Required Sources To Search

##### 1. Searching the Copyright Office’s Database of Pre-1972 Schedules

First, section 1401(c) requires that the search must include searching for the Pre-1972 Sound Recording in the Copyright Office’s database of Pre-1972 Schedules.<sup>52</sup> The Office has issued a final rule governing how rights owners may file Pre-1972 Schedules and how they are made publicly available through an online database.<sup>53</sup> For each sound recording, the Pre-1972 Schedule must include the rights owner’s name, the sound recording title, and the featured artist, as well as the International Standard Recording Code (“ISRC”) (if known and practicable), and rights owners may opt to include additional information, such as album title, version, and alternate artist name(s).<sup>54</sup>

The Office did not receive any comments suggesting changes to the manner of searching the Office’s database of Pre-1972 Schedules, and the final rule adopts this aspect of the proposed rule without substantive change. The final rule requires users to search for the title and featured artist(s) of the Pre-1972 Sound Recording. If the user knows any of the following attributes of the Pre-1972 Sound Recording, the search must also include: Alternate artist name(s), alternate title(s), album title, and the International Standard Recording Code (“ISRC”). The user may also optionally search any other attributes known to the

user of the sound recording, such as label or version.

##### 2. Searching With a Major Search Engine

Second, the proposed rule asked the user to search for the Pre-1972 Sound Recording using at least one major search engine, namely: Google, Yahoo!, or Bing, to determine whether the sound recording is being commercially exploited.<sup>55</sup> As noted in the NPRM, users are widely accustomed to conducting internet searches, and such searching is free and may render searching on a streaming service or other service unnecessary.<sup>56</sup>

EFF asks the Office to clarify that “a reasonable search for commercial exploitation using a search engine does not require an exhaustive reading of every web page returned as a result of such search,” and that “reading the first 1–2 pages of results and drawing reasonable inferences from those results, including following those links whose name or accompanying text suggest that commercial exploitation might be found there” should be sufficient.<sup>57</sup> The Office agrees with this suggestion, with the caveat that depending upon the specific results, it may be reasonable for the user to search more than 1–2 pages (although in other cases these first two pages will likely be sufficient). The Office’s regulations and instructions will address this issue, and clarify that the purpose of this search is to determine whether the Pre-1972 Sound Recording is being commercially exploited (*i.e.*, by being offered for sale in download form or as a new (not resale) physical product, or through a streaming service), and not simply whether the internet includes web pages discussing the recording, such as musicological, historical, or other commentary about the work.

##### 3. Searching on a Digital Streaming Service

Third, the proposed rule asked the user to search at least one of the following streaming services, each of which offers tens of millions of tracks: Amazon Music Unlimited, Apple Music, Spotify, or TIDAL. The Office proposed these streaming services because there appeared to be agreement from commenters on these services in particular.<sup>58</sup> These services currently

<sup>46</sup> Copyright Alliance Initial at 2–3, 5. In response to the proposed rule, Copyright Alliance, A2IM, and RIAA contend that while the Office declined to generally require users to contact rights owners directly, the Office adopted a similar requirement with respect to ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes, by requiring a search through contacting the relevant tribe, association, and/or holding institution. A2IM & RIAA NPRM Comment at 4; Copyright Alliance NPRM Comment at 2. As discussed below, ethnographic field recordings (and the metadata surrounding such recordings) are uniquely situated. *See also* NPRM at 1667–68; U.S. Copyright Office, Federal Copyright Protection For Pre-1972 Sound Recordings 52 (2011), <https://www.copyright.gov/docs/sound/pre-72-report.pdf> (“Pre-1972 Sound Recordings Report”).

<sup>47</sup> 17 U.S.C. 1401(c)(1)(A), (c)(3)(A).

<sup>48</sup> *See* Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 25 (2018), <https://www.copyright.gov/legislation/mma-conference-report.pdf> (“Conf. Rep.”) (search must be based on “services available in the market at the time of the search”).

<sup>49</sup> A2IM & RIAA NPRM Comment at 6.

<sup>50</sup> 5 U.S.C. 553(e) (providing that “[e]ach agency shall give an interested person the right to petition for the . . . amendment . . . of a rule”).

<sup>51</sup> The Office is not at this time exploring “whether it possesses the authority to institute a limited renewal requirement, under which entries in [Pre-1972 Schedules] would be subject to a periodic renewal in the same vein as DMCA agent designations.” Public Knowledge Reply at 17; *see* NPRM at 1664, n.53. In response to the NPRM, multiple commenters assert that the statute does not extend such authority. *See, e.g.*, A2IM & RIAA NPRM Comment at 11; Copyright Alliance Comment at 7.

<sup>52</sup> 17 U.S.C. 1401(c)(1)(A)(i), (f)(5)(A).

<sup>53</sup> 84 FR 10679 (Mar. 22, 2019).

<sup>54</sup> 37 CFR 201.35(f).

<sup>55</sup> NPRM at 1665. *See* A2IM & RIAA Initial at 5; Copyright Alliance Initial at 4; FMC Reply at 6 (each suggesting that major search engines should be searched).

<sup>56</sup> NPRM at 1665.

<sup>57</sup> EFF NPRM Comment at 2.

<sup>58</sup> NPRM at 1665 & n.64 (citing comments).

offer some of the largest repertoires of tracks and “receive digital feeds from the major labels, large indie labels and significant distributors.”<sup>59</sup> The Office invited public comment on whether Google Play Music and/or Deezer should be included in the list of streaming services, as they also offer large repertoires of tracks. These two services, however, were not identified as possible sources from the majority of commenters.<sup>60</sup>

The Office also invited comment on whether users should be required to search a greater number of streaming services as part of a good faith, reasonable search.<sup>61</sup> In response, some stakeholders contend that a search should include more than one streaming service.<sup>62</sup> A2IM and RIAA propose searching two streaming services, but as part of two searches of services “grouped into two separate lists,” one comprising “the four/five major streaming services,” and the second comprising services with “a more ‘specialized’ repertoire.”<sup>63</sup> They also contend that Deezer should be included in the group of “specialized” streaming services,<sup>64</sup> along with Bandcamp.<sup>65</sup> The comments, however, do not provide any examples of recordings that would not otherwise be found through the list of proposed steps.

After careful consideration, the Office concludes that requiring searches of all these streaming services, or another category of streaming services, would likely be largely redundant. As noted

above, a search using a search engine may indicate that the Pre-1972 Sound Recording is available for streaming on various streaming services, rendering further searching unnecessary; Google, for example, appears to index Deezer, Play Music, and Spotify.<sup>66</sup> While these services’ repertoires are not identical, rather than requiring users to search additional services, the final rule limits the number of streaming services to be searched, but includes qualitatively different sources to search. In addition, the Office’s determination to add YouTube as a separate search step may identify commercial exploitations of less mainstream recordings, reducing the need for a separate search of a streaming service with a “specialized” repertoire. As with all of these steps, the Office will consider adjusting this rule if conditions develop that demonstrate a need for adjustment, including adding additional steps (or removing steps), or the amount of services to be searched in each step.

#### 4. Searching YouTube for Authorized Uses

The proposed rule did not request that the user search services comprised of user-generated content, such as YouTube.<sup>67</sup> In response to the NOI, commenters IMSLP.ORG and Public Knowledge maintained that a search should not include services permitting user-uploaded content because such services include unauthorized uses of Pre-1972 Sound Recordings, which do not constitute commercial exploitation “by or under the authority of the rights owner” as required by section 1401(c)(1)(A).<sup>68</sup> By contrast, Recording Academy urged the Office to include YouTube.<sup>69</sup> While the Office noted that legislative history states that “it is important that a user . . . make a robust search, including user-generated services,”<sup>70</sup> the Office expressed

concern that a user conducting a section 1401(c) search on a service permitting user-uploaded content may have no way of knowing if the use of a Pre-1972 Sound Recording is “by or under the authority of the rights owner,” a condition required by the statute.<sup>71</sup>

In response to the proposed rule, multiple stakeholders suggest that a good faith, reasonable search should include a separate search for a Pre-1972 Sound Recording on YouTube.<sup>72</sup> While A2IM, RIAA, and Copyright Alliance recognize that YouTube may include unauthorized uses of works,<sup>73</sup> A2IM and RIAA note that “all of the major record labels and certain indie labels—which collectively account for the vast majority of copyrighted sound recording—currently have licenses with YouTube.”<sup>74</sup> A2IM, RIAA, and Copyright Alliance explain that YouTube does in many cases indicate when a work has been licensed.<sup>75</sup> Specifically, “a user can access information that may be useful in helping to identify whether content on YouTube is licensed or claimed simply by clicking on the ‘Show More’ option that appears below each video and

a persuasive source of authority to anything beyond the personal opinions of Representative Goodlatte.” Public Knowledge Reply at 8; Public Knowledge NPRM Comment at 7. Neither case cited suggests the wholesale dismissal of subsequent legislative history, as Public Knowledge advocates. *See Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978) (concerning Congress’s understanding of a preexisting statute established by a prior Congress); *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1438–39 (7th Cir. 1988) (affidavits prepared for litigation by a lobbyist and a Member of the House of Representatives years after the relevant statute was enacted did not constitute legislative history). In this case, the timing of the “Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees,” which was signed and issued by the principal House Sponsor and Chairman of Judiciary Committee on October 19, 2018, eight days after the MMA was enacted into law, suggests that it is entirely proper to afford it some interpretive value as legislative history.

<sup>71</sup> NPRM at 1668–69; 17 U.S.C. 1401(c)(1)(A).

<sup>72</sup> A2IM & RIAA NPRM Comment at 4 (“YouTube must be added as an additional, separate step in the list of categories users are required to search.”); Copyright Alliance NPRM Comment at 2 (stating it is “essential that the Copyright Office add a YouTube search as an additional separate step.”); Recording Academy NPRM Comment at 3 (“Academy strongly urges the Copyright Office to add a search of YouTube as one additional step in the checklist in the final rule.”).

<sup>73</sup> A2IM & RIAA NPRM Comment at 5–6 (stating “there certainly are instances of unauthorized content on YouTube and other [user-generated content] services”); Copyright Alliance NPRM Comment at 3 (stating “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”).

<sup>74</sup> A2IM & RIAA NPRM Comment at 5.

<sup>75</sup> *Id.*; Copyright Alliance NPRM Comment at 3.

<sup>59</sup> A2IM & RIAA Initial at 5.

<sup>60</sup> NPRM at 1665.

<sup>61</sup> *Id.*

<sup>62</sup> FMC NPRM Comment at 2 (“We would support including a greater number of streaming services, anticipating that the marketplace may continue to move in a more fragmented and specialized direction in potentially unpredictable ways.”); Recording Academy NPRM Comment at 3 (stating that “searching only one subscription service is not sufficient”). A spectrum of commenters suggested, however, that the rule should not require a user to search all streaming services. A2IM & RIAA NPRM Comment at 7 (proposing users search on two services); EFF Initial at 4 (contending it is “[r]easonable to include some subset” of services); Hunter NPRM Comment at 2 (advocating “to include as many services as possible in the list of digital streaming services . . . to make sure that the statute allows people to be able to search whatever music streaming service that they have.”). *Cf.* Internet Archive Initial at 1 (suggesting that a good faith, reasonable search “should entail performing a few high quality searches on a small number of large services rather than performing a low quality search across a large number of services”); Public Knowledge Initial at 5, App. (proposing search of “no more than one to two” services). Commenters also noted that searching multiple streaming services might be duplicative. A2IM & RIAA Initial at 7; Public Knowledge Initial at 2.

<sup>63</sup> A2IM & RIAA NPRM Comment at 2.

<sup>64</sup> *Id.*

<sup>65</sup> *See id.* at 2–3 & n.3; *see also* Copyright Alliance NPRM Comment at 3.

<sup>66</sup> The record also suggests it may be premature to include Google Play Music in the regulatory category, which may soon migrate to YouTube Music. *See* A2IM & RIAA NPRM Comment at 2 (stating they do not oppose including Google Play Music, but requesting Google Play Music and YouTube Music be included as “Google is widely expected to migrate Google Play Music users to YouTube Music sometime in 2019”). *See also* Ara Wagoner, *YouTube Music vs. Spotify: Which is the Better Streaming Music Service?*, Android Central, (June 19, 2018), <https://www.androidcentral.com/youtube-music-vs-spotify> (stating that YouTube Music “doesn’t give out a hard number for the songs in its catalog”).

<sup>67</sup> NPRM at 1668–69.

<sup>68</sup> IMSLP.ORG Reply at 2; Public Knowledge Reply at 11.

<sup>69</sup> Recording Academy Reply at 4.

<sup>70</sup> NPRM at 1668 n.111 (citing Conf. Rep. at 25). Public Knowledge asserts that the document characterized by the Office as a “Conference Report” is not valid legislative history and is “not

referencing the ‘Licensed to YouTube by’ field.”<sup>76</sup> They also indicate that additional recordings may be commercially exploited on YouTube with the authorization of the sound recording rights owner that are unavailable on other services.<sup>77</sup>

Upon review, because the “Show More” option will indicate when a work has been licensed “by or under the authority of the rights owner,” and because YouTube is a predominant service for the consumption of music in the United States,<sup>78</sup> the final rule includes YouTube as a separate search category for those uses that are authorized by the sound recording rights owner. If a user locates the use of a Pre-1972 Sound Recording and the “Show More” option indicates that the work has been licensed, the user should consider the sound recording being commercially exploited.<sup>79</sup> If a user locates the use of a Pre-1972 Sound Recording and the “Show More” option

does *not* indicate whether the work has been licensed, the user should continue to progressively search in the other search categories until and if the sound recording is found.<sup>80</sup>

#### 5. Searching With the SoundExchange ISRC Lookup Tool

Fifth, the rule asks the user to search for the Pre-1972 Sound Recording using the free online ISRC lookup tool (located at <https://isrc.soundexchange.com/#!/search>) to search SoundExchange’s database, which contains information for more than 27 million sound recordings, including Pre-1972 Sound Recordings.<sup>81</sup> As detailed in the NPRM, an overwhelming number of stakeholders representing rights owners initially recommended inclusion of the SoundExchange ISRC lookup tool as an important category of search,<sup>82</sup> and urged inclusion as a mandatory step in response to the proposed rule.<sup>83</sup> As noted above, Public Knowledge objects to including this lookup tool, alleging that it is not itself a “service[] offering a comprehensive set of sound recordings for sale or streaming.”<sup>84</sup>

<sup>80</sup> The Office considered that the “Show More” window can include licensing information unrelated to the sound recording, such as music publishing or performance licensing information. If a user is unfamiliar with the licensor, she should feel empowered to conduct additional diligence (such as a search engine search) to confirm whether the entity listed is likely to represent sound recording interests (e.g., a record label or distribution entity like CD Baby, TuneCore, or The Orchard). While this commingling of licensing information results is inelegant for purposes of this rulemaking, the Office considered the risks of both false positive and false negative results, and determined that the better course is to ask prospective users to bear these additional and manageable clearance activities, rather than neglect a source that many comments pointed out is actively commercially exploiting relevant recordings under authorization of the rights owner. The Office will consider providing additional guidance on this point to aid users in public education materials.

<sup>81</sup> NPRM at 1666–67; SoundExchange Initial at 2–3.

<sup>82</sup> See A2IM & RIAA Initial at 5 (rights owners provide metadata to SoundExchange “for royalty collection, which is a form of commercial exploitation”); Copyright Alliance Initial at 5 (“SoundExchange’s ISRC search tool should be searched, as it provides a vast library of information concerning sound recordings that are submitted by rights owners and their authorized representatives to SoundExchange for the purpose of collecting royalties, which is a form of commercial exploitation”); SoundExchange Initial at 2–14; FMC Reply at 6 (stating that inclusion of a sound recording in this database “is an unambiguous indicator that a recording is being commercially exploited”); Recording Academy Reply at 3 (“SoundExchange’s ISRC Search tool is indispensable to a good faith, reasonable search.”).

<sup>83</sup> A2IM & RIAA NPRM Comment at 6; Copyright Alliance NPRM Comment at 2.

<sup>84</sup> Public Knowledge NPRM Comment at 2–3 & n.1; Public Knowledge Reply at 10 (citing 17 U.S.C. 1401(c)(1)(A)(ii)).

The NPRM, and the above discussion of Public Knowledge’s general objections, explain in detail the propriety of including this step as part of a reasonable search. Because the ISRC lookup tool allows users to freely and easily search a deep trove of sound recording information that rights owners themselves have submitted in connection with commercializing those recordings—including on multiple streaming services—the Office again concludes it is desirable and appropriate to include this tool as a step in a sufficient good faith, reasonable search. Requiring a prospective user to search the ISRC lookup tool is thus expected to serve as a reasonable proxy for searches on a wide array of services that offer a comprehensive set of sound recordings for sale or streaming, and specifically, to address commenters’ concerns that it is otherwise difficult to determine exploitation by non-interactive services that offer limited user search capability.<sup>85</sup>

Accordingly, the final rule includes the ISRC lookup tool as a mandatory step.

#### 6. Searching Sellers of Physical Product

Sixth, a user should search for the Pre-1972 Sound Recording on at least one major seller of physical product, namely *Amazon.com*, and if the user reasonably believes that the sound recording is of a niche genre such as classical music (including opera) or jazz, one smaller online music store offering recordings in that niche whose repertoires are searchable online, namely: ArkivJazz, ArkivMusic (classical), Classical Archives, or Presto (classical).<sup>86</sup> The Office invited public comment on whether there are additional genres that similarly warrant searching another online music service.<sup>87</sup> In response, A2IM and RIAA stated they “are not aware of specific online music services or other sources that users could search to find recordings in other niche genres, such as blues and gospel, that are not available in the services already identified [in the proposed rule].”<sup>88</sup> Accordingly, the final rule adopts this aspect of the proposed rule without substantive change.

Public Knowledge particularly objects to this search step, contending that the

<sup>85</sup> See 17 U.S.C. 1401(c)(1)(A); (3). Compare Copyright Alliance Reply at 2–3; FMC Reply at 4; and Recording Academy Reply at 3 (expressing concerns related to rights owner interests) with EFF Initial at 4 and Public Knowledge Initial at 2 (expressing concerns related to user perspectives).

<sup>86</sup> NPRM at 1667.

<sup>87</sup> *Id.*

<sup>88</sup> A2IM & RIAA NPRM Comment at 4.

<sup>76</sup> A2IM & RIAA NPRM Comment at 5.

<sup>77</sup> *Id.* (“Including YouTube in the list of categories may also help to address the Office’s concern about obscuring the perspective of smaller, less mainstream creators, . . . many of whom post their content on YouTube.”); Copyright Alliance NPRM Comment at 3 (stating that “in many instances . . . works, though being commercially exploited on YouTube, would not be available on other authorized services”). The Office’s own searches bear this out. For example, a search on YouTube for Elizabeth Cotten’s 1959 recording “Freight Train” or Daniel Santos & Sonora Matancera’s 1950 recording “Carolina Cao” reveals they are licensed to YouTube by The Orchard, an entity that comments suggested “does not make its catalog publicly available.” A2IM & RIAA Initial at 6; see *Elizabeth Cotten—Freight Train*, YouTube (Jan. 27, 2014), [https://www.youtube.com/watch?v=g8UN\\_6AUGCw](https://www.youtube.com/watch?v=g8UN_6AUGCw); *Daniel Santos & Sonora Matancera—Carolina Cao* (©1950), YouTube (Apr. 10, 2010), [https://www.youtube.com/watch?v=jXppKWTaw\\_I](https://www.youtube.com/watch?v=jXppKWTaw_I). Both “Carolina Cao” and the recording “I’m Bound for Canaan Land” discussed above appear to be currently unavailable on services like Spotify.

<sup>78</sup> YouTube, Wikipedia, <https://en.wikipedia.org/wiki/YouTube> (last visited Mar. 29, 2019) (“As of February 2017, there were more than 400 hours of content uploaded to YouTube each minute, and one billion hours of content being watched on YouTube every day. As of August 2018, the website is ranked as the second-most popular site in the world . . .”). See also A2IM & RIAA NPRM Comment at 5 (stating that YouTube is “the predominant user-generated service in the U.S. and abroad”); Recording Academy NPRM Comment at 3 (stating that in 2018, YouTube “accounted for almost half of all on-demand music streaming globally, more than every other streaming service combined”).

<sup>79</sup> For example, a search for the 1927 recording “Blue Yodel (T for Texas)” by Jimmie Rodgers suggests that some results are licensed by RCA/Legacy (T For Texas (Blue Yodel #1)—Jimmie Rodgers, YouTube (Jan. 22, 2013), [https://www.youtube.com/watch?v=X\\_3NC\\_kVmhk](https://www.youtube.com/watch?v=X_3NC_kVmhk)), while other results reveal no licensing information after clicking “Show More” (*Jimmie Rodgers—Blue Yodel No 1 (T For Texas)*, YouTube (Jun. 17, 2006), <https://www.youtube.com/watch?v=qEIBmGZxAhg>). Similar results were returned for other recordings, such as Patsy Montana’s 1935 recording “I Want to Be a Cowboy’s Sweetheart” and Link Wray’s 1958 “Rumble.”



statute's use of the word "services" is "plainly a proxy for digital outlets."<sup>89</sup> In support, it references the definition of "service" in section 115(e)(29) to claim that searches under section 1401(c) should be limited to outlets "transmit[ting] music to customers in some electronic form as opposed to providing a market for physical copies."<sup>90</sup> The Office does not find this to be the better interpretation of the statute. Section 1401(c) expressly contemplates searches of multiple services, including those offering sound recordings "for sale"<sup>91</sup> in addition to streaming. While the Office agrees that the term "services" suggests a focus on online sources, as opposed to physical storefronts, it would be improper to ignore evidence of commercial exploitation through sales of physical product.<sup>92</sup> The plain language of the statute is not qualified "for digital sale" or "digital commercial exploitation." Indeed, section 1401(c) does not include the word "digital" at all. Nor does legislative history suggest that the section 1401(c) exception is conditioned upon whether there is "digital" commercial exploitation of Pre-1972 Sound Recordings.<sup>93</sup> Given this background, it would be odd to read the word "digital" into a statutory chapter concerned with recordings that predate the digital age. Further, the definition of "services" referenced by Public Knowledge is expressly limited to section 115 and does not apply to section 1401.<sup>94</sup> Finally, assuming *arguendo* that "services" is indeed a

proxy for "digital outlet," it is not clear why Amazon.com, potentially the largest e-commerce company in the world, would not be considered a "digital outlet."<sup>95</sup>

#### 7. Searches for Ethnographic Pre-1972 Sound Recordings

The NPRM reflected concerns regarding the noncommercial use of ethnographic Pre-1972 Sound Recordings raised by the National Congress of American Indians ("NCAI"), the oldest and largest national organization made up of Alaska Native and American Indian tribal government, and Professors Trevor Reed, Jane Anderson, and Robin Gray, who have worked on legal and cultural issues surrounding pre-1972 ethnographic sound recordings. NCAI asserted that "[t]he lack of complete and accurate information typically available on copyright interests in ethnographic sound recordings, and the cultural sensitivity of the contents of many ethnographic sound recording collections, merits consideration of special opt-out rules carefully tailored to the specific needs of Native American communities."<sup>96</sup> As NCAI explains further:

Often such recordings are the result of anthropological or ethnographical gatherings of sound recordings, frequently capturing ceremonial or otherwise culturally significant songs. Further, due to the circumstances of how these recordings were conducted—often without any documentation of the free and prior informed consent of the tribal practitioners/performers—tribes today are unaware of much of the content that they potentially hold valid copyright claims over.<sup>97</sup>

Similarly, Professors Reed, Anderson, and Gray explain that "scholars have extensively documented the inequalities and ethical dilemmas surrounding early ethnographic field recording," claiming that "ownership interests in pre-1972 ethnographic sound recordings are presumed to have vested in and remained with the performers who recorded them under the common-law rule," but that unrelated holding institutions (e.g., libraries, archives, museums, and universities) typically possess the master recordings.<sup>98</sup> Those professors suggest that regulations governing the noncommercial use exception under section 1401(c) "must be carefully tailored to the informational

disadvantages Native American tribes and tribal members face as they attempt to locate and protect their rights to ethnographic sound recordings."<sup>99</sup>

The Copyright Office is sensitive to the need to ensure that regulations governing the noncommercial use of Pre-1972 Sound Recordings do not adversely impact Alaska Native and American Indian tribes or communities. The Office previously noted that ethnographic field recordings "are an enormous source of cultural and historical information, and come with their own unique copyright issues,"<sup>100</sup> and that "librarians and archivists who deal with ethnographic materials must abide by the cultural and religious norms of those whose voices and stories are on the recordings."<sup>101</sup> The Office appreciates that the public ownership record for these recordings may be less developed and less likely to be indexed, and that as a result, searches that are otherwise reasonable for a prospective user may fail to identify that a specific ethnographic recording is being commercially exploited by the rights owner.

Accordingly, for ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes or communities, the proposed rule asked the user to contact the Alaska Native or Native American tribe and, if known to the user, the relevant holding institution to aid in determining whether the sound recording is being commercially exploited.<sup>102</sup> Specifically, the proposed rule asked the user to make contact by using contact information known to the user if applicable, and also by using the contact information provided in NCAI's tribal directory.<sup>103</sup> If no information is listed or the tribe is unknown to the user, the user would contact NCAI itself.

No commenter opposed this extra search step for ethnographic sound recordings. Indeed, FMC expressed its "wholehearted[] support [of] the extra step in the search requirement for

<sup>89</sup> Public Knowledge NPRM Comment at 3 n.1.

<sup>90</sup> *Id.* (citing Orrin G. Hatch—Bob Goodlatte Music Modernization Act, Pub. L. 115–264, 132 Stat. 3676, 3721–22 (codified at 17 U.S.C. 115(e)(29) (2018))).

<sup>91</sup> 17 U.S.C. 1401(c)(1)(A)(ii); *see id.* at 1401(c)(3)(A) (directing the Register to issue regulations identifying "services offering a comprehensive set of sound recordings for sale or streaming" to be searched).

<sup>92</sup> *See* Hugh McIntyre, *Report: Physical Albums Sell Significantly Better Than Digital Ones*, *Forbes* (Mar. 28, 2018), <https://www.forbes.com/sites/hughmcintyre/2018/03/28/physical-albums-sell-significantly-better-than-digital-ones-even-today/> ("All forms of physical purchases added up to \$1.5 billion in the U.S. last year. CD sales experienced a big hit, losing 10 million sales from the year prior, though at 87.6 million copies moved, they still performed better than their digital counterparts. As has been the case for several years now, vinyl remains the one format of music that must be bought outright that continues to grow by any noticeable measure . . .").

<sup>93</sup> *See* Conf. Rep. at 25 ("Subsection (c) creates a process for requesting from rights owners, at their sole discretion, permission to engage in noncommercial uses of pre-1972 sound recordings that are not otherwise commercially exploited.").

<sup>94</sup> 17 U.S.C. 115(e) (limiting definitions to section 115). Congress's intent to have separate definitions for sections 115 and 1401 is further evidenced by those sections having different definitions of the identical term "covered activity." *Compare* 17 U.S.C. 115(e)(7) *with id.* at 1401(l).

<sup>95</sup> *See* Wikipedia, [https://en.wikipedia.org/wiki/List\\_of\\_largest\\_internet\\_companies](https://en.wikipedia.org/wiki/List_of_largest_internet_companies) (listing Amazon.com at #1 on a list of "largest internet companies").

<sup>96</sup> NCAI Reply at 1.

<sup>97</sup> *Id.*

<sup>98</sup> Reed, Anderson & Gray Reply at 2.

<sup>99</sup> *Id.* at 3.

<sup>100</sup> Pre-1972 Sound Recordings Report at 52.

<sup>101</sup> *Id.* at 61 (citing Rob Bamberger and Sam Brylawski, Nat'l Recording Preservation Board of the Library of Congress, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age* 19 (2010)).

<sup>102</sup> *See* Reed, Anderson & Gray Reply at 2 (suggesting that the marketplace lacks "inaccurate and unreliable information about these sound recordings," necessitating tribal consultation). For example, the professors' comment suggests that making contact may be valuable to provide title, artist, or other information relevant to a particular recording.

<sup>103</sup> *See* *Tribal Directory*, Nat'l Cong. of Am. Indians, <http://www.ncai.org/tribal-directory> (last visited Mar. 29, 2019) (providing searchable directory by tribe name, area, and keyword).

ethnographic sound recordings.”<sup>104</sup> Regarding the proposed regulatory language, NCAI suggests that the final rule define “Alaska Native or American Indian tribes,” “at a minimum,” to those that are “federally recognized,” and to strike the word “communities” from any such definition.<sup>105</sup> NCAI also asks that for users who do not know the contact information for a tribe, the final rule direct users to the U.S. Department of the Interior’s list of federally recognized tribes, which is published annually in the **Federal Register**,<sup>106</sup> and the Department of the Interior’s Bureau of Indian Affairs’ tribal leaders directory, which provides contact information for each federally recognized tribe.”<sup>107</sup>

The Copyright Office appreciates that these issues are nuanced and is committed to addressing them in a sensitive and thoughtful manner. The Office must also be careful, however, not to exceed its regulatory authority, by, for example, prohibiting the use of Pre-1972 Sound Recordings of American Indian and Alaska Native tribes without the relevant tribe’s permission, preventing the recordings from entering the public domain, declaring that tribal law governs Pre-1972 Sound Recordings of American Indian and Alaska Native tribes, or imposing a fee requirement on users to pay tribes for conducting commercial exploitation searches.<sup>108</sup> The Office notes, however, that its inability to issue regulations beyond the scope of this rulemaking does not affect the ability of American Indian and Alaska Native tribes to raise such issues before the courts or Congress. The Office further notes that tribes themselves may choose to impose fees on users to offset any administrative burden.

Within the regulatory authority granted to the Office, the Office has adjusted the final rule to reflect NCAI’s comments. The final rule defines “Alaska Native or American Indian tribes” as those federally recognized by being included in the U.S. Department of the Interior’s list of federally recognized tribes. If the user does not locate the relevant sound recording in the Copyright Office’s database of Pre-1972 Schedules or other search categories, the final rule asks the user to contact the Alaska Native or Native American tribe and, if known to the user, the relevant holding institution to

aid in determining whether the sound recording is being commercially exploited. Specifically, the final rule asks the user to make contact by using contact information known to the user, if applicable, and also by using the contact information provided in the U.S. Department of the Interior’s Bureau of Indian Affairs’ tribal leaders directory.

The Office believes that this search step is a reasonable burden to ask prospective users of such expressions of cultural heritage in light of the complicated history of some of these sound recordings. The Office also expects that the notification requirement will prove useful to rights owners who wish to exercise discretion to opt out of the noncommercial use by filing notice in the Copyright Office.<sup>109</sup>

#### ii. Sources Not Required To Be Searched

The Office’s proposed rule did not include additional search steps or services proposed by some commenters at the notice of inquiry stage, specifically:

- Additional comprehensive streaming services beyond the one the user elects to search from the proposed rule’s list of services
- Terrestrial or internet radio services, including non-interactive services subject to the section 114 license
- The to-be-created Mechanical Licensing Collective database<sup>110</sup>
- Dogstar Radio, which offers searchable playlists from Sirius XM
- Online databases of U.S. performing rights organizations
- Other comprehensive databases offered by private actors (e.g., Songfile, Rumblefish, Songdex, Cuetrak, Crunch Digital)
- IMDB.com
- Video streaming services
- The SXWorks NOI Tools
- Music distribution services (e.g., CDBaby, Tunecore)
- Predominantly foreign music services
- SoundCloud or Bandcamp
- Niche streaming services (e.g., Idagio, Primephonic)<sup>111</sup>

The Office reiterates that the steps in the final rule, including the requirement to search major search engines, may likely reveal some of the very same information contained in the above services, and therefore should result in identifying a vast amount of the Pre-1972 Sound Recordings being commercially exploited at the time searches are conducted. At the same time, the Office recognizes that these locations may provide relevant information to users wishing to obtain additional information, including

further information about recordings that are being commercially exploited in order to facilitate permissive transactions. A2IM and RIAA urge the Office to list “all of the non-mandatory sources in one place” as additional, optional sources that users may wish to search.<sup>112</sup> While the Office does not believe that regulatory text is the best place for this information to reside, the Office will include these sources in other publications, such as its educational resources.

#### iii. Search Terms and Strategy

##### 1. General Rule

The proposed rule asked users to search on the title and featured artist(s) of the Pre-1972 Sound Recording in the various search categories.<sup>113</sup> If the user knows any of the following attributes of the Pre-1972 Sound Recording, and the source has the capability for the user to search such attributes, the user should also search: Alternate artist name(s), alternate title(s), album title, and the International Standard Recording Code (“ISRC”).<sup>114</sup> The user was encouraged to optionally search any other attributes known to the user of the sound recording, such as label or version.<sup>115</sup> The Office determined that narrowing a search by these attributes may inform a user’s good faith, reasonable determination whether or not a Pre-1972 Sound Recording is being commercially exploited.<sup>116</sup>

The NPRM, responding to a relatively general statement by *IMSLP.org*, invited public comment on whether the final rule should address whether users should be able to use officially-supported APIs to search and locate a Pre-1972 Sound Recording on a streaming service.<sup>117</sup> EFF maintains that the final rule “should promote and encourage the development of third-party tools and services that can assist in performing a reasonable search for commercial exploitation,” and clarify that “searches of the various databases listed in the proposed rule can be conducted through any computer-accessible or human-accessible interface.”<sup>118</sup> Copyright Alliance, A2IM, and RIAA assert that the final rule does not need to expressly include the use of APIs.<sup>119</sup> Copyright Alliance

<sup>104</sup> FMC NPRM Comment at 2.

<sup>105</sup> NCAI NPRM Comment at 3–4.

<sup>106</sup> *Id.* at 4; see, e.g., 84 FR 1200–05 (Feb. 1, 2019).

<sup>107</sup> NCAI NPRM Comment at 4; *Tribal Leaders Directory*, U.S. Dep’t of the Interior, Indian Affairs, <https://www.bia.gov/tribal-leaders-directory> (last visited Mar. 29, 2019).

<sup>108</sup> Compare NCAI NPRM Comment at 4–6.

<sup>109</sup> See 17 U.S.C. 1401(c)(1)(C).

<sup>110</sup> The Office is open to revisiting the MLC database once it is up and running.

<sup>111</sup> NPRM at 1668.

<sup>112</sup> A2IM & RIAA NPRM Comment at 6.

<sup>113</sup> NPRM at 1669.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; see EFF Initial at 3.

<sup>117</sup> NPRM at 1666.

<sup>118</sup> EFF NPRM Comment at 2.

<sup>119</sup> A2IM & RIAA NPRM Comment at 3 (stating that distinctions between a user “conduct[ing] an otherwise sufficient search of a service like Spotify



also expresses concern “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 U.S.C. 115.”<sup>120</sup> FMC also expressed concern that searches with APIs may “result in undesirable false negatives” that may go unnoticed if searches are automated.<sup>121</sup> While not commenting on *IMSLP.org*’s statement, the Internet Archive had previously submitted a comment drawing on its own experience “automating the process of searching for commercial availability at scale,” noting it was “more complex than we anticipated,” but that “human searchers would generally not make the same sorts of mistakes” that necessitated refinements in Internet Archive’s code.<sup>122</sup> Given these concerns regarding the use of APIs or other automated searching, the final rule does not expressly permit the use of APIs in conducting a good faith, reasonable search.

As discussed above, at EFF’s suggestion, the Office amended the rule to clarify the scope of searching via search engines.<sup>123</sup> The final rule is otherwise retained without substantive change.

## 2. Classical Music Sound Recordings

Because classical music sound recordings require more information to sufficiently identify the sound recording, the proposed rule required the user to search on additional attributes for those types of sound recordings.<sup>124</sup> Under the proposed rule, a user wishing to determine whether a Pre-1972 Sound Recording of classical music is being commercially exploited must search on the composer and opus (*i.e.*, the work’s title) and the conductor, featured performers, or ensemble, depending upon the work (*i.e.*, the work’s “featured artist”).<sup>125</sup>

using an API that is otherwise voluntarily provided by the service, rather than some other interface to the service (*e.g.*, a desktop or mobile user interface), . . . [do] not seem worth mentioning in regulations”); Copyright Alliance NPRM Comment at 2 (“We see no reason why the rule needs to encourage APIs or other specific means for searching.”).

<sup>120</sup> Copyright Alliance NPRM Comment at 2.

<sup>121</sup> FMC NPRM Comment at 2 (giving example of using the Sonos application to search Apple Music and Spotify for Ethel Merman’s recording of “Everything’s Coming Up Roses,” with the incorrect song being located on Spotify).

<sup>122</sup> Internet Archive Initial at 1.

<sup>123</sup> EFF NPRM Comment at 2.

<sup>124</sup> NPRM at 1669.

<sup>125</sup> *Id.* at 1669, 1676; *see also* Anastasia Tsioulcas, *Why Can’t Streaming Services Get Classical Music*

The Office invited public comment on whether other genres of sound recordings require searching additional terms to identify the sound recording sufficiently. A2IM and RIAA confirm that they are not aware of any such additional genres.<sup>126</sup> FMC suggested “adding film, TV, and theater soundtracks . . . as the quality of metadata implementation is sometimes inconsistent, if generally improving,”<sup>127</sup> but did not provide examples where the proposed search terms would fail to identify a recording being commercially exploited, or suggest specific search criteria to address soundtrack uses. Without more information, the Office declines to adjust the general criteria and the final rule adopts this aspect of the proposed rule without substantive change. If evidence develops that the adopted search criteria are insufficient, the Office will consider subsequent adjustments to the rule.

## 3. Remastered Pre-1972 Sound Recordings

In the NPRM, the Office suggested that should the user find a “remastered” version of a Pre-1972 Sound Recording through searching in any of the categories listed in the proposed rule, such a finding likely evidences commercial exploitation of the Pre-1972 Sound Recording.<sup>128</sup> The Office noted that “remastering” a sound recording may consist of mechanical contributions or contributions that are too minimal to be copyrightable, and that it would thus be prudent for a user to consider a 1948 track that was remastered and reissued in 2015 to qualify as a Pre-1972 Sound Recording.<sup>129</sup>

A2IM and RIAA agree that finding a “remastered” version likely evidences commercial exploitation of the Pre-1972 Sound Recording, and ask for the Office’s regulations to “make this a clear presumption.”<sup>130</sup> The Office has provided clarifying language in its regulatory definition of “Pre-1972 Sound Recording.”

*Right?*, NPR The Record (June 4, 2015, 10:50 a.m.), <https://www.npr.org/sections/therecord/2015/06/04/411963624/why-cant-streaming-services-get-classical-music-right> (last visited Mar. 29, 2019) (describing the metadata conundrum in classical music and difficulty searching streaming services).

<sup>126</sup> A2IM & RIAA NPRM Comment at 4.

<sup>127</sup> FMC NPRM Comment at 2.

<sup>128</sup> NPRM at 1669.

<sup>129</sup> *Id.* (citing U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 803.9(F)(3) (3d ed. 2017) (“*Compendium (Third)*”).

<sup>130</sup> A2IM & RIAA NPRM Comment at 12.

## iv. Other Considerations

### 1. Searches for Foreign Pre-1972 Sound Recordings

Stakeholders questioned whether the section 1401(c) exception applies to foreign Pre-1972 Sound Recordings (*i.e.*, Pre-1972 Sound Recordings originating outside the United States). As detailed in the NPRM, certain foreign Pre-1972 Sound Recordings have been granted copyright protection in the United States through the Uruguay Round Agreements Act, and the MMA does not reference foreign sound recordings specifically.<sup>131</sup> Noting conflicting comments, the NPRM stated “[w]hether the noncommercial use exception under section 1401(c) can immunize content actionable under title 17 for restored works that are foreign Pre-1972 Sound Recordings may ultimately be a matter for the courts to resolve.”<sup>132</sup> In response, A2IM, RIAA, and Copyright Alliance contend the state of the law is clear, and that because foreign sound recordings restored under section 104A “enjoy full federal copyright protection,” they are not subject to the section 1401(c) exception for noncommercial use.<sup>133</sup> They urge the Office to communicate to prospective users “(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 [notices of intent to enforce] for restored works, which would show whether a particular pre-72 sound recording is a restored work under Section 104(a).”<sup>134</sup>

As the NPRM noted, section 1401 provides *sui generis* protection running parallel to any copyright protection afforded to foreign Pre-1972 Sound Recordings under section 104A.<sup>135</sup> While the Office appreciates A2IM, RIAA, and Copyright Alliance’s perspective, this rulemaking does not require the Office to interpret whether

<sup>131</sup> NPRM at 1670.

<sup>132</sup> *Id.*

<sup>133</sup> A2IM & RIAA NPRM Comment at 12 (“To the extent that a sound recording meets the requirements to be covered by Section 104(A), those recordings enjoy full federal copyright protection, not the *sui generis* intellectual property right created by Section 1401. Accordingly, they are not subject to use pursuant to the Section 1401(c) exception.”); Copyright Alliance NPRM Comment at 7 (“We disagree that the applicability of 17 U.S.C. 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.”).

<sup>134</sup> *See* A2IM & RIAA NPRM Comment at 12. Users may locate notices of intent to enforce by searching the Office’s public catalog.

<sup>135</sup> NPRM at 1670; *see* Conf. Rep. at 15; *see also* IFPI Initial at 1–2.

the noncommercial use exception is or is not applicable to these restored foreign sound recordings. Regardless, because protection and enforcement for foreign restored rights is fact-intensive—implicating the specific country, date and location of publication, duration of term in both the United States and the country, and compliance with formalities—the Office reiterates that prospective users of foreign Pre-1972 Sound Recordings should proceed cautiously before relying on the section 1401(c) exception.<sup>136</sup> The Office will provide general guidance in its NNU form instructions regarding the noncommercial use exception and the parallel protection afforded to certain foreign sound recordings, including how to search the Office's records to determine whether a particular Pre-72 Sound Recording is a restored work under section 104A.

## 2. Reliance on Third-Party Searches

The proposed rule did not permit a user to rely on a search conducted by a third party, unless the third party conducted the search as the user's agent.<sup>137</sup> As explained in the NPRM, reliance upon a third-party search is unlikely to be reasonable because that party may have conducted an inadequate search, or the Pre-1972 Sound Recording may become subject to commercial exploitation after a third party has conducted a search, but before another user desires to use the same sound recording for a noncommercial use under section 1401(c).<sup>138</sup> In addition, a user must certify that she conducted a good faith, reasonable search when submitting an NNU, and a user cannot certify the actions of an unrelated third party.<sup>139</sup>

The Office received one comment from the Copyright Alliance, agreeing with the decision not to permit a user to rely on third-party searches.<sup>140</sup> The final rule adopts this aspect of the proposed rule without substantive change.

## 3. Timing of Completing a Search Before Filing an NNU

To ensure that search results are not stale, the rule requires the user (or the user's agent) to conduct a search under section 1401(c) no later than 90 days

before submitting an NNU with the Office.<sup>141</sup> The Office did not receive any comments regarding this proposed 90-day period, and so the final rule adopts this aspect of the proposed rule without substantive change.

### B. Notices of Noncommercial Use (NNUs)

#### i. Form and Content of NNUs

##### 1. Overview of Final Rule

The final rule largely adopts the provisions of the proposed rule regarding which information must be provided in NNUs, with some adjustments in response to public comment.

Commenters initially disagreed on whether a user should be required to document her search, such as by submitting screen shots from searched websites.<sup>142</sup> Under the proposed rule, users would not have to submit documentation of searches to the Copyright Office as part of conducting a good faith, reasonable search.<sup>143</sup> In response, A2IM and RIAA request that users be required to “save evidence of their searches for three years from the date of their first use of the work, in much the way that the Internal Revenue Service requires taxpayers to save documentation that supports a tax return for at least three years.”<sup>144</sup> Copyright Alliance suggests that users be required to provide a “list of the search terms that they used or other evidence of their searches.”<sup>145</sup> Although the final rule does not require users to submit documentation of their searches or provide the search terms used, it adds regulatory language encouraging users to keep records of their searches for at least three years in case of dispute (*i.e.*, if challenged, users may need to provide evidence that they in fact conducted a good faith, reasonable search).<sup>146</sup>

Copyright Alliance, A2IM, and RIAA also request that users be required to list

“the current or last-known rights owner,” such as a record label, to the extent that the information is known or can be reasonably discovered by the user.<sup>147</sup> Copyright Alliance suggests that such a 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,” and that “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.”<sup>148</sup> A2IM and RIAA contend that “where a user is accessing a pre-72 sound recording from an old 33 or 78 rpm record and that record has a label affixed to it, the user should have no trouble identifying the name of the record label that released that recording and including that information in an NNU.”<sup>149</sup> The Office agrees, noting that in cases where a user possesses a physical copy of the work, she may have ready access to record label and other information that would improve the public record regarding these recordings if included on the NNU (and decrease potential false positive opt-outs by owners of different performances or versions). Accordingly, the final rule requires the user to provide the current or last-known rights owner (*e.g.*, record label), if known.

In addition, the proposed rule stated that an NNU may not include a proposed use for more than one Pre-1972 Sound Recording unless all of the sound recordings include the same featured artist and were released on the same pre-1972 album or other unit of publication.<sup>150</sup> Copyright Alliance, A2IM, and RIAA request that users should not be permitted to include all sound recordings released on a “greatest hits” or compilation album, which may include recordings owned by multiple rights owners if the featured artist switched labels throughout her

<sup>141</sup> See NPRM at 1670.

<sup>142</sup> Compare Copyright Alliance Initial at 6 (user should be required to document the search); *IMSLP.ORG* Reply at 1 (same); A2IM & RIAA Initial at 21 (same); with Public Knowledge Reply at 14 (section 1401(c) does not require documentation of the search for the safe harbor to apply); EFF Reply at 4 (same); Wikimedia Foundation Reply at 3 (any documentation only becomes relevant if the adequacy of the search comes into dispute). See also FMC Reply at 5 (requiring a user to upload screenshots is an “inelegant solution”).

<sup>143</sup> NPRM at 1672.

<sup>144</sup> A2IM & RIAA NPRM Comment at 7.

<sup>145</sup> Copyright Alliance NPRM Comment at 4.

<sup>146</sup> See *id.* (“[T]he 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.”).

<sup>147</sup> A2IM & RIAA NPRM Comment at 6; Copyright Alliance NPRM Comment at 4; see also FMC NPRM Comment at 3 (“It would be very helpful for any available information about the label to be included—this would help avoid false negatives and false positives because of the frequency of recordings that artists often made over the course of their careers for multiple rightsholders.”).

<sup>148</sup> Copyright Alliance NPRM Comment at 4; see also A2IM & RIAA NPRM Comment at 6 (“Merely listing the track title and artist, where additional information is readily available to the user, would impose an undue and unsustainable burden on rights owners, who would be forced to research each title covered by an NNU to determine if it belonged to them.”).

<sup>149</sup> A2IM & RIAA NPRM Comment at 6.

<sup>150</sup> NPRM at 1671. A “unit of publication” exists where multiple works are physically bundled or packaged together and first published as an integrated unit. U.S. Copyright Office, *Circular 34: Multiple Works*, <https://www.copyright.gov/circulars/>.

<sup>136</sup> Conversely, the MMA does not address whether restored sound recordings that were given protection under the URAA, then subsequently fell out of term in their home countries would receive additional *sui generis* protection under section 1401(c). See also 84 FR 9053, 9060 (Mar. 13, 2019).

<sup>137</sup> NPRM at 1670.

<sup>138</sup> *Id.*; see A2IM & RIAA Reply at 9.

<sup>139</sup> NPRM at 1670.

<sup>140</sup> Copyright Alliance NPRM Comment at 1.

career.<sup>151</sup> The NPRM recognized that where multiple rights owners own the various Pre-1972 Sound Recordings listed in one NNU, it may be difficult for rights owners as well as prospective users to evaluate opt-outs to proposed noncommercial uses.<sup>152</sup> Accordingly, the final rule states that an NNU may not include a proposed use for more than one Pre-1972 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, and in the case of “greatest hits” or compilation albums, all of the listed sound recordings on the NNU share the same record label or other rights owner information.<sup>153</sup>

Next, Copyright Alliance, A2IM, and RIAA request that the user must specify the start and end dates of the proposed use, not merely “when the use will occur.”<sup>154</sup> The final rule adopts this approach.

In sum, the final rule requires the user to provide:

(1) The user’s full legal name, and whether the user is an individual person or corporate entity, including whether the entity is a tax-exempt organization as defined under the Internal Revenue Code;

(2) The title and featured artist(s) of the Pre-1972 Sound Recording desiring to be used;<sup>155</sup>

(3) If known, the current or last-known rights owner (e.g., record label), alternate artist name(s), alternate title(s), album title, and ISRC; and

(4) A description of the proposed noncommercial use, including a summary of the project and its purpose, how the Pre-1972 Sound Recording will be used in the project, the start and end dates of the use, and where the proposed use will occur (i.e., the U.S.-based territory of the use).

Finally, the rule substantively adopts the provision of the proposed rule requiring the individual submitting the NNU to certify that she has appropriate authority to submit the NNU, that the user desiring to make noncommercial use of the Pre-1972 Sound Recording (or the user’s agent) conducted a good faith,

reasonable search within the last 90 days without finding commercial exploitation of the sound recording, and that all information submitted to the Office in the NNU is true, accurate, and complete to the best of the individual’s knowledge, information, and belief, and is made in good faith.<sup>156</sup>

Because the specific steps under the final rule are sufficient, but not necessary, to demonstrate that a user has conducted a good faith, reasonable search under the section 1401(c) exception,<sup>157</sup> the NNU certification alternatively allows the user to certify that she conducted a good faith, reasonable search for, but did not find, the sound recording in the Copyright Office’s database of indexed schedules listing right owners’ Pre-1972 Sound Recordings, or on services offering a comprehensive set of sound recordings for sale or streaming.<sup>158</sup>

## 2. Determining Whether a Use Is Noncommercial

The section 1401(c) exception applies only to noncommercial uses of Pre-1972 Sound Recordings.<sup>159</sup> Section 1401(c) does not define “noncommercial,” and although other parts of title 17 refer to “commercial” or “non-commercial” uses, nowhere in the statute are they defined terms.<sup>160</sup>

Stakeholders initially disagreed on whether or to what extent the Office should provide guidelines on what constitutes “noncommercial” use.<sup>161</sup> In

<sup>156</sup> NPRM at 1671–72.

<sup>157</sup> 17 U.S.C. 1401(c)(4)(B) (“Taking the specific, reasonable steps identified by the Register of Copyrights . . . shall be sufficient, but not necessary, for a filer to satisfy the requirement to conduct a good faith, reasonable search . . .”).

<sup>158</sup> See Public Knowledge NPRM Comment at 9 (advocating for same).

<sup>159</sup> 17 U.S.C. 1401(c)(1); Conf. Rep. at 25 (“Subsection (c) applies only to noncommercial uses.”).

<sup>160</sup> See, e.g., 17 U.S.C. 107(1); 108(a)(1), (c), (h)(2)(A); 109(a), (b)(1)(A); 110(4), (8); 506(a); see also Kernochan Center Reply at 2–3 (discussing various statutory provisions); 37 CFR 201.40(b)(1)(i)(B) (2018) (regulatory exception for certain uses of motion pictures in noncommercial videos). But cf. 17 U.S.C. 901(a)(5) (defining “commercially exploit” with respect to mask works).

<sup>161</sup> Compare A2IM & RIAA Reply at 6 (“[I]t is vitally important for both users and rights owners that the Office issue guidelines to help users recognize appropriate uses of section 1401(c) and help rights owners assess the NNUs that get filed.”), and FMC Reply at 6 (noting prevalence of incorrect understanding of copyright published by users in connection with user-uploaded content on YouTube), with Kernochan Center Reply at 3–4 (providing a run-down of key court opinions with “differing conclusions as to what constitutes commercial versus noncommercial use”), and Wikimedia Foundation Reply at 3 (cautioning against creating “complex presumptions” for specific anticipated fact patterns, and suggesting that terms like “noncommercial” are defined in

the NPRM, the Office acknowledged that defining “noncommercial” in relation to section 1401 is complex,<sup>162</sup> and sought to identify certain touchstones through its public education functions that could help filers and other interested parties evaluate whether a use is noncommercial for purposes of this exception.<sup>163</sup> The NPRM further noted that “it is not the Office’s intention to constrain resolution of gray areas or edge cases through private negotiation or, if necessary, the courts.”<sup>164</sup>

In response, commenters provided additional insights regarding proposed considerations to be included in the Office’s guidelines.<sup>165</sup> For example, the Organization for Transformative Works (“OTW”) noted that the “guidelines will be extremely useful to individuals and small businesses that don’t have familiarity with copyright law or the resources to reach out to someone who does,” while urging the Office to stress the approach, as articulated in the NPRM, that such guidelines are informational in nature and not hard-and-fast rules.<sup>166</sup> OTW recommended that the Office “emphasize that the fact that a creator makes money from their art or craft does not necessarily make any particular use commercial,” and disagreed that “measurable benefit” is a workable standard when considering educational uses.<sup>167</sup> In addition, OTW would take the opposite approach of A2IM, RIAA, and FMC, who each strongly advocated that a work being commercially exploited by a platform (e.g., though advertising) must be considered a commercial use of that recording, even if the work was uploaded by a user who does not herself “monetize” or otherwise economically benefit from the upload.<sup>168</sup> EFF further suggests that the Office note that while posting on the “open, accessible internet” is not a “private home use,”

fact-specific contexts that are still being explored by courts).

<sup>162</sup> NPRM at 1672.

<sup>163</sup> *Id.* at 1672–73.

<sup>164</sup> *Id.* at 1672.

<sup>165</sup> See, e.g., A2IM & RIAA NPRM Comment at 11–12; EFF NPRM Comment at 3; FMC NPRM Comment at 3; OTW NPRM Comment at 2.

<sup>166</sup> OTW NPRM Comment at 1.

<sup>167</sup> *Id.* at 2–3.

<sup>168</sup> See A2IM & RIAA NPRM Comment at 11–12 (asking for Office’s guidelines on noncommercial use to “make clear that all publicly accessible videos available on YouTube are considered commercial”); FMC NPRM Comment at 3 (stating that “if a use is not being monetized by the uploader, it may indeed still be commercially exploited by the platform on which it appears”). See also OTW NPRM Comment at 3 (“The mere fact that a platform is making money from a user’s use should not be enough to make the use commercial.”).

<sup>151</sup> See A2IM & RIAA NPRM Comment at 7; Copyright Alliance NPRM Comment at 4.

<sup>152</sup> NPRM at 1671.

<sup>153</sup> This requirement is similar to the requirement when registering multiple works under the unit of publication option. See U.S. Copyright Office, Circular 34: Multiple Works, <https://www.copyright.gov/circs/> (“The copyright claimant for all of the works claimed in the unit is the same.”).

<sup>154</sup> A2IM & RIAA NPRM Comment at 7; Copyright Alliance NPRM Comment at 5; see NPRM at 1671.

<sup>155</sup> As noted above, classical music metadata raises unique issues. For such proposed uses, the prospective user should include information that is similar to the attributes the user is asked to search upon for title and featured artist(s) before claiming the statutory safe harbor.

neither is it “presumptively commercial.”<sup>169</sup> The Office will consider these comments as it develops a public circular or other general materials to help filers and other interested parties in evaluating whether a use is noncommercial for purposes of the section 1401(c) exception.

#### ii. Filing of NNUs, Including Copyright Office Review

The final rule adopts the provisions of the proposed rule in regards to the filing of NNUs and the Office’s level of review. As with similar types of filings made with the Office, the final rule states that the Office does not review NNUs for legal sufficiency.<sup>170</sup> Rather, the Office’s review is limited to whether the formal and legal procedural requirements established under the rule (including completing the required information and payment of the proper filing fee) have been met. For example, as noted in the NPRM, the Office’s indexing of an NNU thus does not mean the proposed use in the NNU is, in fact, noncommercial.<sup>171</sup> Users are therefore cautioned to review and scrutinize NNUs to assure their legal sufficiency before submitting them to the Office.

While the Office is adopting the proposed rule with respect to examination, it also clarifies that it does intend to review and reject “facially deficient” NNUs as part of its examination process.<sup>172</sup> The Office will review an NNU to confirm that the correct form has been used, that all required information has been provided and is legible, and that the NNU has been properly certified. Such review parallels the Office’s examination of documents pertaining to copyright before recording them and making them part of the Office’s public record.<sup>173</sup> As stated in the final rule, the Office may reject an NNU that fails to comply with the Office’s requirements or instructions. This clarification is expected to assuage rightsholders’ concern regarding expenditure of resources responding to facially deficient NNUs, and may also mitigate

concern regarding the proposed fee, as discussed below.<sup>174</sup>

#### iii. Indexing NNUs Into the Copyright Office’s Online Database

The final rule largely adopts the provisions of the proposed rule regarding the indexing of NNUs, with some adjustments adopted in response to public comment. Section 1401(c) requires NNUs to be “indexed into the public records of the Copyright Office.”<sup>175</sup> As under the proposed rule, the final rule states that an NNU will be considered “indexed” once it is made publicly available through the Office’s online database of NNUs. The Office has created an online and searchable database of indexed NNUs for rights owners to search.

A2IM and RIAA request the ability to search the Office’s database of indexed NNUs by rights owner name, as “[w]ithout this option, rights owners will be impeded in their ability to exercise their statutory opt-out right.”<sup>176</sup> This suggestion has been adopted. Rights owners will be able to search on the current or last-known rights owner, as well as the prospective user’s name, the title of the sound recording (which includes alternate title(s)), the featured artist(s) (which includes alternate artist name(s)), and the ISRC.<sup>177</sup>

In support of the proposed rule, A2IM and RIAA agree that users cannot rely on NNUs filed by third parties (other than the user’s agent).<sup>178</sup> The final rule adopts this provision, as well as the provision stating that a user cannot rely on her own NNU once the proposed term of use ends (*i.e.*, she must conduct a new good faith, reasonable search and file a new NNU). The Office’s instructions will further clarify that filers should not rely on information contained in NNUs filed by third parties.<sup>179</sup>

#### C. Opt-Out Notices

The proposed rule stated that if a rights owner files a timely Pre-1972 Opt-Out Notice, the user must wait one year before filing another NNU for the same or similar use of the Pre-1972 Sound

Recording.<sup>180</sup> A2IM and RIAA suggest that “there should be some finite limit on the number of times a user can file the same/similar request involving the same recording.”<sup>181</sup> They note that “it seems unlikely that a bona fide user wishing to make a bona fide noncommercial use would still be seeking permission to use the same recording for the same or a similar purpose two or three years later,” and that because the initial opt-out filing will identify the rights owner, “the user will have obtained all of the information necessary to contact the rights owner directly to negotiate a voluntary license.”<sup>182</sup> They propose limiting a user from filing the same NNU two or three times, or prohibiting the user from filing additional requests for the same/similar use of the same recording at any time more than five years after the initial request was filed.<sup>183</sup> The Office believes that a one-year waiting period is sufficient, and that the Office’s database of indexed NNUs should provide rights owners with notice (particularly because the database will list the most recently-indexed NNUs first). Accordingly, the final rule states that if a rights owner files a timely Pre-1972 Opt-Out Notice, the user must wait one year before filing another notice proposing the same or similar use of the same sound recording(s).

As with NNUs and similar filings made with the Office, the final rule states that the Office does not review Pre-1972 Opt-Out Notices for legal sufficiency, but rather whether the formal and legal procedural requirements have been met. The Office will exercise discretion to reject a Pre-1972 Opt-Out Notice that fails to comply with the Office’s requirements or instructions, such as failing to provide required information or containing other facially obvious errors. Rights owners are cautioned to review and scrutinize Pre-1972 Opt-Out Notices to assure their legal sufficiency before submitting them to the Office.

#### D. Fraudulent Filings

Section 1401 contemplates civil penalties for the filing of fraudulent NNUs (*e.g.*, fraudulently describing the proposed use) and for the filing of fraudulent Pre-1972 Opt-Out Notices.<sup>184</sup> In connection with the Office’s exercise of the regulatory authority directed under the MMA and its general authority and responsibility to

<sup>169</sup> EFF NPRM Comment at 3 (citation omitted).

<sup>170</sup> See, *e.g.*, 37 CFR 201.4(g); 201.17(c)(2); 201.18(g).

<sup>171</sup> See A2IM & RIAA NPRM Comment at 7 (agreeing that the Office’s indexing of an NNU does not mean that the proposed use is noncommercial); Copyright Alliance NPRM Comment at 5 (same). The Office will include this caution on the NNU form and/or instructions.

<sup>172</sup> See A2IM & RIAA NPRM Comment at 10–11 (expressing concerns regarding facially deficient NNUs).

<sup>173</sup> See generally U.S. Copyright Office, *Circular 12: Recordation of Transfers and Other Documents*, <https://www.copyright.gov/circs/circ12.pdf>.

<sup>174</sup> See A2IM & RIAA NPRM Comment at 10–11.

<sup>175</sup> 17 U.S.C. 1401(c)(1)(C).

<sup>176</sup> A2IM & RIAA NPRM Comment at 7.

<sup>177</sup> Similar to the database of Pre-1972 Schedules discussed above, the Office’s database of NNUs will allow for wildcard searching by using an asterisk to fill in partial words.

<sup>178</sup> See *id.* at 2.

<sup>179</sup> See Copyright Alliance NPRM Comment at 4 (“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.”).

<sup>180</sup> NPRM at 1675.

<sup>181</sup> A2IM & RIAA NPRM Comment at 8.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> 17 U.S.C. 1401(c)(6)(A); *id.* at 1401(c)(6)(B).

administer title 17,<sup>185</sup> the proposed rule stated that if the Register becomes aware of abusive or fraudulent notices from a certain filer, she shall have the discretion to reject all submissions from that filer under section 1401(c) for up to one year.<sup>186</sup>

Copyright Alliance, A2IM, and RIAA object to imposing such a penalty or one-year “ban.”<sup>187</sup> Copyright Alliance asserts that “a rights owner can opt-out of a[n] NNU without needing any justification, so the circumstances where there would be abuse or fraud present are, at best, exceedingly narrow,” and that such a “‘lock-out’ mechanism . . . 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.”<sup>188</sup> While Copyright Alliance, A2IM, and RIAA maintain that the statute does not support a “ban,”<sup>189</sup> they acknowledge that civil penalties may not be a sufficient deterrent in all cases.<sup>190</sup>

By including the words “abuse” and “fraud” in the proposed rule, this aspect of the rule targeted filers *intentionally* filing false or fraudulent filings, not “bona fide rights owners” who mistakenly file Pre-1972 Opt-Out Notices containing errors.<sup>191</sup> Indeed, section 1401(c) targets the filers of NNUs and Pre-1972 Opt-Out Notices where such filings are “willful” and/or “knowing” acts of fraud.<sup>192</sup> The Office anticipates that few filings would reach the level of “willful” and/or “knowing” acts of fraud to trigger such civil penalties. And as the statute

contemplates civil penalties for both fraudulent NNUs and Pre-1972 Opt-Out Notices, the proposed rule similarly sought an evenhanded approach. Moreover, the proposed penalty assumed that the Office has general regulatory authority to discipline repeated, abusive filers (such as filers of spoof notices) who may be undeterred even by threats of monetary penalty, as part of its general obligation and authority to administer this filing.<sup>193</sup>

To accommodate concerns about disproportionately penalizing rightsholders, while providing flexibility should civil penalties be an insufficient deterrent in other cases, the final rule states that if the Register becomes aware of abuse or fraudulent filings by or from a certain filer or user, she has discretion to impose civil penalties ranging up to \$1,000 per instance of fraud or abuse, and/or other penalties to deter additional false or fraudulent filings from that filer, including potentially rejecting future submissions for up to one year.

#### E. Filing Fees

The Copyright Act grants the Office authority to establish, adjust, and recover fees for services provided to the public.<sup>194</sup> The NPRM proposed that the fee to file an NNU or an Opt-Out Notice should be the same as the current fee to record a notice of intention to make and distribute phonorecords under section 115 (“NOI”), as such filings are generally processed similarly by the Office (*i.e.*, at the same internal cost).<sup>195</sup>

Commenters expressed concern that the proposed fees are too high for both users and rights owners. Public Knowledge maintains that “noncommercial uses will neither be motivated by, nor likely result in, significant or foreseeable financial revenues or other material rewards,” and so “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.”<sup>196</sup> Similarly, A2IM, RIAA, Copyright Alliance, and FMC contend that if the Office’s review will not serve a “gatekeeping” function (*i.e.*, review NNUs for legal sufficiency) rights owners should not have to pay to file Pre-1972 Opt-Out Notices.<sup>197</sup> Copyright Alliance further contends that “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,”<sup>198</sup> and A2IM and RIAA suggest that “the Office should monitor the NNUs to determine what percentage of them are facially deficient and modify the filing fee as appropriate,” as well as “determine the actual costs of accepting and indexing opt-out notices at its next opportunity to do so.”<sup>199</sup>

As noted above, the Office does intend to review NNUs for regulatory compliance, including to confirm that the correct form has been used, that all required information has been provided and is legible, and that the NNU has been properly certified—and will reject NNUs failing to comply with the Office’s requirements or instructions. Such review parallels the Office’s examination of other documents before they are incorporated into the Office’s public record.<sup>200</sup> Accordingly, while the Office does not intend to index “facially deficient” NNUs (or Opt-Out notices), this gatekeeping process accordingly involves some provision of resources.

The Office notes that potential filers of both notices have objected to the proposed fees, which the Office has endeavored to set based on the cost of providing the services. In scrutinizing the projected cost for these new filings, the Office also recognizes that NNUs

<sup>185</sup> See *id.* at 1401(c)(3), (5)(A); *id.* at 701(a), 702.

<sup>186</sup> NPRM at 1674–75.

<sup>187</sup> A2IM & RIAA NPRM Comment at 9 (objecting “to the penalty to the extent it may limit a bona fide rights owner’s ability to file opt-out notices”).

<sup>188</sup> Copyright Alliance NPRM Comment at 5; see also A2IM & RIAA NPRM Comment at 10 (“[U]sers and filers are not similarly situated. Most users will not be repeat filers, at least not to the degree that larger rights owners will be, so a ban would not impact them in the same way it would a bona fide rights owner, who may be filing opt-out notices on an ongoing basis.”).

<sup>189</sup> A2IM & RIAA NPRM Comment at 9; Copyright Alliance NPRM Comment at 5.

<sup>190</sup> See RIAA *et al.* Ex Parte Letter at 2 (suggesting that Copyright Office should have “discretion” to “address . . . concerns about malicious bad actors that are abusive filers”); A2IM & RIAA NPRM Comment at 10 (proposing “that the Office retain the proposed ban but exempt bona fide rights owners (who could be identified by an Office-issued log-in credential) from the proposed ban”); Copyright Alliance NPRM Comment at 6 (suggesting 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”).

<sup>191</sup> See A2IM & RIAA NPRM Comment at 9.

<sup>192</sup> 17 U.S.C. 1401(c)(6)(A); *id.* at 1401(c)(6)(B)(i); see also *id.* at 1401(c)(6)(C).

<sup>193</sup> *Id.* at 702; *id.* at 1401(c)(3)(B); *id.* at 1401(c)(5)(A).

<sup>194</sup> See *id.* at 708. Because they do not involve services specified in section 708(a), the fees proposed in this NPRM are not subject to the adjustment of fees provision in section 708(b).

<sup>195</sup> NPRM at 1675; see 37 CFR 201.3(e)(1) (\$75). The proposed fee was lower than the cost to record a document for a single title. See *id.* at 201.3(c)(17) (\$105). Basing the cost of a service on the cost for a similar service is appropriate. See 83 FR 24054, 24059 (May 24, 2018) (proposing setting new fees at the same level for “analogous” services). In 2017, Booz Allen Hamilton conducted a study of the Office’s most recent fee structure. When asked whether existing rates could be leveraged for new group registration options, it concluded it was appropriate if the work required was of a similar grade and compensation level. Booz Allen Hamilton, *U.S. Copyright Office, Fee Study: Question and Answers* 6 (Dec. 2017), [https://www.copyright.gov/rulemaking/feestudy2018/fee\\_study\\_q&a.pdf](https://www.copyright.gov/rulemaking/feestudy2018/fee_study_q&a.pdf).

<sup>196</sup> Public Knowledge NPRM Comment at 9; see also Public Knowledge Ex Parte Letter at 1–2.

<sup>197</sup> A2IM & RIAA NPRM Comment at 10–11 (asking the Office to “either review NNUs for legal sufficiency before indexing them or eliminate the filing fee associated with filing opt-out notices”); Copyright Alliance NPRM Comment at 6; FMC NPRM Comment at 3; see also Recording Academy NPRM Comment at 4.

<sup>198</sup> Copyright Alliance NPRM Comment at 6. Copyright Alliance also expressed that the proposed fee to file an NNU “does not appear excessive,” as it “provides a benefit analogous to a free license to use a work otherwise protected by the law.” Copyright Alliance Ex Parte Letter at 2. If the cost to file an NNU decreases, Copyright Alliance maintains that “the fees for filing opt-out notices should also be lowered to maintain, at a minimum, parity between the fees.” *Id.*

<sup>199</sup> A2IM & RIAA NPRM Comment at 11.

<sup>200</sup> See, e.g., U.S. Copyright Office, *Circulars 12: Recordation of Transfers and Other Documents*, <https://www.copyright.gov/circulars/circ12.pdf>; see generally *Compendium (Third)* sec. 2300.

and Pre-1972 Opt-Out Notices will typically include information about only one sound recording, which may require less review than Pre-1972 Schedules and notices of intention to make and distribute phonorecords under section 115, which the Office evaluated as most comparable filings. Accordingly, and to encourage use of these new filing mechanisms in advance of usage data, the filing fees for NNUs and Pre-1972 Opt-Out Notices will be lowered to that which copyright owners pay to file a notice to libraries and archives that a published work in its last twenty years of copyright protection is subject to normal commercial exploitation, another potentially analogous filing that services a similar

policy function.<sup>201</sup> In line with its general approach to fee-setting, the Office will consider whether adjustment (including potentially increasing the fees) is necessary after data regarding these filings are available.

#### List of Subjects in 37 CFR Part 201

Copyright, General provisions.

#### Final Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR parts 201 as follows:

#### PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

■ 2. Amend § 201.3 as follows:

■ a. Revise paragraph (c)(22).

■ b. Redesignate paragraph (c)(23) as paragraph (c)(24).

■ c. Add new paragraph (c)(23).

■ d. Add paragraph (c)(25).

The additions read as follows:

#### § 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

\* \* \* \* \*

(c) \* \* \*

Registration, recordation and related services						Fees (\$)
	*	*	*	*	*	
(22) Notice of noncommercial use of pre-1972 sound recording .....						50
(23) Opt-out notice of noncommercial use of pre-1972 sound recording .....						50
	*	*	*	*	*	
(25) Removal of PII from Registration Records .....						
(i) Initial request, per registration record .....						130
(ii) Reconsideration of denied requests, flat fee .....						60
	*	*	*	*	*	

\* \* \* \* \*

■ 3. Amend § 201.4 as follows:

■ a. Revise paragraph (b)(3).

■ b. In paragraph (b)(10), remove “; and” and add a semicolon in its place.

■ c. In paragraphs (b)(11) through (13), remove the period at the end of each paragraph and add a semicolon in their place.

■ d. Add paragraphs (b)(14) and (15).

The revision and additions read as follows:

#### § 201.4 Recordation of transfers and other documents pertaining to copyright.

\* \* \* \* \*

(b) \* \* \*

(3) Notices of use of sound recordings under statutory license and notices of intention to obtain a compulsory license to make and distribute phonorecords of nondramatic musical works (17 U.S.C. 112(e), 114, and 115(b); see §§ 201.18 and 370.2);

\* \* \* \* \*

(14) Notices of noncommercial use of pre-1972 sound recordings (17 U.S.C. 1401(c)(1)(B); see § 201.37); and

(15) Opt-out notices of noncommercial use of pre-1972 sound

recordings (17 U.S.C. 1401(c)(1)(C); see § 201.37).

\* \* \* \* \*

■ 4. Add § 201.37 to read as follows:

#### § 201.37 Noncommercial use of pre-1972 sound recordings.

(a) *General.* This section prescribes the rules under which a user, desiring to make noncommercial use of a pre-1972 sound recording pursuant to 17 U.S.C. 1401(c), conducts a good faith, reasonable search to determine whether the sound recording is being commercially exploited, and if not, files a notice of noncommercial use with the Copyright Office. This section also prescribes the rules under which a rights owner of a pre-1972 sound recording identified in a notice of noncommercial use may file an opt-out notice opposing a proposed use of the sound recording, pursuant to 17 U.S.C. 1401(c)(1)(C).

(b) *Definitions.* For purposes of this section:

(1) Unless otherwise specified, the terms used have the meanings set forth in 17 U.S.C. 1401.

(2) A *pre-1972 sound recording* is a sound recording fixed before February

15, 1972. A post-1972 remastered version of a pre-1972 sound recording that consists of mechanical contributions or contributions that are too minimal to be copyrightable qualifies as a pre-1972 sound recording for purposes of this section.

(3) For pre-1972 sound recordings of classical music, including opera:

(i) The *title* of the pre-1972 sound recording means, to the extent applicable and known by the user, any and all title(s) of the sound recording and underlying musical composition known to the user, and the composer and opus or catalogue number(s) of the underlying musical composition; and

(ii) The *featured artist(s)* of the pre-1972 sound recording means, to the extent applicable and known by the user, the featured soloist(s); featured ensemble(s); featured conductor; and any other featured performer(s).

(4) An *Alaska Native or American Indian tribe* is a tribe included in the U.S. Department of the Interior's list of federally recognized tribes, as published annually in the **Federal Register**.

(c) *Conducting a good faith, reasonable search.* (1) Pursuant to 17 U.S.C. 1401(c)(3)(A), a user desiring to

<sup>201</sup> 37 CFR 201.3(d)(13) (stating fee for notice to libraries and archives for a single title is \$50); 17

U.S.C. 108(h)(2). The final rule makes a technical

edit to 37 CFR 201.3(c) to correct an inadvertent error.

make noncommercial use of a pre-1972 sound recording should progressively search for the sound recording in each of the categories below until the user finds the sound recording. If the user finds the sound recording in a search category, the user need not search the subsequent search categories. If the user does not find the pre-1972 sound recording after searching each of the categories below, her search is sufficient for purposes of the safe harbor in 17 U.S.C. 1401(c)(4), establishing that she made a good faith, reasonable search without finding commercial exploitation of the sound recording by or under the authority of the rights owner. The categories are:

(i) Searching the Copyright Office's database of indexed schedules listing right owners' pre-1972 sound recordings (<https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html>);

(ii) Searching at least one major search engine, namely Google, Yahoo!, or Bing, to determine whether the pre-1972 sound recording is being offered for sale in download form or as a new (not resale) physical product, or is available through a streaming service;

(iii) Searching at least one of the following streaming services: Amazon Music Unlimited, Apple Music, Spotify, or TIDAL;

(iv) Searching YouTube, to determine whether the pre-1972 sound recording is offered under license by the sound recording rights owner (e.g., record label or distribution service);

(v) Searching SoundExchange's repertoire database through the SoundExchange ISRC lookup tool (<https://isrc.soundexchange.com/#!/search>);

(vi) Searching at least one major seller of physical product, namely Amazon.com, and if the pre-1972 sound recording is of classical music or jazz, searching a smaller online music store that specializes in product relative to that niche genre, namely: ArkivJazz, ArkivMusic, Classical Archives, or Presto; in either case, to determine whether the pre-1972 sound recording is being offered for sale in download form or as a new (not resale) physical product; and

(vii) For pre-1972 ethnographic sound recordings of Alaska Native or American Indian tribes, searching, if such contact information is known to the user, by contacting the relevant Alaska Native or American Indian tribe and the holding institution of the sound recording (such as a library or archive) to gather information to determine whether the sound recording is being commercially

exploited. If this contact information is not previously known to the prospective user, the user should use the information provided by the U.S. Department of the Interior's Bureau of Indian Affairs' Tribal Leaders directory, which provides contact information for each federally recognized tribe.

(2) A search under paragraph (c)(1) of this section must include searching the title of the pre-1972 sound recording and its featured artist(s). If the user knows any of the following attributes of the sound recording, and the source being searched has the capability to search any of these attributes, the search must also include searching: alternate artist name(s), alternate title(s), album title, and the International Standard Recording Code ("ISRC"). A user is encouraged, but not required, to search additional known attributes, such as the label or version. A user searching using a search engine should draw reasonable inferences from the search results, including following those links whose name or accompanying text suggest that commercial exploitation might be found there, and reading additional pages of results until two consecutive pages return no such suggestive links. A user need not read every web page returned in a search result.

(3) A search under paragraph (c)(1) of this section must be conducted no later than 90 days of the user (or her authorized agent) filing a notice of noncommercial use under paragraph (d)(1) of this section to be sufficient for purposes of the safe harbor in 17 U.S.C. 1401(c)(4).

(4) For purposes of the safe harbor in 17 U.S.C. 1401(c)(4), a user cannot rely on:

(i) A search conducted under paragraph (c)(1) of this section by a third party who is not the user's authorized agent; or

(ii) A notice of noncommercial use filed under paragraph (d)(1) of this section by a third party (who is not the user's authorized agent).

(5) A user is encouraged to save documentation (e.g., screenshots, list of search terms) of her search under paragraph (c)(1) of this section for at least three years in case her search is challenged.

(d) *Notices of noncommercial use—(1) Form and submission.* A user seeking to comply with 17 U.S.C. 1401(c)(1) (or her authorized agent) must submit a notice of noncommercial use identifying the pre-1972 sound recording that the user intends to use and the nature of such use using an appropriate form and instructions provided by the Copyright Office on its website. The Office may reject any submission that fails to

comply with the requirements of this section.

(2) *Content.* A notice of noncommercial use shall contain the following:

(i) The user's full legal name, and whether the user is an individual person or corporate entity, including whether the entity is a tax-exempt organization as defined under the Internal Revenue Code. Additional contact information, including an email address, may be optionally provided.

(ii) The title and featured artist(s) of the pre-1972 sound recording desiring to be used.

(iii) If any are known to the user, the current or last-known rights owner (e.g., record label), alternate artist name(s), alternate title(s), album title, and International Standard Recording Code ("ISRC").

(iv) The user may include additional optional information about the pre-1972 sound recording as permitted by the Office's form or instructions, such as the year of release.

(v) A description of the proposed noncommercial use, including a summary of the project and its purpose, how the pre-1972 sound recording will be used in the project, the start and end dates of the use, and where the proposed use will occur (i.e., the U.S.-based territory of the use). The user may include additional optional information detailing the proposed use, such as the tentative title of the project, the playing time of the pre-1972 sound recording to be used as well as total playing time of the project, a description of corresponding visuals in the case of audiovisual uses, and whether and how the user will credit the sound recording title, featured artist, and/or rights owner in connection with the project.

(vi) A certification that the user searched but did not find the pre-1972 sound recording in a search conducted under paragraph (c) of this section, or else conducted a good faith, reasonable search for, but did not find, the sound recording in the Copyright Office's database of indexed schedules listing right owners' pre-1972 sound recordings, or on services offering a comprehensive set of sound recordings for sale or streaming.

(vii) A certification that the individual submitting the notice of noncommercial use has appropriate authority to submit the notice, that the user desiring to make noncommercial use of the pre-1972 sound recording (or the user's authorized agent) conducted a search under paragraph (c) of this section or else conducted a good faith, reasonable search under 17 U.S.C. 1401(c)(4), within the last 90 days without finding



commercial exploitation of the sound recording, and that all information submitted to the Office is true, accurate, and complete to the best of the individual's knowledge, information, and belief, and is made in good faith.

(3) Noncommercial use of a pre-1972 recording under this section is limited to use within the United States.

(4) A notice of noncommercial use may not include proposed use for more than one pre-1972 sound recording unless all of the sound recordings include the same featured artist(s) and were released on the same pre-1972 album or other unit of publication. In the case of "greatest hits" or compilation albums, all of the sound recordings listed on a notice must also share the same record label or other rights owner information, as listed on the notice.

(5) The Copyright Office will assign each indexed notice of noncommercial use a unique identifier to identify the notice in the Office's public records.

(6) *Legal sufficiency.* (i) The Copyright Office does not review notices of noncommercial use submitted under paragraph (d)(1) of this section for legal sufficiency. The Office's review is limited to whether the procedural requirements established by the Office (including payment of the proper filing fee) have been met. The fact that the Office has indexed a notice is not a determination by the Office of the notice's validity or legal effect. Indexing by the Copyright Office is without prejudice to any party claiming that the legal or formal requirements for making a noncommercial use of a pre-1972 sound recording have not been met, including before a court of competent jurisdiction. Users are therefore cautioned to review and scrutinize notices of noncommercial use to assure their legal sufficiency before submitting them to the Office.

(ii) If a rights owner does not file an opt-out notice under paragraph (e) of this section, when the term of use specified in the notice of noncommercial use ends, the user must cease noncommercial use of the pre-1972 sound recording for purposes of remaining in the safe harbor in 17 U.S.C. 1401(c)(4). Should the user desire to requalify for the safe harbor with respect to that same recording, the user must conduct a new search and file a

new notice of noncommercial use under paragraphs (c) and (d) of this section, respectively.

(7) *Filing date.* The date of filing of a notice of noncommercial use is the date when a proper submission, including the prescribed fee, is received in the Copyright Office. The filing date may not necessarily be the same date that the notice, for purposes of 17 U.S.C. 1401(c)(1)(C), is indexed into the Office's public records.

(8) *Fees.* The filing fee to submit a notice of noncommercial use pursuant to this section is prescribed in § 201.3(c).

(9) *Third-party notification.* A person may request timely notification of filings made under paragraph (d)(1) of this section by following the instructions provided by the Copyright Office on its website.

(e) *Opt-out notices—*(1) *Form and submission.* A rights owner seeking to comply with 17 U.S.C. 1401(c)(1)(C) (or her authorized agent) must file a notice opting out of a proposed noncommercial use of a pre-1972 sound recording filed under paragraph (d)(1) of this section using an appropriate form provided by the Copyright Office on its website and following the instructions for completion and submission provided on the Office's website or the form itself. The Office may reject any submission that fails to comply with the requirements of this section, or any relevant instructions or guidance provided by the Office.

(2) *Content.* An opt-out notice use shall contain the following:

(i) The user's name, rights owner's name, sound recording title, featured artist(s), an affirmative "yes" statement that the rights owner is opting out of the proposed use, and the unique identifier assigned to the notice of noncommercial use by the Copyright Office. Additional contact information for the rights owner, including an email address, may be optionally provided.

(ii) A certification that the individual submitting the opt-out notice has appropriate authority to submit the notice and that all information submitted to the Office is true, accurate, and complete to the best of the individual's knowledge, information, and belief, and is made in good faith.

(iii) Submission of an opt-out notice does not constitute agreement by the

rights owner or the individual submitting the opt-out notice that the proposed use is in fact noncommercial. The submitter may choose to comment upon whether the rights owner agrees that the proposed use is noncommercial use, but failure to do so does not constitute agreement that the proposed use is in fact noncommercial.

(3) Where a pre-1972 sound recording has multiple rights owners, only one rights owner must file an opt-out notice for purposes of 17 U.S.C. 1401(c)(5).

(4) If a rights owner files a timely opt-out notice under paragraph (e)(1) of this section, a user must wait one year before filing another notice of noncommercial use proposing the same or similar use of the same pre-1972 sound recording(s).

(5) *Legal sufficiency.* The Copyright Office does not review opt-out notices submitted under paragraph (e)(1) of this section for legal sufficiency. The Office's review is limited to whether the procedural requirements established by the Office (including payment of the proper filing fee) have been met. Rights owners are therefore cautioned to review and scrutinize opt-out notices to assure their legal sufficiency before submitting them to the Office.

(6) *Filing date.* The date of filing of an opt-out notice is the date when a proper submission, including the prescribed fee, is received in the Copyright Office.

(7) *Fee.* The filing fee to submit an opt-out notice pursuant to this section is prescribed in § 201.3(c).

(f) *Fraudulent filings.* If the Register becomes aware of abuse or fraudulent filings under this section by or from a certain filer or user, she shall have the discretion to impose civil penalties up to \$1,000 per instance of fraud or abuse, and/or other penalties to deter additional false or fraudulent filings from that filer, including potentially rejecting future submissions from that filer for up to one year.

Dated: April 1, 2019.

**Karyn A. Temple,**

*Register of Copyrights and Director of the U.S. Copyright Office.*

Approved by:

**Carla D. Hayden,**

*Librarian of Congress.*

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