Insurance Corporation Improvement Act of 1991, 12 U.S.C. 1828(o), prescribes standards for real estate lending to be used by FDIC-supervised institutions in adopting internal real estate lending policies. For purposes of this subpart, the term “FDIC-supervised institution” means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

3. Amend § 365.2 by revising paragraphs (a), (b)(1)(iii), (2)(iii) and (iv), and (c) to read as follows:

§ 365.2 Real estate lending standards.

(a) Each FDIC-supervised institution shall adopt and maintain written policies that establish appropriate limits and standards for extensions of credit that are secured by liens on or interests in real estate, or that are made for the purpose of financing permanent improvements to real estate.

(b)(1) * * *

(iii) Be reviewed and approved by the FDIC-supervised institution’s board of directors at least annually.

(2) * * *

(iii) Loan administration procedures for the FDIC-supervised institution’s real estate portfolio; and

(iv) Documentation, approval, and reporting requirements to monitor compliance with the FDIC-supervised institution’s real estate lending policies.

(c) Each FDIC-supervised institution must monitor conditions in the real estate market in its lending area to ensure that its real estate lending policies continue to be appropriate for current market conditions.


Dated at Washington, DC, on December 18, 2018.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie Best,

Assistant Executive Secretary.

[FR Doc. 2018–28084 Filed 2–4–19; 8:45 am]

BILLING CODE 6714–01–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2018–8]

Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commerically Exploited

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office (“Copyright Office” or “Office”) is issuing a notice of proposed rulemaking regarding the Classics Protection and Access Act, title II of the recently enacted 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 also established an exception for certain noncommercial uses of Pre-1972 Sound Recordings that are not being commercially exploited. To qualify for this exemption, 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 object to the use within 90 days. After soliciting public comments through a notice of inquiry, the Office is proposing regulations identifying the specific steps that a user should take to demonstrate she has made a good faith, reasonable search. The proposed 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 objecting to such use.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on March 7, 2019. Meeting requests must be received no later than 11:59 p.m. Eastern Time on March 18, 2019, and all meetings must take place no later than Friday, March 22, 2019. The Office will not consider requests to hold meetings after that date. So that the Copyright Office is able to meet the statutory deadlines set forth in the Music Modernization Act, no further extensions of time will be granted in this rulemaking.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the regulations.gov system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through regulations.gov. Specific instructions for submitting comments are available on the Copyright Office’s website at https://www.copyright.gov/rulemaking/pre1972-soundrecordings-noncommercial/. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at regans@copyright.gov or Anna Chauvet, Assistant General Counsel, by email at achauve@copyright.gov. Each can be contacted by telephone by calling (202) 707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

On October 11, 2018, the president signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551 (“MMA”). Title II of the 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 may be 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, which are indexed into the Office’s public records. 1 The filing requirement is “designed to operate in place of a formal registration requirement that normally applies to claims involving statutory damages.” 2

The MMA also creates a new mechanism for members of the public to obtain authorization to make noncommercial uses of Pre-1972 Sound Recordings

Recordings that are not being commercially exploited. Under section 1401, a person may file a notice with the Copyright Office and propose 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. Specifically, before determining that the recording is not being commercially exploited, she must first undertake a “good faith, reasonable search” of the Pre-1972 Sound Recordings database and the Office’s public records. At that point, she may file a notice identifying the recording as being commercially exploited for sale or streaming. In response, the rights owner may file a notice with the Copyright Office “opting out” of the noncommercial use of the recording. If the Office receives a notice of use, and regardless of whether a rights owner opts out, the Office will consider the recording as being commercially exploited.

In proposing the following regulatory language, the Office also confirms, as requested by multiple commenters, 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 user, not all may be fair; instead, courts will balance the purpose and character of use against the other fair use factors.

Similarly, multiple stakeholders commented 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. These commenters rightly note that the exceptions for libraries and archives, section 1401(f) separately provides that “the limitations on the exclusive rights of a copyright owner described in section 107, 108, 109, 110, and 112(f) shall apply to a claim under [section 1401(a)] with respect to a sound recording fixed before February 15, 1972,” as well as the section 512 limitation on liability relating to material online.
that sections 1401(c) and 108(h) contain differing statutory criteria regarding the type of search or investigation that must be made before making use of the respective exceptions, and the present rulemaking is focused on administering the exception for Pre-1972 Sound Recordings under section 1401(c). Moreover, section 108(h) is not limited to sound recordings (much less Pre-1972 Sound Recordings); as discussed below, the proposed regulations governing a “good faith, reasonable search” for purposes of section 1401(c) specifically consider the various ways sound recordings are brought to market.

Finally, the Copyright Office keenly appreciates that “some of the users hoping to use [Pre-1972 Sound Recordings] may not have much copyright law background.” In connection with the Office’s overall public information and education initiatives and the promulgation of a final rule, the Office intends to prepare additional public resources regarding Pre-1972 Sound Recordings and the new noncommercial use exception, including potentially a public circular.

By the same token, the Office appreciates A2IM and RIAA’s view that “the average person knows full well how to construct an effective internet search designed to uncover a very specific item or information for which they are looking,” and so while the proposed rule does not presume an expertise in copyright, it does presume a functional search capability on the part of a human user.

A. Good Faith, Reasonable Search

The proposed rule identifies five steps (six in the case of Alaska Native and American Indian ethnographic sound recordings) that, taken, will support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited. 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. The proposed rule divides various types of sources into different categories, and requires users to progressively search in each category (if and until a match is found, with a match evidencing commercial exploitation of the Pre-1972 Sound Recording). Categories to be searched are listed in recommended search order, to reduce the likelihood of duplicative searching. Because in some cases, the type of recording (e.g., classical music, jazz, or ethnographic sound recordings) may warrant searching an additional resource or more particularized search criteria, such additional criteria are included on a tailored basis, as applicable to a particular genre.

In short, the rule proposes 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. The SoundExchange ISRC database;
5. Amazon.com, and, where the prospective user reasonably believes the recording implicates a listed niche genre, an additional listed retailer of physical product; and
6. In the case of ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes or communities, searching through contacting the relevant tribe, association, and/or holding institution

The NOI generated a wide range of helpful comments from a rich variety of perspectives, and the proposed rule represents a compromise amongst those views. While this NPRM will no doubt draw out additional thoughtful comments, the Office is optimistic that this proposed rule strikes an appropriate balance, achieving the goal of crafting a practical rule with steps that 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. Although a range of stakeholders agreed in principle with this goal, views differed as to how many steps should constitute a “good faith, reasonable search.” For example, Public Knowledge suggested that users need only search the Office’s database of Pre-1972 Schedules and “no more than one to two” streaming services, while A2IM and RIAA proposed nine categories of steps to be searched. In synthesizing the public comments, the Copyright Office notes that the statute expressly contemplates searching on multiple services, including those offering sound recordings “for sale” in addition to streaming services, and a congressional report characterizing the search requirement as “robust.”

In proposing this rule, the Copyright Office is also mindful of the individual and smaller-group interests from both rights owner and licensee or other user perspectives. 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 themselves play a vital role in ensuring that a diverse array of cultural contributions are created and made available to the public. As FMC notes, artists may deliberately “target niche markets and collectors—sometimes with careful remastering and extensive historical information,” or may opt not to make their entire catalog available on mainstream streaming services. The proposed rule attempts to account for the diversity of practices and leave room for these competing business models to innovate and flourish. But the proposed

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25 See, e.g., Copyright Alliance Initial at 3; LCA Initial at 2.

26 FMC Reply at 6; see also AUA Initial at 1.

27 A2IM & RIAA Reply at 10; see also internet Archive Initial at 1 (“Human searchers should be able to search a couple of services quite thoroughly.”).


29 Copyright Alliance Initial at 3 (suggesting the checklist “should represent the minimum requirements of a reasonable search and recognize that each individual case will be different and will likely require additional steps”).

30 EFF Reply at 3 (suggesting that an open-ended rule “would give potential users no added certainty, making the safe harbor meaningless”); see Wikimedia Foundation Reply at 2 (same).

31 See A2IM & RIAA Initial at 4 (describing category-6 search structure).

32 See id. at 4, 7 (proposing prioritized search from “broad” to “narrow” categories and methodology that minimizes “duplicative searches”); Public Knowledge Initial at 2 (advocating avoidance of “duplicative searching).
rule also takes into account smaller users. It tries to prioritize services with intuitive search capabilities and minimize resources where a subscription is required to access the search function; further, the categories to be searched—with the potential exception of interactive streaming services, which all commenters agree are statutorily required to be included in a search—are all available at no cost to the user. As noted below, the Office has declined to include various suggestions that might be redundant or overly burdensome, and some criteria are included only as applicable to a particular genre of work. The proposed rule also does not require “consultation with an experienced music clearance professional,” although the Office does not discourage such consultation, which may prove helpful to a user planning a wide-scale or complex use case.

In proposing the following search criteria, the Office agrees with various rights holders that the noncommercial use exception is not intended to display the important role of licensed transactions to facilitate the use of Pre-1972 Sound Recordings. Indeed, a main thrust of Title II is to “create royalties” for these works using the criteria, the Office agrees with various rights holders that the noncommercial use exception is not intended to discourage such consultation, which may prove helpful to a user planning a wide-scale or complex use case.

Similarly, multiple commenters pointed out differences between section 1401(c)’s requirement to identify whether a work is being commercially exploited with prior proposals regarding orphan works, including a 2008 bill which provided a description of a “qualifying search, in good faith, to locate and identify the owner of the infringed copyright before making use of an orphan work.” For these reasons, while the Office hopes that the MMA’s noncommercial use provision may well prove to yield useful insights into the broader orphan works debate, the proposed rule is necessarily tailored to the sui generis noncommercial use exception for Pre-1972 Sound Recordings and was not crafted to specifically address that ongoing debate.

Finally, while the proposed rule is intended to take into account the current music marketplace, Congress has provided regulatory flexibility so that the Copyright Office may periodically update its list of specific steps to take in light of changes in the music landscape, and the Office expects to exercise that authority as warranted by changes in the marketplace.

i. Required Sources To Search

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

First, section 1401(c) requires that for a search to constitute a good faith, reasonable search, the search must include searching for the Pre-1972 Sound Recording in the Copyright Office’s database of Pre-1972 Schedules. The Office has issued an interim rule governing how rights owners may file Pre-1972 Schedules and how they are made publicly available through an online database. For each sound recording, the Pre-1972 Schedule requirement in the 2008 bill is too general, and that having a “detailed list of steps required to satisfy the search requirement for services” would be more helpful. To the extent commenters suggested that the 2008 bill is helpful to highlight specific aspects of a proposed search step, it is addressed further below.

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49 See Public Knowledge Initial at 6 (“It would be inappropriate for the Copyright Office to require that a user search the catalog of a service where a subscription is required to access the search function.”). Public Knowledge would include Amazon Music Unlimited and Apple Music as proposed services to search, which are not free, and other services may require a paid subscription to enable more robust search features. See also A2IM & RIAA Reply at 5 (“The cost of any necessary subscriptions is not very high, especially when considering the availability of free trials for premium services and free basic tiers for most services.”).


46 See, e.g., A2IM & RIAA Initial at 1–2; SoundExchange Initial at 2; FMC Reply at 6 (“We largely agree with RIAA’s contextualization of 1401(c), as not contrary to Congress’s recognition that the rights owner is readily identifiable since the Copyright Office may exercise that authority as warranted by changes in the marketplace.”). Congress contemplated situations where the rights owner may be known to the user, but the owner has ceased or otherwise refrained from commercially exploiting the sound recording. In any event, comments suggest that a large array of Pre-1972 Sound Recordings do not have an identifiable owner, in which cases a prospective user making use of the section 1401(c) safe harbor and filing an NNU can expect to benefit from this additional exception.

45 A2IM & RIAA Initial at 1–2; EFF Initial Comments at 2.

44 See, e.g., Public Knowledge Initial at 6 (“It would be inappropriate for the Copyright Office to require that a user search the catalog of a service where a subscription is required to access the search function.”). Public Knowledge would include Amazon Music Unlimited and Apple Music as proposed services to search, which are not free, and other services may require a paid subscription to enable more robust search features. See also A2IM & RIAA Reply at 5 (“The cost of any necessary subscriptions is not very high, especially when considering the availability of free trials for premium services and free basic tiers for most services.”). Public Knowledge would include Amazon Music Unlimited and Apple Music as proposed services to search, which are not free, and other services may require a paid subscription to enable more robust search features. See also A2IM & RIAA Reply at 5 (“The cost of any necessary subscriptions is not very high, especially when considering the availability of free trials for premium services and free basic tiers for most services.”).

43 S. Rep. No. 115–339, at 17–18 (2018); 17 U.S.C. 1401(c)(1)(A) (requiring the Register to “maintain a current directory” of agents). Section 1401 does not explicitly reference the need for periodic renewal of Pre-1972 Sound Recordings depending upon their year of first publication. 17 U.S.C. 1401(a)(2). The Office does not propose such a requirement at this time (and notes that substantive comments in its contemporaneous rulemaking regarding Pre-1972 Schedules did not raise this issue). The Office is open, however, to exploring the need and regulatory authority for such a renewal requirement for Pre-1972 Schedules (or NNUs) at a later date, perhaps in connection with periodic review of the search requirements promulgated under this rule.

51 A2IM & RIAA Initial at 2–3, 5.
must include the rights owner’s name, the sound recording title, and the featured artist, and rights owners may opt to include additional information, such as album title.55

For this rulemaking, the proposed rule would require 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 searching: 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, version, or Universal Product Code (“UPC”). The following fields in the Office’s database of Pre-1972 Schedules will be searchable: Rights owner, sound recording title (which includes alternate titles), album, label, featured artist (which includes alternate artist name(s)), and ISRC. In response to comments, the Office is pleased to report that the database of Pre-1972 Schedules already allows for wildcard searching by using an asterisk to fill in partial words.56 A user can export and download the search results based on those fields into an Excel spreadsheet to view (and search) additional data, such as version or UPC.

2. Searching With a Major Search Engine

Second, the proposed rule asks 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.57 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. For example, a search on the phrase “rockin around the christmas tree” using Google—where the 1958 recording “Rockin’ Around the Christmas Tree” featuring artist Brenda Lee—shows, among other things, that the sound recording is available for streaming on Spotify, Google Play Music, Deezer, and Apple Music.58 Similarly, a search on the combined phrases “rockin around the christmas tree” and “purchase” using Google shows that the same sound recording is available for sale as an .mp3 file download and on a compact disc through Amazon.com. The proposed rule, as well as the Office’s form or instructions, will make clear 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 asks the user to search at least one of the following streaming services, each of which offers tens of millions of tracks:59 Amazon Music Unlimited,60 Apple Music,61 Spotify,62 or TIDAL.63 The Office proposes these streaming services because, among the commenters who proposed specific streaming services to search, there appears to be agreement on these services in particular.64 In addition, these services currently offer some of the largest repertoires of tracks and “receive digital feeds from the major labels, large indie labels and significant distributors.”65 The Office invites 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 but were not identified as possible sources from as many commenters.

A spectrum of commenters suggested that the rule should require a user to search multiple, but not all, such streaming services.66 While it is clear that these services’ repertoires are not identical—including because some rights owners may engage in exclusive streaming arrangements67—commenters also noted that searching multiple streaming services might be duplicative.68 For example, internet Archive, citing its own efforts to “automat[e] the process of searching for commercial availability at scale,” suggests 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.”69 The Office invites comment on whether users should be required to search a greater number of these services.

The Office agrees that requiring repetitive searches of all these streaming services would likely be redundant. Instead, as explained further below, because Pre-1972 Sound Recordings can also be expected to be commercially exploited outside of these services, the proposed rule would limit the number of streaming services to be searched, but add qualitatively different sources to

55 37 CFR 201.35(d). The Office expects to issue a final rule regarding the filing of Pre-1972 Schedules, which will ask rights owners to provide the International Standard Recording Code (“ISRC”) (if known), and to optionally provide the version, alternate artist name(s), and Universal Product Code (“UPC”). This expansion of fields accommodates comments in that parallel proceeding, and should ease user concerns about disambiguating data. See A2IM, RIAA & SoundExchange Comments re Filing Schedules of Pre-1972 Sound Recordings at 7–8 (requesting addition of ISRC number, sound recording version, and alternate artist name fields); EFF Initial at 3 (discussing search engines’ queries of the Office’s database of Pre-1972 Schedules).

56 See, e.g., A2IM & RIAA Initial at 6; Copyright Alliance Initial at 4; EFF Initial at 3. For example, a search for “light” in the title field currently returns, among other titles, “(In The) Cold Light Of Day,” “Harbor Lights,” “White Lightnin’,” and “White Lightning.” See Schedules of Pre-1972 Sound Recordings, U.S. Copyright Office, https://copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html (last visited Jan. 28, 2019). The Office has updated the search instructions on its database web page so users are aware of this search capability. While the current technology does not permit “fuzzy” searching, that limitation is also noted on the web page to guide user expectations.

57 See A2IM & RIAA Initial at 5; Copyright Alliance Initial at 4; FMC Reply at 6 (each suggesting that major search engines should be searched).


59 A2IM & RIAA Initial at 5.


63 A2IM & RIAA Initial at 5.

64 Id. at 7 (proposing users search on two services including, among others, Amazon Music Unlimited, Apple Music, Spotify and TIDAL; EFF Initial at 4 (identifying Amazon Music Unlimited, Apple Music, Spotify and TIDAL as possible streaming services to search); Public Knowledge Initial at 5. App. (identifying Amazon Music Unlimited, Spotify, and Apple Music as possible streaming services to search).

65 A2IM & RIAA Initial at 5.

66 See A2IM & RIAA Initial at 7 (identifying Amazon Music Unlimited, Apple Music, Spotify and TIDAL as possible streaming services to search); EFF Initial at 4 (identifying Amazon Music, Apple Music, Spotify, and TIDAL as possible streaming services to search).
search, such as major search engines, the SoundExchange ISRC lookup tool, and, for certain niche genres, other specific resources. By requiring searches on only one of these comprehensive streaming services, the proposed rule also minimizes the potential financial burden on prospective users. To be sure, A2IM and RIAA note that the cost of these subscription services are “not very high,” suggesting that it is not unreasonable to ask users “to take on a handful of short-term subscription payments in order to gain a royalty-free license to valuable sound recordings.”70 IMSLP.ORG contends that users conducting a good faith, reasonable search under section 1401(c) should be able to search streaming services using “Application Programming Interfaces (APIs) officially supported by the relevant service,” as APIs “considerably decrease the cost of performing such searches with no loss of accuracy.”71 The Office invites public comment on whether the proposed rule should address whether users should be able to use unlicensed APIs to search and locate a Pre-1972 Sound Recording on a streaming service.

4. Searching With the SoundExchange ISRC Lookup Tool

Fourth, the proposed rule asks the user to search for the Pre-1972 Sound Recording using the free online SoundExchange 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.72 An overwhelming number of stakeholders representing rights owners recommended inclusion of the SoundExchange ISRC lookup tool as an important category of search.73 For its part, SoundExchange characterizes its database as “quite possibly the most authoritative and comprehensive database of sound recordings that have otherwise been commercially exploited.”74 On the other hand, Public Knowledge objects to including this lookup tool because it is not itself a “service [] offering a comprehensive set of sound recordings for sale or streaming.”75

Because the ISRC lookup tool allows users to freely and easily perform 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 proposed rule tentatively concludes that it is desireable and appropriate to include this tool as a step in a sufficient good faith, reasonable search. A few considerations buttress this conclusion. First, rights owners register and provide these data regarding their sound recordings so they can be paid for their use under the statutory and direct licenses administered by SoundExchange, including the compulsory licenses applicable for internet radio, satellite radio, cable TV music services, streaming into businesses establishments, and other services.76 As a result, the database provides indicia of exploitation on a wide expanse of music services that the Office does not otherwise propose searching before a user may qualify for the safe harbor under section 1401(c) (e.g., Pandora, Sirius XM, iHeartRadio, MusicChoice, and over 3,100 other non-interactive digital streaming services).77 While not disputing that these types of non-interactive services are exploiting Pre-1972 Sound Recordings, Public Knowledge and others propose excluding non-interactive services “because they are not usefully searchable for specific tracks.”78

unlike other parts of the copyright law, the reference to “services” in section 1401(c) does not distinguish between non-interactive and “interactive services.”79 Given the acknowledged commercial exploitation on non-interactive services, it seems reasonable for a good faith search to cover this broader array of services. Second, this database appears to offer user friendly and granular results available for these recordings. Using the lookup tool is free, without requiring the user to establish an account, take a subscription, or convey any personal information.80 It also apparently receives high marks regarding search confidence and ease, employing fuzzy matching and wildcard searching that a broad spectrum of commenters concur is helpful in gauging the accuracy of results.81 Third, the information in the ISRC database is populated and verified by rights owners themselves, allaying concerns that inaccurate information may lead prospective users astray.82 The uneven quality of publicly accessible music repertoire data is well-documented and, indeed, an animating issue that the Music Modernization Act seeks to address in the context of the section 115 license.83 As SoundExchange attests, “even when SoundExchange learns is being commercially exploited both unreasonable and in bad faith.”).

70 A2IM & RIAA Reply at 5–6 (noting similar requirement in 2008 Shawn Bentley Orphan Works Bill).
71 IMSLP.ORG Reply 2.
72 SoundExchange Initial at 2–3.
73 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 searchable, 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 the SoundExchange ISRC lookup tool is “eminently useful” and 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.”).
74 SoundExchange Initial at 2.
75 Public Knowledge Reply at 10 (citing 17 U.S.C. 1401(c)(1)(A)(II)).
76 SoundExchange Initial at 2–3 (“[R]ights owners and their representatives made a conscious choice to register with SoundExchange and submit their repertoire metadata to allow them to be paid for uses of their works under the statutory licenses and direct licenses administered by SoundExchange.”).
78 Public Knowledge Initial at 6; see also EFF Initial at 4 (expressing concern that Spotify database includes “unlicensed” recordings); Public Knowledge Reply at 11 (objecting to YouTube being included in “licensable repertoire” as “unlicensed” because it is not under the authority of the rights holder”; expressing concerns about resale or imported physical media).
79 See U.S. Copyright Office, Copyright and the Music Marketplace 184 (2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf; H.R. Rep. No. 115–651 at 8 (“Music metadata has more often been seen as a commodity that should be sold to the party that controls the database, rather than as a resource for building an industry on”); noting that the database required by the legislation will include a variety of sound recordings (“compilation”); see also SoundExchange Initial at 43 (“Many digital music services operating under the statutory licenses have (or at least report to SoundExchange) very low quality data identifying the recordings they use.”).
from a service of a putative recording not represented in its repertoire database, SoundExchange will not reflect the recording in its repertoire database unless identifying information for the recording is provided by the rights owner or authorized representative of the rights owner.’’

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 Recording is being commercially exploited on services offering a comprehensive set of sound recordings for sale or streaming. Such cross-platform tools can quickly reveal information relevant to whether a recording is being used on a variety of services that are unequivocally involved in commercially exploiting the sound recordings, but of which the Office does not propose searching for purposes of this safe harbor, as noted further below. 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 NUN.85 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 stakeholder concerns (from both the prospective user and rights owner perspectives) that it is otherwise difficult to determine exploitation by non-interactive services that offer limited user search capability.87

5. Searching Sellers of Physical Product

Fifth, the proposed rule asks the user to 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—and if so, to identify the specific sources to be searched.

The Office agrees that it is appropriate to limit safe harbor requirements to search for physical products to internet searches,80 but finds it important that a good faith, reasonable search be calculated to include ‘‘services offering a comprehensive set of sound recordings for sale,’’89 as some works may be less available on streaming services, but are nonetheless being commercialized in physical formats, including reissues.89 Although Public Knowledge and IMSLP.ORG express concern that sales of physical copies include second-hand sales, as opposed to commercial exploitation by the copyright owner,82 physical retailers typically indicate whether the products are new or used, and others note the robust market for newly reissued albums.83 For example, a search for ‘‘Faith and Grace’’ by The Staple Singers on Amazon.com allows users to purchase both new and used compact discs with that sound recording.94

The proposed rule thus collapses steps 8 and 9 as proposed by AIM & RIAA, that is, searches of retailers of physical product and niche services. Compare AIM & RIAA Initial at 6. The record and the Office’s observations suggest that the universe of niche digital-only, small, focused on classical music, and likely to overlap with searches of retailers of physical product.

EFF Initial at 4 (‘‘The Office should not require that potential users search for commercialization of physical copies of recordings unless records of such commercialization are searchable on the internet or in the Office’s pre-1972 schedules.’’).


See, e.g., FMC Reply at 3 (providing example of recordings by The Staple Singers which are readily available as a box set via Amazon.com or Discogs.com, and easily located by a simple search engine search, but which are unavailable on Spotify or Apple Music).

Public Knowledge Initial at 7; Public Knowledge Reply at 11: IMSLP.ORG Reply at 1. See FMC Reply at 3; FMC contends that Public Knowledge ‘‘overstates the difficulty of discerning whether physical media is made available by authorization of the rightsholder—the risk of a false positive is small when every physical retailer classifies its products as new or used.’’ Id. at 4. Indeed, although Public Knowledge raises the issue of items being offered for resale ‘‘new’’ a/k/a in original shrink wrap or packaging, its own example suggests that ‘‘further inspection’’ can typically clarify whether an item is being offered for first sale, or resale. Public Knowledge Reply at 12.

6. Searches for Ethnographic Pre-1972 Sound Recordings

At the reply comment stage, concerns regarding the noncommercial use of ethnographic Pre-1972 Sound Recordings were 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 asserts 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.’’95 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.’’96

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.97 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

www.amazon.com/gp/product/B0155VTA00?pf_rd_p=2945051-950f-485c-b4df-15aac5223b10&pf_rd_r=r=QZBH1A9CV7VPB1628; FMC Reply at 3 (noting availability of ‘‘Faith and Grace’’ on a compact disc set, but not on Spotify or Apple Music).

NCAI Reply at 1.

Id.

Reed, Anderson & Gray Reply at 2.
ethnographic sound recordings.” 98 Specifically, they maintain that for pre-1972 Native American ethnographic recordings, “a user should not qualify for the [section 1401(c)] safe harbor unless the relevant Native American tribe or tribes or the Office must be careful not to exceed its regulatory authority, by, for example, imposing a requirement that the user obtain certification of the identity of the sound recording and its owner before making use of the sound recording. 102 Accordingly, for ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes or communities, 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 proposed 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. 103 Specifically, the rule proposes that the user 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. 104 If no information is listed or the tribe is unknown to the user, the user should contact NCAI itself. 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. 105 The Copyright Office appreciates that these issues are nuanced and is committed to addressing them in a sensitive and thoughtful manner. The Office acknowledges that these comments were received in the reply comment stage, without opportunity for further comment. Because the Office must timely promulgate a rule for the safe harbor to be available to prospective users of all types of Pre-1972 Sound Recordings, interested parties are encouraged to submit written comments or contact the Office for a meeting to discuss this provisional aspect of the proposed rule.

ii. Sources Not Required To Be Searched

The proposed rule is intended to be accurate and comprehensive, while minimizing redundancy. In proposing a list of “specific, reasonable” steps, the Office declines to add some additional search steps or services proposed by some commenters. Among suggestions received, the rule does not propose to include:

- 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 107
- The to-be-created Mechanical Licensing Collective database. 108

- 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 109
- SoundCloud or Bandcamp
- Niche streaming services (e.g., Idagio, Primephonic)

Notably, the proposed rule does not ask the user to search services based on the commercial exploitation of user-generated content, such as YouTube. Commenters IMSLP.ORG and Public Knowledge maintain 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). 110 By contrast, Recording Academy contends that Congress contemplated searching on services with user-uploaded streaming platforms. 111 The Office agrees that a good faith, reasonable search should be targeted at locating authorized instances of commercial exploitation, and the

98 Id. at 3.
99 Id. at 4.
101 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)).
102 Compare Reed, Anderson & Gray Reply at 4.
103 See id. 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.
105 Id. at 17 U.S.C. 1401(c)(1)(C).
106 Id. at 1401(c)(3).
107 As noted above, this conclusion is based, in part, on the proposal to include the SoundExchange ISRC lookup tool in the proposed rule.
108 Although the Office is open to revisiting the relevance of the MLC database once it is up and running, it is disinclined to ask rights owners to provide “the hashes, with APIs, of all pre-72 sound recordings indexed” into the database. Music Library Association Initial at 1; see also A2IM & RIAA Initial at 5 (suggesting database should be searched same hashes). Other commenters have typified in more detail difficulty with this request, and overall the Office agrees that the Music Library Association’s proposal is opaque and beyond the scope of this rulemaking. See A2IM & RIAA Reply at 4; Copyright Alliance Reply at 2; FMC Reply at 2.
109 See Find Music Services, Pro Music, https://pro-music.org/legal-music-services.php (last visited Jan. 28, 2019); see also A2IM & RIAA Initial at 6; IFPI Initial at 1–2; Public Knowledge Reply at 2 (all discussing same).
110 IMSLP.ORG Reply at 2 (“services permitting user-uploaded content without any mandatory service-side verification of copyright ownership” such as YouTube “should be categorically excluded” from noncommercial use searches under section 1401(c)); Public Knowledge Reply at 11 (maintaining that because websites like YouTube display a combination of licensed and unlicensed media, a sound recording’s “availability on that platform may not be reliable evidence of the recording being commercially exploited ‘by or under the authority of the rights owner’ as required by § 1401(c)(1)(A)”).
111 Recording Academy Reply at 4 & n.5 (citing Conf. Rep., at 25) (“it is important that a user seeking to rely on subsection (c) make a robust search, including user-generated services and other services available in the market at the time of the search”).
presumptive difficulty for online service providers to predetermine whether content is authorized by a rights owner is inherent to the section 512 safe harbor, which limits liability for such services displaying user-uploaded infringing content. Because 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.” The proposed rule does not require the user to search on a service permitting user-uploaded content.

As discussed above, the proposed rule aims to strike a balance between the reasonableness and comprehensivity of the search for this particular subset of works, and can be updated as market conditions warrant. The Office believes that the proposed steps, including the requirement to search major search engines, which may index some of the information contained in the above services, will result in identifying a vast amount of the Pre-1972 Sound Recordings being commercially exploited at the time searches are conducted. If a rights owner is concerned about recordings being overlooked, the Office encourages the filing of a Pre-1972 Schedule and/or monitoring the filing of NNUs for the opportunity to opt out of a particular requested noncommercial use.

Likewise, in commenting on the proposed rule, it would be helpful for user-oriented groups to acknowledge that a list of specific steps should be reasonably calculated to identify recordings being commercially exploited, even where this entails added searching steps of the prospective user. The Office does not believe the proposed rule to be unwieldy from the user perspective. Moreover, while the statute is very clear that following this closed-list of steps is sufficient to qualify for the safe harbor, the proposed rule does not intend to discourage users from taking additional steps that they believe may be fruitful in identifying commercial exploitation of a given Pre-1972 Sound Recording, or in locating the rights owner to negotiate a permissive use, including by searching these additional sources identified by commenters.

iii. Search Terms and Strategy

1. General Rule

In general, the proposed rule asks a user to search on the title and featured artist(s) of the Pre-1972 Sound Recording in the various search categories. 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 any of the following attributes, the user must also search: 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, version, or Universal Product Code (“UPC”). 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. Because “year” may refer to year of a record’s release or re-release, rather than year of recording, the proposed rule does not require searching this attribute.

2. Classical Music Sound Recordings

Because classical music sound recordings require more information to sufficiently identify the sound recording, the proposed rule requires the user to search on additional attributes for those types of sound recordings. For example, the same conductor could have conducted Beethoven’s Symphony No. 9 on multiple occasions, with the same or different orchestras. Even to the trained ear (or database), distinguishing between sound recordings of those various performances may well be impossible without knowing the musical work’s composer and opus, the conductor, the performers (e.g., orchestra), and year of performance. Indeed, as with Beethoven’s Symphony No. 9, the composer and opus effectively function as the work’s title; the closest simile to a “featured artist” may be the conductor, featured performers, or ensemble, depending upon the work. Accordingly, the proposed rule requires the user to search on these additional attributes when trying to determine whether a Pre-1972 Sound Recording of classical music is being commercially exploited.

The Office invites public comment on whether other, specific genres of sound recordings (e.g., jazz) similarly can be reasonably expected to require searching additional terms to identify the sound recording sufficiently—and if so, what those additional attributes should be.

3. Remastered Pre-1972 Sound Recordings

As noted below, prospective users must certify that they have conducted a good faith, reasonable search when filing NNUs. While the Office will not examine for a NNU’s legal validity, it suggests 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. The Office has previously noted that “remastering” a sound recording may consist of mechanical contributions or contributions that are too minimal to be copyrightable. For example, it would 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.

iv. Other Considerations

1. Searches for Foreign Pre-1972 Sound Recordings

Stakeholders question whether the section 1401(c) exception applies to foreign Pre-1972 Sound Recordings (i.e., Pre-1972 Sound Recordings originating outside the United States). EFF contends that the section 1401(c) exception does apply, “as nothing in the extensive and detailed language of the MMA authorizes such a carve-out.” A2IM and RIAA appear to agree, contending that a search under section 1401(c) should include “leading digital

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112 See 17 U.S.C. 512. To pick but one example, a YouTube search of ragtime and early jazz pianist “Jelly Roll Morton” yielded a long scroll of hits featuring his sound recordings, and spot checks did not indicate whether any were authorized, without further refining the search criteria to incorporate record labels or album titles readily identifiable from searching the SoundExchange ISRC lookup tool or Amazon.com. YouTube, https://www.youtube.com/results?search_query=%221900-1920%22+Jelly+Roll+Morton [last visited Jan. 29, 2019].

117 Id. at 1401(c)(1)(A).

117 Id. at 1401(c)(1)(A).

113 Id. at 1401(c)(3)(3).

114 Id. at 1401(c)(3)(3).

115 Id. at 1401(c)(4)(R).

116 See EFF Initial at 3.

117 See, e.g., What Type of Music Can Shazam Identify, Shazam, https://support.shazam.com/hc/en-us/articles/204462958-What-type-of-music-can-Shazam-identify (last visited Jan. 26, 2019) (“Classical tracks can be recorded many times over by various artists, so it can sometimes be tricky for Shazam to tell the different versions apart.”).


120 EFF Reply at 5.
services in relevant foreign countries including the country of origin or countries where the work is most popular, to the extent those services are accessible from the U.S.”

By contrast, IFPI maintains that the Office should clarify that the section 1401(c) exception applies only to foreign sound recordings that have “previously been exploited commercially in the US, thereby establishing a nexus between the US and the rightholder(s) in question.”

Prior to the enactment of the MMA, certain foreign Pre-1972 Sound Recordings were already granted copyright protection in the United States. In 1994, the Uruguay Round Agreements Act (“URAA”) amended section 104A to automatically restore U.S. copyright protection to certain foreign works that had been in the public domain in the United States due to lack of copyright protection for Pre-1972 Sound Recordings more generally. While copyright is restored automatically in eligible works, the owner of a restored work must notify reliance parties if they plan to enforce those rights, including constructively by filing a notice of intent to enforce with the Copyright Office.

The MMA revised section 301(c), which now states that “[n]otwithstanding the provisions of section 303, and in accordance with [section 1401], no sound recording fixed before February 15, 1972, shall be subject to copyright under [title 17].” But section 1401 and the legislative history do not reference foreign recordings specifically, or refer to or revise section 104A, and there is no evidence of congressional intent to extinguish copyright protection granted to foreign Pre-1972 Sound Recordings under section 104A.

Section 1401 provides sui generis protection running parallel to any copyright protection afforded to foreign Pre-1972 Sound Recordings under section 104A. While section 1401(c) operates as a limitation on the protection available under that new chapter, it does not explicitly limit title 17 copyright protection for certain foreign restored works (i.e., copyright protection under section 104A).

Whether 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. Because protection and enforcement for foreign restored rights is fact-intensive—implicating the specific source country, date and location of publication, duration of term in both the United States and the source country, and compliance with formalities—prospective users of foreign Pre-1972 Sound Recordings should proceed cautiously before relying on the section 1401(c) exception.

2. Relevance on Third-Party Searches

Stakeholders disagree as to whether a user may rely on searches conducted by third parties to meet the good faith, reasonable search requirement under section 1401(c). ARSC and EFF contend that users should be able to rely on previous searches conducted for a Pre-1972 Sound Recording when filing an NNU to avoid “‘duplicated effort’” and “‘nothing but make-work.’” By contrast, Copyright Alliance, A2IM, RIAA, and FMC maintain that users relying on searches of other users could create blanket exceptions of noncommercial use.

The Office agrees that reliance on a third-party search, unless the third party conducted the search as the user’s agent, is not reasonable. The third party may have conducted an inadequate search and incorrectly concluded that a Pre-1972 Sound Recording is not being commercially exploited. Or, as noted by A2IM and RIAA, a 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). As noted below, a user will be required to 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. Accordingly, the proposed rule does 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.

3. Timing of Completing a Search Before Filing an NNU

To ensure that search results are not stale, the proposed rule states that the user (or the user’s agent) must conduct a search under section 1401(c) within 90 days before submitting an NNU with the Office. The Music Library Association asserts that if a search has been conducted within a certain timeframe, the search should not have to be repeated. The Office agrees, and believes that 90 days is a reasonable timeframe for a search to remain fresh. Accordingly, a user may rely on a search for a Pre-1972 Sound Recording that she (or her agent) has conducted for 90 days before submitting an NNU proposing a noncommercial use of the same sound recording.

B. Notices of Noncommercial Use (NNUs)

1. Form and Content of NNUs

Overview of Proposed Rule

Commenters offer various proposals on information to be required in NNUs, particularly regarding the level of detail required to describe the good faith, reasonable search and the proposed noncommercial use. Regarding the search. Copyright Alliance, A2IM, and RIAA maintain that the user should be required to describe and certify the steps taken for a search of the Pre-1972 Sound Recording in the NNU, whereas the Music Library Association contends that a user should just have to

121 A2IM & RIAA Initial at 6.
122 IFPI Initial at 2.
123 17 U.S.C. 104A(a), (h)(6)(C).
124 Id. at 104A(a), (h)(6)(Cl)(ii) (referring “sound recordings fixed before 15 February, 1972.”).
126 17 U.S.C. 301(c).
127 In comparison, to minimize concerns regarding any “takings” of property under the Fifth Amendment under section 104A, Congress included provisions to protect the interests of parties who had relied on the loss of copyright protection for such works before enactment of the URAA (i.e., “reliance parties”). See id. at 104A(d)(1), (h)(4).
128 See Conf. Rep. at 15 (discussing sui generis of chapter 14); see also IPPI Initial at 1–2 (discussing foreign Pre-1972 Sound Recordings).
129 ARSC Reply at 4.
130 EFF Reply at 4.
131 Copyright Alliance Initial at 3 (“[A] notice of noncommercial use for a particular pre-72 sound recording should not create a blanket exception for all future noncommercial uses of that sound recording.”). A2IM & RIAA Reply at 9 (“Congress never envisioned that the index of NNUs would operate as a de facto database of recordings available for noncommercial use pursuant to the new safe harbor.”); FMC Reply at 2 (“We see no justification for the suggestion that ‘if a search has been done within a certain time frame, it does not have to be repeated’. …” (quoting Music Library Association Initial at 2)).
132 A2IM & RIAA Reply at 9.
133 See A2IM & RIAA Initial at 21 (contending search must be conducted within 90 days of filing an NNU to be reasonable); Copyright Alliance Initial at 6 (same). Public Knowledge suggests that an even earlier period of 30 days would be reasonable. Public Knowledge Initial at App.
134 Music Library Association Initial at 2.
135 Ninety days is also the timeframe that a rights owner filing a Pre-1972 Schedule must wait before bringing an action for statutory damages or attorneys’ fees, 17 U.S.C. 105(5)(A)(i)(II), and the timeframe a rights owner subject to a proposed noncommercial use, id. at 1401(c)(1)(C).
136 A2IM & RIAA Initial at 21 (contending that user should provide “a certified step-by-step account of all sources searched and the precise search terms used”); Copyright Alliance Initial at 6.
include a mix of required and optional information to establish a baseline of information that will be deemed sufficient for purposes of meeting the regulatory filing requirements, while encouraging users to provide additional descriptive material that may aid in the ensuing determination whether a Pre-1972 Opt-Out Notice is filed. Specifically, the proposed 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;144
3. If known, the alternate 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, and when and where the proposed use will occur (i.e., the term and U.S.-based territory of the use). The prospective user should describe the proposed use clearly and accurately, with enough detail to provide the rights owner with enough information to meaningfully evaluate the use.145 The proposed categories comprise commonsense information, and the prospective user has flexibility in the description of the proposed use.146 To aid filers, the Office’s form or instructions may include exemplar descriptions of the proposed use. As discussed further below, while the proposed rule does not define "noncommercial" for purposes of this filing, the Office’s form, instructions, and other material will be intended to aid individuals in determining how a desired use is likely to relate to the exception for noncommercial uses.

Further recognizing that some NNUs are likely to be filed by individuals or smaller noncommercial entities with limited expertise with copyright licensing, the Office’s form will also provide cues for users to provide additional optional information that is commonly helpful in licensing transactions, such as spaces for title of the project, the playing time of the Pre-1972 Sound Recording to be used as well as total playing time, 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.147 The user may also opt to include additional information about the Pre-1972 Sound Recording as permitted by the Office’s form or instructions, such as the year of release and version. Similarly, to increase the likelihood of a user receiving timely notification of a rights owner’s decision to opt out of a proposed noncommercial use, the proposed rule allows a user to include an email address to which a rights owner may contact the user to obtain more information, or to send a copy of the Pre-1972 Opt-Out Notice in addition to filing a Pre-1972 Opt-Out Notice with the Copyright Office.

In addition, the proposed 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.148 The Office recognizes that, for efficiency, users desiring to make noncommercial use of multiple Pre-1972 Sound Recordings from the same album would prefer to file a single NNU in all cases.149 The Office also recognizes, however, that multiple rights owners may own the various Pre-1972 Sound Recordings in the NNU—and that consequently, multiple rights owners may desire to file Pre-1972 Opt-Out Notices in response to the same NNU. In such circumstances, it may be difficult for rights owners as well as prospective users to evaluate opt-outs to proposed noncommercial uses.

Finally, the proposed rule also requires the individual submitting the NNU to certify that she has appropriate

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137 Music Library Association Initial at 1.
138 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 is to be disputed); see also FMC Reply at 5 (requiring a user to upload screenshots is an “ineligent solution”).
139 A2IM & RIAA Initial at 21; Copyright Alliance Initial at 6.
140 A2IM & RIAA Initial at 17–19; Copyright Alliance Initial at 6. Copyright Alliance, A2IM, and RIAA also suggest that the user should identify whether there is another work embodied within the Pre-1972 Sound Recording, and if so, whether the user has a license to use that work. See A2IM & RIAA Initial at 20 & n.26; Copyright Alliance Initial at 6 & n.6. Because the noncommercial use exception does not extend to the underlying musical, literary, or dramatic work, which may require separate clearance, users are of course not required to identify underlying works embodied within the Pre-1972 Sound Recording, but may include such information, including whether they have secured permission to use such works, to aid the rights owner in considering how to respond to a NNU. See A2IM & RIAA Initial at 20 & n.26.
141 Id. at 17.
142 EFF Initial at 5–6 (“[R]equesting detailed descriptions of a use would invite future legal disputes over whether a user has exceeded the language of its description.”); Public Knowledge Reply at 15 (user should be required to provide only the “basic facts which a non-sophisticated user can reasonably be expected to have on hand”; rightsholders may ask for clarification of proposed uses where descriptions are vague or otherwise insufficient).
143 EFF Reply at 4; Public Knowledge Reply at 16.
144 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.
145 See, e.g., A2IM & RIAA Initial at 18–19; EFF Initial at 5 (both in general accord).
146 For example, a user may describe an “unlimited” term of use, throughout the United States, or a more limited use, such as a particular high school’s spring dance recital. A user may also specify whether a webinar will be live-streamed over the internet and/or archived.
147 See A2IM & RIAA Initial at 19 (proposing these fields, but on a required basis).
148 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/circs/.
149 Indeed, the Office permits applicants to register a claim to copyright for sound recordings on the same album in certain circumstances. See, e.g., 37 CFR 202.3(b)(4)(i)(A) (allowing applicants to register multiple sound recordings as well as accompanying text and artwork as a “unit of publication,” if they are owned by the same claimant, were physically packaged or bundled together, and if all of the recordings were first published together as that integrated unit).
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. Such requirements mimic certification requirements in a wide variety of other filings administered by the Copyright Office.\(^{150}\) The proposed rule does not require users to submit documentation of their searches, but the Office encourages users to keep records of their searches in case they come into dispute.

2. Determining Whether a Use Is Noncommercial

The section 1401(c) exception applies only to noncommercial uses of Pre-1972 Sound Recordings.\(^{151}\) Although section 1401(c) does not define “noncommercial,” it does state that “merely recovering costs of production and distribution of a sound recording resulting from a use otherwise permitted under [section 1401(c)] does not itself necessarily constitute a commercial use,” and “the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial.”\(^{152}\) The Conference Report further states that “the concept of noncommercial use should be understood in the same way as under other provisions of title 17, such as section 107, and includes uses such as teaching, scholarship and research.”\(^{153}\)

Although other parts of title 17 refer to “commercial” or “non-commercial” uses, nowhere in the statute are they defined.\(^{154}\) The Conference Report at 25 (“Section (c) applies only to noncommercial uses.”).

The NOI questioned whether the Office should adopt guidelines for filers “as to what constitutes a ‘noncommercial’ use, and if so, what?”\(^{155}\) FMC strongly urged the Office to provide such guidance to “prevent situations where less sophisticated users misunderstand the statute.”\(^{156}\) Similarly, A2IM and RIAA suggest “it 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,” particularly for users less experienced with copyright.\(^{157}\) Citing an array of case law and endorsing a public survey on this topic from Creative Commons, they propose specific text for the Office’s consideration.\(^{158}\)

On the other hand, Wikimedia Foundation cautioned the Office to avoid creating “complex presumptions” for specific anticipated fact patterns, suggesting that terms like “noncommercial” are defined in factspecific contexts that are still being explored by courts.\(^{159}\) The Kernochan Center provided a run-down of key court opinions with “differing conclusions as to what constitutes commercial versus noncommercial use.”\(^{160}\) It suggested that the A2IM and RIAA proposal was insufficiently clarifying, while also acknowledging that failure to interpret the term might perpetuate conflicting interpretations by courts and advocacy groups.\(^{161}\)

The Office agrees with the Kernochan Center that defining noncommercial in relation to section 1401 is “a complex proposition.”\(^{162}\) In a sense, section 1401(c) requires the Office to mediate a channel for users and rights owners to engage with each other regarding potentially noncommercial uses through competing filings, and it is not the Office’s intention to constrain resolution of gray areas or edge cases through private negotiation or, if necessary, the courts. If anything, the Office hopes this new mechanism may engender dialogues to further productive developments in this area.

But in examining the relevant statutory and case law, as well as the comments, it is apparent that there are some touchstones in evaluating whether a use is noncommercial that may be helpful to flag for filers and other interested parties. While individual determinations may be fact-specific, inclusion of this new exception suggests a congressional intent to provide a new avenue to facilitate certain noncommercial uses.\(^{163}\) Moreover, many comments pointed out that individuals and smaller nonprofit entities may benefit from additional explanation regarding the content and filing of NNUs.\(^{164}\) The Office plans to include information directed at helping users determine whether and how to file a NNU, including considerations that may affect their own determination that a use is noncommercial. Such material may be included on the Office’s instructions, forms, or other public resources, which will also make clear that the Office does not provide legal advice regarding specific uses. Because this information is directly tailored to the Office’s promulgation of regulations establishing the content for the filing of NNUs, and is aimed at aiding prospective filers—both users and rights owners—in evaluating whether a use may fall under this noncommercial use exemption, the Office agrees that this guidance should not necessarily be presumed to directly bear upon questions related to other parts of the statute.\(^{165}\)

While this notice is not including specific language, the Office provisionally anticipates calling attention to the following types of considerations:

1. Use v. User. The evaluation should consider the type of use of the copyrighted material and not simply the nature of the user.\(^{166}\) While a filer will be asked to disclose whether the user is a tax-exempt organization or other corporate entity, this information is helpful but not dispositive, as some uses

\(^{150}\) See id. at § 201.4(c)(4) (recorded documents generally), § 201.10(b)(13) (notices of termination of transfer and licenses), § 201.11(o)(9)(iii)(E) (satellite and cable statements of account), § 201.35(d)(2) (submissions of Pre-1972 Schedules), § 201.36(d)(4) (submissions of notices of contact information for transmitting entities publicly performing Pre-1972 Sound Recordings); see also 18 U.S.C. 1001 (false statements generally).

\(^{151}\) 17 U.S.C. 1401(c)(1); Conf. Rep. at 25 (“Section (c) applies only to noncommercial uses.”).

\(^{152}\) 17 U.S.C. 1401(c)(2)(A).

\(^{153}\) Id. at 1401(c)(2)(B).

\(^{154}\) Conf. Rep. at 25.

\(^{155}\) See, e.g., 17 U.S.C. 107; 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 201.406(b)(1)(ii)(B) [2018] (regulatory exception for certain uses of motion pictures in noncommercial videos); compare 17 U.S.C. 901(a)(5) (defining “commercially exploit” with respect to mask works).

\(^{156}\) FMC Reply at 6 (noting prevalence of incorrect understanding of copyright published by users in connection with user-uploaded content on YouTube).

\(^{157}\) A2IM & RIAA Reply at 6.


\(^{159}\) Id.

\(^{160}\) Kernochan Center Reply at 3–4.

\(^{161}\) Id. at 4.

\(^{162}\) Id.

\(^{163}\) NOI at 52178.

\(^{164}\) See also 17 U.S.C. 1401(c)(6)(A) (prescribing penalties for filing an NNU while “knowing that the use proposed is not permitted”) (emphasis added).

\(^{165}\) See, e.g., EFF Initial at 1; AAU Initial at 1; FMC Reply at 6; Public Knowledge Reply at 9; A2IM & RIAA Reply at 8.

\(^{166}\) See SoundExchange Initial at 15–16 (re specialized licenses for noncommercial users under sections 112 or 114); Kernochan Center Reply at 5.

\(^{167}\) See, e.g., Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1264 (11th Cir. 2014) (“[W]e must consider not only the nature of the user, but the use itself.”); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 921–22 (2d Cir.1994) (“[A] court’s focus should be on the use of the copyrighted material and not simply on the user . . . .”).
by nonprofit organizations may constitute “commercial” use.168 Similarly, some uses by for-profit entities may constitute “noncommercial” use169 and “the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial.”170

2. Educational uses. Educational uses “such as teaching, scholarship and research” are often noncommercial uses that provide a public benefit.171 But some educational uses may be considered commercial, for example, when fees are charged or copies sold, or when the user gains another kind of measurable benefit (such as valuable authorship credit through plagiarism of the work), and so the educational nature of the use should be viewed as one important part of the overall evaluation whether the use is noncommercial.172

3. Covering the costs of production and distribution of the sound recording. “Merely recovering costs of production and distribution of a sound recording resulting from a use” that would otherwise be considered noncommercial “does not itself necessarily constitute a commercial use.”173 Similarly, the fact that the user may save money on a licensing fee does not automatically make the use commercial.174

4. Financial gain or other profit. Beyond covering the costs of production and distribution, if the user otherwise “stands to profit from exploitation of the copyrighted material without paying the customary price,” it is more likely to be considered a commercial use.175 For example, some courts have stated that if the use can be expected to bring the user “conspicuous financial rewards,” it is more likely to be commercial.176 Some examples may include uses of a copyrighted work in an advertisement, through the sale of a newspaper or magazine (even by a non-profit organization), or other uses that directly earn users money.177

5. Private personal uses. If the use is a private home use for an individual’s personal enjoyment, it will generally be considered noncommercial.178 Posting on the open, accessible internet is not a private use, even if the user does not encourage others to access the Pre-1972 Sound Recording.

6. Other individual uses. Putting a Pre-1972 Sound Recording on YouTube or another platform that allows users to upload content may or may not be commercial; again, the user must consider the purpose of the use, including whether the user is monetizing that use for profit.179

Finally, the Copyright Office also addresses a question raised regarding the scope of its regulatory authority. EFF and Public Knowledge contend the Office lacks authority to issue guidance regarding the meaning of “noncommercial use” as part of this rulemaking.180 Perhaps more broadly, EFF suggests that the Copyright Office requires “a statutory grant” “to give opinions” regarding copyright issues or the meaning of specific terms in the copyright law.181 In point of fact here, three relevant statutory charges reside at 17 U.S.C. 701(b), 702, and 1401(c)(3).182 It is well-established, permissible, and often necessary for the Office to construe or otherwise interpret the meaning of statutory terms as part of dutifully exercising its regulatory functions.183 Indeed, this is a basic precept of administrative law.184 As

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168 See, e.g., Greenberg v. Nat’l Geog. Soc’y, 244 F.3d 1207, 1275 (11th Cir. 2001), rev’d on other grounds on reh’g en banc, 533 F.3d 1244 (11th Cir. 2008). (“While the [CD-ROM library] is a product that may serve educational purposes, it is marketed to the public at book stores, specialty stores, and over the internet. [Defendant] is a non-profit organization, but its subsidiary National Geographic Enterprises, which markets and distributes the [product], is not; the sale of the [product] is clearly for profit.”).


172 See, e.g., Peter Letterese & Assoc. v. World Inst. of Scientology Enters. Int’l, 533 F.3d 1287, 1309–12 (11th Cir. 2008) (finding use of copyrighted material in an instructional coursepack, where defendants charged a fee, was “commercial” use); Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1385–86 (6th Cir. 1996) (finding reproduction of academic works was “commercial” use because copies were sold in coursepacks); Weissman v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989) (academic researcher’s plagiarism was commercial because “what is valuable is recognition because it so often influences future advancement”); see also Cambridge Univ. Press, 769 F.3d at 1263–66.


174 See, e.g., Cambridge Univ. Press, 769 F.3d at 1265–66. (“If course, any unlicensed use of copyrighted material profits the user in the sense that the user does not pay a potential licensing fee, allowing the user to keep his or her money. If this analysis were persuasive, no use could qualify as ‘nonprofit’ . . . .”).

175 See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 599, 621 (1985); see also Wall Data Inc. v. Los Angeles County Sheriff’s Dept., 447 F.3d 769, 779 (9th Cir. 2006) (police department copying software to avoid buying additional licenses was a commercial use).


177 See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448–49 (1984) (“time-shifting for private home use must be characterized as a noncommercial, nonprofit activity”); Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) (addressing transfer of legitimately-acquired MP3 files from user’s hard drive to portable player); see also 221 U.S. 539, 562 (1985); 1401(c)(3) (directing promulgation of noncommercial use rulemaking). See also S. Rep. No. 115–339 at 15 (discussing Copyright Office knowledge and expertise regarding music copyright regulations, educational activities, and reports with respect to title I of the MMA); Conf. Rep. at 12 (same). The Office also provides authoritative information about the copyright law and public education regarding copyright and the administration of its functions and duties under title 17. See 17 U.S.C. 701(b); 37 CFR 203.3(i); id. at § 201.2(b)(7).

178 See, e.g., 37 CFR 201.4[c][2] (defining a document “pertaining to a patent”); § 201.10(d)(2) (identifying actions that will meet statutory service requirements); § 201.10(1)(ii)(C) (treatment date for copyright work “as date of execution of a grant”); § 201.11 (including interest in Section 119 royalty payments); § 201.13(a)(2) (defining “copyright owner” for purposes of Section 110(4)); § 201.17(b) (defining “gross receipts” and “cable system” for purposes of Section 111).

179 For example, making copies to help people “get for free something they would ordinarily have to buy,” such as file sharing to anonymous requesters over the internet, has been found to be commercial. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001); see also FMC Report at 6 (expressing “acute concern” about uploads to “YouTube or similar commercial services”).

180 Public Knowledge Initial at 8 (suggesting statute provides “no role” for the Office); EFF Initial at 5; see also Wikimedia Foundation Reply at 3.

181 EFF Initial at 5 (citation omitted).

182 17 U.S.C. 701(b) (outlining additional functions and duties), 702 (Copyright Office regulations), and 1401(c)(3) (directing promulgation of noncommercial use rulemaking). See also S. Rep. No. 115–339 at 15 (discussing Copyright Office knowledge and expertise regarding music copyright regulations, educational activities, and reports with respect to title I of the MMA); Conf. Rep. at 12 (same). The Office also provides authoritative information about the copyright law and public education regarding copyright and the administration of its functions and duties under title 17. See 17 U.S.C. 701(b); 37 CFR 203.3(i); id. at § 201.2(b)(7).

183 See, e.g., 37 CFR 201.4[c][2] (defining a document “pertaining to a patent”); § 201.10(d)(2) (identifying actions that will meet statutory service requirements); § 201.10(1)(ii)(C) (treatment date for copyright work “as date of execution of a grant”); § 201.11 (including interest in Section 119 royalty payments); § 201.13(a)(2) (defining “copyright owner” for purposes of Section 110(4)); § 201.17(b) (defining “gross receipts” and “cable system” for purposes of Section 111).

Congress has so directed, the Office will continue to interpret statutory terms as necessary to administer a wide variety of filings mandated under title 17, including NNUs, and also through documents such as circulars, its Compendium of U.S. Copyright Office Practices, or other public aids. While it is true that courts afford varying levels of deference to these differing types of documents (as with any agency), that fact does not bear upon the Office’s authority to issue these documents in fulfillment of its statutory functions and duties.

ii. Filing of NNUs, Including Copyright Office Review

Stakeholders disagree on the Office’s level of review of NNUs. Copyright Alliance, A2IM, and RIAA contend that the Office should reject NNUs that do not provide sufficient information or are “patently deficient.” In addition, Copyright Alliance and FMC ask for guidance on how the Office plans to police deficient notices. By contrast, EFF maintains that the Office cannot reject facially complete notices of use or opt-out notices, and Public Knowledge contends that section 1401(c) “contemplates no such role for the Office” to reject notices on substantive grounds.

As with similar types of filings made with the Office, the proposed rule states that the Office does not review NNUs for legal sufficiency. 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. The Office’s indexing of an NNU thus does not mean the proposed use in the NNU is, in fact, noncommercial. Users are therefore cautioned to review and scrutinize NNUs to assure their legal sufficiency before submitting them to the Office.

Section 1401(c)(6)(A) contemplates civil penalties for the filing of fraudulent NNUs (e.g., fraudulently describing the use proposed). In connection with the Office’s exercise of the regulatory authority directed under the MMA and its general authority and responsibility to administer title 17, the proposed rule states that if the Register becomes aware of abuse or fraudulent NNUs 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.

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

Section 1401(c) requires NNUs to be “indexed into the public records of the Copyright Office.” Under the proposed rule, an NNU will be considered “indexed publicly” through the Office’s online database of NNUs. Similar to the Office’s database of indexed Pre-1972 Schedules, the Office intends to provide an online and searchable database of indexed NNUs. Rights owners can search on the prospective user’s name, the title of the sound recording, the featured artist(s), and the ISRC provided in NNUs. In addition, each NNU will be assigned a unique identifier by the Copyright Office, which will also be searchable. As noted below, rights owners will be required to include the unique identifier assigned to an NNU if the rights owner desires to file a Pre-1972 Opt-Out Notice in response. Although indexed NNUs will be publicly available, the proposed rule states that users cannot rely on NNUs filed by third parties (other than the user’s agent). Similarly, 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 for the Pre-1972 Sound Recording and file a new NNU).

The proposed rule also confirms that persons may request timely notification of when NNUs are indexed into the Office’s public records by following the instructions provided by the Copyright Office on its website. Individuals requesting such notification can subscribe to a weekly email through a service similar to the Office’s NewsNet service, which will provide a link to the Office’s online database of indexed NNUs. The Office’s searchable database will default to listing the NNUs with the most recent index dates first, so individuals should easily be able to identify recently indexed filings.

C. Opt-Out Notices

As noted above, the rights owner of a Pre-1972 Sound Recording may file a Pre-1972 Opt-Out Notice with the Copyright Office “opting out” of (i.e., objecting to) the proposed use in an NNU within 90 days of the NNU being indexed into the Office’s public records. The proposed rule states that where a Pre-1972 Sound Recording has multiple rights owners, only one rights owner needs to file Pre-1972 Opt-Out Notice for purposes of section

187 Copyright Alliance Initial at 3; FMC Reply at 2.

186 Copyright Alliance Initial at 1; Copyright Office Initial at 3.

185 EFF Reply at 3.

184 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.

183 See A2IM & RIAA Initial at 22 (requesting same).

182 The Office believes having an online, searchable database of indexed NNUs and a periodic email notification option addresses Author Services’ concern about how rights owners of Pre-1972 Sound Recordings will receive notice of indexed NNUs. Author Services Reply #1 at 1–2.

181 Id. at 1401(c)(1)(C); see internet Archive Initial at 2 (advocating same).

180 Public Knowledge Reply at 7. The Copyright Alliance maintains that the “Copyright Office does clearly have authority to deny facially invalid notices,” and the discretion to reject notices which on their face are not sufficient to identify the sound recording—thus not providing notice to the owner of the sound recording—and nature of the use or do not adhere to the form, content, and procedures established by the Register through regulations.” Copyright Alliance Reply at 2.

179 For example, the Office accepts statements of account under the section 111 cable license after a review for “obvious errors or omissions appearing on the face of the documents” (see 37 CFR 201.17(c)(2)).

178 Copyright Alliance Reply at 2.

177 17 U.S.C. 1401(c)(1)(C).

176 The Office believes having an online, searchable database of indexed NNUs and a periodic email notification option addresses Author Services’ concern about how rights owners of Pre-1972 Sound Recordings will receive notice of indexed NNUs. Author Services Reply #1 at 1–2.

175 See id. at 1401(c)(3); (5)(A); id. at 701(a).

174 17 U.S.C. 1401(c)(6)(A) (“Any person who willfully engages in a pattern or practice of filing a [NNU], . . . fraudulently describing the use proposed, or knowing that the use proposed is not permitted under [section 1401(c)], shall be assessed a civil penalty in an amount that is not less than $250, and not more than $1000, for each such notice. An aggregate civil penalty imposed on an entity that comprehensively files fraudulent notices may be available under this title based on the actual use made.”).

173 17 U.S.C. 1401(c)(6)(A) (collecting Compendium). ARS Ent’t, Inc. v. CBS Corp., 908 F.3d 405, 417 n.5 (9th Cir. 2018) (“Circulars provide Copyright Office guidance on various issues. We may rely on them as persuasive but not binding authority.”).
1401(c)(5). In addition, the proposed rule requires the Pre-1972 Opt-Out Notice to include the rights owner’s name and the unique identifier assigned to the NNU by the Copyright Office. The submitter of the Pre-1972 Opt-Out Notice may opt in her discretion to comment on whether the proposed use constitutes noncommercial use. In keeping with filings of similar type, the Pre-1972 Opt-Out Notice must also include a certification that the individual submitting the notice has appropriate authority to do so 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. The Office intends to make Pre-1972 Opt-Out Notices publicly available through the Office’s online searchable database of NNUs.

If a rights owner files a timely Pre-1972 Opt-Out Notice, the proposed rule states that the user specified in the NNU use must wait one year before filing another NNU for the same or similar use of the Pre-1972 Sound Recording. As with NNUs and similar types of filings made with the Office, the proposed rule states that the Office does not review Pre-1972 Opt-Out Notices for legal sufficiency, interpret their content, or screen them for errors or discrepancies. Rather, 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 Pre-1972 Opt-Out Notices to assure their legal sufficiency before submitting them to the Office. As with the Office’s handling of fraudulent NNUs, proposed in 1401(c)(6)(B)(ii) contemplates civil penalties for a pattern of filing of fraudulent Pre-1972 Opt-Out Notices, the proposed rule states that if the Register becomes aware of abuse or fraudulent Pre-1972 Opt-Out Notices from a certain filer, she shall have the discretion to reject all submissions from that filer for up to one year.

D. Filing Fees

The Copyright Act grants the Office authority to establish, adjust, and recover fees for services provided to the public. The rule proposes fees to file an NNU or an Opt-Out Notice that are the same as the current fee to record a notice of intention to make and distribute phonorecords under section 115 (“NOI”). The Office anticipates that the processing of these documents will be analogous to that of processing electronic NOIs, and has based the proposed fee accordingly. Similar to the Office’s free NewsNet service, there will be no fee for individuals to request and receive timely notifications of when NNUs are indexed into the Office’s public records.

III. Ex Parte Communications

In the past, the Office’s communications with rulemaking participants have not generally included discussions about the substance of the proceeding apart from the noticed phases of written comments. The Office has determined that further informal communications with participants might be beneficial in limited circumstances where the Office seeks specific information or follow-up regarding the public record, such as to discuss nuances of proposed regulatory language. The primary means to communicate views in the course of the rulemaking will continue to be through the submission of written comments. In other words, this communication will supplement, not substitute for, the proceeding record.

To ensure that such communications are governed by transparent and consistent procedures, the Office is issuing the following guidelines, which may be supplemented by information on the Copyright Office’s website at https://www.copyright.gov/:

1. Any interested participant seeking an ex parte in-person or telephone meeting with the Office in this proceeding should submit a written request to the persons identified in the contact information section of this NPRM. The request should identify the names of all proposed attendees, and the party or parties on whose behalf each attendee is appearing.

2. Ex parte meetings with the Office are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions and, to respond to questions from the Office on those matters. The Office will generally not consider or accept new documentary materials outside the rulemaking record.

3. Within two business days after the meeting, the attendees must email the Office (using the above email addresses) a letter detailing the information identified in paragraph 1 and summarizing the discussion at the meeting. The letter must summarize the substance of the views expressed and arguments made in such a way that a non-participating party will understand the scope of issues discussed; merely listing the subjects discussed or providing a 1–2 sentence description will not be sufficient. These letters will be made publicly available on the Copyright Office’s website.

4. To ensure compliance with the statutory deadline, all ex parte meetings in this proceeding must take place no later than Friday, March 22, 2019. The Office will not consider requests to hold meetings after that date.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Proposed Regulations

In consideration of the foregoing, the U.S. Copyright Office proposes amending 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

\[ 1. \] The authority citation for part 201 continues to read as follows:


\[ 2. \] Amend § 201.3 as follows:

\[ a. \] Redesignate paragraphs (c)(21) and (c)(22) as paragraphs (c)(23) and (c)(24), respectively.

\[ b. \] Add paragraphs (c)(25) and (c)(26) to 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 ($)

(21) Notice of noncommercial use of pre-1972 sound recording ................................................................. 75
(22) Opt-out notice of noncommercial use of pre-1972 sound recording ................................................................. 75

* * *

§ 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, 370.2 of this chapter):

* * *

(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.

(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).

(c) Conducting a good faith, reasonable search.

(1) Pursuant to 17 U.S.C. 1401(c)(3)(A), a user desiring to make noncommercial use of a pre-1972 sound recording should search for the sound recording in each of the categories below until the user finds the sound recording. If the user does not find the pre-1972 sound recording after searching 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 SoundExchange’s repertoire database through the SoundExchange ISRC lookup tool (https://isrc.soundexchange.com/#!/search);

(v) 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

(vi) For pre-1972 ethnomusicological sound recordings of Alaska Native or American Indian tribes or communities, 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 National Congress of American Indians (NCAI) tribal directory to contact the relevant tribe or NCAI itself (http://www.ncai.org/tribal-directory).

(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 for the user to search any of the following...
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, version, or Universal Product Code (‘‘UPC’’).

(3) A search under paragraph (c)(1) of this section must be conducted within 90 days of the user (or her 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), 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 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 agent) to which the rights owner does not file an opt-out notice.

(d) Noncommercial use.

(1) Form and submission. A user seeking to comply with 17 U.S.C. 1401(c)(1) 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 provided by the Copyright Office on its website and following the instructions 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. 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 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, and when and where the proposed use will occur (i.e., the term and 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, 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.

(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 agent) conducted a search under paragraph (c) 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) U.S.-based territory. Noncommercial use of a pre-1972 recording under this section is limited to use within the United States.

(4) Number of sound recordings. 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 unit of publication.

(5) Unique identifier. 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 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 pre-1972 sound 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) 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 shall contain the following:

(i) The rights owner’s name and the unique identifier assigned to the notice of noncommercial use by the Copyright Office. Additional contact information, 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) Multiple rights owners. Where a pre-1972 sound recording has multiple rights owners, only one rights owner needs to file an opt-out notice for purposes of 17 U.S.C. 1401(c)(5).

(4) Effect of opting out. If a rights owner files a timely opt-out notice under paragraph (e)(1) of this section, the 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 reject all submissions from that filer or user under this section for up to one year.


Regan A. Smith,
General Counsel and Associate Register of Copyrights.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4
RIN 2900–AQ43

Schedule for Rating Disabilities: Infectious Diseases, Immune Disorders, and Nutritional Deficiencies

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend the section of the VA Schedule for Rating Disabilities (VASRD or Rating Schedule) that addresses infectious diseases and immune disorders. The purpose of these changes is to incorporate medical advances since the last revision, update medical terminology, and clarify evaluation criteria. The proposed rule considers comments from experts and the public during a forum held from January 31 to February 1, 2011, on revising this section of the VASRD.

DATES: Comments must be received by VA on or before April 8, 2019.

ADDRESSES: Written comments may be submitted through www.regulations.gov; by mail or hand-delivery to Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll free number.) Comments should indicate that they are submitted in response to “RIN 2900–AQ43—Schedule for Rating Disabilities: Infectious Diseases, Immune Disorders, and Nutritional Deficiencies.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Ioulia Vvedenskaya, M.D., M.B.A., Medical Officer, Part 4 VASRD Regulations Staff (211C), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: As part of its ongoing revision of the VASRD, VA proposes changes to 38 CFR 4.88a, which pertains to chronic fatigue syndrome (CFS), and 38 CFR 4.88b, which pertains to the schedule of ratings for infectious diseases and immune disorders (we note that the proposed changes for § 4.88b exclude the schedule of ratings for nutritional deficiencies—diagnostic codes (DC) 6313, 6314, and 6315). VA last updated the schedule of ratings in § 4.88b on July 31, 1996 (see 61 FR 39875) and updated § 4.88a on July 19, 1995 (see 60 FR 37012).

VA proposes to: (1) Update the medical terminology and definition of certain infectious diseases and immune disorders; (2) add medical conditions not currently in the Rating Schedule; (3) refine evaluation criteria based on medical advances that have occurred since the last revision; and (4) incorporate current understanding of functional changes associated with or resulting from disease (pathophysiology).

A panel of independent experts convened by the Institute of Medicine (IOM) in February 2015 proposed an updated set of diagnostic criteria for infectious disease and immune disorders. This updated revision also included changing the name of CFS to “Systemic Exertion Intolerance Disease (SEID)/Chronic fatigue Syndrome (CFS).”

VA has clear authority to make this regulatory change because of its broad authority to “prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by [VA] and are consistent with those laws.” 38 U.S.C. 501(a); see also 38 U.S.C. 1155 (VA’s authority to adopt and apply schedule for rating disabilities).

§ 4.88a Chronic Fatigue Syndrome

Currently, § 4.88a specifies older diagnostic criteria for the diagnosis of CFS and uses outdated terminology to refer to this complex disease. VA proposes to update the nomenclature for this disease, which is also known as systemic exertion intolerance disease (SEID) or myalgic encephalomyelitis (ME), by changing the diagnostic code name to “Systemic Exertion Intolerance Disease (SEID)/Chronic Fatigue Syndrome (CFS).” This new name captures a central characteristic of the disease that reflects negative effects of any exertion (physical, cognitive, or emotional) on patients’ many organ systems. IOM (Institute of Medicine), Beyond Myalgic Encephalomyelitis/Chronic Fatigue Syndrome: Redefining an Illness (2015), http://www.nationalacademies.org/hmd/∼/media/Files/Report%20Files/2015/