



BEFORE THE UNITED STATES COPYRIGHT OFFICE

COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON NONCOMMERCIAL USES OF PRE-1972 SOUND RECORDINGS

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing more than 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries over two billion times each year.

LCA welcomes the opportunity to respond to the October 16, 2018 Notice of Inquiry concerning the noncommercial use of pre-1972 sound recordings. In any regulations and guidance the Office develops concerning noncommercial uses of pre-1972 sound recordings under the new 17 U.S.C. § 1401(c), the Office should make clear that the section 1401(c) procedures **do not** apply to libraries and archives employing the section 108(h) exception incorporated by section 1401(f)(1)(B). Because of the similarity in language between sections 1401(c) and 108(h), there is a danger that librarians and archivists without expertise in rights clearance may confuse the two and believe that they must comply with the more complex procedures of section 1401(c).

Section 1401(c). The new section 17 U.S.C. § 1401(c), created by title II of the Orrin G. Hatch—Bob Goodlatte Music Modernization Act, permits the noncommercial use of a pre-1972 sound recording that is not being commercially exploited if: 1) the user “makes a good faith, reasonable search” to determine whether the sound recording is being commercially exploited; 2) the user files a notice identifying the sound recording and the nature of the intended use; and 3) the owner of the rights in the sound recording does not opt out within 90 days after the filing of the notice. The Copyright Office is directed to issue regulations providing for specific, reasonable steps that are sufficient to constitute a good faith, reasonable search to determine whether the sound recording is being commercially exploited. If the user follows these steps, he or she is entitled to a safe harbor from liability for using the sound recording. There are penalties for filing a notice of intended use fraudulently.

Section 1401(f). In addition, section 1401(f)(1) provides that libraries and archives can take advantage of section 17 U.S.C. § 108(h) with respect to pre-1972 sound recordings. Section 108(h) permits a library or archives to use a work for the purpose of preservation, scholarship or research during the last 20 years of a work’s copyright term, if the library or archives determines, on the basis of reasonable investigation: 1) that the work is not subject to normal commercial exploitation; 2) a copy of the work cannot be obtained at a reasonable price; or 3) the owner of rights in the work provides notice to the Copyright Office that the other two conditions apply. Section 1401(f)(1)(B) contains a rule of construction providing that with respect to pre-

1972 sound recordings, section 108(h)'s phrase "during the last 20 years of any term of copyright" means any time after the date of enactment of this section. This means that a library or archives can immediately take advantage of section 108(h) for all pre-1972 sound recordings.

Comparison of sections 108(h) and 1401(c). As a general matter, libraries seeking to make uses of pre-1972 sound recordings would be better off relying on section 108(h) than on section 1401(c). Section 108(h) does not prescribe what constitutes a "reasonable investigation," while section 1401(c) directs the Copyright Office to develop "specific, reasonable steps" for "a good faith, reasonable search." Because libraries usually would have expertise with respect to the sound recordings in their collection, it is likely that any regulations of general applicability developed by the Copyright Office under section 1401(c) would be more burdensome than what the libraries determine to be a reasonable investigation under section 108(h).

Moreover, section 1401(c) requires the user to file a notice of intent to use with the Copyright Office, then wait 90 days. By contrast, under section 108(h), the burden of filing a notice is on the rights holder, not the user. If the rights holder has not filed a notice, the library can use the sound recording as soon as it has completed its reasonable investigation.

To be sure, a library can use section 108(h) only for purposes of preservation, scholarship, or research, but libraries should have little difficulty framing their use to meet this standard. Furthermore, section 108(h) is available only if a copy of the sound recording cannot be obtained at a reasonable price, but this typically would be the case for a work not subject to normal commercial exploitation.

Copyright Office Regulations and Guidance. Given the advantages of section 108(h) to libraries and archives, the Copyright Office should exercise great care to ensure that any regulations it proposes, and any guidance it develops, maintain the distinction between sections 108(h) and 1401(c). In particular, the regulations and guidance should not suggest that the standards developed by the Office for a "good faith, reasonable search" for commercial exploitation under section 1401(c) have any bearing on what constitutes a "reasonable investigation" by a library or archives concerning commercial exploitation under section 108(h). To the contrary, the Office should explicitly state that the standards for a good faith reasonable search under section 1401(c) have no implication for a reasonable investigation under section 108(h). Further, to avoid confusion, the Office should make clear that libraries and archives possess the section 108(h) alternative to the section 1401(c) procedures.

Public Interest. Although libraries and archives are unlikely to rely upon section 1401(c), members of the public presumably will, including in particular creators. A musician might create a new work based on samples from old sound recordings of public domain music. A director of a play set during World War II might employ sound recordings of live events to capture a mood. New uses of old works are consistent with the objectives of the copyright system, and should be encouraged. For this reason, the Copyright Office should avoid making the "specific, reasonable steps" for a good faith, reasonable search under section 1401(c) overly burdensome.

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