United States Senate
WASHINGTON, DC 20510

December 20, 2019

Karyn A. Temple
Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20540

Dear Ms. Temple,

I am writing as a follow-up to the questions I posed at the Senate Rules Committee oversight hearing on November 7, 2019, regarding implementation of P.L. 115-264, the *Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018*. Specifically, I am concerned that the Copyright Office's final rule for noncommercial use of pre-1972 non-commercial sound recordings (Final Rule) fails to adequately recognize and respect the cultural rights of Indian Tribes.

Many pre-1972 recordings that fall under the Final Rule are of Tribal members, ceremonies, and religious events that contain sensitive culturally significant information that Anthropologists and sociologists collected without Tribal consent. As such, the Final Rule may cause confidential recordings of sacred Tribal ceremonies and cultural practices to be released to the public without the free, prior, and informed consent of the Indian Tribe.

Additionally, because many of the pre-1972 Tribal sound recordings are kept in non-Tribal institutions such as museums, libraries, archives, universities, and private collections, it would be difficult for many Indian Tribes to access the recordings or even know they exist – especially, for Indian Tribes who may not have the administrative and economic resources necessary to pursue this process. Consequently, I am concerned the Final Rule may place significant administrative and economic burdens on Indian Tribes who choose to utilize the "opt out" process of the noncommercial use of their pre-1972 recordings.

I offer my support in addressing these issues, and I would appreciate scheduling a meeting with the Copyright Office and my Senate Committee on Indian Affairs staff to discuss the following questions:

1. Was there Tribal Consultation during the rulemaking process? And, if so, how did your Office reflect feedback from Tribal Consultation in revising the rule?

2. Are there any statutory limitations prohibiting the Copyright Office from creating a separate set of regulations for pre-1972 Tribal recordings?

3. How can either the Senate Rules Committee or SCIA assist the Copyright Office in addressing Tribal concerns?

Thank you again for your cooperation, I look forward to working with you to uphold the Federal government's Tribal trust responsibility and to engage in meaningful government-to-government relations with Indian Tribes.

Sincerely,

Tom Udall

Tom Udall
Vice Chairman
Senate Committee on Indian Affairs

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

February 3, 2020

The Honorable Tom Udall
Committee on Indian Affairs
United States Senate
531 Hart Senate Office Building
Washington, D.C. 20510

Dear Vice Chairman Udall:

I write in response to your December 20, 2019 letter to then-Register Karyn Temple regarding the Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA") and the noncommercial use exception for pre-1972 sound recordings created through its enactment. The Copyright Office is sensitive to the need to ensure that its regulations governing the noncommercial use of pre-1972 sound recordings do not adversely impact American Indian and Alaskan Native tribes. We welcome the opportunity to discuss these issues more with the Senate Committee on Indian Affairs, and to offer any assistance as you consider potential legislative solutions to address concerns that regulations alone cannot.

Below are responses to your specific questions about the Office's regulations for the noncommercial use exception:

1. **Was there Tribal Consultation during the rulemaking process? And, if so, how did your Office reflect feedback from Tribal Consultation in revising the rule?**

The Copyright Office did engage with Tribal representatives during the rulemaking process, and this feedback was expressly relied upon in adjustments made to the Office's final rule. As your letter notes, pursuant to the MMA's directive and following two periods of notice and comment, on April 9, 2019 the Copyright Office issued a final rule regarding the specific steps a user should take to demonstrate she has made a good faith, reasonable search before submitting a notice of noncommercial use with the Office, as well as the filing requirements for a rights owner to submit a notice opting out of (i.e., objecting to) a proposed noncommercial use.

As part of that rulemaking process, the Copyright Office engaged with the National Congress of American Indians ("NCAI") and the Native American Rights Fund ("NARF"), and met with Tribal representatives. The Office contacted NCAI and NARF representatives to alert them of the opportunity to provide written comments in response to the Copyright Office's notice of inquiry and notice of proposed rulemaking for the noncommercial use exception. NCAI submitted two sets of written comments, which were considered in shaping regulatory language for the noncommercial use exception (detailed below). The Office also considered written comments from Profs. Trevor Reed, Jane Anderson, and Robin Gray regarding the protection of

Tribal interests in conjunction with the rulemaking. In addition, the Copyright Office attended NCAI's Executive Council Winter Session in February 2019 to hold a listening session and *ex parte* rulemaking meeting, which was attended by representatives of NCAI, NARF, and multiple Tribal representatives.

This meeting and written comments were instrumental in shaping the Copyright Office's final rule for the noncommercial use exception. For example, the final rule credited NCAI's assertion 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." *See* 84 Fed. Reg. 14,242, 14,248 (Apr. 9, 2019) (citation omitted). The Office added a separate search requirement applicable only for prospective uses of pre-1972 American Indian and Alaska Native ethnographic sound recordings to make sure that the user contacts the Tribal authority before proceeding with a notice of noncommercial use. Specifically, if prospective users know the relevant Tribal authority, they must contact that Tribe as well as 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. 37 C.F.R. § 201.37(c)(1)(vii). If this contact information is not previously known to the prospective user, the final rule instructs the user to use the information provided by the U.S. Department of the Interior's Bureau of Indian Affairs' Tribal Leaders directory, which provides contact information for each federally recognized tribe. *Id.* The rule's inclusion of a search requirement for pre-1972 Alaska Native and American Indian ethnographic sound recordings and reference to the U.S. Department of the Interior's list of federally recognized tribes directly resulted from NCAI's suggestions.

To date, since the final rule was issued in April 2019, the Copyright Office has received zero notices of noncommercial use regarding any pre-1972 sound recording, and so there has been no opportunity for any American Indian or Alaska Native tribe or other party to utilize the "opt out" process of the noncommercial use.

2. Are there any statutory limitations prohibiting the Copyright Office from creating a separate set of regulations for pre-1972 Tribal recordings?

Yes. Many of the concerns raised in your letter appear broader than the noncommercial use exception for pre-1972 recordings. Title II of the MMA brought all pre-1972 sound recordings partially into the federal copyright system by extending remedies for copyright infringement to owners of pre-1972 recordings. In establishing federal remedies for unauthorized uses, the MMA extended several federal limitations and exceptions to these remedies to allow the use of pre-1972 sound recordings, defined the term "rights owner" of a pre-1972 recording, and adjusted the time periods for when these recordings will definitively enter the public domain.[1] The noncommercial use exception for pre-1972 recordings, and the Copyright Office's related rule, is additive to this existing framework of protections and limitations under title 17.

[1] For additional background on Title II, please see *Classics Protection and Access Act*, COPYRIGHT.GOV, https://www.copyright.gov/music-modernization/pre1972-soundrecordings/ or *Frequently Asked Questions*, COPYRIGHT.GOV, https://www.copyright.gov/music-modernization/faq.html#cpaa.

The Copyright Office lacks administrative authority to promulgate a separate rule with respect to pre-1972 Tribal recordings that would displace statutory language related to ownership, duration of protection, or exceptions and limitations. For example, the noncommercial use exception exists alongside exceptions including fair use, codified in section 107, or section 108(h), which typically authorizes libraries and archives to make uses of published works during the last twenty years of their copyright term; under the MMA, the section 108 exception is immediately available for all pre-1972 recordings regardless of their date of publication. 17 U.S.C. §§ 107; 108(h); *id.* 1401(f)(1)–(2) (incorporating exceptions for pre-1972 recordings). The Copyright Office may not constrain these exceptions through regulation, even where they enable uses of pre-1972 Tribal recordings without consent. The MMA also defined the term "rights owner" by referencing existing rights under state law. *Id.* § 1401(l)(2)(A). As your letter notes, many pre-1972 Tribal recordings are kept in non-Tribal holding institutions, so this definition may also prove complicating, depending upon applicable underlying state law doctrines.

In addition, starting January 1, 2022, all pre-1923 recordings will enter the public domain and may then be used in any manner without permission (*i.e.*, the noncommercial use exception, and any regulatory limitations on making use of that exception, will be moot). *Id.* § 1401(a)(2)(B)(i). Based on the written submissions and dialogue described above, the Office suspects that many ethnographic sound recordings of American Indian and Alaska Native and tribes at-issue may be pre-1923 recordings.

The MMA expressly limits the Copyright Office's regulatory authority for the noncommercial use exception to the following two areas:

- Identifying the "specific, reasonable steps that, if taken by a [noncommercial user of a pre-1972 sound recording], are sufficient to constitute a good faith, reasonable search" of USCO's records and music services to support a conclusion that a relevant pre-1972 sound recording is not being commercially exploited. 17 U.S.C. § 1401(c)(3)(A).
- "[E]stablish[ing] the form, content, and procedures" for users to file notices of noncommercial use and rights owners to file notices opting out of such proposed use. *Id.* § 1401(c)(3)(B), (5)(A).

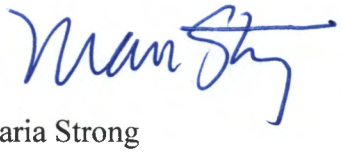
Within this regulatory authority, as noted above, the Copyright Office added a specific search requirement for pre-1972 American Indian and Alaska Native ethnographic sound recordings for users to become eligible for the noncommercial use exception. When issuing the final rule, the Office noted that the extra search requirement for pre-1972 American Indian and Alaska Native ethnographic sound recordings "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." 84 Fed. Reg. at 14,249. The Office also noted, however, that it had to be careful not to exceed its regulatory authority, by, for example, prohibiting the use of pre-1972 sound recordings of American Indian and Alaska Native tribes without the relevant tribe's permission—but that the Office's "inability to issue regulations beyond the scope of this rulemaking does not affect the ability of American Indian and Alaska Native tribes to raise such issues before the courts or Congress," or to "choose to impose fees on users to offset any administrative burden." *Id.*

3. **How can either the Senate Rules Committee or SCIA assist the Copyright Office in addressing Tribal concerns?**

In cautiously promulgating the noncommercial use rule, with an added step requiring prospective users of pre-1972 Tribal recordings to notify the relevant Tribal authority, the Copyright Office endeavored to ensure rules governing the noncommercial use of pre-1972 sound recordings did not adversely impact American Indian and Alaska Native tribes or communities. The Office has previously noted that ethnographic field recordings "are an enormous source of cultural and historical information, and come with their own unique copyright issues," and that "librarians and archivists who deal with ethnographic materials must abide by the cultural and religious norms of those whose voices and stories are on the recordings." U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings* 61 (2011).

In summary, Copyright Office staff appreciates our engagement to-date with members of your staff on these MMA issues. Should you decide to pursue legislation to address the concerns raised in your letter, we welcome the opportunity to provide assistance.

Sincerely,



Maria Strong
Acting Register of Copyrights and Director
U.S. Copyright Office