



March 22, 2019

Regan Smith  
Anna Chauvet  
US Copyright Office  
Library of Congress  
101 Independence Ave. SE  
Washington, DC 20559

Re: Pre-1972 Sound Recordings Noncommercial Use *Ex Parte* Communications

Dear Ms. Smith and Ms. Chauvet:

This letter details the attendees and views expressed during an ex parte meeting held Thursday, March 21. The sole attendee was Terry Hart, appearing on behalf of the Copyright Alliance.

During the meeting, I made the following points, reiterating points made in the written comments of the Copyright Alliance and responding to points raised in other submissions:

I disagreed with the EFF's statement that "posting on the open, accessible internet" is "not presumptively commercial," since such a statement sweeps too broad. In addition, the EFF's summary of the holding in *ASTM v. Public.Resource.Org* does not accurately state the holding there.

I disagreed with the Organization for Transformative Works' (OTW) argument that "cost recovery should not be limited to recovering costs for distributing and reproducing the sound recording specifically and should allow for recovering all costs involved in the project," stating that this goes beyond the statutory language, which says that "merely recovering costs of production and distribution of a sound recording resulting from a use otherwise permitted under this subsection does not itself necessarily constitute a commercial use of the sound recording."

I strongly disagreed with OTW's argument that "the guidelines should distinguish between circumstances in which a user makes a commercial use of a platform like YouTube (by, for example, receiving advertising revenue for their posted material) and circumstances in which the platform itself or a copyright holder monetizes the user's use." I noted that uses aren't separable in that fashion, and the fact that it is being monetized renders the use commercial regardless of the user's original purpose.

I responded to Public Knowledge's assertion that the list of steps provided in the rule raises a risk of "duplicative searching" by noting that once a user has found a sound recording



being commercialized on a service, the search is over and they no longer need to continue searching, meaning there is no risk of duplicative searching. I also expressed the point that searching is not as burdensome as Public Knowledge suggests, since it takes little time to type in a search on online services.

Finally, I argued that the fee proposed by the Copyright Office for filing a Notice of Noncommercial Use (NNU) does not appear excessive. The fee provides a benefit analogous to a free license to use a work otherwise protected by the law. However, I noted that if the fee for NNU's is lowered, then the fees for filing opt-out notices should also be lowered to maintain, at a minimum, parity between the fees—though I also noted that in principle, the fees for opt-out notices should be lower than the fees for NNUs, since an NNU filer is receiving a benefit while an opt-out filer is merely maintaining existing rights they are already entitled to.

The Copyright Alliance appreciates the opportunity to share its views with the Copyright Office.

Sincerely,

Terry Hart  
VP Legal Policy & Copyright Counsel  
Copyright Alliance