Future of Music Coalition
PO Box 73274. Washington DC. 20056 202-822-2051

March 26, 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 & Ms. Chauvet,

On Friday March 22, 2019, Kevin Erickson of Future of Music Coalition met with Regan Smith and Anna Chauvet of the US Copyright Office to discuss the Notice of Proposed Rulemaking Regarding the Noncommercial Use Exception to Unauthorized Uses of Pre-1972 Sound Recordings.

FMC expressed our appreciation for the comments filed by the National Congress of American Indians, and affirmed our general support for the proposals therein. We underscored our support for the extra search step for indigenous sound recordings as a meaningful step, but encouraged the office to be creative in finding ways to accommodate the concerns raised by NCAI, especially in light of the embarrassing failure to include tribes as an stakeholder in the discussions that led to the non-commercial use provisions within MMA.

FMC highlighted several points of disagreement with filings offered by Public Knowledge and others. PK asserts that Google indexes digital services, and so searching both Google and individual streaming services would be duplicative. Unfortunately, PK overstates the extent to which this is true. For example, The Metropolitan Opera operates a "Met Opera On Demand" app, which offers access to a vast library of sound recordings (and video content) on demand, including pre-1972 recordings which do not appear to be available through other digital outlets, nor does this material appear to be indexed by Google. As the digital marketplace evolves, we may see more of these sort of boutique, app-only offerings.

PK further offered a record of its searching of hit songs from a couple years of the *Billboard* charts and found that searches for these songs were all on Soundexchange's ISRC database and readily identifiable by Google Search indicating their presence on streaming services. This exercise is of questionable relevance. The statute in question, and indeed copyright generally, is not written to merely protect the rightsholders of *Billboard* chart hits, but was instead written to protect the full diversity of rightsholders, big and small, famous and obscure; these songs don't represent a reasonable proxy for the full diversity of impacted recordings. FMC noted that PK's comments were broadly unresponsive to FMC's and others' earlier concerns about diversity of business models in the digital music marketplace, and the importance of preserving artist and rightsholders' ability to make individual choices without finding their rights abridged.

FMC suggested that a search is not duplicative just because it yields the same results on multiple platforms—as soon as a positive result is found, the searcher is able to stop. On questions raised by PK regarding whether the office has authority to interpret search requirement language, FMC argued that it's entirely appropriate to offer its expertise and detailed knowledge of practices.

FMC emphasized a set of concerns about whether YouTube is commercial. Noting current controversies over supposedly non-commercial uses of photos posted to Flickr now being used to train artificial

intelligence without explicit consent of the uploaders, FMC noted that evolving digital marketplace practices have highlighted ways that users and rightsholders are becoming more aware of commercial aspects of services that may not be immediately apparent, by design. We expressed our view that just because a YouTube video isn't monetized, the Office should take care not to describe it as "noncommercial"—it may be used to gather data about users or offer inputs to algorithmically driven recommendation engines, directing viewers to videos that are monetized and ad supported. The Office has authority to offer some guidance on what constitutes non-commercial use, while acknowledging that not every case is clear-cut. In light of the pervasive problems of misinformation about copyright basics, lack of guidance invites misinformation to propagate.

FMC underscored our concerns about using APIs in the process of searches and the potential for false negatives, using the shortcomings of existing search functionality via API as an example of why it would be much better for searches to be performed directly on the relevant app or platform. We also noted that while we value interoperable data systems whenever possible, requiring API access without a way to pay for it constitutes an unfunded mandate.

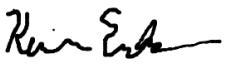
FMC recommended that the office offer advisory language encouraging searchers to use all available data fields (including rights owner or date information if available).

FMC suggested that the office offer explicit clarifying language enumerating what process would trigger a re-evaluation of which services and systems should be included in a qualifying search, given the rapidly changing marketplace and the possibility that tomorrow's business models might look very different from today's.

Finally, FMC expressed our concern about the high fees to both potential users, and especially to rightsholders. While understanding that the office is working within externally imposed constraints, in some cases these fees are higher than what a licensed use would cost. The concern about fees is more acute in an environment where older artists are reclaiming some of their rights and trying new avenues of distribution; they must exercise their exclusive rights without the financial resources of larger labels.

FMC appreciated the opportunity to meet with the Copyright Office on these matters.

Sincerely,



Kevin Erickson
Director
Future of Music Coalition