



# NATIONAL CONGRESS OF AMERICAN INDIANS

February 15, 2019

Letter Summarizing the *Ex Parte* Meeting  
Between the U.S. Copyright Office and  
The National Congress of American Indians  
On the Proposed Rules

Under Title II of the Music Modernization Act of 2018  
Regarding the Noncommercial Use of Pre-1972 Sound Recordings  
That Are Not Being Commercially Exploited,  
*See* 84 Fed. Reg. 1661-01 (Feb. 5, 2019),  
Held on February 13, 2019  
Washington, DC

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Dear Ms. Smith and Ms. Chauvet:

Pursuant to the above-reference Proposed Rules, the National Congress of American Indians (NCAI) submits this letter within two days of *Ex Parte* Meeting: (1) detailing the names of attendees at this Meeting; and, (2) summarizing the substance of the views expressed and arguments made at the Meeting.

### 1. Meeting Attendees

In attendance were representatives from:

- Puyallup Tribe of Indians
- Ione Band of Miwok Indians
- Makah Indian Tribe
- United Tribes of Michigan
- National Congress of American Indians
- Native American Rights Fund

### 2. Meeting Summary

The primary focus of the meeting was on the Reply Comments submitted to the Copyright Office in Docket ID COCL-2018-0008 by NCAI and Professors T Reed, J Anderson, and R Gray, <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=COLC-2018-0008>, and the Copyright Office's response to these comments as reflected in the Notice of Proposed Rulemaking, 84 Fed. Reg. 1661-01 (Feb. 5, 2019), in the form of proposed amendments to 37 C.F.R. § 201.37(c)(1)(vi), particularly with respect to the proposed specific steps and requirements for reasonable searches to determine commercial exploitation of ethnographic pre-1972 sound recordings. As the Copyright Office descriptively states in its Notice:

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 American Indian tribe and, if known to the user, the relevant holding institution to aid in determining whether the sound recording is being commercially exploited. 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. 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.

84 Fed. Reg. 1661-01(footnotes omitted).

The actual relevant language proposed by the Copyright Office on this point is as follows:

(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:

.... (vi) For pre-1972 ethnographic 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>).

84 Fed. Reg. 1661-01(footnotes omitted).

However, the Copyright Office rejected the Professors' suggestion that for pre-1972 Native American ethnographic recordings, "a user should not qualify for the [Copyright Act] section 1401(c) safe harbor unless the relevant Native American tribe or tribes has certified the identity of the sound recording, its owner(s), and its current commercial uses," apparently because the Copyright Office is of the view that under the Copyright Act it does not have the authority to impose a requirement that the user obtain certification of the identity of the sound recording and its owner before making use of the safe harbor. *Id.* (footnote omitted).

Within this primary focus, the Meeting discussion addressed the following:

- What exactly is the scope of the Native American pre-1972 ethnographic sound recordings intended to be addressed by the Copyright Office in this proposed rule? For example, is it, as proposed, such recordings of Alaska Native and American Indian tribes or communities? What about the recordings of Alaska Native and American Indian individuals, families, and clans? Is the reference to tribes intended to mean only those tribes that are federally recognized as listed by the U.S. Department of the Interior? What about non-federally recognized tribes, including but not limited to tribes that are recognized by a state? What about the sound recordings of Native Hawaiians? What about the sound recordings of indigenous peoples outside the United States?
- What is the best source of contact information to be included in the Rule for contacting at least federally recognized tribes? Is it, as proposed, NCAI, or is it the Interior Department's Bureau of Indian Affairs Tribal Leaders Directory? Are there other good sources for non-federally recognized tribes if such tribes are to be contacted?
- Does the proposed rule provide for a tribe to receive direct notice of a potential noncommercial use before being contacted by the user?
- Is there intended to be a time frame set forth in the Rule by which a tribe must respond to being contacted?
- What might be the expected administrative and financial burden on tribes to search for commercial exploitation of a sound recording? What administrative and financial sources are or might be available to tribes to support their efforts? Can tribes charge users a fee for their searches?
- Does either the requirement for contacting a tribe, or a tribe's participation in the reasonable-search-for-commercial-exploitation, give or imply any intent, in and of themselves, to vest control over sound recordings themselves in tribes, to the exclusion of applicable federal and state law?
- Does either the requirement for contacting a tribe, or a tribe's participation in the reasonable-search-for-commercial-exploitation, give or imply any intent, in and of themselves, to prohibit private agreements between the noncommercial user and the tribe regarding control and terms of the noncommercial use that are otherwise consistent with applicable federal, state and tribal law?
- Does the proposed noncommercial use search process provision somehow prohibit or limit, intentionally or unintentionally, Native Americans from seeking to prohibit any noncommercial uses of their pre-1972 sound recordings for which they do not give free, prior and informed consent? Can the Rule address whether Native Americans can affirmatively opt-out some or all of their sound recordings from some or all noncommercial uses?

In addition to the above-mentioned, the following matters were discussed at the Meeting:

- What exactly do Copyright legislation and its agency rules provide with respect to copyright duration terms for Pre-1972 Sound Recordings before such Sound Recordings go into the public domain?
- What, if any, other provisions of federal copyright law or regulations address tribal sovereignty or the rights of tribes regarding intellectual property?
- How, if at all, has the Copyright Office taken into account the provisions of the United Nations Declaration on the Rights of Indigenous Peoples in proposing the Noncommercial Use of Pre-1972 Sound Recording Rule or otherwise?
- If tribes develop their own laws that treat these recordings as traditional knowledge, should those tribal laws control under these regulations?

#### Conclusion

NCAI appreciates the opportunity for the *Ex Parte* Meeting with the Copyright Office on this matter, and the opportunity to comment further on the Proposed Rule. NCAI intends to submit comments on the proposed Rule by the March 7, 2019 deadline for such comments. If the Copyright Office has questions about this Written Summary of the *Ex Parte* Meeting, please contact Derrick Beetso, NCAI General Counsel, at [dbeetso@ncai.org](mailto:dbeetso@ncai.org) or (202) 630-0318.

Sincerely yours,

Derrick Beetso  
NCAI General Counsel