



The Orrin Hatch – Bob Goodlatte Music Modernization Act

A Guide for Sound Recordings Collectors

*This study was written by Eric Harbeson, on behalf of and commissioned by
the National Recording Preservation Board.*

Members of the National Recording Preservation Board

American Federation of Musicians

Billy Linneman

American Folklore Society

Burt Feintuch (*in memoriam*)

Alternate: Timothy Lloyd

American Musicological Society

Judy Tsou

Alternate: Patrick Warfield

American Society of Composers, Authors and Publishers

Elizabeth Matthews

Alternate: John Titta

Association for Recorded Sound Collections

David Seubert

Alternate: Bill Klinger

Audio Engineering Society

George Massenburg

Alternate: Elizabeth Cohen

Broadcast Music, Incorporated

Michael O'Neill

Alternate: Michael Collins

Country Music Foundation

Kyle Young

Alternate: Alan Stoker

Digital Media Association

Garrett Levin

Alternate: Sally Rose Larson

Music Business Association

Portia Sabin

Alternate: Paul Jessop

Music Library Association

James Farrington

Alternate: Maristella Feustle

National Academy of Recording Arts and Sciences

Maureen Droney

Alternate: Daryl Friedman

National Archives and Records Administration

Daniel Rooney

Alternate: Tom Nastick

Recording Industry Association of America

David Hughes

Alternate: Patrick Kraus

SESAC

John Josephson

Alternate: Eric Lense

Society For Ethnomusicology

Jonathan Kertzer

Alternate: Alan Burdette

Songwriters Hall of Fame

Linda Moran

Alternate: Robbin Ahrold

At-Large

Michael Feinstein

At-Large

Brenda Nelson-Strauss

Alternate: Eileen Hayes

At-Large

Mickey Hart

Alternate: Christopher H. Sterling

At-Large

Bob Santelli

Alternate: Al Pryor

At-Large

Eric Schwartz

Alternate: John Simson

Abstract: The Music Modernization Act is reviewed in detail, with a particular eye toward the implications for members of the community supported by the National Recording Preservation Board, including librarians, archivists, and private collectors. The guide attempts an exhaustive treatment using plain but legally precise language.

Acknowledgments: The author gratefully acknowledges the University of Colorado's William A. Wise Law Library, and especially Professor Susan Nevelow Mart, for providing access to online research tools that made this project possible; Sam Brylawski for entrusting this project to him and patiently shepherding it through to completion; and the NRPB for commissioning the work. The author also wishes to thank Kevin Goldberg and Lauren Danzy, at the Digital Licensee Coordinator, as well as the following Library of Congress personnel for their assistance: Robin Dale, Caitlin Hunter, Steve Leggett, Gregory Lukow, Hope O'Keeffe, and David Pierce. The author thanks the U.S. Copyright Office for its consultation.

Eric Harbeson worked in libraries for 30 years, including 10 years as music special collections librarian at the University of Colorado. He has been a vocal advocate for the copyright interests of libraries and archives and is a frequent writer and presenter on the subject. He holds master's degrees in music (Cleveland State University) and Library and Information Science (University of Illinois). In addition to his writings on copyright, he is the editor of two critical music editions, both published by A-R Editions. He is currently pursuing a juris doctor degree from the University of Oregon.



© 2021 by Eric Harbeson

This work is provided under a [Creative Commons BY-NC-ND 4.0 license](https://creativecommons.org/licenses/by-nc-nd/4.0/). To summarize, you are free to share, copy, and redistribute the material herein in any medium or format for noncommercial purposes, on condition that you credit the author and provide a direct link to the original source. Reasonable changes are permitted provided they are clearly indicated and do not suggest endorsement by the author or the National Recording Preservation Board. You may not use the work for any commercial purposes, nor may you distribute any derivatives made. All other rights are reserved.

This document is intended for information purposes only. It is not intended to be, and should not be construed as, legal advice. Readers should not undertake any decision, whether to act or to refrain from acting, based on information in this document. Readers are urged to seek qualified legal counsel before undertaking any projects that implicate a legal matter.

Table of Contents

One-page summary	v
Overview of the MMA: Introduction and background	1
I. Music Modernization	5
II. Classics Protection and Access	
Background	11
Overview of provisions.....	17
A. Protection of pre-1972 sound recordings	17
1. Scope of protection.....	17
2. Limitations on scope.....	17
B. Length of protection.....	19
C. Limitations on protection.....	21
1. Exceptions included.....	21
2. Exceptions not included.....	27
D. The “Last 20 Years” rule, expanded.....	29
E. Filing requirement and licensing.....	31
1. Filing with the Copyright Office.....	31
2. Statutory licensing.....	31
F. Noncommercial use of dormant recordings	33
1. Statutory requirements.....	33
2. Copyright Office regulation	34
G. Additional considerations	43
1. Quasi-copyright.....	43
2. Relationship to state laws	44
3. Pre-1972 recordings made outside the United States.....	45
4. Sovereign immunity	47
5. Criminal infringement.....	48
6. Bootleg recordings	49
III: Allocation for Music Performers	51
IV. Case study: Institutional sound recordings	53
Glossary	59
Resources	64
Bibliography	65
Appendix	
A. Selected statutory texts	
a. Sec. 107 (fair use)	69
b. Sec. 108 (reproduction by libraries and archives).....	69
c. Sec. 301 (Preemption with respect to other laws)	72
d. Sec. 1401 (Unauthorized use of pre-1972 sound recordings.....	72
B. Noncommercial uses decision tree (Sec. 1401(c))	81
C. Educational performances decision tree (Secs. 110(1)-(2)).....	83

One-page summary

The Orrin Hatch–Bob Goodlatte Music Modernization Act “MMA” is divided into three “titles”

Title I: The Musical Works Modernization Act (“MWMA”)

Title II: The Classics Protection and Access Act (“CPAA”)

Title III: The Allocations for Music Producers (“AMP”) Act

For purposes of this document, Titles I and II are most important.

Title I: Music Licensing Modernization

- Creates a blanket compulsory license for interactive digital delivery of musical works by digital music providers.
- Royalties are paid at a statutory rate, based on revenue and usage.
- Requires payment of an annual assessment fee.

Title II: Classics Protection and Access

- Creates federal protection for pre-1972 sound recordings, pre-empting state provisions and bringing a more unified protection regime.
- Protection for some pre-1972 now expires before 2067:

<u>Date Published</u>	<u>Term of protection</u>	<u>Expires</u>
Before Jan. 1, 1923	3 years after enactment	Jan. 1, 2022
Jan. 1, 1923 – Dec. 31, 1946	Transition period + 5 years	100 years after publication
Jan. 1, 1947 – Dec. 31, 1956	Transition period + 15 years	110 years after publication
Jan. 1, 1957 – Feb. 14, 1972	Through Sec. 301(c) expiration	Feb. 15, 2067

- Uses of pre-1972 recordings are now subject to important limitations and exceptions: Sections 107 (fair use), 108 (libraries and archives), 109 (distribution after first sale), and 110 (teaching and performing).
- A new provision allows for non-commercial use of pre-1972 recordings that are not being commercially exploited, after a good faith search and 90 days after notice is filed with the Copyright Office, provided the rights holder does file a notice opting out.
- Libraries and archives have broad license to reproduce, distribute, and perform, pre-1972 recordings not being commercially exploited, under the provisions of section 108(h).
- Attempts to remove sovereign immunity, probably unsuccessfully.
- State laws are (mostly) preempted

Title III: Allocation for Music Producers

- Allows for royalty payments from statutory licenses to producers, recording engineers, and mixers of sound recordings.

INTRODUCTION

The Orrin Hatch–Bob Goodlatte Music Modernization Act (“MMA”)¹ is the most significant change to U.S. copyright law in two decades. The result of many years of work building up to the legislation, including two major studies by the United States Copyright Office, the MMA aimed to update the copyright law with respect to three music-specific issues: licensing of musical works for digital delivery in interactive systems; protection of sound recordings fixed before February 15, 1972; and payment of royalties to sound recordings producers, mixers, and recording engineers.

The Act had a remarkable path to passage. Originally three separate bills, each introduced in 2017, the Act gained sudden and dramatic momentum after the third of the three—the hundred-page Music Modernization Act (H.R. 4706)—was introduced just prior to the adjournment of the 115th Congress’s first session.² The voluminous nature of the bill virtually guaranteed a level of attention that previously-introduced copyright legislation had not received in many years.³ Very shortly after the introduction of H.R. 4706, a deftly-timed op-ed in the *Washington Post* by original Four Tops member Duke Fakir brought national attention to the issue of pre-1972 recordings.⁴ By April 10, 2018, the original Music Modernization Act had been re-written to include two additional bills: the CLASSICS Act⁵ (H.R. 3301), and the AMP Act⁶ (H.R. 881). The new bill, introduced as H.R. 5447, moved rapidly through the House of Representatives, passing unanimously—415–0 on a roll call vote—on April 25, 2018. Meanwhile, individual versions of each of the three bills had been introduced in the Senate in late January.

In May, shortly after the committee held hearings on each of the bills, the legislation encountered its first obstacle. At issue was the treatment of sound recordings created prior to February 15, 1972. The CLASSICS Act federalized protection for “pre-1972 recordings,” which were previously governed only by state laws, by creating a new exclusive right to digital public performance equivalent to that already bestowed on recordings since that date. However, by limiting itself to the creation of a new digital performance right, and thus leaving in place the state laws governing all other exclusive rights, Congress ignored the very issue that gave rise to the debate over pre-1972 recordings debate more than a decade earlier.

Public interest advocacy groups had for many years voiced concerns that the state law system was threatening efforts to preserve America’s recorded heritage—that the vague and inconsistent treatment of recordings by the various state laws, and especially with respect to the limitations and exceptions, made effective curation of recordings collections needlessly difficult or impossible. It was

¹ For purposes of this document, “Music Modernization Act” and “MMA” refer to the entire act, not just to Title I (which originally shared that name, but which is now called the “Musical Works Modernization Act”).

² <https://www.congress.gov/115/bills/hr4706/BILLS-115hr4706ih.pdf>

³ In addition to the MMA, the 115th Congress alone had introduced, but not acted upon: H.R.3350 (Transparency in Music Licensing and Ownership Act); H.R.3301 (CLASSICS Act); H.R.1914 (PROMOTE Act of 2017); H.R.1836 (Fair Play Fair Pay Act of 2017); and H.R.881 (Allocation for Music Producers Act).

⁴ Fakir, Duke. “Opinion | We’re Ripping off Some of the Best Musicians of the Last Century. It Needs to Stop.” *Washington Post*, December 28, 2017, sec. Opinions. https://www.washingtonpost.com/opinions/were-ripping-off-some-of-the-best-musicians-of-the-last-century-it-needs-to-stop/2017/12/28/5c24b660-ea53-11e7-b698-91d4e35920a3_story.html

⁵ CLASSICS is an acronym for “Compensating Legacy Artists for their Songs Service and Important Contributions to Society.”

⁶ AMP is an acronym for “Allocations for Music Producers.”

those concerns that provided the impetus for the U.S. Copyright Office’s 2011 study of pre-1972 sound recordings.⁷ The Office’s final report from the study recommended bringing sound recordings fully under Federal law, and the subsequent *National Recording Preservation Plan* extensively discussed the urgency with which such a solution was needed.⁸ Despite this, the authors of the CLASSICS Act elected to preserve the status quo, placing a bandage over the existing system rather than addressing the flaws in the system itself.

In addition to the general problem of only partially addressing the problem of the patchwork of state laws (and thus, in all likelihood, leaving the problem to fester for at least another decade), the legislation failed to provide meaningful exceptions to the protection of pre-1972 recordings. The bill applied the fair use (Sec. 107⁹) and library and archives (Sec. 108) exceptions, but only to claims of infringement over the new digital performance right. For all other uses, including nearly all of the uses made by sound recordings curators, the various state laws would still govern what was permissible.

Even considering just the digital performance right at the center of the bill, the exceptions provided were inadequate. Absent from the bill was any application of the one section—Sec. 110—that provides copyright exceptions for public performances. In particular, the bill failed to allow for public performances in classrooms and online educational settings, as provided for by Secs. 110(1) and 110(2), respectively. The conspicuous absence of any public performance exceptions in a bill that was exclusively concerned with the public performance right was complemented by the inclusion of the Sec. 108 library and archives exceptions, which was bizarre only in that the latter does not apply to public performances at all.¹⁰ The presence of Sec. 108 exceptions in the bill was meaningless, since there would have been no possible scenario in which they could have been applied.

The bill also failed to establish any meaningful limitations on the duration of protection. One of the loudest complaints raised by public interest groups over the previous twenty years was that the reliance on state laws created a functionally perpetual copyright over pre-1972 sound recordings. At that time, the law dictated that state protection of pre-1972 recordings would cease on February 15, 2067, with the result that some of the oldest recordings would have been protected for close to two centuries by the time their terms expired.¹¹ A high priority for public interest groups was the creation of a public domain for sound recordings.

In response to these and other concerns, Senator Ron Wyden (D-OR) introduced the ACCESS¹² to Recordings Act (S. 2933), in direct competition with the CLASSICS Act. In contrast to the latter’s bulky creation of a quasi-copyright with limited federal protection, the ACCESS to Recordings Act would have brought pre-1972 sound recordings fully under federal copyright law.

⁷ U.S. Copyright Office. *Federal Copyright Protection for Pre-1972 Sound Recordings: A report of the Register of Copyrights*. Dec. 2011. <https://www.copyright.gov/docs/sound/pre-72-report.pdf>

⁸ *The Library of Congress National Recording Preservation Plan* (Council on Library and Information Resources and the Library of Congress, 2012). <https://clir.wordpress.clir.org/wp-content/uploads/sites/6/pub156.pdf>

⁹ This document follows the convention of referring to copyright statutes by the place they occupy in the U.S. Code, Title 17, unless otherwise specified. Thus, “Sec. 107” is shorthand for 17 U.S.C. § 107.

¹⁰ The exception is Sec. 108(h), which provides exceptions to copyright in works in the last 20 years of their copyright term. Even in this case, though, the exception could not have been applied because the recordings were still not subject to federal copyright.

¹¹ For comparison, despite various term extensions, George M. Cohan’s 1917 song, *Over There*, entered the public domain at the end of 1992, 75 years after it was published, but Nora Bayes’s recording of the song from the same year would have been protected until 2067, for a total of 150 years.

¹² ACCESS is an acronym for “Accessibility for Curators, Creators, Educators, Scholars, and Society.”

The summer of 2018 saw intense negotiations from different stakeholders. As the session moved toward adjournment, mounting pressure to pass a bill led to several compromise amendments. With time running short, Congress finally passed the amended bill through an unusual parliamentary maneuver known as an “engrossed amendment:” a bill that had already passed—the engrossed bill—was amended by replacing it in its entirety with the MMA.¹³ This required a unanimous vote in both houses, which, in what must be a first for a major piece of copyright legislation, the bill won.

The final version as enacted into law reflects the time-enforced desperation that gave birth to it. Title II of the Act—originally the CLASSICS Act—is contains many compromises and is often clumsy, but it also brings major improvements for people working with sound recordings collections.

One of the most remarkable aspects of the new law from the perspective of public interest groups is the provisions—also a result of the time pressure—that they had not initially sought. These include an unexpectedly broad application of one of the most important library exceptions, Sec. 108(h), and a new safe harbor provision for noncommercial use of pre-1972 recordings (which was added only days before passage), all in addition to providing essentially everything that the public interest groups had requested. For the sound recordings collection community, the MMA was a rare, and near total win.

The Act is also interesting for one element that it does not contain. Sound recordings continue to be subject to the exclusive right of public performance only in a digital context. An AM or FM radio station must, for example, license each copyrighted musical work that it performs, but it need not license the performance of the sound recording. Advocates for sound recording rights holders have long sought parity with musical works in the form of an analog performance right, and digital performance platforms have also pressed to level their competitive playing field with traditional radio. However, though legislation was introduced to extend the full public performance right to sound recordings, Congress declined to include it in the MMA, leaving that question for another day.¹⁴

This document explores the implications of the Music Modernization Act for librarians, archivists, and other curators, scholars, and users of sound recordings. Title I of the Act, the Musical Works Modernization Act, addresses licensing and digital delivery of musical works. Though Title I forms by far the bulk of the MMA in terms of length, Title II—the Classics Protection and Access Act—is easily the most important section of the MMA for the present purposes and that discussion forms the bulk of this document. After a short discussion of Title III, the Allocation for Music Producers Act, the new legislation is considered in its entirety in the form of a case study.

¹³ In this case, Congress amended H.R. 1551, a bill originally designated “To amend the Internal Revenue Code of 1986 to modify the credit for production from advanced nuclear power facilities,” by replacing its text with the text of the MMA. See the amendment text, <https://www.congress.gov/bill/115th-congress/house-bill/1551/text/eas>

¹⁴ H.R. 5219, the Ask Musicians For Music (AM FM) Act, was introduced in the House in November of 2019. It garnered no cosponsors. A competing resolution arguing against a radio performance royalty, H.Con.Res.20, was introduced in February 2019 and gained 227 cosponsors. Neither was acted upon by the 116th Congress.

TITLE I: THE MUSICAL WORKS MODERNIZATION ACT¹⁵

- Creates a blanket license for interactive digital delivery of recordings of musical works.
- License to use non-dramatic musical works only.
- License became available starting January 1, 2021.
- Rates to be based on “willing buyer/seller” rather than policy-based rates.

Summary

The Musical Works Modernization Act (“MWMA”), Title I of the Music Modernization Act (MMA), establishes a new mechanism for licensing musical works in a digital context. In its 51 pages of new law—the MWMA constitutes roughly three quarters of the text of the MMA—the Act provides for a blanket license to make and distribute digital sound recordings of non-dramatic musical works through interactive streams and limited and permanent downloads.¹⁶

The new license has three important features. First, it is a *compulsory license*, meaning that the owner of the copyright does not have the ability to deny the licensing of the work. Rather, the licensee may obtain the license without permission, by paying royalties at a rate set either by statute or by an entity charged with rate setting. Second, it is a blanket license—instead of requiring multiple individual licenses on a work-by-work basis, the MWMA allows prospective licensees to obtain a single license that includes all works covered by the statute. Finally, and relatedly, the license is available whether or not the rights holder can be found. The MWMA is thus the United States’ first foray into extended collective licensing, creating some relief for the problem of orphan works, at least in a musical setting.

The license is available to *digital music providers*. To qualify as a digital music provider (hereafter, “DMP”), the person or entity must satisfy three criteria: (1) a direct contractual relationship with the end user of the service provided, (2) the ability to fully report on any revenue generated by the service, and (3) the ability to report on any and all usage of sound recordings and musical works provided by the service. Any DMP should be able to obtain the new blanket license.

Much of the text of the MWMA is concerned with establishing, and providing for, the infrastructure to administer the blanket licenses, for which Congress provided two years of lead time. The Act establishes two new entities: a Mechanical Licensing Collective (“MLC”) and a Digital Licensee Coordinator (“DLC”). Among other things, the MLC is charged with issuing licenses, collecting and distributing royalties, enforcing the terms of the license. The MWMA also requires the Mechanical Licensing Collective to establish a publicly searchable database of rights holder information. The Digital Licensee Coordinator coordinates the licensees’ activities, including representing licensees’ interests in rate-setting hearings.

¹⁵ This name comes from the short title, Title I, Sec. 101 (132 Stat. 3676): “Short Title. This title may be cited as the ‘Musical Works Modernization Act.’” However, the Title itself is called “Title I—Music Licensing Modernization.” This is presumably the reason that some sources refer to the title as the “Music Licensing Modernization Act.”

¹⁶ U.S. Copyright Office. <https://www.copyright.gov/music-modernization/115/>

Sound recordings and underlying works

A crucial concept at play throughout the MMA is the notion that sound recordings normally embody at least two copyrightable works. Copyright in the sound recording itself applies only to the sounds that were fixed in the recording process. Those sounds may also embody a performance of another copyrightable work, most often a musical work. The presence of a copyrighted musical work on a sound recording means that any use of the sound recording implicates two different sets of copyrights. Use of a copyrighted sound recording containing a copyrighted musical work thus requires the user to clear each of those copyrights.¹⁷ The MWMA provides a mechanism only for licensing the underlying musical work.¹⁸

The compulsory license

Mechanical rights—the exclusive right to fix a musical work in the form of a sound recording (or mechanical reproduction)—were first added to U.S. law in the Copyright Act of 1909.¹⁹ In creating the new exclusive right, Congress also limited that right by creating, for the first time, a statutory requirement to license mechanical reproductions. That compulsory mechanical license was included in Section 115 of the 1976 Copyright Act.

Unlike statutory exceptions to copyright, under which a work may be used freely without infringing copyright, the compulsory license system limited rights holders' ability to deny permission without limiting their ability to collect royalties from use of their works. The compulsory license allows the licensee to make and distribute recordings of the musical work as both physical and digital phonorecords (the latter are termed digital phonorecord deliveries, or “DPDs”). It also grants the licensee a limited right to create arrangements of the work for the purposes of making the recording. The law provides a statutory royalty rate that is periodically reviewed and adjusted by a Copyright Royalty Board, which consists of three judges appointed by the Librarian of Congress.

Generally speaking, in order to obtain the Sec. 115 license, the musical work to be licensed must already have been distributed to the public at least once as a sound recording (either in physical or digital form) under the authority of the owner of the work's copyright—Sec. 115 does not authorize the first recording of a work. The Sec. 115 license also does not license the use of existing sound recordings; it only applies to the underlying musical works.

The blanket license

In its essence, the MWMA makes a fairly simple change: it provides a way for services to deliver music to their users digitally through a single license. Prior to the MMA, compulsory licenses for both physical and digital deliveries could be obtained only on a work-by-work basis, meaning that a provider that wished to license fifty musical works needed to go through the licensing process fifty separate times. Under the MWMA, the same service need only acquire a single license, called a Blanket License for Digital Use. The blanket license authorizes the use of all eligible works, even if the copyright owner cannot be found. The license applies only to digital delivery—the mechanical licensing process for

¹⁷ For example, a documentary filmmaker's use of a recording of John Lennon performing his song, *Imagine*, caused the filmmaker to be sued twice by different rights holders: once for infringement of the musical work, *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008), and once for use of the sound recording, *EMI Records Ltd. v. Premise Media Corp. L.P.*, 2008 NY Slip Op 33157(U), 2008 N.Y. Misc. LEXIS 8213 (Sup. Ct. New York County).

¹⁸ Title II of the Act, the Classics Protection and Access Act, discussed below, addresses copyrighted sound recordings.

¹⁹ *Copyright and the Music Marketplace: a report of the Register of Copyrights* (February 2015), 17.

delivery on physical media, such as distribution on compact discs, remains unchanged and still requires a separate license for each individual work.

The blanket license became available on January 1, 2021.²⁰ As of that date, Digital Music Providers can obtain the license by filing a Notice of License (“NOL”) with the Music Licensing Collective.²¹ Also on that date, the BDL replaced any existing compulsory licenses for digital delivery obtained under the old system.²²

In addition to meeting the eligibility requirements for the compulsory license, the MWMA places additional requirements on DMPs. The provider must, for example, be able to supply the MLC with a description of its planned (or existing) activities, demonstrating that it meets the criteria for obtaining the DMP. This includes the ability to provide accurate regular reports of user activity, including works performed.²³ The DMP will be expected to make monthly payments and reports. The DMP must also report any significant mechanical licensing activity that it undertakes outside the scope of the blanket license (such as voluntary direct licenses).

The blanket license was created primarily with major commercial digital music providers (e.g., Spotify, Amazon Music, etc.) in mind, both to facilitate the provision of services and to create better accountability and, ultimately, provide increased revenue to rights holders. However, the license also provides a potential benefit to sound recordings collections seeking to undertake significant digital scholarship projects, digitization and preservation programs, and other internal and grant-funded programs that envision digital delivery of musical works. The blanket license streamlines the permissions process, allowing additional certainty in the rights review process.

Costs of the license

The MWMA is a powerful solution to a problem that many institutions have faced, but it is not free. The license requires royalty payments for each performance of each copyrighted work. In addition, the obtaining the license will require investment in the additional time and technology required to meet the requirements of becoming a DMP. Finally, the license requires payment of an annual administrative assessment, which helps defray the costs of operating the Music Licensing Collective. The system benefits libraries and archives, by allowing them to make archival recordings available, and also copyright holders, by facilitating additional licensing revenue.

Providing access to historic recordings has traditionally been complicated by the legal challenges relating to copyright in underlying musical works. Though in the past a fair use theory might have been plausible with respect to performance of sound recordings, licensing was probably still required

²⁰ The MWMA directs the U.S. Copyright Office and the two new entities—the MLC and DLC—to determine many of the details. The Office recently published two interim rules, both effective October 19, 2020. The first governs notices of license and non-blanket activity, data collection and delivery, and reporting of payment and usage. 85 *Federal Register* 58114 (Sept. 17, 2020). The second covers the MLC’s reporting and distribution of payments to rights holders. *Id.* at 58160 (Sept. 17, 2020). As of this writing, the office has several rulemaking proceedings open, which include questions of confidentiality requirements of the MLC and DLC (Docket 2020-7), the musical works database (Doc. 2020-8), and cumulative reporting and transfer of royalties to the MLC (Doc. 2020-12). None of these is within the scope of this document.

²¹ Prior to that date, Digital Music Providers may follow a process that involves filing a Notice of Intent (“NOI”) with the Copyright Office and following their prescribed forms and rules.

²² During the next rate proceeding for the section 115 license, the Copyright Royalty Board will apply a market-based willing buyer / willing seller standard, replacing the previous section 801(b)(1) policy-oriented rate-setting standard.

²³ The Copyright Office has issued an interim rule, which became effective October 19, 2020. 85 *Federal Register* 58160 (Sept. 17, 2020).

for the underlying musical work. However, prior to the MWMA, licensing of musical works had to be done on a work-by-work basis. Because collections in question might occupy thousands of linear feet, with each foot representing several hours of audio, few if any institutions had the wherewithal to obtain individual licenses for each recording they might wish to stream. The blanket license appears to be a solution to what has been an intractable problem.

To take advantage of this solution, libraries and archives will need to be able to meet the criteria for becoming a DMP. This includes reporting requirements that many institutions may not be accustomed to providing. To be able to meet this requirement, institutions may need to acquire or develop software to facilitate the reporting and to find personnel hours to ensure the reporting requirements are met.

The cost of the license starts with the cost of the royalties. Each time a copyrighted musical work is streamed, the DMP must pay a royalty, and the amount of that royalty is determined by the Copyright Royalty Board (CRB). Determining the royalty rates is a complex process and will depend on the particulars of the institution and other factors. That determination is beyond the scope of this document.²⁴ The rate is under discussion and may change in the near future.²⁵

In addition to royalty payments, use of the blanket license requires DMPs to pay an annual “administrative assessment.” The MWMA provides for the funding of the MLC through a number of different means. Among those, the Act provides that the MLC will be funded by an administrative assessment, which will be paid for, in large part, by digital music providers.²⁶ The amount of the assessment is determined by the CRB, which is charged with determining an amount that is “calculated to defray the reasonable ... costs.”²⁷ The cost, for most institutions, is based on the number of unique sound recordings used in a given month.²⁸ As of this writing, the costs are:

Monthly Unique Sound Recording Count	Annual Minimum Fee²⁹
< 10,000	\$2,500
10,001–25,000	\$5,000
25,001–50,000	\$10,000
50,001–100,000	\$20,000
> 100,000	\$60,000

The Sec. 115 blanket license may not be the solution many institutions hoped for, and it may not present a workable solution for some institutions. Certainly, it doesn’t create an exception to copyright that would allow libraries and archives to provide access at no cost, and the license requires more

²⁴ Specifics may be found in the *Code of Federal Regulations*, 37 CFR 385.

²⁵ Music Licensing Consortium, “Announcement Concerning Interim Mechanical Royalty Rates Pending the Outcome of Copyright Royalty Board Remand Proceedings in Phonorecords III.” 13 January 2021. <https://www.themlc.com/press/announcement-concerning-interim-mechanical-royalty-rates-pending-outcome-copyright-royalty>

²⁶ 17 U.S.C. 115(d)(7)(A).

²⁷ 17 U.S.C. 115(d)(7)(D)(ii)

²⁸ “Joint motion to modify the terms of implementation of the initial administrative assessment,” U.S. Copyright Royalty Judges docket no. 19-CRB-0009-AA, filed Dec. 18, 2020, approved Dec. 22, 2020. <https://app.crb.gov/document/download/23403>

²⁹ *Id.*

work and personnel than an exception would have. Still, the blanket license at least provides a solution for institutions that have the funding and infrastructure to take advantage of it. One might hope that, as time progresses and institutions gain more experience working within this structure, consortial arrangements may also be developed, allowing an even greater number of participants.

TITLE II: CLASSICS PROTECTION AND ACCESS ACT

- New federal oversight of pre-1972 recordings
- Protection for pre-1972 recordings expires in phases based on publication date:

Date Published	Term of protection	Expires
Before Jan. 1, 1923	3 years after enactment	Jan. 1, 2022
Jan. 1, 1923 – Dec. 31, 1946	Transition period + 5 years	100 years after publication
Jan. 1, 1947 – Dec. 31, 1956	Transition period + 15 years	110 years after publication
Jan. 1, 1957 – Feb. 14, 1972	Through Sec. 301(c) expiration	Feb. 15, 2067

- Use of pre-1972 recordings subject to fair use as well as other exceptions.
- “Last 20 years rule” applies to all pre-1972 recordings
- Filing requirement to obtain statutory damages and attorney’s fees
- New safe harbor for noncommercial use of pre-1972 recordings
- State laws preempted, but not fully replaced
- No sovereign immunity—perhaps

Background

Title II of the MMA, the Classics Protection and Access Act (“CPAA”), addresses the problem of the so-called “pre-1972 sound recordings.”³⁰ The Act mostly succeeds, if inelegantly, in solving the key problems, though it leaves some confusion and new questions in its wake and it also fails to address some important issues.

Sound recordings did not receive federal copyright protection until 1972, at least 115 years after the first sound recording was created.³¹ Though the 1909 copyright revision did include a royalty requirement for “mechanical reproduction” of a musical work—and indeed that was one of the driving motivations behind the revision—the law did not yet recognize sound recordings as being works independent of the musical works they embody. However, though the copyright law clearly did not reach the sound recording as an independent work, it was unclear how and whether the law *did* reach the sound recording.

For much of the early twentieth century, there was fierce debate over how to handle sound recordings. Parties argued in court over issues such as whether recordings were musical works, and if so whether the release of a recording constituted publication of that work. They argued whether recordings

³⁰ For purposes of this document, unless otherwise specified, the term, “pre-1972 sound recording” refers only to domestic recordings fixed prior to February 15, 1972. Recordings of foreign origin that were subject to restoration under the *Uruguay Round Agreements Act* fall in a grey area and in some cases the CPAA may not apply. For more information, see the treatment of restored recordings, sec. **II.G.3**, below (page 45).

³¹ Patrick Feaster. “Enigmatic Proofs: The archiving of Édouard-Léon Scott de Martinville’s phonautograms. *Technology and Culture* 60/2supp (April, 2019), S14–S38, S15. “To prove he had originated the principle of recording sound vibrations..., Scott invoked a venerable archival convention established with precisely such scenarios in mind. On 26 January 1857, he had already deposited a *pli cachet* with the Académie: a sealed envelope containing evidence of his ideas and accomplishments as of that date.”

constituted “writings” for purposes of the Constitution’s Copyright Clause.³² If they were “writings,” did Congress decline to protect sound recordings (thus making them unprotectable)? Or were sound recordings not “writings” at all, and therefore outside the scope of Congress’s copyright authority entirely? The common law (i.e., law created by courts through judicial tradition and precedent) protected unpublished writings, and states had the power to codify those laws; were sound recordings protected by the common law as well? If so, was that protection divested once they were published, as was the case with unpublished writings?³³

The Sound Recording Act of 1971 amended the 1909 Copyright Act to add, for the first time, federal copyright protection for sound recordings, beginning on February 15, 1972.³⁴ However, that Act specified that the new protection was prospective only: recordings fixed prior to that date were unaffected and remained outside the scope of federal copyright.³⁵ Shortly after, in *Goldstein v. California*, the Supreme Court upheld states’ authority to protect sound recordings by statute or common law.³⁶ The result was that protection of *copyrighted* sound recordings (i.e., recordings subject to the Sound Recording Act), was unified and formalized, while protection of earlier recordings was left to the states, each to act in their own manner.

The Copyright Act of 1976, which came into force January 1, 1978, superseded the 1909 Copyright Act. Among the sweeping changes it brought, the new law fully preempted state level protection of any writings, including unpublished works. Congress made one exception, though, by leaving in place the state protection of pre-1972 sound recordings. Section 301(c) of the new law stated that rights to sound recordings “under the common law or statutes of any State” were preserved until February 15, 2047.³⁷ That date was later revised to 2067 when Congress extended the general term of copyright.³⁸

In addition to the common law, most states provided protection for pre-1972 sound recordings in the form of criminal statutes.³⁹ Though states borrowed language from one another, there was little uniformity from state to state. Pronounced differences included the length of protection (some states

³² U.S. Const. Art. 1, Sec. 8, Cl. 8.

³³ For extensive treatment of the peculiar history of sound recordings copyright in the United States, see Bruce Epperson, “From The Statute of Anne To Z.Z. Top: The Strange World of American Sound Recordings, How it Came About, And Why it Will Never Go Away,” *J. Marshall Rev. Intell. Prop. L.* 15/1 (2015).

³⁴ *An Act to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes*, Pub. L. 92-140, 85 Stat. 391 (enacted October. 15, 1971). Contemporary writings referred to the law as the Sound Recording Act, and that convention will be followed here. See Melvin L. Halpern, “Sound Recording Act of 1971: An end to piracy on the high C’s.” *George Washington Law Review* 40/5 (July 1972), 964–994.

³⁵ Id at Sec. 3, “The provisions...of this Act shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act and before January 1, 1975, and nothing in...this Act shall be applied retroactively or construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.” The sunset provision was removed in 1974 by Pub. L. 93-573 (88 Stat. 1873). See 1 *Patry on Copyright* § 1:70.

³⁶ *Goldstein v. California*, 412 U.S. 546 (1973).

³⁷ *An Act for the general revisions of the Copyright Law, title 17 of the United States Code, and for other purposes*. Pub. L. 94-553, 90 Stat. 2541.

³⁸ *Sonny Bono Copyright Term Extension Act*. Pub L. 105-298, 112 Stat. 2827.

³⁹ California was and is unique for having adopted both civil and criminal statutes governing pre-1972 recordings. Cal. Civ. Code § 980. Indiana and Vermont do not have any current statutes related to pre-1972 recordings. See “State Criminal Laws: Pre-1972 Sound Recordings,” prepared by the U.S. Copyright Office based on a 50-state survey by the Association of Research Libraries.

https://www.copyright.gov/docs/sound/20111212_survey_state_criminal_laws_ARL_CO_v2.pdf

extended protection for all recordings to 2067, while others provided very limited terms),⁴⁰ the scope of protection, and determination of ownership. In particular, the scope and nature of any limitations and exceptions varied significantly. Some states included exceptions for libraries and archives, or noncommercial uses, or both, while a few states had no exceptions at all (see **Figure 1**).

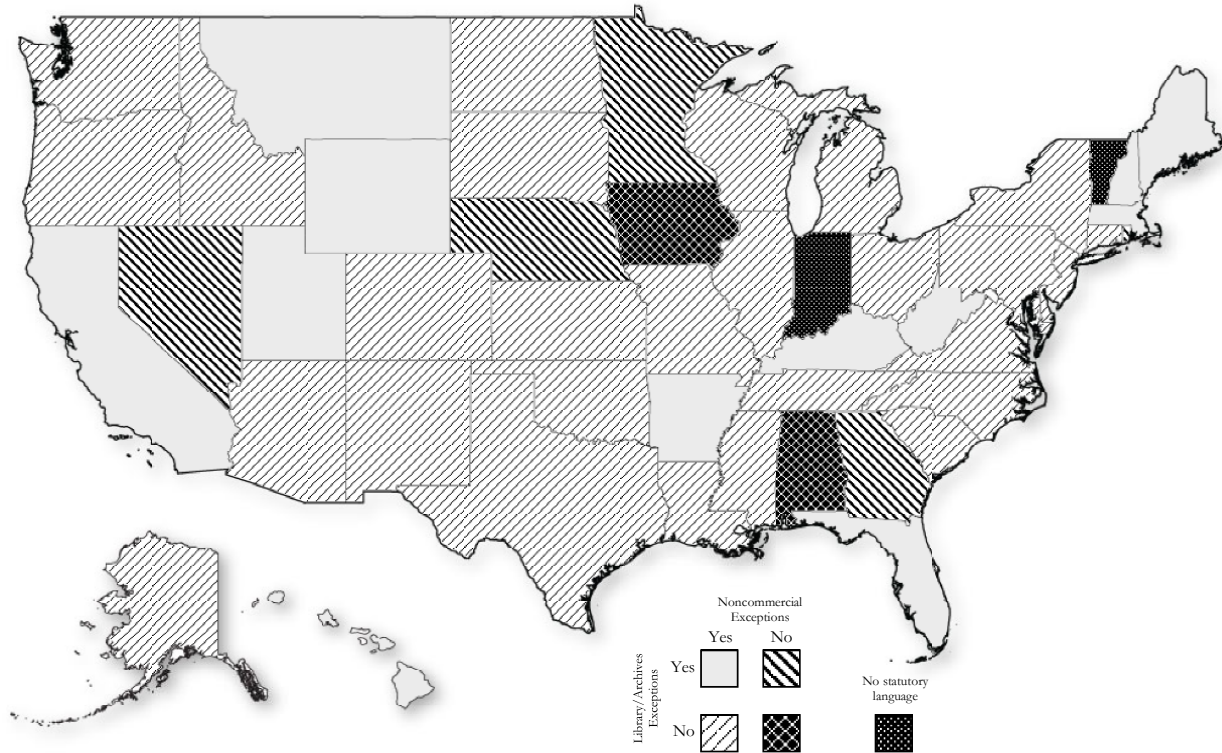


Figure 1: Exceptions for library and noncommercial activity by state⁴¹

For librarians, archivists, and others charged with preserving historic sound recordings, the lack of consistent federal law governing pre-1972 sound recordings created significant obstacles. These obstacles were discussed extensively in the National Recording Preservation Board’s report, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age*.⁴² Published in 2010, the report found that the legal landscape compounded an already daunting situation by rendering virtually all preservation work on pre-1972 sound recordings illegal, strictly speaking. Even where institutions were comfortable operating in legal grey area, preservation of pre-1972 recordings presented enormous technical and logistical challenges. Meeting those challenges requires funding, but the uncertain legal basis put projects involving pre-1972 sound recordings at a competitive disadvantage for public grants. In addition, public institutions’ inability to legally provide access to pre-1972 recordings created a disincentive for private collectors to deposit their collections. The result was that some unknown millions of pre-1972 recordings were at risk of disappearing irrevocably.

⁴⁰ The state of Colorado had the shortest term, limiting all protection to fifty-six years. Colo. Rev. Stat. § 18-4-601 (1.5). Colorado is also the only state that referred to its protection as “copyright.”

⁴¹ “State Criminal Laws, pre-1972 Sound Recordings,” *supra*.

⁴² National Recording Preservation Board, *The State of Recorded Sound Preservation In The United States: A National Legacy At Risk In The Digital Age* (Council on Library and Information Resources and the Library of Congress, 2010).

At the urging of the Association for Sound Recordings Collections and other parties, the Omnibus Appropriations Act of 2009 instructed the U.S. Copyright Office to study the question of bringing pre-1972 sound recordings under federal law.⁴³ The Office released its report in December, 2011, recommending that pre-1972 recordings be federalized.⁴⁴ The following year, another congressionally-mandated report, the *National Recordings Preservation Plan* (NRPP), similarly recommended full federalization of pre-1972 sound recordings.

The reports differed somewhat in their recommendation for how federalization should be achieved, especially in the question the length of protection. The Copyright Office recommended, among other things, that pre-1923 recordings enter the public domain immediately, and that later recordings be assigned a term of 95 years from publication, or 120 years from fixation in the case of unpublished recordings. In addition, the Office recommended offering additional protection until 2067 for post-1923 recordings that are made available to the public, as an incentive to rights holders to release those recordings. The National Recording Preservation Plan recommended “a flat 95-year term for both published and unpublished pre-1972 recordings.” In response to the Office’s recommended incentive, the NRPP indicated that the incentive should be available only for releases that are made available in a high-quality physical format and without unduly restrictive licensing.

Though sound recordings protection at the state level remained mostly static, the federal statute had evolved with the rest of copyright law. The most consequential change came in 1996 with the passage of the Digital Performance Right in Sound Recordings Act (DPRA).⁴⁵ Prior to this act, owners of sound recordings copyrights did not possess an exclusive right to publicly perform their recordings. The DPRA changed this by adding a public performance right for sound recordings by digital transmission only—public performances through analog transmissions remained unprotected. As a result, radio stations broadcasting over AM or FM bands had to pay royalties only for performing copyrighted musical works, while internet broadcasts required royalties for both the copyrighted sound recording and any copyrighted musical works contained therein.

During the Copyright Office’s pre-1972 recordings study, recording industry advocates resisted federalization, but subsequently began pressing for a digital performance right in parity with copyrighted sound recordings. In 2013, a Copyright Office study on Music Licensing Study revisited the question of pre-1972 recordings, with the report reiterating the Office’s support for full federalization while also recognizing an industry-supported proposal for partial federalization—one which would expand the federal licensing statutes to include pre-1972 recordings, but leave the rest of the law as is.⁴⁶ The RESPECT Act of 2014⁴⁷ would have followed this latter recommendation, but it found little support and never received a committee vote.

In addition to pursuing partial federalization, recording industry stakeholders also found some initial support for the notion that the common law included an exclusive right of public performance. In *Flo & Eddie v. Sirius XM*, a series of lawsuits (along with similar suits brought against Pandora) sought to show that a digital public performance right, such as that provided by federal law, also existed at the

⁴³ Pub. L. 111-8, 123 Stat. 524, effective Mar. 11, 2009.

⁴⁴ Perhaps anticipating the report, Rep. Jared Polis (D-CO-2) introduced possibly the first legislation to address the issue, the Sound Recording Simplification Act of 2011, H.R. 2933 (112th Congress), but the bill received no cosponsors and failed in committee.

⁴⁵ Pub. L. 104-39, 109 Stat. 336, effective Feb. 1, 1996.

⁴⁶ *Copyright and the Music Marketplace*, 87.

⁴⁷ *Respecting Senior Performers as Essential Cultural Treasures Act*, H.R. 4772 (113th Congress).

state level. After an initial finding in California that it did, courts in New York⁴⁸ and Florida⁴⁹ found that there was no such protection. With signs increasingly pointing to legislation as the only means to a public performance right for pre-1972 sound recordings, the stage was set for movement in Congress on the long-standing and fraught question of what to do with the oldest sound recordings. Congress's answer came from Rep. Darrell Issa (R-CA-49), who introduced the CLASSICS Act on July 19, 2017.⁵⁰ An amended version became law as the Classics Protection and Access Act (“CPAA”).

The new law falls short the Copyright Office's and NRPP's recommendation that pre-1972 sound recordings be fully federalized, but it does functionally meet the essence of their recommendations. Though it does so in an inelegant fashion, the CPAA does at least federalize the exclusive rights to use a pre-1972 sound recording, as well as the exceptions to those rights. The law strikes a compromise between the differing term length recommendations by instituting a progressive term length, with later recordings generally enjoying somewhat longer protection. The CPAA does not include the possibly beneficial incentives for rerelease recommended by the Copyright Office, but in excluding that recommendation Congress also sidestepped sticky and potentially worrisome discussions, such as whether a physical format release would be required or whether a license-restricted stream or digital download would be sufficient to qualify.

The CPAA also, and unexpectedly, partially addresses the two additional legislative recommendations made by the NRPP. The Plan recommended enabling “recordings whose copyright owners cannot be identified or located to be more readily preserved and accessed legally.”⁵¹ Though not the extensive orphan works plan that the authors of the NRPP may have envisioned, the CPAA addresses this recommendation through the creation of a safe harbor for noncommercial uses. The Plan also recommends expansion and updating of the Section 108 library and archives exceptions,⁵² and though many of the Plan's recommendations along those lines are still wanting, one such recommendation—to expand the “last twenty years” provision to apply to the last 45 years of copyright in a sound recording—is actually exceeded by the new law.

The CPAA is a major step forward for sound recordings curators and memory institutions. Though there is much yet to demand from Congress in future legislation, this act should remedy many of the most critical legal obstacles faced by those charged with preserving the country's recorded heritage.

⁴⁸ *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y.3d 483 (2016).

⁴⁹ *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 229 So.3d 305 (Fla. 2017).

⁵⁰ Another bill, the *Transparency in Music Licensing and Ownership Act*, H.R. 3350 (115th Congress) was introduced just a day later and would have directed the creation of a “nondramatic musical works and sound recordings database,” and would have set inclusion of a work in that database as a condition for collecting damages in certain infringements of the work. The bill was not acted upon but appears to have formed a partial basis for the recordation requirements that were added as part of the CPAA.

⁵¹ National Recording Preservation Board, *The Library of Congress National Recording Preservation Plan* (Council on Library and Information Resources and the Library of Congress, 2012), recommendation 3.5.

⁵² *National Recording Preservation Plan*, recommendation 3.6.

OVERVIEW OF PROVISIONS

A. PROTECTION OF PRE-1972 RECORDINGS

- Pre-1972 sound recordings are protected against unauthorized uses to the same extent as copyrighted sound recordings.
- Public performance of pre-1972 recordings through non-digital transmission does not infringe CPAA protection.

The CPAA prohibits unauthorized use of pre-1972 recordings in a manner separate from, but nearly identical to copyright infringement. Any use that would infringe copyright in a post-1972 (i.e., “copyrighted”) recording is, for the most part, now infringing for pre-1972 recordings.

1. Scope of protection

- **Pre-1972 sound recordings receive protection virtually identical to the copyright protection afforded later recordings**

Section 1401(a) specifies that engaging in *covered activities* without consent of the rights owner is punishable to the same extent as copyright infringement.⁵³ “Covered activities” is defined elsewhere, in Sec. 1401(l), as any activity that would have been considered infringing had the recording been fixed after February 15, 1972.

Specifically, Sec. 1401(l) defines covered activities as applying to the following activities:

- 1) Any act that would infringe on the exclusive rights to reproduce, make derivatives, distribute, or digitally perform the work, as found in Sec. 106
- 2) Any infringing exportation or importation of the recording under Sec. 602(a)
- 3) Any circumvention of copyright protection systems in violation of Sec. 1201
- 4) Any violation of the copyright management information protections in Sec. 1202

Though the statute draws a difference between copyright protection and CPAA protection, the practical result is the same. In addition, CPAA infringements are subject to the same statute of limitations as copyright infringements—3 years.

2. Limitations on scope –

- **Protection of pre-1972 recordings is limited in scope in a manner nearly, but not completely, identical to later recordings**

In defining the covered activities, Sec. 1401(h) specifies that protection applies to “any activity that the copyright owner of a sound recording would have the exclusive right to do or authorize under section 106... if the sound recording were fixed on or after February 15, 1972.”

The scope of federal copyright in sound recordings is more limited than that available for other classes of works. Section 114 specifies those limitations. Any action that falls outside the scope specified by Sec. 114 should also fall outside the scope of protection under the Sec. 1401.

⁵³ But see discussion of criminal infringement below, part **II.G.5**, page 49.

One example is public performance. Though section 106 includes an exclusive right of public performance for copyrighted works, in the case of sound recordings that right is limited to performance through a digital transmission. Section 114 reiterates the fact that the exclusive right to public performance of a sound recording does not include analog performances, such as live performances in public spaces through traditional sound systems, or terrestrial radio broadcasts. Sec. 114 also limits the exclusive rights in sound recordings to the *actual sounds* contained in the recording—sound-alike recordings that do not directly copy the original’s sounds do not infringe the exclusive rights in copyrighted sound recordings; likewise they do not infringe the rights contained in Sec. 1401 for pre-1972 sound recordings. It bears repeating that these limitations in scope are not shared by any other class of copyrightable work. In particular, any underlying musical or literary works must be licensed for analog public performances.

Though the CPAA does not provide rights holders with any protection against analog performances, the law does create one minor caveat. The new law states that if a non-covered activity was protected by a state or the common law prior to the passage of the Act, then those protections are not preempted.⁵⁴ The law does not take a position on *whether* there is such state or common law protection, it only provides that the protection is not preempted *if* it existed prior to passage of the CPAA. Terrestrial radio broadcasts and other non-digital performances would seem to qualify as activities that are not covered under the CPAA, that could be protected under a state law. No state appears to have passed any such legislation prior to enactment of the CPAA,⁵⁵ but the possibility remains that courts could find that common law protection existed prior to October 11, 2018, in which case this language would be applied.⁵⁶ Were there such a law, its application would be subject to the term limits specified by the CPAA.

⁵⁴ 17 U.S.C. 301(c).

⁵⁵ Tennessee considered, but did not pass a bill to create a public performance right in sound recordings that would have included terrestrial broadcast. *Legacy Sound Recording Protection Act*, HB 1603/SB 1792, Tennessee General Assembly, Introduced Feb. 6, 2018. <http://www.capitol.tn.gov/Bills/110/Bill/SB1792.pdf>

⁵⁶ Given findings to the contrary in the *Flo & Eddie* cases, this is unlikely.

B. LENGTH OF PROTECTION

- Protection of pre-1972 sound recordings is limited based on date of publication.
- Protection expires for first pre-1972 sound recordings on Jan. 1 2022.
- Date of publication may be difficult to determine, but also to prove.

The protections created by the CPAA are more limited than the state protections they replaced. Pre-1972 recordings are protected under the provisions of the Act for a transition term of 95 years *from the date of publication*. The actual term of protection varies depending on the date of publication:

Date Published	Term of protection	Expires⁵⁷
Before Jan. 1, 1923	3 years after enactment	Jan. 1, 2022
Jan. 1, 1923 – Dec. 31, 1946	Transition period + 5 years	100 years after publication
Jan. 1, 1947 – Dec. 31, 1956	Transition period + 15 years	110 years after publication
All other pre-1972 recordings	Through Sec. 301(c) expiration	Feb. 15, 2067

After the expiration of its term of protection, all uses of a recording that fall under the covered activities should be unrestricted at both the federal and state level, similar to the entry of a copyrighted work into the public domain.

Though the CPAA applies to all recordings fixed prior to the enactment of the Sound Recordings Act, the term of protection is based on the date of publication.⁵⁸ Because of this, unpublished pre-1972 recordings do not have a transition period, and so are protected through February 15, 2067.⁵⁹ Because the legal definition of publication does not include public performances or broadcasts, this means that, for example, radio broadcast transcriptions continue to be protected through 2067.⁶⁰ The statute makes clear that all federal protection, for all pre-1972 recordings, ends no later than that date.

During the Copyright Office’s hearings, there was debate over whether the term of protection should begin with the creation, or *fixation*, of the recording, or whether the term of protection should be based, as it is for all other copyrighted works, on the date of first publication. Despite concerns raised

⁵⁷ Based on the specified 95-year transition period. The expiration dates are, in principle, moveable. Should Congress opt to change the base transition term (perhaps in the event of another extension of copyright term), then the terms of protection would lengthen accordingly.

⁵⁸ Under the Copyright Act, publication is “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.” 17 U.S.C. 101. Federal courts have ruled that pre-1972 recordings are published according to this definition. See *La Cienega Music Company v. Z.Z. Top*, 53 F.3d 950 (9th Cir., 2018).

⁵⁹ Despite this, their use by libraries and archives is in some ways less restricted than published recordings. Because unpublished pre-1972 recordings are almost by definition not subject to commercial exploitation, they are generally subject to the Sec. 108(h) rule (see part **II.D**, page 24).

⁶⁰ See 17 U.S.C. 101 “A public performance or display of a work does not of itself constitute publication.”

by both public interest groups⁶¹ and rights holders⁶² that determining publication date is “a nearly impossible factual task, in many instances,” the Office recommended using publication date.⁶³

Unfortunately, Congress’s decision to follow this recommendation will likely create some confusion for those attempting to determine whether protection has lapsed for a pre-1972 recording, since a recording’s fixation date is much more commonly available than its publication date, especially for earlier recordings. Users can, presumably, demonstrate that publication happened no later than the date of an existing catalogue that lists a recording, and there may be other, similar techniques to pinpoint the date further. In many cases, though, showing that protection has expired may be an intractable problem. Fortunately, there are sufficient exceptions to the law that most uses desired by sound recordings curators should still be possible.

⁶¹ *Federal Protection for Pre-1972 Sound Recordings: a report of the Register of Copyrights* (February 2011), 152.

⁶² *Federal Protection for Pre-1972 Sound Recordings*, 153.

⁶³ *Federal Protection for Pre-1972 Sound Recordings*, 163. “In order to ensure that federalization does not effect an unlawful taking, the Office recommends that all published pre-1972 sound recordings other than those first published before 1923 receive a term of protection of 95 years from publication, and that all unpublished pre-1972 sound recordings receive a term of 120 years from creation.”

C. LIMITATIONS ON PROTECTION

- Most exceptions to copyright also apply to pre-1972 sound recordings.
 - Fair use fully applies—resolves questions about applicability in state laws.
 - Sec. 108 applies with some modifications specific to pre-1972 recordings.
 - Secs. 109 and 110 apply, but the result is more restrictive than before.
- Recordation requirements apply.

1. Exceptions included

The Classics Protection and Access Act applies several of the most important federal copyright exceptions to the use of pre-1972 recordings. These exceptions apply to claims over covered activities to the same extent they apply to claims of copyright infringement. In some cases, the federal law is more restrictive than the state laws; in other cases, it is less so. What is most important is that, for the first time, limitations and exceptions apply to pre-1972 sound recordings consistently across the states.

The CPAA applies fair use, library and archives exceptions, the first sale doctrine, the exceptions for public performance, and one exception for ephemeral copies. These amount to almost all the copyright exceptions that would apply to copyrighted (i.e., post-1971) sound recordings.

a. Sec. 107 (fair use)

- **Formally extended to pre-1972 recordings**

The CPAA fully incorporates the federal fair use doctrine as codified in Sec. 107 of the Copyright Act. Fair uses of copyrighted works do not infringe copyright. Whether a use is fair is ultimately determined by courts based on a number of factors, including four factors specifically prescribed by the statute—the purpose and character of the use made; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the entire work; and the effect that the use might have on existing or potential markets for the copyrighted work. In codifying the four-factor test, Congress endorsed a process the courts had been using for more than a century. Congress also specified certain classes of uses that it contemplated as potentially fair: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, [and] research.”

There was some question, prior to the CPAA’s passage, as to whether, and to what extent, the doctrine already applied to the use of pre-1972 sound recordings as a matter of the states’ common law. Fair use had been a part of the common law for more than 120 years by the time of its statutory enshrinement in the 1976 Act,⁶⁴ and it is widely understood as being constitutionally essential under the First Amendment’s free speech protection.⁶⁵

Though fair use likely existed in some form in every state, only one—New York—had actually made an affirmative finding that this was the case. In *EMI Records v. Premise Media*, a trial court found that the defendant had made fair use of a pre-1972 sound recording through its inclusion in a motion picture.⁶⁶ However, as significant as it was as the first (and only) finding of fair use under a state law,

⁶⁴ *Folsom v. Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841).

⁶⁵ See *Golan v. Holder*, 565 U.S. 302, 328 (2012).

⁶⁶ *EMI Records Ltd. v. Premise Media Corp. L.P.*, 2008 NY Slip Op 33157(U), 2008 N.Y. Misc. LEXIS 8213.

the ruling created no binding precedent even within the state.⁶⁷ Though the ruling was persuasively argued and might well have influenced other courts were the opportunity to present itself, courts in other states, and even other courts in New York, could have made entirely different findings.

If the Constitution required the existence of some form of fair use at the state level, it did not require any particular implementation of the doctrine. The New York court followed the guidance of the federal statute but was under no obligation to do so. State common law is the realm of the state courts, and each state would have been free, if presented with a case, to define fair use in its own way, provided that the interpretation satisfied the demands of the First Amendment. Different interpretations could have been more or less restrictive than the federal doctrine, could have been based on different factors, and would almost certainly have varied from state to state to some degree.

By applying the federal statute to pre-1972 sound recordings Congress has insured that 180 years of fair use case law developed by the federal courts will also apply to pre-1972 sound recordings, and that as the doctrine continues to evolve it will apply to all recordings, without regard to an accident of its fixation date.

b. Sec. 108 (exceptions for libraries and archives)

- **Applies to pre-1972 recordings, but with a special exception for pre-1972 recordings**

The CPAA incorporates the Copyright Act's specific exemptions for libraries and archives, found in Title 17, Section 108. These exceptions authorize libraries and archives to make reproductions of copyrighted works under certain conditions. Greatly simplified, Sec. 108 gives permission to libraries for the following:

Subsection (a): Isolated single copies

Subsection (b): Copies of unpublished works for preservation, security, or deposit

Subsection (c): Copies of published works for replacement of damaged, deteriorating, lost, stolen, or obsolete items

Subsection (d): Interlibrary loan copies of portions of works

Subsection (e): Interlibrary loan copies of entire works (when a copy is not available at a fair price)

Subsection (h): Reproduction, distribution, display, and performance of works that are in the last 20 years of their copyright term and are not being commercially exploited⁶⁸

Though the CPAA incorporates all of Sec. 108, the benefit of this to libraries is limited by subsection (i), the final piece of Sec. 108. Under this limitation, the provisions of subsections (d) and (e) ("interlibrary loan provisions") do not apply where the copies involve "a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work." As a result, libraries and

⁶⁷ The state's recognition of fair use was not discussed by the courts again until 2017, when it was recognized by the Second Circuit in *Flo & Eddie*. However, it was mentioned only in passing, and in any case still did not create precedent as they were only interpreting the state's law.

⁶⁸ The remaining subsections provide additional conditions and clarifications. Subsection (g) limits Sec. 108 to isolated, unrelated copies, and specifically prevents the application of Sec. 108 in cases where libraries engage in or have knowledge of systematic reproduction or distribution. Subsection (f) limits liability for libraries (and imposes liability on patrons) for copies made on unsupervised reproduction equipment, provides an exception for news footage in audiovisual works, and clarifies that fair use and contractual obligations are unaffected by Sec. 108.

archives do not have the interlibrary loan provisions available for any recording (pre-1972 or otherwise) that contains a copyrighted musical work.

Though this limitation will exclude an enormous portion of recordings in libraries and archives, Sec. 108 does still have use within the sound recordings collections. First, the provisions of subsections (b) and (c) (“preservation exceptions”) apply to all works, including musical works. Second, the interlibrary loan provisions still apply to recordings of literary works, such as readings of poems or plays, oral histories, or audio books, and also to recordings of musical works that have entered the public domain. Finally, fair use may still apply in cases where libraries may wish to apply the interlibrary loan provisions to sound recordings with copyrighted musical works.

The Sec. 108(i) limitation does not restrict the application of subsection (h)—reproduction, distribution, display, and performance of works that are in the last 20 years of their copyright term and are not being commercially exploited. The CPAA provision surrounding that subsection is one of the most important pieces of the law and constitutes an important expansion of the library and archives exceptions. That provision, the so-called “last 20 years rule,” is discussed below (part **II.D**, page 29).

c. Sec. 109 (“first sale” doctrine)

- **Probably already applied to pre-1972 recordings; now applies but with federal limitations**

The CPAA explicitly applies federal codification of the so-called “first sale doctrine,” sometimes called the “exhaustion doctrine” to pre-1972 sound recordings. Under this principle, the rights holder’s exclusive right to distribution of any given copy of a work ends with the first authorized distribution of that copy. This means that rights holders are not able to control secondary markets for their work such as secondhand sales or library lending.

This right—the right to dispose of lawfully acquired copies of works—almost certainly already existed for pre-1972 recordings prior to passage of the MMA.⁶⁹ What the CPAA changed is *how* the doctrine applies to pre-1972 recordings. Sec. 109 replaces the relatively simple common law principle with statutory language, and as a consequence pre-1972 recordings are also subject to the limitations imposed by the statute. The law has two limitations which might affect pre-1972 sound recordings, though there does not appear to be evidence that those limitations have affected the first sale principle in sound recordings in any practical way.

The first limitation concerns sound recordings whose copyright has been restored by the *Uruguay Round Agreements Act* of 1994 (see discussion in part **II.G.3**, page 45). The URAA amended Sec. 109 to restrict distribution of copies of foreign works made prior to December 8, 1994.⁷⁰ Sec. 109 states that those copies may not be “sold or otherwise disposed of without the authorization of the owner”

⁶⁹ The Supreme Court first recognized the principle in 1908, seventy years before its codification in Sec. 109 went into effect, in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). Though the states were not bound by the decision or by the federal law it codified, the principle’s application to pre-1972 recordings was never seriously questioned.

⁷⁰ Since all such recordings have been governed by federal law since that date, this does not actually represent a change made by the CPAA, but it is discussed here for the sake of completeness.

for any direct or indirect commercial advantage if the copyright owner has filed a notice of intent to enforce with the Copyright Office.⁷¹

The second limitation applies to distribution other than by transfer of ownership. The first sale principle does not apply to rental, lease, or lending of sound recordings, except in the case of a library or nonprofit educational institution. Private collectors or used record stores, for example, may sell or give away recordings, but they may not rent or lend them for any direct or indirect commercial advantage. Prior to the CPAA, this restriction would not have applied to pre-1972 recordings; under the new law it applies to all recordings.

d. Sec. 110 (public performances)

- **Applies to pre-1972 recordings, resulting in increased restriction.**

Section 110 limits copyright owners' exclusive right to publicly perform a work, and the CPAA incorporates three of the limitations found in this section.⁷² The right only controls *public* performances, but the definition of "public" is somewhat broader than common understandings of the term.

A "public" performance includes traditional live performances in public places as well as performances in non-public places where "the public" is gathered. In addition, any broadcast or other transmission of a work constitutes a public performance if the transmission is available to the public, whether or not members of the public receive it in the same place or at the same time. For purposes of these definitions, "the public" consists of "a substantial number of persons outside of a normal circle of a family and its social acquaintances." Traditionally understood, a public performance would require an audience of at least one person, but under this definition, for example, uploading a video to a public platform such as YouTube constitutes a public performance whether or not the video is ever viewed.⁷³

Prior to the CPAA, pre-1972 sound recordings were not subject to an exclusive right of public performance.⁷⁴ Because federal law contains a public performance right for digital audio transmission, this is one area of the law where the CPAA created a more restrictive regime than existed before. Under the old law, there was no restriction at all on public performance of pre-1972 sound recordings—under the new law there is a restriction, but with exceptions. The inclusion of the Sec. 110 exceptions is very important—early versions of the bill did not include the exceptions, and had they passed there would have been no explicit allowance for, among other things, classroom teaching.

⁷¹ 17 U.S.C. 109(a). The law specifies that any such works may be distributed without consent within the 12-month period following either the publication of a notice or that notice is served upon the party. The URAA required the notices to be filed with the copyright office within 24 months of restoration, a window which has long since passed. 17 U.S.C. 104(d)(2)(A). If the rights holder did not file a notice with the Copyright Office, they may still serve a direct notice to a reliance party (i.e., a party whose actions would not have been infringing prior to restoration), at which point the reliance party may continue to pursue their actions for 12 months from the date the notice is received. 17 U.S.C. 104(d)(2)(B).

⁷² Sec. 110 includes eleven limitations of the exclusive right to public performance. Eight of those limitations apply only to classes of works other than sound recordings, so though in principle the CPAA applies to all eleven limitations, in practice only the three discussed here are applicable.

⁷³ "[T]he Office concludes that reading the statutory provisions in light of the purposes articulated by Congress indicates that the public performance right encompasses offers to stream." U.S. Copyright Office, *The Making Available Right in the United States: A report of the Register of Copyrights* (February 2016).

https://www.copyright.gov/docs/making_available/making-available-right.pdf

⁷⁴ No state had enacted a statute governing public performance rights, and the *Flo & Eddie* cases left little doubt that the common law also did not reach public performances of pre-1972 sound recordings.

However, like the inclusion of Sec 109, the change over the pre-MMA situation is seen not in the availability of the exception itself, but by the limitations placed on the exception.

CLASSROOM INSTRUCTION

The most important piece of Sec. 110 for purposes of this document is the exceptions found in Sec. 110(1) and (2), which allow for use in teaching settings. Section 110(1), which was included in the 1976 Copyright Act, provides an essential exception to copyright for teaching in a classroom setting. The statute allows performances by instructors and students conducting the teaching business of a nonprofit educational institution, as long as the performance takes place in a classroom “or similar place devoted to instruction.” The only other restriction is that when a performance of a motion picture or audiovisual work is involved, the copy must be lawfully made—all other performances, including those of sound recordings, may be made from any copies, whether or not they are lawfully made.⁷⁵ Most traditional performances of copyrighted sound recordings in classroom settings are noninfringing without Sec. 110(1), because they are not digital transmissions; however, the statute does ensure that any digital transmissions of sound recordings are also permissible.

Section 110(2) is more complicated. Added in 2002 as part of the TEACH Act,⁷⁶ the statute created an additional teaching exception for transmissions in the course of distance education. Unlike the classroom exception, there are numerous restrictions on the use of Sec. 110(2), including the requirement that the performance consist of “reasonable and limited portions” (except with respect to nondramatic literary and musical works) and that the copy be lawfully made.⁷⁷

Prior to the MMA, there were no restrictions at all on public performances of pre-1972 sound recordings.⁷⁸ The CPAA restricted the use of pre-1972 recordings in teaching activities. However, by incorporating Sec. 110 into the CPAA, Congress at least ensured that pre-1972 recordings were treated no differently than other classes of works, including post-1972 recordings.

AMBIENT PERFORMANCES

In addition to the teaching exceptions, Sec. 110(5) provides an allowance for performances of copyrighted works in public via simple playback devices, even if digital. The CPAA extends this exception to digital performance of pre-1972 sound recordings.

A coffee shop proprietor who brings a radio in and turns it on for the benefit of the shop’s customers, for example, might be infringing copyright of the musical works being performed were it not for this exception.⁷⁹ Because public performances of sound recordings on analog systems do not infringe

⁷⁵ 17 U.S.C. 110(1).

⁷⁶ *21st Century Department of Justice Appropriations Authorization Act*, Pub. L. 107-273. Subtitle C, Sec. 13301: *Technology, Education, and Copyright Harmonization Act of 2002*. 116 Stat. 1910.

⁷⁷ The intricacies of Sec. 110(2) are beyond the scope of this document, but a decision tree is included as **Appendix C**, page 83.

⁷⁸ Except where they are subject to restoration under the Uruguay Round Agreement Act; see discussion in **Part II.G.3**, page 45.

⁷⁹ This is not to say that coffee shops, restaurants, and other establishments are exempted from paying for public performances for musical works. The exception doesn’t apply to performances over commercial sound systems, only those made on a “single apparatus of the kind commonly used in private homes.” Owners of commercial establishments have additional guidelines to follow. In many cases, such as where built-in sound systems are involved, establishments must license the music they play. Sec. 110(5) provides some exceptions for public performance in establishments when specific conditions are met. Those conditions are complex and are beyond the scope of this document. For more information, see: <https://www.restaurant.org/articles/operations/11-questions-about-music-licensing>

copyright, many of the uses provided for by Sec. 110(5) are already excepted where sound recordings are concerned. However, more common modern applications—where, for example, the coffee shop owner is instead playing music on a computer or CD player—are digital audio transmissions, and as such would infringe copyrights in both the musical work and the sound recording. Sec. 110(5) allows for public performances of this sort for copyrighted sound recordings, and now the CPAA extends that exception to pre-1972 sound recordings.

e. Sec. 112(f): ephemeral recordings to allow public performance

• **Necessary extension of Sec. 110, possibly not previously permitted**

Though Sec. 110(2) permits performing works in an online teaching environment, those performances cannot be made without also reproducing the works to be performed. The nonprofit teaching exception in Sec. 110(2) (see above) would be unusable if the law prohibited making the copies needed in order to make those performances possible. These *ephemeral copies* are permitted under Sec. 112(f).

Under Sec. 112(f), educational institutions and governmental organizations may make copies of copyrighted works in digital form that are necessary to perform that work if they are entitled to do so under the online teaching exception in Sec. 110(2). Sec. 112(f) also allows copies of analog formats, but only if no version in digital form is available to the institution that is not subject to technological protection measures.⁸⁰

In order to take advantage of this exception, the copies must be used only by the institution making the reproduction, and they may be used only for purposes of transmissions that are authorized by Sec. 110(2). Sec. 112(f) does not permit the recordings to be made or used, for example, under the face-to-face teaching exception, Sec. 110(1), though in the latter case such reproductions might well qualify as fair uses.⁸¹

Though public performances had been fully permitted under the state laws, the creation of ephemeral recordings in order to make those performances was, in many cases, not explicitly provided. Though Sec. 110 may be seen mostly as further restricting public performances of pre-1972 recordings, the inclusion of Sec. 112(f) is a minor change in the opposite direction.⁸² Between Secs 110(2) and 112(f), the law’s provisions for online teaching now apply equally to pre-1972 recordings as they do to copyrighted works.

f. Limitations on liability

• **Reduced penalties for honest mistakes**

Congress has identified actions which, while still copyright infringement, should be less harshly penalized or strictly enforced. These provisions play an important role in the risk management analysis many institutions conduct when determining how to proceed with a project. The CPAA applied two such provisions to pre-1972 recordings.

⁸⁰ Neither the law nor the legislative history includes discussion of what Congress intends by the term, “digital form.” Conflation of the terms, “analog,” and “physical” is a very common error, even among specialists, and it is possible that the drafters of this exception made the same mistake. However, absent guidance to the contrary, it is presumed here that Congress intended what it wrote, and that “digital form” includes physical media in digital formats, such as compact discs and digital audio tape.

⁸¹ Performances in live classroom situations are likely to be noninfringing, since in many cases they will not constitute digital audio transmissions. In those cases, creation of ephemeral recordings is presumably unnecessary in the first place.

⁸² The Act also incorporates the provision, in Sec. 112(g), clarifying that any transmissions made using the ephemeral copies exceptions may not themselves be considered copyrightable derivative works.

STATUTORY DAMAGE REMISSION

The CPAA applies civil penalties for infringement, as provided in Secs. 502–505, “to the same extent as an infringer of copyright.” This includes the statutory damages provisions in Sec. 504. However, Sec. 504 also removes the possibility of statutory damages when the infringement is committed by libraries, archives, or nonprofit educational institutions, and where the defendant can show a reasonable belief that the use was fair under Sec. 107. The provision does not require a court to litigate whether the use actually *was* fair, only whether the infringer “believed or had reasonable grounds for believing” that it was. Because infringements under the CPAA are treated as though they were infringements of copyright, this damage remission appears also to apply to pre-1972 recordings.

An additional damage remission provision, found in Sec. 412, is not included in the CPAA. However, an equivalent provision is included, and is discussed below under filing requirements (part **II.E**, page 31).

SEC. 512—SAFE HARBOR FOR ONLINE ENTITIES

The Digital Millennium Copyright Act placed limits on the liability of online service providers, such as YouTube or Vimeo, for content that is posted on their platforms by users of those platforms. This “safe harbor,” found in Sec. 512, is controversial and is the subject of heavy litigation as well as a recent study by the U.S Copyright Office and ongoing Congressional discussion.⁸³

2. Exceptions not included

Most of the explicit copyright exceptions that are relevant to sound recordings are included in the CPAA. However, the Act was not all inclusive. The Act omitted certain minor exceptions for making of ephemeral copies that might have been useful to sound recordings curators in unusual circumstances.

SEC. 112: EPHEMERAL COPIES

- **Partial application to pre-1972 recordings**

Though, as discussed above, the CPAA applies one such exception that allow institutions to make the copies needed to take advantage of the online teaching exception, the Act does not apply any other exceptions for ephemeral copies. Sec. 112 includes several additional provisions for ephemeral copies, including general permission to make ephemeral copies for any use of a copyrighted work (except an audiovisual work, such as a motion picture) that is permitted by a license. None of those additional exceptions apply with respect to pre-1972 recordings.

In particular, Sec. 112 includes two exceptions that apply to governmental bodies’ and nonprofit organizations’ use of sound recordings, neither of which are applicable to pre-1972 recordings:

- Under Sec. 112(b), institutions that engage in educational activities under Sec. 110(2) may also make copies of the transmissions themselves, possibly for retransmitting to future classes, including any copyrighted works contained therein.
- Sec. 112(c) allows qualifying institutions to make ephemeral copies of transmissions in order to retransmit those transmissions if they are also lawfully entitled to make the transmission.

⁸³ *Section 512 of Title 17: A report of the Register of Copyrights* (May 2020).
<https://www.copyright.gov/policy/section512/section-512-full-report.pdf>

Neither of these exceptions is available under the CPAA. Institutions making use of ephemeral copies of their broadcast teaching activities may not archive those classes for purposes of retransmission. However, as doing so may well constitute a fair use, the loss of these two exceptions is probably of only minor consequence.

D. THE “LAST 20 YEARS” RULE, EXPANDED

- Libraries and archives may reproduce, distribute, and perform recordings
- Applies to all pre-1972 recordings not subject to normal commercial exploitation
- Applies to published and unpublished recordings
- Requires a reasonable investigation (not subject to regulation)

Under the CPAA, the provisions of Section 108(h) of the Copyright Act apply with respect to all pre-1972 recordings. Section 108(h) allows libraries and archives to make extensive use of copyrighted published works that are in the last twenty years of their copyright term and are not being commercially exploited. The new law applies those provisions to all pre-1972 recordings, regardless of their term of protection and whether or not the recording has been published.

1. Section 108(h)

The copyright exceptions with respect to use by libraries and archives (also discussed above) include a special exception, which was added to the Sonny Bono Copyright Term Extension Act (CTEA) of 1998 as a compromise. The CTEA extended copyright terms by twenty years for all works that were not, at the time of enactment, in the public domain. As partial relief for the term extension, Congress added Sec. 108(h), which allows libraries some latitude to reproduce, distribute, perform, and display copyrighted works that are in the last twenty years of their copyright term.

The exception is not unlimited—it does not confer the same freedom to use works that would have existed had the works been allowed to enter the public domain. The exception is limited to works that are not being commercially exploited, and it is limited to uses that fall within the contexts of preservation, scholarship, and research. The exception is also limited to published works (though, as we shall see, not in the case of pre-1972 recordings).

Use of Section 108(h) requires a “reasonable search” to determine whether a work is subject to “normal commercial exploitation.” The statute does not define “commercial exploitation,” and so the term is subject to interpretation. The contours of a “reasonable search” are similarly undefined; however, if an unused copy can be obtained at a reasonable price, the Sec. 108(h) exception does not apply.⁸⁴

2. Section 1401(f)(1)(B)

Because the CPAA applies Sec. 108 to all covered activities, the “last twenty years” exception also applies to uses of pre-1972 recordings. However, the Act goes further by applying Sec. 108(h) to *all* pre-1972 recordings, not just those in the last twenty years of protection. It achieves this through a bit of statutory magic—a rule of construction—by redefining the phrase “the last 20 years of any term of copyright of a published work” to mean, in the context of pre-1972 recordings, “any time after the date of enactment [of the MMA].”

⁸⁴ In addition, Sec. 108(h) may not be applied if a copyright holder provides notice to the Copyright Office that their work is subject to commercial exploitation (whether or not it actually is). However, as of at least 2017 the Office had received no such notices. The Office has recommended that a future revision of Sec. 108 strike this third market check as being extraneous. United States Copyright Office. *Section 108 of Title 17: A discussion document of the Register of Copyrights* (September 2017), p. 44. <https://www.copyright.gov/policy/section108/discussion-document.pdf>

In addition, the statute expands the scope of coverage for Sec. 108(h) to include both published and unpublished pre-1972 recordings. For most classes of works, Sec. 108(h) applies only to published works. In the case of pre-1972 recordings, because of the way the statute was worded, it is clear that the new rule of construction means that Sec. 108(h) applies regardless of publication status.⁸⁵ Because of this, Sec. 108(h) may now prove especially useful to libraries and archives with extensive collections of unpublished recordings, such as archival recital or ethnographic recordings.

Unlike the noncommercial use provisions of Sec. 1401(c) (discussed in part **II.F**, page 33), Sec. 108(h) leaves the determination of eligibility to the user, without prescribing regulations for making determinations of commercial availability. Additionally, none of the requirements, regulations, or other oversight that are connected to Sec. 1401(c) are applicable under Sec. 108(h). As such, libraries and archives that qualify under Sec. 108(h) are unlikely to find any additional benefit from the Sec. 1401(c) noncommercial use provisions.

The expansion of Sec. 108(h) constitutes a unique instance where Congress expanded limitations and exceptions to copyright without simultaneously placing burdens on the use of those exceptions. The new rule raises the possibility of applications that may well extend beyond the reach of the fair use exception, with exciting implications for institutions seeking grants to make use of important historical recordings.

⁸⁵ See 2 *Nimmer on Copyright* 8.03[E][3][b] “As of 1998, the archival privilege during the last twenty years extended only to published works. As to old sound recordings, by contrast, the 2018 language dispenses with that requirement. The result is to expose unpublished pre-1972 sound recordings as well to immediate exploitation under the above dispensation.”

E. FILING REQUIREMENT AND STATUTORY LICENSING

- Directs the establishment of a Copyright Office database of pre-1972 recordings metadata
- Filing with the Copyright Office is required to be eligible for statutory damages and attorneys' fees
- Sec. 114 and 112 statutory licenses are available for pre-1972 recordings

Though the CPAA does not include the full gamut of registration requirements and statutory licensing that would have come with full federalization, the law does include some parallel provisions, and in some respects those provisions are improvements over those governing copyrighted works. The presence of these regulations represents a major, and largely unheralded improvement over the original CLASSICS Act, which contained no filing requirement and very little in the way of statutory licensing.

1. Filing with the Copyright Office

Owners of rights in pre-1972 sound recordings must file information on their recordings with the Copyright Office as a prerequisite to certain damages. Under the CPAA, courts may not award statutory damages or attorney's fees in any cases where the infringement involves a pre-1972 sound recording that is not indexed, or in any cases where the infringement occurs within 90 days of the date the recording was indexed.

This mostly mimics, and partially improves, the registration-based damage remission that applies to copyrighted works, including post-1972 sound recordings. Under sec. 412, a copyright owner cannot collect statutory damages or attorneys' fees in the infringement of an unregistered work when either the work was unpublished, or the work was published and not registered within 90 days of publication. Though the CPAA specifically declines to apply Sec. 412 to pre-1972 sound recordings,⁸⁶ the effect of the new filing requirement is functionally identical, with the exception that infringements within 90 days of the date a pre-1972 sound recording is indexed into the Copyright Office's records (or, where a notice of contact information has been filed, after the entity receives the notice) are also given damage remission.

The CPAA directs the Copyright Office to make the metadata it receives searchable by the public. The information collected is to be determined by the Office, but must include, at a minimum, the title and the names of the artist(s) and rights owner(s). Currently, in addition to the required information, the Office optionally collects the recordings' International Standard Recording Code (ISRC), alternate title and artist names, version, album title(s), label, rights holder contact information, and publication year.⁸⁷ The Office has created an online searchable database of this information.⁸⁸

2. Statutory licensing

As discussed above, the U.S. copyright law includes licensing schemes for music and sound recordings not found with respect to any other class of works. The CPAA essentially incorporates the two licensing regimes for sound recordings, found in Sec. 114 (public performance by digital transmission)

⁸⁶ 17 U.S.C. 1401(f)(5)(C).

⁸⁷ Instructions and forms for filing schedules of recordings may be found at the Copyright Office's website: <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/schedulefiling-instructions.html>

⁸⁸ The database may be found, here: <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html>

and Sec. 112 (ephemeral recordings). The intricacies of these licensing mechanisms are beyond the scope of this document; however, the CPAA provides that uses that would satisfy either of those statutory licenses in the case of post-1972 sound recordings, are now also considered licensed in the case of pre-1972 recordings.

F. NONCOMMERCIAL USES OF PRE-1972 RECORDINGS

- Provides a safe harbor for noncommercial use of pre-1972 sound recordings.
- Noncommercial is undefined.
- Requires a “good faith, reasonable search,” and notice of proposed use.
- Copyright Office regulation constitutes a maximum of what is required.
- Libraries and archives may wish to consider applying Sec. 108(h) first.

The CPAA introduces a new provision for the use of recordings that are not being commercially exploited. Sec. 1401(c) creates a process by which a user may identify and make use of eligible recordings, provided that the rights holder does not explicitly object. Uses that follow the process as outlined in the statute (and as further expanded upon by the Copyright Office) are non-infringing and are immune from damages for the duration of the use described in the notice.⁸⁹

1. Statutory Requirements

In order to qualify for the safe harbor, the statute requires the prospective user to follow each of the following steps:

- 1) **Search**—Make a “good faith, reasonable search” (see below) to determine whether the recording is being commercially exploited by the rights holder;
- 2) **Notice**—File a notice with the U.S. Copyright Office identifying the recording and describing the planned usage;⁹⁰ and
- 3) **Wait**—Allow 90 days from the date the notice is indexed in the Copyright Office’s records for the rights holder to object to the use.

GOOD FAITH SEARCH

Sec. 1401(c) demands that the prospective user engage in a “good faith, reasonable search” in order to qualify for the safe harbor. The statute provides two requirements for a good faith search:

- 1) A search of the Copyright Office’s database of pre-1972 sound recordings, and
- 2) A search in “services offering a comprehensive set of sound recordings for sale or streaming.”

COMMERCIAL EXPLOITATION

Neither the statute nor the Copyright Office defines the term, “commercial exploitation.” Based on its rulemaking, the Office understands the term to include, at a minimum, when a recording is available “for sale in download form or as a new (not resale) physical product, or through a streaming service.” However, the Office does not exclude the possibility that commercial exploitation might take other forms. Most digital music providers do not sell recordings so much as they sell licenses to use recordings. It may be presumed, though, that sale of such licenses also constitutes commercial exploitation under the Office’s understanding.

⁸⁹ Uses made under Sec. 1401(c) may still infringe copyright in pre-1972 recordings whose copyrights were restored under Sec. 104A. See part **II.G.3**, page 45, for discussion of pre-1972 recordings made outside the United States.

⁹⁰ Forms and instructions can be found, here:

<https://www.copyright.gov/music-modernization/pre1972-soundrecordings/NNUfiling-instructions.html>

NONCOMMERCIAL USE

Neither the statute nor the accompanying regulations define “noncommercial use.” The statute says only that recovering costs does not *necessarily* make the use commercial (meaning, by extension, that it could), and that commercial entities *may* make use of the safe harbor for noncommercial uses. The Copyright Office does not evaluate filings to determine whether the proposed use is, in fact noncommercial.⁹¹ This means that even a user that follows the steps prescribed by the statute may still be vulnerable to challenges that the use is commercial, including resultant litigation.

2. Copyright Office Regulation

Except as described above, the statute does not provide any guidance on what constitutes a good faith, reasonable search, but it directs the Copyright Office to add clarity through regulation. After rounds of public comments and *ex parte* meetings with interested parties), the Office released its final rule in April 2019.⁹²

The rule outlines what the Copyright Office describes as a progressive search—where a user follows each of the steps in order, and a positive result in any step indicates commercial exploitation. A user that completes all of the steps without a positive result may assume that the work is not commercially exploited and so can be used under the safe harbor provisions.

SUFFICIENT BUT NOT NECESSARY

The Rule is a way of determining with relative certainty whether a recording is eligible for use under Sec. 1401(c), but it is not the only way of making that determination. The statute specifies that the Copyright Office’s prescriptions are “sufficient, but not necessary” for satisfying the good faith requirement.⁹³ In other words, they do not constitute the only definition of “good faith, reasonable search.” This leaves open the possibility of arriving at other protocols that also satisfy the two statutory requirements.

Following the regulations does create safety, by guaranteeing that the statutory requirement is satisfied. However, some of the steps are problematic in that they are indicative of copyright ownership but not necessarily of commercial exploitation. A search that follows the Copyright Office’s guidelines might eliminate many recordings that would otherwise be eligible for use under the safe harbor. Potential users of Sec. 1401(c) may wish to develop their own policies for conducting good faith searches.

Following the Office’s rule ensures that a search qualifies, but a less extensive search may also qualify. The Office’s rule may thus be viewed as defining the maximum, rather than the minimum steps required to perform a good faith search. The individual steps are discussed in detail below.

⁹¹ The Copyright Office does not currently provide guidance on what constitutes commercial use; however, the Office stated in its rulemaking that, “[i]n addition to promulgating this rule, the Copyright Office intends to prepare additional public resources regarding Pre-1972 Sound Recordings and the new noncommercial use exception, such as a public circular.” 84 *Federal Register* 14242, 14243 (April 9, 2019).

⁹² The Office recorded the names of the parties with whom it met and published meeting summaries written by the parties on its website. <https://www.copyright.gov/rulemaking/pre1972-soundrecordings-noncommercial/ex-parte-communications.html>

⁹³ 17 USC 1401(c)(4)(B).

PRESCRIBED SEARCH STRATEGY

Though the techniques used to conduct a good faith search might preferably be left to the skill of the individual conducting the search, the rule does prescribe required elements of a search. The rule requires that each search include the following elements:

Required for all searches	Title
	Featured artist(s)
Required if known AND if the source has search capability	Alternate name(s) and title(s)
	Album title
	International Standard Recording Code (ISRC)

In the event that a Sec. 1401(c) usage is challenged by a rights holder, it seems very likely that the basis for that challenge will include the extent to which a search met the requirements for a good faith search. To the extent that a user is relying on the search rules outlined by this regulation, documentation of each of the searches of each element is advisable.

GOOD FAITH SEARCH

To satisfy the rule issued by the Copyright Office,⁹⁴ the prospective user must perform one search in each of six (or, in some cases, seven) categories:

	Category	Permissible options
1	U.S. Copyright Office	<u>The Copyright Office’s database of Pre-1972 Schedules</u>
2	Major Search Engine (choose one)	<u>Google</u>
		<u>Yahoo</u>
		<u>Bing</u>
3	Major Streaming Service (choose one)	<u>Amazon Music Unlimited</u>
		<u>Apple Music</u>
		<u>Spotify</u>
		<u>TIDAL</u>
4	YouTube (for authorized uses only)	<u>youtube.com</u>
5	SoundExchange	<u>The SoundExchange ISRC database</u>
6	Amazon (physical availability)	<u>Amazon.com</u>

⁹⁴ The rule can be found in the *Code of Federal Regulations*, 37 C.F.R 201.37.

The rule requires an additional search in two special cases:

- A user that has reason to believe that the recording is either classical or jazz⁹⁵ must search one additional catalogue from the following list:
 - [ArkivMusic](#)
 - [ArkivJazz](#)
 - [Classical Archives](#)
 - [Presto](#)
- For ethnographic native American (including native Alaskan) recordings, the user must contact both the holding institution (where appropriate, such as the library or archives) and the tribe to determine whether the recording is being commercially exploited.⁹⁶

Each of these steps is discussed, below.⁹⁷

a. Copyright Office's searchable database

One of the two statutory requirements for making use of Sec. 1401(c) is a search in the Copyright Office's database of pre-1972 recordings. In order to be eligible for statutory damages or attorneys' fees for infringement of Sec. 1401(a) protection, a recording's rights holders must file information about their recording using a form provided by the Copyright Office.⁹⁸ Those filings are entered into a searchable database, maintained on the Office's website.⁹⁹ If a recording is present in the database, it cannot be used under the Sec. 1401(c) provisions.

The database is a useful research tool, but the statutory requirement to make use of the database is unfortunate. Rights holders may register their recordings whether or not they are currently making commercial use of them, and so the database doesn't answer the question of whether a recording is being commercially exploited. The presence of a recording in the database does at least provide evidence that a rights holder has taken steps to protect their property, by allowing them to collect damages, but the recording may nonetheless be commercially unavailable in any form. Moreover, because there is no process by which entries expire and are removed when their commercial exploitation ceases, this problem will grow as the database ages and an increasing number of recordings that have been forgotten by their owners also have forgotten entries in the database. Rights holders may request that an entry be deleted, but only if the record was defective as submitted or the Copyright Office, in their discretion, accepts the request. In addition to the red tape, the \$75 fee assessed for file removal further disincentivizes requesting removal.¹⁰⁰

⁹⁵ These are the only two niche genres specified. True niche genres not listed do not have additional specified requirements.

⁹⁶ To find contact information for a tribe, the rule directs users to the Bureau of Indian Affairs' Tribal Leaders Directory: <https://www.bia.gov/tribal-leaders-directory>

⁹⁷ It is worth noting that commercial availability does not always amount to commercial exploitation by the rights holder. Recordings that are being exploited overseas, even when doing so legally in their home country, may nonetheless not be available through any source authorized by the rights holders. The statute is clear that commercial exploitation "under the authority of the rights owner" is the condition necessary to disqualify use under Sec. 1401(c). This presumably means that unauthorized exploitation such as that described above do not serve to disqualify a use, if it can be shown that the availability is unauthorized, though users should tread cautiously.

⁹⁸ Regulations for filing that information are found in 37 C.F.R. 201.35. More information can be found, here: <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/schedulefiling-instructions.html>

⁹⁹ <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html>

¹⁰⁰ The Office has stated that it "is open...to exploring the need and regulatory authority for...a renewal requirement for Pre-1972 Schedules (or NNUs) at a later date, perhaps in connection with periodic review of the search requirements promulgated under this rule." 84 *Federal Register* 1661, 1664 note 53 (Feb. 5, 2019).

The statutory direction to include this step may mean a decrease in the usefulness of the safe harbor. However, because searching the Copyright Office’s database is required by the statute, it cannot be omitted from the process of conducting a good faith search. If a recording is found in the database, even if it is not otherwise being exploited, it is not eligible for use. Any recording that is not in the database may nonetheless be commercially exploited for purposes of this process, requiring additional searching. It is worth noting that infringement in any such recording is not subject to statutory damages or attorney’s fees unless the infringement occurs more than 90 days after the recording is indexed in the recording is indexed.¹⁰¹

b. Search Engines

Under the Copyright Office regulations one of three search engines—Google, Bing, or Yahoo—must be used to try to locate commercial use of a recording. The rule specifies that a user need only use one of those three search engines.

Even searching in one search engine provides the opportunity for getting caught in a never-ending warren of search results. Recognizing this, the Copyright Office’s rulemaking clarifies that a search need only consider the first two pages of search results and that one need not conduct an extensive search in each of the links found. Rather, the Office states that in its opinion it is sufficient to read “the first 1–2 pages of results and [draw] reasonable inferences from those results, including following those links whose name or accompanying text suggest that commercial exploitation might be found there.”¹⁰²

c. Streaming services

The third requirement in the Copyright Office’s search prescriptions is a search in one of four major music streaming platforms: Amazon, Apple, Spotify and TIDAL. As with the search engine requirement, the user need pick only one of those services when conducting the search.

Sec. 1401(c) requires that a search be conducted in “services offering a comprehensive set of sound recordings for sale or streaming.” Given the statutory language, it is perhaps surprising that the rule directs a user to conduct a search in only one of four designated streaming services, since the catalogues of each service do not fully overlap. The Office justifies their decision by explaining that because most streaming services (including those not listed in this step) are indexed by search engines, the latter make searching in multiple streaming services’ databases unnecessary.

This is fortunate, since unlike some streaming services, search engines are free to use without the creation of an account.¹⁰³ On the other hand, because search engines index multiple streaming services, the requirement to search directly in one service after already consulting search engines seems redundant; perhaps in future rulemaking the Copyright Office will remove this step. In the meantime, those developing search protocols that do not rely on the Office’s prescription for good faith search might consider whether both this step and the previous search engine step are necessary.

¹⁰¹ 17 U.S.C. 1401(f)(5)(A)(i).

¹⁰² 84 *Federal Register* 14245, using wording suggested by the Electronic Frontier Foundation.

¹⁰³ As of this writing, Apple Music does not allow searching their database without first creating an account.

d. YouTube

Among content hosting platforms, the Copyright Office singled out YouTube as constituting a necessary stop in the search process. The Office’s discussion of the rule stipulates that the presence of authorized uses on YouTube is indicative of commercial exploitation. However, searching for commercial exploitation on YouTube presents special problems. Because the site’s content is entirely user-generated, it is not always obvious when the music on a given video actually constitutes an “authorized use.” During the rulemaking hearings, stakeholders debated the value of requiring a search on a site such as YouTube, and the Office’s findings are unsatisfying in many ways. Nonetheless, the Office did include searching in YouTube as a requirement for satisfying the rule.

As the Office notes in their final rulemaking, many labels and other rights holders have entered into licensing agreements with YouTube that allow music to be performed on the service. Where music is licensed on a video, searchers may find that licensing information by clicking on the “show more” link in the metadata section for the video, just above the comments (see **figure 2**).

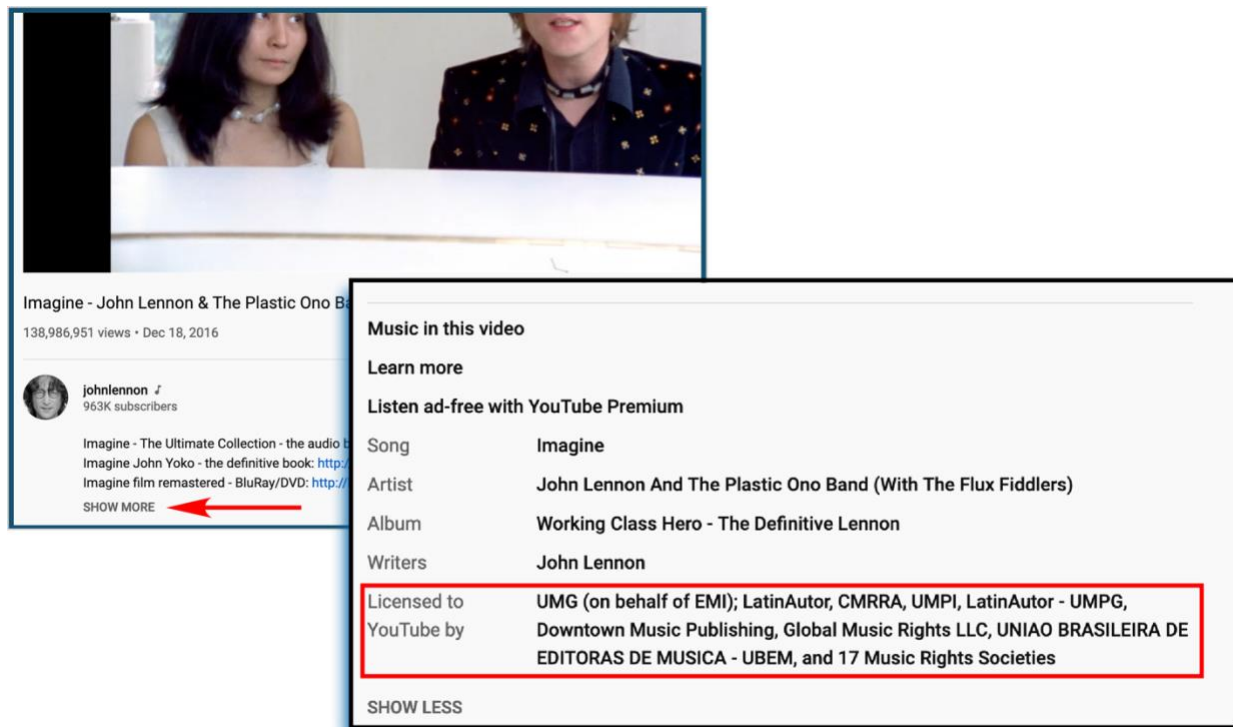


Figure 2: Finding licensing metadata on YouTube

The Copyright Office’s rulemaking report states that, “If a user locates the use of a Pre-1972 Sound Recording and the “Show More” option indicates that the work has been licensed, the user should consider the sound recording being commercially exploited.”¹⁰⁴

One problem with this direction is that the licensing information provided does not distinguish between music rights and sound recording rights. For example, **figure 2** shows that the content in one video of John Lennon’s *Imagine* is licensed to YouTube on behalf of more than two dozen rights holders. Without extra research, someone seeking to make a noncommercial use of the recording under Sec. 1401(c) would have no basis for knowing whether the licensing information refers to the

¹⁰⁴ 84 *Federal Register* 14242, 14247 (April 9, 2019).

rights to the song, the recording, or both. In this case, because the rights are held by two different parties, this is an important detail. The metadata give no reason to assume that both the musical work and the recording are licensed, nor do they include any basis for making that determination. YouTube’s automation of the detection of copyrighted content, being imperfect, makes it entirely possible that a video will make unauthorized use of a recording while making authorized use of the underlying work.

The Copyright Office does not provide guidance on how thorough a YouTube search must be to satisfy the requirement in this category. Presumably, the 1–2 page expectation of the search engine category is also sufficient here.

e. SoundExchange

The fifth stop in the Copyright Office rule is the SoundExchange ISRC database.¹⁰⁵ Like the Copyright Office’s database, the ISRC database is a useful general research tool, but it is not well-suited for determining the commercial status of a recording. By contrast, consultation of the SoundExchange database is not a statutory requirement, and so it is only required where compliance with the Copyright Office Rule is desired.

The International Standard Recording Code (ISRC) is the international standard identifier (ISO 3901) for sound recordings and music video recordings, comparable to the ISBN for books and the ISSN for serials.¹⁰⁶ A recording’s ISRC is unique—it is normally assigned to a recording prior to release and remains associated with that recording permanently. Crucially for pre-1972 recordings, it can also be assigned retroactively, and is often done so prior to rereleases.¹⁰⁷

The SoundExchange database aims to make ISRC information available that previously was not accessible by the public.¹⁰⁸ But just as ISBNs remain with their book in perpetuity, an ISRC remains associated with its recording long after the latter’s commercial value has dried up. The SoundExchange database does not make any attempt to maintain a representation of what recordings are currently being used by their rights holders—its goal appears to be to maintain as complete a database of ISRCs as possible.

Data in the SoundExchange database come from rights holders. The presence of a recording’s listing in the database provides evidence that a recording was commercially exploited once, and possibly even that it has potential to be in the future. A negative result when searching the database would, to be sure, provide strong evidence that a recording is eligible for the noncommercial use safe harbor. However, because the database does not (for good reason) purge records of recordings that are not commercially available, it does not provide evidence of current commercial use. For many users, then,

¹⁰⁵ SoundExchange is the collective rights management organization designated to collect royalties from statutory licenses of sound recordings.

¹⁰⁶ The use of “ISRC” in the database name is somewhat misleading, since the use of the ISRC is governed by the International Federation of the Phonographic Industry (IFPI) and the assigning agency for the USA is the Recording Industry Association of America (RIAA), not SoundExchange. The database therefore does not have any official connection with the ISRC and so is not the registry of record for ISRCs issued, despite being featured on the IFPI’s website. See “Frequently Asked Questions,” <https://isrc.soundexchange.com>

¹⁰⁷ <https://isrc.ifpi.org/en/using-isrc/when-to-assign>

¹⁰⁸ “SoundExchange Launches Public Search Website with Access to Industry’s Best ISRC Data” (March 8, 2016). <https://www.soundexchange.com/news/soundexchange-launches-public-search-website-with-access-to-industrys-best-isrc-data/>

the SoundExchange database may provide too many false positives to be useful in determining a recording's eligibility.

f. Physical availability

The availability of a physical copy of a recording for sale or rental clearly indicates commercial exploitation. The Copyright Office requires a search of Amazon.com in order to satisfy this step.

Note that Amazon provides sellers with the possibility of selling used copies of recordings, but the presence of used copies does not indicate commercial exploitation. Secondary markets cannot, by definition, be indicative of commercial activity on the part of a rights holder. The Copyright Office specifies that only new, unused copies should be considered for the purposes of determining whether a recording qualifies.

Similarly, any new copies sold on Amazon that are not being sold under the authorization of the rights holder are not evidence of commercial exploitation. Since this is a difficult and sometimes impossible determination to make, though, it is a reasonable caution to assume that all new, unused copies on Amazon are authorized.

CLASSICAL AND JAZZ RECORDINGS

The physical search requirement is extended in cases of classical music and jazz. In cases where the user “reasonably believes” the work is work falls into one of these categories (deemed “niche genres”), a user must additionally search the catalogues of one additional seller. For jazz recordings, the prescribed seller is ArkivJazz, and for classical recordings the user may pick from one of: ArkivMusic, Classical Archives, or Presto. The rulemaking discussion does not address the areas where these genres overlap, either with each other or with other genres such as blues or gospel; presumably prudence dictates an inclusive understanding of the genres.

g. Tribal recordings

The Rule requires, in the case of recordings made by or of Alaska Native and American Indian tribes, that a good faith search include contacting the appropriate tribal organization. There are many ethical reasons for including this step when considering making use of these recordings, and the standards and codes of conduct established by professional organizations that interact with or curate the work of indigenous people address these reasons at length.¹⁰⁹

Legally, Sec. 1401(c) is concerned with the commercial nature of recordings, and there is nothing in the statute that suggests this step is essential to the statutory test of commercial exploitation. The steps that professional integrity would demand of a responsible librarian or archivist would likely exceed the requirements in this step, but in considering only the narrow question of commerciality, this step does not seem essential, except where full compliance with the Rule is desired.

¹⁰⁹ See, for example, “Protocols for Native American Archival Materials.” <http://www2.nau.edu/libnap-p/>

3. Notice to the Copyright Office

To make use of the Sec. 1401(c) safe harbor, users must, in addition to conducting the good faith search, file a Notice of Noncommercial Use (NNU) with the Copyright Office. Simplified, a NNU must describe the recording, the nature of the proposed use, and the length of time that it will be used.¹¹⁰ Forms for filing NNUs can be found on the Copyright Office’s website. In addition, the form requires the user to certify having conducted a good faith search within the requirements of the statute.

The Copyright Office does not require documentation of a good faith search in the NNU. However, it is very advisable to retain screenshots and other evidence of a search in case it is challenged later.

The “dates of use” entry merits consideration, because the statute does not require that a noncommercial use be for a limited time. None of the Office’s regulations prescribe a maximum time period that a use may be made, nor do they make any provision for a ruling that a use is too long. Those making use of the noncommercial use safe harbor would be well-advised to err on the side of longer. Once the 90-day waiting period has elapsed, the use is fully protected and the rights holder may no longer opt out for the duration of the time period specified in the NNU, but once the proposed time expires, the user must re-file in order to gain protection. Users planning on using the Sec. 1401(c) provisions should choose an end date that safely exceeds the lifespan of the project.

Currently, filing of NNUs must be done on a recording-by-recording basis, except where the recordings were originally released as part of the same album or other unit of publication. Uses involving multiple pre-1972 recordings will require multiple NNUs, along with multiple filing fees. As the current fee for filing a NNU is \$50, this clearly will present a barrier for many potential users of Sec. 1401(c). In addition to the cost of performing searches, those planning on making use of the safe harbor will want to plan for the cost of filing fees for their use.

4. 90-day waiting period

Once the NNU is filed, the Copyright Office publishes the notice in an online, searchable public database.¹¹¹ If, within ninety days of the NNU’s publication, the rights holder objects to the proposed use by filing an “opt-out” notice with the Copyright Office, then the safe harbor protections are not available. The rights holder does not need to give any reason for the objection.

The statute demands that the good faith search must be made at some point before the end of this waiting period. However, the NNU form requires confirmation that the filer has already performed a good faith search at the time the NNU is filed. Though this is a contradiction, it appears unimportant, since common sense strongly advises performing a search prior to going through the expense of filing a notice.

¹¹⁰ More detailed instructions are here: <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/NNUfiling-instructions.html>

¹¹¹ As of this writing, the Office had not indexed any NNUs. Indexed NNUs will be available at this website: <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-NNUs.html>.

Bottom line

The noncommercial use provision has much in common with earlier attempts to create safe harbors for uses of orphan works, and also shares many of the failings of those attempts. The provision was introduced very late in the legislative process and the statute and subsequent rulemaking leave many unanswered questions. It is difficult to imagine that the provision will see wide-spread use.

As with all other provisions of the CPAA, the Sec. 1401(c) safe harbor does not apply to any underlying works. Any underlying musical (or literary) works, if under copyright, would still need to be licensed or used under an exception.

Librarians and archivists will almost never need to make use of the Sec. 1401(c) safe harbor, because the section 108(h) exception (see part **II.E**, page 31) provides broader license to make use of the recordings and fewer requirements. The only case in which librarians or archivists should look to Sec. 1401(c) is for uses that are not eligible under Sec. 108(h). Creation of derivative works, for example, is not permitted under Sec. 108(h), but would be permitted under Sec. 1401(c). Likewise, Sec. 1401(c) should be used for purposes that cannot be tied somehow to preservation, scholarship, or research, though those criteria create such a broad umbrella that most library and archives uses would qualify.

A non-librarian that needs explicit permission to make a noncommercial use might initially find this safe harbor provision attractive, though the individual would still have to license any underlying musical works that are not in the public domain. However, the use of 1401(c) requires a separate NNU—and its accompanying filing fee—for each recording. Any project that uses multiple recordings could quickly amass hundreds or thousands of dollars in filing fees, and those fees would be lost if the rights holder opts out.

Sec. 1401(c) is aimed at noncommercial uses, so almost by definition many uses that would be available under Sec. 1401(c) might also be presumptively fair. Given the disincentives in filing fees and red tape, users may wish to consider relying on the Sec. 107 fair use exception, allowing the individual to make their use without the accompanying wasted funds, instead of Sec. 1401(c). However, in instances where Sec. 108(h) is not applicable and a fair use defense is either not supportable or desirable, this option might allow uses that otherwise cannot move forward.

G. ADDITIONAL CONSIDERATIONS

- The CPAA provisions are similar to, but not the same as copyright.
- State laws may still affect the protection and use of pre-1972 recordings.
- CPAA application to recordings made outside the United States is unclear.
- The CPAA attempts to remove sovereign immunity, but recent litigation probably supersedes and invalidates that provision.
- The CPAA appears not to provide for criminal infringement.
- Bootleg recordings are not subject to any of the CPAA's exceptions.

1. Quasi-copyright nature of the CPAA

Though similar, the provisions of the CPAA do not constitute copyright. The CPAA makes clear in the amended Sec. 301(c) that no pre-1972 sound recording is subject to copyright under Title 17. The CPAA overlaps significantly, but not entirely, with copyright. The similarities may cause confusion. For many purposes the laws are similar enough that there is no appreciable difference with copyright, but there are edge cases where the differences could prove significant.

Strictly speaking, copyright is limited to those classes of works that fall within the scope of copyright as defined by sections 102–105 of the Copyright Act of 1976 as amended. Works within that scope are automatically incorporated into the full spectrum of copyright laws, including the exclusive rights in Secs 106 and 106A, limitations and exceptions (Secs. 107–122), formalities, damage provisions, trade restrictions, etc.

Though the scope of works covered by copyright is very broad, it is not all-inclusive. In recent years Congress has identified some classes of works that they determine need some form of protection, but rather than simply bringing them into the copyright system they have created special protection that apply some, but not all of the copyright laws. These special laws are found in individual chapters of Title 17, and they incorporate other parts of the Copyright Act only to the extent that they do so explicitly. The CPAA creates one such chapter, found in 17 USC 1401.¹¹²

Another example, found in 17 U.S.C. sec. 1101, is helpful as an illustration. Sec. 1101 addresses unauthorized recording of musical performances. A prerequisite of copyright is that, to be protected, a work must be “fixed in a tangible medium of expression.” Recordings of performances are, of course, a tangible medium, but performances themselves consist of unfixed sounds, and so are outside the scope of copyright. Prior to the Uruguay Round Agreements Act of 1994 (URAA), federal law did not restrict recording of live musical performances, except to the extent that copyrighted works were being performed. A public performance of, say, the Sonata no. 3 in F-minor by Johannes Brahms, could be recorded by a member of the audience without infringing any rights the performer had under federal law. Performers enjoyed protection against the creation of bootleg recordings only to the extent that those protections existed under the common law or state statutes.

The URAA created a new chapter in Title 17 that introduced federal protection against the creation of unauthorized fixations of live musical performances.¹¹³ Sec. 1101 prohibits creation of, or

¹¹² In addition to pre-1972 recordings, similar quasi-copyright chapters exist for semiconductor chips (Ch. 9), musical performances (Ch. 11), and vessel hull designs (Ch. 13).

¹¹³ *Uruguay Round Agreements Act*, Pub.L. 103–465, 108 Stat. 4809, enacted December 8, 1994.

trafficking in, recordings that are made without the consent of the performers, and subjects violators to the damage provisions found in Secs. 502–505 “to the same extent as an infringer of copyright.”¹¹⁴ Structurally, this wording means that bootleg recordings are not copyright infringement, though the penalties for infringing Sec. 1101 are similar. However, though works under copyright are subject to the full range of copyright law in chapters 1–8, sec. 1101 constitutes the entire law governing bootleg recordings except where explicitly stated otherwise. Practically, this means that bootleg recordings enjoy much stricter protection than copyrighted works. Among other differences, there is no limit to the term of protection nor any statute of limitations, they are not subject to the limitations and exceptions that copyrighted works are, and there is no requirement to register in order to pursue damages.

The CPAA creates similarly independent provisions for pre-1972 recordings, found in 17 USC 1401. Congress could simply have retroactively extended copyright to pre-1972 recordings, in which case all of the provisions in chapters 1–8 would have applied and the state laws would have been fully preempted. Among other things, this would mean that the authorship rules, registration requirements, and copyright termination provisions would also apply. Instead, the Act preempts some parts of the state laws, leaving the remainder in place, and replaces those preempted sections with federal provisions that are cherry picked from the copyright system.¹¹⁵ The result is that Sec. 1401 constitutes the entirety of federal law governing pre-1972 sound recordings. The federal laws governing copyrighted works apply to pre-1972 recordings only as explicitly provided for in Sec. 1401.

2. Relationship to state laws

Though the CPAA federalized the protection of pre-1972 sound recordings, the Act did not fully remove the oversight states have over the recordings. State laws, though greatly weakened, will still play a role in understanding pre-1972 sound recordings as intellectual property.

STATES MAY CREATE TERRESTRIAL BROADCAST RIGHTS

One important exception to the CPAA’s preemption of state laws is in the area of terrestrial broadcast. Under federal law, the exclusive right to perform a work publicly applies to sound recordings only in the case of digital transmissions. Analog performances, such as those made through AM/FM radio broadcasts, are non-infringing. Under the CPAA, it appears states may elect to create exclusive rights for analog broadcast transmissions.¹¹⁶ Currently, no states have done so. If and when they do, a recording’s protections may not extend past the expiration of their CPAA protection.

STATE LAWS CONTINUE TO DEFINE OWNERSHIP

Federal copyright law specifies that the “author” of a work is the initial owner of the copyright in that work.¹¹⁷ State laws, by contrast, do not have uniform language or even a unifying principle defining the owner of a sound recording.¹¹⁸ The CPAA does not address ownership of rights in pre-1972 recordings, except to say that the party that owned the rights to a recording prior to the Act continued

¹¹⁴ A related provision in 18 USC 2319A creates criminal penalties for unauthorized recordings.

¹¹⁵ 17 U.S.C. 1401(f)(6)(A): “...[N]o provision of this title shall apply to or limit the remedies available under this section except as otherwise provided in this section.”

¹¹⁶ 17 U.S.C 301(c) “Nothing in this subsection may be construed to affirm or negate the preemption of rights and remedies pertaining to any cause of action arising from the non-subscription broadcast transmission of sound recordings under the common law or statutes of any State for activities that do not qualify as covered activities under chapter 14...”

¹¹⁷ 17 U.S.C. 201.

¹¹⁸ This is not to say that federal law is clear on the matter. The meaning of the term, “author,” in the context of sound recordings is at best ambiguous; however, that question is beyond the scope of this document.

to own them after enactment.¹¹⁹ For most commercial recordings this will not present an issue, since ownership of most commercial recordings is defined by a contract. However, for all other recordings, the ownership is determined by the state copyright laws as they existed on October 10, 2020.

State laws use a variety of different theories for determining ownership. Most states employ the principle that the owner of the recording is the owner of the *sounds* contained in the recording (without defining who it is that owns them). Some states employ the otherwise obsolete principle that ownership of the rights follows ownership of the physical object (in this case, the master recording).¹²⁰ Some states additionally provide for ownership by the person who owns the rights to record or to authorize the recording of a live performance.¹²¹ Based on these differences, it is possible that at as many as three different parties could claim ownership to a given recording depending on the state. Though the CPAA federalized how sound recordings could be subject to royalties, it did not resolve who could collect them if there is disagreement.

3. Pre-1972 recordings made outside the United States

Prior to the MMA, not all pre-1972 recordings were ignored by federal copyright. As part of the Uruguay Round Agreements Act (URAA), Congress retroactively granted, or “restored,” copyright protection to works that had been in the public domain as a consequence of their national origin.¹²² Eligible pre-1972 recordings that were restored have been subject to federal law since the URAA went into effect, on December 8, 1994. The CPAA and URAA contradict each other, leaving an open question as to which takes precedence.

To be restored under the URAA, as codified in Sec. 104A, a work needed to meet each of the following conditions:

1. The work was not in the public domain in its country of origin;
2. The work was “in the public domain in the United States” for one or more reasons, which include “lack of subject matter protection in the case of sound recordings fixed before February 15, 1972;”¹²³
3. The work had at least one author who was a national or domiciliary of an eligible country; and
4. The source country was a signatory of the WIPO Performances and Phonograms Treaty (WPPT).

Any recording that met each of those conditions on the date the URAA went into effect was automatically fully covered by federal copyright.

¹¹⁹ 17 U.S.C. 1401(l)(2)(A).

¹²⁰ Those states are: Connecticut, Georgia, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, Oklahoma, Pennsylvania, Rhode Island, and possibly the District of Columbia. See Eric J. Harbeson, “Online Access to Institutional Recordings: An Analysis of Copyright Issues” (Thesis: C.A.S., University of Illinois, 2012), p. 37, fn 87. Paper available: http://scholar.colorado.edu/amrc_facpapers/2

¹²¹ Specifically: Alabama, Arizona, Arkansas, Florida, Illinois, Kansas, New Jersey, New York, North Carolina, Rhode Island, and Virginia. *Id.* at 38, fn. 89.

¹²² 17 U.S.C. 104A.

¹²³ Strictly speaking, pre-1972 recordings were never in the public domain, since protection under the various state laws is not dependent on place of origin; however, Congress’s intention to bring those recordings under federal copyright seems clear, despite this apparent oversight.

The URAA’s copyright restoration creates a problem for interpreting the CPAA. Prior to the MMA, the text in Sec. 301(c) that “no sound recording fixed before February 15, 1972, shall be subject to copyright under this title” was already in contradiction with the restoration provision in Sec. 104A, though the problem appears to have been largely academic. With the introduction of Sec. 1401, the contradictions have expanded, and so have their significance.

The problem is that Sec. 1401 creates user rights that do not exist elsewhere in Title 17. As discussed above, the provisions of the CPAA run parallel to—but are not a part of—copyright. In recordings with restored copyrights, those provisions overlap. It is not clear how the parallel provisions interact with each other.¹²⁴

A useful example is the application of library and archives exceptions. As discussed above, sec. 108(h) provides libraries and archives broad rights to reproduce, distribute, and perform works that are in their last 20 years of copyright if they are not being commercially exploited. Any published pre-1978 works that are still under copyright currently have a copyright term of 95 years from publication, and so sec. 108(h) applies to works more than 75 years old. Under Sec. 104A, restored pre-1972 sound recordings are subject to the same copyright as other copyrighted works, so the same rules apply. However, Sec. 1401 applies the Sec. 108(h) language to all pre-1972 recordings.

The question, then, is how to resolve the contradiction for pre-1972 recordings that are less than 75 years old. In 2021, libraries may apply Sec. 108(h) only to works other than recordings that were published before 1946, but under Sec. 1401, they may also apply the statute to all recordings fixed before February 15, 1972. May a library apply Sec. 108(h) to restored recordings fixed between 1946 and 1972?

Because foreign pre-1972 recordings have had full copyright protection, they have been limited to a 95-year copyright term; however, most pre-1972 recordings have longer protection under Sec. 1401(a). For example, recordings from 1947–56 have an effective protection term of 110 years from publication. Do foreign recordings from that era now have an additional 15 years of protection after their copyright expires?

The section 1401(c) provision creates a safe harbor for what amount to abandoned works; however, the Copyright Act has no equivalent provision for the use of those works. Will someone who makes use of a restored recording under Sec. 1401(c) be protected from litigation under this statute, or will that person still be liable for copyright infringement claims?

There is unfortunately no language in the statutes or elsewhere that provides definitive answers to these questions. During the U.S. Copyright Office’s rulemaking hearings for the noncommercial use provisions in Sec. 1401(c), stakeholders debated the question, but the Office declined to provide an interpretation, saying only that “prospective users of foreign Pre-1972 Sound Recordings should

¹²⁴ See, for example, 84 *Federal Register* 1661, 1670 (Feb. 5, 2019). “Section 1401 provides *sui generis* protection running parallel to any copyright protection afforded to foreign Pre-1972 Sound Recordings under section 104A. While section 1401(c) operates as a limitation on the protection available under that new chapter, it does not explicitly limit title 17 copyright protection for certain foreign restored works (i.e., copyright protection under section 104A). Whether the noncommercial use exception under section 1401(c) can immunize content actionable under title 17 for restored works that are foreign Pre-1972 Sound Recordings may ultimately be a matter for the courts to resolve.”

proceed cautiously before relying on the [section 1401 exceptions].”¹²⁵ Unless and until the question is litigated, this is likely the best guidance that we will have.

Because Sec. 108(h) and Sec. 1401(c) only apply to recordings that are not currently being commercially exploited, this question is unlikely to be litigated because the nature of the properties involved means they are unlikely to be valuable enough to merit the effort. However, institutions that are risk averse, or anyone relying on a recording’s public domain status would do well to consider the question. If, in the end, courts rule that the Sec. 1401 exceptions do not apply to foreign recordings, then it is very likely that a strong fair use defense will be available. Institutions or individuals that are uncomfortable applying fair use may wish to give extra thought to their use of pre-1972 recordings whose copyright has been restored under Sec. 104A.

4. Sovereign Immunity

The CPAA includes language subjecting states to infringement claims. However, similar language elsewhere in the Copyright Act has been struck down by the Supreme Court in March 2020, and so the CPAA’s language may presumably be ignored, at least for now. Many sound recordings collections are under the aegis of state institutions, and for those institutions the availability of the sovereign immunity defense has been an important failsafe in making copyright decisions.

The Eleventh amendment to the U.S. Constitution protects states from lawsuits brought by citizens of other states, while longstanding legal precedent extends that protection to include legal action brought by a state’s own citizens.¹²⁶ However, the state’s immunity is not absolute. Under the Fourteenth Amendment, Congress can, under the right circumstances, enact legislation that would allow nonconsenting states to be sued by citizens.

The CPAA attempts to create a new condition for states to be sued. The Act states that “anyone” who commits an unauthorized act is liable for monetary damages in line with copyright infringement, and Sec. 1401(a)(3) subsequently defines “anyone” to include:

...any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in the official capacity of the officer or employee, as applicable.¹²⁷

The clear intention is that states are liable for infringement of the CPAA. That understanding is reinforced later, in Sec. 1401(k), which makes clear that states are subject to the provisions as would be any nongovernmental entity. The Copyright Remedies Clarification Act of 1990 (CRCA),¹²⁸ found in 17 U.S.C. sec. 511, also attempted to place copyright liability on the states but has been struck down by the Supreme Court. In that light, it seems unlikely that this provision of the CPAA will withstand judicial review.

¹²⁵ U. S. Copyright Office. “Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited: Final Rule.” 84 *Federal Register* 14251 (April 9, 2019). The notice continues, “The Office will provide general guidance in its [Notice of Noncommercial Use] form instructions regarding the noncommercial use exception and the parallel protection afforded to certain foreign sound recordings, including how to search the Office’s records to determine whether a particular Pre-72 Sound Recording is a restored work under section 104A.”

¹²⁶ *Hans v. Louisiana*, 134 U.S. 1 (1890).

¹²⁷ 17 U.S.C. 1401(a)(3).

¹²⁸ *Copyright Remedies Clarification Act*, Pub. L. 101-553, 104 Stat. 2749 (1990).

Congress may deny states' sovereign immunity if two conditions are met. First, Congress must "enact unequivocal statutory language," explicitly declaring their intention to do so, and second, they must have a constitutional basis for their action.¹²⁹ In *Allen v. Cooper*, the Court held that Congress's constitutional authority to create copyright laws is not a valid basis for abrogating states' sovereign immunity.¹³⁰ The Court also rejected the argument that the Fifth Amendment's protection against taking of property without compensation (as extended to the states in the Fourteenth Amendment) formed a valid constitutional basis.

For the Fifth Amendment argument to succeed, Congress must show a proportional response to either an existing problem or a problem that is likely to present itself.¹³¹ In striking down the CRCA, the Court found that Congress was presented with evidence of neither—rather, the evidence suggested that states are generally good actors where copyright is concerned and, as such, are unlikely to engage in piratical behavior.¹³² In short, because there was no evidence of an existing problem of states abusing their authority, the Court found that Congress had exceeded their authority in enacting the legislation.

The CPAA does not appear to be based on any more evidence of wrongdoing by the states than was the CRCA. As of this writing, the Copyright Office is studying the question of whether copyright owners are experiencing excessive infringements by states, and the results of that study may affect the validity of Sec. 1401(a)(3) in light of *Allen*.¹³³ The CPAA's language may also fail under the "unequivocal language" requirement, in that unlike the CRCA, the CPAA does not explicitly state that it is abrogating the Eleventh Amendment. But at least until the Copyright Office study is released, it seems likely that the sovereign immunity language in the CPAA may be safely ignored.

5. Criminal infringement

The CPAA does not provide for criminal infringement of its protections. Though federal copyright includes both civil and criminal penalties, the CPAA does not apply the criminal provisions as defined in 17 U.S.C. 506. As a result, pre-1972 recordings are only the second class of works—the other being vessel hull designs—that are not protected by criminal statutes.

This omission creates a complete reversal of the state of protection of pre-1972 recordings. Prior to the CPAA's enactment, most of the state statutes that addressed pre-1972 recordings were exclusively criminal in nature, being primarily a response to systematic commercial record piracy.¹³⁴ By some

¹²⁹ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996).

¹³⁰ *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 636 (1999).

¹³¹ *Allen*, 140 S.Ct. at 1004: "an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause. And more: A State cannot violate that Clause unless it fails to offer an adequate remedy for an infringement, because such a remedy itself satisfies the demand of "due process." (internal citations omitted). See also, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) "Congress' enforcement power is remedial."

¹³² *Allen*, 140 S.Ct. at 1006: "Indeed, [then Register of Copyrights Ralph Oman] opined: 'They are all respectful of the copyright law' and 'will continue to respect the law'; what State, after all, would 'want to get a reputation as a copyright pirate?'"

¹³³ "Sovereign Immunity Study: Notice and request for public comment." 85 *Federal Register* 34252 (3 June 2020). After an extension, the comment period closed on October 22, 2020, with public round tables expected at a later date. <https://www.copyright.gov/policy/state-sovereign-immunity/>

¹³⁴ California was the exception, having both criminal and civil statutes in place. Indiana and Vermont did not have record piracy statutes in place at all. "State Criminal Laws: Pre-1972 Sound Recordings." https://www.copyright.gov/docs/sound/20111212_survey_state_criminal_laws_ARL_CO_v2.pdf

accounts, this form of infringement—and the need to preserve the state laws punishing it—was a primary motivation for Congress’s decision not to make the Sound Recordings Act retroactive in the first place.¹³⁵ Congress has always been concerned with criminal infringement, and the recording industry, whose lobbying heavily contributed to winning passage of the MMA, even more so. One might well wonder at whether the decision to omit criminal provisions was deliberate.

Whether deliberate or intentional, the impact is likely minimal on sound recordings collections and their curators, since criminal copyright infringement requires willfulness, commercial intent, and scale that is vanishingly rare in that community. However, it is worth making note of the change if only because of its remarkable nature. Congress has never before removed criminal penalties from the copyright landscape. More importantly, prior to CPAA criminal statutes were the only laws one could turn to for guidance on pre-1972 recordings in most states, and the exceptions for non-commercial activity were inconsistent at best. Now, the entire landscape is governed only by civil law.¹³⁶

6. Bootleg recordings

The CPAA applies to all pre-1972 sound recordings (except perhaps, as discussed above, foreign recordings), and the URAA’s bootleg laws (also discussed in part **II.G.1**, page 43) apply to all music recordings whose fixation was unauthorized. Pre-1972 bootlegs, it follows, are subject to both laws. However, since the protections exist independently of each other, the URAA’s more stringent protection largely supersedes the CPAA with respect to these recordings.

As discussed above, unauthorized, or bootleg recordings occupy a quasi-copyright space in the law that is similar to that created for pre-1972 recordings by the CPAA. Section 1101 (and a parallel criminal statute in 18 U.S.C. 2319A) prohibits, among other things, reproducing or trafficking in unauthorized recordings of musical performances. There are no term limits on the protection,¹³⁷ and there are no statutory exceptions.¹³⁸

Reproduction and distribution are also covered activities under the CPAA. However, though one might hope that its flexibility might provide some moderation to the bootleg laws, this is not the case. Because the laws are self-contained, the limitations and exceptions discussed elsewhere in this document apply only to the protections described in Sec. 1401(a). Even where the CPAA might otherwise allow for use of unauthorized recordings, those allowances do not extend to the similarly siloed prohibitions of Sec. 1101. Therefore, though the CPAA might provide for uses of pre-1972 bootleg recordings, the URAA’s prohibition takes precedence.

¹³⁵ See 1 *Nimmer on Copyright* § 2.10(B)(1)(a)(i).

¹³⁶ An important exception to this is bootleg recordings, discussed earlier (**II.G.1**, page 43 and in the next section).

¹³⁷ Though Sec. 1101 appears to violate the “limited times” requirement in the Constitution, the statute has survived challenge based on the argument that performances are unfixed and therefore not “writings” under the meaning of the Copyright Clause. See *Kiss Catalog v. Passport International Productions*, 405 F.Supp.2d 1169 (C.D. Cal, 2005), finding the statute is constitutional as a valid exercise of Congress’s power under the Commerce Clause.

¹³⁸ It is likely that the First Amendment requires some amount of room for fair use, though the courts have not yet considered this question; however, any fair use discussion would be based solely in common law, and would not necessarily follow the contours of cases surrounding the statutory fair use provision. See Craig W. Dallan, “The Anti-Bootlegging Provisions: Congressional power and Constitutional limitations,” *Vanderbilt Journal of Entertainment and Technology Law* 13/2 (Winter, 2011), 255–321 at 319: “Strong historical precedent supports a fair use defense. Fair use under copyright law was a common law doctrine, recognized by the courts for over a century, before Congress finally codified it in the Copyright Act of 1976. Similarly, fair use has long been a fundamental part of trademark law. The courts, likewise, should find a fair use defense for the anti-bootlegging provisions.”

It is worth noting that the URAA's bootleg prohibitions apply only to recordings of musical performances. Unauthorized recordings of literary works, such as poetry readings, would not fall under Sec. 1101, and therefore if fixed before Feb. 15, 1972 would be exclusively the subject of the CPAA.

TITLE III: ALLOCATIONS FOR MUSIC PRODUCERS ACT

- Codifies an informal practice for issuing direct payments to producers.
- Expands the practice for producers of recordings fixed before 1995.

Owners of rights to sound recordings (including, with the passage of the CPAA, pre-1972 recordings) have the exclusive right to authorize public performances of their works by digital transmission. That exclusive right is subject to two statutory licenses. Section 114 provides for a statutory license that is available to digital music services that broadcast music on a noninteractive basis (i.e., services where the user does not control what works are streamed) via cable, internet, or satellite networks. Sec. 112 provides an additional license that allows making ephemeral copies of the sound recordings for purposes of making use of the Sec. 114 license.

The licenses are managed by SoundExchange, a nonprofit collective management organization which was designated under the Small Webcaster Settlement Act of 2002 as the “nonprofit collective” responsible for collecting and distributing royalties from payment of licenses.¹³⁹ SoundExchange distributes the royalties under a statutorily prescribed formula: 50% of receipts are paid to the owner of the rights in the sound recording, and 45% are paid to the “recording artists or featured artists.” Two designated agents are respectively charged with distributing payments among nonfeatured instrumental musicians and nonfeatured singers. Each of these is allocated 2½% of the royalties.

In its music licensing study, the Copyright Office noted that “record producers—who make valuable creative contributions to sound recordings—are not among the parties entitled by statute to direct payment by SoundExchange.”¹⁴⁰ Instead, the report continues, producers’ contracts with one of the four statutorily designated parties form the basis of their royalties, and the producer is paid by that party out of royalties received. In some such cases, the parties have given written direction to SoundExchange to issue payments directly to the producers rather than indirectly through the statutory party (normally the featured artist).¹⁴¹

The AMP Act codifies this existing practice, formally directing SoundExchange to accept “letters of direction” from rights holders, allowing for direct royalty payments to producers, recording engineers, and mixers (collectively, “producers”). In addition, in the case of recordings fixed prior to November 1, 1995, the Act allows for producers to request payments in the absence of a letter of direction. In those cases, the producer makes a request to SoundExchange, which then attempts to contact the appropriate sound recording rights holder. If the rights holder does not object to the request within a specified timeframe, SoundExchange implements the payments.

The AMP Act ultimately has minimal impact on sound recordings collections. However, the Act may affect members of the larger sound recordings community, especially those who made creative technical contributions to recordings from before 1995.

¹³⁹ *Small Webcasters Settlement Act*, Pub. L. 107-321, 116 Stat. 2780, enacted Dec. 4, 2002.

<https://www.congress.gov/107/plaws/publ321/PLAW-107publ321.pdf>

¹⁴⁰ *Copyright and the Music Marketplace*, 7.

¹⁴¹ *Copyright and the Music Marketplace*, 47–48.

CASE STUDY: DISTRIBUTION OF INSTITUTIONAL SOUND RECORDINGS¹⁴²

To illustrate how the various pieces of the Music Modernization Act might be employed in practice, the following case study considers large sound archives. As was documented in *The State of Recorded Sound Preservation in the United States*, libraries and archives hold significant collections of audio material, a large portion of which might be considered endangered and in need of preservation. Circulating collections might be concentrated on published recordings on compact disc or 12-inch grooved discs, whereas archival recordings might include a mix of unpublished and published recordings on any of more than a dozen different formats that have been used in the more than 150 years since the first sound recordings appeared. Recordings found in archives might be individual recordings lightly scattered among boxes of primarily paper collections, or they may be focused collections consisting of thousands, or even hundreds of thousands of recordings.¹⁴³

Preservation of sound recordings is costly and time-consuming even before considering the legal ramifications. Rights issues have magnified that burden; however, the MMA improves the position of these institutions in two important ways. First, preservation projects depend on the confidence of administrators and granting agencies that a given project is compliant with the law and will not introduce liability. The MMA removes some of the vagaries that, in the past, may have caused cautious decision makers to defer audio preservation. Second, the MMA's provisions, in some cases, enable collection-level decisions, reducing the need for costly (and often wasteful) item-level rights tracking.

How might audio preservation be carried out differently, under the MMA? The answer depends (as it did prior to the MMA) principally on the intended end result.

Greatly simplified, audio preservation requires digital reproduction of a sound recording, after which the reproduction is made available to the public in some form. Each recording will generally implicate at least two sets of rights: those of the recording itself, and those of the work that comprises the recording.¹⁴⁴ The latter might involve a literary work such as a poem, a play, an interview, etc., but most will be musical works. For each of these two works—the sound recording and the underlying work—preservation activities affect as many as three different rights which the author or rights holder has the exclusive right to authorize. Those rights are the right to reproduce the work, and either or both of the right to distribute and the right to publicly perform the work.

Preservation activities, then, create numerous opportunities for infringement. Every reformatted or migrated recording introduces at least two possible counts (more if best practices for additional safety and access copies are followed) and every distribution or performance of the performance adds at least two more. Decision-making at the item level presents intractable time requirements in large

¹⁴² As with the rest of this document, this case study is not intended as legal advice but as an aid in framing the decision-making process in light of the new laws. Readers are urged to consult qualified legal counsel before moving forward with a project.

¹⁴³ For example, the Marr Sound Archives at the University of Missouri–Kansas City holds “over 380,000 items...[on] a wide range of audio formats including LPs, 78s, 45s, cylinders, transcription discs, instantaneous-cut discs, open reel tapes, CDs, and digital audio files.” <https://library.umkc.edu/marr/about>

¹⁴⁴ In the case of musical performances, the performers have rights independent of the recording, as discussed in the section on bootleg recordings, part **II.G.6**, page 49. For purposes of this case study, it is assumed that those rights were not infringed in the making of the recording.

collections. A large-scale project requires an approach that minimizes the number of analyses that need to be conducted and decisions to be made.

Case: academic music recordings

Goal: preservation, accessible on institutional scholarship repository

A common situation for many academic institutions is the presence of large collections of recordings generated in the day-to-day business of colleges, schools, and departments of music. These recordings may include recitals, some of which are given in partial fulfillment of degrees, curricular ensemble performances, guest lectures and performances, or stage performances of operas or musicals. Collections of such recordings may extend over decades, and exist typically on formats associated with master recordings, such as open reel tapes, digital audio tapes, or compact discs.

The unique nature of these recordings, combined with the vulnerability of the formats, may make recordings such as these high priorities for preservation. As the recordings form a historical record of scholarship at the institution (in some cases forming the equivalent of written theses and dissertations), a library or archives holding the recordings may wish to deposit the recordings in an online institutional scholarship repository. Since many institutional repositories are not capable of designating levels of access, the recordings might need to be made available to the public on an unrestricted basis.

There are many ways one might approach this problem. This analysis will consider the sound recordings and musical works separately, attempting to identify ways in which the MMA simplifies or better enables the process.¹⁴⁵

SOUND RECORDINGS

Turning first to the rights in the sound recordings, an archivist might seek a single theory that would allow all uses. One theory to consider is the possibility that the institution is either the owner or joint owner of the rights in the recording. Were that the case, the institution would have unrestricted use of the sound recordings.¹⁴⁶ There are a number of theories that might support this conclusion, including the institution as “producer” of the recording, the “work made for hire” doctrine, or even ownership of the physical master recordings. Unfortunately, the law does not make clear where the rights in a sound recording lie in the absence of the contracts that normally form a part of the commercial recording process. Federal law gives little to no guidance. The CPAA specifies that the owner of a pre-1972 sound recording is the party who owned the rights prior to passage of the Act, and so is based on one more applicable state laws. An institution that determines it owns all the sound recording rights need look no further for permission; however, this is a subtle question and one with many potential pitfalls.¹⁴⁷ The MMA does not add clarity to the question, but rather codifies the existing uncertainty.

¹⁴⁵ This document only considers copyright issues. Other potential legal issues, such as privacy and publicity rights (especially for celebrity musicians) and students’ rights under the Family Educational Rights and Privacy Act, are beyond the scope of this document, but would also demand consideration.

¹⁴⁶ Under U.S. Copyright Law, each joint owner has a fully independent right to use or to license others to use the work. The only responsibility each owner has to the others is to account for any profits from the use of the work. H.R. Rep. 94-1476 at 121.

¹⁴⁷ See Eric J. Harbeson, "Ownership in Institutional Sound Recordings." Paper presented: International Federation of Library Associations, Helsinki, Finland, August 14, 2012. Paper available: http://scholar.colorado.edu/amrc_facpapers/3/

Another usage theory that could apply to all proposed uses of the sound recordings is the fair use doctrine, Sec. 107. Here, the archivist would consider the four statutory factors that courts use to make fair use determinations. As with the ownership theory, fair use depends on the risk tolerance of the institution and a careful and informed judgment. A fair use analysis is not within the scope of this document, though the noncommercial nature of the recordings and the fact that they are unpublished and generally have low commercial value would all undoubtedly factor in. Very importantly, the CPAA newly ensures that consideration of fair use is valid for all recordings in the collection, including pre-1972 recordings.

If neither the fair use nor ownership theories are applicable, then the archivist needs to consider recordings in smaller groups. The next step might be to consider the recordings in two groups—those recorded on or after February 15, 1972 and those recorded before.

Pre-1972 sound recordings

With pre-1972 sound recordings, the archivist looks to the provisions of Sec. 1401. This is where one of the greatest benefits of the MMA is seen. The archivist turns first to Sec. 1401(f), which applies the Sec. 108 library and archives exceptions to the protection of pre-1972 recordings. Sec. 108(h) allows qualifying libraries and archives to reproduce, distribute, and perform published, copyrighted works “for purposes of preservation, scholarship, or research,” when they are in the last twenty years of their copyright term, provided that the works are not subject to commercial exploitation and are not available at a reasonable price. Sec. 1401(f) expands that provision by applying it to all pre-1972 sound recordings, whether or not they are “published.”

The archivist easily determines that the pre-1972 institutional recordings are not subject to normal commercial exploitation and are not available at any price (except, of course, by contacting the institution itself). The publication status of the recordings might be debatable, but in this case the law applies regardless. The archivist determines that the institutional repository is provided expressly for research and scholarship purposes. The law allows for reproduction, distribution and public performance—all of the potential rights that the process might infringe. As a result, the archivist determines that the law fully allows the institution to make the desired use of the sound recording itself. For those recordings, all that remains is to determine the legal issues surrounding the underlying musical works.

The simplicity and reliability of this determination under the MMA stands in stark contrast to the legal landscape it replaced. Prior to passage of the CPAA, the archivist would have to have considered relevant state laws where preservation copies were concerned, and for distribution possibly all of the state laws (because the online distribution creates potential infringement in every state). There was a high probability that fair use was available under state laws, but it was by no means certain how the law would have applied and whether the state courts would have followed the federal precedents.

Copyrighted (post-1972) sound recordings

For works that are fully subject to federal copyright—all pre-1972 recordings as well as foreign recordings whose copyright was restored by the URAA—the determination is not as straight forward. The MMA did not change any of the laws affecting protection of copyrighted sound recordings, and so the process is no different than it would have been prior to passage of the act.

For copyrighted sound recordings, there is no single unifying provision that can be applied. As such, the archivist might re-examine an ownership theory. One might create high level groupings of

recordings which the institution probably owns and those where it is less certain; for example, the archivist might argue that curricular ensembles, as works for hire, are almost certainly at least joint works (with the institution as one author), whereas by contrast a solo piano recital might be the sole property of the performer. This would allow the archivist to reduce the quantity of recordings requiring more detailed attention.

The archivist might determine whether in recent years some of the recordings are subject to agreements or other contracts—which some institutions require their students to sign upon matriculation—that grant the institution privileges that might include distribution of recordings. In addition, even if the institution was uncomfortable relying on fair use for the entirety of a project, they might reconsider whether fair use could be applied to any of the remaining items. Systems that do provide for different levels of access might make for more favorable fair use arguments. The archivist in this case might consider whether the risk to the collections of not proceeding outweighs any risk of a rights holder complaint, especially if precautions such as take-down mechanisms are put in place.

Regardless, the federal Sec. 108 exceptions still apply. No post-1972 recordings can be considered in the last 20 years of their copyright term (the earliest that will happen is 2047), so the “last twenty years” provision in Sec. 108(h) is not available. However, Sec. 108 does nonetheless provide for reproduction for the purposes of preservation (as does, almost certainly, the fair use exception), and also for making those recordings available on the premises of the institution.¹⁴⁸

MUSICAL WORKS

All of the recordings in the hypothetical collection of institutional recordings contain musical works. For the archivist working to move institutional recordings online, sound recordings are in many ways the easier of the two classes of works to manage. The recordings under consideration here generally do not have any particular market value, so it is reasonable to focus on ways that the project may proceed without permission. The CPAA encourages this through its unprecedented library exceptions.

The musical works contained in the recording are, by contrast, likely to consist of highly valuable commercial products. Where the rights in noncommercial, archival sound recordings do not, and likely cannot form a significant source of income to the rights holders, public performance rights form a major source of revenue for the authors of musical works. Because of this, the archivist may find that, instead of looking for permission-free solutions, the safer path is focusing on how the works may be provided under license.

This is not to say that looking at a fair use defense is impossible. As with sound recordings, provision of access to copyrighted musical works is subject to the limitations and exceptions in the Copyright Act, including fair use. The merits of a fair use argument in this scenario are outside the scope of this document; however, they would need to be weighed carefully, especially in light of the commercial value of the works and the existing markets for licensing them.

Prior to the MMA, licensing of musical works was possibly the biggest obstacle to the success of a project such as this. Being an interactive service under the law’s definitions, providing access through an online repository by permission required the institution to seek licenses on a work-by-work basis. Scaled to many thousands of recordings, this could be prohibitive for many institutions. The existence of a statutory blanket license for digital delivery of musical works, under the Musical Works

¹⁴⁸ 17 U.S.C. 108(b)–(c).

Modernization Act, simplifies the situation considerably. The new Sec. 115 license provides the authorizations needed for institutions to make recordings of copyrighted musical works available in a repository setting, provided that the institution is capable of providing the necessary reports to the Music Licensing Collective.

One potential obstacle for some recordings is the requirement that the initial recording have been made under the authority of the musical work's copyright owner.¹⁴⁹ For the most part, institutional recordings of the sort discussed here are created as documentary records of a performance, without intent to distribute them. Distribution requires a mechanical license, such as that discussed here. In most cases, there is no significant question as to whether a recording made for archival purposes is lawful. However, in some cases the institution may have agreed contractually not to record the performance, possibly as part of a rental agreement that is common with orchestral music. In any such case where a recording was made despite that agreement, the recording might be unlawfully made, and in that case the compulsory license would not be available.

The Sec. 115 compulsory license has one important limitation. The compulsory license applies only to nondramatic musical works, and there is no equivalent compulsory license for dramatic works. Therefore, even with the Sec. 115 license, the institution would still have to negotiate licenses to distribute any dramatic musical works, such as operas and musical theatre works.

CONCLUSION

To summarize: the MMA facilitates this hypothetical project in two ways. First, it ultimately removes the necessity to clear rights in any pre-1972 sound recordings through the expansion of the Sec. 108(h) exception for libraries and archives. Second, it facilitates licensing of nondramatic musical works through the creation of the Blanket License for Digital Use. The MMA did not change the law's treatment of copyrighted (i.e., post-1972) sound recordings, though the blanket license would allow licensing of the underlying nondramatic musical works. Finally, the law did not change for dramatic musical or non-musical works underlying either pre- or post-1972 sound recordings. The latter would require either direct licensing with the rights holder or, where appropriate, an exception such as fair use.

¹⁴⁹ 17 U.S.C. 115(a)(1)(A)(ii)(I).

Glossary of terms and acronyms

Agreement on Trade-Related Aspects of Intellectual Property (TRIPS): An international trade agreement administered by the World Trade Organization (WTO). The agreement requires WTO members to adhere to certain minimum requirements for intellectual property rights and enforcement. The agreement was negotiated through the General Agreement on Tariffs and Trade, and its provisions were codified in U.S. law by the *Uruguay Round Agreements Act* of 1994.

Allocation for Music Producers Act (AMP Act): May refer to Title III of the Orrin Hatch–Bob Goodlatte Music Modernization Act of 2018, signed into law as Pub. L. 115-264, or to its legislative predecessor, H.R. 881, introduced separately in 2017.

AMP Act: see Allocation for Music Producers Act.

BDL: see Blanket License for Digital Use

Berne Convention: Formally the Berne Convention for the Protection of Literary and Artistic Works, is the primary international treaty governing copyright, and administered by the World Intellectual Property Organization (WIPO). The treaty formalized the notion that a work under copyright in one country enjoys similar protection in all countries, and it dispensed with formalities (such as registration) as a prerequisite to protection. The Berne Convention entered into force for its first signatories on Dec. 5, 1887, and was last amended in 1979. The United States ratified the treaty in 1988 and implemented it with the Berne Convention Implementation Act, effective March 1, 1989.

Blanket license: In general, a contract that grants its licensee usage privileges to an entire body of works, rather than to a single specific work. See also: Blanket License for Digital Use.

Blanket License for Digital Use (BDL): the statutory blanket license, created by the MWMA and codified in 17 U.S.C. 115(d), which authorizes qualifying Digital Music Providers to provide Digital Phonorecord Deliveries.

CLASSICS Act: The predecessor of the Title II of the Orrin Hatch–Bob Goodlatte Music Modernization Act, introduced in 2017 as H.R. 3301. CLASSICS stands for Compensating Legacy Artists for their Songs Service and Important Contributions to Society.

Classics Protection and Access Act (CPAA): Title II of the Orrin Hatch–Bob Goodlatte Music Modernization Act of 2018, Pub. L. 115-264, which adds federal, quasi-copyright protection to pre-1972 sound recordings.

Compulsory license: A license, also known as a statutory license, that is made available by a governmental act and allows the licensee to make specified use of a work, contingent on payment of statutorily prescribed royalties.

Copyrighted sound recording: A recording that either (1) was fixed on or after February 15, 1972, or (2) has restored copyright under Sec. 104A.

Copyright Clause: Also known as the “Progress Clause.” The basis for federal intellectual property laws in the United States, found in Article I, Section 8, Clause 8 of the United States Constitution: “[Congress shall have the power] to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

Covered activity:

- In the Musical Works Modernization Act, refers to those activities that are authorized by the compulsory license provided under 17 U.S.C. 115.
- In the Classics Protection and Access Act, refers to any action to which the rights holders of pre-1972 sound recordings have the exclusive right to authorize. Equivalent to the exclusive rights provided to owners of copyrighted works in 17 U.S.C. 106.

CPAA: See Classics Protection and Access Act.

Digital Licensee Coordinator (DLC): the entity designated by the Register of Copyrights and responsible for coordinating activities of licensees. The DLC selects one nonvoting member of the Mechanical Licensing Collective (MLC).

Digital Music Provider (DMP): A person or entity who is eligible to make use of the blanket license created by the Musical Works Modernization Act, and who obtains such a license. To be eligible, a DMP must have a direct contractual (or similar) relationship with its subscribers, and the ability to report on revenues and usage.

DPD: See Digital Phonorecord Delivery.

Digital Performance Right in Sound Recordings Act (DPRA): An Act of Congress, Pub. L. 104-39, which created an exclusive right to publicly perform a copyrighted sound recording through means of a digital audio transmission.

Digital Phonorecord Delivery (DPD): an individual delivery of a phonorecord containing a sound recording to an individual recipient by means of a digital transmission. DPD may include both reproduction/distribution and public performance, and it may be achieved through permanent or limited phonorecord downloads, or through interactive streams. DPDs do not include noninteractive streams, and apply only to phonorecords (not to motion picture or audiovisual work sounds). 17 U.S.C. 115(e)(10).

Digital Transmission: legally, a “transmission in whole or in part in a digital or other non-analog format.” 17 U.S.C. 101.

DLC: see Digital License Coordinator.

DMP: see Digital Music Provider.

DPD: see Digital Phonorecord Delivery

DPRA: See Digital Performance Right in Sound Recordings Act.

Fair use doctrine: a legal doctrine holding that certain uses of copyrighted works do not constitute infringement even if they involve uses that are otherwise reserved as the exclusive right of the copyright holder. The doctrine has been a part of U.S. common law since the 1841 decision in *Folsom v. Marsh*, and was codified in 17 U.S.C. 107 by the 1976 Copyright Act.

First Sale doctrine: also called the exhaustion doctrine, holds that a copyright holder’s exclusive right to distribute a given copy of their work expires (or is exhausted) after the first authorized sale (or other permanent transfer) of that copy. The doctrine does not apply to distribution via rental, lease, lending, or other temporary distribution of a copy. The doctrine was first recognized by the Supreme Court in *Bobbs-Merrill v. Straus* (1908) and was codified in 17 U.S.C. 109 by the 1976 Copyright Act.

Interactive: In the context of streaming and other digital delivery services, an interactive service is one where the user determines which works are played, or when. A non-interactive service may be compared to the experience of a traditional radio broadcast, where the works performed are determined by the broadcaster, not the user.

Limited download: A digital download that is accessible to the user only for a limited period of time.

Mechanical license: a specialized form of reproduction/derivative work license that allows the licensee to create sound recordings (originally “mechanical” reproductions in the form of piano rolls) of a copyrighted (normally musical) work.

Mechanical Licensing Collective (MLC): The entity authorized by Congress and designated by the Register of Copyrights (with approval from the Librarian of Congress) to manage the blanket license created in the Musical Works Modernization Act, and to distribute accompanying royalty payments to right holders. 17 U.S.C. 115(e)(18)

MLC: See Music Licensing Collective.

Music Modernization Act (MMA): May refer to the Orrin Hatch–Bob Goodlatte Music Modernization Act (H.R. 1551, P.L.), which became law, or the Music Modernization Act (H.R. 4706), which formed the predecessor of Title I of H.R. 1551. In this document, MMA and Music Modernization Act refer to the passed law.

Musical Works Modernization Act (MWMA): Forms Title I of the Orrin Hatch–Bob Goodlatte Music Modernization Act of 2018. Also sometimes referred to as the Music Licensing Modernization Act.

Neighboring rights: see related rights.

Notice of license: A notice issued by a digital music provider (DMP) and to the Mechanical Licensing Collective (MLC) for purposes of obtaining a Sec. 115 blanket license.

Notice of Noncommercial Use (NNU): A notice filed with the U.S. Copyright Office expressing intent to make use of the noncommercial use provisions of Sec. 1401(c).

NNU: See Notice of Noncommercial Use

Phonorecord: a physical object that is embedded with or otherwise contains a sound recording, such as a disc, tape, or cylinder, or an electronic file containing a sound recording. The legal definition of phonorecord excludes any sounds that accompany motion pictures or other audiovisual works.

Pre-1972 sound recording: A sound recording which was first fixed in a physical medium on or before February 14, 1972.

Preemption: The doctrine under which a federal law may, when Congress so designates, supersede and replace any related state laws. The legal basis for preemption, known as the “Supremacy Clause” is found in Article VI, clause 2 of the U.S. Constitution and states that the federal law, including any treaties, is “the supreme law of the land.”

Public Performance: a performance of a work at “any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” Public performances also include transmissions to the public (i.e., a “substantial number of persons...”) whether or not the recipients receive the transmission in the same place or at the same time. 17 U.S.C. 101.

Publication is defined in Title 17 as, “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.”

Related rights: in the copyright context, related rights are intellectual property rights that in some countries are outside the scope of copyright due to the nature of the contribution. The contributions of performers, producers, and broadcasters are classified in some countries as related rights.

Sovereign immunity: the traditional legal doctrine that the crown (or the government) cannot be sued. In the United States, the basis for sovereign immunity is contained in the eleventh amendment to the United States Constitution, which provides that states may not be sued without their consent, though the Supreme Court has held that, in some circumstances, Congress may permit lawsuits against the states.

TEACH Act: See Technology, Education, and Copyright Harmonization Act.

Technology, Education, and Copyright Harmonization (“TEACH”) Act: Part of the 21st Century Department of Justice Appropriations Authorization Act of 2002. The law created an exception to the public performance right for teachers and students in distance education environments. The exception is found in 17 U.S.C. 101(2).

Terrestrial radio: Broadcasts which are made using analog, Amplitude Modulation (AM) or Frequency Modulation radio bands.

Transition period: The period of time following the term of protection established by the *Classics Protection and Access Act*, during which pre-1972 sound recordings continue to be subject to the protections in the Classics Protection and Access Act. The length of a transition period depends on the date of publication of the recording. (see 17 U.S.C. 1401(a)(2)(B))

TRIPS: See Agreement on Trade-Related Aspects of Intellectual Property.

URAA: See Uruguay Round Agreements Act.

Uruguay Round Agreements Act (URAA): An act of Congress, passed in 1994 as Pub. L. 104-39, that brought the United States into compliance with the agreements of the Uruguay Round of the General Agreement on Tariffs and Trade. The URAA effectively created federal copyright protection for foreign pre-1972 sound recordings.

WCT: See WIPO Copyright Treaty

WIPO: See World Intellectual Property Organization

WIPO Copyright Treaty (WCT): An international agreement, formally part of the Berne Convention, addressing authors rights in the digital environment. The United States ratified the treaty on September 14, 1999 and the treaty entered into force on March 6, 2002. As of this writing, 107 of the 193 WIPO member states were party to the treaty.

WIPO Performances and Phonograms Treaty (WPPT): An international treaty governing the rights of producers and performers on sound recordings. The United States ratified the treaty on September 14, 1999, and the treaty went into force on May 20, 2002. The USA implemented the treaty with the passage of the WIPO Copyright and Performances and Phonograms Implementation Act, Title I of the Digital Millennium Copyright Act of 1998. As of this writing, 106 of the 193 WIPO member states were party to the treaty.

World Intellectual Property Organization (WIPO): The United Nations specialized agency charged with administering most international agreements related to copyright, patents, trademarks, and other forms of intellectual property. <https://www.wipo.int>

WPPT: See WIPO Performances and Phonograms Treaty.

Resources

Music Licensing Consortium, Inc.

<https://www.themlc.com>

Tribal Leaders Directory (Bureau of Indian Affairs)

<https://www.bia.gov/tribal-leaders-directory>

Registering a pre-1972 sound recording (Copyright Office)

<https://www.copyright.gov/music-modernization/pre1972-soundrecordings/schedulefiling-instructions.html>

Searching the Copyright Office's schedules of pre-1972 sound recordings

<https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html>

Filing a Notice of Noncommercial Use

<https://www.copyright.gov/music-modernization/pre1972-soundrecordings/NNUfiling-instructions.html>

Bibliography

LEGISLATION

Orrin Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018)
<https://www.congress.gov/115/plaws/publ264/PLAW-115publ264.pdf>

Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995)

Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994)

Copyright Remedies Clarification Act, Pub. L. 101-553, 104 Stat. 2749 (1990)

An Act to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes, Pub. L. No. 92-140, 85 Stat. 391 (1971) (“Sound Recordings Act”)

Sonny Bono Copyright Term Extension Act. Pub L. 105-298, 112 Stat. 2827.

An Act for the general revisions of the Copyright Law, title 17 of the United States Code, and for other purposes. Pub. L. 94-553, 90 Stat. 2541.

21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273. Subtitle C, Sec. 13301: *Technology, Education, and Copyright Harmonization Act of 2002*. 116 Stat. 1910.

Respecting Senior Performers as Essential Cultural Treasures Act, H.R. 4772 (113th Congress)

Transparency in Music Licensing and Ownership Act, H.R. 3350 (115th Congress)

Omnibus Appropriations Act, Pub. L. 111-8, 123 Stat. 524, effective Mar. 11, 2009.

Sound Recording Simplification Act, H.R. 2933 (112th Congress)

Uruguay Round Agreements Act, Pub.L. 103–465, 108 Stat. 4809, enacted December 8, 1994

House report, H.R. Rep 92-487 (1971) (Sound Recording Act)

Senate report, S. Rep 115-339, “Music Modernization Act” (2018)
<https://www.congress.gov/115/crpt/srpt339/CRPT-115srpt339.pdf>

LITIGATION

Allen, et al., v. Cooper, Governor of North Carolina, et al., No. 18–877, slip op (S.Ct., Mar. 23, 2020)

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999)

La Cienega Music Company v. Z.Z. Top, 53 F.3d 950 (9th Cir., 2018)

Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 2016 WL 7349183 (N.Y. Dec. 20, 2016)

——— no. 15-1164 (2d Cir., 2017)

——— no. SC16-1161 (Fla. Oct. 26, 2017)

Golan v. Holder, 565 U.S. 302 (2012)

Kiss Catalog v. Passport International Productions, 405 F.Supp.2d 1169 (C.D.Cal, 2005)

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999)

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)

EMI Records Ltd. v. Premise Media Corp., 2008 N.Y. Misc. LEXIS 8213

Goldstein v. California, 412 U.S. 546 (1973)

Capitol Records, LLC v. Vimeo, LLC, 972 F. Supp. 2d 500 (2d Cir., 2013)

Capitol Records, Inc. v. Naxos of America, Inc., 4 N.Y. 3d 540 (2005)

BOOKS, REPORTS, ARTICLES

Besek, June M. *Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Unpublished Pre-1972 Sound Recordings by Libraries and Archives* (Council on Library and Information Resources, 2009)

———. *Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings By Libraries And Archives* (Council on Library and Information Resources, 2005)

Brooks, Tim. *Survey of Reissues of U.S. Recordings* (Council on Library and Information Resources, 2005)

Dallon, Craig W. “The Anti-Bootlegging Provisions: Congressional power and Constitutional limitations,” *Vanderbilt Journal of Entertainment and Technology Law* 13/2 (Winter, 2011), 255–321.

Epperson, Bruce “From The Statute of Anne To Z.Z. Top: The Strange World of American Sound Recordings, How it Came About, And Why it Will Never Go Away,” *J. Marshall Rev. Intell. Prop. L.* 15/1 (2015).

Feaster, Patrick. “Enigmatic Proofs: The archiving of Édouard-Léon Scott de Martinville’s phonautograms.” *Technology and Culture* 60/2supp (April, 2019), S14–S38, S15.

Halpern, Melvin L. “Sound Recording Act of 1971: An end to piracy on the high C’s.” *George Washington Law Review* 40/5 (July 1972), 964–994.

Harbeson, Eric J. "Ownership in Institutional Sound Recordings." Paper presented: International Federation of Library Associations, Helsinki, Finland, August 14, 2012. Paper available: http://scholar.colorado.edu/amrc_facpapers/3/

———. "Online Access to Institutional Recordings: An Analysis of Copyright Issues." Thesis: Certificate of Advanced Study (University of Illinois, 2012)

National Recording Preservation Board, *The State of Recorded Sound Preservation In The United States: A National Legacy At Risk In The Digital Age* (Council on Library and Information Resources and the Library of Congress, 2010). <https://www.loc.gov/static/programs/national-recording-preservation-plan/publications-and-reports/documents/pub148.pdf>

———. *The Library of Congress National Recording Preservation Plan* (Council on Library and Information Resources and the Library of Congress, 2012). <https://clir.wordpress.clir.org/wp-content/uploads/sites/6/pub156.pdf>

Program on Information Justice and Intellectual Property. *Protection For Pre-1972 Sound Recordings Under State Law And Its Impact On Use By Nonprofit Institutions: A 10-State Analysis* (Council on Library and Information Resources, 2009).

United States Copyright Office. Copyright and the Music Marketplace

———. *Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited: Final Rule*. 84 Federal Register 14251 (April 9, 2019)

———. *Section 108 of Title 17: A discussion document of the Register of Copyrights* (September, 2017), p. 44. <https://www.copyright.gov/policy/section108/discussion-document.pdf>

———. *The Making Available Right in the United States: A report of the Register of Copyrights*, February 2016. https://www.copyright.gov/docs/making_available/making-available-right.pdf

———. *Section 108 of Title 17: A discussion document of the Register of Copyrights* (September, 2017), p. 44. <https://www.copyright.gov/policy/section108/discussion-document.pdf>

———. *Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited: Final Rule*. 84 Federal Register 14251 (April 9, 2019)

Appendix A: Selected statutory texts

- Sec. 107
- Sec. 108
- Sec. 301
- Sec. 1401

§107: Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The “Four Factor test”

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

§108: Limitations on exclusive rights: Reproduction by libraries and archives

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if—

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- (2) the collections of the library or archives are
 - (i) open to the public, or
 - (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
- (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

Eligible libraries,
defined.

(b) The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for

Preservation of
unpublished works

research use in another library or archives of the type described by clause (2) of subsection (a), if—

- (1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and
- (2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.

- (c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if—

Preservation of published works

- (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and
- (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

- (d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

Patron copies of portions of articles or chapters

- (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
- (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

- (e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—

Patron copies of entire works

- (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
- (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

- (f) Nothing in this section—

- (1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises:

Provided, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

- (2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;
 - (3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or
 - (4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.
- (g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—
- (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
 - (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): Provided, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.
- (h)
- (1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.
 - (2) No reproduction, distribution, display, or performance is authorized under this subsection if—
 - (A) the work is subject to normal commercial exploitation;
 - (B) a copy or phonorecord of the work can be obtained at a reasonable price; or
 - (C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.
 - (3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.
- (i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works

The AV news media
exception

The “last 20 years”
exception
(cf. Sec. 1401(f))

published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

§301: Preemption with respect to other laws

- (c) Notwithstanding the provisions of section 303, and in accordance with chapter 14, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title. With respect to sound recordings fixed before February 15, 1972, the preemptive provisions of subsection (a) shall apply to activities that are commenced on and after the date of enactment of the Classics Protection and Access Act. Nothing in this subsection may be construed to affirm or negate the preemption of rights and remedies pertaining to any cause of action arising from the nonsubscription broadcast transmission of sound recordings under the common law or statutes of any State for activities that do not qualify as covered activities under chapter 14 undertaken during the period between the date of enactment of the Classics Protection and Access Act and the date on which the term of prohibition on unauthorized acts under [section 1401\(a\)\(2\)](#) expires for such sound recordings. Any potential preemption of rights and remedies related to such activities undertaken during that period shall apply in all respects as it did the day before the date of enactment of the Classics Protection and Access Act.

§ 1401: Unauthorized use of pre-1972 sound recordings

(a) In General.—

- (1) **Unauthorized acts.**—Anyone who, on or before the last day of the applicable transition period under paragraph (2), and without the consent of the rights owner, engages in covered activity with respect to a sound recording fixed before February 15, 1972, shall be subject to the remedies provided in [sections 502 through 505](#) and [1203](#) to the same extent as an infringer of copyright or a person that engages in unauthorized activity under chapter 12.

Covered activities

(2) Term of prohibition.—

(A) In general.—The prohibition under paragraph (1)—

- (i) subject to clause (ii), shall apply to a sound recording described in that paragraph—
(I) through December 31 of the year that is 95 years after the year of first publication; and
(II) for a further transition period as prescribed under subparagraph (B) of this paragraph; and
(ii) shall not apply to any sound recording after February 15, 2067.

(B) Transition periods.—

- (i) **Pre-1923 recordings.**—In the case of a sound recording first published before January 1, 1923, the transition period described in subparagraph (A)(i)(II) shall end on December 31 of the year that is 3 years after the date of enactment of this section.
- (ii) **1923–1946 recordings.**—In the case of a sound recording first published during the period beginning on January 1, 1923, and ending on December 31, 1946, the transition period described in subparagraph (A)(i)(II) shall end on the date that is 5 years after the last day of the period described in subparagraph (A)(i)(I).
- (iii) **1947–1956 recordings.**—In the case of a sound recording first published during the period beginning on January 1, 1947, and ending on December 31, 1956, the transition

Duration of protection

period described in subparagraph (A)(i)(II) shall end on the date that is 15 years after the last day of the period described in subparagraph (A)(i)(I).

(iv) **Post-1956 recordings.**—In the case of a sound recording fixed before February 15, 1972, that is not described in clause (i), (ii), or (iii), the transition period described in subparagraph (A)(i)(II) shall end on February 15, 2067.

(3) **Rule of construction.**—For the purposes of this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in the official capacity of the officer or employee, as applicable.

(b) **Certain Authorized Transmissions and Reproductions.**—A public performance by means of a digital audio transmission of a sound recording fixed before February 15, 1972, or a reproduction in an ephemeral phonorecord or copy of a sound recording fixed before February 15, 1972, shall, for purposes of subsection (a), be considered to be authorized and made with the consent of the rights owner if—

(1) the transmission or reproduction would satisfy the requirements for statutory licensing under [section 112\(e\)\(1\)](#) or [section 114\(d\)\(2\)](#), or would be exempt under [section 114\(d\)\(1\)](#), as the case may be, if the sound recording were fixed on or after February 15, 1972; and

(2) the transmitting entity pays the statutory royalty for the transmission or reproduction pursuant to the rates and terms adopted under [sections 112\(e\)](#) and [114\(f\)](#), and complies with other obligations, in the same manner as required by regulations adopted by the Copyright Royalty Judges under [sections 112\(e\)](#) and [114\(f\)](#) for sound recordings that are fixed on or after February 15, 1972, except in the case of a transmission that would be exempt under section 114(d)(1).

(c) **Certain Noncommercial Uses of Sound Recordings That Are Not Being Commercially Exploited.**—

(1) **In general.**—Noncommercial use of a sound recording fixed before February 15, 1972, that is not being commercially exploited by or under the authority of the rights owner shall not violate subsection (a) if—

Noncommercial use safe harbor

(A) the person engaging in the noncommercial use, in order to determine whether the sound recording is being commercially exploited by or under the authority of the rights owner, makes a good faith, reasonable search for, but does not find, the sound recording—

(i) in the records of schedules filed in the Copyright Office as described in subsection (f)(5)(A); and

(ii) on services offering a comprehensive set of sound recordings for sale or streaming;

(B) the person engaging in the noncommercial use files a notice identifying the sound recording and the nature of the use in the Copyright Office in accordance with the regulations issued under paragraph (3)(B); and

(C) during the 90-day period beginning on the date on which the notice described in subparagraph (B) is indexed into the public records of the Copyright Office, the rights owner of the sound recording does not, in its discretion, opt out of the noncommercial use by filing notice thereof in the Copyright Office in accordance with the regulations issued under paragraph (5).

(2) **Rules of construction.**—For purposes of this subsection—

(A) 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;

(B) the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial; and

- (C) the fact that a person files notice of a noncommercial use of a sound recording in accordance with the regulations issued under paragraph (3)(B) does not itself affect any limitation on the exclusive rights of a copyright owner described in [section 107](#), [108](#), [109](#), [110](#), or [112\(f\)](#) as applied to a claim under subsection (a) of this section pursuant to subsection (f)(1)(A) of this section.
- (3) **Notice of covered activity.**—Not later than 180 days after the date of enactment of this section, the Register of Copyrights shall issue regulations that—
- (A) provide specific, reasonable steps that, if taken by a filer, are sufficient to constitute a good faith, reasonable search under paragraph (1)(A) to determine whether a recording is being commercially exploited, including the services that satisfy the good faith, reasonable search requirement under paragraph (1)(A) for purposes of the safe harbor described in paragraph (4)(A); and
- (B) establish the form, content, and procedures for the filing of notices under paragraph (1)(B).
- (4) **Safe harbor.**—
- (A) **In general.**—A person engaging in a noncommercial use of a sound recording otherwise permitted under this subsection who establishes that the person made a good faith, reasonable search under paragraph (1)(A) without finding commercial exploitation of the sound recording by or under the authority of the rights owner shall not be found to be in violation of subsection (a).
- (B) **Steps sufficient but not necessary.**—Taking the specific, reasonable steps identified by the Register of Copyrights in the regulations issued under paragraph (3)(A) shall be sufficient, but not necessary, for a filer to satisfy the requirement to conduct a good faith, reasonable search under paragraph (1)(A) for purposes of subparagraph (A) of this paragraph.
- (5) **Opting out of covered activity.**—
- (A) **In general.**—Not later than 180 days after the date of enactment of this section, the Register of Copyrights shall issue regulations establishing the form, content, and procedures for the rights owner of a sound recording that is the subject of a notice under paragraph (1)(B) to, in its discretion, file notice opting out of the covered activity described in the notice under paragraph (1)(B) during the 90-day period beginning on the date on which the notice under paragraph (1)(B) is indexed into the public records of the Copyright Office.
- (B) **Rule of construction.**—The fact that a rights holder opts out of a noncommercial use of a sound recording by filing notice thereof in the Copyright Office in accordance with the regulations issued under subparagraph (A) does not itself enlarge or diminish any limitation on the exclusive rights of a copyright owner described in [section 107](#), [108](#), [109](#), [110](#), or [112\(f\)](#) as applied to a claim under subsection (a) of this section pursuant to subsection (f)(1)(A) of this section.
- (6) **Civil penalties for certain acts.**—
- (A) **Filing of notices of noncommercial use.**—Any person who willfully engages in a pattern or practice of filing a notice of noncommercial use of a sound recording as described in paragraph (1)(B) fraudulently describing the use proposed, or knowing that the use proposed is not permitted under this subsection, shall be assessed a civil penalty in an amount that is not less than \$250, and not more than \$1000, for each such notice, in addition to any other remedies that may be available under this title based on the actual use made.

- (B) **Filing of opt-out notices.**—
- (i) **In general.**—Any person who files an opt-out notice as described in paragraph (1)(C), knowing that the person is not the rights owner or authorized to act on behalf of the rights owner of the sound recording to which the notice pertains, shall be assessed a civil penalty in an amount not less than \$250, and not more than \$1,000, for each such notice.
 - (ii) **Pattern or practice.**—Any person who engages in a pattern or practice of making filings as described in clause (i) shall be assessed a civil penalty in an amount not less than \$10,000 for each such filing.
- (C) **Definition.**—For purposes of this paragraph, the term “knowing”—
- (i) does not require specific intent to defraud; and
 - (ii) with respect to information about ownership of the sound recording in question, means that the person—
 - (I) has actual knowledge of the information;
 - (II) acts in deliberate ignorance of the truth or falsity of the information; or
 - (III) acts in grossly negligent disregard of the truth or falsity of the information.
- (d) **Payment of Royalties for Transmissions of Performances by Direct Licensing of Statutory Services.**—
- (1) **In general.**—A public performance by means of a digital audio transmission of a sound recording fixed before February 15, 1972, shall, for purposes of subsection (a), be considered to be authorized and made with the consent of the rights owner if the transmission is made pursuant to a license agreement voluntarily negotiated at any time between the rights owner and the entity performing the sound recording.
 - (2) **Payment of royalties to nonprofit collective under certain license agreements.**—
 - (A) **Licenses entered into on or after date of enactment.**—To the extent that a license agreement described in paragraph (1) entered into on or after the date of enactment of this section extends to a public performance by means of a digital audio transmission of a sound recording fixed before February 15, 1972, that meets the conditions of subsection (b)—
 - (i) the licensee shall, with respect to such transmission, pay to the collective designated to distribute receipts from the licensing of transmissions in accordance with [section 114\(f\)](#), 50 percent of the performance royalties for that transmission due under the license; and
 - (ii) the royalties paid under clause (i) shall be fully credited as payments due under the license.
 - (B) **Certain agreements entered into before enactment.**—To the extent that a license agreement described in paragraph (1), entered into during the period beginning on January 1 of the year in which this section is enacted and ending on the day before the date of enactment of this section, or a settlement agreement with a preexisting satellite digital audio radio service (as defined in [section 114\(j\)](#)) entered into during the period beginning on January 1, 2015, and ending on the day before the date of enactment of this section, extends to a public performance by means of a digital audio transmission of a sound recording fixed before February 15, 1972, that meets the conditions of subsection (b)—
 - (i) the rights owner shall, with respect to such transmission, pay to the collective designated to distribute receipts from the licensing of transmissions in accordance with [section 114\(f\)](#) an amount that is equal to the difference between—
 - (I) 50 percent of the difference between—

- (aa) the rights owner’s total gross performance royalty fee receipts or settlement monies received for all such transmissions covered under the license or settlement agreement, as applicable; and
 - (bb) the rights owner’s total payments for outside legal expenses, including any payments of third-party claims, that are directly attributable to the license or settlement agreement, as applicable; and
 - (II) the amount of any royalty receipts or settlement monies under the agreement that are distributed by the rights owner to featured and nonfeatured artists before the date of enactment of this section; and
 - (ii) the royalties paid under clause (i) shall be fully credited as payments due under the license or settlement agreement, as applicable.
- (3) **Distribution of royalties and settlement monies by collective.**—The collective described in paragraph (2) shall, in accordance with [subparagraphs \(B\) through \(D\) of section 114\(g\)\(2\)](#), and [paragraphs \(5\) and \(6\) of section 114\(g\)](#), distribute the royalties or settlement monies received under paragraph (2) under a license or settlement described in paragraph (2), which shall be the only payments to which featured and nonfeatured artists are entitled by virtue of the transmissions described in paragraph (2), except for settlement monies described in paragraph (2) that are distributed by the rights owner to featured and nonfeatured artists before the date of enactment of this section.
- (4) **Payment of royalties under license agreements entered before enactment or not otherwise described in paragraph (2).**—
- (A) **In general.**—To the extent that a license agreement described in paragraph (1) entered into before the date of enactment of this section, or any other license agreement not as described in paragraph (2), extends to a public performance by means of a digital audio transmission of a sound recording fixed before February 15, 1972, that meets the conditions of subsection (b), the payments made by the licensee pursuant to the license shall be made in accordance with the agreement.
 - (B) **Additional payments not required.**—To the extent that a licensee has made, or will make in the future, payments pursuant to a license as described in subparagraph (A), the provisions of paragraphs (2) and (3) shall not require any additional payments from, or additional financial obligations on the part of, the licensee.
 - (C) **Rule of construction.**—Nothing in this subsection may be construed to prohibit the collective designated to distribute receipts from the licensing of transmissions in accordance with [section 114\(f\)](#) from administering royalty payments under any license not described in paragraph (2).
- (e) **Preemption With Respect to Certain Past Acts.**—
- (1) **In general.**—This section preempts any claim of common law copyright or equivalent right under the laws of any State arising from a digital audio transmission or reproduction that is made before the date of enactment of this section of a sound recording fixed before February 15, 1972, if—
 - (A) the digital audio transmission would have satisfied the requirements for statutory licensing under [section 114\(d\)\(2\)](#) or been exempt under [section 114\(d\)\(1\)](#), or the reproduction would have satisfied the requirements of [section 112\(e\)\(1\)](#), as the case may be, if the sound recording were fixed on or after February 15, 1972; and
 - (B) either—
 - (i) except in the case of a transmission that would have been exempt under [section 114\(d\)\(1\)](#), not later than 270 days after the date of enactment of this section, the transmitting entity pays statutory royalties and provides notice of the use of the

relevant sound recordings in the same manner as required by regulations adopted by the Copyright Royalty Judges for sound recordings that are fixed on or after February 15, 1972, for all the digital audio transmissions and reproductions satisfying the requirements for statutory licensing under [sections 112\(e\)\(1\)](#) and [114\(d\)\(2\)](#) during the 3 years before that date of enactment; or

- (ii) an agreement voluntarily negotiated between the rights owner and the entity performing the sound recording (including a litigation settlement agreement entered into before the date of enactment of this section) authorizes or waives liability for any such transmission or reproduction and the transmitting entity has paid for and reported such digital audio transmission under that agreement.

(2) **Rule of construction for common law copyright.**—For purposes of paragraph (1), a claim of common law copyright or equivalent right under the laws of any State includes a claim that characterizes conduct subject to that paragraph as an unlawful distribution, act of record piracy, or similar violation.

(3) **Rule of construction for public performance rights.**—Nothing in this section may be construed to recognize or negate the existence of public performance rights in sound recordings under the laws of any State.

(f) **Limitations on Remedies.**—

(1) **Fair use; uses by libraries, archives, and educational institutions.**—

(A) **In general.**—The limitations on the exclusive rights of a copyright owner described in [sections 107, 108, 109, 110, and 112\(f\)](#) shall apply to a claim under subsection (a) with respect to a sound recording fixed before February 15, 1972.

Limitations and exceptions

(B) **Rule of construction for section 108(h).**—With respect to the application of [section 108\(h\)](#) to a claim under subsection (a) with respect to a sound recording fixed before February 15, 1972, the phrase “during the last 20 years of any term of copyright of a published work” in such [section 108\(h\)](#) shall be construed to mean at any time after the date of enactment of this section.

“Last 20 years” rule, expanded

(2) **Actions.**—The limitations on actions described in [section 507](#) shall apply to a claim under subsection (a) with respect to a sound recording fixed before February 15, 1972.

(3) **Material online.**—[Section 512](#) shall apply to a claim under subsection (a) with respect to a sound recording fixed before February 15, 1972.

(4) **Principles of equity.**—Principles of equity apply to remedies for a violation of this section to the same extent as such principles apply to remedies for infringement of copyright.

(5) **Filing requirement for statutory damages and attorneys’ fees.**—

(A) Filing of information on sound recordings.—

(i) **Filing requirement.**—Except in the case of a transmitting entity that has filed contact information for that transmitting entity under subparagraph (B), in any action under this section, an award of statutory damages or of attorneys’ fees under [section 504](#) or [505](#) may be made with respect to an unauthorized use of a sound recording under subsection (a) only if—

Registration required for certain damage awards

- (I) the rights owner has filed with the Copyright Office a schedule that specifies the title, artist, and rights owner of the sound recording and contains such other information, as practicable, as the Register of Copyrights prescribes by regulation; and

- (II) the use occurs after the end of the 90-day period beginning on the date on which the information described in subclause (I) is indexed into the public records of the Copyright Office.
- (ii) **Regulations.**—Not later than 180 days after the date of enactment of this section, the Register of Copyrights shall issue regulations that—
 - (I) establish the form, content, and procedures for the filing of schedules under clause (i);
 - (II) provide that a person may request that the person receive timely notification of a filing described in subclause (I); and
 - (III) set forth the manner in which a person may make a request under subclause (II).
- (B) **Filing of contact information for transmitting entities.**—
 - (i) **Filing requirement.**—Not later than 30 days after the date of enactment of this section, the Register of Copyrights shall issue regulations establishing the form, content, and procedures for the filing of contact information by any entity that, as of the date of enactment of this section, performs a sound recording fixed before February 15, 1972, by means of a digital audio transmission.
 - (ii) **Time limit on filings.**—The Register of Copyrights may accept filings under clause (i) only until the 180th day after the date of enactment of this section.
 - (iii) **Limitation on statutory damages and attorneys’ fees.**—
 - (I) **Limitation.**—An award of statutory damages or of attorneys’ fees under [section 504](#) or [505](#) may not be made against an entity that has filed contact information for that entity under clause (i) with respect to an unauthorized use by that entity of a sound recording under subsection (a) if the use occurs before the end of the 90-day period beginning on the date on which the entity receives a notice that—
 - (aa) is sent by or on behalf of the rights owner of the sound recording;
 - (bb) states that the entity is not legally authorized to use that sound recording under subsection (a); and
 - (cc) identifies the sound recording in a schedule conforming to the requirements prescribed by the regulations issued under subparagraph (A)(ii).
 - (II) **Undeliverable notices.**—In any case in which a notice under subclause (I) is sent to an entity by mail or courier service and the notice is returned to the sender because the entity either is no longer located at the address provided in the contact information filed under clause (i) or has refused to accept delivery, or the notice is sent by electronic mail and is undeliverable, the 90-day period under subclause (I) shall begin on the date of the attempted delivery.
- (C) **Section 412.**—[Section 412](#) shall not limit an award of statutory damages under [section 504\(c\)](#) or attorneys’ fees under [section 505](#) with respect to a covered activity in violation of subsection (a).
- (6) **Applicability of other provisions.**—
 - (A) **In general.**—Subject to subparagraph (B), no provision of this title shall apply to or limit the remedies available under this section except as otherwise provided in this section.
 - (B) **Applicability of definitions.**—Any term used in this section that is defined in [section 101](#) shall have the meaning given that term in [section 101](#).
- (g) **Application of Section 230 Safe Harbor.**—For purposes of [section 230](#) of the Communications Act of 1934 ([47 U.S.C. 230](#)), subsection (a) shall be considered to be a “law pertaining to intellectual property” under [subsection \(e\)\(2\) of such section 230](#).
- (h) **Application to Rights Owners.**—
 - (1) **Transfers.**—With respect to a rights owner described in subsection (l)(2)(B)—

- (A) [subsections \(d\)](#) and [\(e\)](#) of [section 201](#) and [section 204](#) shall apply to a transfer described in subsection (l)(2)(B) to the same extent as with respect to a transfer of copyright ownership; and
- (B) notwithstanding section 411, that rights owner may institute an action with respect to a violation of this section to the same extent as the owner of an exclusive right under a copyright may institute an action under section 501(b).
- (2) **Application of other provisions.**—The following provisions shall apply to a rights owner under this section to the same extent as any copyright owner:
 - (A) [Section 112\(e\)\(2\)](#).
 - (B) [Section 112\(e\)\(7\)](#).
 - (C) [Section 114\(e\)](#).
 - (D) [Section 114\(h\)](#).
- (i) **Ephemeral Recordings.**—An authorized reproduction made under this section shall be subject to [section 112\(g\)](#) to the same extent as a reproduction of a sound recording fixed on or after February 15, 1972.
- (j) **Rule of Construction.**—A rights owner of, or featured recording artist who performs on, a sound recording under this chapter shall be deemed to be an interested copyright party, as defined in [section 1001](#), to the same extent as a copyright owner or featured recording artist under [chapter 10](#).
- (k) **Treatment of States and State Instrumentalities, Officers, and Employees.**—Any State, and any instrumentality, officer, or employee described in subsection (a)(3), shall be subject to the provisions of this section in the same manner and to the same extent as any nongovernmental entity.

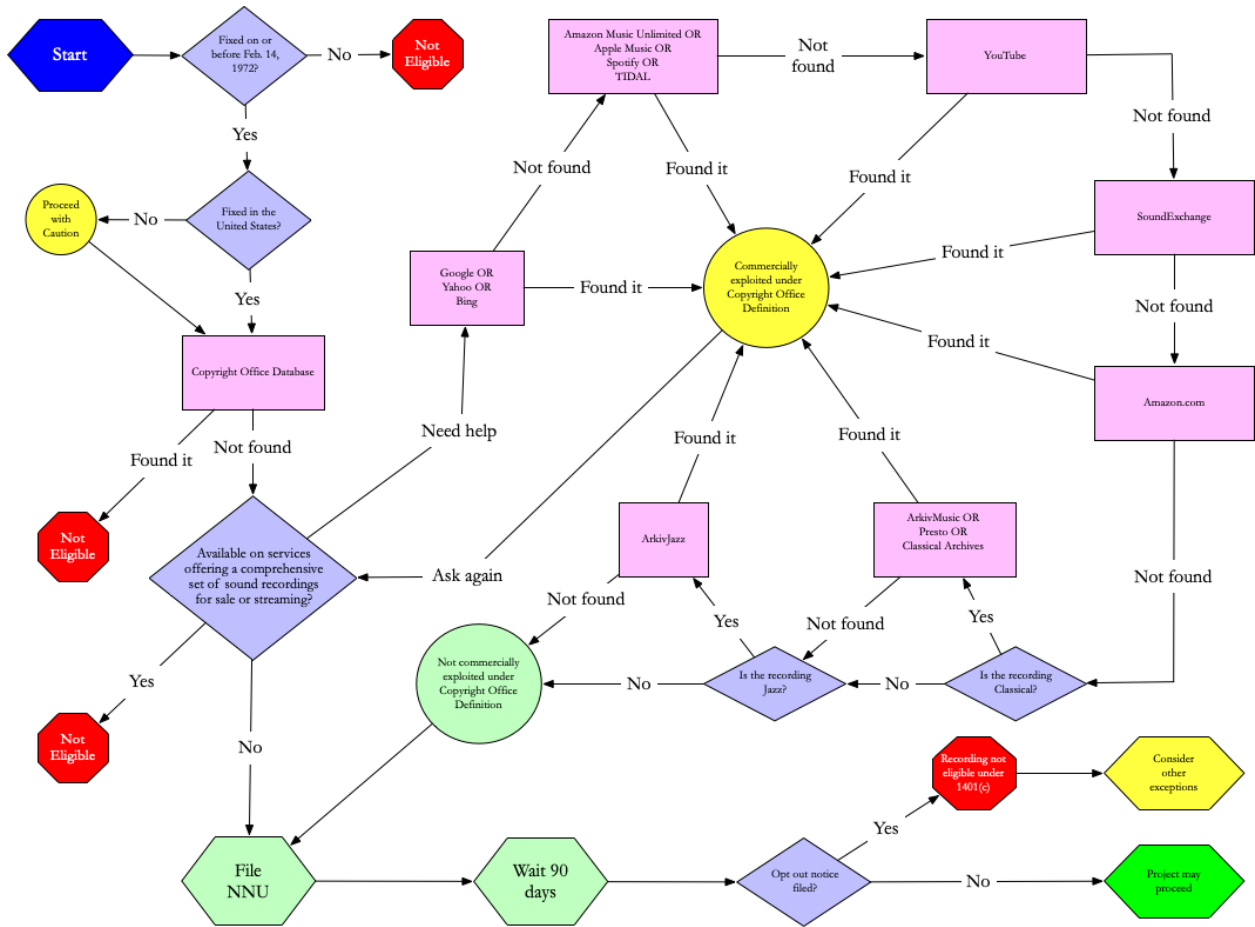
Sovereign Immunity abrogated

- (l) **Definitions.**—In this section:
 - (1) **Covered activity.**—The term “covered activity” means any activity that the copyright owner of a sound recording would have the exclusive right to do or authorize under [section 106](#) or [602](#), or that would violate [section 1201](#) or [1202](#), if the sound recording were fixed on or after February 15, 1972.

Covered Activities, defined

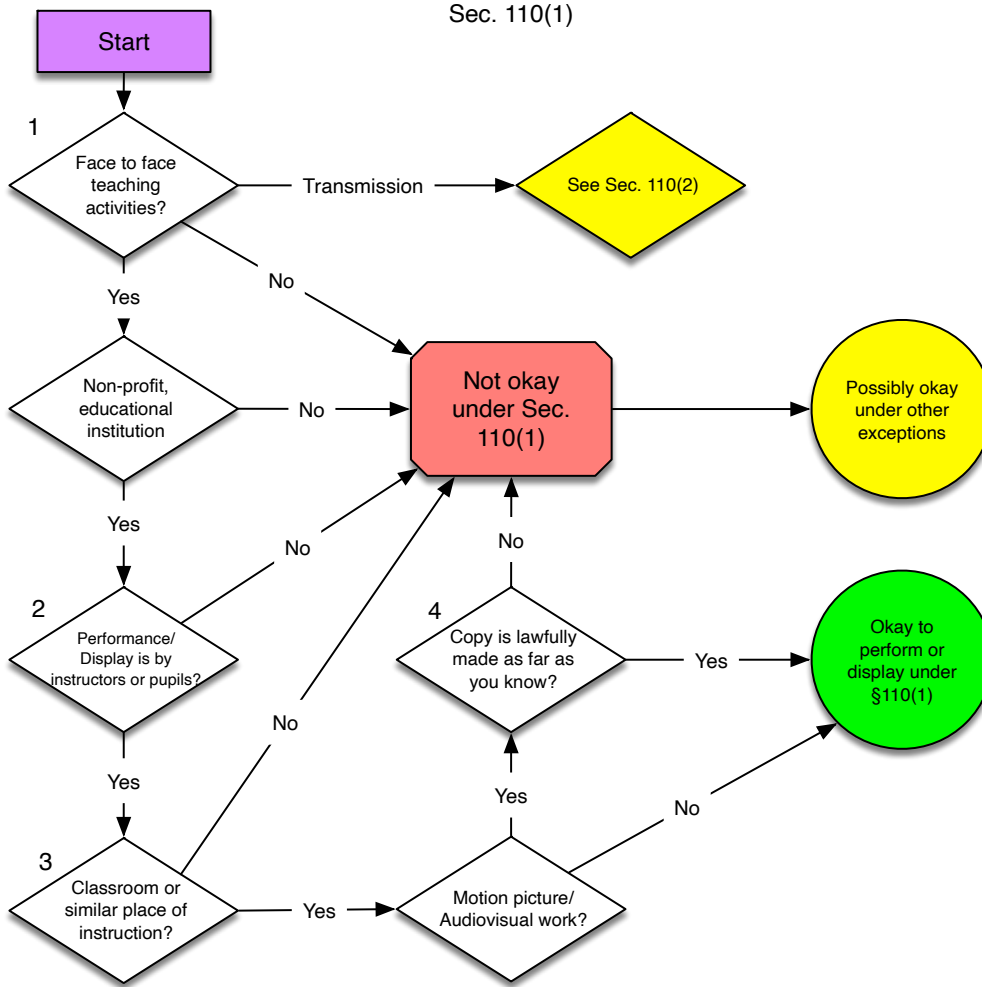
 - (2) **Rights owner.**—The term “rights owner” means—
 - (A) the person that has the exclusive right to reproduce a sound recording under the laws of any State, as of the day before the date of enactment of this section; or
 - (B) any person to which a right to enforce a violation of this section may be transferred, in whole or in part, after the date of enactment of this section, under—
 - (i) [subsections \(d\)](#) and [\(e\)](#) of [section 201](#); and
 - (ii) [section 204](#).

Appendix B: Noncommercial uses decision tree (Sec. 1401(c))



Appendix C: Section 110 Decision Tree

Educational Exceptions Decision Tree



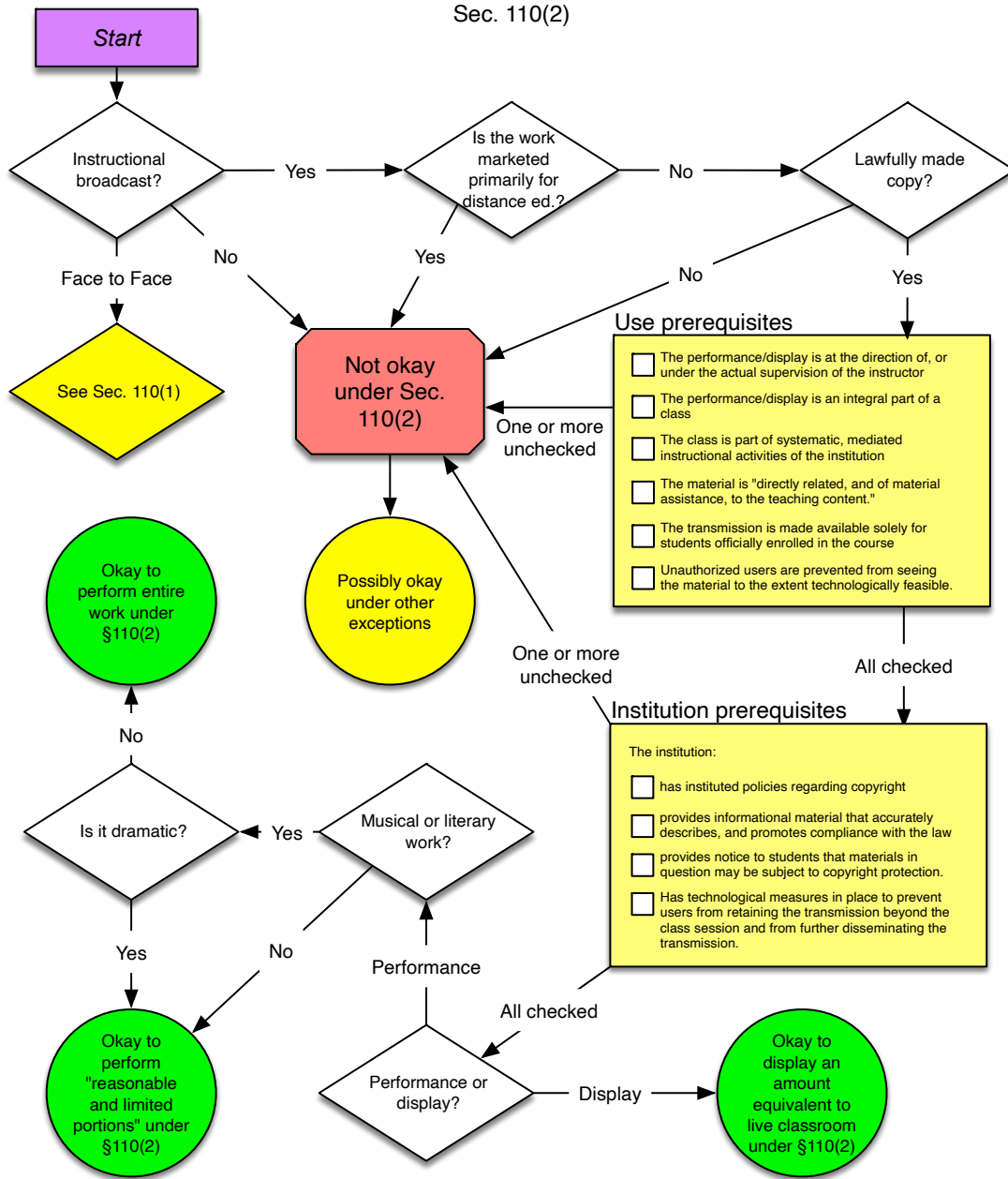
1. Students and teacher must be in the same general place, but need not be able to see each other. Radio and television broadcasts are not permitted, nor are performances or displays for recreational or educational purposes.

2. Students or teachers may perform or display the work, but outside actors or musicians, for example, may not. Guest lecturers are included.

3. Similar places of instruction would include studios, workshops, libraries, gymnasiums, or other places within the educational institution, provided that instruction is taking place. A gymnasium would not be included during a graduation assembly.

4. Strangely, this only applies to motion pictures and audiovisual works. The law does not require to sound recordings, musical works, plays, or the like to be lawfully made copies for purposes of Sec. 110(1), but does for Sec. 110(2).

Educational Exceptions Decision Tree



1. Dramatic works include operas, musical comedies, plays, and the like, as well as any otherwise non-dramatic works which are being performed in dramatic form (such as a novel being acted out, as opposed to merely read).

2. The law says "solely for," but the committee report states that "primarily for" is adequate for exemption.