Comment of the Organization for Transformative Works
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The Organization for Transformative Works (OTW) is a nonprofit organization established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. The OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 4.5 million works and receives over 225 million page views per week. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the "villain" to retelling the story as if a woman, instead of a man, were the hero. We appreciate the opportunity to comment on the Copyright Office's notice of proposed rulemaking's (NPRM) guidelines for defining noncommercial in the context of the Music Modernization Act ("MMA"), and we have a particularly strong interest in an appropriate definition of "noncommerciality."

We agree with the Office that it is useful to offer guidelines for what constitutes a noncommercial use under the MMA, and that such guidelines will be extremely useful to individuals and small businesses that don't have familiarity with copyright law or the resources to reach out to someone who does. With that said, the Office should more clearly stress that any guidelines it releases are informational guidelines (or "touchstones" as the NPRM says) and not an explicit definition or hard-and-fast rules of what is and isn't noncommercial. Any guidelines that the Office promulgates should also continue to contain an explicit statement that they apply only to commerciality for purposes of the present legislation, rather than reflecting the Office's view of commerciality in other contexts, such as fair use or damages calculations.

We also agree with the NPRM that the distinction between "use" and "user" in determining whether a particular use is commercial is a valuable and important one, recognizing that nonprofits may make commercial uses and that for-profit entities may make noncommercial uses. However, we are concerned that the NPRM blurs the border between noncommercial "benefit" and "commerciality" in ways that can unduly burden transformative noncommercial expression. "Noncommercial" does not mean "not beneficial to the user" (just as it does not mean "socially beneficial"). Noncommerciality, by its plain meaning, cannot and should not be made to bear all the work of sorting good from bad uses. For this reason, we write to identify areas in which the Office's proposed rulemaking correctly focuses on the core of commerciality, and areas in which we believe the Office's proposal incorrectly risks conflating noncommercial benefit with commerciality.

Where the USCO's proposed rulemaking correctly focuses on the core of commerciality

Of the six considerations the USCO lists for deciding when a use is commercial, four of them are correctly focused on the core of what it means to be (or not be) noncommercial. For instance, making a financial gain or other monetary profit from the use of a work is usually considered to be commercial and is a key thing to consider when figuring out whether or not a use is noncommercial.

The NPRM also correctly recognizes that not all financial gain is commercial, and that a commerciality analysis should consider whether money made from the use is enough to only recover costs of production and distribution or if actual profit is made. The NPRM states that merely recovering costs for the reproduction and distribution of the *sound recording* does not immediately make an otherwise noncommercial use commercial. This should be clarified to deal with the kinds of uses that can be anticipated. In particular, cost recovery should not be limited to recovering costs for distributing and reproducing the sound recording specifically and should allow for recovering all costs involved in the project. For example, if a filmmaker makes a documentary that, considering all other guidelines, would be noncommercial, but she seeks to recoup the cost of making the documentary by charging only enough money to cover the expenses of that documentary, that should not make her use of the *sound recording* commercial. In other words, the fact that she is recovering her broader costs should not on its own be enough to make her use commercial.

We also appreciate the NPRM's focus on the commerciality of a particular use (as opposed to the nonprofit or for-profit status of the user). With that in mind, any guideline promulgated by the Office should emphasize that the fact that a creator makes money from their art or craft does not necessarily make any particular use commercial.[1] This distinction is increasingly important for independent artists who receive grants or third-party support that is not tied to the creation or sale of particular works. To make those artists' works commercial by virtue of their receiving generalized monetary support would unduly burden their livelihoods and expression. It is also very important that private, personal uses are exempted, as they routinely are in copyright law. We agree with the NPRM that posting on the open, accessible internet should not qualify as a private, personal use. In the era of personal cloud storage, however, we believe that the Office should should explicitly recognize the existence of private websites that are only accessible by the individual. An example of this would be someone uploading a sound recording to their personal (and non-shared) folder on a site like Dropbox.

Where the USCO has gone beyond commerciality and switched to benefit

In the other two guidelines in the NPRM, the Office moves out of the realm of commerciality and instead incorrectly focuses on benefit. One such overreach in the NPRM is in the educational uses section, which says that educational uses can be considered commercial if "the user gains another kind of measurable benefit." This interpretation is inconsistent with the dictionary

[1] For example, the Office has previously recognized that creators can be compensated for creating works that have been commissioned for noncommercial purposes without rendering their uses commercial. Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, October 2012, at 129.

meaning of "commercial."[2] In other areas of intellectual property law, commercial benefit and noncommercial benefit are distinguishable.[3]

Moreover, the Office's proposed standard arguably covers all educational uses; it is incapable of providing any assistance to educators attempting to make real use of the exemptions in the MMA. Faculty who use sound recordings in their classroom could in theory gain boosts in student reviews or improved student learning outcomes. Students and faculty using sound recordings in dissertations, articles, or monographs arguably gain measurable benefits in the form of tenure, prestige, and degrees. Libraries using sound recordings in collections potentially gain more users and potential resources to support further work. However, to describe such uses as "commercial" would empty the term of any meaning, as well as contradicting decades of academic educational practice and understanding. This would place a particular burden on those teaching music, copyright law, and a wide variety of film and media studies. Benefits abound in educational uses, and they should not factor into the uses' commercial/noncommercial analysis.

In addition, in distinguishing between "use" and "user," any guidelines promulgated by the Office should distinguish between circumstances in which a *user's* use is commercial and circumstances in which a *third party* receives commercial benefit. In particular, guidelines should specify that the fact that an intermediary or platform is commercial does not necessarily confer commerciality on its users' uses. For example, the guidelines should distinguish between circumstances in which a user makes a commercial use of a platform like YouTube (by, for example, receiving advertising revenue for their posted material) and circumstances in which the platform itself or a copyright holder monetizes the user's use. The mere fact that a platform is making money from a user's use should not be enough to make the use commercial. Likewise, the fact that a platform gives sound recording copyright owners opportunities to monetize uses of their sound recordings should not make a user's posting of those recordings commercial. If, for example, a user uploads an otherwise noncommercial mashup of songs onto YouTube, the use of an unexploited sound recording in that mashup should not automatically be labeled as commercial because one or more *other* sound recording copyright holders has decided to monetize the video for themselves.

Ultimately, we urge the Office to emphasize that that the heart of the MMA's statutory exception is to protect situations in which sound recordings are used, but not commercially exploited. The point of the good faith search requirement is to make sure that there are no licensing or purchasing mechanisms for the intended use; if there are, a user is already ineligible for this

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[2] See, e.g., https://www.dictionary.com/browse/commercial. It is worth noting that "commerciality" is generally not required to be "measurable," where it is present; the addition of the term "measurable" to "benefit" perhaps attempts to hold out the possibility that some uses might still be "noncommercial," but measurability bears no logical or legal reglationship to commerciality.

[3] See, e.g., Laws v. Sony Music Entm't, Inc., 448 F.3d 1134, 1138 (9th Cir. 2006) (right of publicity, which covers appropriation of identity to the defendant's advantage, "commercially or otherwise"); Restatement (Second) of Torts § 652C(b) Comment (1977) (contrasting commercial benefit and explaining types of noncommercial benefit that might constitute misappropriation of identity).

exception. Given this requirement, *Harper & Row's* concern that the *Nation* was exploiting a copyright without paying the customary price[4] and *Napster's* concern that people are "getting something for free that they would otherwise have to buy"[5] are beside the point for this exemption. In those cases, users didn't get prestige, or better student evaluations, or tenure, or any other generalized "benefit"; those cases involved rights for which there were specific, already-market-measured valuations (first publication and copies of commercially available songs, respectively). Therefore, these cases provide no justification for using an inchoate "measurable benefit" standard as a contrast to "noncommercial" in the context of this exception.

[4] 471 U.S. 539, 562 (1985).
[5] 239 F.3d 1004, 1015 (9th Cir. 2001).