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# POLICY BRIEF

## The Music Modernization Act and its Impact on Tribal Interests

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### Introduction

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA) became Public Law 115-264 on October 11, 2018. Title II of the MMA carries important Tribal implications for recordings pre-dating 1972, which could potentially increase public access to sound recordings for noncommercial purposes. This raises serious concerns regarding public access and use of collections of sound recordings made of Tribal ceremonies, songs, oral histories, and languages.

There is currently a federal docket proceeding open for comments on regulations.gov, which will close on **[March 7, 2019](#)**. In a previous docket proceeding the National Congress of American Indians filed a letter recommending the protection of recordings made on Tribal cultural and linguistic practices.

To file comments in this proceeding (*Due March 7, 2019*), please visit <https://www.regulations.gov/document?D=COLC-2018-0008-0028>.

To view NCAI's letter filed in a previous proceeding, please visit <https://www.regulations.gov/document?D=COLC-2018-0008-0023>.

### Background on the MMA and Tribal Implications

When most people think of sound recordings made before 1972, they probably think of hit albums by major bands or artists like the Beatles, Aretha Franklin, Simon & Garfunkel, etc., not recordings of Indigenous ceremonies, songs, or oral histories. However, Title II of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA), extends federal copyright infringement remedies to owners of all copyrightable pre-1972 sound recordings regardless of their genre.<sup>1</sup> At the same time, the MMA also contains provisions aimed at increasing public access to sound recordings that are not being commercially exploited, which likely includes most "ethnographic sound recordings" (such as recorded ritual performances, oral histories, etc.).

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<sup>1</sup> See 17 U.S.C. § 1401(a).

MMA's Title II permits anyone to use a pre-1972 sound recording for noncommercial purposes without running the risk of copyright infringement if:

- 1) The user conducts a good faith, reasonable search to confirm that the recording is not being commercially exploited;
- 2) Notice is filed with the copyright office regarding the noncommercial use; and
- 3) The copyright owner does not opt out of the noncommercial use within 90 days of when the notice is indexed into the Copyright Office's notice system.<sup>2</sup>

For American Indian and Alaska Native Tribes, the MMA's non-commercial use exception poses some substantial risks. Likely hundreds of thousands of sound recordings were made on Tribal lands between the advent of sound recording in the late 1800s until 1972 when newly created sound recordings became eligible for federal protection. Certainly, many pre-1972 sound recordings made on Tribal lands were recorded by Tribal members; but a substantial volume were made by anthropologists, missionaries, tourists, and many others who documented a wide range of cultural, social, and religious events—some culturally sensitive in nature—or recorded individuals reciting or performing various kinds of traditional cultural expressions. Museums, universities, libraries, archives and other institutions now possess a large number of these recordings, and there is significant interest within the museum and archive community to digitize these materials and make them widely available to the public on the internet. These institutions are among the most likely to make use of the noncommercial use exception, and could thereby avoid copyright liability for unauthorized uses of sound recordings Tribes or Tribal members may own and want to protect.

Unfortunately, Tribes and Tribal members are often unaware that ethnographic sound recordings depicting their cultural expressions exist, or that they or their members may hold copyright interests in them. Under the common law rule that generally applied to sound recordings made prior to 1972, sound recording copyrights typically vested in the performer on a recording, and not necessarily the recordist.<sup>3</sup> However, the documentation that accompanies many ethnographic sound recordings made on Tribal lands is often very poor, leaving out key details like the names of performers, the date of recording, the specific location where the recording was made, or agreements as to who would own the rights to the recordings. Indeed, most professional researchers during that era didn't think it necessary to seek or document permission from Tribes or Tribal members to record some of their most sensitive cultural expressions.

### **The Copyright Office's Proposed Rule**

*"Reasonable Search" Provision.* The regulations governing the non-commercial use exception in Title II of the MMA, are unclear as to whether they

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<sup>2</sup> See 17 U.S.C. § 1401(c).

<sup>3</sup> See Trevor G. Reed, *Who Owns Our Ancestors' Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 Colum. J.L. & Arts 275, 282-84 (discussing the ownership of common-law copyright interests in sound recordings made on Tribal lands prior to 1972). The MMA leaves current state (and presumably Tribal) statutes and common-law doctrines in place that govern the creation and ownership of pre-1972 sound recording copyrights. However, the Copyright Act and the MMA are silent as to whether they apply to works created on Tribal lands. Additionally, it is not clear whether the Copyright Act's preemption provisions have effectively extinguished all Tribal rights "equivalent" to copyright rights, see 17 U.S.C. § 301(a), or has only preempted the common law and statutes of States.

consider the histories of inequality experienced by Tribes and their members who were recorded by researchers and other non-members prior to 1972, and the resulting informational disadvantages Tribes face today. The Copyright Office has taken an important first step by specifying that, in the case of pre-1972 ethnographic sound recordings, a “reasonable search” under the first requirement of the non-commercial use exception would include contacting Native American or Alaska Native Tribes “if such contact information is known to the user” or can be located through the Tribal Directory database of the National Congress of American Indians.<sup>4</sup>

This provision will likely improve Tribes’ and Tribal members’ ability to learn about potential unauthorized uses of their pre-1972 sound recordings, and potentially opt out of those uses when desired. Consider the scenario of an institution seeking to post all of its Native American sound recordings online for public access. The institution conducts a search of its records and finds no names of copyright owners, performers, or any copyright agreements pertaining to the recordings, only the names of the affiliated Tribes. It also searches the Copyright Office database and other major databases and finds no information about the copyright ownership in the recordings. Because of the new “reasonable search” provision in the regulations, the institution would also have to contact the “relevant” Tribe to determine whether the Tribe or its members are exploiting the recording commercially. This would place the Tribe on notice that the sound recording might be exploited, allowing the copyright holder (presumably the performer or Tribe) to take action to file an opt-out notice with the Copyright Office within the 90-day window, if so desired.

This provision as it now stands, however, may be potentially burdensome on Tribes. While requiring noncommercial users to conduct a “reasonable search” by contacting Tribes may help inform Tribes of potential noncommercial uses, Tribes may not have the resources to positively identify the current owner(s) of a particular recording’s copyright (as discussed, many recordings have poor or incomplete documentation) or to determine whether the owner(s) are commercially exploiting any given recording. It is also undetermined if a Tribe could be compensated for research undertaken to provide information about ethnographic recordings to noncommercial users in order to prove their or their members copyright claim.

*Applicability of the MMA on Tribal Lands.* Another important issue not directly addressed by the Copyright Office’s new proposed rule is whether the Copyright Act and the MMA actually apply to sound recordings made on Tribal lands. On the one hand, many Indigenous artists, singers, songwriters and other creative professionals living on Tribal lands depend on copyright law for their livelihoods. Additionally, intellectual property laws—like the Lanham Trademark Act—have been held to be applicable on Tribal lands. But on the other hand, subjecting ceremonial performances, oral histories, or other cultural expressions to copyright—which provides only temporary and limited protection for creative works before injecting them into the public domain—may seem like an uncomfortable fit given the sensitivity and special function of cultural expressions in Tribal communities.

The Copyright Act and the MMA were enacted under the Constitution’s Intellectual Property Clause, which gave Congress authority to “promote the progress” of the arts and sciences by granting “authors” limited rights to their “writings.” But it isn’t clear whether that clause, the Indian Commerce Clause, or any other clause in the Constitution provides Congress power to determine, limit, or even extinguish Tribes or Tribal members’ rights to control their intangible cultural heritage—including recorded ceremonial songs or other forms of cultural expression. This could also be the case if the

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<sup>4</sup> See 37 CFR § 201.37(c)(vi).

MMA's Noncommercial Use exception permits unauthorized uses of Tribes' or Tribal members' ethnographic sound recordings. As the Copyright Act and the MMA are not clear about their applicability to intangible cultural heritage made by Tribal members, there may be a good reason for the Copyright Office to make an exception to the Noncommercial Use safe harbor for pre-1972 sound recordings created on Tribal lands or containing intangible cultural heritage.

## **Conclusion**

The proposed Copyright Office rule is an important step forward for Tribes seeking to learn about and prevent unauthorized uses of their intangible cultural heritage. The new "reasonable search" regulation requiring contact with the relevant Tribe will likely be beneficial for Tribes, but may pose a significant burden on them unless the tribe is compensated for the services it renders to potential noncommercial users.

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