RIAA Ex. A-124-DP

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VIA FACSIMILE AND FEDERAL EXPRESS

Jacqueline Charlesworth
Sr. Vice President and General Counsel
The Harry Fox Agency
711 Third Avenue
New York, NY 10017

Dear Jacqueline:

I am writing to respond to The Harry Fox Agency's ("HFA's") "Important Notice" concerning "Licensing of Multisession Products" dated December 3, 2003 (the "Notice"). The recipients of the Notice were sufficiently taken aback by the legal position that HFA took in the Notice that they asked the RIAA to explain to you our view of the law in this regard.

The Notice asserts that:

> [E]ach mechanical reproduction of a sound recording of the same musical composition on an individual product requires specific license authority from the copyright owner. Thus, for example, a licensee that is manufacturing and distributing a "hybrid" disc containing two sessions of a particular sound recording of the same song must obtain a license that covers both sessions on that disc (or, if there are more than two such sessions on the disc, a license covering each such session).

The notice implies that a separate mechanical royalty payment (*e.g.* 8.5¢) is due for each rendering of a recording on a multisession product, unless a particular publisher chooses to accept less. HFA's issuance of the Notice compels us to confirm our disagreement with that position. We have set forth below why we believe additional payments for each rendering of a recording on a multisession product are not required by the law.

We believe it is important to meet in the near future to discuss this issue so as to better understand each other's positions and to explore ways to resolve our disagreement. Given that the legal issue must be addressed, our companies prefer to work cooperatively to resolve our differences rather than to find ourselves as adversaries in a public forum.

RECORDING INDUSTRY ASSOCIATION OF AMERICA
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Our group is available to meet in New York on the following dates: February 11, 12 (afternoon only), 13, 18 and 19 (afternoon only). Please let me know if HFA and music publishers can meet on any of these dates.

Background

Certain products (which we have colloquially referred to as "multisession" products in our discussions and correspondence with each other) may contain multiple differently-encoded renderings of the same sound recording. Frequently this is the case to enable a disc to be played by different types of audio equipment. As you know, there are presently available in the marketplace various formats for recording music on a five inch disc and numerous players with the capability of reading discs encoded in one or more of those formats. Rather than producing and distributing separate discs in each format, and to ensure playability across a range of players, a record company might include on any particular disc separate renderings of the relevant recordings encoded in a manner intended for play on some combination of CD players, DVD-Audio and DVD-Video players and SACD players. Similarly, the limited number of "copy protected" CD releases frequently have had separate renderings of the same recordings intended for access on CD players and computers. In addition, DVD-Audio and SACD discs frequently contain stereo and surround sound renderings of the same recordings. Thus, there are a number of reasons for including multiple differently-encoded renderings of the same recording on one disc, but in no case can a consumer access more than one rendering at a time, and any individual consumer may well never access more than the one rendering producing the highest-quality audio experience on his or her sound system.

Discussion

We believe that only a single mechanical royalty payment is due when multiple renderings of a recording of a single musical work are included on a single disc, because both Section 115 of the Copyright Act and the Copyright Office's regulations implementing Section 115 make it clear that mechanical royalties are payable on a per work, per phonorecord basis.

Section 115(a)(1), of course, provides a compulsory license to make phonorecords of nondramatic musical works, subject to the other provisions of Section 115. 17 U.S.C. § 115(a)(1). Section 115(c)(2) provides that "the royalty under a compulsory license shall be payable *for every phonorecord* made and distributed in accordance with the license." 17 U.S.C. § 115(c)(2) (emphasis added). It reiterates that the statutory rate shall be payable "[w]ith respect to *each work* embodied *in the phonorecord*." *Id.* (emphasis added).

The Copyright Office's regulations implementing Section 115 are completely consistent. Section 255.2 of those regulations specifies that "[w]ith respect to *each work* embodied *in the phonorecord*, the royalty payable shall be [the rate specified, as adjusted

pursuant to Section 255.3] *for every phonorecord* . . . ." 37 C.F.R. § 255.2 (emphasis added). Section 255.3 of those regulations repeats no less than 13 times that the royalty is payable "*for every phonorecord*." 37 C.F.R. § 255.3 (emphasis added). The regulations concerning reporting and the computation of payments are to a similar effect. For example, each report is to include *on a per work basis*, 37 C.F.R. § 201.19(e)(2)(v), "the number of *phonorecords*" made and distributed, 37 C.F.R. § 201.19(e)(3). The royalty is computed by calculating the number of phonorecords distributed (taking into account reserves) and "multiplying . . . by the statutory rate." 37 C.F.R. § 201.19(e)(4)(ii) (Step 5).

"Phonorecords" are defined by the Copyright Act as "material objects in which sounds . . . are fixed by any method now know or later developed, and from which the sounds can be perceived, reproduced or otherwise communicated . . . ." 17 U.S.C. § 101. Given that a disc is a single "material object" (and not two or more), it is thus apparent that Section 115(c)(2) and the relevant regulations require payment of a single mechanical royalty for each musical work embodied in a disc. Nothing in the statute or the regulations indicates or suggests that the number of renderings of a recording of a single work embodied in a disc should compel multiple royalties.[1]

We think that payment of a per work, per disc royalty is not only the result clearly prescribed by the statute and regulations, but also the most sensible business result. There are in the marketplace now multisession discs having several differently-encoded renderings of the same set of recordings. They do not command a price several times higher than single session releases. In addition, multisession discs typically are in formats such as SACD, DVD-Audio and copy-protected CD that are designed to combat the piracy that has inflicted so much pain on the whole music industry. We know that publishers care deeply about piracy, and we have worked collaboratively with publishers on many antipiracy issues. We would all benefit from having recordings released in more secure formats.

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[1] The Notice also states that, with respect to CD, SACD and DVD-Audio licenses previously obtained for multisession products, "[u]nless the license expressly indicates that it covers the additional session or sessions, you may not rely on the license to manufacture and/or distribute the product, as the license provides authority to make and distribute only a single reproduction of the licensed work." We cannot accept HFA's efforts to alter prior mechanical licenses retroactively. Mechanical licenses previously issued by HFA speak for themselves. We believe that when a license for the CD, SACD or DVD-Audio format does not state a limitation as to the number of sessions, no such limitation exists.

Given the statutory and regulatory provisions discussed above, we do not understand the legal basis for the Notice. However, we understand that you believe there to be an issue here. Again, we would like the opportunity to discuss the matter with you further as soon as possible. We look forward to hearing back from you on scheduling such a meeting on one of the dates we have proposed.

Best regards.

Steven Marks