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April 5, 2002

BY HAND

Office of the Copyright General Counsel
James Madison Building, Room LM-403
101 Independence Avenue, S.E.
Washington, D.C. 20559

Re: Docket No. 2002-1A, Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

Ladies and Gentlemen:

Enclosed please find an original and ten copies of Music Choice's comments in response to the Copyright Office's Notice of Proposed Rulemaking in the above-captioned proceeding.

Please date stamp the enclosed extra copy and return it with the courier as proof of filing. Do not hesitate to contact me if you have any questions regarding the foregoing.

Best regards,

Fernando R. Laguarda

cc: Paula Calhoun, Esq. w/encl.

Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, D.C. 20540

In re: Notice And Recordkeeping	)	
For Use Of Sound Recordings	)	**RM 2002-1A**
Under Statutory License	)	
	)	

COMMENTS OF MUSIC CHOICE

Music Choice, through its attorneys and pursuant to the Copyright Office's Notice of Proposed Rulemaking, 67 Fed. Reg. 5761 (Feb. 7, 2002) ("NPRM"), hereby submits the following comments in the above-captioned proceeding.

I. Initial Considerations

When it first mandated notice and recordkeeping requirements in connection with the use of copyrighted sound recordings, Congress intended to strike a balance between the legitimate needs of sound recording copyright owners and the vast public and consumer benefits apparent in the emerging digital world. See Pub. L. No. 104-39, 109 Stat. 336, 341 ("DPRA"). See also S. Rep. 104-128, at 14-15 (1995) ("Senate Report"). Congress anticipated and encouraged the advancement of technologies dealing with the digital transmission of sound recordings, and intended to provide appropriate protection for copyright owners as these changes occurred. Illustrative of this point, the notice and recordkeeping rules adopted in 1998 pursuant to the DPRA ("the rules") were issued on an interim basis, "in light of the rapidly developing nature of the digital transmission Service industry and the possibility that new technology might be developed which

would allow the reporting requirement to be either expanded or reduced, depending upon the needs of the industries." 67 Fed. Reg. 5761 (Feb. 7, 2002). See also Interim Regulations on Notice and Recordkeeping for Digital Subscription Transmissions ("Interim Regulations"), Docket No. RM 96-3B (June 24, 1998).

The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at scattered sections of 17 U.S.C.) ("DMCA") mandates that notice and recordkeeping rules be established for the expanded section 114 license and the newly created section 112 license. Accordingly, the Copyright Office has proposed amendments to the interim notice and recordkeeping requirements for new licensees. Music Choice participated in the first round of negotiated rulemaking in this docket and recognizes the notice and recordkeeping requirements mandated under the DPRA and DMCA. However, the proposed amendments ignore the intent of the DPRA and DMCA and contemplate the imposition of extremely burdensome requirements on Music Choice.

The purpose of the rules is to provide a reasonable means by which collectives can obtain information sufficient to ensure that copyright owners get paid, not to extract additional compensation from licensees in the form of data. Consequently, the proponent of any recordkeeping requirement should initially meet a high burden to show that the requested data is necessary to effect compensation to copyright holders and not redundant in light of other data already being collected. Although it is not possible to estimate precisely the costs of complying with all of the proposed requirements, it is nevertheless clear that such costs will be substantial, especially given the vast amount of information that would have to be processed. The costs will be particularly onerous in cases where the information required can be more easily obtained from the record labels than from

users. Therefore, for example, where copyright owners are easily capable of providing data matching song and album identifiers to other tracking codes, that function can and should be performed on their behalf by their designated agent, not by licensees.

Finally, Music Choice requests that the Copyright Office again consider making these rules interim and re-visiting them within a reasonable time period. There is precedent for such action when new rules are being formulated. See Interim Regulations, at 1, 25. It also makes sense, given the new and evolving media at issue and the untested burden being imposed, not to settle upon hard and fast rules at this time.

II. Notice Requirements

In connection with the Copyright Office's proposed amendments to the notice requirements of 37 C.F.R. § 201.35, the NPRM seeks comments regarding the use of a standard form by users, the contents of the form, whether or not users that have already filed an initial notice should be required to refile, whether or not the Copyright Office should require periodic filings, where the forms should be filed, and the filing fees associated with filings.

Music Choice agrees with the Copyright Office's proposed use of a standard form. While Music Choice has already filed a general Notice of Use, it will comply with a requirement that all users file new Notices of Use should the Office choose to implement this amendment, as compliance would not be burdensome. However, with respect to the content of such notices, it is unrealistic to require users to specify the date or expected date a user made its first copy or transmission, since that information may not be accessible. It should be sufficient in this regard to insert the date the user commenced operations. Additionally, licensees should not be required to specify each license type

and category at the time of initial notice, as this does not have anything to do with providing "notice" of use to copyright owners.

Users should also be allowed to file Notices of Use within a reasonable period (six months) after commencing operations. A system where users are required to file a one-time Notice of Use and submit amended filings as necessary when information changes is preferable to periodic filings and should meet the RIAA's needs and avoid excess paperwork. Filing Notices of Use with the Copyright Office is preferable to making individual filings with each Collective. A filing fee of twenty dollars ($20) for the one-time Initial Notice filing is appropriate, but no additional filing fee should be required for any amendments.

III. Reports of Use

The NPRM proposes significant amendments to the required Reports of Use, which would require Music Choice to provide additional information in their Reports. The NPRM seeks comment on both general information related to Reports of Use, such as due dates, retention of records, and public access to reports, and on more specific information, such as the content of Reports for each type of service and the content of listener and ephemeral logs.

A. General Information Regarding Reports

The proposed amendments to the rules would require Reports of Use to be posted online by users on or before the 20th day after the close of each month and require information to be kept for three years. The Copyright Office should amend the requirement to make monthly reports and payments due the 30th day after the end of the

month, to be consistent with the payment terms for other rights societies, such as ASCAP and BMI, in addition to most companies' accounting practices.

Further, users should in no case be required to post Reports of Use online for all copyright owners to access. This requirement raises significant privacy concerns. As discussed below, under the proposal set out in the NPRM, certain users would be required to collect personal information about their listeners. Posting this information online is unnecessary and would increase the universe of information that could be inappropriately used or disclosed. Providing owners access to intended playlist data also raises confidentiality problems because it would provide sufficient information to disclose licensees' proprietary and trade-secret programming methodology. In the unlikely event that there is no Collective identified, copyright owners should be required to contact users and request information on an individual basis, and that information should be provided in a reasonable format that is not unduly burdensome to the user.

Finally, the NPRM's requirement that all records be retained for 3 years is unnecessary and raises additional privacy concerns. In some cases, it can also be technologically unfeasible. Some international privacy regimes and domestic legislative proposals require information collectors to promptly destroy data that is no longer needed to provide service. Moreover, keeping records for this long would exceed data retention periods prevalent in the industry, particularly with respect to webcasters, who frequently turn their visitor logs within a matter of weeks. Where licensees provide the Collective with complete records, the Collective, not the licensee, should be the party responsible for maintaining the records for whatever period of time is necessary to fulfill its obligations.

B. Content of Reports

Congress expressly intended that the recordkeeping requirements should not inhibit the emergence of new competition, or otherwise negatively affect existing competitors. Consistent with this intent, reporting rules developed by the Copyright Office should not "hamper[] the arrival of new technologies . . . ."[1/] Digital audio services "should be able to operate just as they do now to bring top-quality digital signals to American homes."[2/] As dicussed below, Music Choice and other services will not be able to operate "just as they do now" if the NPRM's onerous notice and recordkeeping requirements are implemented.

1. Pre-existing services[3/]

Music Choice opposes any increased reporting burdens for pre-existing services. In addition, the following reporting requirements are unreasonable and overly burdensome and should not be required:

a. Catalog Number: The Catalog Number is rarely available. Any requirement to include catalog numbers should be eliminated or in any case should only remain with adequate justification from the RIAA conditioned in the same way as other categories designated "where available and feasible."

b. IRSC: The IRSC is also rarely included with recordings and virtually impossible to locate as it is embedded in certain sound recordings. The IRSC is also not

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1/ See S. Rep. 104-128, at 15 (1995).

2/ CONG. REC. S950 (daily ed. Jan. 13, 1995) (statement of Sen. Feinstein).

3/ A "pre-existing satellite digital audio radio service" is defined as a subscription satellite digital audio service licensed before July 31, 1998. 17 U.S.C. § 114(j)(10). By this definition, Congress intended that if a pre-existing service making transmissions on July 31, 1998 were to offer the same music service through the Internet, it would be considered part of a pre-existing service. See H.R. Rep. No. 105-796, at 89 (1998).

included in promotional or advance copies supplied by the labels. Because Music Choice now relies on promotional copies for virtually its entire play list, it frequently cannot provide such information. Arguably the industry may cease using this code in the future as technologies change, which further supports elimination of this requirement. In any case, Music Choice should not have to shoulder an additional burden associated with reporting when *copyright owners themselves* have recognized the promotional value of the service and provided the copies themselves.

Indeed, where promotional copies are used, the entire basis for imposing recordkeeping requirements is seriously thrown into question. If copyright owners believe they are promoting sales by providing the copy of the work, there is no reason to impose burdensome reporting requirements on a licensee. Certainly, no information is required for direct licensed works. See 17 U.S.C. § 114(4)(A) (records required for "use under this section . . . .").

2. Webcasters

Music Choice believes that web services should not be required to give the RIAA information concerning types of programs, release years, channels or programs accessed, user information such as the date and time the user logged in and time zone and country where the user received the transmission, user identifiers, universal product codes, and copyright owner information. The RIAA does not need any of this information in order to make payments to copyright owners. In addition to being extremely burdensome for webcasting services to collect, the data the RIAA is asking for has substantial proprietary value to the companies collecting the data. While copyright owners deserve to be paid

for their works, they do not have the statutory right to share in the assets of the businesses that use their recordings and promote the sale of those recordings.

3. Ephemeral Copies for Certain Business Establishment Services

The NPRM proposes a series of complicated and burdensome reporting requirements for section 112 licensees, including certain business establishment services. Notice and recordkeeping requirements are intended to facilitate distribution of royalties. Because the scope of the royalties for the section 112 license is still unclear, the Copyright Office cannot implement reasonable notice and recordkeeping requirements for that license.

As the Copyright Office is aware, Music Choice delivers multiple channels of music over cable and satellite to customers in the home as well as to commercial establishments, but it does not offer "on-premise" playback systems or depend on making millions of copies of sound recordings to *transmit* its signal. Notwithstanding the existence of this and other models of business establishment services, the Copyright Arbitration Royalty Panel that set out to recommend rates and terms for these users strictly limited its recommendations to the subset that need to make "literally millions of ephemeral recordings" to run their service. See Report of the Copyright Arbitration Royalty Panel, Docket No. 2000-9, CARP DTRA 1 & 2 (Feb. 20, 2002, public version available March 4, 2002) ("CARP Report) at 113.

As a result, there is no basis in the record before the CARP for assessing the recommended royalties or requiring data from a user -- such as Music Choice-- that *does not need to make* "literally millions of ephemeral recordings" in a "various stag[e] process" that includes "composing [a] digital repository" and making "cache ephemerals"

on a "client server" and "buffer ephemerals" at other "numerous stages" in the transmission process in order to provide its service. Id. Music Choice makes very few copies -- and could provide a business establishment service without making even a single ephemeral copy. Such a user was not contemplated by the Panel. Id. at 118.[4/] In the absence of applicable rates and terms, Music Choice cannot comment on the reasonableness of the proposed recordkeeping requirements.

Even ignoring this fundamental flaw, the statute plainly requires any notice and recordkeeping rules to be reasonable. Requiring licensees that already report under one license to provide duplicative data is both unreasonable and over burdensome. Duplicating the reporting requirements just because there is technically a "separate" license puts form over substance and unduly burdens licensees without any justification. After all, the same licensors are involved in both cases. For that reason, Music Choice believes the only reasonable requirement for recordkeeping under the section 112 license is to rely on any data already provided pursuant to a section 114 license. So long as the data relates to the same "playlist," there is no reason to impose an additional burden on the user.

If the Copyright Office nonetheless decides to proceed with its current proposal, for the same reasons cited above with respect to other licenses, Music Choice specifically objects to providing UPC, copyright owner, and release year information for the ephemeral license. There is no reasonable basis for requiring such information, the cost

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4/ Moreover, even if its business establishment service is covered by the rates and terms as currently recommended, Music Choice cannot determine how to calculate payment of fees. Simply stated, the Panel neglected to explain how such fees should be calculated. See id. at Appendix B-7. Accordingly, any notice and recordkeeping rules related to such license are premature.

of tracking it is unduly high, and it has not shown to be necessary for the distribution of royalties.

4. Retroactivity/Past Years

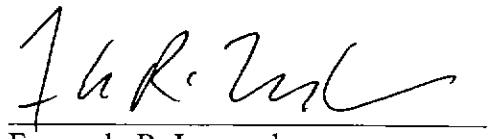
In any case, with respect to all information required under these rules, it will be almost impossible to collect all of the required information for reports for prior years. Regardless of what requirements are imposed, licensees should only be required to provide what is reasonably available and should not be required to spend excessive time and resources re-creating lost data.

CONCLUSION

Music Choice respectfully urges the Copyright Office to refrain from imposing the burdensome requirements contemplated in the NPRM. Instead, the Office should phase in more reasonable requirements, consistent with the foregoing comments. Any specific notice and recordkeeping requirement should be adequately justified, particularly a requirement calling for additional information from pre-existing services. No requirements should be imposed for business establishment services under the section 112 license until the scope of those rates and terms is clarified. Additionally, Services that are reporting for more than one license should not have to provide duplicative information. Lastly, for the reasons the Copyright Office issued interim rules in the past, any new rules should initially be interim, so that the procedures, burdens, usefulness, and adaptability to technology changes therein can be appropriately considered.

Respectfully submitted,

MUSIC CHOICE



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Dated: April 5, 2002

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