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GENERAL COUNSEL
OF COPYRIGHT

April 3, 2002

Copyright Arbitration Royalty Panel
P.O. Box 70977
Southwest Station
Washington, D.C. 20024-0977

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

Dear Sir/Madam:

The proposed rules set forth on pages 5761 through 5767 of the February 7, 2002 Federal Register (Volume 67, Number 26) appear to be arbitrary and unduly burdensome upon persons and businesses publicly performing sound recordings via digital audio transmission ("Services"). I oppose the regulations as currently drafted for the reasons set forth below.

I. THE PROPOSED REGULATIONS ARE PREMATURE

The RIAA has requested that the Copyright Office have new recordkeeping and reporting regulations in place when the current CARP proceeding is concluded. This request is premature, since one of the issues before the current CARP proceeding is which factors should be considered in calculating the royalty under the statutory license. The two main proposals for calculating the royalty are (1) to base the royalty on a percentage of the Service's gross profits, or, (2) to base the royalty on the number of listeners for each work. These proposed regulations appear to presuppose that the method for royalty calculation supported by the RIAA will ultimately prevail, and adoption of these regulations prior to a final decision on royalty calculation may unfairly prejudice that determination. Setting the reporting and recordkeeping requirements before this crucial determination has been finalized is arbitrary and capricious, since different information will be needed under each proposal. For example, these proposed regulations do not require Services to report their gross receipts or profits, which would be crucial to determining the appropriate royalty payment under a profit-based calculation.

II. THE PROPOSED REGULATIONS REQUIRE THE REPORTING OF MORE INFORMATION THAN IS NECESSARY

Unlike traditional AM/FM broadcasting, which must be regulated to avoid interference

and thereby preserve the rights of other broadcasters, there is no public interest in limiting digital transmissions of sound recordings *per se*. This being the case, the only relevant factors for setting the reporting and recordkeeping requirements are the right of copyright owners to receive fair compensation for uses of their copyrighted works and the principles of fairness and free speech. I submit that the proper balance between these interests is one in which no more recordkeeping and reporting is required than is necessary to determine whether fair compensation has been made. Recordkeeping and reporting requirements should be kept at a minimum to insure easy entry into the digital public performance market, which will in turn promote a vibrant and competitive digital marketplace for artistic works.

There are three main categories of information which should be reported: information identifying the Service, information identifying the number of performances, and information identifying the sound recordings. The regulations also require some other information be reported. As drafted, the proposed regulations require more information than is needed to calculate royalty payments, and therefore are unduly burdensome.

1. Identifying the Service

Insofar as the regulations are designed to identify the Service, I agree the information is necessary. Neither the Copyright Office nor its designee should ever have to hire a detective to track down a Service for disputing a Report or for service of process. To this end, I suggest some additional rules and/or clarification may be in order. First, I suggest that a separate licence should be maintained for each channel a Service operates. Second, given the anonymous nature of the Internet, I suggest that failure to maintain correct contact information should void the statutory license, thereby making further transmissions potential acts of copyright infringement. The Copyright Office should also consider whether it would be appropriate to impose some additional penalty for failure to maintain correct contact information, such as denying the issuance of a statutory license for a period of time.

The Copyright Office has requested comments regarding whether it would be appropriate to require that Services register on a periodic basis. I do think this would be reasonable and appropriate and I suggest that Services should register on an annual basis. If the fee for the Notice of Use is more than is required for its administrative processing, that fee should be reduced or waived for filings after the first filing. If the Notice of Use is filed with a party other than the Copyright Office, no charge should be made for filing because that would be an improper use of the government's tax power solely for the benefit of a non-governmental entity.

Although I agree with most of the proposed requirements for identifying the Service, some of the requirements in the proposed regulations, such as the genre of the channel and the

nation where the transmission was received, appear to be designed to facilitate the creation of record popularity charts such as those published by Billboard. Facilitating the creation of record popularity charts is not the proper role for copyright office regulations. These requirements have nothing whatsoever to do with any royalty calculation, and therefore are unduly burdensome.

2. Identifying the Number of Performances

Under any method of royalty calculation, the sound recording copyright owner needs information relating to the identity of the sound recording and the number of performances. This is because the Copyright Act and most recording contracts provide for the royalty to be divided between the sound recording copyright owner and the featured artist. The number of performances may be calculated either based on the number of times a song is played or based on the number of times a song is played times the number of listeners at the time. Obviously, if the former method of calculation is ultimately adopted, then information relating to the number and identity of listeners is completely irrelevant to the royalty calculation and therefore unduly burdensome. If the royalty is to be calculated based on the number of performances times the number of listeners, then the number of listeners logged on at the time each sound recording is performed must also be reported.

However, regardless of the method of royalty calculation, the proposed regulations regarding a "listener log" go further than is necessary. This portion of the proposed regulations requires Services to report the dates and times individual users log in or log off, time zones in which users receive transmissions, countries in which users receive transmissions, and unique user identifiers. These requirements are all irrelevant to determining whether a proper royalty has been paid and should not be required in reports nor required to be kept. If this information is kept in a format which can be linked to a person's name, address, or is otherwise personally identifiable, reporting this information may be a serious breach of the consumer's privacy rights. If any information about individual listeners is kept, it should not be kept in a way that can identify people individually, and it should be made available to the sound recording copyright owners only if a Service's reporting statements are audited. Already certain online services compete based on the level of privacy they afford consumers. Copyright office regulations should not be an obstacle to consumer privacy.

In addition, it appears that the proposed regulations relating to a "listener's log" are designed specifically for Internet transmissions ("webcasting") and may be inappropriate for other media. Providing a "listener's log" may be burdensome for Webcasters, but it may be literally impossible for entities publicly performing sound recordings via digital audio transmission through digital satellite, digital cable, or over-the-air digital broadcast radio. Since

the proposed regulations apply to all new nonsubscription Services, no statutory license will be available for any new entity wishing to broadcast in these media. Keeping a "listener's log" in these media is literally impossible. For this reason, the proposed regulations should not be adopted in their current form. If the number of performances is not calculated based on the number of listeners, then no "listener log" is necessary to calculate the royalty, and media other than the Internet may make transmissions under statutory license.

3. Identifying the Sound Recording

For music consumers, the most common and natural way to refer to a particular sound recording is by the name of the song and the name of the artist. Because artists sometimes make new sound recordings of songs they have previously recorded (as in many live albums) it is not unusual to also refer to the name of the album (e.g., Pink Floyd's *Money* from *Delicate Sound of Thunder* or Nirvana's *Smells Like Teen Spirit* from *MTV Unplugged*). This information is all readily available to anyone who owns a legitimate store-bought copy of a recording and liner notes. Furthermore, record labels typically arrange their files based on the name of the artist, then the name of the album. In order to assure that the Copyright Office or its designee pays the proper party, the reporting statement should also identify the sound recording copyright owner as listed after the phonorecord copyright symbol ("℗") on the sound recording. Any record label can identify a particular sound recording based on the information listed in this paragraph. Any further information is surplusage and therefore unduly burdensome.

The proposed regulations require a lot of information about the sound recordings which is unnecessary to identify the sound recording. My objections to particular pieces of information are as follows:

a. Catalog Numbers: The proposed regulations require that a Service report the catalog numbers for the albums of songs performed under statutory license. Although it is perfectly legitimate to require a record label to report the catalog number of a record it proposes to make under a compulsory mechanical license, the requirement that Services report catalog numbers is unreasonable. Catalog numbers are not usually printed on records. Services wishing to report catalog numbers will likely have to telephone the record label. This means that a label, by refusing to release information about its catalog numbers, could effectively deny statutory licensing for all third party Webcasters. This would be contrary to Congress's intent in creating the statutory licensing scheme.

b. ISRC Codes: The proposed regulations require that a Service report the ISRC code embedded in certain sound recordings. Reporting the ISRC code requires technical know-

how and equipment set to identify the code. People should have the right to webcast sound recordings regardless of their level of technical sophistication. Therefore, this requirement is unduly burdensome.

c. UPC Codes: The proposed regulations require that a Service report the UPC codes for albums of songs performed under statutory license. One of the largest classes of Services is AM/FM broadcasters. UPC codes are removed from promotional copies of sound recordings, which constitute the entire catalog of most AM/FM broadcasters. This means legitimate owners of promotional copies of soundrecordings would have to contact the record company to determine the UPC number. Since these elements are not necessary to determine which sound recording was played, any regulation requiring they be included in a report is unduly burdensome.

Just the simple act of compiling a list of catalog numbers and UPC codes is a huge burden which would require most Services to telephone the sound recording copyright owner for each album in their music library. Since many broadcasters and Webcasters use libraries consisting of thousands of albums, the time and long distance telephone charges required to fulfil this requirement might easily exceed a small Webcaster's expected annual profit. If requests for this information are made in writing, there is still a huge burden in making the information request, and the record labels have no incentive to cooperate promptly. The magnitude of this burden may be exacerbated by the fact that few if any Services organize their music libraries by record label. For these reasons, fulfilling the proposed recordkeeping requirements may be beyond the means of most Services and therefore the proposed regulations are unduly burdensome. I suggest, as an alternative, that the Service should report either (1) the artist, album title, song title, and ℗ owner, or (2) the ISRC code, or (3) the catalog number and song title. These alternative means for reporting all identify the sound recording, and the existence of alternative methods for filing would make reporting easier and more efficient for services which do have the means to report ISRC codes or catalog numbers.

4. Other Requirements

The requirement that Webcasters report both a planned playlist and a statement of the nature of the playlist (live, archived, etc) along with the actual list of sound recordings played is redundant. The planned playlist is not necessary to determine the appropriate royalty payment, and therefore the requirement that it be reported is unduly burdensome. Furthermore, Services should be permitted to operate without a playlist should they choose to do so.

The exact times sound recordings are played is not necessary to determine the appropriate royalty payment. However, a list of exact times transmissions begin and end (subject to

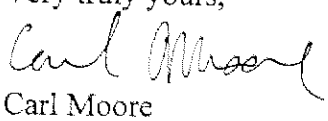
reasonable variations in clock settings) may be necessary to determine whether a royalty statement is accurate for audit purposes. Thus, Webcasters should be required to keep a log of the times sound recordings are played (preferably automated with a timestamp synched to the Webcaster's computer's internal clock), but not required to report those times to RIAA as part of its report. RIAA should be permitted to audit reports on similar terms as recording artists may audit their royalty statements. A common entertainment industry audit clause term states that, in the event the audit shows a deficiency of more than 5%, the entity being audited must pay for the audit. This is a strong incentive to issue statements correctly and a disincentive to conduct an audit where there is no reason to believe the statement is inaccurate because audits are expensive. Similar provisions could be useful in these circumstances.

III. CONCLUSION

In sum, the proposed regulations are premature and require far more information than is reasonably required to identify the proper royalty payment. Some of the proposed provisions make digital transmission in media other than the Internet virtually impossible, and others would require that Webcasters provide information that is not readily ascertainable by anyone other than the record label which created the sound recording, and this information is impossible to submit without the record label's cooperation. As a whole, the requirements are entirely too burdensome, since many of the requirements are not necessary for calculating appropriate royalty payments. In the interest of preserving free speech and fairness to small Services, no more should be required than is reasonably necessary for calculating royalty payments.

Thank you for considering these comments. If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,



Carl Moore

cc: Philip K. Lyon, Esq.
Bruce H. Phillips, Esq.