**Comments on the Effect of the RIAA/NMPA/HFA Agreement on the Issues Identified in the March 9, 2001, Notice of Inquiry (66 FR 64783)**

The following comments are offered by Terry H. Smith, and are not necessarily represent the views of Copyright.net, Inc. or Copyright Management Services, Inc.

In preface to my comments in this matter, I would like to state that the company I founded in 1982, Copyright Management, Inc. and its successor under new ownership, Copyright Management Services, Inc., [CMI] have always been proponents of new technology that invariably opens new markets for the exploitation of copyrighted works. Even though CMI has, from its inception, been privately owned and modestly funded, the company persistently supported its commitment to the development of computer technology through which the complex administrative data inherent in the business of copyright might be more accurately and efficiently managed. The growth of CMI's music publisher client base over the years has been primarily attributable to the copyright administration, licensing and royalty accounting systems developed by the company. It is from that perspective that I view the current challenges created by yet another new seemingly unmanageable market, the Internet.

Creative minds engaged in the development of new technology will continue to afford our industry new opportunities and markets for our products, and those of us that have chosen to search for workable licensing and royalty models will analyze and debate the issues until a workable solution is reached. We have been afforded many such opportunities over the past decades and, I would think, should have learned from these experiences. But the Agreement that is the subject of my comments is strong evidence that we have not.

The Internet and the capability of its component technologies to revolutionize delivery of entertainment media to a previously unheard of consumer population has been common knowledge to the executive committees of every record company, publishing company, agency and performing rights organization for the last several years. These are the authorities our industry always calls upon to provide us with the necessary legal, administrative and technological tools necessary to participate in and benefit from such new markets. But this time, we waited too long. The market moved forward without us and in the process seriously impaired the economic viability of our properties in it.

As the Internet has revolutionized delivery capabilities, we must pursue equally revolutionary, interactive solutions addressing the desires of the consumer without compromising our properties or the rights of the property owners to a fair consideration for their use. But as a result of our failure to respond in that manner, we find ourselves grasping for quick solutions in an effort to mitigate our damages. Responding to the issues at hand in such a manner is unacceptable and can only serve to raise the level of distrust among the various interests within our industry. In that environment, more

negotiations and more agreements will be entered into for the purpose of securing organizational advantages in the digital arena rather than working in concert, contributing collective resources for the benefit of owners and creators. Establishing and implementing an effective solution at this late hour demands a full cooperative effort, even if it forces us to re-evaluate our traditional roles and antiquated licensing schemes in the process. There is no question in my mind that we can successfully meet the current challenges if such cooperative efforts are employed. But failing to address these issues with more flexibility than we have exhibited in the past will only result in our losing further ground in the digital market. It is for that reason that I consider the NMPA/RIAA Agreement of October 5, 2001 [the "Agreement"] to be more of a hindrance to our desired goal than it is a "band aid" covering the wounds of our collective inaction.

While the Agreement is intended to provide a temporary (two year) solution for only two distribution formats, there is too great a risk that it may establish certain precedents that are prejudicial to publishers and writers who are not affiliated with the major publishing interests or the HFA. I realize that such harsh characterization of the Agreement will more than likely be met with forceful rebuttal if not personal criticism. Nevertheless, in the interests of the thousands of music publishers and songwriters that have chosen to conduct their businesses independently rather than become a component of one of the major publishing conglomerates, I am compelled to offer these comments.

It is my opinion that the Agreement discriminates heavily in favor of the major music interests, consisting the major record companies and their related music publishers who corporately support the same coffers. I absolutely agree that we all must support the efforts of the record companies to launch competitive and legitimate digital music services as expediently as possible. I also agree that the publishing community should favor an interim agreement whereby these legitimate services may be granted the right to distribute the underlying works contained in their selected sound recordings until we can cooperatively develop an equitable and appropriate royalty, licensing, auditing and accounting platform designed specifically for the digital markets. I disagree with the manner in which the Agreement proposes we manage this process.

The Agreement allows RIAA member licensees to make On-Demand Streams and Limited Downloads of recordings of musical works through their "majority owned" digital musical services. However, the Agreement authorizes the RIAA licensees of publishers and writers rights to grant further rights in the underlying works to "one or more" third party digital music services without further approval by publishers or their agents with respect to the historical practices or technological capabilities of said third party services. Why should it be presumed that the proper licensee of musical works for distribution via digital music services is the record company? We have chosen to categorize DPD uses in a manner that the compulsory mechanical license provisions of the Copyright Act shall apply. The more appropriate licensee for distribution of DPD's is the digital music service itself, regardless of its ownership. Sites or services engaging in such distribution should be held individually accountable for the quality of copyright protection, ability to accurately monitor and tabulate downloads and account the required fees. Under the Agreement's scenario, music publishers recourse with respect to

improper or illegal acts by the digital music services will be against the RIAA members whether or not their "member services" are guilty of such acts.

Record companies' and music publishers' concerns with respect to DPD are identical. If debates over who is to be in control of a particular revenue stream are set aside, and jointly they will agree to develop the technology by which digital music services can operate in compliance with the law and the terms of the licenses, everyone wins. Similarly, transmissions or distributions that require licenses and payments for performing rights may, with the additional participation of the performing rights organizations, also be incorporated in the license management, use tabulation and royalty accounting system utilized by the music services.

Further, the Agreement reduces the RIAA licensees' liability with respect to notices required by the Copyright Act to nothing more that an administrative function. There is no penalty for failure to comply with compulsory license provisions, for the Agreement is, in essence, a blanket offer of a negotiated license for the subject uses.

The Agreement eliminates the requirement of the RIAA licensee to provide copyright owners notice of the use of their works as anticipated in Section 115(3)(D), except for publisher-principals of the HFA.

In spite of the fact that technically only one owner of a copyright may grant a non-exclusive license, the record company members of RIAA chose not to exercise that option. In fact, record companies have often withheld royalty payments from publishers who have licensed their respective share of a copyright until all owners' licenses have been received. Since the musical works subject to the distributions addressed in the Agreement have already been licensed by one or more of the RIAA member licensees, the publisher information necessary to facilitate proper notices and, eventually, royalty payments, there is no reason for the HFA to be deemed the only necessary recipient of notices, granted the right to issue licenses for all owners of a musical work whether or not they are all HFA publisher-principals, or most importantly, to become an authorized recipient of notices from RIAA member licensees even for publishers who have chosen other means of licensing their works. While HFA publisher-principals were afforded an opportunity to "opt out" of the Agreement, non HFA publishers are not entitled to the same privilege with respect to copyrights they may jointly own with a HFA publisher-principal.

The Agreement further places a royalty advance in the amount of $ 1,000,000.00 in the hands of HFA to be used for future royalty payments, administrative costs, or even to be paid out to HFA publisher-principals based upon some formula tied to "market share". Publishers who agree to appoint HFA as their agent for licensing the subject uses may be able to share in a portion of the advance. Obviously the intent of the parties to the Agreement is to force the publishing community as a whole to employ the HFA as the sole licensing authority for the subject uses. This is further evidenced by the Agreements' provision for the HFA to receive a "bounty" of $95.00 for each non-HFA publisher it brings into the fold to become a participating party to the Agreement.

Independent publishers and writers will clearly be penalized should they not agree to the licensing scheme driven by the principals of these two powerful trade organizations. I am extremely alarmed by the potential of this Agreement and others that are sure to follow, because the individual interests that drive both organizations are bound by the same corporate management authority. I ask only that the final solution afford the same benefits to all copyright interests, regardless of their chosen affiliation.

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