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

In the Matter of	)	
	)	
Notice and Recordkeeping for use of	)	Docket No. RM 2002
Sound Recordings Under Statutory License	)	
	)	

REPLY COMMENTS OF ROYAL PROGRAMS, INC.

Royal Programs, Inc. ("Royal") hereby respectfully submits its Reply Comments in the captioned matter. Specifically, Royal wishes to address the comments filed by the Recording Industry Association of America, Inc. ("RIAA") [Document 30 in the Copyright Office's extremely helpful on-line posting of comments] and by the American Federation of Musicians of the United States and Canada and the American Federation of Television and Radio Artists ("AFM/AFTRA") [Document 28].

The vast majority of commenters demonstrated legal and practical infirmities with the proposed record-keeping and reporting requirements to be associated with the statutory licenses.[1] While Royal agrees (and raised a number of these points in its own comments), it wishes in this reply to address two sets of comments in particular – those of RIAA (which, not surprisingly, wholeheartedly support the proposed regulations which, after all, were based upon RIAA's own

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[1] Among other relevant matters, these commenters aptly observed that the proposed record-keeping and reporting requirements are technically impractical, if not impossible; will invade listener privacy; will discourage creative programming and the exposure of new artists; will force the most innovative webcasters and most non-commercial entities out of business (and thereby foreclose meaningful competition in this medium); and are entirely unjustified in order to fulfill the statutory purpose.

proposal) and AFM/AFTRA, which request even more information than the excessively detailed amount of data RIAA had requested.

These two proposals, and the purported justifications advanced in their respective comments, are premised upon a fundamental but erroneous presumption – that webcasters should compensate for the historical record-keeping lapses of RIAA and its members. Thus, the reason RIAA claims to need a vast amount of detailed information concerning each webcast recording is simple – although such data may prove useful for RIAA to fulfill its own duty of determining its members' entitlement to webcasting fees and thereby to represent its members' interests, it (and they) never bothered to compile this information in the past. Now that it belatedly recognizes a need for such data, rather than undertake this remedial obligation itself, RIAA seeks to impose that burden upon webcasters, who properly have nothing to do with this function.

AFM/AFTRA proceeds from a comparable mistaken premise – that webcasters should somehow be required to research and report all non-featured musicians who participated in a given recording session. But if the unions themselves never bothered to keep track of their own members' activities, why in the world should webcasters now have to do so?

In that light, several of the specific positions asserted by RIAA in its comments compel a response based upon the sheer unreasonableness of expecting webcasters to remedy a record-keeping lapse of RIAA's own creation:

> **Where the Burden Properly Lies** – At pages 2-3 of its comments, RIAA contends that criticism of the overall reporting requirement is inappropriate, as it was mandated by Congress; at pages 6-8, RIAA goes even further in accusing webcasters of shifting a burden of information reporting to the proposed distribution agency (*ie*: an RIAA affiliate). RIAA misses the point. Congress did not impose upon webcasters the burden to collect any and all information which might be tangentially relevant to RIAA in the discharge of its private administrative functions, nor did Congress require that the new webcasting industry subsidize the internal activities of RIAA (which, after all, is a business and hardly a non-profit entity whose activities are devoted solely to advancing

public welfare.[2] Rather, Congress specifically stated that the reporting requirements were to afford "reasonable" notice of the use of a sound recording.[3] In defense of the "reasonableness" of its proposals, RIAA asserts that the burden of providing information so far "did not thwart, hinder or cripple the development of existing services." (RIAA Comments at 4.) The specific concerns raised and evidence presented by the preponderance of commenters herein forcefully demonstrates the opposite – that the activities of many webcasters will be severely curtailed or even destroyed by the record-keeping and reporting burdens RIAA seeks to impose.

Facilitating Exact Distribution of Royalties – RIAA contends that extreme detail is required in order to enable the exact distribution of royalties to each copyright owner and performer. (RIAA Comments at 9.) And yet, keeping in mind the statutory requirement of reasonableness, it makes no sense whatsoever to require webcasters to expend thousands upon thousands of dollars so that RIAA can distribute royalties which may amount to fractions of a penny. Indeed, a useful comparative precedent is the distribution of publisher fees under ASCAP, BMI and SESAC licenses. These umbrella organizations historically have relied with great success upon sampling and other estimation techniques to assure an equitable distribution of fees among music publishers. RIAA has failed to suggest why it could not develop and rely upon a comparable system here. Given the sheer impossibility of achieving a truly exact result regardless of the degree of effort, some tradeoffs are needed for the sake of efficiency.[4]

The Question of Efficiency – It makes no sense whatever for potentially thousands of independent webcasters to each compile and submit the very same types of data which could be assembled in and obtained from a central database. The logical repository for such a database, of course, is the organizations responsible for tracking their members' activities – RIAA and the unions. All that would then be necessary to trigger the quantity of needed information is to report the specific album cut which was webcast; that, in turn, would enable the producer of that album (or the producer's successor, licensee or representative) to provide the remaining information which RIAA seeks. Royal respectfully notes that the All-Music Guide, CDDB and others have already compiled publically-available music databases comprised of album, artist and track information; it would be far more efficient for RIAA and the unions (or some other central repository) to

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[2] On the contrary, RIAA is a private organization which represents *some* of the major players but hardly a preponderance within the recording industry. (Original Sound, Royal's record label, is not a member.) Royal has to wonder if placing in the hands of RIAA responsibility for determining equitable distributions among all claimants will truly protect the interests of the legions of independent labels and artists or whether this situation is compromised by a conflict of interest.

[3] See 17 USC Sections 112(e)(4) and 114(f)(4)(A).

[4] Let us assume, hypothetically but not so improbably, that the heirs of a musician claim that he had played decades ago during a certain recording session for which no documentation was kept. How is RIAA to evaluate such a claim? Even if it is unchallenged, will royalties flow as a result? Clearly some factual premises for distribution will remain forever clouded in certainty.

expand upon such databases to include whatever additional information they feel would be helpful than to call upon each webcaster to attempt to compile it individually (and then to have to reconcile the inevitable inconsistencies which webcaster "guesswork" would inadvertently generate).

Bearing the Cost of Distribution – At page 27 of its comments, RIAA contends that it is not fair for collecting entities to be required to bear the cost of determining equitable distributions. (A similar contention is advanced at pages 10-13 of the AFM/AFTRA comments.) On the contrary, it certainly is. Historically, the comparable distributions of publisher copyright fees by ASCAP, BMI and SESAC has always been net of expenses. Any dissatisfaction of RIAA members with the inefficiency and expense of its own internal record keeping is not a matter for webcaster concern but rather one for which RIAA bears responsibility and should undertake to remedy directly.

Existing Databases – At page 40 of its comments, RIAA contends that webcasters already have compiled databases of all information needed for the reports and so submission of this information would pose at best a minimal burden. That is not true. The databases maintained by webcasters are for specific and limited purposes which do not even come close to coinciding with all of the information which RIAA and the unions now seek.[5]

The Burden of Further Research – In what may well be its most absurd contention of all, at page 44 of its comments RIAA suggests that a webcaster should have the obligation to track down and report information missing from a compact disc – when the RIAA member who issued the "defective" disc had (or should have had) the information but was responsible for omitting it from the disc in the first place! The illogic of this position crystallizes the fundamental flaw in RIAA's position – that a webcaster should somehow be compelled to provide information to an RIAA member which that member already has (or should have) on hand but for whatever reason did not bother to disclose.

This final point, although incongruous, is quite revealing and significant – the very fact that RIAA believes that a webcaster can readily research any "missing" information suggests a

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[5] RIAA quotes a dozen parties who described some of their software during the webcaster CARP proceedings. In each case, the databases are oriented toward a specific need of the webcaster to track certain characteristics of audiences, generally focusing upon listener preferences for certain types of programming. Such information is generally irrelevant to RIAA's concerns and in any event is proprietary and inappropriate for disclosure to competitors or the public. Moreover, these databases belong to relatively rare well-financed players in the field of webcasting. Even the database compiled and used by Killeroldies.com (under common ownership with Royal and the 14th most popular among all webcast channels) comprises only artist, track title and length of track. Presumably, databases of entities with more limited means or lesser success are apt to be even more abbreviated. Clearly, the existing databases comprise only the amount of information deemed necessary for the reasonable conduct of a webcasting business.

highly practical solution to whatever problem RIAA perceives to exist in the availability of information it claims to need. That is, if RIAA truly believes that a mere webcaster can find the missing information so easily, then so can RIAA – and far more efficiently, given its far more extensive resources.

Royal suggests a reasonable and practical approach to the problem with which RIAA seems so concerned. The source material for webcasting can be reliably divided into two broad categories – performances distributed digitally and "catalog" items preceding the current era (that is, recordings made and distributed prior to the inclusion of substantial information coded into the digital recording itself).

As RIAA recognizes, CDs are manufactured under standards spawned from the original standard developed by Phillips and Sony (the so-called "Red Book" for audio CDs). The RIAA, acting in accordance with its mission to conduct industry and technical research, and in conjunction with its members, could easily develop (or adapt from existing standards such as Yellow, Green, White and Orange) a standard to produce and distribute CDs with all of the information RIAA claims is necessary in order for the distribution of webcasting royalties.

As for catalog items, unfortunately in many if not most cases it simply is too late to reliably research such information which is not readily available. Royal respectfully submits that it was the responsibility of record manufacturers, unions and/or those from whom musical cuts were licensed for compilation or reissue albums to have kept track of copyright holders and performers who contributed to the recording. If they can provide RIAA with that information for a central database, then RIAA should actively seek the information and compile and maintain the

database. If not, then this is an unfortunate historical loss, but one which those who merely play the music cannot possibly be expected to bear the burden to recoup at this very late stage.[6]

Royal also respectfully notes that by discouraging webcasting through unduly burdensome record keeping and reporting requirements, RIAA and the unions are only hurting their members. KillerOldies.com (under common control with Royal) has emerged as an important vehicle for direct Internet sales of featured musical product. In light of the uncertainties over the future of "brick and mortar" music retailing, attention has increasingly turned toward Internet sales of CDs as the wave of future music distribution. After all, no other medium permits identification of the artist, album and other information that is being listened to, permits a one-click link to further information (including a discography, pictures and liner notes), and can effect a sale of that music immediately, all while a track is being listened to. Often, such a direct solicitation and possible sale involves an RIAA member's finished product; other sales (such as, for example, of a record album of Original Sound (Royal's affiliated label), entail licenses whereby advance master royalties have been paid and/or subsequent royalties are to be remitted to the rights holder. In either event, this directly creates revenue for both the labels and artists.

Without webcasting, how do RIAA and the unions expect their members to generate future music sales which, in turn, will produce the royalties upon which they increasingly depend for a significant component of their income? And, in light of the international, borderless nature of the Internet, together with the well-known lax copyright enforcement abroad and the

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[6] Royal further notes that its own digital library (*ie*: its digital audio delivery system for its network radio and internet webcasting) consists of about 2,000 tracks of catalog items from seven decades of music, built up over the last decade, the exact source of much of which is no longer known or capable of being determined.

proliferation of imported (and often pirated) material, if the burdens upon domestic webcasters become too burdensome, how does RIAA expect to fend off foreign competition which neither RIAA nor Congress can control (much less derive fees from) at all? As an entity which has its roots (and derives income) from all aspects of the modern industry,[7] Royal urges RIAA to focus upon the long-term implications of strangling the emerging webcasting industry.

In conclusion, for the reasons set forth herein and in its initial comments, Royal urges the Copyright Office not to impair or risk destroying the new webcasting industry with unnecessary and unduly burdensome record-keeping requirements. In particular, centralized entities such as RIAA are in a far better position to compile the information it claims to need, but which in any event goes far beyond what is reasonably required to fulfill the statutory obligation.

Respectfully submitted,

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[7] As noted in its initial comments, Royal and its related companies and owner are active in radio production, radio station ownership, concert promotion, publication, music licensing, syndication, satellite distribution and webcasting. While Royal perhaps could afford compliance with RIAA's proposal far more than most potential webcasters, it is concerned that the net effect will be to diminish the vitality of webcasting which, in turn, will hurt several of its interests which are parallel to those of RIAA and the unions.