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BEFORE THE UNITED STATES COPYRIGHT OFFICE
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DOCKET NO.

RM 2002-1

COMMENT NO. 6

In the Matter of:

Notice of Recordkeeping for Use of
Sound Recordings under Statutory License

Docket No. RM 2002-1

Reply Comments of Princeton Broadcasting Service, Inc.

Princeton Broadcasting Service, Inc. is a non-profit corporation organized under the laws of New Jersey. It is the license-holder of WPRB-FM, a 14,000 watt radio station broadcasting at 103.3 MHz (Channel 277B). Since 1999, WPRB has simulcast its over-the-air FM signal on the Internet with access to the audio stream provided through its web site, now found at <www.wprb.com>. WPRB is a member of Intercollegiate Broadcasting Systems (IBS), a commenter during the initial period in this rulemaking. WPRB now welcomes the opportunity to reply separately from IBS to raise certain issues not explored fully during the initial comment period.

As a commercial yet non-profit radio station, WPRB is uniquely situated to comment on the proposed record-keeping requirements. WPRB's day-to-day operations are substantially similar to those of earlier commenter Harvard Radio Broadcasting Company / WHRB-FM.¹ WPRB receives no direct funding from Princeton University, instead supporting itself through on-air advertising revenues and investment income. Since its inception as a cable-carrier AM station in December 1940, WPRB's broadcasting content and philosophy has been characterized through the ironic title of its Sunday evening folk music program: "Music You Can't Hear On The Radio."

¹ See Comment #33 in this rulemaking, submitted by Harvard Radio Broadcasting Co., Inc. WPRB's studios and offices are located at Princeton University, and its volunteer staff is largely made up of current University students. At the same time, Princeton Broadcasting Service, Inc. is a completely separate entity from the University, and WPRB is not subject to any University control over or review of programming content.

WPRB objects to the proposed rules because they are not reasonably calculated to collect the minimum information needed to provide appropriate compensation to performers and record labels. WPRB recognizes the importance of the royalties to featured and non-featured performers, but it also believes that these royalties can be administered without such onerous reporting requirements. We also object to the "listener log" requirements in their entirety, as there is no practical purpose for such a clear threat to the privacy interests of Internet users. We propose replacing the listener log with a statistically valid sampling model, perhaps supplemented with the equivalent of Nielsen and Arbitron ratings for Internet usage.

I. REASONABLE SAMPLING OF NETCASTERS CAN PROVIDE ADEQUATE DATA FOR ROYALTY COLLECTION AND DISTRIBUTION

Almost since its inception, the broadcasting world has used statistical models, verified and informed by sampling programs, to address two important issues: public performance royalties due to music publishers, and the size of broadcast audiences. These methods and their results provide reasonable alternatives to the onerous and excessive requirements proposed in this Rulemaking.

A. *Publishing Royalties*

As a radio broadcaster, WPRB is required to pay publishing royalties on the compositions it performs publicly. The majority of publishing licenses are administered by three licensing agents: the American Society of Composers, Artists and Performers (ASCAP), Broadcast Music Incorporated (BMI) and SESAC, Inc. These agencies perform the difficult task of determining what public performances have occurred and then distributing royalties to copyright owners in relation to those performances.

All three agencies grant "blanket licenses" to broadcasters, authorizing the performance of all compositions under the licensor's control in return for a single

annual payment. These licenses also cover limited synchronization rights, such as the use of composition excerpts for pre-recorded advertisements, program theme music, and brief musical interludes or "bumpers." For commercial broadcasters like WPRB, ASCAP and BMI royalty payments are a percentage of annual revenues from broadcasting activities while SESAC royalties are derived from the size of the local broadcast market and the average advertising rates charged by the station.

ASCAP, BMI and SESAC each use proprietary statistical sampling and modeling systems to allocate royalties to copyright owners. Twice each year, BMI asks WPRB to complete broadcast logs for a seventy-two hour period detailing each composition performed on the air. The logs ask for the start and stop time of each composition, the title of the composition, the identity of the performer and the identity of the composer. We believe that ASCAP and SESAC hire individuals within the broadcast area to keep periodic broadcast logs or to record broadcast segments that are later analyzed to identify content. Broadcast logs can be supplemented with the recording industry "charts" indicating popularity of various compositions in radio airplay and record sales.

Regardless of the collection model, ASCAP, BMI and SESAC use this data to extrapolate the number of performances of a given composer's works in a year or quarter. Extrapolation provides the basis for each agency's payments back to publishing companies and copyright owners, funded through broadcasters' blanket license payments.

Finally, we note that the performing rights agencies have also extended their blanket licenses and sampling methodology to netcasting. Each agency has slightly different terms and conditions, but they all have recognized that their existing royalty scheme for over-the-air broadcasting applies equally to netcasting. In keeping with its current over-the-air monitoring system, SESAC is currently adopting a "digital

watermark" system to track and measure netcasting content.² WPRB, like many other radio stations, is currently paying increased license rates to cover its on-line simulcasting operations, recognizing the separate and independent use of copyrighted material involved in netcasting.

B. Audience Measurements

In a similar manner, national radio and television advertising rates are set in large part on the results of the Arbitron and Nielsen ratings. These ratings are based on data recorded in set-top boxes or paper journals by audience members, detailing in quarter-hour increments the radio and television programming selected by the participant. The services collect the data and then apply statistical models to extrapolate audience sizes throughout the broadcasting day for each source of programming. Further modeling allows Nielsen and Arbitron to provide demographic analyses of audiences and their programming habits and preferences.

Nielsen and Arbitron do not capture every household's viewing or listening activity, but their samples provide sufficient information to create reasonable estimates of audience size. The ratings drive the rates charged for advertising in a mix of audience size and demographics reached by particular programming sources. Sampling is both valid and necessary in the broadcasting world, since radio and television signals cannot inherently be traced or tracked according to when or where individuals begin and finish listening or viewing.

C. The Proposed Requirements and Reasonable Alternatives

The Copyright Office proposes that netcasters record eighteen separate pieces of data for each performance broadcast each day, along with six pieces of information

² See "SESAC Signs Agreement with Audible Music," press release, found at <http://www.sesac.com/news/sesac_signs_audible_music.html> (visited April 26, 2002).

about each connection made to an audio stream each day. The Notice explains that some netcasters are already recording such data and furnishing it to performance royalty administrators. The Notice further proposes that digital performance rights administrators receive complete logs for each webcasting day, detailing the number of active streams connected with each performance distributed. WPRB believes that these requirements are far greater than necessary.

As explained above, the publishing rights administrators use combinations of broadcast log sampling and statistical models to determine royalties for their member publishers. Nielsen and Arbitron exist precisely to sample and extrapolate audience sizes for over-the-air broadcasts.

WPRB believes that similar sampling systems can and should be used to satisfy the digital performance rights question. Broadcasters and the publishing rights administrators have already proven the efficacy of a statistical sampling model for royalty distribution.

We concur in the prior comments of Harvard Radio Broadcasting and IBS regarding the acquisition and recordation of information requested about each performance. Like many "college radio" stations, WPRB's broadcasts are programmed in real time by individual disc jockeys with selections from the station's extensive library of albums and compact discs. WPRB's netcasting signal is derived from a radio receiver as opposed to a direct audio feed from the broadcast studio. Currently, there is no practical way of embedding the requested metadata into the broadcast stream short of digitizing the entire music library, a task far beyond WPRB's computing and volunteer resources.

BMI logs completed by broadcasters ask merely for the performer, the composition title, the composition's author, and the start-and-finish time of each

selection. From this data, BMI can determine appropriate credit for public performances of licensed works for both over-the-air and on-line transmissions. As noted above, SESAC is now looking to use digital watermarks to track streaming content. These sampling methods place the copyright enforcement burden where it belongs — on the copyright owner and its performance rights agent. A properly applied sampling model would allow sound recording royalty administrators to perform their function without unduly burdening netcasters, many of whom lack the resources to fulfill the proposed recordkeeping requirements.

As for the determination of streams in use, we again believe that the existing models provide an appropriate measuring tool. Arbitron has expanded its services to include audience measurement for netcasting, while Jupiter Media Metrix and others provide similar services for web sites and other Internet resources. The existing technology can be used to derive appropriate “audience share” and average listenership figures for individual netcasters. Combined with occasional measurements taken from a netcaster’s server logs, this data provides an ample substitute for continuous logging of each audio stream. The capability to identify each audio stream does not justify the burden of time and money necessary to do so.

II. THE PROPOSED RECORD-KEEPING IS NOT FEASIBLE AND VIOLATES THE PRIVACY RIGHTS OF END-USERS

Many comments received during the initial period protested various aspects of the proposed “listener log.” WPRB concurs with the comments of Collegiate Broadcasters, Inc., IBS and the Electronic Frontier Foundation in their concerns for the technical limitations of tracking IP addresses and recording local time zone data and the significant privacy interests.

Non-subscription netcasters, like their broadcasting brethren, do not obtain any specific verifiable information about their on-line listeners in the ordinary course of operations. The IP addresses logged by web servers and some streaming audio servers cannot be traced back to a location other than the place of business of the Internet service provider. As pointed out in previous comments, this means that all 23,000,000 subscribers to America Online in the United States may appear to be located in Virginia, where AOL's offices and primary Internet connections are located, rather than the subscriber's home or place of business. More sophisticated Internet users also have the ability to mask or obscure the IP address of their Internet connections, their locality, or both, further frustrating the misguided intentions found in the proposed regulations.

More important than the technical limitations, however, are the privacy concerns. As proposed, the broadcast and listener logs are the equivalent of requiring retailers to record and report uniquely identifying information about each purchaser of phonorecords. The absurdity of such a requirement in the retail world, whether brick-and-mortar or on-line, is easily apparent. Businesses that do tend to acquire such information, such as pre-recorded videotape rental stores and subscription television services, are prohibited by law from releasing such data except by court order.

In many respects, the proposed broadcast and listener logs represent a marketing holy grail: perfect audience knowledge. It is only a matter of time before the royalty administrators acquire the computing capacity and know-how to use the "unique listener identifiers" to provide an unprecedented level of demographic research — records of precisely who is listening to each sound recording. This kind of information is currently unavailable in a pure form, due to the practical limitations on tracking terrestrial broadcast signals and the well-founded privacy concerns manifest in legislation regulating the conduct of pre-recorded videotape rental stores and

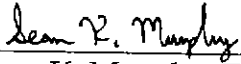
subscription television services. The proposed rules will generate a massive windfall for the royalty administrators, wholly unrelated to their alleged purpose of collecting royalties for the benefit of performers.

As a matter of both technology and public policy, the listener log is an ill-advised element of the proposed regulations. Audience measurement is a valid element of a digital sound performance royalty scheme, but the listener log is not the way to accomplish that goal.

In conclusion, WPRB requests that the Copyright Office modify the data collection requirements for individual sound performances to require only periodic logging and reporting of content. WPRB also asks that the Office eliminate the proposed listener log, instead adopting a sampling methodology supplemented by outside, mass-market Internet traffic measurement schemes. These measures are sufficient to meet the needs of sound performance royalty administrators and readily implementable by netcasters of all sizes. We thank the Office for the opportunity to offer these comments.

Respectfully submitted this 26th day of April, 2002.

PRINCETON BROADCASTING SERVICE, INC.



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