In the
COPYRIGHT OFFICE
Washington, D.C. 20540

In re NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE	)	Docket No. 2002-1

REPLY COMMENTS OF HARVARD RADIO BROADCASTING COMPANY

I. Introductory Statement

Harvard Radio Broadcasting Co., Inc. ("WHRB"), respectfully offers these comments in reply to the thirty-nine posted responses to the Copyright Office's ("Office") Notice of Proposed Rule Making on recordkeeping for use of sound recordings under statutory license. WHRB observes that a large number of the comments support the station's original contention that a "one-size fits all" recordkeeping guideline for different-sized entities does not make sense and that the proposed requirements for *Reports of Use of Sound Recordings under Statutory License* are indeed "too stringent" and "unduly burdensome"[1] for small, non-profit AM-FM webcasters. Indeed, the comments seem to indicate that the proposed rules are overly burdensome even for extremely large entities such as XM Satellite Radio, Sirius Satellite Radio, and Music Choice. *A fortiori* they are too burdensome for much smaller entities.

[1] Section 2 of NPRM, at 67 Fed. Reg. 5761, 5762-63 (February 7, 2002).

WHRB continues to advocate that small businesses[2] be exempted from filing the *Report of Use of Sound Recordings under Statutory License* as proposed or that the Office promulgate procedures similar to those employed by ASCAP in its agreement with webcasters for public performance rights.

WHRB's reply comments will take the following form: areas of agreement amongst small AM/FM webcasters, areas of agreement amongst representatives of all sizes of digital services and WHRB's disagreement with specific initial comments. Finally, these reply comments will respond to the objections voiced formally and informally to the applicability of the Regulatory Flexibility Act of 1980, 5 U.S.C. ch. 6, particularly as amended by P.L. 104-121 in 1996 to deal with "recordkeeping requirements." See 5 U.S.C. §§ 601(8) and 604(4).

II. Small AM/FM Webcasters Agree Requirements Are 'Unduly Burdensome.'

Comments to the Office from small, non-profit AM/FM webcasters all echo the complaint that the reporting requirements are "unduly burdensome." These groups agree on the following points:

- Small AM/FM webcasters lack the software/hardware programming automation systems which make reporting a trivial task for larger entities.
- The purchase of these systems is too expensive for the minimal budget of a non-profit.
- Small AM/FM webcasters play a much larger quantity of individual sound recordings than larger entities.

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[2] *Small Business Size Standards -- Inflation Adjustment to Size Standards,* 67 Fed. Reg. 3041 (January 23, 2002), amending 13 C.F.R. §121.201.

- Much of the information requested by the proposed guidelines does not appear on the more obscure sound recordings transmitted and collected by these groups.

- Small AM/FM webcasters generally do not plan out programming in advance. Programming is done in real-time by live, human DJs.

- Small AM/FM webcasters do not have their music libraries cataloged in digital format. The cost, in both dollars and volunteer time, is prohibitive to complete such a task.

- Small AM/FM webcasters should be exempt from the reporting requirement or be subject to the same reporting requirement currently imposed by ASCAP, BMI or SESAC.

III. All Digital Services Agree Certain Proposed Regulations Are 'Unduly Burdensome.'

Interestingly, even larger entities such as XM Satellite Radio, Sirius Satellite Radio and Music Choice report that the proposed rules are "unduly burdensome." WHRB does not make any recommendation to the Office on reporting structures for these entities, but calls this to the Office's attention to demonstrate the difficulties involved in the creating *Reports of Use*. Some examples:

- XM Radio reports: "Manually entering metadata associated with recordings from entire channels is extremely burdensome and requires a significant expenditure for data entry personnel."

- XM reports that the task of modifying its databases to "reorder the existing fields, include additional fields, create new reporting programs and input all the metadata" would "literally cost millions of dollars." This is in addition to the time and expense of initially creating and installing this system.

- XM reports that the task of re-entering metadata for its 1.6 million-piece library would require "28 people a full year to complete the job."

- Music Choice reports that collecting Catalog Number and IRSC on each sound recording is not feasible.

IV. RIAA is Incorrect in Its Broad Assertions and Fails to Demonstrate the Utility of Its Modified Proposal.

Recording Industry Association of America's ("RIAA's") comments fail to show that the one-size-fits-all recordkeeping requirements it seeks to impose on the webcasters affiliated with educational institutions are either necessary or practical and will have no adverse effects on the public, the small webcasters, and the small record labels.

The RIAA, as a representative of copyright owners, asserts that detailed and uniform reporting on the use of sound recordings by digital services is required by law and precedent. WHRB argues that the RIAA is factually incorrect in this assertion and that certain classes of webcasters should be given recordkeeping exemptions.

A. RIAA is incorrect in using the Office's Interim Ruling, 63 Fed. Reg. 34,289, 34,293 (June 24, 1998), as a basis for forming reporting requirements for small entities.

The RIAA asserts that the Office has already decided in its interim rules on *Notice and Recordkeeping for Digital Subscription Transmissions* in June, 1998, that detailed *Reports of Use* are required for proper allocation or royalties. WHRB would like to remind the Office that in its interim ruling, the Office received and apparently relied on comments and information from only four commenters, viz., RIAA and three digital music subscription services operating in the United States, DMX, Inc. ("DMX); Muzak, Inc. ("Muzak"); and Digital Cable Radio Associates/Music Choice ("DCR"). None of these entities represents the interests or practices of small webcasters such as WHRB. As a consequence, the resulting interim rules, 37 C.F.R. § 201.35-201.37, do not provide an adequate basis as a model for the proposed *Reports of Use*.

B. RIAA is incorrect is stating that "services already use technologies that facilitate detailed reporting."

The RIAA assumes that all webcasters make use of automation software and hardware systems for transmitting sound recordings. The RIAA references a February 25, 2002, Wall Street Journal article about the largest AM/FM webcaster operating in the United States, Clear Channel, and states, "many stations already use software and hardware that could be utilized to provide the data set forth in the proposed regulations." RIAA Comments at 42. As detailed in numerous comments filed with the Office by small AM/FM webcasters, most use human DJs to transmit sound recording in real-time. These small stations do not own or operate these type of systems and estimate the cost of implementation to far and exceed their total annual budgets. In addition, the large music rotations used by many small AM/FM webcasters makes off-the-shelf automation systems impractical.

C. RIAA is incorrect is stating that "information requested in the uniform report of performances is readily available to services."

Throughout its comments, the RIAA assumes that all sound recordings from services originate from recently released CDs. However, many small AM/FM webcasters such as WHRB continue to broadcast recordings from vinyl, cassettes and reels. In many instances, the information contained on these formats is not as detailed as portrayed by the RIAA on recent CD releases. For example, the station estimated it owns 20,000 7" records. Approximately 40% of these records contain no more information than the name of the artist and musical work

D. RIAA's proposal for uniform standards is short-sighted.

The "slightly revised" proposal by the RIAA,[3] standing alone, does not materially reduce the direct and disproportionate burden on small AM/FM webcasters. Therefore, WHRB continues to contend that if the proposed regulations are made final, that station will cease to webcast immediately. WHRB does not understand any benefit this will have on copyright owners. First, since many recordings WHRB transmits are from small record labels, these labels will disproportionately lose out on a valuable promotional channel. Second, if WHRB ceases to webcast it will, necessarily, cease to pay royalties to music performers for transmitting their sound recordings. It would appear that given the choice of receiving no payment and no reporting information versus receiving payment and only limited reporting data, copyright owners would choose the latter.

The compromise proposed by WHRB, to use the guidelines set forth by ASCAP in their *Experimental License Agreement for* Internet *Sites & Services – Release 4.0* (WHRB Comments Attachment II) for reporting the use of digital musical compositions, would allow RIAA's SoundExchange the collection of sampling data on musical works transmitted by smaller entities. ASCAP, which has a lengthy institutional history, finds this information adequate for distributing royalty payments, and WHRB questions why the RIAA would find this system faulty.

RIAA's comments do not negate the showing in this proceeding of the adverse impact that suppression of small webcasters by the proposed rules would have on the diversity of music available to the public at large. By suppressing small webcasters

[3] RIAA Comments at 32.

through recordkeeping disincentives, small labels will be denied the public exposure necessary to their continued viability. It is not the webcasters streaming the standard formats that keep the small labels alive. They are highly dependent for public exposure on the very webcasters that burdensome recordkeeping requirements would drive out of business.

But even to the extent that the surviving webcasters could practicably continue to play such small labels and report such use, RIAA's comments fail to demonstrate that its so-called SoundExchange could practicably process reports of such plays and cost-effectively distribute the small per-label amounts of royalties to the large number of entities entitled to royalties from small-label recordings. Looking at WHRB's libraries of active musical recordings, the station estimates that there are around over three hundred different classical music labels, twenty thousand different rock music labels, one hundred and fifty different jazz labels, and another one hundred fifty different hillbilly labels (not counting 45s). These figures quickly add up to a minimum of 20,500 different labels. The apportionment of a $ 500 minimum payment among 20,500 label entries in SoundExchange's database -- even if it could be done -- would yield an average of less than three cents per payment period per label. RIAA makes no showing that its proposal would be technically practicable or economically feasible. Whatever the net financial benefit from imposing a recordkeeping requirement on popular webcasts that play only fifty different digital recordings per week to large audiences, financially there is no point in the Office's attempting to burden webcasters affiliated with educational institutions with heavy-duty recordkeeping requirements to no one's financial benefit. This is the

sort of mindless regulatory overkill at which the Regulatory Flexibility Act was aimed. See Section 2(a)(3) - (6) of the Act, 5 U.S.C. § 601 nt.

V. The Recordkeeping Proposal Would Unlawfully Burden Small Webcasters.

Neither the proposal published by the Office nor the "slight" modification thereof proposed by RIAA in its comments comports with the purposes of the Regulatory Flexibility Act ("RFA"), as set forth in Section 2 thereof, 5 U.S.C. § 601 nt, nor would the record in this proceeding support the adoption of either in compliance with Section 604(a) of the Act, 5 U.S.C. § 604(a). The argument that the instant rulemaking proceeding is not subject to the RFA, as amended, is unsound as a matter of statutory construction. Congress did not intend to exclude Office rules from application of the RFA. If the Office, in its rulemaking capacity, were to fall within the Congressional exemption in Section 2(a) of the Administrative Procedure Act ("APA"), its exercise of rulemaking powers would conflict either with the presentation clause of the Constitution or with the Constitutional requirement for separation of powers.

The published proposal violates the public policy concerning the impact of Federal rules on small entities, as set down by Congress in Section 2 of the RFA, 5 U.S.C. § 601 nt. Such violation is in no way attenuated by the RIAA's "slight revision" of its original proposal. RIAA Comments at 32. The record in this proceeding simply provides an inadequate basis for the Office's adopting the recordkeeping rules, as proposed, because Section 604(a) of the RFA, 5 U.S.C. § 604(a), requires an agency

> promulgat[ing] a final rule under section 553 of this title [APA Section 4 (Rule making)], after being required ... to publish a general notice of proposed rulemaking ..., the agency shall prepare a final regulatory

flexibility analysis. Each final regulatory flexibility analysis shall contain --

> (1) a succinct statement of the need for, and objectives of, the rule;
> (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
> (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
> (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
> (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rules and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

It is clear as a textual matter that Congress intended rulemakings in the Office to be subject to the RFA. Section 701(d) of the 1976 Copyrights Act ("1976 Act"), now 17 U.S.C. § 701(e), specifically provides that

> all actions taken by the Register of Copyrights under this act are subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, Chapter 5, Subchapter II and Chapter 7).

The Office's instant proposal to impose a recordkeeping requirement is clearly an action within the recordkeeping requirements provisions added to Sections 601(8) and 604(4) by Congress in P.L. 104-121 in 1996.

Any argument that the RFA should not apply to the Office because it is not an "agency" within the meaning of Section 2(a) (agency) of the APA, which is incorporated by reference in Section 601(1) (agency) of the RFA, 5 U.S.C. § 601(1), must be rejected.

The exclusion of "the Congress" from the definition of "agency" in the APA has the intent and effect only to exempt Congress as a governmental authority from the APA. In Section 701(d) of the 1976 Act, Congress very explicitly and deliberately intended the Office to be subject to the APA, thereby limiting *pro tanto* the effect of the Congressional exemption. Moreover, Section 701(d) of the 1976 Act also specifies that Section 10 (Judicial review of agency action) of the APA, now 5 U.S.C., ch. 7 (Judicial review), shall apply to "all actions taken by the Register of Copyrights" under the 1976 Act. The exclusion of "the Congress" from the definition of agency for the purpose of Chapter 7 in 5 U.S.C. § 701(b)(1)(A), is essentially identical with that in Section 2(a) of the APA, now 5 U.S.C. § 551(1). Again in Section 701(d) of the RFA, Congress made it plain that the Office was not exempt from "judicial review of agency action," so the Office is included within the term "agency" throughout the APA.

The omission of any reference to the Regulatory Flexibility Act of 1980, 5 U.S.C., ch. 6 (The Analysis of Regulatory Functions), in Section 701(d) of the 1976 Act does not of itself imply that Congress did not intend the Office to be subject to the RFA. When Section 701(d) was enacted, the RFA had not yet even been enacted and could not have been referred to as Chapter 6 of Title 5.

Congress cannot be taken to have intended to exempt the rulemaking function of the Copyright Office under Section 701(d) of the 1976 Act from the RFA. Otherwise, the exercise of that quasi-legislative function by a part of "Congress" within the meaning of Section 2(a) of the APA, would violate the presentment clause of the Constitution, Art. I, § 7, Cl. 2. See INS v. Chadha, 462 U.S. 919 (1983). Alternatively, if deemed non-

legislative, then the exercise of that function by a part of "Congress" within the meaning of Section 2(a) of the APA, would violate the separation of powers.

Congress, in enacting Section 701 of the 1976 Act and later amending it in 1998 by P.L. 105-304, did not intend to so disregard the Constitutional issue. This is a case where "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.). Section 701(d) of the 1976 Act was inserted in response to the challenge to the Constitutionality of what became the 1976 Act in the course of the House hearings on H.R. 2223. In testimony before the House subcommittee on June 5, 1975,[4] Professor Brylawski previewed his law journal article arguing that Constitutionally the Office "must either be transferred to the executive branch or reestablished as an independent regulatory agency under the direction of a Register appointed by the President." See E. Fulton Brylawski: *The Copyright Office: A Constitutional Confrontation,* 44 Geo.Wash. L. Rev. 1, 47 (1975). In addition, chapter XV(7) of the Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill (1975) relies on a legal memorandum of Kent Dunlap, a staff attorney, "The Effect of the Constitutional Principle of Separation of Powers on the Copyright Revision Bill," printed in the third volume of the 1975 House hearings, supra, at 2160-72. Mr. Dunlap's legal analysis obviously relied only on cases prior to August, 1975, in concluding that the separation of powers limited the placement outside the executive branch of only executive functions

[4] "Copyright Law Revision," Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, on H.R. 2223 (Serial No. 36, Part 1) at 459-67 (1975).

reserved to the President. Moreover, his memorandum was focussed on, if not limited to, quasi-judicial or adjudicatory functions.

The courts have adopted a functional analysis, rather than a formal analysis, so that the fact that the Office is part of the Library of Congress is not determinative of the classification of the Office to the legislative department of government. In rejecting Professor Brylawski's argument under the Appointments Clause, Art. III, § 2, cl. 2, in Eltra Corp. v. Ringer, Register, 579 F.2d 294 (1978), the Fourth Circuit adopted a functional analysis in reaching that result. It observed that

> it would appear indisputable that the operations of the Office of Copyright are executive. * * * It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislation appropriation. The Librarian performs certain functions which may be regarded as legislative (I.e., Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative. Because of its hybrid character, it could have been grouped code-wise under either the legislative or executive department[s]. But such code-grouping cannot determine whether a given function is executive or legislative. * * * The Supreme Court has properly assumed over the decades since 1909 that the Copyright Office is an executive office ***.

Id. at 301. Thus, whether the Library of Congress or the Copyright Office is part of Congress for the purposes of the APA Section 2(a) exemption cannot be determine *en grosse*, but must be determined function-by-function. Under the functional analysis, court decisions on the applicability of the Library of Congress at large are irrelevant to specific functions of the Office.

The Fourth Circuit's decision appeared to quiet the controversy until Bowsher, Comptroller v. Synar, 478 U.S. 714 (1986). That case returned the dialogue to the fundamental underpinnings of the separation of powers doctrine represented in the fear of

"congressional usurpation of Executive Branch functions", i.e., "the fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." Id. at 727, *quoting* Buckley v. Valeo, 424 U.S. 1 (1976). See Madison: 1 Annals of the Constitutional Congress 380 (1789), oft-quoted by the Supreme Court.

Upon the next legislative revisitation to the 1976 Act, this separation-of-powers concern seems to have led to the Leahy amendment,[5] inserting new subsection in Section 107 of the 1976 Copyright Act, which became 17 U.S.C. § 701(b). The legislative rationale is described in House Conference Report No. 105-796 (1998) at 77 thusly:

> The new subsection to be added to 17 U.S.C. Sec. 701 sets forth in express statutory language the functions presently performed by the Register of Copyrights under her general administrative authority under subsection 701(a). Like the Library of Congress, its parent agency, the Copyright Office is a hybrid entity that historically has performed both legislative and executive or administrative functions. *Eltra Corp* v. *Ringer*, 579 F.2d 294 (4th Cir. 1978). Existing subsection 701(a) addresses some of the latter functions. New subsection 701(b) is intended to codify the other traditional roles of the Copyright Office and to confirm the Register's existing areas of jurisdiction.

New subsection (b) seems designed to explicitly establish the "hybrid character" of the Office, Eltra Corp., supra, at 301, by "beefing up" the nominal legislative functions of the Office, thereby attempting to rationalize the Office's formal placement in the legislative department of government. Such attempted rationalization is thoroughly inconsistent with the functional approach utilized by the Fourth Circuit and should be rejected. In light of "the command of the Constitution that the Congress play no direct role in the

[5] 144 Cong. Rec. S8389, S8397 (daily ed. July 16, 1998).

execution of the laws", Bowsher, supra, at 736, it is difficult to conceive that Congress meant to exclude the Office's rulemaking function from the RFA.

The inclusion of the Office in the Section 2(a) exemption for Congress would lead to the logically inescapable conclusion that if the Office's rule-making function is considered an act of "the Congress," then it violates the presentment clause, and if it is considered as an executive or administrative function it violates the separation of powers. See, generally, Jiles: "Copyright Protection in the New Millennium: Amending the Digital Millennium Copyrighted Act to Prevent Constitutional Challenges," 52 Admin. L. Rev. 443 (Winter 2000). While the Office, under jurisprudential principles, lacks the power to decide the Constitutionality of its own statute in this proceeding, it may avoid deciding the question by applying the RFA, as, we submit, Congress intended, including Section 603 (Initial regulatory flexibility analysis).

VI. Conclusion

The Office should reject the RIAA's recordkeeping proposal unless modified to exempt webcasters affiliated with educational institutions or to insure that recordkeeping requirements currently imposed on their FM broadcast by ASCAP, BMI and SESAC are not materially increased. In any event, the Office should not adopt any proposal without first fully complying with the public purposes and policies embodied in the Regulatory Flexibility Act.

Respectfully submitted,

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