Before the
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter Of:

Notice and Recordkeeping for
Use of Sound Recordings Under
Statutory License

Docket No. RM 2002-1

REPLY COMMENTS OF DMX MUSIC, INC.

Pursuant to the Copyright Office's Notice of Proposed Rulemaking, 67 Fed. Reg. 5761 (Feb. 7, 2002) ("NPRM"), DMX Music, Inc.("DMX"),[1] through its undersigned attorneys, hereby submits Reply Comments.

These Reply Comments are necessitated by the extraordinarily overreaching position adopted by the Recording Industry Association of America ("RIAA") in its April 5, 2002 Comments. In those Comments, the RIAA proposes to bring under the Notice and Recordkeeping ambit, not only public performances of sound recordings qualifying for the § 114(f) statutory license – concerning which the record industry understandably is entitled to reasonable information facilitating distribution of royalties thereby generated. It far more broadly seeks to impose this regime in relation to *any* uses of sound recordings whatsoever by background music services such as DMX which occur under the statutory exemption provided for by § 114(d)(1)(C)(iv) (the "Business Establishment Exemption"). See RIAA Comments at p.16 and Exhibit B, §

[1] DMX/AEI Music, Inc. has recently been renamed DMX Music, Inc.

201.435 *et seq*. There is no legal support for this effort by the record industry, through its trade association, to discourage resort to a Congressionally-afforded exemption from copyright liability and thereby continue to expand its control over the digital music licensing landscape.

The Copyright Office May Only Impose Recordkeeping Requirements Concerning Transmissions Made Pursuant to the § 112 and § 114 Licenses

The statutory framework giving rise to the Notice and Recordkeeping provisions under consideration could not be plainer in its intent to confine such Notice and Recordkeeping obligations to activities of transmitting organizations which are the subject of § 114 (and/or § 112) statutory licenses. RIAA's suggestion that such Notice and Recordkeeping obligations ought to extend to services irrespective of whether they operate under the Business Establishment Exemption or a statutory license (see RIAA Comment at 16) is not supported by citation to any legal authority. In fact, there is none. The pertinent statutory language is directly to the contrary.

Section 114(f) of the Copyright Act is the section pertaining to statutory licensing for eligible subscription and nonsubscription transmissions. Within this section are subsections 114(f)(4)(A) and (B), which provide as follows:

> Subsection 114(f)(4)(A) prescribes that the Librarian of Congress "shall ... establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings *under this section*, and under which records of such use shall be kept and made available by entities performing sound recordings." (emphasis added)
>
> Subsection 114(f)(4)(B), in turn, provides that "[a]nyone who wishes to perform sound recordings publicly *by means of a transmission eligible for statutory licensing under this subsection* may do so without infringing the exclusive right

> of the copyright owner of the sound recording – (i) by complying with such Notice requirements as the Librarian of Congress shall prescribe by regulation...." (emphasis added)[2]

In short, subsections 114(f)(4)(A) and (B), which are subparts to Section 114(f), which pertains solely to statutory licensing, unequivocally indicate that the Notice and Recordkeeping obligations, as they pertain to digital performances of sound recordings, apply solely to those services choosing to avail themselves of the statutory license.

As already pointed out in the initial Comments filed by the Radio Broadcasters, there is nothing in the Copyright Act or its history to suggest that Congress intended even those services availing themselves of the statutory license, as a condition of such license, to provide reports demonstrating compliance with various of the statutory license requirements.[3] See Joint Comments of Radio Broadcasters ("Broadcaster Comments") at pages 17-21 . *A fortiori*, there is no legal basis, or any argument grounded in reasonableness or proportionality, for extending such a reporting regime to the activities of background music services which are not operating pursuant to a

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[2] See the comparable language of § 112(e)(4): "The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available *by transmitting organizations entitled to obtain a statutory license under this subsection.*" (emphasis added)

[3] To the extent RIAA argues that it should be entitled to monitor through this recordkeeping proceeding whether business establishment services that operate pursuant to the § 112(e) license are complying with the statutory requirements, DMX agrees with the Broadcasters that the recordkeeping requirements are not intended to serve as an audit for compliance with the statutory factors.

statutory license at all but, instead, pursuant to express legislative exemption. See § 114(d)(1)(C)(iv).

The very premise underlying RIAA's position is breathtaking. Even though an entity has no copyright obligation whatsoever to the record industry, it is proposed that such entity report its music use activities no differently than one which does.

It matters not that the record industry collective purportedly wishes to monitor potential compliance with conditions attendant to the Business Establishment Exemption. This "guilty until proven innocent" approach to copyright finds no support in the Act. Nothing therein authorizes the record industry collective to act in such capacity; in fact, the limited antitrust exemption afforded to the record industry collective under §§ 114(e)(1) and (2), if anything, negates such authority. The plain and simple fact is that individual record labels are fully able, without either the coercive weight of the RIAA or a burdensome Notice and Recordkeeping regime, to assure compliance with appropriate copyright law requirements.

The Librarian should reject the RIAA's attempt to pervert this rulemaking proceeding in order to erect obstacles that can serve no purpose other than to discourage companies from taking advantage of the Business Establishment Exemption.

DMX Concurs in the Comments Submitted by Radio Broadcasters and Webcasters

With respect to the reporting requirements themselves, DMX has now had occasion to review the first-round comments and wishes to echo the concerns expressed by the Radio Broadcasters and the Digital Media Association as to the absurdly burdensome and redundant nature of many of the proposed reporting requirements. See

Broadcaster Comments, pp. 33-59, 61-65; Comments of the Digital Media Association ("DiMA Comments"), pp. 1-12. As the Broadcasters and DiMA note, in many cases the requested information is simply impossible to obtain. With respect to tracking the number of ephemeral copies and the date of creation and destruction of such copies, for instance, the Broadcasters note that it would be enormously burdensome and expensive to develop means by which such information could be tracked. Broadcaster Comments, p. 58 ("Broadcasters currently do not track ephemeral copies because it made no sense to do so from a business perspective. It would be enormously expensive to develop software to track this information"); DiMA Comments, p. 4 ("Some of the proposed regulations are not feasible for any service.").

Indeed, DMX testified to precisely this fact during the recently-concluded Copyright Arbitration Royalty Proceeding to set rates and terms for the section 112(e) statutory license. During those proceedings DMX's Chief Technology Officer, Douglas Talley, explained that it is impossible to account for the number of ephemeral copies made in aid of exempt transmissions since the number of such copies could vary based on the processes, hardware and software involved in any given transmission and on the way in which the hardware and/or software is used by a particular individual. Nor is it practical to count the buffer or cache copies made in any particular process involved in the transmission, since companies may license their software and hardware from third parties and therefore have no way of determining how many buffer and cache copies are made. See *In Re Digital Performance Right in Sound Recordings and Ephemeral Recordings,* Docket No. 200-9, CARP DTRA 1& 2, Transcript 8647 –8649. Accordingly, providing information regarding the date of creation and destruction of

particular ephemeral recordings, and the total number of ephemeral recordings created/destroyed on any given date is not possible and should not be required. See DiMA Comments, *p. 4 (*"Regulations should not impose requirements on the services that are impossible for the services to meet).

DMX likewise agrees with the Broadcasters and DiMA that there is no license-based reason to collect this information. As is the case with the Broadcasters, the number of copies made bears no relation to the ephemeral license fee established for business establishment services by the CARP panel or, for that matter, that proposed instead by DMX. Broadcaster Comments, p. 58. Moreover, given that buffer and cache copies are a ubiquitous part of digital technology, and because such copies typically persist for mere milliseconds, there is no practical reason to collect information concerning the number of such copies. It bears noting that the Copyright Office itself has already determined that such copies "have no economic value independent of the public performance that they enable." See U.S. Copyright Office, DMCA Section 104 Report at 144 (Aug. 2001). Thus, there can be no justification for imposing the crushing recordkeeping requirements proposed in the NPRM. See also Broadcaster Comments, p. 58, DiMA Comments, p. 12.

With respect to other requested data elements, DMX concurs with the Broadcasters that the obligations imposed on parties subject to the rulemaking should be limited to information which is reasonably necessary to give the copyright owners notice of the use of their sound recordings, and not unduly burdensome. Broadcaster Comments, p. 33. In that regard, DMX objects to the inclusion of any data elements beyond those currently required to be reported pursuant to 37 C.F.R. § 201.36 with respect to the

delivery of subscription services to residential customers. In particular, DMX objects to providing information regarding the copyright owner, duration of the sound recording, marketing label of the sound recording, the UPC code of the retail album, and the release year of the sound recording and album. These requirements are completely at odds with the established practice in the business establishment service industry. None of these data elements are necessary to determine sound recording usage and to accurately distribute royalties. Indeed, most of these data elements are not even routinely supplied to DMX when record labels provide DMX with promotional recordings, and are therefore not readily available to entities such as DMX which rely largely on promotional or advance copies supplied by the labels.

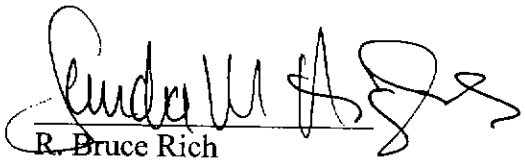
DMX proposes to provide the following data elements with respect to its use of sound recordings under the section 112(e) statutory license:

- the name of the Service or entity
- the sound recording title;
- the featured recording artist, group or orchestra;
- the retail album title (or in the case of compilation albums created for commercial purposes, the name of the retail album identified by the Service for purchase of the sound recording);
- the recording label;
- the catalog number where available and feasible; and
- the International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible.

These data elements are entirely sufficient to provide notice of use of sound recordings under the statutory license and to facilitate the allocation of royalty payments between

copyright owners pursuant to the statutory license. Accordingly, the Copyright Office should reject the Proposed Rule (and the RIAA's requested extension of it) and adopt instead recordkeeping requirements consistent with these comments.

Respectfully submitted,



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