Before the
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COPYRIGHT OFFICE
Washington, D.C. 20540

In re: Notice And Recordkeeping For Use Of Sound Recordings Under Statutory License	)	**RM 2002-1A**

REPLY COMMENTS OF MUSIC CHOICE

Music Choice, through its attorneys and pursuant to the Copyright Office's Notice of Proposed Rulemaking, 67 Fed. Reg. 5761 (Feb. 7, 2002) ("NPRM"), hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND OVERVIEW

The record in this proceeding demonstrates that Congress did not intend to impose burdensome notice and recordkeeping rules on statutory licensees. The existing rules already require licensees to provide more than enough information to facilitate the distribution of royalties. Moreover, it would contravene the policy of the Copyright Office and the stated purposes of the Digital Millennium Copyright Act ("DMCA") to impose additional burdens on licensees at this point in time. In light of this, the Recording Industry Association of America ("RIAA")[1/] has clearly failed to show why

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[1/] Music Choice notes that RIAA is proposing to separate itself from it copyright royalty collective ("SoundExchange"). Comments of RIAA at n.1. Music Choice is unaware how such separation would answer the concerns addressed in the record and highlighted below. RIAA has not explained the nature of this separation or any protections that would prevent it from accessing information provided to SoundExchange. For that reason, Music Choice believes it is prudent to treat RIAA and SoundExchange as one entity for purposes of analyzing the competitive implications of these rules.

additional reporting requirements are necessary or justified as a matter of either law or policy. In fact, the record in this proceeding substantially undercuts the RIAA's claims by showing that much of the information RIAA seeks is absolutely unnecessary to fulfill the statutory purpose that underlies the record keeping obligations.

1. RIAA's request completely contravenes law and policy.

In creating a statutory license for the digital performance of sound recordings, Congress intended to strike a balance between the legitimate needs of copyright owners and the public benefits afforded by new transmission media. See Pub. L. No. 104-39, 109 Stat. 336, 341 ("DPRA"). See also S. Rep. 104-128, at 14-15 (1995). Accord Joint Comments of Sirus Satellite Radio and XM Satellite Radio at 13; Joint Comments of Radio Broadcasters at 6; Comments of Digital Media Association at 3-4. Any recordkeeping rules must maintain this careful balance. But the RIAA's proposal vitiates the balance by imposing unnecessary and burdensome requirements on struggling licensees. The RIAA has not – and indeed cannot – provide persuasive rationale in support of its proposal. See Comments of Sirius Satellite Radio and XM Satellite Radio at 16-17 ("Comments of Sirius and XM"); Joint Comments of Radio Broadcasters at 9-10; Comments of Digital Media Association at n. 1.

Copyright owners already have access to all the data about each sound recording performed under statutory license. Thus, licensees should not be required to re-create that data for the owners. Users should only be obligated to provide such data as is necessary for copyright owners to identify the sound recordings transmitted so as to make

the necessary royalty payments. Any additional data provides an economic windfall to copyright owners and by definition imposes an unreasonable burden on users.[2/]

As the record shows, RIAA is in search of just such an unjustified windfall. RIAA seeks information regarding channel genre, which – while helpful for the labels' marketing initiatives – does not aid in the identification of sound recordings. Several commenters explain in great detail how other information such as release year and UPC is also unnecessary for sound recording identification. See Joint Comments of Radio Broadcasters at 48, 51-52, Comments of Sirius and XM at 29-34, Comments of Digital Media Association at 9-10. Music Choice also agrees with Digital Media Association that the RIAA has completely failed to justify its request for system failure information, which is irrelevant for royalty distribution purposes and adds undue costs and burdens. Comments of Digital Media Association at 13.

These comments also make clear that RIAA's request for information such as program type and influence indicator amounts to an attempt to monitor compliance with the statutory licensing scheme – a purpose that contravenes the statutory basis for the reporting requirements. See Joint Comments of Radio Broadcasters at 45-47, Comments of Sirius and XM at 27-29, Comments of Digital Media Association at 8-9.

Finally, the comments show that RIAA truly overreaches in its request for ephemeral recording logs as the current royalty is not calculated on a per copy basis, and

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[2/] See Stephen E. Arnold and Erik S. Arnold, Vectors of Change: Electronic Information from 1977 to 2007, Online, July 1997 ("[I]nformation and its wiser brother knowledge are the engines of economic power in today's business world."). RIAA's own actions in this proceeding demonstrate the powerful lure of information in the digital economy. Sensing the opportunity to capitalize on reams of data about individual listeners, RIAA sought to demand detailed listener logs. Only after public outcry exposed RIAA's demand as a self-serving privacy incursion was that portion of the proposal dropped.

the Copyright Office has found that ephemeral recordings have no independent value apart from the performances they facilitate. See Joint Comments of Radio Broadcasters at 57-58, Comments of Sirius and XM at 40-41, Comments of Digital Media Association at 12. There is simply no basis in the record for requiring this additional information from licensees.

The record also clearly shows that the rapidly evolving nature of the digital transmission marketplace makes the imposition of unduly burdensome reporting requirements – especially "final" rules – particularly inappropriate. The current proposal would add numerous fields to the required reports resulting in substantial rearchitecture costs. Pre-existing services, in particular, would be prejudiced by the need to reconfigure the reporting systems they have operated since 1998 pursuant to the Copyright Office's interim regulations. See Comments of Sirius and XM at 13-14.

More importantly, the RIAA's extremely complex and burdensome requirements would impose substantial going-forward costs on users. Users would be responsible for generating voluminous reports and for ensuring the accuracy of the reported information. These costs are patently unjustified when one considers licensees – unlike the record labels – often do not have and cannot easily get much of the information RIAA requests.[3/] Even the RIAA acknowledges that promotional copies – which are provided by the record labels – do not contain all the required information, but suggests that licensees can update their databases a month or two later when the recording is commercially released. See Comments of RIAA at 44. This ludicrous suggestion makes plain the inefficiency

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3/ See Comments of Sirius and XM at 6-7, 9-10; Joint Comments of Radio Broadcasters at 26-29, 31-32 (stating that licensees often play promotional copies, commercial compilations, or programming sourced from third parties, which do not provide all of the information RIAA requests for each sound recording).

and inequity that will result from requiring licensees to expend substantial time and effort finding information that the record labels already have, but have failed to provide.

These onerous, added costs come at a time when the marketplace continues to witness a dramatic rate of exit, as the costs of providing service dwarf any returns for most entrants. In this context, RIAA's proposal seems either naive or cynical; in either case, it is not reasonable.[4/] At this stage of market development, any rules – especially final rules – should be narrowly tailored, and impose a far lower cost on users than the current proposal.

2. The RIAA's request for exhaustive data from licensees – including data to show compliance with the statutory license terms – is unfair.

Providing the RIAA with any information beyond the minimal amount necessary for distributing royalties would compensate copyright owners again – albeit in the form of data – on top of the rates already set as mandated under the Copyright Act for the statutory license. Compare 17 U.S.C. §114(f)(2)(B) (establishing the rate setting proceeding) with 17 U.S.C. §114(f)(4) (establishing notice and recordkeeping obligations). Music Choice appreciates that an efficient royalty distribution mechanism requires certain information from licensees. But the Copyright Office should make no mistake: the data that RIAA requests is extremely valuable to the recipient for purposes other than royalty distribution and very expensive to collect and provide. Given that the Copyright Office's mandate is to impose reasonable notice and recordkeeping requirements – not to parlay those obligations into added value for the copyright holder –

[4/] In this regard, RIAA's proposal is not consistent with Music Choice's understanding of the reason why the Copyright Office imposed "interim" rules in the first place. 67 Fed. Reg. 5761, 5761-72 (Feb. 7, 2002) (stating that the record keeping rules for preexisting subscription services were established on an interim basis "in light of the rapidly developing nature of the digital transmission service industry. . . .").

it should err on the side of imposing the least burden possible in this proceeding. See 17 U.S.C. §114(f)(4).

3. The RIAA's request for exhaustive data from licensees is unwise.

RIAA is in effect asking licensees to turn over detailed, sensitive programming information. Licensees depend on programming to differentiate themselves in the marketplace. For that reason, licensees guard their programming methodology from competitors.[5/] Intended and actual playlists that contain detailed information regarding every song played on every channel at all times could be used to learn more about the licensees programming methodology.

For its part, Music Choice would not willingly share much of the information RIAA requests with any of its competitors. As the Copyright Office is aware, the RIAA is clearly an actual (or potential) competitor of every statutory licensee. Especially in light of ongoing investigations by the Department of Justice into the RIAA's licensing practices, the Copyright Office should carefully consider the effect of mandating that licensees provide such sensitive information to one of their most important competitors.

4. The RIAA has failed to show that it actually <u>needs</u> the additional data.

Beyond the foregoing problems with RIAA's overreaching request, there is in fact no reason to require licensees to report the additional data. RIAA's justifications are nothing more than self-serving makeweights. Fundamentally, whatever problems the RIAA may have had distributing royalties to copyright owners, these problems cannot be attributed to a lack of data. It is an unrefuted fact that ASCAP and BMI collect and

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[5/] As a "formula, pattern, device or compilation of information which is used in one's business, and which [provides] an opportunity to maintain an advantage over competitors who do not know or use it," programming methodology likely constitutes a protected trade secret. See Kewanee Oil Co. v. Biczon Corp., 416 U.S. 470 (1974).

distribute royalties from the same licensees with far less information than RIAA seeks. It is an unrefuted fact that when ASCAP has attempted to obtain more data from licensees, its request has been denied by the Rate Court overseeing the ASCAP Consent Decree. See United States v. ASCAP, In re Application of Salem Media et al., 981 F.Supp. 199, 221 (S.D.N.Y. 1997) (rejecting ASCAP's demands for information and reducing the reporting requirements to that information necessary to identify the musical work).

RIAA's inability or unwillingness to develop and implement efficient procedures for performing its function as a copyright collective should not serve as the reason to impose plainly unnecessary burdens on licensees. No matter how strenuously it pleads, RIAA's failure to distribute royalties to copyright owners in a timely manner cannot fairly be attributed to Music Choice -- or any other licensee. If anything, the RIAA's failure is a testament to the need for the Copyright Office to stimulate competition from alternative royalty collectives -- not to reward the monopoly collective for its failure to perform.

5. The RIAA Should Be Required To Share Data With Users

Several commenters helpfully suggest that the RIAA should be required to share its existing database of sound recording information with users in order to facilitate reporting. See Comments of the Digital Media Association at 3. See also Joint Comments of Radio Broadcasters at 45 (noting that it makes no sense for users to duplicate the effort RIAA has expended in building its own sound recording database). Music Choice agrees. For the reasons explained in the record, such a mechanism would facilitate an efficient royalty distribution system, enhance royalties to copyright owners, and lower overall costs of these services for consumers.

Moreover, in today's digital environment, data is a valuable asset. See supra. To the extent that the Copyright Office is inclined to mandate that licensees report additional information beyond that which is already required, the RIAA should be required to share that information on equal terms with all users so that no one has a competitive advantage. Otherwise, the Copyright Office will be awarding a completely unjustified windfall to RIAA.[6/]

6. There Is No Basis To Implement Reporting Requirements For Non-Featured Artists

The American Federation of Musicians of the Untied Stated and Canada ("AFM") and the American Federation of Television and Radio Artists ("AFTRA") suggest that the recordkeeping proposal be amended to require licensees to report the names of non-featured artists. Comments of AFM/AFTRA at 17. AFM/AFTRA asserts that most licensees receive this information in the form of label copy, and that the incremental costs of providing the information would not be excessive. Comments of AFM/AFTRA at 19. In reality, their proposal would impose significant added costs, is not required by the DMCA, and should be rejected out of hand.

Depending on the music genre, sound recordings can involve dozens of non-featured recording artists. Not even AFM/AFTRA can represent with any certainty that the names of each of these artists would be listed on the sound recordings label copy, or in any other readily available resource. Indeed, as several commenters in this proceeding make clear, licensees often receive remarkably little information about the sound recordings they play. Moreover, even if the names of non-featured recording artists were

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[6/] Obviously, to the extent that the Copyright Office would be concerned that sharing this information among all users would raise competitive "red flags," it should not be provided by users to the RIAA or its designated agent in the first place.

as available as AFM/AFTRA claim, capturing and reporting the names of multiple artists would exponentially increase recordkeeping costs.

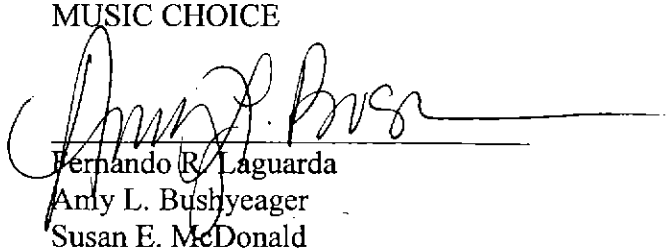
While Music Choice opposes placing an additional obligation on licensees, it is not entirely unsympathetic to the plight of the independent administrators charged with ensuring that non-featured artists get their fair share. Music Choice respectfully suggests that AFM/AFTRA look to the RIAA – the very entity that has been the stalwart defender of artists' rights throughout this proceeding – for the information. At the same time, AFM/AFTRA could impose upon RIAA to distribute royalties to artists more frequently than once every three years.

CONCLUSION

The record in this proceeding unmistakably cautions against the imposition of additional, burdensome requirements on statutory licensees. RIAA has failed to meet its burden of justifying exhaustive requirements on users. Moreover, there is no basis to depart from the framework of interim rules already in place. If "final" rules are imposed, they should reduce and not increase the existing reporting burden. Regardless, AFM/AFTRA's unreasonable request for detailed information on non-featured artists must be rejected.

Respectfully submitted,

MUSIC CHOICE



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