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VIA HAND DELIVERY

Office of the General Counsel
Copyright Office
James Madison Building, Room LM-403
First and Independence Avenue, SE
Washington, DC

**RE: Notice and Recordkeeping for Use of Sound Recordings
Under Statutory License, 37 CFR Part 201**

**Reply Comments
April 26, 2002**

The Future of Music Coalition is filing these reply comments with the US Copyright Office in reference to Docket No. RM 2002. In its Notice, the Copyright Office sought comment on proposed requirements for giving copyright owners reasonable notice of the use of their works for sound recordings under statutory license, as well as proposed recordkeeping requirements for such use.

The FMC has reviewed the majority of the comments that were filed on April 5, 2002, and would like to register a reply that addresses two broad issues:

1. The FMC agrees with the statements made by many filers that the proposed "Listener Log" presents many problems both in regards to necessity in relation to compliance with Section 114 (d)(2), and in relation to listeners' expectations about privacy
2. The FMC also concurs with a number of filers regarding the undue burden that the proposed recordkeeping requirements would place on smaller webcasters.

In addition, the FMC would like to suggest potential remedies to these problems, some of which are different than those proposed by various filers in the comments phase. The FMC believes that, although the proposed recordkeeping requirements as they stand are onerous and burdensome, there are compelling reasons for webcasters to maintain accurate records of what is being played to ensure that musicians and artists will be fairly compensated.

The Lack of Feasibility of “Listener Logs”

One of the clearest issues from these filings – as indicated by broadcasters, webcasters, and listeners – is that the proposed “listener logs” pose many serious problems.

The Electronic Frontier Foundation points out that listeners of traditional broadcast media have enjoyed a high degree of privacy. Traditional media have no way of accurately measuring who is listening to what, or even how many listeners there are. The proposed listener log would create a very different scenario.

“In an unprecedented change to the status quo,” the EFF writes, “the Copyright Office has proposed regulations that would require Services (other than pre-existing subscription services) to gather and report “listener-side” information to copyright owners, including the listener’s country, local time code, local log-in time, channel, and a “unique user identifier”. This important change in the privacy landscape is all the more remarkable in light of the absence of any indication in the legislative history accompanying 17 USC 114 (d)(2) that Congress meant to diminish listener privacy in any manner as a part of its creation of a statutory license.” [EFF filing, p 3]

The EFF continues, noting, “listener privacy should only be compromised only and to the extent absolutely *necessary* to meet the requirements of section 114(d)(2).”

The FMC agrees with the EFF on these points. We cannot see the necessity of collecting this information in order to effectively comply with the reporting requirements and the distribution of webcasting royalties.

Filings by webcasters also call into question whether it is even technically possible to collect this information. For example, Websound points out that it is impossible for a webcaster to verify whether the information provided by a listener is correct. In addition, Websound states that individuals cannot be uniquely identified by their IP address when they’re often using different computers at home and at work. EFF also points out that collecting this information would require thousands and thousands of unique data fields to be registered and compiled on an ongoing basis, which is beyond the range of most small webcasters.

Some filers feel that the data collected under proposed listener logs would not only be unnecessary and technically impossible to collect, but would be used for purposes outside of the scope of this proceeding. Josh Waddles writes, “...knowing when and what a person listens to at the degree of granularity required by the proposed rules is invasive and serves ulterior marketing and data collection interests of both sound-recording owners and webcasters without any regard to the interests of their consumers.” The FMC agrees with Mr. Waddles’ suspicion that copyright holders view listener logs as a source of valuable marketing data that could be used to further promote their acts and increase sales. While we can understand this rationale, we would disagree with this proposed method of collection that both burdens webcasters and infringes on listeners’ privacy.

In general, the FMC agrees with the comments on listener logs made by these filers. Listener logs may be technically impossible to collect, and would therefore set a technological precedent that would place an undue burden on this developing business model. More important, listener logs are not needed to verify compliance with the reporting and recordkeeping requirements, and listener privacy should not be compromised to meet a need that has yet to be proven necessary in regards to the payment of webcasting royalties.

The FMC was interested to see that the RIAA, the organization that proposed the listener logs in the first place, has responded to the concerns filed by webcasters on April 5, as indicated by these comments posted by Steven Marks, Senior Vice President, Business and Legal Affairs, Recording Industry Association of America:

“The RIAA has heard the complaints raised by webcasters and has responded by proposing recordkeeping regulations that take into account many of the webcasters' concerns. For example, RIAA has simplified its proposal by dropping the listener log, which resulted in considerable confusion and criticism. We look forward to working with webcasters on having these reasonable regulations adopted so that record labels and artists can begin receiving royalties.” [http://www.riaa.com/PR_Story.cfm?id=506]

The FMC urges the Copyright Office to take the comments of the webcasters and the RIAA into consideration and drop the listener log reporting requirements.

The Undue Burden of Reporting Requirements

The filed comments from many of the webcasters also express concerns about the reporting requirements. In particular, many small webcasters argue that the number of fields of data they would need to collect for each song played, the ephemeral copies requirements, and the cataloging of existing record collections would create an undue burden on small and non-commercial webcasters.

Comments from 3WK.com and Beethoven.com – both experienced small webcasters – indicate specific problems with many of the data fields that they would be required to collect. In many cases the information called for is not supplied by the copyright holder, is duplicative to collect, or just doesn't exist on older releases. Instead of restating their arguments, the FMC urges the Copyright Office to review the comments of these operating webcasters and take their comments into careful consideration.

Comments from Harvard Radio Broadcasting and the National Federation of Community Broadcasters, among others, articulate the more fundamental problems that collecting this much data would have, particularly for small and non-commercial webcasters. These non-commercial and college broadcasters have been using webcasting for a simple purpose; to extend their stations' reach and offer an eclectic and diverse range of music to the public. Because they are nonprofits, there is no economic incentive for this, but merely an effort to increase their value as a public service. Complying with these

reporting requirements would, in many cases, impose such financial and staffing burdens on them that they would be forced to discontinue webcasting.

The NFCB and Harvard both articulate the very fundamental problems with complying with these reporting requirements. Many of the NFCB member stations do not have computers, program directors, or a catalogued collection. "There are no playlists and no automation," writes Carol Pierson, "and often the records are not catalogued except to be sorted by musical genre using different colored tape on each album jacket" [NFCB filing, p. 2]. Many community stations, it seems, lack the infrastructure it would take to integrate these reporting tasks into their daily operating procedure.

The financial burden may be too great as well. Harvard estimates that it would cost the station \$100,000 - \$150,000 to purchase and install the software and hardware systems it would need to comply with the reporting requirements – a figure that approximates the station's annual revenues [Harvard Broadcasting filing, p. 1].

Harvard continues its analysis by commenting on the impossibility of digitally cataloging their existing collection: "In addition, it would be impractical for WHRB to compile such reports on an on-going basis using its volunteer staff. In what amounts to an extremely burdensome data-entry task, WHRB would need to independently create a master database of all sound recordings currently house in its six libraries (750,000 estimated works) containing, for each work, the nine fields outlines by the Office in proposed Section 201.36(e)(2)(ii)" [Harvard Broadcasting filing, p. 2].

Ironically, non-commercial and college broadcasters would shoulder the burden to a greater extent than traditional and commercial broadcasters because of their emphasis on programming diversity. "WHRB's programming philosophy stresses variety and the airing of musical works often not heard on commercial sources stands in contrast to the practices of large AM/FM webcasters and other large internet-only webcasters. Instead of relying on a rotation of 500-1000 musical works, WHRB estimates it plays 70,000-90,000 unique sound recordings annually" [Harvard Broadcasting filing, p. 8].

We urge the Copyright Office to heed the warnings of non-commercial and college broadcasters: "If the proposed rules were to be made final without change, WHRB would have to cease webcasting immediately. While the station might undertake the tasks outlined to reach compliance, doing so would take ten years and at a cost equal to or greater than the station's entire annual operating budget" [Harvard Broadcasting filing, p. 11]. Losing these valuable broadcasting resources, which are using the Internet to increase programming diversity and create new opportunities for a greater variety of musicians to be heard, would be a terrible outcome of this proceeding.

Proposed Remedies

The Future of Music Coalition now wishes to address two remedies to the reporting requirements presented by filers, and propose what it sees as a workable solution to the myriad of problems that webcasters and copyright holders have expressed.

First, the FMC would respectfully disagree with the remedy presented by the NFCB regarding reporting requirements: “NFCB proposes that noncommercial stations with fewer than 10 employees be exempt from the reporting requirement. In the worst case, they should only have to report one week per year, as required by the music publishers” [NFCB filing, p. 4].

The FMC believes that providing such an exemption for non-commercial stations with fewer than 10 employees sets a bad precedent. We understand that these stations are mostly run by volunteers which would make it very difficult for them to comply with the proposed reporting requirements, but exempting them from reporting at all, or even just one week a year, means that the many musicians that benefit from the stations’ emphasis on diversity would not be fairly compensated.

Second, the FMC takes issues with the Electronic Frontier Foundation’s sampling proposal:

“We urge the Copyright Office to consider adopting a less onerous recordkeeping requirement for Services that can demonstrate hardship. In place of the otherwise applicable recordkeeping, an alternate system, preferably based on a sampling regime similar to that administered by PROs such as BMI and ASCAP, should be available” [EFF filing].

While we agree with EFF that there should be more reasonable recordkeeping requirements, we disagree that basing royalty distribution on a sampling structure is the best alternative. We know that the sampling models used by the PROs were created decades ago, before there were any other methods of collecting data about playlists. We also know that these are not accurate. The most eclectic and obscure music has a less likely statistical chance of getting sampled, which leads to a large number of artists not being properly compensated. Digital transmissions make it much more technically possible to report actual playlists, and reasonable reporting requirements would ensure that a larger and more diverse pool of artists would receive revenues from webcasting.

The FMC believes that there is a technological, data-driven solution to the reporting problems expressed by NFCB, EFF and others in the form of a public authentication database. The creation of a common, public database and/or the application of fingerprinting technologies would both reduce data entry labor for webcasters and would ensure that collected information is accurate and can be used to more immediately compensate artists.

It is our understanding that SoundExchange has already begun to build such a database, including works even beyond those in their own major label catalogs. It seems clear to us that this information should be used to build out an automated reporting structure. This would not only reduce the burden of compliance, but would increase the possibility that the database information is accurate, and that the information would be in a form that would make it easier to administer the payment of royalties. The FMC believes that this database can be further enhanced and enriched by urging musicians to register their own works in the database. This will again ensure that the data is as accurate as possible. Even the concerns raised in the AFTRA/AFM regarding the reporting of non-featured artists could potentially be solved through technology. There just needs to be one publicly accessible database that stores information provided by copyright holders.

The FMC understands that the authentication database, as a concept, still needs to be formalized, and the concerns expressed by small and non-commercial webcasters need to be taken into consideration. We do, however, believe that there is a workable, technology based solution that will make it possible for reporting to be a simple, streamlined process that ensures that musicians are fairly compensated for their work and that does not overly burden the emerging webcasting community.

Again, the Future of Music Coalition appreciates the work the Copyright Office and the CARP are doing to move these issues along, and we look forward to participating in the upcoming Public Roundtable on May 10, 2002.

Respectfully submitted,



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