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GENERAL COUNSEL
OF COPYRIGHT

Before the United States Copyright Office
Library of Congress
Washington, D.C.

In the Matter of	)	
	)	
Notice and Recordkeeping for	)	Docket No. RM 2002-1
Use of Sound Recordings under	)	
Statutory License	)	

DOCKET NO.
RM 2002-1
COMMENT NO. 14

Reply Comments of the Digital Media Association

On behalf of our member webcasters, DiMA appreciates the opportunity to submit these Reply Comments concerning the proposed regulations for notice and recordkeeping for services operating under the statutory sound recording digital performance license, 17 U.S.C. § 114, and multiple ephemeral recordings license, 17 U.S.C. § 112(e). DiMA also appreciates the Copyright Office's announcement of the May 10 "roundtable" on this proceeding, which will enable many small webcasters that could not afford to participate in the royalty arbitration proceeding that is associated with this recordkeeping requirement to visit with policymakers and express directly in this proceeding the extraordinary costs that would be associated with the proposed recordkeeping requirements.

In furtherance of the Copyright Office's consideration of the proposed recordkeeping requirement, and to further define the May 10 discussion, DiMA takes the opportunity of these Reply Comments to once again support the broad-based and virtually unanimous opposition to the initial Recording Industry Association of America ("RIAA") proposal[1] and to further identify the intrusive, burdensome and, frankly, presumptuous nature of the RIAA's Initial Comments in this proceeding.

Overview. The comments submitted by the RIAA in this proceeding imply an unflattering motive underlying their burdensome, over-regulatory proposal. While we hope we are incorrect, we are concerned that, by inflating the Congressionally-mandated "reasonable" notice requirement, the notice and recordkeeping regulations become a highly burdensome, enforcement-oriented scheme, such that minor reporting failures could deem webcasters to have violated the compulsory license, and thereby (a) subject them to punitive copyright infringement litigation and devastating statutory damages, or (b) compel them to negotiate higher-priced exclusive licenses with RIAA or each RIAA member companies. The RIAA comments seem to forget that the notice requirement is one of *reasonable* notice to copyright owners by legitimate users (such as DiMA

[1] DiMA specifically notes the concurring comments of Music Reports, Inc., an expert agency engaged in receiving, allocating and distributing performance royalty payments, that most of the data sought in the proposed regulations was unnecessary or, at best, optional.

company webcasters and several thousand additional webcasters), and that *Congress enacted the statutory license intending that it be used* by a nascent industry that has the potential to offer pro-consumer, pro-creator competitive media services; *not* intending to minimize its use by granting the RIAA a punitive data-fueled bounty-hunting litigation license.

With regard to the specific RIAA comments, it is notable initially that the RIAA has retreated from its view that all data points included in the Proposed Rule are necessary for SoundExchange, its subsidiary collection agency, to distribute royalty payments accurately.[2] RIAA now accepts that a smaller data set would be acceptable, conceding that the differences between its earlier and current proposals "will simplify the reporting obligations of services... ." RIAA Comments at 4. Nonetheless, the RIAA's proposed data requirements remain extraordinary, and well beyond the scope of the "reasonable" statutory standard.

As set forth in the Comments of DiMA and the AM/FM Broadcasters, and in Reply Comments submitted by Yahoo, an even more simplified reporting obligation would meet the statutory requirement by reasonably identifying the performed sound recordings, without imposing unfair burdens on the services. We therefore respectfully submit that the Copyright Office should not simply accept RIAA's representation that this time, they have "gotten it right." Rather, the Copyright Office should carefully scrutinize RIAA's current proposal in light of the statutory requirement and traditional principles that less government is better, and should adopt streamlined reporting requirements.

DiMA agrees with one RIAA suggestion, that the "history [of the adoption of regulations for the pre-existing services] ...should serve as a guide to the Copyright Office in this proceeding." RIAA Comments at 4. As the Copyright Office well remembers, several data reporting requirements were included in the Interim Determination because they comported with the relevant services' existing methods of doing business, and (unlike in the current proceeding) such provisions did not compel the services to either change those methods or undertake unacceptable added expense and burden.[3] For example, the Copyright Office will recall that in the Interim Determination those services accepted the required production of full intended playlist information

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[2] RIAA Comments at 4. *See*, Notice of Proposed Rulemaking, Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1 (February 7, 2001):

> In fashioning the proposed new regulations, the Office is adopting RIAA's recommended changes for recordkeeping requirements for new subscription Services and for Services making eligible nonsubscription transmissions under section 114.... In addition, the proposed regulations incorporate RIAA's recommendation for section 112 recordkeeping requirements.

67 Fed. Reg. 5761, 5763.

[3] Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34,289 (June 24, 1998).

because (a) they had a limited number of channels that was not likely to expand in the foreseeable future, and (b) producing an unedited complete data dump was cheaper and easier, for them, than producing sample data. Thus, following historical precedent, the Copyright Office should promulgate regulations that work within the current data operations of the existing webcasting services (in their several different business and programming models), and adopt the least expensive and least burdensome alternatives in the new regulations.

RIAA Should Provide Foundational Data. One perplexing theme throughout the RIAA comments is the apparent expectation that webcasters should aggregate and maintain, for the RIAA's benefit, massive amounts of data that are created by RIAA and its member companies or maintained by RIAA's subsidiary, SoundExchange. More particularly, RIAA bases its need for several redundant data fields on the notion that webcast services are likely to make mistakes in data entry, and the SoundExchange system will need to review many different data fields to ensure accuracy with respect to royalty allocations. The solution, however, is not for the services to provide more data that are susceptible to the same errors in data entry. If RIAA wants precise song and album identification data, it is far more logical and sensible for copyright owners and SoundExchange should provide that data in the industry-preferred format to the webcasters.

As explained in the Reply Comments of Yahoo, standard practice in the field of information science is that the owners of necessary data should provide accurate databases to information users. In this case, SoundExchange should provide accurate information on the sound recordings to the services; and the services should augment that data with accurate information identifying the services and counting performances. In this manner, there will be few, if any mistaken song identifications.

Government Should Not Gratuitously Require Disclosure of Valuable Data. In the information economy, detailed data regarding services, playlists, performances on particular channels or to particular demographics, for example, has genuine commercial value. In exclusive license deals between labels and webcast services, performance information is bargained for as much as any other term in an agreement.

Therefore, the regulations promulgated under the statutory license should not require services to simply give away their valuable data. Only such data as is strictly necessary to identifying the payor, the sound recordings and the number of performances – a modest but sufficient data set – should be required to be produced. Any excess data could potentially be used by recording companies, with the RIAA's subsidiary, SoundExchange, to structure and maximize marketing and promotion efforts for particular sound recordings or artists, or used to support the success of the record labels' favored webcast services.

Regulations Should Not Promote Abusive RIAA Strategy. Perhaps the most stunning revelation in the RIAA Comments is that the magnitude of their data request is motivated by an expectation and apparent hope that webcasters will violate meaningless and outdated provisions of the law (that the Copyright Office has recommended should

be amended legislatively), because that the RIAA desires to leverage such "opportunities" in efforts to persuade webcasters (under threat of infringement litigation) to negotiate exclusive licenses rather than utilize the statutory license. For example, RIAA insists that services provide detailed reports stating the date upon which each of potentially myriad multiple ephemeral sound recordings was created and destroyed, solely because otherwise services may believe they need not comply with the statutory requirements; and, if that belief becomes prevalent, then RIAA will be deprived of their "right" to leverage the waiver of this requirement into demands for exclusive licenses.[4]

In other words, if RIAA can make the statutory requirements unbearably onerous, and the risk of violation ominously threatening, then webcasters will be motivated to negotiate licenses directly with copyright owners *without* these burdensome requirements. If the RIAA-supported data requirements truly were necessary, then copyright owners would not be willing to waive them under any circumstances. More poignantly, the Copyright Office should not permit the statutory requirement of providing "*reasonable* notice"[5] to be abused so as to create legal or economic disincentives to statutory licensing, or to lay new traps whereby services could be deemed "infringers."

Proposed Requirements Would Impose Extraordinary Costs. The Comments of the Broadcasters and the Reply Comments of Yahoo sketch a rough outline of the extreme burden that the RIAA proposals would force upon webcasters. Importantly, these costs would vary little from any single webcaster to another, as many of the primary costs of recordkeeping and reporting involve data entry and quality assurance, database testing, ongoing database maintenance, data collection and production of data reports.

To get a better understanding of that burden first-hand, we invite the Copyright Office to try the following experiment. Pick up at random a compact disc. Record how long it takes to locate and to type into a word processing file the 11 pieces of information sought by RIAA concerning a particular sound recording on that disc,[6] and to proofread the information on screen against that on the disc to ensure there are no obvious typographical errors. Now, multiply that number of minutes and seconds by 50,000, representing a minimum realistic number of sound recordings that one typically might need to offer for performance on a multi-genre webcast service. (Even assuming that some services already had entered into a database the basic title/artist/album name information to facilitate programming (and to satisfy the section 114(d)(2)(C)(ix)

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4 RIAA Comments at 62.

5 17 U.S.C. § 114(f)(4).

6 The twelfth data item, the ISRC, is a code assigned to a sound recording by RIAA and that is not available solely from the visible attributes of the disc or the liner material. RIAA asserts that a service purportedly can discover by running a PC software program on that compact disc. Of course, that process that may take several minutes per song to accomplish – that is, unless that compact disc has been copy protected, in which case the disc may not run on the PC at all. If the RIAA wants services to use a unique identifier that RIAA itself creates and maintains, it logically seems incumbent upon them to make that identifier available to the services.

criteria),[7] the time to locate that initial data and augment it on a per track basis is little different than the time to enter the data from scratch.) The result from that multiplication exercise represents a truly astonishing load of work that the RIAA-proposed regulations seek to impose upon each and every webcaster.

DiMA respectfully submits that the Copyright Office should reject the RIAA's overbearing, presumptuous approach to recordkeeping obligations, and instead should adopt regulations that reasonably, effectively and efficiently implement the statutory reporting requirements, as follows:

1. The regulations should require SoundExchange to provide the services with its database of information concerning the sound recordings. This database should include blank fields to be filled in, as appropriate, by the licensed services. Data to be provided by the services should be no greater than that necessary to: (a) identify the name of the service; and, (b) state the number of performances made of each sound recording during the relevant payment period.

   Under this proposal, SoundExchange will receive back clean and reliable data concerning the sound recordings performed, in a correct data format and in a manner that its information systems will readily accept and process. To the extent that a service is performing a sound recording that is not already in the database, the service should be required to input information sufficient to identify the sound recording and the copyright owner, namely: the name of the sound recording, the name of the featured artist, the title of the album featuring the sound recording (or the UPC number), and the name of the copyright owner appearing on the "P-line," if any. This proposal would equitably share burdens among SoundExchange and the services, and maximize the benefit from the sound recording database already created.

2. DiMA agrees with the Comments of the Broadcasters that the statutory license does not impose a requirement to submit detailed factual evidence demonstrating affirmative compliance with the statutory criteria. Indeed,

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[7] RIAA suggests in its Comments that webcast services should have known that its data reporting obligations would be at least as great as those for the pre-existing services under the Interim Regulations. Convincing arguments can be made to the contrary. Webcasting services might have greater reason to presume that their data reporting requirements would be far less significant, in light of the section 114(d)(2)(C)(ix) title/artist/album display criteria (with which the pre-existing services need not comply); and in light of the fact that webcasting, having lower start-up costs than cable or satellite services, enabled small, modestly-funded enterprises that did not have sophisticated databases and computer programming equipment to nevertheless get a foot in the door by offering compelling music services to the public. Thus, in keeping with Congress's intention that the notice and recordkeeping requirements should be "reasonable" and should not constitute an independent economic barrier to entry, services could reasonably have assumed that they would not be required to create a sound recording database with 18 pieces of information per track, plus an ephemeral recordings log with 15 pieces of information per track.

if the statute so requires, then why is RIAA requesting this data only on a selective basis? Why do they not ask every service, for example, to turn over aircheck recordings of all of their webcasts so as to affirmatively demonstrate that they have not made prior announcements? Or, screen shots to demonstrate that they have displayed title/artist/album information in textual data? Or videotapes of all performances to provide evidence from which one might infer that the service has not knowingly performed the sound recording along with visual images in a manner that is likely to cause confusion, cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, etc.

For many webcasters, providing playlist information is comparably burdensome to any of the above, seemingly ridiculous, suggestions. As noted in the Broadcaster Comments, some smaller webcast services operate on live programming rather than scheduled playlists. As noted in the Yahoo Reply Comments, certain retransmission services cannot obtain or provide SoundExchange with such information; and, that even for services that may be technically capable of providing such data, the labor and economic costs involved in assembling, maintaining and transferring full playlist data are insupportably high. Moreover, and as noted above, playlist information from Internet webcast services contains valuable data that should be fairly bargained-for, not compelled without compensation.

3. No "Ephemeral Phonorecords" log should be required. The Copyright Office noted in its Section 104 Report, correctly in DiMA's view, that ephemeral recordings have no value independent of the performances of those recordings. Section 104 Report at 144, n. 434 (August 2001). It defies logic that services should be asked to incur high data administration costs in support of a valueless copy. We therefore suggest that, if it ultimately is determined that royalty payments must be made upon ephemeral phonorecords, services simply state whether they are operating under the section 112(e) license. Any royalties that ultimately may be required for such ephemeral recordings under the final decision in the webcast arbitration can justly be allocated according to the reasonable presumption that more performances of a particular recording suggests that more recordings may have been necessary to facilitate those performances.

4. Finally, there is no reason to require services to re-submit Notices under the statutory licenses on an annual basis. A service that makes an initial filing is responsible for making continued payments so long as they are operating under that license. If the payments cease, SoundExchange can readily ascertain whether the service has gone out of business or is operating under other licenses. To require annual filing, however, merely

creates make-work for those services that remain vibrant or, worse, creates unnecessary traps for services to inadvertently lose their entitlement to operate under the statutory license.

To the extent that any webcaster should need to provide sound recording information, or to augment that database we comment on the specific proposals set forth in the RIAA Comments at pages A-6 to A-8:

(i) The name of the Service can be required.

(ii) The category of transmission also is acceptable inasmuch as a single Service may make different types of transmissions.

(iii) A channel or program identifier is unnecessary and inappropriate in most cases. Information concerning which channels play particular songs, with what frequency, is valuable commercial data that should not be turned over to recording companies without further negotiation. Moreover, any requirement to produce data on a channel by channel basis will result in an extraordinarily onerous and expensive production of hundreds of thousands, if not millions, of records per month.

(iv) Genre information is not relevant, and can constitute valuable commercial information as to whether particular songs are being played heavily only in a particular genre or whether they are "crossing over" onto other genre channels.

(v) The type of program identifier is not relevant.

(vi) An "influence indicator" should not be required inasmuch as it is not relevant to any purpose under the statute. Moreover, as noted above, information concerning consumer preferences has commercial value to the service that should not be required to be disclosed to recording companies.

(vii) Start date and time are unnecessary. Even if it were possible to provide such data, date and time data could have to be identified on a per user basis, and thus would be extraordinarily burdensome information to acquire, maintain and produce.

(viii) DiMA agrees that a data field should identify the number of performances of a particular sound recording. However, that field should represent the total number of performances of that sound recording by the service during the covered period; it should not represent the number of performances on a per channel (or per user) basis. We would note that this field is impossible for retransmissions of radio broadcasts, and so should not be required for radio retransmission services.

(ix) Featured recording artist should be provided by SoundExchange and should be included, except in the case of radio retransmission services.

(x) Sound recording title should be provided by SoundExchange and should be included, except in the case of radio retransmission services.

(xi) ISRC should be provided by SoundExchange and could be included in a pre-populated database.

(xii) P-line information should be provided by SoundExchange and should be included, except in the case of radio retransmission services.

(xiii) Duration of the sound recording is unnecessary; but if provided by SoundExchange it could be included in a pre-populated database.

(xiv) Retail album title should be provided by SoundExchange and should be included, except in the case of radio retransmission services.

(xv) Marketing label is unnecessary; but if provided by SoundExchange it could be included in a pre-populated database.

(xvi) Catalog number is unnecessary; but if provided by SoundExchange it could be included in a pre-populated database.

(xvii) UPC is unnecessary; but if provided by SoundExchange it could be included in a pre-populated database.

(xviii) Release year is unnecessary; but if provided by SoundExchange it could be included in a pre-populated database.

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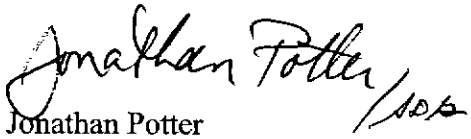
DiMA and its members look forward to participating in the May 10 Roundtable, and we remain available to address any questions, comments or concerns the Copyright Office may have.

Respectfully submitted,



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