Before the
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Washington, D.C.

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

REPLY COMMENTS OF MUZAK, LLC

MUZAK, LLC
Chuck Walker

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Dated: April 26, 2002

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I. INTRODUCTION

Muzak, LLC ("Muzak"), an exempt transmission service under 17 U.S.C. § 114(d)(1)(C)(iv) and a statutory licensee under 17 U.S.C. §§ 112 and 114 characterized by proposed regulation 37 CFR § 201.35(a)(2)(i) as a "preexising subscription service," hereby submits reply comments in the above-captioned proceeding. As a party to previous protracted litigation regarding the notice and recordkeeping provisions, Muzak vigorously opposes the suggested changes to the proposed regulations as they would substantially alter its reporting obligations as resolved in the 1998 Interim Regulations.[1]

While preexisting services are required to provide copyright owners with "reasonable notice of the use of their sound recordings,"[2] the DMCA and the DPRSRA purposely omitted the specific elements of reporting. While sound recording owners have the right to notice and use information, these regulations cannot create obligations rendering it impossible to create and

[1] *See* Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34,289 (June 24, 1998) (the "1998 Regulations").

[2] 17 U.S.C. § 114(f)(4)(A).

maintain a marketable and sustainable business. Muzak insists the proposed alterations to the 1998 regulations would require drastic and costly changes to its business practices which have been tailored specifically for the regulations which were negotiated, settled and adopted at that time. Furthermore, the proposed regulations introduce an obligation to provide information that is not available, is not likely to be available, and would potentially destroy Muzak's ability to maintain an established viable business. Muzak sets forth in these comments our basic objections to the proposed unification of reporting for all types of statutory licensees including the removal of the intended playlist regulations and addition of certain fields of data beyond those included in the 1998 regulations as well as the proposed addition of ephemeral logs.

II. A UNIFORM REPORT OF PERFORMANCES FOR ALL STATUTORY LICENSEES IS NEITHER EFFORTLESS NOR PRACTICAL

The RIAA comments submitted in this proceeding suggest that the Copyright Office adopt a uniform reporting system for all types of statutory licensees.[3] While it may make sense to treat other statutory licensees similarly, a uniform report of performances would unnecessarily require a substantial restructuring of Muzak's systems and the addition of unnecessary data that is far beyond what was anticipated at the conclusion of the proceedings four years ago.

A. The Removal of the Intended Playlist Regulations Would Substantially Alter Existing Music Programming Systems And Reporting Obligations.

[3] *See* RIAA comments at 31.

The RIAA comments to this proceeding recommended that the Copyright Office remove the regulations providing that preexisting services submit reports of use in the form of an intended playlist.[4] Although the RIAA offers to temporarily waive this radical change in reporting, Muzak's concerns still remain the same if it is eventually required to abandon an already established and working system of reporting. A deviation from the intended playlist regulations currently embodied in 37 CFR § 201.36(e) would be costly and extraordinarily detrimental to Muzak. Since the 1998 regulations were issued, Muzak has spent extensive time, resources and funds in developing a system to manage the selection of music it broadcasts and to specifically comply with the reporting requirements set out in the 1998 regulations.

Muzak's music programming is managed by a software system that pre-selects a playlist before broadcast. Hence, Muzak never tracks what is actually transmitted. To do so would be to require Muzak to develop an entirely new software system at an enormous expense. Not only would Muzak have to rebuild the cornerstone of its business, it would then have to train employees, re-integrate its database of music and then work with Designated Collectives to perfect the new system of reporting, all of which is repetitive of the time and money that has already been spent by the preexising services and the RIAA.

While other statutory licensees may utilize technology that is able to track performances as broadcast and report to copyright owners on that basis, it would be ridiculous to punish Muzak for four years of development and maintenance of systems complying with the 1998 regulations. Moreover, the work of setting up systems to process Muzak's intended playlist reports has already been completed by the RIAA. It would be ridiculous to scrap a functioning system of reporting that has already been developed and implemented when the alternative would create

[4] *See* RIAA comments at 37–38.

significant costs with no increased benefit. Thus, Muzak vehemently opposes the suggestion to homogenize the reporting of performances.

B. Requiring Additional Data Fields Is Unnecessary And Would Require Substantial Time, Labor And Resources.

In addition to the removal of the intended playlist regulations, comments to this proceeding have suggested including several data fields not required in the 1998 regulations.[5] Similarly, additional fields are required by the Copyright Office's proposed regulations for ephemeral recording logs. While our general objections to ephemeral logs are discussed below, we will combine our objections to the requirement of additional data fields for the ease of discussion.

The comments and proposed regulations suggest requiring the following additional data fields to reports compliant with the 1998 regulations: the names of all non-featured singers and musicians; the musical genre; the type of program; an influence indicator; the total number of performances (where possible); the marketing label; the Universal Product Code; the release year of the album; and the duration of the sound recording regardless of the amount of the recording transmitted. Muzak has already gone through the labor-intensive process of encoding and providing the requested information on tens of thousands of the recordings in its database once before and now faces the possibility of undertaking the huge task of going back and supplementing that data with new data which was not captured at the outset. This, once again,

[5] *See* RIAA comments at 37–46, AFM comments at 2–3.

seems to require that Muzak recreate a new system to replace one already functioning with the RIAA.

The additional data requested is largely irrelevant and unnecessary for Muzak to report. For example, the length of time of a recording has no bearing or relevance for preexisiting services which pay based upon a percentage of revenue. Extracting original recording lengths would be superfluous and would simply prove to be an extreme waste of time and resources. The same is true if Muzak were required to submit the total number of recordings actually transmitted. As mentioned above, Muzak's systems were simply not designed to track music as performed; they are only capable of tracking music by intended playlists. Therefore, it would be nearly impossible to provide the total number of recordings unless Muzak completely redesigned their systems.

Furthermore, the suggestion that the services provide the names of all non-featured musicians and singers is not only impossible, but makes no sense. Under 17 U.S.C. § 114(g)(2), copyright owners—not statutory licensees—are directed to pay non-featured performers. The reason for this is simple. Rarely are all non-featured performers listed in commercial album packaging and when they are, the listings are notoriously replete with errors. Recording labels are already required to keep record of and pay non-featured performers pursuant to their agreements with both AFM and AFTRA. It would be the height of lunacy to require services to supply data which they do not have access to when the parties requesting the data already posses it.

The remaining additional data fields (i.e., UPC, marketing label, release year) only seem to serve the purpose of aiding the RIAA identify works from Muzak's performance reports. The addition of these fields alone would require the costly alteration of Muzak's software and

countless hours of research and data entry to make reporting compliant, even though the parties have developed and refined a process for reporting. At a minimum, Muzak should not be required to provide any additional data for works used prior to new regulations or, in the alternative, that additional data should be supplied by copyright owners. After all, those works have already been identified by the RIAA/Soundexchange database in order to make already distributed payments.

II. NO EPHEMERAL LOG SHOULD BE REQUIRED

As so eloquently stated in the comments of the National Association of Broadcasters, the imposition of an ephemeral log would be pointless and would require duplicative and unnecessary reporting. In addition to our objections to the additional data fields contained in the proposed ephemeral log which were noted above in Part II.B. above, an ephemeral log would require expensive software development with almost no value resulting from it. The Copyright Office has previously suggested, and we find it especially relevant here, that ephemeral recordings have no value except as a tool to enable broadcasts.[6] It also seems poignant to mention that, to our knowledge, traditional broadcasters (Radio and Television) have never been asked to track copies of recordings or compositions made in order to facilitate a broadcast. To require such efforts in order to track what is essentially worthless would ignore practical realities and serve no discernable benefit.

III. CONCLUSION

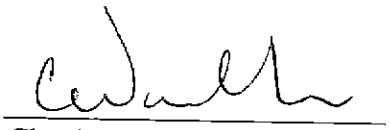
[6] *See* U.S. Copyright Office, DMCA Section 104 Report at 144 (August 2001).

The proposed regulations and what several commentators have suggested in submitted comments would require Muzak to implement an almost entirely new music programming and reporting system, as well as a previously unprecedented ephemeral log and more data fields than ever required under previous regulations. Requiring additional reporting obligations will alter significantly the costs associated with complying with regulations while not reducing rates paid to copyright owners, thus significantly altering the balance struck between parties in the proceedings begun in 1996 and seemingly resolved in 1998. Moreover, requiring data that is simply not available or necessary would expose licensees to unavoidable liability for noncompliance with no substantial benefit.

Therefore, Muzak respectfully requests that the Copyright Office not try to create a "one-size-fits-all" set of regulations when it is clear that not all statutory licensees operate in the same manner, and that the Copyright Office carefully consider imposing new data fields on an already established and functioning reporting system.

Respectfully submitted,

MUZAK, LLC

By: 

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