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Re: The Future of Music Coalition's Comments Regarding the Digital Millennium Copyright Act

Reference is made to the United States Copyright Office's and the National Telecommunications and Information Administration's (NTIA) request for public comments regarding the effects of the amendments made by title 1 of the Digital Millennium Copyright Act, (``DMCA") as contained in the June 5, 2000, Federal Register, pp. 35673-35675.

On behalf of the Future of Music Coalition, we hereby submit our comments. The Future of Music Coalition (http://www.futureofmusic.org) ("FMC") serves as a clearinghouse for research on music technology issues and advocates on behalf of musicians and independent

record labels in Washington, D.C. We are composed of leaders from technology and music who came together to confront the issue of how new digital media distribution will impact the creative community. The FMC, among other things, is concentrating on three pressing areas of concern: i.) what is the recording artist's true stake in the ongoing Napster/Gnutella/Scour dispute considering the perceived inevitability of widespread peer to peer file sharing abilities; ii.) the inability of the Recording Industry of America (RIAA) to represent recording artists' interests (particularly in the all important and under reported Digital Performance Rights in Sound Recordings [DPRSRA] debate); and iii.) how secure digital distribution formats (e.g., SDMI [the "Secured Digital Music Initiative"]) could threaten educators' and academics' access to recorded music and, therefore, jeopardize legitimate educational "fair use".

The FMC chooses to answer the second, or more precisely, the "General" question posed in the June 5, 2000, Federal Register. The legislative intent of Title I of the Digital Millennium Copyright Act was twofold: to further harmonize world intellectual property law and to provide greater protection for digital or electronic copyrighted work. The FMC believes that in order to promote the purpose of the DMCA, two important points must be made.

First, the Congress, the United States Copyright Office and the NTIA should coordinate with the European Economic Community (EEC) in its current efforts to monitor the growth of digital music distribution within its jurisdiction. If the United States does not take note of the EEC's findings, the lack of coordination amongst and between WIPO members could easily frustrate the economic growth of the Internet and leave recording artists, the music industry and consumers in the lurch.

Second, it is imperative that the Congress, the United States Copyright Office and the (NTIA) establish a fair and reliable criteria for distributing DPRSRA monies. The FMC cannot emphasize this point enough. Several commentators have suggested that DPRSRA royalties paid to the Copyright Office should be treated in a manner similar to that of AHRA/DART (American Home Recording Act; Digital Audio Recorder and Tape) monies. Although the DMCA and the AHRA both intend to distribute royalties monies to sound recording copyright holders, there is a serious flaw in the law of a fair and accurate methodology to determine what each sound recording copyright holder is actually owed. Under the current AHRA formula, some sound recording copyright holders are treated unfairly because no system has been implemented that accurately calculates with absolute certainty how many CDs have been sold, and, consequently, how much each sound recording copyright holder is owed. This problem is only exacerbated by the fact that unless sound recording copyright holders apply for AHRA money directly, what royalties would have been due them are actually paid to other parties after their money has been put back into the pool and redistributed to those parties that had gone through the requisite filings.

The FMC would argue that, in fact, the AHRA pool is what is known as a "black box," where, through flawed accounting and registration procedures, independent artists are under represented, and the attempt to take the AHRA criteria and apply to DPRSRA monies would only create a larger "digital black box." It is unacceptable to perpetuate an apparently flawed methodology that penalizes less sophisticated and undercapitalized sound recording copyright

holders. There is great evidence to suggest that innovations in data collection technologies would allow for more accurate auditing trails. Furthermore, if legislative intent underlying the solicitation of public comments is to make all information regarding the DMCA transparent, then all of the details, no matter how seemingly minor, regarding AHRA (and any proposed DPRSRA) royalty collection, calculation and distribution should be made completely available to the public.

Finally, the FMC would also like to conclude by briefly mentioning our concerns regarding the Anti-Circumvention provisions of the DMCA. We are troubled by the possibility that the implementation of SDMI type technologies could deprive educators and researchers from their access to music. It has always been a part of our nation's cultural and legal history that academics should have access to music under traditional notions of "fair use." This should apply to institutions as diverse as the MIT Media Labs and the elementary schools where our children first learn about music. The laws that attempt to protect legitimate copyright holders should not penalize our students and the men and women who teach them.

The FMC states categorically that hearings are absolutely necessary in the preparation of your report to Congress. We would be prepared to have our technological, academic and legal experts be at your disposal for such hearings.

We greatly appreciate being allowed to participate in this process and we applaud your efforts.

Best regards.

Very truly yours,

Walter F. McDonough, Esq.
Future of Music Coalition

cc: Michael Bracy, Jenny Toomey, Brian Zisk, the Future of Music Coalition
Marybeth Peters, Register of Copyrights, United States Copyright Office
Kathy D. Smith, Chief Counsel, NTIA