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**Congress of the United States**  
**House of Representatives**

Committees:  
Government Reform  
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and the  
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**RECEIVED**

April 26, 2002

APR 26 2002

GENERAL COUNSEL  
OF COPYRIGHT

Mr. David O. Carson  
General Counsel  
U.S. Copyright Office  
101 Independence Ave SE #LM403  
Washington, D.C. 20055

Docket No. RM 2002-1A

DOCKET NO.
RM 2002.1
COMMENT NO. 9

Dear Mr. Carson:

Thank you for the opportunity to submit these reply comments in response to the Federal Register notices of February 7 and March 8, 2002, regarding Notice and Recordkeeping for Use of Sound Recordings Under Statutory License. I appreciate the opportunity to make these comments on behalf of the people of Ohio's 10th Congressional District and others from around the country who would be unduly burdened by provisions of the rules being developed pursuant to the Digital Millennium Copyright Act of 1998 (DMCA).

Since filing the original comments on April 5, 2002, in response to the same Federal Register notice, I have received much correspondence from constituents and others from around the country who are concerned about efforts underway by the Copyright Office and others to curtail their free speech rights. The rules as proposed and some of the comments submitted, if approved, would undermine the abilities of small webcasters, college radio stations, and other educational and community webcasters from participating in this new and exciting mode of communication and exercising their free speech rights.

My constituents are served by several such radio stations, including but not limited to WBWC/88.3-FM Berea (Baldwin Wallace College), WRUW/91.1-FM Cleveland (Case Western Reserve University), WCSB/89.3-FM (Cleveland State University), and WUJC/88.7-FM University Heights (John Carroll University) and independent Internet station Radio Crow out of Bay Village. It is crucial that the rules relieve these and other educational and community media and small webcasting startups from burdensome recordkeeping, fee structures, and content restrictions.

### DISTINGUISHING EDUCATIONAL, COMMUNITY, AND INTERNET STARTUPS

It is crucial that the Copyright Office make the distinction between the types of Internet webcasts of concern to me in these comments versus large commercial webcasts. The Record Industry Association of America, Inc. (RIAA), citing the ability of Clear Channel affiliates and other large broadcasters, states in its comments that

It strains credulity to believe that sophisticated broadcast corporations that simulcast AM or FM signals over the Internet or the entrepreneurial companies that provide Internet-only simulcast programming, or both, can develop proprietary algorithms and software to program innumerable stations and sell targeted advertising but are unable to provide the types of reporting logs required for operation under a statutory license or exemption. If companies streaming music on the Internet are sophisticated enough to digitize entire libraries of music to offer their listeners thousands of distinct sound recordings, develop technologies to strip out local commercials for a worldwide audience, and create distinct streams for individual users, then they are capable of developing or purchasing automated systems that will enable them to provide the information that copyright owners need to distribute royalties to each and every copyright owner, artist and nonfeatured musician and vocalist entitled to receive such royalties and enforce their statutory rights.

*See Comments of the Recording Industry Association of America, Inc., filed April 5, 2002, at 42-43.*

The RIAA comments exemplify the type of misunderstanding of college radio and other small webcasts which threatens to silence independent webcasting. Most college radio stations are run entirely or almost entirely by volunteers, both students and other members of their communities. These constituents who volunteer their time for the sake of community radio, have not digitized their entire libraries. College radio stations tend to have enormous libraries accumulated over many decades. These libraries encompass every imaginable genre of music.

The volunteer programmers take time out of their schedules to broadcast songs from these libraries. Many of the shows have educational and cultural value unavailable on the commercial section of the broadcast spectrum. The fact that these signals are webcast at all is due to the enterprise of a few station volunteers who understand or are able to learn how to use Internet technology to broadcast a signal, not digitize an entire music library acquired over 40-50 years.

Typically, a 2-hour/week volunteer will find an old vinyl album with 20 years of dust on the jacket, or an old CD with 10 years of dust on the cover, and play a song that may not get more airplay for another 10 or 20 years. The song is played over the signal and the signal is webcast. There is nothing sophisticated about it.

It is unreasonably burdensome to require an intended playlist in a situation where the volunteer programmer may decide on the next song at the point when she has 30 seconds left on the current song.

The type of reporting requirements in the draft rule and in the RIAA comments may be appropriate for large, organized, radio stations such as the Clear Channel station cited by the RIAA in its comments. See id. However, to foist that requirement on nonprofit educational and community radio stations would destroy a service that has served the Greater Cleveland area very well over the last 4 or 5 decades and has served countless other communities across the country. Nonprofit educational and community radio stations which webcast their signals must be made exempt from the burdensome reporting and fee requirements.

While small webcast-only stations might be more technologically sophisticated than college and community radio stations, most are not prepared to meet the burdensome demands of the proposed rules and those proposed by the RIAA. The proposed fees would silence nearly all Internet radio stations. The majority of Internet stations are, for now, a labor of love for the entrepreneurs developing the medium. These independent entrepreneurs are presenting a truly independent voice at a time when consolidation in the mass communications industry has crippled the independent voice in conventional media.

Webcasting is a fledgling industry. Few, if any, Internet radio sites generate income. This medium, like e-commerce, is still developing. Independent webcasting stations need breathing room to develop before they are stifled out of existence by the fee structures proposed by the DMCA and the Copyright Office. Like e-commerce which benefits from tax exemption during this pioneering period before the industry shows profitability, Internet webcasting should also be exempt from the proposed fee structures while it develops and before it becomes viable as an industry. If the Copyright Office does not grant this exemption, it will stifle this new and exciting communications force and deprive the public from independence in this medium.

#### HISTORICAL PRECEDENT

Webcasting is a new medium for the public dissemination of recorded material. Issues similar to those raised by copyright holders were previously raised with respect the radio broadcast. Congress recognized and balanced the rights of copyright holders and nonprofit educational and community radio stations. The legislative history of the Copyright Act provides that recognition:

The Committee is cognizant of the intent of Congress, in enacting the Public Broadcasting Act on November 7, 1967 (47 U.S.C. 390 et seq.), that encouragement and support of noncommercial broadcasting is in the public interest. It is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources.

See 17 U.S.C. § 118 Historical and Revision Notes. See also 37 C.F.R. § 253.5 (establishing a reasonable royalty rate for nonprofit public radio stations for payment of royalties to composer organizations such as ASCAP and BMI).

### RECORD-KEEPING

The record keeping requirement proposed in the report by Copyright Arbitration Royalty Panel (CARP) would be unduly burdensome for college radio stations. College radio stations generally do not have budgets for automated reporting systems. And unlike commercial radio stations which stick with one general format, college stations tend to have enormous libraries acquired over several decades and are not catalogued in computer databases. The cost or volunteer time requirements would be prohibitive.

A more reasonable reporting alternative would be for college radio programmers and independent webcasters to keep a record of the songs played, the album or CD the song is from, and the artist performing the song. Such a record would be kept for a two or three year period and stations could furnish royalty recipients, upon request, with a music-use report during one week of each calendar year. Recipients should be restricted to request such reports from no more than 10 stations in any one calendar year. The reduced reporting requirement would also reduce the processing costs of royalty recipients. A precedent for such a reporting requirement can be found in 37 C.F.R. § 253.5.

### FEES

The per song, per listener fees proposed will be unduly burdensome to college radio stations exploring the emerging webcasting technologies. If such a station has an average of 25 listeners per hour, which is typical of college radio stations, that station will be subjected to annual fees of approximately \$13,000 based on the RIAA original proposed rate structure. This amount exceeds the budgets of many college radio stations.

For a broadcast station, according to the CARP proposal, the fee would be \$657 per year. For a web only station it would be \$4599 per year. Note that the RIAA has asked for dramatic increases in these rates, at minimum, double for the broadcast stations. Since part of the information about their requested fee increases has been redacted, it is not possible to tell how large of an increase they are actually asking for in their reply comments.

Unlike commercial radio, and even public radio which competes with commercial radio, has large signals and audiences, and is subsidized by the Corporation for Public Broadcasting (CPB), college radio stations tend to have very small signals, audiences, and budgets. While commercial radio and public radio stations are able to pay these fees, college radio stations do not have the ability to raise such funding requirements.

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College, educational, and community radio stations with webcasts, or contemplating webcasts, should either be exempt from such fees or alternatively be charged a reasonable annual licencing fee similar to the royalty rates established for composers works transmitted by public radio stations. See 37 C.F.R. § 253.5.

### CONTENT RESTRICTIONS

College radio and similar nonprofit educational and community radio formats specialize in diversity and innovation. The DMCA, however, restricts content by instituting a maximum number of selections by a given artist during a given period of time. This restriction would have a chilling effect on the creative and educational missions of many college radio stations. Such a restriction would put an end to programs which explore the musical and historical legacies of given artists or shows which address racial frontiers or interpret the works of historical figures. Nonprofit college, educational, and community webcasters should be exempt from numerical or other content restrictions.

### CONCLUSION AND RECOMMENDATION

Educational institutions and independent webcast stations such as those which serve my Congressional District are among the most innovative users of the new Internet media. Students and other constituents who participate in these radio stations are creating innovative uses of these media through webcasting. They are able to learn emerging technology through their participation in college radio and apply their education to the actual market-place and the market-place of ideas. The historic recognition of the problem of nonprofit educational and community institutions with respect to radio technology must also be applied to the emerging webcasting technology.

Special considerations must be made for such stations. Webcasting is a new technology. College stations have limited audiences. The programmers on such stations are volunteers and make no money from their efforts. They provide a crucial service through their educational missions and by providing alternatives to commercial radio and even public radio which competes with commercial radio. They also provide a service to independent artists excluded from mainstream media.

Burdensome restrictions on content, fee structures making independent radio and webcasting impossible, and record-keeping requirements which are impossible for independent college, educational, and small webcasting entities, will have a chilling effect on free speech through the Internet. While I understand that the RIAA seeking royalties for its clients among the 5 or 6 largest media groups, other independent media must not be allowed to be choked out of existence. Congress and the Copyright Office have a duty to strike the proper balance.

College radio and other nonprofit educational and community radio, as well as small independent webcast-only stations with 10 or fewer employees should be exempt from the recordkeeping, content restrictions, and fee structures under the DMCA and the current rulemaking proceedings. These media provide a service to the listening public by presenting truly independent programming which features educational and artistic content not provided by the major media entities.

Please consider these issues as you develop rules pursuant to the DMCA. Attached also are my comments to the House Judiciary Committee's Subcommittee on the Courts, the Internet, and Intellectual Property regarding the changes I believe need to be made legislatively to protect educational and community radio and small Internet webcast startups. Thank you for your consideration of these issues of such importance to my constituents as well as webcasters and listeners throughout the United States of America.

Sincerely,

A handwritten signature in black ink that reads "Dennis J. Kucinich". The signature is written in a cursive, flowing style.

Dennis J. Kucinich  
Member of Congress

Enclosure

cc: House Judiciary Committee  
DJK:mg

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April 8, 2002

The Hon. Howard Coble  
Chairman  
Subcommittee on Courts, the Internet, and Intellectual Property  
B351A RHOB  
Washington, D.C. 20515-0001

Dear Congressman Coble:

Thank you for your March 12, 2002, notice from the Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property regarding the application of copyright law to the digital environment. This issue is of great concern to me because I represent constituents who are involved in the streaming of digital information for nonprofit, educational, and community purposes and should be exempted from burdensome requirements imposed under the Digital Millennium Copyright Act of 1998 (DMCA). I recently filed comments with the U.S. Copyright Office regarding this matter and have attached those comments to this letter for your convenience.

As I reported to the Copyright Office, college radio stations such as those in my Congressional District, are non-profit educational services. Students and others involved in college and community radio learn the media and are able to make contributions to the actual market-place and the market-place of ideas through their involvement. Listeners also benefit because they hear music from independent artists and sources not generally represented in the mainstream radio medium, owned by 5 or 6 large companies.

And certainly artists benefit. Local and independent artists who are not signed by a major record label get no access to the radio spectrum but for the college and community radio programmers who provide these artists with airplay. A recent illustration of this phenomenon is the Grammy Award that went to the soundtrack of "Oh Brother Where Art Thou." This CD received virtually no airplay on commercial radio, but did receive coverage from independent educational and community radio, the webcasts from those stations, and independent webcasting media. As a result of that exposure, the independent artists represented in that CD greatly benefited and were able to compete for, and win, the Grammy Award. While the artists may not have received royalties from those stations, the market exposure through those stations was invaluable.

Burdensome restrictions on content, fee structures making independent radio and webcasting impossible, and record-keeping requirements which are impossible for independent college, educational, and small webcasting entities, will have a chilling effect on free speech through the

Internet. While I understand that the Recording Industry Association of America is seeking royalties for its clients among the 5 or 6 largest media groups, other independent media must not be allowed to be choked out of existence. Congress has a duty to strike a proper balance.

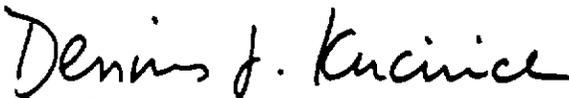
College radio and other nonprofit educational and community radio with 10 or fewer employees should be exempt from the recordkeeping, content restrictions, and fee structures under the DMCA and the rulemaking recommended by the Copyright Arbitration and Royalty Panel (CARP). These media provide a service to the listening public by presenting truly independent programming which features educational and artistic content not provided by the major media entities.

Moreover, the problems presented by the DMCA go far beyond college radio. The proposed fees would silence nearly all Internet radio stations. The majority of Internet stations are, for now, a labor of love to the entrepreneurs developing the medium. These independent entrepreneurs are presenting a truly independent voice at a time when consolidation in the mass communications industry has crippled the independent voice in conventional media.

Webcasting is a fledgling industry. Few, if any, Internet radio sites generate income. This medium, like e-commerce, is still developing. Independent webcasting stations need breathing room to develop before they are stifled out of existence by the fee structures proposed by the DMCA and the Copyright Office. Like e-commerce which benefits from tax exemption during this pioneering period before the industry shows profitability, Internet webcasting should also be exempt from the proposed fee structures while it develops and before it becomes viable as an industry. If Congress does not grant this exemption, it will stifle this new and exciting communications force and deprive the public from independence in this medium.

Please consider these issues as you develop legislation to address the application of copyright law to the digital environment and incorporate my enclosed comments to the Copyright Office into these comments before the Judiciary Committee. Thank you for reviewing this issue.

Sincerely,

  
Dennis J. Kucinich  
Member of Congress

Enclosure  
cc: U.S. Copyright Office  
DJK:mg