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Before the United States Copyright Office
Library of Congress
Washington, D.C.
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DOCKET NO.
RM 2002-1
COMMENT NO. 18

GENERAL COUNSEL
OF COPYRIGHT

In the Matter of)
)
 Notice and Recordkeeping for)
 Use of Sound Recordings under)
 Statutory License)

Docket No. RM 2002-1

Reply Comments of a United Group of Webcasters

We respectfully submit these comments on behalf of a group of small, commercial webcasters including 3WK, Beethoven.com, Chronix Radio, CyberRadio2000.com, radioio.com, SomaFM, Ultimate-80s, and Wolf FM all of whom are small companies with significantly sized listening audiences (combined listening hours of 20,124,273 – Cyberradio2000 not included) and are fairly representative of a typical small webcasting company. None of these webcasters were financially able to participate in the CARP negotiations, but most have previously submitted comments to the Library of Congress on the Notice and Recordkeeping for use of Sound Recordings Under Statutory License for regarding the use of copyrighted materials under the statutory sound recording digital performance license, 17 U.S.C. § 114, and multiple ephemeral recordings license, 17 U.S.C. § 112(e). These webcasters have also made requests to participate in the roundtable discussion scheduled for May 10 and hope to relay concerns in this discussion as to the dangerous ramifications of the proposed reporting guidelines as it adversely affects small webcasting companies.

We would like it to be known that we unanimously oppose the reporting guideline demands proposed in the comments filed by the RIAA in the strongest of terms. We believe the proposal calls for data to be collected and reported which creates, at best, an unreasonable financial and logistic burden on small webcasters and, at worst, impossible technological obstacles for compliance. We simply do not believe that we can remain in business and fulfill these requirements and that, should these guidelines be adopted, there is a reasonable assurance that we will be unable financially or technologically to comply.

Because the RIAA has continued to argue for unreasonably high royalty rates and standards for Recordkeeping, artists and labels have waited for years to see royalties for digital performances of their music. We strongly believe that providing the Artist, Song Title, Album Title, and Label is more than enough information for the copyright owners to adequately identify the parties to which royalties should be dispersed. Webcasters believe that the simple collection of these 4 items completely fulfills Section 114 of the DMCA act that provides that copyright owners are supplied with "reasonable notice of the use of their sound recordings". This is information that most webcasters are already collecting and would be immediately available for use in determining royalty amounts for artists and labels. Anything beyond these four pieces of information would require a serious investment of time and money on the part of webcasters well above and beyond the normal requirements of running their businesses.

The following will reiterate in detail why the Recordkeeping requirements as proposed by the RIAA are overly complicated, technically unfeasible, time-consuming, and ultimately not affordable to webcasters, especially given the fact that webcasters already have systems in place that would satisfy the Notice and Recordkeeping for use of Sound Recordings Under Statutory License as suggested above.

I. OVERLY COMPLICATED



A. Problems

The RIAA requests in their Recordkeeping Comments that webcasters provide a log of "performances" that encompasses 18 pieces of information for each and every song played, for each and every listener. The RIAA also says when SoundExchange processed over 85 million "performances" for the first digital performance distribution in the fall of 2001, they "identified weaknesses in the reporting requirements". They state that "usage logs provided by the preexisting subscription services contained incomplete, ambiguous or inaccurate information." Instead of simplifying the requested information (to Artist, Song Title, Album Title, and Label), the RIAA is now asking for even more information – information that will provide even more chance of being "incomplete, ambiguous or inaccurate". The solution to incompleteness, ambiguity, and inaccuracy is to simplify the information collected, not further complicate it.

The RIAA states in their own Recordkeeping Comments that "there would be no commercial benefit to having different reporting regulations for different types of transmission services. To the contrary, such different regulations will necessarily increase the administrative costs of collecting entities and so reduce the royalties available for distribution." And yet the RIAA is recommending a MINIMUM of 22 reporting regulations – 11 separate transmission categories, with 2 different methods for figuring rates of each of these transmission categories (% or pay per play), and this doesn't even take into account different percentages and \$ amounts for "pay per play" that are negotiated on a one-to-one basis.

B. Proposed Solution

Webcasters strongly believe that the only information necessary to identify an artist work is Artist, Song Title, Album Title, and Label. These 4 pieces of information will provide 100% accuracy in determining copyright royalties. There is no circumstance, even if a song has been recorded by different artists, on different albums, and/or on different labels, that these 4 pieces of information will not provide a clear indication of who will receive the royalty. All other information is superfluous, and in fact an impediment to efficiently and quickly providing Recordkeeping to determine a Digital Sound Recording Royalty. And as webcasters are already collecting this information, no additional system would need to be created, and collection of Digital Sound Recording Royalties could begin immediately.

Webcasters strongly believe that all transmitting entities should use the same reporting methods in order to make royalty collection and distribution as simple as possible. Webcasters suggest that the Librarian Of Congress reevaluate copyright collection systems already in place and currently used by all transmitting entities (ASCAP/BMI/SESAC). Anything that will make this massive collection of data easier especially if already proven to work should be used as a model for Digital Sound Recording Royalty collection.

II. NOT AFFORDABLE TO WEBCASTERS;

A. Problems

The RIAA states in their Recordkeeping Comments that the use of detailed reports by current digital audio transmission services "did not thwart, hinder, or cripple the development of such services". However, they also state that "many services that have filed Initial Notices [to participate in Royalty collection] under the current regulation have ceased using the statutory license, and in many cases have gone out of business altogether". In fact, of the webcasters that originally signed with the RIAA under similar reporting conditions as requested here, very few companies remain in business.

The RIAA states that the "minimal burden imposed" on webcasters in absorbing costs for collection of royalty information is far outweighed by the "tremendous, additional burden that



would be incurred by a collecting entity if it had to expend more time and money identifying copyright owners". This statement is especially ironic in that the RIAA represents the "\$15 billion U.S. sound recording industry" (RIAA website), and the combined total last year gross revenue of the 8 webcasters mentioned in these comments, was \$123,382. Any additional software development, or additional employees needed to provide the RIAA required recordkeeping would very likely put any of these 8 companies out of business.

Webcasters currently collect Artist, Song Title, Album Title, and Label information, more information than is dictated by the DMCA. We've already absorbed the costs to write proprietary, or buy off-the-shelf software that compiles this information. Webcasters should not have to create complex auditing systems beyond what they currently have, especially when their current systems already deliver information that will give copyright holders "reasonable notice of the use of their sound recordings".

B. Proposed Solution

Webcasters strongly believe that the only information necessary to identify copyrighted material is Artist, Song Title, Album Title, and Label. These 4 pieces of information will provide 100% accuracy in determining copyright royalties. And as webcasters are already collecting this information, distribution of Digital Sound Recording Royalties could begin immediately, with little or no additional financial expenditures.

Webcasters suggest that the current SoundExchange database system set up to track background artists and musicians be expanded to include all artist copyright information. Every time an artist wants to start royalty collection on the digital performance of their work, they should have the ability to electronically enter their own copyright information into the SoundExchange database system. This way, the "minimal [financial] burden" would be shifted from both the collecting entities (webcasters) and the royalty distributor (SoundExchange) to the people who will receive the royalties themselves (artists and labels). Using this method, the input information would be much more accurate, and if any webcaster needed to verify Artist, Song Title, Album Title, or Label copyright information for their systems they would have one all-inclusive databank from which to access the information.

III. PER SONG PER LISTENER DATA COLLECTION IS NOT TECHNICALLY FEASIBLE

A. Problems

Webcasters strongly disagree that royalty information should be or need be collected Per Song Per Listener. The sheer volume of information that would need to be collected, as proposed by the RIAA, would be overwhelming and administering a program this large with any semblance of accuracy, would be a technical impossibility at this time. Even the RIAA states that "SoundExchange faced significant obstacles when it processed over 85 million performances for the first digital performance distribution in the fall of 2001, which covered royalties received from preexisting subscription services between February 1996 and March 2000". The total performances collected by just the 8 webcasters writing these comments would be 261,615,549 performances (ttsl x 13 songs per hour), for just the year 2001. Multiply that number by the more than 4600 other webcasters and you have a logistical nightmare.

Webcasters also strongly disagree that Congress intended that 1 second of a song would be considered a "digital performance". There is no precedent in any previous copyright royalty collection procedure that would permit the RIAA to require that webcasters collect "any portion of a sound recording [that] is transmitted to a user" - even if the duration is 1 second of a song. Current log information varies by server, measurement system, and methodology. Therefore, any method of measuring digital royalties Per Song Per Listener should be thrown



out because of the inaccuracy of reporting performances per listener; basing a copyright rate structure on such inexact measurement would be at best unfair, and at worst theft.

B. Proposed Solution

Webcasters strongly suggest that any measurement of digital royalties Per Play Per Listener should be thrown out because of the technical impossibility of administering a program this large with any semblance of accuracy and the inaccuracy inherent in discerning what time segment would constitute a "performances" per listener. Instead, webcasters suggest that the only measurement necessary to provide a copyright owner with "reasonable notice of the use of their sound recordings" is to collect Artist, Song Title, Album Title, and Label information per transmitting entity, in a similar manner as is currently done by ASCAP/BMI/SESAC.

IV. TIME CONSUMING;

A. Problems

There are few, if any circumstances, in which all of the RIAA required Recordkeeping information is immediately available to webcasters on any chosen song. In many cases, especially when dealing with independent artists, Artist, Song Title, Album Title, and Label is the only information available. RIAA requested information like UPC and IRSC, is usually not available in readable form on the CD and would have to be researched. In fact, the RIAA itself states that there is no single place that a webcaster could research to discover the information requested. The time needed and cost of such intensive data collection is totally unnecessary and is in fact a hindrance to the efficient processing of Digital Sound Recording Royalties.

B. Proposed Solutions

Webcasters strongly suggest that only Artist, Song Title, Album Title, and Label information be required (which would provide 100% identification of copyright information to the copyright holder). As this information is almost always provided on every CD, the time to research and input the data would be minimal. And since we already have this information input into our software systems, there would be little or no additional time needed to set up our current song libraries.

For the reasons set forth above, 3WK, Beethoven.com, Chronix Radio, CyberRadio2000.com, radioio, SomaFM, Ultimate-80s, and Wolf FM respectfully request that the Copyright Office adopt our Proposed Solutions concerning the Notice and Recordkeeping for use of Sound Recordings Under Statutory License.

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