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GENERAL COUNCIL OF COPYRIGHT

Beethoven.com Comments in Response to Proposed Rulemaking for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

LIBRARY OF CONGRESS
Copyright Office
37 CFR Part 201
[Docket No. RM 2002-1]

DOCKET NO.
RM 2002-1
COMMENT NO. 23

Dated April 4, 2002

PRELIMINARY STATEMENT

Beethoven.com respectfully submits these comments and requests that changes be made to the guidelines outlined in the Notice and Recordkeeping for Use of Sound Recordings Under Statutory License proposed rulemaking (hereby referred to as the "Proposed Rulemaking". It is the position of Beethoven.com that many of the items detailed in the current proposed reporting guidelines are either unduly burdensome, technologically impossible, economically unfeasible or unnecessary to fulfill the requirements of the current copyright laws. It is a further assertion by Beethoven.com that the proposed guidelines create an unfair burden on the holders of statutory licenses which frustrates the intention of Congress in providing the rights to statutory licenses under 17 U.S.C. § 114 and, therefore, is not a "reasonable notice" to copyright holders required by 17 U.S.C. § 114(f)(4)(A).

It is the intention of this document to outline the specific requirements proposed by the Proposed Rulemaking which are unduly burdensome, technologically impossible, economically unfeasible or unnecessary to fulfill the requirements of the current copyright laws, as well as to suggest which requirements are not objectionable and, therefore, satisfy the "reasonable notice" intention of Congress. For purposes

OBJECTIONS TO REQUIREMENTS IN THE PROPOSED RULEMAKING

This section outlines objections to specific requirements set out in the Proposed Rulemaking in Sec.201.36 paragraph (e)(2)(ii). The designations of each requirement referred to here are in relation to the paragraph (e)(2)(ii).

- (G) Numeric designation of the place of the sound recording within the program There is no reason why this information should be necessary for the fulfillment or collection of royalties by the copyright holder. To fulfill such a request, the statutory license holder would need to institute a hitherto undeveloped technological solution in



order to adequately record the numeric designation. The difficulty and significant cost involved would make this requirement in conflict with the intent of Congress to require "reasonable notice". In addition, the unnecessary nature of this requirement makes its suggestion arbitrary and, therefore, should be removed.

- (H) Duration of transmission (to nearest second) This requirement should be removed for exactly the same reason as (G) stated above.
- (J) The ISRC code of the recording This code is currently unused and unknown to Beethoven.com and the requirement simply to look up this information for every piece of copyrighted material used by Beethoven.com would be extremely costly and create a burden which frustrates the intention of Congress to require a "reasonable notice" to copyright holders. To require such information would put a financial strain on Beethoven.com which would prevent the implementation of a viable business model.

In addition, it is Beethoven.com's position that such information is much more reasonably available to the copyright holder, and, as such, the burden of assignment of an ISRC code should be put on the copyright holder and not the holder of the statutory license.

- (K) The release year of the album per copyright notice and in the case of compilation albums, the release year of the album and copyright date of the track Again, the copyright holder has vastly superior access to this information simply by the other requirements that are not objected to herein. To place the burden of collection of this information, some of which is very difficult to collect for the statutory license holder, is arbitrary and frustrates intention of Congress to require a "reasonable notice" to copyright holders.
- (O) The UPC code of the retail album In addition to the objections outlined above in (J) and (K), it should also be noted that Beethoven.com, as with many webcasters, does not purchase ANY copyrighted recorded material for webcasting. ALL recorded material transmitted by Beethoven.com has been sent FREE OF CHARGE to Beethoven.com by the copyright holders with the generally understood request of having it transmitted for promotional purposes. As such, many of these recordings have been designated by the copyright holders as "promotional copies" and have the UPC codes either stamped or cut out, or are missing altogether. In the position of



Beethoven.com, inasmuch as these "promotional copies" have been designated as such by the copyright holders, the copyright holders have expressly conveyed their desire to have the recordings transmitted by the statutory license holder. Therefore, it should be assumed that any detailed collection of information required by the copyright holder is already in the possession of the copyright holder.

(P) The Catalog Number Beethoven.com does not have immediate access to this information and the efforts required to meet such a requirement would be onerous and unduly burdensome. It cannot be met with the current staffing levels and would create the need for additional personnel that would make Beethoven.com's effort to implement a viable business model very difficult, if not impossible. Again, this is information which the copyright holder already has immediate access to from the simplest of parts of the information required by the Proposed Rulemaking that are not being objected to herein. To suggest that the burden of assignment of this information should be placed on the statutory license holder is arbitrary and not within the intent of "reasonable notice" to the copyright holder.

(Q) The copyright holder information This requirement is hereby objected to based on the reasons outlined in the objection to (P) above. It should be noted that if the copyright holder does not have knowledge of what material it has in its possession, there should be no reasonable expectation that statutory license holders would have this knowledge.

Beethoven.com also summarily objects to the requirements for creating a "Listener's Log" set forth in the Proposed Rulemaking in Sec.201.36 paragraph (e)(3) based on the following arguments:

1. That the collection of most of the information contained in paragraph (e)(3) is either technologically impossible or incredibly burdensome and is not, in fact, necessary for the establishment of "reasonable notice" required by the copyright law passed by Congress.
2. That some of the information creates problematic privacy concerns for the consumer which will frustrate the development of the industry and greatly influence in a negative way the desire for public adoption of this new technology.
3. That there is no certifiable way for webcasters to ensure that data is not collected on consumers which are minors, a collection of data which is expressly prohibited by current laws.



The problem of being technologically possible for such data being collected in the creation of a "Listener's Log" stem primarily from the inability of webcasters to guarantee or confirm the accuracy of the data. For example, there are currently only two ways in which a webcaster can determine where a listener is located when he or she listens to a transmission of copyrighted material.

1. The webcaster can ask the listener where they are located. This is the most common way webcasters currently attempt to locate the geographic locations of members of their audience. The problem with this is that it is completely dependent on the listener providing accurate information. The experience of Beethoven.com is that between 10-25% of listeners who are asked for such information either refuse to give it or give false information. This is known based on later attempts to contact those listeners who have, in fact, given information and attempts to quantify the audience for Beethoven.com's advertising initiatives.
2. The webcaster can try to "trace" the location of the listener through a backwards trace of the listener's internet connection, or "IP Address". The problem with this method of determining location is that many Internet service providers, including the largest one being America Online, block such traces of IP Addresses beyond their own servers to protect their users' privacy. This is why when a webcaster attempts to locate the geographic location of a listener using America Online, that listener appears to be coming from Virginia, which is where America Online's servers are located, no matter where the listener is actually listening from. In the case of Beethoven.com, as many as 12% of listeners in any given month are connected to the Internet using America Online. There is currently no technological solution known to be available which adequately addresses this problem.

It is the position of Beethoven.com that such a "Listener's Log" is, in fact, unnecessary for the fulfillment of "reasonable notice" to copyright holders. Therefore, requiring such information goes far beyond the intention of Congress to provide reporting requirements for use with statutory licenses for eligible nonexempt transmissions of copyrighted material. Beethoven.com respectfully requests that Sec.201.36 paragraph (e)(3) be completely stricken from the Proposed Rulemaking.

SUMMARY AND PROPOSAL FOR REVISED REPORTING REQUIREMENTS

Beethoven.com has no objection to the following pieces of information being submitted to copyright holders for use with a statutory license for transmitting copyrighted material over the Internet. This information is all that is

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necessary to fulfill the intention of Congress in 17 U.S.C. § 114 outlined in the Proposed Rulemaking in Sec. 201.36 paragraph (e)(2):

- (A) The name of the service
- (B) The channel of the program (AM/FM stations use station id)
- (C) The type of program (Archived/Looped/Live)
- (D) Date of Transmission
- (E) Time of Transmission
- (F) Time zone of origination of Transmission
- (I) Sound Recording Title
- (L) Featured recording artist
- (M) Retail album title
- (N) The recording Label
- (R) The musical genre of the channel or program (station format)

Beethoven.com respectfully submits that these pieces of information be adopted as the full and complete requirements for webcasters to provide "reasonable notice" to copyright holders for use of their copyrighted material under the provisions of the statutory license set forth in 17 U.S.C. § 114. Any additional information beyond these pieces would create technological and economic problems for holders of statutory licenses that frustrate the intentions of Congress and make it difficult or impossible to continue operations under a viable business model.

In making this request, Beethoven.com would like to, once again, remind the Library of Congress that the copyright holders provided all copyrighted material currently being used by Beethoven.com for promotional use free of charge and without written requirements for its use. In providing this material, the copyright holders have accepted that transmission of such material is in their best interest and holds promotional value to them. Beethoven.com respectfully requests that the Library of Congress take this fact into consideration in interpreting the intention of Congress in passing the current copyright laws.

Respectfully Submitted,

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