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Washington, D.C.

In the Matter of	
Preregistration of Certain Unpublished Copyright Claims	Docket No. RM 2005-9

COMMENTS OF
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.
AND THE HARRY FOX AGENCY, INC. CONCERNING
THE JULY 22, 2005 NOTICE OF PROPOSED RULEMAKING

The National Music Publishers' Association, Inc. ("NMPA") and The Harry Fox Agency, Inc. ("HFA") submit these comments in response to the Copyright Office's Notice of Proposed Rulemaking concerning Preregistration of Certain Unpublished Copyright Claims dated July 22, 2005 (the "Notice"). 70 Fed. Reg. 42286.

Musical works as a class have been increasingly subject to prerelease infringement. These instances of infringement have not been limited exclusively to musical works distributed in physical phonorecords, but also have included musical works distributed digitally or electronically over the Internet and in motion pictures, among other methods. Moreover, prerelease infringement affects new artists and songwriters as well as established acts that have an existing fan base.

Our comments, therefore, address the following issues regarding preregistration of unpublished works for copyright protection, with specific reference to the musical work copyright: (1) the history of pre-release infringement (*i.e.*, infringement prior to commercial distribution) of musical works as a class of works; and (2) the appropriate definition and scope of musical works eligible for preregistration.

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NMPA, founded in 1917, is the principal trade association representing the interests of music publishers in the United States. As such, NMPA works to advance and protect the interests of the music publishing industry and, for over eight decades, has served as the leading voice of the American music publishing industry in Congress and the courts. With over 600 members, NMPA represents both large and small music publishing firms throughout the United States.

HFA, the licensing affiliate of NMPA, acts as licensing agent for almost 28,000 music publishers, which in turn represent the interests of more than 160,000 songwriters. HFA provides an information source and clearinghouse service for licensing musical copyrights.

I. As a Class of Works, Musical Works Have a Significant History of Prerelease Infringement

As both Congress and the Copyright Office have found, the substantial history of prerelease infringement of musical works reproduced in sound recordings is likely to continue causing harm to copyright owners. That harm can be ameliorated by permitting preregistration of such works so that copyright owners can take advantage of the remedies available for registered works pursuant to the Copyright Act.

There are numerous examples of musical works that have been leaked or otherwise made available for widespread public distribution before their commercial release, contrary to the desires of their authors or creators. Recently, Grammy award-winning singer Fiona Apple had to re-record the majority of songs on her unreleased third album because earlier versions of 11 of the recordings had been leaked and "circulated on unlicensed Internet file-swapping networks." Jeff Leeds, *Fiona Apple Retools Her*

Leaked Album, N.Y. Times, August 15, 2005, at D1. Similarly, shortly after releasing their album, "Everyday," four years ago, the Dave Matthews Band "discovered that an album's worth of songs they had recorded earlier — and then scrapped — had leaked to file-sharing systems and had been heard by untold numbers of the band's followers." *Id.*

In fact, prerelease infringement of musical works has become commonplace. In addition to the two examples given above, prerelease infringement has affected and harmed artists and songwriters who collaborated on the creation of the numerous other recent albums, including, among others, *Guero* by Beck (2005), *Human After All* by Daft Punk (2005), *Encore* by Eminem (2004), *The Beautiful Struggle* by Talib Kweli (2004), *Hail to the Thief* by Radiohead (2003), *How to Dismantle an Atomic Bomb* by U2 (2004) and *A Ghost is Born* by Wilco (2004). Further, artists and songwriters who created original musical works for motion pictures have been harmed by the unauthorized prerelease of such films as "Dreamcatcher" (2003), "Finding Nemo" (2003), "The Matrix Reloaded" (2003) and "Star Wars: Episode III — Revenge of the Sith" (2005).

The prerelease versions of these works act as substitutes for authorized product, in both digital and physical formats, resulting in lost sales. Moreover, the prerelease of these works not only causes financial harm to the owners, but also impinges on the right of the creators to control the public presentation of their art and craft. The harm to an artist's or a songwriter's reputation, therefore, cannot be measured by lost sales alone and should be taken into account in the regulations that result from this process.

II. The Definition and Scope of Musical Works Eligible for Preregistration Is Underinclusive

The proposed regulations limit eligible musical works to those "performed [or reproduced] in a sound recording subject to a contract for distribution of physical phonorecords with an established distributor of phonorecords." *See* 70 Fed. Reg. 42286, 42291. This definition limits the musical works eligible for preregistration in three respects. First, it limits the medium of distribution to physical phonorecords. Second, it limits the type of distribution contract to one with a distributor of phonorecords. Lastly, it requires that the contract for distribution be with an established distributor of phonorecords.

We believe these limitations on the definition and scope of musical works eligible for preregistration as proposed by the Copyright Office (for the purported reason of preventing fraudulent preregistrations) create unfair restrictions on the eligibility of certain works for prerelease protection. *See id.* at 42289 (proposing various restrictions on the eligible classes of works). The proposed restrictions ignore the fact that numerous musical works are distributed in formats other than physical phonorecords, such as digitally or electronically over the Internet, and in motion pictures. In addition, the owners of musical works are generally not in privity with the distributors of phonorecords and would not necessarily have first-hand information regarding the existence of such an agreement. Moreover, new or 'newly-discovered' artists, musicians and songwriters, as well as independent or upstart music distributors and publishers, are an important source of creativity and innovation on which the music industry relies. They should be treated the same as more established artists and distributors.

A. Preregistration and Pre-Release Protection Should Not Be Limited to Musical Works to Be Distributed in Physical Phonorecords

Musical works do not have commercial value only if distributed through physical phonorecords. Currently, musical works and sound recordings are reproduced and distributed in numerous ways *other* than in physical phonorecords, including but not limited to Internet-based distribution through digital phonorecord delivery ("DPDs"), certain time or use-limited DPDs, and digital streaming configurations, as well as synchronization in motion pictures, television broadcasts and commercials, among other methods. *See* Harry Fox Agency, *Configuration Codes for HFA Mechanical Licenses*, *available at* http://www.harryfox.com/public/infoFAQConfigurationCodes.jsp. Works to be distributed in all of these formats and media should be eligible for preregistration and pre-release protection.

The artist, musician or songwriter who creates a musical work for distribution digitally, over the Internet, for example, has the same interest in protecting his or her work from copyright infringement as does a recording artist under contract with a record company who will manufacture and distribute audio CDs or other physical phonorecords. The commercial importance of the Internet is only growing. Increasingly, authors and performers are releasing their musical works over the Internet first, before such works appear physically on store shelves. *See* Leeds, *supra*, at D1. And some musical works are never released in physical formats. For example, They Might Be Giants released an MP3-only EP entitled, "Working Undercover for the Man," and the Violent Femmes released "Something Wrong" in MP3 format. As legal digital distribution grows widespread, therefore, lost digital sales will account for a significant portion of lost revenue.

In addition, the failure to include musical works used in motion pictures, television and commercials ignores completely a major source of income for artists and songwriters. Musical works are reproduced in timed synchronization in numerous releases every year by the movie studios, and cable and broadcast television. A distribution agreement for physical phonorecords, therefore, is not a sufficient proxy for commercial value.

B. Owners of Musical Works Generally Are Not Party to Agreements to Distribute Physical Phonorecords, Making It Difficult for Them to Exercise Preregistration Rights

Publishers and songwriters (other than artists who write their own compositions) are usually not parties to a "contract for distribution of physical phonorecords." 70 Fed. Reg. 42286, 42291. To require owners of musical works to certify under penalty of perjury that such an agreement exists places publishers and songwriters in an untenable position, even if they have been informed that the artist with whom they are working has signed such an agreement. Publishers and songwriters are placing their musical works in the stream of commerce when they agree to work with an artists to compose or co-write a song, or when they agree to work with a movie producer to score a film, among other arrangements. As a result, we believe the restriction that musical works must be reproduced "in a sound recording subject to a contract for distribution in physical phonorecords" will make it very difficult for owners of musical works to take advantage of preregistration rights. *Id.*

C. Preregistration and Pre-Release Protection Should Not Be Limited to "Established" Distributors

The proposed requirement that preregistration and pre-release protection be limited to "'established' distributors" — which the Notice defines as entities "that

[are] actually in the business of commercial distribution [of musical works] and [have] actually engaged in commercial distribution of two or more phonorecords in the past year" — could unfairly deny copyright protection to emerging artists, musicians and songwriters who are unaffiliated with a major record label or major motion picture studio, but have nonetheless created commercially-viable work that they are eager to exploit. *See id.* Independent music and film distributors provide an essential vehicle to new and emerging artists for distribution of their works and it would be unfair to deny these individuals or entities — vulnerable to the same type of prerelease infringement — access to the same level of copyright protection. With increased methods of distribution and types of distributors, musical works will be subject to pre-release infringement regardless of how they are distributed or by whom.

D. Preregistration Should Not Be Limited to Artists with a Track Record of Success or a Prior History of Commercial Distribution

Likewise, musical works and sound recordings by new or 'newly-discovered' artists, musicians and songwriters deserve the same preregistration rights as those of more established artists. Indeed, there should be no distinction between the two. We note that although the regulations do not include a requirement that preregistration be limited to artists with a track record of success or a prior history of commercial distribution, the Copyright Office has sought comments on whether such a requirement is desirable and workable. *Id.* at 42289. It is not. Many songwriters and other musicians toil for years before achieving professional recognition. Songwriting, in particular, has always been a profession characterized by a high degree of failure, a low probability of success, constant threats to rights, and, in most cases, little — and frequently delayed — remuneration. Against this backdrop, extending the benefits of preregistration and pre-

release protection to all creators of musical works and sound recordings is necessary to maintain fairness and provide incentives for the creation of new works.

In addition, the music publishing and recording industries thrive on the discovery and promotion of new talent. There are numerous artists, musicians and songwriters with no track record of success or past commercial distribution who have debuted at number one or elsewhere near the top of the Billboard charts and achieved enormous commercial success. For example, Grammy award-winning singer Mariah Carey — widely known as the biggest selling recording artist of the 1990s and the biggest selling R&B artist of all time — became a commercial success overnight with her eponymous 1990 debut album. The first five singles that she ever released all went to number one on the Billboard Hot 100 chart. In addition, Jesse Harris gained instant and widespread recognition as a songwriter with the release of Norah Jones' debut album, *Come Away With Me*, in 2002, which has sold more than 20 million copies worldwide. Such artists and writers are often discovered and have their first release produced by independent labels and production companies, as yet unaffiliated with a major label or distributor.

Furthermore, there is often huge anticipation accompanying these musical works and sound recordings among consumers and music fans eager to be among the first to hear or obtain a new release. Historically, music distributors and publishers have aggressively marketed and promoted new talent, making their works prime targets for eager infringers. Moreover, these artists and songwriters do not have an established fan base to rely on for sales. Arguably, prerelease infringement increases the risk associated with breaking a new act and could cause greater harm to a new act than to an established

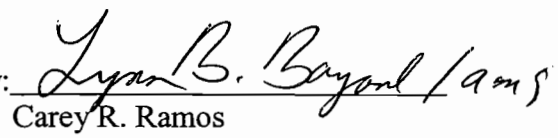
artist. Congress' desire to support a copyright owner's ability to receive "fair and adequate" compensation was not limited to superstars.

III. Conclusion

In sum, the limitations set forth in the regulations are designed to create an "objective" measure of whether a songwriter prepared a musical work for commercial distribution. As such, the limitations are all proxies for evaluating demand. The concern that copyright owners will preregister works for which there is no expected demand seems misplaced, however. If there is no expected demand, then the artist or songwriter has no expectation of prerelease infringement, and thus, no incentive to spend the time or money associated with preregistration. Once the Copyright Office has determined which categories of works, such as musical works, have a history of prerelease infringement, the better path is to allow preregistration of those works by any author, whether they have some badge of potential commercial viability or not.

For the foregoing reasons, we respectfully urge the Copyright Office to acknowledge the history of pre-release infringement of musical works as a class of works, and to broaden the definition and scope of musical works eligible for preregistration to include those musical works distributed by independent or upstart distributors and artists without a track record of success or prior history of commercial distribution.

Dated: August 22, 2005

By: 

Carey R. Ramos
Lynn B. Bayard
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019

(212) 373-3000
(212) 757-3990 (fax)
Counsel for the National Music Publishers' Association, Inc. and The Harry Fox Agency, Inc.

Of Counsel:
Berkley Etheridge
National Music Publishers' Association, Inc.
101 Constitution Ave., NW, Suite 705E
Washington, D.C. 20001

Jacqueline C. Charlesworth
The Harry Fox Agency, Inc.
711 Third Avenue
New York, NY 10017