BEFORE THE COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of	)	
	)	
Proposed Amendments to	)	Docket No. 2012-7
Regulations Governing Reporting of	)	
Monthly and Annual Statements of Account	)	
Under Section 115 License	)	

REPLY COMMENTS OF GEAR PUBLISHING COMPANY

Gear Publishing Company ("Gear") restates its initial comments and submits these reply comments in the above mentioned proceeding. The purpose of these reply comments is to respond to other comments that have been submitted regarding two of the issues under consideration, Minimum Payment Thresholds and Accountings for Promotional Uses.

1. Minimum Payment Thresholds:

We would be inclined to agree with comments from The Digital Media Association, National Music Publishers' Association, Inc., Recording Industry Association of America, Inc., The Harry Fox Agency, Inc. and Music Reports, Inc. (the "Joint Commenters") in which they proposed a minimum threshold of $50.00 with the option for a copyright owner to put the compulsory licensee on notice to request a one cent minimum threshold (see Joint Commenters comment 7), provided, however, that the default threshold should be one cent and the burden of obtaining a higher threshold of $50.00 should be borne by the licensee.

The Joint Commenters have pointed out that it is problematic to account for licenses of recordings that don't sell well. However, Music Reports, RIAA members and digital service providers have no obligation to represent and distribute every single sound recording that comes their way, and certainly not on a compulsory basis. If a particular sound recording does not sell well and the revenues generated do not cover the cost of administering the compulsory license, then these parties are free to

drop those licenses and cease such distribution (which is certainly common place in the physical retail space) or, if they prefer to keep them in circulation, seek less stringent terms via a voluntary license where the copyright owner agrees to a higher threshold. A decision by a digital service provider or an aggregator to cease representing unprofitable sound recordings would not preclude the sound recording owner from obtaining and administering their own compulsory license(s) just as easily under the Act. There are plenty of options available to the public and sound recording owners to promote and distribute their products including facebook, Myspace, websites, online stores, youtube, etc. And since the RIAA members already have direct licenses and relationships with each copyright owner for the vast majority of sound recordings they release it would be easy for RIAA members to revise their standard license agreements which they regularly process to address these concerns.

We caution that there is much room for additional abuse with the introduction of default minimum thresholds above one cent. The karaoke and tribute markets are at least as large as the "original recording" market in terms of the number of compulsory licenses. For every well known song in the market there is at least one karaoke and one tribute/soundalike equivalent, often dozens and with some Gear compositions, there are at least hundreds that we are aware of. If a default threshold of $50.00 were enacted, tribute and karaoke companies could easily generate a long trail of under-the-threshold accounts. These companies are already exploiting singular sound recordings on digital service providers under multiple titles (e.g."Rock And Roll Never Forgets", "Rock & Roll Never Forgets", and "Rock n Roll Never Forgets") and they account for each title of the same recording under separate compulsory licenses. Since they have already positioned themselves to "game the system", all they would have to do to avoid monthly payments is simply take recordings out of circulation when they are about to meet the minimum threshold for payment and immediately reload the same recordings into the system again under a slightly different name and selection number.

We feel there is an opportunity to better serve the karaoke companies, tribute companies, consumers, digital service providers and publishers which could improve the consumer experience, the sales of such products and dramatically reduce the burdens of administering compulsory licenses. However, we would invite the stakeholders to have this discussion outside the construct of copyright rules and regulations.

If the NMPA and RIAA desire to revise terms of the compulsory license, such as a minimum threshold, to best suit their needs they can very easily accomplish this with a simple letter of agreement which would suffice without interrupting the due process other copyright owners are entitled to under

the rules and regulations. It is imperative that the rules and regulations take into account all users and uses, rather than conform the rules and regulations to the most convenient method for certain stakeholders and their specific service providers that currently have substantial standing in the industry but may not in the years ahead.

And while the contemplated thresholds may be met quicker if companies use aggregators and the threshold were applied by the entity as opposed to by the work, what is to stop the compulsory licensee from hiring the aggregator to solely file the NOIs and keep the responsibility to pay royalties to themselves? We do not recall seeing a rule where the compulsory licensee is required to combine all accounts for a single licensor into one statement or a rule requiring a compulsory licensee to utilize an aggregator or administration service for all administration requirements under the law as opposed to 'a la carte.

Also, please clarify what legal role an aggregator plays in this process. Taking the thresholds discussion into account, if the Joint Commenters proposal were enacted and there were a default threshold of $50.00 coupled with an option for the copyright owner to elect a lower threshold of $.01, and a copyright owner was required to go through the trouble of serving notice to achieve that lower threshold, would the law recognize the delivery of such notice when sent to compulsory licensee's service provider or would such a notice have no legal effect because it was not delivered upon the compulsory licensee itself? An aggregator can make <u>one change on behalf of hundreds of licensees</u> with the click of a button, but if the copyright owner is required to send a notice to each of the aggregator's clients in order for such notices to have legal effect, this would cost the copyright owner a much greater amount of time and expense resulting in an unreasonable burden on the copyright owner.

Perhaps more importantly, as other commenters have pointed out, compliance with the regulations is spotty at best. Specific to the issue of thresholds and reconciliations on annual statements, in our experience, most compulsory licensees do not generate and/or deliver annual statements making this proposal impractical.

For the avoidance of doubt or confusion, any rules involving thresholds under the regulations should specifically state that cross-collateralization between physical and digital configurations is not permitted and cross-collateralization between different compositions is not permitted.

2. Accountings for Promotional Uses:

Of course, we agree with other commenters that there are industry standards where copyright owners have allowed certain free promotional uses of compositions to support the marketing, distribution, sale and airplay (more commonly where such airplay is subject to performance royalties) of an artist's rendition of the composition. It is important to note that the industry standards with respect to promotional uses have evolved over time and are the result of discussions and mutual agreements reached between the parties. However, this practice has never applied to compulsory licensing and has ALWAYS had its limits. For example, there has never been consensus as to extending such promotional courtesies to promote third party products/services, or karaoke and soundalike uses, or where such uses exceed 10% of the overall use of the composition (e.g. attract loops on digital jukeboxes).

There are many ways copyright owners could benefit from the receipt of this information. For example, with information as to the ninety second preview streams of sound recordings offered for sale in online retail stores, a copyright owner could determine from the song previews data which song previews need adjustment to help improve sell through and help provide more insight as to the effectiveness of marketing and advertising campaigns related to such compositions. Additional examples: if a copyright owner learns that certain works are being streamed in a meaningful volume via free trials by a particular service in a particular area of the country, that data can be used to help promote the use of the composition in other services, other geographic areas, target similar demographic groups, use the exposure that the composition is receiving to promote the composition to music supervisors and advertisers, target specific social media marketing to focus on building that momentum, and even help provide songwriters valuable guidance as to how to quickly focus their writing in a direction that is connecting with an audience. Promotional uses need to be accounted for in detail or we will never know whether or not such uses helped or impeded revenues or which promotional uses were effective and which were detrimental.

The parties that use music for promotional purposes have the data and can use it for their own purposes, including the sale of advertising and other products and/or sale of this information to third parties (e.g. and if there is any doubt that this information might be sold or used for marketing purposes, we encourage the Office to read the privacy statement on a smart phone app). The sharing of this information with the copyright owner is invaluable. There is no reason to prevent all copyright owners from having access to data regarding the use of their works just because certain other copyright owners or administrators are too large or too indolent to process it. There is nothing more valuable in the digital space than data. The value of this information cannot be understated.

From the perspective of negotiating settlements amongst the stakeholders, it is imperative that copyright owners are able to evaluate promotional use data so that when the next phonorecord rate proceedings take place, at the very least, we would have an informed understanding of what is helping our industry and what has no effect and what percentage use of our business is free vs. paid. Since the settlements and revisions to the rules and regulations of compulsory licenses and other digital uses in recent years have led to a historic 50-60% decline in sales and resulted in thousands of people losing their jobs, the analysis of promotional use data in this context could not be more important. Had similar information been made available previously, how many of these sales/jobs might have been saved?

From the standpoint of verification and compliance with accounting regulations, this data is absolutely necessary to ensure that users do not exceed the thresholds permitted by the regulations. If there is no accountability, then there will be rampant non-compliance. The idea that we should presume that everyone will just simply abide by the rules is so naïve that it is hard to imagine this forum even considering a "no accountability" option. The accounting of all uses permitted under the compulsory license should be a foregone, common sense, conclusion. Any use prescribed under the Act on a compulsory basis should be accounted for – plain and simple. So what if it's a nuisance! With privilege comes responsibility. Compulsory licensees are already getting the largest expansion of free uses and compulsory rights in the history of our copyright law. Compulsory licensees should quit complaining and prove that this expansion of their promotional rights under the regulations has merit.

Finally, to lower the standard of accounting provisions in order to appease large entities who do not provide a comprehensive service to their clients is an affront to independent companies such as Gear who have been providing specialized services to their clients for decades. Rigging the system so that no entity can provide a more comprehensive service just because it is inconvenient for large entities to do so would create a ceiling of potential that would stifle competition, limit the range of service we can provide our clients, and deny authors of the opportunity to receive that level of attention and service they deserve.

Conclusion:

The Joint Commenters have become a powerful force in drafting rules and regulations before the CRB and the Copyright Office. We understand that disagreement with such large entities can be easily characterized and perceived as the "minority report". There has been some dismissal by the Joint

Commenters of comments by us and other interested parties provided to the Office as being "off topic". Some participants have included perspective to help provide insight and information as to how the accountings are being generated and received in the "real world" which is often in stark contrast to what the rules indicate, and some have offered ideas for solutions which should not be taken lightly just because they do not speak with the voice of a well financed special interest. In fact, the accounting rules do not exist in a vacuum and if comments include references to inequities which the accountings relate to, then we would urge the Office to consider such information to help put the accounting provisions in perspective.

As many of the comments have illustrated, some of the major stakeholders and aggregators pick and choose which rules to abide by and which ones are apparently, in their view, not so important. The complaints as to the NOIs and accountings are real and can be easily verified by the Office.

Gear reiterates our initial comments and urges the Office to consider them when drafting the rules and regulations for statements of account. And for the reasons set forth above, Gear urges the Office to set a default minimum payment threshold of $.01 with an option for a $50.00 minimum payment threshold solely upon written consent of the copyright owner. Gear also urges the Office to require accountings for all promotional uses permitted and exercised under a compulsory license.

Respectfully submitted,

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