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	)	

COMMENTS OF GEAR PUBLISHING COMPANY

By Federal Register notice dated July 27, 2012, Vol. 77 No. 145, the Copyright Office solicited comment on the proposed amendments to regulations for reporting Monthly and Annual Statements of Account for the making and distribution of phonorecords under the compulsory license, 17 U.S.C. 115. Gear Publishing Company hereby submits its comments below.

ABOUT GEAR

Gear Publishing Company ("Gear") is a privately held company established in 1965. Gear has been recording artist Bob Seger's exclusive publisher since 1966. Mr. Seger is an accomplished international recording artist and composer who has achieved remarkable success and longevity in his career. He is a 2012 inductee in the Songwriter's Hall of Fame, 2004 Inductee in the Rock And Roll Hall of Fame, has sold over 50 million records, and his Greatest Hits album was recognized by SoundScan as the #1 Catalog Album of the Decade (2000 – 2010). Gear also served as a publishing consultant for recording artist Robert Ritchie (p/k/a/ Kid Rock) while Mr. Ritchie was managed by Punch Enterprises, Inc. from 2000 to 2007.

INTRODUCTION TO COMMENTS

The compulsory license is a privilege and should serve as a safety net in the free market for those who wish to exploit a recording of a musical work but are unable to obtain a direct license from

the copyright owner. The compulsory license should not serve to supplant a copyright owner's ability to license their works in the free market.

The rules and regulations pertaining to the Statements of Account and the timings of payment are the essence of the compulsory license. Creating more relaxed standards of accounting for compulsory licenses would diminish the value of compulsory licenses to the copyright owner which would in turn devalue the copyrights themselves. Every time the rights to exploit musical works under a compulsory license are expanded and/or accounting rules are relaxed for compulsory licensees, the liberties that a musical work copyright owner enjoys to negotiate, manage, and develop its copyrights on its own behalf are correspondingly reduced.

Within the context of a direct license negotiation, the copyright owner has the ability to evaluate the credibility and legitimacy of a potential licensee. Under the current compulsory license, unknown third party licensees have the ability to obtain a wider spectrum of rights and sub-license those rights to an unlimited number of additional third parties without so much as informing the copyright owner who these parties are. We believe the compulsory accounting provisions need to be strengthened and reinforced, not weakened and relaxed, in order to protect musical work copyright owners from potential harm under the new, over reaching scope of the compulsory license provisions.

The compulsory license accounting provisions should be enhanced to provide copyright owners with more information and oversight with respect to the use of their musical works. This is especially true with respect to digital distribution in which millions of reproductions and streams can take place in hours or days with virtually no other paper trail to support accountings in a business that has been notorious for its creative accounting practices at the expense of the artists and songwriters.

Any comment below in relation to any specific accounting provision under compulsory license should not be construed to suggest that we agree that such use should be available via compulsory license or that the rates themselves are acceptable.

COMMENTS IN ORDER OF ISSUE RAISED

1. Issues Presented Involving Calculations of Royalties:

A. Public Performance royalties that are to be first deducted before mechanicals are paid.

The Copyright Office requests comments on whether to apply GAAP for the estimate of public performance rights royalty calculation in the absence of an interim or final rate; and alternatively if GAAP is not the right approach, identification of an alternative methodology.

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It would be much more useful to copyright owners and compulsory licensees if the rules were specific to eliminate ambiguities, subjective interpretations and unnecessary disputes over how the GAAP are applied in the determination of rates and what would constitute a breach or miscalculation. In the absence of an interim royalty rate, the public performance royalty rates should be no less than one hundred and thirty five percent (135%) of the previously set rates.

We are opposed to giving compulsory licensees the right to make their own determinations as to what to pay for any use as an interim rate while negotiations take place for future rates. Inevitably different compulsory licensees will come up with different rates and it will be nearly impossible to (a) track or verify who is in compliance during the interim period and (b) confirm if the proper corrections have been made once final rates are in place. If the licensee has a continued right to use copyrights and can set their own interim rates then there is an incentive for them to pay a lower estimated rate and drag their feet for years on the negotiations. Allowing compulsory licensees to decide what they want to pay for the use of musical works would constitute a distinct disadvantage to the copyright owners. This is especially problematic when the performance and mechanical rates are combined, but negotiated independently at different intervals.

Ideally, estimated rates for performance royalties should be determined by the copyright owners or their representatives (performance societies). The copyright owner should be permitted to charge a market rate with respect to any uses for which rates have not been established.

In the absence of free market negotiations, with respect to rates that have previously been set but have expired and for which new statutory rates are being negotiated we recommend interim

rates be set at a minimum of 135% of their previous levels (i.e. previous rate plus 35%). This increased rate is necessary since streaming, interactive streaming, limited downloads, and other rates for new digital uses have, from the beginning, been grossly undervalued. The streaming and subscription markets are simply replacing a reasonable source of income for musical work copyright owners (royalties from sales and radio airplay) with a much smaller unreasonable source of revenue (royalties, such as they are, from streaming and subscription services). Musical work copyright owners have had to make their assets available at bargain basement prices in order to assist compulsory licensees who provide streaming and subscription services in their stated goals to replace established sources of income from sales and radio airplay which musical copyright owners have relied upon for decades as their primary sources of income. In other words, the Act requires musical work copyright owners to offer their works for free, or virtually free, and suffer a dramatic reduction in their primary sources of income (i.e. 'shoot themselves in the financial foot').

Furthermore, there should be no presumption or requirement that the performance rate negotiated for any use must be less than any previously imposed rate for combined mechanical and performance rights.

We recommend that musical work copyright owners be given the ability to terminate compulsory licenses related to alternative new forms of digital exploitation such as streaming, interactive streaming, subscription, limited download, and cloud services during these interim periods even if they have previously voluntarily participated in the experiment. If the "test case" is not working out financially for the musical work copyright owners, then it makes no sense to force them to continue licensing their works for such purposes.

B. Application of Negative Reserve Balances in Calculating Payment Amounts

While the Office has not proposed an amendment to allow licensees to apply a credit for a negative reserve balance to royalties due for digital uses, it would like to receive comments on whether there is statutory authority for allowing the application of a credit for negative reserve balances to digital phonorecord deliveries. Assuming there is statutory authority to allow the application of credits for negative reserve balances to the ''net balance'' owed, are there reasons to limit the application of credits for negative reserve balances to physical phonorecords? If licensees should be allowed to apply credits for negative reserve balances to royalties due for digital uses, should the credits for negative reserve balances be calculated on a per work basis or should the regulations permit the application of credits for negative reserve balances to be cross-collateralized to royalties due to a particular copyright owner for different works? And, in what form should such regulations be established?

To the extent, if any, a compulsory licensee "over-pays" (as referenced in the background comments of the Federal Register) for the use of a musical work such "over-payments" should not be cross-collateralized in any way from any other composition, license or use.

Compulsory licensees should not be able to cross-collateralize negative reserve balances of physical sales from digital royalties of the same recording of a musical work. The copyright owner is expected to "sit in the same shoes" as the compulsory licensee (no advances, no guarantees). We see no reason why the compulsory licensee should be given any protection by the copyright owner against risks that the compulsory licensee takes with the musical work especially considering the copyright owner has no say with respect to matters of manufacturing, distribution, sales, or marketing. For one example, if a musical work is the promotional lead track (i.e. single) for an album and the compulsory licensee exercises its new compulsory rights to offer the musical work for free via various streaming promotions as an enticement for consumers to sign up for third party services and/or other promotional streams then the musical work could conceivably be streamed millions of times for free during the peak of its popularity. Streaming services, by design, encourage consumers not to purchase the very physical shipments that the compulsory licensee may have successfully distributed in the market. If, as encouraged, the consumer decides to stream the musical work for free rather than purchase the music then the compulsory licensee has made a marketing decision which affects the sell-through of their physical release. As a result, the copyright owner ends up with a negative reserve balance for physical configurations of the musical work while not receiving any compensation for the extensive streaming and promotional use of the musical work. Use is use. The compulsory licensee should not be able to cross-collateralize physical negative reserve balances with digital royalties since there are so many digital uses for which the copyright owner has no control of and receives no payment whatsoever.

Additionally, compulsory licensees should not be able to cross-collateralize royalties between various musical works or between different licenses of the same musical work. Each compulsory license is a separate and distinct privilege applicable to one specific recording of a single musical work. The compulsory licensee who pays an amount in excess of what it ultimately owes under a

compulsory license should not be able to cross-collateralize such amounts from royalties due on account of other privileges which the compulsory licensee may have exercised under the Act. Compulsory accountings are generally not made and delivered to the author, but rather to a publisher or administrator. If a compulsory licensee was permitted to cross negative royalty balances between two or more songs then the writer of one work might be unfairly punished by the application of a negative reserve balance against another author's work. Additionally, when a compulsory licensee or its agent compiles or aggregates accountings payable to one administrator who represents more than one musical work copyright owner, a negative reserve balance with respect to a compulsory license payable to one copyright owner could easily and inappropriately be cross collateralized with a compulsory license of a musical work owned by a different copyright owner. Furthermore, when a compulsory licensee or its agent compiles or aggregates accountings from various compulsory licensees payable to one copyright owner, a negative reserve balance with respect to one compulsory licensee could easily and inappropriately be cross collateralized with the payments due from one or more different compulsory licensees.

In its history, Gear has not issued mechanical licenses permitting cross-collateralization between compositions.

C. Degree of Rounding for Decimal Points

Consequently, the Office requests suggestions as to the degree of rounding that would be appropriate for reporting royalties associated with limited downloads, interactive streams, and incidental digital phonorecord deliveries made under the compulsory license. In considering the appropriate level for reporting royalty fees, the Office notes that past rates for the public performance of sound recordings and for ephemeral recordings have been set out to between four and six decimal places based upon a fraction of a dollar rate. See 17 CFR 380.3. Consideration should be given to whether a variance can be allowed based on the system of accounting, or whether reporting to a certain decimal place should be completely uniform.

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There is something inherently wrong when the question comes down to whether royalties should be reported at either one ten thousandth or one millionth of a dollar. If four decimal places are insufficient to express compensation for the use of a musical work, then clearly the rates themselves are sorely lacking. There should be no compulsory use which requires 1,000,000 units/uses to accumulate in order to generate $1.00 of income. The accountings should be limited to

three decimal places and the rates should never be less than 1/10th of a penny. These new forms of compulsory uses replace performance and mechanical reproduction sources of income. Applying standards of royalties and/or decimal places related solely to performance royalties is, in our opinion, an apples and oranges comparison.

2. Issues Presented Involving Method of Payment and Delivery of Royalties.

A. Electronic Payment

In light of the general agreement by the Stakeholders regarding payment, the Office proposes to maintain the current default requirement that payment be sent by mail or courier service. The Office also proposes to allow copyright owners and licensees to agree to alternatives to the current default methods of payment through mail or courier service. Finally, the Office proposes to maintain the requirement that when both the Monthly Statement of Account and payment are sent by mail or courier service, they should be sent together and that otherwise they should be sent contemporaneously. The Copyright Office requests comments on these proposals.

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We agree that Monthly Statements of Account should be sent via mail or by reputable courier service. We agree that payments should be sent together with such statements or contemporaneously if unable to be sent together. Electronic payments should be permitted solely with the prior written approval of the compulsory licensor and any electronic deposit fees charged by the financial institutions, if any, should be paid by the compulsory licensee. In addition, a compulsory licensor should not be required to provide bank account information to third parties, known or unknown, in order to receive payments for the use of their copyrights. Also, any payments made electronically to the copyright owner should NOT constitute acceptance or approval by the copyright owner of any royalty accounting associated with such payment and all rights of copyright owners' should be considered reserved.

B. Electronic Statements of Account

As such, the Office proposes to maintain the current requirement that Statements of Account be sent by mail or courier service as a default rule. However, the Office does understand that in many cases a copyright owner may reasonably wish to compel certain licensees, who submit voluminous Statements of Account, to serve them in electronic format. The Office notes that the regulations for filing Notices of Intention to use the compulsory license allows for filing the Notice electronically and for copyright owners to require submission of Notices of Intention in an electronic format in the case where the Notice covers more than 50 musical works. 37 CFR 201.18(f)(6). Section 201.18(a)(7) also allows copyright owners to offer alternative means for service,

including by means of electronic transmission. The Office has adopted these rules to increase efficiencies for both the copyright owners and the licensees and has provided an exception to the requirement for a handwritten signature when service is made electronically. Because these rules appear to be working well and offer flexibility for electronic submissions of Notices, the Office proposes adopting parallel provisions for filing a Statement of Account, whereby copyright owners may require a licensee submitting a Statement of Account covering more than 50 works to provide the copyright owner with an electronic copy of the Statement of Account, and whereby a copyright owner may make known its willingness to accept Statements of Account and payment by means of electronic transmission. Furthermore, the Office proposes an exception to the requirement for a handwritten signature when service is made electronically, and a new provision for retention of records that support certification of Statements of Account that are served electronically. The Copyright Office requests comments on these proposals regarding submission of Statements of Account in electronic format and by electronic transmission. Additionally, the Office would like to know whether there are copyright owners that prefer paper statements and to what extent digital reporting has become the normal course of business.

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We prefer paper statements for our files. However, we support the option for copyright owners to elect to receive statements electronically on a case by case basis and with their prior consent.

We agree that copyright owners should not be required to enter a password protected internet site in order to retrieve statements of account. Copyright owners and compulsory licensees can receive statements from an unlimited number of compulsory licensees. Requiring copyright owners to download statements for multiple compulsory licensees would place an unnecessary and unfair burden on the copyright owners to maintain potentially hundreds of internet user names and passwords and require them to bear the cost of paper and cartridge ink which, these days, is more than a nominal expense. When the Copyright Office is requesting comments as to whether royalties should be rounded off to four or six decimals, clearly there are many instances when the royalties do not exceed the cost to the copyright owner to retrieve, print and process what are often voluminous statements for de minimis royalties.

The delivery of statements via electronic means can be handy when delivered in both pdf and xls electronic formats in which data can be re-sorted to suit the copyright owner's internal accounting needs, especially for large volume statements. We agree there should be a requirement to offer the statements electronically in such formats if they exceed a specific size/volume (e.g. in excess of five pages, more than 25 compositions, etc.). Regardless of whether the copyright owner agrees to accept electronic delivery of statements, the copyright owner should also have the option,

in its sole discretion, as to whether paper statements need also be delivered via mail or reputable courier to alleviate the cost of paper and cartridge ink for those copyright owners who keep hard copies for their files.

All statements should be required to be sent (i.e. delivered) to the copyright owner. If the copyright owner agrees to receive statements from the compulsory licensee electronically, the statements should be sent by the compulsory licensee to the copyright owner's supplied email address.

C. Minimum Amount for Payment.

Interest, however, does exist today to consider regulations that would defer payment of royalties until the amount owed reached an established level as a way to avoid overly burdensome costs for making payments valued at less than the cost of making the payment. The Copyright Office requests comments on whether it has authority to adopt such a regulation and whether (and if so, why and how) the minimum payment issue should be addressed.

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We strongly disagree with changing the rules so that compulsory licensees would not have to make royalty payments unless the royalties due exceed a pre-determined threshold. These types of conveniences can be negotiated with copyright owners through direct licensing. It is important to remember that while each individual and entity seeking a compulsory license must be treated equally and fairly under the law, not every individual or entity that desires a license is equal from the perspective of the copyright owner as to their service, product, quality of recording, or what they have to offer in exchange for rights requested of the copyright owners. Similarly, there are some music users that are more or less desirable as potential licensees to copyright owners for any number of non-financial reasons whether by their reputation, experience, brand image, or perhaps based on some alignment with political, charitable or other dispositions that may be important to individual artists and copyright owners. Any user of music that seeks to acquire rights via a compulsory license is avoiding direct negotiations with the copyright owner and should not be afforded special treatments to delay or defer payments automatically under the compulsory license.

If a threshold of $50.00, for example, is set in place then essentially every music user will be able to exploit musical works and sub-license those works to countless third parties without any

obligation to pay royalties unless and until they reach roughly 550 sales or tens of thousands (hundreds of thousands?) of streams. So if a compulsory licensee that produces 500 soundalike or karaoke recordings based on classic hit songs and each recording achieves 549 sales, then that compulsory licensee can conceivably sell 274,500 DPDs without having to pay a dime to any musical work copyright owner.

Likewise, if 100 compulsory licensees owe a copyright owner $45 – that's $4,500.00 that a copyright owner might need but cannot access because of arbitrary thresholds set up by others who might otherwise view these amounts as trivial. The fact is, the less you have the more important what you earn becomes. Let's not throw struggling musicians and songwriters under the bus by legislating that third parties profiting from the use of their property have to reach certain thresholds of success before the copyright owner can even get paid for the use of the works. With thresholds a copyright owner could conceivably rack up millions of streams on dozens of digital services and never be paid. This is truly unacceptable.

As opposed to a minimum payment threshold, we propose that advances be required for each type of use contemplated in the compulsory license. For example, if a compulsory license is solely for digital downloads, then the advance could be 500 units (e.g. $45.50). If a compulsory license is solely for streaming then the advance could be $100.00. If a compulsory license contemplates both streaming and downloads, then the advance could be $145.50. Compulsory license accountings are time consuming to analyze, verify, and process. Many are incorrect and create additional work for copyright owners either in obtaining corrections or dealing with take downs and other legal correspondences. Most compulsory licenses result in royalty statements below $50.00. Non-returnable, recoupable advances would help provide copyright owners a partial "guarantee" for their time processing compulsory paperwork. Considering the expense producing a sound recording of a musical work, the aforementioned advances would be a nominal expense to the sound recording owner. Considering the expense of launching a streaming service and the risk that these services pose to musical work copyright owners' well established income streams, the aforementioned advances would represent a nominal advance to cover adding such users to copyright owner databases and internal accounting systems.

3. Issues Presented Involving Reporting on Statements of Account.

A. Promotional Digital Phonorecord Deliveries

The Copyright Office asks for comments on whether the statute requires that Statements of Account contain play information on promotional digital phonorecord deliveries. Specifically, the Office asks for comments that address the Register's conclusion that ''[t]here is no statutory authority for an exception to [the section 115(c)(5)] requirement for certain types of 'phonorecords.' '' Review of Copyright Royalty Judges Determination 74 FR 4537, 4543 (January 26, 2009). If the conclusion is that there is no statutory requirement, comments should address whether digital phonorecords offered at a promotional rate or for a free trial period should be reported and with what frequency, e.g., monthly or annually.

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First and foremost we believe that there should never be an instance where the compulsory license rate is zero. There is no place for promotional uses without express permission from copyright owners. In our opinion, this is the most ridiculous thing that has ever been enacted into the copyright law (and perhaps any law effecting personal property).

There is a long sorted history of "free goods" in the music industry. Artists and songwriters have long been victimized by less than accurate accountings related to the reproduction and sale of their works. This is not to say that record companies and other music users have had trouble accounting for uses of music, rather, they have had an inexplicable, seemingly unavoidable, decades long, repetitive practice of underreporting sales to writers and artists.

The fact, according to the Copyright Office, that the Stakeholders (defined by the Copyright Office as "A group of industry stakeholders comprised of Recording Industry Association of America, Inc., National Music Publishers Association, Songwriters Guild of America, Digital Media Association, Music Reports, Inc., RightsFlow, Inc., and American Association of Independent Music") feel it is unnecessary to report promotional digital phonorecord deliveries in the Statements of Account brings into focus just how underrepresented songwriters and artists are within these Copyright Office proceedings.

The Copyright Office appears to presume that the purported promotional uses "are offered for free trial periods to promote the sale or other paid use of sound recordings." This is a very narrow view of how music is being used in the market on a promotional basis. Practically any use of music can be construed by the licensee as a "promotional tool" to help sell the music. Musical work copyright owners have long been pitched by potential music licensees how wonderful it would be for

their copyrights to be used in various ways at reduced or gratis rates in the name of promoting the sale of records. Without complete reporting as to what promotional uses are then the copyright owners are left to the mercy of music licensees' subjective opinions as to what constitutes "promotional use".

In the context of the new provisions of the compulsory license, music is now being used on a promotional basis (e.g. free trial periods, free downloads, free streaming, free access to bonus content, etc.) to help sell millions of technology devices such as Androids and iPhones, cell phone subscriptions, automobile packages, computers, strategically placed banner ads, pre-roll ads, etc. If these promotional uses actually resulted in additional sales of music, then music sales would be soaring. Unfortunately for the songwriters and artists, these promotional uses of music are selling billions of dollars of tech devices and services that utilize music as primary content while dramatically reducing royalty payments. Obviously, this extensive, ill-conceived, government ratified use of music for "promotional" purposes on a gratis basis under the involuntary (as to the copyright owner) compulsory license is a failed concept and an incredible disservice to musical work copyright owners.

Promotional uses that actually help sell music most often involve artist participation including artist interviews and music videos, artist related contests, artist related products and prizes such as concert tickets, t-shirts, and artist autographed items. These promotions are created on a case by case basis with approval of the artist and copyright owners. In our experience, it is common for most musical work copyright owners to go along with gratis use for promotional purposes related solely to the promotion of the artist's recorded version of the music. However, this standard does not apply to all uses of copyrights by all sound recording owners and certainly does not apply at all to third party companies selling products or services.

Any person or entity who strives to get something of value for nothing should be able to stand behind their use. The accounting provisions for promotional uses should be the most stringent and should include penalties for inaccuracies, uses beyond the scope of compulsory license rights, and/or non-reporting. The information accounted to the copyright owner should be sufficient to verify that the promotional uses do not extend beyond the promotional use limits.

Accounting for actual promotional uses should be included on monthly statements. Limiting such accountings to annual statements would create an unreasonable and nearly impossible burden on copyright owners to verify that such accountings and uses have been executed within the rules. Promotions are (and should be) considered temporary events. There would be little or no record readily available for a copyright owner to research and verify when information is received on an annual statement up to fourteen months after the fact (where a promotion is executed in January and the annual statement is delivered the following February).

Compulsory licensees should have to report proposed promotional uses to copyright owners in advance of promotions being executed since failures to comply with the rules and regulations can result in significant damage to a copyright owner or author of a work and copyright owners should be afforded an opportunity to evaluate and intercede before such damages are incurred.

There are questions and parameters which should be vetted when considering whether to permit gratis use of a musical work in a promotion and are essential to verify that the musical work was used within the limits permitted. A simple count of free uses is not enough information to determine whether such uses have exceeded the boundaries permitted under this law. And promotions by their nature often involve more rights than are contemplated under the compulsory license. Information which would normally be vetted may include: the service or product associated or sold in conjunction with such use; the number and type of uses (copies reproduced, streams, emails, mouse clicks, etc.); the date range of such use; how many other musical work copyrights, if any, were included in the same promotion (which establishes how much weight was placed on the musical work copyright owner's asset to sell or promote the product or service); images associated with such promotions that show the sales pitch/promotional language which could include song titles and lyrics as slogans; graphics which include images of artists or songwriters used alongside the promotion; subject lines (of promotional emails or mobile messages); flash content; web address where the promotion rules and messaging presided; pdfs of printed materials such as flyers or inserts included with consumer billing statements, corrugates, standups, posters and other in-store messaging; promotional email blasts; banner ads; screen shots of online promotions; information as to any use of the artist and or songwriter's name, image and/or likeness; and information as to whether the rights were exercised via pass through or direct compulsory license. There are endless

possible parameters to consider when creating promotions. Promotions by their nature are constantly evolving as innovators come up with new ideas to differentiate themselves from the pack. There must be dialog. The potential for abuse of the system, liability and damages are too great to leave musical work copyright owners uninformed and provide what is essentially a "blank promotional check" to compulsory licensees and their promotional partners.

B. Reporting the Identification of Third Party Licensees.

The Copyright Office would like comments concerning the views set forth above and how the alternatives could potentially affect copyright owners and licensees. To what degree would these requirements burden or benefit licensees and copyright owners?

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It is not clear why any party would object to transparency of accountings with respect to third party licensees. Without the benefit of third party licensee reporting, it is almost impossible for the musical work copyright owner to ascertain which uses in the marketplace are licensed and which are not. Any abuses found help to make all affected industries stronger. Digital service providers who are following the rules and are properly licensed certainly do not want competitors using the same music without proper license and payment. Sound recording owners would benefit from an extra pair of eyes on the market as to what is licensed and not licensed as they would also lose royalties from unlicensed uses. Musical work copyright owners who are proactive in the representation of their works would have the ability to at least help determine and call attention to missing sources of income. Everyone benefits.

There is a reference in the background information provided by the Copyright Office to making exceptions to third party licensee identification in the case of "bona fide technological limitations" and a suggestion that there should be leniency in situations where sound recording owners fail to provide information to licensing agents. The idea of providing leniency for incomplete accountings or only providing information when it's technologically convenient is unacceptable. If a compulsory licensee or its agent acting on its behalf is not set up to abide by or implement the rules that have been largely set in their own favor, then there is no excuse for not providing all the required information in the accountings properly and on time. No digital service should be launched

without its technological and accounting house in order. And no entity should record a musical work and obtain a compulsory license if they are not prepared to fulfill the terms of the license.

The bigger issue is, should the licensing agent be required to take any action if the compulsory licensee and/or third party licensees of the compulsory licensee are not in compliance with reporting requirements? It is difficult to ascertain where the licensing agent's responsibilities lie. Are they responsible in some way for making proper accountings to the copyright owners? If not, do they have an obligation to copyright owners to cause their client's to comply with the rules? Do they have an obligation to provide the copyright owner notice of such failure? Sound recording owners and digital service providers are relying on these agents in some capacity to fulfill their obligations to copyright owners. Should the licensing agent be required to meet some sort of certification by the Copyright Office in order to qualify as a licensing agent and lose such certification if they fail to comply with the accounting provisions?

CPAs are required to sign off on these accountings to provide adequate assurance to the copyright owner that the accountings are completed in a manner that is audited to be compliant with the compulsory license rules and regulations and in accordance with GAAP. Are CPAs verifying the statements of account after the licensing agent prepares the statements and before they are delivered to the copyright owner? Or are the licensing agents acting as CPAs in review and support of the accountings they generate? Who is liable?

Sound recording owners and third party compulsory licensees are utilizing other people's property in order to generate revenue for themselves. With privileges come responsibilities. If the concept of leniency is introduced into the copyright law, then every error, omission, and inconsistency will be met with a defense of leniency regardless of whether it pertains to third party licensee reporting or other provision of the law. A leniency provision is a slippery slope akin to building in safe harbor for all compulsory licensees. This would have a negative effect beyond the scope of tweaking the accounting provisions.

C. Certification Language.

The CPA requirement should assure that copyright owners receive the royalties to which they are entitled, but the requirement should not burden the licensee to the point that it would prevent the compulsory

license from being a practical option for record companies or services. Are there alternative certification methods that satisfy both goals and should be considered by the Office?

Record companies and internet service providers have sufficient CPAs in their employment to handle the requirements. If a compulsory licensee wishes to avoid the burden of annual statements and monthly accountings, then they can negotiate a direct license with the copyright owner. The certification language binds the compulsory licensee to the license in a meaningful and important way. The musical work copyright owner needs to be able to rely on the representations made in the annual statement in the unfortunate situation where legal action may be required.

Alternatively, we support the expansion of certification language requirement so that third party licensees receiving rights from the compulsory licensee on a pass through basis would also be bound by the certification language. That is, each third party licensee receiving rights from a compulsory licensee should be required to make the same certification to the musical work copyright owner and the compulsory licensee that their own accountings to the compulsory licensee meet the requirements as this is ultimately what is being relied upon by both parties.

Additionally, the employment of a third party licensing agent (e.g. Google, Music Reports, The Harry Fox Agency, etc.) by a compulsory licensee to prepare and execute accountings should not diminish the copyright owner's right to receive the benefits of the representations contained in the certification language. No compulsory licensee should be able to hold up their hands and say "it wasn't me" or "oops" due to the actions of a third party providing accounting and reporting services on behalf of the compulsory licensee. And when a licensing agent working on behalf of a compulsory licensee also serves as the administrator for the copyright owner the certification language should include an informative statement advising the copyright owner of this dual relationship and the potential conflict of interest.

D. Adjustment of Timetables for Reporting.

Based on these early discussions, the Office proposes amending its regulations and adopting the later deadline for filing the Annual Statement of Account. The Office requests comments from the relevant parties as to whether this additional time is required to create an accurate Statement of Account for annual statements.

We oppose the proposed adjustment of timetable in filing Annual Statements of Account. The digital age is supposed to make things faster not slower. Most of the calculations are built in to the software systems. We are fairly certain, for example, that there are no stream counters sitting behind desks at digital service providers manually counting each stream with an abacus or a pencil. These calculations are automatic, on demand, and accumulate as it happens in real time. A summary of streams related to any musical work should be available at any time. Alternatively, we propose that the time to produce an annual statement be reduced from three months to forty five days.

E. Service of Statements of Account for Periods Prior to Enactment of New Regulations.

Specifically, the proposed regulations require that Statements of Account for any prior accounting period shall be due 180 days after the date the regulations become effective. This should not be an undue burden on the licensees, since as a matter of good business practice, licensees should have retained the necessary records to make these filings in accordance with the records retention provision the current regulations in § 201.19.

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From the way section §210.19 and §210.27 are written, it is not clear that this rule applies solely to periods prior to March 1, 2009 and could be construed to apply to all "prior periods" of any effective date of regulation where musical works have been used prior to the effective date of regulations. Also, it is not clear whether accountings for periods prior to regulations taking place should be due 180 days after March 1, 2009 or 180 days after these new proposed accounting revisions are adopted. Also, we do not see where the effective date of regulation is defined.

We believe this language should also state that the compulsory license is not available for new types of uses for which rates and regulations are being negotiated for the first time and that all such uses require permission direct from musical work copyright owners.

F. Retention of Records (AKA Documentation)

The Stakeholders have agreed in principle that it would be appropriate to extend the general record retention period from three to five years after service of Statements of Account. In light of this agreement among the Stakeholders, the proposed regulations require retention of supporting records for five years after service of Statements of Account. The proposed amendment to this section also addresses situations in which it

may be necessary to retain records even longer in the case where public performance rates have not been set at the time of filing the Statements of Account. To that end, the proposed regulation requires retention of records for a period of at least five years from the date of service of an Annual Statement of Account or for a period of at least three years from the date the relevant public performance royalty fees have been set, whichever is longer. Comment on this approach is requested.

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We are already nine years into Apple's iTunes service and copyright owners are still finding their footing in the digital marketplace. Rules and rates have been in near constant flux and many copyright owners are working hard to stay afloat at the same time that many of these complex rules and regulations are being ratified, often on a retroactive basis. By the time a copyright owner is aware that a musical work has been improperly used or accounted for the records pertaining to such use could be destroyed and all evidence for audit or retribution permanently out of reach. Given the inaccuracies and rampant lack of compliance with compulsory licensing accounting provisions and the lack of information available to musical work copyright owners due to the pass-through licensing provisions, we suggest that information for digital uses and promotional uses be retained for 15 years beginning from the latter of (a) when the final rates and rules have been adopted or (b) when the royalties have been received by the musical works copyright owner. Being a recipient of volumes of compulsory statements with information that is difficult at times to decipher and in various forms, many incomplete, there are so many potential problems with accountings that it is difficult to know where to begin in terms of auditing these statements and services. Often times we receive statements purportedly made on a compulsory basis for many months of use presented (retroactively) in monthly segments to suggest compliance with compulsory monthly accountings. Musical work copyright owners should be afforded audit rights of users receiving rights via pass through licensing and such rights should include the ability to go back since inception of the digital music service, but not more than 15 years.

G. Harmless Error Provision.

Copyright Office asks for comments on the Office's authority to include a harmless error provision and whether such a provision in Statement of Account regulations would be useful as a way to protect licensees from inadvertent errors that do not materially affect the adequacy of the information provided on the Statement of Account.

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Harmless is a subjective term which, like "leniency", has the potential to become the focus of many copyright infringement claims. From the musical works copyright owner perspective the only harmless error is the one where the musical works owner is paid a higher rate than the minimum compulsory rate required under the law. The allowance for harmless errors once again denies the musical work copyright owner the right to remove undesirable content and negotiate for direct license of their works or deny such non-compliant users further rights. To the extent any harmless error provision is erroneously implemented it should only be permitted when the total amount of under-payment is less than one ($1.00) dollar and the error is corrected no later than the next required annual accounting, which is essentially the "second look" at the books.

H. Confidentiality Provision.

Therefore, the Copyright Office asks for comments as to what would be the appropriate limits to such a requirement, as well as on its authority to require copyright owners to keep information contained in Statements of Account confidential.

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We do not believe that a confidentiality provision for a publicly obtained license should be permitted. The information that is broader in scope and utilized to calculate rates (e.g. ad revenue, gross subscriptions, etc.) is theoretically being made available to millions of copyright owners. The vast number of people with access to this information is so large that it essentially equates to public knowledge. As for the information specific to the musical work copyright owner, that owner should be in control of its own royalty information and will likely want to keep that somewhat close to the vest. The scope of the proposed provision is remarkable in its apparent attempt to prevent different people within the same organization from discussing the royalty results.

There should be no restriction on what a copyright owner does with their own royalty information under a compulsory license. Once again, if a music user wishes to secure confidentiality provisions then they are free to negotiate directly with the copyright owner to achieve such an arrangement.

In its 46 year history, Gear has never issued a license for rights available under a compulsory license with a confidentiality clause nor can we recall being asked to include one.

Respectfully Submitted,

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