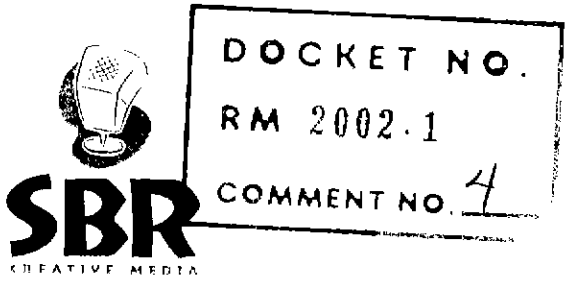

SBR CREATIVE MEDIA

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United States Copyright Office
Library of Congress
Washington, DC

April 26, 2002

RE: Reply Comments of SBR Creative Media, Inc. In the Matter of Notice and Record keeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1

To the Library of Congress:

SBR Creative Media, Inc. submits these Reply Comments in response to the Copyright Office's Notice of Proposed Rulemaking, published at 67 Fed. 5761 Reg. (February 7, 2002).

SBR Creative Media provides webcast, niche format "side channel" services to commercial radio stations, recording artists and other sites. We believe the notice and recordkeeping requirements proposed by the RIAA and currently under consideration by the U.S. Copyright Office are excessive for purposes of tracking and distributing royalties under the Section 114 and Section 112 licenses and present an unreasonable and unworkable recordkeeping and reporting burden for small operators such as SBR Creative Media. We urge the Copyright Office to take into consideration that there are a great number different webcast methods and models being used and developed by licensees and that not all webcast methods are capable of reasonably generating and reporting the scope of data being sought by the RIAA. We ask the Copyright office to consider a reasonable, common sense approach that will facilitate the primary purpose of recordkeeping – to reasonably track song usage and distribute royalty payments to copyright holders – without undue burdens on licensees.

First, we support and agree with the consise recommendations made in Comments filed by the Digital Media Association (DiMA) in this matter. Our comments herein are intended to provide additional perspective that relates specifically to our business.

Proposed routine reporting requirements are impractical and exceed copyright holders needs with respect to distribution of royalties. As the number of listener sessions for even a small webcast operation such as ours can run into the thousands in a single day, the logistics and costs of tracking, compiling and reporting multiple pieces of data for each listener session would be overwhelming and would require additional equipment, sophisticated software and additional full-time personnel just to handle reporting responsibilities. The amount of data that would have to be compiled, parsed and transferred to copyright holders' agents on a monthly basis would be unworkable for a small service such ours whose particular delivery method tracks usage on a calendar basis; not a clock and stop-watch basis. Thus, we propose a more streamlined "aggregate use" method of reporting for services whose delivery methods do not allow session-specific reporting.

We submit that such proposed recordkeeping requirements as *advance playlists, date and time a user logged in or out, the time zone of which the user received the transmission, the length of the transmission, the unique user identifier, the country in which the user received the transmission and the numeric designation of the sound recording in the program* exceeds the needs of copyright holders since the royalty rate is not conditional upon or does not vary with any of these conditions. We recognize that in comments the RIAA has dropped some of these requirements from their proposal.

In response to comments filed by the RIAA concerning their need of certain data to ensure services "comply with the sound performance compliment" and "comply with time limitations for certain archived and continuous programs", we feel that it is unnecessary and unreasonable that routine reporting for purposes of royalty calculation and distribution be expanded to include "proof" of statutory license compliance by services that have filed intent to operate under the license provisions. This is like a licensed driver having to take a comprehensive driving test each time her or she gets behind the wheel of a car. All that should be required is an exact, or reasonable mathematical calculation of the total number of times a song was transmitted to a user within the designated reporting period. This information should be able to provided on an aggregate basis, not on a listener-session by listener-session basis.

Recognize differences in delivery methods to allow reasonable estimates. We ask that the Copyright Office consider differences in programming and delivery methods that different services employ. For example, we produce our content as long-form radio programming (3-9 hours) that loops. Listeners access the loop at random times and places in the loop (as opposed to an "on demand" stream which starts from the same place with each new user). We can *estimate* the number of times a particular song is heard by taking the *aggregate* listening minutes to the program over a period of time (e.g. a week or two weeks) and dividing by the length of the program multiplied by the number of times the song was prescheduled on the program. But we are not able to report the start and stop time that someone accessed a particular song in the program. This is the same problem many "live" radio webcasters and broadcasters may have. In contrast, services that stream individual song files, one at a time, may be able to more easily track exact time usage on a song-by-song basis.

A central, public database is needed. If copyright holders and/or their collective agencies desire that extensive amounts of data be maintained for each licensed sound recording, they should be responsible for creating and maintaining a centralized, public database of recordings that can be utilized on a uniform basis by licensees. Rather than requiring all services to research, replicate, store and report such arcane data as ISRC Code, Release Year, Copyright notice, Featured Recording Artist, the Recording Label, UPC, Catalog Number, Copyright Owner, etc., copyright holders should provide a simple identifying code number for each recording that, when matched to the master database would quickly "backfill" the information they desire. For example, if we play Elton John's "Goodbye Yellow Brick Road" from the original album, we should be able to look up on the public database and find a unique identifying code number for that recording and use that number in our report as a proxy for all of the specific sound recording information. Services could add new recordings to the database so the database could grow organically and not put the entire responsibility of updating the database on copyright holders. This would also be easier for copyright holders and their agents since the format would be consistent no matter which service was reporting. We note that ASCAP and BMI provide a public database of songs in their repertoire that makes reporting to these agencies relatively simple for licensees.

Absent the availability such a public database, it seems that reporting the Song Title, Recording Artist, Album Name and copyright owner's notice on the retail album, promotional copy or individual track (the so-called "P-line") should be sufficient data to identify the recording and copyright owner.

Listener log requirements. We are pleased that the RIAA has dropped its request for Listener Log data as we feel it is unreasonable and burdensome to require that licensees report and deliver all of this data for every song that is webcast on a routine basis, especially since it exceeds the needs of copyright holders for purposes of tracking the number of "song streams" delivered and royalty distribution. We, like many other services, outsource our streaming to third parties (like Digital Island or Vital Stream) and would have to arrange, at significant expense, to get this data in the form of voluminous and complex server logs from the streaming provider as it is not data we use in our normal course of business (note that we do not use this information because of privacy concerns).

Ephemeral Phonorecord Log is unnecessary and redundant. We agree with the Copyright Office in its Section 104 Report that ephemeral recordings have no independent economic value apart from the paid performances that they facilitate. However, if it is determined that an excess royalty for ephemeral recordings is due (as was suggested by the CARP report), an ephemeral recording should be evidenced by the existence of a reported song performance and the royalty should be tied to the underlying performance royalty. Respectfully, the maintenance of a separate ephemeral recording log seems like an excessive, irrelevant and redundant additional burden on licensees especially considering ephemeral recordings are prerequisite to our ability to deliver a licensed performance in the first place.

SBR Summary

SBR respectfully urges the Copyright Office to consider as part of its record keeping requirements only information that is relevant to royalty tracking and allocation. Services should be required to supply only information that **identifies each sound recording** and **states the total number of performances** of that sound recording during the reporting period. We make the following recommendations for routine reporting for this purpose:

1. The Name of the Service

2. The Reporting Period (i.e. 4/1/01 through 6/30/02)

3. Recording ID Number or Code obtained from a central public database. In the absence of such database, the Song Title, Recording Artist, Album Name and copyright notice should be sufficient.

4. Number of performances (song streams) delivered during the Reporting Period for each recording. The rules should allow for a reasonable, mathematical estimate or average of performances by those services (such as live broadcasts, archived programs or pre-programmed loops) that only have the capability of tracking usage on a program, rather than a song-specific, basis.

Thank you for your consideration of these comments and suggestions.

Respectfully,

David Rahn
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