



Future of Music Coalition

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Re: Docket No. 96-5 CARP DSTRA/Copyright Office's Request for
Comment on Proposed Regulations that will govern the RIAA Collective
("Sound Exchange") When it Functions as the Designated Agent Receiving
Royalty Payments and Statements of Accounts

Dear Mr. Carson:

Reference is made to the United States Copyright Office's request for public
comments regarding the proposed regulations that will govern the RIAA
Collective ("Sound Exchange") when it functions as the designated agent
receiving royalty payments and statements of accounts. On behalf of the
Future of Music Coalition, we hereby submit our comments.

www.futureofmusic.org

I. INTRODUCTION

Although the Copyright Office has limited the scope of comments to the terms offered in the context of the proceeding to set rates and terms for the three subscription services, the Future of Music Coalition (the "FMC") asks the Copyright Office to consider extremely important issues that have not been addressed to date. Notwithstanding the fact that these terms governing the administrative functions and future collective shall have no precedential value and any such terms shall be decided in future rate adjustment proceedings, there could still be a detrimental impact on all future proceedings if the parties do not recognize that the Sound Exchange proposal is uniquely flawed and unworkable as it is currently conceived. It is imperative that these matters are explored now so the allocation of future monies is not compromised by confusion and litigation. This docket should be seen as opportunity to resolve these issues before problems arise and the parties should see this a time when they can work together to maximize income and minimize litigation and administrative expenses.

The FMC would like to bring forward comments in three areas: first, a clarification as to the proposed forty-five (45%) percent direct payment to recording artists of DPRSRA monies; second, the need to establish a "protocol" to allocate such monies; and third, the establishment of procedures pursuant to the collection and ownership of data.

II. DISCUSSION

A. Direct Payment of DPRSRA Monies to Recording Artists

It is clear that the music business is at the beginning of a very long process that will determine how certain monies will be paid to record companies, artists, so-called "guest" artists, producers, session musicians, background singers and sound recording copyright owners whose works have been sampled. Due to the fact that numerous constituencies need to be considered in this proceeding, there is no better time to acknowledge this reality than at this critical juncture. The FMC fears that if this is not done, the potential for litigation is chilling and could further compromise the growth of our industry both for the traditional record companies, creative artists and new entrants to this space.

Accordingly, the time has come for a mutual declaration by all parties that the forty-five (45%) percent share be paid directly to recording artists and such monies shall not be recoupable against any debt accumulated with the artists' record labels. Artist groups have been encouraged by the RIAA's efforts to resolve this matter. The FMC endorses any resolution that would:

i) require each record company that is a member of Sound Exchange to agree that DPRSRA monies payable to artists for any and all statutory licenses would be paid directly to artists and would, therefore, be non-recoupable;

ii) dictate that all so-called "major" record labels would be members of Sound Exchange;

iii) design the structure of Sound Exchange board to be analogous to that of the AARC or ASCAP with recording artists and labels each controlling an equal number of elected board seats; and

iv) guarantee that both artists and labels will have equal access to all data collected by Sound Exchange in addition to approving all methods of data collection.

The best way to jumpstart such an agreement would be for the Copyright Office to urge the parties to immediately conclude such discussions in order to reach a final covenant. Although certain other threshold issues would also have to be examined, inter alia, the recoupment of legal fees and voting procedures, it is apparent that the RIAA and its members have adopted a more realistic attitude towards artists and their importance in these matters as evidenced by the recent CARP proceedings in comparison to such past issues as "work-for-hire."

B. Adoption of the "Protocol"

Once the parties have agreed to the proper allocation of said monies, the FMC advocates for what we like to refer to as the "Protocol." Once adopted, the Protocol would lower transaction costs for all parties while offering transparent and accurate data to secure reliable payments to all parties. This is particularly important in musical genres like Hip Hop, which are collaborative in nature, with producers, samples and guest artists all playing an important role. Such musical works do not fit neatly into the Sound Exchange guidelines and there needs to be a recognition that there are other parties besides record companies and recording artists that participate in downstream or "back-end" record royalty income. (At this time, the FMC will not address current and proposed international treaties and their potential impact on the proposed Sound Exchange guidelines.) This system is as follows.

The first step is to identify sound recordings. The Copyright Office could establish a future date in time when all sound recording copyright registration applications must be accompanied by a "thumb print" (the "Effective Date") that embeds digital information identifying the underlying sound recording copyright. For pre-Effective Date sound recording copyrights, Sound Exchange would need

to contract with a third party vendor, approved by all the parties, to provide thumb prints for all such previous recordings. Once identity of the sound recording is established, it would be listed in the data base by identification number, song title, performer, and record company.

For example, "Hard Knock Life (the Ghetto Anthem)" by Shawn Carter p/k/a "Jay-Z" would be identified as "Identification Number # xxxxx, "Hard Knock Life (the Ghetto Anthem)", Shawn Carter p/k/a "Jay-Z", Roc-A-Fella Records/Def Jam/Island/Universal." Such identification would then make it possible to separate the record company share, the artist share and the union share of the underlying royalties. (For purposes of clarification the shares shall be described as "record company", "performer", "AFM" and "AFTRA" shares in similar fashion as "writer" and "publisher" shares for performance royalties for musical compositions as collected by the Performance Royalty Organizations ["PROs"].)

After identity has been established, the next policy goal would be to centralize all payment data in Sound Exchange the same way that current procedures are conducted by the "PROs" namely, ASCAP, BMI, and SESAC. Whenever there is a failure of any party to provide any of the PROs with accurate identification information, the PROs may elect to withhold payment until such data is provided by the songwriters and publishers. This is a policy that is not only efficient, but, ultimately, works to lower transaction costs for songwriters and publishers because the information is centralized in one place and payment cannot be made unless the shares of the songs have been declared.

Under current proposed Sound Exchange guidelines, a recording artist would be responsible for paying their producer, any accompanying artist and/or any sound recording copyright owner that has been "sampled" from their forty-five (45%) percent share of DPRSRA monies in addition to paying for the legal and business fee to complete such payments. This places unfair transaction costs on the back of the recording artist when this is entirely unnecessary. It also places transaction costs on the respective record label as most third party costs (e.g., producer agreements) are structured legally as accommodations paid by the record company to the said third party. Business and Legal Affairs Departments of record companies would have additional paper work and statement accounts to compute just in order to support their legal accommodation of third party payments on behalf of their artists. Any confusion over such pro-rata royalty payments could result in litigation between stakeholders that could become a Pandora's Box of lawsuits.

The FMC proposes that all information regarding such third party should be included in all identification data. Let's again use the example of "Hard Knock Life (the Ghetto Anthem)" a Grammy Award winning sound recording. The song was produced by Mark James p/k/a "45 King" and it contains a sound recording copyright sample from the cast album of the Broadway show "Annie." The identifying data would read: "Identification Number # xxxxx, "Hard Knock Life

(the Ghetto Anthem)", Shawn Carter p/k/a "Jay-Z", Roc-A-Fella Records/Def Jam/Island/Universal, Producer: Mark James, Sample." In the future, the Record Company and the Artist would be responsible for providing all such data to Sound Exchange that would detail what percentage third parties have in the sound recording copyright royalty stream. If such information were not provided, payment would not be made.

Obviously, there is much work to be done in order to catalogue what has happened vis a vis third parties before any effective date is established for these aforementioned requirements. But the refusal to address this matter could result in litigation that could potentially strangle the industry. The benefit, however, is potentially immeasurable. We also urge the Copyright Office to consider the historical precedent provided by the performing rights organizations and the music publishers. These entities have spent decades developing their procedures for the direct payment of performance royalties to artists and songwriters. There is no reason why we should not learn from their successes and mistakes in order to create the best possible payment system for recording artists and record companies.

C. Ownership and Approval of all Data Collection Efforts

Finally, the FMC would like to address the notion of collected data. First, any and all data collected by Sound Exchange should be available to artists and record companies alike without discrimination. Ten years from now the potential asset value of such collected data could be one of the more valuable properties in the entertainment industry. No member (or group of members) of Sound Exchange should have exclusive property interests in such a database. To do otherwise, in an organization with such stringent fiduciary duties, is fraught with peril.

Furthermore, any decisions to use particular software or vendors, e.g., companies that provide thumb prints, should be subject to a vote of the newly composed Sound Exchange board. Due to the equal division of Sound Exchange board members, artists and record companies would both have an opportunity to review and approve all new technologies that would be used in the collection process. These are important decisions and should be handled strictly on a Request for Proposal ("RFP") basis in order to insure the best quality and to eliminate any appearance of conflict of interest.

III. CONCLUSION

That is the basis of our observations. We appreciate being a part of this critically important process. The FMC would prefer not to file a written objection with the Copyright Office and an accompanying Notice of Intent to Participate. Instead, we are hopeful that all parties will address the aforementioned issues. We look forward to comments on our filing by the Copyright Office and all interested parties.

Very truly yours,

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Future of Music Coalition

cc: Jenny Toomey
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