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Copyright Royalty Board Issues Delivery and Reporting Requirements for Digital Audio Services

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After over four years of “contentious” rulemaking proceedings, the Copyright Royalty Board (“Board”) on October 6 issued interim regulations covering the delivery and reporting requirements of digital audio services (“Services”) that use copyrighted sound recordings.¹ The goal of the Board’s interim regulations is to allow royalty payments made to copyright owners, under sections 112 and 114 of the Copyright Act, to be based on actual transmission data.²

Background

Recorded music contains two levels of copyrights. First there are the copyrights in the musical composition (the “Song”), including both the music and the lyrics. Performing rights in a Song are licensed in the United States by one of the three performance rights societies – ASCAP, BMI, and SESAC – on behalf of the Song copyright owner. Secondly, there are the copyrights in the sound recording (“Sound Recording”), which is the specific recorded version of the Song. Copyrights in the Sound Recording are generally owned by the record label and the revenue from exploitation of the Sound Recording is shared with the artists. However, until the enactment of the Digital Performance Rights in Sound Recordings Act of 1995 (“DPRA”), there was no performance right in a Sound Recording. The DPRA created a new digital public performance right for Sound Recordings but only for public performances by means of a digital audio transmission.

Services that publicly perform Sound Recordings through digital audio transmissions must license the copyrights in the Sound Recordings used. For the Sound Recordings, Services may directly license from the copyright owner or may obtain a license pursuant to the compulsory license provisions of sections 112 and

¹ Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2005-2 (October 6, 2006).

² 17 U.S.C. §§ 112, 114 (1995).

114 of the Copyright Act ("Statutory Licenses"). Section 114 allows certain subscription, non-subscription and satellite digital audio services to perform Sound Recordings publicly through digital audio transmissions. Eligible services include, for example, satellite radio providers and webcasters whose transmissions do not have any on-demand or interactive features. Section 112 permits certain subscription, non-subscription and satellite digital audio services to create ephemeral copies of such Sound Recordings in order to assist in their digital audio transmissions. SoundExchange, a non-profit organization, was created to administer the Statutory Licenses.

Copyright owners must be given reasonable notice of the use of their works. Services must pay all applicable royalty fees if they publicly perform a copyrighted Sound Recording and must create and maintain records of use ("Records of Use") for delivery to the appropriate copyright owners, in which they report data concerning use of the Sound Recordings.

The royalties paid under the Statutory Licenses are paid to SoundExchange, the designated receiving agent. SoundExchange then makes royalty payments to copyright owners whose recordings were used by the Service. Since the creation of the Copyright Royalty and Distribution Reform Act of 2004 ("Act"), enacted on May 31, 2005, the Board has been charged with determining royalty rates for works used under sections 112 and 114 of the Copyright Act.

On May 10, 2002, the Copyright Office held a public meeting concerning what data should be included in a report of use, the frequency of recordkeeping and the manner and format for delivery of reports of use to copyright owners. Copyright owners, users and performers attending the meeting disagreed over the scope and technical aspects of reports of use and voiced their concerns regarding these issues. Transitional provisions for filing Notice of Intent to use a Sound Recording and Report of Use were set until the current interim regulations came into effect.

Application of the Interim Regulations

Services are required to deliver Reports of Use containing information from April 1, 2004 forward. SoundExchange has been charged with making the necessary royalty distributions to copyright owners.

Frequency

The interim regulations require periodic reporting of publicly performed Sound Recordings. Reports of Use are required for two periods of seven consecutive days during each calendar quarter of the year. The Board stated, however, that year-round census Reports of Use will be required in the future.

Format

The Board determined that only electronic copies would be accepted, rejecting the possibility of paper or hard copy Reports of Use. The Board reasoned that hard copies create a substantial expense for copyright owners to interpret and process. The Board also rejected the proposition that a wide variety of electronic formats should be allowed, emphasizing its goal of creating "baseline format requirements." The Board did not establish a data processing format, stating that a recognized standard was not "currently available" to be adopted "in lieu of the system proposed by SoundExchange."

Spreadsheets

The Board approved the proposal that “commercially available spreadsheets, such as Microsoft’s Excel and Corel’s Quattro Pro,” could be used to create Reports of Use, as long as the final report is delivered in ASCII (American Standard Code for Information Interchange) format. The Board reasoned that the conversion into ASCII format does not create a substantial burden on Services. SoundExchange maintains that conversion of reports using Microsoft or Corel software is relatively simple. SoundExchange has also developed software that facilitates the conversion using Microsoft and will soon have similar software using Corel.

Files With Headers

The Board determined that files with headers do not pose a substantial burden. Broadcasters argued that headers were redundant and unduly burdensome since the information was also available in the body of the Report of Use or the Notice of Intent to obtain a statutory license. The Board reasoned that the headers were not burdensome due to the fact that services have the option of providing their data files with or without headers.

The Board also stated that the standard YYYYMMDD format would be adopted for recording date information.

Files Without Headers

The Board accepted the proposal that in files without headers, text fields should accommodate both upper and lower case fields. The Board did not approve the use of abbreviations in data fields, however. The Board reasoned that there lacked any standard use of abbreviations for artists’ names, song titles, or album titles, causing data processors the burden of correctly identifying the abbreviations.

Delivery

The Board determined that Reports of Use may be delivered by File Transfer Protocol (FTP), e-mail, CD-ROM, or floppy diskette to SoundExchange. Some services requested that SoundExchange maintain a website for receipt of report information in addition to the aforementioned methods of delivery. In addition, Royalty Logic, Inc. (“RLI”) requested that Services provide it with Reports of Use as well.³

The Board rejected the request to “add a fifth delivery method” but stated that it would consider requiring a SoundExchange website that can receive Reports of Use before final regulations are issued. The Board also determined that SoundExchange would remain the exclusive receiving agent for royalties originating from Statutory Licenses under sections 112 and 114 of the Copyright Act.

Note that these rules are set forth in Chapter III of Title 37 of the Code of Federal Regulations. This is due to the fact that the Board, not the Copyright Office, was charged with announcing the regulations. In the future, all rules promulgated by the Board will also be placed under Chapter III.

Conclusion

While these new interim rules do not seem to be earthshaking, they do provide more guidance regarding how Reports of Use must be prepared and filed, and should lead to greater uniformity in reporting and to more accurate payment of royalties to the copyright owners.

³ RLI is a royalty management service that competes with SoundExchange.

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