

DOCKET NO.  
RM 2000.7A  
COMMENT NO. 1

Before the  
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GENERAL COUNSEL  
OF COPYRIGHT

In the Matter of

Mechanical and Digital Phonorecord  
Delivery Compulsory Licenses

Docket No. RM 2000-7A

**COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC. AND SESAC, INC. REGARDING THE INTERPRETATION AND APPLICATION OF THE MECHANICAL AND DIGITAL PHONORECORD COMPULSORY LICENSE TO CERTAIN DIGITAL MUSIC SERVICES**

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. ("SESAC") (collectively, the "PROs") hereby submit these comments in response to the request of the Copyright Office (the "Office") for Comment of December 14, 2001, 66 Fed. Reg. 64783 (December 11, 2001), soliciting additional public comment on the Office's Notice of Inquiry of March 6, 2001 regarding the interpretation and application of the mechanical compulsory license, 17 U.S.C. §115, to certain digital music services, in light of the recent RIAA/NMPA/HFA agreement (the "Agreement") filed jointly by those parties in this proceeding. These comments supplement the reply comments filed separately by ASCAP and BMI earlier in this proceeding, and we respectfully request the Office to again consider those comments.<sup>1</sup>

At the outset, we applaud the agreement reached between the RIAA and the NMPA/HFA (collectively, the "Publishers"). As more fully discussed below, the Agreement proves that marketplace solutions to the challenges raised by digital music business models do indeed work. The Agreement serves as a constructive flexible model for immediately licensing mechanical rights for services that transmit music in a variety of forms, including

on-demand streaming and time-limited downloads. While the Agreement does not establish rates, the Agreement does recognize that different types of music services make use of music in different ways and those uses may therefore possess different values in the marketplace. The RIAA and the Publishers have committed to engage in good faith negotiations to reach an industry-wide agreement for mechanical royalty rates for those services. Equally important, the Agreement serves further to clarify that performance and reproduction rights in copyrighted musical works coexist when music is used in the digital environment.

In response to the Office's Notice of Inquiry, numerous commentators requested that the Office rule upon the legal and/or economic relationship of the mechanical and public performance rights in digital music services.<sup>2</sup> These commentators, generally representing the users of copyrighted musical works, assert that copyright owners should never be paid for both mechanical rights and performance rights in the course of the same transmission. That assertion is nothing more than an effort to avoid just and proper payment to creators and copyright owners for the use of their music in the course of digital transmissions. The users' claim is that streaming music invokes the performance right only, and downloads invoke the mechanical license only. See DiMA Comments at 1. This mantra has often been repeated by the music users before the Office and before Congress.<sup>3</sup> It is misleading and wrong.

We appreciate that different uses of different rights may be valued differently in the marketplace. At opposite ends of the spectrum, it can be argued that 'pure' audio-only downloads should not require payment for the public performance right and that 'pure'

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<sup>1</sup> See Reply Comments filed by ASCAP and BMI in Docket No. RM 2000-7, May 23, 2001.

<sup>2</sup> See the Comments of the Consumer Electronics Association and Clear Channel Communications, Inc. ("CEA") and the Digital Media Association ("DiMA"), who represent numerous users of digital copyrighted music (asserting that this proceeding should focus on broadly clarifying "the relationship between performances and reproductions") E.g., CEA Comments at 1.

<sup>3</sup> See, e.g., Statement of Jonathan Potter before the United States House of Representatives, Subcommittee on Courts, the Internet and Intellectual Property, Committee on the Judiciary (December 13, 2001).

