

January 24, 2002

DOCKET NO.  
RM 2000-7B  
COMMENT NO. 2



Wixen Music Publishing, Inc.

David O. Carson, Esq.  
Office of the Copyright General Counsel  
P.O. Box 70977  
Southwest Station  
Washington, DC 20024

RECEIVED

JAN 29 2002

GENERAL COUNSEL  
OF COPYRIGHT

Re: Mechanical and Digital Phonorecord Delivery Compulsory License

*Docket No. 2000-7B*

Dear Mr. Carson:

Our company provides music publishing administration for such well-known songwriters as Neil Young, Jackson Browne, the Doors, Tom Petty, Styx, Michael McDonald, Richard Marx, Weezer, Journey, Barry Mann, and Cynthia Weil. We would like to take this opportunity to respond to the Copyright Office's request for additional public comment on its Notice of Inquiry in light of the RIAA/NMPA/HFA agreement.

We have already commented on several issues regarding this matter in our letter to the Register of Copyrights dated September 26, 2001 (a copy of which is included here for your easy reference). I will refer you to that letter for our comments concerning those issues raised by paragraph 9.2 of the RIAA/NMPA/HFA agreement. We also object to several other provisions of the agreement as follows:

- Paragraph 3.3 of the RIAA/NMPA/HFA agreement provides that if a license is requested for a HFA member publisher's composition, that HFA will also issue such licenses on behalf of the share of such composition controlled by a non-member publisher, regardless of the non-HFA publisher's desire.
- Paragraph 3.5 extends paragraph 3.3 to included compositions which are not controlled whatsoever by a HFA member publisher. It also establishes incentive fees payable to HFA by the particular RIAA member for HFA recruiting non-members to participate under the terms of the agreement.
- Paragraph 8 provides that NMPA and HFA agree to recognize On-Demand streaming downloads and Limited Downloads as subject to the compulsory license provisions of the U.S. Copyright Act, that they are bound to publically support this position, and that they are forbidden from

forbidden from commencing, supporting, or in any way condoning legal actions to the contrary.

The RIAA/NMPA/HFA agreement also raises several other issues. First, we are appalled that the agreement was made without any agreement as to the actual rate that will be paid for the use of compositions on so-called digital subscription services. We do not necessarily agree that a digital phonorecord delivery (DPD) or the use of such through a subscription service constitutes a mechanical usage or that it should be subject to a compulsory license provision. However, if it is determined that such is the case, a download is a download. The license rate for a so-called temporary download should be just as much as that for a permanent download. Record companies would like to build into U.S. copyright law the provision for a reduced rate on temporary downloads. This is a similar situation to when record companies re-release phonorecords on their so-called 'budget' or 'mid-line' series. However, the reduced rate for these products is negotiated in the market place. There is no need to mandate these rates in Federal legislation.

Second, compulsory mechanical license provisions are not appropriate for these uses. It seems to us that the limits applied to copyright ownership under U.S. copyright law (e.g., the compulsory mechanical license provisions, the "fair use" doctrine, copyright ownership expiration) were established in order to offset the potential negative effects that monopoly ownership of copyrights might cause to the economy and/or the dissemination of information. These concerns might have been valid at the beginning of the twentieth century when songwriters were on a more equal footing with entertainment companies. However, in this day of the Internet and rapid entertainment industry consolidation, it is the oligopoly of the big five record companies (BMG, EMI, Universal, Sony, and Warner) wielding monopolistic power over intellectual property that is of greater concern.

Finally, neither the NMPA nor HFA can truly claim to represent songwriters' or music publishers' interests in this matter. With the blurring of the boundaries between these companies' record divisions and their publishing divisions, so that arm-length dealings between the two becomes subjugated to the bottom line interests of the corporate whole, it is ludicrous for the multi-national publishing companies to propose that they represent the best interests of music publishing or songwriters. So what we have is the NMPA/HFA representing the interests of a few major publishing companies owned by entertainment conglomerates that also own the records companies represented by

Mechanical and Digital Phonorecord Delivery Compulsory License  
January 24, 2002  
Page 3

the RIAA. In light of foregoing, the RIAA/HFA agreement is like having the left hand shake the right hand.

Thank you for providing us this opportunity to provide our comments. Please do not hesitate to contact me you should have any questions about or wish to discuss the foregoing.

Sincerely,



Eric Polin  
Partner

cc: Randall Wixen  
Erik Szabo