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GENERAL COUNSEL
OF COPYRIGHT

In the Matter of

Mechanical and Digital Phonorecord
Delivery Compulsory License

Docket No. RM 2000-7

REPLY COMMENTS OF MP3.COM, INC.

MP3.com, Inc. ("MP3.com"), by its attorneys, hereby submits its reply comments in response to the Copyright Office's Notice of Inquiry in the above-captioned proceeding.¹ As MP3.com demonstrated in its initial comments, and as we discuss in these reply comments, it not only is necessary and appropriate for the Copyright Office to conduct a rulemaking proceeding to clarify and implement the Section 115 "mechanical" compulsory license as it applies to "incidental digital phonorecord deliveries" ("IDPDs"), but it also is necessary and appropriate for the Office to take immediate action by adopting interim licensing provisions that will permit online music service providers to deliver streaming audio to consumers while protecting the interests of copyright owners.

¹ 66 Fed. Reg. 14099 (March 9, 2001).

DISCUSSION

I. There Is a Compelling Need For The Copyright Office To Act

MP3.com's initial comments in this proceeding explained why it has become imperative that the Copyright Office promptly commence a rulemaking proceeding to clarify and implement Section 115 as it applies to IDPDs and to take the even more immediate step of establishing interim licensing procedures that can be relied upon by online music services until the issues raised in the rulemaking proceeding are resolved. As we described, the technological issues and concerns about consumer demand that previously slowed the deployment of online music services have been swept away in the past few years. Unfortunately, however, uncertainty about the application of the copyright law to various online music business models – and, in particular, uncertainty surrounding publishing rights issues – has fostered a litigious atmosphere that is impeding the fulfillment of the online music revolution. Moreover, as MP3.com's experience demonstrates, even when an online music provider attempts to operate in accordance with an expansive interpretation of the music publishers' rights, the existing marketplace licensing mechanisms are neither capable of meeting the demand for clearances in a timely fashion nor do they protect against litigation.

As MP3.com explained in its initial comments, the principal marketplace mechanism for clearing publishing rights is the Harry Fox Agency ("HFA"), which represents more than 25,000 publishers. The problem is that HFA does not represent the publishers of an unknown, but not insignificant, number of songs, including songs written by major artists. For example, an infringement action recently filed against MP3.com by Randy Newman, Tom Waits, and Ann and Nancy Wilson of the band "Heart" – artists who claim not to be represented by HFA – seeks

damages relating to the alleged copying of several songs that MP3.com licensed through HFA. In addition, the difficulties associated with marketplace licensing are evidenced by the fact that MP3.com has not yet obtained licenses for more than half of the nearly million song titles it submitted to HFA more than six months ago, due to the sheer volume of licenses requested and difficulties in matching databases.

What plainly is needed is an effective and efficient statutory license mechanism for clearing publishing rights in the online environment. As amended by Congress in 1995, Section 115 of the Copyright Act is supposed to provide such a solution. Unfortunately, however, under the Copyright Office's current rules, using Section 115 to clear music publishing rights turns out to be an even less viable option for online music providers than marketplace licensing. The problem is that while Congress drew a distinction between "incidental" DPDs and DPDs "in general," there are no rules offering any guidance as to what does or does not constitute an IDPD. Furthermore, the Copyright Office has expressly "deferred" adopting any IDPD-specific rates or terms and has not yet established a practical way for on-demand streaming services to invoke the compulsory license with respect to the hundreds of thousands of song titles that such services typically seek to offer consumers.

The problems confronting music services that would like to invoke the Section 115 compulsory license with respect to IDPDs need to be addressed now and they need to be addressed by the Copyright Office.² Waiting for Congress to "fix" Section 115 will leave those

² Even if a viable marketplace mechanism existed for obtaining all of the licenses that are needed to operate in the digital environment, it would still be necessary for the Office to adopt rules to facilitate the use of the Section 115 compulsory license by online music providers. Nothing in the history of Section 115 suggests that Congress intended for the availability of compulsory

