

6

RECEIVED

**Before the
Copyright Office of the Library of Congress
Washington, D.C. 20024**

MAY 23 2001

**GENERAL COUNSEL
OF COPYRIGHT**

In the Matter of)
)
Mechanical and Digital Phonorecord)
Delivery Compulsory License)

Docket No. RM 2000-7

REPLY COMMENTS OF NAPSTER, INC.

I. Introduction.

Napster, Inc. (“Napster”) has followed with interest the above captioned proceeding and the Copyright Office of the Library of Congress’ (“Copyright Office”) Notice of Inquiry (“Notice”). In a prior letter to the Copyright Office, Napster argued that the United States Congress (“Congress”) is the proper forum to resolve the issues raised by the Recording Industry Association of America (“RIAA”) in its Petition for Rulemaking and to Convene Copyright Arbitration Royalty Panel if Necessary, In the Matter of Application of the Mechanical Compulsory License to Certain Digital Music Services (“RIAA Petition”) filed with the Copyright Office. More specifically, Napster stated that Congress, and not the Copyright Office, should determine the proper application of the mechanical compulsory license system for musical works to certain types of online digital music services.

Napster still believes that Congress is the proper forum to resolve these issues. Beyond the reasons raised in its letter, Napster notes that other commentors, including the RIAA¹, MP3.com², the Digital Media Association (“DiMA”)³, and the National Music Publishers’ Association (“NMPA”)⁴, have taken the position at various times that the Copyright Office may not have the jurisdiction to undertake the action encouraged in the RIAA Petition or that Congress actually is the proper forum to resolve some of the issues attendant to online music distribution.

Nevertheless, Napster submits that if the Copyright Office does initiate a rulemaking on these issues, the Copyright Office should define incidental digital phonorecord deliveries (“iDPDs”) to include Limited Downloads within the scope of the definition and that, further, the Copyright Office should make clear that the term Limited Downloads extends beyond the limited download business model that RIAA members have to date advocated. Rather, Limited Downloads should be interpreted to include a broad but predictable range of music sampling or promotional services and peer-to-peer business models.

If the Copyright Office determines, however, that Limited Downloads are not iDPDs, Napster suggests in the alternative that Limited Downloads are a subclass of

¹ See Memorandum of NMPA, SGA, and the RIAA Regarding Disposition of the Digital Phonorecord Delivery Rate Adjustment Proceeding (July 21, 1998), at 2 (submitted to the Copyright Office in *In the Matter of DPD Rate Adjustment Proceeding*, No. 96-4).

² See Comments of MP3.com, *In the Matter of Mechanical and Digital Phonorecord Delivery Compulsory License*, Docket No. RM 2000-7, at 7 (April 23, 2001) (MP3.com Comments).

³ See Comments of the Digital Media Association, *In the Matter of Mechanical and Digital Phonorecord Delivery Compulsory License*, Docket No. RM 2000-7, at 3 (April 23, 2001) (DiMA Comments).

⁴ See Comments of the National Music Publishers’ Association, *In the Matter of Mechanical and Digital Phonorecord Delivery Compulsory License*, Docket No. RM 2000-7, at 1, 4-10 (April 23, 2001) (NMPA Comments).

digital phonorecord deliveries (“DPDs”) and that the Copyright Office, pursuant to Section 115(c)(3)(D), should consider this as part of its rulemaking and undertake to set a lower rate for Limited Downloads than for DPDs. If the Copyright Office conducts a rulemaking to define iDPDs as they relate to Limited Downloads, Napster supports the use of a CARP proceeding to set the rates for iDPDs.

If it is determined that the Copyright Office has jurisdiction, Napster agrees that the Copyright Office should streamline the procedure for obtaining a mechanical compulsory license for not only iDPDs, but DPDs, as well. This will better take into account the nature of the online music distribution services that will require such licenses.⁵ Finally, should it be determined that the Copyright Office has the authority in this instance to create a safe harbor under Section 115 and issue interim rules, it should not be exercised in the absence of notice and an expedited public comment period.⁶

Napster wishes to make clear that its Reply Comments in this proceeding are made with reference to the musical works copyrights contained in Limited Downloads and in no way are meant to reflect Napster’s stance in regards to sound recording licenses. More specifically, Napster reiterates its prior stance that the current licensing scheme for sound recordings is inefficient and anticompetitive, thereby requiring the development of a federal legislative solution in the form of a sound recording compulsory license.⁷

II. Napster Background.

Napster, which has created an Internet community of music fans, has been the fastest-growing application in the history of the Internet. Shawn Fanning, then an 18-year-old freshman at Northeastern University, invented the Napster software in 1999. The company and its approximately 90 employees are based in Redwood City, California.

The Napster software is a revolutionary technology based on person-to-person file sharing. The Napster application enables users to locate and share music files (in MP3 and WMA formats) from one convenient, easy-to-use interface. The files are not stored on a central computer, they are stored on the hard drives of each of the millions of Napster users. Users download the music files from other users’ computers. Napster also provides community members with a vehicle to identify new artists and a forum to communicate their interests and tastes with one another via instant messaging, chat rooms, and Hot List user bookmarks.

⁵ See MP3.com Comments, at 8.

⁶ See Comments of the Recording Industry Association of America, *In the Matter of Mechanical and Digital Phonorecord Delivery Compulsory License*, Docket No. RM 2000-7, at 17-21 (April 23, 2001) (RIAA Comments); MP3.com Comments, at 10-11.

⁷ See Testimony of Hank Barry, Interim CEO, Napster, Inc., “Online Entertainment: Coming Soon to a Digital Device Near You?” United States Senate, Committee on the Judiciary, April 3, 2001, at 10. Attached as Appendix B.

Users have installed the Napster application more than 80 million times. The service has experienced peak use of more than 1.8 million people simultaneously and approximately 8 million unique IP addresses in one day.

On February 20, 2001, Napster unveiled the business model for its new membership-based service. The New Napster Service, which the company plans to release this summer, will allow Napster to provide compensation to all rights holders involved. More specifically, Napster's new, modified service will be a Limited Download service that allows the company to: (1) track songs that are exchanged using the New Napster Service, thereby providing Napster with information necessary to compensate rights holders; (2) limit users' ability to transfer files to another device, in essence tethering the files to users' computers; and (3) limit the sound quality through fidelity limitations.

III. The Current State of the Industry and Relevant Licensing Mechanisms.

Despite the many benefits that Napster and the emerging online music distribution industry promises, and the high consumer demand to receive music online, the industry's future viability is far from secure. Instead, the industry's development has been slowed by recording industry business and legal tactics aimed at curtailing competitive online music distributors' abilities to compete effectively against the established offline major recording companies. In terms of licensing, not one publicly traded and operating company has successfully obtained licenses from the major recording companies and all music publishers. Many online music companies, such as Riffage.com and MusicMaker.com, ceased operations. Many other companies have been forced to lay off a significant percentage of their employees.

Jim Griffin, Founder and CEO of Cherry Lane Digital, authored a white paper on these issues entitled "At Impasse: Technology, Popular Demand, and Today's Corporate Regime," in which he described the uphill battle that new online music distribution companies face. According to Griffin, the five major recording companies control roughly 85% of the market for prerecorded music.⁸ Further, these companies' music publishing arms control a high percentage of the music publishing market as well. Griffin noted that the major recording companies' high market concentration allows them to operate in a coordinated manner that results in non-competitive anti-consumer behavior.⁹ In the online world, this coordinated behavior has manifested itself in the aforementioned actions against competing online music distribution companies that, according to Griffin, require a legislative solution.¹⁰

The competing online music distribution companies, including the major recording companies, also are hampered by the incredibly complex and inefficient music licensing procedures that often involve multiple licensors for any particular work. As

⁸ See Jim Griffin, At Impasse: Technology, Popular Demand, and Today's Copyright Regime, April 2001, at 5.

⁹ *Id.* at 7.

¹⁰ *Id.* at 4.

Napster's Interim CEO, Hank Barry, stated before the Senate Judiciary Committee, each work on a CD usually constitutes two separate copyrights. The first copyright is in the sound recording, or the artist's performance, which the recording company (usually) owns. The second copyright is in the musical composition being performed.¹¹ The complexity arises from the fact that the musical composition and the sound recording frequently are owned by separate companies or individuals. For example, at the Senate Judiciary Committee hearing, Mr. Barry noted that on one specific Holmes Brothers gospel CD, there are thirteen sound recordings and eight separate music publishers.¹² With approximately 3,000 recording companies and over 25,000 independent music publishers in the United States alone, the prospect of negotiating the sound recording and musical composition rights for all works to enable online distribution is a virtually impossible task.¹³

The RIAA Petition seeks to have the Copyright Office resolve certain inefficiencies associated with securing the publishing licenses for the online delivery or distribution of non-dramatic musical works through the establishment of a more efficient licensing process.¹⁴ The RIAA stated in its petition that the lack of clarity regarding such licensing issues was "the primary obstacle to the launch of digital services."¹⁵ Napster believes that the lack of clarity and the lack of a streamlined process for obtaining all forms of licenses, including publishing licenses, is a major obstacle to launching consumer friendly services. The current licensing procedures, for both musical compositions and sound recordings, have led to a paralysis within the nascent online music distribution market that is seriously hindering the industry's ability to grow and meet the staggering consumer demand for online music services. Napster believes a streamlining of procedure and a determination that iDPDs include Limited Downloads would help alleviate some of these licensing concerns as they relate to musical works, and thus facilitate the growth of the online music distribution industry.¹⁶

¹¹ See Testimony of Hank Barry, Interim CEO, Napster, Inc., "Online Entertainment: Coming Soon to a Digital Device Near You?" United States Senate, Committee on the Judiciary, April 3, 2001, at 6.

¹² See Oral Statement of Hank Barry, Interim CEO, Napster, Inc., "Online Entertainment: Coming Soon to a Digital Device Near You?" United States Senate, Committee on the Judiciary, April 3, 2001.

¹³ See Testimony of Hank Barry, Interim CEO, Napster, Inc., "Online Entertainment: Coming Soon to a Digital Device Near You?" United States Senate, Committee on the Judiciary, April 3, 2001, at 7.

¹⁴ See *Petition for Rulemaking and to Convene Copyright Arbitration Royalty Panel if Necessary, In the Matter of Application of the Mechanical Compulsory License to Certain Digital Music Services* (November 22, 2000) ("RIAA Petition").

¹⁵ See RIAA Petition, at 11.

¹⁶ It is important to note that regardless of the Copyright Office's ultimate determination, this proceeding will not help alleviate licensing concerns related to sound recordings.

IV. The United States Congress is the Proper Forum to Determine the Scope of the Mechanical Compulsory License for Musical Compositions.

The RIAA argues that a rulemaking is necessary to determine whether Section 115 of the Copyright Act, which established a mechanical compulsory license for DPDs, applies to On-Demand Streams and Limited Downloads.¹⁷ It is Napster's opinion that Congress, and not the Copyright Office, is the proper forum for resolving such policy issues raised by the advent of innovations in the digital delivery of musical works.

First, by the RIAA's own admission, the Copyright Act is not clear as to whether Section 115 applies to these situations.¹⁸ The RIAA also concedes that there are important policy questions regarding mechanical compulsory licenses for certain digital musical services that must be examined.¹⁹ Given the important policy issues involved, combined with the uncertainty regarding Section 115's application to online music services, Congressional action is necessary.

Further, in a prior Copyright Office proceeding, the RIAA took the position that the Copyright Office did not have the authority to determine if streaming media activities were DPDs within the meaning of Section 115.²⁰ Now, the RIAA argues that the Copyright Office has the requisite authority to initiate the rulemaking proceeding pursuant to Section 702 of the Copyright Act, which states: "The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties *made the responsibility* of the Register under this title."²¹ While Section 115 provides the Register with a number of responsibilities, Congress did not confer upon the Register in Section 115 the responsibility to define iDPDs, or to determine which online music distribution business models involve the use of DPDs or iDPDs. The RIAA also is misplaced in its reliance on the *Satellite Broadcasting*²² and *Cablevision*²³ cases to support the Copyright Office's authority to initiate a rulemaking proceeding, as those cases: (1) did not involve the possibility of wide ranging agency action, as is contemplated here, and (2) involved Section 111 of the Copyright Act, as opposed to Section 115 and mechanical compulsory licenses.

¹⁷ See 17 U.S.C. 115.

¹⁸ See RIAA Petition, at 3, 9, 11-14.

¹⁹ See RIAA Petition, at 11-14.

²⁰ See Memorandum of NMPA, SGA, and the RIAA Regarding Disposition of the Digital Phonorecord Delivery Rate Adjustment Proceeding (July 21, 1998), at 2 (submitted to the Copyright Office in *In the Matter of DPD Rate Adjustment Proceeding*, No. 96-4).

²¹ See 17 U.S.C. § 702 (emphasis added).

²² *Satellite Broadcasting and Communications Association v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994).

²³ *Cablevision Systems Development Co. v. Motion Picture Association of America, Inc.*, 836 F.2d 599, 608-609 (D.C. Cir. 1988).

The RIAA also notes that resolution of these issues will impact “thousands” of companies.²⁴ Further, the online music marketplace has changed substantially since Congress amended Section 115 to include DPDs and iDPDs, including the recent advent of vertically integrated content development and distribution companies. In such situations, Congress is the proper forum, as the Copyright Office stated, to “balance the specific concerns of the interested parties and enact a legal regime that addresses those concerns.”²⁵ Napster’s Interim CEO Hank Barry echoed these concerns in his recent testimony before the Senate Judiciary Committee on April 3, 2001.²⁶ At that time, Mr. Barry noted that the complexities surrounding the licensing of music for online distribution that result from the many potential licensors for any given work warranted Congressional intervention in the form of a compulsory license system.²⁷

Congress already has begun to explore these issues in the form of two separate Senate Judiciary Committee hearings²⁸ and a May 17th hearing before the House Judiciary Committee. Further, DiMA and MP3.com both noted that Congress actually is the proper forum to resolve some of the issues related to online music distribution services.²⁹ Accordingly, Napster urges Congress to continue its examination of these issues and determine the proper application of the mechanical compulsory license to Limited Downloads.³⁰

V. Should the Copyright Office Initiate a Rulemaking, It Should Determine that Limited Downloads are iDPDs and that Limited Downloads are Defined to Include Peer-to-Peer Limited Download Business Models.

Napster recognizes that the Copyright Office may choose to undertake such a proceeding and, as such, offers the following arguments related thereto.

²⁴ See RIAA Petition, at 13.

²⁵ See Notice of Inquiry, *In the Matter of Mechanical and Digital Phonorecord Delivery Compulsory License*, 66 FR 14099 (March 9, 2001), Docket No. RM 2000-7, at 14099.

²⁶ See Testimony of Hank Barry, Interim CEO, Napster, Inc., “Online Entertainment: Coming Soon to a Digital Device Near You?” United States Senate, Committee on the Judiciary, April 3, 2001.

²⁷ See *id.* at 10.

²⁸ Napster Interim CEO Hank Barry testified before the Senate Judiciary Committee on July 11, 2000, and April 3, 2001, on a number of issues related to the emerging online music distribution market. Mr. Barry’s testimony for the July 11, 2000, hearing is attached as Appendix A.

²⁹ See MP3.com Comments, at 7; DiMA Comments, at 3.

³⁰ It also is important to note that at the recent House Judiciary Committee hearing on online music distribution, Representative Cannon questioned whether the Copyright Office had the requisite authority to initiate a rulemaking proceeding. See Comments of Representative Chris Cannon, “Oversight Hearing on Music on the Internet,” United States House of Representatives, Committee on the Judiciary, May 17, 2001.

Definition of Limited Downloads

Napster's service involves the exchange of online music files via digital downloads. The New Napster Service, set to launch this summer, will be a Limited Download service that will permit Napster users to: (1) track songs that are exchanged using the New Napster Service, thereby providing Napster with information necessary to compensate rights holders; (2) limit users' ability to transfer files to another device, in essence tethering the files to users' computers; and (3) control the sound quality through fidelity limitations.

Any Copyright Office proceeding involving Limited Downloads should adopt a definition for Limited Downloads that takes into account the many online music services being offered. More specifically, the Copyright Office should not limit the services that qualify as Limited Downloads merely to those that fit within the RIAA's proposed definition.³¹ A more flexible approach might prove to be the most prudent. For example, the Copyright Office might want to consider a definition for Limited Downloads along the lines of: "a commercial on-demand transmission of a use-limited download (*e.g.*, available for listening for a limited number of times or a time certain, or limited by the file's sound fidelity or by a user's ability to transfer the file downloaded to another device) to a local storage device (*e.g.*, the hard drive of a user's computer) using technology that causes the downloaded file to be available for such limited uses without regard to the architecture of the service through which the transmission occurred." The Copyright Office should not define Limited Downloads, or for that matter iDPDs or DPDs, in a manner that prevents peer-to-peer file sharing companies that facilitate the transfer of Limited Downloads from being able to avail themselves of Section 115 simply because the music files are transferred via a peer-to-peer architecture.³² Simply put, the Copyright Office should take care to ensure that all business models that facilitate the delivery of downloads meetings an objective definition for Limited Downloads will be able to avail themselves of the mechanical compulsory license for iDPDs.

³¹ See RIAA Petition, at 1 (The RIAA defined the term Limited Download to include "an on-demand transmission of a time-limited or other use-limited (*i.e.*, non-permanent) download to a local storage device (*e.g.*, the hard drive of the user's computer), using technology that causes the downloaded file to be available for listening only either during a limited time (*e.g.*, a time certain or a time tied to ongoing subscription payments) or for a limited number of times.").

³² There is no reason to think that Section 115 currently would not apply to Napster-like peer-to-peer services that enable their users to share music files, assuming that the Napster-like service complies with Section 115's requirements. More specifically, according to one noted copyright law commentator, a company may obtain a compulsory license on behalf of another. As such, there would not seem to be any reason why a peer-to-peer company would not be able to obtain a compulsory license that allows its users to share music files. See *Nimmer on Copyright*, Ch. 8, Sec. 8.04 (J)(1) (2001).

