

Before the  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS

RECEIVED

MAY 23 2001

GENERAL COUNSEL  
OF COPYRIGHT

In the Matter of	)	
	)	
	)	
Mechanical and Digital Phonorecord	)	Docket No. RM 2000-7
Delivery Compulsory License	)	May 23, 2001
	)	

**Reply Comments of  
National Association of Recording Merchandisers  
and  
Video Software Dealers Association**

Neither the administrative recognition of a "Limited Download" nor the bootstrapping of such a concept into a "rental" are authorized by the Copyright Act. To do so now would unlawfully expand copyright to include a right over entirely private performances for which copyright owners have no rights, and would deny to artists the reproduction royalties due to them under law.

The National Association of Recording Merchandisers ("NARM") and the Video Software Dealers Association ("VSDA") submit these reply comments, pursuant to the Copyright Office's March 9, 2001 Notice of Inquiry ("NOI"), 66 Fed. Reg. 14,099, regarding the Mechanical and Digital Phonorecord Delivery Compulsory License. NARM is the trade association for this nation's music retailers, rack jobbers and distributors, who have a vital interest in preserving appropriate financial incentives and rewards for creative artists. VSDA is the trade association for home video retailers, and its members have substantial experience in the true rental of copies of copyrighted works. NARM and VSDA members share a vital interest in

preserving vibrant retail competition in copyrighted works, and in carrying out Congress' intent that such competition be free from control or restraint by the copyright owner.<sup>1</sup>

The Recording Industry Association of America's comments (hereafter "RIAA Comments") ask the Copyright Office to (a) administratively expand the plain meaning of the term "rental," and (b) ignore the plain language of Section 115, which requires that any rental royalty be in addition to the reproduction and distribution royalty. The Copyright Office should bend neither reality nor the law in such a manner.

### **A Limited Download Cannot Be A Rental**

The RIAA seeks to use technological controls to limit the length of time or number of times that the owner of a phonorecord made through a lawful digital phonorecord delivery ("DPD") may listen to it.<sup>2</sup> It would call this concept a "Limited Download" and ask that it be treated as though it were a rental. RIAA's proposed new business model cannot, however, alter existing property rights or find legitimacy within the Copyright Act.

In the first place, the term "rental" has never been used to refer to payments made for the use or possession of one's own property. By definition, rent is the fee paid by one who is not the owner for the right to use the property for the rental period. *See* Black's Law Dictionary, 5<sup>th</sup> Ed. The Limited Download, in contrast, would wrest from the owner and possessor of the property

---

<sup>1</sup> Although these Reply Comments are limited to a discussion of the implications of treating a Limited Download as though it were a rental, NARM and VSDA agree with the position taken, and legal analysis made, by the Consumer Electronics Association and Clear Channel Communications, Inc., in their April 23 Comments with respect to other issues raised in the NOI.

<sup>2</sup> The RIAA has acknowledged that the owner of a DPD is the owner of a lawfully made phonorecord, and that, therefore, Section 109 applies. *See, e.g., Joint Reply Comments of Copyright Industry Organizations Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act*, dated September 5, 2000, submitted by the American Film Marketing Association, the Association of American Publishers, the Business Software Alliance, the Interactive Digital Software Association, the Motion Picture Association of America, the National Music Publishers' Association and the Recording Industry Association of America, p. 6; *Hearing Before the Copyright Office and the National Telecommunications and Information Administration on a Joint Study on 17 U.S.C. Section 109 and 117* (November 29, 2000) (statement of Cary Sherman on behalf of the Recording Industry Association of America, Inc., p. 298). As discussed below, a Limited Download, by its very nature, would impair the statutory right of the owner of a phonorecord made through a lawful DPD to sell, lend or give away that copy.

