

Before the Library of Congress  
United States Copyright Office

RECEIVED

APR 23 2001

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

GENERAL COUNSEL  
OF COPYRIGHT

**DiMA Comments to  
Copyright Office Request for Comments**

Pursuant to the Copyright Office Notice of Inquiry, 66 Fed. Reg. 14099 (March 9, 2001) (hereinafter "the Notice"), the Digital Media Association ("DiMA") respectfully submits these comments to express its support of a rulemaking, but one more limited in scope than the rulemaking requested by the November 29, 2000, petition of the Recording Industry Association of America ("RIAA").

DiMA (<http://www.digmedia.org>) is the trade association representing more than 70 companies dedicated to developing technologies and business models to broadcast and market audio and video over digital online networks. DiMA members thus are directly affected by the issues addressed in the Notice with respect to digital phonorecord delivery ("DPD"), as well as by any effort to blur the clear distinctions between DPDs and interactive streaming services.

The development of Internet streaming technology has done much to advance consumer access to and enjoyment of music. Unlike the listening experience in 1995 that required waiting an hour or more to download a single track, streaming brings the real-time radio-like listening experience (as well as radio retransmissions themselves) to the computer user. Streaming technology allows music to be played within seconds of tuning to an Internet music channel. Not only does streaming operate differently from downloading, streaming technology can be set so as to prevent downloading. Therefore, it should go without saying that streaming is a performance, whereas a download is a digital phonorecord delivery.

Streaming relies on Internet packet switching to deliver the signal to the user. With today's bandwidth speeds, streaming therefore requires the use of a temporary memory buffer to accumulate and correctly order the received data packets before the music can be performed in a continuous and pleasing listening experience -- whereupon, those data packets are discarded.

That some representatives of copyright owners have seized on this buffer in an effort to create a new revenue opportunity would be laughable, if the consequences (including the prospect of duplicate licensing and royalty obligations) were not so dire for Internet webcast businesses. Ironically, the same copyright owners who have been so swift to condemn online infringement are themselves impeding the establishment of legitimate online enterprises that are ready and willing to pay performance royalties for streaming activities. Although nearly six years have passed since the enactment of the Digital Performance Right in Sound Recordings Act, the business and legal mechanical licensing infrastructure still has proved itself incapable of accommodating the timely licensing of copyrighted musical compositions for online use.

The number and complexity of the questions posed in the Notice amply attest to the reasons for today's market paralysis. In 1995, Congress enacted a statute based on its understanding of early-nineties technology. As the Notice aptly observes, Congress focused on the then-known Internet technology of the downloading of entire music files, and did not contemplate Internet streaming: "It appears that when Congress passed the Digital Performance Act in 1995 and amended the section 115 mechanical license, current delivery mechanisms for digital transmission of musical works were unknown. Consequently, On-Demand Streaming and Limited Downloads, as described in the RIAA petition, and the applicability of the section 115 license to these services do not appear to have been anticipated." Notice at 14101.<sup>1</sup> The unfortunate consequence of these lacunae is that some royalty administrators have grasped for strained legal interpretations of the existing Act, in an effort to advantage themselves, by shoehorning nascent subscription-based streaming services into the particular license scheme that they administer.

Ultimately, the current stalemate over online music licensing is in no one's interest. In 1995, and again in 1998, Congress created music and sound recording statutory licenses intending to facilitate the development of new markets for digitally disseminating music. What Congress surely did not envision was that these statutory license rights would be thwarted by agents representing songwriters and publishers fighting over who gets to collect the money on behalf of their clients. Yet, that is precisely the debate in which we now are engaged -- a fight over whether songwriters and publishers are paid under one license regime for performances or another for distributing phonorecord reproductions; and, whether these agents can extract double-dip payments for what is, to the user, a single act of listening.

---

<sup>1</sup> "At the time the DPRSRA was crafted, Internet transmissions of music were not the focus of Congress' effort." Staff of the House of Representatives Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 at 51 (Comm. Print, Serial No. 6, 1998).