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**GENERAL COUNSEL  
OF COPYRIGHT**

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In the Matter of )  
 )  
MECHANICAL AND DIGITAL PHONORECORD )  
DELIVERY COMPULSORY LICENSE )  
\_\_\_\_\_ )

Docket No. RM 2000-7

**COMMENTS OF  
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION  
AND THE SONGWRITERS' GUILD OF AMERICA  
IN OPPOSITION TO THE PROPOSED RULEMAKING PROCEEDING**

The National Music Publishers' Association ("NMPA") and the Songwriters Guild of America ("SGA") submit these comments in response to the Copyright Office's Notice of Inquiry dated March 9, 2001 ("Notice") concerning whether to conduct a rulemaking proceeding to address the application of copyright law to various types of digital transmissions of musical works.

NMPA and SGA respectfully submit that such a rulemaking would exceed the authority of the Copyright Office and very likely harm the development of legitimate music delivery services on the Internet. Congress has expressed a strong preference for the resolution of these issues through voluntary private negotiations. Such negotiations have already led to the licensing of many legitimate Internet music services and represent the best way to accommodate evolving technologies and business models together with the legal rights of music creators.

### The Commenting Parties

Founded in 1917, NMPA is the principal trade association of music publishers in the United States. NMPA's members – over 800 today – own or control the overwhelming majority of musical compositions available for licensing in the United States. NMPA's wholly owned licensing subsidiary, The Harry Fox Agency, Inc. (“HFA”) is an industry service organization that represents over 27,000 publisher-principals, which collectively own more than 2.5 million copyrighted musical works. Established in 1927, HFA serves as agent on behalf of its publisher-principals in licensing copyrighted musical compositions for reproduction and distribution as physical phonorecords (CDs, cassette tapes and phonograph records) and over the Internet as digital phonorecord deliveries (“DPDs”).

SGA is the nation's oldest and largest organization run exclusively by and for songwriters. SGA is an unincorporated voluntary association of approximately 5,000 songwriters and songwriter estates throughout the United States of America. Among other services, SGA provides licensing, royalty collection and audit services on behalf of its members.

### I.

#### **THE MATTERS RAISED BY THE RULEMAKING PETITIONS ARE OUTSIDE THE STATUTORY AUTHORITY OF THE COPYRIGHT OFFICE**

In its petition to the Copyright Office of November 20, 2000, the Recording Industry Association of America (“RIAA”) requested that the Copyright Office commence a rulemaking proceeding to address

- Whether what it refers to as “on-demand streams” are incidental DPDs covered by the section 115 compulsory license; and
- Whether the computer server copies necessary to transmit “on-demand streams” are included in the section 115 compulsory license.

Notice of Inquiry, Mechanical and Digital Phonorecord Delivery Compulsory License, 66 Fed. Reg. 14099, 14100 (2001)(hereinafter “Notice”).

Responding to the RIAA petition, MP3.com, Inc. (“MP3.com”) asked the Copyright Office to address in any such proceeding the additional matters

- Whether distinctions can and should be drawn among “streaming audio services” depending upon whether consumers have previously purchased the streamed music;
- The effect that the Copyright Office’s decision to defer rates for incidental DPDs has on services currently streaming music; and
- Possible amendments to the current procedural regulations for invoking and complying with the section 115 license with respect to incidental DPDs.

*Id.*<sup>1</sup>

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<sup>1</sup> Two additional organizations, Napster, Inc. (“Napster”) and the Digital Media Association (“DiMA”) have also responded to the RIAA petition, urging that the Copyright Office stay its hand in favor of legislative action. (*Id.* at 14100--01)

DiMA further recommends that the Copyright Office consider the status of temporary copies of musical works in the context of its section 104 study. This proposal is misplaced because the section 104 study requires analysis of “the development of electronic commerce and associated technology on the operation of sections 109 and 117” of the Copyright Act. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2861 (1998). Section 109 (first-sale doctrine) and section 117 (archival copies of computer programs) are not germane to the question of what digital music services constitute DPDs under section 115. As such, DiMA’s proposal is merely an attempt to have the issue of “temporary copies” boot-strapped into a study that Congress explicitly limited to the topics described above. The Office should accordingly reject the DiMA proposal.

