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APR 23 2001

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

**GENERAL COUNSEL
OF COPYRIGHT**

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

**COMMENTS OF THE RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC.**

The Recording Industry Association of America, Inc. ("RIAA") is pleased that the Copyright Office has issued a Notice of Inquiry ("NOI") regarding the application of the mechanical compulsory license of 17 U.S.C. § 115 to certain digital music services. The NOI seeks public comment on the advisability of conducting a rulemaking proceeding concerning that issue. RIAA believes that it is not only advisable that the Copyright Office conduct such a rulemaking proceeding, but critically important that the Office conduct such a proceeding. In addition, we urge the Copyright Office immediately to promulgate interim rules during the pendency of the proceeding that would allow legitimate services to obtain a mechanical compulsory license by means of a practicable procedure, even before the Copyright Office expresses any view as to the proper classification of On-Demand Streams or Limited Downloads.¹

There is a pressing need in the marketplace for legitimate digital music services, driven by the dual forces of exploding consumer demand and a proliferation of digital

¹ In these comments, we use the terms "On-Demand Stream" and "Limited Download" as defined in the NOI and our petition.

music services that either infringe or facilitate the infringement of copyrights in musical works and sound recordings. Indeed, the very demand consumers have for digital music seems to be the driving force behind the massive infringements of copyrights that continue to occur through various services. The relative popularity of these infringing services and the widely publicized litigation necessitated by their trespass into the marketplace have caught the attention of Congress, which has recently conducted hearings inquiring into the market for digital music.

The swelling consumer demand for digital music and the need for legitimate digital music services to meet that demand necessitates swift action on the part of all those with interests in digital music, as well as the Copyright Office. RIAA's members and their business partners are working hard to bring services to the market to meet consumers' demand. Unfortunately, the lack of clarity as to the application of the mechanical compulsory license to various types of services and the lack of a regulatory framework to implement whatever statutory provisions may be applicable to these services has slowed the efforts of RIAA members and other legitimate digital music providers to bring these services to consumers. RIAA and its members have diligently pursued discussions with music publishers and others to try to reach a consensus concerning these issues among the affected industries. However, those negotiations have not yet been successful. The Copyright Office uniquely possesses the expertise and power to resolve these issues now. Accordingly, we urge the Copyright Office to move forward on every front as expeditiously as possible, to do everything in its power to allow legitimate digital music services to flourish.

The Copyright Office would be well within its regulatory authority should it both commence a rulemaking concerning the questions addressed in the NOI and promulgate the interim rules we request during the pendency of that rulemaking. The Copyright Office's rulemaking authority with regard to the compulsory licenses of the Copyright Act is well established. Congress has recognized the long-standing role of the Copyright Office in making and administering rules with regard to compulsory licenses, and the Copyright Office has a long history of doing so. Furthermore, the Copyright Office has recently recognized that it has the specific authority to determine whether certain activities fall within or outside the scope of a compulsory license. Accordingly, the Copyright Office's rulemaking authority undoubtedly encompasses the power to determine whether On-Demand Streams are iDPDs, and whether Limited Downloads should be considered iDPDs or "rentals" for the purpose of the compulsory license.

I. BACKGROUND

A. RIAA

RIAA is the trade association that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes its members' creative and financial vitality. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. RIAA represents its members in a variety of forums, including before the Copyright Office and through testimony before Congress.

B. THE DEMAND FOR DIGITAL MUSIC

New transmission technologies and music listening devices have allowed consumers to obtain access to their favorite sound recordings with an ease and speed, and

in new ways, not possible just a few years ago. As a result, and not surprisingly, the demand for music in digital format, whether by download from the Internet, streaming audio webcasts, or interactive music services, is exploding. It was estimated in June of 2000 that some 38 million Americans listened to music on the Internet in addition to or instead of listening to the radio or their stereo systems. Steven Bonisteel, *Web Surfers Prefer Their Music Free – Survey*, NEWSBYTES, June 9, 2000 (citing a Pew Internet & American Life Project survey). The number undoubtedly has increased in the past year.

Although RIAA and record companies have concluded dozens of deals to license the transmission of music over the Internet, much of the demand for digital music has been met by services that infringe upon musical work and sound recording copyrights. Before Judge Patel issued a modified preliminary injunction just a few weeks ago, Napster, Inc. boasted of more than 60 million users. See <http://www.napster.com/pressroom/pr/010403.html>. At any one time, millions of copyrighted works were available via the Napster service. The Ninth Circuit's recent decision firmly established that Napster is liable for contributory infringement for its role in materially contributing to infringement on a massive scale. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Other file-distributing systems pose similar legal problems.

Legitimate services – those which compensate content owners and creators appropriately – must be developed to meet what Senator Hatch has called the “justifiably impatient demand of consumers.” <http://www.senate.gov/~judiciary/ogh040301h.htm> (opening statement of Senator Hatch on April 3, 2001 during hearing entitled “Online Entertainment: Coming Soon to a Digital Device Near You?”). Expressing his

frustration with the apparent lack of legitimate services currently available, Senator Hatch has stated:

The Napster community represents a huge consumer demand for the kind of online music services Napster, rightly or wrongly, has offered and, to date, the major record labels have been unable to satisfy. Now, I understand that the labels have been working hard to get offerings online, and I have seen some projects beginning recently. I have been promised consumer roll-outs this year. But these offerings have been slow in coming and have not been broadly deployed as of yet. I hope deployment will be speeded up to meet the unsatisfied demand that may be caused by interruptions in Napster service as the litigation continues through trial on the merits and appeals.

147 Cong. Rec. S1376, S1380 (daily ed. Feb. 14, 2001) (statement of Sen. Hatch). As described more fully in the next section, recording companies have been announcing groundbreaking initiatives that respond to Senator Hatch's remarks and marketplace demand. But unless the rules for securing musical work licenses for these services are clarified, those initiatives will be stymied, and instead of being launched within months they will remain elusive plans on the drawing board. By embarking on a rulemaking and establishing clear rules concerning the application of the mechanical compulsory license to On-Demand Streams and Limited Downloads, the Copyright Office will aid the recording industry and other companies in "speeding up" the "deployment" of legitimate services to meet the consumer demand that has thus far been met to a large degree by copyright infringers.

C. RECORDING INDUSTRY DIGITAL MUSIC INITIATIVES

RIAA's members are excited about and eagerly embracing the opportunity to deliver digital music to consumers over the Internet. Toward that end, members of RIAA have issued numerous licenses to Internet music services and are in the process of

classification of On-Demand Streams and Limited Downloads for purposes of the mechanical compulsory license; and (5) whether the Office can issue a rule determining whether a particular use of a copyrighted work is a fair use. Our comments will address each of these issue areas in turn.

A. THE COPYRIGHT OFFICE WOULD SIGNIFICANTLY ADVANCE THE SATISFACTION OF CONSUMER DEMAND FOR DIGITAL MUSIC BY ISSUING RULES ADDRESSING THE CLASSIFICATION OF ON-DEMAND STREAMS AND LIMITED DOWNLOADS FOR PURPOSES OF § 115

The Copyright Office would significantly advance the delivery of digital music to consumers by issuing rules addressing the classification of On-Demand Streams and Limited Downloads for purposes of the § 115 license. As stated in RIAA's petition, record companies take their obligations under the copyright law very seriously, and wish to obtain all the licenses necessary to operate services that deliver digital music to consumers via On-Demand Streams and Limited Downloads. RIAA's members believe that the copyright owners in musical works should be fully and fairly compensated for the use of their works, and are willing to compensate them as the law demands. However, the law with regard to these two delivery methods is unclear at this time, and the uncertainty with regard to what licenses are necessary to operate subscription services using those methods has slowed their introduction.

Accordingly, we believe that it is vital that the classification of On-Demand Streams and Limited Downloads be settled now. While these issues are difficult in the sense that both sides can make sensible arguments, the issues will not get any easier a year or two from now. These are not the kinds of questions that require years of study; they require receiving comments from all interested parties, weighing the legal and policy

considerations, and then making prudent choices. Additional time also is unlikely to provide significantly better information, because these services will languish until rules are established. As the agency charged with administration of the Copyright Act, and in particular its compulsory licenses, the Copyright Office has unique expertise, the capability, and indeed a responsibility, to resolve these questions, and to do so now.

1. It Is Possible For The Copyright Office To Define “Incidental DPD” Through A Rulemaking Proceeding

The NOI asks whether it is possible for the Copyright Office to define “incidental DPD” through a rulemaking, and if so, how incidental DPD should be defined. RIAA submits that such a definition is possible through rulemaking, possibly through a definition of general application, or more likely by a clarification in 37 C.F.R. §§ 201.18 and 201.19 that the iDPD configuration does or does not include certain specified activities.

The Copyright Office has, in the past, issued regulations interpreting the language of the § 115 license, and the term “incidental DPD” is no less susceptible to definition by rulemaking. For example, § 115(c)(2) provides that royalties are payable on all phonorecords of which the compulsory licensee has “voluntary and permanently” parted with possession. The Copyright Office issued regulations that define “voluntarily and permanently.” *See* 37 C.F.R. § 201.19(a)(6). There is no reason to believe that the term “incidental DPD” would be more difficult to define in a rulemaking context than “voluntarily and permanently.”

2. Whether On-Demand Streams Are iDPDs

Resolution of the question of whether On-Demand Streams are iDPDs is absolutely essential to establish the legal framework for offering subscription music

services. Many of the current Internet music services, including MP3.com (which already has filed comments on our petition), operate by offering On-Demand Streams, and both MusicNet and Duet may enable consumers to receive On-Demand Streams. On-Demand Streams are likely to be a primary means of music delivery used by subscription services for the foreseeable future. Thus, of all the questions raised by the NOI, most pressing is probably resolution of the question “are some or all the copies of a musical work made that are necessary to stream that work incidental DPDs?”

The transmission of On-Demand Streams involves making reproductions, either whole or fragmented, in various contexts. First, a server recording generally is created. The server recording is then further copied and stored briefly in the random access memory of the server so that it can be transmitted over the Internet in a streaming media protocol. In a process over which neither the transmitting entity nor the recipient has much knowledge or control, numerous fragmented reproductions may be made in the course of delivering a stream over the Internet to the recipient’s computer, where a fragmented buffer reproduction is made. The streaming media player on the recipient’s computer then renders the sound recording from the buffer. Other than the server recordings, these reproductions are made because data necessarily must be transmitted over the Internet one bit at a time, yet a number of bits must be collected and processed simultaneously when a computer renders music. Because the transmission of streaming media data over the Internet is somewhat erratic, streaming media protocols generally provide for the buffering of some seconds of sonic information, allowing that information to be received and assembled in proper order so that the user hears a smooth and uninterrupted performance of the sound recording.

The Office is clearly correct that iDPDs are subject to § 115's definition of digital phonorecord delivery ("DPD"). *See* 17 U.S.C. § 115(d). That is, iDPDs are a species of DPD that is relevant only as a royalty rate category. A DPD is an "individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording" *Id.* There is no evident "delivery" of server recordings and other reproductions made during the Internet transmission process, but to the extent those reproductions may constitute "phonorecords," we believe it is clear that they are encompassed by the mechanical compulsory license, which authorizes a licensee to "make and distribute phonorecords." 17 U.S.C. § 115(a)(1). No royalty would be payable for those phonorecords, because they are not distributed to the public. *See* 17 U.S.C. § 115(c)(2). Because musical work copyright owners and their representatives sometimes have made suggestions to the contrary, we think it is desirable that the Office clarify this point, but it seems beyond serious dispute.

The difficult question concerns buffer reproductions made on users' computers, since they arguably are "delivered" or "distributed." There is a substantial question as to whether a buffer reproduction would be a "specifically identifiable" phonorecord. Moreover we think there is a substantial question as to whether buffer reproductions are phonorecords at all.

Whether buffer recordings are "phonorecords" depends on whether they embody a work in a tangible medium of expression in a way that "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (definition of "fixed"). If Congress had

intended this definition to refer to a specific period of time, whether it be a nanosecond or a minute, Congress could have said that. Because Congress did not, it would seem that how long a duration is transitory depends on the particular technology and context at issue. When it enacted the 1976 Act, Congress made clear that how this definition applies in the context of a technology it understood well – television: the evanescent glow on a television screen is not to be considered sufficiently fixed to make a television set a copy for purposes of the Copyright Act (even though that glow can be perceived for a period of time that might be orders of magnitude greater than the life of some reproductions made within computers). *See* H.R. Rep. 94-1476, at 53. It can be argued that, in the specific context of the transmission of a licensed performance over a digital network, buffer reproductions are not embodied in a tangible medium of expression so as to allow works to be communicated for a period of more than transitory duration. Such a result would preserve the distinction between performances and reproductions that is important to numerous provisions of the Copyright Act, including some of the statutory licenses, and to industry practices that have developed based on that distinction. Moreover, the legislative history to the 1976 Act states that transient reproductions “captured momentarily in the ‘memory’ of a computer” do not meet the definition of “fixed.” *Id.*

On the other hand, it can be argued that buffer reproductions are sufficiently “fixed” to be considered copies or phonorecords. There is support for this proposition in certain decisions of lower federal courts. *See, e.g., Ticketmaster Corp. v. Tickets.Com, Inc.*, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000) (holding that copy retained for 10-15 seconds as a part of the “ripping” of data from a Web site was of more than transitory

duration); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999 (N.D. Ill. 1982) (holding that because work was reproduced over and over in memory, audiovisual computer game was fixed).

If there were a clear answer to this question, we would not have filed our petition asking the Office to resolve it. Accordingly, we urge the Office to undertake a rulemaking proceeding to articulate an answer to this question that is consistent with the Act and the policies behind it.

3. Whether Limited Downloads Are iDPDs or Rentals

Nearly as important as the legal status of On-Demand Streams is the legal status of Limited Downloads. Limited Downloads have many advantages as part of a compelling consumer offering: They can make it easier for consumers to access the music they most like and save service providers bandwidth costs, and perhaps most important, music that has been downloaded can be enjoyed away from an Internet connection. Accordingly, while Limited Downloads have not been commercially important to date, we believe that they will become increasingly important as legitimate music services are launched, and a determination of the legal status of Limited Downloads will foster the development of such services.

There appears to be a genuine question whether Limited Downloads should be considered iDPDs or rentals, since they have characteristics of both. They involve the delivery of a phonorecord by means of a digital transmission, which suggests that they

might be iDPDs.⁴ *See* 17 U.S.C. § 115(d). However, Congress created the rental royalty specifically to compensate musical work copyright owners in the case of particular kinds of distribution transactions where a phonorecord is delivered to a user for a limited time – and a Limited Download is just such a transaction. There certainly is nothing in the text of the rental provision of § 115(c)(4) that would exclude its application to transactions consummated by electronic means. Where the two statutory royalty rate categories may be equally applicable, it simply is not clear what rate should be paid by a licensee who wants to comply with the Act and render reasonable compensation to musical work copyright owners.

As in the case of On-Demand Streams, if there were a clear answer to this question, we would not have filed our petition asking the Office to resolve it. However, if it is determined that Limited Downloads are rentals, it is necessary that the Register of Copyrights issue the regulations required by § 115(c)(4) to implement the rental royalty. Such regulations would need to specify the computation of the rental royalty in much the same manner as 37 C.F.R. § 201.19(e)(4)(ii) specifies the computation to be undertaken for phonorecords with which the licensee has permanently parted possession. The details of such regulations would require some financial analysis, and it would seem premature to undertake that analysis until a later stage of the proceeding.

⁴ Musical work copyright owners conceivably might take the position that they should be considered general DPDs, but given that the reproduction of a phonorecord as part of a Limited Download is incidental to the purpose of the transmission to give the user access to performances of the music under limited conditions, this seems clearly incorrect.

