Before the United States Copyright Office
Library of Congress

Request for Public Comment	)	
	)	**37 C.F.R. Part 255**
	)	**Docket No. RM 2000-7**
Mechanical and Digital Phonorecord	)	
Delivery Compulsory License	)	**April 23, 2001**
	)	

Comments of Consumer Electronics Association
and Clear Channel Communications, Inc.

The Consumer Electronics Association ("CEA") and Clear Channel Communications, Inc. ("Clear Channel") submit these comments in response to the Copyright Office's March 9, 2001 Notice of Inquiry, 66 Fed. Reg. 14,099, regarding the Mechanical and Digital Phonorecord Delivery Compulsory License. Commenters have a vital interest in copyright law as it applies to Internet streaming and the devices used to receive content over the Internet.

Despite its apparently narrow focus on the section 115 mechanical license and incidental "digital phonorecord deliveries," the issues addressed in the NOI have potentially broad applicability to Internet streaming and to other transmissions of content over digital networks as well as to the devices that receive those transmissions. Indeed, the NOI raises fundamental issues of the relationship between performances and reproductions over a medium that necessarily creates incidental "copies" of portions or all of a work with no other purpose or effect than the dissemination of a performance. Commenters respectfully believe that in such cases, the performance is the only economically meaningful activity that occurs, and any copies that may be created as a necessary incident of such performances are not and should not be subject to authorization or licensing separate from the licensing of the underlying performance.

Moreover, any determination that streaming creates compensable copies or phonorecords, either in-stream or in the receiving device (whether as incidental DPDs or otherwise), would exacerbate rather than resolve the confusion that currently exists in connection with the digital performance of recorded music. For example, as discussed below, such a determination would be wholly inconsistent with the detailed statutory licensing scheme enacted in the 1998 amendments to section 114 and 112 applicable to Internet streaming, a scheme that already suffers from substantial inconsistency and confusion.

There is no doubt that there are gaps in the current law as it applies to the transmission over the Internet of digital performances of recorded music. However, Commenters believe that these gaps cannot be resolved by declaring streams to create "DPDs." While clarification of the law would be beneficial, it must come from Congress.

The Interest of Commenters

Clear Channel is the largest radio broadcasting company in the nation, with approximately 1200 AM and FM broadcast radio stations. Many of Clear Channel's radio stations have streamed, and intend in the future to stream, their broadcast programming over the Internet. In addition, Clear Channel operates a number of Internet-only webcasts. Clear Channel has substantial interests in ensuring that copyright laws are adapted rationally to the digital environment, in order to foster the growth of streaming while providing reasonable protection to the interests of copyright owners of sound recordings and musical works.

CEA is the oldest and largest trade association representing manufacturers of consumer electronics devices. Its members include more than 650 U.S. manufacturers of audio, video, mobile electronics, communication, information and multimedia products and accessories sold to consumers, including products that play recorded and transmitted music. Many of CEA's

members are, or are contemplating, the development and production of products that receive audio streams and other content over the Internet. As such, CEA has an interest in seeing that streaming is not inhibited by uncertain, duplicative and burdensome copyright laws and in ensuring that manufacturers of such devices do not face claims of liability for the copies made by those devices.

The Relationship of Performance and Reproduction on the Internet

The NOI asks whether incidental buffer and other in-stream "copies" produced as a technological incident of performances rendered by Internet streaming are subject to the control of the copyright owner and generate a liability for payment of the mechanical license fee applicable to incidental DPDs. Commenters submit that such "copies" cannot be treated separately from the performance of which they are a part, and do not and should not generate independent copyright liability.

If copyright law is to move smoothly into the new Millennium and onto the Internet, it must be construed in accordance with a common-sense view of economic reality. Historically, the bundle of copyright rights matched the different means by which a work could be exploited. Thus, the making of a public performance required a license to make the performance; the reproduction and distribution of copies required licenses for those rights. In the rare cases where a single economic activity incidentally required the exercise of multiple rights, the law either provided an exemption (e.g., the section 112(a) ephemeral recording exemption for copies made solely to facilitate performances) or the existence of a single licensor and licensing regime obviated any inefficiency, and led to a unitary payment to a single payee.

Such construction makes economic sense. When the economic activity is a performance—in other words, the transmission of a work in real time in order to provide a real-

time listening experience for the recipient—and that performance is licensed, the copyright owner is fully compensated for the use of his or her work by the fees it receives for the performance. The mere fact that the technology chosen to make the performance, or the device that receives the performance, incidentally operates by making "copies" of all or parts of the performed work in order to effectuate the performance adds no value to the recipient or to the transmitter; it should not create added liability. Any other approach would cause mass confusion, inhibit the providing of new, desirable products and services to consumers, and result in unwarranted double-dipping by the same copyright owner for the same use of the same work.

Nowhere are the problems of multiple rights and attempts to double dip more clear than in the case of recorded music. Any entity that wishes to create a service based on the use of recorded music faces an inscrutable morass of multiple copyrighted works, multiple copyright owners, multiple agents authorized to license different rights in the same work on behalf of the same owner, and multiple, and often inconsistent, legal rules and systems governing the licensing of those rights. Any entity that wishes to build a device to receive streamed music should not face a claim that the device is making unauthorized copies. It should not be surprising that new legitimate markets and means to bring recorded music to consumers have been slow to develop and that consumers have attempted to turn to illegitimate alternatives.

Any decision on the issues presented by the NOI must take into account the economic purpose and technical realities of the conduct at issue. The decision must not be hide-bound to a formalistic, dogmatic view of distinctions developed to accommodate different technologies and different means of exploitation. When a performance of a musical work or sound recording is licensed, the copyright owner receives full compensation for the use of his or her work in connection with that performance. That should end the matter.

Potential Effect of the NOI on Internet Streaming and Receiving Devices

Wholly apart from the economic issue discussed above, Commenters are concerned that a decision that on-demand streams create incidental DPDs would wreak havoc upon the statutory scheme that has been put in place for non-subscription and subscription Internet streaming in sections 112 and 114. Although the RIAA's Petition and NMPA's currently-announced claims for compensation focus on "on-demand" streaming, neither party has, to our knowledge, provided any explanation for why the same principles would not also apply to subscription and non-subscription streaming. The technologies used for all streaming are fundamentally the same. The same types of "copies" are made in-stream and as buffers in recipient devices and, in many cases, the same types of source copies, server copies and cache copies, are used. Before the Copyright Office considers adoption of a rule for on-demand streaming, petitioners must provide a cogent explanation of why the same rule would not also apply to subscription and non-subscription streaming.

Further, RIAA has provided no explanation of why any decision that buffer and other in-stream copies are compensable DPDs would not apply to the sound recording as well as the musical work. In order for a DPD to exist (incidental or otherwise), a phonorecord must be created. If this phonorecord creates a right to compensation for the owner of the copyright in the musical work, does it not also create such a right for the owner of the copyright in the sound recording? In short, any decision with respect to the existence or non-existence of a DPD in the case of on-demand streaming, would appear also to be a decision that subscription and non-subscription streaming create compensable copies of the streamed sound recording.

The conclusion that non-subscription and subscription streaming create compensable phonorecords would fly in the face of the detailed scheme adopted to govern such streaming in

sections 114 and 112, as amended by the 1998 Digital Millennium Copyright Act. In its 1998 amendments to section 114, Congress adopted a painfully detailed statutory license for the public performance of sound recordings by non-subscription and subscription Internet streaming. In enacting this license, Congress was well aware of the transactional impossibility facing such streamers if required to negotiate and secure licenses from copyright owner of a streamed sound recording. It defies credulity to suggest that Congress intended that a streamer, having secured the performance right by statutory license or statutory exemption, would nevertheless be required to negotiate with each sound recording copyright owner to secure the right to cause "incidental phonorecords" in the transmission stream and in the receiving device. To the contrary, the statutory license only makes sense if Congress concluded that such copies were not subject to the control of the copyright owner. It follows that they are not "incidental DPDs."

Another questionable result of a finding that buffer copies are "incidental DPDs" could arise in connection with the Audio Home Recording Act. Congress certainly did not intend to define devices that receive transmissions in order to make performances to be "digital audio recording devices." However, a finding that a buffer is a "phonorecord" could lead to the argument that the receiving device has a "recording function" that qualifies it as a digital audio recording device, subject to the AHRA royalty. Such a result was not contemplated and should not be countenanced.

The Applicability of the Mechanical License to "Copies" Used in Streaming

Commenters understand RIAA's concern with the apparent absence of any means to obtain the right under the musical work copyright to create the source copies used for streamed performances. Indeed, similar questions also are raised in the context of non-subscription and subscription streaming in light of the differential treatment of sound recordings and musical works

in section 112(e). However, Commenters question whether the section 115 mechanical license is an appropriate means to resolve this concern.

First, the underlying purpose of the 1995 amendments to section 115 does not appear to be related to streamed performances, or any performances, for that matter. Streaming is mentioned nowhere in the legislative history to these amendments. When Congress introduced the concept of DPDs in the 1995 expansion of the section 115 statutory license, it did so to clarify the continued applicability of publishers' mechanical rights in new, electronic *distribution* activities, not to create a new mechanical right in incidental copies existing solely to effectuate *performances* such as Internet streaming. "[Section 115 covers] infringement when phonorecords embodying [copyright owners'] works are delivered to consumers by means of transmissions rather than by means of phonorecord retail sales. The intention [is to] *maintain and reaffirm* the mechanical rights of [publishers] as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes, and CDs. The intention is *not to* substitute for or *duplicate performance rights in musical works*." S. Rep. 104-128, 104th Cong., 1st Sess. (1995) at 37 (emphasis added). Fragmentary or incidental buffer "copies" used in connection with a real-time stream are not analogous to copies used in connection with the distribution of traditional, physical media by a consumer. Nor do source or server copies used in performances have anything to do with the mechanical license or physical distributions.

Second, none of the "copies" at issue appear to meet the statutory definition of a DPD, which is a "specifically identifiable reproduction by or for the transmission recipient." As the legislative history makes clear, it is the *transmitting* service that must be able to specifically identify the reproduction resulting from the DPD. *See* S. Rep. 104-128 at 44. Any party

advocating a rule that streaming creates DPDs must explain how the definition of DPD is satisfied in the context of streaming.

Third, the section 115 DPD license is ill suited to the needs of streaming services. The license requires the service of individual notices on the musical work copyright owners and the payment of a fee for each "copy" that is made. This requirement stands in sharp contrast to the way in which musical work performances are licensed—by blanket, full repertory licenses that do not require advance notification or, in most cases, the tracking of uses.

In short, if there are gaps in existing law, it is doubtful that section 115 provides an appropriate fill. Commenters are interested to see how others address the issues set forth above. However, it appears to Commenters that the only reasonable argument for the absence of any statutory license for source and server copies of musical works is that Congress concluded that such copies made for licensed performances were already exempt from liability as fair use.

Questions that Must Be Answered

Commenters believe that any party advocating a rule that on-demand streaming creates compensable DPDs must answer numerous questions. Specifically:

1. What is the economic justification for allowing multiple recoveries by the same copyright owner for the same act?
2. How is on-demand streaming distinguished from subscription or non-subscription streaming?
3. Would a finding that streaming creates an incidental DPD also create added rights to compensation for sound recording copyright owners?
4. How can such sound recording rights be reconciled with the section 114 and 112 statutory licenses applicable to streaming?
5. Are devices that receive Internet transmissions "digital audio recording devices" by virtue of the making of buffer copies?

6. How does adding the reproduction right to streamed performances effectuate the legislative purpose of section 115?

7. How do in-stream and buffer "copies" meet the definition of DPDs?

8. As a practical matter, how can the section 115 license requirements be applied to streaming services?

We look forward to any answers that may be offered by those who support the claim that streaming creates "incidental DPDs."

Respectfully submitted.

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