Before the Library of Congress
United States Copyright Office

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

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.[1] 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.

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[1] "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).

When Internet businesses (and even the world's largest recording company) cannot launch new interactive services that consumers want, and that will generate millions of dollars in performance rights and retail sales, without risking lawsuits for hundreds of millions of dollars in damages, something has gone profoundly wrong with our copyright regime. Two facts are clear beyond contravention:

- The current marketplace for licensing music online is dysfunctional in ways that undermine Congress' intention in creating the statutory licensing framework; and,

- Swift governmental intervention is needed to set the market aright.

DiMA therefore respectfully submits that, in response to the dueling petitions filed by the Recording Industry Association of America ("RIAA") on one hand, and the National Music Publishers Association ("NMPA") and the Songwriters Guild of America ("SGA"), the Copyright Office should undertake the following procedures and findings:

1. Streaming (whether interactive or noninteractive) does not create an "incidental DPD."

2. A CARP should be convened, if necessary, to set rates for DPDs, including Limited Downloads.

3. No CARP should be instituted to set rates for incidental DPDs until and unless the petitioners who seek a CARP can identify and define a particular type of existing communication that constitutes an incidental DPD.

4. Although the Copyright Office has authority to issue the above findings, these findings alone may not be sufficient to lay the necessary legal foundation for compelling new online music services, such as subscription and locker services. Thus, these proceedings alone may not resolve the fundamental dilemmas created by strained interpretations of existing laws, and the inability to secure music licenses for the new services consumers want most.

Therefore, Congress should, at minimum:

a. Clarify that transient copies made during authorized streaming performances (noninteractive and interactive) are exempt from copyright liability; and,

b. Recognize (as has been the practice with respect to terrestrial broadcasting for decades) that multiple server copies of musical works used to facilitate licensed performances and downloads have no independent economic value, and so, consequently, should be either clearly exempted from any copyright liability or explicitly made subject to statutory licensing.

Comments to Questions Presented

1. Streaming Does Not Create an "Incidental DPD."

The DPRSRA creates a class of incidental DPDs "where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery." 17 U.S.C. § 115(c)(3)(C). This provision incorporates by reference the definition of "digital phonorecord delivery," which is a delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for a transmission recipient of the phonorecord. 17 U.S.C. § 115(d).

As the statute and legislative history make clear, amending the section 115 mechanical license to clarify the legal basis for distribution of DPDs was intended only as an adaptation of existing law of mechanical licenses, not to bestow new rights over performances. The Senate Report notes:

> [T]his section is intended to confirm and clarify the right of musical work and sound recording copyright owners to be protected against infringement when their works are delivered to consumers by means of transmissions rather than by means of phonorecord retail sales. The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music 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 CD's. The intention is not to substitute for or duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers.

S. Rep. No. 104-128 at 37. See also H.R. Rep. No. 104-274 at 28, referring to Congress' intention to confirm the application of existing mechanical rights to certain distributions of phonorecords by digital transmission. Use of words like "confirm," "clarify," "extending," "maintain" and "reaffirm" demonstrate that the provision was not intended to enlarge the existing compulsory mechanical license regime. Congress made clear that the purpose of the provision was simply to apply mechanical license rights to traditional acts undertaken by new technological means: the use of digital transmissions to make retail sales of phonorecords. It was not intended to equate every digital performance with the pressing of a compact disc.

The requirement that a DPD must be a "specifically identifiable" reproduction, the legislative history explains, means that the reproduction must be "specifically

identifiable to the transmission service." S. Rep. No. 104-108 at 44; H.R. Rep. No. 104-274 at 30. Whether a user actually makes a copy of the phonorecord (e.g., by traditional fair use acts of home recording) is therefore irrelevant, unless the transmission service intended that that specific phonorecord be made; and, in light of the legislative purpose of section 115, that such phonorecord delivery be in the nature of a "phonorecord retail sale."

In the case of streaming, the transmitting entity does not intend for the stream to be reproduced in a phonorecord. To the contrary, the sole purpose of the transmission is to facilitate real-time listening in a manner indistinguishable from the receipt of radio waves. Indeed, Congress emphasized these distinctions between streaming and phonorecord reproduction in enacting the section 114 "webcasting" license. Under the DMCA statutory sound recording performance license, transmitting entities should set the transmission technology (e.g., RealPlayer and Windows Media Player) to limit the making of phonorecords by the transmission recipient. [2] Therefore, transient cache and buffer copies created because of the technical requirements of transmission should not be considered DPDs. [3]

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[2] Thus, these partial buffers made to satisfy the technical requirements of IP transmission are readily distinguishable from the hypothetical situations posited in the 1995 DPRSRA Senate Report (although not in the later House Report), which suggest that an incidental DPD might be created where an entire sound recording intentionally is downloaded at high speed to a user storage device for listening (e.g., a Limited Download) or for further copying. S. Rep. No. 104-128 at 39. In those cases, the method of delivery involves the deliberate downloading of an entire phonorecord to the consumer. This is not only consistent with the nature of Internet technology as then understood by Congress, but also reflects the intention of the transmission service that a copy be made and, for some period of time, retained. By contrast, streaming by its nature does not involve the downloading of a file, or the making of an entire copy; and, as noted, the transmission service can take steps to thwart the making of such a copy.

[3] To further illustrate this point, the size of the memory buffer in ISP caches or the transmission recipient's computer is dictated by externalities not controlled by the transmission service. For example, the size of the buffer will vary depending upon the bandwidth of the user's Internet connection; the processing speed of the user's computer; the extent of Internet network congestion; the capacity of the user's Internet service provider; the use of multicast transmission technology; and the efficiency of the software product installed on the user's computer. In the future, ultra-high speed connections and computing equipment could significantly shrink, or even eliminate, use of this buffer. Therefore, it would be illogical as a matter of law to declare streaming caches or buffers to be reproductions that are "specifically identifiable" to the transmission service, when the size and existence of the buffer essentially remains beyond the service's control.

These cache and buffer copies should specifically be exempt from any claim of copyright infringement. The Copyright Office report on distance education recommended that transient reproductions made as part of an automatic technical process of transmission should be exempt, and that recommendation has been incorporated in S. 487, the Technology, Education and Copyright Harmonization ("TEACH") Act of 2001.[4] Similarly, the March 2001 Department of Commerce National Telecommunications and Information Administration recommended that "further Congressional consideration of whether an extension of the principles underlying Section 117 to buffered content stored in RAM, as required for playback of Internet webcasting, is warranted."[5] Indeed, the Copyright Directive recently adopted by the European Parliament of the Copyright Directive, intended to implement the 1996 WIPO Copyright and Performances and Phonograms Treaties, includes a provision that similarly exempts the making of transient copies that are part of automatic technical processes such as the real-time performance of sound recordings over the Internet.

Therefore, the Copyright Office should declare that the transient retention of small portions of sound recordings in a cache or memory buffer do not constitute "incidental DPDs."

2. DiMA Would Support a Rulemaking and an Arbitration to Set "Limited Download" Rates.

Many DiMA members offer music downloads that are intended to be recorded by the consumer (i.e., are not delivered in "real time" and are "specifically identifiable" to the transmitting service), and that, once recording is complete, can be played by the consumer for a limited period of time, such as 30 days. Typically, these downloads are

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[4] The TEACH bill provides, in pertinent part, that it would not constitute an infringement of copyright for an educational institution, in the course of performing a nondramatic musical work by transmission, to reproduce the work in transient copies or phonorecords created as a part of the automatic technical process of a digital transmission, and to distribute such copies or phonorecords in the course of such transmission, to the extent technologically necessary to transmit the performance or display. The exemption further requires that any transient copies can be retained for no longer than reasonably necessary to complete the transmission. In other words, the bill clearly would insulate from copyright liability any phonorecords made during the course of Internet streaming transmission. Hence, such phonorecords could not be deemed to be "incidental DPDs" subject to a compulsory or other license right.

[5] *Report to Congress: Study Examining 17 U.S.C. Sections 109 and 117 Pursuant to Section 104 of the Digital Millennium Copyright Act* (March 21, 2001). http://www.ntia.doc.gov/ntiahome/occ/dmca2001/cover.htm

offered for promotional purposes. For example, a single track from a forthcoming or recently-released disc may be made available for downloading so as to stimulate sales of the full disc. Or, alternate or live versions of the album tracks may be offered, to maintain CD sales or promote a forthcoming concert tour.

Downloaded files that reside on the user's computer with restrictions on the duration or number of plays could be classified in a number of ways. One possibility, as the RIAA suggests, could be to consider these tracks to be authorized rentals of sound recordings under 17 U.S.C. § 115(c)(4). However, these limited downloads also share the characteristics of the temporary download, for the purpose of listening, contemplated by Congress as an "incidental DPD" in the legislative history of the DPRSRA.

DiMA supports a rulemaking to define the category under which these limited downloads can be classified. If the Copyright Office determines that they are "incidental DPDs," then setting the rate would be appropriate for a CARP.

3. The Copyright Office Should Recommend a Legislative Solution to Facilitate the Making of Multiple Ephemeral Server Copies.

The RIAA's suggestion that buffer copies are incidental DPDs, subject to the section 115 compulsory license, thinly disguises the actual concern underlying its petition: the inability of online services to obtain the rights necessary to make the multiple copies necessary to serve sound recordings to subscribers in multiple encoding formats, optimized for delivery over multiple bandwidth speeds. This issue presented by the RIAA petition lies also at the core of the Complaint in Rodgers and Hammerstein v. Universal Music Group. It is the same problem haunting the efforts of DiMA members and others to create a legitimate and viable marketplace for certain online interactive services.

On April 3, 2001, at a hearing entitled "Online Entertainment: Coming Soon to a Digital Device Near You?", the Senate Judiciary Committee heard testimony from executives from online enterprises explaining how the inability to obtain timely license rights from music publishers stifles development of compelling new interactive subscription services.[6] Despite obtaining licenses from record labels to distribute and perform the sound recordings from record labels, and from performing rights societies to perform the musical compositions, these services are no closer to offering consumers the ability to hear music of their own choosing at their own convenience – because of positions taken by certain music publishers (and their agents) to the effect that these multiple server copies require additional licenses.

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[6] See testimony at http://www.senate.gov/~judiciary/hr040301f.htm.

These multiple copies are technologically necessary to facilitate performances, but their economic value is intertwined with and inseparable from the value of the performances themselves. The copies are valueless other than in light of the value of the performance itself. And, of course, music publishers and songwriters would be entitled to receive the negotiated compensation for those performances from the online entities. Yet, the music publishers' assertion of rights over the technical means of performance (i.e., server copies and transient buffers) has delayed development of the online music market, to the detriment of copyright owners who otherwise might earn additional income from these services.

The market needs a prompt resolution of this stalemate. Because the impediment arises from copyright law, DiMA believes that a legislative or regulatory solution must be applied. Thus, DiMA urges the Copyright Office to recommend that Congress either exempt these multiple server copies from further copyright liability or supplement the existing statutory license regimes to expressly cover the making of multiple server copies of musical compositions.

4. The Scope of the Potential Arbitration

DiMA agrees with the Copyright Office that the RIAA and NMPA/SGA petitions are conceptually related to one another. As a practical matter, resolution of certain of the issues in the petition may smooth the path to negotiation of the remaining issues, thus obviating the need for a CARP proceeding. Therefore, as a matter of procedure, DiMA reiterates its suggestion from its January 16, 2001, letter, that the Copyright Office determine the underlying legal issues first, before addressing the rates and terms of any necessary statutory license rights.

More specifically, the Copyright Office first should determine that the technical copies made during the process of streaming do not create "incidental DPDs." DiMA respectfully submits that this need not be done through a rulemaking proceeding, inasmuch as Congressional intent to differentiate between streaming and downloading is unambiguous. As noted in section 1 above, Congress intended the compulsory DPD mechanical license to cover the digital equivalent of phonorecord retail sale. The Copyright Office could decline to initiate the requested rulemaking proceeding on grounds that it is clear, on the face of the statute, that these technical buffer and cache copies do not constitute "incidental DPDs." However, should the Copyright Office believe it more advisable to conduct a full rulemaking proceeding to determine the issue, DiMA would support it.[7]

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[7] The Copyright Office has stated in prior contexts that it possesses the authority to interpret section 115 "in accordance with Congress" intentions and framework and, where Congress is silent, to provide reasonable and permissible interpretations" thereof. 65 FR 14227, citing 57 FR 3284, 3292 (January 29, 1992). See also Satellite Broadcasting and Communications Ass'n of Am. v. Oman, 17 F.3d 344, 347 (11th Cir.

As noted in section 2, DiMA also would support a rulemaking to determine the appropriate classification of a Limited Download as an incidental DPD or record rental.

Once these issues have been decided, DiMA believes that the path may be sufficiently clear so that rates and terms may voluntarily be negotiated for the applicable statutory licenses. If a CARP remains necessary, the arbitration should address the DPD rate and, potentially, the rate for Limited Downloads.

Finally, the arbitration should address the rate for incidental DPDs only if the petitioners demonstrate that a class of incidental DPDs in fact exists and define specific species of incidental DPDs within that class. As the Copyright Office observed in its notice, Congress created the category of incidental DPDs without further defining them. Unless such a class of incidental DPDs actually exist at this time, there is no reason to empanel a CARP to set rates and terms for a null set of services.

If a class of incidental DPDs is found, the services within that class should be clearly defined before direct cases in the arbitration are required to be filed. Since 1997, the Copyright Office has been presented with some extravagant contentions about classifying even noninteractive streaming as incidental DPDs. Before embarking upon an arbitration over rates and terms for an incidental DPD license, the parties who might be affected by the license rates and terms are entitled to a specific identification of what they are being asked to pay for. Otherwise, parties that should participate in the arbitration may lack sufficient advance notice that their rights may be affected by the proposed CARP, and those who intend to participate will not have sufficient advance notice of the rates and terms to be set.

Thus, advance identification of specific services claimed to constitute incidental DPDs will benefit not only those parties who will or should participate in the arbitration, but also will bring certainty to the online music market by assuring new music services whether their businesses may be eligible for a statutory license. DiMA therefore submits that it should be incumbent upon the petitioners to define such services before the issuance of any notice of intention to participate in a CARP to assess the rates and terms applicable to those services.

1994), and Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc., 836 F.2d 599 at 608-09 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988) In this proceeding, as the Copyright Office Notice acknowledges, Congress has failed to provide a detailed or specific definition of "incidental digital phonorecord delivery." See Notice at 14099 ("However, Congress did not define what constitutes an incidental DPD, and that omission is the source of today's Notice of Inquiry.") Indeed, Congress does not even use the term "incidental digital phonorecord delivery" in the statute itself. DiMA therefore believes that the Copyright Office should tread carefully so as not to broaden the "incidental DPD" beyond the intended scope of phonorecord retail sales.

Conclusion

DiMA expresses its appreciation to the Copyright Office for its willingness to address, once again, the legal standards and principles needed to resolve issues of copyright law vexing the development of the online music marketplace. In this instance, DiMA has suggested a procedure to narrow the issues before the Office, and to assure that any arbitration implicates only those services and parties that have a direct interest in the outcome. We look forward to replying to the Comments of other parties, and express our willingness to address any further questions you may have.

Respectfully submitted,

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