Before the
COPYRIGHT OFFICE of the
LIBRARY OF CONGRESS

Mechanical and Digital Phonorecord Delivery Compulsory License

[Docket No. RM 2000-7]

Comments of Supertracks.com, Inc.

Supertracks.com, Inc. ("Supertracks"), an Oregon Company involved in delivery of various types of digital content utilizing the Internet, is pleased to take this opportunity to submit comments in response to the notice of inquiry published in 66 Federal Register 14099 on March 9, 2001 by the Copyright Office of the Library of Congress to address the interpretation and application of the mechanical and digital phonorecord compulsory license to certain digital music services under 17 U.S.C. 115.

Testimony

Introduction

Supertracks is a member of the Digital Media Association (DiMA), and as such defers addressing many of the questions raised in the call for comments, to the comments which are being provided by DiMA. Nevertheless, we do feel it is important that we provide comment to some of the issues raised in order to bring specific market examples to industry-wide concerns.

In the conclusion of the call for comments published in the Federal Register, the statement is made that some of the means of digitally delivering music to consumers have been brought to the awareness of the Copyright Office, and yet there may be others existing or contemplated. The statement concludes by inviting comment on these other technologies or services whose existence might have an effect on the interpretation of section 115. To this end we provide the following comments.

The Rise of Digitally Delivered Entertainment

Technology stock plunges and the rise of Napster dominated the press coverage of the Internet in the last year, but quietly, another major Web phenomenon was taking shape and resolutely gaining ground: Internet radio. Last year more and more U.S. Internet users began listening to music online, and listening online for longer periods. Arbitron reports that aggregate tuning hours for webcasting and Internet radio grew from 5 million in July 2000 to 7.4 million in August—a 48 percent increase in one month![1] As Microsoft's Steve Ballmer proudly proclaimed at the Streaming Media West conference in December 2000, more people now listen to Internet radio than watch Monday Night

[1] "The Broadband Revolution," Arbitron, 2000

Football (35 million listened to online streaming in November, 2000, according to Nielsen Net Ratings—a 65 percent increase in one year).

Napster, the revolutionary music file-sharing system, not only stunned the music industry in the last year by building a registered user base of over 50 million fans,[2] but also, according to a recent Jupiter Communications report, signaled that "online music has become a mass-market phenomenon."[3] Listeners of all ages are using the Internet to gain access to their favorite music:

26 percent are 18 to 24 years old
25 percent are 35 to 44 years old
22 percent are 24 to 34 years old
20 percent are 45 to 54 years old
8 percent are 55 years old and over.[4]

In November 2000, 47 percent of U.S. home computer users used a media player, while 40 percent used a streaming media player.[5] Music and other forms of rich media are increasingly in great demand by online consumers. Hardware manufacturers, network builders, wireless providers, content delivery and digital storage vendors and a host of other companies are investing feverishly to bring ever more digital delivery and storage capacity to the home and office.

Consumers, for their part, are continuing to invest in a variety of new digital devices and services supplied by such vendors. They are becoming more and more network-savvy, and are demanding interesting and compelling new content, and new models of access, for their new devices.

Despite the innovations and technical achievements which have made it possible to deliver high-quality, in-demand music over the Internet, there remain questions of legal interpretations regarding whether the mechanical and digital phonorecord compulsory license under 17 USC 115 can be applied to a service or enabling technology. These questions put any business engaging in the distribution of content over the Internet in a potentially perilous position, and have a direct dampening affect on its business efforts.

Supertracks

Early in 2000, Supertracks began exploring a novel streaming concept that synthesized existing digital rights management (DRM) technologies, conventional file downloading systems, local desktop caching, and a new proprietary rules engine that embodies the Digital Millennium Copyright Act (DMCA) to assure legal compliance.

---

[2] Napster, Inc. *Response to Ninth Circuit Court of Appeals Ruling on the U.S. District Court Injunction in A&M Inc v. Napster*, February 12, 2001
[3] Jupiter, Online Music Radio, December 2000
[4] Harris Interactive, August 2000
[5] Media Matrix, January 22, 2001

Supertracks has developed this novel streaming concept into a new and complete Internet radio system. Our key goal was to bring to market a technology solution that would enable webcasters to control costs, protect copyright holders, and produce a higher quality listening experience for consumers—all while complying with Federal copyright law. We call the technology developed by Supertracks to accomplish these goals "BridgePort™." The heart of BridgePort is a particularly elegant and robust rules engine component, which has the ability to manage music so that it meets the requirements of the law, while providing the listener with a compelling and satisfying music experience and also optimizing the network of the Internet.

A key element of BridgePort is an obfuscated and encrypted cache. BridgePort works by positioning this secure cache on an end user's hard drive, then storing an encrypted stream of content to this secure cache. When the end user turns his desktop software player on, the secure cache is the source of the streaming content. Using BridgePort as the streaming source means that playback quality is unhampered by network delivery anomalies. The application does not facilitate a download for end consumption by a consumer; in fact, it deliberately and actively prevents downloading of the music.

BridgePort is, in fact, a proxy server located inside the end user's computer, and as such is the last element of the Internet architecture for the delivery of streamed content. This is not a time shift of content by consumers, nor is it a download they can access. The cache is never intended, nor does it act, as the final repository of the content file in BridgePort. Content does not remain permanently; it expires in accordance with DMCA stipulations, or even earlier. There is no additional use being made of the content in the cache.

Because of BridgePort's' architecture, it becomes possible to enforce and track the legal rights of copyright holders in ways never possible before. As content is streamed from the BridgePort application, a transaction record is created. This record tracks in exact numbers the times a song was reproduced or performed, which ensures that the appropriate rights owners can be paid accurately for use of the content. Tracking content consumption becomes an exact science, not an exercise in statistical sampling. For the first time rights owners can know the exact use of their works and have the framework to be paid precisely for each use.

The BridgePort rules engine ensures that all music is in compliance with copyright laws and business policies. It will only allow a song to play, that when played, will be in conformity with all the rules of the DMCA. The BridgePort rules engine enables BridgePort to keep automatic, accurate records of all songs and advertisements played, and provide meticulous reports for copyright royalty payments and advertising tracking. The rules engine can personalize a particular channel to a unique listener's requirements, to whatever degree a webcaster chooses that is not prohibited by law. Legal compliance with the DMCA does create certain substantial limitations in this regard, but it also offers considerably more flexibility than has been generally exploited to date (especially with respect to user feedback leading to music rotation weighting,

which can be accomplished without direct interactivity). In applications where music is licensed from the copyright owner, personalized options are almost unlimited, creating custom channels for each user.

Comment

It's clear that Internet users love to listen to music over the Net, yet the online streaming industry is in serious trouble. Streaming media operations are bleeding red ink, and stock prices of many companies in the sector are way down. If the business environment was not bad enough, there is the additional problem of an uncertain legal environment that has a direct affect on the ability of a company to navigate the already stormy seas. In fact, it is this uncertain legal environment that has had a direct negative affect on continued investment in this industry, which in turn has affected the overall economy.

Copyright law strives to balance two principles: protection of copyright holders' rights in their creations, and the right of the public to have access to those creative works. In the last six years two significant pieces of legislation have been passed which attempt to strike a balance between these competing principles in an environment of ongoing digital change. These two acts are the Digital Performance Right in Sound Recording Act of 1995 (DPRA) and the Digital Millennium Copyright Act of 1998 (DMCA). Although the intent of these acts is clear, actual implementation has put the current legal environment of digital music in great turmoil for music accessed or listened to via the Internet, and for music played in consumer digital devices. Technology has leaped far beyond what the "black-letter law" contemplated concerning how music is delivered to an end user by means of the Internet. Section 115 raises many legal questions about delivery of music over the Internet that need to be answered in light of the realities of the technology. Each and every copy produced in the course of an Internet transmission should not trigger a legal liability of payment of a content owner.

In simple terms, the following is how a music file must be copied in order for it to be transmitted as a stream to a final listener:

- One of the first steps for delivery of music is the making of a copy of the good to be delivered on a server. This often necessitates creating multiple "masters" of the same song in differing formats, in order to fulfill potential consumer needs that exist in differing formats. In today's market there is no uniformity, no standardization, in types of music players for digital music, or formats for accepting digital music on personal computers or portable devices. The same holds true for other kinds of digital content.

- The server then must deliver that copy to other servers in the network that make up what is called the Internet: thousands of computers and servers, all interconnected. Some of these are called proxy servers, some routers; each performs an essential step in the transmission of a stream of music to the

person who will finally receive it on some kind of machine that will make the music perceivable to them, usually a personal computer (PC).

In reality, many copies of the music file may be made in proxy and edge servers before it ever reaches a machine where it can be rendered into a form a person can experience. Once it reaches a machine, a PC for example, the PC must make copies in the cache and RAM before it can be rendered perceivable by a person. All of these copies have to take place as the song file is passed along the network. These "transmission copies" cannot be accessed or used by the consumer; they have no salable economic value. These copies only have economic value inasmuch as they enable a final copy that can be rendered into some kind of perceivable form. They are no more and no less than a technical necessity for transmitting the final, consumable song file to the consumer.

Copyright owners are not losing potential revenue by the making of these various copies along the delivery line, because no revenue-generating event can occur until a consumer can listen to the song (whether downloaded or streamed). If these copies (that are made strictly for the purpose of transmission, storage and related non-revenue generating events) are not allowed to be exempt from copyright enforcement, from point of origin and along the network and in the RAM of a personal computer, the ability of the Internet to act as a cost-efficient conduit for delivery (and thusly as a revenue generator) is negated.

In the broadcast of music for a traditional radio signal, it is recognized as necessary that certain technical copies must be made in order to facilitate that broadcast. These copies do not trigger additional payments. The technology required to broadcast in the traditional way is well understood, as is the fact that copies are made of the music for the express, sole purpose of facilitating the ultimate broadcast. Likewise, this same recognition, understanding and agreement should apply to the parallel process of Internet broadcasting, as it concerns the copies made in the process of Internet broadcasting.

The only copy that should matter for the purpose of triggering a royalty payment is the one the consumer has the ability to consume. None of the other copies, including the one made in RAM, should be subject to copyright liability, as they are a part of a transmission process and are not the end product.

Conclusion

Congress, music executives, music publishers, music distributors and retailers, music broadcasters, software developers, consumer electronic manufacturers and artists are all looking for a solution in this current legal environment. Each wants to increase the availability of digital music to consumers while ensuring that payment for music used does, in fact, reach those entitled to receive payment. This can happen if the uncertainties of Section 115 are resolved in a way that truly reflects how the technology of Internet delivery works.

Ultimately, regardless of who has the authority to make rulings regarding: whether some or all the copies of a musical work made in an Internet broadcast are incidental Digital Phonorecord Deliveries (DPDs); whether temporary copies can be categorized as incidental DPDs; or, what is the definition of "incidental,"—these decisions must incorporate the realities of Internet transmission discussed above. The core consideration should not be whether a copy is permanent or temporary, but rather whether a copy is being made (immediately or in the future) accessible to an end user for consumption.

Respectfully Submitted,

Jeff Vanek
Director of Legal & Business Affairs
Supertracks.com, Inc.
700 NE Multnomah
Suite 1600
Portland, Oregon 97232
503-239-1515
jeff.vanek@supertracks.com