Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS

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

REPLY COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS REGARDING THE INTERPRETATION AND APPLICATION OF THE MECHANICAL AND DIGITAL PHONORECORD COMPULSORY LICENSE TO CERTAIN DIGITAL MUSIC SERVICES

The American Society of Composers, Authors and Publishers ("ASCAP") hereby submits these reply comments in response to the Notice of Inquiry ("NOI") of the Copyright Office (the "Office") of March 6, 2001, 66 Fed. Reg. 14099 (March 9, 2001) requesting public comment on the interpretation and application of the mechanical and digital mechanical phonorecord compulsory license, 17 U.S.C. §115, to certain digital music services.

ASCAP's Interest

ASCAP is the oldest and largest musical performing rights society in the United States with a repertory of millions of copyrighted works and more than 115,000 songwriter and publisher members. ASCAP is also affiliated with over 60 foreign performing rights organizations around the world and licenses the repertories of those organizations in the United States.

ASCAP members, as creators and owners of copyrighted musical works, enjoy exclusive rights in those works as are granted under section 106 of the Copyright Act. These rights include the right to perform the works publicly, the right to reproduce the works in copies and phonorecords and the right to distribute such copies and phonorecords. On behalf of its members and affiliated foreign performing rights societies, ASCAP licenses only their non-dramatic public performance rights.

The types of users to whom ASCAP grants public performance licenses are wide and varying, and include, for example, television and radio broadcasters, hotels, nightclubs and college and universities. As new means of technology have been created to transmit music, ASCAP has taken the lead in offering new forms of licenses appropriate to these mediums. Thus, as digital transmission of copyrighted musical works became possible over the Internet, ASCAP became the first performing rights organization to license these transmissions and now licenses thousands of sites.

The web sites that ASCAP licenses are likewise wide and varying and representative of the full diversity of sites performing music, including commercial and non-commercial web sites ~~**[??FCC licensed and non-FCC licensed webcasting sites??]**~~offering webcasting, on-demand streams and music downloads.

ASCAP's successful Internet licensing practices demonstrate that free-market negotiations do not inhibit the growth of digital music services. In fact, ASCAP's endeavors show that private licensing works and can readily evolve and adapt to meet the licensing needs of the myriad and growing number of web sites publicly performing copyrighted musical compositions.

ASCAP respectfully submits these reply comments for the sole purpose of urging the Office to focus on the single issue at hand – the interpretation and application of

Section 115 – the mechanical license – to certain Internet transmissions of copyrighted music.[1] Much as some commentators seek otherwise, the licensing of the right to publicly perform music is not the subject matter of the NOI and the Copyright Office should reject any and all such efforts to improperly broaden the scope of this proceeding.

The Copyright Office Should Limit This Proceeding To The Section 115 Mechanical Right.

ASCAP submits that the issues inherent in the licensing of digital music are complex. With the passage of the Digital Performance Right in Sound Recording Act ("DPRA"), Pub. L. No. 104-39, 109 Stat. 336 and the Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860, new rights were created in, and existing rights were extended to, the transmissions of copyrighted sound recordings and musical works in digital form. Due to the complexity of applying these new rights, not surprisingly, many of these issues have been at the forefront of Office proceedings and recent headline legal battles. See, e.g., In the Matter of Public Performance of Sound Recordings Definition of a Service, Docket No. RM 2000-3, 65, Fed. Reg. 77330 (December 11, 2000); A&M Records, Inc. v. Napster, 239 F.3d 1009 (9th Cir. 2001).

The Office issued the NOI in response to the petition and replies thereto filed by the Recording Industry Association of America ("RIAA") and certain Internet music users and copyright owners on the specific issue of the application of Section 115 to certain music transmissions, i.e., to on-demand streaming and limited downloads. Despite the limited scope of the NOI, certain commentators have decided to use their filings to campaign for the fusion of the public performance right with the rights of the mechanical license, a campaign that did not succeed and which Congress rejected when the DPRA was enacted.

[1] As discussed more fully below, ASCAP does not maintain that the Copyright Office should, or can,

In particular, the Consumer Electronics Association and Clear Channel Communications, Inc. ("CEA") and the Digital Media Association ("DiMA"), who represent numerous users of digital copyrighted music, disingenuously assert that this proceeding should focus on broadly clarifying "the relationship between performances and reproductions." E.g., CEA Comments at 1. To this end, in each of their comments, CEA and DiMA devote considerable attention to comparing the economic and legal relationships of mechanical licensing under Section 115 to those involved in the licensing of the Section 106(4) performance right. See CEA Comments at 1, 3, 4, 8; DiMA Comments at 2, 8. Their purpose in doing so is quite transparent; both commentators' objective is to blur what are indisputably two separate rights into one, and so encourage the Office to address matters related to the Section 106(4) performance right, a right that is and should remain wholly unrelated to Section 115.[2] To further their objective of writing the public performance right in certain Internet transmissions out of the Copyright Law, CEA and DiMA each offer their own "definitions" of "performance" ("the transmission of a work in real time in order to provide a real-time listening experience for the recipient", CEA Comments at 3-4; "streaming is a performance, whereas a download is a digital phonorecord delivery", DiMA Comments at 1). Another commentator similarly proffers a definition of "private performances" that serves its own economic business model, but does not reflect the current state of the Copyright Law, nor the specific application of Section 115 before the Office. MP3.com Comments at 7 (arguing that performances made on My.MP3.com are "private" performances). None of these "definitions" are supported by or included in the Copyright Act, and have nothing to do with the subject or scope of the NOI.

---

initiate a rulemaking proceeding to determine these issues.

[2] Indeed, CEA includes comment on the application of certain Internet transmitting activities to the Audio Home Recording Act, a subject completely irrelevant to the issue at hand.

The Copyright Office's Approach in this Proceeding.

Some commentators question whether the issue being addressed by the Office is properly before it. Specifically, whether the Office should and even can make a rulemaking, whether this is an issue for Congress, or whether no action should be taken and the issue should be dealt with through voluntary negotiations (or a CARP proceeding if voluntary agreements cannot be reached). ASCAP believes, as the National Music Publishers' Association and the Songwriters Guild of America (collectively, "NMPA") have suggested, that these issues are best addressed through voluntary negotiations. As noted at the outset, ASCAP has successfully negotiated thousands of Internet performance licenses and has consistently maintained that a successful licensing regime can best develop on its own, left to the interested parties. No comments have shown otherwise. Indeed, it is clear, and commentators have duly noted, that the delivery of music through online services is moving at "Internet Speed", RIAA Comments at 28. ASCAP is concerned that if the Office is dragged into lengthy and protracted proceedings or if the matter is left to the legislature, the resulting determinations will (1) be issued too late to resolve effectively the issues at hand and (2) not be able to anticipate fully new issues that evolving transmission technologies have yet to present. It seems imprudent to make technologically specific determinations in an emerging and quickly changing industry. See NMPA Comments at 10. Indeed, many of the commentators who request legislative action cite Congress's inability to predict the evolution of digital music delivery when the DPRA and DMCA where enacted.

Should the Office decide that it can and need be involved in this matter, ASCAP respectfully suggests that the Office focus solely on Section 115 issues and ignore those comments seeking to redefine the public performance right under Section 106(4). In the event a rulemaking proceeding is commenced, ASCAP will participate solely to ensure

adequate representation and defense of the public performing rights of its members and members of affiliated foreign societies.

Dated: May 23, 2001

Respectfully Submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By: Joan McGivern \ aff

Joan McGivern
Sam Mosenkis
ASCAP
One Lincoln Plaza
New York, NY 10023
Tel (212) 621-6204
Fax (212) 787-1381

By: I. Fred Koenigsberg \ aff

I. Fred Koenigsberg
White & Case
1155 Avenue of the Americas
New York, NY 10036

Tel (212) 819-8806
Fax (212) 354-8113