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	)	**May 23, 2001**
	)	

Reply Comments of the National Association of Broadcasters

The National Association of Broadcasters ("NAB")[1] respectfully submits these Reply Comments in response to the Copyright Office's March 9, 2001 Notice of Inquiry, the Mechanical and Digital Phonorecord Delivery Compulsory License, 66 Fed. Reg. 14,099 ("NOI").

I. Background and Summary of Position

Twice in the past six years, the development of digital technologies has prompted Congress to revise the sections of the Copyright Act that govern rights in both musical works and sound recordings.[2] Congress intended to effectuate these reforms "without upsetting the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." S. Rep. No. 104-128, at 13 (1995).

[1] NAB is a non-profit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

[2] Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"); Digital Millennium Copyright Act of 1998 ("DMCA").

To strike an appropriate balance among the various interests, Congress determined that certain types of digital services should fare differently from others under the statutory scheme. This is apparent, for example, in the distinctions made between different types of digital transmissions in the context of digital sound recording performance and ephemeral recording rights. At one end of the spectrum, those transmissions perceived to have the highest potential to displace record sales, such as those engaged in by "interactive" ("On-Demand") services, were made subject to voluntary licensing by individual rights holders. At the other end of the spectrum, those transmissions with no discernable displacement effect were exempted altogether. Non-interactive, "nonsubscription broadcast transmission[s]" are granted this exemption. 114 U.S.C. § 114(d)(1)(A).[3] Statutory differences in the treatment of these types of services should also inform the approach to the questions raised in the NOI.

In sum, the Copyright Office should not make any determination regarding On-Demand Streams that would adversely impact the exemption or licensing position of non-interactive real-time streams. To this end, the Copyright Office should ensure that any determination made regarding On-Demand Streams is carefully crafted to those transmissions. Furthermore, any such determination should not alter the position that temporary buffering in the course of non-interactive simultaneous streams do not constitute reproductions, and therefore do not create Incidental Digital Phonorecord

[3] In explaining its refusal to impose new burdens on FCC-licensed terrestrial radio broadcasters, Congress identified numerous features of radio programming that place such programming beyond the concerns that animated the creation of the limited public performance right in sound recordings in Section 106(6). Specifically, radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill FCC licensing conditions; (4) promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats." 1995 Senate Report, at 15. In particular, radio broadcast stations are subject to numerous "public interest" requirements in order to

Deliveries ("I-DPDs") under section 115.

II. The Copyright Office Inquiry into Incidental DPDS Should be Limited to On-Demand Streams and Should Not Impact Non-Interactive Simultaneous Streams

The NOI sets out a number of issues regarding the application of the section 115 mechanical compulsory license to "On-Demand Streams." In particular, the Copyright Office asks whether On-Demand Streams create I-DPDs under section 115.[4]

The Copyright Office, Petitioners and Commentors rightly recognize that the resolution of this question may depend on the nature of the streaming technology or service at issue.[5] While NAB does not seek to address this question in the context of On-Demand Streams, it does have a direct interest in this proceeding insofar as any resulting determinations regarding On-Demand Streams may impact the non-interactive streaming activities of its members.

The Copyright Office queries whether other types of streaming services in addition to On-Demand Streams should be addressed in its inquiry. NOI at 14102. NAB believes that to so extend the present inquiry is unwarranted and may unnecessarily complicate the licensing of other materially different forms of streaming. To avoid such an outcome, any ruling resulting from this proceeding should be appropriately tailored to On-Demand Streams. In particular, should the Copyright Office make any determination regarding On-Demand Streams, it should be careful to avoid making any generalized

---

obtain and maintain their FCC licenses that that do not apply to Internet-only webcasters. See 47 U.S.C. §§ 307, 309-10 (1998).

[4] Radio and television stations engage in streaming, but do not provide Limited Download services. Therefore, NAB confines its Reply Comments to the issues raised in the NOI pertaining to On-Demand Streams.

[5] For example, the Copyright Office queries whether distinctions should be made between On-Demand Streams and MP3.com's music locker service. NOI at 14101.

factual or legal conclusions that could, directly or by implication, adversely impact non-interactive real-time streaming. For example, if the Copyright Office were to determine that "buffering" that occurs in the course of On-Demand Streams results in a reproduction, such a determination should be expressly limited to those transmissions. The Copyright Office would thereby avoid adversely impacting non-interactive simultaneous streams which music publishers have never claimed constitute reproductions.

A. **Interactive (On-Demand) and Non-Interactive Streams Are Different**

As described below, currently, there are a number of different types or services for the streaming of music:

Interactive services (or On-Demand Streams): Often described as "celestial jukebox," "pay-per-listen" or "audio-on-demand" services, they enable a user to receive, on request, a digital transmission of the particular recording that that person wants to hear.[6] This interactive element brings a risk that listeners will use such services as a substitute for record sales. The "potential impact" such services may have to displace traditional record sales was an "important rationale" behind the Congress' decision to enact "a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings." S. Rep. No. 104-128 at 13.

Non-interactive services: It has become increasingly common for FCC-licensed radio stations to reach the public in two ways: through traditional over-the-air broadcasts, and through simultaneous transmission of their signals over the

Internet. This activity is known as "simultaneous" or "real-time" "streaming." Music content is transmitted as part of the station's general programming to members of the public at large. Users cannot obtain a transmission of a specific musical work they want to listen to when they want to listen to it. Therefore, such transmissions by FCC-licensed radio stations pose no threat to sales of sound recordings.

No additional license is required for an FCC-licensed radio station to stream its over-the-air radio broadcasts in this manner. Radio stations do not charge listeners any fee for receiving streamed radio broadcasts. The licensing of such transmissions is already subject to a detailed statutory scheme.[7] Thus, these non-interactive simultaneous streaming services are not the focus of the Copyright Office's present inquiry.

B. Music Publishers Make No Claim That Non-Interactive Streams Create Incidental DPDs

To NAB's knowledge, music publishers have never claimed that streams other than On-Demand Streams implicate their reproduction rights. *See* RIAA Petition at n.1. NAB endorses this conclusion. Indeed, NAB considers that non-interactive simultaneous streams do not involve the creation of a reproduction and therefore are not I-DPDs under section 115.[8] This conclusion follows from a plain reading of the relevant statutory definitions. It is also confirmed by the legislative history and is consistent with

---

[6] The NOI describes an On-Demand Stream as: "an on-demand real time transmission using streaming technology such as Real Audio, which permits users to listen to the music they want when they want and as it is transmitted to them." RIAA Petition at 2. *See also* NOI at 14100.

[7] Streaming of prerecorded musical works invokes public performance rights in the underlying musical work (§ 106(4)) and in the sound recording (§ 106(6)), as limited by the statutory exemptions and compulsory license provisions in § 114 and § 112.

[8] Indeed, NAB does not interpret the NOI or any of the Commentors to posit otherwise.

the overall statutory scheme. Copyright owners in musical works already collect performance license fees covering non-interactive, real-time streaming transmissions. There is no economic justification for imposing an additional mechanical license fee in circumstances where the exact same transmission is subject to a negotiated performance fee payable to the same copyright owner.[9]

III. Temporary or Transient Buffering in Non-Interactive Simultaneous Streaming Does Not Result in the Creation of Copies and By Extension, I-DPDs

The streaming technologies employed by FCC-licensed broadcasters generally involve the use of a temporary memory buffer to accumulate and correctly order data packets (each containing snippets of the work) in order for the work to be performed in a continuous listening experience at the user's computer. Notably, streaming software installed on the user's computer is not designed to enable the streamed content to be used by or available to the user once the stream is completed. The user's experience is no different than listening to a traditional radio broadcast.[10]

Several factors support the conclusion that such buffering does not constitute a reproduction and therefore does not create any I-DPDs.

A. An I-DPD Requires a Reproduction

A digital phonorecord delivery ("DPD") is defined in the statute as "a specifically identifiable reproduction by or for any transmission of a sound recording."[11]

---

[9] NAB is in general agreement with submissions of Commentors that any copies made solely to facilitate authorized performances streamed in digital transmissions should not incur copyright or fee liability independent of the authorized performance. However, NAB considers it is unnecessary to make such a determination at this stage.

[10] In contrast, file sharing technologies, such as Napster, require users to transfer ("download") an entire file before beginning to play it. This is more akin to purchasing a CD.

[11] 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. No. 104-128, at 44.

17 U.S.C. § 115(d). An I-DPD arises "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).

Temporary buffering that occurs in non-interactive, real-time streams involves the ordering of data packets, each containing only a fragment of a work. This activity does not create anything that is sufficiently fixed or perceptible to be considered a "copy" or "phonorecord" as defined in the statute.[12] Indeed, RIAA correctly points out "in the context of a streaming transmission of a licensed digital performance, any fragmentary 'temporary' or 'transient' reproduction in a computer's 'buffer' memory, which is necessary for the transmission of the performance and constantly recycled, may be of only transitory duration, and therefore not sufficiently 'fixed' to be considered a phonorecord." RIAA Comments at 3.

The legislative history describes certain digital transmission systems "designed to allow transmission recipients to hear sound recordings substantially at the time of transmission" that could result in an I-DPD. However, such "systems" are stated to involve the transmission and storage of an entire sound recording (not fragments thereof) in the computer memory ("such storage being technically the making of a phonorecord").[13]

---

[12] This is true regardless of whether the buffering is described as "temporary", "transient" or "fragmentary". In the event a determination to the contrary is made, such copies must surely fall within the compulsory licensing provisions of § 115. Otherwise, radio broadcasters would be required to obtain negotiated licenses for individual works broadcast over-the-air, impossible to accomplish as a practical matter, and plainly inconsistent with the statutory scheme.

[13] As DiMA notes, in such cases the method of delivery involves the deliberate downloading of an entire phonorecord to the consumer. By contrast, DiMA notes that streaming by its nature does not involve the downloading of a file or the making of an entire copy. *See* DiMA Comments at n.2.

B. The DPD Amendment Did Not Expand the Scope of Reproduction Rights

In 1995, Congress amended section 115 to confirm that the compulsory license encompasses the reproduction and delivery of musical works in sound recordings by DPDs. S. Rep. No. 104-128, at 36-37. Congress's stated intention was to clarify that section 115 applies to new digital methods of distributing musical works, not to bestow new rights associated with performances of musical works.

As the legislative history makes clear, Congress's "intention [was] 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. Indeed, at the time of its enactment, copyright owners of musical works affirmed that "current law gives them the ability to enforce their reproduction and distribution rights relating to digital transmissions, but recommend[ed] that these rights be clarified and confirmed in the digital environment." S. Rep. No. 104-128, at 17.

The legislative history supports the conclusion that digital phonorecord deliveries do not encompass non-interactive, simultaneous streaming activities. Although a "digital phonorecord delivery, as defined in Sec. 115(d), may also constitute a public performance . . . it does not include real-time non-interactive subscription transmission where the recorded performance and music are merely received in order to hear them." (Emphasis added). H.R. Conference Report No. 105-796, at App. 45-27. This carve out includes non-interactive real-time streaming transmissions of over-the-air radio broadcasts.

C. This Outcome Is Consistent With the Overall Statutory Scheme

Non-interactive streams are already covered by a series of statutory exemptions, performance and ephemeral licenses under section 114 and section 112. NAB agrees with other Commentors that "Congress cannot have 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'. 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." *See* Consumer Electronics Association and Clear Channel Communications, Inc. Comments at 6.

Payment of the statutory fee under a mechanical license is intended to cover the sale of a copy (whether a physical phonorecord or a digital phonorecord delivery), which would include all private performances of the song arising from the use of such copy. It would seem to turn the section 115 mechanical license on its head if non-interactive streams required a license under section 115, even though the recipient listens only once and does not end up with a reusable copy of the recording.

NAB respectfully submits that should the Copyright Office make any determination in this area, it should do so without disturbing the present framework regarding non-interactive real-time streaming.

Respectfully Submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

By: R. Bruce Rich /pw

R. Bruce Rich
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorney for National Association of Broadcasters

Digital Performance Right in Sound Recordings and Ephemeral Recordings
Docket No. 2000-9 CARP DTRA 1&2

CERTIFICATE OF SERVICE

I, Patrick Wells on May 23, 2001, hereby certify that I caused a copy of Reply Comments of the National Association of Broadcasters to be served by facsimile transmission and first class mail.

SERVICE LIST

RECIPIENTS	FAX NO.	TELEPHONE NO.	COUNSEL FOR
Bruce G. Joseph **Wiley, Rein & Fielding**	(202)719-7207	(202) 718-7000	**Clear Channel Communications Inc.**
Barry I. Slotnick **Richards & O'Neil LLP**	(212) 750-9022	(212)207-1200	**Association for Independent Music**
Patricia Polach **Bredhoff & Kaiser, P. L.L.C.**	(202) 842-1888	(202) 842-2600	**American Federation of Musicians of the United States and Canada**
Arthur J. Levine **Finnegan, Henderson, Farabow, Garrett & Dunner, LLP**	(202) 408-4400	(202) 408-4000	**American Federation of Television and Radio Artists**

Robert Alan Garrett, Ronal A. Schechter, *Michele J. Woods, Jule L. Sigall, Brad R. Newberg **Arnold & Porter**	(202) 942-5999	(202) 942 5000	**Recording Industry Association of America, Inc.**
David R. Berz, Sandra M. Aistars **Weil, Gotshal & Manges**	(212) 310-8007	(212) 310-8000	**AEI Music Network, Inc, DMX Music, Inc.**
Denise Leary, Neal A. Jackson **National Public Radio**	202-414-2000	202-414-3329	**National Public Radio**

Patrick A. Wells