Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

Mechanical and Digital Phonorecord Delivery Compulsory Licenses

Docket No. RM 2000-7A

COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC. AND SESAC, INC. 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"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. ("SESAC") (collectively, the "PROs") hereby submit these comments in response to the request of the Copyright Office (the "Office") for Comment of December 14, 2001, 66 Fed. Reg. 64783 (December 11, 2001), soliciting additional public comment on the Office's Notice of Inquiry of March 6, 2001 regarding the interpretation and application of the mechanical compulsory license, 17 U.S.C. §115, to certain digital music services, in light of the recent RIAA/NMPA/HFA agreement (the "Agreement") filed jointly by those parties in this proceeding. These comments supplement the reply comments filed separately by ASCAP and BMI earlier in this proceeding, and we respectfully request the Office to again consider those comments.[1]

At the outset, we applaud the agreement reached between the RIAA and the NMPA/HFA (collectively, the "Publishers"). As more fully discussed below, the Agreement proves that marketplace solutions to the challenges raised by digital music business models do indeed work. The Agreement serves as a constructive flexible model for immediately licensing mechanical rights for services that transmit music in a variety of forms, including

on-demand streaming and time-limited downloads. While the Agreement does not establish rates, the Agreement does recognize that different types of music services make use of music in different ways and those uses may therefore possess different values in the marketplace. The RIAA and the Publishers have committed to engage in good faith negotiations to reach an industry-wide agreement for mechanical royalty rates for those services. Equally important, the Agreement serves further to clarify that performance and reproduction rights in copyrighted musical works coexist when music is used in the digital environment.

In response to the Office's Notice of Inquiry, numerous commentators requested that the Office rule upon the legal and/or economic relationship of the mechanical and public performance rights in digital music services.[2] These commentators, generally representing the users of copyrighted musical works, assert that copyright owners should never be paid for both mechanical rights and performance rights in the course of the same transmission. That assertion is nothing more than an effort to avoid just and proper payment to creators and copyright owners for the use of their music in the course of digital transmissions. The users' claim is that streaming music invokes the performance right only, and downloads invoke the mechanical license only. See DiMA Comments at 1. This mantra has often been repeated by the music users before the Office and before Congress.[3] It is misleading and wrong.

We appreciate that different uses of different rights may be valued differently in the marketplace. At opposite ends of the spectrum, it can be argued that 'pure' audio-only downloads should not require payment for the public performance right and that 'pure'

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[1] See Reply Comments filed by ASCAP and BMI in Docket No. RM 2000-7, May 23, 2001.

[2] See the Comments of the Consumer Electronics Association and Clear Channel Communications, Inc. ("CEA") and the Digital Media Association ("DiMA"), who represent numerous users of digital copyrighted music (asserting that this proceeding should focus on broadly clarifying "the relationship between performances and reproductions") E.g., CEA Comments at 1.

[3] See, e.g., Statement of Jonathan Potter before the United States House of Representatives, Subcommittee on Courts, the Internet and Intellectual Property, Committee on the Judiciary (December 13, 2001).

audio-only webcasts should not require payment for the mechanical right.[4] But in between those poles lie many uses for which, as the Agreement makes clear, both mechanical and performance rights are implicated. And, as the industry evolves and grows, those uses will increase. See Joint Statement of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and the National Music Publishers' Association/Harry Fox Agency on Internet Uses of Music appended to Statement of Marvin L. Berenson, Senior Vice President & General Counsel, Broadcast Music, Inc. before the United States House of Representatives, Subcommittee on Courts, the Internet and Intellectual Property, Committee on the Judiciary (December 13, 2001).

The Agreement demonstrates the speciousness of the music users' overly simplistic argument. It also demonstrates the fact that users of copyrighted music can reach market driven voluntary agreements that value separately the multiple rights inherent in such uses and that compensate creators and copyright owners for both mechanical and performance rights.

Although this proceeding is not about the performing right in musical works, the Office should not inadvertently take a position that negatively impacts on the present and future ability of creators and copyright owners -- the songwriters and music publishers we represent -- to license the performance right as new technologies emerge. Accordingly, we respectfully request the Office to keep its focus on the mechanical right, the one right

[4] For example, a "pure" audio-only download could be one that met all these requirements: (1) the musical work could not be perceived (i.e. heard) while the transmission was taking place; (2) the sole purpose of the transmission was to deliver a phonorecord of the musical work to the home user; (3) the resulting phonorecord received by the home user was permanent, capable of further non-commercial duplication by the home user, and not limited by time, usage, further payment, or any other factor; and (4) the transmission of the musical work was made on demand. By contrast, a "pure" audio-only webcast could be one that met all these requirements: (1) no copy was made on a local storage device (e.g. hard drive or portable device) that would be accessible for subsequent listening; (2) the webcast was not part of an "interactive service" (as defined in Section 114(j)(7)); and (3) the webcast does not exceed the "sound recording performance complement" (as defined in Section 114(j)(13)). See Statement of Marvin L. Berenson, Senior Vice President & General Counsel, Broadcast Music, Inc. before the United States House of Representatives, Subcommittee on Courts, the Internet and Intellectual Property, Committee on the Judiciary (December 13, 2001).

implicated by section 115, and be mindful of the lessons learned from the RIAA/NMPA/HFA Agreement:

(1) This digital music world is not black or white, and the concept of divisibility of exclusive rights – the cornerstone of our copyright law – holds firm in the digital world as it does in the analog world. Congress made that clear when it amended section 115 in 1995.

(2) The marketplace will continue to evolve and adapt to meet new business models as they emerge. When left to negotiate in the marketplace, copyright owners and users will together reach a fair solution to the licensing issues presented to them.[5] The Office should not upset this apple cart.

In sum, we do not believe that a rulemaking proceeding should be conducted. As has been shown, the marketplace can resolve licensing issues. Furthermore, a CARP can set rates if they cannot be negotiated by the parties. If the Office does commence a rulemaking proceeding, we respectfully request that the Office use this proceeding solely to address the issues at hand -- the application of Section 115 to certain Internet transmissions of copyrighted music -- recognizing that issues regarding the performance right under Section 106(4) are irrelevant to, and beyond the jurisdiction of, this proceeding. We urge the Office to conclude that licensing determinations are best handled in the marketplace by creators and copyright owners on the one hand, and users on the other, as exemplified by the RIAA/NMPA/HFA Agreement.

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[5] The PROs have licensed and will continue to license *any* Internet user who requests a license for the public performance of musical compositions, and have to date licensed thousands of on-line services.

Respectfully Submitted,

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