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In the Matter of

Mechanical and Digital Phonorecord Delivery Compulsory License

Docket No. RM 2000-7A

JOINT COMMENTS OF
THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.,
THE HARRY FOX AGENCY, INC., AND
THE SONGWRITERS GUILD OF AMERICA

The Recording Industry Association of America, Inc. ("RIAA"), the National Music Publishers' Association, Inc. ("NMPA"), The Harry Fox Agency, Inc. ("HFA"), and the Songwriters Guild of America ("SGA") submit these joint comments in response to the Copyright Office's Request for Comment dated December 14, 2001.

On December 6, 2001, RIAA, NMPA and HFA submitted a joint statement to the Copyright Office summarizing the principal terms and benefits of their recent agreement dated as of October 5, 2001, regarding online music subscription services (the "Agreement"). The Agreement provides a framework for the immediate issuance of compulsory licenses for subscription services offering on-demand streams and limited downloads.[1] In addition, in November 2001, HFA entered into substantially the same agreement with Listen.com. As a direct result of the Agreement and the Listen.com agreement, several subscription digital

[1] Aside from full downloads, for which a statutory rate already exists and compulsory licenses are clearly available, on-demand streams and limited downloads are the principal types of digital phonorecord deliveries ("DPDs") currently being offered on the Internet. Accordingly, there is an immediate need to provide a clear mechanism for obtaining statutory compulsory licenses for these types of DPDs.

music services have been able to launch, offering consumers legitimate access to a broad array of musical works and diverse methods of online delivery, by obtaining licenses now on the understanding that they will pay royalties for the use of copyrighted musical works retroactively, once rates are set. While these agreements have made the vast majority of musical works available to licensed services, they have not provided access to songs owned or controlled by music publishers not represented by HFA, or otherwise not participating in the licensing mechanism created under the Agreement.

In order to make available to consumers the full range of music they wish to enjoy online, as Congress intended when it clarified the application of the mechanical compulsory license to digital delivery,[2] RIAA, NMPA, HFA and SGA believe it is important that mechanical compulsory licenses for subscription services offering on-demand streams and limited downloads be available to all digital music services and for all musical works by regulation pursuant to 17 U.S.C. § 115. Thus, we respectfully request that the Copyright Office expeditiously conduct a rulemaking to adopt regulations providing for the availability of statutory compulsory licenses for digital delivery of all copyrighted musical works on substantially the same basis as licenses are available under the Agreement.[3]

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[2] *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4, 109 Stat. 336 (1995); *see also* S. Rep. 104-128, at 14 (1995); 141 Cong. Rec. S11,945-967, at 11,959 (1995) (statement of Sen. Feinstein); 141 Cong. Rec. H10,098-108, at 10,102 (1995) (statement of Rep. Moorhead).

[3] The proposed regulations will complement the procedural amendments that RIAA, NMPA and HFA proposed in their joint comments dated October 12, 2001, regarding the "Notice of Intention" regulations in 37 C.F.R. § 201.18 (and certain conforming changes in 37 C.F.R. § 201.19). *See* In the Matter of Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Docket No. RM 2001-6. The amendments previously proposed will also facilitate the launch and operation of subscription digital music services and should thus be adopted as soon as possible.

In particular, RIAA, NMPA, HFA and SGA respectfully urge that the Copyright Office enact rules providing that:

1. statutory compulsory licenses are available under the compulsory license provisions for DPDs in Section 115 of the Copyright Act for licensees that wish to make or authorize on-demand streams and limited downloads through subscription services, as provided in Section 8.1 of the Agreement;[4]

2. such licenses extend to the processes of making on-demand streams and limited downloads, viewed in their entirety, including the making of (a) server copies to enable the delivery of on-demand streams and limited downloads, (b) transient copies in the transmission of on-demand streams and limited downloads, and (c) local buffer copies of on-demand streams and limited downloads;

3. prospective licensees that intend to make or authorize on-demand streams and/or limited downloads may avail themselves of the procedures for obtaining statutory compulsory licenses under Section 115 and the applicable regulations by serving or filing a notice of intention to obtain a compulsory license;

4. licensees shall pay royalties for making on-demand streams and limited downloads on a retroactive basis once the applicable rates and terms are finally determined by agreement or a CARP proceeding; and

5. licensees shall render timely statements of account pursuant to applicable law and regulations, including 37 C.F.R. § 201.19, which shall include certain other information relevant to the calculation of royalties (such as the specific

[4] Section 8.1 provides, *inter alia*, that the process of making on-demand streams and of making limited downloads through subscription digital music services (from the making of server copies to the transmission and local storage of the stream or download), viewed in its entirety, involves the making and distribution of DPDs; it also provides that the process of making streams that would qualify for a statutory license under Section 114(d)(2) of the Copyright Act does not involve the making or distribution of DPDs, and thus does not require a mechanical license. It takes no position concerning the status of other streams (*i.e.*, those that are neither on-demand streams through subscription digital music services nor eligible for the Section 114 statutory license). These principles should be codified in regulations.

DPD configurations made, e.g., full download, limited download, or on-demand stream), comparable to what is provided in Section 6.1 of the Agreement, so that the royalties to be paid on a retroactive basis may be determined when the applicable rates and terms are set.[5]

Such regulations are fully consistent with the compulsory licensing provisions in Section 115 of the Copyright Act:

- On-Demand Streams. As the Office has already concluded, buffer copies made in the course of streaming transmissions implicate the reproduction right. *See* DMCA Section 104 Report of the U.S. Copyright Office, at xxiv, 133 (August 2001).[6] Server copies also implicate the reproduction right, and are a necessary step in transmitting on-demand streams. The process of making on-demand streams, viewed in its entirety – from the making of server copies to the transmission and local buffering of the streams – plainly involves the distribution of a "specifically identifiable reproduction" of a copyrighted musical work and therefore constitutes a DPD. *See* 17 U.S.C. § 115(d); 141 Cong. Rec. S11,945-967, at 11,959 (1995).

- Limited Downloads. Limited downloads also involve the distribution of "specifically identifiable reproduction[s]" and hence constitute DPDs. *See Id.*

- Availability of Compulsory Licenses. Because on-demand streams and limited downloads are DPDs, the Copyright Act is clear that a mechanical compulsory license is available to those who make or authorize them. *See* 17 U.S.C. § 115(c)(3)(A). Here, royalty payments would be made monthly once applicable rates and terms are finally determined. Payments would be deferred only for so long as determination of such rates and terms is deferred. *See* 37 C.F.R. § 255.6. NMPA and HFA – acting as common agents for their music publisher principals – and RIAA – acting as common agent for its record company members – have negotiated and agreed to these payment terms in order to make statutory compulsory licenses immediately available. We believe that adopting regulations embodying

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5 RIAA, NMPA, HFA and SGA will endeavor to submit proposed regulations before the close of the comment period (February 27, 2002).

6 While we may disagree concerning the economic value of the use of musical works in on-demand streams and the effect of such use upon the potential market for or value of the musical works, we agree that this issue should be decided in royalty rate negotiations or a CARP proceeding.

these negotiated terms is within the Office's rulemaking authority under 17 U.S.C. §§ 115(c)(3), 115(c)(5) and 702.

RIAA, NMPA, HFA and SGA believe that such regulations will:

- meet the needs of the marketplace by providing an orderly process for the immediate licensing of copyrighted musical works to subscription digital music services;
- enable the launch of services that will provide consumers broad access to copyrighted musical works;
- achieve Congress's express intent that mechanical compulsory licenses be made available to support the delivery of phonorecords embodying copyrighted musical works over the Internet;
- provide a clear mechanism for obtaining licenses from music publishers not represented by HFA or otherwise not participating in the licensing mechanism created under the Agreement;
- confirm that the licensing mechanism created under the Agreement is available to prospective licensees irrespective of whether they are members of RIAA or their licensees;
- provide the basic framework upon which copyright owners and users can proceed to negotiate rates and terms for DPDs;
- provide a legal safe harbor for Internet companies that wish to deliver copyrighted musical works without the risk of litigation; and
- support the launch of legitimate services as an alternative to the rampant music piracy that has plagued the Internet.

RIAA, NMPA, HFA and SGA believe that such regulations will bring certainty to the marketplace while providing breathing room for copyright owners and users to

negotiate the applicable mechanical royalty rates as Congress intended.[7] RIAA, NMPA, HFA and SGA believe it is important for the Office to adopt such regulations so that legitimate digital music services will have broad access to copyrighted musical works through the mechanism of the mechanical compulsory license, as Congress intended. Clarifying the availability of such licenses now will also focus and facilitate the negotiation of royalty rates, as Congress also intended. The Office is uniquely positioned to address these issues by adopting the requested regulations. RIAA, NMPA, HFA and SGA believe there is no legal impediment to the Office's doing so,[8] and believe it is important that the Office do so expeditiously.

For the foregoing reasons, RIAA, NMPA, HFA and SGA respectfully request that the Copyright Office expeditiously conduct a rulemaking along the lines described above to adopt regulations providing for the availability of statutory compulsory licenses for digital delivery of all copyrighted musical works on substantially the same basis as licenses are available under the Agreement.

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7 *See* 17 U.S.C. §§ 115(c)(3)(B)-(C); 141 Cong. Rec. S11,945-967, at 11,957 (1995); *see also* "Oppose Regulation of the Internet Music Market," Letter from the Honorable Howard L. Berman, John Conyers, Jr., Elton Gallegly, Bob Goodlatte, Henry J. Hyde and Robert Wexler to Colleagues (September 2001).

8 The rulemaking proposed here is different from the wide-ranging rulemaking contemplated in the Notice of Inquiry issued by the Copyright Office last March, which anticipated that the Office would opine on numerous legal questions. The regulations proposed here are targeted at specific, well-defined types of services presently available in the marketplace, and are based on a marketplace solution already achieved between the owners and users of copyrighted musical works as an important first step in negotiating rates and terms under Section 115 of the Copyright Act, as Congress expressly contemplated. *See* note 7 *supra*. RIAA, NMPA, HFA and SGA do not believe it is necessary to conduct a wider-ranging rulemaking at this time.

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By: Steven R. Englund /cw

Steven R. Englund
Christopher Winters
ARNOLD & PORTER
1600 Tysons Boulevard
Suite 900
McLean, Virginia 22102
(703) 720-7000
(703) 720-7399 (fax)

Counsel for the Recording Industry Association of America, Inc.

Of Counsel:

Cary H. Sherman
Steven M. Marks
RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

By: Carey R. Ramos /cw

Carey R. Ramos
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
(212) 757-3990 (fax)

Counsel for the National Music Publishers' Association, Inc., The Harry Fox Agency, Inc., and the Songwriters Guild of America

Of Counsel:

Charles J. Sanders
National Music Publishers' Association, Inc.
475 Park Avenue South
29th Floor
New York, New York 10016

Jacqueline C. Charlesworth
The Harry Fox Agency, Inc.
711 Third Avenue
New York, New York 10017