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GENERAL COUNSEL
OF COPYRIGHT

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

**JOINT REPLY 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 reply comments in response to the Copyright Office's Request for Comment dated December 14, 2001. (RIAA, NMPA, HFA and SGA are referred to collectively herein as the "Commenters.")

On February 6, 2002, the Commenters submitted joint comments in this proceeding urging the Copyright Office expeditiously to conduct a rulemaking to adopt regulations providing for the availability of statutory mechanical compulsory licenses for digital delivery of all copyrighted musical works on substantially the same basis as licenses are available under the Agreement between RIAA and NMPA/HFA dated as of October 5,

2001 (the "Agreement"). The Commenters respectfully urge the Office to conduct a rulemaking to adopt rules (the "Proposed Regulations") providing that:¹

1. The process of making on-demand streams through subscription services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a digital phonorecord delivery, for which process compulsory licenses are available pursuant to 17 U.S.C. § 115.
2. The process of making limited downloads through subscription services (from the making of server reproductions to the transmission and local storage of the limited download), viewed in its entirety, involves the making and distribution of a digital phonorecord delivery, for which process compulsory licenses are available pursuant to 17 U.S.C. § 115.
3. Compulsory licenses under Section 115 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.
4. 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.
5. Licensees shall pay royalties for making on-demand streams and limited downloads on a retroactive basis once the

¹ The Commenters are close to finalizing a draft of specific regulations embodying the Proposed Regulations. We expect to provide such draft to the Office within two weeks.

applicable rates and terms are finally determined by agreement or a CARP proceeding.

6. 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 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.
7. 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 a digital phonorecord delivery and does not require a compulsory license under Section 115.

There Is A Compelling Need and Substantial Support for a Rulemaking Proceeding

Infringing services have inflicted grave injury on songwriters, music publishers, recording artists and record companies alike. There thus is a compelling need for a framework within which legitimate services can enter the digital music market. By recognizing that the mechanical compulsory license applies to certain types of digital audio services, the Proposed Regulations are an important and, the Commenters believe, necessary first step toward that goal. Accordingly, in order to make available to consumers the full range of music they wish to enjoy online through legitimate services, and thereby help to stem the tide of Internet piracy, the Office should conduct a rulemaking proceeding to address issues within the general scope of, and adopt, the Proposed Regulations.

The initial round of comments in response to the Office's Request for Comment illustrates that there is substantial support for a rulemaking. Among the Commenters, NMPA, HFA and SGA represent the vast majority of creators and copyright owners of copyrighted

musical works. RIAA represents the companies that historically have obtained the overwhelming majority of mechanical compulsory licenses for the use of musical works in their sound recordings, and that have licensed the use of those recordings for use in digital music services. All of the other users of musical works that filed comments – the Digital Media Association, Yahoo! Inc. and Liquid Audio, Inc. (both of which are members of the Digital Media Association) – joined the Commenters in calling for greater certainty in the Internet music licensing marketplace and urging the Office to conduct a rulemaking to provide that certainty.² Other commenting parties are either inclined to favor, or have voiced no substantial objection to, a rulemaking.³

The Proposed Regulations are the Right Rules for the Office to Adopt

If the Office conducts the requested rulemaking, the Proposed Regulations are the right rules for the Office to adopt:

² See Comments of the Digital Media Association, at 2-3, 4-5; Comments of Yahoo! Inc., at 1-3; Comments of Liquid Audio, Inc., at 2-3.

³ Wixen Music Publishing, Inc. criticizes the Agreement in various respects, but does not appear to express a view concerning whether a rulemaking would be desirable. The National Association of Recording Merchandisers and Video Software Dealers Association likewise criticize the Agreement, but seem to call for action from the Office of a kind that might be consistent with a rulemaking proceeding. See Comments of National Association of Recording Merchandisers and Video Software Dealers Association, at 3. Terry H. Smith also appears to contemplate action by the Office of a kind that might be consistent with a rulemaking proceeding. See Comments of Terry H. Smith, at 4. The performing rights organizations would prefer that the Office not conduct a rulemaking, but have stated that if the Office does conduct a rulemaking, it should be limited to issues arising under Section 115 of the Copyright Act. See Comments of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc., at 4. The Commenters do not propose a more wide-ranging rulemaking, and a rulemaking limited to Section 115 issues would have no effect on the public performance right or performing rights organizations. See 17 U.S.C. § 115(c)(3)(K)(i); 37 C.F.R. § 255.8.

- They meet the needs of the marketplace by providing an orderly process for the immediate licensing of copyrighted musical works to subscription digital music services.
- They provide a licensing mechanism for companies that wish to deliver copyrighted musical works without the risk of litigation.
- They 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.
- They 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.
- They place all services on an equal footing by confirming that the licensing mechanism created under the Agreement is available to prospective licensees irrespective of whether they are members of RIAA or such members' licensees.
- They provide a framework for copyright owners and users to negotiate royalty rates and terms without waiting for judicial decisions or legislation.
- They support the launch of legitimate services as an alternative to the rampant music piracy that has plagued the Internet.

Even if There Were a Substantial Question of Whether the Proposed Rules Are Consistent with Existing Law, the Requested Rulemaking Is the Proper Forum to Address that Question

While we believe that the interpretation of existing law embodied in the Proposed Regulations is correct, it is not necessary for the Office to provide a definitive answer to that question at this stage of the proceeding. The question for the Office now is whether it should conduct a rulemaking proceeding. There seems to be general agreement – or at least no substantial disagreement – that the Office should do so. The Commenters have requested that such a rulemaking address issues within the general scope of the Proposed Regulations, and that the Office adopt the Proposed Regulations. To the extent that other commenting parties

or the Office have concerns with the Proposed Regulations, the requested rulemaking is the proper forum to address them.

**Other Issues Raised in Initial Comments
Would Not Preclude the Requested Rulemaking**

In the initial round of comments in response to the Office's Request for Comment, other issues were raised as well, including criticisms of provisions of the Agreement that the Commenters have not proposed be adopted in regulations.⁴ Because the Commenters do not propose adopting these provisions, related criticisms are simply irrelevant to any issue before the Office. Other commenting parties advocate legislation addressing issues within the general scope of the Proposed Regulations, and have presented their legislative agenda to the Office.⁵ However, these parties' desire for legislation does not diminish the importance of the Office doing everything in its power to effectuate existing law as intended by Congress. Indeed, adoption of the Proposed Regulations would obviate any perceived need for the legislation sought.⁶

⁴ See, e.g., Comments of the Digital Media Association, at 5-6; Comments of Wixen Music Publishing, Inc., at 1-3; Comments of Terry H. Smith, at 2-4.

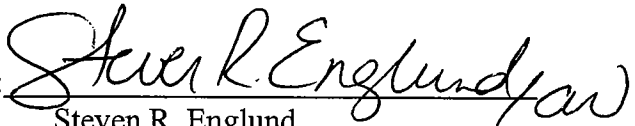
⁵ See, e.g., Comments of the Digital Media Association, at 2.

⁶ Separately, HFA notes that the Digital Media Association makes numerous statements concerning HFA which have nothing to do with the proposed rulemaking. Comments of the Digital Media Association, at 6. HFA disputes these assertions and will respond to them if and when they become relevant to this proceeding.

Conclusion

For the foregoing reasons, the Commenters respectfully request that the Copyright Office expeditiously conduct the rulemaking proposed herein to adopt the Proposed Regulations.

Dated: February 27, 2002

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