ORIGINAL

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RM 2000-7B
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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

REPLY COMMENTS OF TERRY H. SMITH REGARDING THE INTERPRETATION AND APPLICATION OF THE MECHANICAL AND DIGITAL PHONORECORD COMPULSORY LICENSE, 17 U.S.C. 115, TO CERTAIN DIGITAL MUSIC SERVICES

I appreciate the opportunity to respond to the public comments filed pursuant to the March 9, 2001, Notice of Inquiry (66 FR 64783). While I continue to serve in a consulting capacity to the company I founded, Copyright Management, Inc. and its successor, Copyright Management Services, Inc., the following comments are being submitted by me individually and are not intended to represent the views of said companies.

First, I would like to express my gratitude to the Copyright Office for allowing comments from the public regarding this matter and for giving consideration to such comments in the course of making a determination. I fear that in the absence of an opportunity to review comments from all interested public parties, a final determination in this matter may have been unduly influenced by the posturing of a few powerful organizations whose financial resources provide them an undeniably loud voice. While the entire copyright community has, in the past, relied upon and benefited from the efforts of these powerful voices, the digital marketplace has, with respect to determining an appropriate licensing authority, leveled the playing field.

Even though I disagree with many of the terms and assumptions contained in the NMPA RIAA Agreement, I applaud the NMPA's firm stand in its position regarding Streaming technology and ASCAP, BMI and SESAC's support of that position. If we are to achieve an effective licensing scheme for digitally distributed properties, we must first recognize that the technology driving the Internet will evolve at a much fast pace than the copyright community can debate the nuances of an appropriate license structure. We should all be concerned that the issue as to whether On Demand Streams should be treated simply as a performance use or a mechanical use or both. With all due respect to the Copyright Office and its efforts in the preparation of the Section 104 Report, those that still subscribe to the premise that "streamed" uses should be covered under a performing rights agreement, simply are not aware of the software solutions created daily by thousands of resourceful "free music" proponents. Works distributed by means of streaming technology are being "ripped" every day and converted to permanent copies on the hard drives of anyone in possession of free software available on hundreds of Websites. In fact, a large percentage of consumers searching for free music find it more time efficient to download On Demand Streams rather than those available through the Napster clone sites. There are several of these free "ripping" programs available, but the most popular versions we have tested are "Stream Ripper", "Beam Back" and "Total Recorder". As far as file quality, these programs record streams at 44.1kHz, 16 Bit, Stereo, creating CD quality copies on the hard drive of the

user. One of the more popular sites offering these stream-ripping programs is the RIAA member owned MP3.com.

I read the comments submitted by Liquid Audio which, in my opinion is one of the more conscientious and technologically advanced services of its type. However, even their streaming technology is not immune to the "ripping" capabilities of "Total Recorder". I can see the merit in non-interactive streams or Webcasting technology being considered performance uses. At the moment, they offer no greater risk of unauthorized copying than the satellite or Cable music services. However, interactive services offering the consumer the ability to select works for download or On Demand Streams simply cannot be excluded from the uses currently defined as Digital Phonorecord Deliveries.

Since there appears to be no debate as to an appropriate license structure for Limited Downloads, I will offer no specific comment except to cite this use as yet another in a never-ending list of uses that will require further debates to determine their proper licensing "slot" as performances, mechanical reproductions or, perhaps, both. Despite assertions to the contrary by some of the respondents in this matter, there is no absolute license model based upon historically negotiated schemes that will adequately satisfy digitally distributed intellectual property. It will be unnecessarily burdensome, if not impossible, to effectively address the nearly unlimited variety of copyright uses made possible by the Internet if we continue to restrict license models to either a "performing right" or a "mechanical reproduction right". The provisions of the DMCA and its necessary "amplified" definitions have already become laborious and we have barely addressed the simple few uses we've become aware of.

We need look no further than the joint comments of ASCAP, BMI and SESAC to see just how burdensome these restricted license models will become. In their rebuttal of DiMA's assertion that streaming music invokes the performance right only, and downloads invoke the mechanical license only, the joint PRO parties quite correctly state:

> "We appreciate that difference 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' audio-only webcasts should not require payment for the mechanical right. But in between those poles lie many uses for which, as the (NMPA/RIAA) Agreement makes clear, both mechanical and performance rights are implicated. And, as the industry evolves and grows, those uses will increase".

For clarification purposes regarding some of the criteria that must be evaluated under the "performance" and/or "mechanical" license models, the joint parties added footnote 4 as follows:

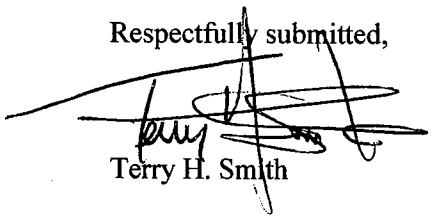
> "[4] For example, a "pure" audio-only download could be one that met all these requirements: (1) the musical work could not be perceived (i.e. heard) while the transmission was taking place; (2) the sole purpose of the transmission was to deliver a phonorecord of the musical work to the home user; (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 ..."

I submit for the Copyright Office's consideration that the current public performing rights and mechanical reproduction rights licensing models remain viable for the television and radio broadcast and/or telecast markets, but a new licensing model will be needed in the digital marketplace to facilitate the myriad format options the public desires. If we do not implement a clearly defined licensing model tailored specifically for digitally distributed content, we very well may have contributed to the total erosion of our collective copyright interests this market.

The grant of rights for digitally distributed works need not be classified as "performance" or "mechanical reproduction", but simply as a digital use license incorporating the variables for the requested use types. A per-use royalty fee can then become the varying factor rather than the type of license offered. In other words, the more use options requested, the higher the royalty fee. A license structure of this nature is much more adaptable to a technology-supported licensing, royalty tabulation, royalty accounting system or service. The importance of such a system cannot be overstated. We must pursue technological solutions to streamline the data management, licensing administration and royalty accounting processes required in the digital marketplace. Should we fail to employ technological solutions, we will become incapable of keeping pace with the evolution of the market and find ourselves continuing to debate over yesterdays uses of our works. While I am in disagreement with DiMA's position regarding On Demand Streams, I do agree with their assessment of the importance of an electronic solution for those "...internet based businesses that live and breathe digital data ..." and their belief that such technology will "...result in greater availability of paying music services and legitimate music on the Internet and more rapid and accurate payments to music publishers, composers and [authors]".

The design and development of a system capable of facilitating the licensing and royalty requirements of digital music services in the manner explained above can be made available much sooner than some have indicated. The time involved in completion of such a project is directly proportionate to the interest of the digital and copyright communities in making it happen. But most importantly, the reality of such a system or service is dependent upon the Copyright Office's determination as to a workable license structure for digital uses, beginning with "On-Demand Streams" and "Limited Downloads".

Respectfully submitted,



Terry H. Smith