Reply
Comment Letter
RM 2000 7
No. 8

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of	)	
Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries	)	Docket No. RM 2000-7 September 15, 2008

Reply Comments of National Association of Recording Merchandisers

National Association of Recording Merchandisers (NARM) is the 50-year-old trade association representing retailers and distributors of sound recordings. At its founding, NARM's membership was comprised of participants in the physical delivery of analog recordings (such as vinyl LPs, cassettes, and 8-trac tapes). The retail industry soon embraced digital music, successfully rolling out the music CD, which remains to this day the delivery medium of choice. Although the CD is 100% digital music, the delivery mechanism remains physical. Over time, it became possible to deliver the medium and music separately, such that consumers could purchase the recording medium (recordable CDs, flash drives, "hard drive" discs and other storage media) and reproduce their own phonorecords. The Section 106(1) and 106(3) reproduction/distribution right combination made way for the pure Section 106(1) reproduction right exploitation to garner a larger share of the means by which consumers gain ownership of phonorecords.

From the inception of Congress' attempts to modernize the Copyright Act with respect to digital delivery of copies and phonorecords, and of public performances under Section 115, NARM has sought to make sure that DPDs (which, after all, are nothing more than

"reproductions" in copyright terms) be treated broadly to enable the widest possible variety of business models and strategies, be it downloading to personal computers or telephones, reproductions in-store in kiosks, or any other means of giving the consumer ownership of a lawful reproduction of a sound recording. NARM also urged ways of streamlining the process so that all merchants engaged in the development of non-infringing business models could come to market quickly with compelling alternatives to piracy, both broadening and leveling the playing field. For pubic performances, too, reform of Section 115 consistent with nimble, low-friction licensing – both statutory and private – that would enable exciting new ventures leading to the greater discovery and wider dissemination of creative works. NARM's focus, however, has been on growing the market through legal and creative new exploitation of copyrights rather than protecting any given revenue stream or any particular business model.

It was natural for NARM's members to become more heavily involved in public performance of sound recordings than ever before. Whereas in the past, the in-store play was the primary vehicle for promoting the sale of pre-recorded phonorecords, the Internet age brought with it the opportunity to use Internet-based public performances as a similar promotional tool, and many NARM members soon embraced business models that involved a blend of –

(a) sales of pre-recorded phonorecords, exploiting Sections 106(1) and 106(3) of the Copyright Act;

(b) sales of licenses to reproduce the work onto the consumer's own tangible medium (digital phonorecord deliveries), exploiting Section 106(1) only; and

(c) sales of all manner of public performances, exploiting Sections 106(4) and 106(6).

NARM is particularly pleased that the Copyright Office and a number of commenters agree with NARM's position, taken at the inception of this proceeding several years ago, that there is no basis in law or in fact to deem a so-called "limited download" to be in the nature of a

rental. We welcome the abandonment of that misguided notion, while remaining open to the licensing of a true rental right.

As for the Section 115 issue pertaining to the treatment of "buffer" and "server" copies, however, we believe that the broadest, fastest, most economical and most friction-free dissemination of the affected works can best be carried out adhering to common sense interpretations within the existing framework that has served us so well for the past century.

NARM agrees with those who observe that virtually all Internet-based public performances of a work necessarily require some reproductive activity along the way. Indeed, in this digital age, virtually any licensed reproduction in the nature of an Internet-based download cannot be carried out without the aid of significant incidental reproductive activity. At the end of either process, however, is a single public performance or a single usable reproduction. The intermediary reproductions, be they server copies or buffer copies, are required as a necessary fact of the Internet architecture. NARM has in the past acknowledged negotiated resolutions in which one party's legal position is not questioned so long as the cost to other parties does not increase, but accepting those interim settlements as a business resolution does not mean they are the best legal solution. Such agreements may suffice as stopgap measures to permit the market to continue to be exploited until the legal issues are resolved, but should not be a permanent substitute for resolution of the legal issues, nor a subtle rule-based amendment to the Copyright Act

While "the Internet" may be novel, the practice of making incidental (and inconsequential) reproductions necessary to fulfill the licensed activity is not. Book publishers licensed to reproduce 100,000 copies of a book never feared being sued for infringement for making proofs, for making plates, for making misprints, and so on. The modern printer, too, receives masters by e-mail, and, without a separate license, reproduces them onto the media

required to carry out the licensed task. All of these are "copies" as defined in Section 101, yet no copyright holder dreamed licensing the reproduction of 100 copies of a pamphlet only to then claim that ruined copies and proofs are infringing unless separately licensed. Under the rationale of the Proposed Rule, the modern photocopier makes a copy in RAM before reproducing it onto a sheet of paper, and that RAM copy is infringing unless determined to constitute fair use.

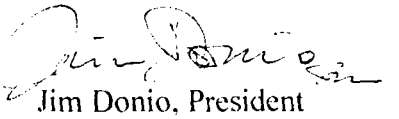
Regardless whether we recognize them as a fair use limitation on the reproduction right or an authorized-by-implication license necessary to enjoy the primary exclusive right being licensed, we cannot adopt a special rule for buffer and server copies made in the course of Internet-based public performance of musical works and sound recordings without extending the same logic to the Internet-based public performance of a poem or public display of text or a photograph. Under the Copyright Act, the treatment must be the same as for the RAM buffers in photocopiers and the buffer copies of a copyrighted e-mail message delivered through multiple paths using the TCP/IP protocol. Wisely, we never went down the path of suing Xerox for storing an additional copy in RAM, nor sued the local printer for the additional copies necessary to produce the specific number that had been licensed. We should follow that wisdom.

NARM suggests a rationale different from that advanced in the comments or suggested in the Notice – one that need not rest entirely on the concept of fair use as articulated in Section 107. There is a fundamental copyright policy at work that dictates this result, and it is illustrated for works in the music industry better than for any other types of works. In the music industry, it is common for different entities to be the holders of different exclusive rights in the same work. It is well established that each of the six enumerated rights in Section 106 may be exercised independently, and may be transferred independently. They are all distinct. It would do upset this longstanding structure to allow the holder of the exclusive right under one subsection of Section 106 to abridge the enjoyment of the separate exclusive right held by another under a different

subsection. To recognize the reproductions essential to the public performance of a work over the Internet as implicating the reproduction right is to burden all owners of the public performance right, making them subject to getting permission from the rights holder of the reproduction right any time they seek to exploit their "exclusive no longer" right to perform a work publicly over the Internet. Under the proposed rule, the public performance right is no longer exclusive, not because others get to perform the work publicly without a license, but because those who own the reproduction right get to charge a toll to the owner of the public performance right.

The music industry already suffers from inordinate transactional friction and infringement risk even by the most careful, conscientious and effective retailers – the licensees who bring the works to the consumer. It is crucial that, once a particular right is licensed, the owners of separate rights in the same work not be given de facto market control over the exploitation of that right by demanding additional permissions. It is one thing to have to compete against infringing dissemination of music. It is quite another to have to refrain from competing effectively because the rights holders of separate rights are different (or are represented by different collection societies) who each want to extract a toll, not because of the nature of the primary right being exploited, but because the only way to exploit the right is to incidentally and inconsequentially take a step that meets the technical requirements of a separate right that is not being exploited at all.

Respectfully submitted,



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