



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

NOTICE OF INQUIRY

MECHANICAL AND DIGITAL PHONORECORD DELIVERY COMPULSORY LICENSE

The following excerpt is taken from Volume 66, Number 47 of the
Federal Register of Friday, March 9, 2001 (pp. 14099-14103)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 255

[Docket No. RM 2000-7]

Mechanical and Digital Phonorecord Delivery Compulsory License

AGENCY: Copyright Office, Library of
Congress.

ACTION: Notice of Inquiry

SUMMARY: The Copyright Office of the
Library of Congress requests public comment
on the interpretation and application of the
mechanical and digital phonorecord
compulsory license, 17 U.S.C. 115, to certain
digital music services.

DATES: Comments are due no later than
April 23, 2001. Reply comments are due
May 23, 2001.

ADDRESSES: If sent by mail, and original
and ten copies of comments and reply
comments should be addressed to: Office of
the Copyright General Counsel, PO Box
70977, Southwest Station, Washington, DC
20024. If hand delivered, an original and ten
copies should be brought to: Office of the
Copyright General Counsel, James Madison
Memorial Building, Room LM-403, First and
Independence Avenue, SE, Washington, DC
20559-6000.

FOR FURTHER INFORMATION

CONTACT: David O. Carson, General
Counsel, or William J. Roberts, Jr., Senior
Attorney for Compulsory Licenses,
Copyright Arbitration Royalty Panel, PO Box
70977, Southwest Station, Washington, DC
20024 Telephone: (202) 707-8380. Telefax:
(202) 252-3423.

SUPPLEMENTARY INFORMATION:

Background

The copyright laws of the United States
grant certain rights to copyright owners for

the protection of their works of authorship.
Among these rights is the right to make, and
to authorize others to make, a reproduction of
the copyrighted work, and the right to
distribute, and to authorize others to
distribute, the copyrighted work. Both the
reproduction right and the distribution right
granted to a copyright owner inhere in all
works of authorship and are, for the most
part, exclusive rights. However, for copyright
holders of nondramatic musical works, the
exclusivity of the reproduction right and
distribution right are limited by the
compulsory license of section 115 of the
Copyright Act. Often referred to as the
"mechanical license," section 115 grants
third parties a nonexclusive license to make
and distribute phonorecords of nondramatic
musical works.

The license can be invoked once a
nondramatic musical work embodied in a
phonorecord is distributed "to the public in
the United States under the authority of the
copyright owner." 17 U.S.C. 115(a)(1).
Unless and until such an act occurs, the
copyright owner's rights in the musical work
remain exclusive, and the compulsory license
does not apply. Once it does occur, the
license permits anyone to make and
distribute phonorecords of the musical work
provided, of course, that they comply with all
of the royalty and accounting requirements of
section 115. It is important to note that the
mechanical license only permits the making
and distribution of phonorecords of a musical
work, and does not permit the use of a sound
recording created by someone else. The
compulsory licensee must either assemble his
own musicians, singers, recording engineers
and equipment, or obtain permission from the
copyright owner to use a preexisting sound
recording. One who obtains permission to
use another's sound recording is eligible to
use the compulsory license for the musical
composition that is performed on the sound
recording.

The mechanical license was the first
compulsory license in U.S. copyright law,
having its origin in the 1909 Copyright Act.

It operated successfully for many years, and
it continued under the 1976 Copyright Act
with only some technical modifications.
However, in 1995, Congress passed the
Digital Performance Right in Sound
Recordings Act ("Digital Performance Act"),
Public Law 104-39, 109 Stat. 336, which
amended sections 114 and 115 of the
Copyright Act to take account of
technological changes which were beginning
to enable digital transmission of sound
recordings. With respect to section 115, the
Act expanded the scope of the mechanical
license to include the right to distribute, or
authorize the distribution of, a phonorecord
by means of a digital transmission which
constitutes a "digital phonorecord delivery."
17 U.S.C. 115(c)(3)(A). A "digital
phonorecord delivery" is defined as "each
individual delivery of a phonorecord by
digital transmission of a sound recording
which results in a specifically identifiable
reproduction by or for any transmission
recipient of a phonorecord of that sound
recording * * *." 17 U.S.C. 115(d).

As a result of the Digital Performance
Act, the mechanical license applies to two
kinds of disseminations of nondramatic
musical works: (1) The traditional making
and distribution of physical, hard copy
phonorecords; and (2) digital phonorecord
deliveries, commonly referred to as DPDs.
However, in including DPDs within section
115, Congress added a wrinkle by creating a
subset of DPDs, commonly referred to as
"incidental DPDs." It did this by requiring
that royalty fees established under the
compulsory license rate adjustment process
of chapter 8 of the Copyright Act distinguish
between "(i) digital phonorecord deliveries
where the reproduction or distribution of a
phonorecord is incidental to the transmission
which constitutes the digital phonorecord
delivery, and (ii) digital phonorecord
deliveries in general." 17 U.S.C.
115(c)(3)(D). However, Congress did not
define what constitutes an incidental DPD,
and that omission is the source of today's
Notice of Inquiry.

As required by the Digital Performance Act, in 1996 the Library of Congress initiated a Copyright Arbitration Royalty Panel ("CARP") proceeding to adjust the royalty rates for

[[Page 14100]]

DPDs and incidental DPDs. 61 FR 37213 (July 17, 1996). The parties to the proceeding avoided arbitration by reaching a settlement as to new rates for DPDs and the time periods for conducting future rate adjustment proceedings for DPDs. The parties could not reach agreement, however, on new rates for incidental DPDs because the representatives of both copyright owners and users of the section 115 license could not agree as to what was, and what was not, an incidental DPD. The resolution of this impasse was to defer establishing rates for incidental DPDs until the next scheduled rate adjustment proceeding.

The Librarian of Congress accepted the settlement agreement of the parties and adopted new regulations governing section 115 royalties for DPDs. 64 FR 6221 (February 9, 1999). Section 255.5 of 37 CFR establishes royalty rates for DPDs "in general," while Sec. 255.6 of the rules expressly defers consideration of incidental DPDs. And Sec. 255.7 sets the time table for rate adjustment proceedings for general DPDs and incidental DPDs, providing for proceedings at two-year intervals upon the filing of a petition by an interested party. The year 2000 was a window year for the filing of such petitions.

Petition for Rulemaking

1. RIAA Petition

On November 22, 2000, the Copyright Office received a pleading from the Recording Industry Association of America ("RIAA") styled as a "Petition for Rulemaking and to Convene a Copyright Arbitration Royalty Panel If Necessary." The RIAA petition requests that the Office resolve, through a rulemaking proceeding, the issue of what types of digital transmissions of prerecorded music are general DPDs, and what types are incidental DPDs. In addition, RIAA petitions the Library of Congress to conduct a CARP proceeding to set rates for incidental DPDs. MP3.com, Inc. ("MP3.com"), Napster, Inc. ("Napster"), and the Digital Media Association ("DiMA") responded to the RIAA petition. The Office also received a petition to convene a CARP to set rates for general DPDs and incidental DPDs from the National Music Publishers Association, Inc. and the Songwriters Guild of America (collectively, "NMPA/SGA").

The RIAA petition focuses on two types of digital music deliveries: "On-Demand Streams" and "Limited Downloads." RIAA defines an "On-Demand Stream" as an "on-demand, real-time transmission using streaming technology such as Real Audio, which permits users to listen to the music

they want when they want and as it is transmitted to them." RIAA Petition at 1. A "Limited Download" is defined as an "on-demand transmission of a time-limited or other use-limited (i.e. non-permanent) download to a local storage device (e.g. the hard drive of the user's computer), using technology that causes the downloaded file to be available for listening only either during a limited time (e.g. a time certain or a time tied to ongoing subscription payments) or for a limited number of times." *Id.* RIAA asserts that a rulemaking is necessary to determine the status of On-Demand Streams and Limited Downloads (i.e. whether they are general DPDs or incidental DPDs) because record companies and music publishers cannot reach agreement as to their treatment under section 115.

According to RIAA, music publishers take the position that both On-Demand Streams and Limited Downloads implicate their mechanical rights. In RIAA's view, On-Demand Streams may be incidental DPDs, for which there are currently no established royalty rates. RIAA therefore requests that the Office determine whether On-Demand Streams are incidental DPDs and, if they are, to convene a CARP to set rates for these incidental DPDs.

RIAA also submits that for services offering On-Demand Streams and Limited Downloads to work, it is necessary that the section 115 license be interpreted in such a way as to cover all the copies necessary to operate such services.¹ In general, the operator of a service must make multiple phonorecords of musical works on its servers, and those works may be further reproduced, at least in part and for short periods of time, as part of the transmission process. While some of these reproductions may be exempt from copyright liability under 17 U.S.C. 112(a), RIAA asserts that it is likely that certain reproductions necessary for the operation of the services are not exempt and that they should be covered by the section 115 license.

With respect to Limited Downloads, RIAA suggests that they may be either (1) incidental DPDs or (2) more in the nature of record rentals, leases or lendings. The section 115 license authorizes the maker of a phonorecord to rent, lease or lend it, provided that a royalty fee is paid. The statute states:

A compulsory license under this section includes the right of the maker of a phonorecord of a nondramatic musical work * * * to distribute or authorize distribution of such phonorecord by rental, lease, or lending (or by acts or practices in the nature of rental, lease, or lending). In addition

¹ It would probably be more precise to characterize such "copies" as "phonorecords," since presumably they include the fixation of sounds. Compare the definitions of "copies" and "phonorecords" set forth in 17 U.S.C. 101. However, because discussions of this issue usually refer more colloquially to "copies," we will frequently use that term in this notice.

to any royalty payable under clause (2) and chapter 8 of this title, a royalty shall be payable by the compulsory licensee for every act of distribution of a phonorecord by or in the nature of rental, lease, or lending, by or under the authority of the compulsory licensee. With respect to each nondramatic musical work embodied in the phonorecord, the royalty shall be a proportion of the revenue received by the compulsory licensee from every such act of distribution of the phonorecord under this clause equal to the proportion of the revenue received by the compulsory licensee from distribution of the phonorecord under clause (2) that is payable by a compulsory licensee under that clause and under chapter 8. The Register of Copyrights shall issue regulations to carry out the purpose of this clause.

17 U.S.C. 115(c)(4). RIAA notes that the Copyright Office has yet to adopt such regulations.

This provision was added to section 115 in the Record Rental Amendment of 1984, Pub. L. 98-450, which also amended the first sale doctrine codified in section 109 to restrict the owner of a phonorecord from disposing of the phonorecord for direct or indirect commercial advantage by rental, lease or lending without authorization of the sound recording copyright owner. The legislative history of the amendment to section 115 states that the amendment was made to emphasize "that the right of authorization accorded to copyright owners of recorded musical works under revised section 109(a) is subject to compulsory licensing under revised section 115" and that it gives the copyright owner of a nondramatic musical work recorded under a compulsory license the right to a share of the royalties for rental received by a compulsory licensee (a record company) in proportion equal to that received for distribution under section 115(c)(2). H.R. Rep. 98-987, at 4 (1984).

The Office was to issue appropriate regulations relating to the royalty for rental, lease or lending "as and when necessary to carry out the purposes" of section 115(c)(4). S.Rep. No. 98-162, at 9 (1983). Thus far, there has been no need to issue such regulations because the Office has been unaware of any activity by sound recording copyright owners engaging in or authorizing the rental, lease or lending of phonorecords.

In sum, RIAA asserts that it is unclear whether the section 115 license permits

[[Page 14101]]

all of the activities necessary to make On-Demand Streams or Limited Downloads, and if so, at what royalty rates. Consequently, RIAA petitions the Office to determine (1) whether On-Demand Streams are incidental DPDs covered by the license; (2) whether the license includes the right to make server copies or other copies necessary to transmit On-Demand Streams and Limited Downloads; and (3) the royalty rate applicable to On-Demand Streams (if they are covered by the license) and Limited Downloads.

Napster opposes RIAA's petition and urges the Copyright Office to defer to Congress, which Napster contends is the appropriate forum for resolving the issues raised by the petition. MP3.com submits that the Office should conduct a rulemaking proceeding to determine whether copies made in the course of On-Demand Streams are incidental DPDs, and whether the copies made that are necessary to stream musical works are covered by the section 115 license.² If they are, MP3.com also petitions the Library to convene a CARP to "determine the appropriate rate or rates (if any)" for incidental DPDs.

MP3.com also asks the Copyright Office to consider additional matters in a rulemaking proceeding. First, MP3.com questions whether distinctions can and should be drawn among streaming audio services. MP3.com's service streams music to recipients who select the streams from a "locker" containing the recipients' personally purchased music collections. MP3.com requests that the Office consider whether this type of service—where the copyright owner has received compensation from the recipient who has already purchased the music—should be distinguished from a service that indiscriminately transmits streams of music to the public at large.

Second, MP3.com requests that the Office consider the effect of the decision to defer adoption of a royalty rate for incidental DPDs to a later date, and what effect that has on services that are currently streaming music. Finally, MP3.com requests that the Office reconsider its current procedural regulations for invoking and complying with the section 115 license with respect to incidental DPDs.

Like RIAA and MP3.com, DiMA is especially concerned with the status of copies of musical works made in the course of streaming. In particular, DiMA notes that the status of temporary RAM buffer copies created in a user's personal computer during audio streaming was raised at the November 29, 2000, Copyright Office/National Telecommunications and Information Administration hearing on the section 104 study mandated by the Digital Millennium Copyright Act of 1998 ("DMCA") and urges that consideration of the same issue in a rulemaking proceeding be done in such a way as not to prejudice the outcome of that study. Thus, DiMA submits that either this should be resolved in the section 104 study, or the Office should conduct a separate rulemaking proceeding devoted solely to the issue. DiMA suggests, however, that the complexity of the issue counsels for legislative action rather than agency interpretation of the existing statute.

The NMPA/SGA petition does not request

any rulemaking from the Copyright Office and simply requests that the Library convene a CARP to set rates for both general DPDs and incidental DPDs. As discussed above, the year 2000 was a window year for filing such petitions with the Library.

Notice of Inquiry

The foregoing discussion of the petitions and filings with the Copyright Office reveals that there is considerable uncertainty as to interpretation and application of the copyright laws to certain kinds of digital transmissions of prerecorded musical works. It is also apparent that the impasse presented by these legal questions may impede the ability of copyright owners and users to agree upon royalty rates under section 115 for both general DPDs and incidental DPDs. Therefore, the Copyright Office deems it appropriate to seek public comment on the advisability of conducting a rulemaking proceeding and on the issues that would be addressed in such a proceeding.

1. Agency Action

Before addressing the matters raised in the parties' petitions and comments, a threshold matter must first be resolved. It appears that when Congress passed the Digital Performance Act in 1995 and amended the section 115 mechanical license, current delivery mechanisms for digital transmission of musical works were unknown. Consequently, On-Demand Streaming and Limited Downloads, as described in the RIAA petition, and the applicability of the section 115 license to these services do not appear to have been anticipated. DiMA and Napster assert that to fully address the copyright implications of all aspects of these services, the law needs to be reconsidered and amended. While amendment of the law is a time-consuming proposition, Congress does have the power, unlike the Copyright Office, to balance the specific concerns of the interested parties and enact a legal regime that addresses those concerns. Must or should the Copyright Office defer to congressional action on some or all of the issues raised by the RIAA and MP3.com petitions? In other words, are there matters raised by these petitions that the Office lacks statutory authority to resolve? If the Office does have authority to interpret the meaning of section 115 as applied to these new services, is agency rulemaking the best forum for addressing such matters, or is congressional (or judicial) action more appropriate? We seek public comment on the extent of our authority to act, as well as the advisability of exercising any such authority.

2. Issues Presented

Assuming that the Copyright Office does have the authority to act, and assuming that a rulemaking proceeding is the best forum, the RIAA and MP3.com petitions raise a number of questions. Central to RIAA's petition is a determination of the meaning of an incidental

DPD under section 115. Is it possible to define "incidental DPD" through a rulemaking proceeding? How should it be defined? Could such a definition be one of general application, or can incidental DPDs be defined only in a manner that is specific to the service offered (such as On-Demand Streams)? If the latter, how can this be accomplished?

As discussed above, there is considerable interest in the streaming of recorded music. Streaming necessarily involves a making of a number of copies of the musical work—or portions of the work—along the transmission path to accomplish the delivery of the work. RIAA and MP3.com relate that copies are made by the computer servers that deliver the musical work (variously referred to as "server," "root," "encoded," or "cache" copies), and additional copies are made by the receiving computer to better facilitate the actual performance of the work (often referred to as "buffer" copies). Some of these copies are temporary; some may not necessarily be so. Are some or all the copies of a musical work made that are necessary to stream that work incidental DPDs? If temporary copies can be categorized as incidental DPDs, what is the definition of "temporary"? Some "temporary" copies may exist for a very short period of time; others may exist for weeks. Is the concept of a "transient" copy more

[[Page 14102]]

relevant than the concept of a "temporary" copy? If fragmented copies of a musical work are made, can each fragment, or the aggregation of the fragments of a single work, be considered an incidental DPD? If a fragmented copy can be an incidental DPD, does it make a difference in the analysis whether the copy is temporary or is permanent? Aren't incidental DPDs subject to section 115's definition of digital phonorecord deliveries? If so, does the requirement that a DPD result in a "specifically identifiable reproduction" by or for a transmission recipient rule out some of the copies discussed above from consideration as incidental or general DPDs?

DiMA argues that all temporary copies of a musical work that are made to stream that work can be deemed to be covered by the fair use doctrine of section 107 of the Copyright Act. This would mean, of course, that these copies would not be subject to any royalty fee because there is no copyright liability. What is the statutory support for this argument? Should the Copyright Office, in a rulemaking proceeding, declare whether any particular use of a copyrighted work constitutes a fair use, or should it leave that determination to a court of competent jurisdiction?

It is apparent from the filings received by the Copyright Office that currently there are different types or services for the streaming of music. RIAA refers to On-Demand

² MP3.com does not take a position as to whether there should be a rulemaking for Limited Downloads as well, since this is not part of its business.

Streams, whereby subscribers can receive real-time transmissions, using technology such as Real Audio, of the musical works that they request. MP3.com transmits streamed performances of musical works to subscribers who select the works from a "locker" containing recorded music that the subscriber has already purchased. MP3.com suggests that a distinction should be drawn between its service and those that indiscriminately transmit streamed music to the public because users of MP3.com have already compensated copyright holders of the music they stream for the reproduction and distribution of the phonorecord. Can and should such distinctions be made between these two streaming services and, if so, what should they be? Are there difficulties in determining whether the subscriber actually has purchased a phonorecord containing the music that is being streamed, and if there are, what impact should that have on how the Office addresses the issue? Are there additional types of streaming services that should be addressed?

MP3.com also calls into question the status of the current royalty structure for incidental DPDs. As discussed above, the rate adjustment proceeding for DPDs in 1998 resulted in a settlement as to the royalty rates for general DPDs, and an agreement to a royalty determination for incidental DPDs. See 64 FR 6221 (February 9, 1999) (adopting 37 CFR 255.6, which provides that royalty rates for incidental DPDs are "deferred until the next digital phonorecord delivery rate adjustment proceeding pursuant to the schedule set forth in § 255.7"). If it is determined in a rulemaking proceeding that streaming does result in the creation of incidental DPDs, is there liability for parties that have been engaging in such streaming activities? In other words, when a CARP is ultimately convened to establish royalty rates for incidental DPDs, can the CARP set rates for the 1998-2000 period, in addition to the current period? What is the meaning of a "deferral" of royalty rates, and is such action statutorily permissible? If the CARP did set rates for incidental DPDs for 1998-2000, would such action constitute impermissible retroactive rulemaking if the Librarian adopted those rates? How would a service account for such incidental DPDs that have already occurred?

In addition to streaming, RIAA seeks clarification of the status of Limited Downloads. It defines a Limited Download as an on-demand transmission of a time-limited or other use-limited download to a storage device (such as a computer's hard drive), using technology that causes the downloaded file to be available for listening only either during a limited time or for a certain number of times. Are the copies made of musical works for Limited Downloads incidental DPDs? Do the time period or the number of times the music is available have any bearing on this determination?

RIAA suggests that if Limited Downloads are not incidental DPDs, then they may be record rentals, leases or lendings under section 115(c)(4). Are Limited Downloads phonorecords distributed by rentals, leases or lendings, and what is the statutory support for such a determination? If Limited Downloads are record rentals, leases or lendings, RIAA requests that the Copyright Office adopt regulations under section 115(c)(4) for assessing the royalty fee for such uses. What should those regulations include? Should they be adopted as part of this rulemaking proceeding, or a separate proceeding? How should the statutory requirement to set a royalty rate at a "proportion of the revenue received by the compulsory licensee" be interpreted?³

3. Petitions for Ratemaking

In addition to the RIAA's petition for rulemaking, the Copyright Office has before it several requests to convene a CARP to set rates either for general DPDs or incidental DPDs, or both. As noted above, the year 2000 was a window year for petitioning for an adjustment of the royalty rates for DPDs. There is a difference of opinion, however, as to how and when a CARP should be convened.

The NMPA/SGA petition requests the Librarian to convene a general rate adjustment proceeding for DPDs, asking that the CARP establish rates for both general DPDs and incidental DPDs. NMPA/SGA's request is not conditioned upon the conduct or outcome of a rulemaking proceeding regarding incidental DPDs.

RIAA requests the Library to convene a CARP if and only if the Copyright Office makes a determination that copies of musical works made in the course of On-Demand Streams and/or Limited Downloads are incidental DPDs. RIAA does not seek adjustment of the rates for general DPDs. MP3.com makes a similar request.

DiMA does not petition the Library to convene a CARP, but does suggest a course of action. First, DiMA recommends that the Copyright Office consider the status of temporary copies of musical works made in the course of streaming those works in the context of the study it is conducting under section 104 of the DMCA. If that study concludes that such copies are not fair use, then DiMA recommends that the Office conduct a rulemaking proceeding to determine if the copies are incidental DPDs. If the Office determines that they are not incidental DPDs, then DiMA supports the

³If a Limited Download is an activity in the nature of rental, lease or lending, it may be that nonprofit libraries and educational institutions that engage in Limited Downloads for nonprofit purposes may do so without liability. See 17 U.S.C. 109(b)(1)(A). Persons submitting comments on whether Limited Downloads are in the nature of rentals, leases or lending pursuant to section 115(c)(4) are invited to address the implications of that issue with respect to libraries and educational institutions.

NMPA/SGA petition to conduct a rate adjustment for DPDs and for Limited Downloads. DiMA submits that the Library should not convene a CARP for incidental DPDs "unless the petitioners first demonstrate that there currently exists some class of known or cognizable incidental digital phonorecord deliveries." DiMA comments at 3.

The Copyright Office, on behalf of itself and the Library of Congress, seeks comments on these proposals for handling a rate adjustment proceeding

[[Page 14103]]

in the context of a rulemaking proceeding on the status of DPDs.

Conclusion

The advent of new means of digitally delivering record music to consumers presents new challenges and questions to the interpretation and application of the section 115 license. Some of these new means, as described by the parties seeking action from the Copyright Office, are discussed above. There may be others, existing or contemplated. We also invite comment on whether there are other technologies and services whose existence might affect our interpretation and application of section 115.

Dated: March 6, 2001.

David O. Carson,
General Counsel

[FR Doc. 01-5832 Filed 3-8-01; 8:45 am]

BILLING CODE 1410-31-P