UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
AND THE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
DEPARTMENT OF COMMERCE

In Re Request for Public Comment In Preparation for Report to Congress Pursuant to Section 104 of The Digital Millennium Copyright Act	Docket No. 000522150-0150-01

SUPPLEMENTAL REPLY COMMENTS OF
NATIONAL MUSIC PUBLISHERS' ASSOCIATION

The National Music Publishers' Association, Inc. ("NMPA") submits these supplemental Reply Comments pursuant to the Notice of the Copyright Office and the National Telecommunications and Information Administration in the above-referenced matter, initiated June 5, 2000, 65 Fed. Reg. 35673.

NMPA is the principal trade association representing the interests of music publishers in the United States. The more than 600 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. NMPA's wholly owned subsidiary, The Harry Fox Agency, Inc., acts as licensing agent for more than 26,000 music publishers, who in turn represent the interests of hundreds of thousands of songwriters. The Harry Fox Agency acts on behalf of its publisher-principals in connection with licensing the Internet distribution of music, as well as other, more traditional uses of music in recordings, motion pictures and other audiovisual productions.

NMPA has participated in this inquiry by filing joint Comments and Reply Comments along with the American Film Marketing Association, the Association of American Publishers, the Business Software Alliance, the Motion Picture Association of America, and the Recording Industry Association of America (hereinafter "Copyright Owners Comments" and "Copyright Owners Reply Comments"). We fully support those filings. We wish to offer these additional comments on several points raised by other parties in the initial round, to the extent that those comments have particular bearing upon the interests of music copyright owners and creators.

As a preliminary matter, NMPA notes that several commentors[1] in the initial round have urged the expansion of limitations on rights of copyright owners in connection with sections 109 and 117 of the Copyright Act. In general, the very legislative proposals advocated by these groups (or substantially similar proposals) were considered by Congress during deliberations leading to enactment of the Digital Millennium Copyright Act ("DMCA") and rejected. The history of Congress's consideration of these failed attempts to amend sections 109 and 117 is discussed at some length in the Copyright Owners Comments and Copyright Owners Reply Comments. We will not repeat that history here. But suffice it to say that, in evaluating "the relationship between existing and emerging technology and the operation of [sections 109 and 117]" – Congress's charge to the Copyright Office and the NTIA -- little has happened in the past 24 months to alter Congress's calculation that no legislative expansion of either of these sections is warranted. To the contrary, changes in technology and emerging business

[1] NMPA refers principally to the comments of the Digital Media Association, the Home Recording Rights Coalition and the Digital Future Coalition.

models have served to confirm Congress's prudence in making only the limited adjustments in the law contained in the DMCA at the time of its enactment.

Section 109

Copyright law has long distinguished between the ownership of an intangible copyrighted work, and the ownership of a tangible copy or phonorecord of that work. When a tangible copy or phonorecord of a work – e.g. a CD or cassette tape – is sold, the "first sale doctrine," codified in section 109 of the Copyright Act, allows the purchaser of that tangible copy to dispose of it as he or she sees fit.

The Digital Media Association ("DiMA"), the Home Recording Rights Coalition ("HRRC") and the Digital Future Coalition ("DFC") urge the adoption of a wildly expansive view of the very limited first sale doctrine. These groups recommend that the doctrine be expanded to allow persons arguably in lawful possession of a copy of a work to transmit that work to another, without limitation, in order to ensure the enjoyment of what they call "full first sale doctrine rights."[2] The very nature of the electronic transfer of copies described by DiMA and its allies implicates not only the exclusive distribution right of the copyright owner, to which the limited privilege in section 109(a) attaches, but also many of the other exclusive rights of the copyright owner established in section 106 of the Copyright Act. The attempt to shoe-horn activities that involve, at a minimum, the reproduction and public distribution of works into the very narrow limitations of section 109(a) flies in the face of both the letter and intent of the fist sale doctrine.

As Professor Nimmer summarized:

> It should be made clear that the one who is entitled to claim the benefit of Section 109(a) is not thereby exempted from the thrust of any rights of the

[2] See, e.g., Comments of the National Association of Recording Merchandisers and Video Software Dealers Association at 12.

> copyright owner other than the distribution right. This follows from the fact that Section 109(a) merely authorizes "the owner of a particular copy or phonorecord … to sell or otherwise dispose of the possession of that copy or phonorecord." This is, in effect, an authorization to distribute. It does not authorize reproduction, adaptation, or performance. Moreover, Section 109(a), by its own terms, merely creates an immunity "notwithstanding the provisions of section 106(3)," *i.e.,* the distribution right. It does not purport to create an exemption *vis-à-vis* the other Section 106 rights.[3]

DiMA and its supporters claim a "digital first sale doctrine" is necessary to avoid discrimination against "digitally-acquired media."[4] But what these groups really seek is not a "digital first sale doctrine," but rather a new, broad exemption from all rights of the copyright owner, which bears little resemblance, in scope or purpose, to the first sale doctrine as it exists today. As one commentor pointed out in the initial round,

> When phrases like "digital first sale doctrine" are used, at least by some, the intent is not an application of the first sale doctrine to digital works, but a wholesale expansion of the first sale doctrine in derogation of the rights of copyright owners. To take a newsworthy example, when the owner of a lawful copy of a CD "rips" a song into a digital MP3 file and then transmits that file to one or more friends, the first sale doctrine cannot be invoked to provide legal justification for the reproduction involved and the multiple resulting copies. And the first sale doctrine is hardly applicable when, in the Napster-type context, an individual makes copies available around the world, thus engaging in public distribution of the works involved.[5] (Emphasis in original.)

A close reading of the initial round comments reveals the scope of the exemption contemplated by some. For example, the joint comments of the National Association of Recording Merchandisers ("NARM") and the Video Software Dealers Association ("VSDA") strongly suggest that these organizations and their members believe that the first sale privilege attaches not only to a purchased copy, but also to any copy of the purchased copy made pursuant to a license agreement (for backup or for other purposes), regardless of the limitations on the use of such additional copies agreed to under the

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[3] M. NIMMER AND D. NIMMER, NIMMER on Copyright Sec. 8.12[D].
[4] DiMA Comments at 9-10.

terms of the license. Thus, as envisioned by NARM-VDSA, a purchaser of a single copy or phonorecord of a work, who along with that copy purchases the right to make two additional copies for a specified purpose, should – by operation of the first sale doctrine – have the right to keep one copy and distribute the other two.[6] Such a result would open a digital floodgate of unauthorized distribution of copyright music and greatly hinder the efforts of music publishers to establish economically rational licensing relationships and business models for existing Internet uses, as well as those to come.

In carrying through with Congress's mandate to assess the impact of new technologies on the operation of section 109, we urge the Copyright Office and NTIA to consider the impact that the legislative expansion advocated by DiMA and its allies would have on the ongoing efforts of music and other copyright owners to curb widespread piracy through so-called "file sharing" services and software. An expanded reproduction/distribution privilege of the type advocated by these groups would do little more than give Napster and others of its kind a legal shield for their predatory practices. And the impossibility of enforcing a legal mandate to delete one's own copy of a protected work when a copy of that work is forwarded to another would be sure to cause many consumers – some of whom already wrongly believe that they have a "right" to copy protected works – to believe that they also have a "right" to distribute those works to the public.

NMPA joins other copyright owner associations in vigorously opposing the legislative language expanding the first sale doctrine proposed by DiMA and its allies. As the Copyright Owners Reply Comments make clear, the proposal these groups

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[5] Time Warner Comments at 1.
[6] See NARM-VSDA Comments at 19-20.

advocate was considered and rejected by the 105th Congress in enacting the DMCA. The Copyright Owners Reply Comments further show the flaws inherent in DiMA's suggestion that developments in digital rights management technologies provide justification for taking the step Congress declined to take 23 months ago. Copyright owners are eagerly embracing and experimenting with a variety of rights management technologies as a means of facilitating licensing and tracking uses of works, for the shared benefit of rights owners, commercial users of works and consumers. It is not yet clear, however, which technologies will prove most effective or which will stand the test of the marketplace (both in terms of their impact on cost and general ease of use by the consumer). But the decision as to whether to employ a rights management technology or which such technology to employ – at a time at which both the market and technology are developing rapidly – is best left to rights owners and the customers they serve.

NMPA urges the Copyright Office and NTIA to proceed, as Congress did, with caution. We urge rejection of any recommendation that would create a dangerous loophole in the law that could be manipulated by commercial predators seeking to avoid the obligation to license the uses of music and other copyrighted works that they exploit.

Section 117

NMPA fully supports the Copyright Owners Reply Comments in their criticism of the suggestions of some organizations to expand section 117 to cover temporary or incidental digital copying. These suggestions are in fact a surreptitious attack on the exclusive reproduction right with respect to all works, not just computer programs, and should be rejected. We wish to draw particular attention to the comments of DiMA, which quotes its own congressional testimony from June 1998 that:

> Hundreds of thousands of hours of audio and video material now are available over the Internet. "Streaming media" technology is essential to making these Internet transmissions sound as smooth as over the radio . . . .
>
> If temporary RAM copies of those few seconds of material are deemed to be copyright infringement, and streaming media performances and technology could therefore be deemed unlawful, audio and video over the Internet will come to a grinding halt.[7]

Similar arguments are made by the HRRC.[8] The quoted passage proves that an amendment to section 117 is unnecessary. DiMA issued the dire warning about "audio and video over the Internet" coming to "a grinding halt" more than two years ago. As NMPA and its members can testify from their own experience, and as the general public can clearly observe, audio over the Internet today is flourishing and will expand. DiMA's dire warnings were wrong. Its expansive suggestion that "section 117 of the Copyright Act should exempt archival and temporary copying for digital media" was without justification in 1998 and it is without justification today.

In addition, DiMA asserts that "the exemption from the reproduction right is all the more warranted for webcasting, where the same copyright owners of the musical composition, audiovisual work or the sound recording already will have authorized, and been compensated for, the performance of the works."[9] This statement implies that respect for the right granted in section 106(4) (the public performance right) should exempt a party from any responsibility or any liability with regard to the other rights granted under sections 106(1) (the reproduction right), 106(3) (the distribution right) or any other portion of section 106. Decades of well-settled law establish that the rights in each clause of section 106 are separate and distinct. As such, they are separately

[7] DiMA Comments at 17.
[8] HRRC Comments at 6.

licensable. DiMA's suggestion otherwise is either a gross misreading of copyright law or a deliberate attempt to confuse. In either case, there is no reason or basis to read or amend section 117 to effect such a dramatic change in copyright law.[10]

Finally, DiMA asserts that:

> The scope of the temporary copying exemption, as relevant to Internet webcasting, reappeared on the radar screen in December 1997. Three Internet webcasters -- AudioNet, Inc. (now Yahoo!/broadcast.com), RealNetworks, Inc. and Terraflex Data Systems, Inc. (now Spinner.com, which is owned by America Online, Inc.) -- opposed the adoption of a broadly-worded rule, jointly proposed to the Copyright Office by the National Music Publishers Association and the Recording Industry Association of America, that could have applied the reproduction right (and the mechanical royalty at the statutory rate) to these temporary RAM buffer copies. Eventually, that language was withdrawn from the proposed regulation and the issue was deferred until the next arbitration period.[11]

This assertion is just plain wrong. The joint NMPA-RIAA submission proposed a ***rate*** for incidental digital phonorecord deliveries under section 115. That proposal contained no "broadly-worded rule," said nothing about "temporary RAM buffer copies," and did not purport to define the scope of the statutory term "incidental" digital phonorecord delivery. The opposition was filed by the Association of Internet Webcasters, which opposed the rate jointly proposed by NMPA and RIAA for incidental digital phonorecord deliveries ("DPDs") and argued that streaming audio should not be treated as an incidental DPD (an issue that was not properly before the Copyright Office). NMPA and

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[9] DiMA Comments at 20.

[10] Nor are DiMA members in any way burdened by the necessity of obtaining licenses from more than one licensing entity. In a business structure that exists worldwide, music publishers license "mechanical" and public performance rights separately, typically through separate (although sometimes related) collectives. This structure serves the interests of the businesses that require licenses as well as those of songwriters and copyright owners. It eliminates the need to search out and identify individual copyright owners in a business in which the number of rights owners is in the tens of thousands, and the number of works in the hundreds of thousands.

[11] DiMA Comments at 17.

RIAA ended up deferring the incidental rate until the next rate proceeding. The general DPD rate that had been jointly proposed was then adopted without opposition. In short, the scope or definition of "temporary RAM buffer copies" has never been at issue in a DPD proceeding, and the webcaster submission described above is certainly not germane to the current study involving section 117.

Expansion of the Retail Store Exemption

In a proposal far afield from the scope of issues Congress has asked the Copyright Office and the NTIA to review in connection with this study, DiMA asks that the existing "retail store" exemption contained in section 110(7) of the Copyright Act be expanded to extend to online retailers. In NMPA's view, such an expansion is unnecessary and unwarranted.

Section 110(7) allows stores that sell compact discs and tapes to publicly perform the music they sell where:

- the ***sole*** purpose of the performance is to promote the sale of copies or phonorecords of the work;
- the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring; and
- there is no direct or indirect charge made to hear the performance.

The expanded exemption for online "retailers" envisioned by DiMA would meet none of these statutory criteria, and would do violence to the balance of interests struck by Congress in section 110(7).

First, a transmission made by an online retailer to an online purchaser is, by definition, sent "beyond the place where the establishment is located." Under the current

exemption, some traditional, brick-and-mortar retailers play music over loudspeakers in the music sales area for the benefit of patrons who have traveled to the store. Others offer headsets and allow a potential buyer to listen to all or portions of selected discs, often subject to special promotional efforts. In each instance, the music available to potential customers is selected by the retail establishment for the limited use of such customers within a discrete sales area. Music cannot be enjoyed outside the retail establishment unless it is purchased. Thus, the physical limitation of the current exemption in section 110(7) ensures that the public performances subject to the exemption are those that promote the shared interests of the retailer and the copyright owner. Those uses are -- in the language of the statute -- those that have the "sole purpose" of promoting the sale of copies or phonorecords of music.[12]

NMPA and its members believe it is highly unlikely that public performances of music offered by an online retailer would ever be for the "sole purpose" of promoting the sale of copies or phonorecords of their works. It remains true that a majority of commercial online businesses earn a substantial portion of their revenues from advertising. Companies are willing to pay a web-based business to promote their products or services based on the number of visitors to the site or the number of "hits" to a particular page containing the advertising. Given the enormous popularity of music sites on the Internet, "retailers" could be expected to use music to attract visitors to the site for the purpose of generating advertising revenues alone. Any such financial

[12] DiMA, for its own purposes, chooses to read the "sole purpose" test out of the law. The DiMA Comments, at page 21, states "Section 110(7) exempts retail record stores from paying music license fees when they perform music in their stores 'to promote the retail sale of copies or phonorecords of the work.'" Read in full, the relevant criteria of section 110(7) provides an exemption where "the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work."

motivation would eliminate the sale of phonorecords as the "sole purpose" of the performance, and run afoul of the promotional purpose underlying the exemption.

DiMA proposes that online "retailers" be permitted – without payment of any kind to the copyright owner -- to transmit public performances of music and sound recordings to any potential "customer" at that customer's home or workplace – or, in the near future – to a hand-held device that could accompany the customer anywhere. And the "retailer" could offer such public performances (free to the retailer), uninterrupted, 24-hours a day. Presumably, the "retailer" could offer narrow-cast "promotional" channels aimed at established and commercially successful genres, as well as emerging ones. Another channel could allow "customers" to listen to the "artist of the week."

NMPA questions how – or even whether -- the listening public would distinguish public performances offered by "retailer"/webcasters from those offered by licensed webcasters that were not also retailers. More to the point, we question whether, if DiMA were to get its way, there would be any non-"retailer" webcasters. Why would a webcaster pay for the music it uses if it were able to avoid the payment obligation simply by placing "buy" buttons on the pages of its web site?

As DiMA itself points out, its membership is growing rapidly – from 7 to more than 50 companies in less than two years. Among its members are some of the best known and most successful "dot com" ventures: Amazon.com, America Online, EMusic.com, Tower Records, Yahoo!, and others. Most of these companies are thriving now, under the law as it is written. Music publishers have licensed some DiMA members, and look forward to working with others to conclude mutually acceptable agreements.

The payment of fair license fees to music copyright owners and creators will not threaten the growth of webcasting or other services offering music online. But a rush to shoe-horn every new e-business model for offering music into some – or many – existing but inapposite limitations on rights or exemptions from liability will ensure that the Internet never becomes a vibrant business for music copyright owners and creators. DiMA's attempt to draw section 110(7) into the scope of this study is one such effort; it should be rejected.

Conclusion

NMPA and its members appreciate the opportunity to comment on the important matters within the scope of this study. We looking forward to reviewing reply comments received, and to participating in any further proceedings that may be scheduled.

Respectfully submitted,

NATIONAL MUSIC PUBLISHERS' ASSOCIATION

Contact:

Charles J. Sanders, Esq.
National Music Publishers' Association
711 Third Avenue, 8th Floor
New York, New York 10017
Phone: 212.922.3263
Fax: 212.922.3299
Email: csanders@nmpa.org

Susan Mann
Griffin, Johnson, Dover & Stewart
Suite 600
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
Phone: 202.775.8116
Fax: 202.223-0358
Email: mann@griffinjohnson.com