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Washington, D.C.

MAY 28 2001

GENERAL COUNSEL  
OF COPYRIGHT

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In the Matter of )  
Mechanical and Digital Phonorecord )  
Delivery Compulsory License )  
\_\_\_\_\_ )

Docket No. RM 2000-7

REPLY COMMENTS IN SECTION 115 INQUIRY

Broadcast Music, Inc. ("BMI") is a music performing rights licensing organization that represents approximately 300,000 affiliated songwriters, composers and music publishers and licenses the public performing right in a repertoire consisting of approximately 4.5 million musical works. Since 1995 BMI has licensed music-using web sites on the Internet that offer both streaming and downloading of music. BMI has pioneered in the area of developing flexible and efficient online music public performing right licenses.

BMI respectfully submits these reply comments in this inquiry about mechanical rights licensing matters to respond to the proposal of certain Internet music users that the Copyright Office (the "Office") rule on the economic and/or legal relationship of the mechanical compulsory license to the public performing right licensed by performing right licensing organizations ("PROs"). At the outset, BMI supports the position of the National Music Publishers' Association and Songwriters Guild of America ("NMPA/SGA") that the mechanical licensing implications of "On Demand Streaming"

and “Limited Downloads” as described by the Recording Industry Association of America (“RIAA”) are better addressed by the interested parties in voluntary negotiations.<sup>1</sup>

Insofar as the RIAA and the music users represented by the Digital Media Association (“DiMA”) and Consumer Electronics Association and Clear Channel Communications, Inc. (“CEA/CCC”) have requested that the Office rule upon the legal and/or economic relationship of the mechanical license to the public performing right in these transmissions, BMI believes that their proposal raises complex issues outside of the purview of the Section 115 compulsory license.<sup>2</sup> This in part may explain why the RIAA and the music users appear to disagree with one another on key legal issues regarding the extent to which Section 115 should apply to On Demand Streaming. BMI does not believe that the Office should attempt to make policy decisions on the scope of the public performing right in the context of a Section 115 proceeding.

The RIAA and the music users are united in one respect concerning On Demand Streaming, however. Namely, they regard any reproductions made in the course of this activity as incidental to public performances licensed with PROs, and they feel that they should not have to pay music publishers twice for a single performance. RIAA at p. 4 n.3, 13; CEA/CCC at 3-4. Because of the fact that PROs license streaming on the Internet, the RIAA and the music users are seeking legal rulings that would exempt them from paying musical composition copyright owners any royalties in mechanical license

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<sup>1</sup> See NMPA/SGA Comments at 15.

<sup>2</sup> The music users acknowledge that this inquiry raises highly complex issues. See, e.g., CEA/CCC Comments at 1 (this inquiry presents “fundamental issues of the relationship between performances and reproductions over a medium that necessarily creates incidental ‘copies’ of portions or all of a work with no other purposes or effect than the dissemination of a performance.”).

fees for the mechanical license rights associated with On Demand Streaming. See, e.g., RIAA at 13 (with regard to “server” copies necessary to operate On Demand Streaming services, the RIAA states that “no royalty would be payable for these phonorecords, because they are not distributed to the public.”)<sup>3</sup>; DiMA at 13; CEA/CCC at 1, 3-4, 8. They take this position despite the fact that On Demand Streaming appears to have a strong potential to be a very lucrative business opportunity in cyberspace.<sup>4</sup>

They are similarly united in their wish to pay little or no mechanical license fees for Limited Downloads. See, e.g., DiMA at 6-7; RIAA at 4 n.3. The music users also characterize Limited Downloads as performance driven services. For example, the RIAA states that Limited Downloads are “incidental to the purpose of the transmission [which is] to give the user access to performances of the music”. RIAA at p. 16 n.4. DiMA similarly notes that “limited downloads also share the characteristics of the temporary download, for the purpose of listening, contemplated by Congress as an ‘incidental DPD’ in the legislative history of the DPRSRA.” DiMA at 7.<sup>5</sup>

RIAA states that it is attempting to “preserve the distinction between performances and reproductions” that is important to the “industry practices developed based on that distinction.” RIAA at 4. While RIAA member labels may have chosen to

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<sup>3</sup> The RIAA’s position that server copies ought to be free is somewhat surprising in view of the litigation that Universal Music successfully waged against MP3.com last year for the precise act of unauthorized making of server copies. See UMG Recordings, Inc. v. MP3.com, 92 F. Supp.2d 349 (S.D.N.Y.). Judge Rakoff had little difficulty concluding that the unauthorized act of recording music for a server to operate an On Demand Streaming service was an infringement, and set damages at \$25,000 per CD copied.

<sup>4</sup> *The New York Times* reported on Monday, May 21, 2001 (at p. C1), that Vivendi Universal has announced plans to purchase MP3.com for \$372 million.

<sup>5</sup> Although the Section 115 contains no definitions of the terms that the RIAA asks the Office to define in this rulemaking proceeding, it is self-evident that the Congress could not possibly have had the concept of “Limited Downloads” in mind years ago when it enacted the unused record rental language of Section 115(c)(4).

separate their business practices, no “either/or” distinction exists in the copyright law or in entertainment industry, generally.<sup>6</sup> Congress adopted the “bundle of rights” approach to copyright in the Copyright Act of 1976. Since then, each of the separate exclusive rights set forth in Section 106 can be separately licensed (and indeed subdivided) by a copyright owner and may in fact be owned by separate proprietors. 17 U.S.C. Section 201(d)(2).

Since 1976 the Copyright Act has provided that transmissions of musical works to the public are public performances. Congress reaffirmed the bundle of rights approach in the DPRA of 1995 when it amended Section 115 to recognize implicitly that some DPDs will cause reproductions to be made incidentally to transmissions of music to the public. Congress also explicitly recognized in the definition of DPD in Section 115 that a given transmission can be a DPD “regardless of whether the digital transmission is also a public performance of a sound recording or any nondramatic musical work embodied therein”. 17 U.S.C. Sec. 115(d). Congress therefore did not intend a formalistic “either/or” distinction between performance rights and reproduction rights as the RIAA suggests, or as CEA/CCC and DiMA urge the Office to conclude. Accordingly, BMI does not believe that the Office should rule upon the scope of the public performing right as it affects downloading or streaming in a Section 115 rule-making proceeding.

The CEA/CCC’s comment that it is only a rare case where two or more copyright rights are implicated by a given activity<sup>7</sup> is simply inaccurate. There are, in fact,

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<sup>6</sup> Until the adoption of the DPRSRA of 1995, there was no public performing right in sound recordings; hence it is only natural that the record industry has not developed any historic practices with regard to the licensing of such rights.

<sup>7</sup> CEA/CCC at 3.

numerous examples where multiple copyright rights in music are cleared in the course of a single economic enterprise. The fact that Internet music transmission services using technologies such as streaming and downloading must obtain multiple rights to music does not make the Internet different from other types of transmission services. In fact, according to the users, both the On Demand Streaming and Limited Download services in question here envision massive-scale music usage in a manner that makes them similar to broadcasting activities.<sup>8</sup>

It is foreseeable that time-limited downloads of music and audiovisual programming that are enabled by access control measures will provide copyright owners with the ability and incentive to offer consumers a wide array of entertainment options at a variety of pricing levels. Many of these new services will spring from and/or compete with today's radio and television broadcasting and cable services. For example, MP3.com's comments reveal that online entertainment services in fact offer a package of streaming and downloading services, based on customer needs. MP3.com at 2 n.3, 11. Congress rejected an "either/or" legal framework in Section 115(d) in which some portions of these integrated services would be considered "mechanical only" while other portions are deemed "performance only." Yet the music users are urging the Office to legally "interpret" Section 115 in a manner that would result in precisely the rigid and formalistic legal analysis that Congress rejected. To the extent that the music users are making economic arguments and not legal arguments, the marketplace should determine the fee implications for mechanical licensing for such activities.

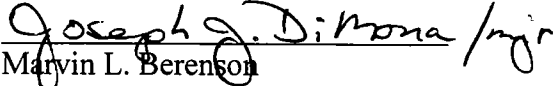
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<sup>8</sup> RIAA Comments at 18; MP3.com Comments at 8 (citing a "million songs that a service likely would want to offer").

For the reasons stated above, BMI does not believe that the Office should undertake to rule upon the legal and/or economic relationship of mechanical rights to public performing rights in a Section 115 proceeding. However, should the Office conduct a rulemaking proceeding BMI will participate to the extent necessary to adequately protect the public performing right of BMI's affiliated songwriters, composers and music publishers.

Respectfully submitted,

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