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United States Copyright Office

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GENERAL COUNSEL
OF COPYRIGHT

In the Matter of)	
)	
Mechanical and)	Docket No. RM 2000-7
Digital Phonorecord Delivery)	
Compulsory License)	

**Digital Media Association Reply Comments to
Copyright Office Notice of Inquiry**

In response to the Comments submitted to the Copyright Office Notice of Inquiry, 66 Fed. Reg. 14099 (March 9, 2001) (hereinafter "the Notice"), the Digital Media Association ("DiMA") respectfully submits these reply comments, primarily with respect to comments submitted by the National Music Publishers Association ("NMPA") and the Songwriters Guild of America ("SGA"); and in support, in part, of the comments submitted by MP3.com and the Recording Industry Association of America ("RIAA").

In its initial Comments, DiMA supported the concept of a limited rulemaking, and requested that the Copyright Office should undertake the following procedures and findings:

1. The Copyright Office should determine that streaming (whether interactive or noninteractive) does not create an "incidental DPD." This determination can be made by the Copyright Office either by a finding that the law is clear and therefore a rulemaking is not needed, or after conducting a rulemaking proceeding.
2. A CARP should be convened thereafter if necessary to set rates for DPDs, including Limited Downloads.
3. No CARP should be instituted to set rates for incidental DPDs until and unless the petitioners seeking a CARP first identify and define specific types of existing communications that constitute an incidental DPD.¹

¹ DiMA further noted that the Copyright Office may lack the authority to issue all findings sufficient to fully secure the necessary licensing framework for new online music services that consumers want most, such as subscription and locker services. Therefore, DiMA's Comments asked the Copyright Office to recommend that Congress should clarify that transient copies made during authorized streaming performances (noninteractive and interactive) are exempt from copyright liability; and either to explicitly exempt, or subject to statutory license, multiple server copies of musical works used to facilitate licensed performances and downloads.

All submitted comments demonstrate the pressing need for the Copyright Office promptly to undertake these efforts. Not surprisingly, of all the commenters, the only party that did not directly support some form of rulemaking was NMPA/SGA. The gist of the NMPA/SGA paper seems to be that the Copyright Office should refrain from regulation and allow additional time for voluntary license agreements to take root. Yet, the actions of NMPA/SGA in the marketplace – and their role in promoting the years’-long stalemate that now stymies market progress – illustrate precisely why regulatory action is needed now. For, contrary to the view of NMPA/SGA, there is no danger that Copyright Office action could delay market progress. It is indisputably clear that voluntary licensing to date has not worked.

Witnesses at the May 17, 2001, hearing before the House Judiciary Committee Subcommittee on Courts, the Internet and Intellectual Property described how the inability to obtain timely music publishing rights obstructed the launch of legitimate new music services. Rob Glaser, Chairman and CEO of RealNetworks, Inc. and Chairman and acting CEO of the subscription music service, MusicNet, testified:

[W]hat MusicNet’s launch underscores is that the technology is there, the content is being assembled, and the subscription business model is being proven every day. So what is missing? In our view, music publishing issues stand out as the most significant potential impediment to launching great subscription services.²

These legal impediments, as noted in the NMPA/SGA comments, are not new. Controversies over what is, or is not, an incidental digital phonorecord delivery first came before the Copyright Office some four years ago, in December 1997, in In re: Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, No. 96-4 (CARP DPRA). At that time, online entities AudioNet (which is now the webcasting arm of Yahoo!), RealNetworks and Terraflex Data Systems (now AOL’s webcast music service at Spinner.com) – all of whom remain members of DiMA – banded together to form an ad hoc “Coalition of Internet Webcasters.” The Coalition lodged objections to regulations, proposed under a “voluntary agreement” among RIAA, NMPA and SGA, governing the rates and terms applicable to incidental DPDs. As a result of those objections, the Copyright Office, with the consent of the parties, deferred final regulations regarding incidental DPDs until the market and licensing regimes had further time to mature.

Since that time, streaming has found widespread public acceptance as a compelling way to hear new music programming over the Internet. Notwithstanding, the development of a mature market remains hamstrung by this unresolved legal dispute. The comments of digital streaming media provider Supertracks.com, Inc. pointedly observed that the debate over music rights, and the consequent inability to obtain timely license rights, contributed very substantially to the decline of many Internet music outlets:

² See Testimony of Rob Glaser at http://www.house.gov/judiciary/glaser_051701.htm.

It's clear that Internet users love to listen to music over the Net, yet the online streaming industry is in serious trouble. Streaming media operations are bleeding red ink, and stock prices of many companies in the sector are way down. If the business environment was not bad enough, there is the additional problem of an uncertain legal environment that has a direct affect on the ability of a company to navigate the already stormy seas. In fact, it is this uncertain legal environment that has had a direct negative affect on continued investment in this industry, which in turn has affected the overall economy.

Supertracks.com Comments at 4.

These legal obstacles to music licensing further have been exacerbated by practical difficulties in obtaining music licenses. At the May 17 hearing Robin Richards, President of MP3.com, described the difficulties of even offering consumers the right to listen online to music they already own:

MP3.com has a loyal following of music lovers who have purchased CDs and who want to use our service as a convenient way of listening to the songs on those CDs. We have millions and millions of dollars worth of licensing agreements with the record labels. But we still can't give consumers access to all of their music – and this is a problem that will be faced by every Internet music provider – because right now there is no practical way to contact all of the music publishers with copyright ownership claims in the more than 900,000 songs in our digital library.³

Thus, despite the passage of time, the maturation of the marketplace and repeated efforts at voluntary licensing, the dueling petitions of the RIAA and MP3.com on one hand and the NMPA/SGA on the other manifest the need for prompt regulatory action. DiMA respectfully submits, as explained further below, that the time for such action is now, and the first stop along the road to a final resolution of these issues is the Copyright Office.

1. The Market Can No Longer Wait for “Voluntary” Licensing by Music Publishers.

NMPA and SGA principally contend that Congress intended for incidental DPDs to be defined by voluntary licensing. Coming before the Copyright Office now are the RIAA, MP3.com and the more than 70 members of DiMA, which collectively constitute the largest music streaming entities on the Internet, attesting to a single fact: Despite reasonable efforts, “voluntary” licensing has not worked, in large measure because of the stubborn adherence by NMPA and SGA to an untenable and overbroad legal claim that every interactive stream creates

³ See Testimony of Robin Richards at http://www.house.gov/judiciary/richards_051701.htm. Similarly, Vivendi Universal Executive Vice Chairman Edgar Bronfman, Jr. stated, “The impediment that remains quite frankly I hope we can resolve amongst ourselves, and that is that we need the music publishers to license in the way that the sound recording companies have, to allow music to be used in the way that consumers want.” http://artists.mp3s.com/artist_song/1570/1570107.html, at 9:39.

an incidental DPD. It now has been some six years since Congress created the section 115 DPD compulsory license. The time for “voluntary” action has passed. What NMPA/SGA are asking of the Copyright Office, in truth, is to allow them to keep dangling the sword of Damocles over the market, hoping that leading Internet services will concede their principles and, instead, pay a high price for peace.⁴ A rulemaking proceeding would create a more level playing field, foster an equitable resolution of the issues, and thereby promote the more rapid development of a legitimate licensed marketplace.⁵

The NMPA/SGA similarly cannot seriously contend that the Copyright Office lacks the legal authority necessary to engage in the proposed rulemaking. Indeed, it is internally inconsistent for NMPA and SGA to acknowledge that a CARP has the obligation to set rates and terms for the section 115 compulsory license, including for incidental DPDs, yet to insist that neither the Copyright Office nor a CARP can determine what is or is not an incidental DPD. If no one overseeing the arbitration can make this determination, then how can a CARP set the license terms? Must the CARP set rates for every type of transmission that NMPA and SGA claim to be an incidental DPD? Or, does a CARP in such circumstance set rates only for services that all parties concede to be an incidental DPD? Unless the Copyright Office has the authority, at the outset, to determine whether a particular service creates an incidental DPD, arbitrating parties will be forced to squander time and fees in prolonged arbitration over rates and terms for every transmission that anyone claims could constitute an iDPD, no matter how specious or farfetched the claim might be.⁶

This cannot have been Congress’ intention. The Section 115 arbitration was designed to be a streamlined procedure, not one that requires an appellate court to set the baseline for the

⁴ It seems odd in this regard for NMPA and SGA to point to the license with MP3.com for the My.MP3.com locker service as a paradigm “voluntary” license. That license was executed in settlement of a lawsuit, after My.MP3.com was found liable for infringement to sound recording copyright owners, and hundreds of millions of dollars in damages. Suffice it to say that DiMA members who have been offered those same terms believe that the terms and rates in the MP3.com license are prohibitively high, reflecting litigation risk rather than marketplace negotiation.

⁵ Moreover, it is absurd for NMPA and SGA to suggest that voluntary licensing terms could “define” an incidental DPD. See NMPA/SGA Comments at 7-8. Private negotiations cannot and do not define the terms of the Copyright Act. Congress and the Copyright Office do.

⁶ DiMA notes that the regulation proposed by NMPA/SGA in 1997, was similarly inconsistent with their current contention that the CARP and Copyright Office lack authority to determine what is or is not an incidental DPD. Their proposed regulation, section 255.6(a), would have provided, “In any future proceeding under 17 U.S. 115(c)(3)(C) or (D), the characterization of a digital phonorecord delivery as ‘incidental’ and the royalty rates payable for a compulsory license for Incidental DPDs shall be established de novo,” See 62 Fed. Reg. 63506, 63508 (Dec. 1, 1997). If the Copyright Office or a Copyright Arbitration Royalty Panel (“CARP”) could possess the authority to establish what is an incidental DPD “in any future proceeding,” they obviously must have had the authority to do so in the first proceeding as well.

arbitration only after the arbitration is complete.⁷ Congress wrote the rules so that each party would enter the arbitration upon a level playing field, not with a guaranteed "home court advantage" for the NMPA and SGA. Therefore, Congress could not have intended that the simplified process for obtaining the compulsory DPD license be undermined by lengthy court disputes over what services require rates and terms to be set. Rather, as is apparent from the statute, Congress gave the Copyright Office primary authority to set preliminary guidelines for the arbitration, and to serve as the first line of legal review for the findings of the panel. Implicit in this authority is the ability to engage in a rulemaking necessary to determine, in the first instance, whether particular services come within the scope of a rate-setting proceeding.⁸

Thus, under the case law cited in the DiMA comments at 8 and n. 7, and as a matter of sound policy, the Copyright Office possesses the authority necessary to determine, in the first instance, that the temporary copies made during streaming do not constitute an "incidental DPD."

2. The Copyright Office Need Not "Legislate" to Make the Requested Finding that Transitory Buffers are not "Incidental DPDs."

The NMPA and SGA comments further suggest that the Copyright Office cannot countenance the RIAA petition because it would require the Copyright Office to legislate in the interstices of the statute. This assertion overstates the facts. In truth, the parties are asking the Copyright Office only to interpret the existing statute, not to rewrite it.

The NMPA/SGA contention seems particularly self-serving here, inasmuch as these same parties had proposed regulations in 1997, which, had they been adopted, would have added new and far-reaching substantive provisions to section 115(c)(3)(C)(ii). Indeed, the regulations proposed by NMPA/SGA in 1997 did far more than merely track the statutory language regarding incidental DPDs. Their proposed regulations would have created a new category of phonorecord, the "Transient Phonorecord," as a species of incidental DPD. That new category would have constituted a breathtaking expansion of rights for NMPA and SGA, by reading out of section 115(d) the requirement that a DPD result in a "specifically identifiable reproduction." In effect, their proposed regulations could have been read such that all transitory acts in the course of transmission would have required a compulsory mechanical license – a result that plainly was

⁷ NMPA and SGA are wrong in their contention that a rulemaking would be more time-consuming than the litigious process they propose. See NMPA/SGA Comments at 12. A rulemaking can be complete within far less time than a court or appellate proceeding. DiMA notes in this regard that the petition that initiated the recent rulemaking as to the definition of a "service" under section 114 and a district court case to make the opposite determination were filed at approximately the same time, yet the Copyright Office rulemaking was complete long before the district court case left the launch pad.

⁸ This authority also was implicit in the recent Copyright Office rulemaking regarding the definition of a "service" under section 114. Absent this rulemaking, the parties would have been in the untenable situation of conducting an arbitration that was either underinclusive or overinclusive. Hence, the Copyright Office properly exercised its authority to resolve the issue prior to the submission of direct cases by the parties. A similar result should obtain here.

not contemplated by the DPRSRA. Moreover, their proposed regulations purported to establish standards for secondary liability against entities that transmit Transient Phonorecords (and, by implication, all Incidental DPDs).

Clearly, the NMPA and SGA in 1997 had no hesitation to ask the Copyright Office to “legislate” new details into the DPRSRA. They should not be heard now to complain that the Copyright Office suddenly lacks the authority to interpret the statute – particularly where such interpretation would manifestly benefit the administration of the compulsory license, decision-making by the CARP and, ultimately, legal certainty for all concerned parties.

What DiMA seeks from the Copyright Office is not an addition to the statute, but an interpretation of its intended scope. As set forth in DiMA’s comments, and in the next section below, DiMA believes it is clear beyond cavil that transitory cache or buffer storage used solely to facilitate authorized transmissions should not be deemed “incidental DPDs.” As a matter of procedure, the Copyright Office can reach this conclusion in one of two ways. Either the Copyright Office could acknowledge now that streaming does not create an incidental DPD and, therefore, find that no rulemaking is needed, or it could make this determination through the rulemaking process. Any further clarification to the law, such as a finding that such cache and buffer storage are fully exempt from copyright liability, could be made by Congress or a court, as necessary; but need not be made through this rulemaking alone.

3. The Copyright Office Should Determine that Transitory Buffer Copies are not "Incidental DPDs."

DiMA’s Comments summarized the reasons why Congress did not intend in 1995, to expand the traditional mechanical license to include the type of transient buffers such as are used during Internet webcast streaming. As noted in DiMA’s Comments, the legislative history of the DPRSRA describes Congressional intent to "confirm," "clarify," "maintain" and "reaffirm" those existing rights. Congress evinced no intention to expand or enlarge mechanical rights, or to blur the otherwise clear distinctions between mechanical royalties and the right of public performance. *See* DiMA Comments at 4, *citing* S. Rep. No. 104-128 at 37; H.R. Rep. No. 104-274 at 28. *Accord* Comments of Consumer Electronics Association and Clear Channel Broadcasting, Inc. at 7. Moreover, DiMA’s comments observed that any cache and buffer storage used in the technical act of making public performances should not be deemed “specifically identifiable reproductions” with respect to the transmitting entity and, therefore, would not meet the definition of either a DPD or incidental DPD. DiMA Comments at 5 and n. 3.

The comments of Supertracks.com further illustrate why there is no economic justification for imposing separate liability for transitory reproductions, inasmuch as each copy is but a part of a single, uninterrupted economic event – *i.e.*, a public performance:

Copyright owners are not losing potential revenue by the making of these various copies along the delivery line, because no revenue-generating event can occur until a consumer can listen to the song (whether downloaded or streamed). If these copies (that are made strictly for the purpose of transmission, storage and related non-revenue generating events) are not allowed to be exempt from

copyright enforcement, from point of origin and along the network and in the RAM of a personal computer, the ability of the Internet to act as a cost-efficient conduit for delivery (and thusly as a revenue generator) is negated.

Supertracks.com Comments at 6.

DiMA welcomes the recognition in the RIAA comments that “any fragmented ‘temporary’ or ‘transient’ reproduction in a computer’s ‘buffer’ memory, which is necessary for the transmission of the performance and constantly recycled, may be of only transitory duration, and therefore not sufficiently ‘fixed’ to be considered a phonorecord.” RIAA Comments at 3. In fact, the Coalition of Internet Webcasters made this very point in 1997:

Indeed, the Coalition questions whether all ‘incidental DPDs’ or ‘transient phonorecords’ as defined in the NPRM, may be ‘fixed’ under 17 U.S.C. § 101. Without such fixation, the temporary copies do not constitute ‘phonorecords’ under 17 U.S.C. § 101 and, consequently, DPDs under 17 U.S.C. § 115(d).

Comments and Notice of Intent to Participate of the Coalition of Internet Webcasters, In re: Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, No. 96-4 CARP DPRA (December 29, 1997).

In this connection, the RIAA Comments cite legislative history underlying the 1976 Copyright Act that is highly pertinent to the issues now before the Copyright Office. “Fixation” being a constitutional prerequisite to copyright protection, the 1976 Act accords statutory protection to a live broadcast only if it is being recorded, by or under the authority of the broadcaster, simultaneously with its transmission. H.R. Rep. No. 94-1476, at 52-53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665-66. Hence, an Internet webcast would not be protected by copyright merely because it is webcast; it would be subject to copyright protection only if it is simultaneously recorded by or under authority of the webcaster. Absent such recording, webcasting is not “fixed” and creates no phonorecord – hence, it creates no digital phonorecord or digital phonorecord delivery.

The legislative history further clarifies that Congress did not intend that fixation would occur by purely evanescent or transient reproductions that enable perception of the live broadcast signal – “such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or *captured momentarily in the ‘memory’ of a computer.*” *Id.*, H.R. Rep. No. 94-1476 at 53, *reprinted in* 1976 U.S.C.C.A.N. at 5666 (emphasis added). This legislative history further supports Congress’ intention to retain clear distinctions between transitory performances and reproductions.

In sum, applying Congressional intent in 1976 to today’s Internet technology, it is clear that streaming webcasts captured in caches or buffers are mere transient events to enable perception of the webcast, and should not be considered “fixed” or subject to copyright.⁹ Yet, as

⁹ See RIAA Comments at 3. See also, Comments of Consumer Electronics Association and Clear Channel Broadcasting at 1 (“the performance is the only economically meaningful activity that occurs, and any copies that may be created as a necessary incident of such

noted above, the market has been impeded by the intransigent legal posturing of music publishers. Therefore, the Copyright Office should find that the evanescent and transitory storage that occurs during webcasting does not fall within the definition of an incidental DPD.

4. DiMA Joins the Request for Interim Rules, under Appropriately Protective Conditions.

The comments of the RIAA and MP3.com suggest that the Copyright Office should adopt Interim Rules that enable all parties to obtain prompt compulsory licenses to musical works, for the purpose of engaging in interactive streaming and locker services. DiMA believes that Interim Rules can be a useful tool to promote growth of online music, if adopted with at least the following essential safeguards:

First, the Interim Rules should cover the making of both incidental DPDs and multiple ephemeral server recordings, without prejudice to the parties' respective positions as to whether any license is needed. The rules should make absolutely clear that parties can take advantage of the rules so as to obtain licenses and make appropriate payments – *if* it is later determined that such licenses are necessary.

Second, while we could support the concept of creating a “safe harbor” for online services, the Interim Rules should not create an opportunity to impose liability on entities that have not filed for licenses under the rules. While entities may wish affirmatively to take advantage of this safe harbor, any Interim Rules should not give rise to a negative implication that those who do not file per se are infringers.

Third, the Interim Rules should provide retroactive protection for those who have taken positions on principle in this long-standing dispute. The purpose of the rules should be to solve marketplace problems, not to create new opportunities to obtain windfall recoveries through retrospective damage claims. Thus, through the operation of these interim rules copyright owners should be released from potential claims for copyright misuse, and copyright users would be relieved of possible claims of infringement, based on their respective pre-rulemaking conceptions of what does or does not constitute an incidental DPD.

Therefore, DiMA would support the exploration, through a rulemaking, of a set of Interim Rules to promote prompt and simple administration of the section 115 compulsory license as it may pertain to online music services.

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performances are not and should not be subject to authorization or licensing separate from the licensing of the underlying performance.”). It has been suggested that other arguments, such as fair use or implied license, might apply with respect to these evanescent buffer copies as well; however, such arguments may not be encompassed within the scope of the proposed rulemaking.

Conclusion

The Comments received by the Copyright Office pursuant to the Notice demonstrate cogently that the longstanding dispute over the scope of mechanical rights with respect to Internet streaming needs to be resolved now, in order to stimulate creation of new subscription and interactive services to disseminate music to an eager, paying public. DiMA therefore believes, as we suggested in our January 16, 2001, letter and in our Comments, that the Copyright Office can promote marketplace development by addressing the underlying legal issues first, before addressing the rates and terms of any necessary statutory license rights.

More specifically, the Copyright Office first should determine that the technical copies made during the process of streaming do not create "incidental DPDs." This could be done either by declining to undertake a rulemaking proceeding, on the grounds that the legal distinction between streaming and digital phonorecord delivery is unambiguous; or, by conducting a full rulemaking proceeding to determine the issue.


Second, DiMA would support the use of the rulemaking process to consider and adopt appropriate Interim Rules governing the coverage under section 115 of any reproduction rights necessary to engage in subscription, download and locker services.

Third, DiMA also would support a rulemaking to determine the appropriate classification of a Limited Download as an incidental DPD or record rental. If, after making these findings, the Copyright Office determines that a CARP remains necessary, the arbitration should address the DPD rate and, as necessary, the rate for Limited Downloads.

Finally, as DiMA noted in its January 2001, letter and its comments, an arbitration should address the rate for incidental DPDs only if petitioners demonstrate that specific types of incidental DPDs today exist. Unless such incidental DPDs actually exist at this time, there is no reason to empanel a CARP to set rates and terms for a null set of services.

On behalf of the members of DiMA, we again thank you for conducting this inquiry, and express our willingness to address any further questions you may have.

Respectfully submitted,



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