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DOCKET NO.
RM 2000.7B
COMMENT NO. 4

United States Copyright Office
Library of Congress

FEB 6 2002

GENERAL COUNSEL
OF COPYRIGHT

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

COMMENTS OF YAHOO! INC.

Yahoo! Inc. is pleased to submit this response to the Copyright Office's December 14, 2001, Request for Comment, published at 66 Fed. Reg. 64783, concerning the impact of the October 5, 2001, settlement agreement between the Harry Fox Agency ("HFA") and National Music Publishers Association ("NMPA") and the Recording Industry Association of America ("RIAA") (referred to hereinafter as "the Agreement"), which covers mechanical licenses for On-Demand Streams and Limited Downloads.

Neither this voluntary settlement agreement, nor any other agreement negotiated by private parties, should set the terms for the compulsory mechanical license, particularly where (as here) the settlement agreement covers matters outside the scope of that compulsory license. Yahoo believes it is clear that Limited Downloads come within the scope of the section 115 compulsory license. However, it is equally clear that Internet Streaming, whether preprogrammed or on-demand, does not implicate the mechanical license right. As such, the Copyright Office should initiate a rulemaking only to properly classify Limited Downloads as a type of digital phonorecord delivery or as record rental, so that voluntary negotiations or any necessary arbitration before a CARP will reflect the proper standards for determining a fair and reasonable rate.

Yahoo's Music Offerings

Yahoo is a leading global Internet communications, commerce and media company that offers a comprehensive branded network of services to more than 219 million individuals each month worldwide. As the first online navigational guide to the Web, www.yahoo.com is the leading guide in terms of traffic, advertising, household and business user reach. Yahoo! is the No. 1 Internet brand globally and reaches the largest audience worldwide.

Yahoo currently offers its users varied music offerings, including on demand streaming videos, internet-only music channels, streaming audio and video broadcast events, and music file downloads.

Uncertainty in Internet Music Licensing Impedes Online Services.

Yahoo's efforts to launch new music services have been delayed and deterred by disputes with rights owners over what music rights are necessary for each type of service and by the

uncertainty and inefficiency surrounding online music licensing. Most relevant to this Notice, for as long as there has been a streaming music business, Yahoo has taken the position that streaming does not implicate the mechanical license or sound recording reproduction right. In late 1997, AudioNet¹ helped form the Coalition of Internet Webcasters, which objected to prior regulations drafted and proposed jointly by RIAA and HFA/NMPA that could have imposed liability on all streaming activity as an "incidental DPD." Launch Media² CEO David Goldberg testified at the November 29, 2000, Section 104 Study hearing before the Copyright Office and NTIA, that licensing demands had been made on Launch based on claims that mechanical license payments were required for Internet streaming; and, as Mr. Goldberg stated, it remains preferable to resolve any ambiguities in the law on this issue through legislation rather than litigation. See Section 104 Report at 57, 140.

Yahoo therefore welcomed the August 2001 Section 104 Report of the Copyright Office which stated that this key issue should be resolved in favor of the positions advocated by the online music community.³ It remains Yahoo's strongly held view that buffers and server and cache copies created in the course of licensed online performances, via streaming, should not and do not require mechanical licenses; and that any buffers or cache and server copies made to enable licensed performances and downloads have no independent economic value and are within the scope of fair use. We further support the Copyright Office's conclusion that legislation to adopt the recommendations of the Report would help to cut the Gordian knot and clarify music licensing law for the Internet.

The RIAA-HFA Agreement Demonstrates the Need for the Rulemaking.

The Section 104 Report makes clear that the process of streaming does not implicate any right to compensation independent of the value of the public performance itself. See Report at 142-146. Therefore, no mechanical license is needed with respect to the buffer copies created by the technological process of streaming. The Report further notes that there is no justification for royalty payments upon server copies which are made solely to enable licensed performances, and which have no economic value independent of the licensed performances. See Report at 144 n. 434. As specifically recognized in the Section 104 Report, "[t]he economic value of licensed streaming is in the public performance of the musical work and the sound recording, both of which are paid for." Report at 13. However, the Agreement between RIAA and HFA attempts to establish that a mechanical license is needed for On-Demand Streams, and that this license is available under the section 115 compulsory license. Such compromises in a voluntary settlement agreement may affect the legal relations between those parties, but the copyright law is created by Congress, not by private agreements.

¹ AudioNet, later renamed broadcast.com, was one of the first full-time streaming services on the Internet. It was acquired by Yahoo in 1999.

² Yahoo acquired Launch Media in 2001.

³ Yahoo also concurs with the Copyright Office concerning the symmetrical issues addressed in the Section 104 Report, that online services need not pay performance royalties based on downloading.

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We respectfully submit that the Copyright Office should continue its support for sound copyright policy, and should not promulgate any regulations based on any purported mechanical license obligation for On-Demand Streams.

Yahoo does agree that Limited Downloads would require a mechanical license, and that such license should therefore be available under the provisions of the compulsory license of section 115. There may, however, be an unresolved issue as to the proper classification of Limited Downloads as a DPD or "incidental" DPD, or as a record rental. The correct classification could affect both the nature of the rights available with respect to these Limited Downloads and the method for calculating the statutory fee. Proper classification is best resolved in a rulemaking proceeding. We therefore would ask the Copyright Office to conduct and complete this rulemaking proceeding as soon as possible.

Conclusion

The Copyright Office Section 104 Report analysis demonstrates why licensed streaming performances, from server copies to buffers, should require no mechanical license payments. On this basis, Yahoo respectfully requests that the Copyright Office should not accept any elements of the Agreement that conflict with this conclusion, specifically, those provisions that would impose mechanical license obligations upon On-Demand Streaming. This will bring greater clarity to the licensing of online music, to the benefit of online services, creators and the public.

Respectfully submitted,



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