

**TESTIMONY BY DAVID PAKMAN, MYPLAY, INC.  
November 29, 2000**

**BEFORE THE UNITED STATES COPYRIGHT OFFICE, Library of Congress  
and  
THE NATIONAL TELECOMMUNICATIONS AND INFORMATION  
ADMINISTRATION (NTIA)  
U.S. Department of Commerce**

***Re: REPORT TO CONGRESS  
PURSUANT TO SECTION 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT***

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Good afternoon Register Peters and Assistant Secretary Rohde,

*[INTRODUCTION]*

I am the Co-Founder and President of myplay, Inc., the first digital locker service where consumers can lawfully store and access anywhere the music they purchase. Before founding myplay I enjoyed 5 years in the early days of online music and media – first at Apple Computer where I co-created the first commercial webcasting network, and then at N2K, one of the earliest Internet music companies and the first provider of commercial digital downloads.

*[DESCRIPTION OF MYPLAY]*

Launched just over a year ago, myplay is the category creator and leading music Locker™ storage service on the internet with more than 4,000,000 customers currently registered, and more than 20,000 being added per day. The myplay personal locker enables customers to store, organize and stream back to them the music they own, that is, to hear their personal music collection wherever they happen to be.

And unlike many sites offering music on the internet, myplay has been recognized by the RIAA, Artists Against Piracy and others for having structured its service in a manner that both complies with the Copyright Act and compensates owners of copyright in musical sound recordings and compositions.

The myplay service is unique among internet music services because it offers its customers both password-protected personalized locker space as well as the ability to transmit playlists to the general public of music assembled by customers from their locker collections. The myplay personal locker enables its customers to organize, store, and transmit back to the customer from any location,

his or her personal collection of recordings uploaded from customers' own CD collections, or acquired online. Consumers' use of myplay as a personalized storage and playback facility is unquestionably a fair use of musical sound recordings and compositions for which myplay does not pay royalties. Myplay also gives record labels the opportunity to offer our customers downloads of tracks and of albums, which can be added to customers' lockers.

Myplay will, however, pay substantial royalties pursuant to both voluntary music performance licenses and compulsory sound recording licenses for the streaming transmission to the public of customer playlists.

We consider these payments to be just, fair, and complete compensation to copyright owners for our streaming of licensed musical compositions and sound recordings. However, the threat of copyright owners assessing further royalties for mere incidental copies that bear no independent value to consumers, and are mere technical requirements for the transmission and playback of streams, is not only unfair to those of us who obtain rights through blanket and compulsory licenses, it is both unjustified and will needlessly impede electronic commerce. This is my principal reason for testifying today.

*[POINT ONE: TEMPORARY BUFFER-MEMORY COPIES FOR AUTHORIZED STREAMING SHOULD BE EXPLICITLY PLACED OUTSIDE THE COPYRIGHT OWNER'S MONOPOLY POWERS AND RIGHT TO DEMAND COMPENSATION]*

Temporary buffer-memory copies for authorized streaming should be explicitly placed outside the copyright owner's monopoly powers and right to demand compensation. These copies in buffer-memory are technically required for the transmission and playback of streams of music on the internet, both during transmission through the internet infrastructure and also at the ultimate destination, the user's personal computer. There is no practical way to transmit and play back streams without them.

These buffer-memory copies are not permanent; they bring no value to consumers and consumers will not pay for them. They are mere technical necessities -- no different from the buffer copies made by cd-players, e-book readers, and other electronic players of digital material. Manufacturers of every one of these devices enjoy a *de facto* exemption from liability for buffer-memory copies. No copyright owner would dream of trying to collect extra fees for any of these uses.

Buffer-memory copies are also created during the transmission of downloads of music -- or of text or graphics for that matter -- through the internet infrastructure and during final processing at the customer's PC. But to my knowledge, no web site has ever been asked to pay extra for mere buffer-memory copies made through the sending and processing of copyrighted material -- other than musical streams -- over the internet. Why should companies like myplay, who offer streams of music, and pay blanket license and compulsory license fees for the privilege, be treated any differently?

*[Fair Use]*

I am confident that, if put to the test, these buffer-memory copies would be deemed a fair use as mere incidental copies made in the exercise of authorized rights of public performance that bear economic benefits to user and copyright owner alike. However, it would be better for our industry if the status of buffer-memory copies were made clear in the Copyright Act. Even if companies like myplay possessed large war chests -- which we definitely do not -- there is no rational basis for us to bear even the threat of lawsuits, much less the immense cost of establishing this principle in the courts.

Moreover, the clarification we request should be precise about exempting buffer-memory copies for *all lawful* transmissions and playback -- not just those that are licensed. This is necessary to embrace and preserve meaningful fair use, which is of great importance to consumers, and integral to the myplay locker service. Absent such clarification, myplay and similarly situated internet service providers would continue to be exposed to threats from owners of copyright, and their representatives, who contend that we who stream audio files online must pay not only public performance fees, but also must pay again for fleeting buffer-memory copies as if such copies were the equivalent of permanent downloads.

An amendment clearing up this point will benefit copyright owners, too. Myplay has studied customer usage patterns and the economic benefits that can be derived from that usage, and there is no rational business model that allows for payments by consumers or advertisers for mere buffer-memory copies. Royalties and payments due for use of copyrighted works are made possible only when an economically rational business can be built in accordance with the use of such works. We believe strongly that significant profitable businesses can be built from the use of copyrighted works, however no business can be built or expanded solely by commercializing temporary memory copies. Conversely, if royalties were due on the creation of purely transient copies, there is a substantial danger that presently viable business models would be fatally undermined.

Given the significant amount of uncertainty surrounding this and other issues of copyright in the digital domain, myplay currently retains 8 law firms and over 20 lawyers, many simply to seek clarification, warn of risks, and defend against potential claims arising from the lawful use of copyrighted works by myplay or our consumers. This unnecessary expense and resource drain would be obviated by further clarification of the Copyright Act, allowing our and other businesses to get on with the work of building a business and serving consumers.

Copyright law should avoid needlessly placing obstacles in the way of commerce and consumer enjoyment, particularly hurdles based on *the most trivial of technicalities*. This is particularly advisable when clarifications of the law will have virtually no effect on a copyright owner's reasonable and just expectations for compensation. Copyright owners are entitled to -- and should be paid-- fees for public performance, but not for the buffer-memory copies that do nothing more than technically facilitate transmission and playback.

For all the reasons I have given, temporary buffer-memory copies for *lawful streaming* should be *explicitly* placed outside the copyright owner's monopoly powers and right to demand compensation.

*[POINT THREE: MYPLAY CUSTOMERS SHOULD BE ABLE TO MAKE A BACK-UP ARCHIVAL COPY OF A DIGITALLY-DOWNLOADED COPY.]*

As the law now stands, under principles of fair use, consumers may make back-up copies for personal use, unless material is encrypted. Myplay consumers should have the right to do the same with digitally delivered works that do not require decryption. Computer hard drives crash; new ones replace old ones. Customers need this right for convenience no less than the lawful acquirers of computer software who already enjoy this privilege under Section 117 of the current Copyright Act.

The myplay Locker service, for example, is built upon the consumers' ability to upload copies of the works they have bought (either as CDs or as digital downloads). Changes in the consumers' right to do this for digital works would violate principles of fair use, would be inconsistent with the rights afforded owners of analog physical goods, and would stifle the success of the burgeoning digital download industry.

## [CONCLUSION]

Myplay has, from the beginning, designed its service in a way that compensates copyright owners and artists in full compliance with the Digital Millennium Copyright Act and other relevant sections of the Copyright Act. Myplay plays by the rules.

There are many additional changes in the law that myplay would desire for the sake of fair treatment beyond those under consideration here today. For apparent reasons, in addition to the clarification regarding fleeting buffer-memory reproductions made during the course of streaming -- that they not be considered reproductions -- myplay would *also* wish an explicit statement in the Copyright Act that *downloads* that cannot be monitored in real time are not to be considered *public performances*. This would avoid yet another form of threat from copyright owners and their representatives who wish to be paid more than once for the same authorized use.

Myplay is also a strong proponent of the expansion of compulsory licenses to make music more available in response to consumer demand. Such licenses should require reasonable payment to copyright owners. Myplay does not favor any *exemption* from payment obligations (unlike those covered by the proposed MP3.com bill); we are not looking for a free ride. Rather, myplay wants to ensure fair compensation to copyright owners because that is the only way to ensure the future of music online.

But in the meantime, before these additional changes in the law become feasible, myplay urges that at least one small, but significant, step be taken immediately: enhance the flow of e-commerce for which consumers are now clamoring by legally precluding copyright owner demands for redundant compensation in instances of authorized streaming that are excessive and unjustified.

Thank you for your time.