ORIGINAL

RECEIVED

FEB 26 2002

GENERAL COUNSEL
OF COPYRIGHT

Before the
United States Copyright Office
Library of Congress

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

DOCKET NO.
RM 2000.7B
COMMENT NO. 2

Reply Comments of the Digital Media Association

In its initial Comments in the above-captioned proceeding, the Digital Media Association ("DiMA") articulated reasons why the Copyright Office should not adopt the provisions of the October 5, 2001, voluntary settlement between the Harry Fox Agency ("HFA") and National Music Publishers Association ("NMPA") and the Recording Industry Association of America ("RIAA") (hereinafter, "the Agreement") as regulations implementing the section 115 compulsory license:

1. As a private agreement between parties, it is entitled to no particular weight either as an interpretation of the scope of section 115 or in determining the rights of non-parties.

2. Contrary to the plain language of section 115, the Agreement purports to apply the compulsory mechanical license to acts, such as the making of buffers during webcast streaming, which are not subject to the mechanical license and as to which a strong case can be made for fair use. The Copyright Office should not adopt regulations at variance with the law simply because two parties accede to a contrary interpretation. The impact of such misinterpretation of law will be to expose webcasters to claims for mechanical royalty payments upon acts that have economic consequences only as performances.

3. Similarly, adoption of the Agreement's interpretation could impose additional unwarranted royalties upon the making of server copies that are used solely to make licensed digital phonorecord distributions, when only the DPDs themselves properly are subject to mechanical royalties.

4. By leaving essential points such as rates and the classification of Limited Downloads to further negotiation, the Agreement, in truth, merely establishes contingent liabilities while doing little to resolve the digital music licensing dilemma.

5. The potential for misinterpration of law that results from private publisher agreements supported and motivated only by litigation leverage demonstrates precisely why the marketplace continues to need a workable compulsory license under section 115. To serve this salutary purpose, however, procedures to obtain the mechanical license sorely need updating for the digital age. Specifically, DiMA urged the following reforms:

- the creation of a publicly-available comprehensive database of ownership of copyrighted musical works;
- the ability to search the database electronically;
- the ability to file license requests electronically;
- the ability to file license requests in batch files;
- the ability to file these licenses, statements of account and royalty payments with a single entity, such as an agent appointed by the Copyright Office.

The importance of these points to the Internet music industry was underscored in comments filed by two well-known Internet companies that have much at stake in the online music marketplace. Liquid Audio, the company that was first to introduce "limited download" technology to the marketplace, observed that the Agreement adds to rather than solves the problems hindering online music services; and that the Copyright Office should instead provide further clarity to the marketplace by reaffirming the findings of its Section 104 Report. Yahoo! similarly noted that, as broadcast.com and in the present, it has ardently opposed publishers' efforts to assess reproduction royalties against webcast streaming, and so views the imposition of such royalties under the Agreement as detrimental to the economic prospects of online music companies.

Although DiMA had expected in this Reply to address any additional points submitted by HFA, NMPA and the RIAA over and above their initial December 6, 2001, filing with the Copyright Office, unfortunately the HFA-RIAA comments offer nothing new in their favor. Instead, their comments essentially recapitulate their December 6 filing, arguing only that the Agreement represents the byproduct of "the marketplace at work." There is no explanation of how the terms of the Agreement, and particularly paragraph 8.1 thereof, comport with and implement existing law. What appears obvious from the Agreement and their Comments is that HFA and RIAA have not resolved their differences as a matter of law. Rather, they are merely allowing a monetary value to be assigned, by negotiation or arbitration, to their "agreement to disagree."

DiMA respectfully submits that attempting to finesse the legal issues through convenient but inaccurate interpretation merely invites more problems and more payments, less marketplace certainty and fewer

marketplace players who can afford to compete. Emblematic of the flaws in this approach is the HFA-RIAA proposal *not* to resolve disputed rights with respect to consumer-influenced streaming performances that the publishers may consider neither "pure" webcasting nor "on-demand." Disputes over this middle ground perhaps are of no consequence to RIAA members, who are not currently offering such services. We note, however, that RIAA members last summer filed a lawsuit against several consumer-influenced webcasting services that music publishers might deem to fall within this center of the spectrum. Absent a definitive statement that webcast streaming creates no mechanical royalty obligation, then any of these services could find themselves to have resolved their differences with the record labels, only to be threatened with additional license payments or litigation with publishers over webcast buffers.

Similarly, the Comments of ASCAP, BMI and SESAC demonstrate the wisdom of the Copyright Office's decision to address in the Section 104 Report the reciprocal issue of why downloads that cannot be heard simultaneous with their transmission do not implicate performance royalties. We note that the Section 104 Report already has had a salutary impact by stimulating the November, 2001 concession by these entities and the NMPA that no payment is due either upon a "pure" download or a "pure audio-only" webcast. See Joint Statement of ASCAP, BMI, HFA and NMPA, published at http://www.ascap.com/legislative/jointstatement.html. From DiMA's perspective, it is difficult to understand the logic behind the limitations in each of these parties' points of view. If these parties are conceding that the technological acts that constitute buffering or downloading do not implicate each other's respective collection rights, then it should not matter whether the acts fall within the sphere of "pure" webcasting or downloading, or within some other sphere in which only the business model, rather than the technological act, has changed. Conversely, if by the Joint Statement these parties are merely staking out the specific circumstances in which they intend to stay out of, or intrude upon, the other's collection business, then the Joint Statement seems to be an instrument of market allocation rather than sound copyright policy.

DiMA believes that the path through this licensing thicket will become clear only through the enunciation by a government agency – not a private party -- of which copyright rights properly apply to each act. Our members cannot afford any other solution. Most DiMA members are lean entrepreneurial companies that are long on music industry experience and technical expertise, but are surviving only by stretching their limited investment capital. If required to pay duplicative royalty fees to multiple entities for a single economic act, these services cannot hope to show a profit, or to attract sufficient new investment capital so as to reach profitability. Hence the Copyright Office, as in the Section 104 Report,

should enunciate clear principles distinguishing between mechanical license rights and valueless streaming buffers, and between downloading and public performances, so as to avoid exposing Internet webcast services to additional claims of liability and lawsuits by publishers that have already granted licenses for the relevant economic act through their authorized agents.

Wherefore, the Digital Media Association respectfully submits, as set forth in its Comments, that the Copyright Office should affirm its findings in the Section 104 Report with respect to the legal status of webcast buffers and server copies vis-à-vis the mechanical compulsory license right, and should institute a limited rulemaking to ascertain the status of Limited Downloads so that appropriate rates and terms can be set for such downloads by negotiation or arbitration.

Respectfully submitted,

February 27, 2002

Jonathan Potter
Executive Director
Digital Media Association
1120 Connecticut Avenue NW
Suite 1100
Washington, D.C. 20036
(202) 715-0592
jpotter@digmedia.org

Seth D. Greenstein
McDermott, Will & Emery
600 Thirteenth Street NW
Washington, D.C. 20005-3096
202-756-8088
sgreenstein@mwe.com
Counsel to Digital Media
Association