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GENERAL COUNSEL
OF COPYRIGHT

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liquid audio

the way music moves

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January 28, 2002

Before the United States Copyright Office, Library of Congress

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

COMMENTS OF LIQUID AUDIO, INC.

In response to the US Copyright Office Request for Comment (66 Fed. Reg. 64783, Dec. 14, 2001), Liquid Audio, Inc. respectfully submits that the October 2001 agreement between the RIAA and NMPA/HFA should have no impact on the Notice of Inquiry in Docket RM 2000-7 (66 Fed. Reg. 14099, Mar. 9, 2001), nor should it have any effect on any rulemaking concerning the relationship of the section 115 compulsory mechanical licenses to On-Demand Streams or Limited Downloads.

BACKGROUND

Liquid Audio provides software and services for Internet music delivery. Our solutions enable musicians, record labels, Web sites, music retailers and other businesses to publish, distribute and sell music online with copy protection and copyright management.

Using our software, consumers can access a large catalog of digital music -- in many leading formats -- from hundreds of Web sites in the Liquid Music Network. Liquid Audio also works with software and consumer electronics companies to ensure that a wide range of digital audio products can playback Liquid Music.

Liquid Audio was formed in May 1996 by experts in music and technology and was the first to deliver secure music over the Internet. Liquid Audio had the first digital music commerce system featuring copy protection and copyright management, as well as the first and largest digital music distribution network. The company's catalog of secure music downloads is one of the largest in the world.

Members of the company's executive team include senior executives and founders of prominent technology companies and senior executives from the music industry. Liquid Audio became a publicly held company in July 1999.

LIQUID AUDIO'S SUBSCRIPTION SERVICE PLATFORM

In late 2000 and early 2001 Liquid Audio combined newly developed and existing technologies to create a secure platform for subscription music services. That platform includes time-limited downloads, on-demand streaming, and full downloads.

Downloaded music files can be exported to numerous secure portable consumer devices.

It is important to point out that since Liquid Audio's inception in 1996, we have sought and received input from music publishers, record labels and their agents on how to comply with their security concerns and rights issues. For example, the NMPA/HFA policy in 1996 and 1997 maintained that an Internet stream was a performance right, and a download was a mechanical right, and requested that Liquid create space in its metadata system for a unique song identifier. Our encryption, watermarking, file identification and digital rights management technologies have implemented these suggestions, and allow the rights holder to determine the permissions and conditions under which their music may be distributed, and to encode the unique identifier of their choice.

The culmination of this work can be seen in our subscription technology that provides for setting time-limited downloads, with options to set licenses for export quantities and device specific permissions. The flexibility of the system also allows the rights holder to implement upgradeable licenses that change the permissions allowed for any given musical file. For example, a consumer might download a set quantity of time-limited music files for a monthly fee, and choose to purchase one or more of them for permanent ownership. The upgrade permission allows the user to obtain the file with a single click of the mouse, thereby negating the need to re-download the file.

LICENSING ISSUES

Liquid Audio's ability to bring a legitimate subscription service to market has centered on licensing issues. As a result, Liquid Audio has abandoned the rollout of its interactive-streaming, and time-limited download technologies:

The lack of clarity in the DMCA in defining the rights implicated by downloads and streaming, poses a great financial and legal risk.

The lack of clarity in the DMCA has helped foster a situation in which the performing rights organizations (ASCAP, BMI and SESAC) and the principle mechanical rights agency (NMPA/HFA) have sought to "double-dip" by extracting performance and mechanical rights on both streaming and download activities. Liquid Audio has maintained a policy that Internet streams are performance rights and downloads are compulsory mechanical rights. We believe that RAM buffers and server master copies are essential to the delivery technology, but do not carry any independent economic value.

We are pleased with the findings of the US Copyright Office Section 104 Report that supports the common sense view separating Internet streams and downloads into performance rights and mechanical rights respectively. Unfortunately, the rights organizations are not satisfied with collecting the royalties rightfully due to their

publisher clients, maintaining instead, the position that they each deserve to collect a share of the other's royalty stream as well. The RIAA – NMPA/HFA agreement brazenly defies the US Copyright Office's findings and is an attempt by NMPA/HFA to compromise the Copyright Law by using this private agreement to establish a precedent that mechanical licenses are required for on-demand streams and server master copies. It must be remembered that the RIAA - NMPA/HFA agreement is an interim compromise allowing the record labels to launch their joint venture services, while the definitions and royalty rates continue to be negotiated. The agreement does not provide any definite negotiated royalty rate. The potential for the use of this agreement as a forward-looking template presents Liquid Audio with a dangerous risk of paying exorbitant royalties on a retroactive basis.

The RIAA-NMPA/HFA agreement should not affect the US Copyright Office's March 2001 Notice of Inquiry, and should have no affect on the scope of the compulsory Section 115 license. On-demand streaming, for which a performance license is granted, does not require a mechanical license for either buffers or server masters and caches. Liquid Audio supports the findings of the US Copyright Office Section 104 Report that buffers, server masters and caches have no economic value other than a performance right, and constitute a fair use.

Full downloads and time-limited downloads are covered under the Section 115 mechanical license. The US Copyright Office's inquiry remains relevant and rates and terms for time-limited downloads need to be established. The RIAA-NMPA/HFA agreement does not specify how these are covered, whether as full DPD, incidental DPD or record rental, and therefore presents a dangerous and open-ended legal and financial risk to Liquid Audio.

CONCLUSION

It is imperative that the US Copyright Office issue its rulemaking on these issues consistent with the Section 104 Report. Online music services like Liquid Audio are faced with either paying for rights that we do not we need, conceding strongly-held legal principles or abandoning the very technology that was developed with the rights owners input. We have spent tens of millions of dollars and have employed hundreds of people in order to comply with the specifications and policies of rights holders. It is not appropriate that royalty collecting agencies continuously exploit ambiguities in the law, in order extort unfair terms and fees under threat of litigation.

Respectfully submitted,

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