**Before the**
**UNITED STATES COPYRIGHT OFFICE**
**LIBRARY OF CONGRESS**
**Washington, DC**



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| **Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries** | ) | **Docket No. RM 2000-7** |

**Reply Comments of Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers**

Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors and Publishers ("ASCAP") (collectively, the "Performing Rights Organizations" or the "PROs") hereby submit their reply comments in the above-captioned proceeding pursuant to the Copyright Office's Notice of Proposed Rulemaking ("NPRM") and the Federal Register notices dated July 10, 2008, 73 Fed. Reg. 40802 (July 16, 2008), and August 8, 2008, 73 Fed. Reg. 47113 (August 13, 2008).

BMI and ASCAP filed initial comments along one basic line: this proceeding is intended to set forth the parameters of *only* the Section 115 license. Nevertheless, as expected, numerous comments filed by various user groups once again seek to transform this rulemaking proceeding from focusing on a narrow subject matter into a soapbox denouncing the entire existing framework for the clearing of copyrighted musical works by digital music services. Particularly, the now tired complaint of double-dipping by copyright owners ran through the comments like a euphemistic broken record. The PROs reiterate the caution given to the Office in their initial

comments – all such issues concerning the performance right and the practice of licensing multiple rights have no bearing on this rulemaking and should be ignored.

The PROs have commented from time to time in the Copyright Office's Section 115 rulemaking proceedings for the express and sole purpose of protecting the public performing right from encroachment by licensees and music users. We continue to urge the Office not to issue rulings or interpretations of statutes related to the public performing right. In view of the vitriolic comments of some music users in response to the NPRM, we feel compelled to briefly respond to some of the misstatements of the law concerning public performances and their relationship to mechanical rights.

First, it is the PROs' longstanding position that digital transmissions implicate the public performing right, regardless of whether a mechanical or "ephemeral" reproduction license is also required for the service. The very definition of "digital phonorecord delivery" ("DPD") in Section 115 contains an acknowledgement by Congress that public performing rights are implicated by DPDs. The parties to the pending mechanical rate case before the Copyright Royalty Board all likewise agree that interactive streaming, an activity which is licensed by the PROs, also requires a mechanical license. Thus, performing rights and mechanical rights can and do co-exist.

The PROs take issue with those commenters that argue that each transmission must necessarily implicate either the performing right, or the mechanical right, but not both. *See* Comments of Ad Hoc Coalition of Streamed Content Providers at 19-20. These comments incorrectly contend that this has been a long established principle of the copyright law. The 1976 Act established that copyrights contain a bundle of rights, each of which can be separately licensed. While the separate licensing of performing rights and reproduction/distribution rights

in the United States has a long history, many users (background music services included, as confirmed by their own submission in this proceeding) have long obtained both rights. The either/or test attempts to cleanly divide the rights implicated by Internet and wireless music transmission services in a way that does not respect economic reality. These commenters are shamelessly trying to deny songwriters just compensation.[1]

Certain commenters decried the history of "double dip claims" brought by participants in the music industry. *See, e.g.,* Verizon Comments at 18. However, prior cases have made clear that a service often requires multiple licenses, confirming the intention of Congress in creating multiple and separate rights. *See, e.g., Country Road Music, Inc v. MP3.com, Inc.*, 279 F.Supp.2d 325 (S.D.N.Y. 2003) (rejecting a defense that a performance license shields the defendant Internet service from infringement of the separate reproduction right); *Rodgers and Hammerstein Org. et al. v. UMG Recordings, Inc. and the Farm Club Online, Inc.*, 2001 U.S. Dist. LEXIS 16111 (S.D.N.Y. 2001).

The "Ad Hoc Coalition" attempts to support this misguided black or white view through the recent decision in the ASCAP rate court that certain "downloads" of musical works do not implicate the public performing right. Comments of Ad Hoc Coalition of Streamed Content Providers at 18-20. However, that case dealt only with pure downloads of music sold as singles online, and left open the prospect that some downloads can qualify as public performances. *See U.S. v. ASCAP, In the Matter of the Application of AOL et al.*, 485 F.Supp.2d 438, 446 n.5

[1] The unique relationships the PROs maintain with their separate songwriter and publisher members and affiliates underscores the importance of respecting both streams of royalty income.

(S.D.N.Y. 2007). The Court's decision cannot be taken for the sweeping statement of law that the users would like it to be.[2]

In conclusion, the PROs reiterate their view that the instant rulemaking proceeding should be limited to mechanical rights issue and echo the concern expressed by others that "controversies surrounding ancillary issues could jeopardize the goals of this rulemaking." Comments of EFF et al. at 1. We hope the Office heeds these concerns.

Respectfully submitted,

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[2] Moreover, the decision is open for appeal to the Second Circuit, which recently reaffirmed that the transmission of a performance does itself constitute a performance. *The Cartoon Network L.P., L.L.P. et al. v. Cablevision Systems Corp.*, 07-1480-cv (L) and 07-1511-cv (CON) (2d Cir. 2008), slip op. dated August 4, 2008.