Before the
United States Copyright Office
Library of Congress

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

Comments of the Digital Media Association

The Digital Media Association ("DiMA"), in response to the Request for Comment from the Copyright Office,[1] respectfully submits that a voluntary agreement settling disputes between private entities does not, and should not, define for all parties the metes and bounds of a statute. Therefore, 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") (hereinafter, "the Agreement"), should have little impact upon the Notice of Inquiry in Docket RM 2000-7[2] or any rulemaking pursuant thereto, with respect to the applicability of the section 115 mechanical license to On-Demand Streams and Limited Downloads.

The Agreement embodies a "compromise" interpretation of the section 115 compulsory license that does not comport with either the plain statutory language or the correct interpretations of existing law set forth in the Copyright Office Section 104 Report. The Copyright Office should not adopt regulations and rates at variance with section 115 simply because a party accedes to a contrary interpretation.[3] DiMA agrees with the Register's observation at the December 13, 2001, hearing before the U.S. House of Representatives Subcommittee on Courts, the Internet and Intellectual Property: the recommendations of the Section 104 Report reflect sound, balanced copyright policy. The Agreement does not.

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1 66 Fed. Reg. 64783 (December 14, 2001).

2 66 Fed. Reg. 14099 (March 9, 2001). DiMA filed Comments and Reply Comments in that proceeding on April 23 and May 23, 2001, respectively, which we incorporate herein by reference.

3 DiMA notes in this connection that a few DiMA members signed the Agreement and thereby eliminated the threat of litigation as an impediment to launching new Internet on-demand subscription music services, and to attracting and sustaining outside capital investments. DiMA's comments do not purport to speak on behalf of these members. If we did, those members might be accused of breaching paragraph 8.2 of the Agreement, which precludes them from making public comments to any governmental entity, directly or through associations they support, that contradict the legal compromises in paragraph 8.1. We ask the Copyright Office to take cognizance of this "muzzle clause," and to not presume that the silence of these services signifies their assent.

In other key respects, the Agreement is but an empty vessel. Basic points are left to further negotiation; or, if negotiation is unsuccessful, to arbitration or litigation. There is no explication of what specific characteristics of a Limited Download purportedly require, or fall under, the section 115 license. No rates are set for Limited Downloads. There is no suggestion of how Limited Downloads are to be characterized under section 115, so that appropriate rates can be determined. Such issues need to be decided authoritatively in a rulemaking conducted by the Copyright Office.[4]

Finally, we respectfully submit that the Agreement demonstrates precisely why the marketplace continues to need a workable compulsory license under section 115. Internet services need the statutory mechanical license as an alternative and safeguard against the overreaching of private licensing agents. For the section 115 license to achieve that goal, however, the licensing procedures for the mechanical license sorely need updating for the digital age. Perhaps the most powerful proof of the inadequacy of the Agreement, and the urgent need for reform, came from RIAA General Counsel Cary Sherman, who testified on December 12, 2001, before the U.S. House of Representatives Subcommittee on Courts, the Internet and Intellectual Property, that legitimate licensed online music services were unable to offer consumers access to 15 of the top 20 most popular sound recordings, because they were unable to obtain the mechanical license rights even pursuant to the terms of the Agreement. We urge the Copyright Office to support modernization of the compulsory license process (in a manner such as is proposed by H.R. 2427, the Music Online Competition Act) to take advantage of more efficient methods of electronic searching, submission and payment.

The Need for Certainty in Internet Music Licensing

Uncertainty and inefficiency in the licensing of music online have hamstrung the efforts of DiMA member companies to create new and compelling online music experiences for our consumers. As a result, DiMA members have been unable to launch legitimate services that innovatively market and expose new music, while watching tens of millions of consumers flock instead to free services that pay no license fees. These delays also have harmed performers, composers, lyricists and music publishers, who have lost substantial revenue that would have been generated by these unlaunched online services.

The current music licensing regime is fraught with litigation threats and duplicative license demands. Certain copyright owners (or, more accurately, their agents) have attempted to exploit untested legal arguments in order to enlarge their traditional scope of mechanical or performance royalty collection. For as long as there has been a streaming music business, Internet companies have contended

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[4] Inasmuch as no mechanical license is needed for the server or cache copies or buffers used for On-Demand Streaming, or the server copies used to make Limited Downloads, there is no need (or right) to convene a CARP for those purposes.

with copyright owners who claim that any type of streaming requires a mechanical license. DiMA agrees with the assessment of the Copyright Office Section 104 Report that buffers made to enable licensed streaming public performances have no independent economic value and are within the scope of fair use; and that there is no justification for imposing royalty obligations upon the copies that enable those licensed performances.[5] We therefore support the Copyright Office's call for legislation to implement the recommendations of the Report, and thereby to clarify music licensing law for Internet services.

Moreover, the process for obtaining a section 115 compulsory license for new music services is unwieldy, time-consuming, labor-intensive and prohibitively expensive. For Internet-based businesses that live and breathe digital data, an electronic system that permits rapid online searching and submission of batch license requests would substantially streamline the process. This would result in greater availability of paying music services and legitimate music on the Internet, and more rapid and accurate payments to the music publishers, composers and lyricists.

Streaming Does Not Require A Mechanical License.

Notwithstanding the well-reasoned views set forth in the Copyright Office Report, HFA and RIAA attempt to rewrite the law by proclaiming, in a private settlement, that a mechanical license is needed for On-Demand Streams, and that this license is available under the section 115 compulsory license. The Agreement, at paragraph 8.1, states in a conclusory fashion that the process of On-Demand Streaming, "viewed in its entirety," requires a mechanical license, without any analysis of which act – the making of server copies, the caching of content or the making of buffers in the random access memory of the recipient's computer – purportedly creates the license obligation.[6] Such private agreements may affect relationships between those parties, but they do not, and should not, change the law.

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[5] DiMA members also continue to experience the problems referencedin the Section 104 Report whereby performing rights societies request payments based on the downloading of music. *See* Report at 146-148. While DiMA believes that file downloads are not public performances, we certainly can agree with the Copyright Office that no performance royalty payment should be made when downloading a music file, and that clarifying the law in this regard would assist online companies in their license negotiations with the PROs.

[6] Paragraph 8.1 of the Agreement recognizes that streaming pursuant to the section 114 statutory license to perform sound recordings by digital transmission does not require a mechanical license. This is a noteworthy concession inasmuch as there is no technical difference in the process of streaming for an on-demand or noninteractive service. Notwithstanding, the Agreement specifically leaves open the possibility of future claims that a mechanical license would be necessary for interactive services, other than on-demand services, that fall outside the section 114 license. DiMA respectfully submits that such uncertainties provide another compelling reason for the Copyright Office to state definitively in this proceeding that licensed streaming public performances, from server to buffer, require no mechanical license.

The Section 104 Report analysis makes clear that the process of streaming should not implicate any right to compensation independent of the value of the public performance itself. *See* Report at 142-146. DiMA therefore believes that no mechanical license is needed with respect to any copies or buffers created by the technological process of streaming – or for the related server copies, which also have no economic value independent of the licensed performances, and which are made solely to enable those licensed performances. *See* Report at 144 n. 434.[7] We respectfully submit that the Copyright Office should continue its support for sound copyright policy, and should neither endorse nor adopt that portion of the Agreement that purports to create a mechanical license obligation for On-Demand Streams.

Limited Downloads Need Proper Characterization through Rulemaking.

The Agreement provides that the making of Limited Downloads does require a mechanical license, and that such licenses are available under the compulsory license provisions of section 115. With that much, DiMA agrees. However, there are two issues that we believe nevertheless should be addressed through a rulemaking by the Copyright Office.

First, the Copyright Office should find that the server copies used to make Limited Downloads have no economic value independent of the download itself and, therefore, that no separate mechanical license payment is required for those server copies. *Cf.* Report at 144 n. 434. The making of Limited Downloads is a single economic act. Logically, there is no independent economic value to copyright owners in the technical elements necessary to manufacture and distribute Limited Downloads, apart from the downloads themselves. Server copies are in that sense no different from the professional manufacturing equipment used by vinyl record pressing plants or CD stamping facilities, for which no separate license is required. The making of these server copies thus amply can be justified under legal theories of fair use or implied license.

Second, a rulemaking is needed to properly classify Limited Downloads either as a type of DPD, or as record lease or rental. As noted in the March 9, 2001 Federal Register Notice, the correct classification could affect the method for

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[7] Subsequent to the issuance of the Section 104 Report by the Copyright Office, the district court in *Rodgers & Hammerstein Organization v. UMG Recordings, Inc.* concluded upon summary judgment that mechanical licenses obtained from HFA were limited to particular physical media formats and did not cover the making of server copies to support on-demand streaming through the FarmClub subscription service. Memorandum Opinion and Order, 00 Civ. 5444 (JSM) (SDNY September 25, 2001). We respectfully submit that this decision does not and should not affect the analysis that no statutory mechanical license should be required for server copies. First, as the district court stated, its decision was circumscribed by the terms of an express written license between UMG and HFA, and did not rely upon the compulsory section 115 license. Second, the district court was not asked to consider legal theories that could have compelled a different holding: whether the making of such server copies constituted fair use, and the question of implied license.

calculating the statutory fee under section 115(c)(3), or as a percentage rate under section 115(c)(4).[8] We therefore believe that the Copyright Office should conduct and complete this rulemaking proceeding so as to assist the parties in negotiations, or, if necessary, to guide the determinations of a CARP.

Additional Concerns with the Agreement

HFA has stated its willingness to extend a modified version of the Agreement to other online services. Regrettably, the Agreement remains unacceptable to many online services for several reasons in addition to those stated above. These reasons, described below, further demonstrate why the marketplace continues to require a workable compulsory mechanical license.

First, the Agreement really is little more than a promise to not sue now and to negotiate later. Services that sign the Agreement assume an obligation to pay royalties, without knowing what the rate eventually may be. Negotiations over those rates, to our knowledge, have been conducted as a private matter between the labels and the publishers, such that independent online services have not been represented at the bargaining table.

Second, the Agreement exacerbates, rather than ameliorates, the risks of potential liability for online music services. The Agreement does not require HFA to provide a list of its membership or its participating publishers. Because of this, and the "opt-out" provisions of the Agreement (at ¶ 3.2), a signatory does not know when signing the license exactly which publishers are willing to grant them rights. Similarly, while HFA volunteers to seek licenses from non-HFA participating publishers, there is no guarantee that such publishers will in fact accept the HFA form request, which varies the terms of section 115 license, as a notice of intention under section 115. Agreement ¶ 3.5; *see Rodgers & Hammerstein v. UMG Recordings*, Memorandum Opinion at 10-12. Consequently, a service that needs rights to distribute particular songs may be well advised to negotiate licenses or file section 115 license requests directly with the copyright owner as well as

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[8] However Limited Downloads ultimately are classified, DiMA submits that a number of economic factors will be relevant to a proper determination of the applicable rate, including: the limitations imposed upon the use of the Limited Download by a transmission recipient in proportion to DPDs and other phonorecord distributions in general (*e.g.*, duration, number and location of listening opportunities versus unlimited plays in untethered locations); the extent to which Limited Downloads may promote or may substitute for the sales of phonorecords or otherwise may enhance or may interfere with the copyright owner's other streams of revenue from its nondramatic musical works; and the revenue received by the compulsory licensee from every Limited Download in proportion to the revenue received by the compulsory licensee from distribution of a general DPD or phonorecord. DiMA notes that these considerations are set forth in Section 5(b)(1)(B) of the Music Online Competition Act, which also would clarify the nature of Limited Downloads as a category of DPD.

with HFA, or else risk losing the right to ever obtain a compulsory license to a particular work.

Third, the Agreement attempts to silence the services' ability to continue to oppose before legislative bodies and relevant administrative agencies the payment of mechanical royalties on streaming services. Those services that signed the Agreement have been prevented by paragraph 8.2 from filing comments or openly supporting the positions taken in this submission by DiMA.[9] That HFA seeks to suppress any challenge to their conclusory legal theories suggests that paragraph 8.1 cannot bear close public scrutiny.

Finally, the Agreement effectively solidifies HFA control over factual information concerning copyright ownership that HFA does not and should not exclusively own, and that ought to be publicly available. As reflected by the Congressional testimony of Mr. Sherman of the RIAA, online music services that have signed on to the Agreement have discovered that HFA does not have a comprehensive and current database of copyright ownership by music publishers. Under the Agreement, HFA requires services to provide HFA with information from those services' own databases concerning the ownership of the copyrights that are sought to be licensed. HFA then may incorporate that information into its own database. The Agreement further provides that all information contained in the HFA database – regardless of whether it came from sources other than HFA – is proprietary to HFA and may not even be used to seek licenses directly from the publishers themselves. *See* Agreement ¶¶ 3.1 and 3.6. Thus, it appears that HFA is using information that it obtains in the course of licensing to create a monopoly over the licensing itself.

The Copyright Office Should Support Section 115 Modernization.

Each of the above reasons demonstrates the need for an effective alternative to the HFA Agreement, and why the section 115 compulsory license remains necessary for DPDs. However, the procedures for obtaining the section 115 compulsory license remain extremely time-consuming, burdensome and expensive for new music services. Witnesses before the House Subcommittee on Courts, the Internet and Intellectual Property on May 17, 2001, described how current paper-

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[9] DiMA questions whether this clause in the agreement is in fact void as against public policy. Much in the same way that licensees cannot be estopped from challenging the validity of particular licensed patents or copyrights, it would seem that licensees should not be barred from challenging efforts to license non-existent rights as a condition to the license of certain legal rights that the licensee desires. *See, Lear, Inc. v. Adkins*, 395 U.S. 653, 674 (1969) (rejecting theory estopping licensee from challenging patent validity); *Twin Books Corp. v. Walt Disney Co.*, 877 F.2d 496, 500 (N.D. Cal. 1995), rev'd on other grounds 83 F.2d 1162 (9th Cir. 1996); 3 *Nimmer on Copyright* §10.15-B at 10-130 to 10-135 (2001 ed.). *See also, Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1200 (7th Cir. 1987) (a clause used to confer monopoly power beyond the amount that the copyright laws authorize can be attacked as a contract in restraint of trade notwithstanding a "no-contest" clause).

based procedures to obtain the compulsory license are unworkable for Internet services that must file tens and hundreds of thousands of notices at a time.[10] Thus, we submit that there is an urgent need to reform the process of obtaining compulsory mechanical licenses under Section 115.

Specifically, DiMA urges 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.

In the digital age, the process of music licensing could be made more efficient, by an order of magnitude, by creating a system whereby copyright owners of a particular musical work can be identified rapidly by searching an online database, and licenses may be obtained immediately online by simply clicking a button on the online database entry for that work. DiMA therefore urges the Copyright Office to closely examine the relevant provisions of the Music Online Competition Act, and to support the adoption of procedures that would streamline the process for obtaining a compulsory license under section 115.

Conclusion

The analysis and legislative recommendations of the Copyright Office Section 104 Report concerning the legal status of streaming should not be undermined by a private agreement among but a few of the interested parties. From the server to the buffer, DiMA believes that licensed streaming public performances – whether on-demand, interactive or non-interactive – require no mechanical license payments. We therefore urge the Copyright Office not to adopt any aspects of the Agreement relating to the mechanical licensing of On-Demand Streaming, and to confirm that no mechanical license is required where streaming public performances are licensed. With respect to Limited Downloads, DiMA requests the Copyright Office further to find that no separate license is needed to make server copies that support the making of licensed downloads under the compulsory license. Finally, we support a rulemaking to determine the correct categorization of Limited Downloads under Section 115, so that any negotiations among the parties or any subsequent arbitration before a CARP with respect to the

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[10] *See* Hearing on Music on the Internet, at 43 (testimony of Robin Richards), 67 (testimony of Rob Glaser) , 118-119 (testimony of Edgar Bronfman, Jr.), transcript available at http://commdocs.house.gov/committees/judiciary/hju72613.000/hju72613_0f.htm; Comments and Reply Comments of DiMA in Docket RM2000-7.

rates and terms for the Limited Download license will proceed according to the proper standards.

Respectfully submitted,

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Jonathan Potter
Executive Director
Digital Media Association
2111 Wilson Boulevard, Suite 1200
Arlington, VA 22201
703-276-1706
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