Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of	)	
	)	
Mechanical and Digital Phonorecord	)	Docket No. RM 2000-7B
Delivery Compulsory License	)	February 6, 2002

Comments of National Association of Recording Merchandisers and Video Software Dealers Association

Thirty years ago, the Register of Copyrights gave us guidance for today's technology: "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright." Register's Report on the General Revision of the U.S. Copyright Law (1961), at 30 (emphasis added). That statement was one of several in opposition to efforts by motion picture producers and distributors to extend the performance right to what were "clearly private performances" in people's homes. *Id.* at 29-30. Congress followed the Register's recommendation, and we recommend that it also be followed where sound recordings are lawfully reproduced in the home.

America's music and video retailers believe the Register's position is just as pertinent today, as new technological devices make it practical to reproduce motion pictures, sound recordings and literary works in the home instead of a factory. The private performance of such reproductions is not, and should not be, placed under the control of copyright owners.

The Copyright Act has never permitted copyright owners to control private performances, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975). Today, technological restraints have been fashioned to achieve *de facto* control over private performances where *de jure* control has been denied. The so-called "Limited Download" is but a technological tool to circumvent the limitations that the Copyright Act places on copyright owners. As in the original RIAA proposal and in the agreements among competing copyright owners in joint ventures such as pressplay, MusicNet, MovieLink, and movies.com, the RIAA/NMPA/HFA agreement furthers the objective of capturing from the public the right of private performance while, at the same time, nullifying the effects of Section 109 of the Copyright Act. (By capturing control over private performances of lawfully made copies, the uncontrolled redistribution of such copies

envisioned by Section 109 is eviscerated, as the prospective transferees would have to pay to play what they own.)

The Limited Download has been referred to as a "rental" when, in reality, consumers are being asked to pay to use what they already own, and nothing is returned at the end of the rental period. If what is truly intended is a "virtual rental," then the proper model is the one already in the law – one that permits most rentals without the consent of the copyright owner. The home video industry, for example, has flourished precisely because copyright owners could not control the home video rental market, leading to fantastic competition and growth through myriad independent and competing business models. (In the limited case of sound recordings and certain computer software, the rental of which requires the consent of the copyright owner, no consent has, to date, been given.)

Limited Downloads are also referred to as a "subscription" model when, in reality, subscribers are effectively denied access to their collection of prior issues should they ever cancel the subscription. If what is truly intended is a "virtual subscription," then current law already provides that the owners of lawfully made copies get to keep the copies they bought with their subscription, and to privately perform them as long as they wish. If what is truly intended is something akin to cable television subscriptions, then current law already permits copyright owners to license the repeated public performances of their works, where no download takes place.

In reality, the Limited Download referred to in the RIAA/NMPA/HFA agreement (and being implemented in concert by all of the major record companies and motion picture studios) is designed to gain the revenue stream consumers might be willing to pay for access to public performances of these works, while at the same time enjoying the control and efficiencies (but not the limitations) of a single digital reproduction (the download). It is intended to turn every digital player into a pay-for-play jukebox, where the consumers own the copies, but lose their federal right to privately perform them (or transfer to others the physical medium on which they are lawfully recorded) without permission from or further compensation to the copyright owner.

Although the focus of this inquiry is on the music industry, it is important to note that motion picture studios embracing the Limited Download do not need agreements such as the RIAA/NMPA/HFA agreement because they already control the applicable rights. They, also, are choosing to work in concert with each other to implement platforms based on charging for private performances. Thus, for music and movies, consumers are being asked to pay for what is

already theirs, and are beginning to lose the immeasurable benefits of an independent, vibrant, competitive and innovative retail component of each mass-market distribution channel.

Copyright owners enjoying the benefits of copyright protection should not be permitted to avoid the very limitations that are intended as the public's benefit in the copyright bargain. To be sure, there may be instances where access to a download may lawfully be limited, such as by limiting access long enough to confirm that payment for the reproduction license has been received, but such instances involve the protection of the copyright itself. There is no copyright in a private performance. The changes in the balance of copyright brought by these Limited Download joint ventures are so fundamental and substantial that nothing short of an Act of Congress is required to legalize them. If Congress were to consider whether the public might benefit from legalizing a mechanism by which persons in lawful possession of legally made copies have to pay or otherwise get permission from the copyright owner to privately perform them, then Congress would surely include safeguards to ensure that competitive, independent delivery systems could flourish, rather than permit copyright owners to place a chokehold on private enjoyment or on the development of lawful, independent and competitive retail and low-cost used product markets.

For these reasons, NARM and VSDA respectfully recommend that the Copyright Office reject the initial RIAA proposal with respect to the Limited Download, expose the Limited Download as an infringement of the public's right of private performance and Section 109 rights, and advise copyright owners against using the Limited Download as a tool for suppressing trade in lawfully made copies and phonorecords owned by others.

Respectfully submitted,

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