

April 30, 2009

The Honorable John Conyers, Jr.
Chairman, U.S. House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member, U.S. House of
Representatives Committee on the Judiciary
2142 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

Last month several composer, songwriter and performance rights organizations (collectively the “PROs”) asked you to amend the Copyright Act to extend the “public performance right” so that it will apply to digital downloads of audiovisual works. We write to oppose this request, as this legislation would impose a licensing obligation and potentially significant royalties on activities that are unequivocally unrelated to public performance.

The PROs assert that parity is their goal, and that legislation is required to associate public performance rights with digital *downloads* of audiovisual works because performance rights are associated with broadcast and cable television *performances* of audiovisual works. This reasoning is circular, however, because it concludes that all digital activities implicate the same rights merely because the activities are digital. The correct comparison is between digital distributions and physical distributions (e.g., CDs, sheet music and DVDs) which have never been considered performances or to implicate the public performance right.

This legislative request is the latest of many efforts by PROs to blur the lines between making a copy and making a public performance in order to demand royalties where none are obligated, nor should they be obligated. The PROs’ letter claims its proposed legislation would merely clarify the law and resolve “conflicting interpretations” of how current law applies to digital downloads. However, all independent legal opinions are clear and unconflicted, and they disagree with the PROs’ point of view and proposal.

In a 2001 hearing of the House of Representatives Subcommittee on Courts, the Internet and Intellectual Property, Register of Copyrights Marybeth Peters testified that digital downloads are “the equivalent of going to a record store and buying a CD...”¹ Earlier that year, in a written report to Congress, the Copyright Office analyzed and rejected the PROs’ assertion that a digital download necessarily constitutes a public performance even when no audible performance of the work occurs contemporaneously with the download.²

¹ Hearing Before the Subcommittee on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary, 107th Cong. (Dec. 12-13, 2001).

² U.S Copyright Office, A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act, at xxvii (Aug. 29, 2001).

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In 1995 the U.S. Department of Commerce, in the seminal report of the Information Infrastructure Task Force that served as the foundation of the Digital Millennium Copyright Act, rejected the PROs' similar proposal to blend copyright rights and instead endorsed the continuing divisibility of copyright rights.

A distinction must be made between transmissions of copies of works and transmissions of performances or displays of works. When a copy of a work is transmitted over wires, fiber optics, satellite signals or other modes in digital form so that it may be captured in a user's computer without the capability of simultaneous "rendering" or "showing," it has rather clearly not been performed. Thus, for example, a file comprising the digitized version of a motion picture might be transferred from a copyright owner to an end user via the Internet without the public performance right being implicated. When, however, the motion picture is "rendered" – by showing its images in sequence – so that users with the requisite hardware and software might watch it with or without copying the performance, then, under current law, a "performance" has occurred.³

Most recently, in 2007, a federal district court rejected ASCAP's assertion that public performance rights are implicated by digital downloads.⁴ The court, after careful review of the controlling statutes, analogous case law, and secondary authorities, concluded that the "downloading of a music file is more accurately characterized as a method of reproducing that file." A transmission of a work for the purpose of delivering a copy to a consumer is not a public performance. Rather, the court concluded that in order for a song to implicate the public performance right it had to be "transmitted in a manner designed for contemporaneous perception".

Notwithstanding these expert rejections of their position, the PROs are now asking Congress to amend federal law in a manner that would have them paid twice for every download. One payment would be for the actual synchronization, reproduction and distribution rights that licensees agree must be licensed and which are licensed only after a negotiation occurs between composers, music publishers and producers of audiovisual works. A second payment would be for a phantom techno-legal "performance" that does not occur, or which occurs after the consumer possesses the music and therefore is a private performance, which has never been a compensable act in the United States or any other country. This change in law is unjustified.

If composers and music publishers wish to be paid more by producers of audiovisual works, they should include such request in their negotiations, and if they do not receive adequate payment then they should refuse to license their music. The notion of amending federal law to attach a "performance right" to every audiovisual download undermines the songwriters own arguments in favor of "platform parity" and maintaining a system of

³ Working Group Report on Intellectual Property Rights, Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure* at 71 (1995).

⁴ *United States v. ASCAP, in re America Online*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

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copyright law that is “technology neutral”. Under the circumstances highlighted by the PROs’ letter, the consumer who enjoys a purchased DVD while riding the train or in a coffee shop is enjoying a work that justifies only a previously paid synchronization royalty. If that same consumer privately enjoys a video purchased by digital download, a second “public performance” royalty is not justified.

Thank you for your consideration of our views. Please contact any of the undersigned if you have any questions or need additional information regarding this matter.

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