

## Copyright Office Defines Digital Phonorecord Delivery

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Garvey Schubert Barer Legal Update, December 28, 2008.

In November 2008, the Copyright Office adopted interim regulations that could lead to additional royalties needing to be paid for streaming. It comes down to whether copies of songs – known as Digital Phonorecord Delivery (DPD) – made in the streaming process are sufficiently permanent to trigger the need to pay mechanical royalties. Mechanical royalties are paid to owners of musical compositions when their music is copied and distributed.

The purpose of the proceeding was to define exactly what a DPD is. To paraphrase the Copyright Office, a DPD involves the digital transmission of a sound recording that results in a specifically identifiable reproduction by or for a transmission recipient where the reproduction is sufficiently permanent or stable to permit it to be perceived for more than a transitory duration.

The Copyright Office declined to decide whether streaming of music that involves making of buffer copies would trigger the need to obtain a mechanical license. It seemed inclined to believe that buffer copies would be DPDs, but believes the marketplace may decide to treat buffer copies as DPDs but not necessarily entitled to the same royalty rates as more permanent copies. The Copyright Office also stated its opinion that some streaming services that involve the making of cache copies placed on a recipient's hard drive that exist for some period of time beyond the entire performance of the song would be a reproduction of the song. To the extent a phonorecord exists on a recipient's computer for some period of time beyond their performance, the phonorecord is considered "distributed." It punted to the Copyright Royalty Judges the determination of whether some DPDs are "incidental" and entitled to a different royalty rate.

Recognizing that server copies and other intermediate copies used to make and distribute DPDs are similar to master recordings and manufacturing equipment in the physical world, the Copyright Office held that server copies and intermediate reproductions are within the scope of the mechanical license if they are the source of a transmission that results in the distribution of a DPD. If such copies are not distributed, then copyright owners are not entitled to separate royalty payments.

The Copyright Office's adoption of the definition of DPDs leaves open the possibility that additional royalties for reproduction and distribution of musical works may need to be paid to songwriters in addition to the fees paid to ASCAP, BMI and SESAC for the right to publicly perform the same songs. Although it is generally believed that mechanical royalties would need to be paid for digital downloads, mechanical fees may also need to be paid for copies made in the streaming process. That will be a determination left to the Copyright Royalty Judges in the future unless industry parties cut their own deals.

Such a settlement was reached this past Fall by National Music Publishers Association, DiMa, the RIAA, and other music publishing groups to provide a mechanical royalty for the reproduction and distribution of compositions that occur during streaming and limited-time downloads. Trade press reports that the royalty in that private settlement was 10.5% of revenue, less amounts paid for performance royalties to ASCAP, BMI and SESAC.