

# NEWSLETTER

An Entertainment Industry Organization



## The President's Corner

*David Hirshland*

I am pleased to welcome everyone to the California Copyright Conference's (and my) 53rd year (no gifts please). The Board of Directors and I are very excited about the coming year as we are planning several informative and innovative programs. The first of which, our annual Legal Eagles panel tonight, is sure to get the year off to a rousing start as we discuss the merits of the proposed Copyright Act revision and the way the new digital era is affecting the recording artist's relationship with his or her label.

As a natural follow up to this program, next month we will be visited by the top brass at the Harry Fox Agency who will detail the changes they have undertaken and the services they now provide. We look forward to seeing you at this event and throughout the coming year!

## CALIFORNIA COPYRIGHT CONFERENCE

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Our website is the place to find information on upcoming meetings and other events. Make reservations, join, or renew your membership online. To view past issues of the CCC newsletter, visit our website and click News.

Below is a summary of the major provisions contained in the proposed amendment to Section 115 (the compulsory mechanical licensing provision) of the U.S. Copyright Law (HR 5553) as amended on August 31, 2006. This proposed amendment is commonly referred to as SIRA. The proposed amendment is drafted as a subsection of Section 115. The purpose of SIRA is to facilitate the licensing of musical compositions to digital music providers (e.g., online services). This summary does not intend to describe every provision or every detail of every provision contained within the proposal. The term "copyright owner" as used in the proposed amendment, and in this summary, refers to persons and/or music publishers.

**Scope.** Covers non-dramatic musical works in the form of digital phonorecord deliveries which are now defined to include permanent digital downloads (such as those available on iTunes), limited downloads (limited by number of plays, time, subscription requirements, etc), and interactive streams (on-demand streaming audio). Also covered are hybrid offerings which are physical objects that become playable via the transmission of data from a digital music provider.

**Blanket Compulsory License.** Establishes a blanket compulsory license for digital phonorecord downloads and hybrid offerings. The compulsory license grants the licensee all reproduction and distribution rights necessary to make reproductions for end users, including reproductions made on servers and incidental reproductions such as caching and RAM buffer reproductions. The compulsory license is available only to digital music providers and may be obtained only

from a designated agent (defined below).

**Incidental Reproductions.** It will not be an infringement of copyright for digital music providers and transmitting entities to make server and incidental reproductions in order to facilitate non-interactive streaming or terrestrial broadcasts. This provision is retroactive to January 1, 2001. A designated agent will provide royalty free licenses for such activities.

**Limited Time Shield on Infringement Liability.** Licensees obtaining licenses from a designated agent for the making and distribution of limited downloads or interactive streams, may report to the Designated Agent on activity from January 1, 2001 through January 1, 2008 and make associated payments by March 1, 2008. Doing so will shield the digital music provider from copyright infringement action arising from reproduction and distribution, provided that such activity is reported and paid for.

**Setting of Royalty Rates.** If royalty rates have not been set by December 1, 2007, royalty rates will be determined by Copyright Royalty Judges. A rate-making proceeding will be initiated not later than December 1, 2007. Rates currently in effect shall continue to apply until new rates are set.

**Interim Royalty Rates.** With respect to activities for which rates have not yet been set, digital music providers may obtain licenses from designated agents. Designated agents and digital music providers may negotiate interim rates, or they may apply to the Copyright Royalty Judges for an interim rate. Notwithstanding any agreement to the contrary, the final rate will be retro-

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*Ed Arrow*

active to the date of commencement with respect to services operating under interim rates, and either the designated agent or the licensees will make any payment necessary to account for the difference between the interim rates the final rate.

**General Designated Agent.** No later than August 1, 2007, the Register of Copyrights shall designate a mechanical licensing and collection agency to represent music publishers. The agent shall be that entity representing the greatest share of the music publishing market as measured by the amount of royalties collected during the preceding three years with respect to the use of copyrighted musical works pursuant to section 115. This agency will establish the General Designated Agent. The General Designated Agent will license digital music providers and collect and distribute royalty payments for the use of musical works as described in the subsection. The General Designated Agent will not represent works controlled by copyright owners who choose not to be represented by another designated agent or who choose to enter into direct licenses with digital music providers.

**Additional Designated Agents.** The Register of Copyrights may certify additional designated agents. To qualify a party must represent one or more music publishing entities that represent at least 15% of the market as measured by the amount of royalties collected in the three prior years.

**Selection of Designated Agent by Copyright Owners.** By default all copyright owners will be represented by the General Designated Agent. However, all copyright owners will have the option of appointing an additional designated agent to represent them. A copyright owner may be represented by only one designated agent during any calendar year.

**Voluntary Agreements.** A copyright owner and a digital music provider may enter into a voluntary agreement. Such an agreement will apply in lieu of a blanket license.

**Data to be Made Available by Designated Agents.** The General Designated Agent and any other designated agents will make available to licensees, free of charge, a searchable electronic database of information from which it may be determined which musical works are available for licensing.

**Recoupment.** A copyright owner may submit a letter of direction to a designa-

ted agent instructing the designated agent to pay royalties otherwise payable to the copyright owner to a sound recording company in order that the sound recording company may apply those royalties to the recoupment of advance payments made under a contract prior to January 1, 2007.

**Royalty Reporting.** Licensees will account quarterly and in electronic format to the applicable designated agents.

**Promotional Use Exemption.** Licensees shall not be required to pay a royalty to designated agents or copyright owners for interactive streams and limited downloads authorized as free promotional uses by the owners of sound recordings. (The proposal contains a lengthy definition of what constitutes a promotional use.) Licensees licensed by the owner of applicable sound recordings may distribute 30 second promotional streams of sound recordings for the purpose of promoting the sale of full downloads or sales of physical product. Provided that the licensee offers the 30 second promotional streams free of charge, the licensee will not be required to pay a royalty for the distribution of 30 second promotional streams.

**Royalty Compliance.** Designated agents may conduct examinations of licensees one time per calendar year, and may examine any period only one time. Designated agents may conduct examinations jointly. Examinations must begin within 18 months from the end of the period being examined and may cover a period of not less than two, but no more than four consecutive years, except that an examination of more than four years will be permitted with respect to an examination of retroactive payments and an examination of less than two years will be permitted with respect to a service whose licensing has terminated.

**Failure to Report or Pay Royalties.** Subject to certain cure provisions, a designated agent may terminate the license of any licensee that fails to report or pay royalties. Upon termination the licensee will be liable for copyright infringement action.

**Distribution of Royalties by Designated Agent.** Designated agents shall distribute royalties to copyright owners on a quarterly basis. Distributions shall occur no later than 60 days after the close of each calendar quarter. Distributions will be made only to copyright owners who have provided designated

agents with information sufficient for the purpose of royalty distribution. Undistributed funds will be placed in an interest bearing unclaimed funds account. Designated agents will make reasonable efforts to identify owners of unclaimed funds and shall publicize the existence of the account. Unclaimed funds will be held for three years. After three years, undistributed funds may be retained by designated agents to offset administrative costs. If any funds remain after the offset, the funds will be distributed proportionally among the designated agents and the designated agents will distribute the funds proportionally to the copyright owners.

**Dispute Resolution.** The General Designated Agent shall establish a dispute resolution committee. The committee shall be comprised of at least six publisher members and an equal number of songwriters. The Register of Copyrights shall establish procedures to be followed by the committee.

**Cost Sharing.** Not later than February 1, 2007, the Copyright Royalty Judges shall determine appropriate interim cost sharing amounts to be paid by licensees and applied equally among the designated agents.

**Direct Payment by Licensees to Owners of Sound Recordings.** An owner of a sound recording may retain the right to be paid royalties by licensees provided that (1) the owner of the recording advises the designated agent of their election to receive royalties directly and; (2) the use of the musical composition in the sound recording is a digital phonorecord delivery subject to a contract between a recording artist/songwriter and an owner of a sound recording establishing a mechanical royalty rate made on or before June 22, 1995 and not modified thereafter for the purpose of reducing the royalty rate; or (3) the use of the musical composition in the sound recording is not a digital phonorecord delivery and is subject to a contract which has been voluntarily negotiated pursuant to subsection (c)(3)(E)(i).

**Application of Pre-Existing Licenses.** The subsection applies to digital phonorecord downloads and hybrid offerings in lieu of any compulsory license under this section prior to the enactment of this subsection.

**Public Performance Rights Preserved.** The rights granted in the subsection shall not include, limit, or otherwise effect, any right of public performance in a musical composition.