

Reasonable Certainty Guidelines

The basic premise of the Copyright and Licensing Verification Program is that replicators must ensure that their customers are authorized to produce and distribute the content that they seek to have replicated. Therefore, the CLV Standard requires that “The manufacturer must obtain and maintain proof of intellectual property rights and trademark authorization.” However, the Standard provides for a limited exception to this general requirement in cases “where the manufacturer is reasonably certain that the reproduction has been authorized and that the contents are what they have been described to be.” A determination of reasonable certainty must be “based on factual criteria that rationally support the conclusion” that is reached. In other words, the replicator must be certain, based on reasonable grounds, that the customer is authorized to produce and distribute the content they seek to have replicated.

Reasonable certainty requires that a replicator has a well-established relationship with a highly trustworthy customer and that the customer’s description of the contents of the media is credible and consistent with the customer’s business and past replication history. In addition, reasonable certainty can exist only where the order as a whole has the hallmarks of a legitimate order and is consistent with the customer’s business practices. In considering whether reasonable certainty exists, a replicator should consider the following factors:

1. Who is the customer?
 - Is your customer a substantial entity within its industry?
 - Does your customer have a notable, good standing within its particular industry?
 - Is your customer a content owner or a substantial licensee/agent of such owner(s)?
 - Is your customer a member of a recognized trade organization that protects the interests of content owners?
 - Does your customer routinely work with copyrighted material have a good understanding of intellectual property law?

2. What is your relationship with the customer?
 - How long have you conducted business with your customer?
 - Do you have an established, safe and secure order history with your customer free of any prior piracy or licensing related issues?
 - Has or can your customer demonstrated that they can provide proof of ownership or authority to replicate at any time for any submitted product?
 - Is your customer certified in CDSA’s Copyright and Licensing Verification Program, and are you satisfied they are complying with the Standard? If your customer is not CDSA certified, does it comply with practices that meet or exceed the most current requirements of the CDSA Copyright and Licensing Verification Standard? How is this verified?

3. Is the description of the contents of the media to be replicated credible?
 - Is the content submitted for replication always similar in nature for the particular customer or does it vary?
 - If you have previous experience with the customer, have the content listings been consistent with the actual contents?
 - Has the order information always been complete (track listing, label information, paperwork, etc.)?

4. Does the order have characteristics of legitimate orders?
 - Are the characteristics of the order, including the content to be replicated, consistent with the customer's business and past replication history?
 - Is the order free of the general piracy indicators set out in the APCP as well as those identified by BSA, IFPI, RIAA and MPAA in their respective good business practices?
 - Are the descriptions of the contents, the artwork or other elements of the order suspicious on their face?
 - Do your customer's name, logo, and copyright warning appear on the label artwork as either content owner or distributor?
 - Has the customer requested delivery of replicated media without artwork?
 - Has the customer used a traceable means of payment?
 - If you are providing Mastering Services for another replicator, can your customer show proof of appropriate licensing and, if applicable, the payment of replication industry royalties?
 - Are you aware if your customer is using additional suppliers for pre-recorded media or are you their primary supplier?

The Internet is a valuable resource that a manufacturer can use to learn more about its customers and their business when making a determination of reasonable certainty.

Even where a manufacturer has made a determination of reasonable certainty, the manufacturer may want to request proof of replication authority as part of a sampling plan to ensure that its criteria for determining reasonable certainty are sufficient.

This is not a complete list of all factors that a replicator may want to consider in assessing whether reasonable certainty exists with regard to any specific order, and these guidelines in no way change a manufacturer's liability with regard to manufacturing pirated material. Instead, they are intended to provide guidelines that may be helpful when making sound business decisions regarding the level of risk that a manufacturer may be willing to take. Therefore, CDSA must decline any liability toward a manufacturer, replicator or third party on account of these guidelines.