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GENERAL COUNCIL
OF COPYRIGHT

In the Matter of)
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Compulsory License for Making and)
Distributing Phonorecords, Including)
Digital Phonorecord Deliveries)
)
)

Docket No. RM 2000-7

**COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION,
SONGWriters' GUILD OF AMERICA,
NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL
AND ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS
ON SECTION 115 INTERIM RULE**

The National Music Publishers' Association, including its wholly owned licensing subsidiary, The Harry Fox Agency, Inc. ("HFA") (together, "NMPA"), the Songwriters' Guild of America ("SGA"), the Nashville Songwriters Association International ("NSAI") and the Association of Independent Music Publishers ("AIMP") respectfully submit these comments concerning the interim regulation addressing the Section 115 license announced by Copyright Office on November 7, 2008 ("Interim Rule"). *See* 73 Fed. Reg. 66,173 (Nov. 7, 2008).

NMPA, SGA, NSAI and AIMP (collectively, the "Commenting Parties") appreciate the Copyright Office's time and attention to the longstanding issues surrounding the availability of the Section 115 license for full downloads, limited downloads and interactive streams, including the server, buffer and intermediate phonorecords required to facilitate the making and distribution of these digital deliveries. The Commenting Parties believe that clarification of the scope and application of the Section 115 license is essential to promoting the growth of digital music services, which rely upon the Section 115 license (and its voluntary equivalents) to obtain

authority for the use of musical works, and are grateful to the Copyright Office for its thoughtful consideration of these matters.

As the Office is aware, the Commenting Parties, along with the other key stakeholders in the digital music industry represented by the Recording Industry Association of America and the Digital Media Association, believe that the delivery of full downloads, limited downloads and interactive streams to end users implicates the making and distribution of digital phonorecord deliveries (“DPDs”) under Section 115. Accordingly, the Commenting Parties supported the adoption (with minor modifications) of the regulation initially proposed by the Copyright Office, 73 Fed. Reg. 40,802 (July 16, 2008) (“Proposed Rule”), to confirm such industry understanding, as well as the related point that the server reproductions and other phonorecords required to deliver these digital configurations to consumers are properly included in the Section 115 license. In particular, the Commenting Parties agreed with the Copyright Office’s conclusion, embodied in the Proposed Rule and based on the Office’s interpretation of the Copyright Act, that buffer phonorecords (often referred to informally as “buffer copies”) of musical works made to facilitate the interactive streaming of sound recordings constitute DPDs subject to licensing under Section 115.

In the wake of the Second Circuit’s *Cartoon Network* decision, however, which was issued shortly after the publication of the Proposed Rule, the Office modified its approach. Notwithstanding the Office’s earlier conclusion concerning buffer phonorecords, the Interim Rule does not espouse a final pronouncement on this issue. 73 Fed. Reg. at 66,173-74 (citing *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)).

For reasons the Commenting Parties have previously explained, we take issue with the Second Circuit’s approach in the *Cartoon Network* case.¹ But even setting aside the reasoning of that opinion, that case does not (and does not purport to) address the status of buffer phonorecords that are created and used to play complete copies of musical works for end users through interactive streaming services. The Commenting Parties therefore do not believe that *Cartoon Network* compels a conclusion different from that embraced by the Copyright Office in the Proposed Rule.²

Indeed, the Copyright Office itself expresses skepticism about the Second Circuit’s approach in the *Cartoon Network* case. *Id.* at 66,177. The Commenting Parties therefore question the second sentence in the text of the Interim Rule, which adds language not included in Section 115’s definition of DPD, as an apparent response to that decision.³ In this regard, we note that the Office specifically observed that it does not intend to offer any position on whether a buffer phonorecord (or “buffer copy”) qualifies as a DPD. *See id.* at 66,174. While it would thus appear contrary to the Office’s intention, because Section 115 of the Copyright Act already sets forth the requirements for a “digital phonorecord delivery,” and Section 101 defines “phonorecords” and “fixed,” the second sentence of the Interim Rule – which does not track Section 115 and does not adhere to the controlling definitions in Section 101⁴ – seemingly could be misinterpreted by some as suggesting an alternative to the statutory standard.

¹ For example, we disagree with the decision’s inappropriate equation of a home-use VCR with a massive, centralized DVR storage system, and the problematic standards applied by the court in assessing whether Cablevision infringed the content owners’ reproduction rights.

² In response to the Proposed Rule, the Commenting Parties provided extensive comments and testimony on the treatment of buffer phonorecords and other issues raised in this rulemaking. Rather than repeat all of our positions here, we instead append our earlier submissions, including written versions of the prior oral testimony, and incorporate them by reference.

³ The sentence in question provides: “The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 73 Fed. Reg. 66,181.

⁴ For example, the newly added sentence refers to the ability to “perceive[], reproduce[], or otherwise communicate[]” the “reproduction of the phonorecord,” while Section 101’s definition of “fixed” speaks of the

Section 115 is unique in the Copyright Act, and represents a nuanced balancing of the interests of copyright owners and copyright users within a government-regulated regime. No court of which we are aware has addressed the status of buffer phonorecords in the context of Section 115, or relative to the definition of DPD within that section. Because the Copyright Act already includes the statutory definitions that must guide any such inquiry, and to avoid any misunderstanding that the Copyright Office has departed from the statutory framework, the Commenting Parties respectfully but strongly suggest that the second sentence of the regulatory text be eliminated from any future iteration of the rule.⁵ Alternatively, the Office could substitute a sentence that more closely tracks the Act by stating that the reproduction of the phonorecord must meet all other requirements, including any fixation requirement, of Sections 101 and 115 of the Copyright Act. Whether the first, preferable, alternative, or the second, is adopted by the Office, in order to avoid any perceived departure from the relevant statutory provisions, we believe the commentary to the rule should emphasize that the regulatory text is not intended to impose any greater, lesser or different fixation standard than that required under Sections 101 and 115, which are controlling.

In conclusion, subject to our significant reservation concerning the second sentence of the regulatory text, which, as discussed above, we believe should be eliminated or revised to ensure

ability to “perceive[], reproduce[], or otherwise communicate” *the work itself*. See 17 U.S.C. § 101. In this regard, we reiterate the concern we raised earlier in this proceeding that the definition of “fixed” was added to the Copyright Act not to address the question of infringement, but rather the standard for copyrightability.


⁵ The Interim Rule also departs from the Proposed Rule in its treatment of the term “specifically identifiable” within the definition of “digital phonorecord delivery” found in Section 115(d). Taking into consideration the comments of various parties, the Copyright Office in issuing the Interim Rule concluded that it should not attempt to specify the persons, entities or things by or for which a phonorecord is “specifically identifiable,” as it had in the Proposed Rule. See *id.* at 66,178. As the Commenting Parties observed earlier, Congress could easily have included such a limitation in the statutory definition, but did not. See *id.* Accordingly, the Commenting Parties are satisfied with and support the approach now settled upon by the Copyright Office in announcing the Interim Rule, that “specifically identifiable” should be understood to mean that the phonorecord is specifically identifiable to “anyone or anything, including the transmission service, the transmission service’s computer, the transmission recipient, or the transmission recipient’s computer.” *Id.*

consistency with the Copyright Act, the Commenting Parties are encouraged by the Copyright Office's announcement of the Interim Rule. In keeping with industry norms, the regulatory framework now confirms that digital services may obtain Section 115 licenses to cover all of the reproductions – including buffer phonorecords – that are required to deliver full downloads, limited downloads and interactive streams of musical works to consumers. In this respect, the Interim Rule represents a vital step forward that should facilitate the licensing and growth of digital music services, to the benefit of both copyright owners and copyright users.

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downloads or interactive streams extends to all phonorecords necessary to enable such activity (solely for the purpose of enabling that activity); and (iii) a digital phonorecord delivery includes a digital transmission of a sound recording that results in a reproduction that is specifically identifiable by the transmission recipient or by a device for the transmission recipient.

NMPA, SGA, NSAI and AIMP agree with the Copyright Office that the lack of an express rule confirming that licenses are available under Section 115 for the use of musical works by digital services offering interactive streams and limited downloads has been detrimental to the music industry. *See* NPRM at 40,806. As discussed in more detail below, the key constituents of the online music industry – music publishers and songwriters, record labels and digital music companies – have, since the time this rulemaking was first requested in 2000, moved toward and reached a consensus that all the parties will benefit by making such licenses available under Section 115 on an industry-wide basis, at rates to be determined through statutory ratesetting proceedings. *See* 17 U.S.C. §§ 115(c)(3)(C), (D), 803-804.

Most recently, NMPA, SGA and NSAI, on the one hand, and the Recording Industry Association of America (“RIAA”) and Digital Media Association (“DiMA”), on the other, reached a groundbreaking settlement to address these issues in the context of the Section 115 ratesetting proceeding currently pending before the Copyright Royalty Board (the agreed rates and terms to be adopted by regulation hereafter referred to as the “CRB Settlement”). *See* Joint Mot. to Adopt Procedures for Submission of Partial Settlement, *In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, No. 2006-3 CRB DPRA (“CRB Proceeding”) (May 15, 2008). The CRB Settlement will establish the licensing rates and terms

for digital phonorecord deliveries in the form of interactive streaming and limited downloads under Section 115 of the Copyright Act.¹

The CRB Settlement represents the culmination of a long series of industry negotiations and understandings to clarify and resolve concerns surrounding the treatment of interactive streaming and limited downloads under Section 115, as well as the server copies² and intermediate copies required to facilitate these types of digital transmissions. Notably, the rates and terms agreed to by the parties and embodied in the CRB Settlement are consistent with and supported by the Proposed Regulations. Because adoption of the Proposed Regulations would further clarify the meaning of “DPD” – and thus remove any residual doubts about the broad availability of licenses for various online activities under Section 115 – NMPA, SGA, NSAI and AIMP strongly support the adoption of the Proposed Regulations as applied to full (or “permanent”) downloads, limited downloads and interactive streaming of musical works.³

Commenting Parties

Established in 1917, NMPA is the leading trade association representing the interests of music publishers in the United States. Representing over 700 publishers, NMPA’s members own or administer the overwhelming majority of musical compositions available in the United States. NMPA acts as the voice of both large and small music publishers, and seeks to protect, promote and advance the interests of music’s creators. NMPA’s wholly owned subsidiary, The

¹The settlement is expected to be provided to the Copyright Royalty Judges on September 15, 2008 for adoption as part of the CRB’s final determination in the proceeding. See Joint Mot. to Adopt Procedures for Submission of Partial Settlement.

²In these comments we use the term “copies” interchangeably with “phonorecords.” The term “server copies” is shorthand for the “server-end complete copies” referenced in the NPRM. Our use of the term “buffer copies” means “server-end buffer copies” and/or “recipient-end buffer copies” in the terminology of the NPRM.

³While the Copyright Office correctly notes that the parties’ positions have “evolved” over the course of this eight-year proceeding, NPRM at 40,806, NMPA and SGA note that they have from inception advocated for an industry-negotiated resolution of the issues, which in fact has now occurred.

Harry Fox Agency, Inc. (“HFA”), is an industry service organization representing almost 35,000 publisher principals, that in turn collectively own or administer nearly two million copyrighted musical works. HFA acts as an agent on behalf of its publisher principals, licensing copyrighted musical compositions for reproduction and distribution in the form of CDs and other physical formats, as well as for downloads and other online uses.

SGA represents over 5,000 of America’s best-known and well-respected music creators and their heirs. Established in 1931, SGA is the oldest and largest organization in the United States run exclusively by and for songwriters. SGA is an unincorporated voluntary association headquartered in Nashville, with offices in New York and Los Angeles. It provides royalty collection and audit services for its members, as well as music licensing.

NSAI, founded in 1967, is a trade association dedicated to serving songwriters of all genres. With approximately 5,000 members, NSAI seeks to advance and protect the legal and economic interests of the creators of musical works. NSAI also helps to develop and promote songwriting talent by sponsoring workshops and showcases for aspiring songwriters.

AIMP, founded in 1977, is dedicated to serving independent music publishers. With approximately 500 members in both New York and Los Angeles, AIMP seeks to educate and inform music publishers about industry trends and practices by providing a forum for the discussion of the issues and challenges confronting the music publishing industry.

I.
THE SCOPE AND APPLICATION OF THE SECTION 115 LICENSE
SHOULD BE CLARIFIED TO PROVIDE CERTAINTY
IN THE DIGITAL LICENSING PROCESS

A. Background

Following the RIAA’s petition to commence this rulemaking proceeding in 2000, NMPA engaged in a series of negotiations with the RIAA to address the issues presented in the

rulemaking and to develop a licensing framework for online subscription services offering on-demand streams and limited downloads. These negotiations proved successful: on October 5, 2001, NMPA and RIAA entered into an agreement to facilitate the launch of music subscription services (the "Subscription Services Agreement"). In the Subscription Services Agreement, the parties confirmed their understanding that the process of making on-demand streams and limited downloads through subscription music services involved the making of DPDs and was therefore licensable under Section 115, and provided a mechanism for RIAA member companies to obtain licenses for these activities through HFA at rates to be established by statutory ratesetting proceeding or industry negotiation.⁴ The parties further acknowledged in the Subscription Services Agreement that noninteractive streaming activities would not be subject to licensing. Once in place, the licensing arrangement embodied in the Subscription Services Agreement was offered by HFA to non-RIAA companies as well. DiMA members such as RealNetworks/Rhapsody (formerly Listen.com), Napster LLC (formerly pressplay) and Microsoft, among others, subsequently entered into their own subscription services licensing agreements with HFA.

In light of the significant industry development represented by the Subscription Services Agreement, the Copyright Office published a follow-up notice in late 2001 seeking additional comments on the proposed rulemaking. *See* NPRM at 40,805. In response, RIAA, NMPA and SGA submitted unified comments urging the Copyright Office to adopt the framework agreed to in the Subscription Services Agreement in the form of a regulation so that licenses could be

⁴ Because no ratesetting proceeding has taken place until the current CRB Proceeding, industry rates have not previously been adopted, and music publishers and songwriters have not been paid for these uses during the intervening seven years.

made available on an industry-wide basis, as opposed to only from HFA-affiliated publishers.⁵ Even though this did not occur, the parties to the Subscription Services Agreement have continued to advocate for and support the fundamental framework and understandings of that agreement, including at the June 15, 2007 roundtable discussion conducted by the Copyright Office as a prelude to its issuance of the NPRM (“June 2007 Roundtable”).

As the Copyright Office observes in the NPRM, legislative efforts to address the lack of an industry-wide framework for licensing of digital music services have not yet yielded results. *See* NPRM at 40,805. In 2006, in response to congressional inquiries regarding the efficient licensing of digital music services, NMPA joined with DiMA to support the introduction of the Section 115 Reform Act (“SIRA”), which would have created a new blanket licensing system under Section 115 for digital music services. SIRA, H.R. 5553, 109th Cong. (2d Sess. 2006). SIRA would have clarified the law consistent with the basic understandings reached in the Subscription Services Agreement concerning interactive and noninteractive streaming.⁶ *Id.* As the Copyright Office explains in the NPRM, SIRA would have confirmed that the reproductions required to deliver full downloads, limited downloads and interactive streams are subject to and included under the Section 115 license, and at the same time would have created a statutory exemption (originally structured as a royalty-free license) for noninteractive streaming. *See* NPRM at 40,805. Despite the endorsement of SIRA by the House Subcommittee on Courts, the Internet and Intellectual Property on June 8, 2006, and the significant efforts of NMPA, DiMA,

⁵ DiMA companies in particular have complained about the lack of an industry-wide framework covering non-HFA-affiliated publishers that would reduce the administrative effort associated with obtaining all necessary licenses for music subscription services offering interactive streams and limited downloads.

⁶ Because of the way “on-demand” is defined in the Subscription Services Agreement, the Subscription Services Agreement does not provide a licensing framework for certain types of interactive streams. SIRA addressed this deficiency in a manner analogous to Section 114 by classifying streams as either interactive and subject to licensing under Section 115, or noninteractive and (in the later versions of SIRA) exempt from such licensing.

SGA, NSAI, RIAA and others to achieve such a legislative solution, however, SIRA did not become law, and Congress has been largely silent on these issues for the past two years.

The distinction made in the Subscription Services Agreement between streaming of musical works upon user request and noninteractive streaming – a distinction reiterated in SIRA – is based on the fundamental policy consideration that the ability to access songs upon request is a substitute for and displaces the purchase of music (whether in physical formats or digital downloads). The displacement of music sales in turn diminishes mechanical licensing revenues, which are the lifeblood of music creators.⁷

Significantly, this concern regarding the impact of on-demand access to music parallels congressional findings and the philosophy behind the analogous interactive/noninteractive distinction found in Section 114 of the Copyright Act governing the compulsory license for digital performance of sound recordings. 17 U.S.C. § 114; S. Rep. No. 104-128, at 16 (1995) (“Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.”); H.R. Rep. No. 104-274, at 13 (1995) (recognizing that “certain types of subscription and interact[ive] audio services might adversely affect sales of sound recordings and erode copyright owners’ ability to control and be paid for use of their work.”). More broadly speaking, the distinction furthers Congress’s original intent in amending Section 115 to include DPDs, an act undertaken to confirm mechanical rights and preserve royalty streams for songwriters and music publishers when their works are used digitally. S. Rep. No. 104-128, at 17 (1995) (in amending Section 115 to include DPDs, Congress wished to avoid “even a perception of uncertainty,” and

⁷ During the current CRB ratesetting proceeding, numerous songwriter witnesses testified to their dependence upon mechanical royalty streams for their livelihoods.

thus sought to “clarify[y] and confirm[.]” the mechanical rights of music copyright owners in the digital environment); H.R. Rep. No. 104-274, at 28 (1995) (purpose of DPD amendments was to “confirm” mechanical rights in context of digital transmissions).

B. The Music Industry Will Benefit from Adoption of the Proposed Regulations

As noted above, in a major milestone for the music industry, copyright owners and users have reached a settlement in the context of the pending Section 115 CRB rate proceeding on the rates and terms to govern the licensing of DPDs in the form of interactive streams and limited downloads. Pursuant to the relevant statutory framework, the CRB Settlement is to be adopted by the Copyright Royalty Judges as a final determination of these issues. *See* 17 U.S.C. § 801(b)(7)(A); 37 C.F.R. § 351.2(b)(2).

The CRB Settlement, representing an accord among music publishers, songwriters, record labels and digital music companies – that is, each of the key stakeholders in the digital music marketplace – fully conforms with the Copyright Office’s interpretation of Section 115 as applied to interactive streaming and limited downloads. NMPA, SGA, NSAI and AIMP therefore urge the adoption of the Proposed Regulations as to these activities, which would eliminate any lingering uncertainty concerning the proper scope and application of the DPD definition in Section 115 and, more specifically, within the context of the CRB Settlement. It is vital for digital music businesses to have access to a reliable, industry-wide licensing framework that will allow them to grow their businesses, and equally vital for songwriters and music publishers to have a means to be paid for the use of their musical works by digital services.

Under existing law, the server, cached, network and RAM buffer copies made and/or transmitted in the process of delivering interactive streams – as well as in delivering full and limited downloads – require licenses from copyright owners. Notably, as was demonstrated in recent expert testimony in the CRB Proceeding, in addition to making server copies of musical

works, interactive streaming music services reproduce musical works in RAM to render them perceptible to the end user⁸ and also typically cause “cache” copies of the works to be made on users’ hard drives for future access and listening.⁹ It is well established that the reproduction of server copies to operate an interactive digital music service requires a license.¹⁰ The RAM and cache copies made by such a service also require appropriate license authority from the copyright owner.¹¹ A lack of ready availability of licenses to cover each of these types of reproductions to the extent they are required for the process of downloading or interactive streaming gives rise to fears of infringement exposure – and thus inhibits the growth of legitimate digital music services.

Dating back to the original framework of the Subscription Services Agreement, through congressional consideration of SIRA, and most recently in the June 2007 Roundtable, music publishers and songwriters have agreed with those that seek to use their works that a Section 115 license to make and deliver DPDs should include related server and intermediate copies to the extent such server and intermediate copies are necessary and in fact used in the course of

⁸ In the NPRM, the Copyright Office suggests that a RAM buffer copy of a musical work is always “less than the entire composition of [the] musical work.” NPRM at 40,808. We note that, while the buffering process may involve serial copying of portions of a work (with the goal of rendering the complete work), a RAM buffer copy can also comprise a whole work. Regardless, we agree with the conclusion that a RAM buffer copy of a portion of a musical work that is interactively streamed constitutes a phonorecord under the Copyright Act, *see* NPRM at 40,809, as does a RAM buffer copy of the entire work.

⁹ *See* Expert Report of Ketan Mayer-Patel on Behalf of the National Music Publishers’ Association, Inc., the Songwriters Guild of America and The Nashville Songwriters Association International, CRB Proceeding (Apr. 3, 2008).

¹⁰ *Rodgers and Hammerstein Org. v. UMG Recordings, Inc.*, No. 00 Civ. 9322 (JSM), 2001 U.S. Dist. LEXIS 16111 (S.D.N.Y. Sept. 26, 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (“*MP3.com*”). Contrary to certain parties’ suggestion as described in the NPRM, NPRM at 40,810-11, the notion that the making of such server copies to operate an interactive music service could constitute a fair use has been expressly rejected. *See, e.g., MP3.com* at 350-53 (“[D]efendant’s ‘fair use’ defense is indefensible.”)

¹¹ *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993); *Stenograph L.L.C. v. Bossard Assoc., Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998); *Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip. Distrib.*, 983 F. Supp. 1167, 1177-78 (N.D. Ill. 1997). In its Supplemental Notice, the Copyright Office refers to the Second Circuit’s recent decision in *Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480-cv(L), 2008 U.S. App. LEXIS 16458 (2d Cir. Aug. 4, 2008) (“*Cablevision*”). We discuss below, *infra* Section I.C., why the *Cablevision* case is not instructive here and why the approach of the *MAI* decision and its progeny still governs in the context of interactive streaming.

engaging in the licensed activity.¹² NMPA, SGA, NSAI and AIMP therefore support the approach of the NPRM and Proposed Regulation in this regard, and believe that the Copyright Office's authoritative interpretation of Section 115 in this respect will provide additional comfort to music services when they obtain licenses for their Section 115 activities.

C. The *Cablevision* Holding Is Inapplicable to Digital Music Services

Subsequent to the issuance of the NPRM, the United States Court of Appeals for the Second Circuit issued a highly controversial opinion in a case involving a DVR service operated by Cablevision, *Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480-cv(L), 2008 U.S. App. LEXIS 16458 (2d Cir. Aug. 4, 2008) ("*Cablevision*"). The *Cablevision* decision, at odds with at least three different lines of precedent spanning multiple circuits,¹³ departs from the approach of Section 101 of the Copyright Act and the Copyright Office's longstanding interpretation of that section¹⁴ in reading a new and distinct "duration" requirement into the definition of "copy" under the Copyright Act.¹⁵ See *id.* at *14-*15. Based on this construction, the Second Circuit reversed the judgment of the trial court below in reaching the conclusion that Cablevision would not

¹² Of course, if the same server and intermediate copies were used for other purposes, they would be subject to separate licensing and royalty payments if required. Moreover, as the Copyright Office explains, standing alone, a server copy does not qualify for licensing under Section 115 because it is not in itself distributed. NPRM at 40,808.

¹³ The *Cablevision* court attempted to distinguish, and in some respects disregarded, major lines of precedent concerning RAM computer copies, *Cablevision*, 2008 U.S. App. LEXIS 16458, at *16-*20 (including, *inter alia*, the Second Circuit's own decision in *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998)), the scope of public performance rights, *id.* at *48-*53, and the role of commercial copying services in producing infringing copies, *id.* at *28-*30. We respectfully submit that the Copyright Office is not bound by the Second Circuit's approach to these issues to the exclusion of other courts' thinking.

¹⁴ See *id.* at *20-*22.

¹⁵ The Second Circuit's novel "duration" requirement is unsupported by the Act or existing judicial interpretation. While the *Cablevision* court took a "stopwatch" approach by measuring the duration of the subject buffer copies in seconds (and then opining that they did not last for a sufficient number of seconds), Section 101 of the Copyright Act does not require that a copy last for any specified period of time. 17 U.S.C. § 101. The glaring deficiency of the *Cablevision* approach, apart from the fact that it is inconsistent with the statute, is the lack of standards – statutory or otherwise – to guide this judge-made "duration" requirement. By contrast, the functional approach of the Copyright Office – which, based on Section 101 of the Copyright Act, examines whether the copies in question exist for a sufficient period of time to be capable of being "perceived, reproduced or otherwise communicated" – does not depend upon an arbitrary assessment. See NPRM at 40,808. Moreover, it adheres to the overarching consensus of other courts that have considered this issue. See *MAI* line of cases cited *supra* note 11.

directly infringe the copyrights of television and movie content owners by, *inter alia*, automatically creating buffer copies of cable programming to enable the operation of a remote storage DVR (“RS-DVR”) service.¹⁶ *Id.* at *24, *53.

NMPA, SGA, NSAI and AIMP anticipate that some parties, pursuing an agenda beyond the scope of Section 115, may seek to insert *Cablevision* into this proceeding so as to prolong uncertainty in the licensing of interactive streaming music services, to the detriment of the digital music industry. But the highly fact-dependent *Cablevision* decision does not – and does not even purport to – address the particularized concerns of interactive music services that are before the Copyright Office in this limited Section 115 proceeding, and therefore is not pertinent here.

In reaching its holding that *Cablevision* was not directly liable for infringement,¹⁷ the *Cablevision* court concluded that broadcast programming data residing in a system buffer for 1.2 seconds or less (before being automatically overwritten) for the purpose of enabling customers to request to record programming in their individual RS-DVR accounts did not create a copy under the Copyright Act. *Id.* at *22-*24. Significantly, however, the *Cablevision* decision *did not* hold that a RAM buffer reproduction cannot be a copy. To the contrary, the Second Circuit expressly acknowledged that such reproductions *can* be copies under the Copyright Act – as, indeed, the

¹⁶ The *Cablevision* RS-DVR is a substitute for a home set-top DVR that enables a subscriber to request, before or at the time of broadcast, that a particular program be saved in that subscriber’s allocated storage space at *Cablevision*’s centralized facility. As the court explained the rationale for its ultimate holding: “We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer’s command.” *Id.* at *27. A digital music service is not like a VCR. Digital music services, such as Apple’s iTunes service and subscription music services, reproduce, maintain and offer long-term, ongoing access to entire libraries of musical works, typically numbering in the millions, to deliver to their customers upon request. Far from simply supplying a recording service, such digital music providers exist for the purpose of making music content available to users in the first instance.

In any event, we disagree with the *Cablevision* court’s inappropriate analogy equating a VCR (with limited home storage capacity) to a massive centralized recording facility. We also disagree with the court’s conclusion that RS-DVR subscribers, rather than *Cablevision*, were making the reproductions at issue in that case. *See id.* at *35. We assume the court’s treatment of these issues, however, for purposes of discussing its opinion.

¹⁷ Notably, the *Cablevision* decision did not address, and expressly reserved judgment on, the question of whether *Cablevision* could be held secondarily liable for infringement. *Id.* at *6, *35, *53.

overwhelming weight of authority has held. *See id.* at *18 (reproducing a work in RAM “can result in copying”) (emphasis in original).

Buffer copies made by interactive streaming music services for purposes of delivering and allowing users to hear entire musical works are unlike the “fleeting” copies made by Cablevision in the course of operating its centralized DVR system. *See id.* at *23. Consistent with the definition of “phonorecords” in the Copyright Act, buffer copies made by an interactive streaming service consist of sounds fixed in a material object that are “perceived, reproduced, or otherwise communicated” through a machine or device; the end result is the rendering of a musical work of several minutes’ duration. 17 U.S.C. § 101; *cf. Cablevision*, 2008 U.S. App. LEXIS 16458, at *18 (distinguishing *MAI* on ground that RAM embodiment of computer program presumably lasted “several minutes”). Indeed, unlike in the *Cablevision* case, where the buffer copies were automatically created simply to facilitate a user-controlled storage process – rather than for purposes of communication or human perception – buffer copies made during the interactive streaming process comprise the very product that is delivered to the end user: a complete sound recording of a musical work.

The buffer copies made by interactive streaming music services are much more analogous to the RAM copies considered in *MAI* (operating system software)¹⁸, *Stenograph* (stenographic software)¹⁹ and *Marobie-FL* (clip art)²⁰ than those at issue in *Cablevision*. This is because they constitute a complete embodiment of a copyrighted work to be accessed, perceived and used by end users, and exist for a sufficient period of time (or longer) to achieve this purpose. This was not the case with the *Cablevision* copies, which were automatically created

¹⁸ *MAI*, 991 F.2d 511.

¹⁹ *Stenograph*, 144 F.3d 96.

²⁰ *Marobie-FL*, 983 F. Supp. 1167.

from broadcast feed and discarded within 1.2 seconds (or less) without rendering the work, and regardless of whether a subscriber sought to use a copy of the work. *Cablevision*, 2008 U.S. App. LEXIS 16458, at *14, *23. *Cablevision* simply does not speak to the nature or functionality of buffer copies made by interactive streaming music services.

The *Cablevision* holding is inapplicable to interactive streaming music services for additional reasons as well. First, as discussed above, in transmitting works to end users, in addition to the RAM copies necessary to render the work for the user, interactive music services typically cause "cache" copies of the works to be made on users' hard drives for future access. Even under the logic of *Cablevision*, such copies indisputably qualify as phonorecords.

In addition, the *Cablevision* court made a point of emphasizing that reproductions used to transmit copyrighted content (*i.e.*, server copies) implicate the reproduction right. *Id.* at *47. Interactive streaming and download services of course rely on such reproductions to deliver music to consumers.

In sum, even taking *Cablevision* into account, interactive streaming music services clearly need appropriate license authority in order to operate. The buffer copies considered by *Cablevision* are readily distinguishable from those used in interactive streaming activities. Moreover, of concern to those who operate interactive streaming services, other courts have not taken the approach of *Cablevision*. Rather, other courts have agreed with the Copyright Office's interpretation of "copy," which adheres to the functional definition of Section 101 of the Copyright Act in considering the ability to perceive, reproduce or communicate a copyrighted work. *See* NPRM at 40,808.

Finally, *Cablevision* did not consider the question of buffer copies in relation to Section 115, the subject under review here. Because the process of interactive streaming of musical

works involves the making of reproductions that would nonetheless require license authority from copyright owners, it makes sense for the Copyright Office to adopt a rule that will permit interactive streaming services to benefit from the statutory licensing framework of Section 115.

D. There Is No Need for the Proposed Regulations To Apply to Noninteractive Streaming

At the same time, as is reflected by the fact that noninteractive streaming was not addressed in the CRB Proceeding and is not included in the CRB Settlement, NMPA, SGA, NSAI and AIMP do not believe that the existing legal regime requires music users to obtain licenses to engage in the process of noninteractive streaming (including the making and/or transmission of server, cached, network and RAM buffer copies to the extent necessary and used solely for that process).²¹ Furthermore, to require such licenses would conflict with the basic industry understanding reflected in the Subscription Services Agreement, SIRA and CRB Settlement. We recognize that in this respect we depart from the Copyright Office's considered approach in the NPRM. However, based on the policy considerations outlined above and by industry agreement, music publishers and songwriters have not pursued licenses or royalties for noninteractive streaming activities. Accordingly, NMPA, SGA, NSAI and AIMP do not believe there is a need for the Copyright Office to address noninteractive streaming in the current rulemaking or Proposed Regulations. NMPA, SGA, NSAI and AIMP therefore respectfully suggest that the Proposed Regulations be limited in their application to DPDs in the form of full downloads, limited downloads and interactive streams and not apply to noninteractive streaming.

²¹ At the same time, it is NMPA's position that such an exemption from licensing and royalty payments for noninteractive streaming cannot apply where a transmitting service affirmatively causes or induces end users to copy streamed works for future listening. SIRA in fact contained an express carveout from the noninteractive streaming exemption for services that promote such end user reproductions. SIRA, H.R. 5553 (2d Sess. 2006). A transmitting entity must have appropriate license authority if it engages in this type of conduct.

II.
**THE TERM “SPECIFICALLY IDENTIFIABLE” SHOULD BE INTERPRETED
IN LIGHT OF THE PLAIN MEANING OF THE STATUTE**

NMPA, SGA, NSAI and AIMP concur with the Copyright Office’s general approach to the interpretation of “specifically identifiable” as it appears in the definition of DPD in Section 115. As observed by the Copyright Office, certain parties have argued, based upon a comment appearing in legislative history, that there can be no DPD unless the reproduction is specifically identifiable to the transmitting service. *See* NPRM at 40,809.

But the statute itself is clear: a DPD is “each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording.” 17 U.S.C. § 115(d). Congress could easily have included a requirement that the reproduction be specifically identifiable to the transmitting service, but did not. As the Copyright Office explains, under the most basic principle of statutory construction, when the meaning of a statute is plain on its face, there is no reason to turn to legislative history to read an additional requirement into the law. NPRM at 40,809; *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, the Copyright Office is correct in concluding that the statutory requirement is met when the reproduction is “either specifically identifiable by any transmission recipient or specifically identifiable *for* any transmission recipient.” NPRM at 40,809 (emphasis in original).

Moreover, to adopt the view that there is no DPD unless a reproduction of the sound recording or musical work embodied therein is specifically identifiable to the transmitting service would create an incentive for transmitting entities to facilitate and promote copying of musical works but purposefully blind themselves to what was being copied. We do not believe

that Congress could possibly have intended such a result – and such an attitude has also been rejected by the courts.²²

Seeking to eliminate doubt about the meaning of “specifically identifiable,” the Proposed Regulations provide that “[a] reproduction is specifically identifiable if it can be identified by the transmission recipient, or if a device receiving it can identify the reproduction for the transmission recipient, for the purposes of rendering a performance of the sound recording.” Consistent with the approach to statutory interpretation endorsed by the Copyright Office, NMPA, SGA, NSAI and AIMP question whether and why it is necessary to engraft a “performance purpose” requirement onto the statutory definition, which could have the unintended result of causing some DPDs – e.g., a download to a storage device that is made for the purpose of being played through a separate device – to fall out of the definition provided by Congress. Thus, we respectfully suggest a minor modification of the relevant sentence wherever it appears in the Proposed Regulations, so that it reads as follows:

A reproduction is specifically identifiable if it can be identified by the transmission recipient, or if a device receiving it can identify the reproduction for the transmission recipient, including without limitation such identification for purposes of rendering a performance of the sound recording.

We believe that, revised in this manner, the proposed regulatory elaboration would help to clarify, but at the same time remain true to, the statutory definition. 17 U.S.C. § 115(d).

III. OTHER ISSUES

A. Incidental DPDs

NMPA, SGA, NSAI and AIMP agree with the Copyright Office that “Incidental DPDs” are merely a subset of the general category “DPDs” and that this subset is not further defined

²² See, e.g., *In re: Aimster Copyright Litig.*, 334 F.3d 643, 650 (“Willful blindness is knowledge, in copyright law . . . as it is in the law generally.”) (7th Cir. 2003) (Posner, J.).

within Section 115. *See* NPRM at 40,810. We also concur in the Copyright Office’s view that “the only consequence of a determination that a digital phonorecord delivery is ‘incidental’ is that a separate rate must be set” for that type of DPD by the Copyright Royalty Judges. *Id.* Accordingly, consistent with the opinion of the Copyright Office, we believe that the determination of which types of DPDs fall into the “incidental” category is best left to the Copyright Royalty Judges in the context of their Section 115 ratesetting activities.

B. Limited Downloads

At this juncture, there can be no serious dispute that a download of a musical work that is limited in access either in terms of time or the number of plays constitutes a DPD, and we agree with the Copyright Office’s conclusion to this effect. *See* NPRM at 40,808.

C. Locked Content

Likewise, NMPA, SGA, NSAI and AIMP agree with the Copyright Office’s approach to locked content – that is, phonorecords that are “encrypted, otherwise protected by digital rights management, or degraded so as not to substitute for the sale of a non-degraded recording.” NPRM at 40,811. As explained in the NPRM, a DPD that is subject to encryption, DRM or other technological protection is still a DPD and thus requires a license and payment of applicable royalties. *Id.*

D. Rental, Lease or Lending

Despite the RIAA’s initial suggestion in its 2000 petition seeking to initiate this rulemaking that a limited download might be treated as a “rental” of a musical work, the RIAA has since abandoned this proposal, and it was not pursued by any of the industry participants at the June 2007 Roundtable. NPRM at 40,811-12. NMPA, SGA, NSAI and AIMP observe that it would defy common sense to treat a DPD as a “rental” when it cannot be returned. Accordingly, we support the Copyright Office’s decision to eliminate this issue from further consideration.


Conclusion

For the foregoing reasons, NMPA, SGA, NSAI and AIMP respectfully submit that the Copyright Office should adopt the Proposed Regulations, with the minor modification suggested above, and in so doing indicate that such Proposed Regulations shall apply to DPDs in the form of full (permanent) downloads, limited downloads and interactive streams.

Dated: August 28, 2008

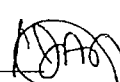
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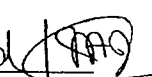
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GENERAL COUNSEL
OF COPYRIGHT

In the Matter of)

Compulsory License for Making and)
Distributing Phonorecords, Including)
Digital Phonorecord Deliveries)

Docket No. RM 2000-7

REPLY COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION,
SONGWriters' GUILD OF AMERICA,
NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL
AND ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS
IN FURTHER SUPPORT OF THE PROPOSED RULEMAKING

The National Music Publishers' Association, including its wholly owned licensing subsidiary, The Harry Fox Agency, Inc. ("HFA") (together, "NMPA"), the Songwriters' Guild of America ("SGA"), the Nashville Songwriters Association International ("NSAI") and the Association of Independent Music Publishers ("AIMP") submit these reply comments in further support of the Copyright Office's proposal to clarify the Section 115 license and to address issues raised by other commenting parties in response to the Copyright Office's Notice of Proposed Rulemaking ("NPRM").

For the reasons discussed herein, NMPA, SGA, NSAI and AIMP believe that the several commenters that oppose the adoption of a rule clarifying that Section 115 licenses are available to cover the activities engaged in by interactive streaming and download services ("Opposing Commenters") have failed to demonstrate that such a rule is either inconsistent with the law or unreasonable as a matter of policy. Notably, the Opposing Commenters are not, and do not hold themselves out to be, entities that actually seek or obtain Section 115 licenses, or variations thereof, from musical work copyright owners. At the same time, those in the music industry that

do depend upon the efficient operation of Section 115 – digital media companies, record labels, music publishers and songwriters – joined by groups concerned with consumer access to digital music services – uniformly support an interpretation of Section 115 that unambiguously provides coverage for music download and interactive streaming services. Because there is no good reason in law or policy to preclude the adoption of regulations that will bring to a close nearly a decade of perceived uncertainty over the licensing of these services, the Copyright Office, which has a statutory duty to implement Section 115, should take this essential step.

Overview of Other Parties' Comments

As discussed at length in the Comments filed on August 28, 2008 by NMPA, SGA, NSAI and AIMP (“Opening Comments”), all of the key constituents in the digital music industry – that is, those who are directly involved in using the Section 115 license or a voluntary counterpart thereof – have reached a consensus that the license should unequivocally apply to the full range of reproduction and distribution activities required to make digital phonorecord deliveries (“DPDs”) in the form of full (permanent) downloads, limited downloads and interactive streams. Our Opening Comments, as well as those filed by the Recording Industry Association of America (“RIAA”) and the Digital Media Association (“DiMA”), all point to the fact that the broad availability of such licenses is a critical step to enable the growth of legitimate digital music services. At the same time, RIAA and DiMA, joined by NMPA and its co-commenters, have expressed their agreement that, in light of existing industry understandings and practices, the Copyright Office should not extend such a rule to encompass noninteractive music services.

Significantly, the Electronic Frontier Foundation, Public Knowledge, Center for Democracy and Technology, Consumers Union, Consumer Federation of America, U.S. PIRG and the Computer & Communications Industry Association (who refer to themselves collectively

as the “Public Interest Commenters”), while not necessarily endorsing the legal analysis of the NPRM, nonetheless recognize the value of – and therefore support – the Copyright Office’s proposal. As these commenters explain: “[T]he proposed rule would enable existing services to resolve lingering uncertainties while also allowing new entrants to understand whom they have to pay and how much. . . . Clarifying the scope of Section 115 offers an opportunity to streamline the current licensing process and facilitate continued innovation and growth in the digital music industry.” (Public Interest Comments at 4.)

Similarly, RoyaltyShare, Inc., a provider of content management and royalty services to Section 115 licensees, submitted comments that support the Copyright Office effort to “amend and clarify the scope and application of the Section 115 compulsory license.” (RoyaltyShare, Inc. Comments at 1.)

Several providers of background music and digital music services that are not eligible to be licensed under Section 115 submitted two sets of somewhat overlapping comments (these included Muzak LLC, DMX, Inc., Ecast Inc., Touchtunes Music Corporation and AMI Entertainment) (the “B2B commenters”). The B2B commenters essentially argue that by making the Section 115 license easier to use, B2B providers will be competitively disadvantaged because they cannot avail themselves of the license.¹ NMPA and its co-commenters respectfully submit that, even if this were true, it is not a reason to hold back the rest of the digital music industry. (In fact, broadening the availability of the Section 115 license for those services that are eligible may indirectly benefit B2B services by encouraging industry investment in bulk licensing

¹ The B2B Commenters also suggest, without legal analysis or explanation, that the Copyright Office’s Proposed Regulations under Section 115 would somehow alter existing rules of liability for B2B providers with respect to “server and cache copies.” (B2B Comments at 1, 4.) Regardless of whether they fall under Section 115, such reproductions already require appropriate license authority from musical work copyright owners, as we explain in our Opening Comments. (Opening Comments at 8-9.)

systems and copyright ownership databases.²) In any event, licensing of non-115 providers is, by definition, outside the scope of this Section 115 rulemaking proceeding. We therefore suggest that the B2B Comments not be considered to weigh against the proposed rule.

This leaves a handful of commenters that substantively oppose the adoption of a rule to clarify the availability of Section 115 licenses for download and interactive streaming activities. As observed above, none of these Opposing Commenters appears to be directly involved in procuring licenses from musical work copyright owners for activities that fall within Section 115. Three of the five commenters, Verizon Communications, CTIA-The Wireless Association and National Association of Broadcasters, are represented by the same counsel and filed substantially the same comments. The other two commenters in this category, the Ad Hoc Coalition of Streamed Content Providers (as it turns out, a coalition of one – Google, Inc./YouTube LLC³) (“Google”) and New Media Rights, focus heavily on buffer copies and their treatment by the Second Circuit in *Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480-cv(L), 2008 U.S. App. LEXIS 16458 (2d Cir. Aug. 4, 2008) (“*Cablevision*”)⁴ – a decision also relied upon in triplicate in the Verizon, CTIA and NAB filings. We explain below why the objections of the Opposing Commenters (which we generally treat as a group because of their similar and overlapping approach) should not override the strong consensus of those with an actual stake in the outcome that licenses for download and interactive streaming activities should be unambiguously available under Section 115.⁵

² A number of B2B providers, including Muzak and AMI, have entered into licensing relationships with HFA to obtain non-115 licenses.

³ Subsequent to filing comments on behalf of the Ad Hoc Coalition, counsel for the coalition notified the Copyright Office that the second member, Slacker, Inc., was not in fact part of the group or a party to the comments.

⁴ The Opposing Commenters refer to the Second Circuit’s decision as *Cartoon Network*; for consistency with our earlier submission, we continue to use the short form “*Cablevision*.”

⁵ Additionally, a number of parties submitted comments that are nonsubstantive in nature or address matters clearly outside the scope of this rulemaking proceeding. These include the comments filed by the performing rights organizations ASCAP, BMI and SESAC (in essence seeking only to confirm the indisputable proposition that any

I.
**THE PROPOSED RULE IS PROMULGATED UNDER SECTION 115,
SHOULD BE UNDERSTOOD AS SUCH,
AND SHOULD NOT EXTEND TO NONINTERACTIVE STREAMING**

In citing a parade of alleged concerns outside of the ambit of Section 115 (ranging from the Audio Home Recording Act to the viability of cloud computing) as a basis for their opposition to Copyright Office action, the Opposing Commenters appear to have lost sight of the fact that the rule proposed by the Copyright Office is an interpretation of Section 115 for the purpose of administering the Section 115 license. Oversight of this license is a duty that has been expressly delegated to the Copyright Office by Section 115. *See* NPRM at 40,806 (citing 17 U.S.C. § 115(b)(1) and 115(c)(5)). The rule proposed by the Copyright Office – representing a reasoned and practical interpretation of the availability of the compulsory license it administers – is not, and is not intended to be, a binding interpretation of the entire Copyright Act.⁶

In a remarkably parallel situation, the Copyright Office previously engaged in rulemaking to interpret a definition within the Section 111 license for the purpose of clarifying the cable compulsory licensing scheme. Rejecting a challenge to that rule, the D.C. Court of Appeals indicated that the Copyright Office clarification would serve to limit costly *ad hoc* disputes over the meaning of the statute. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988). The circuit court further observed that “Congress . . . necessarily relies on agency action to make ‘common sense’ responses to problems that arise during implementation [of legislation].” *Id.* at 612.

Section 115 rules will not regulate the performance right); those filed by Music Reports, Inc. (requesting the Copyright Office to authorize electronic filing of Section 115 Notices of Intent); and those of Sword and Stone Publishing, Inc. (suggesting certain edits to the language of the NPRM). None of these commenters opposes the adoption of the Proposed Regulations.

⁶ Most of the Opposing Commenters take the position that the Proposed Regulations exceed the rulemaking authority of the Copyright Office. Because the Copyright Office has already rejected earlier arguments to this effect in this very proceeding, *see* NPRM at 40,806, these Comments assume the Copyright Office’s authority to act.

The same logic applies here. That the existing regime for licensing of DPDs under Section 115 could benefit from an authoritative interpretation by the Copyright Office can hardly be in doubt, given the fact that such a clarification has been under discussion for nearly a decade.

At the same time, contrary to the protestations of various commenters, the Copyright Office is not obliged to resolve issues beyond those on which it has chosen to focus its attention at this time. “[A]n agency need not solve every problem before it in the same proceeding.”

Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos., 498 U.S. 211, 231 (1991). Rather, as explained by the Supreme Court, the agency “enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures, and priorities.” *Id.* at 230 (internal citations omitted).⁷

Here, the longstanding problem is uncertainty on the part of some regarding the applicability of the Section 115 license to the full range of reproductions and distributions made in the course of delivering full downloads, limited downloads and interactive streams. The copyright owners and users that are directly involved with the Section 115 licensing process seek confirmation that the Section 115 license so applies. On the other hand, none of the directly affected parties believes that such a rule should extend to noninteractive streaming activities. (See, e.g., Opening Comments at 14; DiMA Comments at 2; RIAA Comments at 6-8.) To require licenses for noninteractive streaming would depart from existing industry practices (in contrast to interactive streaming, where, since 2001, there has been an industry precedent of

⁷ And, contrary to the suggestions made by the Opposing Commenters in reference to prior testimony given by the Register of Copyrights, the Copyright Office has the latitude to “change course” in its handling of a particular issue if a better solution presents itself. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005). This is especially the case where, as here, the subject matter under review is “technical, complex and dynamic.” *Id.* at 1002-03 (citing *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)).

licensing⁸). (Opening Comments at 14; *see also* Google Comments at 2, 6-7). Based on this record, the Copyright Office should adopt the regulations proposed in the NPRM (“Proposed Regulations”), but at the same time exercise its agency discretion to limit the application of the rule to those activities for which the lack of clarity is perceived by market participants to be a problem. Indeed, to limit the rule in this manner would quickly eliminate many of the purported concerns of the Opposing Commenters because it would maintain the *status quo* for noninteractive webcasters and others that are currently operating without Section 115 licenses.⁹

II.
NONE OF THE ISSUES RAISED
BY THE OPPOSING COMMENTERS BARS
THE ADOPTION OF A RULE TO CLARIFY THE SECTION 115 LICENSE

Opposing Commenters offer up a long list of reasons why those who seek to build and support legitimate digital music services should continue to operate in a state of licensing uncertainty. None of these arguments is compelling.

A. *Cablevision* Does Not Answer the Interactive Streaming Question

Seizing upon the recent *Cablevision* decision, the Opposing Commenters seek to shoehorn interactive music streaming services into that decision’s narrow holding for the purpose of arguing that enactment of the Proposed Regulations to facilitate licensing of such services under Section 115 would be unlawful. In so doing, they greatly overstate the reach of that decision.

⁸ This fact alone contradicts Google’s indiscriminate claim of an “industry consensus” and “common understanding” that “streamed public performances of digital content do not implicate reproduction and distribution rights.” (Google Comments at 6, 12.)

⁹ For example, while Google opposes Copyright Office action generally, Google’s second choice is to have the Copyright Office take a “common-sense, marketplace-supported” approach by limiting the rule to interactive streaming. (*See* Google Comments at 7.) Approaching the same issue from a different angle, NAB asserts that the final sentence of Subsection 115(d) indicates Congress’ intent to exclude non-interactive digital performances from the definition of DPD. (NAB Comments at 14.)

As discussed in our Opening Comments, the *Cablevision* court engaged in a novel interpretation of Section 101 of the Copyright Act to arrive at the result that 1.2-second buffer copies made in the course of operating a centralized DVR system did not qualify as “copies” under the Copyright Act. But *Cablevision* did not analyze buffer copies that enable the perception or communication of full-length musical works.¹⁰ Indeed, the *Cablevision* court was careful to limit its holding to the specific technology before it, explaining that its inquiry was “necessarily fact-specific,” and that “other factors not present” in that case could alter the court’s analysis “significantly.” *Cablevision*, 2008 U.S. App. LEXIS 16458, at *23. It is therefore a gross misreading of *Cablevision* to suggest that the adoption of a rule to permit licensing of interactive streaming services not considered by that court would be “contrary to law.” (Verizon at 5; CTIA Comments at 4; NAB Comments at 6; *see also* Google Comments at 12).¹¹

In invoking *Cablevision*, the Opposing Commenters ultimately seek to hang their hat on the definition of “fixed” in Section 101 of the Copyright Act to argue that copies of works reproduced in computer buffers cannot be copies. But Section 101 provides that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101. Buffer copies created by interactive streaming services manifestly meet the definition of Section 101. This is because such copies embody a musical work in a sufficiently stable form to permit the work in its entirety to be perceived and communicated. Under the statutory definition of “fixed,” it is the

¹⁰ Opposing Commenters employ the apparently invented term “performance buffers” to refer to the buffer copies used to render interactive streams of musical works. (*See, e.g.*, Verizon Comments at 5; NAB Comments at 6.) Ironically, this in itself suggests that *Cablevision* is inapposite, for the buffer copies at issue there were not rendering “performances.”

¹¹ Opposing Commenters also seek to rely on *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), for this same purpose. But *CoStar* did not address buffer copies.

work – not any “bits” of data that may comprise the work (as wrongly asserted by the Opposing Commenters (e.g., Verizon Comments at 6)) – that is used to determine fixation. That is, according to the definition, a work that remains perceptible is considered “fixed” even if some of its “bits” have already passed through a buffer.¹²

Moreover, because interactive buffer copies are sufficient to render the entire musical work for the listener, the perception of *the work* is not “fleeting,” “transitory” or otherwise less than complete; the experience is of the whole work for as long as it was intended to last.¹³ Put another way, it takes no less time to listen to an interactively streamed song than one that is played from a CD.¹⁴

Indeed, this very interpretation of the interactive music streaming process has been confirmed by Congress. Unlike the *Cablevision* court, Congress, in enacting the Digital

¹² Indeed, it is this very analysis that yields the clarification in the Proposed Regulations that “[a] digital phonorecord delivery also includes phonorecords which embody portions of a musical work so long as those portions are, individually or in the aggregate, sufficient to permit the recipient to render the sound recording which embodies the musical work.” NPRM at 40,812.

¹³ *Webster’s* defines “fleeting” as “moving or passing by very swiftly.” *Webster’s Online Dictionary*, at <http://www.websters-online-dictionary.org/definition/fleeting> (Sept. 10, 2008). The same dictionary defines “transitory” as “[e]nduring a very short time.” *Id.* at <http://www.websters-online-dictionary.org/definition/transitory> (Sept. 10, 2008). A sound recording of a musical work that is played via an interactive streaming service passes no more “swiftly” and lasts for no “shorter” period than when played from an alternative source.

¹⁴ Even if the Opposing Commenters were correct (and we do not think that they are) that *Cablevision* is not limited, as it says, to its facts, but somehow tacitly addresses the question of interactively streamed musical works, the Copyright Office can still choose to follow the numerous decisions of other courts that have reached a different result, not to mention its own longstanding interpretation of the Copyright Act. In analyzing the relationship between judicial precedent and agency action, the Supreme Court has explained: “[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court’s interpretation to override an agency’s. *Chevron’s* premise is that it is for agencies, not courts, to fill statutory gaps.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Accordingly, an agency rule need not conform to judicial precedent. Absent an express judicial holding that a statute “unambiguously forecloses” an agency construction – that the statute “contains no gap for the agency to fill” – the agency is free to issue its own differing interpretation. *Id.* at 980-83 (upholding FCC conclusion that broadband cable modem companies are exempt from common-carrier regulation under FCC’s interpretation of “telecommunications service” as lawful construction of Communications Act despite court’s prior contrary construction of the same term). In the words of the Supreme Court, the opposite view would “lead to the ossification of large portions of our statutory law.” *Id.* at 983 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)). In sum, even if the Copyright Office’s proposed rule did depart from *Cablevision*, it would hardly be “contrary to law,” but instead entitled to the full measure of judicial deference due under *Chevron*. *Id.*; see also *Satellite Broad. & Communications Ass’n v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994) (even though in conflict with earlier interpretation of deciding court, where more than one interpretation of statute was possible, Copyright Office’s construction of Section 111 upheld as “neither arbitrary, capricious, nor contrary to the statute’s ‘clear meaning’”).

Performance Right in Sound Recordings Act of 1995 (“DPRA”), *did* specifically consider the question of whether a temporary copy in “computer memory” for purposes of one-time streaming “playback” constitutes a phonorecord within the meaning of the Copyright Act. Its answer is apparent from its discussion of “general” versus “incidental” DPDs in the legislative history of the DPRA:

[I]f a transmission system was designed to allow transmission recipients to hear sound recordings substantially at the time of transmission, but the sound recording was transmitted in a high-speed burst of data and stored in a computer memory for prompt playback (such storage being technically *the making of a phonorecord*), and the transmission recipient could not retain the *phonorecord* for playback on subsequent occasions (or for any other purpose), delivering the *phonorecord* to the transmission recipient would be incidental to the transmission.

S. Rep. No. 104-128, at 39 (1995) (emphasis added). In characterizing temporary – or “incidental” – computer copies used to facilitate digital performances as constituting “phonorecords” that have been “deliver[ed]” via digital transmission, this commentary lends unequivocal support to the Copyright Office’s interpretation of DPD as including buffer copies used to deliver interactive streams. Indeed, it demonstrates that the Copyright Office’s treatment is the *only* defensible interpretation of Section 115.

Finally, in focusing solely on buffer copies, the Opposing Commenters simply fail to address the fact that, as explained in our Opening Comments, under existing law, interactive streaming services also require licenses for the server and cache copies they make – other than to suggest that the Copyright Office should simply declare these copies exempt. (*See* Verizon Comments at 18; Google Comments at 8.)¹⁵ This approach presumably offers little comfort to such services, which are seeking a legitimate answer to their licensing concerns.

¹⁵ Opposing Commenters also seek to advance the absurd argument that licenses should not be made available under Section 115 for server, buffer and cache copies used to operate interactive streaming services because the existence

B. Section 115 Unambiguously Provides that a DPD Can Be Both a Reproduction and a Performance

Seeking to construe the Copyright Act as a “harmonious whole,” the Opposing Commenters urge that the Copyright Act imposes an across-the-board, bright-line distinction between reproduction and distribution rights, on the one hand, and public performance rights, on the other. Thus, they argue, a DPD under Section 115 cannot implicate both species of rights. But this reading is demonstrably wrong, for it contradicts not only the controlling text of the statute – which the Opposing Commenters relegated to a single footnote to the extent they discuss it at all (*see* Verizon Comments at 12 n.8) – but the relevant legislative history as well.

The definition of a DPD in Section 115 could not be clearer on this point: “A ‘digital phonorecord delivery’ is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, *regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.*” 17 U.S.C. § 115(d) (emphasis added). The italicized language, echoed almost verbatim in a second provision of Section 115, 17 U.S.C. § 115 (c)(3)(A), plainly provides that a DPD can be both a reproduction and a public performance. To suggest otherwise is simply to ignore the language of the statute.

of such a license structure will “weigh against” fair use claims. (*E.g.*, Verizon Comments at 18.) The underlying assumption is simply specious; as discussed in our Opening Comments, this type of fair use claim has already been rejected by the courts. (*See* Opening Comments at 9 n.10.) Moreover, this argument completely ignores the fact, also discussed in our Opening Comments, that a license structure for interactive services has been in existence since 2001. (*Id.* at 5.) Finally, the related suggestion of the Opposing Commenters that these types of copies have no economic value, (*e.g.*, Verizon Comments at 18; Google Comments at 17), is belied by substantial record evidence in the CRB Proceeding – not to mention the parties’ agreement to rates and terms for these assertedly “valueless” copies in a partial settlement of that proceeding. Distributed or not, the copies required to provide an interactive music service have demonstrable value in the operation of the service and are therefore logically compensated within the framework of the Section 115 license.

Moreover, the fact that Congress understood that an interactive stream would also constitute a DPD is also abundantly clear from the legislative history of the 1995 amendments to Section 115, cited above, which explains that a “phonorecord” can result from the one-time performance (or “playback”) of a musical work via digital transmission. S. Rep. No. 104-128, at 39 (1995).

C. A DPD Is, by Definition, Distributed

In a variation on their theme, Opposing Commenters also object to the Copyright Office’s statement that DPDs, “by virtue of having been delivered, [are] distributed, within the meaning of copyright law.” (NAB Comments at 16 (citing NPRM at 40,811)). Thus, according to the Opposing Commenters, even if interactive streams are DPDs, they fail the “primary purpose” test of Section 115, which requires that the primary purpose of phonorecords licensed under statute be to distribute them to the public for private use.

But the Copyright Office’s interpretation of Section 115 in this regard is the only plausible reading of the statute: if a phonorecord is delivered as a DPD, a distribution has occurred. In straining to reach a different result, the Opposing Commenters simply overlook the effect of the amendments to Section 115 that clarified Section 115’s applicability to digital transmissions by creating and adding the category of DPD. Indeed, the amendments were intended to nullify the very argument urged by the Opposing Commenters. S. Rep. No. 104-128, at 37 (1995) (in amending Section 115, Congress’ intention was “to confirm and clarify the right of musical work and sound recording copyright owners to be protected against infringement when phonorecords embodying their works are delivered to consumers by means of transmissions rather than by means of phonorecord retail sales.”)

Tellingly, pursuant to the 1995 amendments, the text of Section 115 unequivocally provides that

[a] compulsory license . . . includes the right of the compulsory licensee to *distribute or authorize the distribution* of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance . . . of any nondramatic musical work For every digital phonorecord delivery by or under the authority of the compulsory licensee . . . the royalty payable by the compulsory licensee shall be [etc.].

17 U.S.C. § 115 (c)(3)(A) (emphasis added).

Thus, once again looking simply to the plain language of the statute, if a musical work is delivered “by means of a digital transmission which constitutes a digital phonorecord delivery,” it is considered distributed for purposes of Section 115 – even if the transmission also constitutes a public performance of the work. Moreover, because Section 115 provides that royalties are payable for phonorecords that have been “distributed,” *see* 17 U.S.C. § 115 (c)(2), it follows from the statutory language requiring payment for “every” DPD that every DPD is understood to be distributed.

D. The “Specifically Identifiable” Language Is Not Ambiguous

Opposing Commenters also take issue with the Copyright Office interpretation of the “specifically identifiable” language in Subsection 115(d), which provides in pertinent part that “A ‘digital phonorecord delivery’ is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording” In our Opening Comments, we point out that Congress could easily have limited the language of Section 115(d) to specify that a reproduction had to be specifically identifiable by the transmitting service, but instead chose not to restrict the concept of “identifiability” in this manner. Certain Opposing

Commenters seem to be arguing that Congress simply suffered a grammatical lapse in constructing the sentence as it did, and quite possibly meant to say something else. According to these commenters, the “‘specifically identifiable’ phrase” can (and should) be read “as referring to the transmitting service.” (*E.g.*, Verizon Comments at 14.) The problem with this construction is, all grammar aside, there is no mention of the “transmitting service” anywhere in the sentence being construed. Such an implausible reading is nothing more than a transparent attempt to manufacture ambiguity where there is none, and should be rejected.

E. A Rule Confirming the Availability of Licenses for Interactive Streaming and Download Activities Under Section 115 Is Fully Compatible With Section 114

Opposing Commenters argue that the Copyright Office is foreclosed from acting under Section 115 because it will disrupt the statutory licensing scheme of Section 114. This is not a *bona fide* concern.

First, as explained above, the Proposed Regulations, issued under Section 115, by their terms would govern licensing practices under Section 115, not Section 114. As noted above, it is not incumbent upon the Copyright Office to address more than one statutory provision at a time. But more than that, assuming the proposed rule were adopted, as we suggest, to facilitate licensing of interactive rather than noninteractive streaming services, the respective licensing regimes would be entirely complementary. Interactive uses of musical works would be entitled to mechanical royalties in recognition of the fact that they are a substitute for sales, just as interactive uses of sound recordings are entitled to enhanced royalties by virtue of nonstatutory licensing arrangements for the same reason. Likewise, those noninteractive uses licensable by performance rights societies on the musical work side would similarly be eligible for the Section 114 statutory license on the sound recording side.

F. The Audio Home Recording Act is Beside the Point

Despite their own suggestion that their hypothetical interpretation is “absurd,” Opposing Commenters complain that the Proposed Regulations could impact the Audio Home Recording Act (“AHRA”) by expanding the universe of devices subject to royalty payments under that statute. But the question of whether a “recording” as defined in the AHRA is coextensive with the term “DPD” is a question that already exists, and will continue to exist, regardless of whether the Copyright Office chooses to clarify the definition of DPD. Moreover, neither the AHRA nor the legislative history of the AHRA relied upon by Opposing Commenters makes reference to “DPDs” (understandably, since the AHRA predates the passage of the DPRA). For these reasons, the AHRA and history of the AHRA are not germane to this rulemaking – especially when held up against Congress’s specific commentary elaborating on the definition of DPD, cited above. Congress enacted the DPD amendments against the backdrop of the AHRA, and in so doing, made it abundantly clear that it intended for interactive streaming activities to qualify as DPDs.

G. Generalized Complaints About Section 115 Should Not Stand in the Way of Progress

In an argument no more compelling than their others, Opposing Commenters suggest that because Section 115 is considered “outdated” and “cumbersome” to use, the Copyright Office should forego any effort to remedy its perceived deficiencies. This argument ignores the simple truth that those who actually make use of the statutory system – whether directly under Section 115, through HFA or otherwise – agree that a clarification of the statute to facilitate industry-wide licensing of digital services would be a significant step forward. An improved system, even if less than perfect, is better than no system at all.

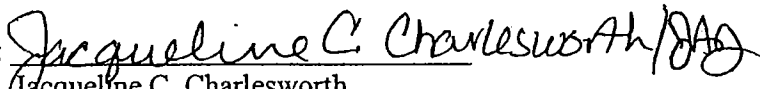
Conclusion

For the foregoing reasons, NMPA, SGA, NSAI and AIMP respectfully submit that the Copyright Office should reject the flawed reasoning of the Opposing Commenters and adopt the Proposed Regulations, subject to the minor modification described in our Opening Comments, with such regulations to apply to DPDs in the form of full (permanent) downloads, limited downloads and interactive streams.

Dated: September 15, 2008


Respectfully submitted,

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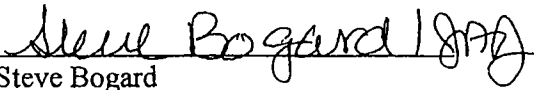
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streaming services, is an issue that has plagued the industry for almost a decade. It has been a limiting factor in the growth of digital music services. While HFA, acting on behalf of its music publisher principals, has made licenses available for limited download and interactive streaming services since 2001, this licensing structure does not extend to copyright owners not represented by HFA. Similarly, although server, buffer and other intermediate copies of musical works are understood to be included in digital licenses offered by HFA, such licenses are not available on an industry-wide basis. The fact is that technology continues to evolve and offer new possibilities for the delivery of music to consumers, while the statutorily-based licensing system lags behind.

But the digital music industry has not given up. In a significant achievement, those that are directly impacted by the Section 115 licensing process – music publishers, songwriters, record labels and digital music services – recently reached a settlement in the pending Copyright Royalty Board rate proceeding that establishes rates and terms for the licensing of limited download and interactive streaming services. The settlement reflects the industry consensus that has developed in the years since this rulemaking was commenced that these activities are properly and sensibly licensed under Section 115. At the same time, the settlement does not extend to noninteractive streaming which – again based upon industry experience – the parties do not believe should require a mechanical license. We hope that the Copyright Office will adopt a rule that is consistent with and supports these crucial industry understandings.

Unfortunately, there are those from outside the digital music industry that, pursuing other agendas, have entered this rulemaking process possibly in the hope of creating paralyzing gridlock on these issues. But non-115 interests are not the reason we are here. The proposed regulation does not and would not govern the licensing regime for audiovisual works, B2B providers, cloud computing or other activities outside of Section 115. By its terms, this is a rule

to be promulgated under Section 115 to clarify the availability of the compulsory license for the benefit of those who rely upon Section 115, and that is how it should be analyzed.

Much has been said (and undoubtedly will be said today) in this proceeding about the Second Circuit's recent *Cablevision* decision. For reasons that Professor Goldstein will explain in his testimony in support of statutory clarification, that decision is not controlling here. The *Cablevision* court simply did not consider the type or nature of copies used to deliver interactive streams of musical works. It did not address the very specific history or purpose of Section 115, or the definition of digital phonorecord delivery within that section. And even if it had, under principles of agency discretion, the Copyright Office is empowered to adopt its own reasonable construction of the statutory license it oversees for purposes of administering that license.

Nor, significantly, did *Cablevision* declare server or cache copies made by interactive streaming services exempt under the law. To the contrary, the *Cablevision* court made a point of emphasizing that reproductions used to transmit copyrighted content implicate the reproduction right (as other courts have previously held). These reproductions cannot simply be brushed under the rug. Such phonorecords require a license and, in keeping with the prevailing industry practice, are logically included and compensated within the Section 115 framework. If this were not the case, digital music services would be forced to license these copies through *ad hoc*, non-115 arrangements – undoubtedly a less satisfactory alternative (at least from these services' point of view) than a readily available statutory license. We should be moving forward, not backward, on these issues.

In view of the limited time for these opening remarks, rather than repeat each of the points made in our Opening Comments and Reply Comments, because the Copyright Office has expressed a particular interest in the technology of interactive streaming services, we wanted to share some thoughts on this subject.

First, we believe that properly read, the definition of DPD is meant to encompass the phonorecords that are created in buffers to enable interactive streaming. This is clear from the legislative history of the amendments to Section 115, in which Congress expressed the view that a temporary reproduction made to permit “playback” of a sound recording constitutes a phonorecord. In light of Congress’ express intent in this regard, we do not believe that a rule clarifying that the 115 license applies to interactive streaming activities requires specific or elaborate technological justification.

To the extent the Copyright Office is interested in learning more about the process of interactive streaming of musical works, however, we respectfully refer the Office to the report of Dr. Ketan Mayer-Patel, an expert in streaming technology, that is included in the record of the CRB proceeding. To prepare his report, Dr. Mayer-Patel examined the three leading interactive streaming music services, Rhapsody, MediaNet and Napster, analyzing various copies made by those services. After conducting a series of experiments, he concluded that, with respect to each of these services: (i) a complete and specifically identifiable copy of the sound recording comprising the musical work must be made in the RAM of the user’s computer in order to enable the musical work to be perceived by the user (Expert Report of K. Mayer-Patel (CO Trial Ex. 403) at 2, 27, 36, 43); and (ii) in addition to the RAM copy, a cached copy of the sound recording is made and stored indefinitely on the user’s hard drive that is accessed and used for future playback of the work (*id.* at 2-3, 28, 36-37, 44).¹

¹ Notably, the charts included within Dr. Mayer-Patel’s report documenting his investigation indicate that the audio file for a full-length sound recording is delivered and copied to a user’s computer in under a minute – that is, in much less time than it takes to play the song. (Expert Report of K. Mayer-Patel at 26, 35, 42.) Accordingly, based on Dr. Mayer-Patel’s observations, it appears that the buffering process entails the storage of data in the user’s computer for a period of minutes (at a minimum) in order to render a typical-length recording.

While we do not view the information developed by Dr. Mayer-Patel as necessary to the adoption of a rule confirming the availability of Section 115 licenses for interactive streaming services, we nonetheless believe it unequivocally demonstrates the *need* for such a clarification. This is because, in delivering these types of buffer and cache copies to end users, interactive streaming services indisputably are making phonorecords (in addition to underlying server copies) that require a license.

In sum, we believe the Copyright Office can and should adopt a rule to confirm and support the industry consensus that the Section 115 license is available to cover the full range of reproduction and distribution activities engaged in by download and interactive streaming services. For the good of the digital music industry – which faces its share of challenges as it is – it is time that the lingering cloud of uncertainty concerning the availability of the Section 115 license be dispelled.

September 19, 2008

ny-834760

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of)
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Compulsory License for Making and
Distributing Phonorecords, Including
Digital Phonorecord Deliveries

Docket No. RM 2000-7

**STATEMENT OF PAUL GOLDSTEIN
ON BEHALF OF NMPA, HFA, SGA, NSAI AND AIMP
IN SUPPORT OF RULEMAKING TO CLARIFY THE SECTION 115 LICENSE**

Register Peters and other officials of the Copyright Office, my name is Paul Goldstein. I am the Lillick Professor of Law at Stanford Law School and Of Counsel to the law firm of Morrison & Foerster LLP, and I am grateful to the Copyright Office for giving me the opportunity to testify on behalf of the music publisher and songwriter groups in connection with the Copyright Office's Notice of Proposed Rulemaking of July 16, 2008, and specifically its proposed regulations (the "Proposed Regulations")¹ clarifying, among other things, that interactive streams of musical works are subject to licensing pursuant to Section 115 of the 1976 Copyright Act as amended (the "1976 Act")².

The essence of my testimony today is that the Proposed Regulations respecting music download and interactive streaming services are entirely consistent with, and violate no principle of, the 1976 Act. Indeed, as will be shown, the legislative history behind Section 115 of the 1976 Act specifically directs the approach to interactive streaming that would be confirmed by

¹ 73 Fed. Reg. 40,802 (July 16, 2008).

² 17 U.S.C. §§ 101 *et seq.*

the Proposed Regulations. Further, the Proposed Regulations are entirely consistent with the Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act (the “Section 104 Report”)³ and with applicable case law interpreting the 1976 Act.

Although much discussed in the Comments on the Proposed Regulations, there is one case that is *not* applicable to the question that the Proposed Regulations address. Because, however, the recent decision in *Cartoon Network LP v. CSC Holdings, Inc.*⁴ (“*Cablevision*”) has kicked up some still unsettled dust around the question of buffer copies, it may help if I frame my remarks today around the Second Circuit’s decision in that case, even though *Cablevision* is a decision of but one circuit and effectively contradicts holdings in other circuits.⁵ Specifically, (1) the facts that the Second Circuit addressed in *Cablevision* differ materially from the facts pertinent to interactive streaming of musical works under Section 115; and (2) the law that the Second Circuit considered in *Cablevision* differs materially from the law applicable to interactive streaming of musical works under Section 115. I shall in discussing facts and law also refer to the parallel discussion of these questions in the Section 104 Report, the contours of which the Proposed Regulations so closely follow.

1. *Applicable Facts.* As described by the *Cablevision* court, the buffer copies made there were “fleeting”; were automatically created from a broadcast feed and discarded within 1.2 seconds or fewer; and were made without rendering the work to a viewer, indeed, were made regardless of whether a subscriber even sought to use a copy of the work. The buffer copies

³ U.S Copyright Office, DMCA Section 104 Report (2001).

⁴ No. 07-1480-cv(L), 2008 U.S. App. LEXIS 16458 (2d Cir. Aug. 4, 2008).

⁵ See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993); *Stenograph L.L.C. v. Bossard Assoc., Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998).

involved in *Cablevision* differ from the phonorecords characteristically made in interactive streams in at least three material respects.

First, and unlike the fleeting fragments of *Cablevision*, buffer phonorecords made in the course of interactive streaming suffice to render the entire musical work to the listener; they are, in the relevant words of section 101's definition of "phonorecords," "material objects in which sounds... are fixed... and from which the sounds can be perceived, reproduced, *or* otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (emphasis supplied). Second, phonorecords made in the course of interactive streaming typically also include cached copies made on the user's hard drive for purposes of future access and listenings.

Third, the phonorecords made in the course of interactive streaming possess independent – and critical – economic value in terms of their displacement of record sales that would otherwise be made in the form of CDs. Securing this economic value was the very rationale behind the 1995 Digital Performance Right in Sound Recordings Act ("DPRA")⁶ when it expanded the scope of Section 115's mechanical compulsory license to encompass the distribution of phonorecords of nondramatic musical works "by means of a digital transmission which constitutes a digital phonorecord delivery." Such economic value was also a central benchmark adopted by the Section 104 Report to determine whether copies fall inside or outside of copyright control under the 1976 Act.⁷ (The comparative absence of this economic value in

⁶ Pub. L. No. 104-39, § 4, 109 Stat. 336 (1995).

⁷ Section 104 Report at 111. ("In establishing the dividing line between those reproductions that are subject to the reproduction right and those that are not, we believe that Congress intended the copyright owner's exclusive right to extend to all reproductions from which economic value can be derived. The economic value derived from a

the case of *noninteractive* streaming helps to explain why licenses from copyright owners of musical works are not required to engage in this mode of streaming.)

2. *Applicable Law.* *Cablevision* involved the copying and performance of television and motion picture content and, as such, called for the application of a no more differentiated infringement standard than the standard applied to copyrighted works generally. By contrast, and as dealt with by the Proposed Regulations, musical works are the subject of a statutory provision, Section 115 of the 1976 Act, whose intricate balancing of economic interests dates back to the 1909 Act and through the 1995 amendments wrought by the DPRA to adjust the provision's historically delicate balance to the economic realities of digital transmission.

Just how closely the Proposed Regulations conform to the 1976 Act's statutory scheme, including the 1995 amendments, is immediately evident from a comparison of interactive streaming as contemplated by the Proposed Regulations and interactive streaming as contemplated by the Senate Report on the DPRA. In distinguishing between so-called "general" and "incidental" digital phonorecord deliveries, the Senate Report defined incidental digital phonorecord deliveries in terms that perfectly mirror the buffer phonorecords made in the course of interactive streaming:

[I]f a transmission system was designed to allow transmission recipients to hear sound recordings substantially at the time of transmission, but the sound recording was transmitted in a high-speed burst of data and stored in a computer memory for prompt playback (such storage being technically the making of a

reproduction lies in the ability to copy, perceive or communicate it. Unless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated, the making of that copy should fall within the scope of the copyright owner's exclusive rights.")

phonorecord), and the transmission recipient could not retain the phonorecord for playback on subsequent occasions (or for any other purpose), delivering the phonorecord to the transmission recipient would be incidental to the transmission.⁸

As should be evident, for the Proposed Regulations to write phonorecords made in the course of interactive streaming out of section 115's compass would demonstrably violate the mandate of the 1976 Act as amended.

Even were *Cablevision's* decision on buffer copies correct on the specific facts before the court – and there is strong evidence in the 1976 Act and in the case law that the decision is not correct – the Copyright Office would have no obligation to extend the Second Circuit's approach to a question that, as shown, presents an entirely different set of facts as well as an entirely different – and historically validated – legal regime under Section 115 of the 1976 Act dealing not with copies of motion pictures and television programs, but with phonorecords embodying musical works.

September 19, 2008

ny-834763

⁸ S. Rep. No. 104-128, at 39 (1995).