

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.

