

Reply
Comment Letter
RM 2000 7
No. 5

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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 CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation (“Cablevision”) respectfully submits the following reply comments to respond to the comments filed in connection with the Copyright Office’s Notice of Proposed Rulemaking (“NPRM”), dated July 16, 2008, and published at 73 Fed. Reg. 40,802.

INTRODUCTION

Cablevision is one of the Nation’s leading media, entertainment, and telecommunications companies, offering cable television, high-speed Internet, and telephone service primarily in the New York area. Cablevision has developed a Remote Storage Digital Video Recorder (“RS-DVR”) that allows consumers to record and play back television programming—much as they would using a traditional set-top Digital Video Recorder (“DVR”) or Video Cassette Recorder (“VCR”)—except that the consumer’s recordings are stored remotely on a server in a Cablevision facility. To operate, the RS-DVR must briefly store tiny snippets of incoming program data in electronic data buffers.

Cablevision recently prevailed in a lawsuit brought by various copyright holders claiming (among other things) that those fleeting bits of buffer data would constitute “copies” that would infringe the owners’ reproduction rights. In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (“Cablevision”), No. 07-1480 (2d Cir. Aug. 4, 2008), the United States Court of Appeals for the

Second Circuit rejected that argument, agreeing with Cablevision’s position that such buffer data is not a “copy” within the meaning of the Copyright Act.

Two commenters in this proceeding—the National Music Publishers’ Association (“NMPA”) and the Recording Industry Association of America, Inc. (“RIAA”)—filed an *amicus* brief supporting the losing side in the *Cablevision* case. Those organizations have now filed comments in this proceeding criticizing the Second Circuit’s unanimous decision and urging the Office to distinguish the Second Circuit’s analysis. See NMPA Comments at 10-14; RIAA Comments at 4-5. But the Second Circuit’s decision is correct. There is, moreover, no good reason for the Office to address that decision in this proceeding—and every reason not to.

As an initial matter, NMPA’s and RIAA’s critiques are unfounded. Although NMPA claims that “Section 101 of the Copyright Act does not require that a copy last for any specified period of time” and derides the court of appeals for creating a “novel,” “judge-made ‘duration’ requirement,” NMPA Comments at 10 n.15, the text of the Copyright Act does not merely support, but in fact compels, the Second Circuit’s conclusion. The Act expressly requires that a “copy” be “fixed,” *i.e.*, “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 (emphasis added). Neither NMPA nor RIAA even attempts to grapple with the Second Circuit’s analysis of that language, and the contrary construction they propose would read the “transitory duration” language out of the statute entirely. It is therefore no surprise that the only other court of appeals to have squarely addressed this issue has, like the Second Circuit, concluded that electronically buffered data does not constitute a “copy” within the meaning of the Act.

More fundamentally, it would be both unnecessary and unwise for this Office to rule on the buffering issue in the course of this proceeding. The Office began this proceeding to provide

an element of certainty—effectively, a safe harbor—for digital music streaming through Section 115 compulsory licenses. *See* 73 Fed. Reg. at 40,805-06. The Office, however, cannot provide that certainty if its rules rest on a construction of the Act that has been rejected by two courts of appeals. An unnecessary pronouncement about buffering, moreover, would exacerbate the doubts surrounding the scope of the Office’s authority to promulgate its proposed rules. And the Office need not reach out for the buffering issue. Instead, the Office can and should rule that, *if* any buffer data created during music streaming constitutes a “copy” (or “phonorecord”) under the Act, *then such* copies are licensable under Section 115. That is the approach proposed by other commenters. *See, e.g.*, EFF Comments at 6-8. And that is the approach that best accomplishes the Office’s stated goal of providing an element of certainty for music streaming: It makes clear that any operator of music services wishing to ensure its immunity from liability can gain such protection through Section 115’s compulsory license.

ARGUMENT

Virtually everyone submitting comments in this proceeding seems to agree on one issue: The Office need not and should not address whether the contents of data buffers constitute “copies” (or “phonorecords”) within the meaning of the Copyright Act. Whether based on concerns about the Office’s jurisdiction,¹ policy considerations,² or other reasons,³ nearly all commenters—regardless of their position on the merits—seem to agree on that point. The

¹ *See* Verizon Comments at 2-5; DiMA Comments at 1-7; NAB Comments at 3-6; CTIA Comments at 3-4; ASCAP Comments at 3, 5 (urging “narrow[] . . . focus” and arguing that the Office has “no authority to regulate matters outside the boundaries of Section 115”).

² *See* EFF Comments at 6-8; Ad Hoc Coalition of Streamed Content Providers Comments at 22 (urging that Copyright Office should rule, at most, that “Section 115 extends to and embraces any reproductions that *may* be generated as part of a transmission” but “should not purport to decide the legal question of whether ‘fixed’ copies *are in fact created* by a particular service or whether such copies are legally cognizable”).

³ *See* RIAA Comments at 4 (disagreeing with *Cablevision* but declaring that “it is not necessary to debate those issues here”).

absence of industry support for any foray by this Office into the buffering issue should come as no surprise. There is no persuasive reason for the Office to address the issue. And doing so would be manifestly unwise, undermining the Office's efforts to provide certainty and exposing the Office's decision in these proceedings to serious statutory and constitutional challenges.

In its NPRM, the Office noted that it had previously suggested that buffer data may be sufficiently "fixed" to constitute a copy within the meaning of the Copyright Act. 73 Fed. Reg. at 40,809 (citing the Office's *DMCA Section 104 Report* 111-12 (Aug. 2001)). The NPRM stated that, in addressing the scope of Section 115 licenses, the Office felt comfortable relying on that earlier assessment because it perceived "no reason to believe that developments in either technology or the law require [it] to revisit the above-stated conclusions." *Id.* Only a few weeks later, however, precisely such a "development[]" in . . . the law" occurred. In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* ("*Cablevision*"), No. 07-1480 (2d Cir. Aug. 4, 2008), the United States Court of Appeals for the Second Circuit expressly rejected this Office's analysis in the *DMCA Report* and held that buffer data, such as that in *Cablevision's* RS-DVR, does not constitute a "copy" because it does not meet the Act's fixation requirement. Slip op. at 13-21. In view of that development (and other considerations discussed below), this Office should not jeopardize any action it takes under Section 115 by addressing the buffering issue unnecessarily.

I. The Second Circuit's Interpretation of the Copyright Act Is Unquestionably Correct

To the extent some commenters invite this Office unnecessarily to take issue with the Second Circuit's decision in *Cablevision*, the Office should decline that invitation. The Second Circuit's decision was compelled by the Act's text and legislative history. And while NMPA labels the decision "highly controversial," NMPA Comments at 10, nothing could be further from the truth. The Second Circuit's judgment was not fractured; it was unanimous. It was

authored by Judge Walker, one of the leading copyright experts on the federal bench. *See, e.g., Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) (Walker, J.); Hon. John M. Walker, Jr., *Protectable "Nuggets": Drawing the Line Between Idea and Expression in Computer Program Copyright Protection*, 44 J. Copr. Soc'y 79 (1997). It follows the only other appellate decision that has addressed data buffers. *See CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004). And it reflects the position of more than 25 professors of copyright law, who filed an *amicus curiae* brief urging the Second Circuit to hold that transient buffer data is not "fixed" and thus not a "copy" within the meaning of the Act. *See Br. of Amici Curiae Law Professors in Support of Reversal*, No. 07-1480 (2d Cir. filed June 8, 2007).

A. As other commenters have recognized, the Second Circuit's decision began where all statutory construction must—with the text of the statute. *See* slip op. at 13. The Copyright Act affords copyright holders the exclusive right to reproduce their works in "copies" or "phonorecords." 17 U.S.C. § 106(1). The Act defines "copies" as "material objects . . . in which a work is *fixed* . . . and from which the work can be perceived, reproduced, or otherwise communicated." 17 U.S.C. § 101 (emphasis added); *see also id.* (defining "phonorecords" as material objects in which a sound is "fixed"). The Act then specifies that a work is "fixed" when "its embodiment . . . is *sufficiently permanent or stable* to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration.*" *Id.* (emphasis added). As the Second Circuit observed, that definition of "fixed" "plainly imposes two distinct but related requirements: the work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc., . . . and it must remain thus embodied 'for a period of more than transitory duration.'" Slip op. at 13.

Thus, unless a reproduction exists “for a period of more than transitory duration,” it cannot be an infringing “copy” or “phonorecord” under the Act. Consistent with that limitation, the House Report accompanying the 1976 Copyright Act explains that the “definition of ‘fixation’ . . . *exclude[s]* from the concept *purely evanescent or transient* reproductions.” H.R. Rep. No. 94-1476, at 53 (1976) (emphasis added). Providing examples of such “evanescent or transient” reproductions, the report cites reproductions “projected briefly on a screen, shown electronically on a television or other cathode ray tube, or *captured momentarily in the ‘memory’ of a computer.*” *Id.* (emphasis added).

The text and legislative history of the Act thus refute NMPA’s claim that the Second Circuit’s decision establishes a “novel,” “judge-made ‘duration’ requirement,” and that “Section 101 of the Copyright Act does not require that a copy last for any specified period of time.” NMPA Comments at 10 n.15. The Act by its plain terms declares that, unless a reproduction exists for a “period of more than transitory duration,” it cannot be an infringing “copy” or “phonorecord.” The House Report makes that clear as well, explaining that transient reproductions, including those “captured momentarily in the ‘memory’ of a computer,” are not “copies” within the meaning of the Act. That, of course, perfectly describes data buffers, in which bits of data representing fragments of a work exist in computer memory for only a short period before being overwritten as the next wave of data flows in.

Moreover, far from being “unsupported by . . . existing judicial interpretation,” NMPA Comments at 10 n.15, the Second Circuit’s conclusion follows the only other appellate court to have specifically addressed buffer data. As various commenters and the Second Circuit all note, *see, e.g.,* Verizon Comments at 6; slip op. at 19, the Fourth Circuit’s decision in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), reached precisely the same conclusion.

CoStar rejected the argument that buffer data stored temporarily during transmission over the Internet is a “fixed” reproduction that can constitute a “copy” within the meaning of the Act. An Internet service provider, the court observed, “hardly ‘copies’ the information and data in the sense that it fixes a copy in its system *of more than transitory duration.*” *Id.* at 551. “While temporary electronic copies may be made in this transmission process,” the court continued, “they would appear not to be ‘fixed’ in the sense that they are ‘of more than transitory duration’” *Id.* The court also observed that buffer data is “transitory” in a “qualitative” sense as well, since it exists only while the data is *in transit* through a computer network. *Id.*

B. NMPA offers virtually no response except to invoke, in a footnote, this Office’s earlier suggestion that buffer data would constitute a “copy” if it “exist[s] for a sufficient period of time to be capable of being ‘perceived, reproduced or otherwise communicated.’” NMPA Comments at 10 n.15 (citing 73 Fed. Reg. at 40,808). As an initial matter, the report of this Office that first articulated that theory also concluded that buffers are normally *lawful fair use*, which hardly supports NMPA’s position. *See DMCA Section 104 Report* 133-41 (Aug. 2001).⁴ In any event, the suggestion that buffer data is “fixed” if it is capable of being “perceived, reproduced, or otherwise communicated”—no matter how briefly—cannot be reconciled with the Act’s text. As the Second Circuit explained in rejecting that position, “[t]he problem with this interpretation is that it reads the ‘transitory duration’ language out of the statute.” *Slip op.* at 18. The Act requires a copy to be “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 (emphasis added). NMPA (like the *DMCA Report*) simply omits that last clause,

⁴ Even apart from fair use, data buffers clearly qualify under the *de minimis* exception. *See* 2 Goldstein on Copyright § 7.0.2, at 7:9 (3d ed. 2006).

requiring only that a copy be capable of being “perceived, reproduced, or otherwise communicated”—for *any* duration.

“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). If Congress had wanted to reach *all* reproductions capable of being “perceived, reproduced, or otherwise communicated,” no matter how briefly, it would not have added the phrase “for a period of more than transitory duration.” As the Second Circuit cogently observed, the *DMCA Report* on which NMPA’s argument ultimately rests “does not explain why Congress would include language in a definition if it intended courts to ignore that language.” Slip op. at 18-19. Even in contexts where deference to an agency is otherwise warranted, courts will not sustain an interpretation that “read[s] . . . words out of the statute entirely.” *NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 502-03 (1998) (rejecting interpretation on that ground, despite generous *Chevron* standard). That is particularly true where, as here, the Act’s legislative history and structure likewise foreclose the construction.⁵

⁵ The Act’s legislative history forecloses the claim that a “fixed” copy exists whenever data lasts long enough to be reproduced. Television programs can be copied, but Congress intended “the definition of ‘fixation’ [to] exclude . . . reproductions . . . shown electronically on a television.” H.R. Rep. No. 94-1476, at 53. Congress likewise meant to exclude “reproductions . . . captured momentarily in the ‘memory’ of a computer.” *Id.* NMPA would contradict that statement by deeming *all* RAM copies “fixed,” since all can be copied virtually instantaneously. The Act’s structure, moreover, clearly distinguishes between the owner’s exclusive right “to reproduce the copyrighted work in copies or phonorecords” and its right “to perform the copyrighted work publicly.” 17 U.S.C. § 106(1), (4). As various commenters explain, *see, e.g.*, Verizon Comments at 9, treating temporarily buffered data snippets as “fixed” copies undermines that distinction by converting performances into infringing reproductions for which a separate license may be required. For example, broadcasting a television show is traditionally understood to be a “performance,” not a “reproduction.” 2 Nimmer on Copyright § 8.02[B][3], at 8-32 & n.15 (2006). As just noted, however, television images would constitute “copies” under NMPA’s view because they appear on screen long enough to be copied. NMPA’s position thus undermines the longstanding distinction between reproduction and public performance rights.

The Office should not fatally infect any Section 115 rules it might issue by including an interpretation of the Act that the courts have already rejected.

C. NMPA also declares that the *Cablevision* decision is “at odds with at least three different lines of precedent spanning multiple circuits.” NMPA Comments at 10. But the Second Circuit specifically considered the “*MAI* line of cases” on which NMPA now relies. *Id.* at 10 n.15. As the court observed, none of those cases addressed data buffers—the temporary data storage that occurs as a normal part of transmitting digital data through a network. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), for example, involved repair technicians who “load[ed] the software into the RAM and [were] then able to view the system error log and diagnose the problem with the computer.” 991 F.2d at 518. As the Second Circuit noted, “it seems fair to assume that in these cases the program was embodied in the RAM for at least several minutes.” Slip op. at 16. The stored data, moreover, was not “transitory” in any “qualitative” sense—the data was not in transit, but instead resided in memory at its intended destination. *See CoStar*, 373 F.3d at 551. *MAI Systems* thus did not address buffering at all, and it certainly did not address the duration requirement, which was not at issue. *See* slip op. at 15-17. The other cases that NMPA relies on (NMPA Comments at 9 n.11, 10 n.13) are all inapposite for the same reasons—none of the cases involved buffer data or similarly evanescent electronic reproductions of bits of program data incident to its transmission through a computer network.⁶

⁶ *Stenograph L.L.C. v. Brossard Associates*, 144 F.3d 96 (D.C. Cir. 1998), involved copyrighted transcription software that was used without a license for months. *Id.* at 100-03. *Marobie-FL, Inc. v. National Ass’n of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D. Ill. 1997), involved copyrighted clip art downloaded to a user’s computer. *Id.* at 1178. And *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998), involved essentially permanent reproductions of copyrighted arrangements on a CD-ROM. *Id.* at 703.

In fact, as the Second Circuit pointed out (slip op. at 17), another court applying *MAI Systems* has held—like the *Cablevision* decision—that *MAI* is consistent with a duration requirement. In *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F. Supp. 356 (E.D. Va. 1994), technicians loaded copyrighted software into RAM and then used an “error log” to perform maintenance, just as in *MAI Systems Corp. v. Peak Computer, Inc.* See 845 F. Supp. at 361. The court found those copies “fixed,” but only because they lasted for “minutes or longer.” *Id.* at 363. “Of course,” the court explained, “if a computer is turned off within seconds or fractions of a second of the loading, the resulting RAM representation of the program arguably would be too ephemeral to be considered ‘fixed’ or a ‘copy’ under the Act.” *Id.* (emphasis added); see also *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 771 (E.D. Mich. 2003). That perfectly describes data buffers as well.

* * * * *

To the extent this Office addresses the issue at all, it must reach the conclusion compelled by the statutory text: Data stored temporarily in a buffer as it is transmitted through a network is *not* a copy or phonorecord within the meaning of the Act, because it is not fixed. It is instead precisely the sort of “evanescent or transient” reproduction Congress meant to exclude from the definition of copy or phonorecord. That is the conclusion reached by the only courts of appeals (the Second and Fourth Circuits) to have addressed the issue. It is the construction endorsed by a virtual who’s-who list of copyright professors. And it is the only conclusion that can be reconciled with the Act’s text and legislative history. This Office should not place the results of its Section 115 proceeding in jeopardy—creating precisely the uncertainty it seeks to avoid—by adopting NMPA’s unfounded claims to the contrary.

II. The Copyright Office Should Not Address Whether Buffer Data Is Sufficiently “Fixed” To Be a “Copy” or “Phonorecord”

Aside from the merits, this Office need not, and should not, address whether buffer data—a regular feature of Internet and digital transmission generally—constitutes a “copy” or “phonorecord” within the meaning of the Act. In the NPRM, the Office repeatedly explained that the purpose of this proceeding is to “clarify the scope and application of the Section 115 compulsory license,” 73 Fed. Reg. at 40,802, so as to ameliorate “continued legal uncertainty associated with operating music services in the current marketplace,” *id.* at 40,806; *see also id.* (noting the need for “certainty”); *id.* at 40,810 (need for “clarification”). Any decision of this Office that addresses the broader question of buffer data, much less a decision that does so in a manner that contradicts the decisions in *Cablevision* and *CoStar*, would fatally impede the Office’s efforts to achieve those goals. Such a decision would put this Office’s regulations in legal jeopardy and undermine the goals of clarity and certainty the Office has set out to achieve.

The best way to achieve that certainty here is to adopt instead the approach proposed by EFF. *See* EFF Comments at 6-8. As EFF explains, this Office could fully achieve its goals of clarifying the scope of the Section 115 license by limiting itself to deciding whether, *if* copies are created in the digital streaming process, such copies are *licensable* under Section 115. The Office need not opine on whether particular reproductions would constitute “copies” absent the compulsory license. So long as any copies that are created in the process are licensable, this rulemaking can provide the safe harbor and legal certainty that is the Office’s stated goal—without the risk of protracted legal challenges that would flow from a less modest course.

A. The NPRM itself acknowledges the benefits of pursuing a limited course and avoiding pronouncements that are extraneous to the Section 115 issues under consideration. For example, the NPRM states that the Office meant to take “no position with respect to whether and

when it is necessary to obtain a license.” 73 Fed. Reg. at 40,805. Rather, the Office merely sought to “make the use of the statutory license available to a music service that wishes to engage in such activity without fear of incurring liability for infringement.” *Id.* As the Office explained: “Use of the license need not be deemed an admission that the licensed acts would otherwise be infringing. *A fortiori*, a regulation clarifying that all copies made in the course of or for the purpose of making a DPD are included within the Section 115 compulsory license should not be construed as an indication that all such copies would be infringing but for their inclusion within the scope of the license.” *Id.* at 40,811 n.11. The Office observed that some copies created during music streaming might be “fair use.” *Id.* Notably, to support that latter observation, the NPRM cited the *DMCA Report’s* statement that *buffer copies* are normally fair use. *Id.* (citing *DMCA Section 104 Report* at 133-41).

If the Office issues rules in this proceeding, it should follow a similar course in connection with the issues of buffering and fixation (particularly in light of *CoStar* and *Cablevision*). In particular, the Office could determine that any “fixed” reproductions created in the streaming process are licensable under Section 115, without resolving whether particular reproductions (such as data stored temporarily in buffers) qualify as “fixed” and thus “copies” within the meaning of the Act. Section 115 would then operate as a safe harbor, just as in the fair use context: Firms that wanted to test their claims of non-infringement in court could do so; while those that wanted to avoid litigation could opt for the compulsory license. As the Ad Hoc Coalition of Streamed Content Providers explains, the Office can merely state that “Section 115 extends to and embraces any reproductions that *may* be generated as part of a transmission” without “purport[ing] to decide the legal question of whether ‘fixed’ copies *are in fact created*

by a particular service or whether such copies are legally cognizable.” Ad Hoc Coalition Comments at 22. That approach makes sense for fair use, and it makes sense for fixation as well.

B. That course is not merely consistent with this Office’s general approach. It is also strongly supported by practical considerations. First, whether buffer copies are “fixed” under the Copyright Act is a question of broad significance that extends far beyond the Section 115 compulsory license context. As the district court observed in the *Cablevision* case, “[a]ll digital devices . . . utilize transient data buffers.” *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 613 (S.D.N.Y. 2007). Any view this Office expresses on buffers could thus have a destabilizing effect far beyond this proceeding. This Office should not use Section 115 as a springboard for addressing issues far afield when there is no need to do so.

Restraint is particularly important given the limited participation of affected stakeholders. This Office has been overseeing these proceedings in a variety of forms for many years. *See* 73 Fed. Reg. at 40,803-06. Largely, however, the participants have been parties such as NMPA and RIAA that are directly interested in music streaming. Those parties make up only a small subset of the entities that would be interested in a pronouncement on buffers—a category that includes virtually every maker of digital electronic devices and every entity that transmits data over a computer network. Any effort to resolve or opine on the question in this context would occur without robust participation by all affected parties, on a record skewed by the limited agendas of select groups.

Addressing buffering is also bound to lead to further litigation. Any ruling this Office renders on buffering is sure to be challenged in court. The result will be years of additional proceedings, potential delays in implementing any Section 115 regulations, and prolonged

uncertainty for companies engaged in music streaming. That protracted uncertainty will be avoided, or at least reduced, if this Office declines to take a position on buffering.

C. Moreover, as explained by several other commenters, *see, e.g., Verizon Comments* at 2-5, there are serious doubts whether this Office even has authority to address the buffering issue. “It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.” *American Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005); *see Gonzales v. Oregon*, 546 U.S. 243, 255-56, 258 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Accordingly, courts (and agencies) must carefully examine whether the statute evinces an intent to delegate interpretive authority to the agency. *Gonzales*, 546 U.S. at 258; *Am. Library Ass’n*, 406 F.3d at 698-99.

Here, the Copyright Act contains no evidence that Congress intended to give this Office authority to issue binding regulations interpreting terms such as “copies” and “phonorecords” in 17 U.S.C. § 101—terms that are not specific to Section 115 but rather are endemic to copyright law. Section 702 does not provide that authority.⁷ Nor does the provision authorizing review of

⁷ Section 702 merely authorizes the Office “to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register [of Copyrights] under this title.” Although the Office claims to be promulgating its rule in aid of the Register’s “functions and duties” under Section 115 to administer the compulsory license, Section 115 contains no delegation of substantive rulemaking or interpretive authority of the sort required by *Mead*. *See Verizon Comments* at 2-3. It merely outlines ministerial and adjudicative responsibilities relating to the compulsory license. *See* 17 U.S.C. § 115(c)(3). While the Office may issue procedural regulations to aid the Register in performing such functions, neither Section 115 nor Section 702 so much as hints at authority to issue substantive interpretations of general copyright terms that appear throughout the Copyright Act. The Supreme Court made it quite clear in *Gonzales* and *Mead* that statutory authority to issue rules in one context does not imply authority to issue rules in others. *See Gonzales*, 546 U.S. at 259; *Mead*, 533 U.S. at 231-32 & n.14; *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990); *Am. Library Ass’n*, 406 F.3d at 698. This Office’s authority under Section 115 to administer the nuts and bolts of the compulsory license thus does not empower it to issue rules on whether buffer data is “fixed” under Section 101.

Copyright Royalty Judge rulings.⁸ The Office should not embroil itself in litigation over the scope of its legal authority by opining on subjects—such as buffering—that appear to be beyond the scope of its authority and are wholly unnecessary to resolution of the issue before it.

The courts of appeals have recognized that the Office lacks delegated authority to issue regulations interpreting substantive terms of the Copyright Act. The Second Circuit has squarely held that “the Copyright Office has no authority to give opinions or define legal terms, and its interpretation on an issue never before decided should not be given controlling weight.” *Morris v. Bus. Concepts, Inc.*, 283 F.3d 502, 505 (2d Cir. 2002) (quoting *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 946-47 (2d Cir. 1975) (footnotes omitted)); *Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 167 n.22 (2d Cir. 2003). The court thus refuses to grant *Chevron* deference to Copyright Office decisions, instead according them only limited *Skidmore* deference—in other words, considering them only to the extent they are persuasive. See *Morris*, 283 F.3d at 505-06 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)). In *Bonneville International Corp. v. Peters*, 347 F.3d 485 (3d Cir. 2003), two of the three judges on a Third Circuit panel similarly opined that Section 702’s “broad general authority” to issue regulations does not give the Office authority to issue binding regulations interpreting a specific term in the statute. *Id.* at 490 n.9. That reasoning applies directly here.⁹

⁸ The Act explicitly states that the Register’s rulings in such cases bind only the Copyright Royalty Judges. 17 U.S.C. § 802(f)(1)(D)-(E). An agency may not bootstrap its authority to issue rulings in particular cases into a more general regulatory authority. See *Mead*, 533 U.S. at 232. Indeed, the Act’s express grant of authority to determine legal questions in *CRJ proceedings* shows that Congress knew how to grant interpretive authority when it wanted to, but chose not to do so here. See *Verizon Comments* at 4.

⁹ As *Verizon* explains, see *Verizon Comments* at 4-5, the two cases cited in the NPRM do not support the Office’s claimed authority. 73 Fed. Reg. at 40,806. The D.C. Circuit in *Cablevision Systems Development Co. v. Motion Picture Ass’n of America, Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988), specifically limited its holding to Section 111. The court observed that Section 111 “fails to define the basic terms at issue here,” and concluded that Congress intended the Copyright

D. Finally, a narrow approach is supported by the doctrine of constitutional avoidance. To the extent that NMPA and RIAA suggest that this Office has authority to address buffering, *see* NMPA Comments at 13-14; RIAA Comments at 5, their views are inconsistent with that settled principle. Time and again courts have held that, where the scope of an agency's statutory authority is unclear, the agency must construe its authority to avoid constitutional problems. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78 (1988); *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994); *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1455-56 (D.C. Cir. 1988). Any effort by the Office to promulgate regulations interpreting key terms in Section 101 would implicate such issues.

Under our system of separated powers, legislative agencies cannot exercise executive powers. For example, in *Bowsher v. Synar*, 478 U.S. 714 (1986), the Supreme Court held that the Comptroller General—a legislative officer—could not constitutionally exercise executive powers granted to him by the Gramm-Rudman-Hollings Act. *Id.* at 732. The Court focused specifically on the Comptroller General's power to construe and implement federal law, concluding that “interpreting a law enacted by Congress to implement the legislative mandate is the very essence of execution of the law.” *Id.* at 733.

Like the agency at issue in *Bowsher*, the Copyright Office is a legislative entity. It is subordinate to the Library of Congress, which is itself a legislative agency. 2 U.S.C. § 171(1);

Office to fill that narrow gap. *Id.* at 607. The buffering issue, by contrast, involves fundamental terms that pervade the Copyright Act, and Congress itself defined those terms, leaving no room to infer a delegation of interpretive authority. The other decision cited by the Office, *Satellite Broadcasting & Communications Ass'n v. Oman*, 17 F.3d 344, 374 (11th Cir. 1994), merely followed the D.C. Circuit's interpretation of Section 111 and thus has no bearing here either. Crucially, moreover, both decisions predate *Gonzales* and *Mead*, and their willingness to extend regulatory authority by implication is in significant tension with those later cases. *See Gonzales*, 546 U.S. at 258; *see also Bonneville*, 347 F.3d at 490 n.9.

Bowsher, 478 U.S. at 746 n.11 (Stevens, J., concurring) (referring to Library of Congress as a “congressional agency”); *Keeffe v. Library of Congress*, 777 F.2d 1573, 1574 (D.C. Cir. 1985) (“the Library of Congress is a congressional agency”); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 172 (1996) (Library is a “congressional agenc[y]” and “most of [its] functions . . . can comfortably be described as in aid of the legislative process”). And the Register of Copyrights is appointed (and presumably removable) by the Librarian of Congress, the head of that legislative agency. 17 U.S.C. § 701(a); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 182 n.6 (1985) (White, J., dissenting) (referring to “the Copyright Office, which is itself an arm of Congress”); *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733, 736 (2d Cir. 1983) (referring to “the Copyright Office of the Library of Congress, which is a part of the legislative branch itself”), *rev’d on other grounds sub nom. Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985); *United States v. Brooks*, 945 F. Supp. 830, 834 (E.D. Pa. 1996) (“The Copyright Office is a division of the Library of Congress, which is a part of the legislative branch, and thus the Copyright Office is part of the legislative branch.”); *but see Eltra Corp. v. Ringer*, 579 F.2d 294, 301 (4th Cir. 1978). As in *Bowsher*, therefore, any attempt by the Office to “interpret[] a law enacted by Congress to implement [a] legislative mandate” would raise concerns about intrusion on the “very essence” of executive-branch authority—“execution of the law.” 478 U.S. at 733.

A legislative entity like the Copyright Office can perform procedural or informational functions such as registering, tracking, and reporting copyrights—functions that do not have the “purpose and effect of altering the legal rights, duties, and relations” of private parties. *MWAA v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 & n.21 (1991); *see also Buckley v. Valeo*, 424 U.S. 1, 137-39 (1976). But separation-of-powers principles limit the

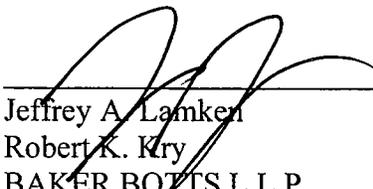
authority of such agencies to exercise the *executive* function of implementing a statute by promulgating rules that construe key statutory terms and directly regulate primary conduct. *See Bowsher*, 478 U.S. at 733. Addressing the buffering issue, moreover, could also raise constitutional questions under the Appointments Clause, U.S. Const. art. II, § 2.¹⁰ Principles of constitutional avoidance thus weigh doubly against unnecessary pronouncements on buffering here. While the Office may confront related constitutional issues in other fora, *see, e.g., Intercoll. Broad. Sys. v. Copyright Royalty Board*, No. 07-1123 (D.C. Cir. appeal filed May 3, 2007) (pending), there is no reason for the Office to inject further uncertainty into this proceeding—or to fan the flames of dispute elsewhere—by construing basic copyright terms extraneous to the narrow Section 115 issue before it in this proceeding.

¹⁰ “[A]ny appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed” by the Appointments Clause. *Buckley*, 424 U.S. at 125-26. The Register of Copyrights is not appointed in that manner. The Appointments Clause requires principal officers to be appointed by the President and confirmed by the Senate, but allows Congress to vest appointment of inferior officers in the President alone, the courts of law, or the “heads of departments.” Art. II, § 2, cl. 2. The Register is appointed by the Librarian of Congress, 17 U.S.C. § 701(a), a legislative officer who does not fall into any of those categories. (The Librarian is not the “head” of a “department” because the term “department” includes only *executive* agencies, not legislative agencies like the Library of Congress. *See Freytag v. Comm’r*, 501 U.S. 868, 886 (1991) (“executive divisions like the Cabinet-level departments”); *United States v. Germaine*, 99 U.S. 508, 510-11 (1879).) Although congressional adjuncts like the Register can perform informational or similar functions without being considered “Officers of the United States” subject to the Appointments Clause, *see Buckley*, 424 U.S. at 137, the NPRM proposes to address buffering in a way that goes well beyond those traditional functions.

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Respectfully submitted,

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