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

In the Matter of

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

Docket No. RM 2000-7

COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS AND BROADCAST MUSIC, INC.

Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors and Publishers ("ASCAP"), music performing rights organizations ("PROs"), hereby respond to the notice of requests for comments issued by the Copyright Office ("Office") on July 10, 2008 concerning the proposed amendments of Office regulations to clarify the scope and application of the Section 115 compulsory license to make and distribute phonorecords of a musical work by means of digital phonorecord deliveries. 73 Fed. Reg. 40802 (July 16, 2008) (the "Notice."), as amended by notice dated August 8, 2008, 73 Fed. Reg. 47113 (August 13, 2008).

ASCAP and BMI are this nation's two major PROs, with over 650,000 writer and publisher members and affiliates and a combined repertory of many millions of copyrighted musical works. On behalf of their respective affiliates and members, BMI and ASCAP license the nondramatic public performance rights in musical works to a wide range of users, including

television and radio broadcasters, online services, background/foreground music services, hotels, nightclubs, colleges and universities. ASCAP and BMI represent not only U.S. writers and publishers, but also hundreds of thousands of foreign writers and publishers through affiliation agreements with PROs in over 90 countries, by which the foreign repertories are licensed in the U.S. The foreign PROs reciprocally license the performance of ASCAP and BMI's repertories in their own countries.

The PROs are not strangers to the long and protracted Section 115 proceedings. We have been involved in the legislative process leading to the passage of the Digital Performance Right and Sound Recordings Act ("DPSRA"), Pub. L. No. 104-39, 109 Stat. 336, and all subsequent congressional (including legislative negotiations) and Office activity, including filing comments in the Copyright Office/National Telecommunications and Information Administration Section 104 study and in response to the original March 2001 Office Notice of Inquiry which sought comments regarding issues presented herein.

The PROs' matters of issue in this proceeding do not directly involve the reproduction and distribution rights per se because the PROs license only the non-dramatic performance right of musical works under 17 U.S.C. §106(4). Nevertheless, as made evidently clear in all previous congressional and Office proceedings concerning the application of Section 115 to digital music services, the music use activities giving rise to the questions of applicability of the Section 115 license - such as reproductions and transmissions involved in on-demand/interactive and non-interactive streaming and downloads - necessarily overlap the right of public performance and as a result may affect the rights and economic licensing interests of the PROs. Indeed, numerous comments in those proceedings addressed the relationship between the reproduction/distribution (or, "mechanical") rights and performance rights in digital uses, specifically the economic and legal

interrelationship between the 115 license and the performance right licensed by the PROs. Wisely, the Office made clear that its mission here is not to opine on such interrelationship or to pass judgment on the value of digital uses, nor has the Office claimed to be addressing the effect of digital uses on anything other than the scope and application of Section 115 to the mechanical right. See Notice at 40812.[1]

The PROs applaud the Office's narrowness of focus. The PROs have pointed out numerous times that section 115 has no bearing on the performance right whatsoever. In plain statutory language, Section 115(d) states that a transmission can be a classified to be DPD "regardless of whether the digital transmission is also a public performance." The legislative history of the DPRA makes clear that Section 115 should not impact at all on the Section 106(4) performance right – *legally and economically*. As stated in the Senate Report: "[t]he intention [of the DPRA amendments to Section 115] is not to substitute for * * * performance rights in musical works, but rather to maintain mechanical royalty income *and* performance rights income for writers and music publishers." S. Rep. 104-128, 104th Cong., 1st Sess. (1995) at 37 (emphasis added). Indeed, this intent to separately treat the two rights has been recognized by the Office in its promulgation of 37 C.F.R. §255.8, which states that "nothing in this part annuls or limits the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under 17 U.S.C. 106(4) and 106(6)."

In this regard, we are pleased that the Office has clearly recognized the existence of a mechanical right in streaming activities (undeniably also the existence of public performances): "While reasonable minds can differ on how to interpret Section 115 with respect to these reproductions, the Office proposes an approach which would support the making of all phonorecords

made during the course of a transmission without regard to whether that transmission also involves the delivery of a public performance." Notice at 40806. The PROs have long maintained that multiple rights exist in all digital online music transmission activities, and that the marketplace (not the Office) is best situated to determine the value of those respective rights.[2]

Notwithstanding the Office's limited statutory mandate to address mechanical issues only, the PROs have concern that certain statements in the Notice may be read to have inadvertent or unintended effect on the performance right, in contravention of the aforementioned congressional intent and the Office's own intent to limit the issues in this proceeding. For example, in its discussion of what are deemed to be "specifically identifiable reproductions," the Office stated:

> The Office also understands that the recipient's computer is necessarily able to specifically identify each individual reproduction of Recipient-end Complete Copies and Recipient-end Buffer Copies *for* the transmission recipient. The Office understands that such identification by the computer for the transmission recipient is a necessary step in the computer actually making the phonorecord perceptible to the transmission recipient. In other words, if a computer could not specifically identify each part of a stream, it would be unable to render the stream into a performance by assembling the parts in the proper order for performance. (underlined emphasis added). Notice at 40809.

A music user might contend that this statement, while not directly bearing on the proposed regulations at issue here, arguably suggests an interpretation of the legal definition of a performance. Clearly, when and how a performance occurs is an important issue for both copyright owners and music users alike. Indeed, as mentioned above, numerous commentators in past proceedings have raised that very issue. Nevertheless, the Office has indicated its intention to remove itself, in the context of Section 115, from discussing and opining on that issue. Indeed, in its discussion of its rulemaking authority in this proceeding, the Office reasoned that Section 115 gives the Register of Copyrights the authority to administer the compulsory license

[2] The PROs also applaud the Office's recognition that limited downloads are not in the nature of "rental, lease or lending," as several parties have contended in the past. Notice at 40812.

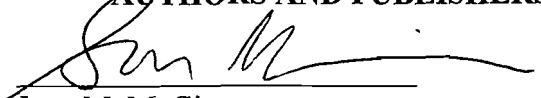
insofar as the Register is to prescribe by regulation requirements for the Section 115 license. Notice at 40806. In enacting Section 115, Congress gave the Office no authority to regulate matters outside the boundaries of Section 115. Interpreting Section 115 – a license for the reproduction and distribution of musical works, and *not* the performance of musical works – is where the Office's authority clearly begins and ends in this proceeding. Any statements affecting other issues – such as the definition or applicability of the performance right – improperly reach way beyond such limited authority.

While the PROs do not suggest that the Office intends any legal consequences of statements such as the one quoted above, the PROs are concerned, however, that any statements made by the Office concerning any part of the Copyright Act may be given deference by courts and other decision-making bodies. Accordingly, the PROs respectfully request the Office to specifically acknowledge that any statements concerning other rights not implicated by Section 115 – in particular the performance right – be accredited no weight or precedent for any purpose. Moreover, concerning the above quoted statement, the PROs respectfully request that the Office clarify that it did not intend to opine on the definition of what constitutes a performance and when such performance occurs.

The PROs respectfully reserve their rights to file reply comments on other issues related to and or arising from the Notice and comments filed in response thereto.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS



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