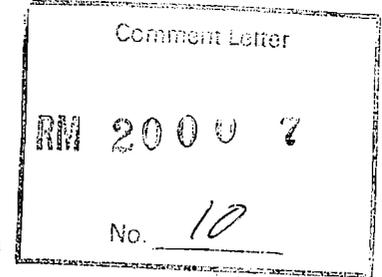


Before the United States Copyright Office  
Library of Congress

Notice of Proposed Rulemaking )  
)  
)  
Compulsory License for Making and )  
Distributing Phonorecords, Including )  
Digital Phonorecord Deliveries )  
\_\_\_\_\_ )

37 C.F.R. Part 201 and 255  
Docket No. RM 2000-7

August 28, 2008



**Comments of CTIA – The Wireless Association**

CTIA – The Wireless Association (“CTIA”)® offers these comments in response to the Notice of Proposed Rulemaking concerning the section 115 statutory license published by the Copyright Office on July 16, 2008 (the “NPRM”), and to the regulation proposed therein (the “Proposed Rule”). CTIA agrees with the Copyright Office that it would be beneficial (i) to clarify the legal relationship between public performances, on one hand, and reproductions and distributions of musical works, on the other, and (ii) to remove the uncertainty that has been created by music publisher claims that server copies and buffers used to effectuate digital performances implicate their reproduction and distribution rights. CTIA also appreciates the Copyright Office’s creative effort to establish a regulatory “safe harbor” for such copies.

Unfortunately, however, the approach proposed in the NPRM is the wrong approach. The Proposed Rule exceeds the authority of the Copyright Office and is contrary to law and to the Copyright Office’s own prior statements on the status of server copies and buffers. The NPRM’s reasoning conflates the performance right with the reproduction and distribution rights in the digital environment, encourages double-dip mechanical license fee claims for already licensed digital performances, threatens meritorious fair use arguments, and relies on principles that will increase, not decrease, confusion and interfere with existing business relationships. Further, the safe harbor offered by the NPRM is of questionable value. The section 115 statutory license, while useful in facilitating private licensing agreements, is burdensome and largely useless as a statutory license. Thus, any benefit it may provide is wholly within the control of the publishers.

A far better solution to the current problems associated with music licensing is legislative reform recognizing that server copies, including intermediate copies made on content distribution networks, used to effectuate digital performances are exempt from separate copyright liability and confirming that transitory buffers used to effectuate those performances are not copies or phonorecords and are not compensable. The Copyright Office has advocated substantially such an approach in prior testimony before Congress and in the DMCA Section 104 Report. *See, e.g.*, DMCA Section 104 Report at 142-46 &

n.434; *Section 115 Reform Act (SIRA) of 2006: Hearings before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary 5-6* (May 16, 2006) (Statement of Marybeth Peters, Register of Copyrights) (hereinafter “Register Peters’ 2006 SIRA Testimony”). Absent legislative reform, the Copyright Office should continue to express the view that server copies and buffers used to effectuate digital performances have no independent economic value (apart from the value of the performance) and constitute fair use. *See, e.g.*, DMCA Section 104 Report 133-41, 142-46 & n.434; *Digital Millennium Copyright Act: Hearings Before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary*, 107th Cong., at 21-22 (Dec. 12, 2001) (discussing buffers).

The Register has recognized that transmissions of digital performances do not implicate the distribution right. In a recent hearing, she testified, “[c]haracterizing streaming as a form of distribution is factually and legally incorrect and can only lead to confusion.” Register Peters’ 2006 SIRA Testimony at 6. The Register went on to explain “[a] stream does not . . . constitute a ‘distribution,’ the object of which is to deliver a useable copy of the work to the recipient; the buffer and other intermediate copies or portions of copies that may temporarily exist on a recipient’s computer to facilitate the stream and are for all practical purposes useless (apart from their role in facilitating the single performance) and most likely unknown to the recipient simply do not qualify.” *Id.* at 5-6 (emphasis added).

Register Peters was right then. The NPRM, however, is simply wrong. CTIA urges the Copyright Office to withdraw the NPRM and not to adopt the Proposed Rule.

### **CTIA’s Interest in the Proposed Rule**

CTIA is an international organization representing all sectors of wireless communications – cellular, personal communication services, and enhanced specialized mobile radio. A nonprofit membership organization founded in 1984, CTIA represents providers of commercial mobile radio services (“wireless telecommunications carriers”), mobile virtual network operators, aggregators of content provided over wireless telecommunications systems, equipment suppliers, wireless data and Internet companies and other contributors to the wireless universe. A list of CTIA’s members appears at [http://www.ctia.org/membership/ctia\\_members/](http://www.ctia.org/membership/ctia_members/).

CTIA frequently participates in administrative proceedings and coordinates efforts to educate government agencies and the public about wireless issues. CTIA also has presented its views in testimony before Congress, and has filed numerous amicus briefs in the federal courts on behalf of the wireless industry on a variety of issues, including copyright issues. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *United States v. ASCAP*, in re *Am. Online*, 485 F.Supp. 2d 438 (S.D.N.Y. 2007) (holding downloads are not public performances).

CTIA has a substantial interest in this proceeding. Wireless technology not only provides consumers with first-rate telecommunications service, but also provides a convenient and important means for wireless consumers to receive digital performances

of music, video, and other copyrighted works, and to download a wide array of data and media products to their wireless devices. CTIA's members also transmit performances of recorded music to individuals placing calls to wireless customers in the form of "ringback tones"—sounds that replace the ringing that the caller hears when he or she calls a mobile telephone. Further, many of the media products and services that CTIA's members make available, are available for preview using performances of short clip samples that are streamed over the Internet.

CTIA members strongly support efforts to protect the legitimate rights of copyright owners. Indeed, CTIA members are among the leading legitimate performers and distributors of recorded music, and pay for the right to do both. Music publishers, and their songwriters, earn substantial performance royalties as compensation for CTIA members' public performance of music compositions, and substantial mechanical royalties for CTIA members' offerings of downloadable music content, whether in the form of full track downloads or ringtones.

CTIA, however, strongly opposes duplicative compensation to music publishers (or to any copyright owner, for that matter) and redundant, burdensome rate-setting and administrative systems, for the same economic transaction. Public performances are subject to the performance right; they should not also be subject to mechanical licensing. Downloads are DPDs, subject to the mechanical license; they should not also be subject to performance licensing. It makes no sense to make formalistic distinctions based on the technicalities of new transmission systems or to burden those wishing to provide legitimate, licensed music services with overlapping claims by different agents of the same copyright owner or multiple, hugely expensive litigation processes in rate court and before the Copyright Royalty Board.

CTIA successfully participated as an *amicus curiae* in litigation leading to the rejection by the Southern District of New York of efforts by ASCAP, on behalf of its music publisher members, to obtain duplicative performance compensation for downloads (including ringtones). *United States v. ASCAP*, in re *Am. Online*, 485 F.Supp. 2d 438 (S.D.N.Y. 2007). As the Copyright Office recognized in its DMCA Section 104 Report, the issue addressed by the NPRM is the "symmetrical" "mirror image" of the issue addressed in the ASCAP case. Section 104 Report at 146-48. Unfortunately, the NPRM does not adopt the symmetrical result. As the Section 104 Report recognized, it should. *Id.*

In sum, CTIA has a direct interest in the success or failure of music publisher claims that digital performances implicate reproduction and distribution rights. Resolution of the questions presented in the NPRM will have significant ramifications for the wireless industry and the interests of CTIA members.

#### **I. The Copyright Office Has No Authority To Adopt the Proposed Rule.**

The Copyright Office has no statutory authority to conduct a rulemaking over the scope and application of the section 115 compulsory license. The Supreme Court has made clear that an agency rule "must be promulgated pursuant to authority Congress has

delegated to the official.” *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). In the recent words of the D.C. Circuit, “[i]t is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.” *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (reversing and vacating FCC rule issued in absence of congressional delegation of authority). There is no default presumption of implicit authority. *Mead*, 533 U.S. at 229.

There has been no congressional delegation of rulemaking authority that would support the NPRM. Section 701 of the Copyright Act, which sets out the general responsibilities and organization of the Copyright Office, provides no general substantive regulatory or lawmaking authority. The NPRM cites section 702, but that provision states only that “[t]he Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title.” 17 U.S.C. § 702 (emphasis added). The Proposed Rule is a substantive rule of copyright law, not a matter of administration of the functions and duties of the Copyright Office. Section 802, also cited in the NPRM, provides no rulemaking authority. It provides carefully circumscribed procedure for commenting on substantive issues arising in adjudicatory matters before the Copyright Royalty Board.<sup>1</sup>

Neither of the two appellate cases cited in the NPRM provides any further support for the Office’s claimed authority. See NPRM at 40,806 (citing *Satellite Broadcasting and Commc’ns Ass’n v. Oman*, 17 F.3d 344 (11th Cir. 1994) (“*SBCA*”) and *Cablevision Sys. Dev. Co. v. Motion Pictures Ass’n*, 836 F.2d 599 (D.C. Cir. 1988) (“*Cablevision*”). In *Cablevision*, the D.C. Circuit briefly took note of section 702, but relied “[m]ore specifically” on section 111(d)(1)’s requirement that the Register prescribe by regulation requirements for deposit of statutory license fees. 836 F.2d at 608. For this reason, the Court stated explicitly that “[o]ur holding on deference due the [copyright] office does not extend beyond the bounds of its interpretation of Section 111.” *Id.* (emphasis added). The Eleventh Circuit’s decision in *SBCA* does not mention, let alone rely upon, section 702 as a proper basis for the Copyright Office’s rulemaking. Rather, presumably because the rule at issue involved section 111, the *SBCA* court essentially followed *Cablevision* in finding that the Copyright Office had rulemaking authority under that provision, without citing any particular congressional delegation. See 17 F.3d at 347.

The Copyright Office lacks the requisite statutory authority to promulgate the Proposed Rule; it should not do so.

## **II. The NPRM’s Conclusion that Transitory Buffers Are Phonorecords Is Contrary to Law.**

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<sup>1</sup> The NPRM notes that there is presently a section 115 proceeding pending before the Copyright Royalty Judges (No. 2006-3 CRB DPRA), and suggests that it therefore “makes sense” for the Register to “offer guidance.” NPRM at 40,806. However, it is beyond question that none of the express statutory prerequisites for Register action contained in section 802(f)(1) has been met. The Register cannot disregard these statutory constraints based on the view that doing so “makes sense.”

The central premise of the NPRM's conclusion that digital performances are subject to the section 115 license is the determination that sound recordings embodied in buffers that are necessary to receive and render digital performances are fixed, and, therefore, are phonorecords that have been distributed. NPRM at 40,808-09. This determination is wrong as a matter of law, as the Second Circuit recently held in *The Cartoon Network LP v. CSC Holdings, Inc.*, \_\_\_ F.3d \_\_\_, Nos. 07-1480-cv(L) & 07-1511-cv(CON), 2008 WL 2952614 (2d Cir. Aug. 4, 2008), and as the Fourth Circuit previously held in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004).

The NPRM correctly observes that for there to be a DPD, there must be a "phonorecord" that is delivered to a recipient. NPRM at 40,808. The Copyright Act, in turn, defines "phonorecord," *inter alia*, as a material object in which "sounds. . . are fixed." 17 U.S.C. § 101 (definition of phonorecord). The Act further provides that "[a] work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, 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)

In determining that sounds in performance buffers are "fixed," the NPRM relied upon the reasoning of the Copyright Office's Section 104 Report, which concluded that for purposes of fixation, "the dividing line can be drawn between reproductions that exist for a sufficient period of time to be capable of being 'perceived, reproduced, or otherwise communicated' and those that do not." NPRM at 40,808, *quoting* DMCA Section 104 Report at 107-129. The NPRM also relied on the district court decision in *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 621 (S.D.N.Y. 2007) (holding that the creation of a buffer copy is "copying").

The Second Circuit in *Cartoon Network* expressly rejected this reasoning and conclusion of the Section 104 Report and reversed the district court's decision in *Cablevision*. The Court of Appeals ruled that fixation imposes

two distinct but related requirements: the work must be embodied in a medium . . . such that it can be perceived, reproduced, etc., from that medium (the "embodiment requirement"), and it must remain thus embodied "for a period of more than transitory duration" (the "duration requirement"). Unless both requirements are met, the work is not "fixed" in the buffer, and as a result, the buffer data is not a "copy" of the original work whose data is buffered.

*Cartoon Network* at \*4 (citations omitted). The court reasoned that the Copyright Office's Section 104 Report erroneously merged the two requirements and "reads the 'transitory duration' language out of the statute." *Id.* at \*6. The court ruled that fixation requires embodiment for more than "transitory" duration, and that, where "each bit of data . . . is rapidly and automatically overwritten as soon as it is processed," the embodiment is merely transitory. *Id.* at \*7; *accord* H. Rep. No. 94-1476, at 53 (Sep. 3, 1976) ("[T]he definition of 'fixation' would exclude from the concept purely evanescent

or transient reproductions such as those . . . captured momentarily in the ‘memory’ of a computer.”).

The Fourth Circuit reached a similar conclusion in *CoStar*. There, the court concluded that bits collected in temporary RAM in the course of transmission by a digital transmission system were not copies fixed for a period of more than transitory duration. 373 F.3d at 550-51 (“When an electronic infrastructure is designed and managed as a *conduit* of information and data that connects users over the Internet, the owner and manager of the conduit hardly ‘copies’ the information and data in the sense that it fixes a copy in its system of more than transitory duration.”) (emphasis added). In rejecting a claim that the ISP that owned and managed the system was making copies, the court observed that “the entire system functions solely to transmit the user’s data to the Internet.” *Id.* at 551.

Digital performance buffers are precisely analogous to the buffers at issue in *Cartoon Network* and *CoStar*. Data representing brief segments of a work typically are present in a performance buffer for only so long as necessary to effectuate a real-time performance. The data are then overwritten. That is the essence of “transitory” duration. *See, e.g., id.* (“Transitory duration . . . is qualitative in the sense that it describes the status of transition.”).

Transitory buffers that collect data to effectuate digital performances are not phonorecords. Hence, there are no distributed DPDs, and the Proposed Rule cannot stand. Digital performance buffers do not implicate the reproduction or distribution rights.

### **III. The NPRM’s Merger of Performance Rights with Reproduction and Distribution Rights Is Inconsistent with the Structure of the Copyright Act and other Provisions of the Act, and Therefore Is Contrary to Law.**

As the Copyright Office recognizes, transmissions of digital performances, by their nature, require buffering at the receiving end. NPRM at 40,807. Thus, if the NPRM’s reasoning is adopted, all digital performances would implicate the reproduction and distribution rights. Further, this reasoning could not be limited to musical works. If buffers used to effectuate digital performances of sounds are phonorecords, the reproduction and distribution rights in sound recordings are necessarily implicated. *See, e.g.,* 17 U.S.C. §115(c)(3)(G) (providing that a DPD is subject to the rights of the sound recording copyright owner). Similarly, buffers used to effectuate digital performances of audiovisual works would implicate at least the reproduction right, and possibly the distribution right. Such a construction is inconsistent with the overall structure of the Copyright Act, with numerous specific provisions of the Act, and with the legislative history of section 115. Thus, it must be rejected.

The Copyright Office has recognized the “well-established rule of statutory construction which requires interpretation of each provision in a section in such a way as to produce a harmonious whole.” 65 Fed. Reg. 77,292, 77,298 (Dec. 11, 2000); *see FDA*

*v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (A court must interpret a statute “as a symmetrical and coherent regulatory scheme” and “fit, if possible, all parts into an harmonious whole.”)(citations omitted)); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (observing that plain meaning is determined not only by statutory language itself but by “the language and design of the statute as a whole”). “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Brown & Williamson*, 529 U.S. at 133, quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994). The NPRM’s determination that buffers implicate the reproduction and distribution rights, and its construction of section 115, violate these fundamental principles of statutory construction.

The Copyright Act consistently differentiates between the public performance right and other rights, often limiting the public performance right in ways that other rights are not limited. For example, sections 106(6) and 114 limit the sound recording performance right in ways that do not apply to the reproduction and distribution rights. Section 110 contains numerous exemptions for performances and displays, including many that expressly apply to performances by transmission. *See, e.g.*, 17 U.S.C. §§ 110(2), 110(5), 110(8). The section 110 exemptions do not exempt reproductions or distributions. A rule decreeing that all digital public performances necessarily implicate the distribution and reproduction rights would risk gutting these exemptions by substituting an exemption with respect to one right (performance) with liability for another (reproduction and distribution).

An important example of the irreconcilable conflict between the Proposed Rule and copyright law is the potential effect of the rule on sound recording rights applicable to non-interactive performances by digital transmission. Section 114, coupled with section 112, establishes a detailed statutory license structure for sound recording rights. The scheme includes the grant of the public performance right (section 114) and the right to make server copies of the sound recordings that are performed (section 112). Neither section addresses buffers or grants any distribution right. NPRM at 40,805 n.1.

Congress intended sections 112 and 114 as a comprehensive, carefully balanced, congressional solution to the issue of sound recording rights in digital performances. *See, e.g.*, H.R. Rep. No. 104-274, at 14 (“[I]t is important to strike a balance among all of the interests affected” by the new performance right; “That balance is reflected in various limitations on the new performance rights”.); *Id.* at 13 (“[T]he bill has been carefully drafted to accommodate foreseeable technological changes”). Congress would not have ignored reproduction and distribution rights in buffers if those rights existed. It simply would make no sense for Congress to have enacted the complex, costly statutory license system to address sound recording rights in non-interactive performances if the services making those performances were, nevertheless, required to negotiate individual reproduction and distribution licenses with the record companies to accommodate the record companies’ rights in buffers. Yet that is precisely the import of the NPRM’s treatment of buffers. The NPRM construes the Copyright Act in a way that reaches an

absurd result and cannot be harmonized with sections 112 and 114, contrary to fundamental principles of statutory construction.

Another example of inconsistency between the Proposed Rule and the Copyright Act is the effect of the NPRM on devices that receive digital performances. The Audio Home Recording Act imposes certain obligations on the manufacturers and distributors of “digital audio recording devices,” including the obligation to pay royalties upon the distribution of the device and the obligation to apply specified content protection technology to the device. 17 U.S.C. §§ 1002 (incorporation of copying controls), 1003 (obligation to make royalty payments). The NPRM’s proposal to construe digital performance buffers as “phonorecords” implicating the reproduction right would, at minimum, create credible arguments that all devices used to receive performances by digital transmission are digital audio recording devices subject to the obligations of the AHRA.<sup>2</sup> Such a result would lead to controversy over compliance with the AHRA and would impose added costs and burdens on manufacturers and distributors of wireless devices and on consumers.

On the other hand, such a result would be wholly inconsistent with the regulatory regime established by the AHRA and would make no sense. The purpose of the AHRA was to address consumer home recording, not listening at home in real time to digitally transmitted performances. *See, e.g.*, Audio Home Recording Act of 1991, S. Rep. No. 102-294, at 30 (1992) (“The purpose of S. 1623 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.”); Audio Home Recording Act of 1992, H.R. Rep. No. 102-873 Part I, at 11-12 (1992) (discussing history of controversy over copyright status of home recording). An interpretation of law leading to the result that all digital receivers are digital audio recording devices would not construe the provisions of the Copyright Act as a harmonious whole, in violation of fundamental principles of statutory construction.

Finally, the legislative history of section 115 makes clear that Congress did not intend the result achieved by the NPRM. The Senate Report expressly states

The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD's. The intention is not to substitute for or

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<sup>2</sup> Section 1001 defines “digital audio recording device” in relevant part as “any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use.” A digital audio copied recording, in turn, is a “reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.” If a performance buffer is a reproduction, there are at least credible arguments that a device designed or marketed primarily to receive transmitted digital performances of music meets the definition of “digital audio recording device.”

duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers.

Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128, at 37 (1995) (emphasis added). The NPRM's conclusion that all digital performances also entail a distribution and reproductions would contravene this intention by "duplicat[ing] performance rights in musical works."

#### **IV. The NPRM's Strained Construction of Section 115 Is Contrary to Law.**

The NPRM also misconstrues section 115 in two important aspects. First, in order to be a "digital phonorecord delivery," the delivered phonorecord must be "specifically identifiable" by the transmitting service, not "by or for" the transmission recipient (as the NPRM concludes). Second, even if server copies and buffers used to effectuate performances are "phonorecords," it cannot reasonably be contended that the "primary purpose" of those phonorecords is to distribute them to the public, which is a prerequisite for the applicability of the statutory license.

The definition of digital phonorecord delivery provides in relevant part that 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." 17 U.S.C. § 115(d) (emphasis added). The NPRM "tentatively concludes"<sup>3</sup> that the statutory text so clearly means that the reproduction must be "specifically identifiable" by the transmission recipient's device, that the Copyright Office eschews consideration of clear, contrary legislative history and the structure of section 115. As a matter of law, that interpretation is simply wrong.

Although the statutory text is clear that the "reproduction" constituting the DPD must be "by or for any transmission recipient," nothing in the sentence ties the phrase "specifically identifiable" to the transmission recipient. It is just as plausible to understand the phrase as referring to the entity making the digital transmission.

As the Copyright Office itself has reasoned, where two interpretations of statutory language are both plausible: "Turning to the legislative history is appropriate where, as here, the precise meaning is not apparent and a clear understanding of what Congress meant is crucial to an accurate determination of how Congress intended the digital performance right and the statutory scheme to operate." *Final Rule, Public Performance of Sound Recordings: Definition of a Service*, 65 Fed. Reg. 77,292, 77,296 (Dec. 11, 2000); *see, e.g., Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 642 (1990) (where statutory language is not dispositive, issue turns "on the intent of Congress as revealed in the history purposes of the statutory scheme."). Specifically, the Copyright Office, in its 2000 "Definition of a Service" rulemaking, stated that "we place great weight on the passages in the 1995 House and Senate Reports." 65 Fed. Reg. at 77,298 (emphasis added). In this case, those very reports, as well as the structure and context of the 1995

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<sup>3</sup> NPRM at 40,809-10.

DPRA, make clear that “specifically identifiable” refers to identification by the transmitting service.

The Senate and House Committee Reports on the DPRA (the “1995 House and Senate Reports”) both expressly addressed the textual ambiguity in the term “specifically identifiable” and clarified the term in a manner directly contrary to the construction proposed in the NPRM:

The Committee notes that the phrase “specifically identifiable reproduction,” as used in the definition, should be understood to mean a reproduction specifically identifiable to the transmission service. Of course, a transmission recipient making a reproduction from a transmission is able to identify that reproduction, but the mere fact that a transmission recipient can make and identify a reproduction should not in itself cause a transmission to be considered a digital phonorecord delivery.

Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128, at 44 (1995) (emphasis added); *accord* Digital Performance Right in Sound Recordings Act of 1995, H.R. Rep. No. 104-274, at 30 (1995) (same, without the words “of course” and other minor word differences).

Further, the NPRM’s construction of “specifically identifiable” is inconsistent with the structure of the section 115 statutory license and the context in which Congress acted in 1995. Under the statutory license, “the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license.” 17 U.S.C. § 115(c)(2) (emphasis added). At the time of enactment, the mechanical license fee had long been based on a penny rate per distributed phonorecord, and that structure was adopted by the DPRA for the period through December 31, 1997. *See, e.g., id.* §§ 115(c)(2), 115(c)(3). It would make no sense to attempt to charge a transmitting service for digital phonorecord deliveries on a per-DPD basis unless the transmitting service could specifically identify all DPDs for which it was responsible.

The NPRM’s construction of the “primary purpose” requirement is similarly erroneous. For the statutory license to apply, the primary purpose in making phonorecords must be “to distribute them to the public.” As Register Peters recognized in her testimony before the House Intellectual Property Subcommittee on May 16, 2006: “A stream does not . . . constitute a ‘distribution,’ the object of which is to deliver a useable copy of the work to the recipient; the buffer and other intermediate copies or portions of copies that may temporarily exist on a recipient’s computer to facilitate the stream and are for all practical purposes useless (apart from their role in facilitating the single performance) and most likely unknown to the recipient simply do not qualify.” Register Peters’ 2006 SIRA Testimony at 5-6 (emphasis added). There is no justification for adopting a position 180 degrees opposite from that presented by Register Peters.

**V. Section 115 Does Not Offer a Viable Solution to Overlapping Fee Claims by Multiple Agents of Music Publishers; Rather the NPRM Threatens To Exacerbate the Problem and To Cause Unintended Adverse Consequences.**

The correct response to the assertions of music publishers that they are entitled to overlapping, duplicative payments for digital performances (once under the performance right and again under the reproduction and distribution rights) is not to agree that digital performances do, in fact, implicate the reproduction and performance rights. Rather, it is to continue to recognize that any incidental reproductions that may be made have no independent economic value and are not entitled to separate compensation.

Nor does section 115 offer a viable “safe harbor” that may be used to respond to those claims. The problems with section 115 have been well documented. Register Peters has described the section 115 license as “an antiquated statutory scheme” that is “not up to the task of meeting licensing needs of the 21<sup>st</sup> Century.” *Music Licensing Reform: Hearings Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (July 12, 2005) (Statement of Marybeth Peters, Register of Copyrights) (“The Register’s July 12, 2005 Testimony”). She testified that, among other reasons, due to the inefficiencies and administrative burdens imposed by the license, the use of the section 115 license, “other than as a de facto ceiling on privately negotiated rates, has remained at an almost non-existent level.” *Id.* The problems with section 115 include the difficulties engendered by the need to identify, and then search Copyright Office records to locate and notify, the copyright owner of each musical work to be distributed before the work is distributed, 17 U.S.C. § 115(c)(1); 37 C.F.R. § 201.18, the obligation to make payments for each phonorecord that has been “distributed,” 17 U.S.C. § 115(c)(2), the obligation to make payments directly to each copyright owner that has been located, *id.* § 115(c)(6), and the obligation to provide monthly and annual statements of account to each, *id.* § 115(c)(5); 37 C.F.R. § 201.19. *Accord*, *Section 115 of the Copyright Act: In Need of Update? ’: Hearings Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong., at 4 (Mar. 11, 2004) (Statement of Jonathan Potter, Executive Director, Digital Media Association) (testifying that the section 115 “license clearance process is so cumbersome as to be dysfunctional”). It makes no sense to stretch the law beyond recognition to provide as a putative “safe harbor” a form of license that simply does not work.<sup>4</sup>

Indeed, an illusory “safe harbor” does more harm than good. First, while the Copyright Office attempts in the NPRM to preserve the argument that server copies and buffers are fair use,<sup>5</sup> the putative availability of the section 115 license is likely to lead to

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<sup>4</sup> It particularly makes no sense to do that when the Register has acknowledged that regulatory changes cannot solve the problems with section 115. *Music Licensing Reform: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. at 4 (June 21, 2005) (Statement of Marybeth Peters, Register of Copyrights) (acknowledging that the problems with section 115 “based in the statutory framework—are beyond my power to cure by regulation.”).

<sup>5</sup> NPRM at 40,805 (taking “no position” on “whether and when it is necessary to obtain a license to cover the reproduction and distribution of a musical work in order to engage in activities such as streaming”).

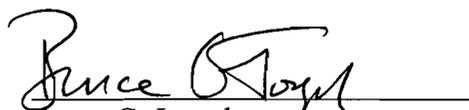
publisher arguments that could make a fair use defense more difficult to sustain than it otherwise would be. At least some courts have held that the existence of a license structure weighs against a fair use claim. *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930-31 (2d Cir.1994); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1387 & n.4 (6th Cir. 1996).

Second, in addition to the potential adverse consequences identified above with respect to sections 110, 114, and Chapter 10 of the Act, the NPRM threatens to cause unintended adverse consequences for digital performances of works other than sound recordings and musical works. Under the reasoning of the NPRM, when audiovisual works are streamed, the reproduction rights in the audiovisual work and all works contained in the audiovisual work (including any musical works) are implicated. Those rights are not within the scope of the section 115 statutory license. While the license granting rights to perform an audiovisual work may include all necessary rights (including buffer reproductions), there is no assurance that licensees would have believed such rights to be needed. Thus, the NPRM may have the unintended consequence of disrupting previously settled commercial arrangements. Moreover, even if the audiovisual work licensor granted all necessary rights, there is no assurance that the licensor obtained buffer reproduction rights from the copyright owners of works included in the audiovisual work. The Copyright Office should not adopt such a far reaching, erroneous, rule.

### **Conclusion**

For all of the foregoing reasons, the Copyright Office should withdraw the NPRM and not adopt the Proposed Rule.

Respectfully submitted,



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