Before the

UNITED STATES 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 Electronic Frontier Foundation, Public Knowledge, Center for Democracy and Technology, Consumers Union, Consumer Federation of America, U.S. PIRG, and the Computer & Communications Industry Association

The Electronic Frontier Foundation (EFF), Public Knowledge, Center for Democracy and Technology (CDT), Consumers Union (CU), Consumer Federation of America, U.S. Public Interest Research Group (U.S. PIRG), and the Computer & Communications Industry Association (CCIA) (collectively the "Public Interest Commenters") submit the following comments in response to the Copyright Office's Notice of Proposed Rulemaking (NPRM) published at 73 Fed. Reg. 40802 (July 16, 2008).

I. INTRODUCTION

The Public Interest Commenters endorse the broad goals of the Copyright Office (CO) in this rulemaking. We support the goal of reducing the legal uncertainty associated with operating a digital music service in today's marketplace. We agree with the CO that digital music services should be able to rely on the Section 115 license to "cover all musical works embodied in phonorecords made and distributed to the public for private use including those phonorecords made on the end-users' RAM [random access memory] or hard drive, on transmission service's servers, and all intermediate reproductions on the networks through which transmission occurs." 73 Fed. Reg. at 40806. We also endorse the CO's conclusion that "a regulation clarifying that all copies made in the course of or for the purpose of making a DPD [digital phonorecord delivery] are included within the Section 115 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." 73 Fed. Reg. at 40811 n.11.

The Public Interest Commenters, however, are concerned that controversies surrounding ancillary issues could jeopardize the goals of this rulemaking. In light of the

uncertainty regarding the scope of the Copyright Office's regulatory authority, the more this rulemaking delves unnecessarily into controversial issues with implications beyond Section 115, the greater the likelihood that any final rule may be the subject of litigation that undermines the goal of reducing legal uncertainty for parties seeking to rely on Section 115. In particular, it seems both extraneous and premature in this rulemaking to address the proper application of the reproduction and distribution rights to new digital technologies in light of the evolving legal precedent in this area. Accordingly, the Public Interest Commenters urge the CO to take a conservative approach and focus this rulemaking narrowly on the specific issues that are critical to the application of Section 115, avoiding ancillary questions that may entangle this rulemaking in unnecessary controversy.

Fortunately, the NPRM itself suggests a constructive solution that would minimize the uncertainties that threaten this rulemaking, while still meeting the goals of clarifying the scope of the Section 115 compulsory license. A narrowly tailored rule developed along these lines would:

- **Stand by the view that all relevant distributions and reproductions of musical compositions needed to implement digital download and streaming services are "licensable" under the Section 115 compulsory license.** Section 115 can then act as a "safe harbor" for those music services that wish to use Section 115 without testing the question of whether each of their activities requires a license as a matter of copyright law.

- **Avoid addressing ancillary questions regarding the scope of the reproduction and distribution rights as applied to new digital technologies.** In particular, the Public Interest Commenters believe there is no need for the CO to take any position on whether specific copies made and disseminated in the course of delivering a DPD qualify as phonorecords, constitute distributions within the meaning of Section 106(3), or otherwise require a license. Those questions should be left to courts to decide on a case-by-case basis.

II. COMMENTING PARTIES

The Electronic Frontier Foundation (EFF) is a nonprofit, donor-supported membership organization that has been working since 1990 to protect civil liberties in the digital age. Based in San Francisco, California, the EFF engages in public education, litigation, and grassroots advocacy aimed at ensuring that established principles of civil liberties, privacy, and other fundamental rights survive undiminished in the digital realm.

The Center for Democracy and Technology (CDT) is a non-profit public interest organization focused on civil liberties issues relating to the Internet and digital technologies. CDT represents the public's interest in an open, decentralized Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

Public Knowledge is a nonprofit public interest advocacy organization that represents consumers' rights in Washington, D.C. Public Knowledge works with

consumer and industry groups to promote balance in intellectual property law and technology policy, ensuring that the public can benefit from new innovations, fast and affordable access, and the use of content.

Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 5.8 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

Consumer Federation of America is an advocacy, research, education, and service organization which works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. In addition to its policy efforts, Consumer Federation of America conducts research, educates the public and policymakers, and supports other like-minded organizations on consumer issues.

U.S. Public Interest Research Group (U.S. PIRG) is a non-profit, non-partisan advocate for the public interest. U.S. PIRG has a long history of advocacy before Congress and administrative agencies on issues affecting intellectual property, privacy, telecommunications, and media reform.

The Computer & Communications Industry Association (CCIA) is an international, nonprofit trade association dedicated to open markets, open systems, and open networks. CCIA members participate in the information and communications technology industries, ranging from small entrepreneurial firms to the largest in the business. CCIA members employ nearly one million people and generate annual revenues exceeding $200 billion. A complete list of CCIA's members is available online at <http://www.ccianet.org/members.html>.

III. THE COMMENTING PARTIES SUPPORT THE GOAL OF THE PROPOSED RULEMAKING, BUT URGE THE COPYRIGHT OFFICE TO NARROW THE SCOPE OF THE NPRM.

The NPRM describes this rulemaking as an effort by the Copyright Office to "amend its regulations in a way that would enable digital music services to utilize the compulsory license to clear all reproduction and distribution rights in musical works that might be necessary in order to engage in activities such as the making of full downloads, Limited Downloads, On-Demand streams and non-interactive streams." 73 Fed.Reg. at 40805. At the same time, the proposal correctly recognizes that there is no need to reach the more controversial question of the precise scope of the exclusive rights granted to owners of musical compositions: "[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 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 40811 n.11.

The Public Interest Commenters endorse this approach. Despite the passage of the Digital Performance Right in Sound Recordings Act (DPSRA) in 1995, there remains continuing uncertainty about the scope of Section 115. The ongoing debates between music services and music publishers about what licenses are necessary for the activities of digital music services and the lack of specified royalty rates stand as barriers to the development of an efficient, smoothly functioning digital music marketplace.

By making it clear that Section 115 reaches "all reproduction and distribution rights in musical works that might be necessary in order to engage in activities such as the making of full downloads, Limited Downloads, On-Demand streams and non-interactive streams," the proposed rule would enable existing services to resolve lingering uncertainties while also allowing new entrants to understand whom they have to pay and how much. *Id.* at 40805. Clarifying the scope of Section 115 offers an opportunity to streamline the current licensing process and facilitate continued innovation and growth in the digital music industry. For these reasons, we support the overall goal and approach of the proposed rule.

The Public Interest Commenters, however, are concerned that the proposed rule touches on several ancillary and unnecessary controversies surrounding the application of the reproduction and distribution rights to new digital technologies. Entanglement in these controversies increases the risk that any final rule will be met with litigation, a risk further exacerbated by uncertainties regarding the regulatory authority of the Copyright Office in this area. Unnecessary litigation, in turn, may jeopardize the NPRM's goal of fostering legal certainty for music services and copyright owners alike.

A. Uncertainties Regarding the Regulatory Authority of the Copyright Office.

As acknowledged in the NPRM, several stakeholders with differing views, including National Music Publishers Association (NMPA), Songwriters Guild of America (SGA), and Consumer Electronics Association (CEA), have raised questions regarding the scope of the CO's rulemaking authority in this proceeding. *Id.* at 40806. Because a disappointed stakeholder may raise this issue in litigation challenging any final rule, the CO should proceed with caution, keeping close to the heart of its statutorily granted rulemaking authority.[1]

The NPRM invokes 17 U.S.C. § 702 as the source of the CO's authority to issue the proposed rule. Although Section 702 authorizes the office "to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title," the precise scope of this grant of authority remains largely untested in court. Nor does the legislative history provide significant insight into the meaning of Section 702. *See* H.R. Rep. 94-1476 at 133.

The NPRM argues that the CO's "authority to provide reasonable interpretations" of statutes is supported by *Cablevision Sys. Dev. Co.* v. *Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599 (D.C. Cir, 1988). Yet, in *Cablevision v. MPAA*, the court specifically limited its holding, stating that the deference due to the CO "does not extend beyond the

[1] The commenting parties express no view here regarding whether the proposed rule falls within the CO's regulatory rulemaking authority.

bounds of its interpretation of Section 111." *Cablevision v. MPAA,* 836 F.2d at 609. Accordingly, *Cablevision v. MPAA* suggests that the CO here should focus narrowly on interpreting Section 115, rather than reaching out to address other statutory provisions.

The NPRM also notes that because the Register is empowered to review the rulings of the Copyright Royalty Judges on questions of substantive law, "it makes sense for the Register to offer guidance." 73 Fed.Reg. at 40806. Nothing in Section 802(f)(1), however, suggests that Congress meant to confer on the CO plenary powers to issue interpretations of the Copyright Act that bind anyone other than the Copyright Royalty Judges. *Compare* 17 U.S.C. § 802(f)(1)(D) (Register's legal determinations are binding on Copyright Royalty Judges) *with Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480-cv, 2008 WL 2952614, slip op. at 18 (2d Cir. Aug. 4, 2008)[2] (ruling that CO interpretation of statutory provisions is entitled to deference only to the extent of its "power to persuade"). The NPRM itself acknowledges that, "ideally, the resolution of the issues addressed herein should be made by Congress." 73 Fed. Reg. at 40806.

Given the uncertainties regarding the scope of the CO's regulatory authority, as well as the possibility of litigation challenging that authority, the proposed rule should focus narrowly on matters necessary for the administration of Section 115, rather than attempting to address more far-reaching questions better left to Congress and the courts.

B. Evolving Jurisprudence Regarding the Reproduction and Distribution Rights in the Digital Environment.

In response to new digital technologies, courts continue to evolve and refine the proper interpretation of the reproduction and distribution rights set out in Section 106. There is nothing about the current rulemaking that requires the CO to preempt this case-by-case evolution of the law. On the contrary, unnecessarily entangling this rulemaking in those controversies could undermine the goal of fostering clarity for market participants who intend to rely on the Section 115 compulsory license. Should future judicial rulings reject CO interpretations contained in the final rule, those rulings could cast doubt on the rule as a whole. *See, e.g., Cartoon Network v. CSC*, 2008 WL 2952614, slip op. at 18-19 (rejecting the CO's interpretation of "fixation" as applied to buffer copies). The goal of clarification would be better served by narrowly addressing the scope of the Section 115 compulsory license, rather than reaching controversial and unsettled questions regarding the reproduction or distribution rights.

Unfortunately, the NPRM departs from this narrow course in three ways. First, it unnecessarily enters the thicket surrounding the copyright treatment of "buffer copies" and other intermediate reproductions. The recent ruling in *Cartoon Network v. CSC Holdings* represents the latest example of the continuing controversy surrounding whether temporary buffers held in computer random access memory (RAM) should be considered "fixed" for the purpose of copyright law. *Compare Costar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004) (holding that transient buffer copies were not "fixed" for copyright purposes); *Advanced Computer Servs. of Michigan, Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994) (recognizing that RAM

[2] Paginated slip opinion available at <http://www.eff.org/files/filenode/studios_v_cablevision/cablevision-decision.pdf>.

reproduction lasting "seconds or fractions of a second" would be too ephemeral to be considered a fixed copy) *with MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (treating RAM copies as "fixed"); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distrib.*, 983 F.Supp. 1167, 1177-78 (N.D. Ill. 1997) (same). To be considered "copies" or "phonorecords" under Section 101, a work must be "fixed... [and] sufficiently permanent of stable to permit it to be... reproduced... for a period of more than a transitory duration." 17 U.S.C. § 101. Just a few weeks ago, the Second Circuit Court of Appeals concluded in *Cartoon Network v. CSC Holdings* that data in the temporary computer memory buffers at issue was transitory in duration, and hence not "fixed." *See Cartoon Network v. CSC,* 2008 WL 2952614, slip op. at 20. The court explicitly disagreed with the CO's differing view of "fixation," a view that was expressly incorporated in the NPRM. *Id.* at 18-19; 73 Fed. Reg. at 40809.

Second, the NPRM unnecessarily tackles the question of whether Server-end Complete Copies are always "phonorecords." 73 Fed. Reg. at 40809. The NPRM's conclusion that such copies are covered by Section 115 whether or not they qualify as DPDs, however, renders moot the question of whether such copies qualify as "phonorecords." *See id.* at 40811.

Finally, the NPRM unnecessarily addresses the scope of the Section 106(3) distribution right as applied to digital transmissions, an issue that remains controversial among commentators and continues to be the subject of litigation before the courts. *See generally* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM 'Copies,'* 2001 U. of Ill. L. Rev. 83, 126-35 (2001) (concluding that Section 106(3) only applies to material objects). By reaching out to address this controversial issue, the NPRM also risks being undermined by contrary judicial interpretations of the distribution right.

The safest course would be to avoid unnecessary entanglements in these digital copyright controversies, which in any event are ancillary to the core question at the heart of this rulemaking—the scope of Section 115.

C. The CO Can and Should Adopt a More Narrowly Tailored Rule that Avoids Unnecessary Copyright Controversies.

Fortunately, the NPRM itself suggests a course that would serve this rulemaking's core goals of clarifying the Section 115 license while steering clear of extraneous legal questions. In discussing the interaction of the fair use doctrine and the Section 115 compulsory license, the NPRM states:

> [W]e note that the determination of fair use requires a case-specific analysis. Services that wish to rely on the fair use defense are free to do so, knowing that they may have to litigate the issue and that the outcome of such litigation is not necessarily clear. But whether or not such use is fair does not prevent the inclusion of such activity within the scope of the compulsory license. The Section 115 license can operate as a safe harbor for services that wish to use it without testing the question of whether their use is actually fair. 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 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.

73 Fed. Reg. at 40811 n.11.

This "safe harbor" approach to Section 115 can and should be employed to sidestep the other controversies surrounding the application of the reproduction and distribution rights to new digital technologies. Rather than specifying which reproduction and distribution rights in musical works *must be licensed*, the CO should declare that all relevant digital reproductions and distributions are *licensable* under the Section 115 license. Companies that wish to take a license and pay the royalties specified by the Copyright Royalty Judges may do so; entities that forgo the compulsory license can seek a declaratory judgment and test their claims of noninfringement in court. This approach enables Section 115 to operate as a safe harbor, protecting services that wish to proceed quickly and conservatively in launching new businesses. It also leaves to the courts the ultimate resolution of the more difficult, and often fact-specific, questions that may arise regarding the copyright treatment of intermediate copies and digital transmissions.

This approach is also consistent with the overall approach endorsed by the NPRM:

> The proposed regulatory changes take no position with respect to whether and when it is necessary to obtain a license to cover the reproduction of distribution of a musical work in order to engage in activities such as streaming. However the amendments would make the use of the statutory license available to a music service that wishes to engage in such an activity without fear of incurring liability for infringement of the reproduction or distribution rights.

Id. at 40805. The NPRM adopts a similarly cautious approach in its discussion of "incidental DPDs," noting that a definitive regulatory interpretation of the term is unnecessary. The NPRM instead concludes that interpretation of "incidental DPD" can be left in the hands of Copyright Royalty Judges acting in their rate-setting capacities. *See id.* at 40810.

Accordingly, the Public Interest Commenters recommend that the CO embrace this focused approach, decide only the questions necessary to allow stakeholders to make productive use of the compulsory license, and avoid entangling this rulemaking in the following unnecessary controversies:

- Whether a "buffer copy" is a phonorecord;
- Whether a Server-end Complete Copy is a phonorecord; and
- Whether a DPD constitutes a distribution under Section 106(3).

1. The CO Need Not and Ought Not Express a View Regarding Whether Buffer Copies are Phonorecords.

For the purposes of this rulemaking, there is no need for the CO to decide whether "buffer copies" (whether Server-end Buffer Copies or Recipient-end Buffer Copies)

created in the course of digital music transmissions qualify as phonorecords. The recent Second Circuit decision in *Cartoon Network v. CSC Holdings* suggests that the resolution of this question may require a case-specific inquiry into, among other things, the temporal duration of the buffer copies in question. *See Cartoon Network v. CSC*, 2008 WL 2952614, slip op. at 20; *see also CoStar v. LoopNet*. 373 F.3d at 550-51 (concluding that buffer copies made by an ISP are not "fixed [for] more than transitory duration"); *Advanced Computer Servs. v. MAI*, 845 F. Supp. at 363 (recognizing that RAM reproduction lasting "seconds or fractions of a second" would be too ephemeral to be considered a fixed copy). For the purpose of clarifying the scope of the Section 115 compulsory license, it is enough for the CO to conclude that any buffer copies that qualify as "fixed" and whose reproduction would require a license are licensable under Section 115.

2. The CO Need Not and Ought Not Express a View Regarding Whether Server-end Complete Copies are Phonorecords.

For the purposes of this rulemaking, there is no need for the CO to express a view regarding whether Server-end Complete Copies are phonorecords. *See* 73 Fed. Reg. at 40808 ("[T]he Office tentatively finds that a Server-end Complete Copy is a phonorecord and therefore satisfies the second (but, as noted above, not the first) requirement for being a DPD.")

The CO concludes that Server-end Complete Copies are not DPDs because they are not delivered. *See id.* at 40809 ("Server-end Complete Copies... are not delivered and therefore do not satisfy the first requirement being a DPD."). In light of this threshold determination, there is no need for the CO to reach the subsequent question of whether Server-end Complete Copies qualify as phonorecords. In fact, the NPRM itself adopts exactly this approach when turning to the question of whether server copies are "specifically identifiable." *See id.* at n.7 ("The Office does not consider whether a server copy is specifically identifiable because, under the Office's analysis, the server copy is not delivered and therefore does not fall within the definition of DPD.").

Despite its determination that Server-side Complete Copies are not DPDs, the CO nevertheless concludes that "Server-end Copies, as well as all other intermediate copies, used to create DPDs under the Section 115 license ... fall within the scope of the license." *Id.* at 40811. In other words, the proposed rule makes it clear that server-side copies are *licensable* under the Section 115 compulsory license, whether or not they qualify as DPDs. In light of this determination, there is no need for the CO to reach the question of whether Server-end Complete Copies always constitute phonorecords or otherwise require a license. Depending on the technologies employed and the particular facts at issue, Server-end Complete Copies might be too transitory to qualify as phonorecords, or might qualify as fair uses. Accordingly, whether a license is necessary for any particular Server-end Complete Copies is better left for case-by-case analysis, should digital music services decide to test the question in court. For purposes of this rulemaking, it is enough to conclude that Server-end Complete Copies are licensable under Section 115.

3. The CO Need Not and Ought Not Express a View Regarding Whether a Digital Phonorecord Delivery is a Distribution Under Section 106(3).

The NPRM states that "[t]he Office understands that digital phonorecord deliveries are, by the fact of their having been delivered, distributed within the meaning of the copyright law." *Id.* Whether a transmission over the Internet implicates the Section 106(3) distribution right, however, is the subject of continuing controversy among courts and commentators.

Section 115(a)(1) provides that "[a] person may obtain a compulsory license only if his or her *primary purpose in making* phonorecords is to *distribute* them to the public for private use, including by means of a digital phonorecord delivery." 17 U.S.C. § 115(a)(1) (emphasis added). Section 106(3), in contrast, makes it clear that a copyright owner enjoys the exclusive right to "distribute...phonorecords...to the public," 17 U.S.C. § 106(3). "Phonorecords," in turn, are defined in Section 101 as "material objects in which sounds...are fixed." 17 U.S.C. § 101. Commentators have noted that Section 106(3)'s express focus on the distribution of "material objects" leaves the status of Internet transmissions less than clear.[3] *See, e.g.,* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM 'Copies,'* 2001 U. of Ill. L. Rev. at 126-35; *cf. Agee v. Paramount Communications, Inc.,* 59 F.3d 317 (2d Cir. 1995) (suggesting that satellite transmissions, even when they result in material copies, do not infringe the Section 106(3) distribution right).

There is no need in this rulemaking for the CO to preempt the ultimate judicial resolution of this controversy. Section 115(a)(1) uses the term "distribute" in reference to the purpose for which phonorecords are made.[4] The question of whether a phonorecord

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[3] We are aware that the United States has taken a contrary position in litigation, *see Elektra Enter. Group v. Barker*, No. 05-Civ-7340 (S.D.N.Y. brief filed Apr. 21, 2006) (statement of interest by United States arguing that Section 106(3) applies to Internet transmissions). This further underscores the importance of avoiding unnecessary entanglement with issues that are currently being addressed by the courts. *See, e.g., London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 172-75 (D. Mass. 2008) (first district court ruling squarely addressing in detail the question of whether Section 106(3) reaches beyond material objects).

[4] The NPRM cites the legislative history of a different statutory provision, Section 114(d)(4), to support the suggestion that every digital phonorecord delivery "implicates the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein," 73 Fed. Reg. at 40811 (citing S. Rep. No. 104-128 at 27, *reprinted in* 1995 U.S.C.C.A.N. 357, 374). The legislative history accompanying Section 115, however, indicates that Congress intended to remain agnostic on the issue, crafting the Section 115 compulsory license to encompass *any* necessary reproduction and distribution rights implicated by the delivery of DPDs, without resolving precisely *which* rights are necessarily so implicated. *See* S. Rep. 104-128 at 17, *reprinted in* 1995 U.S.C.C.A.N. 357, 364 (expressing "no view on current law" in this regard in connection with the amendment of Section 115); R. Anthony Reese, *The Public Display Right: The*

has been made, and whether its transmission infringes Section 106(3) absent the compulsory license, are analytically separate issues that should be resolved by the courts on a case-by-case basis. As noted above, it is enough for the CO to clarify that any relevant distributions of phonorecords are *licensable* under Section 115, thereby creating a safe harbor for music services that opt for the compulsory license rather than testing these complex questions in court.

IV. CONCLUSION

For the foregoing reasons, the undersigned urge the CO to revise the NPRM to focus on the questions necessary to the application and interpretation of Section 115, rather than reaching out to ancillary questions more properly left to judicial and legislative development.

Respectfully submitted,

Fred von Lohmann
Senior Intellectual Property Attorney
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333 x123

Sherwin Siy
Staff Attorney
Public Knowledge
1875 Connecticut Avenue NW #650
Washington, DC 20009
(202) 518-0020

David Sohn
Senior Policy Counsel
Center for Democracy and Technology
1634 Eye Street NW #1100
Washington, DC 20006
(202) 637-9800

Matthew Schruers
Senior Counsel for Litigation & Legislative Affairs
Computer & Communications Industry Association
(202) 783-0070 x109

Chris Murray
Senior Counsel
Consumers Union
1101 17th Street NW #500
Washington, DC 20036
(202) 238-9253

Mark Cooper
Research Director
Consumer Federation of America
1620 I Street, NW #200
Washington, DC 20006
(202) 387-6121

Amina Fazlullah
Staff Attorney
U.S. PIRG
218 D Street SE
Washington, DC 20003
(202) 546-9707

Copyright Act's Neglected Solution to the Controversy Over RAM 'Copies,' 2001 U. of Ill. L. Rev. at 133 & n.192 (discussing legislative history).