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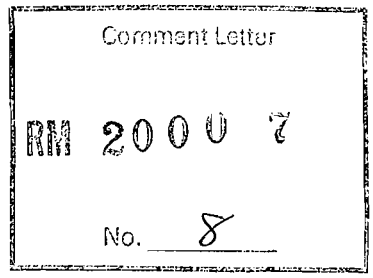
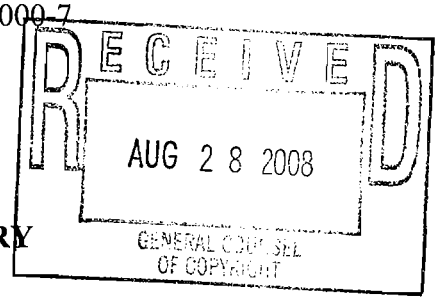


In the Matter of	)	
Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries	)	Docket No. RM 2000-7



COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The Recording Industry Association of America, Inc. ("RIAA") submits these comments in response to the Copyright Office's Notice of Proposed Rulemaking ("NPRM") regarding the application of the mechanical compulsory license set forth in 17 U.S.C. § 115 to certain digital phonorecord deliveries ("DPDs"). *See* 73 Fed. Reg. 40,802 (July 16, 2008).

As the party that petitioned for the commencement of this rulemaking, RIAA appreciates the Office's many efforts to try to bring clarity to questions concerning the application of Section 115 to the digital music marketplace. The questions raised in RIAA's original petition included ones that remain important today, so RIAA particularly appreciates the Office's desire to resolve those questions at this time.

However, it is important to recognize that the digital music marketplace has not stood still since RIAA's petition was filed. During that time, certain understandings have emerged concerning the licenses that legitimate digital music services need to operate, making the need for rulemaking in this area less compelling than it seemed to RIAA at the

time it filed its petition, and creating a risk that a rule could disrupt existing practices. At this point, regulations consistent with marketplace understandings that would apply to all industry participants would be a very helpful outcome of this proceeding, while regulations that would upset those understandings have the potential to be very disruptive.

This is particularly true with respect to noninteractive streaming.[1] The NPRM proposes adding to the Copyright Office regulations under Section 115, in three places, a definition of the term "digital phonorecord delivery" (the "Proposed Definition"). The Proposed Definition consists of four sentences: a first sentence echoing the first sentence of the statutory definition set forth in 17 U.S.C. § 115(d), and three additional sentences tracking the tentative legal analysis set forth in the NPRM. The effect of the three additional sentences is likely to indicate that any digital transmission of a sound recording is a DPD. However, while a consensus has emerged among the most affected parties that mechanical licenses are required to engage in the process of interactive streaming, it has not been the practice of services transmitting noninteractive streams to obtain mechanical licenses from music publishers, and indeed, the National Music Publishers' Association ("NMPA") has publicly disclaimed the need for such licensing, as discussed further below.

[1] In these comments, RIAA uses the term "noninteractive streaming" to refer to streaming transmissions that are exempt from the sound recording performance right under 17 U.S.C. § 114(d)(1) or qualify for statutory licensing under 17 U.S.C. § 114(d)(2). RIAA uses the term "interactive streaming" to refer to streaming transmissions that are not exempt from the sound recording performance right under 17 U.S.C. § 114(d)(1) and do not qualify for statutory licensing under 17 U.S.C. § 114(d)(2). RIAA adopts this nomenclature because it has been used in discussions concerning these issues among the affected industries. However, for clarity it should be noted that it is not interactivity as that term is used in 17 U.S.C. § 114(j)(7) but the presence or absence of exclusive public performance rights in sound recordings that delineate these categories of streaming.

In these comments, RIAA first addresses the key question of the status of interactive and noninteractive streaming. We then turn to some other more detailed issues raised by the NPRM.

I. The Office Should Adopt Regulations Providing That the Process of Interactive Streaming Involves Making DPDs, and Reproduction/Distribution Licenses from Copyright Owners of Musical Works Are Not Required to Engage in the Process of Noninteractive Streaming

Over the course of the last eight years a consensus has slowly emerged among the most affected parties as to what types of licenses different kinds of services need in order to operate. This consensus is reflected in the licensing practices of individual companies as well as in agreements reflecting discussions among representatives of the affected industries. As noted in the NPRM, 73 Fed. Reg. at 40,805, RIAA, NMPA and The Harry Fox Agency notified the Office of the first such agreement in 2001. RIAA and NMPA have recently reached a similar agreement with the Digital Media Association. It thus is accepted by all those entities that under current law –

- licenses from copyright owners of musical works are required under 17 U.S.C. § 115 to engage in the process of interactive streaming, including the making and/or transmission of server, cached, network and RAM buffer copies necessary to engage in such activity;

- the process of interactive streaming involves the making of incidental DPDs and falls within the scope of 17 U.S.C. § 115;

- licenses for interactive streaming and limited downloads under 17 U.S.C. § 115 include the right to make necessary server, cache, network and RAM buffer copies; and

- reproduction/distribution licenses from copyright owners of musical works are not required to engage in the process of noninteractive streaming, including the making and/or transmission of server, cached, network and RAM buffer copies necessary to engage in such activity.

This understanding is reasonably clear and administrable and has been accepted by the most affected parties. The Office can and should adopt regulations that are consistent with this understanding.

In considering the potential role of the Office in determining which kinds of streaming transmissions are DPDs, the initial question is whether Congress' intentions are clear, such that, for example, the construction advanced in the NPRM is the only permissible construction of Section 115. It is an elementary principle of administrative law, as well as statutory construction generally, that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

The statutory definition of DPD embodies the concept of "delivery of a phonorecord" and the notion that a reproduction must be "specifically identifiable." *See* 73 Fed. Reg. at 40,809 (referring to "specifically identifiable" as a "unique phrase"). The NPRM suggests greater certainty in the application of these concepts to streaming than is probably warranted under the circumstances.[2] Since publication of the NPRM, the Second Circuit has held that some short-lived buffer copies are not "fixed" as that term is defined in Section 101 of the Copyright Act. *The Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480-cv(L) (2d Cir. Aug. 4, 2008). RIAA disagrees with that decision, but it is not necessary to debate those issues here. As the NPRM indicates, digital music services

[2] For example, in discussing the phrase "specifically identifiable reproduction," the NPRM indicates that the meaning of that phrase is "plain." However, the interpretation of that phrase advanced in the NPRM is contrary to its legislative history, and to explain the provision the NPRM must rearrange its words to refer to a "reproduction . . . that is . . . specifically identifiable." 73 Fed. Reg. 40,809.

transmitting streams make numerous copies of various kinds and durations. Some of those copies are clearly persistent enough that they would meet any definition of the term "fixed," and services that wish to obtain a Section 115 license as a "safe harbor" should have the option of doing so. *See* 73 Fed. Reg. at 40,811 n.11. However, the fact that the long-held views of the Office and this recent Second Circuit decision in the *Cartoon Network* case potentially lead to different conclusions concerning the status of some reproductions indicates that Congress' intentions as to when streaming services require mechanical licenses are not so clear that the Office is without authority to interpret Section 115 in accordance with the emerging industry consensus.

In addition, a rule like the one proposed in the NPRM that would have the effect of classifying all digital transmissions as DPDs would make the second sentence of the statutory definition of the term DPD meaningless. That sentence provides that "[a] digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible." 17 U.S.C. § 115(d). The NPRM refers to this sentence and finds it inapplicable to streaming because all transmissions over a digital network involve some reproduction activity. 73 Fed. Reg. at 40,807. However, this sentence must be taken as an indication that Congress thought some class of real-time noninteractive transmissions did not constitute DPDs. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotation marks omitted)).

Thus, it does not appear to us that Congress' intentions as to when streaming services require mechanical licenses are so clear and unambiguous that application of the construction advanced in the NPRM to noninteractive streaming is the only permissible construction of Section 115. If the Office agrees, then as an agency charged with administration of Section 115, it is entitled to make policy judgments in adopting a reasonable construction of Section 115. *See Chevron*, 467 U.S. at 843-44; *Pauly v. Bethenergy Mines, Inc.,* 501 U.S. 680, 696 (1991) ("the resolution of ambiguity in a statutory text is often more a question of policy than of law").

In doing so, the Office should make pragmatic judgments about sound policy. *See* 2A Norman J. Singer, Sutherland Statutory Construction § 45:12 (6th ed. 2002) ("It is a well established principle of statutory interpretation that the law favors rational and sensible construction.") (citation and quotation marks omitted); *see also Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 59 (1st Cir. 2008) ("[S]tatutory construction . . . is not an exact science, and there are times when contortionistic strivings at seamless interpretation must yield to common sense."); *United States v. Project on Gov't Oversight*, 484 F. Supp. 2d 56, 65 (D.D.C. 2007) (an "eminently sensible" construction is "preferable under prevailing canons of construction") (citing *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 F. 5, 17 (8th Cir. 1907) ("[A] rational, sensible, and practical interpretation of a Constitution, statute, or contract should be preferred to one which is unreasonable, absurd, or impracticable.")); *United States v. Missouri Pac. Ry. Co.*, 213 F. 169, 173 (8th Cir. 1914) ("Another approved rule of construction is that a rational, sensible and practical interpretation of a statute, one which will permit the accomplishment of the purpose of the act, should be preferred to one which

is unreasonable or impracticable, or that would hinder or retard the accomplishment of that purpose.").

A sensible point of demarcation between DPDs and digital transmissions that do not need to be licensed as DPDs can be found by seeking to reconcile Section 115(d) with Section 114(d). Both these provisions were added to the Copyright Act by the same enactment – the Digital Performance Right in Sound Recordings Act of 1995 – and, as described above, a consensus is emerging that transmissions that are not exempt from the sound recording performance right under 17 U.S.C. § 114(d)(1) and do not qualify for statutory licensing under 17 U.S.C. § 114(d)(2) should be treated as DPDs, while transmissions that are exempt from the sound recording performance right under 17 U.S.C. § 114(d)(1) or qualify for statutory licensing under 17 U.S.C. § 114(d)(2) should not be treated as DPDs.

This distinction has the significant advantages of being clear and administrable, as well as being accepted by the most affected parties. As a bright line rule, it also makes sense in view of the transmission practices in the marketplace. Because of the transmission technologies involved and the legal limitations on the scope of the Section 114 statutory license, there is little need for noninteractive streams to be reproduced except for a limited amount of buffering. By contrast, on-demand streams and other interactive streaming may involve more repeated play of the relevant recordings, and it is our understanding that services generally tend to engage in more local cache copying of interactive streams. In this way there seems to be, generally speaking, a qualitative difference in the reproduction activity of interactive and noninteractive streaming services

that could be taken into account in crafting a regulation concerning which streaming activities constitute DPDs.

Because the construction given to Section 115 in the NPRM is not the only permissible one, rather than upsetting the emerging consensus concerning the types of licenses that different kinds of services need to operate, RIAA believes that the Office should adopt regulations providing that the process of interactive streaming involves making DPDs, while reproduction/distribution licenses from copyright owners of musical works are not required to engage in the process of noninteractive streaming.

II. Additional Issues Raised by the NPRM

A. Incidental DPDs

The NPRM addresses the concept of so-called "incidental DPDs." 73 Fed. Reg. at 40,810. These are DPDs "where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery." 17 U.S.C. § 115(c)(3)(C). As the NPRM suggests the Office is inclined to agree, it is plain from the language of Section 115(c)(3)(C) that incidental DPDs are nothing more than a subset of DPDs. However the Office resolves the issues addressed above, RIAA believes that all streaming transmissions that constitute DPDs are within the incidental DPD subset, because the reproduction or distribution of a phonorecord is incidental to a performance. *See* S. Rep. No. 104-128 at 39 (quoted in 73 Fed. Reg. 40,810 n.8). As of this date, we do not believe that the Office needs to do more to distinguish incidental DPDs from DPDs in

general, but RIAA urges the Office to make no pronouncements contrary to the interpretation set forth in the NPRM in the remainder of this proceeding.[3]

B. Non-DPD Copies

The NPRM addresses the status of certain copies made under the Section 115 license but not distributed, particularly what the NPRM refers to as "Server-end Copies." 73 Fed. Reg. at 40,810-11. Because Section 115 provides a license to both make and distribute phonorecords, 17 U.S.C. § 115(a)(1), and royalties are payable only on phonorecords that are distributed, 17 U.S.C. § 115(c)(2), the Office's analysis is manifestly correct.

In the mechanical royalty rate proceeding presently pending before the Copyright Royalty Judges ("CRJs"), RIAA requested that the CRJs adopt a term concerning the scope of the reproduction activity covered by Section 115. Specifically, the regulatory language proposed by RIAA was as follows:

> *Clarification of Covered Reproductions.* A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary to engage in activities covered by the compulsory license, including –
>
> (1) the making of reproductions by and for end users;
>
> (2) reproductions made on servers under the authority of the licensee; and
>
> (3) incidental reproductions made under the authority of the licensee in the normal course of engaging in such activities, including cached, network, and buffer reproductions.

[3] RIAA reserves the right to suggest regulations concerning this issue in reply comments if that seems warranted by the initial comments submitted by others.

Draft Regulations Implementing RIAA's Proposed Rates and Terms, at 4 (attached to RIAA's Proposed Findings of Fact (July 2, 2008)). The language of this proposal was based on clarifying language contained in the proposed Section 115 Reform Act considered by Congress in 2006. *See* Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. § 102 (2006) (which would have added to Section 115 a new subsection (e)(1)(B) concerning the scope of activity covered by compulsory licenses). The National Music Publishers' Association, Inc., the Songwriters Guild of America and the Nashville Songwriters Association International indicated in the proceeding before the CRJs that they "do not oppose the adoption of such term." Reply of National Music Publishers' Association, Inc., the Songwriters Guild of America and the Nashville Songwriters Association International to the Proposed Findings of Fact of the Recording Industry Association of America, Inc. and the Digital Media Association, at 319 (July 18, 2008).

On August 8, 2008, the Office issued a Memorandum Opinion concerning the division of authority between the Register of Copyrights and the CRJs under Section 115. Memorandum Opinion on Material Questions of Substantive Law, 73 Fed. Reg. 48,396 (August 19, 2008). That Memorandum Opinion stated that "[t]he CRJs do not have authority to issue rules setting forth the scope of activities covered by the license." *Id.* at 48,399. While RIAA does not necessarily agree with that conclusion, RIAA understands it to be inconsistent with adoption by the CRJs of the term proposed by RIAA. Because the language proposed by RIAA and quoted above would alleviate any doubts about this issue,

and the language is consistent with the analysis in the NPRM, RIAA respectfully requests that the Office adopt the proposed rule in this proceeding.[4]

C. Locked Content

The NPRM addresses the status of so-called locked content made available by means of DPD. 73 Fed. Reg. at 40,811. Importantly, the Office notes that "in a ratemaking proceeding a compelling case might be made that . . . no royalties shall be due for any DPD unless and until it is 'unlocked.'" *Id.* The clear implication of that statement is that the Copyright Royalty Judges could adopt a royalty rate for locked content that is not payable unless and until the content is unlocked.

However, because the NPRM also indicates that locked content is "distributed" when transmitted, there is a risk that the NPRM could be interpreted as foreclosing a royalty rate for locked content that is not payable until the content is unlocked, even if a compelling case was made that such a result was appropriate. Such a result would make distribution of locked content impracticable, and RIAA does not understand such a result to have been intended by the Office. RIAA urges the Office to dispel any doubt in this regard.

D. Copies That a DPD "Includes"

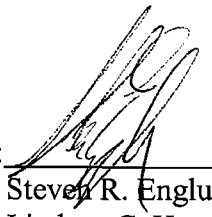
As discussed above, RIAA does not believe that the Office should adopt a regulation suggesting that mechanical licenses from copyright owners of musical works are required to engage in the process of noninteractive streaming. Even within the context of

[4] It is possible that the Office may have intended that the third sentence of the Proposed Definition address this issue, at least in part. To the extent that is the case, RIAA believes that the language quoted above would be more clear, because it would reach Server-end Copies, while the third sentence of the Proposed Definition would not necessarily do so, and the third sentence of the Proposed Definition is susceptible to the problem described in Part II.D below.

interactive streaming, the language proposed in the third and fourth sentences of the Proposed Definition is susceptible to an interpretation that RIAA does not believe was intended by the Office.

Those sentences specify that a DPD "includes" certain phonorecords that are made in the course of transmission. As written, there is a risk that these sentences could be interpreted to provide that intermediate transient copies made in the course of routing a DPD over the internet are themselves DPDs even though they are not made at the terminus of the transmission and hence are not delivered to the transmission recipient. Such an interpretation would be inconsistent with the Office's discussion in the NPRM, and would be impracticable to administer (and likely uneconomical) if a cents-based royalty rate structure required payment for each such intermediate transient copy as a DPD. Any regulatory language finally adopted by the Office should not lend itself to the interpretation that certain phonorecords might be DPDs irrespective of the statutory requirement of delivery.

Dated: August 28, 2008

By: 

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