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In the Matter of	)	
Mechanical and Digital Phonorecord Delivery Compulsory License	)	Docket No. RM 2000-7

REPLY COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The members of the Recording Industry Association of America, Inc. ("RIAA," "we" or "our") and digital music services want to meet the huge consumer demand for legitimate digital music services. Unfortunately, uncertainty regarding the issues raised by the Copyright Office in its Notice of Inquiry ("Notice"), and the cumbersome procedures embodied in the Office's regulations implementing Section 115, are primary obstacles to efforts to meet that demand. RIAA firmly believes it is critically important that the Copyright Office follow through on its Notice by acting in the very near term to clear the way for the introduction of legitimate digital music services.

The consistent theme of all the comments submitted in response to the Notice was that an established set of rules is necessary for legitimate online digital music services to go forward. Indeed, all of the parties submitting comments except for the National Music Publishers Association ("NMPA")[1] supported a rulemaking regarding the Section 115 mechanical license. And even the NMPA's comments acknowledge the necessity of an

[1] NMPA filed its comments jointly with the Songwriters' Guild of America ("SGA"). References herein to those comments, and to NMPA's positions therein, are intended to refer to SGA as well.

established set of rules for the online music community to prosper. *See* NMPA Comments at 12. NMPA simply would prefer that set of rules to emerge later, through negotiations or litigation rather than a rulemaking proceeding, a position that, with all respect, we believe to be ill-advised for the numerous reasons described below.

Accordingly, RIAA submits that there is substantial support for a Copyright Office rulemaking that would determine whether and how On-Demand Streams and Limited Downloads fall within the ambit of Section 115. Indeed, there seems to be a growing consensus – expressed by those filing comments and by members of Congress[2] – that an expeditious rulemaking by the Copyright Office would materially advance the introduction of legitimate digital music services to satisfy the exploding consumer demand for music on the Internet. The Office has the power to issue rules necessary for the administration of the Section 115 license, including the rules we have requested concerning the treatment of On-Demand Streams and Limited Downloads and interim procedural rules to enable the launch of services. The Office should exercise that power to make Congress' and consumers' dream of a "celestial jukebox" a reality. *See* S. Rep. No. 104-128 at 14 (1995).

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[2] *See, e.g.,* Statement of the Honorable Howard Hyde before the House Judiciary Subcommittee on the Courts, the Internet and Intellectual Property, May 17, 2001 (attached as Exhibit 1) ("I support action by the Copyright Office to effectuate the intent of the DPRA to enable electronic music delivery, and I hope that the Office will take such action quickly, to help meet the consumer demand for digital music that exists today."); Statement of the Honorable Rick Boucher before the House Judiciary Subcommittee on the Courts, the Internet and Intellectual Property, May 17, 2001 ("It is also appropriate that we use the hearing this afternoon as a means of urging the Copyright Office to put in place a temporary safe harbor arrangement for the Section 115 license until the Copyright Office completes its process for deciding the full scope of the license and establishes a rate under the compulsory license which would be associated with licensing of the music.") (available online at http://www.mp3.com/ThePhoRecordings).

DISCUSSION

I. THE COPYRIGHT OFFICE SHOULD NOT WAIT FOR THE RELEVANT PARTIES TO ARRIVE AT A NEGOTIATED SOLUTION

NMPA's primary argument against the rulemaking we have requested seems to be that the interested parties should instead try to work out a negotiated resolution of the questions raised by the Notice. RIAA too would prefer a negotiated solution. RIAA's members have tried for years to negotiate a resolution to the issues raised by the Notice, and RIAA is committed to continue to negotiate in good faith for so long as we can make progress. Such negotiations are difficult, however, and may be protracted and ultimately unsuccessful, when the fundamental basis that must underlie such negotiations – what rights, if any, are to be licensed – remains unclear. Even Ed Murphy, the President of NMPA, has been quoted as admitting that "[i]f you don't acknowledge that there's going to be a right, there's no point in talking about rates. . . . The rights issue first has to be clarified." Jon Healey, *Net Music Services in Royal Bind*, L.A. TIMES, May 21, 2001 at C1 (ellipsis in original). The rulemaking we have proposed would create the clarity that everyone, including NMPA, thinks is necessary to facilitate fruitful negotiations.

Even if it were unambiguous that On-Demand Streams and Limited Downloads require a mechanical license (and as we have explained elsewhere, that is far from clear), negotiations cannot be allowed to extend on into eternity if legitimate music services are to thrive, and the hope for a negotiated solution is no reason to delay a rulemaking that is so desperately needed. NMPA's argument that administrative process should wait for a continuation of voluntary negotiations ignores the fundamental character of the Section 115 license. That license is *compulsory*, a point well understood by NMPA since it was that organization that insisted in 1995 that the benefits of the mechanical

compulsory licensing system apply to the new world of digital phonorecord deliveries. The royalty rates payable under a compulsory license can be *informed* by voluntary negotiations. But a compulsory license would not be *compulsory* if it were *subordinated* to voluntary negotiations. In this case, music publishers have refused to recognize that if mechanical licenses are necessary, the beneficiaries of the compulsory license are entitled to obtain such licenses whether or not there is an agreement concerning the matters at issue, including particularly the royalty rates for iDPDs. As music publishers have recognized in other contexts, the compulsory license does not afford them the luxury of conditioning licenses on their acceptance of terms.[3]

It is true that Section 115 contemplates that voluntary negotiations may occur. *See* 17 U.S.C. § 115(c)(3)(C). But the time provided for those negotiations has passed. *See* 17 U.S.C. § 115(c)(3)(D); 37 C.F.R. § 255.7. And because the Section 115 license is a *compulsory* license, voluntary negotiations are neither necessary nor sufficient. Administrative process always must follow any voluntary negotiations to effectuate a statutory scheme that binds all copyright owners and users – not just those who might be represented in whatever negotiations may occur. One form of administrative process that might occur is a CARP proceeding to set rates and terms for the license. *See* 17 U.S.C. § 115(c)(3)(D). Another possible form of administrative process is a rulemaking in lieu of a CARP. *See* 37 C.F.R. § 251.63(b). Either way, administrative process is necessary.

To this point, negotiations between representatives of music publishers and potential Section 115 licensees have failed to result in an agreement. As a result, *both*

[3] March 23, 1998 Submission of NMPA to the UCC Article 2B Drafting Committee (attached as Exhibit 2) at 18-19 ("[N]o act of acceptance is statutorily required. The

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RIAA and NMPA have requested the initiation of a CARP to set the rates and terms, even though they have continued to negotiate. If the disagreement between the parties merely concerned the royalty rates appropriate for the iDPDs made by Section 115 licensees, convening a CARP clearly would be the next step. However, there is also a disagreement about the scope of the Section 115 license and the classification of certain types of uses of musical works for purposes of that license. As a result, the question faced by the Office is whether to proceed directly to a CARP – which would have to set royalty rates for iDPDs when it is not certain as a legal matter whether anybody is operating or proposes to operate a service that makes iDPDs – or whether first to conduct a rulemaking to determine whether a CARP is necessary. We submit that the latter is the only sensible choice.[4]

II. A RULEMAKING REGARDING ON-DEMAND STREAMS AND LIMITED DOWNLOADS AND THE ISSUANCE OF INTERIM RULES FOR THE EXERCISE OF THE COMPULSORY LICENSE WOULD SPUR THE DEVELOPMENT OF LEGITIMATE DIGITAL MUSIC SERVICES

NMPA argues that a rulemaking would actually *hinder* the development of legitimate digital music services. *See* NMPA Comments at 10-12. We disagree. What is

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compulsory license is deemed granted so long as the licensee complies with the statutory requirements.")

[4] We note that NMPA's statement that it has granted certain licenses for streaming, *see* NMPA Comments at 14, is also not relevant to the legal and policy questions raised by the Notice. As an initial matter, it is not clear how many of the 30 online licenses NMPA mentions are for general DPDs rather than streaming. On information and belief, the overwhelming majority are for general DPDs. Moreover, the license to MP3.com, which we believe to be one of very few mechanical licenses specifically intended to cover streaming, was entered into in settlement of infringement litigation in which MP3.com faced massive liability. That a few copyright users have acceded to the publishers' interpretations of the Copyright Act under their own unique circumstances is no indication of the proper construction of a statutory compulsory license binding on all copyright owners and users.

hindering the development of legitimate digital music services is the uncertainty concerning the need for mechanical licenses and the application of the Section 115 license to digital music services, which uncertainty music publishers have used to gain a more favorable position in the negotiation of royalty rates and terms for what is supposed to be a *compulsory* license.

NMPA's argument does not take into account the reality of the current marketplace for online music: infringing operations, which have refused to obtain licenses for the use of musical compositions, have flourished, while legitimate services, which want to obtain the necessary licenses and compensate rights holders in accordance with the law, have found that an uncertain legal landscape prevents their launch. In the absence of clarity as to whether or not an On-Demand Stream is an iDPD, or whether a Limited Download is an iDPD or a rental, legitimate digital music services are not at all sure whether their activities require them to obtain mechanical licenses – at great difficulty under the current regulations – and simply cannot know what royalty to pay if licenses indeed are required. It is exceedingly difficult to design an effective business model for a legitimate digital music service without knowing what the rights and obligations of copyright owner and user will be. That is why all of the parties commenting in this proceeding who are actually trying to operate legitimate digital music services agree that the uncertain legal status of On-Demand Streams and Limited Downloads, as well as the impracticable procedures for obtaining any necessary Section 115 licenses for large numbers of works, have been huge obstacles to the development of legitimate services. A rulemaking by the Copyright Office to address these issues is the

single most important thing that could be done to spur the development of legitimate digital music services to meet the manifest consumer demand for such services.

NMPA suggests that the Copyright Office would be chasing a moving target if it were to try to conduct a rulemaking concerning On-Demand Streams and Limited Downloads. NMPA Comments at 10. This is not so. Congress at least envisioned transmissions like On-Demand Streams in the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), which created the concept of a DPD. On-Demand Streams and Limited Downloads are two formats likely to be used by digital music services for the foreseeable future. Regulations would not need to speak to other delivery methods or technologies at this point (and indeed, no party has asked the Copyright Office to consider other delivery methods or technologies). Thus, a rulemaking concerning these two delivery methods is possible, likely to have lasting utility, and would be the best way to promote the launch of legitimate digital music services.

If there is a moving target, it is the publishers' view of the law in this area. One reason that uncertainty regarding these issues has persisted for so long is that music publishers have not spoken consistently or with one voice concerning them. NMPA's comments are notable as the only comments in this proceeding that do not address any of the substantive questions raised in the Notice. When publishers have articulated views on these questions, they have sent inconsistent signals to the community of licensees. For example, on the ultimate question of whether the existing compulsory licensing system is sufficient to enable the launch of services, publishers sometimes have indicated that it is: "NMPA believes that the existing section 115 compulsory license provides an adequate framework for Napster and other Internet distributors of music to secure licenses at a

reasonable rate." Responses of NMPA to Senators' Questions (attached as Exhibit 3) at 2. Other times, publishers have seemingly taken the contrary view: "Please be advised Prince Street Music does not agree with Atlantic Recording Corporation's stand that digital downloads and interactive and/or non-interactive streaming fall under the compulsory license provision of the United States Copyright Act." Letter from Sussman & Associates to Atlantic Recording Corporation (attached as Exhibit 4). Publishers have also sent mixed signals concerning subsidiary questions such as whether streams (whether on-demand or otherwise) require licensing as reproductions, and whether server reproductions are covered, and compensable, under the mechanical compulsory license. Doubt as to both the law, and the publishers' view of the law, has made efforts to negotiate difficult and held up the introduction of legitimate digital music services. In the short term it appears that this uncertainty can be remedied only by a rulemaking, not further negotiations.

NMPA's comments do not offer a feasible alternative to a rulemaking, and would actually cause further delay in the introduction of legitimate digital music services. Negotiation has failed thus far; further open-ended negotiation over a complex set of legal, monetary and technology issues is therefore unlikely to produce the clarity that is necessary for the near-term launch of digital music services. Under NMPA's conception of Section 115, it appears that litigation should replace a rulemaking as the means for answering the questions raised by the Notice. But litigation is unlikely to result in a comprehensible answer to these questions that can be relied upon nationwide for purposes of business planning any time soon. In the absence of any satisfactory alternative, the Office should do everything in its power to clarify the application of

Section 115 and simplify the procedures for exercising Section 115 (to the extent that it is applicable) to facilitate the launch of legitimate digital music services.

III. ESTABLISHING INTERIM PROCEDURAL RULES IS THE PROPER FIRST STEP FOR THE COPYRIGHT OFFICE

The current pressing demand for legitimate digital music services creates the need for the Copyright Office to act swiftly in resolving doubts about the application of the Section 115 license to certain digital music services, so that, if it is necessary, it can be relied upon as intended by Congress for the launch of services. But clarifying the substantive scope and royalty categories of Section 115 is only part of the equation. The other issue, which we believe could be addressed more quickly, concerns the procedure for obtaining Section 115 licenses if they are required. In this regard, RIAA agrees with MP3.com that interim procedural rules would be a very important step in enabling the launch of legitimate services, without prejudicing the interests of any interested party concerning the substantive issues to be addressed.

We believe that such interim procedural rules should do the following:

- Confirm that compulsory licenses include all the rights necessary to reproduce and distribute phonorecords in the iDPD configuration, just like any other configuration, despite the Copyright Office's decision to defer determination of royalty rates for iDPDs. (We submit that such regulations, being interim in nature, should not attempt to identify particular activities that might constitute the making of iDPDs.)

- Confirm that compulsory licenses include all the rights necessary to distribute phonorecords by acts or practices in the nature of rental, lease or lending, just like distribution by means of permanently parting with possession and by DPD, despite the Copyright Office's decision to defer determination of royalty rates for rentals. (We submit that such regulations, being interim in nature, should not attempt to identify particular activities that might constitute acts or practices in the nature of rental, lease or lending.)

- Confirm that, since no royalty rate for iDPDs and rentals has been determined, and no royalty for iDPDs or rentals can be paid until the rate is determined,

licensees are to keep the records necessary to account for any iDPDs and rentals made in accordance with regulations,[5] and account and pay royalties for any iDPDs and rentals made promptly after rates are determined; in the interim, nonpayment shall not affect the validity of licenses.

- Permit services making On-Demand Streams and Limited Downloads to serve combined notices of intention on copyright owners of musical works by filing in the Copyright Office, followed by publication on the Copyright Office website and/or in the *Federal Register*, without either a service or the Copyright Office expressing any view as to whether the activities of the service constitute the making of iDPDs, rentals or neither. (We submit that such notices could include identification of the licensee and the works at issue substantially in accordance with existing regulations.)

We believe that such interim rules are a very modest proposal, well within the range of rulemaking activities previously undertaken by the Copyright Office and consistent with procedures under other compulsory licenses. Yet these simple interim rules would be sufficient to allow services that are prepared to assume the business risk as to the classification of their activities, and as to royalty rates, to launch digital music services in the near term. At the same time, they would preserve the rights and legal arguments of both legitimate digital music services and musical work copyright owners, and allow the compensation of musical work copyright owners, if it is determined that such compensation is required by existing law, as soon as royalty rates are determined.

[5] As a representative of NMPA recently recognized, digital music services have the ability to keep detailed records of which recordings are being streamed or delivered to consumers, which would allow them to account to copyright owners when royalty rates finally are determined. *See* Responses of NMPA to Senators' Questions (attached as Exhibit 3) at 4-5.

IV. THE COPYRIGHT OFFICE HAS THE POWER TO ENGAGE IN A RULEMAKING TO DETERMINE HOW ON-DEMAND STREAMS AND LIMITED DOWNLOADS SHOULD BE CLASSIFIED UNDER SECTION 115

As RIAA described in its initial comments, the Copyright Office would be well within its authority to engage in a substantive rulemaking to classify certain activities for the purposes of the Section 115 license, and also in promulgating the interim procedural rules described above.

In our initial comments, we described at length the Copyright Office's plenary authority to interpret and make rules regarding the various compulsory licenses it administers. *See* RIAA Comments at 25-28. That authority is broad and derives from multiple sources. Most important, Section 702 of the Copyright Act specifically gives the Office the power to address matters just such as these.[6] NMPA was the lone commenting party to object to the Copyright Office's power to issue rules related to the questions raised in the Notice. It cites no substantial authority in support of its objection other than a 1998 petition by NMPA and the Songwriters' Guild of America in which RIAA joined. The particular quotes NMPA pulls from that petition are taken out of context. However, in any event, that petition is not an authority that should outweigh the significant authority cited in our initial comments in this proceeding. Since we joined in

[6] Even if that were not the case, it is not necessary for Congress specifically to authorize agencies to engage in rulemaking. That authorization is contained in the Administrative Procedure Act. *See Five Flags Pipe Line Co. v. U.S. Dep't of Transp.*, No. 89-0119 JGP, 1992 WL 78773, *3 (D.D.C. Apr. 1, 1992). Moreover "[i]t is well established that an agency charged with a duty to enforce or administer a statute has inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." *Prod. Tool Corp. v. Employment and Training Admin., U.S. Dep't of Labor,* 688 F.2d 1161, 1166 (7th Cir. 1982).

that petition, the Office has even more firmly confirmed, in the context of the Section 114 license, the scope of its authority to determine whether certain activities are within the scope of the compulsory licenses it is charged with administering. *See* Public Performance of Sound Recordings, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (to be codified at 37 C.F.R. pt. 201).

Our initial comments also examined in detail the Office's specific authority to issue the interim procedural rules described above, and described why they are consistent with law. *See* RIAA Comments at 19-21, 23-25. In short, we believe that these interim procedural rules are specifically authorized by Section 115(c)(3)(D), which requires the Librarian of Congress to "establish requirements by which copyright owners may receive reasonable notice of the use of their works under [§ 115]," and by Section 115(b)(1), which authorizes the Register to prescribe regulations as to the "manner of service" of notices of intention. Furthermore, we note that Congress specifically contemplated that a CARP might establish terms that deviate from the statutory procedures if they "are not readily applicable to the new digital transmission environment." S. Rep. 104-128 at 98.

Here, some might argue that the Office is presented with a conflict between various statutory provisions. On the one hand, Section 115(a)(1) provides that the scope of a mechanical license is to make and distribute phonorecords (without any limitation as to configuration or mode of distribution), Section 115(c)(3)(A) provides that a compulsory license includes the right to make DPDs, and Section 115(c)(4) provides that a compulsory license includes the right to engage in transactions in the nature of rental, lease or lending. Yet on the other hand, Section 115(c)(3)(5) provides for the timing of payments, and payments clearly cannot be made at those times when no royalty rate has

been determined. Similarly, Section 115(b)(1) juxtaposes requirements of service and filing, which arguably might suggest that service cannot be accomplished by means of filing. However, that same provision authorizes the Register to prescribe regulations concerning the manner of service, and even if that provision could be read as limiting the Office's discretion to define the manner of service to include filing, the provisions of Section 115(c)(3)(D) confer on the Office the power to determine notice requirements independent of any such limitation in Section 115(b)(1). RIAA believes that these provisions can be read consistent with one another to allow the interim procedural rules we have requested.

But even if these statutory provisions were inconsistent, it is the duty of the Office, as administrator of the Copyright Act's compulsory licenses, to resolve these inconsistencies. If it does so, courts should defer to its interpretation of the Copyright Act. *See Cablevision Sys. Devel. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608-609 (D.C. Cir. 1988) (court must defer to the Copyright Office's reasonable interpretation of a compulsory licensing provision in the Act given that it "certainly has greater expertise in such matters than do the federal courts."); *SBCA v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994) (court must defer to Copyright Office statutory interpretation "so long as 'the agency's answer is based on a permissible construction of the statute.'").

In determining whether to implement the interim rules we have requested, the Office must interpret the Copyright Act in a sensible manner intended to achieve the intentions of Congress. The Office should avoid any interpretation of the Copyright Act that is clearly contrary to the will of Congress. This would be so even if some of the

literal language of the Act could be perceived as inconsistent with our proposed interim rules:

> [A]lthough it is generally unnecessary to look beyond the language of a statute to arrive at the legislative purpose and intent, where different interpretations are urged, a court must look to reasons for the enactment of the statute and the purposes to be gained by it and construe the statute in the manner which is consistent with such purpose. A statute should not be read literally where such a reading is contrary to its purposes.
>
> The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to allow a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read to conform to the spirit of the act.

2A Norman J. Singer, *Sutherland Statutory Construction* § 46.07 (5th ed. 1992) (footnotes omitted).[7] To determine the intent of Congress, it is necessary to investigate the context of the statute and its legislative history. *See, e.g., Heppner v. Alyeska Pipeline Serv. Co.,* 665 F.2d 868, 872-73 (9th Cir. 1981).

Here, as members of Congress have recently expressed[8] and is also evident from the legislative history, the DPRA was intended by Congress to enable the "celestial

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[7] *See also City of Piqua v. Federal Energy Regulatory Comm'n,* 610 F.2d 950, 953 (D.C. Cir. 1979) (affirming agency action over objections based on literal interpretation of statute in deference to "the policies underlying the Act" and agency interpretation thereof); *Heppner v. Alyeska Pipeline Serv. Co.,* 665 F.2d 686, 872 (9th Cir. 1981) ("[T]he literal application of statutes" sometimes may cause "absurd results." An absurd result "from a drafting error" that is "outside the intent of Congress" "is usually subject to judicial cure.").

[8] *See* Statement of the Honorable Howard Hyde before the House Judiciary Subcommittee on the Courts, the Internet and Intellectual Property, May 17, 2001 (Exhibit 1) ("At the time I believed, and I still believe, that the DPRA gave record companies and online services whatever rights they may need to make reproductions in the operation of digital music services.").

jukebox" to "permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible." *See* S. Rep. 104-128 at 14 (1995). That is precisely what digital music services propose to do through On-Demand Streams and Limited Downloads. The Copyright Office should avoid any interpretation of Section 115 that would render the statute ineffective at achieving its intended purpose.

The Office has taken just such a common sense approach to interpreting the Copyright Act in other situations. Perhaps most significantly, the Office has adopted the regulation at 37 C.F.R. § 251.63(b), allowing it to adopt compulsory license royalty rates in a rulemaking proceeding, without convening a CARP, when there is no dissent. Such a rule has no explicit basis in the text of the Copyright Act, and is arguably inconsistent with the various statutory requirements for convening a CARP. *See, e.g.,* 17 U.S.C. § 803. Yet Congress later specifically indicated its approval of this procedure, in the specific context of Section 115 no less, finding that "[i]f an agreement as to rates and terms is reached . . . it would make no sense to subject the interested parties to the needless expense of an arbitration . . . ." S. Rep. 104-128 at 40 (1995).

In another music-related context, in modifying a CARP determination, the Office appointed RIAA as a collective to receive payments on behalf of all sound recording copyright owners under the Section 114 statutory license, rather than requiring payments to each copyright owner individually, and imposed various regulations on RIAA, in the absence of any suggestion of such an arrangement in the text of Section 114, because that was necessary to effectuate Section 114. *See* 37 C.F.R. § 260.3(e). Likewise, the Office has retroactively established royalty rates under both the Section 111 and Section 118 compulsory licenses, notwithstanding the lack of any suggestion in those provisions that

it might do so. *See* Adjustment of Cable Statutory License Royalty Rates, 65 Fed. Reg. 64,622 (Oct. 30, 2000) (to be codified at 37 C.F.R. pts. 201 and 256); Noncommercial Educational Broadcasting Compulsory License, 63 Fed. Reg. 49,823 (Sept. 18, 1998) (to be codified at 37 C.F.R. pt. 253).

Turning to the details of our proposed interim rules, the first three proposals (listed above on pages 9-10) all clarify that deferring the determination of iDPD and rental royalty rates did not exclude the iDPD configuration and rental mode of distribution from the broad scope of Section 115. In the peculiar situation in which we find ourselves, absent any royalty rates for iDPDs and rentals, choosing to subordinate the payment provisions of Section 115 to the broad license grants contained in Section 115 cannot require any greater power, or be any more at odds with the language of Section 115, than the initial decisions not to determine those rates. Section 115 uses mandatory language to require that a CARP be convened to determine the iDPD royalty rate, 17 U.S.C. § 115(c)(3)(D), and that rental regulations be promulgated, 17 U.S.C. § 115(c)(4). Yet in each case the Office chose not to do so. If those decisions were within the authority of the Office and consistent with law (and we believe they were), it must be within the authority of the Office and consistent with law now to clarify that those decisions do not have the effect of nullifying the compulsory license enacted by Congress as to the iDPD configuration and rental mode of distribution.

The Office also would be within its authority and acting consistent with law in adopting our proposal to clarify on an interim basis that combined notices of intention covering more than one work may be served by filing and publication rather than certified or registered mail as presently required by 37 C.F.R. § 201.18(e)(2).

Section 115(b)(1) specifically authorizes the Register to prescribe regulations as to the "manner of service" of notices of intention, and the combination of filing and publication is used as a means of service in other contexts (including specifically the context of federal agencies). *See, e.g.*, *Fogel* v. *Zell*, 221 F.3d 955, 963 (7th Cir. 2000) (Posner, J.) ("Notice by publication may thus be entirely appropriate when potential claimants are numerous, unknown, or have small claims, . . . all circumstances that singly or in combination may make the cost of ascertaining the claimants' names and addresses and mailing each one a notice of the bar date and processing the responses consume a disproportionate share of the [funds at issue]"); *Lakeshore Broad., Inc.* v. *FCC*, 199 F.3d 468, 474 (D.C. Cir. 1999) (agency's publication of notice of filing fee due date in *Federal Register* was sufficient); Fed. R. Civ. P. 5(c) (permitting service among large numbers of defendants by filing with court). *See generally Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (holding that the propriety of a particular form of notice depends on the "peculiarities" and "practicalities" of a given case).[9] If this were not sufficient, an interpretation of Section 115(b)(1) to require personalized service, such as by mail or process server, would preclude Section 115 from being able to achieve its intended purpose of enabling the celestial jukebox. The Office should not limit its ability to achieve Congress' intent by adopting such a limited construction of Section 115.

[9] In general, "notice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. In this situation, the "peculiarities" and "practicalities" do not indicate a need for personal notice. Musical work copyright owners cannot object to a compulsory licenses, nor can they invoke a process to stop the issuance of the compulsory license. And they will in due course receive individualized accountings for the use of their works.

V. THE COPYRIGHT OFFICE SHOULD NOT PURSUE OTHER ISSUES THAT WOULD EXPAND ITS RULEMAKING

The comments raised by other commenting parties, most notably the Digital Media Association ("DiMA"), do not warrant an expansion of a Copyright Office rulemaking to include the issues of fair use, the scope of Section 112, or the need for congressional action. The rulemaking contemplated by the Copyright Office in the Notice, as well as the adoption of practicable rules for the exercise of the Section 115 license on an interim basis would be sufficient to enable the launch of legitimate digital music services. Any expansion of the rulemaking into other areas would inevitably lead to delay in the rulemaking, and would unnecessarily bog the Copyright Office down in issues not within its role or expertise.

DiMA's comments ask the Copyright Office to consider a question that is fundamentally outside the role of the Copyright Office: whether the making of certain reproductions in the operation of digital music services should be considered "fair use" under Section 107 of the Copyright Act. As stated in RIAA's initial comments, such a determination is solely within the power of the federal courts. In contrast to Section 115 and the other statutory compulsory licenses, Section 107 is essentially the codification of the judicial doctrine of fair use. *See* RIAA Comments at 29-30. Whereas the compulsory license of Section 115 explicitly requires Copyright Office administration, no role for the Copyright Office is contemplated with regard to Section 107. Moreover, the fact-based nature of fair use determinations make such a rulemaking infeasible. Accordingly, the Copyright Office should not undertake the fair use determination requested by DiMA.

There is also no reason for the Copyright Office to entertain the question of whether Sections 112 and 115 need to be expanded legislatively to cover reproductions

made during the operations of a legitimate digital music service. Even NMPA has acknowledged "that the existing section 115 compulsory license provides an adequate framework for Napster and other Internet distributors of music to secure licenses at a reasonable rate."[10] Thus, there is no need for additional legislation to provide the legal foundation for services to deliver On-Demand Streams and Limited Downloads.

CONCLUSION

RIAA thanks the Copyright Office for its willingness to consider a rulemaking to determine the status of On-Demand Streams and Limited Downloads. Although the RIAA fully intends to continue discussions with music publishers in the hope of finding a negotiated solution, we cannot emphasize enough the importance of the Copyright Office's taking the action we have requested to enable the proliferation of legitimate digital music services to satisfy consumer demand for music on the Internet.

Dated: May 23, 2001

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[10] Response of NMPA to Senators' Questions (attached as Exhibit 3) at 2.

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