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Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

In the Matter of	)	Docket No. RM 2000-7
MECHANICAL AND DIGITAL PHONORECORD DELIVERY COMPULSORY LICENSE	)	

COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION
AND THE SONGWRITERS' GUILD OF AMERICA
IN OPPOSITION TO THE PROPOSED RULEMAKING PROCEEDING

The National Music Publishers' Association ("NMPA") and the Songwriters Guild of America ("SGA") submit these comments in response to the Copyright Office's Notice of Inquiry dated March 9, 2001 ("Notice") concerning whether to conduct a rulemaking proceeding to address the application of copyright law to various types of digital transmissions of musical works.

NMPA and SGA respectfully submit that such a rulemaking would exceed the authority of the Copyright Office and very likely harm the development of legitimate music delivery services on the Internet. Congress has expressed a strong preference for the resolution of these issues through voluntary private negotiations. Such negotiations have already led to the licensing of many legitimate Internet music services and represent the best way to accommodate evolving technologies and business models together with the legal rights of music creators.

The Commenting Parties

Founded in 1917, NMPA is the principal trade association of music publishers in the United States. NMPA's members – over 800 today – own or control the overwhelming majority of musical compositions available for licensing in the United States. NMPA's wholly owned licensing subsidiary, The Harry Fox Agency, Inc. ("HFA") is an industry service organization that represents over 27,000 publisher-principals, which collectively own more than 2.5 million copyrighted musical works. Established in 1927, HFA serves as agent on behalf of its publisher-principals in licensing copyrighted musical compositions for reproduction and distribution as physical phonorecords (CDs, cassette tapes and phonograph records) and over the Internet as digital phonorecord deliveries ("DPDs").

SGA is the nation's oldest and largest organization run exclusively by and for songwriters. SGA is an unincorporated voluntary association of approximately 5,000 songwriters and songwriter estates throughout the United States of America. Among other services, SGA provides licensing, royalty collection and audit services on behalf of its members.

I.

THE MATTERS RAISED BY THE RULEMAKING PETITIONS ARE OUTSIDE THE STATUTORY AUTHORITY OF THE COPYRIGHT OFFICE

In its petition to the Copyright Office of November 20, 2000, the Recording Industry Association of America ("RIAA") requested that the Copyright Office commence a rulemaking proceeding to address

- Whether what it refers to as "on-demand streams" are incidental DPDs covered by the section 115 compulsory license; and

- Whether the computer server copies necessary to transmit "on-demand streams" are included in the section 115 compulsory license.

Notice of Inquiry, Mechanical and Digital Phonorecord Delivery Compulsory License, 66 Fed. Reg. 14099, 14100 (2001)(hereinafter "Notice").

Responding to the RIAA petition, MP3.com, Inc. ("MP3.com") asked the Copyright Office to address in any such proceeding the additional matters

- Whether distinctions can and should be drawn among "streaming audio services" depending upon whether consumers have previously purchased the streamed music;

- The effect that the Copyright Office's decision to defer rates for incidental DPDs has on services currently streaming music; and

- Possible amendments to the current procedural regulations for invoking and complying with the section 115 license with respect to incidental DPDs.

Id.[1]

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[1] Two additional organizations, Napster, Inc. ("Napster") and the Digital Media Association ("DiMA") have also responded to the RIAA petition, urging that the Copyright Office stay its hand in favor of legislative action. (*Id.* at 14100--01)

DiMA further recommends that the Copyright Office consider the status of temporary copies of musical works in the context of its section 104 study. This proposal is misplaced because the section 104 study requires analysis of "the development of electronic commerce and associated technology on the operation of sections 109 and 117" of the Copyright Act. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2861 (1998). Section 109 (first-sale doctrine) and section 117 (archival copies of computer programs) are not germane to the question of what digital music services constitute DPDs under section 115. As such, DiMA's proposal is merely an attempt to have the issue of "temporary copies" boot-strapped into a study that Congress explicitly limited to the topics described above. The Office should accordingly reject the DiMA proposal.

In turn, in its Notice, the Copyright Office has framed *no fewer than thirty questions* – ranging from "How should [incidental DPD] be defined?" to "Are there difficulties in determining whether the subscriber actually has purchased a phonorecord containing the music that is being streamed?" to "If it is determined that streaming does result in the creation of incidental DPDs, is there liability for parties that have been engaging in streaming?" – that might need to be resolved in connection with the proposed rulemaking proceeding. It is apparent from the very concerns raised by the Copyright Office itself that such a proceeding would invade the province of Congress and the courts.

Indeed, as discussed below, the architecture of section 115 indicates that voluntary negotiations are the preferred method for resolving disputes, setting rates and terms, and determining which commercial services are covered by the statutory provisions. Congress decided that it did not want to micromanage this growing and complex industry, and it concluded that the Copyright Office should not do so by regulation, either.

A. The Copyright Act Provides No Basis to Engage in the Proposed Rulemaking

The matters raised by RIAA's and MP3.com's requests for rulemaking (hereafter "rulemaking petitions") are beyond the statutory authority of the Copyright Office to resolve. Indeed, when similar questions concerning streaming activities came up during the 1997-1998 DPD rate adjustment proceedings, RIAA joined NMPA and SGA in arguing that:

> [T]he determination of whether streaming media activities are exempt from the Copyright Act can be made only by

> Congress or the federal courts. It is not within the authority or jurisdiction of the Copyright Office, or a CARP, to determine whether streaming media activities are "DPDs" within the meaning of section 115 of the Copyright Act or whether such activities infringe the exclusive rights of owners of copyrights in musical works under the Copyright Act.

(Memorandum of NMPA, SGA and RIAA Regarding Disposition of the Digital Phonorecord Delivery Rate Adjustment Proceeding (July 21, 1998) at 2 (submitted to the Copyright Office in *In the Matter of DPD Rate Adjustment Proceeding*, No. 96-4)("Joint Submission").). The Joint Submission further observed that:

> [T]here simply is no support for the proposition that a CARP, or the Copyright Office, may decide whether certain activities – in this instance, streaming media – constitute copyright infringement. That determination is exclusively reserved by the Copyright Act for Congress and the federal courts. It plainly exceeds the scope of the authority of either the Copyright Office or a CARP.

Id. at 3. NMPA and SGA submit that the principles articulated in the Joint Submission still hold true.

Contradicting the position it took in 1998, RIAA now suggests that section 702 of the Copyright Act provides a statutory basis for the Copyright Office to act on its petition. (RIAA Petition at 12.) We do not believe that section 702 endows the Copyright Office with such wide-ranging authority. Rather, that section merely states: "The 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).

A reasonable construction of section 702 thus would require that, in order for the Copyright Office to act in this area, there be some indication in the Copyright Act that it is in fact the duty of the Register (or Librarian of Congress) to determine whether

particular activities, technologies and/or business models involve the making or distribution of DPDs. But Congress declined to confer such authority on the Copyright Office.

Section 115 speaks at length about the Librarian's responsibility to initiate voluntary negotiation proceedings, convene Copyright Arbitration Royalty Panels and establish "requirements by which copyright owners may receive reasonable notice of use of works." 17 U.S.C. § 115(c)(3)(C)-(D)). It does not, however, suggest that the Copyright Office is responsible for further defining (or redefining) the term "digital phonorecord delivery," and no other portion of the Copyright Act does so.

Indeed, rather than leave it to agency rulemaking, Congress itself provided a carefully drawn definition of "digital phonorecord delivery" in section 115(d):

> *Definition.*—As used in this section, the following term has the following meaning: A "digital phonorecord delivery" 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 of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. 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.

Appropriately enough, it is Congress' definition that is incorporated verbatim into the implementing regulations. *See* 37 C.F.R. § 255.4 ("Definition of digital phonorecord delivery").

In contrast to the expressly defined term "digital phonorecord delivery," Congress did not create a statutory classification known as "incidental digital

phonorecord deliveries." *Indeed, Congress does not even use the term "incidental digital phonorecord delivery" in section 115.* Congress merely directed that any "rates and terms" for DPDs established through voluntary negotiations or arbitration proceedings "distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general." 17 U.S.C. § 115(c)(3)(C).

Had Congress wanted to create pre-defined, static categories known as "incidental DPDs" and "general DPDs," it could have done so. Instead, in employing the concepts "incidental" and "general" in connection with licensing rates and terms -- which, of course, are subject to periodic adjustment -- Congress recognized that the distinction of "incidental" versus "general" could only be made in the factually specific context of a rate-setting negotiation or CARP proceeding and with respect to the particular business models and technologies known at that time. *See* 141 Cong. Rec. S11957 (Aug. 8, 1995). The legislative history for section 115 supplies a number of illustrative examples of DPDs that might be considered "incidental" to the making of transmissions constituting DPDs, but does not suggest that an exhaustive list would be possible or at all necessary to create. *Id.* Congress' approach clearly demonstrates that it sought to leave the "incidental" and "general" concepts open-ended and subject to interpretation through voluntary negotiations or arbitration *based upon the specific activities and technologies at issue.*

Nor did Congress instruct or authorize the Copyright Office to make comprehensive prior determinations concerning which DPDs were incidental and which were general as a prerequisite to a rate-setting proceeding. To the contrary, Congress

expressly mandated that *such distinctions be made through voluntary negotiation or by a CARP*. 17 U.S.C. § 115(c)(3)(C)-(D).

When Congress wanted the Librarian to act on aspects of the DPD licensing regime, it specifically instructed the Librarian to do so, in the sections cited above. If it had wanted the Copyright Office to pass on what activities constitute DPDs, it could also have provided a mechanism for the Office to do so. Indeed, it would seem that any such grant of authority would had to have been in the nature of ongoing review, for new technologies and business models appear and change every day. Plainly, Congress included no such provision in section 115.

B. There Is No Legal Precedent to Support Such Rulemaking

RIAA cites *Satellite Broadcasting and Communications Association v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994) and *Cablevision Systems Development Co. v. Motion Picture Association of America, Inc.*, 836 F.2d 599, 608-09 (D.C. Cir. 1988), as authority for the proposed rulemaking proceeding. (RIAA Petition at 12.) Neither of these cases – which concerned section 111 of the Copyright Act rather than section115 – provides the Copyright Office with a basis to act here.

In *Satellite Broadcasting*, the issue was whether the Copyright Office could decide whether satellite carriers were "cable systems" within the meaning of section 111. In enacting section 111, Congress did not contemplate the entry of satellite carriers into the cable industry. *Satellite*, 17 F.3d at 348. Thus, the court upheld the Copyright Office's rule excluding satellite carriers from the compulsory licensing regime under a *Chevron* analysis. *Id.*

Satellite Broadcasting is unlike the situation at hand, in two important respects. First, the proposed rulemaking here does not involve providing a "yes or no"

answer to a single, discrete question left unanswered by Congress (are satellite carriers in or out?), but rather necessarily would encompass the exploration and determination of myriad issues and sub-issues, as revealed in the Notice and rulemaking petitions. Second, as explained above, unlike in *Satellite Broadcasting*, Congress did not fail to anticipate the concerns raised in the rulemaking petitions. Rather, it provided a carefully crafted definition of "digital phonorecord delivery" and expressly directed that the application of that definition to existing and future activities be determined *through voluntary negotiations.*

Similarly, *Cablevision* does not support the wide-ranging agency action proposed here. In *Cablevision*, the D.C. Circuit upheld the Copyright Office's regulatory interpretation of the following phrase in the cable compulsory license embodied in section 111 of the Copyright Act: "'specified percentage[] of the gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters.'" 836 F.2d at 601 (quoting 17 U.S.C. § 111(d)(1)(B)). Again invoking *Chevron*, the court deferred to the Copyright Office's expertise concerning how "gross receipts" should be calculated. *Id.* at 607.

Cablevision does not support the proposed rulemaking here because, unlike the many issues presented here, the regulatory action under review in *Cablevision* addressed a narrow issue that was never considered by Congress. *Id.* But equally significant, in enacting section 111, Congress had instructed that "cable systems deposit their compulsory license royalty fees with the Register of Copyrights, *'in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal . . ., prescribe by regulation.*'" *Id.* at 608 (quoting 17 U.S.C. § 111(d)(1) (emphasis added).) Unlike the issues presented here, then, Congress had expressly

provided a mechanism for the regulatory action at issue. The relevance of the *Cablevision* holding to the section 115 compulsory license is perhaps best characterized by the *Cablevision* court itself, which expressly stated: "Our holding on deference due the Office does not extend beyond the bounds of its interpretation of section 111 . . . . " *Id.* at 608.

Because section 115 offers no basis for the Copyright Office to dictate which activities constitute what kinds of DPDs -- and in fact can only be read to suggest that Congress *did not* expect for the Copyright Office to act in this regard -- the Office is without authority to engage in rulemaking on these topics.

II.

IN ANY EVENT, SUCH A RULEMAKING PROCEEDING WOULD BE INADVISABLE AND VERY LIKELY HARMFUL TO THE DEVELOPMENT OF LEGITIMATE INTERNET MUSIC SERVICES

A. It Would Not Be Possible to Fashion Timely Regulations of General Applicability

Even assuming *arguendo* that the Copyright Office had authority to issue regulations, it should decline to do so because rapidly changing technology would soon make any rule obsolete.

The music services raised in the rulemaking petitions are the result of new technologies and business models related to or reliant on the Internet. Digital technologies tend to arise and mutate with blinding speed – indeed the accelerated pace of technological change is the hallmark of the Internet economy. Were it to attempt to regulate in this area, the Copyright Office would be perpetually chasing a moving target that it could not catch. Indeed, no agency subject to the notice and comment requirements of the Administrative Procedure Act could possibly make timely

determinations on the copyright status of digital music services -- the regulatory process will always be many paces behind the latest technology or business model.

In addition, any regulations that were promulgated could have the effect of freezing technological development at whatever regulatory standard emerges from the digital services presently before the Office. It would be contrary to congressional intent to have government regulations drive technology; the opposite approach is the intended and preferable one.

The Notice asks, "Is it possible to define 'incidental DPD' through a rulemaking proceeding?" Notice at 14101. The answer to this question is no -- not through a definition of general application. As explained above, Congress chose not to create such a fixed category in section 115. Rather, it directed that those entering into voluntary agreements – or, if necessary, a CARP -- distinguish between reproductions of phonorecords "incidental" to the making of DPDs and DPDs "in general." It was thus Congress' considered judgment that the concepts "incidental" and "general" only be applied in the context of a fact-specific inquiry to establish royalty rates for actual activities engaged in or to be in engaged in by those making and distributing DPDs -- *and preferably through voluntary negotiations before resort to a CARP.*

We note that if voluntary negotiations failed to resolve the applicability of the section 115 compulsory license to a particular music service, the question could properly be addressed by a federal court. Unlike the Copyright Office in the context of a rulemaking proceeding, a court would have the advantage of a developed factual record to support its decision -- it would not be rendering a judgment in the abstract. Moreover, a court would not be called upon to render advice on a plethora of issues which are not

the subject of actual disputes and which are likely to be resolved over time through private negotiation – as Congress intended.

In addition, any rulemaking proceedings to define "incidental DPD" – which could easily consume eighteen months or more, especially in light of the appeals that would inevitably follow the Copyright Office's determination – would not likely be concluded within the time frame in which Congress desires consumers to have access to legitimate sources of online music.[2] To engage in the process proposed here would place the Copyright Office in a no-win situation: there would be numerous complex business, technological and legal issues to be resolved, which the Office undoubtedly would consider carefully. But the regulatory deliberation necessary to address the issues fully and properly would inevitably be too time-consuming to produce a result with the speed that Congress desires and American consumers demand. The Copyright Office would be exposed to criticism no matter how reasonable its actions.

Finally, if a rulemaking proceeding were to be commenced, the commercial market might defer launching new services until the regulatory uncertainty is resolved. This could have the unintended effect of slowing the launch of new services pending a ruling from the Copyright Office. While the Office presumably does not wish to control the initiation of new digital services, that is the probable result of a decision to proceed down the rulemaking path.

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[2] At a recent hearing on "Online Entertainment and Copyright Law: Coming Soon to a Digital Device Near You," Senator Hatch noted: "[A]s a music lover, as one who enjoys the best that human creativity offers, I – and fans across the country – eagerly anticipate these technological transformations the future holds." Hearing of the Senate Committee on the Judiciary Regarding Online Music (Apr. 3, 2001).

B. Such a Proceeding Could Open the Door to Unlimited Future Requests to Elaborate on Terms Already Defined in the Copyright Act

Additionally, if it were to act on the rulemaking petitions, the Office would set a troubling precedent. We are not aware of any Copyright Office regulation that elaborates further on a term that is already defined in the Copyright Act. Rather, regulations of the Office refer to the statutory definition of any such term.[3] There is thus no precedent for the Copyright Office to elaborate on the defined term "digital phonorecord delivery." If it were to do so, it would be inviting a petition from any other party seeking a regulatory explication of any of the other forty-odd terms defined in section 101 of the Copyright Act or other terms defined elsewhere in the Act. The result could be an avalanche of requests for regulatory "clarifications" of terms Congress has already defined – submitted to gain an advantage in commercial negotiations and other business dealings. Surely Congress never intended that the Copyright Office serve in such a wide-ranging advisory capacity. Such a situation would introduce *greater* uncertainty with respect to the application of copyright law to various businesses, both online and offline.

Congress deliberately placed its trust in voluntary negotiations to resolve technical and business issues as they relate to the determination of rates and terms, and that is why voluntary negotiations are the proper response to the questions raised by the pending petitions. To proceed down a rulemaking path would not be faithful to Congress' intentions.

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[3] *See, e.g.*, 37 C.F.R. § 202.3(a)(2)("For the purposes of this section, the terms audiovisual work, compilation, copy, derivative work, device, fixation, literary work, motion picture, phonorecord, pictorial, graphic and sculptural works, process, sound recording, and their variant forms, have the meanings set forth in section 101 of title

C. Music Publishers Are Already Licensing Their Works for Internet Delivery By Various Means

Lastly, we note that music publishers *are* negotiating licensing agreements with Internet music services, as Congress intended. Acting through HFA, the licensing arm of NMPA, HFA, music publishers have entered into *over thirty licensing agreements* for the online use of copyrighted musical works in a variety of business models and technologies, including streaming. Among other services, publishers have licensed the Internet music providers EMusic.com and MP3.com (the latter entering into a negotiated agreement in the wake of infringement litigation).

This is in keeping with the process of voluntary negotiation that Congress clearly intended take precedence in setting rates and terms for online music services. While RIAA complains of "uncertainty" concerning the licensing status of the services its member companies wish to offer (RIAA Petition at 2), *in fact the record companies could eliminate much of that "uncertainty" by revealing what it is they intend to do.* Although in recent weeks the major labels have announced two significant Internet music ventures – MusicNet and Duet – they have yet to disclose any details concerning the nature of the services to be offered. *See* Bob Tedeschi, *E-Commerce Report*, N.Y. Times, April 23, 2001, at C7. What technologies will be used? What business models will be followed? What rates and terms will be offered to consumers and Internet services? . . . Record companies are in the best position to move the licensing process forward by clarifying the terms of the services they intend to offer.

17."); 37 C.F.R. § 255.4 (adopting Congress' definition of "digital phonorecord delivery").

CONCLUSION

For the foregoing reasons, in response to the Copyright Office's Notice of Inquiry dated March 9, 2001, NMPA and SGA respectfully submit that the Copyright Office should decline to conduct a rulemaking proceeding as requested in the filings of RIAA and MP3.com.

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Respectfully submitted,

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