BEFORE THE

COPYRIGHT OFFICE LIBRARY OF CONGRESS Washington, D.C.

Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries	Docket No. RM 2000-7

REPLY COMMENTS OF NEW MEDIA RIGHTS

New Media Rights submits the following reply comments in response to the Copyright Office's Notice of Proposed Rulemaking, published at 73 Fed. Reg. 137 (July 16, 2008) (proposing revision of 37 CFR Part 201 and 255) as well as in response to comments submitted by the various other parties. In its Notice, the Copyright Office seeks comment on proposed amendments to its regulations to clarify the scope and application of the Section 115 compulsory license to make and distribute phonorecords of a musical work by means of digital phonorecord deliveries.

In particular, these comments address the treatment of buffer reproductions made by transmission services within both server-end and recipient-end systems.

I. COMMENTING PARTY

New Media Rights (NMR) is a project of the non-profit Utility Consumers' Action Network. NMR provides legal information and assistance to emerging artists, software and web developers, and creators of all types on the legal issues surrounding new media (copyright, licensing, and trademark law, particularly fair use, parody, mash-ups, sampling, re-mixing, and open source licensing). NMR seeks to facilitate the creation of new and exciting content that is not currently supported or funded by mainstream business models.

NMR seeks to expose artists to open-source creative tools, licensing options, and new media distribution alternatives, while educating users and creators on their rights under current copyright/IP law. NMR encourages the use of open-source technology and creative commons licenses out of our belief that the public benefits from less restrictive and more flexible content rights.

NMR believes no one should hold a monopoly over creativity, and seeks to encourage a vibrant grassroots, non-hierarchical creative community that provides alternatives to traditional, hierarchical media.

Further information regarding New Media Rights' mission and activities can be obtained at http://www.newmediarights.org.

II. SUMMARY OF REPLY COMMENTS

The substantial differences in opinion between commenters regarding the treatment of emerging digital technologies under copyright law highlight the need for fact-specific, case-by-case analysis of these matters in the courts.

We agree with the other public interest commenters that a narrower 'safe harbor' approach to the scope of Section 115 will avoid unnecessary confusion and controversy in the copyright treatment of emerging digital technologies.

II. THE SUBSTANTIAL DIFFERENCES IN OPINION BETWEEN COMMENTERS REGARDING THE TREATMENT OF EMERGING DIGITAL TECHNOLOGIES UNDER COPYRIGHT LAW HIGHLIGHT THE NEED FOR FACT-SPECIFIC, CASE-BY-CASE ANALYSIS OF THESE MATTERS IN THE COURTS.

Despite the clarity of the recent Second Circuit decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 2008 WL 2952614, 3 (C.A.2 (N.Y.), 2008), some continue to misunderstand the plain language of the Copyright Act as well as precedent related to the treatment of digital information distribution and reproduction rights under the Act. The persistent differences in opinion on these matters demonstrate the need for fact-specific and case-by-case analysis by the courts as opposed to an attempt by the Copyright Office to create a bright-line rule which will only lead to further misunderstanding and confusion.

The most striking example of the confusion surrounding this matter is the attempt by parties in favor of the proposed rulemaking to wish away the 'duration' requirement from the analysis of buffer reproductions.[1] In their comments, the National Music Publishers' Association ("NMPA"), among others, attempts to argue that "[t]he Second Circuit's novel "duration" requirement is unsupported by the Act or existing judicial interpretation."[2]

The confusion seems to persist as a result of their solitary focus on the definition of "copies" under Section 101 of the Copyright Act without considering the relationship between the definitions of "copies" and "fixed." While it is true that copies must only be able to be "perceived, reproduced, or otherwise communicated," a copy of a work only exists if it is "fixed."[3] Fixation requires that the work be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory

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[1] *Comments of the National Music Publishers' Association, Songwriters' Guild of America, Nashville Songwriters Association International and Association of Independent Music Publishers in Response to Notice of Proposed Rulemaking*, Docket No. RM 2000-7, August 28, 2008, at 10.
[2] Id.
[3] 17 U.S.C. § 101

duration"[4] In essence, the NMPA is suggesting as others unsuccessfully before them[5] that mere embodiment of a work implicates copyright liability, whereas the plain language of the Act suggests otherwise.

Ironically, just as the NMPA attempts to write out the duration requirement from the Copyright Act, they attempt to add one of their own.[6] The NMPA attempts to create a sort of "purpose" requirement in their attempt to distinguish the Second Circuit's *Cablevision* decision from the creation of digital buffer reproductions when they said,

> "Indeed, unlike in the *Cablevision* case, where the buffer copies were automatically created simply to facilitate a user-controlled storage process - rather than for purposes of communication or human perception - buffer copies made during the interactive streaming process comprise the very product that is delivered to the end user: a complete sound recording of a musical work."

One could agree or disagree with this distinction, but the conclusion would be dependent on the specific features of an interactive streaming process or other digital distribution technology. NMPA's success in highlighting the vast array of digital media distribution technologies ends up undermining their arguments for bright line rules preempting judicial consideration. Their arguments distinguishing various digital distribution technologies and new media simply reinforces the prudent suggestions of the other public interest commenters regarding the need for a case-by-case analysis.

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[4] Id.
[5] *Cartoon Network*, 2008 WL 2952614 at 5.
[6] *Comments of the National Music Publishers' Association* at 12.

IV. NEW MEDIA RIGHTS AGREES WITH OTHER PUBLIC INTEREST COMMENTERS THAT A NARROWER 'SAFE HARBOR' APPROACH TO THE SCOPE OF SECTION 115 WILL AVOID UNNECESSARY CONFUSION AND CONTROVERSY IN THE COPYRIGHT TREATMENT OF EMERGING TECHNOLOGIES.

A bright line rule such as the one proposed which attempts to clarify Section 115 by redefining the reproduction and distribution rights for the transmission of digital information will cause unnecessary confusion and controversy. For this reason, we agree with other public interest commenters that the Copyright Office's goals would be better served through an approach which allows all "relevant digital reproduction and distribution rights in musical works" to be licensed as opposed to "specifying which reproduction and distribution rights in musical works must be licensed."[7]

This approach will dispel any confusion for potential distributors as to what they can or cannot license without unnecessarily imposing copyright liability on all reproductions and distributions of digital information regardless of their duration. As the parties favoring this approach have said, "[c]ompanies 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."[8] The recognized ability to take licenses and pay royalties voluntarily will act as a safe harbor for those in or entering the music distribution industry, allowing the court to rightfully decide on a case-by-case basis whether those who chose not to purchase licenses are violating the distribution and reproduction rights of copyright holders.

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[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*, Docket No. RM 2000-7, August 28, 2008 at 7.

[8] Id.

V. CONCLUSION

We strongly reiterate our position that the Copyright Office should reject any approach which seeks to eliminate the durational requirement from an analysis of buffer reproductions. Such reasoning would have damaging implications for digital transmission technology, as all digital transmission technology requires buffering.[9] The fact-sensitive nature of these matters would be better served through case-by-cases analysis in the courts as opposed to one-size-fits-all rule. A measured approached which allows an industry standard of purchasing licenses as a safe harbor from infringement would best satisfy the need for clarity while avoiding confusion, controversy, and a chilling effect on technological innovation.

Respectfully submitted,

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[9] See *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F.Supp.2d 607, 613 (S.D.N.Y. 2007).