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Washington, D.C.

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GENERAL COUNSEL
OF COPYRIGHT

In the Matter of

Mechanical and Digital Phonorecord
Delivery Compulsory License

Docket No. RM 2000-7

REPLY COMMENTS OF MP3.COM, INC.

MP3.com, Inc. ("MP3.com"), by its attorneys, hereby submits its reply comments in response to the Copyright Office's Notice of Inquiry in the above-captioned proceeding.¹ As MP3.com demonstrated in its initial comments, and as we discuss in these reply comments, it not only is necessary and appropriate for the Copyright Office to conduct a rulemaking proceeding to clarify and implement the Section 115 "mechanical" compulsory license as it applies to "incidental digital phonorecord deliveries" ("IDPDs"), but it also is necessary and appropriate for the Office to take immediate action by adopting interim licensing provisions that will permit online music service providers to deliver streaming audio to consumers while protecting the interests of copyright owners.

¹ 66 Fed. Reg. 14099 (March 9, 2001).

DISCUSSION

I. There Is a Compelling Need For The Copyright Office To Act

MP3.com's initial comments in this proceeding explained why it has become imperative that the Copyright Office promptly commence a rulemaking proceeding to clarify and implement Section 115 as it applies to IDPDs and to take the even more immediate step of establishing interim licensing procedures that can be relied upon by online music services until the issues raised in the rulemaking proceeding are resolved. As we described, the technological issues and concerns about consumer demand that previously slowed the deployment of online music services have been swept away in the past few years. Unfortunately, however, uncertainty about the application of the copyright law to various online music business models – and, in particular, uncertainty surrounding publishing rights issues – has fostered a litigious atmosphere that is impeding the fulfillment of the online music revolution. Moreover, as MP3.com's experience demonstrates, even when an online music provider attempts to operate in accordance with an expansive interpretation of the music publishers' rights, the existing marketplace licensing mechanisms are neither capable of meeting the demand for clearances in a timely fashion nor do they protect against litigation.

As MP3.com explained in its initial comments, the principal marketplace mechanism for clearing publishing rights is the Harry Fox Agency ("HFA"), which represents more than 25,000 publishers. The problem is that HFA does not represent the publishers of an unknown, but not insignificant, number of songs, including songs written by major artists. For example, an infringement action recently filed against MP3.com by Randy Newman, Tom Waits, and Ann and Nancy Wilson of the band "Heart" – artists who claim not to be represented by HFA – seeks

damages relating to the alleged copying of several songs that MP3.com licensed through HFA. In addition, the difficulties associated with marketplace licensing are evidenced by the fact that MP3.com has not yet obtained licenses for more than half of the nearly million song titles it submitted to HFA more than six months ago, due to the sheer volume of licenses requested and difficulties in matching databases.

What plainly is needed is an effective and efficient statutory license mechanism for clearing publishing rights in the online environment. As amended by Congress in 1995, Section 115 of the Copyright Act is supposed to provide such a solution. Unfortunately, however, under the Copyright Office's current rules, using Section 115 to clear music publishing rights turns out to be an even less viable option for online music providers than marketplace licensing. The problem is that while Congress drew a distinction between "incidental" DPDs and DPDs "in general," there are no rules offering any guidance as to what does or does not constitute an IDPD. Furthermore, the Copyright Office has expressly "deferred" adopting any IDPD-specific rates or terms and has not yet established a practical way for on-demand streaming services to invoke the compulsory license with respect to the hundreds of thousands of song titles that such services typically seek to offer consumers.

The problems confronting music services that would like to invoke the Section 115 compulsory license with respect to IDPDs need to be addressed now and they need to be addressed by the Copyright Office.² Waiting for Congress to "fix" Section 115 will leave those

² Even if a viable marketplace mechanism existed for obtaining all of the licenses that are needed to operate in the digital environment, it would still be necessary for the Office to adopt rules to facilitate the use of the Section 115 compulsory license by online music providers. Nothing in the history of Section 115 suggests that Congress intended for the availability of compulsory

who want to use the license in limbo for too long.³ As MP3.com urged in its initial comments in this proceeding, the Copyright Office needs to initiate a rulemaking to clarify and implement Section 115 as it applies to IDPDs. In addition to providing guidance as to what does and does not constitute an IDPD, this rulemaking will allow the Office to address the logistical problems inherent in a licensing scheme that potentially applies to millions of uses of hundreds of thousands of separately copyrighted works owned by tens of thousands of copyright owners.⁴ Moreover, in order to ensure that online music services have access to a workable compulsory license mechanism even while this rulemaking is pending, MP3.com again urges that the Office immediately adopt interim notice and recordkeeping requirements that will allow online music services engaging in on-demand streaming to invoke the Section 115 compulsory license but that will not leave copyright owners unprotected.

MP3.com's arguments regarding the need for the Copyright Office to act, both by commencing a rulemaking proceeding to clarify and implement Section 115 as it applies to IDPDs and by adopting interim licensing procedures that can be relied upon while the

licensing to turn on the feasibility of marketplace licensing.

³ Moreover, leaving it up to Congress to address the practical concerns that are impeding the compulsory licensing of IDPDs cannot be justified unless it is assumed that the 1995 amendments were intended to be ineffective – an absurd conclusion that the Office is not at liberty to reach.

⁴ In this regard, MP3.com reiterates its recommendation that the Office consider an approach to statutory licensing for IDPDs that is modeled on the cable and satellite compulsory licensing schemes – schemes that allow copyright users to give copyright owners constructive notice of the use of their works (through filings submitted to the Copyright Office) and that require copyright owners to submit claims for the royalties due them.

rulemaking proceeding is pending, are echoed in the comments filed by the Recording Industry Association of America, Inc. ("RIAA"). On the other hand, the National Music Publishers' Association and the Songwriters' Guild of America ("NMPA/SGA") jointly contend that it would be "inadvisable" for the Copyright Office to attempt to formulate rules addressing the application of Section 115 to IDPDs "because rapidly changing technology would soon make any rule obsolete." Instead, NMPA/SGA suggest that the courts be relied upon to provide a timely resolution to the issues that RIAA and MP3.com believe should be addressed by the Copyright Office.⁵

The notion that the courts can clarify and implement Section 115 more rapidly than the Office defies both common sense and the Office's own precedents.⁶ Moreover, turning to the courts almost certainly will lead to varying and conflicting results, thereby exacerbating the uncertainty that currently exists. And, of course, compared to the expert agency with responsibility for administering a variety of compulsory licenses, the judiciary is particularly ill-

⁵ NMPA/SGA also argue that "voluntary negotiations" offer a better way of resolving the issues relating to the application of Section 115 to IDPDs than the adoption of rules by the Copyright Office. While voluntary negotiations represent the preferred mechanism for establishing compulsory license rates and terms under Section 115, defining the scope of the license and establishing the process by which the license is invoked are matters more appropriately dealt with through rulemaking. Indeed, if the very scope of the license is subject to voluntary negotiation, Congress' intent to subject certain activities to compulsory licensing could effectively be nullified by private agreement.

⁶ See, e.g., *Public Performance of Sound Recordings: Definition of a Service*, Docket No. RM 2000-3B, 65 Fed. Reg. 77292, 77294 (December 11, 2000) (rejecting requests that, in lieu of adopting a clarifying rule, the Office defer to federal court litigation on the scope of the Section 114 compulsory license).

suiting to establishing the types of notice and recordkeeping requirements that are needed, both as part of an interim set of licensing procedures and as part of more permanent rules.

In short, if Congress' intent to extend the Section 115 license to online music is to be fulfilled, it is up to the Copyright Office to adopt the necessary rules clarifying what online activities require licenses and establishing procedures whereby licenses can readily be claimed and royalty payments can efficiently be calculated and distributed. Absent Copyright Office action, it is virtually certain that the uncertainty and litigation that has plagued the online music environment will continue indefinitely.

II. The Copyright Office Has the Authority To Adopt Rules Clarifying and Implementing Section 115 As It Applies To IDPDs

Congress enacted legislation extending the Section 115 compulsory license to cover IDPDs in 1995. However, the lack of clear definitional and procedural rules has frustrated the ability of online music providers to take advantage of this legislation. As a result, nearly six years after Congress acted, MP3.com is unaware of any instance in which the right to make IDPDs has been cleared using the Section 115 compulsory license mechanism.

This fact, in and of itself, suggests that Congress intended for the Copyright Office to exercise its inherent authority to adopt regulations to fill in the gaps in the statutory scheme and to clarify and implement Section 115 as it applies to IDPDs.⁷ Indeed, as noted above, to

⁷See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress" (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (omission in original)); see also *FDA v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation

conclude otherwise would attribute to Congress the absurd intent to extend compulsory licensing to IDPDs in a manner that makes the use of such compulsory licensing completely impracticable.

In any event, it is not necessary to look solely to the Office's inherent or implicit powers to find the requisite authority for the adoption of rules clarifying and implementing Section 115 as it applies to IDPDs. As both RIAA and MP3.com pointed out in their comments, Section 702 of the Copyright Act specifically confers broad discretion on the Office to adopt rules in furtherance of its administration of the compulsory license provisions of the Act, including Section 115. Moreover, the 1995 amendments to Section 115 themselves contain an express delegation of authority to the Office to adopt rules to implement the extension of the compulsory license to DPDs and IDPDs. Specifically, Section 115(c)(3)(D) directs the Librarian of Congress to "establish requirements by which copyright owners may receive reasonable notice of the use of their works under [Section 115], and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries."

The authority conferred on the Copyright Office by Section 115(c)(3)(D) is broad enough to allow the Office to adopt rules governing the various operational aspects of the Section 115 compulsory license as it applies to IDPDs, including the process by which digital music services invoke the license and the process by which royalty payments are calculated and distributed. In particular, Section 115(c)(3)(D) provides the Office with the requisite authority to adopt the interim licensing procedures proposed by MP3.com and RIAA. Those procedures, to reiterate, would permit digital music services to invoke the Section 115 compulsory license by filing a

from Congress to the agency to fill in the statutory gaps.").

notice of intent with the Copyright Office. Such notice would include the name, address, and phone number of the service invoking the license along with information identifying the works being used. In addition, the interim procedures would require the compulsory licensee to maintain and periodically file with the Copyright Office information regarding the licensee's use of particular works. This information would thus be available to determine what royalties, if any, are due with respect to those uses.⁸

Nothing in the Act limits the Office's authority to adopt such rules, either on an interim basis or otherwise. While Section 115(b)(1) generally provides that a person seeking to obtain a compulsory license to make physical phonorecords must first attempt to serve a separate "notice of intent" directly on the copyright owner of each work being licensed and that service on the Copyright Office is sufficient only if the Office's records do not identify the copyright owner's name and address, the specific grant of authority in Section 115(c)(3)(D) to establish "reasonable" notice requirements with respect to the application of Section 115 to IDPDs should take precedence over the general requirements contained in Section 115(b)(1). Moreover, principles of statutory construction recognize that a statute need not be applied literally if such application would lead to an absurd result outside the intent of Congress.⁹ In the case of the

⁸In order to clarify that the Office's "deferral" rule was not intended to foreclose the availability of the Section 115 license, the Office should make clear that the interim procedures can be invoked retroactively to cover IDPDs made in the past.

⁹*See, e.g., Sykes v. Columbus & Greenville Railway*, 117 F.3d 287, 290 (5th Cir. 1997) (notwithstanding the lack of ambiguity in statutory language, the court went beyond the plain language to avoid an "absurd result."); *see also United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202 (1979) (literal interpretation of a statutory provision that would "bring about an end completely at variance with the purpose of the statute" must be rejected.); *see also Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (citing principle that

extension of Section 115 to the digital environment, it is clear not only that Congress wanted to foster the creation of a "celestial jukebox" offering consumers a vast array of music choices, but also that Congress intended these amendments to be interpreted in a manner designed to achieve the bill's intended purposes.¹⁰ Subjecting IDPD licensing to the Section 115(b)(1) procedures, which were developed for use in licensing the manufacture and distribution of physical phonorecords, would clearly frustrate the accomplishment of these purposes by imposing on potential compulsory licensees the impossibly burdensome logistical task of finding and submitting individual notices to tens of thousands of copyright owners for hundreds of thousands of works.

Furthermore, the Office itself has recognized that its authority under Section 115(c)(3)(D) encompasses the establishment of rules relating both to the notice of intent that must be given to invoke the Section 115 license and to the manner by which licensees account for their use of the license to make IDPDs.¹¹ Although the rules adopted by the Office subject persons seeking a compulsory license to make DPDs to the same notice of intention requirements as apply to persons seeking a license to make physical phonorecords, nothing in the decision suggests that

"Congress cannot be presumed to do a futile thing.").

¹⁰See H. Rep. No. 104-274 at 12-13; S. Rep. No.104-128 at 14. As MP3.com noted in its initial comments, the legislative history of the Section 115 amendments also indicates that Congress foresaw and authorized departures from the existing statutory provisions if such provisions "are not readily applicable to the new digital transmission environment." S. Rep. 104-28 at 98.

¹¹See *Notice and Recordkeeping for Making and Distributing Phonorecords*, Docket No. RM 98-7C, 64 Fed. Reg. 41286, 41287 (July 30, 1999) (adoption of "interim" regulations governing the submission of notices of intention to make DPDs "fulfills the section 115(c)(3)(D) requirement for notice").

the Office either was compelled to reach this result or intended it to apply to IDPDs.¹² Indeed, the fact that the rules adopted by the Office were designated as "interim" and were to be revisited after two years strongly supports the conclusion that the Office understood that it has the discretion to adopt a notice of intention process for DPDs and IDPDs that varied from the process specified in Section 115(b)(1) for physical phonorecords.

Finally, MP3.com submits that the various sources of rulemaking authority discussed herein also empower the Copyright Office to adopt rules clarifying what activities do and do not constitute IDPDs. As indicated above, Congress expressly directed the Office to adopt rules governing the notice that must be given to invoke the compulsory license for particular uses of copyrighted works and the records that must be kept with respect to the "uses" made pursuant to the license. Inherent in the authority to adopt such rules is the authority to define the "uses" to which those rules apply. It is inconceivable that Congress intended to tie the Office's hands by requiring it to establish rules without the ability to describe the activities to which those rules apply.¹³

¹²In fact, as previously noted, the Office ultimately decided to "defer" adopting any IDPD-specific rules.

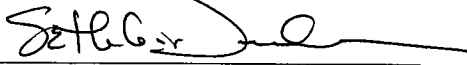
¹³See also *Public Performance of Sound Recordings: Definition of Service*, *supra* note 7 (concluding that the Office has authority to conduct a rulemaking to determine whether a compulsory license under the Office's administration applies to particular conduct).

CONCLUSION

Immediate action by the Copyright Office to resolve the logistical and other obstacles currently impeding the application of the Section 115 compulsory license to on-demand music services is both necessary and appropriate. MP3.com again urges the Office to move as quickly as possible to take the actions recommended herein.

Respectfully submitted,

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**WRITTEN STATEMENT OF THE HONORABLE HENRY J. HYDE
BEFORE THE SUBCOMMITTEE ON
COURTS, THE INTERNET AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
MAY 17, 2001**

The present disagreement over the ability of record companies and online services to make the reproductions of musical compositions necessary to launch digital music services is a troublesome obstacle to efforts to meet consumers' demand for music on the Internet. I understand that record companies and online services have been negotiating with music publishers to find a business solution to this disagreement. My sincere hope is that the parties will come to a negotiated solution quickly to resolve their differences, and that the marketplace will work to provide consumers with the music they desire.

However, it is important to recognize that a voluntary agreement is not necessary for the use of musical works in digital music services. During my tenure as Chairman of this Committee, the Committee worked with both the music publishers and the recording industry to enact the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"). Among other things, the DPRA clarified that the mechanical compulsory license found in Section 115 of the Copyright Act applies to the digital world. We did so at the music publishers' insistence, and with the support of the recording industry. 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.

It is therefore very disappointing to me that some are now asserting that the compulsory license we enacted in 1995 is insufficient to grant the necessary rights to get digital music services up and running. This is contrary to what I believe to have been one of the key purposes of the DPRA: to allow legitimate operators to rely upon the compulsory license to launch their services.

My hope is that the disagreement between music publishers and the recording industry and Internet music companies will be resolved quickly through business negotiations and I understand that the Copyright Office is considering a rulemaking to clarify the application of the mechanical compulsory license to certain specific types of services. 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.

