Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress

Notice of Proposed Rulemaking	37 C.F.R. Part 201 and 255
	Docket No. RM 2000-7
Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries	

Reply Comments Of
The Consumer Electronics Association
And The Home Recording Rights Coalition

September 15, 2008

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The Consumer Electronics Association ("CEA") and the Home Recording Rights Coalition ("HRRC") offer these Reply Comments with respect to the Copyright Office's Notice of Proposed Rulemaking ("NPRM") that would define and apply a substantive legal copyright standard to administrative regulations pertaining to the section 115 statutory license.

CEA is the preeminent trade association of the U.S. consumer electronics industry. CEA members lead the consumer electronics industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, that are sold through consumer channels. Its more than 2,200 corporate members contribute more than $173 billion to the U.S. economy.

HRRC, an (unincorporated) association, is a leading advocacy group for consumers' rights to use home electronics products for private, non-commercial purposes. The members of HRRC include consumers, retailers, manufacturers and professional servicers of consumer electronics products. The HRRC was founded in 1981, in response to the Ninth Circuit's ruling, in the *Betamax* litigation, later overturned by the Supreme Court, that distribution of consumer video recorders constituted contributory copyright infringement.

As is reflected in the NPRM, CEA and HRRC have long been interested in and participated in the Office's positions, information gathering, and proceedings relating to section 115. With respect to the new regulations proposed in this NPRM, CEA and HRRC thought it appropriate first to review the Comments of the stakeholders that would

be most directly affected by the imposition and administration of the new regulations as proposed. Having studied these contributions, CEA and HRRC believe these observations and conclusions are well-supported:

- There is no stakeholder consensus for these rule changes; indeed they are opposed by most interested parties on valid and substantial grounds.

- Concerns that these regulations would be substantive rather than administrative, and hence beyond the Office's jurisdiction, appear well founded.

- The substantive direction in which these regulations would interpret the law is now contrary to the legal precedent cited, and to other sound legal precedent. Considering "buffer" copies made in the course of receiving a transmission to be "copies" for all legal purposes would be disastrous for consumers and destructive to technology companies that rely on sound and predictable understanding and interpretation of copyright law.

- The Office's concern with the state of section 115 law and administration is well founded, but the dangers that were evident to the Congress in hesitating to push through changes should be equally evident to the Office.

I. THE NPRM'S LEGAL DOCTRINES AND PROPOSED REGULATIONS HAVE ATTRACTED FAR MORE STAKEHOLDER AND PUBLIC INTEREST CONCERN AND OPPOSITION THAN SUPPORT.

While those most directly concerned with section 115 understand and appreciate the Copyright Office's frustration with the law and the statutory license, the response of the vitally concerned stakeholders has been *the sound of one hand clapping*. Only the National Music Publishers' Association and its publisher allies (hereinafter "NMPA") express any real enthusiasm for the substantive and regulatory declarations proposed in this NPRM, or for proceeding with this rulemaking. And even the NMPA Comments[1] are largely defensive.

Much of the NMPA contribution is addressed to trying to *distinguish* the facts and law of the *Cablevision*[2] case on which the Office itself relied in taking this rulemaking initiative. Whether or not the NMPA effort in this respect can succeed (CEA and HRRC argue below that it cannot), the fact that the prime private sector supporter of this initiative is now straining to find it consistent with the case law should give the Office pause.

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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.

[2] *Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480-cv(L) (2d Cir. 2008) (hereinafter "Cablevision").

CEA and HRRC note that others who have longstanding interests in and frustrations with section 115 are either lukewarm about this rulemaking or hotly opposed:

- The RIAA[3] notes that it was "the party that petitioned for the commencement of this rulemaking" but observes that "the digital music marketplace has not stood still since RIAA's petition was filed. ... making the need for rulemaking in this area less compelling than it seemed to RIAA at the time it filed its petition, and creating a risk that a rule could disrupt existing practices." This is the RIAA's only comment on whether the Office should forge ahead at this time.

- The Comments of ASCAP and BMI[4] similarly are devoid of any endorsement or urging for the Office to move ahead at this time, and are largely devoted to cautioning against any "unintended effect on the performance right."

- DiMA, which begins by noting its longstanding frustration with "the uncertainties of Section 115," has as its first point: "The Proposed Rulemaking Is Untimely," and is concerned that it may interfere with CRB proceedings. It then notes the overbroad scope of the proposed rule and its lack of consensus support.

- NAB[5] finds "no basis to adopt the proposed rule," concludes that the Office lacks authority to impose a substantive rule of this nature, and urges the Office not to proceed.

- The "Business Music Industry's Comments" conclude that "the rule if adopted would be an incomplete solution that will cause substantial harm to the business music market," and urge the Office instead to "return to prodding Congress."

- Verizon Communications opposes proceeding based on lack of authority, substance, and confusion and damage to legal doctrine.

- The "Ad Hoc Coalition of Streamed Content Providers" says the rule "would directly and adversely affect their businesses" and asks the Office "to abandon its rulemaking ...."

- CTIA[6] observes that the Office proposes "the wrong approach," conflates the performance right with the distribution right, would hand publishers a "double-dip" mechanical license fee, threatens meritorious fair use arguments, and would confuse business relationships as well as the law.

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[3] Comments of the Recording Industry Association of America, Inc.
[4] Comments of the American Society of Composers, Authors and Publishers and Broadcast Music, Inc.
[5] Comments of the National Association of Broadcasters.
[6] Comments of CTIA – The Wireless Association.

- The filings of the "Public Interest Commenters"[7] and "New Media Rights"[8] show no greater enthusiasm for going ahead with this rulemaking, or for the substance of the proposed regulations, than do these stakeholders.

II. THE REGULATIONS APPEAR SUBSTANTIVE RATHER THAN ADMINISTRATIVE AND HENCE BEYOND THE OFFICE'S DELEGATED AUTHORITY FROM THE CONGRESS.

CEA and HRRC believe that the Office's concern over whether it has the delegated authority to proceed with a rule that is essentially substantive rather than administrative has been shown to be very well founded. CEA and HRRC specifically endorse the argument set forth by Verizon that the Register's authority with respect to these regulations is administrative rather than substantive in nature, that these regulations would lay down and implement a substantive rule of copyright law, and that the Office lacks such authority.[9]

III. BUFFER STORAGE NECESSARY FOR OR ATTENDANT TO CONSUMERS' RECEIPT AND RENDERING OF DIGITAL TRANSMISSIONS SHOULD NOT BE CONSIDERED "COPIES" FOR ANY RELEVANT LEGAL PURPOSE.

Several Commenters have made the point that if the notion that all buffer copies should be considered "copies" for all relevant copyright purposes, there would be untoward, unintended, ungovernable, and unacceptable consequences for the administration of the copyright law and for the reasonable and customary expectations of consumers.[10] Yet an across-the-board acceptance of such a doctrine is exactly what the Office has proposed. More generally, DiMA (at 7) suggests that "the broader application of its interpretations of fundamental copyright terms could be more harmful than beneficial to copyright stakeholders in all digital media – including creators."

CEA and HRRC have long been concerned that any restrictions on the use of content made possible by transmission and storage in the digital realm should be balanced by advantages to consumers that digital techniques offer. In other words, the transition to digital transmission should be equitable for consumers. A rule that all incidents of buffer storage are "copies" for copyright purposes, however, would violate

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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.

[8] Comments of New Media Rights, described as a project providing information to emerging artists, software developers, and other creators.

[9] Verizon comments at 2 – 5. Several other Comments made the same points. *See* NAB at 3 – 6, CTIA at 3-4, Ad Hoc Coalition at 21 – 22. CEA and HRRC find particularly egregious, gratuitous, and anti-consumer NMPA's bootstrap suggestion in n. 21 that the Office leverage this NPRM into a substantive change to the copyright law that the Congress declined to make in considering HR 5533, and that would trample consumers' fair use rights.

[10] Verizon comments at 8 – 12, NAB at 8 – 14, CTIA at 4 – 6, Ad Hoc Coalition at 12 – 18, New Media Rights at 4 – 9.

this equitable rule of thumb: it would take away rights from consumers with no countervailing consideration whatsoever. There is nothing about digital buffering that makes a transmission more valuable to a consumer, other than to facilitate the means of transmission chosen by the content provider and distributor. In the legal parlance of the DMCA, the consumer via buffering is in no sense is asserting a right reserved to the copyright owner. Thus, even aside from questions of fair use, it is simply wrongheaded and inequitable to account for buffering as a "copy." CEA and HRRC, previously, had praised the Office for advocating this position. To the extent the Office's change in posture can be attributed to the *Cablevision* case, this factor now weighs against rather than for the Office's reversal.

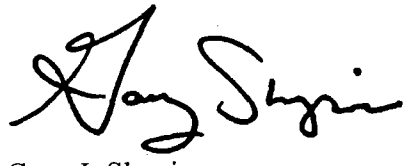
IV. CEA AND HRRC AGREE WITH THOSE COMMENTERS WHO CAUTION AGAINST THE OFFICE PROCEEDING WITH THESE REGULATIONS AT THIS TIME.

As we note at the outset, there is far from a groundswell of opinion, among those most directly affected, in favor of the adoption of these regulations. This is not even a case of "tech" or "public interest" parties against "rightsholders." Only one rights group shows any enthusiasm or provides any comfort or encouragement. The case law no longer support's the Office's proposal and the Congress has not provoked or endorsed it. Even the party that originally requested this rulemaking, the RIAA, is at pains to point out that times and circumstances have changed. Responsible stakeholders have labeled any such regulations as *ultra vires*. Under these circumstances CEA and HRRC add their voice to those who have called on the Office to revisit its thinking and its proposals, and not to proceed at this time.

V. CONCLUSION.

Like many others, CEA and HRRC appreciate the Office's continued efforts to slice through the Gordion Knot of Section 115. Like most of the other Commenters, we conclude that the vehicle on which comment has been requested is neither sufficiently pointed nor adequately aimed. We look forward to work with the Office and with the Congress, as may be necessary, to achieve a streamlined licensing process that serves rather than threatens consumers, innovators, and rightsholders.

Respectfully submitted,



Gary J. Shapiro
President & CEO
The Consumer Electronics Association
Chairman
The Home Recording Rights Coalition
1919 S. Eads Street
Arlington, VA 22202
703 907-7600

Of Counsel:

Robert S. Schwartz
Constantine Cannon LLP
1627 Eye Street, N.W.
Washington, D.C. 20006
202 204-3508

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