

Reply

Comment Letter

RM 2000 7

No. 3

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GENERAL COUNSEL
OF COPYRIGHT

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of)
)
)
Compulsory License for Making and)
Distributing Phonorecords, Including)
Digital Phonorecord Deliveries)
)
)

Docket No. RM 2000-7

**REPLY COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION,
SONGWRITERS' GUILD OF AMERICA,
NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL
AND ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS
IN FURTHER SUPPORT OF THE PROPOSED RULEMAKING**

The National Music Publishers' Association, including its wholly owned licensing subsidiary, The Harry Fox Agency, Inc. ("HFA") (together, "NMPA"), the Songwriters' Guild of America ("SGA"), the Nashville Songwriters Association International ("NSAI") and the Association of Independent Music Publishers ("AIMP") submit these reply comments in further support of the Copyright Office's proposal to clarify the Section 115 license and to address issues raised by other commenting parties in response to the Copyright Office's Notice of Proposed Rulemaking ("NPRM").

For the reasons discussed herein, NMPA, SGA, NSAI and AIMP believe that the several commenters that oppose the adoption of a rule clarifying that Section 115 licenses are available to cover the activities engaged in by interactive streaming and download services ("Opposing Commenters") have failed to demonstrate that such a rule is either inconsistent with the law or unreasonable as a matter of policy. Notably, the Opposing Commenters are not, and do not hold themselves out to be, entities that actually seek or obtain Section 115 licenses, or variations thereof, from musical work copyright owners. At the same time, those in the music industry that

do depend upon the efficient operation of Section 115 – digital media companies, record labels, music publishers and songwriters – joined by groups concerned with consumer access to digital music services – uniformly support an interpretation of Section 115 that unambiguously provides coverage for music download and interactive streaming services. Because there is no good reason in law or policy to preclude the adoption of regulations that will bring to a close nearly a decade of perceived uncertainty over the licensing of these services, the Copyright Office, which has a statutory duty to implement Section 115, should take this essential step.

Overview of Other Parties' Comments

As discussed at length in the Comments filed on August 28, 2008 by NMPA, SGA, NSAI and AIMP (“Opening Comments”), all of the key constituents in the digital music industry – that is, those who are directly involved in using the Section 115 license or a voluntary counterpart thereof – have reached a consensus that the license should unequivocally apply to the full range of reproduction and distribution activities required to make digital phonorecord deliveries (“DPDs”) in the form of full (permanent) downloads, limited downloads and interactive streams. Our Opening Comments, as well as those filed by the Recording Industry Association of America (“RIAA”) and the Digital Media Association (“DiMA”), all point to the fact that the broad availability of such licenses is a critical step to enable the growth of legitimate digital music services. At the same time, RIAA and DiMA, joined by NMPA and its co-commenters, have expressed their agreement that, in light of existing industry understandings and practices, the Copyright Office should not extend such a rule to encompass noninteractive music services.

Significantly, 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 (who refer to themselves collectively

as the “Public Interest Commenters”), while not necessarily endorsing the legal analysis of the NPRM, nonetheless recognize the value of – and therefore support – the Copyright Office’s proposal. As these commenters explain: “[T]he proposed rule would enable existing services to resolve lingering uncertainties while also allowing new entrants to understand whom they have to pay and how much. . . . Clarifying the scope of Section 115 offers an opportunity to streamline the current licensing process and facilitate continued innovation and growth in the digital music industry.” (Public Interest Comments at 4.)

Similarly, RoyaltyShare, Inc., a provider of content management and royalty services to Section 115 licensees, submitted comments that support the Copyright Office effort to “amend and clarify the scope and application of the Section 115 compulsory license.” (RoyaltyShare, Inc. Comments at 1.)

Several providers of background music and digital music services that are not eligible to be licensed under Section 115 submitted two sets of somewhat overlapping comments (these included Muzak LLC, DMX, Inc., Ecast Inc., Touchtunes Music Corporation and AMI Entertainment) (the “B2B commenters”). The B2B commenters essentially argue that by making the Section 115 license easier to use, B2B providers will be competitively disadvantaged because they cannot avail themselves of the license.¹ NMPA and its co-commenters respectfully submit that, even if this were true, it is not a reason to hold back the rest of the digital music industry. (In fact, broadening the availability of the Section 115 license for those services that are eligible may indirectly benefit B2B services by encouraging industry investment in bulk licensing

¹ The B2B Commenters also suggest, without legal analysis or explanation, that the Copyright Office’s Proposed Regulations under Section 115 would somehow alter existing rules of liability for B2B providers with respect to “server and cache copies.” (B2B Comments at 1, 4.) Regardless of whether they fall under Section 115, such reproductions already require appropriate license authority from musical work copyright owners, as we explain in our Opening Comments. (Opening Comments at 8-9.)

systems and copyright ownership databases.²⁾ In any event, licensing of non-115 providers is, by definition, outside the scope of this Section 115 rulemaking proceeding. We therefore suggest that the B2B Comments not be considered to weigh against the proposed rule.

This leaves a handful of commenters that substantively oppose the adoption of a rule to clarify the availability of Section 115 licenses for download and interactive streaming activities. As observed above, none of these Opposing Commenters appears to be directly involved in procuring licenses from musical work copyright owners for activities that fall within Section 115. Three of the five commenters, Verizon Communications, CTIA-The Wireless Association and National Association of Broadcasters, are represented by the same counsel and filed substantially the same comments. The other two commenters in this category, the Ad Hoc Coalition of Streamed Content Providers (as it turns out, a coalition of one – Google, Inc./YouTube LLC³⁾ (“Google”) and New Media Rights, focus heavily on buffer copies and their treatment by the Second Circuit in *Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480-cv(L), 2008 U.S. App. LEXIS 16458 (2d Cir. Aug. 4, 2008) (“*Cablevision*”)⁴ – a decision also relied upon in triplicate in the Verizon, CTIA and NAB filings. We explain below why the objections of the Opposing Commenters (which we generally treat as a group because of their similar and overlapping approach) should not override the strong consensus of those with an actual stake in the outcome that licenses for download and interactive streaming activities should be unambiguously available under Section 115.⁵

² A number of B2B providers, including Muzak and AMI, have entered into licensing relationships with HFA to obtain non-115 licenses.

³ Subsequent to filing comments on behalf of the Ad Hoc Coalition, counsel for the coalition notified the Copyright Office that the second member, Slacker, Inc., was not in fact part of the group or a party to the comments.

⁴ The Opposing Commenters refer to the Second Circuit’s decision as *Cartoon Network*; for consistency with our earlier submission, we continue to use the short form “*Cablevision*.”

⁵ Additionally, a number of parties submitted comments that are nonsubstantive in nature or address matters clearly outside the scope of this rulemaking proceeding. These include the comments filed by the performing rights organizations ASCAP, BMI and SESAC (in essence seeking only to confirm the indisputable proposition that any

I.
**THE PROPOSED RULE IS PROMULGATED UNDER SECTION 115,
SHOULD BE UNDERSTOOD AS SUCH,
AND SHOULD NOT EXTEND TO NONINTERACTIVE STREAMING**

In citing a parade of alleged concerns outside of the ambit of Section 115 (ranging from the Audio Home Recording Act to the viability of cloud computing) as a basis for their opposition to Copyright Office action, the Opposing Commenters appear to have lost sight of the fact that the rule proposed by the Copyright Office is an interpretation of Section 115 for the purpose of administering the Section 115 license. Oversight of this license is a duty that has been expressly delegated to the Copyright Office by Section 115. *See* NPRM at 40,806 (citing 17 U.S.C. § 115(b)(1) and 115(c)(5)). The rule proposed by the Copyright Office – representing a reasoned and practical interpretation of the availability of the compulsory license it administers – is not, and is not intended to be, a binding interpretation of the entire Copyright Act.⁶

In a remarkably parallel situation, the Copyright Office previously engaged in rulemaking to interpret a definition within the Section 111 license for the purpose of clarifying the cable compulsory licensing scheme. Rejecting a challenge to that rule, the D.C. Court of Appeals indicated that the Copyright Office clarification would serve to limit costly *ad hoc* disputes over the meaning of the statute. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of America, Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988). The circuit court further observed that “Congress . . . necessarily relies on agency action to make ‘common sense’ responses to problems that arise during implementation [of legislation].” *Id.* at 612.

Section 115 rules will not regulate the performance right); those filed by Music Reports, Inc. (requesting the Copyright Office to authorize electronic filing of Section 115 Notices of Intent); and those of Sword and Stone Publishing, Inc. (suggesting certain edits to the language of the NPRM). None of these commenters opposes the adoption of the Proposed Regulations.

⁶ Most of the Opposing Commenters take the position that the Proposed Regulations exceed the rulemaking authority of the Copyright Office. Because the Copyright Office has already rejected earlier arguments to this effect in this very proceeding, *see* NPRM at 40,806, these Comments assume the Copyright Office’s authority to act.

The same logic applies here. That the existing regime for licensing of DPDs under Section 115 could benefit from an authoritative interpretation by the Copyright Office can hardly be in doubt, given the fact that such a clarification has been under discussion for nearly a decade.

At the same time, contrary to the protestations of various commenters, the Copyright Office is not obliged to resolve issues beyond those on which it has chosen to focus its attention at this time. “[A]n agency need not solve every problem before it in the same proceeding.” *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 231 (1991). Rather, as explained by the Supreme Court, the agency “enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures, and priorities.” *Id.* at 230 (internal citations omitted).⁷

Here, the longstanding problem is uncertainty on the part of some regarding the applicability of the Section 115 license to the full range of reproductions and distributions made in the course of delivering full downloads, limited downloads and interactive streams. The copyright owners and users that are directly involved with the Section 115 licensing process seek confirmation that the Section 115 license so applies. On the other hand, none of the directly affected parties believes that such a rule should extend to noninteractive streaming activities. (See, e.g., Opening Comments at 14; DiMA Comments at 2; RIAA Comments at 6-8.) To require licenses for noninteractive streaming would depart from existing industry practices (in contrast to interactive streaming, where, since 2001, there has been an industry precedent of

⁷ And, contrary to the suggestions made by the Opposing Commenters in reference to prior testimony given by the Register of Copyrights, the Copyright Office has the latitude to “change course” in its handling of a particular issue if a better solution presents itself. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005). This is especially the case where, as here, the subject matter under review is “‘technical, complex and dynamic.’” *Id.* at 1002-03 (citing *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)).

licensing⁸). (Opening Comments at 14; *see also* Google Comments at 2, 6-7). Based on this record, the Copyright Office should adopt the regulations proposed in the NPRM (“Proposed Regulations”), but at the same time exercise its agency discretion to limit the application of the rule to those activities for which the lack of clarity is perceived by market participants to be a problem. Indeed, to limit the rule in this manner would quickly eliminate many of the purported concerns of the Opposing Commenters because it would maintain the *status quo* for noninteractive webcasters and others that are currently operating without Section 115 licenses.⁹

II.
NONE OF THE ISSUES RAISED
BY THE OPPOSING COMMENTERS BARS
THE ADOPTION OF A RULE TO CLARIFY THE SECTION 115 LICENSE

Opposing Commenters offer up a long list of reasons why those who seek to build and support legitimate digital music services should continue to operate in a state of licensing uncertainty. None of these arguments is compelling.

A. *Cablevision* Does Not Answer the Interactive Streaming Question

Seizing upon the recent *Cablevision* decision, the Opposing Commenters seek to shoehorn interactive music streaming services into that decision’s narrow holding for the purpose of arguing that enactment of the Proposed Regulations to facilitate licensing of such services under Section 115 would be unlawful. In so doing, they greatly overstate the reach of that decision.

⁸ This fact alone contradicts Google’s indiscriminate claim of an “industry consensus” and “common understanding” that “streamed public performances of digital content do not implicate reproduction and distribution rights.” (Google Comments at 6, 12.)

⁹ For example, while Google opposes Copyright Office action generally, Google’s second choice is to have the Copyright Office take a “common-sense, marketplace-supported” approach by limiting the rule to interactive streaming. (*See* Google Comments at 7.) Approaching the same issue from a different angle, NAB asserts that the final sentence of Subsection 115(d) indicates Congress’ intent to exclude non-interactive digital performances from the definition of DPD. (NAB Comments at 14.)

As discussed in our Opening Comments, the *Cablevision* court engaged in a novel interpretation of Section 101 of the Copyright Act to arrive at the result that 1.2-second buffer copies made in the course of operating a centralized DVR system did not qualify as “copies” under the Copyright Act. But *Cablevision* did not analyze buffer copies that enable the perception or communication of full-length musical works.¹⁰ Indeed, the *Cablevision* court was careful to limit its holding to the specific technology before it, explaining that its inquiry was “necessarily fact-specific,” and that “other factors not present” in that case could alter the court’s analysis “significantly.” *Cablevision*, 2008 U.S. App. LEXIS 16458, at *23. It is therefore a gross misreading of *Cablevision* to suggest that the adoption of a rule to permit licensing of interactive streaming services not considered by that court would be “contrary to law.” (Verizon at 5; CTIA Comments at 4; NAB Comments at 6; *see also* Google Comments at 12).¹¹

In invoking *Cablevision*, the Opposing Commenters ultimately seek to hang their hat on the definition of “fixed” in Section 101 of the Copyright Act to argue that copies of works reproduced in computer buffers cannot be copies. But Section 101 provides that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101. Buffer copies created by interactive streaming services manifestly meet the definition of Section 101. This is because such copies embody a musical work in a sufficiently stable form to permit the work in its entirety to be perceived and communicated. Under the statutory definition of “fixed,” it is the

¹⁰ Opposing Commenters employ the apparently invented term “performance buffers” to refer to the buffer copies used to render interactive streams of musical works. (*See, e.g.*, Verizon Comments at 5; NAB Comments at 6.) Ironically, this in itself suggests that *Cablevision* is inapposite, for the buffer copies at issue there were not rendering “performances.”

¹¹ Opposing Commenters also seek to rely on *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), for this same purpose. But *CoStar* did not address buffer copies.

work – not any “bits” of data that may comprise the work (as wrongly asserted by the Opposing Commenters (e.g., Verizon Comments at 6)) – *that is used to determine fixation*. That is, according to the definition, a work that remains perceptible is considered “fixed” even if some of its “bits” have already passed through a buffer.¹²

Moreover, because interactive buffer copies are sufficient to render the entire musical work for the listener, the perception of *the work* is not “fleeting,” “transitory” or otherwise less than complete; the experience is of the whole work for as long as it was intended to last.¹³ Put another way, it takes no less time to listen to an interactively streamed song than one that is played from a CD.¹⁴

Indeed, this very interpretation of the interactive music streaming process has been confirmed by Congress. Unlike the *Cablevision* court, Congress, in enacting the Digital

¹² Indeed, it is this very analysis that yields the clarification in the Proposed Regulations that “[a] digital phonorecord delivery also includes phonorecords which embody portions of a musical work so long as those portions are, individually or in the aggregate, sufficient to permit the recipient to render the sound recording which embodies the musical work.” NPRM at 40,812.

¹³ *Webster’s* defines “fleeting” as “moving or passing by very swiftly.” *Webster’s Online Dictionary*, at <http://www.websters-online-dictionary.org/definition/fleeting> (Sept. 10, 2008). The same dictionary defines “transitory” as “[e]nduring a very short time.” *Id.* at <http://www.websters-online-dictionary.org/definition/transitory> (Sept. 10, 2008). A sound recording of a musical work that is played via an interactive streaming service passes no more “swiftly” and lasts for no “shorter” period than when played from an alternative source.

¹⁴ Even if the Opposing Commenters were correct (and we do not think that they are) that *Cablevision* is not limited, as it says, to its facts, but somehow tacitly addresses the question of interactively streamed musical works, the Copyright Office can still choose to follow the numerous decisions of other courts that have reached a different result, not to mention its own longstanding interpretation of the Copyright Act. In analyzing the relationship between judicial precedent and agency action, the Supreme Court has explained: “[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court’s interpretation to override an agency’s. *Chevron’s* premise is that it is for agencies, not courts, to fill statutory gaps.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Accordingly, an agency rule need not conform to judicial precedent. Absent an express judicial holding that a statute “unambiguously forecloses” an agency construction – that the statute “contains no gap for the agency to fill” – the agency is free to issue its own differing interpretation. *Id.* at 980-83 (upholding FCC conclusion that broadband cable modem companies are exempt from common-carrier regulation under FCC’s interpretation of “telecommunications service” as lawful construction of Communications Act despite court’s prior contrary construction of the same term). In the words of the Supreme Court, the opposite view would “lead to the ossification of large portions of our statutory law.” *Id.* at 983 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)). In sum, even if the Copyright Office’s proposed rule did depart from *Cablevision*, it would hardly be “contrary to law,” but instead entitled to the full measure of judicial deference due under *Chevron*. *Id.*; see also *Satellite Broad. & Communications Ass’n v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994) (even though in conflict with earlier interpretation of deciding court, where more than one interpretation of statute was possible, Copyright Office’s construction of Section 111 upheld as “neither arbitrary, capricious, nor contrary to the statute’s ‘clear meaning’”).

Performance Right in Sound Recordings Act of 1995 (“DPRA”), *did* specifically consider the question of whether a temporary copy in “computer memory” for purposes of one-time streaming “playback” constitutes a phonorecord within the meaning of the Copyright Act. Its answer is apparent from its discussion of “general” versus “incidental” DPDs in the legislative history of the DPRA:

[I]f a transmission system was designed to allow transmission recipients to hear sound recordings substantially at the time of transmission, but the sound recording was transmitted in a high-speed burst of data and stored in a computer memory for prompt playback (such storage being technically *the making of a phonorecord*), and the transmission recipient could not retain the *phonorecord* for playback on subsequent occasions (or for any other purpose), delivering the *phonorecord* to the transmission recipient would be incidental to the transmission.

S. Rep. No. 104-128, at 39 (1995) (emphasis added). In characterizing temporary – or “incidental” – computer copies used to facilitate digital performances as constituting “phonorecords” that have been “deliver[ed]” via digital transmission, this commentary lends unequivocal support to the Copyright Office’s interpretation of DPD as including buffer copies used to deliver interactive streams. Indeed, it demonstrates that the Copyright Office’s treatment is the *only* defensible interpretation of Section 115.

Finally, in focusing solely on buffer copies, the Opposing Commenters simply fail to address the fact that, as explained in our Opening Comments, under existing law, interactive streaming services also require licenses for the server and cache copies they make – other than to suggest that the Copyright Office should simply declare these copies exempt. (*See* Verizon Comments at 18; Google Comments at 8.)¹⁵ This approach presumably offers little comfort to such services, which are seeking a legitimate answer to their licensing concerns.

¹⁵ Opposing Commenters also seek to advance the absurd argument that licenses should not be made available under Section 115 for server, buffer and cache copies used to operate interactive streaming services because the existence

B. Section 115 Unambiguously Provides that a DPD Can Be Both a Reproduction and a Performance

Seeking to construe the Copyright Act as a “harmonious whole,” the Opposing Commenters urge that the Copyright Act imposes an across-the-board, bright-line distinction between reproduction and distribution rights, on the one hand, and public performance rights, on the other. Thus, they argue, a DPD under Section 115 cannot implicate both species of rights. But this reading is demonstrably wrong, for it contradicts not only the controlling text of the statute – which the Opposing Commenters relegated to a single footnote to the extent they discuss it at all (*see* Verizon Comments at 12 n.8) – but the relevant legislative history as well.

The definition of a DPD in Section 115 could not be clearer on this point: “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.*” 17 U.S.C. § 115(d) (emphasis added). The italicized language, echoed almost verbatim in a second provision of Section 115, 17 U.S.C. § 115 (c)(3)(A), plainly provides that a DPD can be both a reproduction and a public performance. To suggest otherwise is simply to ignore the language of the statute.

of such a license structure will “weigh against” fair use claims. (*E.g.*, Verizon Comments at 18.) The underlying assumption is simply specious; as discussed in our Opening Comments, this type of fair use claim has already been rejected by the courts. (*See* Opening Comments at 9 n.10.) Moreover, this argument completely ignores the fact, also discussed in our Opening Comments, that a license structure for interactive services has been in existence since 2001. (*Id.* at 5.) Finally, the related suggestion of the Opposing Commenters that these types of copies have no economic value, (*e.g.*, Verizon Comments at 18; Google Comments at 17), is belied by substantial record evidence in the CRB Proceeding – not to mention the parties’ agreement to rates and terms for these assertedly “valueless” copies in a partial settlement of that proceeding. Distributed or not, the copies required to provide an interactive music service have demonstrable value in the operation of the service and are therefore logically compensated within the framework of the Section 115 license.

Moreover, the fact that Congress understood that an interactive stream would also constitute a DPD is also abundantly clear from the legislative history of the 1995 amendments to Section 115, cited above, which explains that a “phonorecord” can result from the one-time performance (or “playback”) of a musical work via digital transmission. S. Rep. No. 104-128, at 39 (1995).

C. A DPD Is, by Definition, Distributed

In a variation on their theme, Opposing Commenters also object to the Copyright Office’s statement that DPDs, “by virtue of having been delivered, ‘[are] distributed, within the meaning of copyright law.’” (NAB Comments at 16 (citing NPRM at 40,811)). Thus, according to the Opposing Commenters, even if interactive streams are DPDs, they fail the “primary purpose” test of Section 115, which requires that the primary purpose of phonorecords licensed under statute be to distribute them to the public for private use.

But the Copyright Office’s interpretation of Section 115 in this regard is the only plausible reading of the statute: if a phonorecord is delivered as a DPD, a distribution has occurred. In straining to reach a different result, the Opposing Commenters simply overlook the effect of the amendments to Section 115 that clarified Section 115’s applicability to digital transmissions by creating and adding the category of DPD. Indeed, the amendments were intended to nullify the very argument urged by the Opposing Commenters. S. Rep. No. 104-128, at 37 (1995) (in amending Section 115, Congress’ intention was “to confirm and clarify the right of musical work and sound recording copyright owners to be protected against infringement when phonorecords embodying their works are delivered to consumers by means of transmissions rather than by means of phonorecord retail sales.”)

Tellingly, pursuant to the 1995 amendments, the text of Section 115 unequivocally provides that

[a] compulsory license . . . includes the right of the compulsory licensee to *distribute or authorize the distribution* of a phonorecord of a nondramatic musical work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance . . . of any nondramatic musical work For every digital phonorecord delivery by or under the authority of the compulsory licensee . . . the royalty payable by the compulsory licensee shall be [etc.].

17 U.S.C. § 115 (c)(3)(A) (emphasis added).

Thus, once again looking simply to the plain language of the statute, if a musical work is delivered “by means of a digital transmission which constitutes a digital phonorecord delivery,” it is considered distributed for purposes of Section 115 – even if the transmission also constitutes a public performance of the work. Moreover, because Section 115 provides that royalties are payable for phonorecords that have been “distributed,” *see* 17 U.S.C. § 115 (c)(2), it follows from the statutory language requiring payment for “every” DPD that every DPD is understood to be distributed.

D. The “Specifically Identifiable” Language Is Not Ambiguous

Opposing Commenters also take issue with the Copyright Office interpretation of the “specifically identifiable” language in Subsection 115(d), which provides in pertinent part that “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” In our Opening Comments, we point out that Congress could easily have limited the language of Section 115(d) to specify that a reproduction had to be specifically identifiable by the transmitting service, but instead chose not to restrict the concept of “identifiability” in this manner. Certain Opposing

Commenters seem to be arguing that Congress simply suffered a grammatical lapse in constructing the sentence as it did, and quite possibly meant to say something else. According to these commenters, the “‘specifically identifiable’ phrase” can (and should) be read “as referring to the transmitting service.” (*E.g.*, Verizon Comments at 14.) The problem with this construction is, all grammar aside, there is no mention of the “transmitting service” anywhere in the sentence being construed. Such an implausible reading is nothing more than a transparent attempt to manufacture ambiguity where there is none, and should be rejected.

E. A Rule Confirming the Availability of Licenses for Interactive Streaming and Download Activities Under Section 115 Is Fully Compatible With Section 114

Opposing Commenters argue that the Copyright Office is foreclosed from acting under Section 115 because it will disrupt the statutory licensing scheme of Section 114. This is not a *bona fide* concern.

First, as explained above, the Proposed Regulations, issued under Section 115, by their terms would govern licensing practices under Section 115, not Section 114. As noted above, it is not incumbent upon the Copyright Office to address more than one statutory provision at a time. But more than that, assuming the proposed rule were adopted, as we suggest, to facilitate licensing of interactive rather than noninteractive streaming services, the respective licensing regimes would be entirely complementary. Interactive uses of musical works would be entitled to mechanical royalties in recognition of the fact that they are a substitute for sales, just as interactive uses of sound recordings are entitled to enhanced royalties by virtue of nonstatutory licensing arrangements for the same reason. Likewise, those noninteractive uses licensable by performance rights societies on the musical work side would similarly be eligible for the Section 114 statutory license on the sound recording side.

F. The Audio Home Recording Act is Beside the Point

Despite their own suggestion that their hypothetical interpretation is “absurd,” Opposing Commenters complain that the Proposed Regulations could impact the Audio Home Recording Act (“AHRA”) by expanding the universe of devices subject to royalty payments under that statute. But the question of whether a “recording” as defined in the AHRA is coextensive with the term “DPD” is a question that already exists, and will continue to exist, regardless of whether the Copyright Office chooses to clarify the definition of DPD. Moreover, neither the AHRA nor the legislative history of the AHRA relied upon by Opposing Commenters makes reference to “DPDs” (understandably, since the AHRA predates the passage of the DPRA). For these reasons, the AHRA and history of the AHRA are not germane to this rulemaking – especially when held up against Congress’s specific commentary elaborating on the definition of DPD, cited above. Congress enacted the DPD amendments against the backdrop of the AHRA, and in so doing, made it abundantly clear that it intended for interactive streaming activities to qualify as DPDs.

G. Generalized Complaints About Section 115 Should Not Stand in the Way of Progress

In an argument no more compelling than their others, Opposing Commenters suggest that because Section 115 is considered “outdated” and “cumbersome” to use, the Copyright Office should forego any effort to remedy its perceived deficiencies. This argument ignores the simple truth that those who actually make use of the statutory system – whether directly under Section 115, through HFA or otherwise – agree that a clarification of the statute to facilitate industry-wide licensing of digital services would be a significant step forward. An improved system, even if less than perfect, is better than no system at all.

Conclusion

For the foregoing reasons, NMPA, SGA, NSAI and AIMP respectfully submit that the Copyright Office should reject the flawed reasoning of the Opposing Commenters and adopt the Proposed Regulations, subject to the minor modification described in our Opening Comments, with such regulations to apply to DPDs in the form of full (permanent) downloads, limited downloads and interactive streams.

Dated: September 15, 2008

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