Before the
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Washington, D.C.

In the Matter of	)	
Mechanical and Digital Phonorecord Delivery Compulsory License, Statement of Accounts	)	Docket No. 2012-7

COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE HARRY FOX AGENCY, INC., SONGWRITERS' GUILD OF AMERICA, INC., AND NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

The National Music Publishers' Association ("NMPA"), including its wholly owned licensing subsidiary, The Harry Fox Agency, Inc. ("HFA"), the Songwriters' Guild of America, Inc. ("SGA"), and the Nashville Songwriters Association International ("NSAI") respectfully submit these comments in response to the Copyright Office's Notice of Proposed Rulemaking dated July 27, 2012, 77 Fed. Reg. 44179 (July 27, 2012) to amend regulations for reporting monthly and annual Statements of Account for the making and distribution of phonorecords under the Section 115 compulsory license in order to bring the regulations up to date to reflect recent rate determinations for new technologies, such as limited downloads, interactive streaming, and incidental digital phonorecord deliveries and to bring these reporting requirements in line with the existing regulations for reporting the making and distribution of physical phonorecords, permanent downloads, and ringtones.

Commenting Parties

Established in 1917, NMPA is the leading trade association representing the interests of music publishers in the United States. Representing over 2,500 publishers, NMPA's members own or administer the overwhelming majority of musical compositions available in the United States. NMPA acts as the voice of both large and small music publishers and seeks to protect, promote and advance the interests of music's creators.

HFA, which is solely owned by NMPA, provides licensing and administrative services to over 46,000 music publishing clients that, in turn, control over four million copyrighted musical works. On behalf of its affiliated publishers, HFA issues licenses for the use of music in both physical and digital formats, and collects and distributes royalties due pursuant to those licenses.

Established in 1931, SGA represents over 5,000 of America's best-known and well-respected music creators and their heirs, and is the oldest and largest organization in the United States run exclusively by and for songwriters. SGA is incorporated in the State of Tennessee and headquartered in Nashville, with offices in New York and Los Angeles. It provides music licensing, royalty collection and audit services for its members, as well as regularly engaging in legislative, legal and education activities on behalf of the American songwriter community.

NSAI, founded in 1967, is a trade organization dedicated to serving songwriters of all genres. With approximately 5,000 members, NSAI seeks to advance and protect the legal and economic interests of the creators of musical works. NSAI also helps to develop and promote songwriting talent by sponsoring workshops and showcases for aspiring songwriters.

Background

Prior to initiating a formal rulemaking proceeding to amend existing regulations regarding monthly and annual Statements of Account, the Copyright Office met with the

Recording Industry Association of America, Inc., National Music Publishers' Association, Songwriters' Guild of America, Inc., Digital Media Association, Music Reports, Inc., RightsFlow, Inc., and A2IM (collectively "Stakeholders") to discuss how to amend the existing regulations to accommodate the changes in the rate structure. The Stakeholders are filing contemporaneously with this submission, a joint submission of proposed amendments to the existing regulations that reflects their agreement on the majority of issues involved. However, NMPA, HFA, NSAI, and SGA respectfully submit these separate comments on issues on which consensus could not be reached, and which directly impact the economic and legal interests of their members.

I.

STATEMENTS OF ACCOUNT PROVIDED TO PUBLISHERS AND SONGWRITERS SHOULD IDENTIFY THE THIRD PARTY SUB-LICENSEES AUTHORIZED BY THE COMPULSORY LICENSEE TO DISTRIBUTE DIGITAL PHONORECORD DELIVERIES

The Office has requested comments regarding the potential burdens or benefits of requiring licensees to provide identification information for third party licensees.

NMPA, HFA, NSAI, and SGA support the amendment of the existing regulations to require compulsory licensees to identify each third party service ("Third Party Licensees") compulsory licensees have authorized to distribute digital phonorecord deliveries ("DPDs") and the number of DPDs transmitted by each such Third Party Licensee.[1] Without such information, music publishers and songwriters are unable to determine whether Third Party Licensees are acting under the authority of compulsory licensees or infringers. In addition, the identity of the Third Party Licensees and related distribution information is necessarily available to the

[1] The current regulations do require compulsory licensees to report all DPD distributions made pursuant to a compulsory license on their Statements of Account. Songwriters and music publishers merely seek to have that usage information associated with each Third Party Licensee operating under authority of the compulsory licensee.

compulsory licensees who contract directly with Third Party Licensees to distribute sound recordings. Because distributions of DPDs are already electronically tracked and reported to the compulsory licensee by each third party service (or in some cases, a common royalty processing agent operating on the compulsory licensee's behalf), reporting of such information by the compulsory licensee is not only reasonable, but also necessary to ensure transparency in the digital environment. Such transparency is critical in an era of expanding digital distribution over the Internet and wireless networks.

The compulsory license provisions of Section 115 establish an honor system for licensing musical works. Songwriters and music publishers do not control and cannot prevent their copyrighted works from being distributed. Instead, compulsory licensees self-execute, self-report and self-assess. Under such circumstances, identifying all parties who distribute DPDs in the monthly and annual Statements of Account is the only mechanism for copyright owners to understand who is using their music and assess whether payment for their works seems reasonable.

The music business has become increasingly complex in the digital age. New technologies and business models have encouraged record labels and other compulsory licensees to enter into third party licensing or sub-licensing arrangements at an unprecedented pace. Indeed, record labels and other compulsory licensees regularly invest in and own part of the very Third Party Licensees they want to conceal. Stated simply, more companies are entering the digital marketplace than ever. The number of Third Party Licensees and intermediary companies providing digital distribution services for all types of copyrighted works is expected to expand exponentially and these companies are connected by a variety of licensing and ownership

arrangements. Cloaking the identities of these third party users of songwriters' and music publishers' music limits our members' ability to participate actively in this exciting new market.

Songwriters and music publishers should not and cannot be isolated from the development of the digital music industry. It is in the best interest of the entire industry, as it is in the best interest of the country in these challenging economic times, to ensure that all market participants are informed and have access to information bearing on their business decisions. Using Section 115 and the proposed regulations to shield songwriters and music publishers from the most basic information regarding distribution of their compositions (*i.e.*, the identity of the companies exploiting their musical compositions) will result in a dysfunctional and inefficient digital music industry. Publishers will not know who is exploiting their works. They will not be able to assess the breadth of distribution and impact of their music. Most importantly, they will not be able to interact with the very companies distributing their music because they will not know who they are.

Congress is empowered by the Constitution "[t]o promote the Progress of Science and useful Arts . . ." Shared information promotes this goal. Concealing information does not. Only by allowing for unfettered transparency will "progress" be promoted by the compulsory license provisions of Section 115.

II.

NEGATIVE RESERVE BALANCES APPLY ONLY TO PHYSICAL PHONORECORDS AND SHOULD NOT BE APPLIED TO DIGITAL PHONORECORD DELIVERIES

The Office has inquired whether there is statutory authority for allowing the application of credits for negative reserve balances to digital phonorecord deliveries, and, if so, whether there are reasons to limit the application of credits for negative reserve balances to physical phonorecords.

The current regulations clearly indicate that negative reserve balances only apply to physical phonorecords. They provide that "[t]o the extent that the terms *reserve*, *credit*, and *return* appear in this section, such provisions shall not apply to digital phonorecord deliveries." 37 C.F.R. § 201.19(a)(9). The Copyright Office adopted this regulation fully informed of the problems inherent in cross-collateralization between digital and physical product. Nothing has changed to alter this conclusion or the wisdom in adopting this sensible and necessary rule.

Reserve accounting and the negative reserve balance were included in the regulations governing Statements of Account to accommodate the unique record label practice of selling physical phonorecords subject to a right of return. Digital configurations are not sold on a returns basis and, therefore, should not be subject to reserve accounting. In addition, allowing compulsory licensees to offset the negative reserve balance against royalties due on digital uses would offset the risk of "over-shipping" of physical product. As such, cross-collateralization would encourage the practice. This result is not good for anyone in the transaction chain. Further, to the extent compulsory licensees currently have negative reserve balances, and copyright owners do not know the size or extent of such balances, it is possible that copyright owners would not receive any payment for digital uses in the near to medium term, thus dramatically reducing their income. Moreover, the process for applying the negative reserve balance to digital configurations would be exceedingly complex and require that compulsory licensees link returns of physical product typically sold as complete albums to digital product that is sold in varying configurations, through numerous service offerings, at different rates than physical product. Even if such complexities could be worked out, music publishers who represent multiple songwriters would be required to develop systems to track cross-

collateralization at the song and product level. Such a financial imposition in an environment constrained by the statutory rate is inequitable.

Songwriters and music publishers are also concerned about the potential for this practice to bleed into non-compulsory licensing. Record labels have placed numerous contractual restrictions on the way they pay artist/songwriters and even third party songwriters. The "controlled composition" clause imposes some of those restrictions, including paying royalties equal to 75% of the statutory rate or less, and the only relief from these controversial restrictions is a provision in Section 115 that prohibits payment of less than the statutory rate for certain digital distributions. The aforementioned provision does not apply to physical sales. No one knows how cross-collateralization will be used in connection with, or incorporated into, controlled composition clauses and affect royalties paid to songwriters and publishers. But it surely will bring uncertainty and imprecision to the reporting system. This is another compelling reason to resist the cross-collateralization between negative physical balances and digital product.

Nothing has changed to alter the Copyright Office's conclusion embodied in the current regulations that negative reserve balances only apply to physical phonorecords, where sales are subject to a right of return. Such a change would be exceedingly complex and impose an unfair financial burden on music publishers. As a result, reserve accounting and negative reserve balances should continue to be limited to the distribution of physical product.

Conclusion

For the foregoing reasons, NMPA, HFA, NSAI, and SGA respectfully submit that the Copyright Office should adopt the regulations submitted by the Stakeholders, with the modifications suggested above. Please note, however, that this submission is without prejudice

to the possibility of NMPA (or any of the other listed parties acting on behalf of their own organizations) from further developing, supplementing, and/or changing the Commenter Stakeholders' submission on certain points, as additional comments are received from other parties and the Commenter Stakeholder parties continue to reach consensus on language.

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Respectfully submitted,

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