

Comment Letter

RM 2000 7

No. 12

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

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Request for Public Comment )  
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 Compulsory License for Making and )  
 Distributing Phonorecords, Including )  
 Digital Phonorecord Deliveries )  
 )

37 CFR Part 201 and 255  
 Docket No. RM 2000-7

**COMMENTS OF AD HOC COALITION OF STREAMED CONTENT PROVIDERS**

These comments are submitted on behalf of the Ad Hoc Coalition of Streamed Content Providers (the "Coalition").<sup>1</sup> The Coalition consists of digital music and video service providers that are involved in making available "streamed" music and/or audiovisual programming to consumers, either or both on an "on demand" (often called "interactive") and "non-on demand" (often called "noninteractive") basis. Coalition members share common concerns regarding the scope and substance of the Copyright Office's Notice of Proposed Rulemaking (the "Proposed Rulemaking"), 73 Fed. Reg. 40,802 (July 16, 2008), which they believe would directly and adversely affect their businesses.

**INTRODUCTION**

Coalition members provide digital music and/or audiovisual offerings and transmit content in the form of "streaming" to end users for their listening and/or viewing pleasure. Coalition members understand that, by virtue of the Proposed Rulemaking, the

<sup>1</sup> The current members of the Coalition are Google, Inc./YouTube LLC and Slacker, Inc.

Copyright Office (the “Office”) is seeking to reduce the legal uncertainty surrounding the application of Section 115 to streamed transmissions of sound recordings. But, as explained in Part I of these Comments, they fear that the Office’s intervention at this time, and the Office’s expansive interpretation of what constitutes a cognizable reproduction under the Copyright Act, will instead exacerbate and create uncertainty both with respect to noninteractive and interactive content streaming activity.

First, as relates to noninteractive streaming activity, the Coalition members believe that the Proposed Rulemaking, as drafted, would disturb existing commercial arrangements by overturning the industry consensus that no “copy” for which a reproduction rights license is required is made in the course of noninteractive streaming. This consensus is reflected in, inter alia, more than a decade of industry practice, during which music publishers generally have voluntarily accepted public performance licenses as the sole requisite license for noninteractive streaming of musical works.

Second, the Office’s interpretation of Section 115 also could give rise to new licensing obligations for existing and fledgling interactive music and audiovisual content streaming services (the latter of which are not even eligible for the Section 115 compulsory license) at a time when the legal issues surrounding such business models are unsettled and still evolving. While some interactive music services have agreed voluntarily to license reproduction rights in order to avoid the risks and costs associated with litigation, they are operating in a fast-evolving marketplace and an uncertain legal landscape – indeed, one in which the Second Circuit (in the Cablevision case discussed below) earlier this month issued a ruling the implication of which is that *no* such licenses

ultimately are required in the absence of “fixed” reproductions made in the course of streaming.

That some commercial entities may have agreed to take Section 115 licenses for interactive music audio streaming as an alternative to litigation does not change the status of such interactive streaming as a matter of statutory construction (nor render it, as a consequence, different from noninteractive streaming when it comes to reproduction rights licensing requirements under the Copyright Act). The Coalition notes, moreover, that DiMA is contractually bound to support these commercial resolutions and the proposed legal conclusion that on-demand streaming requires a Section 115 license, and its comments – at least in part – should be viewed in that light.

The Proposed Rulemaking blurs the commonly accepted distinction between reproduction rights and public performance rights with a construction of Section 115 that begs reexamination in the wake, most notably, of the Second Circuit’s recent decision in The Cartoon Network LP, LLLP v. CSC Holdings, Inc. and Cablevision Sys. Corp., Nos. 07-1480-cv(L), 07-1511-cv(CON), 2008 WL 2952614 (2d Cir. Aug. 4, 2008) (“Cablevision”). Cablevision, in which the Second Circuit articulated a much narrower interpretation of the statutory definition of a “fixed” reproduction than does the Office in the Proposed Rulemaking, counsels against the Office intervening at this juncture and opining (as it does in the Proposed Rulemaking) as to the scope of Section 115. The reproduction right should be shaped by the courts in the context of a specific factual record or by the legislature. Cablevision requires a rethinking of the Office’s legal analysis.

The Proposed Rulemaking is at odds with Cablevision in that it suggests an inflexible, across-the-board requirement that mechanical/reproduction licenses be obtained for every form of buffered, cached, or other transitory intermediate copies – irrespective of duration, utility, or ability of the consumer to access same – even where such copies merely facilitate licensed public performances and have no independent economic value. Indeed, such a rule would be inconsistent not only with Cablevision, but also with the observation in the Office’s own prior Section 104 report that independent economic value (to the consumer) should be the touchstone of a legally cognizable reproduction.

From a commercial and pragmatic viewpoint, the significant expansion of reproduction rights licensing requirements that would be engendered by the Proposed Rulemaking would be especially problematic. For services that are eligible for a Section 115 license, this would be so because of the cumbersome nature of the existing procedures for obtaining licenses for musical works under Section 115 (procedures that are in desperate need of revision for digital services). Coalition members that stream audio-only music content would be required to comply with Section 115’s procedures for hundreds of thousands (if not millions) of musical works, many of which are owned by multiple publishers. The cost in time and expense of such compliance with Section 115 would be enormous. Much of the information that would be required, were streaming services forced to adopt such licensing procedures (such as identifying the names and addresses of the multiple publishers and the publishing “splits” for the huge volume of musical works that would be subject to the Section 115 Notices of Intention to Obtain a

Compulsory License under the applicable Office regulations), is neither publicly available nor readily accessible.

For audiovisual streaming services that *do not qualify for Section 115 compulsory licenses*, the additional licensing burden would be *even more paralyzing*. Such services could face the crippling prospect of having to negotiate individual voluntary licenses with hundreds of thousands of rights holders in the absence of readily available copyright ownership data or any procedural mechanism that might make the process of identifying rights holders and obtaining the necessary rights feasible for less-than-debilitating transaction costs.

At bottom, the Office's decision to define cognizable reproductions to include all copies generated in the course of a streamed transmission, irrespective of the purpose, function, or economic significance of those reproductions, overlooks a critical legal distinction between copying that facilitates the delivery or "distribution" of a reproduction of a sound recording, on the one hand, and copying that merely enables the public performance of a sound recording, on the other. By collapsing the clear statutory distinction between the distribution of copies and the transmission of performances, *i.e.*, between activities licensable under Section 115 and those licensable under Section 114, the Office conflates separate compulsory licensing schemes and undermines the integrity of Section 114. Congress surely would not have created an express compulsory license under Section 114 to enable streamed digital transmissions of sound recordings unless it intended that compulsory license to include an authorization for all intermediate copies needed to facilitate the streamed public performances. Nor can the seismic potential

implications of the Proposed Rulemaking as it pertains to the streaming of audiovisual works be reconciled with pre-existing copyright law or industry practices.

In Part II of these Comments, we examine in detail how the recent Cablevision decision raises serious concerns about the Office's legal analysis and suggest that the Office may not have merely erred substantively in its reading of Section 115, but also may have exceeded the scope of its rulemaking authority.

**I. THE PROPOSED RULEMAKING WOULD UNNECESSARILY INJECT CONFUSION INTO THE MARKET FOR STREAMED CONTENT AT A TIME WHEN THE VALIDITY OF ITS LEGAL ANALYSIS HAS BEEN SIGNIFICANTLY CALLED INTO QUESTION**

**A. The Industry Consensus Is That Streaming Implicates Only Public Performance Rights, Not Reproduction or Distribution Rights**

More than seven years after initiating an inquiry into the scope of the Section 115 compulsory license, the Office seems to have decided, with no forewarning, to intervene in the market by issuing far-reaching and commercially significant proposed rules that would upset established practice and settled commercial and legal expectations across many media by, inter alia, overturning the common understanding that streamed public performances of digital content do not implicate reproduction and distribution rights. Contrary to the Office's professed constructive intentions, the Coalition members fear that the Proposed Rules would confuse, rather than clarify, the current commercial landscape.

For example, DiMA, the RIAA, and the NMPA – representatives of three primary commercial concerns implicated by streaming – all agree that Section 115 does not apply to noninteractive audio-only streaming and that such noninteractive streaming does not trigger any reproduction right licensing requirement. In addition, noninteractive

and interactive audiovisual (as well as many interactive audio-only) streaming services generally have operated since 1995 with only public performance right licenses without challenge by the music publishers. Yet the Proposed Rulemaking – in extending the Section 115 license to noninteractive streaming of content – takes a contrary view.

Although the Office purports to “take no position with respect to whether and when it is necessary to obtain a license to cover the reproduction or distribution of a musical work in order to engage in activities such as streaming,” 73 Fed. Reg. at 40,805, the Proposed Rulemaking goes on to do exactly that. In attempting to justify its proposed extension of the scope and availability of Section 115, the Office articulates legal conclusions regarding cognizable copying that would give rise to costly and burdensome new licensing obligations for streaming services by recognizing heretofore unrecognized reproduction and distribution rights within the ambit of Section 115. These adverse consequences would far outweigh the benefits of expanding the availability of Section 115.

Accordingly, the Coalition urges the Office to strike the legal analysis underlying its decision to extend the availability of a Section 115 compulsory license to streamed transmissions (of any kind). Should the Office insist on promulgating new rules prior to issuance of the pending CRB Section 115 rate-setting determination, the Coalition urges it to endorse the common-sense, marketplace-supported proposition that streamed noninteractive public performances do not implicate the copyright owner’s reproduction or distribution rights and thus do not require a mechanical license.

The Coalition believes, moreover, that there is no sound legal basis upon which to conclude that a reproduction right license is required for or implicated by

temporary or incidental copies generated in the course of what is essentially a “public performance” of a musical work (where the consumer is left with no readily accessible copy from which the performance may be rendered anew) whether the streamed transmissions involved are interactive *or* noninteractive.

Insofar as the Office, in extending the Section 115 compulsory license to streaming transmissions, intended to “do a favor” to streaming services by bringing the server copies made by such services within the confines of a compulsory licensing regime, the Coalition respectfully submits that there are much better ways to accomplish the avoidance of copyright infringement claims (however dubious) associated with the making of such copies. These alternatives include: (i) modernizing the section 112 ephemeral copy exemption to include all server copies that exist solely for the purpose of enabling licensed public performances, whether or not they are destroyed after six months (as such copies are the functional equivalent of ephemeral copies); (ii) expanding the scope of Section 112 to embrace any and all incidental or temporary copies used to effectuate a licensed public performance of any streamed audio or audiovisual work; (iii) providing that such copies are covered by an implied license; and/or (iv) recognizing or conclusively determining that such reproductions made solely to facilitate an otherwise valid and licensed public performance are “de minimis” or should be deemed “fair use,” as suggested in the Office’s Section 104 Report. See Section 104 Report at 133-41.

**B. The Section 115 Procedural Regulations Are Ill-Equipped for Streaming Services**

To the extent the Office believes extending Section 115 to all forms of streaming services, including noninteractive streaming services, would be a “cure” for a



lack of industry consensus regarding the scope of Section 115, the Coalition respectfully suggests that belief is misguided and dangerous in its potential financial implications. In addition to whatever questions may be raised by the substance of the Office's legal analysis, the proposed extension also creates extremely problematic practical obstacles to implementation. If every streaming service were required to procure reproduction licenses in addition to public performance licenses for the transmission of musical works, it likely would bring all such services to an immediate, screeching halt.

Extending compulsory mechanical licensing to streaming services would add significant additional administrative burden and cost for streaming services (even assuming a Section 115 license would, in theory, be available – which, for the transmission of audiovisual content, it is not). Under the current applicable regulations found in 37 C.F.R. § 201.18 and 19, the Proposed Rulemaking appears to impose on streaming services eligible for the Section 115 license the obligation to research, identify, maintain, and report on the basis of information that does not exist in any complete centralized form or database.

The corresponding regulations governing Notices of Intent to Obtain a Compulsory License under Section 115 may be construed to: require users to seek and file hundreds of thousands (if not millions) of individual licenses and notices; require streaming services that are ill-equipped to do so to identify the myriad copyright owners and publishers who own an interest in each such work, where no publicly available central repository for that information currently exists; and mandate the unnecessarily duplicative and costly design, creation, maintenance, utilization, and storage of vast

amounts of publishing data in order to comply with the current compulsory licensing obligations.

The extension of Section 115 to all streaming services proposed by the Office could have the unfortunate, and surely unintended, consequence of eliminating digital delivery services engaged in legitimate, licensed streaming. The transactional clearance costs and potential litigation costs (whether for CRB proceedings or for potential copyright infringement litigation) that the Proposed Rulemaking would engender for services suddenly required for the first time to obtain Section 115 licenses would be staggering, as the compulsory license appears to require, on a monthly basis, that all streaming services track, compile, account, and pay each time a “copy” of each of the millions of such works is used under the compulsory license – an undertaking of which virtually no digital service appears capable.<sup>2</sup>

For these reasons, reform as to procedure must go hand in hand with any extension of the Section 115 compulsory license. The Office cannot and should not consider any change in the scope or nature of the Section 115 license (much less a more general expansion of the Section 106(1) reproduction right) absent a concurrent modification and modernization of the outdated compulsory licensing procedures set forth in 37 C.F.R §§ 201.18 and 19. Even such reform, however, would merely ease, rather than eliminate, the onerous new burdens that a broadening of the reproduction right

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<sup>2</sup> Existing download services do not face this problem, as they have been able to rely upon the music-publishing databases amassed over the years by the record companies in order to comply with Section 115.

and of Section 115 along the lines contemplated in the Proposed Rulemaking would impose on streaming services.

Further, in addition to its adverse impact on audio-only streamed music services, the Office's conclusion that all recipient-end buffered and cached copies are sufficiently "fixed" to qualify as DPDs invites the erroneous conclusion that a reproduction right attaches to streamed music videos and other audiovisual works *for which no Section 115 compulsory license is available*, since the Copyright Act defines phonorecords as objects embodying sounds only and *specifically excludes audiovisual works*. Thus, the Proposed Rulemaking would force streaming services offering audiovisual content to negotiate new voluntary reproduction rights licenses or risk incurring infringement liability – an extremely daunting, if not crippling, prospect given the lack of any database of copyright ownership and "split" data, the difficulty of identifying incidental music in audiovisual works, the huge cumulative transaction costs, etc.

Because no complete, publicly available and searchable record or database exists that identifies all the music publishers, ownership splits, and/or addresses for copyright owners that have an ownership or administration interest in the millions of musical works that any commercially viable streaming service would have to offer, there appears to be no currently viable mechanism for identifying the copyright owners whose works are used, and there also is no mechanism by which the requisite licenses can be obtained en masse. Thus, the transaction costs associated with obtaining licenses through voluntary negotiations, even if it could be accomplished, would be astronomical. In

short, the Proposed Rulemaking would impose insurmountable administrative burdens on audiovisual streaming services.

## **II. THE PROPOSED RULEMAKING APPEARS TO BE ERRONEOUS AS A MATTER OF LAW**

### **A. Buffering and Other Intermediate Copying Are Not Phonorecords or Digital Phonorecord Deliveries**

As explained above, the Coalition believes the Office would be wise to refrain from upsetting the industry consensus (for virtually all noninteractive and many interactive audiovisual and other streaming services) that buffer and other intermediate copies that facilitate streamed performances do not constitute reproductions for which a license is required under the Copyright Act. The contrary position spelled out in the Proposed Rulemaking has been rendered suspect, if not persuasively undermined, by the Second Circuit's decision in Cablevision. As explained below, that decision weakens the rationale for requiring reproductions rights licenses for any streaming, whether interactive or noninteractive.

#### **1. The Proposed Rulemaking ignores the “transitory duration” requirement**

The Office's proposed extension of the Section 115 compulsory license to all copies created incident to a streamed performance rests on its analysis of what constitutes a “phonorecord.” Under the Copyright Act, a “copy” or a “phonorecord” must be “fixed” in a material object – *i.e.*, “capable of being perceived, reproduced, or otherwise communicated *for a period of more than transitory duration.*” 17 U.S.C. § 101 (emphasis added). The Coalition believes that by addressing the construction of these statutory terms in the Proposed Rulemaking, the Office may inappropriately be interposing its views at a time when litigation is ongoing that bears upon the issue of

whether a cognizable reproduction is created in the course of the “streaming” of a public performance. In fact, in the Proposed Rulemaking, the Office cites and seemingly adopts the district court opinion in Cablevision that *was just reversed by the Second Circuit* for, *inter alia*, erroneously ignoring the statutory “more than transitory duration” requirement for a copy to be “fixed.” See 73 Fed. Reg. at 40,809.

The Coalition submits that the flawed statutory analysis in the Proposed Rulemaking traces directly back to the Office’s DMCA Section 104 Report, a now seven-year-old analysis that is the principal source of the Office’s conclusions regarding the legal status of buffered data. In that report, the Office acknowledged the statutory “duration” requirement and the fact that certain RAM copies might not exist for a sufficient duration to qualify as “fixed” reproductions. See Section 104 Report at 111. The Office even suggested there that the test for a legally cognizable copy should be whether independent “economic value” can be derived from the copy. But the Office ascribed the economic value of a reproduction to “the ability to copy, perceive, or communicate it,” *id.*, and concluded that a “dividing line . . . can be drawn between reproductions that exist for a sufficient period of time to be capable of being ‘perceived, reproduced, or otherwise communicated’ and those that do not.” Section 104 Report at 111 (cited in Proposed Rulemaking, 73 Fed. Reg. at 40,808).

As the Second Circuit observed in Cablevision, reducing the fixation requirement to *perceivability* impermissibly “reads the ‘transitory duration’ language out of the statute.” 2008 WL 2952614, at \*6. The court specifically rejected the Office’s analysis quoted above, stating: “[T]he Office’s interpretation does not explain why

Congress would include language in a definition if it intended courts to ignore that language. . . .” Id.

The Office states in the Proposed Rulemaking that it has “no reason to believe that developments in either technology or the law require us to revisit” the conclusions reached in the Section 104 Report as to buffer copies. 73 Fed. Reg. at 40,809. The Coalition respectfully suggests, however, that Cablevision calls for just such a revisitation, as well as restraint by the Office in interposing its own views at this juncture insofar as the issue of what constitutes a cognizable reproduction remains unsettled.

**2. Data buffered during streamed performances is “transitory” and thus fails the “duration” requirement for fixation**

In addition to believing that the Office is wrong to intervene at this point, the Coalition respectfully believes that the Office also is incorrect in the merits of its legal analysis. Fragmentary data stored momentarily in a RAM buffer is the epitome of the type of “transitory” embodiment that Congress regarded as *not* being “fixed”: it is held for mere seconds and then is immediately overwritten by subsequent data such that no copy remains after that part of the performance has been rendered. As explained in the 1976 House Report, the definition of “fixed” excludes “purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, *or captured momentarily in the ‘memory’ of a computer.*” H. Rep. 94-1476 at 53 (emphasis added). The Section 104 Report quotes this very language. See Section 104 Report at 114.

The Section 104 Report also noted that buffered data “is continually overwritten and ceases to exist once the song is finished playing” and that “at the end of the transmission the consumer is left with nothing but the fond memory of a favorite song.” Section 104 Report at 140-41. The buffer copies exist, the Office noted, “for too short a period of time to be exploited in any way other than to enable the performance of the work,” *id.* at 140, and they have “no independent economic significance.” *Id.* at 143. Unfortunately, in the Proposed Rulemaking, the Office has chosen to ignore the legal implications of its own prior observations concerning the nature of buffered data, namely, that such data should not be regarded as legally cognizable copying.<sup>3</sup>

By contrast, the Second Circuit concluded in Cablevision that buffered data may not be held in memory long enough to be considered “more than transitory”:

No bit of data remains in any buffer for more than a fleeting 1.2 seconds . . . . [E]ach bit of data here is rapidly and automatically overwritten as soon as it is processed. . . . [T]hese facts strongly suggest that the works in this case are embodied in the buffer for only a ‘transitory’ period, thus failing the duration requirement.

2008 WL 2952614, at \*7.

The Office worries that it cannot provide a precise definition: How many seconds are “transitory”? How many are *more* than transitory? Faced with such

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<sup>3</sup> Despite Congress’s guidance as to the status of “momentary” computer copies, the Office previously concluded that an earlier statement in the House Report’s discussion of the fixation requirement that quoted only the first half of the definition of fixation is the “best guide” for drawing the durational line under the second half of the definition. See Section 104 Report at 116. But this ignores the fact that just two paragraphs later the House Report explains the second half of the definition, including the exclusion of “momentarily” captured computer data as described above – an explanation that can only be understood as qualifying the prior discussion relied upon by the Office.

uncertainty, the Coalition believes the prudent answer surely is not adopting the sweeping conclusion that *all* buffer data falls beyond the “transitory” line, a conclusion that would sweep in, among other things, buffer data of the type that the Second Circuit – working with the benefit of a full record concerning specific technology – has explicitly held *not* to be “fixed.”

The implications of the Proposed Rulemaking are similarly troubling for services that utilize cached copies solely to facilitate streamed performances. The Proposed Rulemaking would seem to encompass all such copies within Section 115 (in the case of streamed music services), but it fails to account for the factual nuances of caching techniques. For instance, even where such copies might satisfy the “more than transitory duration” requirement, they often reside on the user’s computer and are created at the behest of the user’s software, not by the streaming service. Under Cablevision, because such cached copies would be “made” by the user, they would appear not to give rise to any licensing obligation on the part of the streaming service. See Cablevision, 2008 WL 2952614, at \*11.

Thus, the Second Circuit decision in Cablevision cautions against the adoption in the Proposed Rulemaking of the position that *all* buffer, cache, or other copies – however fleeting, however partial, and for whatever purpose – are “fixed” or otherwise cognizable copies requiring a license.

The Office’s analysis of cognizable copying draws upon the discussion in its Section 104 report of the holding in MAI Systems Corp. v. Peak Computer Inc., 991 F.2d 511 (9th Cir. 1993), and its progeny with respect to RAM copies. But a full working copy of a computer program held in RAM for as long as the computer is turned



on, see Section 104 Report at 107, is significantly different than bits of a song stored momentarily and then written over once that part of the song is performed. The computer program stored in RAM is an end product; its value is attributable to the consumer's ability to access and use *that copy*, giving it the potential to replace the purchased/licensed copy. See id. at 131. Had the MAI court ruled otherwise, it would have opened the door for "pirated" (but non-permanent) copies to be loaded onto users' computers, used for a period of time, and then discarded when the computers were powered down.

Buffered song (or audiovisual) data, by contrast, is useless to the consumer apart from its role in rendering an already licensed performance. It does not replace a copy that otherwise might be licensed, it is not generally accessible to the user for a replay of the work concerned, and it does not have any independent value. Thus, a determination that such copies are not phonorecords would *not* open a loophole for pirated RAM song fragments. The Office recognized this in the Section 104 Report, where it explained that the "productive purpose" of a buffer copy lies not in its independent existence but in the performance it makes possible.<sup>4</sup>

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<sup>4</sup> See Section 104 Report at 138; id. at 143 ("The economic value of licensed streaming is in the public performance of the musical work and the sound recording, both of which are paid for. The . . . copies have no independent economic significance. They are made solely to enable the performance."). Register Peters testified to similar effect in the hearings related to the Section 104 Report, explaining that in a streamed performance (even on-demand) "there [is] no separate economic value to the buffer copy. . . . You never make a copy from what's in the random access memory. . . . the activity is essentially a performance." Testimony on DMCA Section 104 Report Before the Subcommittee on Courts, the Internet and Intellectual Property of the Committee on the Judiciary, House of Representatives, Dec. 12-13, 2001.

It follows from the foregoing that “perception” by the “receiving device” for long enough for the device to act on same is not the proper test for ascertaining the existence of a phonorecord. The scope of Section 115 should not be determined by the (hyper)technical question of whether any intermediate copies are stored even momentarily and imperceptibly to the user in order to facilitate a licensed transmission; the “fixation” test instead must look to whether the copy is fixed for a duration sufficient to enable a user to access it after and apart from the streamed performance for which it was created, lest the definition of fixation/reproduction collapse into the definition of performance.

**B. In Addition to Years of Industry Practice, the Statute and the Legislative History Clearly Preclude Requiring a Mechanical License for Streaming**

Section 115, which provides a compulsory license for “making and distributing phonorecords,” expressly references only sections 106(1) and 106(3) of the Copyright Act – the reproduction and distribution rights. Consistent with this, the Department of Commerce, in the 1995 report of its Information Infrastructure Task Force, stated that “[a] distinction must be made between transmissions of *copies* of works and transmissions of *performances* or *displays* of works.” Information Infrastructure Task Force, “The Report of the Working Group on Intellectual Property Rights” (Bruce A. Lehman) at 71 (Sept. 1995) (emphasis in original) (quoted in United States v. American Society of Composers, Authors and Publishers, 485 F. Supp. 2d 438, 445 (S.D.N.Y. 2007)). Section 115 draws precisely this distinction: it is meant to cover the distribution of physical, retainable *copies* of sound recordings (whether analog or digital),

not the transmission of *public performances* of sound recordings, which is addressed in Section 114.

The Proposed Rulemaking would violate the cognizable copy/public performance distinction, which long has been fundamental to the digital content marketplace. The Office's analysis is inconsistent with the many decisions holding that the transmission of a "performance" to consumers, with or without the benefit of an intervening distribution entity, does not constitute the "distribution" of a copy of the content at issue, which is the predicate for a compulsory license under Section 115. See, e.g., Agee v. Paramount Communications, Inc., 59 F.3d 317, 325 (2d Cir. 1995); Coleman v. ESPN, Inc., 764 F. Supp. 290, 294 (S.D.N.Y. 1991). See also David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 759 n.3 (S.D.N.Y. 1988) (holding that the transmission of a program to a cable operator by a cable programmer is a public performance under the Copyright Act); WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 625 (7th Cir. 1982).

The purpose of the 1995 amendments to Section 115, which made the compulsory mechanical license applicable to DPDs, was straightforward: to ensure compensation to the owners of musical work copyrights for the reproduction and distribution of sound recordings "distributed" in digital form, *i.e.*, digital downloads. The legislative history makes clear that Section 115, as amended, does not apply to public performances any more than it did prior the amendment. It explains that a DPD, as defined in Section 115(d), "does not include real-time noninteractive subscription transmissions where the recorded performance and music are merely received in order to hear them." H.R. Conference Report No. 105-796, at App. 54-27. Codification of the

reasoning set forth in the Proposed Rulemaking would, in other words, be inconsistent with the “distinct classification and treatment of performances and reproductions under the Act.” American Society of Composers, Authors and Publishers, 485 F. Supp. 2d at 447.

The Office’s construction of the statute also could hamper technological innovation by causing mechanical licensing obligations to turn on differences in transmission technologies rather than on the characteristics of the end product transmitted to users. The Second Circuit in Cablevision makes clear the “form over substance” folly associated with such an interpretation of the Copyright Act.

The Proposed Rulemaking is problematic for the additional reason that it purports to define what constitutes a reproduction under Section 106 and a DPD under Section 115 without addressing whether there are valid considerations/defenses/other factors that might, with respect to a particular service or delivery method, ultimately lead to the conclusion that some or all of such reproductions need not be licensed. For example, a court reviewing any incidental, temporary, fragmented, or partial reproductions created by way of a digital transmission (whether noninteractive or interactive) effectuating an otherwise licensed public performance might find, with the benefit of a full record, that such copies, inter alia: (i) fail to satisfy the definition of “fixed” in Section 101 of the Act, as discussed above; (ii) do not result in a fixed reproduction “from which sounds may be perceived, reproduced or communicated” under the definition of “phonorecords” in Section 101; (iii) do not result in a “specifically identifiable reproduction” and thus do not meet the definition of a DPD in Section 115(d); (iv) are the subject of an “implied license” as a result of the grant of a public

performance license; (v) are non-actionable de minimis reproductions; (vi) are fair use; and/or (vii) do not constitute an actionable “distribution,” e.g., if the server cache copies are made available without an intention to further distribute such copies.

In other words, although the Office claims to “take no position on when or whether it is necessary to obtain a reproduction license,” 73 Fed. Reg. at 40,805, it puts forward a definition of a DPD that would support a demand for such a license without addressing any of the defenses that potentially would obviate the need for such license. Such an approach encourages conflict and confusion rather than resolution and consensus.

**C. Redefining the Scope of Section 115 as the Office Proposed Would Exceed the Office’s Authority**

The Coalition also believes that were it to issue the Proposed Rulemaking in its present form, the Office likely would be overstepping the limits of its authority to administer the Section 115 compulsory license. While the Office may have authority under sections 802(f)(1)(B) and (D) to opine on “novel issues of law” and to correct errors by Copyright Royalty Judges, it is inappropriate for the Office to propound rules of general applicability, untethered to a specific factual record that would inform evaluation of the highly technical issues involved in determining the legal status of the various types of intermediate copying.

The Proposed Rulemaking is replete with what the Coalition believes are questionable legal conclusions as to what is – or is not – a “fixed” and hence legally cognizable “reproduction,” what is a DPD, and whether streaming involves the creation of DPDs. Although the Office, in its role of administering the operation of the Section

115 compulsory license, may be permitted under that authority to determine that Section 115 extends to and embraces any reproductions that *may* be generated as part of a transmission for which a license is required, it should not purport to decide the legal question of whether “fixed” copies *are in fact created* by a particular service or whether any such copies are legally cognizable. That is a case-specific inquiry properly addressed by a court, by Congress, or by the Copyright Royalty Judges in the first instance.


### **CONCLUSION**

The Coalition understands the desire of the Office to bring a greater measure of legal and commercial certainty to the contours of Section 115 with respect to streaming. But the “cure” proposed by the Office in the form of the Proposed Rulemaking is worse than the “harm” it seeks to alleviate.

The Proposed Rulemaking advances a disconcerting expansion of the Section 115 compulsory license to streaming services in a manner that is likely to seriously impede the functioning of the digital licensing marketplace. If implemented, the proposed rules would saddle streaming services with new and burdensome licensing obligations that would threaten the continued viability of many such services. These consequences would flow directly from the Office’s overly broad conception of what constitutes a “fixed” reproduction, which would encompass all reproductions made in the course of an otherwise properly licensed public performance of a streamed digital transmission. This pronouncement would, if enacted, create licensing gridlock. It would, moreover, appear to be highly questionable as a matter of law under the Second Circuit’s recent decision in Cablevision.

It is clear as a general matter – consistent with the prevailing industry consensus – that noninteractive audio streaming falls outside the scope of Section 115. Thus, any rulemaking relating to Section 115 should exclude noninteractive streaming if it is to comport with the distinct compulsory license regimes Congress established for phonorecord deliveries, on the one hand, and for public performances, on the other. Existing legal principles (as recently supplemented by Cablevision) suggest, moreover, that the same exclusion should apply to interactive (on-demand) streaming. Thus, the Coalition hereby requests the Office to abandon its rulemaking or, at a minimum, defer rulemaking as to these issues while they remain subject to further litigation in the courts as well as to adjudication by the Copyright Royalty Judges in the pending rate-setting proceeding.

Respectfully submitted,

  
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