

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

Comment Letter  
**RM 2000 7**  
No. 1

In the Matter of

Compulsory License for Making and  
Distributing Phonorecords, Including  
Digital Phonorecord Deliveries

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AUG 28 2008 Docket No. RM 2000 AUG 28 2008  
**GENERAL COUNSEL** **COPYRIGHT OFFICE**  
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**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**

The National Music Publishers' Association, including its wholly owned licensing subsidiary, The Harry Fox Agency, Inc. ("NMPA"), the Songwriters' Guild of America ("SGA") the Nashville Songwriters Association International ("NSAI") and the Association of Independent Music Publishers ("AIMP") submit these comments in response to the Copyright Office's Notice of Proposed Rulemaking dated July 16, 2008, 73 Fed. Reg. 40,802 (July 16, 2008) to clarify the scope and application of the Section 115 compulsory license to make and distribute phonorecords of a musical work by means of digital phonorecord deliveries ("DPDs") ("NPRM"), as supplemented by the Copyright Office's Extension of Time to File Comments and Reply Comments and Notice of Hearing dated August 8, 2008 ("Supplemental Notice").

NMPA, SGA, NSAI and AIMP strongly support the adoption of the regulations proposed by the Copyright Office in the NPRM ("Proposed Regulations") as applied to download and interactive streaming services, with certain minor modifications addressed herein, to confirm and clarify that (i) interactive streams of musical works are subject to licensing pursuant to Section 115 of the Copyright Act; (ii) a Section 115 license for full (permanent) downloads, limited

downloads or interactive streams extends to all phonorecords necessary to enable such activity (solely for the purpose of enabling that activity); and (iii) a digital phonorecord delivery includes a digital transmission of a sound recording that results in a reproduction that is specifically identifiable by the transmission recipient or by a device for the transmission recipient.

NMPA, SGA, NSAI and AIMP agree with the Copyright Office that the lack of an express rule confirming that licenses are available under Section 115 for the use of musical works by digital services offering interactive streams and limited downloads has been detrimental to the music industry. *See* NPRM at 40,806. As discussed in more detail below, the key constituents of the online music industry – music publishers and songwriters, record labels and digital music companies – have, since the time this rulemaking was first requested in 2000, moved toward and reached a consensus that all the parties will benefit by making such licenses available under Section 115 on an industry-wide basis, at rates to be determined through statutory ratesetting proceedings. *See* 17 U.S.C. §§ 115(c)(3)(C), (D), 803-804.

Most recently, NMPA, SGA and NSAI, on the one hand, and the Recording Industry Association of America (“RIAA”) and Digital Media Association (“DiMA”), on the other, reached a groundbreaking settlement to address these issues in the context of the Section 115 ratesetting proceeding currently pending before the Copyright Royalty Board (the agreed rates and terms to be adopted by regulation hereafter referred to as the “CRB Settlement”). *See* Joint Mot. to Adopt Procedures for Submission of Partial Settlement, *In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, No. 2006-3 CRB DPRA (“CRB Proceeding”) (May 15, 2008). The CRB Settlement will establish the licensing rates and terms

for digital phonorecord deliveries in the form of interactive streaming and limited downloads under Section 115 of the Copyright Act.<sup>1</sup>

The CRB Settlement represents the culmination of a long series of industry negotiations and understandings to clarify and resolve concerns surrounding the treatment of interactive streaming and limited downloads under Section 115, as well as the server copies<sup>2</sup> and intermediate copies required to facilitate these types of digital transmissions. Notably, the rates and terms agreed to by the parties and embodied in the CRB Settlement are consistent with and supported by the Proposed Regulations. Because adoption of the Proposed Regulations would further clarify the meaning of “DPD” – and thus remove any residual doubts about the broad availability of licenses for various online activities under Section 115 – NMPA, SGA, NSAI and AIMP strongly support the adoption of the Proposed Regulations as applied to full (or “permanent”) downloads, limited downloads and interactive streaming of musical works.<sup>3</sup>

### **Commenting Parties**

Established in 1917, NMPA is the leading trade association representing the interests of music publishers in the United States. Representing over 700 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. NMPA’s wholly owned subsidiary, The

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<sup>1</sup>The settlement is expected to be provided to the Copyright Royalty Judges on September 15, 2008 for adoption as part of the CRB’s final determination in the proceeding. *See* Joint Mot. to Adopt Procedures for Submission of Partial Settlement.

<sup>2</sup> In these comments we use the term “copies” interchangeably with “phonorecords.” The term “server copies” is shorthand for the “server-end complete copies” referenced in the NPRM. Our use of the term “buffer copies” means “server-end buffer copies” and/or “recipient-end buffer copies” in the terminology of the NPRM.

<sup>3</sup> While the Copyright Office correctly notes that the parties’ positions have “evolved” over the course of this eight-year proceeding, NPRM at 40,806, NMPA and SGA note that they have from inception advocated for an industry-negotiated resolution of the issues, which in fact has now occurred.

Harry Fox Agency, Inc. (“HFA”), is an industry service organization representing almost 35,000 publisher principals, that in turn collectively own or administer nearly two million copyrighted musical works. HFA acts as an agent on behalf of its publisher principals, licensing copyrighted musical compositions for reproduction and distribution in the form of CDs and other physical formats, as well as for downloads and other online uses.

SGA represents over 5,000 of America's best-known and well-respected music creators and their heirs. Established in 1931, SGA is the oldest and largest organization in the United States run exclusively by and for songwriters. SGA is an unincorporated voluntary association headquartered in Nashville, with offices in New York and Los Angeles. It provides royalty collection and audit services for its members, as well as music licensing.

NSAI, founded in 1967, is a trade association 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.

AIMP, founded in 1977, is dedicated to serving independent music publishers. With approximately 500 members in both New York and Los Angeles, AIMP seeks to educate and inform music publishers about industry trends and practices by providing a forum for the discussion of the issues and challenges confronting the music publishing industry.

## **I.**

### **THE SCOPE AND APPLICATION OF THE SECTION 115 LICENSE SHOULD BE CLARIFIED TO PROVIDE CERTAINTY IN THE DIGITAL LICENSING PROCESS**

#### **A. Background**

Following the RIAA’s petition to commence this rulemaking proceeding in 2000, NMPA engaged in a series of negotiations with the RIAA to address the issues presented in the

rulemaking and to develop a licensing framework for online subscription services offering on-demand streams and limited downloads. These negotiations proved successful: on October 5, 2001, NMPA and RIAA entered into an agreement to facilitate the launch of music subscription services (the “Subscription Services Agreement”). In the Subscription Services Agreement, the parties confirmed their understanding that the process of making on-demand streams and limited downloads through subscription music services involved the making of DPDs and was therefore licensable under Section 115, and provided a mechanism for RIAA member companies to obtain licenses for these activities through HFA at rates to be established by statutory ratesetting proceeding or industry negotiation.<sup>4</sup> The parties further acknowledged in the Subscription Services Agreement that noninteractive streaming activities would not be subject to licensing. Once in place, the licensing arrangement embodied in the Subscription Services Agreement was offered by HFA to non-RIAA companies as well. DiMA members such as RealNetworks/Rhapsody (formerly Listen.com), Napster LLC (formerly pressplay) and Microsoft, among others, subsequently entered into their own subscription services licensing agreements with HFA.

In light of the significant industry development represented by the Subscription Services Agreement, the Copyright Office published a follow-up notice in late 2001 seeking additional comments on the proposed rulemaking. *See* NPRM at 40,805. In response, RIAA, NMPA and SGA submitted unified comments urging the Copyright Office to adopt the framework agreed to in the Subscription Services Agreement in the form of a regulation so that licenses could be

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<sup>4</sup> Because no ratesetting proceeding has taken place until the current CRB Proceeding, industry rates have not previously been adopted, and music publishers and songwriters have not been paid for these uses during the intervening seven years.

made available on an industry-wide basis, as opposed to only from HFA-affiliated publishers.<sup>5</sup> Even though this did not occur, the parties to the Subscription Services Agreement have continued to advocate for and support the fundamental framework and understandings of that agreement, including at the June 15, 2007 roundtable discussion conducted by the Copyright Office as a prelude to its issuance of the NPRM (“June 2007 Roundtable”).

As the Copyright Office observes in the NPRM, legislative efforts to address the lack of an industry-wide framework for licensing of digital music services have not yet yielded results. *See* NPRM at 40,805. In 2006, in response to congressional inquiries regarding the efficient licensing of digital music services, NMPA joined with DiMA to support the introduction of the Section 115 Reform Act (“SIRA”), which would have created a new blanket licensing system under Section 115 for digital music services. SIRA, H.R. 5553, 109th Cong. (2d Sess. 2006). SIRA would have clarified the law consistent with the basic understandings reached in the Subscription Services Agreement concerning interactive and noninteractive streaming.<sup>6</sup> *Id.* As the Copyright Office explains in the NPRM, SIRA would have confirmed that the reproductions required to deliver full downloads, limited downloads and interactive streams are subject to and included under the Section 115 license, and at the same time would have created a statutory exemption (originally structured as a royalty-free license) for noninteractive streaming. *See* NPRM at 40,805. Despite the endorsement of SIRA by the House Subcommittee on Courts, the Internet and Intellectual Property on June 8, 2006, and the significant efforts of NMPA, DiMA,

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<sup>5</sup> DiMA companies in particular have complained about the lack of an industry-wide framework covering non-HFA-affiliated publishers that would reduce the administrative effort associated with obtaining all necessary licenses for music subscription services offering interactive streams and limited downloads.

<sup>6</sup> Because of the way “on-demand” is defined in the Subscription Services Agreement, the Subscription Services Agreement does not provide a licensing framework for certain types of interactive streams. SIRA addressed this deficiency in a manner analogous to Section 114 by classifying streams as either interactive and subject to licensing under Section 115, or noninteractive and (in the later versions of SIRA) exempt from such licensing.

SGA, NSAI, RIAA and others to achieve such a legislative solution, however, SIRA did not become law, and Congress has been largely silent on these issues for the past two years.

The distinction made in the Subscription Services Agreement between streaming of musical works upon user request and noninteractive streaming – a distinction reiterated in SIRA – is based on the fundamental policy consideration that the ability to access songs upon request is a substitute for and displaces the purchase of music (whether in physical formats or digital downloads). The displacement of music sales in turn diminishes mechanical licensing revenues, which are the lifeblood of music creators.<sup>7</sup>

Significantly, this concern regarding the impact of on-demand access to music parallels congressional findings and the philosophy behind the analogous interactive/noninteractive distinction found in Section 114 of the Copyright Act governing the compulsory license for digital performance of sound recordings. 17 U.S.C. § 114; S. Rep. No. 104-128, at 16 (1995) (“Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.”); H.R. Rep. No. 104-274, at 13 (1995) (recognizing that “certain types of subscription and interact[ive] audio services might adversely affect sales of sound recordings and erode copyright owners’ ability to control and be paid for use of their work.”). More broadly speaking, the distinction furthers Congress’s original intent in amending Section 115 to include DPDs, an act undertaken to confirm mechanical rights and preserve royalty streams for songwriters and music publishers when their works are used digitally. S. Rep. No. 104-128, at 17 (1995) (in amending Section 115 to include DPDs, Congress wished to avoid “even a perception of uncertainty,” and

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<sup>7</sup> During the current CRB ratesetting proceeding, numerous songwriter witnesses testified to their dependence upon mechanical royalty streams for their livelihoods.

thus sought to “clarify[y] and confirm[.]” the mechanical rights of music copyright owners in the digital environment); H.R. Rep. No. 104-274, at 28 (1995) (purpose of DPD amendments was to “confirm” mechanical rights in context of digital transmissions).

**B. The Music Industry Will Benefit from Adoption of the Proposed Regulations**

As noted above, in a major milestone for the music industry, copyright owners and users have reached a settlement in the context of the pending Section 115 CRB rate proceeding on the rates and terms to govern the licensing of DPDs in the form of interactive streams and limited downloads. Pursuant to the relevant statutory framework, the CRB Settlement is to be adopted by the Copyright Royalty Judges as a final determination of these issues. *See* 17 U.S.C. § 801(b)(7)(A); 37 C.F.R. § 351.2(b)(2).

The CRB Settlement, representing an accord among music publishers, songwriters, record labels and digital music companies – that is, each of the key stakeholders in the digital music marketplace – fully conforms with the Copyright Office’s interpretation of Section 115 as applied to interactive streaming and limited downloads. NMPA, SGA, NSAI and AIMP therefore urge the adoption of the Proposed Regulations as to these activities, which would eliminate any lingering uncertainty concerning the proper scope and application of the DPD definition in Section 115 and, more specifically, within the context of the CRB Settlement. It is vital for digital music businesses to have access to a reliable, industry-wide licensing framework that will allow them to grow their businesses, and equally vital for songwriters and music publishers to have a means to be paid for the use of their musical works by digital services.

Under existing law, the server, cached, network and RAM buffer copies made and/or transmitted in the process of delivering interactive streams – as well as in delivering full and limited downloads – require licenses from copyright owners. Notably, as was demonstrated in recent expert testimony in the CRB Proceeding, in addition to making server copies of musical



works, interactive streaming music services reproduce musical works in RAM to render them perceptible to the end user<sup>8</sup> and also typically cause “cache” copies of the works to be made on users’ hard drives for future access and listening.<sup>9</sup> It is well established that the reproduction of server copies to operate an interactive digital music service requires a license.<sup>10</sup> The RAM and cache copies made by such a service also require appropriate license authority from the copyright owner.<sup>11</sup> A lack of ready availability of licenses to cover each of these types of reproductions to the extent they are required for the process of downloading or interactive streaming gives rise to fears of infringement exposure – and thus inhibits the growth of legitimate digital music services.

Dating back to the original framework of the Subscription Services Agreement, through congressional consideration of SIRA, and most recently in the June 2007 Roundtable, music publishers and songwriters have agreed with those that seek to use their works that a Section 115 license to make and deliver DPDs should include related server and intermediate copies to the extent such server and intermediate copies are necessary and in fact used in the course of

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<sup>8</sup> In the NPRM, the Copyright Office suggests that a RAM buffer copy of a musical work is always “less than the entire composition of [the] musical work.” NPRM at 40,808. We note that, while the buffering process may involve serial copying of portions of a work (with the goal of rendering the complete work), a RAM buffer copy can also comprise a whole work. Regardless, we agree with the conclusion that a RAM buffer copy of a portion of a musical work that is interactively streamed constitutes a phonorecord under the Copyright Act, *see* NPRM at 40,809, as does a RAM buffer copy of the entire work.

<sup>9</sup> *See* Expert Report of Ketan Mayer-Patel on Behalf of the National Music Publishers’ Association, Inc., the Songwriters Guild of America and The Nashville Songwriters Association International, CRB Proceeding (Apr. 3, 2008).

<sup>10</sup> *Rodgers and Hammerstein Org. v. UMG Recordings, Inc.*, No. 00 Civ. 9322 (JSM), 2001 U.S. Dist. LEXIS 16111 (S.D.N.Y. Sept. 26, 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (“*MP3.com*”). Contrary to certain parties’ suggestion as described in the NPRM, NPRM at 40,810-11, the notion that the making of such server copies to operate an interactive music service could constitute a fair use has been expressly rejected. *See, e.g., MP3.com* at 350-53 (“[D]efendant’s ‘fair use’ defense is indefensible.”)

<sup>11</sup> *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993); *Stenograph L.L.C. v. Bossard Assoc., Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998); *Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip. Distrib.*, 983 F. Supp. 1167, 1177-78 (N.D. Ill. 1997). In its Supplemental Notice, the Copyright Office refers to the Second Circuit’s recent decision 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*”). We discuss below, *infra* Section I.C., why the *Cablevision* case is not instructive here and why the approach of the *MAI* decision and its progeny still governs in the context of interactive streaming.

engaging in the licensed activity.<sup>12</sup> NMPA, SGA, NSAI and AIMP therefore support the approach of the NPRM and Proposed Regulation in this regard, and believe that the Copyright Office's authoritative interpretation of Section 115 in this respect will provide additional comfort to music services when they obtain licenses for their Section 115 activities.

### C. The *Cablevision* Holding Is Inapplicable to Digital Music Services

Subsequent to the issuance of the NPRM, the United States Court of Appeals for the Second Circuit issued a highly controversial opinion in a case involving a DVR service operated by Cablevision, *Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480-cv(L), 2008 U.S. App. LEXIS 16458 (2d Cir. Aug. 4, 2008) ("*Cablevision*"). The *Cablevision* decision, at odds with at least three different lines of precedent spanning multiple circuits,<sup>13</sup> departs from the approach of Section 101 of the Copyright Act and the Copyright Office's longstanding interpretation of that section<sup>14</sup> in reading a new and distinct "duration" requirement into the definition of "copy" under the Copyright Act.<sup>15</sup> *See id.* at \*14-\*15. Based on this construction, the Second Circuit reversed the judgment of the trial court below in reaching the conclusion that Cablevision would not

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<sup>12</sup> Of course, if the same server and intermediate copies were used for other purposes, they would be subject to separate licensing and royalty payments if required. Moreover, as the Copyright Office explains, standing alone, a server copy does not qualify for licensing under Section 115 because it is not in itself distributed. NPRM at 40,808.

<sup>13</sup> The *Cablevision* court attempted to distinguish, and in some respects disregarded, major lines of precedent concerning RAM computer copies, *Cablevision*, 2008 U.S. App. LEXIS 16458, at \*16-\*20 (including, *inter alia*, the Second Circuit's own decision in *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998)), the scope of public performance rights, *id.* at \*48-\*53, and the role of commercial copying services in producing infringing copies, *id.* at \*28-\*30. We respectfully submit that the Copyright Office is not bound by the Second Circuit's approach to these issues to the exclusion of other courts' thinking.

<sup>14</sup> *See id.* at \*20-\*22.

<sup>15</sup> The Second Circuit's novel "duration" requirement is unsupported by the Act or existing judicial interpretation. While the *Cablevision* court took a "stopwatch" approach by measuring the duration of the subject buffer copies in seconds (and then opining that they did not last for a sufficient number of seconds), Section 101 of the Copyright Act does not require that a copy last for any specified period of time. 17 U.S.C. § 101. The glaring deficiency of the *Cablevision* approach, apart from the fact that it is inconsistent with the statute, is the lack of standards – statutory or otherwise – to guide this judge-made "duration" requirement. By contrast, the functional approach of the Copyright Office – which, based on Section 101 of the Copyright Act, examines whether the copies in question exist for a sufficient period of time to be capable of being "perceived, reproduced or otherwise communicated" – does not depend upon an arbitrary assessment. *See* NPRM at 40,808. Moreover, it adheres to the overarching consensus of other courts that have considered this issue. *See MAI* line of cases cited *supra* note 11.

directly infringe the copyrights of television and movie content owners by, *inter alia*, automatically creating buffer copies of cable programming to enable the operation of a remote storage DVR (“RS-DVR”) service.<sup>16</sup> *Id.* at \*24, \*53.

NMPA, SGA, NSAI and AIMP anticipate that some parties, pursuing an agenda beyond the scope of Section 115, may seek to insert *Cablevision* into this proceeding so as to prolong uncertainty in the licensing of interactive streaming music services, to the detriment of the digital music industry. But the highly fact-dependent *Cablevision* decision does not – and does not even purport to – address the particularized concerns of interactive music services that are before the Copyright Office in this limited Section 115 proceeding, and therefore is not pertinent here.

In reaching its holding that *Cablevision* was not directly liable for infringement,<sup>17</sup> the *Cablevision* court concluded that broadcast programming data residing in a system buffer for 1.2 seconds or less (before being automatically overwritten) for the purpose of enabling customers to request to record programming in their individual RS-DVR accounts did not create a copy under the Copyright Act. *Id.* at \*22-\*24. Significantly, however, the *Cablevision* decision *did not* hold that a RAM buffer reproduction cannot be a copy. To the contrary, the Second Circuit expressly acknowledged that such reproductions *can* be copies under the Copyright Act – as, indeed, the

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<sup>16</sup> The *Cablevision* RS-DVR is a substitute for a home set-top DVR that enables a subscriber to request, before or at the time of broadcast, that a particular program be saved in that subscriber’s allocated storage space at *Cablevision*’s centralized facility. As the court explained the rationale for its ultimate holding: “We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer’s command.” *Id.* at \*27. A digital music service is not like a VCR. Digital music services, such as Apple’s iTunes service and subscription music services, reproduce, maintain and offer long-term, ongoing access to entire libraries of musical works, typically numbering in the millions, to deliver to their customers upon request. Far from simply supplying a recording service, such digital music providers exist for the purpose of making music content available to users in the first instance.

In any event, we disagree with the *Cablevision* court’s inappropriate analogy equating a VCR (with limited home storage capacity) to a massive centralized recording facility. We also disagree with the court’s conclusion that RS-DVR subscribers, rather than *Cablevision*, were making the reproductions at issue in that case. *See id.* at \*35. We assume the court’s treatment of these issues, however, for purposes of discussing its opinion.

<sup>17</sup> Notably, the *Cablevision* decision did not address, and expressly reserved judgment on, the question of whether *Cablevision* could be held secondarily liable for infringement. *Id.* at \*6, \*35, \*53.

overwhelming weight of authority has held. *See id.* at \*18 (reproducing a work in RAM “can result in copying”) (emphasis in original).

Buffer copies made by interactive streaming music services for purposes of delivering and allowing users to hear entire musical works are unlike the “fleeting” copies made by Cablevision in the course of operating its centralized DVR system. *See id.* at \*23. Consistent with the definition of “phonorecords” in the Copyright Act, buffer copies made by an interactive streaming service consist of sounds fixed in a material object that are “perceived, reproduced, or otherwise communicated” through a machine or device; the end result is the rendering of a musical work of several minutes’ duration. 17 U.S.C. § 101; *cf. Cablevision*, 2008 U.S. App. LEXIS 16458, at \*18 (distinguishing *MAI* on ground that RAM embodiment of computer program presumably lasted “several minutes”). Indeed, unlike in the *Cablevision* case, where the buffer copies were automatically created simply to facilitate a user-controlled storage process – rather than for purposes of communication or human perception – buffer copies made during the interactive streaming process comprise the very product that is delivered to the end user: a complete sound recording of a musical work.

The buffer copies made by interactive streaming music services are much more analogous to the RAM copies considered in *MAI* (operating system software)<sup>18</sup>, *Stenograph* (stenographic software)<sup>19</sup> and *Marobie-FL* (clip art)<sup>20</sup> than those at issue in *Cablevision*. This is because they constitute a complete embodiment of a copyrighted work to be accessed, perceived and used by end users, and exist for a sufficient period of time (or longer) to achieve this purpose. This was not the case with the *Cablevision* copies, which were automatically created

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<sup>18</sup> *MAI*, 991 F.2d 511.

<sup>19</sup> *Stenograph*, 144 F.3d 96.

<sup>20</sup> *Marobie-FL*, 983 F. Supp. 1167.

from broadcast feed and discarded within 1.2 seconds (or less) without rendering the work, and regardless of whether a subscriber sought to use a copy of the work. *Cablevision*, 2008 U.S. App. LEXIS 16458, at \*14, \*23. *Cablevision* simply does not speak to the nature or functionality of buffer copies made by interactive streaming music services.

The *Cablevision* holding is inapplicable to interactive streaming music services for additional reasons as well. First, as discussed above, in transmitting works to end users, in addition to the RAM copies necessary to render the work for the user, interactive music services typically cause “cache” copies of the works to be made on users’ hard drives for future access. Even under the logic of *Cablevision*, such copies indisputably qualify as phonorecords.

In addition, the *Cablevision* court made a point of emphasizing that reproductions used to transmit copyrighted content (*i.e.*, server copies) implicate the reproduction right. *Id.* at \*47. Interactive streaming and download services of course rely on such reproductions to deliver music to consumers.

In sum, even taking *Cablevision* into account, interactive streaming music services clearly need appropriate license authority in order to operate. The buffer copies considered by *Cablevision* are readily distinguishable from those used in interactive streaming activities. Moreover, of concern to those who operate interactive streaming services, other courts have not taken the approach of *Cablevision*. Rather, other courts have agreed with the Copyright Office's interpretation of “copy,” which adheres to the functional definition of Section 101 of the Copyright Act in considering the ability to perceive, reproduce or communicate a copyrighted work. *See* NPRM at 40,808.

Finally, *Cablevision* did not consider the question of buffer copies in relation to Section 115, the subject under review here. Because the process of interactive streaming of musical

works involves the making of reproductions that would nonetheless require license authority from copyright owners, it makes sense for the Copyright Office to adopt a rule that will permit interactive streaming services to benefit from the statutory licensing framework of Section 115.

**D. There Is No Need for the Proposed Regulations To Apply to Noninteractive Streaming**

At the same time, as is reflected by the fact that noninteractive streaming was not addressed in the CRB Proceeding and is not included in the CRB Settlement, NMPA, SGA, NSAI and AIMP do not believe that the existing legal regime requires music users to obtain licenses to engage in the process of noninteractive streaming (including the making and/or transmission of server, cached, network and RAM buffer copies to the extent necessary and used solely for that process).<sup>21</sup> Furthermore, to require such licenses would conflict with the basic industry understanding reflected in the Subscription Services Agreement, SIRA and CRB Settlement. We recognize that in this respect we depart from the Copyright Office's considered approach in the NPRM. However, based on the policy considerations outlined above and by industry agreement, music publishers and songwriters have not pursued licenses or royalties for noninteractive streaming activities. Accordingly, NMPA, SGA, NSAI and AIMP do not believe there is a need for the Copyright Office to address noninteractive streaming in the current rulemaking or Proposed Regulations. NMPA, SGA, NSAI and AIMP therefore respectfully suggest that the Proposed Regulations be limited in their application to DPDs in the form of full downloads, limited downloads and interactive streams and not apply to noninteractive streaming.

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<sup>21</sup> At the same time, it is NMPA's position that such an exemption from licensing and royalty payments for noninteractive streaming cannot apply where a transmitting service affirmatively causes or induces end users to copy streamed works for future listening. SIRA in fact contained an express carveout from the noninteractive streaming exemption for services that promote such end user reproductions. SIRA, H.R. 5553 (2d Sess. 2006). A transmitting entity must have appropriate license authority if it engages in this type of conduct.

**II.**  
**THE TERM “SPECIFICALLY IDENTIFIABLE” SHOULD BE INTERPRETED  
IN LIGHT OF THE PLAIN MEANING OF THE STATUTE**

NMPA, SGA, NSAI and AIMP concur with the Copyright Office’s general approach to the interpretation of “specifically identifiable” as it appears in the definition of DPD in Section 115. As observed by the Copyright Office, certain parties have argued, based upon a comment appearing in legislative history, that there can be no DPD unless the reproduction is specifically identifiable to the transmitting service. *See* NPRM at 40,809.

But the statute itself is clear: a DPD 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.” 17 U.S.C. § 115(d). Congress could easily have included a requirement that the reproduction be specifically identifiable to the transmitting service, but did not. As the Copyright Office explains, under the most basic principle of statutory construction, when the meaning of a statute is plain on its face, there is no reason to turn to legislative history to read an additional requirement into the law. NPRM at 40,809; *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, the Copyright Office is correct in concluding that the statutory requirement is met when the reproduction is “either specifically identifiable by any transmission recipient or specifically identifiable *for* any transmission recipient.” NPRM at 40,809 (emphasis in original).

Moreover, to adopt the view that there is no DPD unless a reproduction of the sound recording or musical work embodied therein is specifically identifiable to the transmitting service would create an incentive for transmitting entities to facilitate and promote copying of musical works but purposefully blind themselves to what was being copied. We do not believe

that Congress could possibly have intended such a result – and such an attitude has also been rejected by the courts.<sup>22</sup>

Seeking to eliminate doubt about the meaning of “specifically identifiable,” the Proposed Regulations provide that “[a] reproduction is specifically identifiable if it can be identified by the transmission recipient, or if a device receiving it can identify the reproduction for the transmission recipient, for the purposes of rendering a performance of the sound recording.” Consistent with the approach to statutory interpretation endorsed by the Copyright Office, NMPA, SGA, NSAI and AIMP question whether and why it is necessary to engraft a “performance purpose” requirement onto the statutory definition, which could have the unintended result of causing some DPDs – e.g., a download to a storage device that is made for the purpose of being played through a separate device – to fall out of the definition provided by Congress. Thus, we respectfully suggest a minor modification of the relevant sentence wherever it appears in the Proposed Regulations, so that it reads as follows:

A reproduction is specifically identifiable if it can be identified by the transmission recipient, or if a device receiving it can identify the reproduction for the transmission recipient, including without limitation such identification for purposes of rendering a performance of the sound recording.

We believe that, revised in this manner, the proposed regulatory elaboration would help to clarify, but at the same time remain true to, the statutory definition. 17 U.S.C. § 115(d).

### **III. OTHER ISSUES**

#### **A. Incidental DPDs**

NMPA, SGA, NSAI and AIMP agree with the Copyright Office that “Incidental DPDs” are merely a subset of the general category “DPDs” and that this subset is not further defined

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<sup>22</sup> See, e.g., *In re: Aimster Copyright Litig.*, 334 F.3d 643, 650 (“Willful blindness is knowledge, in copyright law . . . as it is in the law generally.”) (7th Cir. 2003) (Posner, J.).



within Section 115. *See* NPRM at 40,810. We also concur in the Copyright Office’s view that “the only consequence of a determination that a digital phonorecord delivery is ‘incidental’ is that a separate rate must be set” for that type of DPD by the Copyright Royalty Judges. *Id.* Accordingly, consistent with the opinion of the Copyright Office, we believe that the determination of which types of DPDs fall into the “incidental” category is best left to the Copyright Royalty Judges in the context of their Section 115 ratesetting activities.

**B. Limited Downloads**

At this juncture, there can be no serious dispute that a download of a musical work that is limited in access either in terms of time or the number of plays constitutes a DPD, and we agree with the Copyright Office’s conclusion to this effect. *See* NPRM at 40,808.

**C. Locked Content**

Likewise, NMPA, SGA, NSAI and AIMP agree with the Copyright Office’s approach to locked content – that is, phonorecords that are “encrypted, otherwise protected by digital rights management, or degraded so as not to substitute for the sale of a non-degraded recording.” NPRM at 40,811. As explained in the NPRM, a DPD that is subject to encryption, DRM or other technological protection is still a DPD and thus requires a license and payment of applicable royalties. *Id.*

**D. Rental, Lease or Lending**

Despite the RIAA’s initial suggestion in its 2000 petition seeking to initiate this rulemaking that a limited download might be treated as a “rental” of a musical work, the RIAA has since abandoned this proposal, and it was not pursued by any of the industry participants at the June 2007 Roundtable. NPRM at 40,811-12. NMPA, SGA, NSAI and AIMP observe that it would defy common sense to treat a DPD as a “rental” when it cannot be returned. Accordingly, we support the Copyright Office’s decision to eliminate this issue from further consideration.




**Conclusion**

For the foregoing reasons, NMPA, SGA, NSAI and AIMP respectfully submit that the Copyright Office should adopt the Proposed Regulations, with the minor modification suggested above, and in so doing indicate that such Proposed Regulations shall apply to DPDs in the form of full (permanent) downloads, limited downloads and interactive streams.

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Respectfully submitted,

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