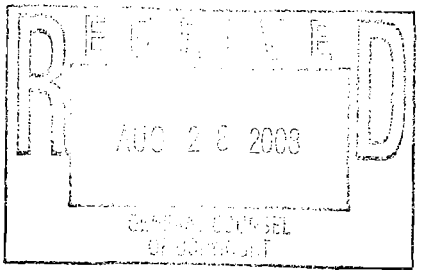
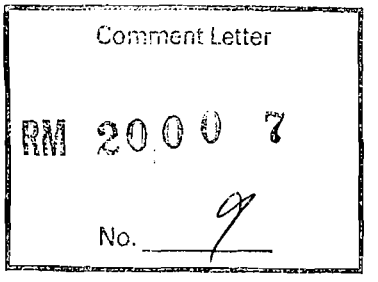
Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress

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

COMMENTS OF VERIZON COMMUNICATIONS





Bruce G. Joseph
Karyn K. Ablin
Michael L. Sturm
WILEY, REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
202-719-7258

Counsel for Verizon Communications

August 28, 2008

TABLE OF CONTENTS

Page

Introduction and Summary 1

I. The Copyright Office Lacks Authority To Promulgate the Proposed Rule 2

II. The Proposed Rule Is Contrary to Law 5

A. Sound Recordings Embodied in Performance Buffers Are Not "Fixed" and, Therefore, Are Not Phonorecords and Do Not Implicate Reproduction or Distribution Rights 6

B. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Violates Fundamental Canons of Statutory Construction 8

1. The Words of a Statute Must Be Construed in Context as Part of a Harmonious Whole 8

2. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled With the Structure of the Copyright Act, Which Distinguishes the Public Performance Right from the Reproduction and Distribution Rights 9

3. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled With the Carefully Crafted Statutory License Scheme of Sections 114 and 112 of the Copyright Act 10

4. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Easily Be Reconciled with Chapter 10 of the Copyright Act 11

5. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled with the Legislative History of Section 115 12

C. The NPRM's Strained Construction of the "Primary Purpose" and "Specifically Identifiable" Requirements of the Section 115 License Is Contrary to Law 13

1. The Primary Purpose of Performance Buffers and Server Copies Used To Effectuate Public Performances Is To Effectuate Public Performances, Not To Distribute Phonorecords 13

2. The "Specifically Identifiable" Limitation Must Be Construed by Reference to Legislative History and the Structure of Section 115. 14

III. The Proposed Rule Is Bad Policy. 16

A. Treating Performance Buffers as Distributed Phonorecords Does Not Provide a Safe Harbor Against Claims of Infringement Because the Section 115 Statutory License Is Antiquated and Unworkable. 16

B. Treating Performance Buffers as Distributed Phonorecords Risks Undermining Fair Use Claims. 18

C. The NPRM Will Likely Have Unintended Adverse Consequences. 19

IV. There Is No Basis To Adopt any Rule. 19

Conclusion 20

Introduction and Summary

Verizon Communications offers these comments on the Copyright Office's July 16, 2008, Notice of Proposed Rulemaking on the section 115 statutory license for making and distributing phonorecords, including digital phonorecord deliveries (the "NPRM" or the "Proposed Rule").[1]

Verizon is the nation's second largest digital provider of music, offering services that include ringtones, ringback tones, full-track downloads, music videos, streaming and other digital audio performances, and a full-track subscription service offered through an arrangement with Rhapsody. Verizon also provides video services using digital transmission over its wireless service, over its fiber optic video service, and through its Internet services. It thus has a substantial interest both in the licensing rules applicable to music and sound recordings as well as in the way copyright concepts are applied in the digital environment, generally.

Verizon agrees with the Copyright Office that the law applicable to music licensing needs reform and clarification. The existing section 115 statutory license is burdensome and inefficient, bordering on the useless. Further, there are ambiguities in the law relating to server copies of musical works that have given rise to unreasonable claims for double-dip payments by music publishers and over-reaching lawsuits. As the Register has repeatedly recognized, these issues require legislative reform.

While Verizon shares the Office's disappointment in the lack of a reasonable legislative solution, the answer is not the contorted, *ultra vires*, regulatory action proposed in the NPRM. Indeed, the Proposed Rule is a cure worse than the disease. First, it is directly contrary to law. Buffers used solely to effectuate performances by digital transmissions ("performance buffers") are not fixed, so there is no phonorecord, and, thus, no phonorecord delivery.

Second, the Proposed Rule is inconsistent with the structure of the Copyright Act and with clear distinctions throughout the Act between performances, on one hand, and reproductions and distributions, on the other. For example, the law provides that a public performance is not publication (*i.e.*, a distribution to the public), a conclusion contradicted by the NPRM. Similarly, section 114 purports to provide all necessary licenses for non-interactive digital sound recording performances, but it provides no reproduction or distribution rights.

Third, the Proposed Rule raises more questions and creates greater risks than exist under current law, not only for music services, but for every service engaged in performances made by digital transmission. The logic of the Proposed Rule cannot easily be limited to transmissions of recorded music. If performance buffers implicate the reproduction and distribution rights, then services that have licenses to make digital performances of sound recordings and audiovisual works (for which the section 115 is not available) will need to question whether they have all of the licenses that they need.

---

[1] Copyright Office, Library of Congress, *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Notice of Proposed Rulemaking*, 73 Fed. Reg. 40,802 (July 16, 2008) (hereinafter cited as "NPRM" or "Proposed Rule").

Moreover, the Proposed Rule cannot be reconciled either with section 115 or with common sense. As the Register of Copyrights correctly testified on May 16, 2006, "Characterizing streaming as a form of distribution is factually and legally incorrect and can only lead to confusion." *Section 115 Reform Act (SIRA) of 2006: Hearings before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary* 6 (May 16, 2006) (Statement of Marybeth Peters, Register of Copyrights) (emphasis added) (hereinafter "The Register's May 16, 2006 SIRA Testimony"). "A stream does not . . . constitute a 'distribution,' the object of which is to deliver a useable copy of the work to the recipient; the buffer and other intermediate copies or portions of copies that may temporarily exist on a recipient's computer to facilitate the stream and are for all practical purposes useless (apart from their role in facilitating the single performance) and most likely unknown to the recipient simply do not qualify." *Id.* at 5-6 (emphasis added). The Register was correct on May 16, 2006. There is no basis to change that view, and no explanation for the 180-degree reversal that forms the basis of the NPRM.

Even if section 115 could be twisted to apply to server copies and digital buffers, the statutory license is not a workable solution. The Register and the interested parties have repeatedly emphasized that section 115 does not work. It is too burdensome to function as a meaningful statutory licensing vehicle. Proposing a defective and unused licensing mechanism as a solution to resolve uncertain claims by music publishers does not help those who face those claims. If it does anything, it creates a risk that courts will view the existence of the section 115 license as a justification for rejecting otherwise meritorious fair use claims.

Verizon respectfully submits that the correct response to publisher claims for double compensation for digital performances is the response that the Copyright Office voiced in its Report under Section 104 of the Digital Millennium Copyright Act, and has continued to voice in hearings: either Congress should enact legislation making clear that performances do not implicate the reproduction and distribution rights or courts should deem any such reproductions that are made to be fair use. *See, e.g.,* DMCA Section 104 Report at 142-46; *Digital Millennium Copyright Act: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong., at 21-22 (Dec. 12, 2001) (Statement of Marybeth Peters, Register of Copyrights) (hereinafter "Dec. 12, 2001 Statement of Marybeth Peters"); The Register's May 16, 2006 SIRA Testimony at 11 (recommending statutory exemption for buffers).

I. The Copyright Office Lacks Authority To Promulgate the Proposed Rule.

Contrary to the assertion in the NPRM (at 40,802, 40,806), the Copyright Office lacks statutory authority to conduct a rulemaking purporting to establish the "scope and application" of the section 115 statutory license.

The Supreme Court repeatedly has held that an agency rule "must be promulgated pursuant to authority Congress has delegated to the official." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (judicial deference to agency rulemaking warranted only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority") (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). The D.C.

Circuit recently confirmed that "[i]t is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (reversing and vacating FCC rule issued in absence of congressional delegation of authority).

There has been no congressional delegation of rulemaking authority that would support the NPRM. Section 701 of the Copyright Act, which sets out the general responsibilities and organization of the Copyright Office, provides no general substantive regulatory or lawmaking authority; the duties prescribed are primarily advisory, educational, or informational. *See* 17 U.S.C. § 701. The only statutory provision cited in the NPRM as evidence of the purported delegation of regulatory authority is 17 U.S.C. § 702. *See* NPRM at 40,806. However, that provision merely states that:

> The Register of Copyrights is authorized to establish regulations not inconsistent with law *for the administration of the functions and duties made the responsibility of the Register under this title.* All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

17 U.S.C. § 702 (emphasis added). The section 702 regulatory authority therefore is expressly limited to the establishment of regulations "for the *administration of the functions and duties*" of the Copyright Office under the Act.

The Proposed Rule is a substantive rule of copyright law, not a matter of administration of the functions and duties of the Copyright Office. As discussed below, it would both reinterpret substantive principles of copyright law and fundamentally reset the balance between copyright owners and users. Such a momentous decision goes far beyond the "administration of functions and duties" in section 702 and also goes beyond the advice-giving function described in section 701.

As *Mead* makes clear, there is no default presumption of implicit agency authority. 533 U.S. at 229. The Supreme Court also has rejected agency attempts to claim broad interpretive and regulatory authority based on a specifically limited grant. For example, in *Gonzales*, the Court held that statutory authorizations to "promulgate and enforce any rules, regulations and procedures which [the Attorney General] may deem necessary and appropriate for the efficient execution of his functions under this subchapter" did not "delegate . . . authority to carry out or effect all provisions of the [statute]." Rather, he can promulgate rules relating only to "registration and control" and "for the efficient execution of his functions" under the statute. 546 U.S. at 259. Thus, the Court rejected the Attorney General's claimed authority to issue an interpretative rule as a statement with the force of law. *Id.* at 268. Under *Mead* and *Gonzales*, the limited administrative authority conferred in section 702 cannot properly be inflated into plenary authority over the copyright laws, or even substantive authority over the scope of statutory licenses. As the Court noted, "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes." *Id.* at 267 (quoting *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 408 (2001)). Here, the elephant of determining substantive issues of copyright law is not hidden in the mousehole of section 702's limited grant of administrative authority.

A comparison of section 702 with other provisions of the Copyright Act confirms the limited scope of the authority conferred by section 702. Most specifically, and subject to various material limitations, section 802(f)(1) provides that the Register may provide, upon the request of a Copyright Royalty Judge or a motion of a party to a proceeding before them, "an interpretation of any material questions of substantive law" that "arise in the course of [a] proceeding" before the Copyright Royalty Judges. 17 U.S.C. § 802(f)(1)(A)(ii). The Register may also, upon rendering a determination in such a proceeding, "review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law." 17 U.S.C. § 802(f)(1)(D). A comparison of section 702 authority to make rules for the "administration of the functions and duties" of the Office and the section 802(f)(1) authority to opine concerning "material question[s] of substantive law" confirms that (1) when Congress intended for the Register to opine concerning issues of substantive law, that intention was expressed directly, not by implication and (2) that power was accompanied by specific procedural limitations that indisputably are not met here.[2] Thus, review of the statutory language confirms that the Copyright Office lacks the required authority conferred by Congress to promulgate the Proposed Rule.

Moreover, while a regulation properly adopted pursuant to congressional authority has the effect of law, *see I.N.S. v. Chadha*, 462 U.S. 919, 985-86 (1983), opinions provided under section 802 in the context of inter-parties litigation have no precedential force. They bind the CRB in future rate making decisions, *see* 17 U.S.C. § 802(f)(1)(D), but have no binding effect in infringement litigation or in other contexts. *Cf. id.* § 802(f)(1)(E). Action under section 802 is not equivalent to promulgation of a regulation.

Similarly, while the Office may be frustrated by the failure of Congress to pass legislation addressing music licensing issues, *see* NPRM at 40,805, legislative inaction does not confer authority for regulatory action. The Copyright Office may not arrogate regulatory authority that Congress has not given because Congress has not acted or "is silent," NPRM at 40,806, on a subject on which the Office desires action. A different rule would essentially grant the Register plenary authority to legislate by regulation whenever Congress does not act, which is precisely the authority that *Mead* and *Gonzales* make clear an agency does not have. Further, Congress has been far from "silent." As the NPRM recognizes, *id.*, there has been substantial congressional activity, including the introduction of legislation, hearings and congressionally sponsored negotiation, on these very issues in 2004 through 2007. This cannot be described as a field that Congress has ignored. It is up to Congress to decide whether to legislate, how to legislate and when to legislate.

Neither of the two appellate cases cited in the NPRM provides any further support for the Office's claimed authority. *See* NPRM at 40,806 (citing *Satellite Broadcasting and Commc'ns Ass'n v. Oman*, 17 F.3d 344 (11th Cir. 1994) ("*SBCA*") and *Cablevision Sys. Dev. Co. v. Motion*

[2] The NPRM notes that there is currently a section 115 proceeding pending before the Copyright Royalty Judges (No. 2006-3 CRB DPRA) and suggests that it therefore "makes sense" for the Register to "offer guidance." NPRM at 40,806. However, it is beyond question that the express statutory prerequisites for Register action contained in section 802(f)(1) have not been met. The Register may not disregard these statutory constraints based on the view that doing so "makes sense."

Pictures Ass'n, 836 F.2d 599 (D.C. Cir. 1988) ("*Cablevision*")). In *Cablevision*, the D.C. Circuit briefly took note of section 702, but relied "[m]ore specifically" on section 111(d)(1)'s requirement that the Register prescribe by regulation requirements for deposit of statutory license fees. 836 F.2d at 608. For this reason, the Court stated explicitly that "[o]ur holding on deference due the [copyright] office *does not extend beyond the bounds of its interpretation of Section 111*." *Id.* (emphasis added). Thus, *Cablevision* does not support the open-ended rulemaking authority with respect to section 115, as the NPRM asserts.

The Eleventh Circuit's decision in *SBCA* is similarly unilluminating. The *SBCA* decision does not mention, let alone rely upon, section 702 as a proper basis for the Copyright Office's rulemaking. Rather, presumably because the rule at issue involved section 111, the *SBCA* court essentially followed *Cablevision* in finding that the Copyright Office had rulemaking authority under that provision, without citing any particular congressional delegation. *See* 17 F.3d at 347.[3] However, as the Third Circuit has explained, such vaguely supported assertions of rulemaking authority are no longer sufficient in view of recent Supreme Court precedent:

> The Supreme Court in *Mead* altered the judicial landscape of *Chevron* deference, limiting previously strong presumptions of deference to formal agency actions and promoting a more searching threshold inquiry into the existence of Congressional authorization. After *Mead*, the existence of a general delegation of authority and the use of a formal notice-and-comment procedure is no longer sufficient to trigger *Chevron* deference – instead we must look for express or implied indications that "Congress ever thought of [giving the agency actions] the deference claimed for them here."

Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 490 n.9 (3d Cir. 2003) (citations omitted). Here, section 702's limited grant of administrative authority does not extend to reinterpreting the meaning of section 115.[4] Because the Copyright Office lacks the requisite statutory authority to promulgate the Proposed Rule, it should not do so.

II. The Proposed Rule Is Contrary to Law.

The Proposed Rule's treatment of performance buffers is contrary to the Copyright Act in numerous respects. For the reasons discussed below, the Copyright Office may not adopt a rule concluding that performance buffers are phonorecords in which a sound recording is fixed. If a

---

[3] The Eleventh Circuit in *SBCA* also cited one of its prior decisions and a 1956 Supreme Court case, *DeSylva v. Ballentine*, 351 U.S. 570 (1956). In both of those cases, however, the courts declined to afford any deference to the Copyright Office's views.

[4] In *Bonneville*, a majority of the Third Circuit panel opined that the section 702 language is "insufficient to shift the responsibility of interpreting what is copyright-protected from the courts, the traditional stewards of such property rights, to the Copyright Office, which has no history of, or significant expertise in, such a role." 347 F.3d at 490 n.9. Ultimately, however, resolution of this issue was unnecessary to the decision.

performance buffer is not a phonorecord, digital performances do not entail digital phonorecord delivery and do not implicate the copyright owners' reproduction or distribution rights.

First, the NPRM incorrectly reasons that the bits that are accumulated in transitory performance buffers are "fixed" so that the buffers are "phonorecords." The recent decision by the U.S. Court of Appeals for the Second Circuit in *The Cartoon Network LP v. CSC Holdings, Inc.*, __F.3d__, Nos. 07-1480-cv(L) & 07-1511-cv(CON), 2008 WL 2952614 (2d Cir. Aug. 4, 2008). confirms that this conclusion was incorrect, that works are not fixed in such buffers, and, therefore, that buffers used to effectuate digital performances of sound recordings are not phonorecords.

Second, because all digital performances require the use of buffers that accumulate bits, the NPRM's conclusion that performance buffers are phonorecords would mean that every digital performance also implicates the reproduction and distribution rights. This is true not only with respect to performances made by digital transmission, but also is inherent in non-transmitted digital performances, such as performances by the playing of a compact disc. Such a conclusion is at odds with the Copyright Act's careful delineation between rights, and would wreak havoc with several other carefully crafted provisions of the Act, including the Act's treatment of sound recording performances and digital audio recording devices, and the definition of publication. Fundamental canons of statutory construction prohibit such a result.

Third, the Office's conclusion that the primary purpose of a service that causes a performance buffer to embody bits to effectuate performance is "to distribute [phonorecords]" is contrary to the plain meaning of the statute and to prior Copyright Office testimony. Moreover, it is circular. Finally, it cannot credibly be argued that the referent for the term "specifically identifiable" in the definition of "digital phonorecord delivery" is so "plain" from the text of the statute that resort to legislative history and the overall structure and context of section 115 is not necessary. Proper construction of the term "specifically identifiable" requires that the delivered phonorecord be "specifically identifiable" by the transmitting service.

A. Sound Recordings Embodied in Performance Buffers Are Not "Fixed" and, Therefore, Are Not Phonorecords and Do Not Implicate Reproduction or Distribution Rights.

A central premise of the Proposed Rule's treatment of interactive and non-interactive streaming is the conclusion that sound recordings embodied in performance buffers are fixed, and, therefore, that the buffers are phonorecords that have been distributed. NPRM at 40,808-09. The law is to the contrary, as the Second Circuit recently confirmed in *Cartoon Network* and as the Fourth Circuit previously held in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004). Accordingly, the NPRM's conclusions that digital performance buffers implicate the reproduction and distribution rights, and that buffers are distributed phonorecords, cannot stand.

The NPRM (at 40,808) is correct that for there to be a DPD, there must be a "phonorecord" that is delivered to a recipient. The Copyright Act defines "phonorecord," in relevant part, as a material object in which "sounds . . . are fixed." 17 U.S.C. § 101 (definition of phonorecord). The Act further provides that "[a] work is "fixed" in a tangible medium of

expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* (emphasis added)

In determining that digital performance buffers created a fixation of musical works and sound recordings, the NPRM relied upon the reasoning of the Copyright Office's Section 104 Report, which concluded that for purposes of fixation, "the 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." NPRM at 40,808, *quoting* DMCA Section 104 Report at 107-29. The NPRM also relied on the district court decision in *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 621 (S.D.N.Y. 2007) (holding that the creation of a buffer copy is "copying").

The Second Circuit in *Cartoon Network* expressly rejected the logic and conclusion of the Section 104 Report on the meaning of fixation and reversed the district court's decision in *Cablevision.* The Court of Appeals ruled that fixation imposes

> two distinct but related requirements: the work must be embodied in a medium . . . such that it can be perceived, reproduced, etc., from that medium (the "embodiment requirement"), and it must remain thus embodied "for a period of more than transitory duration" (the "duration requirement"). Unless both requirements are met, the work is not "fixed" in the buffer, and as a result, the buffer data is not a "copy" of the original work whose data is buffered.

Cartoon Network, 2008 WL 2952614, at *4 (citations omitted). The court reasoned that the Copyright Office's Section 104 Report conflated the two requirements and "reads the 'transitory duration' language out of the statute." *Id.* at *6. "Because the Office's interpretation does not explain why Congress would include language in a definition if it intended courts to ignore that language, we are not persuaded" by the Copyright Office's Section 104 Report's construction of the fixation requirement. *Id.* at *7. The court ruled that fixation requires embodiment for more than "transitory" duration, and that, where "each bit of data . . . is rapidly and automatically overwritten as soon as it is processed," the embodiment is merely transitory. *Id.*; *accord* H.R. Rep. No. 94-1476, at 53 (1976) ("[T]he definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those . . . captured momentarily in the 'memory' of a computer.").

Similarly, in *CoStar*, the Fourth Circuit concluded that temporary RAM downloads made in the course of transmission by a digital transmission system were not copies fixed for a period of more than transitory duration. 373 F.3d at 550-51 ("When an electronic infrastructure is designed and managed as a *conduit* of information and data that connects users over the Internet, the owner and manager of the conduit hardly 'copies' the information and data in the sense that it fixes a copy in its system of more than transitory duration.") (emphasis added). In rejecting a claim that the ISP that owned and managed the system was making copies, the court observed that "the entire system functions solely to transmit the user's data to the Internet." *Id.* at 551.

Digital performance buffers are precisely analogous to the buffers at issue in *Cartoon Network* and *CoStar*. Data representing brief segments of a work typically are present in a performance buffer for only so long as necessary to effectuate a real-time performance. The data are then overwritten. That is the essence of "transitory" duration.[5] *See, e.g., id.* ("Transitory duration . . . is qualitative in the sense that it describes the status of transition.").

B. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Violates Fundamental Canons of Statutory Construction.

The NPRM asserts the Copyright Office's understanding that transmissions of digital performances, by their nature, require buffering at the receiving end to effectuate the performance. NPRM at 40,807. Verizon shares this understanding. In short, under the NPRM, all digital performances would implicate the reproduction and distribution rights. Such a construction is inconsistent with the overall structure of the Copyright Act and with numerous specific provisions of the Act. Thus, it must be rejected.

1. The Words of a Statute Must Be Construed in Context as Part of a Harmonious Whole.

The NPRM's construction of the section 115 license would violate what the Copyright Office itself has characterized as the "well-established rule of statutory construction which requires interpretation of each provision in a section in such a way as to produce a harmonious whole." 65 Fed. Reg. 77,292, 77,298 (Dec. 11, 2000); s*ee FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (court must interpret a statute "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into an harmonious whole") (citations omitted)); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (observing that plain meaning is determined not only by statutory language itself but by "the language and design of the statute as a whole").

The correct way to interpret the provisions of section 115 becomes evident when placed in the context of the Copyright Act as a whole. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context"). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 133 (quoting *Brown v. Gardner,* 513 U.S. 115, 118 (1994)). As discussed in the sections that follow, when the context, structure, and overall statutory scheme of the Copyright Act are considered, it is clear that performance buffers are not within the scope of the reproduction and distribution rights.

[5] In *Cartoon Network*, the data remained for 1.2 seconds before they were overwritten, 2008 WL 2952614, at *7, but there is no indication from the Second Circuit that 1.2 seconds is an outside limit.

2. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled With the Structure of the Copyright Act, Which Distinguishes the Public Performance Right from the Reproduction and Distribution Rights.

The Copyright Act consistently differentiates between the public performance right and other rights, often limiting the public performance right in ways that other rights are not limited. For example, sections 106(6) and 114 limit the sound recording performance right in ways that the reproduction and distribution rights are not. Similarly, section 110 is replete with numerous exemptions for certain performances and displays, including many that expressly apply to performances by transmission. *See, e.g.,* 17 U.S.C. §§ 110(2), 110(5), 110(8). The section 110 exemptions do not exempt reproductions or distributions. Section 112(a) provides an exemption for source copies made to effectuate a licensed (or exempt) public performance, but says nothing about downstream reproductions or distributions. A rule decreeing that all performances implicate the distribution and reproduction rights would risk gutting these exemptions by substituting an exemption with respect to one right (performance) with liability for another (reproduction and distribution). Specific examples are discussed in greater detail below.

Moreover, construing digital performances to implicate the distribution right could irreconcilably alter one of the most fundamental concepts of copyright law—publication. Section 101 defines publication as the "distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership." However, the definition makes clear that "[a] public performance or display of a work does not of itself constitute publication." Under the NPRM's construction of section 115, every transmitted digital public performance would also constitute a distribution to the public. This would appear to lead to the conclusion, contrary to the plain meaning of the definition, that every public performance by digital transmission would constitute publication.[6] That, in turn, could have profound effects for Copyright Office registration practices and substantive issues, such as the availability of statutory damages and attorneys' fees.

In sum, adoption of a rule that essentially decrees that all transmitted digital performances constitute distributions and reproductions would eviscerate longstanding, well understood, careful distinctions throughout the Copyright Act. Such a result is not consistent with the overall structure of the Copyright Act. It is, therefore, contrary to law.

[6] In some cases, it could be argued that the distribution coincident with a public performance was not by "sale or other transfer of ownership." But this would be difficult in any case in which the performance was sold, and, in any event, the Proposed Rule would introduce new-found ambiguity into prior decisions that works either were, or were not, published.

3. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled With the Carefully Crafted Statutory License Scheme of Sections 114 and 112 of the Copyright Act.

One example of the irreconcilable conflict between the Proposed Rule and copyright law is the potential effect of the rule on sound recording rights applicable to non-interactive performances by digital transmission. Section 114, coupled with section 112, of the Copyright Act establishes a detailed statutory license structure for such rights. The scheme includes the grant of the public performance right (section 114) and the right to make server copies of the sound recordings that are performed (section 112). The copies licensed by section 112 must be "retained and used solely by the transmitting organization that made it," 17 U.S.C. §112(e)(1)(A), and, as the Copyright Office recognizes in the NPRM, neither section 114 nor section 112 grants any distribution right. NPRM at 40,805 n.1.

It is clear from the structure of the Act, the context, and the legislative history that the detailed statutory license structure was intended as a comprehensive, carefully balanced, congressional solution to the issue of sound recording rights in digital performances. *See, e.g.,* H.R. Rep. No. 104-274, at 14 ("[I]t is important to strike a balance among all of the interests affected" by the new performance right; "That balance is reflected in various limitations on the new performance rights."); *id.* at 13 ("[T]he bill has been carefully drafted to accommodate foreseeable technological changes."). It would be absurd for Congress to have put in place the complex structure of sections 112 and 114 or to have charged the Copyright Arbitration Royalty Panels and then the Copyright Royalty Judges with setting willing-buyer/willing-seller rates in a detailed, complex, on-the-record, trial-type litigation, if, after all that was done, sound recording copyright owners could still say "that is all very nice, but you still need to obtain licenses for the reproductions and distributions that necessarily result from those licensed digital performances, or, at least, you need to prevail on a fact-specific claim that those copies are fair use. And, by the way, there is no statutory license for that—you must deal with us individually."

Yet that is precisely the import of the NPRM's treatment of performance buffers. If the NPRM is correct that performance buffers are phonorecords that implicate the musical work reproduction and distribution rights, NPRM at 40,808-09, it follows *a fortiori* that they implicate sound recording reproduction and distribution rights. A phonorecord is, after all, a fixation of a sound recording. 17 U.S.C. § 101. Section 115(c)(3)(G) expressly provides that "a digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by section 502 through 506 and section 509, unless" the DPD of the sound recording has been authorized by the sound recording copyright owner. 17 U.S.C. § 115(c)(3)(G). In short, the NPRM construes the Copyright Act in a way that reaches an absurd result and that is contrary to fundamental principles of statutory construction.

Moreover, this absurdity was explicitly called to the Copyright Office's attention in comments in this docket. For example, the Comments of the Consumer Electronics Association and Clear Channel Communications, Inc., noted that:

> it defies credulity to suggest that Congress intended that a streamer, having secured the performance right by statutory license or

> statutory exemption, would nevertheless be required to negotiate with each sound recording copyright owner to secure the right to cause "incidental phonorecords" in the transmission stream and in the receiving device.

Comments of Consumer Electronics Assoc. and Clear Channel Communications, Docket No. RM 2000-7 at 6 (Apr. 23, 2001) (hereinafter "CEA/Clear Channel Comments"); *accord* Reply Comments of the National Association of Broadcasters, Docket No. RM 2000-7 at 9 (May 23, 2001). Yet the NPRM is silent on this issue, and makes no attempt to reconcile or explain the absurd result embodied in the Proposed Rule. That is arbitrary.

4. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Easily Be Reconciled with Chapter 10 of the Copyright Act.

Another example of where the Proposed Rule's conflation of reproduction and performance cannot easily be reconciled with existing law is found in chapter 10 of the Copyright Act, the Audio Home Recording Act of 1992. That Act imposes certain obligations on the manufacturers and distributors of "digital audio recording devices," including the obligation to pay royalties upon the distribution of the device and the obligation to apply specified content protection technology to the device. 17 U.S.C. §§ 1002 (incorporation of copying controls), 1003 (obligation to make royalty payments). The NPRM's proposal to construe digital performance buffers as "phonorecords" implicating the reproduction right could mean that all devices used to receive performances by digital transmission are digital audio recording devices subject to the obligations of the AHRA. Such a result would be absurd, and an interpretation of law leading to such a result would not be one that construed the provisions of the Copyright Act as a harmonious whole, in violation of fundamental principles of statutory construction. *See supra* Section II.B.1. Moreover, the failure of the NPRM to address this issue, which was called to the attention of the Copyright Office in comments in this docket, *see* CEA/Clear Channel Comments at 6, 8, is arbitrary and capricious.

Section 1001 defines "digital audio recording device" in relevant part as "any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use." A digital audio copied recording, in turn, is a "reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission." If a performance buffer is a reproduction, it would appear to create troubling arguments that a device that is designed or marketed primarily to receive transmitted digital performances of music meets the definition of "digital audio recording device." Under the logic of the NPRM, the buffer could be construed to be a digital recording function—it makes digital reproductions,[7] the device

[7] It may be argued that not all "reproductions" are "recordings" and that the latter entails a greater degree of permanence or separate identity. However, this is likely to be a controversial issue, the result is not at all clear from the NPRM, and the Office has provided no guidance on how to reconcile its Proposed Rule with the AHRA.

is distributed to individuals for private use, and the reproductions are of digital musical recordings from a transmission.

Such a result, of course, would be absurd. The purpose of the AHRA was to address consumer home recording, not listening at home in real time to digitally transmitted performances. *See, e.g.,* Audio Home Recording Act of 1991, S. Rep. No. 102-294, at 30 (1992) ("The purpose of S. 1623 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use."); Audio Home Recording Act of 1992, H.R. Rep. No. 102-873 Part I, at 11-12 (1992) (discussing history of controversy over copyright status of home recording). Yet the language and history of the AHRA make clear that Congress considered the effect of digitally transmitted performances on AHRA obligations. *See, e.g.,* 17 U.S.C. § 1001(1) (defining "digital audio copied recording," in part, as a recording made from a transmission); S. Rep. No. 102-294, at 66 (1992) ("[D]igital broadcast and cable transmissions generally will be recordable by consumers, but second generation digital copies will not be able to be made from those first generation copies."). The logical conclusion is that Congress, in enacting the AHRA, did not understand digital performance buffers to be cognizable reproductions. The NPRM's conclusion, which is directly to the contrary, would be inconsistent with Congress' conclusion in enacting the AHRA.

5. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled with the Legislative History of Section 115.

The legislative history of the DPRA further makes clear that Congress did not intend to conflate performance rights with reproduction and distribution rights in the manner that the NPRM does. The Senate Report expressly states:

> The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD's. The intention is not to substitute for or duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers.

Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128, at 37 (1995) (emphasis added). The NPRM's conclusion that all digital performances also entail a distribution and reproductions would contravene this intention by "duplicat[ing] performance rights in musical works."[8]

[8] The phrase in the definition of "digital phonorecord delivery" that provides that a transmission can result in a DPD "regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein" adds nothing to this discussion. 17 U.S.C. § 115(d). That phrase merely recognizes that a particular transmission may be intended and function both as a performance (for real-time rendering) and as a distribution (for storage and later playback). That phrase cannot be read to eviscerate the longstanding distinction between performances and distributions.

C. The NPRM's Strained Construction of the "Primary Purpose" and "Specifically Identifiable" Requirements of the Section 115 License Is Contrary to Law.

Verizon appreciates the Copyright Office's efforts to eliminate the publisher-induced controversy over the status of server copies and performance buffers. Regrettably, however, the contortions that the NPRM must undertake to reach that conclusion is further evidence that section 115 does not address performances, or copies or phonorecords (if any) that may be necessary to make such performances.

The NPRM strains in two respects to reach the determination that section 115 applies to performance buffers and server copies—concluding that the primary purpose in making server and buffer "phonorecords" is "to distribute them to the public for private use," and that "specifically identifiable" should be construed with reference to the transmission recipient or the recipient's device. NPRM at 40,809-10. Neither conclusion fits comfortably with a reasonable construction of the statute, as the Register herself recognized in testifying that "[c]haracterizing streaming as a form of distribution is factually and legally incorrect and can only lead to confusion." The Register's May 16, 2006 SIRA Testimony at 6.

1. The Primary Purpose of Performance Buffers and Server Copies Used To Effectuate Public Performances Is To Effectuate Public Performances, Not To Distribute Phonorecords.

The NPRM recognizes that, for the section 115 statutory license to apply, the "primary purpose in making phonorecords [must be] to distribute them to the public for private use." 17 U.S.C. § 115(a)(1); NPRM at 80,811. The NPRM provides little analysis, saying only that DPDs, by virtue of having been delivered, are "distributed, within the meaning of copyright law." NPRM at 40,811. That, however, expresses a legal conclusion that is near a tautology (DPD = distribution), and says nothing about the primary purpose of the "distribution." The NPRM then goes on to focus on the second clause, concluding that the primary purpose is to facilitate "private use" of the phonorecord.

The first step of the NPRM's analysis all but reads the "primary purpose" requirement out of section 115. By definition, a DPD is distributed, so it could be argued that a primary purpose in making the DPD is to distribute it. But that ignores the fact that, even if the performance buffer creates a DPD, the primary purpose of making the DPD is not to "distribute" anything, but as an essential step in the effectuation of a performance. In the Register's own words, before Congress: "A stream does not . . . constitute a 'distribution,' the object of which is to deliver a useable copy of the work to the recipient; the buffer and other intermediate copies or portions of copies that may temporarily exist on a recipient's computer to facilitate the stream and are for all practical purposes useless (apart from their role in facilitating the single performance) and most likely unknown to the recipient simply do not qualify." The Register's May 16, 2006 SIRA Testimony at 5-6 (emphasis added).

Further, the NPRM's treatment of the primary purpose of server copies does not withstand scrutiny. The NPRM states that because server copies "perform an identical function

in the world of digital phonorecord deliveries" to the masters used to make physical copies for delivery, they should be treated the same. NPRM at 40,811. However, while it is clear that the primary purpose of a physical master is to distribute phonorecords to the public, the same cannot be said of server copies. The most natural conclusion is that server copies have been made with the primary purpose of effectuating performances. To support the application of the section 115 license, the Copyright Office must explain how these phonorecords (if they are, in fact, phonorecords) meet the primary purpose test.

2. The "Specifically Identifiable" Limitation Must Be Construed by Reference to Legislative History and the Structure of Section 115.

The NPRM's construction of the "specifically identifiable" limitation on the definition of DPD also is contrary to law. The NPRM rejects crystal clear legislative history contrary to the Copyright Office's conclusion, ignores the contrary implications of the structure of section 115, and reasons that the statutory text itself is sufficiently "plain" that there is no basis for looking beyond that text. NPRM at 40,809. In fact, the statutory text standing alone cannot be described as plain; it includes a phrase that is "unique in copyright law," NPRM at 40,809, and is susceptible to multiple constructions. Further, the phrase has no recognized meaning or context. The plain meaning of the "specifically identifiable" phrase only emerges upon consideration of the relevant Committee Report and the statutory structure and context—and that meaning plainly is contrary to the conclusion reached in the NPRM.[9]

Section 115 defines "digital phonorecord delivery," in relevant part, as "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). It is clear from the text that the "reproduction" must be "by or for any transmission recipient," but, contrary to the NPRM's attempted construction (at 40,809), there is absolutely nothing in the sentence that links the prior adjectival clause—"specifically identifiable"—to the transmission recipient. In fact, the structure of the sentence is identical to other common sentences in which it is clear that the referent for the prior adjective is not the person identified following the adjective. For example, it is clear that the phrase "an instantly recognizable painting by Picasso," does not mean to say that the painting is "instantly recognizable" by Picasso. Similarly, when contemplating a "completely indigestible dinner by the greasy spoon's cook" is it not the cook who will have trouble with his digestion, and in "a well-respected lawyer for the defendant," it is not the defendant doing the respecting. In the sentence at issue here, it is equally plausible to construe the "specifically identifiable" phrase as referring to the transmitting service.

Where statutory language is subject to multiple interpretations, that langauge should be construed by reference to the legislative intent and the overall structure of the statutory provision. *See, e.g., Muniz v. Hoffman*, 422 U.S. 454, 468 (1975) (statutory section "may not be read isolated from its legislative history and the revision process from which it emerged, all of which

[9] The NPRM's citation of *Caminetti v. United States*, 242 U.S. 470, 485 (1917), is inapposite. *Caminetti* was limited to cases "[w]here the language is plain and admits of no more than one meaning," and where "[t]here is no ambiguity in the terms of this act." *Id.* (emphasis added). That is not this case.

place definite limitations on the latitude we have in construing it."); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 642 (1990) (where statutory language is not dispositive, issue turns "on the intent of Congress as revealed in the history and purposes of the statutory scheme.").

The Copyright Office itself has relied upon the validity of this principle and recognized the importance of the Senate and House Reports in construing the DPRA—the very act at issue here. In the Office's own words, where two interpretations of statutory language are both plausible: "the Office turns to the relevant legislative history in order to understand how Congress intended the law to operate. Turning to the legislative history is appropriate where, as here, the precise meaning is not apparent and a clear understanding of what Congress meant is crucial to an accurate determination of how Congress intended the digital performance right and the statutory scheme to operate." *Final Rule, Public Performance of Sound Recordings: Definition of a Service*, 65 Fed. Reg. 77,292, 77,298 (Dec. 11, 2000). In particular, the Office stated that "we place great weight on the passages in the 1995 House and Senate Reports." *Id.* at 77,298 (emphasis added). In this case, those very reports, as well as the structure and context of the 1995 DPRA, make clear that "specifically identifiable" refers to identification by the transmitting service.

The Senate and House Committee Reports on the DPRA (the "1995 House and Senate Reports") both expressly addressed the textual ambiguity in the term "specifically identifiable" and, as the NPRM recognizes (at 40,809), clarified the term in a manner directly contrary to the construction proposed in the NPRM. In fact, the Senate Report makes clear that the Judiciary Committee thought that the construction proposed by the NPRM was, itself, so contrary to common sense that it was dismissed with a backhanded "of course" that it did not mean what the NPRM proposes:

> The Committee notes that the phrase "specifically identifiable reproduction," as used in the definition, should be understood to mean a reproduction specifically identifiable to the transmission service. Of course, a transmission recipient making a reproduction from a transmission is able to identify that reproduction, but the mere fact that a transmission recipient can make and identify a reproduction should not in itself cause a transmission to be considered a digital phonorecord delivery.

Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128, at 44 (1995); *accord* Digital Performance Right in Sound Recordings Act of 1995, H.R. Rep. No. 104-274, at 30 (1995) (same, without the words "of course" and other minor word differences).

Further, the NPRM's construction of "specifically identifiable" is inconsistent with the structure of the section 115 statutory license and the context in which Congress acted in 1995. Under the statutory license, "the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license." 17 U.S.C. § 115(c)(2) (emphasis added). At the time of enactment, the mechanical license fee had long been based on a penny rate per distributed phonorecord, and that structure was adopted by the DPRA for the period through December 31, 1997. *See, e.g., id.* §§ 115(c)(2), 115(c)(3). It would make no sense to attempt to charge a transmitting service for digital phonorecord deliveries on a per-DPD

basis unless the transmitting service could specifically identify all DPDs for which it was responsible. The idea that a DPD might not be "specifically identifiable" by the service, but that the service might nevertheless be liable, because the DPD was "specifically identifiable" by the recipient's computer, is a nonsensical construction given the context of the 1995 Act.

III. The Proposed Rule Is Bad Policy.

The Copyright Office's desire to create a means for services to avoid the publishers' unwarranted claims that digital performances infringe reproduction and distribution rights, while laudable, is misguided. The section 115 license, which the NPRM seeks to make available, is antiquated, administratively burdensome, and not a workable alternative for many, if not most, services that make performances by digital transmission. Far better answers, advanced by the Copyright Office in earlier statements, are (i) legislative exemption of server copies used to make digital performances coupled with legislative clarification that buffers do not create phonorecords, or (ii) clearly established principles that such server copies and buffers are fair use. Regrettably, by seeking to make section 115 available, the NPRM preempts essential legislative action and, worse, could undermine fair use claims.

Moreover, it does not appear that the logic of the NPRM can be limited to performance buffers used to effectuate digital performances of sound recordings. If performance buffers of sound recordings create phonorecords, it would appear to follow that performance buffers of audiovisual works and other types of copyrighted works create copies that are cognizable under the reproduction right and, possibly, the distribution right. Such copies, including copies of musical works embodied in audiovisual works, are not subject to the section 115 statutory license. Thus, the reasoning of the NPRM raises significant questions about whether existing contractual relations relating to digital performances of other types of works are adequate to convey the necessary rights. In other words, in an attempt to solve a narrow issue related to server copies of musical works, the NPRM creates potentially greater questions regarding buffers used for digital performances of other works.

A. Treating Performance Buffers as Distributed Phonorecords Does Not Provide a Safe Harbor Against Claims of Infringement Because the Section 115 Statutory License Is Antiquated and Unworkable.

The section 115 statutory license is not a realistic solution to concerns created by over-reaching copyright owner claims that digital performances implicate reproduction and distribution rights. As the Copyright Office repeatedly has recognized, the section 115 license is an antiquated license, rooted in the physical distribution of recordings, is administratively burdensome, and has never served as a viable option, even for those seeking to use the license as it was originally envisioned.

In testimony before the Senate Judiciary Committee, Register Peters has described the section 115 license as "an antiquated statutory scheme" that is "not up to the task of meeting licensing needs of the 21st Century." *Music Licensing Reform: Hearings Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (July 12, 2005) (Statement of Marybeth Peters, Register of Copyrights) ("The Register's July 12, 2005 Testimony"). Register Peters made clear that, among other reasons, due to the inefficiencies and

administrative burdens imposed by the license, the use of the section 115 license, "other than as a de facto ceiling on privately negotiated rates, has remained at an almost non-existent level." *Id.* According to Register Peters, "[t]here is no debate that section 115 needs to be reformed." *Id.*

Three weeks earlier, before the House Intellectual Property Subcommittee, the Register described the section 115 license as "outdated" and suffering from "fundamental problems." *Music Licensing Reform: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. at 1 (June 21, 2005) (Statement of Marybeth Peters, Register of Copyrights). Further, the Register acknowledged that "those problems—based in the statutory framework—are beyond my power to cure by regulation." *Id.* at 4 (emphasis added).

The problems with section 115 as a workable statutory license have been well documented. *See generally* The Register's July 12, 2005 Testimony (discussing difficulties encountered "under this antiquated statutory scheme"). They include the difficulties engendered by the need to identify, and then search Copyright Office records to locate and notify, the copyright owner of each musical work to be distributed before the work is distributed, 17 U.S.C. § 115(c)(1); 37 C.F.R. § 201.18, the obligation to make payments for each phonorecord that has been "distributed," 17 U.S.C. § 115(c)(2), the obligation to make payments directly to each copyright owner that has been located, *id.* § 115(c)(6), and the obligation to provide monthly and annual statements of account to each, *id.* § 115(c)(5); 37 C.F.R. § 201.19.

Jonathan Potter, the Executive Director of the Digital Media Association, confirmed these problems, testifying that the section 115 "license clearance process is so cumbersome as to be dysfunctional." *Section 115 of the Copyright Act: In Need of Update?": Hearings Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong., at 4 (Mar. 11, 2004) (Statement of Jonathan Potter, Executive Director, Digital Media Association). He observed that "[f]inding copyright owners can be almost impossible" given that "[o]nly about 20 percent of musical works are registered in the Copyright Office" and that "[f]or pre-1978 works, copyright owner information is available only on card files that must be searched manually in the Copyright Office on a song-by-song basis." *Id.* He also noted that "[i]f a copyright owner is identified, the licensee must notify the owner using a 2-page form for each individual composition, and send the form and then monthly statements of use and royalty checks by certified or registered mail." *Id.* Thus, "[t]he process of identifying and providing notice to a copyright owner, or determining that notice is not possible because there is no registration data or the data is incorrect, might take several weeks per copyright." *Id.* at 5.

More recently, Register Peters confirmed that the "Section 115 compulsory license remains a dysfunctional option for licensing the reproduction and distribution of musical works." *Reforming Section 115 of the Copyright Act for the Digital Age: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. at 2 (Mar. 22, 2007) (Statement of Marybeth Peters, Register of Copyrights). The Register candidly acknowledged that "[r]egulatory changes . . . cannot address the inherent problems with the statutory license. . . . Congress must take action and make the necessary structural changes." *Id.*

It makes no sense to stretch the law beyond recognition to provide as a putative "safe harbor" a form of license that simply does not work. It particularly makes no sense to do that when the Register has acknowledged that regulatory changes cannot solve the problems with section 115. As discussed below, such a "safe harbor" does more harm than good.

B. Treating Performance Buffers as Distributed Phonorecords Risks Undermining Fair Use Claims.

The Copyright Office recognized in its Section 104 Report, and in subsequent testimony, that the best response to double-dipping claims by music publishers that digital performances implicate reproduction and distribution rights is legislation making clear that they do not. *See, e.g.,* DMCA Section 104 Report at 142-46; The Register's May 16, 2006 SIRA Testimony at 5-6; *Reforming Section 115 of the Copyright Act for the Digital Age: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong., at 3 (Mar. 22, 2007) (Statement of Marybeth Peters, Register of Copyrights) ("[I]t may well be advisable to amend the law to . . . provide that when a digital transmission is predominantly a public performance, any reproductions made in the course of transmitting that performance will not give rise to liability.").

Absent legislation, the best response is administrative recognition that the buffers used to make such performances have no independent economic value and should be viewed as fair use. DMCA Section 104 Report at 142-45; The Register's July 12, 2005 Testimony at 11 ("An online music service that engages in streaming under a license of the performance right should not be required to pay as well for the right to make the buffer and cache copies that are incidental to the performance that is being streamed."); Dec. 12, 2001 Statement of Marybeth Peters at 21-22 (performing fair use analysis and concluding that on balance, "the equities weigh heavily in favor of fair use"); *Section 115 Compulsory License: Hearings Before the Subcomm. on Courts, The Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong., at 11 (Mar. 11, 2004) (Statement of Marybeth Peters, Register of Copyrights) ("[T]here should be no liability for the making of buffer copies in the course of streaming a licensed public performance of a musical work."). Server copies used to make digital performances similarly have no independent economic value and should be subject to a legislative exemption, or should be viewed as fair use. *See, e.g.*, DMCA Section 104 Report at 144 & n.434 (ephemeral recordings used solely to effectuate performance have no independent economic value; section 112(e) statutory license "can best be viewed as an aberration").

The Copyright Office goes to significant lengths to make clear in the NPRM that it does not intend to undermine such fair use claims. NPRM at 40,805 (taking "no position" on "whether and when it is necessary to obtain a license to cover the reproduction and distribution of a musical work in order to engage in activities such as streaming"). Unfortunately, however, the availability of the section 115 license is likely to lead to publisher arguments that may make a fair use defense more difficult to sustain than it otherwise would be.

Courts have held that the existence of a license structure weighs against a fair use claim. *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930-31 (2d Cir.1994) (finding it "sensible" that a particular use "should be considered 'less fair' when there is a ready market or means to pay for the use"); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381,

1387 & n.4 (6th Cir. 1996) ("Although not conclusive, the existence of an established license fee system is highly relevant." (quoting *Am. Geophysical Union*)). While the Copyright Office's notice seeks to make clear that such an effect is not intended here, a court could rule otherwise.

C. The NPRM Will Likely Have Unintended Adverse Consequences.

Section II.B, above, demonstrates the potential unintended, adverse consequences that the NPRM may cause with respect to (i) the statutory license for non-interactive performances of sound recordings, (ii) the Audio Home Recording Act, and (iii) the definition of "publication." But these are not the only potential adverse consequences of the NPRM. All digitally transmitted performances, regardless of the works performed, require the use of buffers at the receiving device. The reasoning of the Copyright Office's conclusion that those buffers are phonorecords when the transmitted material is a sound recording cannot be limited to sound recordings. If performance buffers are phonorecords, it follows, by the same reasoning, that performances of other types of works create copies at the receiving device, and that those copies are arguably within the scope of the copyright owners' reproduction rights.

Under the reasoning of the NPRM, when audiovisual works are streamed, the reproduction rights in the audiovisual work and all works contained in the audiovisual work (including any musical works) are implicated. Those rights are not within the scope of the section 115 statutory license, which is limited to the inclusion of musical works in phonorecords. While the license granting rights to perform the audiovisual work may include all necessary rights (including buffer reproductions), there is no assurance that licensees would have believed such rights to be needed. Thus, the NPRM may have the unintended consequence of disrupting previously settled commercial arrangements. Moreover, even if the audiovisual work licensor granted all necessary rights, there is no assurance that the licensor obtained buffer reproduction rights from the copyright owners of works included in the audiovisual work. Again, the NPRM's conclusion that buffers are within the scope of the reproduction right and, possibly, the distribution right, may disrupt previously settled relationships.

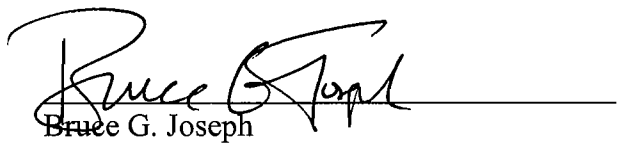
IV. There Is No Basis To Adopt any Rule.

The foregoing demonstrates that any rule relating to performance buffers is contrary to law and bad policy. Further, even beyond issues related to performance buffers, the Proposed Rule also depends on the conclusions that reproductions created in receiving devices are for the "primary purpose" of distribution and need only be "specifically identifiable" "for" the recipient by the recipient's device, both of which are erroneous. Thus, there is no basis to adopt the Proposed Rule as to even more lasting reproductions that occur in users' devices. Finally, the Proposed Rule is beyond the authority of the Copyright Office.

Conclusion

For the foregoing reasons, the Copyright Office should not adopt the Proposed Rule.

Respectfully submitted,



Bruce G. Joseph
Karyn K. Ablin
Michael L. Sturm
WILEY, REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
202-719-7258
Counsel for Verizon Communications