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U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400
Washington, DC 20024

Via US Postal Service Express Mail

November 22, 2008

Re: Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Interim rule and request for comments

To the General Counsel:

I would like to draw attention to an ambiguity in the Request for comments. On Federal Register / Vol. 73, No. 217, page 66181, the following text appears:

> The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

It might appear from this text that the "it" in the above sentence refers to the "reproduction." If so, then the text would not be an accurate paraphrase. The Copyright Act's definition of "fixation" states: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or a 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." The Request appears to equate the "it" in "sufficiently permanent or stable to permit it to be perceived . . ." with the work's "embodiment in a copy." But this construction is questionable, both grammatically and as a matter of common sense.

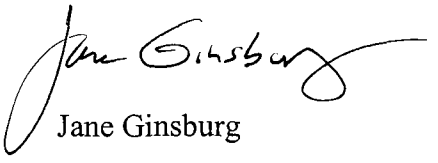
Grammatically, the "it" refers to the "work," not the "embodiment." The House Report accompanying the 1976 Act confirms that the drafters intended the correct grammatical meaning: "Under the first sentence of the definition of 'fixed' in section 101, a work would be considered 'fixed in a tangible medium of expression' if there has been an authorized embodiment in a copy or phonorecord and if that embodiment 'is sufficiently permanent or stable' to permit *the work* 'to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.'" H.R. Rep. No. 94-1476, at 53 (1976) (emphasis supplied).

Substantively, substituting "embodiment" for "it" would mean that the *embodiment* would be "perceived, reproduced, or otherwise communicated." But the embodiment – that is, the "tangible medium of expression" -- is not what the user "perceives." Indeed, for digital storage media, particularly those internal to a computer, the user will never see the "embodiment," but the embodiment will enable the user to see the *work*, albeit "with the aid of a machine or device." By the same token, in the digital context, the "embodiment" is not "otherwise communicated," because the communication will produce new embodiments; the work contained in those embodiments is what is "communicated."

The difference between the readings -- "sufficiently permanent or stable to permit **the work** to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration," versus "sufficiently permanent or stable to permit **the embodiment in a copy or phonorecord** to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration" – matters in other ways as well. As the Second Circuit's recent decision in *Cartoon Network v. CSC Holdings*, 536 F.3d 121 (2d Cir. 2008), illustrates, a focus on the "embodiment" may dictate the outcome of the question whether buffer copies are reproductions to which the section 106(1) exclusive right at least initially applies. By contrast, reading the definition as it was in fact written allows for more flexibility of interpretation. It does not pre-determine the "buffer copy" question, but at least allows consideration of whether, and under what circumstances, transient copies might be characterized as "reproductions."

A fuller discussion of the transient copy issue appears at pp. 8-14 of an article forthcoming in the REVUE INTERNATIONAL DU DROIT D'AUTEUR, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305270 .

Sincerely,



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