Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress

Interim Rule and Request for Comments	**37 C.F.R. Parts 201 and 255**
Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries	**Docket No. RM 2000-7**

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB") offers these comments on the Copyright Office's November 7, 2008, Interim Rule addressing the section 115 statutory license for making and distributing phonorecords, including digital phonorecord deliveries (the "Interim Rule").[1] These comments focus on the specific terms of the Interim Rule as set forth in 37 C.F.R. Parts 201 and 255.[2] In addition, NAB calls the Register's attention to the fact that the Copyright Royalty Judges, on November 24, 2008, adopted a Final Determination[3] that is inconsistent with the Register's Interim Rule.

The Register's Interim Rule

NAB appreciates the Register's responsiveness to NAB's August 28, 2008 Comments[4] on the NPRM and the Register's decision to adopt the Interim Rule in lieu of the Proposed Rule. NAB agrees with many aspects of the Interim Rule, which largely tracks language in the Copyright Act and confirms that where a digital phonorecord delivery (DPD) is made, the statutory license covers all of the reproductions made for the purpose of making that DPD.

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[1] Copyright Office, Library of Congress, *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Interim Rule and Request for Comments*, 73 Fed. Reg. 66,173 (Nov. 7, 2008).

[2] 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). These comments do not focus on the statements made by the Register in discussing the differences between the Interim Rule and the rule proposed in the Register's July 16 Notice of Proposed Rulemaking (the "Proposed Rule" in the "NPRM"). While NAB disagrees with several of the comments made by the Register in her discussion of the Interim Rule, the points of disagreement do not affect the Interim Rule as promulgated, and thus are moot.

[3] Copyright Royalty Judges, Final Determination of Rates and Terms, *In the Matter of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, Docket No. 2006-3 (Nov. 24, 2008) (the "Final 115 Determination").

[4] Comments of the National Association of Broadcasters, Docket No. 2000-7, Notice of Proposed Rulemaking, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries (August 28, 2008).

While NAB may not agree with the Register's conclusions concerning the scope of her authority, there is no need to press the point if the final rule adopted by the Register remains as set forth in the Interim Rule.

In particular, for the reasons set forth in NAB's August 28 Comments and in the September 19 presentation by NAB counsel at the Copyright Office's Hearing in this docket, NAB supports the decision by the Register (i) not to take any position on whether or when buffers used in the course of performances made by digital transmission are DPDs or implicate the reproduction and distribution rights, and (ii) to remove the portion of the Proposed Rule attempting to prescribe when a reproduction is "specifically identifiable" as required in section 115.

The Copyright Royalty Judges' Final Determination

While the Register's Interim Rule correctly refuses to determine that streaming performances that involve buffering create DPDs or otherwise implicate the reproduction or distribution rights, the Copyright Royalty Judges were not so circumspect in their adoption of a private settlement agreement among the parties litigating the section 115 rate proceeding before them. In their Final 115 Determination, the Judges adopt a rule declaring that "[a]n interactive stream is an incidental phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D)." Final 115 Determination at 76, § 385.11 (definition of "interactive stream").

This regulation was proposed by the parties to the then-pending section 115 rate proceeding as a settlement and was published for comment as a "Notice of Proposed Rulemaking" by the Judges on October 1, 2008,[5] as mandated by 17 U.S.C. § 801(b)(7). The Judges' sole justification and analysis for adoption of this rule was that, because none of "parties" to the proceeding objected to the settlement, under the Judges' view of section 801, "[the Judges] have no choice but to adopt it as the basis for the necessary statutory rates and terms applicable to the corresponding licensed activities." Final 115 Determination at 19. The Judges provided no legal analysis in support of the substance of the regulation and cited to nothing in the record before them demonstrating that interactive streams create DPDs, much less that they are, *per se*, DPDs.[6] Indeed, the Judges specifically disclaimed any responsibility for the rule they adopt, stating "we observe that the provisions of the settlement do not constitute a finding of fact or a resolution of law by us." *Id.* at 19-20. In short, because the parties to the

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[5] Copyright Royalty Board, *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 37 C.F.R. Part 385*, Notice of Proposed Rulemaking, Docket No. 2006-3 CRB DPRA, 73 Fed. Reg. 57,033 (Oct. 1, 2008) (the "CRB NPRM").

[6] The Judges themselves had previously declared that such findings were essential when they refused the Digital Media Association's request to refer to the Register, as a question of law, whether and when an interactive stream was a DPD. The Judges decided that the issue could not be referred as a matter of law in light of the lack of factual information relating to the "circumstances and types of activities that could be considered 'interactive streaming,' and the extent to which those factual circumstances and types of activities result in reproductions of musical works." *Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Docket No. 2006-3 CRB DPRA, Order Denying Motion of the Digital Media Association for Referral of a Novel Material Question of Substantive Law at 2 (Feb. 4, 2008).

proceeding before the Judges decided, for their own business reasons, to declare an interactive stream to be a DPD, the Judges believed they were bound to adopt that private conclusion as a regulation.

The law does not permit the Judges to adopt regulations that are contrary to law.[7] The Judges' stated view that, absent an objection from a party to the case, the Judges are bound to adopt a settlement as proposed by the parties is belied by the Judges' own handling of this very settlement. The Judges refused to include in the NPRM a statement proposed by the settling parties that the "rates have no precedential effect and may not be introduced or relied upon in any governmental or judicial proceeding," because the Judges viewed that statement as contrary to their proper role. CRB NPRM at 57,034.

But the Judges cannot have it both ways. Either the Judges are stuck with the settlement proposed by the parties or they are not. If it is not the Judges' "task to offer evaluations, limitations or characterizations of the rates and terms" adopted as part of a settlement, *id.*, it surely is not the Judges' task to adopt, as part of a settlement under their name, regulations that are contrary to law.

Moreover, section 801(b) specifically requires the Judges to publish a proposed settlement for comment by "those that would be bound by the terms, rates, or other determination set by any agreement." 17 U.S.C. § 801(b)(7)(A). The Judges admit that it is "curious" that the statute would require such publication, but then prohibit the Judges from considering the comments that are received. Final 115 Determination at 19 n.13. It is more than curious; it makes no sense at all.

NAB, joined by CTIA-The Wireless Association, provided comments in response to the Judges' NPRM, demonstrating that the proposed settlement was contrary to law and pointing out that it would be particularly appropriate for the Judges to take account of such comments where,

> as here, the Proposed Rule seeks to expand the DPD right set forth in section 115(c)(3)(G)(i) beyond its reasonably expected and lawful scope. The DPD right is grounded in the reproduction and distribution rights, yet the Proposed Rule purports to extend that right to cover acts that are pure performances, subject to the public performance right (and its applicable exceptions and limitations). This, in turn, implicates the interests of a range of parties, including Commenters, who did not participate in the proceeding that gave rise to the Settlement in reliance on the

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[7] *See, e.g.*, 5 U.S.C. § 706(2) (court should hold unlawful and set aside agency action that is contrary to law); *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 965 (9th Cir. 2003) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." (*quoting Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936))); *Ashton v. Pierce*, 716 F.2d 56, 60 (D.C. Cir. 1983) ("[F]or regulations to be valid they must be consistent with the statute under which they were promulgated." (citation omitted)); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("[W]e must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." (internal quotations omitted)).

> understanding that the proceeding would be confined to its lawful scope—setting rates and terms only for activities properly within the scope of section 115, not for activities beyond that scope. Just as the parties to a settlement may not declare an over-the-air radio broadcast or the digital transmission of a display of a photograph to be a DPD or set a section 115 statutory license rate for that activity, they may not declare an interactive performance to be a DPD subject to section 115.

Comments of CTIA-The Wireless Association and the National Association of Broadcasters, Docket No. 2006-3 CRB DPRA, Notice of Proposed Rulemaking, *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding* at 4, 6-16 (October 31, 2008) (the "NAB-CTIA CRB Comments").[8]

Moreover, the Copyright Royalty Judges lack authority to promulgate a rule declaring an interactive stream to be a DPD. As the Register advised the Judges in her Memorandum Opinion on Material Questions of Substantive Law, the Judges "do not have the authority to issue rules setting forth the scope of the activities covered by the [section 115] license," 73 Fed. Reg. 48,396, 48,399 (Aug. 19, 2008). The Judges are required to comply with the Register's ruling. *See* 17 U.S.C. § 802(f)(1)(A)(ii) (providing that "the Copyright Royalty Judges shall apply the legal interpretation embodied in the response of the Register of Copyrights" to referred material questions of substantive law (emphasis added)).

The declaration in the Proposed Rule that an interactive stream is a digital phonorecord delivery is a regulation that the law forbids. It is a declaration that a defined type of activity falls within the scope of section 115. Further, there was no need for the Judges to issue such a regulation here. The settling parties were free to propose rates for any DPDs that may be created in the context of a given activity, provided that a service wishes to use the section 115 statutory license for that activity. Giving effect to the parties' settlement did not require a declaration that every incident of "interactive streaming" is a DPD. It merely required the setting of a rate under the license "to the extent that" the activity involves DPDs. NAB and CTIA provided the judges with suitable language to effectuate that result.[9] The relevant language (without an added change suggested by NAB and CTIA to add the word "qualifying" to the defined terms "stream" and "interactive stream") is attached as Exhibit A, hereto.

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[8] Rather than repeat all of the arguments presented to the Copyright Royalty Judges, NAB hereby asks the Copyright Office to incorporate the NAB-CTIA CRB Comments by reference into these comments. The NAB-CTIA CRB Comments may be found on the CRB website at http://www.loc.gov/crb/comments/2008/ctia-nab.pdf.

[9] NAB-CTIA CRB Comments at 23 and Exhibit A.

If the Register decides to examine, pursuant to 17 U.S.C. § 802(d)(1)(D), whether certain decisions or actions of the Judges might have been unauthorized, material error, or otherwise contrary to law, NAB would welcome an opportunity to further comment on these matters.

Respectfully submitted,

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Exhibit A

§ 385.10 General.

(a) This subpart establishes rates and terms of royalty payments for digital phonorecord deliveries to the extent that they are made in the course of interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services made pursuant to the statutory license provided in 17 U.S.C. 115, in accordance with the provisions of 17 U.S.C. 115.

(b) *Legal compliance.* A licensee that makes or authorizes digital phonorecord deliveries in the course of making interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services pursuant to the statutory license provided in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations.

§ 385.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Interactive stream means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. 114 (d)(2). ~~An interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(3)(C) and (D).~~

§ 385.17 Effect of rates.

In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo. Nothing in this part shall be

construed as a determination that any interactive stream does or does not result in a digital phonorecord delivery or require a license under 17 U.S.C. 115.