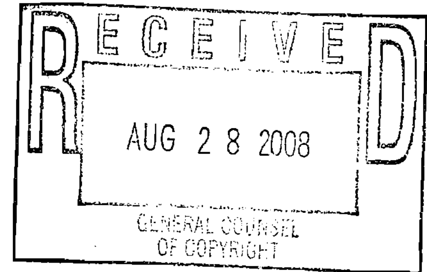
Comment Letter

RM 2000 7

No. 6

digital media association
the online audio and video association



August 28, 2008

Office of the General Counsel
U.S. Copyright Office
James Madison Memorial Building, Room LM-401
First Street and Independence Avenues, S.E.
Washington, DC 20559-6000

Re: Docket No. RM 2000-7, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries

On behalf of the Digital Media Association ("DiMA"), I write to express our comments in response to the Copyright Office's Notice of Proposed Rulemaking (the "NPRM") dated July 10, 2008, in connection with the compulsory license provisions of 17 U.S.C. § 115. *See* Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Notice of Proposed Rulemaking, 73 Fed. Reg. 40,802 (July 16, 2008). DiMA's membership includes America's leading providers of digital and online music and media services, including AOL, Amazon.com, Apple, BestBuy, Microsoft, Motorola, Napster, Nokia, Pandora, RealNetworks, Sony and Yahoo! DiMA's members are significantly affected by the proposed rule.

For several years DiMA has asked Congress and the Copyright Office ("the Office") to provide clear, specific interpretations of Section 115 so that its members and all digital media innovators can conduct mission-critical risk management with certainty. We have commented and testified about the uncertainties of Section 115, and of the costs these uncertainties impose on innovation, raising capital, and operating legitimate, royalty-paying music services. Accordingly, we are pleased that these issues are considered important by the Office and have been the subject of significant consideration.

As an initial matter, DiMA's general positions with regard to the proposed rule's application to Section 115 and the distribution and reproduction of musical works, reflecting broad music industry agreement intended to promote business and creative progress and innovation, are as follows:

- DiMA agrees with the Office, consistent with a partial settlement agreement in the pending Copyright Royalty Board Section 115 rate-setting proceeding (discussed in detail below) entered into by the parties and notified to the CRB, *see* Order in Docket No. 2006-3 CRB-DPRA (May 27, 2008), that the process of "interactive streaming" results in the production of digital phonorecord deliveries ("DPDs") and more specifically incidental digital phonorecord deliveries ("iDPDs"). Moreover, except for so-called "promotional interactive streaming," DiMA agrees consistent with the partial settlement agreement that interactive streaming requires a Section 115 license and potentially obligates a royalty.

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- DiMA agrees with the Office that rights to make and distribute server copies in association with activities otherwise licensed by Section 115 licenses are themselves deemed included in and covered by that same Section 115 license.

- DiMA disagrees with the Office's conclusion with regard to "noninteractive streaming" because that activity does not require a license under Section 115 and activities outside the scope of the statutory license are not properly the subject of this rulemaking.

Additionally, DiMA has very serious concerns with regard to the timing of the NPRM (including its potentially detrimental impact on the partial settlement); how interpretations of core statutory terms which are the foundation of this rule may affect fundamental copyright law well beyond musical works and Section 115, which take it outside the proper scope of this rulemaking.

I. The Proposed Rulemaking is Untimely.

Though eight years in the making and informed in many respects by DiMA's concerns about legal and business uncertainty associated with the statutory terms "digital phonorecords delivery" and "incidental digital phonorecords delivery," we believe that this proposed rule is ill-timed, to the substantial detriment of DiMA members and other music industry stakeholders that have been participants in an ongoing Copyright Royalty Board ("CRB") proceeding that is addressing many of these same issues. Additionally, as a matter of law DiMA is concerned that a final rule issued at this time may unlawfully inject the Office into the pending CRB proceeding with regard to rates and terms associated with Section 115 compulsory licenses. Moreover, as a matter of policy and practice DiMA is concerned that many legal uncertainties that were causing risk in the music industry have in large part been addressed in the marketplace, and that the marketplace resolutions which allow business, industry and creativity to move forward may be undermined by a rule issued at this time.

A. The Proposed Rulemaking Interferes With Pending Copyright Royalty Board Proceedings.

As the Office knows well, DiMA and several other music industry stakeholders have spent almost two years and millions of dollars litigating before the Copyright Royalty Board many of the precise issues addressed by the NPRM. *See generally Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Docket No. 2006-3 CRB DPRA. The record in that proceeding is now closed and the parties have no further opportunity to introduce or rebut any evidence, or to oppose or support any factual or legal arguments, conclusions, or interpretations of law that may affect the outcome of the case. Yet the NPRM notes that the proposed rule may have – and indeed seems intended to have – significant substantive impact on that proceeding. This result would potentially prejudice all the parties to the CRB proceeding and the many members they represent. Moreover, this result would contravene specific provisions of the Copyright Act that narrowly circumscribe the Office's authority to be involved in a CRB rate-setting proceeding.

The Copyright Act precisely defines the Office's limited consultative opportunities to affect a pending CRB proceeding. *See* 17 U.S.C. § 801(f)(1). As the Office is aware, it was DiMA's view that certain issues addressed in the NPRM are so novel and so integral to the CRB decision that we petitioned the CRB to refer them to the Office for clarifying legal interpretation. *See* Motion of the

Digital Media Association Requesting Referral of a Novel Material Question of Substantive Law, *Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Docket No. 2006-3 CRB DPRA (filed Jan. 7, 2008). However, the CRB declined to refer these issues, and as a result of the regulatory structure designed by Congress (as manifested in the Act) the Office's involvement with those issues is foreclosed until the CRB issues its final determination. At that point the Office will again have a critical role, as within 60 days it may review and opine with respect to the CRB's legal conclusions. That review becomes part of the official record if the CRB decision is appealed, and it becomes binding on the CRB with respect to future proceedings. *See* 17 U.S.C. § 802(f)(1)(D).

This Congressionally-designed process is very important. In one respect it ensures the CRB's independence, as it enables the Copyright Royalty Judges to determine whether a question requires legal interpretation while a case is pending, and then to build on their interlocutory decisions throughout the remainder of the case without being reviewed until after the proceeding concludes. The process also protects parties to the ongoing proceedings, by ensuring that they can present evidence and argumentation knowing that the scope, import and interpretation of the statute are settled during the proceeding. This is particularly important when parties often, as in this case, spend years and many millions of dollars preparing for, briefing and litigating issues under a particular and recognized interpretation and application of the Copyright Act.

Undoubtedly parties may have changed strategies, submitted different evidence and witnesses, cross-examined witnesses differently and made entirely different legal and economic arguments if the proposed rule had been issued prior to the CRB proceeding's beginning or early in the case when DiMA requested the referral. Those changes can all be accommodated if the Office issues its interpretation (in the form of a final rule or a review of the CRB decision) after the CRB decides the case. Because the record in the proceeding is now closed, the Office should refrain from rulemaking until after the CRB issues its determination.

B. When Certainty is Most Needed, the Proposed Rule Creates Uncertainty.

In the thirteen years since the terms "digital phonorecord delivery" and "incidental digital phonorecord delivery" were added to our statutory lexicon, technology has dramatically changed the performance and delivery of musical content, and business practices have sought to keep up. Applicable laws, however, have not kept pace with the changes in business and technology. As the Office notes in the NPRM, Congress has held several hearings about reforming Section 115; legislative reform efforts made some progress; and this rulemaking has progressed haltingly.

For all of those thirteen years innovators have been developing technologies, entrepreneurs and investors have been creating businesses, and lawyers have been debating the finer points of Section 115 in license negotiations and litigation, before Congress and the Copyright Office. Throughout this period the businesses have never reached maximum efficiency due to legal and risk management distraction, caused largely by seemingly intractable disagreements over the meaning and application of Section 115. Finally, however, a meaningful way of resolving issues has been taking shape within the CRB's pending Section 115 proceeding, both through the conclusion of the proceeding itself and the execution of a partial settlement by participating music industry stakeholders. The settlement incorporates several agreed positions regarding the interpretation and application of Section 115, and

it is these unified positions that provide certainty and stability and a foundation for collective progress that DiMA stands by in these Comments.

As directed by the Copyright Act, DiMA anticipates that the settlement will soon be presented to the CRB and published in the Federal Register. Yet, at the very moment that the most affected music industry stakeholders are seeking to resolve eight years of uncertainty, and to make a unified leap forward in their respective businesses that compete daily against piracy, this proposed rule may inadvertently derail that progress. For this reason, DiMA urges the Office to refrain from taking any action on the proposed rule at this juncture.

II. <u>The Effect of the Proposed Rulemaking Is Much Broader than Just the Scope of Section 115.</u>

The Office states that the NPRM is intended to provide guidance with respect to the Section 115 compulsory license. However, in providing such guidance the Office relies on interpretations of fundamental broadly-applicable Copyright Act terms such as "reproduction" and "distribution" in ways that may create turbulence for a broad universe of stakeholders, including every DiMA member company.

A. The Proposed Rule Appears to Undermine the Section 114 Sound Recording Statutory License.

In 1995 and 1998, when Congress created and then amended digital radio sound recording performance licenses, it carefully crafted a simple comprehensive statutory solution that offers to all who follow the rules and pay the royalties – without the need for any additional licensing – all sound recording rights necessary for the provision of digital radio service. That solution includes (in Section 114, *see* 17 U.S.C. § 114) all the rights necessary to perform sound recordings, and has always been considered to provide (in Section 112, *see* 17 U.S.C. § 112) all the rights necessary to reproduce the sound recordings in ways that are needed to transmit the recordings for purposes of making radio performances. Notably, Congress did not authorize the statutory agent to offer a license to distribute the sound recordings or to reproduce them beyond the service's owned (or authorized) servers, including to the buffers of listeners' personal computers or digital radios.

The proposed rule's interpretations of "reproduction" and "distribution" – if extended beyond Section 115 to reproductions and distributions of sound recordings – would effectively undermine Congress's intention that Internet, cable and satellite radio services would have a simple statutory license for all necessary sound recording rights. Absent legislative amendment, the "reproductions" of sound recordings on listeners' device buffers for the purposes of offering non-interactive radio arguably would not be authorized by statute, and arguably would require additional licensure and potentially royalty payments. Moreover, these licenses would be available only from copyright owners directly; royalties would be paid directly to copyright owners and not to SoundExchange where they are divided among owners and performers; and there would be no Copyright Royalty Board proceeding to set royalties if licensors and licensees disagree on rates.

This would work an extremely harsh and totally unanticipated result. After several years of enjoying the digital radio statutory license, and after several years of Congressional hearings detailing various

parties' interests in improving the license, the Copyright Office's proposed rule – conveyed in an NPRM concerning Section 115 and noting Section 114 only in a footnote – would offer a legal interpretation that implies the license is ineffective because the radio service is making and distributing copies of the underlying sound recording. The resulting infringement risk for cable, satellite and Internet radio services would be draconian, and could not be what the Office intended when crafting a rule that is ostensibly limited to Section 115 with respect to musical works.

The provisions in Section 115 regarding DPDs and the provisions of Section 114 regarding interactive and non-interactive streaming were considered and enacted by Congress as part of one update to the Copyright Act, simultaneously. As such, these provisions should be read and applied in a way that is internally consistent, between them. The interpretation and application of Sections 114 and 115 must be harmonized to ensure that the application of either one does not undermine the meaning, application or effect of the either provision.

B. Non-Music Digital Transmissions Are Also Dramatically Impacted by the Proposed Rule.

In concluding that the definitions that apply to all digital transmissions of music result in specifically identifiable reproductions of the works in buffer memory, no matter how fragmentary or temporary they may be, the proposed rule begs the question: "Do all digital transmissions of any content – audio-visual, photographic, textual, graphic or otherwise – necessarily implicate the full reproduction and distribution rights of every copyrightable element comprising that content?" Again, DiMA cannot imagine the Office intends this – at least not as a result of this proposed rule.

With regard to the potentially very broad application of the proposed rule's interpretation of fundamental copyright terms, DiMA is troubled by the NPRM's several references to "general agreement" about certain concepts or conclusions, especially as those concepts and conclusions extend beyond music. It is entirely unclear which specific parties "generally agree" with the itemized conclusions, and what "general agreement" with certain statements means, but one thing is absolutely certain: To the extent that DiMA was commenting on proposed regulations or interpretations related to Section 115, it did so specifically with respect to their application to the reproduction and distribution of musical works – not to other sound recordings or audiovisual works or any other category of work. We assume this is so for all commenters.

Additionally, these statements in the NPRM disregard the fact that many parties affected by the proposed rule did not participate in earlier portions of this proceeding because until this NPRM was issued it was generally understood that the proceedings were solely about music. Thus, relying on general agreement among parties that have in the past participated in this proceeding may not be a reliable basis on which to conclude that there is general agreement with respect to the proposed rule.

III. The Proposed Rule Lacks Sufficient Support Beyond the Scope of Section 115.

The Office devotes significant attention to detailing, and also simplifying for purposes of analysis, the types of copies that are associated with digital distribution of content in general. As an initial matter, DiMA does not believe it is appropriate for the Office to directly or indirectly implement rules that affect Copyright Law outside the scope of Section 115 by effectively modifying the definition and

applicability of fundamental terms applicable throughout the Copyright Act and that have import and effect beyond the proper boundaries of this rulemaking. The parties to the current Section 115 rate setting proceeding have resolved these issues for purposes of Section 115, pursuant to applicable law. 17 U.S.C. § 801(b)(7)(A). The Office has neither the legal authority nor the record evidence to address these issues.

With respect to activities outside the scope of Section 115, the Office has no legal basis for rulemaking that has such foundational and thereby wide-reaching definitional impact, in this context or at this time. Even if it had such a basis, the NPRM's technological analysis focuses almost entirely on "server end" and "recipient end" copies, ignoring the activity occurring in networks that are the transport medium for moving content between servers and end-users. The question of whether a reproduction or a distribution has occurred as a part of any digital transmission outside the scope of Section 115 is a complex and nuanced inquiry that requires a thorough analysis of all the specific technical details that are unique to any particular transmission.

In this regard, it is insufficient to categorically imply that all digital transmissions necessarily deliver specifically identifiable reproductions. At the very least, such a determination would require a detailed and comprehensive record, including review of the subtle factors that are unique to each individual case and to each technology. *See, e.g., Cartoon Network LP v. CSC Holdings, Inc.,* No. 07 Civ. 1480, __ F.3d __ (2d Cir., Aug. 4, 2008) (holding that buffer copies of television programs are "transitory" and thus do not implicate the reproduction right). The NPRM purports to opine on these fundamental definitional issues in the abstract, without the necessary factual record, for works and technologies from outside the online music industry. Whether the definitions are met in cases involving computer software, video games or other works must be left to the courts in specific cases to determine.

IV. The Office's Analysis of the Applicability of Section 115 to Certain Reproductions Relies on Assumptions that are not Necessarily Valid.

As noted earlier in these comments, DiMA agrees that the process of delivering interactive streams as defined by the parties to the partial settlement in the Section 115 ratesetting proceeding, including copies used in that process, necessarily includes the production of licensable DPDs. However, DiMA does not agree that partial fragments of other types of content, not considered in the Section 115 CRB proceeding, that are temporarily buffered on a service's transmission equipment or on a user's computer or receiving device, however fleeting or incomplete, must always implicate reproduction rights under law. Applying this conclusion to all other types of streaming activities ignores the critical factor in determining whether a copy exists: namely, what constitutes a fixation under copyright law. Similarly, the analysis of the NPRM that results in the conclusion that online models other than interactive streaming models have the primary purpose of making phonorecords for their recipients is also flawed. Services that engage in various types of streaming other than interactive streaming of musical works may or may not make reproductions at the recipient end of a transmission, and such reproductions may not always be for the "primary purpose" of making phonorecords.

The Office may be aware that testimony in the Section 115 CRB proceeding addressed the placement by some streaming services of complete songs in a computer's RAM buffer prior to performing those

songs. It may also be aware, however, that testimony also detailed how certain technologies do not place complete songs in the buffer prior to rendering them audible. The same variety of technological approaches applies to audiovisual works being transmitted for the sole purpose of performance.

Regardless of these clear and apparently important differences between technologies, the NPRM concludes simply that all buffers and all digital performance technologies are legally equal. As a result, the proposed rule would have even miniscule, partial buffering for the purpose of a non-interactive performance (which is often necessary as the bits must be stored momentarily as they are converted to audible sounds), when aggregated, deemed to equal a licensable reproduction of a work that is reproduced expressly for the purpose of being distributed.

As the Second Circuit's *Cartoon Network* decision makes clear, a fundamental and fact-specific question is whether a reproduction is or is not specifically identifiable as a copyrighted work – and if enough of the bits to comprise anything resembling an identifiable work are ever residing on the buffer at the same time. Outside the scope of Section 115, these very fact- and technology-specific questions are more appropriately considered on a case-by-case basis in order to identify whether each use meets the requirements of the Act.

V. The Proposed Regulations Do Not Account for Non-DPD Copies under the Section 115 License

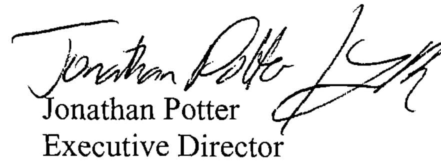
As stated above, DiMA agrees with the Office that the Section 115 license has traditionally provided coverage beyond those phonorecords made and distributed to the public for private use. Since its inception in 1976, Section 115 was intended to cover all of the possible manufacturing or other processes capable of reproducing phonorecords. The Office correctly extends this understanding to include server–end copies, as well as all other intermediate copies necessary to provide DPDs and/or iDPDs under Section 115.

As also stated, DiMA agrees that the process of interactive streaming results in the production of DPDs and/or iDPDs, and that except for promotional activity, interactive streaming requires a Section 115 license and potentially obligates a royalty payment. Accordingly, the Section 115 license should be specifically extended under this understanding to include all server copies and other intermediate copies necessary to provide interactive streaming to recipients under Section 115, including the explicit understanding that such copies are not "distributed" and, as a result, they do not entitle the copyright owner to separate royalty payments. Despite the NPRM's stated conclusions regarding these issues, the Office did not provide a draft regulation to confirm this as law. DiMA, therefore, suggests adding the following language: "A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed activity, solely for the purpose of providing such licensed activity (and no other purpose)."

In closing, DiMA appreciates the Copyright Office's intention to interpret Section 115 to address the needs of the emerging digital music marketplace. We are obviously concerned, however, that the timing of this proposed rule and the broader application of its interpretations of fundamental copyright terms could be more harmful than beneficial to copyright stakeholders in all digital media – including creators. The parties to the Section 115 rate setting proceeding have already resolved many of these issues. As applied in the broader copyright context beyond musical works, the remaining

issues are best addressed via the legislative process where the laws can be fully modernized and tailored to accommodate all stakeholders' needs.

Respectfully submitted,



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