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

In the Matter of Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries	Docket No. RM 2000-7

COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION,
SONGWRITERS' GUILD OF AMERICA,
NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL
AND ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS
ON SECTION 115 INTERIM RULE

The National Music Publishers' Association, including its wholly owned licensing subsidiary, The Harry Fox Agency, Inc. ("HFA") (together, "NMPA"), the Songwriters' Guild of America ("SGA"), the Nashville Songwriters Association International ("NSAI") and the Association of Independent Music Publishers ("AIMP") respectfully submit these comments concerning the interim regulation addressing the Section 115 license announced by Copyright Office on November 7, 2008 ("Interim Rule"). *See* 73 Fed. Reg. 66,173 (Nov. 7, 2008).

NMPA, SGA, NSAI and AIMP (collectively, the "Commenting Parties") appreciate the Copyright Office's time and attention to the longstanding issues surrounding the availability of the Section 115 license for full downloads, limited downloads and interactive streams, including the server, buffer and intermediate phonorecords required to facilitate the making and distribution of these digital deliveries. The Commenting Parties believe that clarification of the scope and application of the Section 115 license is essential to promoting the growth of digital music services, which rely upon the Section 115 license (and its voluntary equivalents) to obtain

authority for the use of musical works, and are grateful to the Copyright Office for its thoughtful consideration of these matters.

As the Office is aware, the Commenting Parties, along with the other key stakeholders in the digital music industry represented by the Recording Industry Association of America and the Digital Media Association, believe that the delivery of full downloads, limited downloads and interactive streams to end users implicates the making and distribution of digital phonorecord deliveries ("DPDs") under Section 115. Accordingly, the Commenting Parties supported the adoption (with minor modifications) of the regulation initially proposed by the Copyright Office, 73 Fed. Reg. 40,802 (July 16, 2008) ("Proposed Rule"), to confirm such industry understanding, as well as the related point that the server reproductions and other phonorecords required to deliver these digital configurations to consumers are properly included in the Section 115 license. In particular, the Commenting Parties agreed with the Copyright Office's conclusion, embodied in the Proposed Rule and based on the Office's interpretation of the Copyright Act, that buffer phonorecords (often referred to informally as "buffer copies") of musical works made to facilitate the interactive streaming of sound recordings constitute DPDs subject to licensing under Section 115.

In the wake of the Second Circuit's *Cartoon Network* decision, however, which was issued shortly after the publication of the Proposed Rule, the Office modified its approach. Notwithstanding the Office's earlier conclusion concerning buffer phonorecords, the Interim Rule does not espouse a final pronouncement on this issue. 73 Fed. Reg. at 66,173-74 (citing *Cartoon Network LP* v. *CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)).

For reasons the Commenting Parties have previously explained, we take issue with the Second Circuit's approach in the *Cartoon Network* case.[1] But even setting aside the reasoning of that opinion, that case does not (and does not purport to) address the status of buffer phonorecords that are created and used to play complete copies of musical works for end users through interactive streaming services. The Commenting Parties therefore do not believe that *Cartoon Network* compels a conclusion different from that embraced by the Copyright Office in the Proposed Rule.[2]

Indeed, the Copyright Office itself expresses skepticism about the Second Circuit's approach in the *Cartoon Network* case. *Id.* at 66,177. The Commenting Parties therefore question the second sentence in the text of the Interim Rule, which adds language not included in Section 115's definition of DPD, as an apparent response to that decision.[3] In this regard, we note that the Office specifically observed that it does not intend to offer any position on whether a buffer phonorecord (or "buffer copy") qualifies as a DPD. *See id.* at 66,174. While it would thus appear contrary to the Office's intention, because Section 115 of the Copyright Act already sets forth the requirements for a "digital phonorecord delivery," and Section 101 defines "phonorecords" and "fixed," the second sentence of the Interim Rule – which does not track Section 115 and does not adhere to the controlling definitions in Section 101[4] – seemingly could be misinterpreted by some as suggesting an alternative to the statutory standard.

---

[1] For example, we disagree with the decision's inappropriate equation of a home-use VCR with a massive, centralized DVR storage system, and the problematic standards applied by the court in assessing whether Cablevision infringed the content owners' reproduction rights.

[2] In response to the Proposed Rule, the Commenting Parties provided extensive comments and testimony on the treatment of buffer phonorecords and other issues raised in this rulemaking. Rather than repeat all of our positions here, we instead append our earlier submissions, including written versions of the prior oral testimony, and incorporate them by reference.

[3] The sentence in question provides: "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." 73 Fed. Reg. 66,181.

[4] For example, the newly added sentence refers to the ability to "perceive[], reproduce[], or otherwise communicate[]" the "reproduction of the phonorecord," while Section 101's definition of "fixed" speaks of the

Section 115 is unique in the Copyright Act, and represents a nuanced balancing of the interests of copyright owners and copyright users within a government-regulated regime. No court of which we are aware has addressed the status of buffer phonorecords in the context of Section 115, or relative to the definition of DPD within that section. Because the Copyright Act already includes the statutory definitions that must guide any such inquiry, and to avoid any misunderstanding that the Copyright Office has departed from the statutory framework, the Commenting Parties respectfully but strongly suggest that the second sentence of the regulatory text be eliminated from any future iteration of the rule.[5] Alternatively, the Office could substitute a sentence that more closely tracks the Act by stating that the reproduction of the phonorecord must meet all other requirements, including any fixation requirement, of Sections 101 and 115 of the Copyright Act. Whether the first, preferable, alternative, or the second, is adopted by the Office, in order to avoid any perceived departure from the relevant statutory provisions, we believe the commentary to the rule should emphasize that the regulatory text is not intended to impose any greater, lesser or different fixation standard than that required under Sections 101 and 115, which are controlling.

In conclusion, subject to our significant reservation concerning the second sentence of the regulatory text, which, as discussed above, we believe should be eliminated or revised to ensure

---

ability to "perceive[], reproduce[], or otherwise communicate" *the work itself*. *See* 17 U.S.C. § 101. In this regard, we reiterate the concern we raised earlier in this proceeding that the definition of "fixed" was added to the Copyright Act not to address the question of infringement, but rather the standard for copyrightability.

[5] The Interim Rule also departs from the Proposed Rule in its treatment of the term "specifically identifiable" within the definition of "digital phonorecord delivery" found in Section 115(d). Taking into consideration the comments of various parties, the Copyright Office in issuing the Interim Rule concluded that it should not attempt to specify the persons, entities or things by or for which a phonorecord is "specifically identifiable," as it had in the Proposed Rule. *See id.* at 66,178. As the Commenting Parties observed earlier, Congress could easily have included such a limitation in the statutory definition, but did not. *See id.* Accordingly, the Commenting Parties are satisfied with and support the approach now settled upon by the Copyright Office in announcing the Interim Rule, that "specifically identifiable" should be understood to mean that the phonorecord is specifically identifiable to "anyone or anything, including the transmission service, the transmission service's computer, the transmission recipient, or the transmission recipient's computer." *Id.*

consistency with the Copyright Act, the Commenting Parties are encouraged by the Copyright Office's announcement of the Interim Rule. In keeping with industry norms, the regulatory framework now confirms that digital services may obtain Section 115 licenses to cover all of the reproductions – including buffer phonorecords – that are required to deliver full downloads, limited downloads and interactive streams of musical works to consumers. In this respect, the Interim Rule represents a vital step forward that should facilitate the licensing and growth of digital music services, to the benefit of both copyright owners and copyright users.

Dated: January 6, 2009

Respectfully submitted,

MORRISON & FOERSTER LLP

By: Jacqueline Charlesworth

Jacqueline C. Charlesworth
Paul Goldstein
Morgan Adessa
1290 Avenue of the Americas
New York, New York 10104
(212) 468-8000
(212) 468-7900 (fax)

Counsel for the National Music Publishers' Association and The Harry Fox, Agency, Inc.

BAKER & McKENZIE LLP

By: Carl Hampe

Carl W. Hampe
815 Connecticut Ave. NW
Washington, DC 20006
(202) 452-7000
(202) 452-7074 (fax)

Counsel for Songwriters' Guild of America

NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL

By: Steve Bogard

Steve Bogard
President, Board of Directors
1710 Roy Acuff Place
Nashville, Tennessee 37203
(615) 417-1777
(615) 256-0034 (fax)

ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS

By: Cathy Merenda

Cathy Merenda
President
P.O. Box 69473
Los Angeles, California 90069
(818) 771-7301

Of Counsel:

Jay Rosenthal, Esq.
National Music Publishers' Association
101 Constitution Ave. NW
Suite 705 East
Washington, DC 20001
(202) 742-4375
(202) 742-4377 (fax)