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

In the Matter of

Mechanical and Digital Phonorecord Delivery Compulsory License

Docket No. RM 2000-7

COMMENTS OF MP3.COM, INC.

MP3.com, Inc. ("MP3.com"), by its attorneys, hereby submits comments in response to the Copyright Office's Notice of Inquiry in the above-captioned proceeding.[1] As discussed below, MP3.com submits that it is both necessary and appropriate for the Copyright Office to conduct a rulemaking proceeding with regard to the application of the Section 115 "mechanical" compulsory license to on-demand streaming of sound recordings embodying musical works. Moreover, rather than leave the existing state of regulatory uncertainty and stalemate unresolved during its consideration of final rules, the Office can and should immediately adopt "interim" regulations. Such regulations should clarify the meaning of 37 CFR Section 255.6 (the "deferral" provision") and establish "safe harbor" provisions that will permit on-line music service providers that deliver on-demand streams to consumers to rely on the amendments to Section 115 of the Copyright Act enacted by Congress in 1995 while protecting the interests of copyright owners.[2]

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[1] 66 Fed. Reg. 14099 (March 9, 2001). The Notice of Inquiry seeks comments on issues arising from the application of Section 115 of the Copyright Act to "on-demand streams" of music and to "limited downloads." MP3.com's comments will address only the application of Section 115 to "on-demand streams."

[2] The Office has recognized its power to adopt "interim" regulations on several occasions. For example, noting the "developing nature of the digital transmission service industry and of the technology which will be employed in

INTRODUCTION AND BACKGROUND

The Internet music industry is at a critical juncture. Millions of consumers have signaled their interest in using on-line tools and services to access recorded music. However, the ability of innovative companies to meet this consumer demand is being frustrated as the result of legal uncertainty – uncertainty both as to the application of copyright law principles to Internet-based tools and services and as to the rights of music purchasers with regard to their use of these tools and services.

MP3.com's own experience in offering music consumers the benefits of Internet-based technology is illustrative of the problems that the Copyright Office can and should address. MP3.com is a premier, worldwide, Internet music service provider.[3] In January 2000, MP3.com launched a new service called My.MP3.com. My.MP3.com is a digital music "locker" service that enables people to use Internet-connected devices to listen to compressed "MP3" format audio streams of the music on the CDs that they purchase at their local record stores or from on-line retailers. Today, the primary playback devices for My.MP3.com users are their personal computers. But in the not too distant future, My.MP3.com's users will be able to use a variety of Internet-connected devices (including wireless hand-held players and Internet-enabled car "radios") to listen to audio streams of the songs on the CDs that they purchase.

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accommodating the reporting requirements," the Office adopted interim regulations regarding the notice and recordkeeping requirements for use of copyrighted works by digital subscription transmission services. *See Notice and Recordkeeping for Digital Subscription Transmissions*, Interim Regulations, Docket No. RM 96-3B, 63 Fed. Reg. 34289, 34290 (June 24, 1998) ("Digital Subscription Transmissions Interim Regulations Order").

[3]In addition to developing the My.MP3.com service described in the text, MP3.com gives up-and-coming musicians access to a market and marketing that would otherwise be closed to them; assists new entrepreneurs to use the management tools MP3.com has developed and refined to create their own services and businesses; teams with radio stations to bring the music of their local artists to on-line listeners; provides unique music and management services to retailers; sells CDs; recommends and assists with hardware and software; and provides free musical greeting cards. MP3.com has a children's music channel, too.

The way the My.MP3.com service works is as follows: with respect to a CD that a consumer already has purchased, the consumer takes the CD and places it in the CD-ROM tray of his or her computer; My.MP3.com's "Beam-It" software then "reads" the CD and, having established that it is an actual, legitimate CD release, adds that CD to a secure, personalized "locker" from which that consumer – and only that consumer – can access audio streams. In addition, with respect to CDs purchased on-line from one of MP3.com's retail partners, the consumer can use My.MP3.com's "Instant Listening" software to add a CD in MP3 format to his or her personal locker at the same time the consumer pays for the CD, thereby allowing access to audio streams of the songs on the CD even before the disc is physically delivered.

It should be emphasized that My.MP3.com differs from music file-sharing or "swapping" services that allow users to download, save, and trade music that they have not purchased. Sound recordings and the musical compositions embodied therein can be accessed on My.MP3.com only for a real-time streaming audio listening experience, not for downloading and copying. Indeed, before My.MP3.com can be used to listen to an audio stream of the music on a CD, both the listener and MP3.com must have purchased the physical CD.

The launch of the My.MP3.com service triggered the filing of copyright infringement complaints by several record labels (as owners of copyrighted sound recordings on the CDs stored in the lockers provided by My.MP3.com) and by certain music publishers (as owners of the copyrighted musical compositions embodied in those CDs). These lawsuits focused on certain integral features of the audio streaming process.

Specifically, both the record labels and the publishers cited the fact that My.MP3.com converted CDs (which My.MP3.com had purchased in the marketplace) into compressed MP3 format files for storage on My.MP3.com's servers. According to the record labels and music

publishers, the creation of these "server copies" (also sometimes referred to as "root" or "cache" or "encoded" copies"), which is a necessary step in the process of providing audio streams over the Internet, constituted an act of infringement. In addition, the music publishers asserted that, by providing consumers with audio streams of songs on the CDs that they purchased and stored in their My.MP3.com lockers, MP3.com was making unlicensed "digital phonorecord deliveries." This argument was made notwithstanding the fact that, as noted above, My.MP3.com is a streaming service, not a "download" service.

Although MP3.com disagreed with the interpretation of the copyright law put forward by the record labels and publishers, it elected to voluntarily "lock down" the My.MP3.com service pending resolution of these disputes. Locking down the My.MP3.com service deprived consumers of the ability to access music that they had purchased and stored in their on-line lockers. There is a certain irony in the fact that by forcing My.MP3.com to shut down, the record labels and music publishers undoubtedly drove many consumers to services such as Napster, where they not only could find and play the CDs that they already had bought, but also could (and probably did) obtain access to a vast array of music selections without ever having to purchase them.

Ultimately, one federal judge ruled that, in creating the server copies needed to provide consumers with streaming audio of the music in their My.MP3.com lockers, MP3.com had infringed the record labels' copyrights. This decision, together with MP3.com's desire to get the My.MP3.com service back up and running, led it to enter into very costly agreements with various record labels and with the Harry Fox Agency (on behalf of the music publishers). These agreements effectively assume that audio streaming, even when transmitted exclusively to consumers who already have purchased the very music being streamed to them, requires not only

a license covering the public performance of the copyrighted songs and of the sound recordings in which the songs are embodied, but also licenses covering both the creation of the "server copies" needed to initiate the streaming process and the "incidental digital phonorecord deliveries" that, at least according to the publishers, occur each time a music purchaser uses My.MP3.com to listen to a song stored in his or her music locker.

It is now more than six months since MP3.com entered into these agreements with the record labels and music publishers. And despite having obtained licenses with respect to sound recordings embodying nearly a million musical compositions, MP3.com has not been able to fully "unlock" the My.MP3.com service and thereby allow users of the service to listen to audio streams of the songs on their purchased CDs. The immediate problem faced by MP3.com – and the problem that will be faced by any provider of on-demand audio streaming who wants to offer listeners the broad choice of song selections consumers clearly desire – results from the music publishers' insistence that audio streaming constitutes the reproduction and distribution of the publishers' copyrighted songs. As MP3.com's experience demonstrates, there simply is no practicable means for obtaining licenses for the reproduction and distribution of every song that consumers will want to access via on-demand streaming.

In his opening statement at the Senate Judiciary Committee's April 3, 2001 hearing concerning on-line music, Chairman Hatch aptly characterized MP3.com's plight by referring to Alanis Morissette's song "Isn't It Ironic."[4] The irony alluded to by Chairman Hatch is not just that MP3.com remains unable to provide consumers with access to audio streams of most of the songs on the CDs that they have purchased despite having entered into a multi-million dollar licensing agreement with the Harry Fox Agency (an agreement, by the way, that was

[4] *See* Opening Statement of Orrin G. Hatch (R-UT), U.S. Senate Judiciary Committee Hearing, "Online Entertainment: Coming Soon to a Digital Device Near You?" (April 3, 2001).

characterized at the time as giving My.MP3.com reproduction and distribution licenses with respect to nearly a million song titles). The irony also is that MP3.com cannot get the licenses it is told that it needs despite the fact that for nearly 100 years, the publishers' reproduction and distribution rights have been subject to a statutory "compulsory" licensing arrangement (now codified in Section 115 of the Copyright Act) and that, just six years ago, Congress amended this statutory compulsory license provision to clarify that it covers the reproduction and distribution of musical works not only in the form of physical phonorecords, but also in the form of "digital phonorecord deliveries" ("DPDs") and "incidental digital phonorecord deliveries" ("IDPDs").

The 1995 legislation amending Section 115 authorized the Copyright Office to adopt rules implementing the new provisions regarding DPDs and IDPDs. And, in fact, the Office did adopt certain rules specifically addressing the licensing of DPDs.[5] However, with respect to IDPDs, the interested parties were unable to reach consensus on certain basic definitional issues, as well as on other matters. Consequently, at the parties' request, the Office decided not to adopt any rules establishing specific definitions, rates, terms, or procedures for the licensing of IDPDs. Instead, the Office amended its rules to add a provision (37 CFR Section 255.6) expressly "deferring" the implementation of IDPD-specific regulations.[6]

Whatever the merits of the deferral rule at the time it was adopted, it is clear that the need has now arisen for specific rules addressing the IDPD provision in Section 115. The current uncertainty surrounding the IDPD provision breeds litigation, as demonstrated by MP3.com's experience and by the lawsuit recently filed by the publishers against an on-demand music service that is being launched by one of the major record labels. It was not surprising, therefore,

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[5] *See Notice and Recordkeeping for Making and Distributing Phonorecords,* Interim Regulations, Docket No. 98-7C, 64 Fed. Reg. 41286, 41286 (1999); *see also Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Final Regulations, Docket No. 96-4 CARP DPRA, 64 Fed. Reg. 6221 (February 9, 1999).

[6] *See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Final Regulations, Docket No. 96-4 CARP DPRA, 64 Fed. Reg. 6221 (February 9, 1999).

application of the IDPD provision to on-demand streaming. Indeed, the Office, on more than one occasion, has expressly acknowledged that Section 702 of the Copyright Act grants it authority "to interpret the statute in accordance with Congress' intentions and framework and, where Congress is silent, to provide reasonable and permissible interpretations of the statute."[7]

Consistent with the above-referenced grant of authority under Section 702, the Office should undertake a rulemaking that has as its focus the effectuation of Congress' intent. For example, the Office should seek to resolve the status not only of the "buffer" copies that are produced in the course of audio streaming, but also of the server copies that are an equally essential feature of the streaming process. As RIAA suggested in its petition, if the Office determines that "buffer" copies are covered by the IDPD license, the server copies also should be deemed to be covered by that license. On the other hand, even if the Office concludes that the buffer copies are not IDPDs, the Office should consider whether the server copies themselves qualify as IDPDs or are otherwise exempt from licensing under a fair use or other theory.

In addition, simply clarifying what constitutes an IDPD without providing for a usable mechanism for obtaining IDPD licenses would be an empty exercise. Under the existing procedures, an applicant for an IDPD license would have to manually search the Copyright Office's records for the names and addresses of the copyright owners of every one of the songs for which licenses are needed – a task that in and of itself is economically and practically infeasible when hundreds of thousands of songs are involved. Moreover, for any song that does

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[7] *See, e.g.*, Public Performance of Sound Recordings: Definition of a Service, Final Rule, Docket No. RM 2000-3B, 65 Fed. Reg. 77292 (Dec. 11, 2000), *citing* 57 Fed. Reg. 3284, 3292 (January 29, 1992). *See also* 63 FR 3685, 3686 (January 26, 1998) (invoking section 702 to determine whether a local over-the-air broadcast signal may be retransmitted into the local market area under the provisions of the Section 119 statutory license); *Cablevision Sys. Dev. Co. v. MPAA*, 836 F.2d 599, 608-09 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988) (acknowledging the authority of the Copyright Office to promulgate rules concerning the meaning and application of the Section 111 cable compulsory license); *Satellite Broadcasting and Communications Ass'n of America v. Oman*, 17 F. 3d 344, 347 (11th Cir. 1994) (accord); *DeSylva v. Ballentine*, 351 U.S. 570,577-78 (1956) (recognizing that the Copyright Office's interpretation of the Copyright Act should ordinarily receive deference).

not have current ownership information on file, a separate compulsory license application must be filed with the Office. Thus, if current information is not available for merely a third of the million songs that a service likely would want to offer – a not improbable result given that songwriters and publishers are not required to notify the Copyright Office about changes in the ownership of a song's publishing rights, or even to register the copyright in the song in the first place – over 300,000 separate filings would have to be made at the Copyright Office. To put the burden that this would create in some perspective, last year the Copyright Office processed roughly 350 Section 115 license applications.

Fortunately, the Office has the ability to reform these procedures in the context of the Section 115 IDPD license. When Congress amended Section 115 in 1995, it specifically authorized the Office (or, more precisely, the Librarian of Congress) to establish requirements by which copyright owners may receive reasonable notice of the use of their works in DPDs and IDPDs and rules governing what records of such uses should be kept and made available by persons making DPDs and IDPDs.[8] Moreover, the legislative history indicates that Congress recognized that the existing statutory provisions might have to be adapted or even altered to facilitate the application of Section 115 to digital deliveries.[9]

As noted above, having acceded to requests that it defer adopting specific rates or terms for IDPD licensing, the Office has not yet adopted any IDPD-specific notice or record-keeping procedures. MP3.com submits that the time has now come for the Office to do so. While there are undoubtedly a variety of changes that could be made to overcome the logistical hurdles

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[8] *See* 47 U.S.C. Section 115(c)(3)(D).

[9] *See, e.g.*, Senate Report on the Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128 at 40 (1995) (acknowledging that while the terms of the Section 115 license are "for the most part already prescribed in section 115, and related details are to be established by the Librarian under section 115(c)(3)(D), the bill allows for additional such terms to be set by the parties or by CARP's in the event that the foregoing provisions or regulations are not readily applicable to the new digital transmission environment").

described above, we urge the Office to look to procedures employed for invoking the satellite and cable compulsory licenses. Under those models, parties are able to claim the benefit of the license without first having to identify and contact the owners of all of the copyrighted works involved. Instead, the copyright "users" submit accounting statements containing basic information from which copyright owners can ascertain whether their works were used. Payments are made on a periodic basis to a royalty pool that is then distributed amongst copyright owning claimants. This model protects the interests of copyright owners, while giving copyright users the right to use the works to which the compulsory license applies without first having to identify and locate the copyright owners.

II. The Copyright Office Can and Should Adopt "Interim" Rules Clarifying the "Deferral" Rule and Providing Copyright Users a Safe Harbor With Respect to IDPDs

While MP3.com believes that there is a pressing need for quick action to clarify and reform the application of Section 115 to on-demand streaming, it is not naïve. MP3.com recognizes that the Office's rules cannot be changed overnight. Fortunately, there is a short-term solution available that will give on-line digital music providers a "safe harbor" from infringement claims while protecting the music publishers' interests. Specifically, the Office can and should adopt, on an emergency basis, "interim" rules clarifying the "deferral" rule and establishing procedures that will protect copyright owners while allowing copyright users to claim the protection of the Section 115 license for IDPDs.

More than five years ago, Congress recognized the need for a compulsory IDPD license and enacted legislation to confer that license. The Office should clarify that its "deferral" rule did not have the effect of nullifying the license and that parties making IDPDs are entitled to the protection from liability that the 1995 amendments to Section 115 were intended to give.

Moreover, in order to protect the copyright owners, the Office should adopt a requirement that, as a condition for claiming the benefit of the IDPD license, copyright users must submit to the Office informational statements that not only identify the copyright user, but that also provide the names of the songs for which protection is sought, together with information regarding the name of the CD on which the song appears, the artist performing the song, and the number of times that the song has been "delivered" to consumers. Once final rules clarifying Section 115 and establishing rates and procedures have been established, the information on these statements can be used to calculate the royalty payments due for the activities described.

This safe harbor approach, if implemented, will immediately solve the problem faced by My.MP3.com and other on-line music providers: the risk of being sued for using songs owned by publishers who cannot be identified through the existing marketplace and statutory licensing mechanisms. More importantly, it will fulfill Congress' intent to facilitate the deployment of innovative technologies that benefit consumers, copyright owners, and the economy.

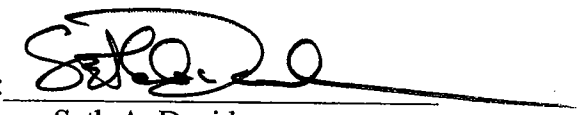
CONCLUSION

The Copyright Office need not and should not stand idly by and simply hope that the gridlock currently frustrating the operation of on-demand music services will resolve itself. There is an advertisement on television in which a traveler stops at a remote establishment and is offered a choice of every song ever recorded in every format. This concept is supposed to be shocking, unimaginable. But, given the advances in digital technology, the idea that every piece of recorded music could be available at the click of a mouse is not unimaginable at all. What does remain unimaginable, however, is that anyone could ever overcome the logistical hurdles inherent in tracking down the copyright owners for every single song. If the "science fiction" depicted in that ad is to become "science fact," government must deal decisively – and quickly –

to clarify and enable the operation of the Section 115 compulsory license for on-demand streaming and other on-line music services.

Respectfully submitted,

MP3.COM, INC.

By: 

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