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 THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The Recording Industry Association of America, Inc. ("RIAA") is pleased that the Copyright Office has issued a Notice of Inquiry ("NOI") regarding the application of the mechanical compulsory license of 17 U.S.C. § 115 to certain digital music services. The NOI seeks public comment on the advisability of conducting a rulemaking proceeding concerning that issue. RIAA believes that it is not only advisable that the Copyright Office conduct such a rulemaking proceeding, but critically important that the Office conduct such a proceeding. In addition, we urge the Copyright Office immediately to promulgate interim rules during the pendency of the proceeding that would allow legitimate services to obtain a mechanical compulsory license by means of a practicable procedure, even before the Copyright Office expresses any view as to the proper classification of On-Demand Streams or Limited Downloads.[1]

There is a pressing need in the marketplace for legitimate digital music services, driven by the dual forces of exploding consumer demand and a proliferation of digital

[1] In these comments, we use the terms "On-Demand Stream" and "Limited Download" as defined in the NOI and our petition.

music services that either infringe or facilitate the infringement of copyrights in musical works and sound recordings. Indeed, the very demand consumers have for digital music seems to be the driving force behind the massive infringements of copyrights that continue to occur through various services. The relative popularity of these infringing services and the widely publicized litigation necessitated by their trespass into the marketplace have caught the attention of Congress, which has recently conducted hearings inquiring into the market for digital music.

The swelling consumer demand for digital music and the need for legitimate digital music services to meet that demand necessitates swift action on the part of all those with interests in digital music, as well as the Copyright Office. RIAA's members and their business partners are working hard to bring services to the market to meet consumers' demand. Unfortunately, the lack of clarity as to the application of the mechanical compulsory license to various types of services and the lack of a regulatory framework to implement whatever statutory provisions may be applicable to these services has slowed the efforts of RIAA members and other legitimate digital music providers to bring these services to consumers. RIAA and its members have diligently pursued discussions with music publishers and others to try to reach a consensus concerning these issues among the affected industries. However, those negotiations have not yet been successful. The Copyright Office uniquely possesses the expertise and power to resolve these issues now. Accordingly, we urge the Copyright Office to move forward on every front as expeditiously as possible, to do everything in its power to allow legitimate digital music services to flourish.

The Copyright Office would be well within its regulatory authority should it both commence a rulemaking concerning the questions addressed in the NOI and promulgate the interim rules we request during the pendency of that rulemaking. The Copyright Office's rulemaking authority with regard to the compulsory licenses of the Copyright Act is well established. Congress has recognized the long-standing role of the Copyright Office in making and administering rules with regard to compulsory licenses, and the Copyright Office has a long history of doing so. Furthermore, the Copyright Office has recently recognized that it has the specific authority to determine whether certain activities fall within or outside the scope of a compulsory license. Accordingly, the Copyright Office's rulemaking authority undoubtedly encompasses the power to determine whether On-Demand Streams are iDPDs, and whether Limited Downloads should be considered iDPDs or "rentals" for the purpose of the compulsory license.

I. BACKGROUND

A. RIAA

RIAA is the trade association that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes its members' creative and financial vitality. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. RIAA represents its members in a variety of forums, including before the Copyright Office and through testimony before Congress.

B. THE DEMAND FOR DIGITAL MUSIC

New transmission technologies and music listening devices have allowed consumers to obtain access to their favorite sound recordings with an ease and speed, and

in new ways, not possible just a few years ago. As a result, and not surprisingly, the demand for music in digital format, whether by download from the Internet, streaming audio webcasts, or interactive music services, is exploding. It was estimated in June of 2000 that some 38 million Americans listened to music on the Internet in addition to or instead of listening to the radio or their stereo systems. Steven Bonisteel, *Web Surfers Prefer Their Music Free – Survey*, NEWSBYTES, June 9, 2000 (citing a Pew Internet & American Life Project survey). The number undoubtedly has increased in the past year.

Although RIAA and record companies have concluded dozens of deals to license the transmission of music over the Internet, much of the demand for digital music has been met by services that infringe upon musical work and sound recording copyrights. Before Judge Patel issued a modified preliminary injunction just a few weeks ago, Napster, Inc. boasted of more than 60 million users. *See* http://www.napster.com/pressroom/pr/010403.html. At any one time, millions of copyrighted works were available via the Napster service. The Ninth Circuit's recent decision firmly established that Napster is liable for contributory infringement for its role in materially contributing to infringement on a massive scale. *See A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Other file-distributing systems pose similar legal problems.

Legitimate services – those which compensate content owners and creators appropriately – must be developed to meet what Senator Hatch has called the "justifiably impatient demand of consumers." http://www.senate.gov/~judiciary/ogh040301h.htm (opening statement of Senator Hatch on April 3, 2001 during hearing entitled "Online Entertainment: Coming Soon to a Digital Device Near You?"). Expressing his

frustration with the apparent lack of legitimate services currently available, Senator Hatch has stated:

> The Napster community represents a huge consumer demand for the kind of online music services Napster, rightly or wrongly, has offered and, to date, the major record labels have been unable to satisfy. Now, I understand that the labels have been working hard to get offerings online, and I have seen some projects beginning recently. I have been promised consumer roll-outs this year. But these offerings have been slow in coming and have not been broadly deployed as of yet. I hope deployment will be speeded up to meet the unsatisfied demand that may be caused by interruptions in Napster service as the litigation continues through trial on the merits and appeals.

147 Cong. Rec. S1376, S1380 (daily ed. Feb. 14, 2001) (statement of Sen. Hatch). As described more fully in the next section, recording companies have been announcing groundbreaking initiatives that respond to Senator Hatch's remarks and marketplace demand. But unless the rules for securing musical work licenses for these services are clarified, those initiatives will be stymied, and instead of being launched within months they will remain elusive plans on the drawing board. By embarking on a rulemaking and establishing clear rules concerning the application of the mechanical compulsory license to On-Demand Streams and Limited Downloads, the Copyright Office will aid the recording industry and other companies in "speeding up" the "deployment" of legitimate services to meet the consumer demand that has thus far been met to a large degree by copyright infringers.

C. RECORDING INDUSTRY DIGITAL MUSIC INITIATIVES

RIAA's members are excited about and eagerly embracing the opportunity to deliver digital music to consumers over the Internet. Toward that end, members of RIAA have issued numerous licenses to Internet music services and are in the process of

classification of On-Demand Streams and Limited Downloads for purposes of the mechanical compulsory license; and (5) whether the Office can issue a rule determining whether a particular use of a copyrighted work is a fair use. Our comments will address each of these issue areas in turn.

A. THE COPYRIGHT OFFICE WOULD SIGNIFICANTLY ADVANCE THE SATISFACTION OF CONSUMER DEMAND FOR DIGITAL MUSIC BY ISSUING RULES ADDRESSING THE CLASSIFICATION OF ON-DEMAND STREAMS AND LIMITED DOWNLOADS FOR PURPOSES OF § 115

The Copyright Office would significantly advance the delivery of digital music to consumers by issuing rules addressing the classification of On-Demand Streams and Limited Downloads for purposes of the § 115 license. As stated in RIAA's petition, record companies take their obligations under the copyright law very seriously, and wish to obtain all the licenses necessary to operate services that deliver digital music to consumers via On-Demand Streams and Limited Downloads. RIAA's members believe that the copyright owners in musical works should be fully and fairly compensated for the use of their works, and are willing to compensate them as the law demands. However, the law with regard to these two delivery methods is unclear at this time, and the uncertainty with regard to what licenses are necessary to operate subscription services using those methods has slowed their introduction.

Accordingly, we believe that it is vital that the classification of On-Demand Streams and Limited Downloads be settled now. While these issues are difficult in the sense that both sides can make sensible arguments, the issues will not get any easier a year or two from now. These are not the kinds of questions that require years of study; they require receiving comments from all interested parties, weighing the legal and policy

considerations, and then making prudent choices. Additional time also is unlikely to provide significantly better information, because these services will languish until rules are established. As the agency charged with administration of the Copyright Act, and in particular its compulsory licenses, the Copyright Office has unique expertise, the capability, and indeed a responsibility, to resolve these questions, and to do so now.

1. It Is Possible For The Copyright Office To Define "Incidental DPD" Through A Rulemaking Proceeding

The NOI asks whether it is possible for the Copyright Office to define "incidental DPD" through a rulemaking, and if so, how incidental DPD should be defined. RIAA submits that such a definition is possible through rulemaking, possibly through a definition of general application, or more likely by a clarification in 37 C.F.R. §§ 201.18 and 201.19 that the iDPD configuration does or does not include certain specified activities.

The Copyright Office has, in the past, issued regulations interpreting the language of the § 115 license, and the term "incidental DPD" is no less susceptible to definition by rulemaking. For example, § 115(c)(2) provides that royalties are payable on all phonorecords of which the compulsory licensee has "voluntary and permanently" parted with possession. The Copyright Office issued regulations that define "voluntarily and permanently." *See* 37 C.F.R. § 201.19(a)(6). There is no reason to believe that the term "incidental DPD" would be more difficult to define in a rulemaking context than "voluntarily and permanently."

2. Whether On-Demand Streams Are iDPDs

Resolution of the question of whether On-Demand Streams are iDPDs is absolutely essential to establish the legal framework for offering subscription music

services. Many of the current Internet music services, including MP3.com (which already has filed comments on our petition), operate by offering On-Demand Streams, and both MusicNet and Duet may enable consumers to receive On-Demand Streams. On-Demand Streams are likely to be a primary means of music delivery used by subscription services for the foreseeable future. Thus, of all the questions raised by the NOI, most pressing is probably resolution of the question "are some or all the copies of a musical work made that are necessary to stream that work incidental DPDs?"

The transmission of On-Demand Streams involves making reproductions, either whole or fragmented, in various contexts. First, a server recording generally is created. The server recording is then further copied and stored briefly in the random access memory of the server so that it can be transmitted over the Internet in a streaming media protocol. In a process over which neither the transmitting entity nor the recipient has much knowledge or control, numerous fragmented reproductions may be made in the course of delivering a stream over the Internet to the recipient's computer, where a fragmented buffer reproduction is made. The streaming media player on the recipient's computer then renders the sound recording from the buffer. Other than the server recordings, these reproductions are made because data necessarily must be transmitted over the Internet one bit at a time, yet a number of bits must be collected and processed simultaneously when a computer renders music. Because the transmission of streaming media data over the Internet is somewhat erratic, streaming media protocols generally provide for the buffering of some seconds of sonic information, allowing that information to be received and assembled in proper order so that the user hears a smooth and uninterrupted performance of the sound recording.

The Office is clearly correct that iDPDs are subject to § 115's definition of digital phonorecord delivery ("DPD"). *See* 17 U.S.C. § 115(d). That is, iDPDs are a species of DPD that is relevant only as a royalty rate category. A DPD is an "individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording ...." *Id.* There is no evident "delivery" of server recordings and other reproductions made during the Internet transmission process, but to the extent those reproductions may constitute "phonorecords," we believe it is clear that they are encompassed by the mechanical compulsory license, which authorizes a licensee to "make and distribute phonorecords." 17 U.S.C. § 115(a)(1). No royalty would be payable for those phonorecords, because they are not distributed to the public. *See* 17 U.S.C. § 115(c)(2). Because musical work copyright owners and their representatives sometimes have made suggestions to the contrary, we think it is desirable that the Office clarify this point, but it seems beyond serious dispute.

The difficult question concerns buffer reproductions made on users' computers, since they arguably are "delivered" or "distributed." There is a substantial question as to whether a buffer reproduction would be a "specifically identifiable" phonorecord. Moreover we think there is a substantial question as to whether buffer reproductions are phonorecords at all.

Whether buffer recordings are "phonorecords" depends on whether they embody a work in a tangible medium of expression in a way that "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (definition of "fixed"). If Congress had

intended this definition to refer to a specific period of time, whether it be a nanosecond or a minute, Congress could have said that. Because Congress did not, it would seem that how long a duration is transitory depends on the particular technology and context at issue. When it enacted the 1976 Act, Congress made clear that how this definition applies in the context of a technology it understood well – television: the evanescent glow on a television screen is not to be considered sufficiently fixed to make a television set a copy for purposes of the Copyright Act (even though that glow can be perceived for a period of time that might be orders of magnitude greater than the life of some reproductions made within computers). *See* H.R. Rep. 94-1476, at 53. It can be argued that, in the specific context of the transmission of a licensed performance over a digital network, buffer reproductions are not embodied in a tangible medium of expression so as to allow works to be communicated for a period of more than transitory duration. Such a result would preserve the distinction between performances and reproductions that is important to numerous provisions of the Copyright Act, including some of the statutory licenses, and to industry practices that have developed based on that distinction. Moreover, the legislative history to the 1976 Act states that transient reproductions "captured momentarily in the 'memory' of a computer" do not meet the definition of "fixed." *Id.*

On the other hand, it can be argued that buffer reproductions are sufficiently "fixed" to be considered copies or phonorecords. There is support for this proposition in certain decisions of lower federal courts. *See, e.g., Ticketmaster Corp. v. Tickets.Com, Inc.*, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000) (holding that copy retained for 10-15 seconds as a part of the "ripping" of data from a Web site was of more than transitory

duration); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999 (N.D. Ill. 1982) (holding that because work was reproduced over and over in memory, audiovisual computer game was fixed).

If there were a clear answer to this question, we would not have filed our petition asking the Office to resolve it. Accordingly, we urge the Office to undertake a rulemaking proceeding to articulate an answer to this question that is consistent with the Act and the policies behind it.

3. Whether Limited Downloads Are iDPDs or Rentals

Nearly as important as the legal status of On-Demand Streams is the legal status of Limited Downloads. Limited Downloads have many advantages as part of a compelling consumer offering: They can make it easier for consumers to access the music they most like and save service providers bandwidth costs, and perhaps most important, music that has been downloaded can be enjoyed away from an Internet connection. Accordingly, while Limited Downloads have not been commercially important to date, we believe that they will become increasingly important as legitimate music services are launched, and a determination of the legal status of Limited Downloads will foster the development of such services.

There appears to be a genuine question whether Limited Downloads should be considered iDPDs or rentals, since they have characteristics of both. They involve the delivery of a phonorecord by means of a digital transmission, which suggests that they

might be iDPDs.[4] *See* 17 U.S.C. § 115(d). However, Congress created the rental royalty specifically to compensate musical work copyright owners in the case of particular kinds of distribution transactions where a phonorecord is delivered to a user for a limited time – and a Limited Download is just such a transaction. There certainly is nothing in the text of the rental provision of § 115(c)(4) that would exclude its application to transactions consummated by electronic means. Where the two statutory royalty rate categories may be equally applicable, it simply is not clear what rate should be paid by a licensee who wants to comply with the Act and render reasonable compensation to musical work copyright owners.

As in the case of On-Demand Streams, if there were a clear answer to this question, we would not have filed our petition asking the Office to resolve it. However, if it is determined that Limited Downloads are rentals, it is necessary that the Register of Copyrights issue the regulations required by § 115(c)(4) to implement the rental royalty. Such regulations would need to specify the computation of the rental royalty in much the same manner as 37 C.F.R. § 201.19(e)(4)(ii) specifies the computation to be undertaken for phonorecords with which the licensee has permanently parted possession. The details of such regulations would require some financial analysis, and it would seem premature to undertake that analysis until a later stage of the proceeding.

[4] Musical work copyright owners conceivably might take the position that they should be considered general DPDs, but given that the reproduction of a phonorecord as part of a Limited Download is incidental to the purpose of the transmission to give the user access to performances of the music under limited conditions, this seems clearly incorrect.

B. THE COPYRIGHT OFFICE SHOULD ISSUE INTERIM RULES ALLOWING LEGITIMATE SERVICES TO OPERATE PENDING THE DETERMINATION OF THE QUESTIONS ADDRESSED IN THE NOI

We cannot emphasize sufficiently the importance of the Office's undertaking a rulemaking as described in the NOI, irrespective of the process by which the Office might choose to do so.[5] One potential aspect of the process that might be followed by the Office warrants special attention in these comments: Interim rules that would enable the operation of legitimate digital music services while the proceeding is conducted.

Time inevitably will be required to complete the proceeding. Yet, the recent hearings before the Senate have shown that both consumers and Congress demand that legitimate sources of digital music be made available, and made available on an expedited basis. The Office should not allow the time that will be required to resolve these questions to thwart the will of the public and of Congress that services be launched. There unquestionably is a compulsory license that authorizes licensees to make On-Demand Streams and Limited Downloads (if, in the case of On-Demand Streams, a license is required); the questions are whether such a license is necessary in certain circumstances and what royalty should be paid if those activities are considered iDPDs and/or rentals under the license.[6]

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[5] Such a rulemaking proceeding might initially focus on the primary questions of the classification of On-Demand Streams and Limited Downloads, and subsequently turn to details such as the implementation of the rental royalty rate, if that should prove necessary. Such a proceeding presumably would involve the procedural tools of written comments, public hearings and perhaps consultations with the affected industries.

[6] Section 115(a)(1) makes clear that the scope of the mechanical compulsory license is to "make and distribute phonorecords." Phonorecords are reproduced in the case of Limited Downloads, and may be reproduced in the case of On-Demand Streams. The implementing regulations require the reporting in notices of intention of the configurations of phonorecords "expected to be made," 37 C.F.R. § 201.18(c)(1)(vi), but the regulations also make clear that later developments concerning such matters do not affect the license, 37 C.F.R. § 201.18(c)(3). Thus, it seems clear that everyone with a

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Given that Congress has mandated, and musical work copyright owners always have embraced,[7] the existing compulsory license, the Copyright Office should do everything in its power to effectuate the compulsory license as soon as possible. The purposes of the compulsory license would be furthered, and the demand for legitimate digital music services could be met, if it were clear that On-Demand Streams and Limited Downloads can be made under the mechanical compulsory license today (if, in the case of On-Demand Streams, a license is required), with the royalty being payable promptly after it is known what licensees are to pay.

We note in this connection that the procedures presently mandated by 37 C.F.R. §§ 201.18 and .19 are very poorly suited to the needs of those seeking to launch digital music services, because they require the burdensome service of notices of intention, on a work-by-work basis, by certified or registered mail no less, after searching the records of the Copyright Office. While record companies have evolved mechanical rights clearance processes tailored to those procedures, which have worked acceptably when companies have had to clear rights to a dozen musical works at a time for a new album release, it would be extraordinarily difficult and expensive to follow those procedures to obtain rights to the tens of thousands of works that may be required for a commercially viable service. The existing procedures impose a crushing burden and a huge barrier to entry for anyone seeking to launch a digital music service.

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mechanical compulsory license is today authorized to make On-Demand Streams and Limited Downloads under the license (if, in the case of On-Demand Streams, a license is required), but a licensee's payment and accounting obligations are less clear in the absence of an iDPD royalty rate and regulations to implement the rental rate.

[7] The extension of the compulsory license to DPDs itself was made at the insistence of the NMPA. *See* S. Rep. 104-128, at 17.

We believe that all of these issues would be addressed, and the launch of services greatly facilitated, if the Office were to issue, as soon as possible,[8] interim rules allowing services that make On-Demand Streams or Limited Downloads to obtain a mechanical compulsory license as if they were iDPDs or rentals, by means of a practicable procedure, with the understanding that if they are found to be within one of the statutory rate categories, that rate would be paid (retrospectively and prospectively) promptly after the rate was determined. In promulgating such rules, the Office would not need to express, and in availing themselves of such rules licensees should not be required to express, any view as to whether On-Demand Streams or Limited Downloads are iDPDs, rentals or neither. As to the procedures under such rules, we propose that compulsory licenses be obtained (to the extent they may later be determined to be necessary) by filing in the Copyright Office a notice of intention that might cover multiple musical works, without being required to identify the owner or owners of copyright in those works, and irrespective of whether the copyright owner is identified in the registration or other public records of the Copyright Office.

These proposed rules appear well within the authority of the Copyright Office. The Librarian of Congress must "establish requirements by which copyright owners may receive reasonable notice of the use of their works under [§ 115] ...." 17 U.S.C.

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[8] The Copyright Office would be justified, given the exigencies of the current marketplace and the need to provide legitimate, licensed services to stave off encroachment from piracy, in issuing interim rules without going through the formalities of notice and a hearing. *See* 5 U.S.C. § 553(b)(3)(B) (providing for the issuance of rules without notice and public procedure if good cause is shown); *Nat'l Customs Brokers And Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1223-24 (Fed. Cir. 1995) (holding that issuance of rules without notice and public hearing was permissible and was for good cause where agency found that the public demanded that rules take effect as soon as possible and where the public benefited from the rules promulgated).

§ 115(c)(3)(D). There is even precedent for the Copyright Office's issuance of interim rules in this area. It has done so with regard to the notice and recordkeeping requirements for making and distributing DPDs. *See* 64 Fed. Reg. 41,286. In the Federal Register notice adopting the present notice and recordkeeping requirements for the § 115 license, the Copyright Office specifically contemplated reexamining the issue this year, and earlier for good cause. *See id.* at 41,287.

We further believe that § 115(b)(1) gives the Office authority to permit the filing of notices of intention in the Office even when the registration or other public records of the Office identify the copyright owner. The Register is authorized under that provision to prescribe regulations as to the "manner of service," 17 U.S.C. § 115(b)(1). Service by general publication has been held to be reasonable and sufficient in other contexts,[9] and would work very well on an interim basis in this context.

Moreover, the statutory provision for notice and recordkeeping regulations for DPDs mandates that notice requirements be "reasonable." 17 U.S.C. § 115(c)(3)(D). If it is true that On-Demand Streams are iDPDs, it simply is not reasonable to require that the same activity that can be licensed as to performance rights on a blanket basis through performing rights societies such as ASCAP and BMI also be licensed as to iDPDs on a work-by-work basis, by service by certified or registered mail, on individual copyright owners. This reasonableness standard must give the Copyright Office flexibility to

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[9] *See, e.g., In re Gulfco Inv. Corp.*, 593 F.2d 933, 935 (10th Cir. 1979) (notice by publication reasonable for unknown affiliates); *Chemical Leaman Tank Lines, Inc. v. United States*, 368 F. Supp. 925, 951 n.33 (D. Del. 1973) (three-judge panel pursuant to 28 U.S.C. § 2284) (holding that publication in Federal Register was reasonable notice under statutory notice requirement); MANUAL FOR COMPLEX LITIGATION § 30.211, at 223 (recognizing that a reasonable notice plan is a function of anticipated results).

define reasonable notice and recordkeeping requirements that would facilitate the introduction of digital music services notwithstanding § 115(b)(1); were this not so, § 115(b)(1) would be entirely sufficient to address the issue and there would be no need for the notice provisions of § 115(c)(3)(D).

Finally, we note that a CARP is to determine not only royalty rates for DPDs, but also "terms." The legislative history of the Digital Performance Right in Sound Recordings Act of 1995 sheds light on the breadth of the power to set "terms":

> While these details are for the most part already prescribed in section 115 . . . 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.

S. Rep. 104-128 at 98. This passage from the legislative history clearly indicates Congress' expectation that the provisions of § 115(b)(1) might not be applicable to services that make DPDs. Congress thus empowered a CARP to give relief from the provisions of § 115(b)(1) if warranted. We think such terms should be submitted to a CARP in due course if necessary, but Congress could not have intended its statutory scheme to be ineffective during the lengthy pendency of a CARP. If a CARP could prescribe terms inconsistent with § 115(b)(1), which then would be implemented in regulations of the Copyright Office, the Copyright Office should have the authority to prescribe those same regulations on its own initiative on an interim basis during the pendency of the CARP.

C. THE DEFERRED DETERMINATION OF iDPD ROYALTIES SHOULD ALLOW THE LAUNCH OF LEGITIMATE SERVICES THAT ARE PREPARED TO ACCEPT THE ECONOMIC RISK OF PROCEEDING IN THE ABSENCE OF A RATE, AND THE LIBRARIAN WOULD NOT BE ENGAGED IN IMPERMISSIBLE RETROACTIVE RULEMAKING IF IT ADOPTED A CARP'S iDPD RATES FOR THE 1998-2000 PERIOD

Some of the questions asked in the NOI concern the Copyright Office's decision to defer determination of royalty rates and terms for iDPDs. *See* 37 C.F.R. § 255.6. In 1999, the nascence of the market for digital music properly led the Office to defer this determination. Now the Office has solicited comments concerning the consequences of that decision and whether that decision was statutorily permissible. One might ask the same questions about the Office's decision not to promulgate rental royalty regulations.

The scope of the mechanical compulsory license is broad. It permits the manufacture and distribution of phonorecords, without limitation as to phonorecord configuration or manner of distribution. *See* 17 U.S.C. § 115(a)(1). Thus, of all the possible consequences of the decisions to defer agency action under § 115, the one that would seem most to be avoided and most inconsistent with the statute would be to deny the application of the statutory compulsory license to a particular phonorecord configuration, rate category or activity that otherwise should be covered by the license. Nothing in the grant of the statutory license suggests that its effectiveness should be contingent on actions of the Copyright Office, and interpreting the Office's inaction as excluding from the scope of the license the making of iDPDs or distribution by means of rental would impose by nonfeasance material adverse limitations on an otherwise broad statutory license. The Office should not condemn itself with such an interpretation. Far better, and more consistent with the purposes of the mechanical compulsory license and the express procedures of other statutory licenses, *see, e.g.*, 17 U.S.C. §§ 112(e)(7),

114(f)(4), would be to recognize that licensees who engage in the activities covered by the license before the royalty rate is determined are free of infringement risk, and so can launch legitimate services if they are prepared to accept the economic risk of proceeding in the absence of a rate.

Such an interpretation assumes that a royalty rate might be determined retroactively, at some point after licensees have begun to engage in the relevant activity. Accordingly, the NOI asks whether it would be appropriate for a CARP to set royalty rates for iDPDs for the 1998-2000 period, or whether the Librarian would be engaging in an impermissible retroactive rulemaking, presumably under the doctrine of *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988), if he adopted the rates determined by the CARP for that period. Setting iDPD royalty rates for the 1998-2000 period would not be impermissible retroactive rulemaking because such rate setting would be adjudicatory in nature, and because both Congress and the Copyright Office have put those interested in the making and distribution of iDPDs on notice that rates will be set.

A CARP proceeding that set royalty rates for the 1998-2000 period would be adjudicatory in nature, and thus not subject to the limitations on retroactive rulemaking set forth in *Bowen*. *See Bowen*, 488 U.S. at 222 (Scalia, J., concurring) ("it is obviously available to the agency to 'make' law retroactively through adjudication, just as courts routinely do"). As the Supreme Court has observed, the "line dividing [rulemaking and adjudication] may not always be a bright one." *United States v. Florida East Coast Railway*, 410 U.S. 224, 244-45 (1973). However, the adoption of royalty rates for iDPDs seems to fit comfortably within the concept of an "adjudication." In a CARP proceeding, interested parties introduce direct cases, take discovery, and present evidence before a

panel of arbitrators. A CARP is required to "report" its "determinations" to the Librarian, including its findings of fact, and if the Librarian rejects the panel's determination, he must issue an "order" implementing his determination. *See* 17 U.S.C. §§ 802(c), (d), (e), (f). *See generally* 37 C.F.R. Part 251. These are clearly the procedures of an adjudication. *See* 5 U.S.C. § 551(7) (defining "adjudication" as the process of making an order); 17 U.S.C. § 802(c) (subjecting CARPs to the procedures of Administrative Procedure Act, 5 U.S.C. chapter 5, subchapter II).

Furthermore, even if the Librarian's adoption of a CARP's determination of iDPD royalty rates for 1998-2000 were considered a "rulemaking," the retroactive effect of that rulemaking would be permissible. In the analogous context of setting rates for energy prices, the D.C. Circuit has adopted the "filed rate" doctrine, which allows the setting of rates retroactively provided that all relevant parties have been given notice that the regulatory agency will be engaging in a rate setting proceeding. *See, e.g., Public Service Co. of Colorado* v. *FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996). In that case, the D.C. Circuit held that any reliance on a previous rate structure "would have been foolhardy" given Congress' amendment of a statute providing for the different treatment of certain types of taxes by the Federal Energy Regulatory Commission. *See id.* The D.C. Circuit thus held that FERC could set rates retroactively to October 1983, when it first issued a notice in the Federal Register that it would address the tax issue. *See id.*

The setting of royalty rates for iDPDs would fall within the D.C. Circuit's "filed rate" doctrine. As an initial matter, § 115 puts all interested parties on notice that rates will be established for general DPDs and iDPDs for the period beginning January 1, 1998. *See* 17 U.S.C. § 115(c)(3)(A)(ii) ("on or after January 1, 1998, the royalty payable

by the compulsory licensee shall be the royalty prescribed under subparagraphs (B) through (F) and chapter 8 of this title"). The Copyright Office itself provided further notice to all interested parties that the royalty rates and terms for iDPDs would be set during the next period for setting the royalty rates for all DPDs. *See* 37 C.F.R. § 255.6; 63 Fed. Reg. 65,555 (November 27, 1998). Accordingly, it would be "foolhardy" for any party to think that they would not be subject to a later determination of a royalty rate for iDPDs made and distributed during the 1998-2000 period, and there would be no retroactivity problem should the Librarian adopt the iDPD royalty rates established by a CARP for that period.

D. THE COPYRIGHT OFFICE HAS THE AUTHORITY TO MAKE RULES CLARIFYING THE PROPER CLASSIFICATION OF ON-DEMAND STREAMS AND LIMITED DOWNLOADS FOR PURPOSES OF THE MECHANICAL COMPULSORY LICENSE

In the NOI, the Copyright Office asked several questions concerning its power to undertake the rulemaking requested by RIAA's petition and these comments. All of these questions have a single answer: It is entirely appropriate and desirable, and within the Copyright Office's statutory authority, to make rules that establish which types of digital transmissions fall within and without the scope of the § 115 license and, for transmissions within the scope of the license, which royalty rate category applies.

It is well established that the Copyright Office has the authority to issue regulations interpreting the Copyright Act and, more specifically, the statutory licenses set forth therein. *See, e.g., SBCA v. Oman*, 17 F.3d 344 (11th Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (hereinafter "*Oman*") (acknowledging that the Copyright Office has the authority to promulgate rules construing Section 111); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 602 (D.C. Cir. 1988), *cert. denied*, 487

U.S. 1235 (1988) (hereinafter *Cablevision*) (holding that the Copyright Office has the authority to issue regulations interpreting the statutory language at issue and that its interpretation was a reasonable one.). Section 702 of the Copyright Act authorizes the Copyright Office "to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title," and Congress has recognized the important "long standing role" the Copyright Office has played as an "expert advisor" on issues of copyright law. H. Rep. 105-796, at 79-80 (1998). The Copyright Office frequently has promulgated interpretive rules as part of its administration of the Copyright Act's statutory licensing provisions. *See, e.g.*, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (Definition of "Service" for purposes of the Section 114 statutory license); 62 Fed. Reg. 18,705 (April 17, 1997) (Establishing filing regulations for SMATV systems under Section 111); 57 Fed. Reg. 3284 (Jan. 29, 1992) (Definition of a cable system under Section 111 license); 49 Fed. Reg. 13,029 (Apr. 2, 1984) (Definition of gross receipts under Section 111 license).

Courts consistently have upheld the Copyright Office's authority to construe the Copyright Act. In *SBCA v. Oman* the Eleventh Circuit succinctly concluded that the "Copyright Office is a federal agency with authority to promulgate rules" concerning the § 111 statutory license applicable to cable systems. 17 F.3d at 347. As is the case here, the issue in *Oman* involved the application of a statutory license to a new technology. The Copyright Office had conducted a rulemaking and determined that the § 111 cable compulsory license did not apply to satellite retransmission of broadcast stations. 57 Fed. Reg. 3284 (Jan. 29, 1992). In a suit challenging this rule, the Eleventh Circuit found that "Courts generally must defer to an agency statutory interpretation ... so long as 'the

agency's answer is based on a permissible construction of the statute.'" *Oman*, 17 F.3d at 347 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). As with the application of § 111 to satellite retransmissions, the application of the § 115 compulsory license to On-Demand Streams and Limited Downloads is a question which requires an answer to effectuate the purpose of the statutory license and the Copyright Office has the authority, indeed an obligation, to address the issue.

The D.C. Circuit has similarly deferred to the Copyright Office and recognized that the Office "certainly has greater expertise in such matters than do the federal courts." *Cablevision*, 836 F.2d at 608-09. Rejecting the argument that the Copyright Office had no authority to issue a substantive regulation interpreting the § 111 license, the Court concluded that because Congress was aware of the rapid changes occurring in the cable industry and because there was no statutory language to the contrary, Congress intended that the Office serve as the "overseer" of the § 111 license. *Id.* at 608. There is no statutory provision in § 115 that prohibits the Copyright Office from construing the scope of the § 115 license; Congress was familiar with the fast paced evolution of the Internet and on-line music delivery services; and there can be little doubt that Congress expected the Copyright Office to oversee the application of § 115 to these services.

More recently the Copyright Office confirmed its authority to determine through a rulemaking proceeding whether certain activity was within the scope of the § 114 statutory license. 65 Fed. Reg. 77,292 (Dec. 11, 2000). In response to the argument made by AM/FM broadcasters that the Copyright Office lacked the authority to determine whether the transmission of an AM/FM radio broadcast signal over the Internet by the broadcaster that originates the AM/FM signal is exempt from copyright liability

under the exemption to the digital performance right in sound recordings set forth in § 114(d)(1)(A), the Copyright Office reasoned that if it failed to construe even the exemption provisions of § 114, its ability to administer the statutory license would be frustrated. *Id.* at 77,293. In fact, the Office noted that "where the law is complex and requires clarification, the general policy is to allow the agency to complete its action." *Id.* at 77,294. There is no difference between the Copyright Office's prior rulemakings in which it interpreted the § 111 and § 114 licenses and RIAA's request that the Copyright Office construe the § 115 license with respect to On-Demand Streams and Limited Downloads.

Like previous issues under the § 111 and § 114 licenses, the application of the § 115 license to On-Demand Streams and Limited Downloads is complex and unclear. The § 115 license, like the § 111 and § 114 licenses, was intended by Congress to ensure that necessary rights can be obtained, when needed, at a known price, and pursuant to established procedures. This purpose would be frustrated if the Copyright Office abdicated its responsibilities by choosing not to exercise its authority to interpret § 115. Congress is well aware that the delivery of music through online services is a business that is moving at "Internet Speed." H. Rep. 105-796 (1998). Waiting for the issues raised by services offering On-Demand Streams and Limited Downloads to be resolved by litigation, or waiting in hope that Congress might address these issues, would render the § 115 license useless in the context of Internet distribution of music.

E. THE COPYRIGHT OFFICE DOES NOT HAVE THE POWER TO DETERMINE WHETHER PARTICULAR USES OF A COPYRIGHTED MUSICAL WORK SHOULD BE CONSIDERED A FAIR USE

While RIAA believes that the Copyright Office is well within its regulatory authority in determining whether certain digital music delivery methods fall within the scope of the § 115 license, the Copyright Office's authority does not extend to making the essentially judicial determination of whether a particular use of a copyrighted work is fair use. The Copyright Office should therefore refuse the entreaties of the Digital Music Association and MP3.com to engage in a quasi-judicial adjudication of whether their activities are permitted by fair use.

The doctrine of fair use long predates its current codification in 17 U.S.C. § 107, and developed as a judicial doctrine rather than a legislative mandate. *See, e.g., Triangle Pub'n, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980) (citing H.R. Rep. 94-1476 at 66). The doctrine of fair use has been and will be developed on a case-by-case basis. *See* H.R. Rep. 94-1476 at 66. A fair use determination is therefore judicial, not regulatory, in nature. In this respect, determinations concerning fair use are just like determinations concerning the degree of consumer influence that can be had over the programming of a service before it must be considered "interactive," which determinations the Office recently declined to address through a rulemaking. 65 Fed. Reg. 77,330, at 77,332 (Dec. 11, 2000).

Furthermore, the Copyright Office has been delegated no statutory role in interpreting or administering the fair use doctrine. Accordingly, because the Copyright Act assigns no duties or responsibilities to the Register of Copyrights with regard to fair use, it has no authority to establish regulations determining whether certain uses of

copyrighted works are permitted by 17 U.S.C. § 107. *See* 17 U.S.C. § 702 (granting the Register of Copyrights the power to establish regulation in relation to administration of functions and duties assigned to the Register by the Copyright Act).

CONCLUSION

For the foregoing reasons, we respectfully request that the Copyright Office commence a rulemaking as requested in our petition. We also respectfully request that the Copyright Office immediately exercise its powers to put in place interim rules that will allow digital music services to begin operating legitimately pending the outcome of the proposed rulemaking.

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