Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of	
Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries	37 C.F.R. Part 201 and 255 Docket No. RM 2000-7

REPLY COMMENTS OF RADIO TRAINING NETWORK, INC.
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Radio Training Network, Inc. ("RTN") submits these reply comments in response to the Copyright Office's Notice of Proposed Rulemaking ("NPRM") published in the Federal Register, 73 Fed. Reg. 40802, on July 16, 2008, as amended in 73 Fed. Reg. 47113, on August 13, 2008.

RTN strongly urges the Copyright Office not to adopt a rule that would include non-interactive streaming of copyright content within the purview of the Section 115 statutory license.

RTN is a nonprofit network of thirteen religious radio broadcast stations in the southeastern United States that offer non-interactive streams of their broadcasts on the Internet. In response to the Comments filed by other parties that represent online media services, music publishers, song writers, and business music providers, among others, RTN contributes its views in the interests of small radio webcasters that depend on the availability of affordable, easy-to-use, blanket licenses and statutory licenses for their existence. The statutory licenses are meant to make it easier for entities like RTN to obtain permission for the broadcasting and streaming of music. Yet, increasingly, the myriad of licenses needed, the exponential growth in fees, the

extensive reporting requirements, and the labyrinthine copyright statutes and regulations all conspire to make webcasting more and more difficult. As the public increasingly looks to the Internet as a source of music, the legal burdens imposed on webcasters ultimately hurt the American public, who suffer from reduced options in music sources.

I. Section 115 should not be interpreted hypertechnically against common sense.

The Copyright Office's hypertechnical interpretation of the definition of "digital phonorecord delivery" violates general principles of statutory construction as well as common sense. The Copyright Office emphasizes the meaning of the phrase "specifically identifiable reproduction" in its assertion that computer buffer copies of sound recordings constitute "digital phonorecord deliveries." *See* NPRM at 40,809. The Office argues that the meaning of the phrase "digital phonorecord delivery" is "plain" and therefore, there is no need to look beyond the text of the statute to interpret its meaning. *See* NPRM at 40,809. However, the Office fails to interpret the phrase in light of entire statutory system of which it is a part. The plain meaning of a statutory provision should be determined not only by the statutory language itself, but by "the language and design of the statute as a whole." *K-Mark Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Congress set up a basic dual licensing structure to enable music reproductions and public performances. Section 115 provides a statutory license for reproductions, while Sections 114 and 112 provide a statutory license for public performances. In enacting the Digital Performance Right in Sound Recordings Act ("DPSRA"), Congress amended the statutory licenses to take into account technological changes which enable digital transmissions of sound recordings on a large scale. *See* NPRM at 40,803. Congress intended to update the statutory licenses to

accommodate modern digital technology; it did not intend to disrupt the basic statutory license structure. Yet, the Copyright Office's proposed interpretation of Section 115 threatens to do just that by creating an unnecessary overlap between the two licenses at a technical point of juncture, *i.e.*, the computer buffer copies.

The computer buffer is merely an incidental part of the mechanism necessary for listening to a noninteractive stream. It is a temporary rest area for the packets of information on their journey to the ultimate destination -- the output device. To consider the buffer copy a "reproduction" for the purpose of requiring a mechanical license is not required by the plain language of the statute, and simply defies common sense. To require a license for computer buffer copies of a non-interactive stream would be akin to charging toll for a car stopping at a red light on a road on which the car must already pay a toll for driving.

The NPRM's interpretation of Section 115 is the very kind of reading that the Supreme Court has warned against, in admonishing "a hypertechnical interpretation that would make trouble rather than to allay it." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 303 (U.S. 1988), *citing* Ft. Smith & W. R. Co. v. Mills, 253 U.S. 206, 208 (U.S. 1920). The NPRM purports to benefit the music community, but would create more trouble than it allays. The Copyright Office can avoid disturbing the existing statutory license structure by not including non-interactive streams within the scope of the Section 115 license.

II. There Is No Sound Policy Basis for Imposing the Section 115 License on Non-Interactive Streaming.

The NPRM states that "[t]he proposed regulatory changes take no position with respect to whether and when it is necessary to obtain a license to cover the reproduction or distribution of a

musical work in order to engage in activities such as streaming. However, the amendments would make the use of the statutory license available to a music service that wishes to engage in such activity without fear of incurring liability for infringement of the reproduction or distribution rights." *See* NPRM at 40,805. It is curious that the Copyright Office purports to be *helping* music services by offering a shield from liability. In reality, the proposed rules would create a shield for a harm that would not exist but for the proposed rules.

To RTN's knowledge, no party, not even music publishers, has advocated for a mechanical license to be imposed on non-interactive streaming. The general music industry consensus is that non-interactive streaming of music constitutes a public performance, not a reproduction. It is the Office's interpretation of the statute that would create "the fear of incurring liability" by giving copyright owners a basis by which to argue that non-interactive streaming of music without a license would constitute copyright infringement.

The NPRM further states that, "[n]or would the proposed regulations preclude licensees from arguing to the Copyright Royalty Judges that the royalty fees for certain of the licensed activities should be nominal or even free." *See* NPRM at 40,805. However, even if music services were successful in persuading the CRJs to set the rate a zero (which is unlikely), they would still have the administrative burden of filing Notices of Intent and Statements of Account. This administrative burden is unfair given the utter lack of independent economic value in the buffer copies of non-interactive streams, and given that music services are already burdened with administrative requirements for the same activity under the performance license.

CONCLUSION

By finding a non-interactive stream to constitute a phonorecord reproduction, the Copyright Office's hypertechnical reading of Section 115 would impose a new requirement on webcasters that no one in the music industry argues is necessary. Small webcasters already have enough of a burden in complying with existing copyright license requirements. RTN urges the Copyright Office not to impose on webcasters an additional burden that is unwarranted by the language, purpose, or intent of the statutory licenses, nor by sound policy.

Respectfully submitted,

A. Wray Fitch
Kenneth E. Liu
GAMMON & GRANGE, P.C.
8280 Greensboro Dr., 7thF
McLean, VA 22102
703-761-5000
703-761-5023 (Fax)

Counsel for Radio Training Network, Inc.

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