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

REPLY COMMENTS OF MP3.COM, INC.

MP3.com, Inc. ("MP3.com"), by its attorneys, hereby submits its reply comments in response to the Copyright Office's Notice of Inquiry in the above-captioned proceeding.[1] As MP3.com demonstrated in its initial comments, and as we discuss in these reply comments, it not only is necessary and appropriate for the Copyright Office to conduct a rulemaking proceeding to clarify and implement the Section 115 "mechanical" compulsory license as it applies to "incidental digital phonorecord deliveries" ("IDPDs"), but it also is necessary and appropriate for the Office to take immediate action by adopting interim licensing provisions that will permit online music service providers to deliver streaming audio to consumers while protecting the interests of copyright owners.

---

[1] 66 Fed. Reg. 14099 (March 9, 2001).

DISCUSSION

I. There Is a Compelling Need For The Copyright Office To Act

MP3.com's initial comments in this proceeding explained why it has become imperative that the Copyright Office promptly commence a rulemaking proceeding to clarify and implement Section 115 as it applies to IDPDs and to take the even more immediate step of establishing interim licensing procedures that can be relied upon by online music services until the issues raised in the rulemaking proceeding are resolved. As we described, the technological issues and concerns about consumer demand that previously slowed the deployment of online music services have been swept away in the past few years. Unfortunately, however, uncertainty about the application of the copyright law to various online music business models – and, in particular, uncertainty surrounding publishing rights issues – has fostered a litigious atmosphere that is impeding the fulfillment of the online music revolution. Moreover, as MP3.com's experience demonstrates, even when an online music provider attempts to operate in accordance with an expansive interpretation of the music publishers' rights, the existing marketplace licensing mechanisms are neither capable of meeting the demand for clearances in a timely fashion nor do they protect against litigation.

As MP3.com explained in its initial comments, the principal marketplace mechanism for clearing publishing rights is the Harry Fox Agency ("HFA"), which represents more than 25,000 publishers. The problem is that HFA does not represent the publishers of an unknown, but not insignificant, number of songs, including songs written by major artists. For example, an infringement action recently filed against MP3.com by Randy Newman, Tom Waits, and Ann and Nancy Wilson of the band "Heart" – artists who claim not to be represented by HFA – seeks

damages relating to the alleged copying of several songs that MP3.com licensed through HFA. In addition, the difficulties associated with marketplace licensing are evidenced by the fact that MP3.com has not yet obtained licenses for more than half of the nearly million song titles it submitted to HFA more than six months ago, due to the sheer volume of licenses requested and difficulties in matching databases.

What plainly is needed is an effective and efficient statutory license mechanism for clearing publishing rights in the online environment. As amended by Congress in 1995, Section 115 of the Copyright Act is supposed to provide such a solution. Unfortunately, however, under the Copyright Office's current rules, using Section 115 to clear music publishing rights turns out to be an even less viable option for online music providers than marketplace licensing. The problem is that while Congress drew a distinction between "incidental" DPDs and DPDs "in general," there are no rules offering any guidance as to what does or does not constitute an IDPD. Furthermore, the Copyright Office has expressly "deferred" adopting any IDPD-specific rates or terms and has not yet established a practical way for on-demand streaming services to invoke the compulsory license with respect to the hundreds of thousands of song titles that such services typically seek to offer consumers.

The problems confronting music services that would like to invoke the Section 115 compulsory license with respect to IDPDs need to be addressed now and they need to be addressed by the Copyright Office.[2] Waiting for Congress to "fix" Section 115 will leave those

---

[2] Even if a viable marketplace mechanism existed for obtaining all of the licenses that are needed to operate in the digital environment, it would still be necessary for the Office to adopt rules to facilitate the use of the Section 115 compulsory license by online music providers. Nothing in the history of Section 115 suggests that Congress intended for the availability of compulsory

who want to use the license in limbo for too long.[3] As MP3.com urged in its initial comments in this proceeding, the Copyright Office needs to initiate a rulemaking to clarify and implement Section 115 as it applies to IDPDs. In addition to providing guidance as to what does and does not constitute an IDPD, this rulemaking will allow the Office to address the logistical problems inherent in a licensing scheme that potentially applies to millions of uses of hundreds of thousands of separately copyrighted works owned by tens of thousands of copyright owners.[4] Moreover, in order to ensure that online music services have access to a workable compulsory license mechanism even while this rulemaking is pending, MP3.com again urges that the Office immediately adopt interim notice and recordkeeping requirements that will allow online music services engaging in on-demand streaming to invoke the Section 115 compulsory license but that will not leave copyright owners unprotected.

MP3.com's arguments regarding the need for the Copyright Office to act, both by commencing a rulemaking proceeding to clarify and implement Section 115 as it applies to IDPDs and by adopting interim licensing procedures that can be relied upon while the

---

licensing to turn on the feasibility of marketplace licensing.

[3] Moreover, leaving it up to Congress to address the practical concerns that are impeding the compulsory licensing of IDPDs cannot be justified unless it is assumed that the 1995 amendments were intended to be ineffective – an absurd conclusion that the Office is not at liberty to reach.

[4] In this regard, MP3.com reiterates its recommendation that the Office consider an approach to statutory licensing for IDPDs that is modeled on the cable and satellite compulsory licensing schemes – schemes that allow copyright users to give copyright owners constructive notice of the use of their works (through filings submitted to the Copyright Office) and that require copyright owners to submit claims for the royalties due them.

rulemaking proceeding is pending, are echoed in the comments filed by the Recording Industry Association of America, Inc. ("RIAA"). On the other hand, the National Music Publishers' Association and the Songwriters' Guild of America ("NMPA/SGA") jointly contend that it would be "inadvisable" for the Copyright Office to attempt to formulate rules addressing the application of Section 115 to IDPDs "because rapidly changing technology would soon make any rule obsolete." Instead, NMPA/SGA suggest that the courts be relied upon to provide a timely resolution to the issues that RIAA and MP3.com believe should be addressed by the Copyright Office.[5]

The notion that the courts can clarify and implement Section 115 more rapidly than the Office defies both common sense and the Office's own precedents.[6] Moreover, turning to the courts almost certainly will lead to varying and conflicting results, thereby exacerbating the uncertainty that currently exists. And, of course, compared to the expert agency with responsibility for administering a variety of compulsory licenses, the judiciary is particularly ill-

---

[5] NMPA/SGA also argue that "voluntary negotiations" offer a better way of resolving the issues relating to the application of Section 115 to IDPDs than the adoption of rules by the Copyright Office. While voluntary negotiations represent the preferred mechanism for establishing compulsory license rates and terms under Section 115, defining the scope of the license and establishing the process by which the license is invoked are matters more appropriately dealt with through rulemaking. Indeed, if the very scope of the license is subject to voluntary negotiation, Congress' intent to subject certain activities to compulsory licensing could effectively be nullified by private agreement.

[6] *See, e.g., Public Performance of Sound Recordings: Definition of a Service*, Docket No. RM 2000-3B, 65 Fed. Reg. 77292, 77294 (December 11, 2000) (rejecting requests that, in lieu of adopting a clarifying rule, the Office defer to federal court litigation on the scope of the Section 114 compulsory license).

suited to establishing the types of notice and recordkeeping requirements that are needed, both as part of an interim set of licensing procedures and as part of more permanent rules.

In short, if Congress' intent to extend the Section 115 license to online music is to be fulfilled, it is up to the Copyright Office to adopt the necessary rules clarifying what online activities require licenses and establishing procedures whereby licenses can readily be claimed and royalty payments can efficiently be calculated and distributed. Absent Copyright Office action, it is virtually certain that the uncertainty and litigation that has plagued the online music environment will continue indefinitely.

II. The Copyright Office Has the Authority To Adopt Rules Clarifying and Implementing Section 115 As It Applies To IDPDs

Congress enacted legislation extending the Section 115 compulsory license to cover IDPDs in 1995. However, the lack of clear definitional and procedural rules has frustrated the ability of online music providers to take advantage of this legislation. As a result, nearly six years after Congress acted, MP3.com is unaware of any instance in which the right to make IDPDs has been cleared using the Section 115 compulsory license mechanism.

This fact, in and of itself, suggests that Congress intended for the Copyright Office to exercise its inherent authority to adopt regulations to fill in the gaps in the statutory scheme and to clarify and implement Section 115 as it applies to IDPDs.[7] Indeed, as noted above, to

---

[7]*See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress'" (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (omission in original)); *see also FDA v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation

conclude otherwise would attribute to Congress the absurd intent to extend compulsory licensing to IDPDs in a manner that makes the use of such compulsory licensing completely impracticable.

In any event, it is not necessary to look solely to the Office's inherent or implicit powers to find the requisite authority for the adoption of rules clarifying and implementing Section 115 as it applies to IDPDs. As both RIAA and MP3.com pointed out in their comments, Section 702 of the Copyright Act specifically confers broad discretion on the Office to adopt rules in furtherance of its administration of the compulsory license provisions of the Act, including Section 115. Moreover, the 1995 amendments to Section 115 themselves contain an express delegation of authority to the Office to adopt rules to implement the extension of the compulsory license to DPDs and IDPDs. Specifically, Section 115(c)(3)(D) directs the Librarian of Congress to "establish requirements by which copyright owners may receive reasonable notice of the use of their works under [Section 115], and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries."

The authority conferred on the Copyright Office by Section 115(c)(3)(D) is broad enough to allow the Office to adopt rules governing the various operational aspects of the Section 115 compulsory license as it applies to IDPDs, including the process by which digital music services invoke the license and the process by which royalty payments are calculated and distributed. In particular, Section 115(c)(3)(D) provides the Office with the requisite authority to adopt the interim licensing procedures proposed by MP3.com and RIAA. Those procedures, to reiterate, would permit digital music services to invoke the Section 115 compulsory license by filing a

---

from Congress to the agency to fill in the statutory gaps.").

notice of intent with the Copyright Office. Such notice would include the name, address, and phone number of the service invoking the license along with information identifying the works being used. In addition, the interim procedures would require the compulsory licensee to maintain and periodically file with the Copyright Office information regarding the licensee's use of particular works. This information would thus be available to determine what royalties, if any, are due with respect to those uses.[8]

Nothing in the Act limits the Office's authority to adopt such rules, either on an interim basis or otherwise. While Section 115(b)(1) generally provides that a person seeking to obtain a compulsory license to make physical phonorecords must first attempt to serve a separate "notice of intent" directly on the copyright owner of each work being licensed and that service on the Copyright Office is sufficient only if the Office's records do not identify the copyright owner's name and address, the specific grant of authority in Section 115(c)(3)(D) to establish "reasonable" notice requirements with respect to the application of Section 115 to IDPDs should take precedence over the general requirements contained in Section 115(b)(1). Moreover, principles of statutory construction recognize that a statute need not be applied literally if such application would lead to an absurd result outside the intent of Congress.[9] In the case of the

---

[8]In order to clarify that the Office's "deferral" rule was not intended to foreclose the availability of the Section 115 license, the Office should make clear that the interim procedures can be invoked retroactively to cover IDPDs made in the past.

[9]*See, e.g., Sykes v. Columbus & Greenville Railway,* 117 F.3d 287, 290 (5th Cir. 1997) (notwithstanding the lack of ambiguity in statutory language, the court went beyond the plain language to avoid an "absurd result."); *see also United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202 (1979) (literal interpretation of a statutory provision that would "'bring about an end completely at variance with the purpose of the statute'" must be rejected.); *see also Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (citing principle that

extension of Section 115 to the digital environment, it is clear not only that Congress wanted to foster the creation of a "celestial jukebox" offering consumers a vast array of music choices, but also that Congress intended these amendments to be interpreted in a manner designed to achieve the bill's intended purposes.[10] Subjecting IDPD licensing to the Section 115(b)(1) procedures, which were developed for use in licensing the manufacture and distribution of physical phonorecords, would clearly frustrate the accomplishment of these purposes by imposing on potential compulsory licensees the impossibly burdensome logistical task of finding and submitting individual notices to tens of thousands of copyright owners for hundreds of thousands of works.

Furthermore, the Office itself has recognized that its authority under Section 115(c)(3)(D) encompasses the establishment of rules relating both to the notice of intent that must be given to invoke the Section 115 license and to the manner by which licensees account for their use of the license to make IDPDs.[11] Although the rules adopted by the Office subject persons seeking a compulsory license to make DPDs to the same notice of intention requirements as apply to persons seeking a license to make physical phonorecords, nothing in the decision suggests that

---

"Congress cannot be presumed to do a futile thing.").

[10]*See* H. Rep. No. 104-274 at 12-13; S. Rep. No.104-128 at 14. As MP3.com noted in its initial comments, the legislative history of the Section 115 amendments also indicates that Congress foresaw and authorized departures from the existing statutory provisions if such provisions "are not readily applicable to the new digital transmission environment." S. Rep. 104-28 at 98.

[11]*See Notice and Recordkeeping for Making and Distributing Phonorecords*, Docket No. RM 98-7C, 64 Fed. Reg. 41286, 41287 (July 30, 1999) (adoption of "interim" regulations governing the submission of notices of intention to make DPDs "fulfills the section 115(c)(3)(D) requirement for notice").

the Office either was compelled to reach this result or intended it to apply to IDPDs.[12] Indeed, the fact that the rules adopted by the Office were designated as "interim" and were to be revisited after two years strongly supports the conclusion that the Office understood that it has the discretion to adopt a notice of intention process for DPDs and IDPDs that varied from the process specified in Section 115(b)(1) for physical phonorecords.

Finally, MP3.com submits that the various sources of rulemaking authority discussed herein also empower the Copyright Office to adopt rules clarifying what activities do and do not constitute IDPDs. As indicated above, Congress expressly directed the Office to adopt rules governing the notice that must be given to invoke the compulsory license for particular uses of copyrighted works and the records that must be kept with respect to the "uses" made pursuant to the license. Inherent in the authority to adopt such rules is the authority to define the "uses" to which those rules apply. It is inconceivable that Congress intended to tie the Office's hands by requiring it to establish rules without the ability to describe the activities to which those rules apply.[13]

---

[12]In fact, as previously noted, the Office ultimately decided to "defer" adopting any IDPD-specific rules.

[13]*See also Public Performance of Sound Recordings: Definition of Service*, *supra* note 7 (concluding that the Office has authority to conduct a rulemaking to determine whether a compulsory license under the Office's administration applies to particular conduct).

CONCLUSION

Immediate action by the Copyright Office to resolve the logistical and other obstacles currently impeding the application of the Section 115 compulsory license to on-demand music services is both necessary and appropriate. MP3.com again urges the Office to move as quickly as possible to take the actions recommended herein.

Respectfully submitted,

MP3.COM, INC.

By: _____

Seth A. Davidson
Lisa Chandler Cordell
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, NW
Suite 600
Washington, DC 20036
(202) 939-7900
Counsel for MP3.com, Inc.

May 23, 2001

::ODMA\MHODMA\iManage;134829;1

WRITTEN STATEMENT OF THE HONORABLE HENRY J. HYDE
BEFORE THE SUBCOMMITTEE ON
COURTS, THE INTERNET AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
MAY 17, 2001

The present disagreement over the ability of record companies and online services to make the reproductions of musical compositions necessary to launch digital music services is a troublesome obstacle to efforts to meet consumers' demand for music on the Internet. I understand that record companies and online services have been negotiating with music publishers to find a business solution to this disagreement. My sincere hope is that the parties will come to a negotiated solution quickly to resolve their differences, and that the marketplace will work to provide consumers with the music they desire.

However, it is important to recognize that a voluntary agreement is not necessary for the use of musical works in digital music services. During my tenure as Chairman of this Committee, the Committee worked with both the music publishers and the recording industry to enact the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"). Among other things, the DPRA clarified that the mechanical compulsory license found in Section 115 of the Copyright Act applies to the digital world. We did so at the music publishers' insistence, and with the support of the recording industry. At the time I believed, and I still believe, that the DPRA gave record companies and online services whatever rights they may need to make reproductions in the operation of digital music services.

It is therefore very disappointing to me that some are now asserting that the compulsory license we enacted in 1995 is insufficient to grant the necessary rights to get digital music services up and running. This is contrary to what I believe to have been one of the key purposes of the DPRA: to allow legitimate operators to rely upon the compulsory license to launch their services.

My hope is that the disagreement between music publishers and the recording industry and Internet music companies will be resolved quickly through business negotiations and I understand that the Copyright Office is considering a rulemaking to clarify the application of the mechanical compulsory license to certain specific types of services. I support action by the Copyright Office to effectuate the intent of the DPRA to enable electronic music delivery, and I hope that the Office will take such action quickly, to help meet the consumer demand for digital music that exists today.

DRAFT UCC ARTICLE 2B:
PROPOSED EXEMPTION FOR COMPULSORY LICENSES UNDER SECTION 115 OF THE COPYRIGHT ACT

Submitted to the UCC Article 2B Drafting Committee
by National Music Publishers' Association and
The Harry Fox Agency, Inc.

National Music Publishers' Association, Inc. ("NMPA") and its music licensing subsidiary, The Harry Fox Agency, Inc. ("HFA") (together, "NMPA/HFA"), write to urge that proposed UCC Article 2B ("Article 2B") expressly exempt from its terms the compulsory license for the making and distribution of phonorecords of nondramatic musical works prescribed by section 115 of the U.S. Copyright Act. Without such an exemption, Article 2B would improperly impose state law terms on a license created and governed by federal law. It would also needlessly interfere with a compulsory licensing system for musical recordings that has operated well for nearly a century, serving the growth of a major entertainment industry, without any request from any of the participants in that industry for such regulation, without any study of the longstanding customs and practices or structure and economics of the industry affected, and without any justification for such a disruptive intrusion into an area in which Congress has, pursuant to the Copyright Clause of the U.S. Constitution, calibrated the delicate balance involved in promoting the creation and dissemination of musical works.

I.

BACKGROUND

A. National Music Publishers' Association and The Harry Fox Agency

NMPA is the principal trade association representing the interests of music publishers in the United States. The more than 600 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. For over eight decades, NMPA has served as the leading voice of the American music publishing industry in Congress and in the courts.

NMPA's wholly owned subsidiary, HFA, was founded in 1927. It acts as a licensing agent for over 18,000 music publishers, licensing most of the music used on U.S.-produced CDs, tapes and records. In 1996, HFA issued some 210,775 licenses under the compulsory licensing provisions of the Copyright Act and collected approximately $404 million in royalties from such licenses on behalf of its publisher clients. Although the aggregate figures for last year are not yet available, HFA saw an increase in its licensing activities in 1997.

B. The Compulsory License

Each year, hundreds of thousands of licenses are issued in the United States pursuant to section 115 of the Copyright Act for the making and distribution of phonorecords of nondramatic musical works. Such licenses are typically memorialized on a short form that incorporates by reference the compulsory license terms of section 115. An example of a compulsory license form is attached hereto as Exhibit A.

Notwithstanding the vast number of compulsory licenses issued pursuant to section 115 every year, NMPA/HFA is not aware of any initiative by industry participants to alter existing industry practice for the issuance of these licenses. Unlike software licensing -- the original focus of Article 2B -- the system for compulsory licensing of musical works is longstanding and well established. Indeed, NMPA/HFA submits that the sudden introduction of new license terms into the compulsory music licensing system, which has been operating successfully for nearly 100 years, can only be disruptive of well-developed and successful industry practices.

1. History

The section 115 compulsory license -- or "mechanical" license, as it is called in the music industry -- represents a statutory limitation on the exclusive rights of reproduction and distribution otherwise enjoyed by the authors of musical works under the Copyright Act. *See* 17 U.S.C. §§ 106, 115. Under section 115 of the Act, once a copyright owner has authorized distribution of phonorecords of a nondramatic musical work to the public in the United States, "any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of [section 115], obtain a compulsory license to make and distribute phonorecords of the work." 17 U.S.C. § 115(a). That is, a license is available to anyone who wants to produce a compact disc ("CD"), audiocassette or record containing the work, or who

wants to distribute a copy of the work by means of digital transmission -- resulting in what is referred to by section 115 as a "digital phonorecord delivery" ("DPD").[1/]

Section 115, like the rest of the Copyright Act, was enacted by Congress pursuant to the Copyright Clause of the Constitution, which grants Congress the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const. art. I, § 8, cl. 8. Congress included the compulsory license provision in the 1909 Copyright Act because it was concerned about the possibility of "'a great music monopoly'" in the hands of a single piano roll manufacturer that had exclusive contracts with many music publishers. 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.04[A] (1997) (quoting H.R. Rep. No. 60-2222, at 6 (1909))

[1/] A "digital phonorecord delivery" is defined in section 115 of the Copyright Act as

> each 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, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

17 U.S.C. § 115(d).

compulsory licenses -- thereby leaving this field to federal regulation as Congress intended.[7/] The reporter's notes to section 2B-105 recognize that there may be instances in the copyright context where the provisions of Article 2B are preempted under the Supremacy Clause. March Draft § 2B-105 note 2. This is such an instance.

We discuss below several provisions of proposed Article 2B and how they conflict with the objectives of the compulsory licensing provision of the Copyright Act.

III.

ANALYSIS OF SPECIFIC PROVISIONS OF OF PROPOSED ARTICLE 2B

Initially, we must stress that the following discussion represents only a preliminary review of the most obvious problems presented by proposed Article 2B and does not provide an exhaustive analysis of all the ways in which the Article might interfere with the compulsory licensing scheme created by section 115. These problems alone, however, demonstrate the fundamental conflict between federal law and proposed Article 2B as applied to the compulsory mechanical license.

[7/] NMPA/HFA can discern no rational reason why trademark and patent licenses should be generally exempted from the scope of Article 2B, but not compulsory licenses under section 115 of the Copyright Act. *See* March Draft § 2B-103(b)(2)(B).

A. Section 2B-201 -- Formal Requirements

Under section 2B-201, in order for a license calling for payment of $20,000 or more in royalties to be enforceable, a written record "authenticated by the party against which enforcement is sought" is required except under certain specified circumstances. March Draft § 2B-201.

Section 115 of the Copyright Act does not require an "authenticated record" for a compulsory license to be enforceable. *See* 17 U.S.C. § 115(b), (c)(1) (setting forth notice and registration requirements, but no "authenticated record" requirement, for compulsory licenses); 37 C.F.R. § 201.18 (detailing required content of notice to be served on copyright owner or filed with Copyright Office by compulsory licensee, but imposing no requirement that licensor sign or acknowledge notice). The statute of frauds provision embodied in section 2B-201 of Article 2B is therefore at odds with the compulsory licensing scheme devised by Congress, which imposes its own set of requirements on compulsory licensors and licensees.

B. Section 2B-203 -- Offer and Acceptance; Varying Terms; Conditional Offers; Section 2B-209 -- Terms When Contract Created by Conduct

The above-referenced sections of proposed Article 2B address contract formation and set forth guidelines for determining the terms of the contract in a "battle of the forms" situation. They make little sense in the context of the compulsory licensing scheme of section 115, however, because section 115 *requires* a licensor to "accept" a licensee's offer to establish a license in accordance with the statutorily

prescribed terms. Indeed, no act of acceptance is statutorily required. The compulsory license is deemed granted so long as the licensee complies with the statutory requirements.

These proposed sections are also inconsistent with the reality that a compulsory licensor lacks the bargaining power or ability to demand additional or more favorable terms from the licensee, as the licensee can always fall back on his statutory rights.

C. Section 2B-401 -- Warranty and Obligations Concerning Quiet Enjoyment and Noninfringement

Proposed section 2B-401 provides that, unless specifically disclaimed in the license, a licensor of "informational property rights" is warranting that the information and rights "shall be delivered free of the rightful claim of any third person by way of infringement or the like" and also that "no person holds a claim to or interest in the information which arose from an act or omission of the licensor, other than a claim by way of infringement or the like, which will interfere with the licensee's enjoyment of its license interest." March Draft § 2B-401(a), (b)(1). The proposed section adds that if the "informational property rights" being licensed are also subject to compulsory licensing, then the warranty is "subject to" such rights. March Draft § 2B-401(c)(1). Article 2B does not, however, exempt compulsory licenses from the implied warranty requirement.

Section 115 of the Copyright Act does *not* require such warranties to be made by the copyright owner in the compulsory license context and, likewise, the

Responses of National Music Publishers' Association

To Questions for Hearing Record From Senators Hatch and Leahy

April 30, 2001

I. Questions from Senator Hatch:

One argument we have heard in favor of a compulsory license is that music has so many pieces to license and there have been substantial disputes between the record labels, the publishers and technology companies like MP3.com about how to get the publishing rights cleared in the volume demanded by online offerings . . . . Would any of you be interested in commenting on this particular problem and suggest ways to remedy it?

As you are aware, songwriters and music publishers already operate pursuant to the statutory compulsory license in section 115 of the Copyright Act. MP3.com has mischaracterized its experience in clearing publishing rights with the Harry Fox Agency ("HFA"), and in fact substantial progress has been made recently between MP3 and HFA, which we describe in detail below. There has been no increase in the number of licenses necessary to distribute music since the emergence of online digital music services, and music has been successfully distributed for decades under the current legal regime. As we demonstrate in detail in the answers that follow, no new compulsory license is necessary -- nor would it be beneficial.

Mr. Hank Barry argues that we have created compulsory licenses in the past for publishing rights in music and in rebroadcast of television programming because it was difficult to clear the rights to the myriad creative interests involved in making up a broadcast day. Would anyone like to explain why that analogy does or does not obtain in the online music and entertainment world?

NMPA does not believe that any new compulsory license is warranted to promote the availability of music over the Internet. What is necessary for a vibrant online music market to take root is for "services" such as Napster to cease their promotion and facilitation of online infringement. At both the Committee's initial hearing on music and the Internet, held July 11, 2000, and the April 3, 2001 hearing, witnesses representing companies and interests offering appropriately licensed music services acknowledged the virtual impossibility of competing with rogue entities that make other people's music available to anyone for nothing. Until Napster and its imitators follow the law by seeking necessary licenses and making the necessary payments to creators and rights holders; law-abiding companies will remain at a serious, if not fatal, commercial disadvantage.

As Mr. Barry knows, at the time Napster launched its service, the company was eligible – like any other Internet music service -- for compulsory licenses under the terms and conditions of section 115 of the Copyright Act for the making of

"digital phonorecord deliveries" ("DPDs") of musical compositions. It chose not to use the compulsory licensing system available to it. Napster has therefore forfeited eligibility for compulsory licensing through its continued infringement. The company now urges Congress to establish a new compulsory license regime that would reward it with access to all musical compositions (and all sound recordings), presumably at a rate it finds acceptable and with few if any administrative responsibilities for Napster. NMPA believes that the existing section 115 compulsory license provides an adequate framework for Napster and other Internet distributors of music to secure licenses at a reasonable rate.

I have heard a number of entertainment companies say that acceptable protection for online content simply does not exist yet, that existing Digital Rights Management and watermarks, wrappers, or encryption, is simply not good enough to protect valuable content. Yet we have a number of technology companies here today who believe that they have such a solution, and now we have announcements of online initiatives from all five major labels, which suggests the technological protections have developed recently. Would any of you care to comment on the state of technological protection for content?

The technology for protection of digitally distributed content is still in its infancy. The field is extremely complex and combines disparate academic fields of study including computer science, encryption mathematics, digital signal processing and acoustics. Our experience with reviewing the different technologies offered by various vendors (large and small) is that a technology is "tamper-proof" or "hacker proof" only as a matter of degree. Today, there is no single copy protection technology that meets the requirement of consumer convenience, strong protection, practicality and reasonable cost.

In addition to copy protection technology, use tracking mechanisms are equally important to ensure a vibrant digital music business where all of the participants, including songwriters and publishers, get properly paid for the uses of their creations. While "fingerprinting" technology is useful to identify unauthorized music files on computer servers, such a function is distinct from managing legitimate delivery to consumers of copy protected music. For example, The Harry Fox Agency has proposed for several years, most recently in the "SDMI" process, that the license number corresponding to the mechanical license (and any other relevant license number) authorizing a digital distribution be included in the header of each downloaded or streamed file. Inclusion of the mechanical license number would permit automated spot checking of websites and allow automated auditing of a licensed website. It is a given that different website operators may secure the authority to distribute a song from their website from different parties. In order for a songwriter, publisher or their agent (HFA, for example) to check that a website has such authority, it is essential that a license number corresponding to the license granting the operator the authority to execute such distribution appear in the header of the digital music files being distributed from their website.

Although digital rights management technology vendors profess to have the solution to this problem, they and the record labels have resisted attaching license

numbers to digital music files. While we have been given a number of reasons for this resistance (including the "header" can only accommodate so much data), all can be technologically surmounted. By continuing to resist inclusion of this license information in the "header," the record companies make it much more difficult for music publishers to audit record company compliance with our licensing agreements. Furthermore, because the primary clients of digital rights management vendors are the record labels (because the record labels control the distribution of sound recordings), the technology they have developed and adopted so far has been responsive to the interests of record labels, not those of music publishers. An important principle arises from our experience with digital rights management: technology alone is not the only challenge facing an effective digital rights management regime. The economic tensions that have been a part of the music business for decades are also a significant factor in whether the right technology is made available. We remain hopeful that on-going discussions between the music publishing community and the RIAA will resolve this issue.

There is an important additional factor to consider: the "consumer-friendliness" of the protection and management technologies. A near-perfect copy protection technology is of little help to the music industry if it frustrates consumers. It is our experience that the easier and more versatile the technology is for consumers, then the easier they are to "hack" or bypass. Conversely, the more tamper-resistant the technology is, the more difficult it becomes for legitimate consumers to access their purchased content and for the music licensing community to implement the technology. Currently, the Achilles heel of all of these technologies is a product called "Total Recorder." This packaged software product, generally available, pretends to the computer operating system that it is the sound card hardware that produces the musical sound. This means that after legitimate content is legitimately decrypted by the copy protection and rights management software, the Total Recorder software can copy the decrypted digital sound data constituting the song into a separate file, typically in MP3 format, that would be "clear" of encryption. In other words, truly piracy-proof digital music delivery technology must protect the entire chain of delivery, from the website to the speaker. This last state of affairs will only occur if the entire industry agrees on a copy protection and rights management model that meets everyone's needs and is implemented across all platforms at each point in the chain of digital music delivery. So far, as mentioned above, that has not occurred.

In summary, copy protection technology is still developing. "Perfect" systems from a technological perspective are not yet perfect from a business market perspective. Digital rights management technologies are improving but so far, music publishers are at the mercy of the record companies regarding which digital rights management technology is used and what information is included in the identifying "headers." Industry-wide resolution of this issue remains elusive. We are confident that these problems can be resolved, but as this answer indicates, there are some significant issues remaining.

For all panelists: The premise of this hearing is that digital content is coming soon to digital devices to be enjoyed by consumers soon. Based on our discussion today, how soon is soon, and when will the promise become reality?

Mr. Chairman, for music, the question is not when the content is coming – digital delivery of music is here. NMPA members have licensed more than thirty enterprises, most of them fledgling businesses less than five years old, to distribute recordings of music over the Internet. EMusic and MP3.com are among the licensees. These companies have chosen to respect the rules laid down by Congress by obtaining licenses and paying compensation to the copyright owners. Our licensing arrangements demonstrate that music publishers are fully prepared to license any Internet music service if that service is prepared to follow the law.

Furthermore, NMPA has every incentive to license its works in the digital environment. Some digital music services imply that music copyright owners are deliberately impeding the issuance of licenses for online music services. This suggestion is both inaccurate and illogical. Music publishers only get paid when their work is used; if it is not used, no revenue is generated. NMPA members are eager (and economically motivated) to license their works in the new digital environment.

For all panelists: Is there any point you feel should be raised or that you would like to further respond to for the completeness of our record?

We would like to respond to the suggestion of some that a new "blanket" statutory license be created for digital music distribution.

Music website operators (including MP3.com in its written testimony) often propose that digital music distribution be governed by a "blanket licensing" scheme without further elaborating on the complexities of current blanket licensing. NMPA believes that blanket licensing is inappropriate to the licensing of digital phonorecord deliveries, for the following reasons.

Blanket licensing is a process that the performing rights societies (e.g. ASCAP, BMI and SESAC) use to license and collect performance royalties from radio and television stations for performances of songs on radio and television. Created during the World War I era to address the practicalities of keeping track of the public performance of musical works on radio and in live performances, the blanket license is premised on the impracticality of reviewing every radio or television station's play log or programming for every minute the station is on the air or every location where the music is played. Instead, statistical sampling of a smaller number of radio and television stations is employed to estimate how many times a particular work is performed.

Sections 111 and 119 of the Copyright Act establish limited compulsory licenses for the retransmission of certain broadcast signals under modified blanket licensing. Royalties deposited pursuant to the terms of these compulsory licenses are subject to a complex, two-phase distribution proceeding. In phase one, groups of eligible rights holders demonstrate how much of the overall royalty pool should be allocated to