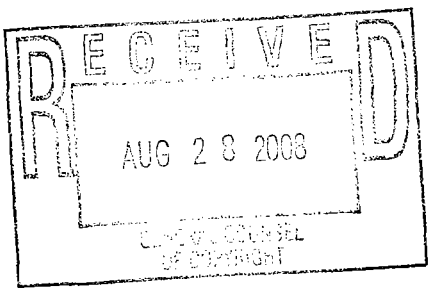
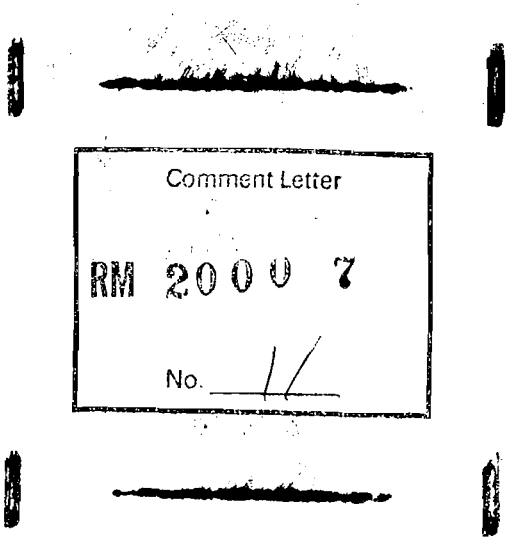
Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress

Notice of Proposed Rulemaking	)	
	)	**37 C.F.R. Part 201 and 255**
	)	**Docket No. RM 2000-7**
Compulsory License for Making and	)	
Distributing Phonorecords, Including	)	
Digital Phonorecord Deliveries	)	
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS





Bruce G. Joseph
Matthew J. Astle
WILEY, REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
202-719-7258

Counsel for National Association of Broadcasters

August 28, 2008

TABLE OF CONTENTS

Introduction and Summary

The National Association of Broadcasters ("NAB") offers these comments on the Copyright Office's July 16, 2008, Notice of Proposed Rulemaking on the section 115 statutory license for making and distributing phonorecords, including digital phonorecord deliveries (the "NPRM" or the "Proposed Rule").[1] For the reasons discussed below, NAB respectfully submits that:

- The Copyright Office lacks authority to promulgate the Proposed Rule;
- The Proposed Rule is contrary to law—transitory reproductions in the buffers used to render digital performances are not "fixed" within the meaning of copyright law, and thus are neither copies nor phonorecords, nor digital phonorecord deliveries ("DPDs");
- The Proposed Rule would hopelessly confuse copyright law, eviscerating the longstanding, statutorily mandated, economically rational distinction between performance rights, on the one hand, and reproduction and distribution rights on the other. This, in turn, would, among other things:
    - Conflict with the statutory license scheme Congress established under sections 112 and 114 for non-interactive streaming (and other performances by non-interactive digital transmission);
    - Expand the scope of musical works subject to the section 115 license beyond Congress' intent, to include those publicly performed by digital transmission with the consent of the copyright owner, even if the work was never otherwise distributed to the public with authorization;
    - Create controversy and doubt about the applicability of the Audio Home Recording Act to digital audio receiving devices; and
    - Conflict with other, long-established copyright principles, including the clear statutory direction that performance is not publication and numerous provisions of section 110.
- The NPRM contorts the plain meaning of section 115 and its definition of "digital phonorecord delivery" in its effort to apply the section to activities to which Congress made clear it did not apply (such as non-interactive streaming); and
- The Copyright Office's laudable goal of resolving unfounded claims that digital performances require a second payment to music publishers for server and buffer copies cannot be achieved by the antiquated and largely useless procedures of section 115.

---

[1] Copyright Office, Library of Congress, *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Notice of Proposed Rulemaking*, 73 Fed. Reg. 40,802 (July 16, 2008) (hereinafter cited as "NPRM" or "Proposed Rule").

The Register of Copyrights herself said it best. Testifying before Congress in 2006, Register Peters declared: "Characterizing streaming as a form of distribution is factually and legally incorrect and can only lead to confusion." *Section 115 Reform Act (SIRA) of 2006: Hearings before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary* 6 (May 16, 2006) (Statement of Marybeth Peters, Register of Copyrights) (emphasis added) (hereinafter "The Register's May 16, 2006 SIRA Testimony"). NAB agrees with this conclusion, and nothing in the NPRM justifies the Copyright Office's unexplained and inexplicable 180-degree about-face.

In sum, the NPRM reaches beyond the Copyright Office's statutory authority to adopt a Proposed Rule that conflicts with well-established copyright principles, conflates economically distinct digital performances with reproductions and distributions, contradicts the plain language and clearly expressed intent behind section 115, and threatens increased confusion with respect to all digital performances, in order to provide as a potential "safe harbor" against claims that should be dismissed summarily, a statutory license that the Copyright Office and interested parties generally recognize is outmoded, burdensome, and borders on the useless. That is both bad policy and contrary to law. For these reasons and others, NAB opposes the Proposed Rule and urges the Copyright Office to withdraw the NPRM and terminate this rulemaking without further action.

NAB's Interest in the Proposed Rule

NAB is a non-profit association of radio and television stations and broadcasting networks, serving and representing the interests of the American broadcasting industry. NAB members have a vital interest in the Proposed Rule and in ensuring that copyright laws are interpreted rationally in the digital world. NAB's interest is reflected in the fact that NAB filed reply comments in May, 2001, in connection with the Notice of Inquiry in this very Docket. Reply Comments of the National Association of Broadcasters, Docket No. RM 2000-7, Request for Public Comment, Mechanical and Digital Phonorecord Delivery Compulsory License (May 23, 2001) (hereinafter "NAB Reply Comments"). Among other things, NAB's comments maintained (at 6-7) that temporary buffering that occurs in non-interactive, real-time streams are not "fixed" and, therefore, are not copies or phonorecords. This view has since been confirmed by both the Second and Fourth Circuits. *See infra* Section II.A.

Many of NAB's radio members stream their broadcast programming over the Internet, in reliance on the section 114 and section 112 statutory licenses, and others hope to do so in the future. While those licenses are not, themselves, without problems, the Proposed Rule threatens to exacerbate those problems by creating additional copyright rights in streamed performances. Further, NAB's radio members have spent hundreds of millions of dollars innovating and supporting the roll-out of an entirely new means of bringing high quality audio programming to the American public—HD digital radio. By its erroneous conclusion that buffers used by devices that receive digital performances implicate the reproduction and distribution rights of music and sound recording copyright owners, the Proposed Rule threatens this burgeoning new technology.

Many NAB members also engage in other forms of digital performances. The issues addressed in the NPRM have potentially broad applicability to all transmissions of digital

performances, including not only performances of recorded music, and to the devices that receive those transmissions, which by their nature require incidental buffering with no purpose or effect other than the dissemination of the performance.

NAB understands the need for section 115 reform and appreciates the efforts of the Copyright Office to effectuate such reform. However, as the Register of Copyrights has repeatedly stated, that reform can only meaningfully be accomplished by legislation. Absent legislation, any reproductions that are made in connection with otherwise licensed or exempt digital performances should be deemed to be fair use. *See, e.g.,* DMCA Section 104 Report at 142-46; *Digital Millennium Copyright Act: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong., at 21-22 (Dec. 12, 2001) (Statement of Marybeth Peters, Register of Copyrights) (hereinafter "Dec. 12, 2001 Statement of Marybeth Peters"); The Register's May 16, 2006 SIRA Testimony at 11 (recommending statutory exemption for buffers).

I. The Copyright Office Lacks Authority To Promulgate the Proposed Rule.

The Copyright Office lacks statutory authority to conduct a rulemaking purporting to establish the "scope and application" of the compulsory license provided for in Section 115 of the Copyright Act. NPRM at 40,802, 40,806. Any rule adopted by the Copyright Office will be without legal effect.

The Supreme Court repeatedly has held that an agency rule "must be promulgated pursuant to authority Congress has delegated to the official." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (judicial deference to agency rulemaking warranted only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority") (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). The D.C. Circuit has confirmed that "[i]t is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (reversing and vacating FCC rule issued in absence of congressional delegation of authority).

There has been no congressional delegation of rulemaking authority that would support the NPRM. Section 701 of the Copyright Act, which sets out the general responsibilities and organization of the Copyright Office, provides no general substantive regulatory or lawmaking authority; the duties prescribed are primarily advisory, educational, or informational. *See* 17 U.S.C. § 701. The only statutory provision cited in the NPRM as evidence of the purported delegation of regulatory authority is 17 U.S.C. § 702. *See* NPRM at 40,806. However, that provision merely states that:

> The Register of Copyrights is authorized to establish regulations not inconsistent with law *for the administration of the functions and duties made the responsibility of the Register under this title.* All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

17 U.S.C. § 702 (emphasis added). The section 702 regulatory authority therefore is expressly limited to the establishment of regulations "for the *administration of the functions and duties*" of the Copyright Office under the Act.

The Proposed Rule is a substantive rule of copyright law, not a matter of administration of the functions and duties of the Copyright Office. As discussed below, it would both reinterpret substantive principles of copyright law and fundamentally reset the balance between copyright owners and users. Such a momentous decision goes far beyond the "administration of functions and duties" in section 702 and also goes beyond the advice-giving function described in section 701. It is a role appropriate for the courts, as exemplified by the recent Second Circuit decision in *The Cartoon Network LP v. CSC Holdings, Inc.*, __F.3d__, Nos. 07-1480-cv(L) & 07-1511-cv(CON), 2008 WL 2952614 (2d Cir. Aug. 4, 2008), which held that bits buffers are not "fixed" and are not "copies."

As *Mead* makes clear, there is no default presumption of implicit authority. 533 U.S. at 229. The Supreme Court similarly has rejected agency attempts to claim broad interpretive and regulatory authority based on a specifically limited grant. For example, in *Gonzales*, the Court held that statutory authorizations to "promulgate and enforce any rules, regulations and procedures which [the Attorney General] may deem necessary and appropriate for the efficient execution of his functions under this subchapter" did not "delegate . . . authority to carry out or effect all provisions of the [statute]." Rather, he can promulgate rules relating only to "registration and control" and "for the efficient execution of his functions" under the statute. 546 U.S. at 259. Thus, the Court rejected the Attorney General's claimed authority to issue an interpretative rule as a statement with the force of law. *Id.* at 268. Under *Mead* and *Gonzales*, the limited administrative authority conferred in section 702 cannot properly be inflated into plenary authority over the copyright laws, or even substantive authority over the scope of statutory licenses. As the Court noted, "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Id.* at 267 (quoting *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 408 (2001)). Here, the elephant of determining substantive issues of copyright law is not hidden in the mousehole of section 702's limited grant of administrative authority.

A comparison of section 702 with other provisions of the Copyright Act confirms the limited scope of the authority conferred by section 702. Most specifically, and subject to various material limitations, section 802(f)(1) provides that the Register may provide, upon the request of a Copyright Royalty Judge or a motion of a party to a proceeding before them, "an interpretation of any material questions of substantive law" that "arise in the course of [a] proceeding" before the Copyright Royalty Judges. 17 U.S.C. § 802(f)(1)(A)(ii). The Register may also, upon rendering a determination in such a proceeding, "review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law." 17 U.S.C. § 802(f)(1)(D). A comparison of section 702 authority to make rules for the "administration of the functions and duties" of the Office and the section 802(f)(1) authority to opine concerning "material question[s] of substantive law" confirms that (1) when Congress intended for the Register to opine concerning issues of substantive law, that intention was expressed directly, not by implication, and (2) that power was accompanied by specific procedural limitations that

indisputably are not met here.[2] Thus, review of the statutory language confirms that the Copyright Office lacks the required authority conferred by Congress to promulgate the Proposed Rule.

Neither of the two appellate cases cited in the NPRM provides any further support for the Office's claimed authority. *See* NPRM at 40,806 (citing *Satellite Broadcasting and Commc'ns Ass'n v. Oman*, 17 F.3d 344 (11th Cir. 1994) ("*SBCA*") and *Cablevision Sys. Dev. Co. v. Motion Pictures Ass'n*, 836 F.2d 599 (D.C. Cir. 1988) ("*Cablevision*")). In *Cablevision*, the D.C. Circuit briefly took note of section 702, but relied on the fact that section 111 expressly provides that the Register should prescribe regulations concerning the subject there at issue. 836 F.2d at 608. For this reason, the Court stated explicitly that "[o]ur holding on deference due the [copyright] office does not extend beyond the bounds of its interpretation of Section 111." *Id.* (emphasis added). Thus, *Cablevision* does not support the open-ended rulemaking authority with respect to section 115, as the NPRM asserts.

The Eleventh Circuit's decision in *SBCA* is similarly unilluminating. The *SBCA* decision does not mention, let alone rely upon, section 702 as a proper basis for the Copyright Office's rulemaking. Rather, presumably because the rule at issue involved section 111, the *SBCA* court essentially followed *Cablevision* in finding that the Copyright Office had rulemaking authority under that provision, without citing any particular congressional delegation. *See* 17 F.3d at 347.[3] However, as the Third Circuit has explained, such vaguely supported assertions of rulemaking authority are no longer sufficient in view of recent Supreme Court precedent:

> The Supreme Court in *Mead* altered the judicial landscape of *Chevron* deference, limiting previously strong presumptions of deference to formal agency actions and promoting a more searching threshold inquiry into the existence of Congressional authorization. After *Mead*, the existence of a general delegation of authority and the use of a formal notice-and-comment procedure is no longer sufficient to trigger *Chevron* deference – instead we must look for express or implied indications that "Congress ever thought of [giving the agency actions] the deference claimed for them here."

Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 490 n.9 (3d Cir. 2003) (citations omitted). Here, section 702's limited grant of administrative authority does not extend to reinterpreting the

---

[2] The NPRM notes that there is presently a section 115 proceeding pending before the Copyright Royalty Judges (No. 2006-3 CRB DPRA) and suggests that it therefore "makes sense" for the Register to "offer guidance." NPRM at 40,806. However, it is beyond question that neither of the express statutory prerequisites for Register action contained in section 802(f)(1) has been met. The Register cannot disregard these statutory constraints based on the view that doing so "makes sense."

[3] The Eleventh Circuit in *SBCA* also cited one of its prior decisions and a 1956 Supreme Court case, *DeSylva v. Ballentine*, 351 U.S. 570 (1956). In both of those cases, however, the courts declined to afford any deference to the Copyright Office's views.

meaning of section 115.[4] Because the Copyright Office lacks the requisite statutory authority to promulgate the Proposed Rule, it may not do so.

II. The Proposed Rule Is Contrary to Law.

The Proposed Rule's treatment of buffers used to render digital performances is contrary to the Copyright Act in numerous respects. For the reasons discussed below, the Copyright Office may not adopt a rule based on a conclusion that such buffers are phonorecords in which a sound recording is fixed. If a buffer is not a phonorecord, digital performances do not entail digital phonorecord delivery and do not implicate the copyright owners' reproduction or distribution rights.

First, the NPRM incorrectly reasons that the bits that are accumulated in transitory buffers are "fixed" so that the buffers are "phonorecords." This is contrary to law. *See, e.g., Cartoon Network* at *4-*7 (buffers are not fixed, and therefore do not implicate the reproduction right); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004) (RAM buffers used to effectuate a digital transmission are not fixed).

Second, because all digital performances require the use of buffers that accumulate bits, the NPRM's conclusion that performance buffers are phonorecords would mean that every transmitted digital performance also implicates the reproduction and distribution rights. Such a conclusion is at odds with the Copyright Act's careful delineation between rights, and would wreak havoc with other carefully crafted provisions of the Act, including the statutory license scheme for non-interactive sound recording performances, the Act's treatment of digital radio broadcasting, the treatment of digital audio recording devices, the definition of publication and other provisions of copyright law. Fundamental canons of statutory construction prohibit such a result.

Third, the Office's construction of important provisions of section 115 is contrary to the plain meaning of the statute and to prior Copyright Office testimony. The NPRM contradicts the statutory text, structure and history, in its construction of the definition of DPD with respect to the exclusion of noninteractive transmissions and the requirement that DPDs be "specifically identifiable," and with respect to the "primary purpose" requirement of the section 115 license.

A. Sound Recordings Embodied in Performance Buffers Are Not "Fixed" and, Therefore, Are Not Phonorecords and Do Not Implicate Reproduction or Distribution Rights.

A central premise of the Proposed Rule's treatment of interactive and non-interactive streaming is the conclusion that sound recordings embodied in the buffers used to render a digital performance are fixed, and, therefore, that the buffers are phonorecords that have been distributed. NPRM at 40,808-09. The law is to the contrary, as the Second Circuit recently

[4] In *Bonneville*, a majority of the Third Circuit panel opined that the section 702 language is "insufficient to shift the responsibility of interpreting what is copyright-protected from the courts, the traditional stewards of such property rights, to the Copyright Office, which has no history of, or significant expertise in, such a role." 347 F.3d at 490 n.9. Ultimately, however, resolution of this issue was unnecessary to the decision.

confirmed in *Cartoon Network* at *4-*7, and as the Fourth Circuit previously held in *CoStar*. Accordingly, the NPRM's conclusions that digital buffers implicate the reproduction and distribution rights, and that buffers are distributed phonorecords, cannot stand.

The NPRM correctly observes that for there to be a DPD, there must be a "phonorecord" that is delivered to a recipient. NPRM at 40,808. The Copyright Act, in turn, defines "phonorecord," *inter alia*, as a material object in which "sounds . . . are fixed." 17 U.S.C. § 101 (definition of phonorecord). The Act further provides that "[a] work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* (emphasis added)

In determining that buffers used to render digital performances create a fixation of musical works and sound recordings, the NPRM relied upon the reasoning of the Copyright Office's Section 104 Report, which concluded that for purposes of fixation, "the dividing line can be drawn between reproductions that exist for a sufficient period of time to be capable of being 'perceived, reproduced, or otherwise communicated' and those that do not." NPRM at 40,808, *quoting* DMCA Section 104 Report at 107-29. The NPRM also relied on the district court decision in *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 621 (S.D.N.Y. 2007) (holding that the creation of a buffer copy is "copying").

The Second Circuit in *Cartoon Network* expressly rejected the logic and conclusion of the Section 104 Report on the meaning of fixation and reversed the district court's decision in *Cablevision*. The Court of Appeals ruled that fixation imposes

> two distinct but related requirements: the work must be embodied in a medium . . . such that it can be perceived, reproduced, etc., from that medium (the "embodiment requirement"), and it must remain thus embodied "for a period of more than transitory duration" (the "duration requirement"). Unless both requirements are met, the work is not "fixed" in the buffer, and as a result, the buffer data is not a "copy" of the original work whose data is buffered.

Cartoon Network at *4 (citations omitted). The court reasoned that the Copyright Office's Section 104 Report conflated the two requirements and "reads the 'transitory duration' language out of the statute." *Id.* at *6. "Because the Office's interpretation does not explain why Congress would include language in a definition if it intended courts to ignore that language, we are not persuaded" by the Copyright Office's Section 104 Report's construction of the fixation requirement. *Id.* at *7. The court ruled that fixation requires embodiment for more than "transitory" duration, and that, where "each bit of data . . . is rapidly and automatically overwritten as soon as it is processed," the embodiment is merely transitory. *Id.*; *accord* H.R. Rep. No. 94-1476, at 53 (1976) ("[T]he definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on television or other cathode ray tube or captured momentarily in the 'memory' of a computer.") (emphasis added).

Similarly, in *CoStar*, the Fourth Circuit concluded that temporary RAM downloads made in the course of transmission by a digital transmission system were not copies fixed for a period of more than transitory duration. 373 F.3d at 550-51 ("When an electronic infrastructure is designed and managed as a *conduit* of information and data that connects users over the Internet, the owner and manager of the conduit hardly 'copies' the information and data in the sense that it fixes a copy in its system of more than transitory duration.") (emphasis added). In rejecting a claim that the ISP that owned and managed the system was making copies, the court observed that "the entire system functions solely to transmit the user's data to the Internet." *Id.* at 551.

Buffers of the type discussed in the NPRM are precisely analogous to the buffers at issue in *Cartoon Network* and *CoStar*. Data representing brief segments of a work typically are present in such a buffer for only so long as necessary to effectuate a real-time performance. The data are then overwritten. That is the essence of "transitory" duration.[5] *See, e.g., id.* ("Transitory duration . . . is qualitative in the sense that it describes the status of transition.").

B. The NPRM's Conclusion that Digital Performances Necessarily Entail Reproductions and Distributions Violates the Fundamental Obligation To Construe the Copyright Act as a Harmonious Whole.

The NPRM asserts the Copyright Office's understanding that transmissions of digital performances, by their nature, require buffering at the receiving end to effectuate the performance. NPRM at 40,807. NAB shares this understanding. In short, under the NPRM, all transmitted digital performances would implicate the reproduction and distribution rights. Such a construction is inconsistent with the overall structure and history of the Copyright Act and with numerous specific provisions of the Act. Thus, it must be rejected.

The Copyright Act consistently differentiates between the public performance right and other rights. These distinctions are deeply rooted in copyright law, and stem from underlying economic realities. *See infra,* Section III.A.

As will be discussed in greater detail in the sections that follow, the distinctions among the copyright rights are manifested throughout the Act. For example, the Act often limits the public performance right in ways that other rights are not limited. Sections 106(6) and 114 limit the sound recording performance right but not reproduction and distribution. Among other things, sections 114 and 112 combine to establish a comprehensive statutory license structure for sound recording rights in non-interactive digital performances. However, the buffers needed to render such performances are not addressed in either section for the simple reason that the law cannot be construed to give sound recording copyright owners any rights with respect to such buffers.

The only musical works subject to section 115 are those for which phonorecords "have been distributed to the public in the United States under the authority of the copyright owner." 17 U.S.C. § 115(a)(1). Under the logic of the NPRM, any musical work performed publicly, by

[5] In *Cartoon Network*, the data remained for 1.2 seconds before they were overwritten, 2008 WL 2952614, at *7, but there is no indication from the Second Circuit that 1.2 seconds is an outside limit.

digital transmission, with authority, would also be one for which a phonorecord has been "distributed to the public" under the authority of the copyright owner, and could be recorded and distributed by anyone, under statutory license. That is not what section 115 contemplates.

Section 110, which provides specific exemptions for certain performances, including many that expressly apply to performances by transmission, also distinguishes between performance rights and other rights. *See, e.g.*, 17 U.S.C. §§ 110(2), 110(5), 110(8). These exemptions apply to the public performance right, but not the reproduction or distribution rights. Section 112(a) provides an exemption for source copies made to effectuate a licensed (or exempt) public performance, but says nothing about downstream reproductions or distributions. A rule decreeing that all digital performances implicate the distribution and reproduction rights would risk gutting these exemptions by substituting an exemption with respect to one right (performance) with liability for another (reproduction and distribution).

Moreover, construing digital performances to implicate the distribution right could irreconcilably alter one of the most fundamental concepts of copyright law—publication. Section 101 defines publication as the "distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership" but provides that "a public performance or display of a work does not of itself constitute publication." 17 U.S.C. § 101 (emphasis added). Construing every performance as a distribution to the public would turn this rule on its head—every digital performance could be publication, contrary to the express provisions of the Act.

Finally, construing all digital performances to implicate reproduction and distribution rights cannot easily be reconciled with the Audio Home Recording Act, chapter 10 of title 17. That chapter imposes obligations on digital audio recording devices, and was not intended to apply to devices that do nothing more than receive a digital performance. Yet the logic of the NPRM would cast doubt on the status of such devices.

For these reasons, and others, the NPRM's construction of the section 115 license would violate what the Copyright Office itself has characterized as the "well-established rule of statutory construction which requires interpretation of each provision in a section in such a way as to produce a harmonious whole." 65 Fed. Reg. 77,292, 77,298 (Dec. 11, 2000); s*ee FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (court must interpret a statute as a balanced and coherent regulatory scheme and "fit, if possible, all parts into an harmonious whole.")(citations omitted)); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (observing that plain meaning is determined not only by statutory language itself but by "the language and design of the statute as a whole").

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 133 (quoting *Brown v. Gardner,* 513 U.S. 115, 118 (1994)). As discussed in the sections that follow, when the context, structure, and overall statutory scheme of the Copyright Act are considered, it is clear that buffers used to render digital performances are not within the scope of the reproduction and distribution rights.

In short, adoption of a rule that essentially decrees that all transmitted digital performances constitute distributions and reproductions would eviscerate longstanding, well understood, careful distinctions throughout the Copyright Act. Such a result is not consistent with the overall structure of the Copyright Act. It is, therefore, contrary to law.

1. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled With the Carefully Crafted Statutory License Scheme of Sections 114 and 112 of the Copyright Act.

The irreconcilable conflict between the Proposed Rule and copyright law is evident in the potential effect of the rule on sound recording rights applicable to non-interactive performances by digital transmission. Congress created a detailed statutory license structure, with the intent of comprehensively licensing the all the necessary rights. The scheme includes the grant of the public performance right (section 114) and the right to make server copies of the sound recordings that are performed (section 112). The copies licensed by section 112 must be "retained and used solely by the transmitting organization that made it," 17 U.S.C. §112(e)(1)(A), and, as the Copyright Office recognizes in the NPRM, neither section 114 nor section 112 grants any distribution right. NPRM at 40,805 n.1.

It is clear from the structure of the Act, the context, and the legislative history that the detailed statutory license structure was intended as a comprehensive, carefully balanced, congressional solution to the issue of sound recording rights in digital performances. *See, e.g.*, H.R. Rep. No. 104-274, at 14 ("[I]t is important to strike a balance among all of the interests affected" by the new performance right; "That balance is reflected in various limitations on the new performance rights."); *id.* at 13 ("[T]he bill has been carefully drafted to accommodate foreseeable technological changes."). It would be absurd for Congress to have put in place the complex structure of sections 112 and 114 or to have charged the Copyright Arbitration Royalty Panels and then the Copyright Royalty Judges with setting willing-buyer/willing-seller rates in a detailed, complex, on-the-record, trial-type litigation, if, after all that was done, sound recording copyright owners could still say "that is all very nice, but you still need to obtain licenses for the reproductions and distributions that necessarily result from those licensed digital performances, or, at least, you need to prevail on a fact-specific claim that those copies are fair use. And, by the way, there is no statutory license for that—you must deal with us individually."

Yet that is precisely the import of the NPRM's treatment of the buffers that are essential to render those performances. If the NPRM is correct that such performance buffers are phonorecords that implicate the musical work reproduction and distribution rights, NPRM at 40,808-09, it follows *a fortiori* that they implicate sound recording reproduction and distribution rights. A phonorecord is, after all, a fixation of a sound recording. 17 U.S.C. § 101. Section 115(c)(3)(G) expressly provides that "a digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by section 502 through 506 and section 509, unless" the DPD of the sound recording has been authorized by the sound recording copyright owner. 17 U.S.C. § 115(c)(3)(G). In short, the NPRM construes the Copyright Act in a way that reaches a result and that is contrary to fundamental principles of statutory construction.

Moreover, although this incongruity was explicitly called to the Copyright Office's attention in comments in this docket,[6] the NPRM is silent on this issue, and makes no attempt to reconcile or explain the absurd result embodied in the Proposed Rule. That is arbitrary.

2. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled with Congress' Decision To Subject to Section 115 Only Those Musical Works that Have Been Recorded and Distributed Under Authority of the Copyright Owner.

The NPRM's contortion of copyright law also is evident in the effect of the NPRM on the musical works eligible for reproduction and distribution under the section 115 statutory license. When it first enacted section 115 in 1976, Congress established a clear rule: only those musical works for which a phonorecord "have been distributed to the public in the United States under the authority of the copyright owner" were subject to the statutory license. 17 U.S.C. § 115(a)(1); Copyright Law Revision, H.R. Rep. No. 94-1476, at 107-08 (Sep. 3, 1976) (the "1976 House Report"). The issue of what works were subject to the license was described as "the most controversial issue in the 1909 act" (at least with respect to the mechanical license). 1976 House Report at 107. Conversely, Congress decided that, before a musical work was recorded and distributed to the public, a record company could not record or distribute it under section 115.

The NPRM declares that the digital transmission of a public performance of a song creates phonorecords and constitutes a distribution of those phonorecords to the public. The unavoidable consequence of that logic is that if a composer authorizes a digital public performance of a musical work that has never been recorded, that composer will also have authorized the creation and distribution of phonorecords of the work. Simply appearing in the studio of a digital transmission service, and performing a new song, the songwriter will have yielded any rights to control first recording and distribution of the song. That is not what Congress intended or provided. The NPRM is inconsistent with the language and intent of section 115.

3. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled with Section 110 of the Copyright Act or with the Fundamental Principle of Publication.

As mentioned above, section 110 provides numerous exemptions from the public performance and display rights. These exemptions include, among others, an exemption for

---

[6] For example, the Comments of the Consumer Electronics Association and Clear Channel Communications, Inc., noted that:

> it defies credulity to suggest that Congress intended that a streamer, having secured the performance right by statutory license or statutory exemption, would nevertheless be required to negotiate with each sound recording copyright owner to secure the right to cause "incidental phonorecords" in the transmission stream and in the receiving device.

Comments of Consumer Electronics Assoc. and Clear Channel Communications, Docket No. RM 2000-7 (April 23, 2001) (hereinafter CEA/Clear Channel Comments) at 6; *accord* NAB Reply Comments at 9.

performances made by digital transmissions used in digital distance education, 17 U.S.C. § 110(2), performances made upon the receipt of digital transmissions by licensed radio stations, *id.* § 110(5), and performances made in the course of a transmission specifically designed for and primarily directed to the blind or other handicapped persons, *id.* 110(8). Each of the underlying transmissions, when made digitally, requires buffering at the receiving device. Under the logic of the NPRM, the transmitting person would be engaging in causing the making of a reproduction and distribution, and the receiving person would be causing the making of a reproduction. Yet, nothing in these exemptions applies to the reproduction or distribution rights. In other words, under the logic of the NPRM, the exemptions could be rendered a nullity. Instead of benefitting from an exemption, the intended beneficiary would be subject to liability under either the reproduction right, the distribution right, or both. That result cannot be reconciled with section 110.

Nor can the NPRM be reconciled with the statutory definition of "publication." Publication is defined as the "distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership," but the Act expressly provides that "a public performance or display of a work does not of itself constitute publication." 17 U.S.C. § 101 (emphasis added). Under the NPRM's construction of section 115, every digitally transmitted public performance of a work would also constitute a distribution to the public of that work. That would appear to lead to the conclusion, contrary to the plain meaning of the definition, that every public performance by digital transmission would constitute publication.[7] In other words, the NPRM directly conflicts with the mandate of the statute providing that public performance is not, of itself, publication.

Moreover, such a conclusion could have profound effects for Copyright Office registration practices and for substantive issues such as the availability of statutory damages and attorneys' fees in cases of infringement. Today, works performed by digital transmission but not otherwise distributed may be considered unpublished. Under the NPRM, they would need to be registered as published works. They could not be included in an unpublished collection, significantly increasing the costs and administrative burdens of registration for many types of works for both copyright owners and the Copyright Office. Such a construction would trigger the mandatory deposit requirement for works that were never intended to be published within the meaning of that provision. Further, the scope of the work would depend on the "unit of publication," which would become the "unit of performance." Substantively, such a rule would potentially expand the scope of statutory damages and attorneys' fees, perhaps a good result for some and a bad result for others, but not one to be effected by this NPRM. More fundamentally, the NPRM could change which works fall within the scope of U.S. copyright law, as section 104 bases decisions as to national origin on whether or not the work was published and where and when it was first published.

[7] In some cases, it could be argued that the distribution coincident with a public performance was not by "sale or other transfer of ownership." But this would be difficult in any case in which the performance was sold, and, in any event, the Proposed Rule would introduce new-found ambiguity into prior decisions that works either were, or were not, published.

In other words, the NPRM threatens to turn settled principles of copyright law on their head. The Proposed Rule should not be adopted.

4. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Easily Be Reconciled with Chapter 10 of the Copyright Act.

Another example of where the Proposed Rule's conflation of reproduction and performance cannot easily be reconciled with existing law is found in chapter 10 of the Copyright Act, the Audio Home Recording Act of 1992. That Act imposes certain obligations on the manufacturers and distributors of "digital audio recording devices," including the obligation to pay royalties upon the distribution of the device and the obligation to apply specified content protection technology to the device. 17 U.S.C. §§ 1002 (incorporation of copying controls), 1003 (obligation to make royalty payments). The NPRM's proposal to construe digital performance buffers as "phonorecords" implicating the reproduction right could mean that all devices used to receive performances by digital transmission, including all HD radios, are digital audio recording devices subject to the obligations of the AHRA. An interpretation of law leading to such a result would not be one that construed the provisions of the Copyright Act as a harmonious whole, in violation of fundamental principles of statutory construction. *See supra* Section II.B.1. Moreover, the failure of the NPRM to address this issue, which was called to the attention of the Copyright Office in comments in this docket, see CEA/Clear Channel Comments at 6, 8, is arbitrary and capricious.

Section 1001 defines "digital audio recording device" in relevant part as "any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use." A digital audio copied recording, in turn, is a "reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission." If a buffer created in a receiving device is a reproduction, it would appear to create troubling arguments that a device that is designed or marketed primarily to receive transmitted digital performances of music meets the definition of "digital audio recording device." Under the logic of the NPRM, the buffer could be construed to be a digital recording function—it makes digital reproductions,[8] the device is distributed to individuals for private use, and the reproductions are of digital musical recordings from a transmission.

Such a result is inconsistent with the AHRA. The purpose of the AHRA was to address consumer home recording, not listening at home in real time to digitally transmitted performances. *See, e.g.,* Audio Home Recording Act of 1991, S. Rep. No. 102-294, at 30 (1992) ("The purpose of S. 1623 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use."); Audio Home Recording

[8] It may be argued that not all "reproductions" are "recordings" and that the latter entails a greater degree of permanence or separate identity. However, this is likely to be a controversial issue, the result is not at all clear from the NPRM, and the Office has provided no guidance on how to reconcile its Proposed Rule with the AHRA.

Act of 1992, H.R. Rep. No. 102-873 Part I, at 11-12 (1992) (discussing history of controversy over copyright status of home recording). Yet the language and history of the AHRA make clear that Congress considered the effect of digitally transmitted performances on AHRA obligations. *See, e.g.*, 17 U.S.C. § 1001(1) (defining "digital audio copied recording," in part, as a recording made from a transmission); S. Rep. No. 102-294, at 66 (1992) ("[D]igital broadcast and cable transmissions generally will be recordable by consumers, but second generation digital copies will not be able to be made from those first generation copies."). The logical conclusion is that Congress, in enacting the AHRA, did not understand digital performance buffers to be cognizable reproductions. The NPRM's conclusion, which is directly to the contrary, would be inconsistent with Congress' conclusion in enacting the AHRA.

5. Construing All Digital Performances To Implicate Reproduction and Distribution Rights Cannot Be Reconciled with the Legislative History of Section 115.

The legislative history of the DPRA further makes clear that Congress did not intend to conflate performance rights with reproduction and distribution rights in the manner that the NPRM does. The Senate Report expressly states

> The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD's. The intention is not to substitute for or duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers.

Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128, at 37 (1995) (emphasis added). The NPRM's conclusion that all digital performances also entail a distribution and reproductions would contravene this intention by "duplicat[ing] performance rights in musical works."

C. The Proposed Rule Is Contrary to the Express Language of Section 115 Excepting Real-Time, Non-Interactive Transmissions from the Definition of DPD.

The Copyright Office also commits legal error in its conclusion that non-interactive digital performances are not expressly excluded from the definition of DPD. That definition provides that "[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). The plain intent of this provision was to make clear that non-interactive performances were not DPDs. The NPRM's attempt to subject non-interactive performances to a DPD right is contrary to law and violates fundamental principles of statutory construction.

The NPRM declares that "no participant offered any evidence or argument that streaming music services. . . are able to operate in a way in which 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." NPRM at 40,807. Thus, according to the NPRM, the exclusion contained in the last sentence is not applicable to any type of transmission. That, of course, would read the sentence out of the law, at least under current technology—the technology known to Congress when it enacted the definition of DPD. Such a result is contrary to a fundamental principle of statutory construction—a statutory provision should not be construed in such a way as to read it out of the law. *See Cartoon Network* at *6.

Under the NPRM, the exclusionary sentence can *never* take effect or have meaning. By definition, if the transmission does not create a phonorecord at the transmission recipient, there can be no DPD. 17 U.S.C. §115(d) (a DPD requires the "delivery" of a "phonorecord"); NPRM at 40,807-08. If there is no DPD because no phonorecord has been delivered, the last sentence exclusion for real-time, non-interactive transmissions is not required and is not reached. On the other hand, if the transmission does create a phonorecord through buffering at the receiving device, under the logic of the NPRM, the condition on the last sentence—that there be no buffer made on the recipient's device—would fail, and the exclusion would not apply. In short, the NPRM construes the sentence in a way that creates a logical nullity. Such a construction is improper and contrary to law.

D. The NPRM Misconstrues the "Primary Purpose" and "Specifically Identifiable" Requirements of the Section 115 License, Leading to a Result that is Contrary to Law.

The Copyright Office's efforts to find the section 115 statutory license available for server copies and performance buffers, while suggesting that the license is not necessary and should be available for a nominal cost are laudable. Regrettably, however, the contortions that the NPRM must undertake to reach that conclusion is further evidence that section 115 does not address performances, or copies or phonorecords (if any) that may be necessary to make such performances.

The NPRM strains in two respects to reach the determination that section 115 applies to performance buffers and server copies—concluding that the primary purpose in making server and buffer "phonorecords" is "to distribute them to the public for private use," and that "specifically identifiable" should be construed with reference to the transmission recipient or the recipient's device. NPRM at 40,809-10. Neither conclusion fits comfortably with a reasonable construction of the statute, as the Register herself recognized in testifying that "[c]haracterizing streaming as a form of distribution is factually and legally incorrect and can only lead to confusion." The Register's May 16, 2006 SIRA Testimony at 6.

1. The Primary Purpose of Buffers and Server Copies Used To Effectuate Public Performances Is To Effectuate Public Performances, Not To Distribute Phonorecords.

The NPRM recognizes that, for the section 115 statutory license to apply, the "primary purpose in making phonorecords [must be] to distribute them to the public for private use." 17 U.S.C. § 115(a)(1); NPRM at 80,811. The NPRM provides little analysis, saying only that DPDs, by virtue of having been delivered, are "distributed, within the meaning of copyright law." NPRM at 40,811. That, however, expresses a legal conclusion that is near a tautology (DPD = distribution), and says nothing about the primary purpose of the "distribution." The NPRM then goes on to focus on the second clause, concluding that the primary purpose is to facilitate "private use" of the phonorecord.

The first step of the NPRM's analysis all but reads the "primary purpose" requirement out of section 115. By definition, a DPD is distributed, so it could be argued that a primary purpose in making the DPD is to distribute it. But that ignores the fact that, even if the buffer is a DPD, the primary purpose of making the DPD is not to "distribute" anything, but as an essential step in the effectuation of a performance. In the Register's own words, before Congress: "A stream does not . . . constitute a 'distribution,' the object of which is to deliver a useable copy of the work to the recipient; the buffer and other intermediate copies or portions of copies that may temporarily exist on a recipient's computer to facilitate the stream and are for all practical purposes useless (apart from their role in facilitating the single performance) and most likely unknown to the recipient simply do not qualify." The Register's May 16, 2006 SIRA Testimony at 5-6 (emphasis added).

2. The "Specifically Identifiable" Limitation Must Be Construed by Reference to Legislative History and the Structure of Section 115.

The NPRM's construction of the "specifically identifiable" limitation on the definition of DPD also violates basic principles of statutory construction and is contrary to law. The NPRM rejects crystal clear legislative history that contradicts the Copyright Office's conclusion, ignores the contrary implications of the structure of section 115, and reasons that the statutory text itself is sufficiently "plain" that there is no basis for looking beyond that text. NPRM at 40,809. In fact, the statutory text standing alone includes a phrase that is "unique in copyright law," NPRM at 40,809, and cannot be described as plain; it is susceptible to multiple constructions. Further, the phrase "specifically identifiable" has no recognized meaning or context. The plain meaning of the phrase only emerges upon consideration of the relevant Committee Report and the statutory structure and context—and that meaning plainly is contrary to the conclusion reached in the NPRM.[9]

Section 115 defines "digital phonorecord delivery," in relevant part, as "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a

[9] The NPRM's citation of *Caminetti v. United States*, 242 U.S. 470, 485 (1917), is inapposite. *Caminetti* was limited to cases "[w]here the language is plain and admits of no more than one meaning," and where "[t]here is no ambiguity in the terms of this act." *Id.* (emphasis added). That is not this case.

specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording." 17 U.S.C. § 115(d). It is clear from the text that the "reproduction" must be "by or for any transmission recipient," but, contrary to the NPRM's attempted construction (at 40,809), there is absolutely nothing in the sentence that links the prior adjectival clause—"specifically identifiable"—to the transmission recipient. In fact, the structure of the sentence is identical to other common sentences in which it is clear that the referent for the prior adjective is not the person identified following the adjective. For example, it is clear that the phrase "an instantly recognizable painting by Picasso," does not mean to say that the painting is "instantly recognizable" by Picasso. Similarly, when contemplating a "completely indigestible dinner by Chef Boyardee" is it not the good chef who will have trouble with his digestion, and in "a well-respected lawyer for the defendant," it is not the defendant doing the respecting. In the sentence at issue here, it is equally plausible to construe the "specifically identifiable" phrase as referring to the transmitting service.

Where statutory language is subject to multiple interpretations, that langauge should be construed by reference to the legislative intent and the overall structure of the statutory provision. *See, e.g., Muniz v. Hoffman*, 422 U.S. 454, 468 (1975) (statutory section "may not be read isolated from its legislative history and the revision process from which it emerged, all of which place definite limitations on the latitude we have in construing it."); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 642 (1990) (where statutory language is not dispositive, issue turns "on the intent of Congress as revealed in the history and purposes of the statutory scheme.").

The Copyright Office itself has relied upon the validity of this principle and recognized the importance of the DPRA Senate and House Reports in construing the DPRA—the very act at issue here. In the Office's own words, where two interpretations of statutory language are both plausible: "the Office turns to the relevant legislative history in order to understand how Congress intended the law to operate. Turning to the legislative history is appropriate where, as here, the precise meaning is not apparent and a clear understanding of what Congress meant is crucial to an accurate determination of how Congress intended the digital performance right and the statutory scheme to operate." *Final Rule, Public Performance of Sound Recordings: Definition of a Service*, 65 Fed. Reg. 77,292, 77,298 (Dec. 11, 2000). In particular, the Office stated that "we place great weight on the passages in the 1995 House and Senate Reports." *Id.* at 77,298 (emphasis added).

In this case, those very reports, as well as the structure and context of the 1995 DPRA, make clear that "specifically identifiable" refers to identification by the transmitting service. The Senate and House Committee Reports on the DPRA (the "1995 House and Senate Reports") both expressly addressed the textual ambiguity in the term "specifically identifiable" and, as the NPRM recognizes (at 40,809), clarified the term in a manner directly incompatible with the construction proposed in the NPRM. In fact, the Senate Report makes clear that the Judiciary Committee thought that the construction proposed by the NPRM was, itself, so contrary to common sense that it was dismissed with a backhanded "of course" that it did not mean what the NPRM proposes:

> The Committee notes that the phrase "specifically identifiable reproduction," as used in the definition, should be understood to

> mean a reproduction specifically identifiable to the transmission service. Of course, a transmission recipient making a reproduction from a transmission is able to identify that reproduction, but the mere fact that a transmission recipient can make and identify a reproduction should not in itself cause a transmission to be considered a digital phonorecord delivery.

Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 104-128, at 44 (1995); *accord* Digital Performance Right in Sound Recordings Act of 1995, H.R. Rep. No. 104-274, at 30 (1995) (same, without the words "of course" and other minor word differences).

Further, the NPRM's construction of "specifically identifiable" is inconsistent with the structure of the section 115 statutory license and the context in which Congress acted in 1995. Under the statutory license, "the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license." 17 U.S.C. § 115(c)(2) (emphasis added). At the time of enactment, the mechanical license fee had long been based on a penny rate per distributed phonorecord, and that structure was adopted by the DPRA for the period through December 31, 1997. *See, e.g., id.* §§ 115(c)(2), 115(c)(3). It would make no sense to attempt to charge a transmitting service for digital phonorecord deliveries on a per-DPD basis unless the transmitting service could specifically identify all DPDs for which it was responsible. The idea that a DPD might not be "specifically identifiable" by the service, but that the service might nevertheless be liable, because the DPD was "specifically identifiable" by the recipient's computer, is a nonsensical construction given the context of the 1995 Act.

III. The Proposed Rule Is Bad Policy.

The Copyright Office's desire to create a "safe harbor" against claims that digital performances infringe reproduction and distribution rights, while laudable, is not good public policy. First, the NPRM relies on hyper-technical distinctions to greatly expand the reproduction and distribution rights beyond their natural, economically rational boundaries. Such expansion will hinder the development of the digital economy, and make it even more difficult than it already is for legitimate digital services to develop.

Second, the section 115 license, which the NPRM seeks to make available, is antiquated, administratively burdensome, and is not a workable alternative for many, if not most, services that make performances by digital transmission. Far better answers, advanced by the Copyright Office in earlier statements, are (i) legislative exemption of server copies used to make digital performances coupled with legislative clarification that buffers do not create phonorecords, or (ii) clearly established principles that such server copies and buffers have no economic value apart from the value of the performance and are fair use. Regrettably, by seeking to make section 115 available, the NPRM preempts legislative action and, worse, could undermine fair use claims.

In an attempt to solve a narrow issue related to server copies of musical works, the NPRM creates a potentially greater question regarding buffers.

A. The NPRM's Expansion of the Reproduction and Distribution Rights Beyond Economically Rational Boundaries Will Interfere with the Development of Legitimate Digital Services.

Historically, the bundle of copyright rights matched the common sense different means by which a work could be exploited. Thus, the making of a public performance required a license to make the performance; the reproduction and distribution of copies required licenses for those rights. In the rare cases where a single economic activity incidentally required the exercise of multiple rights, the law either provided an exemption (*e.g.*, the section 112(a) ephemeral recording exemption for copies made solely to facilitate performances), or the existence of a single licensor and licensing regime obviated any inefficiency, and led to a unitary payment to a single payee.

When the economic activity is a performance—in other words, the transmission of a work in real time in order to provide a real-time listening experience for the recipient—and that performance is licensed, the copyright owner is fully compensated for the use of his or her work by the fees it receives for the performance. The mere fact that the technology chosen to make the performance, or the device that receives the performance, incidentally operates by reproducing all or parts of the performed work in order to effectuate the performance adds no value to the recipient or to the transmitter beyond the value of the performance; it should not create added liability. Any other approach would cause mass confusion, inhibit the providing of new, desirable products and services to consumers, and result in unwarranted duplicative claims by the same copyright owner for the same use of the same work. If copyright law is to move smoothly into the new Millennium and onto the Internet, it must be construed in accordance with a common-sense view of economic reality.

B. Treating Performance Buffers as Distributed Phonorecords Does Not Provide a Safe Harbor Against Claims of Infringement, Because the Section 115 Statutory License Is Antiquated and Unworkable.

The section 115 statutory license is not a realistic solution to concerns created by over-reaching claims that digital performances implicate reproduction and distribution rights. As the Copyright Office repeatedly has recognized, the section 115 license is an antiquated license, rooted in the physical distribution of recordings, is administratively burdensome, and has never served as a viable option, even for those seeking to use the license as it was originally envisioned.

In testimony before the Senate Judiciary Committee, Register Peters has described the section 115 license as "an antiquated statutory scheme" that is "not up to the task of meeting licensing needs of the 21st Century." *Music Licensing Reform: Hearings Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (July 12, 2005) (Statement of Marybeth Peters, Register of Copyrights) ("The Register's July 12, 2005 Testimony"). Register Peters made clear that, among other reasons, due to the inefficiencies and administrative burdens imposed by the license, the use of the section 115 license, "other than as a de facto ceiling on privately negotiated rates, has remained at an almost non-existent level." *Id.* According to Register Peters, "[t]here is no debate that section 115 needs to be reformed." *Id.*

Three weeks earlier, before the House Intellectual Property Subcommittee, the Register described the section 115 license as "outdated" and suffering from "fundamental problems." *Music Licensing Reform: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. at 1 (June 21, 2005) (Statement of Marybeth Peters, Register of Copyrights). Further, the Register acknowledged that "those problems—based in the statutory framework—are beyond my power to cure by regulation." *Id.* at 4.

The problems with section 115 as a workable statutory license have been well documented. *See generally* The Register's July 12, 2005 Testimony (discussing difficulties encountered "under this antiquated statutory scheme"). They include the difficulties engendered by the need to identify, and then search Copyright Office records to locate and notify, the copyright owner of each musical work to be distributed before the work is distributed, 17 U.S.C. § 115(c)(1); 37 C.F.R. § 201.18, the obligation to make payments for each phonorecord that has been "distributed," 17 U.S.C. § 115(c)(2), the obligation to make payments directly to each copyright owner that has been located, *id.* § 115(c)(6), and the obligation to provide monthly and annual statements of account to each, *id.* § 115(c)(5); 37 C.F.R. § 201.19.

Jonathan Potter, the Executive Director of the Digital Media Association, confirmed these problems, testifying that the section 115 "license clearance process is so cumbersome as to be dysfunctional." *Section 115 of the Copyright Act: In Need of Update?": Hearings Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong., at 4 (Mar. 11, 2004) (Statement of Jonathan Potter, Executive Director, Digital Media Association). He observed that "[f]inding copyright owners can be almost impossible" given that "[o]nly about 20 percent of musical works are registered in the Copyright Office" and that "[f]or pre-1978 works, copyright owner information is available only on card files that must be searched manually in the Copyright Office on a song-by-song basis." *Id.* He also noted that "[i]f a copyright owner is identified, the licensee must notify the owner using a 2-page form for each individual composition, and send the form and then monthly statements of use and royalty checks by certified or registered mail." *Id.* Thus, "[t]he process of identifying and providing notice to a copyright owner, or determining that notice is not possible because there is no registration data or the data is incorrect, might take several weeks per copyright." *Id.* at 5.

More recently, Register Peters confirmed that the "Section 115 compulsory license remains a dysfunctional option for licensing the reproduction and distribution of musical works." *Reforming Section 115 of the Copyright Act for the Digital Age: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. at 2 (Mar. 22, 2007) (Statement of Marybeth Peters, Register of Copyrights). The Register candidly acknowledged that "[r]egulatory changes . . . cannot address the inherent problems with the statutory license. . . . Congress must take action and make the necessary structural changes." *Id.*

It makes no sense to stretch the law beyond recognition to provide as a putative "safe harbor" a form of license that simply does not work. It particularly makes no sense to do that when the Register has acknowledged that regulatory changes cannot solve the problems with section 115. Such a "safe harbor" does more harm than good.

C. Treating Performance Buffers as Distributed Phonorecords Risks Undermining Fair Use Claims.

The Copyright Office recognized in its Section 104 Report, and in subsequent testimony, that the best response to double-dipping claims by music publishers that digital performances implicate reproduction and distribution rights is legislation making clear that they do not. *See, e.g.,* DMCA Section 104 Report at 142-46; The Register's May 16, 2006 SIRA Testimony at 5-6; *Reforming Section 115 of the Copyright Act for the Digital Age: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong., at 3 (Mar. 22, 2007) (Statement of Marybeth Peters, Register of Copyrights) ("[I]t may well be advisable to amend the law to . . . provide that when a digital transmission is predominantly a public performance, any reproductions made in the course of transmitting that performance will not give rise to liability.").

Absent legislation, the best response is administrative recognition that the buffers used to make such performances have no independent economic value and should be viewed as fair use. DMCA Section 104 Report at 142-45; The Register's July 12, 2005 Testimony at 11 ("An online music service that engages in streaming under a license of the performance right should not be required to pay as well for the right to make the buffer and cache copies that are incidental to the performance that is being streamed."); Dec. 12, 2001 Statement of Marybeth Peters at 21-22 (performing fair use analysis and concluding that on balance, "the equities weigh heavily in favor of fair use"); *Section 115 Compulsory License: Hearings Before the Subcomm. on Courts, The Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong., at 11 (Mar. 11, 2004) (Statement of Marybeth Peters, Register of Copyrights) ("[T]here should be no liability for the making of buffer copies in the course of streaming a licensed public performance of a musical work."). Server copies used to make digital performances similarly have no independent economic value and should be subject to a legislative exemption, or should be viewed as fair use. *See, e.g.*, DMCA Section 104 Report at 144 & n.434 (ephemeral recordings used solely to effectuate performance have no independent economic value; section 112(e) statutory license "can best be viewed as an aberration").

The Copyright Office goes to significant lengths to make clear in the NPRM that it does not intend to undermine such fair use claims. NPRM at 40,805 (taking "no position" on "whether and when it is necessary to obtain a license to cover the reproduction and distribution of a musical work in order to engage in activities such as streaming"). Unfortunately, however, the availability of the section 115 license is likely to lead to publisher arguments that may make a fair use defense more difficult to sustain than it otherwise would be.

Courts have held that the existence of a license structure weighs against a fair use claim. *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930-31 (2d Cir.1994) (finding it "sensible" that a particular use "should be considered 'less fair' when there is a ready market or means to pay for the use"); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1387 & n.4 (6th Cir. 1996) ("Although not conclusive, the existence of an established license fee system is highly relevant.") (quoting *Am. Geophysical Union*). While the Copyright Office's notice seeks to make clear that such an effect is not intended here, a court could rule otherwise.

Conclusion: There Is No Basis To Adopt the Proposed Rule

The foregoing demonstrates that any rule relating to performance buffers is contrary to law and bad policy. Further, even beyond issues related to performance buffers, the Proposed Rule also depends on the conclusions that reproductions created in receiving devices are for the "primary purpose" of distribution and need only be "specifically identifiable" "for" the recipient by the recipient's device, both of which are erroneous. Thus, there is no basis to adopt the Proposed Rule as to even more lasting reproductions that may be made in the course of performances. Finally, the Proposed Rule is beyond the authority of the Copyright Office. For the foregoing reasons, the Copyright Office should not adopt the Proposed Rule.

Respectfully submitted,

Bruce G. Joseph
Matthew J. Astle
WILEY, REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
202-719-7258
Counsel for National Association of Broadcasters

August 28, 2008