Internet Commerce Coalition

Reply Comment Letter
RM 2000 7
No. 6

Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress

Notice of Proposed Rulemaking	)
	)
	)
Docket No. RM 2000-7	)
	)
Compulsory License for Making and	)
Distributing Phonorecords, Including	)
Digitial Phonorecord Deliveries	)
	)
	)

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GENERAL COUNSEL OF COPYRIGHT

REPLY COMMENTS OF INTERNET COMMERCE COALITION

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September 15, 2008

On behalf of the Internet Commerce Coalition, we write to offer reply comments to the Copyright Office's Notice of Proposed Rulemaking (the "Proposed Rule") regarding the compulsory license provisions under 17 U.S.C. § 115.

The Internet Commerce Coalition (ICC) consists of many of the nation's leading Internet Service Providers, electronic commerce websites, technology companies, and technology trade associations.

The ICC is deeply concerned that the Proposed Rule would have the unintended consequence of stymieing growth in the still-nascent marketplace for the digital transmission of phonorecords. Buffer copies that embody sound recordings play a critical role in the transmission of lawful content to paid subscribers of video and music services. The ICC agrees with Verizon that buffer copies do not constitute a "phonorecord" under the Copyright Act that would implicate rights enumerated under the Copyright Act.

Under the Copyright Act, a "phonorecord" is defined to mean "material objects in which sounds are...fixed." 17 U.S.C. § 101. A sound is "fixed" under the Act where "its embodiment in a copy or phonorecord...is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* In its statutorily mandated report under the Digital Millennium Copyright Act (DMCA), however, the Copyright Office opined that "[u]nless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated, the making of that copy should fall within the scope of the copyright owner's exclusive rights." U.S. Copyright Office, *DMCA Section 104 Report 111* (August 2001). The Copyright Office also embraces this view in the Proposed Rule, which notes that "the Section 104 Report stated that 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." 73 Fed. Reg. at 40808.

The Act, however, in delineating the precise contours of the phrase "transitory duration," does not distinguish between works that are *capable* of being reproduced and those that are not. The Proposed Rule thus conflates the separate and distinct criteria for determining whether a work is fixed by treating them as one and the same. Under the Proposed Rule, the mere fact that a phonorecord is capable of being reproduced invariably leads to the conclusion it is sufficiently permanent or stable for more than a transitory duration. This is true even under circumstances where the ephemeral existence of the phonorecord (as is the case with buffer copies) is necessary for the transmission of lawful content for which copyright owners are fully compensated.

Notably, the Second Circuit recently rejected the Copyright Office's interpretation of the term "transitory duration" in this context. *See Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). In *Cartoon Network*, the Second Circuit observed that the problem with the Copyright Office's interpretation of this term in its DMCA report "is that it reads the 'transitory duration' language out of the statute." *Id.* at 129. Although the court recognized that the proper delineation of the term "transitory duration" is necessarily contextual and fact-intensive, it eschewed the promulgation of a legal rule that would define "transitory duration" in a way that effectively deprived it of its temporal quality.

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Not only is the classification of buffer copies as phonorecords inconsistent with the Act, but this classification would have profound, adverse consequences for the young market for delivery of lawful content. As a practical matter, the Proposed Rule would complicate the ability of legitimate subscription services to obtain appropriate licenses, increase costs to both services and consumers, and risk driving consumers to alternative, unlawful distribution channels for content that would otherwise be purchased through legitimate distribution channels.

In the absence of clarifying legislation, the Copyright Office should formally recognize that buffer copies possess no independent economic value. As Verizon notes in its comments, this is a view that the Copyright Office has explicitly embraced in the past. The ICC believes this is far and away the more prudent course of action for the Copyright Office to take in this proceeding.

As the Second Circuit recently observed, the Copyright Office's pronouncement regarding the meaning of "transitory duration" in its DMCA report does not have the force of law, and, as a result, is only entitled to "*Skidmore* deference, deference based on its 'power to persuade.'" *Cartoon Network*, 536 F.3d at 129. In light of both the Second Circuit's recent disagreement with the Copyright Office on this very issue, the ICC respectfully submits that the Copyright office should decline to adopt the Proposed Rule.

Sincerely,

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