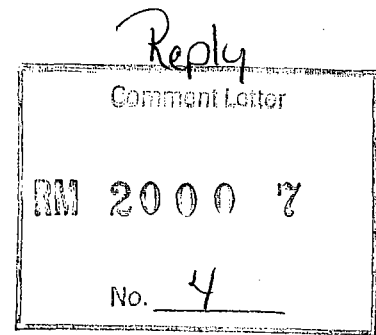


Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.



\_\_\_\_\_  
In the Matter of \_\_\_\_\_ )  
\_\_\_\_\_) )  
Compulsory License for Making and \_\_\_\_\_ )  
Distributing Phonorecords, Including \_\_\_\_\_ )  
Digital Phonorecord Deliveries \_\_\_\_\_ )  
\_\_\_\_\_ )

Docket No. RM 2000-7

**REPLY COMMENTS OF THE  
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.**

The Recording Industry Association of America, Inc. (“RIAA”) submits these reply comments in response to the Copyright Office’s Notice of Proposed Rulemaking (“NPRM”) regarding the application of the mechanical compulsory license set forth in 17 U.S.C. § 115 to certain digital phonorecord deliveries (“DPDs”). *See* 73 Fed. Reg. 40,802 (July 16, 2008); 73 Fed. Reg. 47,113 (August 13, 2008).

In its initial comments in response to the NPRM, RIAA urged the Office to adopt regulations that are consistent with the emerging industry consensus that under current law –

- the process of interactive streaming of sound recordings of musical works involves the making of incidental DPDs that are licensable under 17 U.S.C. § 115;
- licenses for DPDs under 17 U.S.C. § 115 include the right to make necessary server, cache, network and RAM buffer copies; and
- reproduction/distribution licenses from copyright owners of musical works are not required to engage in the process of noninteractive streaming, including the making and/or transmission of server, cached, network and RAM buffer copies necessary to engage in such activity.

The initial comments submitted by the Digital Media Association (“DiMA”) and by the National Music Publishers’ Association, Songwriters’ Guild of America, Nashville Songwriters

Association International and Association of Independent Music Publishers (the “Publisher/Songwriter Groups”) make clear that a definition of the term “digital phonorecord delivery” or other rules along the lines proposed by RIAA would in fact reflect broad agreement among the most affected industries concerning a permissible interpretation of Section 115. Adopting such rules would also help bring clarity to the digital music marketplace and hence promote its development.

The initial comments of others neither present a convincing case against the Office’s adopting an interpretation of Section 115 in this proceeding nor urge a more compelling interpretation than that advanced by RIAA, DiMA and the Publisher/Songwriter Groups. Accordingly, RIAA continues to urge the Office to adopt regulations as described in its initial comments.

**I. The Office Has Authority to Issue Regulations Consistent with RIAA’s Initial Comments.**

Several commenters have argued that the Office lacks the authority to promulgate the rule proposed in the NPRM (the “Proposed Rule”).<sup>1</sup> By extension, they presumably would argue that the Office lacks authority to adopt the rule proposed by RIAA. Seeking to construe the Proposed Rule as “a substantive rule of copyright law, not a matter of administration of the functions and duties of the Copyright Office,” Verizon Comments at 3, these commenters suggest that Congress has not granted the Office any statutory authority for its actions. These

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<sup>1</sup> Comments of CTIA – The Wireless Association (“CTIA Comments”), at 3-4; Comments of the National Association of Broadcasters (“NAB Comments”), at 3-6; Comments of Verizon Communications (“Verizon Comments”), at 2-5.

comments misapprehend the limited nature of the Proposed Rule and the delegation of authority that Congress has made to the Office to adopt such rules.<sup>2</sup>

**A. Both the Proposed Rule and RIAA's Proposal Are Well Within Congress' Delegation of Rulemaking Authority to the Office.**

As RIAA explained at length in its initial comments in this docket, *see* Comments of the Recording Industry Association of America, Inc. (Apr. 23, 2001), at 25-28, the Office plainly has the authority to issue regulations interpreting Section 115 within the context of the definition of DPD proposed by the Office, or the regulations proposed by RIAA.

Section 115 contains two specific grants of regulatory authority that are relevant here. Section 115(b)(1) specifies that notices of intention “shall comply, in form, content, and manner of service, *with requirements that the Register of Copyright shall prescribe by regulation.*” (Emphasis added.) In addition, Section 115(c)(5) specifies that the Register “shall prescribe regulations under which detailed cumulative annual statements of account . . . shall be filed for every compulsory license under this section.”<sup>3</sup> The Office has long had regulations adopted pursuant to these delegations. *See* 37 C.F.R. §§ 201.18, 201.19.

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<sup>2</sup> While RIAA believes that the Office has the authority to interpret Section 115 within the context of its regulations concerning notices of intention and statements of account at any time, DiMA's practical concerns about the timing of this proceeding have merit. *See* DiMA Comments at 2-4. Because a rule cannot now be adopted in this proceeding earlier than a few days before the decision in the Section 115 rate proceeding pending before the Copyright Royalty Judges, any rule adopted at this time other than one along the lines proposed by RIAA is likely to be disruptive and prejudicial to the parties to that proceeding.

<sup>3</sup> Notably, the Verizon Comments state that “[t]he only statutory provision cited in the NPRM as evidence of the purported delegation of regulatory authority is 17 U.S.C. § 702.” Verizon Comments, at 3. That is simply false. The NPRM very specifically relies on Sections 115(b)(1) and (c)(5) as well. *See* 73 Fed. Reg. at 40,806. Even absent these specific grants, the more generalized delegation in Section 702 of the Copyright Act might well be sufficient to authorize the Proposed Rule.

Carrying out Congress' mandate to implement the Copyright Act's various compulsory licenses necessarily requires the Office to interpret those licenses, as it proposes to do here.<sup>4</sup> As the NPRM rightly noted, regulatory provisions similar to those proposed here were considered by the District of Columbia Circuit in *Cablevision Systems Development Co. v. MPAA*, 836 F.2d 599 (D.C. Cir. 1988). Other comments argue that *Cablevision* is inapplicable because it relied primarily on a grant of authority within Section 111, making it inapplicable to the compulsory license under Section 115. But *Cablevision* is not so easily dismissed. The Section 111 compulsory license requires that in order to avail themselves of the right to make secondary transmissions of broadcast networks, cable systems must "deposit" with the Register, "in accordance with requirements that the Register shall prescribe," a "statement of account" as well as a royalty fee defined as a certain percentage of "gross receipts." 17 U.S.C. § 111(d)(1)(A)&(B). Disputing the Register's interpretation of the term "gross receipts," the cable companies contended that the Register's rulemaking power was "limited to the ministerial task of designing forms" and did not extend to the power to define the substantive terms at issue in the statute. 836 F.2d at 608.

The D.C. Circuit rejected this argument, for a number of reasons. First, the D.C. Circuit reasoned, even the cable companies' interpretation of the Register's rulemaking power would not invalidate the rule, because "designing forms has a substantial policy component." 836 F.2d at 608. That conclusion alone could have ended the matter. But the court went on to note that

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<sup>4</sup> For example, Section 115(c)(2) provides that royalties are payable on all phonorecords of which the compulsory licensee has "voluntarily and permanently" parted with possession. Because that concept is fundamental to preparation of statements of account, the Office has long had regulations that define the term "voluntarily and permanently." See 37 C.F.R. § 201.19(a)(6)(ii). The concept of what is a DPD likewise is fundamental to what activity must be reported on notices of intention and statements of account, and the Office has no less authority to clarify the definition of that concept.

there were important practical reasons to recognize the Register's authority in this matter. Most importantly, "[t]he Copyright Office certainly has greater expertise in [these] matters than do the federal courts; and while watching over the cable industry may have been a novel brief for the Copyright Office when the new Act was passed, that agency has had time to accumulate experience." *Id.* at 608-09. Thus, the court reasoned, when faced with "several interpretations of ambiguous language which really involve competing policies among which Congress did not explicitly choose," it was appropriate to recognize the Copyright Office's "legitimacy in selecting . . . among those choices." *Id.* at 609.

All of these rationales apply squarely to the Section 115 compulsory license. First, the grants of regulatory authority specified in Sections 111 and 115 are essentially identical in wording. Where the Section 111 language grants the Register authority to regulate the "deposit" of "statements of account" and fees, 17 U.S.C. § 111(d)(1)(A) & (B), Section 115(b)(1) grants the Register authority to regulate the "fil[ing]" of "notices of intention," while Section 115(c)(5) authorizes regulations concerning the "fil[ing]" of "annual statements of account." There is no meaningful distinction between the applicable statutory language that could justify limiting the Register's authority in the Section 115 context relative to the Section 111 context. Second, even if the various Section 115 and Section 702 grants of regulatory authority applicable here were somehow limited to "designing forms" – and they are not – that action alone has a policy component under the *Cablevision* rule. 836 F.2d at 608. Finally, the D.C Circuit's assessment of the Copyright Office's relevant expertise in applying the compulsory license is of even greater applicability here, where the Section 115 compulsory license – and a role for the Office in administering it – have been in place, in one form or another, for nearly 100 years. In light of these principles, it is readily "apparent from the [Copyright Office's] generally conferred

authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the [Section 115 compulsory license].” *United States v. Mead*, 533 U.S. 218, 229 (2001).

**B. The Supreme Court’s Decision in *Gonzales v. Oregon* Does Not Negate the Office’s Authority.**

Other commenters argue that the Proposed Rule is foreclosed by the Supreme Court’s decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006). There is no merit to these suggestions.

In *Gonzales*, the question was whether the Controlled Substances Act gave the U.S. Attorney General the right to determine whether the use of controlled substances to assist suicide could be considered “a legitimate medical purpose.” Under the Act, doctors are permitted to authorize prescriptions for drugs only if they are “issued for a legitimate medical purpose.” 21 U.S.C. § 830(b)(3)(A)(ii). In addition, in order to issue prescriptions, they must obtain a registration with the Attorney General. 21 U.S.C. § 822(a)(2). Although the Act does not expressly grant the Attorney General the authority to determine what constitutes a “legitimate medical purpose,” the Act does give the Attorney General the authority to determine, by regulation, whether a particular physician’s registration is “inconsistent with the public interest.” 21 U.S.C. § 824(a)(4). Relying on that latter provision, the Attorney General issued a determination that assisting in suicide was not a “legitimate medical purpose” and thus, as such, the registration of any physician who would make such a prescription was “inconsistent with the public interest” and would not be permitted. *Gonzales*, 546 U.S. at 253-54. The Court found that the Attorney General’s use of the registration requirements as a vehicle for rendering a regulatory ruling about the scope of “legitimate medical purpose” was not entitled to *Chevron* deference. 546 U.S. at 269.

The *Gonzales* Court articulated several reasons for its ruling, each of which highlights the difference between that decision and the situation here. Most important, the regulatory authority claimed by the Attorney General was “inconsistent with the design of the statute” because it purported to inject the Attorney General into matters more properly overseen by other federal and state agencies. As the Court noted, the Act “allocates decisionmaking powers among statutory actors so that medical judgments, if they are to be decided at the federal level . . . are to be placed in the hands of the Secretary [for Health and Human Services].” 546 U.S. at 265. Noting the importance of “historical familiarity and policymaking expertise” in interpreting statutes, the Court concluded that “we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes” – a presumption which “works against a conclusion that the Attorney General has authority to make quintessentially medical judgments.” 546 U.S. at 266-67. Needless to say, that consideration is not applicable here, where the Copyright Office is clearly the administrative agency “in the best position” to interpret Section 115.<sup>5</sup>

The Court also found it notable that the Attorney General had failed to consider five specific factors that he was required to consider in deregistering physicians, 546 U.S. at 261, and found it “anomalous” for Congress to have restricted the Attorney General’s power to deregister physicians (by binding him to the five-factor test) while opening up the door for the Attorney General, by implication, “to declare an entire class of activity outside the course of professional practice.” 546 U. S. at 262. This, too, illustrates how different the context is here. Neither

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<sup>5</sup> Indeed, the Court in *Gonzales* was careful to limit its decision to the unique facts before it, stating that “[w]e need not decide whether *Chevron* deference would be warranted for an interpretation issued by the Attorney General concerning matters closer to his role under the [Controlled Substances Act].” 546 U.S. at 268 (emphasis added).

specific requirements of the Copyright Act nor structural limitations on the Register's power suggest that defining the term DPD is different from countless other judgments the Register has had to make in administering compulsory licenses. Moreover, the Office has expressly *disclaimed* any broad assertions about what conduct is, or is not, permissible under the Act.<sup>6</sup> Thus, the Proposed Rule is fundamentally unlike the provision at issue in *Gonzales*, and the position of the Register is fundamentally unlike the position of the Attorney General in *Gonzales*.

## **II. Regulations Consistent with RIAA's Initial Comments Are Not Contrary to Law.**

### **A. The *Cartoon Network* and *CoStar* Decisions Do Not Preclude Adoption of Regulations Consistent with RIAA's Initial Comments.**

Subsequent to the issuance of the NPRM, the Second Circuit issued a decision in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). That decision is at odds with authority from other courts as well as the Office, and RIAA disagrees with it. Various commenters argued that the regulations proposed by the Office in the NPRM are inconsistent with the *Cartoon Network* decision, as well as the Fourth Circuit's earlier decision in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004). The regulations proposed in the NPRM and by RIAA are not inconsistent with those decisions, and even if they were, the Office would not be obligated to defer to those decisions.

A number of commenters describe the *Cartoon Network* decision as if the court held that any reproduction in any kind of buffer is not "fixed" within the meaning of Section 101 of the

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<sup>6</sup> "The proposed regulatory changes *take no position with respect to whether and when it is necessary to obtain a license to cover the reproduction or distribution of a music work in order to engage in activities such as streaming.*" 73 Fed. Reg. at 40,805 (emphasis added).



Copyright Act and therefore is not a phonorecord.<sup>7</sup> The court held no such thing. Instead, the court was confronted with buffering that occurred in the very specific context of a cable operator's splitting a signal being transmitted from a cable network to the operator's subscribers and making a determination whether to retain in long-term storage a copy of the transmitted programming. The buffered material remained in memory for a period of no more than 1.2 seconds. 536 F.3d at 124-25. The court held that under those circumstances, buffering for 1.2 seconds was too brief to constitute a fixation, while suggesting that a copy resident in random access memory for minutes would or may be fixed. *See* 536 F.3d at 127-30.

The *CoStar* case involved a website to which users could upload photographs. In considering whether the operator of the website could be liable as a direct infringer for infringing photographs uploaded to the site, the court discussed at length the decision in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (holding that a finding of direct infringement requires volition on the part of the defendant). In the course of that discussion of *Netcom*, the *CoStar* court speculated concerning the liability of a hypothetical internet access provider offering a service very different from the one provided by the *CoStar* defendant. Without citation to relevant authority or any evident factual record on the point, the court found "additional support" for the holding in *Netcom* in an assertion that reproductions made within "an electronic infrastructure . . . designed and managed

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<sup>7</sup> *See* Comments of CTIA – The Wireless Association ("CTIA Comments"), at 5-6; Comments of Ad Hoc Coalition of Streamed Content Providers ("Google Comments"), at 15; Comments of the Electronic Frontier Foundation, Public Knowledge, Center for Democracy and Technology, Consumers Union, Consumer Federation of America, U.S. PIRG, and the Computer & Communications Industry Association ("Public Interest Comments"), at 5; NAB Comments, at 6-8; Verizon Comments, at 1, 6-7.

as a conduit of information and data that connects users over the internet” “would not appear to be ‘fixed.’” *CoStar*, 373 F.3d at 550-551 (emphasis omitted).<sup>8</sup>

Digital music services offering interactive streaming use technologies that are very different from the buffering practices at issue in *Cartoon Network*, and from the practices of the hypothetical internet access provider mentioned in *CoStar*'s discussion of *Netcom*. The *Cartoon Network* and *CoStar* cases do not address whether delivering interactive streams involves the reproduction of phonorecords. And because the *Cartoon Network* decision suggests that under the court's duration requirement the boundary of fixation lies between seconds and minutes, the decision does not indicate whether delivery of interactive streams involves the reproduction of phonorecords. Neither do these decisions construe the term “digital phonorecord delivery.” Accordingly, they simply do not answer the questions the Office sought to answer in the NPRM.

Even if these decisions spoke more directly to the questions before the Office in this proceeding, the Office would not be bound by those decisions. The *Cartoon Network* decision expressly rejects the Office's longstanding views concerning the fixation requirement, as articulated in the NPRM. See 536 F.3d 129. The *Cartoon Network* decision does not compel the Office to abandon its longstanding views.<sup>9</sup> Indeed, the whole point of so-called *Chevron*

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<sup>8</sup> Other commenters are incorrect to the extent that they suggest that *CoStar* involved claims against an internet access provider for buffering activity while serving as a conduit of information over the internet. See Verizon Comments, at 7-8.

<sup>9</sup> See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (“[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.”); *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996) (overruling prior Second Circuit decision in view of agency nonacquiescence in that decision); *Satellite Broad. & Communications Ass'n of Am. v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994) (upholding as “neither arbitrary, capricious, nor in conflict with the clear meaning of the statute” Copyright Office interpretation of Section 111 in conflict with earlier Eleventh Circuit decision); *Schisler v. Sullivan*, 3 F.3d 563, 563 (2d Cir. 1993) (recognizing “an agency's right to non-acquiesce in the rule of one circuit” and deferring to agency interpretation over prior judicial determination).

deference is that when, as here, Congress has delegated to an agency the power to implement a statutory scheme, the agency is entitled to select its own interpretation of an ambiguous enactment from the range of permissible constructions. In doing so, agencies are not required to follow judicial decisions, which are limited by their facts as well as being geographically limited. An agency also may apply its expertise and take into account broader circumstances and relevant policy considerations, to establish sound and uniform national law.<sup>10</sup> Rather than agencies deferring to the decisions of courts of appeals, courts are required to defer to agencies when they adopt reasonable regulations pursuant to a delegation by Congress.

**B. Regulations Consistent with RIAA's Initial Comments Are a Permissible Interpretation of Section 115.**

As described in RIAA's initial comments, the Office can and should adopt an interpretation of Section 115 that is sensible, workable and consistent with emerging industry consensus. The application of the DPD provisions of Section 115 to streaming is not so clear and unambiguous that Congress has left the Office no discretion in interpreting Section 115 as it implements that provision in the regulations Congress has asked the Office to adopt. Instead, as the expert agency charged with implementing Section 115 in regulations concerning notices of intention and statements of account, the Office is entitled to adopt a reasonable construction of Section 115 for purposes of those regulations. *See Chevron*, 467 U.S. at 843-45.

A definition of DPD or other modifications to the Office's Section 115 regulations consistent with the approach proposed by RIAA would embody a permissible construction of Section 115. The Office's interpretation of Section 115 articulated in the NPRM certainly draws

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<sup>10</sup> *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 840-45 (1984) (upholding EPA statutory interpretation inconsistent with previous D.C. Circuit interpretations).

from established principles of copyright law. However, as a number of commenters noted, that interpretation seems to lead to the conclusion that all digital audio transmissions are DPDs.<sup>11</sup> Yet the second sentence of Section 115(d) clearly indicates that Congress thought some class of real-time noninteractive transmissions did not constitute DPDs,<sup>12</sup> and other commenters have argued that operation of the Section 114 license would be thwarted by an interpretation of Section 115 that makes noninteractive streams DPDs.<sup>13</sup>

A rule consistent with the Office's analysis but excluding noninteractive streaming from the definition of DPD, as proposed by RIAA, would give effect to the principles articulated by the Office in the NPRM with respect to interactive streaming, and also give effect to the second sentence of Section 115(d). In addition, because transmissions that are exempt or licensable under Section 114 would not be DPDs, such an approach would ensure that Section 115 will not impede operation of Section 114. It is thus responsive to the comments raising concerns about the relationship between Sections 114 and 115, and would seem to address most of the concerns expressed by business music providers.<sup>14</sup> The approach proposed by RIAA thus resolves statutory tension left unresolved by the Office's approach, and has the additional significant policy advantages of providing a workable, bright-line rule that is consistent with an emerging

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<sup>11</sup> Verizon Comments, at 6, 8; NAB Comments, at 6.

<sup>12</sup> 17 U.S.C. § 115(d) ("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.").

<sup>13</sup> CTIA Comments, at 7-8; DiMA Comments, at 4-5; Google Comments, at 5; NAB Comments, at 10-11; Verizon Comments, at 10-11.

<sup>14</sup> See Business Music Industry's Comments, at 7 (B2B music providers are primarily engaged in broadcasting); see also 17 U.S.C. § 114(d)(1)(C)(iv) (exempting certain transmissions to business establishments).

industry consensus. The approach advocated by RIAA certainly reflects a permissible construction of Section 115.

Various commenters asserted that the Office's proposed construction of Section 115 is contrary to law because of alleged inconsistencies between that construction and other provisions of the Copyright Act. Insofar as the Office's proposed construction of Section 115 is limited to interactive streaming, these alleged inconsistencies do not provide a compelling basis for rejecting the Office's proposed interpretation of Section 115, or RIAA's. For example:

- Some commenters argue that Congress could not have intended the publication and first use provisions of the Copyright Act to be implicated by streaming.<sup>15</sup> However, because the emerging industry consensus is that musical work copyright owners license interactive streams as distributions, it is simply to be expected that they will implicate the publication and first use provisions. The statement in the statutory definition of the term publication that performance “does not of itself constitute publication,” *see* 17 U.S.C. § 101, is immaterial, because there are many kinds of performances – including noninteractive digital performances – that would not constitute publications.
- Some commenters argue that Section 115's “primary purpose” test is not implicated by streaming.<sup>16</sup> As the Office recognizes in its treatment of the primary purpose test in the NPRM, 73 Fed. Reg. at 40,811, the primary purpose test determines which DPDs (and other phonorecords) can be licensed under Section 115, not what transmissions constitute DPDs. Thus, the primary purpose test is simply irrelevant to classification of transmissions as DPDs or not. Once an interactive stream is found to be a DPD, it seems self-evident that the phonorecords delivered by a consumer-oriented interactive streaming service are for private use.
- Some commenters argue that the Office's analysis is inconsistent with the Audio Home Recording Act (“AHRA”).<sup>17</sup> The AHRA is predicated on a complex of “nested definitions.” *See Recording Indust. Ass'n of Am. v. Diamond Multimedia Systems Inc.*, 180 F.3d 1072, 1075 (9th Cir. 1999). The concept of a DPD is found nowhere in the AHRA, and even the concept of a phonorecord is notably absent from the AHRA. The word “fixed” is used in the AHRA's definition of the term “digital musical recording,” *see* 17 U.S.C. § 1001(5), but because there is no reference there

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<sup>15</sup> NAB Comments, at 8-9, 11-12; Verizon Comments, at 9.

<sup>16</sup> DiMA Comments, at 6; NAB Comments, at 16; Verizon Comments, at 6, 13-14.

<sup>17</sup> CTIA Comments, at 8; NAB Comments, at 9, 13-14; Verizon Comments, at 11-12.

to fixation in a phonorecord, it is not clear that the definition of fixation in Section 101 is applicable thereto. In any event, the concepts upon which the AHRA is predicated seem so far removed from the definition of a DPD that it is difficult to see how their application might realistically be affected by adoption of any permissible definition of a DPD.

- Some commenters argue that the Office's analysis would interfere with application of the fair use doctrine in circumstances where that doctrine otherwise might apply.<sup>18</sup> It is not evident that the Office has authority to do what these commenters suggest – administratively recognize that some activity constitutes a fair use. However, the Office has already made clear that it does not understand its proposed rule to undermine fair use claims. *See* 73 Fed. Reg. 40,805, 40,811 n.11.

Because a rule along the lines proposed by RIAA would make sense of the novel and ambiguous provisions of Section 115 without creating any substantial inconsistency with other provisions of the Copyright Act, it is clearly within the range of permissible interpretations that the Office could adopt in this proceeding.

### **III. Adopting Regulations Consistent with RIAA's Initial Comments Would Promote Further Development of the Digital Music Marketplace.**

As RIAA has indicated throughout this proceeding, the lack of certainty as to the application of Section 115 to streaming is an impediment to the development of the legitimate digital music marketplace. Various other commenters agree that the law applicable to music licensing should be clarified.<sup>19</sup> At this time, it is certainly possible that any effects of such uncertainty would be alleviated in the absence of action by the Office simply by virtue of the emerging industry consensus concerning these matters, and regulations that would upset those understandings have the potential to be very disruptive. However, regulations that are consistent with the emerging marketplace understandings would be a very helpful outcome of this proceeding.


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<sup>18</sup> NAB Comments, at 21; Verizon Comments, at 18-19.

<sup>19</sup> Public Interest Comments, at 1, 4; Verizon Comments, at 1.

Some commenters suggest that inclusion of streams as DPDs presents an illusory solution to licensing problems.<sup>20</sup> RIAA agrees with these commenters that Section 115 is antiquated and has significant defects. However, as other commenters point out, Section 115 provides a framework for licensing that is clearly superior to the absence of such a framework.<sup>21</sup> Accordingly, the marketplace would benefit from confirmation that interactive streams are licensable under Section 115, that noninteractive streams do not require licensing, and that server copies are covered by a Section 115 license.

Dated: September 15, 2008

By:   
Steven R. Englund  
Matthew Hersh  
JENNER & BLOCK LLP  
1099 New York Avenue, N.W.  
Suite 900  
Washington, D.C. 2001  
(202) 639-6000  
*Counsel for the Recording Industry  
Association of America, Inc.*

Of Counsel:

Steven M. Marks  
RECORDING INDUSTRY  
ASSOCIATION OF AMERICA, INC.  
1025 F Street, N.W., 10th Floor  
Washington D.C. 20004  
(202) 775-0101

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<sup>20</sup> CTIA Comments, at 11; Google Comments, at 8-10; NAB Comments, at 18, 19-20; Verizon Comments, at 16-18.

<sup>21</sup> Public Interest Comments, at 1.