Before the
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In the Matter of Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries	Docket No. RM 2000-7

STATEMENT OF JACQUELINE C. CHARLESWORTH
ON BEHALF OF NMPA, HFA, SGA, NSAI AND AIMP
IN SUPPORT OF RULEMAKING TO CLARIFY THE SECTION 115 LICENSE

The music publisher and songwriter groups that have filed comments in this proceeding, the National Music Publishers' Association, including The Harry Fox Agency, Inc., the Songwriters' Guild of America, the Nashville Songwriters Association International and the Association of Independent Music Publishers, are grateful to Register Peters and others at the Copyright Office for their efforts to resolve a longstanding concern of those who seek to support the development of legitimate digital music services, namely, the availability of licenses under Section 115 to cover the activities engaged in by download and interactive streaming services. We appreciate the opportunity today to share some additional thoughts on this critical issue and answer any questions you may have.

Simply put, the question in this rulemaking proceeding is whether the Copyright Office should exercise its discretion as the entity responsible for overseeing the administration of the Section 115 license to rationalize the Section 115 licensing process for digital music services. We believe that it should.

As the Copyright Office is aware, the perceived lack of clarity concerning the availability and scope of the Section 115 license vis-à-vis digital music services, particularly interactive

streaming services, is an issue that has plagued the industry for almost a decade. It has been a limiting factor in the growth of digital music services. While HFA, acting on behalf of its music publisher principals, has made licenses available for limited download and interactive streaming services since 2001, this licensing structure does not extend to copyright owners not represented by HFA. Similarly, although server, buffer and other intermediate copies of musical works are understood to be included in digital licenses offered by HFA, such licenses are not available on an industry-wide basis. The fact is that technology continues to evolve and offer new possibilities for the delivery of music to consumers, while the statutorily-based licensing system lags behind.

But the digital music industry has not given up. In a significant achievement, those that are directly impacted by the Section 115 licensing process – music publishers, songwriters, record labels and digital music services – recently reached a settlement in the pending Copyright Royalty Board rate proceeding that establishes rates and terms for the licensing of limited download and interactive streaming services. The settlement reflects the industry consensus that has developed in the years since this rulemaking was commenced that these activities are properly and sensibly licensed under Section 115. At the same time, the settlement does not extend to noninteractive streaming which – again based upon industry experience – the parties do not believe should require a mechanical license. We hope that the Copyright Office will adopt a rule that is consistent with and supports these crucial industry understandings.

Unfortunately, there are those from outside the digital music industry that, pursuing other agendas, have entered this rulemaking process possibly in the hope of creating paralyzing gridlock on these issues. But non-115 interests are not the reason we are here. The proposed regulation does not and would not govern the licensing regime for audiovisual works, B2B providers, cloud computing or other activities outside of Section 115. By its terms, this is a rule

to be promulgated under Section 115 to clarify the availability of the compulsory license for the benefit of those who rely upon Section 115, and that is how it should be analyzed.

Much has been said (and undoubtedly will be said today) in this proceeding about the Second Circuit's recent *Cablevision* decision. For reasons that Professor Goldstein will explain in his testimony in support of statutory clarification, that decision is not controlling here. The *Cablevision* court simply did not consider the type or nature of copies used to deliver interactive streams of musical works. It did not address the very specific history or purpose of Section 115, or the definition of digital phonorecord delivery within that section. And even if it had, under principles of agency discretion, the Copyright Office is empowered to adopt its own reasonable construction of the statutory license it oversees for purposes of administering that license.

Nor, significantly, did *Cablevision* declare server or cache copies made by interactive streaming services exempt under the law. To the contrary, the *Cablevision* court made a point of emphasizing that reproductions used to transmit copyrighted content implicate the reproduction right (as other courts have previously held). These reproductions cannot simply be brushed under the rug. Such phonorecords require a license and, in keeping with the prevailing industry practice, are logically included and compensated within the Section 115 framework. If this were not the case, digital music services would be forced to license these copies through *ad hoc*, non-115 arrangements – undoubtedly a less satisfactory alternative (at least from these services' point of view) than a readily available statutory license. We should be moving forward, not backward, on these issues.

In view of the limited time for these opening remarks, rather than repeat each of the points made in our Opening Comments and Reply Comments, because the Copyright Office has expressed a particular interest in the technology of interactive streaming services, we wanted to share some thoughts on this subject.

First, we believe that properly read, the definition of DPD is meant to encompass the phonorecords that are created in buffers to enable interactive streaming. This is clear from the legislative history of the amendments to Section 115, in which Congress expressed the view that a temporary reproduction made to permit "playback" of a sound recording constitutes a phonorecord. In light of Congress' express intent in this regard, we do not believe that a rule clarifying that the 115 license applies to interactive streaming activities requires specific or elaborate technological justification.

To the extent the Copyright Office is interested in learning more about the process of interactive streaming of musical works, however, we respectfully refer the Office to the report of Dr. Ketan Mayer-Patel, an expert in streaming technology, that is included in the record of the CRB proceeding. To prepare his report, Dr. Mayer-Patel examined the three leading interactive streaming music services, Rhapsody, MediaNet and Napster, analyzing various copies made by those services. After conducting a series of experiments, he concluded that, with respect to each of these services: (i) a complete and specifically identifiable copy of the sound recording comprising the musical work must be made in the RAM of the user's computer in order to enable the musical work to be perceived by the user (Expert Report of K. Mayer-Patel (CO Trial Ex. 403) at 2, 27, 36, 43); and (ii) in addition to the RAM copy, a cached copy of the sound recording is made and stored indefinitely on the user's hard drive that is accessed and used for future playback of the work (*id.* at 2-3, 28, 36-37, 44).[1]

[1] Notably, the charts included within Dr. Mayer-Patel's report documenting his investigation indicate that the audio file for a full-length sound recording is delivered and copied to a user's computer in under a minute – that is, in much less time than it takes to play the song. (Expert Report of K. Mayer-Patel at 26, 35, 42.) Accordingly, based on Dr. Mayer-Patel's observations, it appears that the buffering process entails the storage of data in the user's computer for a period of minutes (at a minimum) in order to render a typical-length recording.

While we do not view the information developed by Dr. Mayer-Patel as necessary to the adoption of a rule confirming the availability of Section 115 licenses for interactive streaming services, we nonetheless believe it unequivocally demonstrates the *need* for such a clarification. This is because, in delivering these types of buffer and cache copies to end users, interactive streaming services indisputably are making phonorecords (in addition to underlying server copies) that require a license.

In sum, we believe the Copyright Office can and should adopt a rule to confirm and support the industry consensus that the Section 115 license is available to cover the full range of reproduction and distribution activities engaged in by download and interactive streaming services. For the good of the digital music industry – which faces its share of challenges as it is – it is time that the lingering cloud of uncertainty concerning the availability of the Section 115 license be dispelled.

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