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LIBRARY OF CONGRESS - COPYRIGHT OFFICE
PUBLIC HEARING
SECTION 115 NOTICE OF PROPOSED RULEMAKING
Compulsory License for Making and Distributing
Phonorecords, Including Digital Phonorecord Deliveries

Date: September 19, 2008
Time: 10:00 - 1:00 p.m.
Location: Madison Building
101 Independence Avenue, S.E.
Washington, D.C.

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P R O C E E D I N G S

MS. PETERS: Good morning. My name is Marybeth Peters. I'm the head of the Copyright Office. And we're delighted that you are here this morning to help us in the days ahead struggling with what we do with our proposed regulation to try to make Section 115 a little more usable. We'll see whether we get there.

With me this morning, to my immediate left, is Tanya Sandros, General Counsel of the Copyright Office. To my immediate right is David Carson, Associate Register for Policy and International Affairs.

To his right is Steve Tepp, Policy Planning Advisor in the Office of Policy and International Affairs. And to Tanya's left is Steve Ruwe, Attorney Advisor in the Office of the General Counsel.

Thank you all for attending this hearing regarding our proposed regulation to clarify the application of Section 115 to make and distribute phonorecords of musical works by means of digital phonorecord deliveries.

As you all know, we published our notice of proposed rulemaking in July. We didn't, at that time,

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think it would generate as much interest as it has. We had no idea that shortly after publication of our proposed rule, the Second Circuit would issue a ruling that put into question some of the premises on which our proposed rule was based.

Even so, at the time that we published our proposed rule, we recognized that our proposed rule was rather ambitious and, arguably, inconsistent with the more conservative approach that we have taken over the years in addressing the Section 115 compulsory license.

In fact, it was our intention to be provocative in order to get reactions of the various stakeholders and to see how far we could go in trying to implement a regulatory fix to many of the problems that we had been discussing for quite a few years.

I have read all the comments and all the reply comments submitted for this rulemaking, and I think it's quite safe to say that we did provoke many of you. Perhaps most of you believe that our proposals did, in fact, go too far; not all of you, but most of you.

I also have to say that I have never seen my own words used against me so profusely and so

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effectively as they were in some of the comments. I feel a bit like a presidential candidate, but I guess I can't get away with saying I was against it before I was for it.

In any case, we published this proposal because we were trying to determine the extent to which we could make some sense out of the Section 115 license in a way that would assist copyright owners of musical

works and digital music services in clearing the rights to engage in various online activities. In particular, we hope to address the problems presented by a number of commenters in earlier phases of this proceeding, which we began in 2000.

These issues were whether the reproductions made for the purposes of and in the course of the streaming of music are covered by the compulsory license, and if they are not, whether there is any other way effectively to license the reproduction right, assuming that that right needs to be licensed.

Our proposal, which would extend the compulsory license to cover all reproductions of musical works made for the purpose of or in the course

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of streaming, was based upon a recognition that streaming of music inevitably involves reproduction of that music at one or more points in the process.

For example, it is our understanding that all streaming services require a server copy, which serves as the source of the stream. As the music is streamed from the server to the recipient's device, intermediate copies are made. As the stream is received on the recipient's device, buffer copies are made on that device. Typically, each of those buffer copies consist of a small portion of the entire musical work and may exist for only a few seconds.

However, cumulatively, the buffer copies constitute the entire work. Moreover, it is our understanding that, in many cases, at the conclusion of the stream, a copy, sometimes called the "cache" copy, remains on the recipient's device, for example, on the hard drive, and that that company can, at least in some cases, be replayed on future occasions.

Music publishers, record companies and online music services have urged us to make a distinction between interactive and non-interactive streaming.

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They suggest that the copies made in the course of interactive streaming should fall within the Section 115 license for digital phonorecord deliveries, but the license for DPDs not be implicated by non-interactive streaming.

In our notice of proposed rulemaking, we suggested that we could find no legal basis for distinguishing between interactive and non-interactive streaming, although we could understand the business reason why interested parties might wish to treat the two forms differently.

One thing that we are interested in learning about in the course of this hearing is whether there are, in fact, distinctions between interactive and non-interactive streaming -- this is critical -- that are legally meaningful and that could justify treating the two forms of streaming differently for purposes of the compulsory license.

For example, there is some reason to believe that interactive streaming commonly involves the making of cache copies on the recipient's hard drive, which exists for some indefinite period of time beyond the

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performance itself and which, in some cases, can be used to replay the recorded performance.

There is also some reason to believe that this is much less common with non-interactive streams. So perhaps there is a basis for distinction between the two types of streams, at least to the extent that one of them does make cache copies and the other does not. But perhaps it's not that simple.

In any event, at this point, I'm convinced that there is a basis in -- let me make sure that I'm saying this right. I'm looking at what is here. I wrote it last night and it was great.

In any event, at this point, I remain unconvinced that there's a basis in law for making a distinction between Section 115's treatment of the reproduction right with respect to non-interactive streaming and its treatment of the reproduction right with respect to interactive streaming.

For at least some of you, the business justification for treating the two differently is sufficient, but for an agency, like the Copyright Office, whose job it is to administer the law and

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interpret that law, we need more than a business justification. Our interpretation must be consistent

with the law. By far, most of the comments we received addressed our proposal to conclude that buffer copies constitute DPDs.

The Second Circuit's Cartoon Network decision last month certainly cast doubt on any conclusion that all buffer copies are DPDs, although it does appear to leave open the question about whether some and perhaps many buffer copies can constitute DPDs.

Let me suggest to you that it would not be productive today to focus only on the buffer copy issue. I'm looking at all of you. We certainly detect a lack of enthusiasm on the part of most commentators for our proposal with respect to buffer copies, and it's not clear to us whether we need to reach that conclusion. Of course, if any of our witnesses believe that we should, then you need to speak up in the next several hours.

I will note that one reason that we proposed to include buffer copies as DPDs was that it would help us to resolve what, in many respects, is the most

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difficult problem; what do you do about the server copies?

As we noted in our proposed rulemaking, we believe that when there is a DPD, the server copy can be analogized to the master recording, which has always been considered to be part and parcel of the Section 115 mechanical license.

However, it strikes us as unlikely that a server copy ever could be, in and of itself, considered a DPD, because the server copy itself is not delivered or distributed, and, for any streaming activity which does not result in a DPD, there appears to be no way to bring the server copy within the scope of 115, nor are we aware of any other means by which the right to make the server copy can be acquired apart from negotiating a license with the music publisher or the music publisher's representative. So one of the benefits of concluding that all buffer copies are DPDs would be that all server copies used in streaming could be brought within the scope of the license.

A less comprehensive solution, which covers only some streaming activity, would create potentially

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significant exposure for those services that are engaged in streaming activity which does not result in digital phonorecord deliveries, when those services have not otherwise licensed the right to make server copies.

While one can and, I guess, many do argue, as a matter of policy, whether or not they need a license, a question that I'm not taking a position on at this moment, it seems reasonably clear that under the existing law, one who does make server copies without licensing that right is on thin ice.

So even for those of you who are confident that you can make buffer copies with impunity and without obtaining a license, you need to at least pause and ask how confident you are that the server copies that you make without a license are lawful. As long as those server copies are used to make DPDs, you're probably okay. But if there's no DPD, then it's not at all clear to me that you have the right to make a server copy of the musical work without permission.

Having said all of that, I recognize that bringing buffer copies or at least all buffer copies

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within the ambit of the compulsory license may have been too ambitious a proposal, especially in light of the Second Circuit's reminder that the fixation requirement does require an element of duration. If that's the case, then I'm interested to know where, if at all, we can go with this rulemaking. Perhaps it would be sufficient if we were to conclude that at least in those cases where a transmission results in the making of a phonorecord, the compulsory license is available.

We can probably all agree that, at least in some cases, streaming activity does result in the making of a phonorecord at the recipient's end. Would it be a correct interpretation of the law and would it serve the policy goal of facilitating the licensing of rights necessary to engage in the streaming of music to simply acknowledge that where there is a phonorecord at the end of the transmission, there is a DPD which falls within the scope of the compulsory license?

We need not specify when or under what circumstances there will be a phonorecord at the end of the process. We simply acknowledge that at least

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sometimes there will be a phonorecord and, in that case, the compulsory license is available.

Online music services could then elect to use the compulsory license to clear the reproduction distribution for all phonorecords made for the purpose of making the resulting DPDs.

My suspicion is that music publishers would be more than happy to acknowledge that the compulsory license is available in such cases, and music services will be able to act with confidence that they will not be accused of infringing the reproduction and distribution rights.

In other words, the Section 115 license would serve as a safe harbor for those who wanted it. It could be used by music services to clear reproduction distribution rights, even in cases where maybe there is not a need to clear those rights.

This morning, I hope you all will educate us on these issues. I know that some of you, in your comments, have raised questions about our authority to engage in regulatory activity in this case.

I have read your arguments. I understand

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them. I take them seriously. But let me suggest that it would not be a good use of your time to address that issue this morning. Our time together will be much better spent by discussing the substantive law and how that law applies to the facts involved in the streaming of music.

What we're going to do, as we start, is actually start at this end of the table and move down. And one of the things that I did was I did identify what we thought buffer copies were and what we thought cache copies were.

I think that some of you may be using those terms. If you do not agree with the way that we have described them, you need to tell us. You need to identify how you're using that term, if it doesn't match ours, and explain what your term -- how that

affects what we think.
So having said that, let us start with Jacqueline, NMPA. Thank you.
MS. CHARLESWORTH: Good morning and thank you for the opportunity to be here to speak to these important issues.

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The music publisher and songwriter groups that have filed comments in this proceeding, which include NMPA, HFA, Songwriters Guild of America, National Songwriters Association --
MS. PETERS: Jacqueline, could I just remind you, and you probably know from being in this room before, we have not put the acoustical system in. There is no sound that projects back. And this transcript will be online fairly soon. But to the extent that you have people behind you, all of you need to speak up so that at least some of the people in the room can hear.
We're fine, you're facing us.
MS. CHARLESWORTH: You're fine, okay.
MS. PETERS: Some of the people behind you, including those who are supporting you.
MS. CHARLESWORTH: Projection is not my best quality, but I will try.
MS. PETERS: Thank you.
MS. CHARLESWORTH: Good morning.
MS. PETERS: That was good.
MS. CHARLESWORTH: The music publisher and

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songwriter groups that have filed comments in this proceeding, the NMPA, HFA, Songwriters Guild of America, Nashville Songwriters Association International, and the Association of Independent Music Publishers, are grateful to you, Register Peters, and the others at the Copyright Office, for your efforts to try 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, which I think you've identified already, 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 you should.

As the Copyright Office is aware, the

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perceived lack of clarity concerning the availability and scope of the Section 115 license vis-a-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 activities 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,

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that is, music publishers, songwriters, record labels and digital music services, recently reached a settlement in the pending Copyright Royalty Board proceeding that establishes rates and terms for the licensing of limited downloads 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 non-interactive streaming, which, again, based on 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 perhaps other agendas, have entered this rulemaking process possibly in the hope of creating a certain amount of gridlock on these issues. But non-115 interests are not the reason

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we are here.

The proposed regulation 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, who is also representing the music publisher and songwriter groups here today, will explain in his testimony in support of statutory clarification, that decision, I don't think, we don't think, is 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 very unique definition of digital

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phonorecord delivery within that section. And even if it had, under principles of agency discretion, the Copyright Office, we believe, is empowered to adopt its own reasonable construction of the statutory license it oversees for purposes of administering the 115 license.

Nor, significantly, did Cablevision declare server copies or cache copies made by interactive

streaming services to be exempt under the law, to your point. 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. They need to be licensed and, in keeping with the prevailing industry practice, are logically included within the section 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, exactly what you've pointed out, undoubtedly, a less satisfactory alternative, at least from the services' point of view,

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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 you indicated some interest in the technology issues relating to this question, we wanted to express a few thoughts on those.

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, we believe, 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

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interested in learning more about the process of interactive streaming of musical works, however, we respectfully refer you to the report and testimony of Dr. Ketan Mayer-Patel in the recent CRB proceedings.

And in this regard, with respect to your comments and definitions, the one area where I think we would probably take some exception is in the concept that the stream necessarily involves little tiny bits of data that pass through the buffer.

In his testimony, Dr. Mayer-Patel noted that you could have the whole song in the buffer and if you look at the charts that are included in his report, which appear on pages 26, 35 and 42 of his expert report, what you'll note is that you have -- the entire song is transmitted within a matter of seconds, in under a minute.

And so by definition, copies and data have to reside in the computer to allow the buffering process that would take, say, four minutes. So you have -- we're not talking about, at least in the services he examined, 1.2 second copies, we're talking about copies or data that exists in a much more meaningful way in

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the computer for a period of minutes, we believe. That's what his report shows.

In addition, I -- well, as I noted, he examined the three leading interactive streaming services, which are Rhapsody, MediaNet and Napster, to reach his conclusions. And after conducting a series of experiments, he concluded that with respect to each of these services, a complete and specifically identifiable copy of the sound recording comprising the musical work has to be made in the RAM of the user's computer in order to enable the musical work to be perceptible.

And in addition to the RAM copy, a cache copy, what we've been referring to as a more permanent, lasting copy, is delivered to the user's hard drive and is stored there indefinitely for the purposes of potential future playback.

And I think that to your question, he did observe that this was probably a much more -- and this was in his testimony, I believe -- a much more common practice with interactive streaming, because, there, there is an assumption that the user is going to want

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to access the song again more than once, or may want to

do that, whereas with non-interactive, that may be less the case.

At the same time, as I noted, we don't think that these technological distinctions are necessarily the -- should be the foundation of the rule, but they suggest the need for the rule.

While we do not view the information developed by Dr. Mayer-Patel as required for a rule clarifying the availability of a Section 115 license, we think it shows that copies are made that certainly require licensing. 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 the 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 downloading and interactive streaming services.

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For the good of the digital music industry, which faces its share of challenges as it is, it's time that this lingering cloud of uncertainty be dispelled.

MS. PETERS: Thank you.

RIAA, Steve?

MS. CHARLESWORTH: Actually, Professor Goldstein had a few remarks.

MS. PETERS: Excuse me, that's right.

MS. CHARLESWORTH: I'm sorry. We --

MS. PETERS: I remember that now. Yes, you're sharing.

DR. GOLDSTEIN: Register Peters, other officials of the Copyright Office, I am grateful to you for giving me the opportunity to testify today on behalf of the music publisher and songwriter groups in connection with the Copyright Office's notice of proposed rulemaking, which clarifies, among other things, that interactive streams of musical works are subject to licensing pursuant to Section 115 of the 1976 Act, and that the 115 license for full and limited downloads, as well as Internet streams, extends to all

phonorecords necessary to enable this activity.

I will be brief. The essence of my testimony today is that the proposed regulations respecting music download and interactive streaming services are entirely consistent with, and violate no principle of, the 1976 Act.

Further, the proposed regulations are also entirely consistent with the Register's Section 104 Report and with applicable case law interpreting the 1976 Act.

On the subject of case law, much in the comments has been addressed to a recent decision of the Second Circuit of Appeals, the Cartoon Network case. Register Peters, you referred to it in your opening statement as having put into question some of the premises under discussion on which the proposed rules are based. I don't think that's really the case. I think at a surface level, the decision certainly throws up some dust around the questions that are being considered here.

But what I would like to do is to actually take the Cartoon Network case and use its facts and law to contrast the very different set of facts, legislative facts and law, that are the subject of this proposed rulemaking.

First, in connection with the applicable facts, as described by the Cartoon Network court -- and we refer to Cartoon Network as the Cablevision case in our comments. I mean the same, and not the other Cablevision case, with which I know you're also quite familiar.

As described by the Cartoon Network decision, the buffer copies made there were fleeting. They were automatically created from a broadcast feed and discarded within 1.2 seconds or fewer -- and this point is absolutely key to distinguishing the issues before you and the issue before the court in the Cartoon Network case; they were made without rendering the work to a viewer, a key concept within the definition of "fixed in a tangible medium of expression."

Indeed, they were made regardless of whether a subscriber even sought to use a copy of the work. The buffer copies, in other words, involved in the Cartoon Network case differed from the phonorecords that are

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the subject of this proposed rulemaking and Section 115 in three respects.

Unlike the fleeting fragments of Cablevision, buffer phonorecords made in the course of interactive streaming suffice to render the entire musical work to the listener. And, again, the relevant duration focused on by the Cablevision court, erroneously, I would think, under the definition of the statute, was an embodiment of more than transitory duration.

The statute says the performance, the viewing, the relevant perception, is of more than transitory duration and there's no question but that in the case of interactive streaming, that standard is met.

Second, as has been indicated by Ms. Charlesworth, phonorecords made in the course of interactive streaming typically also do include cache copies on the user's hard drive for an indefinite period for purposes of future access and listening.

Third, distinguishing the Cablevision facts, phonorecords made in the course of interactive streaming possess an independent economic value, an economic value in terms of their displacement of record

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sales that would otherwise have been made in the form of sales of CDs.

Securing this particular economic value was the very rationale for passage of the DPD amendments in 1995. Also, it serves as a rationale in your Section 104 Report, when one measures what constitutes a copy or a phonorecord, even though it doesn't last forever. It was a functional focus on its economic consequence and in the case of interactive streaming, that economic consequence is clearly present.

To distinguish, under the applicable law, what Cablevision, the Cartoon Network case was about, it was about the copying and performance of television and motion picture content and, as such, required the court to apply a no more differentiated standard of infringement

than is applied to copyright cases generally.
"By contrast, and as dealt with by the proposed regulations, musical works are the subject of a precise statutory provision, Section 115, whose intricate balancing of economic interests dates back to the 1909 Act, and has maintained that narrow, delicately balanced, intricately balanced focus through the 1995
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amendments brought by the DPRA to adjust the bells and whistles and levers and buttons of this intensely regulatory statute to digital transmission of musical works.
This is a very different environment for measuring what constitutes a copy -- indeed, we're not dealing with a "copy" here, we're dealing with a "phonorecord" -- than is involved in the general context of infringement decisions, like the Cartoon Network's case.
As an example of this, of how Section 115 carves out its own terms for what is a phonorecord, that may not apply outside of the section -- Ms. Charlesworth referred to the Senate report on the bill, a now famous provision, in which the definition of incidental DPDs -- which come within, as you all know, the compulsory license -- given in that report at page 39, mirrors exactly what goes on in the case of interactive streaming. There is no such legislative history or statutory authority, that comparably supports any decision like that outside of the realm of 115.
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As should be evident, the proposed regulations, were they to write phonorecords made in the course of interactive streaming out of Section 115's compass, would demonstrably violate the mandate of the 1976 Act, as amended.
Thank you for your time.
MS. PETERS: Thank you.
And now, Steve.
MR. ENGLUND: Good morning. RIAA also appreciates the Office's efforts to try to bring clarity to the digital music marketplace through this proceeding, as well as the opportunity to testify this

morning.

RIAA has submitted eight major filings in this docket, totaling well over 100 pages, and as recently as a few days ago. As a result, there is not much for us to say that we have not already said and my remarks this morning will be brief.

When RIAA filed its petition that led to this proceeding, it was apparent to us that digital music services would potentially make copies under various circumstances, including what you have described as

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server copies, buffer copies and cache copies, and at least some of those copies would need to be licensed.

As you also recognized, Section 115 provides the obvious framework for that licensing, and we called the lack of clarity as to the application of Section 115 in licensing those copies the primary obstacle to the launch of new digital music services. That lack of clarity remains an issue today, but its effects have diminished because an industry consensus is emerging concerning which types of services need which types of licenses.

As Jacqueline has already explained, that consensus is, first, that the process of interactive streaming of sound recordings involves the making of incidental DPDs that are licensable under Section 115; second, that licenses for DPDs under Section 115 include the right to make all necessary server, buffer and cache copies; and, third, that reproduction and distribution licenses from copyright owners are not required to engage in the process of non-interactive streaming.

Like Jacqueline, I'm here this morning to ask

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you to adopt a rule that is consistent with that consensus. Regulations consistent with that consensus would be a very helpful outcome of this proceeding. Regulations that would upset that consensus have the potential to be very disruptive.

The Office wisely chose to implement its proposed rule as a definition of the term DPD. As Professor Goldstein just explained, DPDs are a concept unique to Section 115 and the definition of the term

DPD would apply only to Section 115 and the music industry.

Within that limited context, the Office has flexibility to look at Section 115 as a whole and Section 115 together with Section 114, and to adopt an interpretation of Section 115 that makes sense.

In doing so, it need not get bogged down in dissecting every word of an ambiguous statutory text. The office is entitled to and should consider the broader policies of Section 115 and adopt an interpretation of Section 115 that works within its limited framework.

The industry consensus I described is

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reasonably clear and administrable and serves the other policies of Section 115. Importantly, because it draws a bright line between interactive and non-interactive services, it doesn't put record companies and services in the position of needing to base mechanical license clearance and royalty payment decisions on fine technical details of the limitations adopted by services. Moreover, that distinction can be justified in the statutory text, and, as Jacqueline explained, in the general technological practices of interactive streaming services.

As we explained at length in our written comments, the industry consensus is more consistent with some of the various relevant statutory provisions than the rule proposed in the NPRM. In particular, it makes sense of the second sentence of the statutory definition of DPD and harmonizes Section 115 with Section 114 in a way that the rule proposed in the NPRM does not.

The Office has been delegated by Congress authority to implement Section 115 in its regulations. Nothing in the Cartoon Network decision or Gonzalez or

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CoStar or Section 110 of the Audio Home Recording Act, or any of the other miscellaneous provisions of the copyrights in this proceeding, prevents the Office from adopting, within the framework of Section 115, an interpretation of Section 115 that is consistent with the industry consensus I have described.

I urge you to do that.
MS. PETERS: Thank you.
DiMA; Jonathan?
MR. POTTER: Thank you for the opportunity to participate this morning. On behalf of the members of the Digital Media Association, including AOL, Amazon.com, Apple, Best Buy, Microsoft, Motorola, Napster, Nokia, Pandora, Real Networks, Sony and Yahoo, I thank the Copyright Office for your interest in this issue that for many years DiMA has asked you and the Congress to attend to.
Many times during the past 10 years, DiMA and our members have asked the office and the Congress to regulate and legislate to ensure that the Copyright Act, and particularly Section 115, is comprehensible, administrable, and promotes legitimate royalty paying

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enterprises rather than statutory damages, infringement litigation, or piracy.
We appreciate that this was your intent, but we are concerned. We are concerned that the way the rule has been supported leads to some overbroad effects. We are concerned that the technological conclusions, which are primarily in the commentary that support the rule, also lead to some potentially very significant and unfortunate effects. And frankly, we're also very concerned about the timing of the rule as it relates to the timing of the CRB decision.
Starting with the issue of over-breadth, we are concerned that the interpretations within the rulemaking of fundamental Copyright Act defined terms, such as "reproduction" and "distribution" and "fixation," should not be undertaken without extensive consideration of all implications for all industries, computer software, graphic, and audiovisual works.
It is true that this is a rule about 115 and it is true that this is a rule about music, but the application of your conclusions to other industries and other forms of content have great risk for disturbing

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business practices and creating litigation opportunities where they otherwise did not exist.
So to the extent that our settlement chose not

to dive too deeply into details and to focus on trying to make sense of what some might argue is occasionally nonsensical, or perhaps incomprehensible is a kinder word for the statute, we would ask you to focus on creating clarity and not necessarily relying intensively on how you're going to get there.

We are very concerned about the Office's conclusion that all digital transmissions of music and, by analogy, all transmissions of content result in legally cognizable reproductions when that content passes through what is essentially any process or any processor.

The application, the reading of buffers or the reading of cache can be read through any processing technology that exists to move content from one place to another, no matter how fragmentary the copyrighted copy portion is, no matter how long the copied portion exists, we think has unfortunate implications for everything that's done in the digital environment.

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We are also concerned that the proposed rule, arguably, undermines the Section 114 statutory license to reproduce and perform sound recordings. Congress has intended and rewrote that law on at least one occasion, so it wrote it in '95 and it rewrote it in '98, to draft a comprehensive statutory license that includes all the rights necessary to perform sound recordings for non-interactive radio.

If every non-interactive transmission of music creates legally cognizable reproductions and buffers that are not covered by those statutes, by the Digital Performance Rights in Sound Recordings Act, then there's a whole lot of risk that is now being brought upon cable radio, satellite radio and Internet radio, and I don't think that's what the Office intends.

Moving to the technological discussion, DiMA is very concerned about the idea that partial fragments of content that may be temporarily buffered on a service's transmission equipment or on a user's computer or receiving device, however fleeting or incomplete, must always implicate reproduction rights under the law.

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There are a myriad of possible variables that affect how and when, for what purpose, for how long, and what portions of a song might be buffered or held in cache or might be held in any -- and that goes to any cache, whether it's towards the user end or anywhere in the network as the content is being transmitted from the service to the consumer.

Variables to how the content moves and how it is held and retransmitted can include a service's choice of streaming technology or CODEC, and there are several of those, whether it's Windows Media or Real Networks or Flash or MP3 or even the open source Ogg Vorbis technology.

Music services have many different options and each option will have an effect on how long the content is stored in various places through the network, including on the user's PC. Other variables include the amount of network traffic present at a given time, the route between the service and the end user, the service's choice of content delivery network, such as a Cogent or a Level 3 or an Akamai.

And then there are the variables at the user

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end, the consumer's choice of a browser, the consumer settings on the PC, the consumer settings on the browser, the bus speeds of the user's computer, how much RAM memory is available, what programs are running, what operating system is in use, all affect how the content is stored, how the content moves, how much of the content is stored, and for how long it is stored.

All of these variables produce wildly differing results and, therefore, it is our position that if one is to go down the road that the Office has chosen, to make conclusions that are relying on the technology, it requires an intensively fact-specific investigation. And I'm not concluding in support of or against any Cablevision discussion, but they had a very fact-intensive examination and that was what they used to support their conclusion.

Now, people will differ as to their conclusions, but they certainly spent a lot of time talking about technology and precisely what that

technology did in that environment.
That's a road that, candidly, we chose not to
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go down in the context of reaching the settlement that we have reached in the Copyright Royalty Board proceeding, and it is, in fact, largely because of the crazy quilt results that could have been effected if we chose to say the technology makes a very specific copy at a very specific time, at a very -- it leads to workarounds.
It leads to the idea of people going into your server room and trying to figure out exactly how your technology is working on a given day, and it doesn't lead to clarity. It doesn't lead to a sustainable business model. It leads only to more litigation and only to a cat-and-mouse game between technological developers and forensic and technological investigators.
I will note that with regard to Ms. Charlesworth's reference to NMPA's expert witness, in fact, he acknowledged that he had only tested three songs on three machines, on each of three machines, and if he had changed the variety of settings that we talk about in our testimony, his results would have changed dramatically.
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So it is not true that every streaming technology leaves DPDs on the buffer every time. It is true that we have agreed, in the context of interactive streaming, that the 115 license is implicated, that the rights are implicated, that DPDs are made, and that we are prepared to license those and pay royalties on those through the 115 process.
It is a way of simplifying the world. It is a way of bringing clarity and administrability to it. It is a way of risk management, and, frankly, it's a way of paying a reasonable amount of money to rights holders and having us all move forward in a stable business environment. That is really, I think, everybody's collective goal.
Finally, I would note that for those of us who are parties in the Copyright Royalty Board proceeding and have spent several millions of dollars arguing a

variety of points of law, fact and technology, so of which, arguably, have gone away in the settlement, but some of which are still valid, it's a great concern to have the Office step in now, potentially just prior to that decision, and create a most interesting

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environment for the board to rule, but also a most interesting environment because it will, in essence, change the rules of the game at a time when the record is closed and we have no opportunity to be responsive.

We think there's a great opportunity for the Copyright Office to comment once the decision comes out, and that also creates some interesting opportunities down the road. But we don't think it's particularly fair, now that the record has closed, for significant interpretations of law to be thrown into the mix, and, arguably, to force the CRB's hand in certain respects.

Thank you very much.

MS. PETERS: You just responded to what I asked in my opening remark. What if we were to just basically say when there is a phonorecord at the end of a transmission, when you believe there is a DPD, if that's all we said and we didn't say "every" transmission, how would that affect all of your concerns?

MR. POTTER: Is that your safe harbor question?

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MS. PETERS: Yes.

MR. POTTER: The record reflects. Let me get back to you on that.

MS. PETERS: Okay. All right.

MR. POTTER: Thank you.

MS. PETERS: All right. Google? Google/You Tube.

MR. PATRY: Google/You Tube, right. I'm Bill Patry. Thanks for the opportunity to appear today. It's a pleasure to be here in front of my former employer. You remain, for me, the best in government, as witnessed by the years of hard work that you have devoted to music licensing issues. And as a former public servant, I realize it's not easy to listen to

constant criticism of your Herculean efforts to clear up the Augean stables of Section 115. Regrettably, though, I have to say that while I appreciate the effort and I support the policy that led to the proposals, the proposals themselves, if implemented, would have serious impact on our company.

Our position, therefore, is that the inquiry should be closed with no action, including the last

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reference to the safe harbor.

We don't believe that greater understanding of the technologies would lead to a different conclusion. Consistent with the terms of the existing statute, which we're all bound by, we don't believe it's possible to draft a set of regulations, notwithstanding your great skill, that can meaningfully take into account the different types of streaming technologies, the different ways in which buffering and caching occurs, and Jonathan mentioned a few of those. To the contrary, we believe that if you focus on those different sorts of technical issues, that's going to lead you down the wrong path. So here's why.

The proposal, we regard as a commercial disaster. By creating a new definition of digital phonorecord delivery that's not tied to the purpose or the economic significance of the conduct, or to the right that's implicated, you open up a Pandora's box that can't be closed, as all Pandora boxes are, and it will lead to chaos. We appreciate you don't want to implicate the Section 114 license or audiovisual works, but in our view, that's exactly what's going to happen.

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During her remarks, Jacqueline made reference to those who stream audiovisual works and described it, I believe, as something akin to interlopers who have a different agenda. I prefer to regard this as innocent bystanders who have been unwillingly roped in to something we didn't want to be a part of, and we're roped in because of the broad nature of the approach that's taken in the proposal.

Whether that was the intent or not, nevertheless, that's going to be the result. We don't think that the proposal can be safely contained to just

non-dramatic musical compositions in Section 115. It's going to be a bit like a regulatory faire naturelle. All right. It's going to be running out there in the wild and its provisions are going to be cited in diverse litigation for diverse purposes; not that that's your intent, but you can't control it.

It's out there and it's going to be used in different ways, and we've all seen that happen in a number of different contexts. As Marybeth mentioned, it was exciting to see her own remarks used against her, and certainly the regulatory provisions and what

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you say in explaining them will be used in different contexts, including 114 and audiovisual works. You can't prevent it. That's just the way it is, and that's why I say we've been roped in and are interlopers.

Since audiovisual works can't qualify for the 115 license, that will have the effect of forcing my company and others to try and negotiate across-the-table licenses with hundreds of thousands of rights holders, most of whom we can't even find in the first place. I mean, trying just to identify them is itself a task.

The one bright spot so far, for us at least, has been that we have been able to operate with a license from the PROs for audiovisual streaming, and that's it. This proposal will take away really the one bright spot that there is, and, also, in the process, obliterates the statutory line between the performance right and the distribution right.

We share, of course, the concern of efforts by music publishers to what's been called double dipping. The answer to that, though, is to regard buffering and

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caching that's incidental to streaming as not involving the making of a copy or a phonorecord, whatever you want to call it.

The line between the performance right and the distribution right has to be preserved despite changes in technology for the simple reason that it exists in the statute. It's there. You can't wish away the line that's in the state. There are different rights,

they're there, they've been historically, and you can't wish them to go away simply because technology has made it difficult to separate them.

What should happen, if there are concerns about double dipping, is to take away the scoop that's being used for the second dip. I have some experience with trying to keep the line between these two rights separate and, I think, how we got there. So in 1993 and 1994, I, along with the House subcommittee's Chief Hayden Gregory and Chairman Hughes, developed a bill that later became the '95 Sound Recordings in Performance Act.

Now, that bill, as originally introduced, was really clear and easy. In fact, it just said there was

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a Section 106 right to perform sound recordings. That, of course, was aspirational and the starting point, and what we ended up with is, obviously, quite different than that rather elegant, politically dead-on-arrival proposal.

So you start one place and, as we all know, you may end up with something very different, so different that you may decide you don't want to end up there. But we did. So as a result of getting from pure position down to where we were, there was a lot of jockeying for positions. Right? What do we do?

The PROs wanted to make sure that they didn't get a penny less than they did before. It was the one-pie theory. Right? We've got the one pie that exists and we want to make sure we're the only ones at the table eating it.

The music publishers, on the other hand, wanted to make sure that their rather early 20th century role as a middleman was continued forth into the 21st century. There's no necessary connection between the two, of course. Right? Section 1066 was a public performance right. The reason they got tied, of

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course, was the political insistence by the music publishers that that bill wasn't going anywhere unless 115 got amended. Right?

And the RIAA, with great reluctance, signed off of that and we had a meeting once where Jay Berman

said, "No way we're going to sign off of that. We'll walk away from it." But he didn't. He came back to the table. That was the deal.

Those provisions have been twinned ever since. Like it or not, it was the music publishers who twinned those two provisions. They are there. Since they're twinned, the issue of how you distinguish between the performance right and the distribution right became really important, and the way that it was resolved, at least in those days, was in the final sentence of the definition of DPD, which excludes from DPDs real-time, non-interactive subscription services, transmissions of sound recordings.

Those are, of course, as we know, subject to statutory licensing, but that doesn't mean that real-time interactive services do result in distributions, but rather those are subject to the exclusive right

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granted under 1066. The sound recording owners had to get some exclusive right out of the deal, and they did.

Now, in answer to the Register's introductory remarks, we don't believe that the statute supports the distinction drawn by some of the parties between interactive and non-interactive services for buffering, and we don't believe that the proposal, if it goes forward, does.

The final remarks I want to make deal with the question of what's a copy or a phonorecord, not to go down the path that Marybeth warned us not to go down, but because of the proposal, the way it treats buffering and phonorecords.

So I'm not going to repeat what people said in their comments. I want to offer sort of a different perspective on this that's based upon my understanding of what the legislative history is. And I think that this perspective sort of takes care of the issue of double dipping by putting the statutory definition of "fixed" where it was intended to be.

So why do we have a definition of "fixed" in the statute at all? MAI v. Peak thought it had

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something to do with infringement. But it doesn't. It has to do with protectability.

The definition of "fixed" was put in in 1965 for two reasons. One, in that draft of what became the '76 Act, audiovisual works were added for the first time as a protected subject matter category. Also in '65, the Copyright Office was amazingly prescient, as it has been, in realizing that there were going to be transmissions, evanescent images, that were momentarily captured in a computer, and for the display right, there was that history there that's really phenomenally prescient. Right?

That's what was going on. But those issues had to do with protectability. They didn't have a thing to do with infringement, as MAI v. Peak has said.

In infringement, it's a common law deal. The courts have always had the common law authority to determine what's a copy in the meaning of infringement, copy from infringement and a copy for physical object. That's always been a common law issue and it's been a common law issue that's been dealt with in an economic sense.

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What's going to be a substantial reproduction that we're going to say the copyright owner's rights have been implicated and you've either got to pay up or you've got to stop doing it. So in the past, we had fair abridgments, which were not deemed to be copies. We had translations, which weren't deemed to be copies. That's the Harriet Beecher Stowe case, which wasn't a copy, because the words weren't the same. We have fair uses in a lot of things that have deemed not to be copies and not to implicate the copyright owner's reproduction right.

So it's certainly not the case the Congress, in putting the definition of "fixed" in to deal with the protectability issue, ever meant to take away courts' common law ability to determine whether something should be infringed on. That's an economic test and we certainly agree with the Register's statement in the Section 104 report that an economic test of copy for buffering and caching makes sense.

It makes sense because it's consistent with how the common law has evolved for these issues, and it makes sense because buffering and caching, the

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incidents of streaming, is not the sort of thing that should trigger the turnstile, in Judge Kaplan's words, to lead to payment.

So we think that any effort to make buffering and caching, whether you want to call it DPD, a phonorecord or anything else, is not the way to go. Whether that's done through 114, through 112 or whatever, is an issue for a different day, but our view is that those issues should not be compensable. And we regret that we're at the table here and being roped in. The way to deal with it, we think, is not to proceed and let Congress work its will or, as in the Cablevision case, let the courts figure it out.

Thank you.

MS. PETERS: Thank you. It helped last night that I read your treatise on these distinctions and will have a lot of questions.

Okay. Bruce, NAB.

MR. JOSEPH: Madam Register, esteemed counsel, I appreciate the opportunity to appear today on behalf of the National Association of Broadcasters to present its views on these important issues.

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As you know, we have submitted substantial written comments, so I will use my opening time today just to highlight some of the most important points and to respond to some of the fallacies and, indeed, ironies in the comments of the proponents of the proposed rule.

NAB's comments made three main points. First, at the risk of being kicked out, the Copyright Office lacks authority to promulgate the proposed rule.

MS. PETERS: No, it just means you can't listen.

MR. JOSEPH: Given the Register's injunction, I will say nothing further about that issue, other than to urge you to consider the evolution of the law since the Section 111 cases.

Second, the propose rule is contrary to law, both decided case law and basic principles of statutory construction.

Third, while NAB appreciates the spirit in

which the NPRM was proposed and agrees that reform of our existing music licensing system is needed, we respectfully submit that the proposed rule is not the

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way to do it. Indeed, it is bad public policy.

Before turning to the second and third of these points, since I will say nothing more about the first, let me comment on the undisclosed agreement among DiMA, RIAA and the publishers.

RIAA and the publishers, at least, cite that agreement as justification for Copyright Office action. It is not. A private agreement provides no basis for regulatory action. The fact that those three self-selected interests may have agreed to something reflects their business needs and perceived relative bargaining power. It says nothing about the public interest, what the law is or what the law should be.

It does nothing to address the concerns of those who were not a party to the negotiations, and, indeed, those are parties that, contrary to the aspersions cast by Ms. Charlesworth, have a direct interest in the digital music business and digital music industry.

Indeed, despite the hubris inherent in that comment, we have absolutely no ulterior motive. Further, the content of the agreement is largely

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unknown. The parties are asking you essentially to buy a pig in a poke.

MR. PATRY: With lipstick?

MR. JOSEPH: Yes. That's no basis to proceed.

Let's turn to the substance of the proposed rule and why it is contrary to law.

Well, we've all talked about the Cartoon Network decision. It's been the subject of extensive briefing and, no doubt, will be the subject of further discussion here. For now, suffice it to say NAB believes the court was right about buffers and that the decision is fatal to the rule proposed in the NPRM.

No commenter has pointed to a single decision, other than the one reversed by the Second Circuit, holding that transitory buffers are fixed copies or phonorecords. Certainly, none of the cases cited by

the publishers reach such a conclusion. Moreover, all of the additional statutory construction issues that we present in our comments confirms the correctness of the decision with respect to buffers in the context of digital performances.

Now, with respect to the terminology of

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buffers, I am not a technologist and my understanding is admittedly limited. However, it is my understanding that with respect to non-interactive streaming and non-interactive digital performances, typically, buffers exist in receiving devices that exist for matters of seconds and are overwritten, exactly as in the Cartoon Network case. The buffers serve only to gather bits in order to make the sound perceptible and to ensure the continuity of the transmission in case there are drops in reception or drops in the transmission path.

In non-interactive streaming, as I understand it, there typically is no caching in the sense that you have used it, nor, by the way, is my understanding that caching is necessarily involved in interactive streaming. That depends on the technology used and, as Mr. Potter said, the settings that are involved.

Now, publishers' counsels' attempt to distinguish the buffers that are perceived from the buffers that lead to reproductions in the Cartoon Network case, frankly, is baffling and appears hollow, because the definition of fixation treats "perceived, reproduced or otherwise communicated" in pari materia.

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So if the buffers lead to perception or if they lead to reproduction for purposes of the definition of fixation, there appears to be, and ought to be, no difference.

Now, let's move from Cartoon Network to more general obligations to construe the Copyright Act in a rational manner and as a harmonious whole. And we submit that as a matter of statutory construction, it is not possible to reconcile the proposed rule with numerous provisions of the Copyright Act, including two provisions directly related to Section 115.

First, the NPRM's conclusion that all digital performances implicate the reproduction and

distribution rights cannot be reconciled with Section 114, which was enacted in the same legislation as the DPD amendments. We give a greater explanation of that, a more detailed explanation of that, in the written comments.

While limiting the proposed rule to interactive performances resolves some of the important practical concerns raised by NAB, most notably, the inconsistency between the proposed rule and the Section

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114 statutory license, it does not eliminate your statutory construction problems.

For example, 114(d)(3) imposes limitations with respect to interactive performances on the 106(6) right, but (d)(4) is express that those same limitations do not apply to the reproduction or distribution rights.

Similarly, 114(e)(2) grants authority for collective negotiation of 106(6) rights, but says nothing about reproduction or distribution rights. Even a rule holding that interactive performances necessarily implicate reproduction and distribution rights simply can't be reconciled with those distinctions that Congress drew in enacting Section 114. Nor can you harmonize the proposed rule with Section 115 itself.

Under the logic of the proposed rule, any authorization granted by the proposal to perform a new work by digital transmission means the composer has also authorized the DPD incidental to that transmission.

The result would mean that the song could then be recorded and exploited by any artist or any record

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company under the Section 115 statutory license. In essence, the right of first recording and first distribution would disappear.

If non-interactive streaming is covered, no artist could appear live at a digital transmission service to perform a work without giving up their right to record and distribute the first phonorecord of that composition.

If the rule even is limited to interactive streaming, an emerging songwriter could not put a demo

of the work on his or her website, or authorize another to do that, without giving up the right to license and make the first recording. Why? Because under the logic of the proposed rule, the authorized performance would necessarily lead to authorized DPDs. As we've been told, DPDs are distributions, and as soon as you have the first authorized distribution of a composition, the Section 115 license kicks in.

Now, it's hard to understand why representatives of songwriters would want to preclude emerging artists from putting demos on their websites. They haven't addressed that issue in their reply

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comments, even though we've raised it in the opening comments. But certainly, such a result would be bad public policy and was not intended by Congress.

More fundamentally, that very fact, and the result that the proposed rule would lead to, demonstrates that you can't reconcile the proposed rule with Section 115's structure and intent. In other words, the proposed rule is completely inconsistent with what 115 otherwise provides.

Now, the NPRM contains other major errors of statutory construction. It would construe the last sentence of the DPD definition, the sentence excluding non-interactive performances, in a way that reads that sentence out of the law. That's just wrong and no commenter has argued otherwise.

The NPRM misconstrues the importance of the specifically identifiable requirement. Neither grammar nor context supports the conclusion that the statutory text unambiguously refers to, of all things, the recipient's device, and the Senate and House report explicitly compelled the opposite result, as does the statutory structure.

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The NPRM's construction of the primary purpose requirement is also contrary to the prior testimony of the Register, a decided case relied upon by publishers to support the rule, and the express conclusion of publishers' own counsel.

As the Register testified, the stream does not constitute a distribution, because the object, the

purpose, is not to deliver a usable copy of the work to a recipient. The buffers, in her own words, "simply do not qualify."

The Farm Club case, cited by publishers in support of the proposed rule, actually is to the contrary. That case said that even if the service had properly invoked Section 115, "it would not give the defendants a right to a compulsory license for the server copies." They are used, by the way, for interactive streaming.

Why? Because the server copies "are neither intended for distribution to the public nor part of a process for distributing digital copies of existing phonorecords."

In short, they fail the primary purpose test.

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And publishers' counsel, Professor Goldstein, when speaking as a treatise writer rather than as an advocate, doesn't mince words. He says in his treatise, and I quote and underscore, "It is clear that the reproduction of a musical work on a server for purposes of streaming to end users falls outside the compulsory license," and he explains that that is "because the reproduction lacks the primary purpose of distributing phonorecords to the public for private use." It's on page 7:30 of the treatise.

And if server copies aren't subject to the Section 115 license, there is absolutely no reason at all to move forward with the proposed rule.

Now, publishers make much in the reply comments of the language of Section 115, saying that a DPD can also be a public performance. But here they're attacking a straw man.

NAB doesn't deny that a transmission that results in a DPD can also implicate the public performance right when the transmission is intended both for simultaneous rendering and for storage for later playback.

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But it's very different, as a matter of statutory construction, to say that such an overlap is possible than it is to say that such an overlap necessarily occurs in every case of transmitted

performance or even in every case of interactive transmitted performances.

The proposed rule is also bad public policy. Publishers are paid for the economic value of interactive and non-interactive streaming through the performance right. The rate courts charged with setting those fees are charged with setting fair market value for the performance activity.

There is no justification for imposing a second fee nor is there any rationale for subjecting those who wish to engage in digital performances to multiple rate-setting processes before multiple rate-setting bodies.

It is difficult to imagine a less efficient system, than one that requires users, and for that matter, copyright owners, to spend tens of millions of dollars to litigate the fair market value of a streamed performance in each of not one, but two rate courts,

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and then to spend tens of millions of dollars more to litigate a mechanical fee in the crucible of this room before the Copyright Royalty Judges.

Moreover, while the term "double dipping" apparently rankles the various publisher agents, that is precisely the likely result. A streamed performance is a single economic activity, with a single economic value. The economic value of server copies and buffers is inseparable from and wholly dependent on the value of the performance.

Absent the performance, the copies would not be made, to the extent there are copies. Absent the copies, the performance would not be made. It is not reasonable to ask the rate courts of the CRJs to differentiate the value of the performance from the value of the copies needed to make the performance.

Experience demonstrates that they cannot and do not do so. The ASCAP and BMI rate courts base their fee decisions on the value of the economic activity, not the value of the performance as divorced from any necessary reproduction. And, as you well know, the CRJs have demonstrated their inability to separate the value

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of ephemeral recording rights from the value of

performance rights, even in cases where they have been specifically invited to do so.

I might say, by the way, that is one of the things they did correctly in the cases that they decided, without implying anything more.

There is more to say, but I probably have used more than my allotted time. And for all of these reasons, we respectfully submit that you should not adopt the proposed rule.

MS. PETERS: Respectfully? Okay.

MR. JOSEPH: I'm surprised you say that. You know I have the greatest respect for you.

MS. PETERS: I'm teasing. I'm teasing. I'm teasing.

MR. JOSEPH: And as to your safe harbor question, I think I have to take the same course that Mr. Potter takes. It's not a question that was posed in the NPRM. It's not a question that I heard before this morning, and I am certainly not prepared to answer it now.

MS. PETERS: Music Reports, Les?

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MR. WATKINS: On behalf of Music Reports, Inc., I'd like to thank the Office for this opportunity to testify regarding the important issues raised in the NPRM.

Our interest in this proceeding derives from the fact that we currently invoke and administer the Section 115 compulsory license on behalf of digital music services and others on a very broad scale. Indeed, to our knowledge, we're the only entity that does so as a third-party service provider between the music publishers and the services.

Contrary to the assertions made by some of the other commenters, there are several digital music services which are now relying on numerous Section 115 licenses, which we've invoked on their behalf, to cover the reproduction and distribution of musical works in connection with interactive and non-interactive streams, limited downloads, and ringtone transmissions.

In fact, since first invoking the 115 license in 2001, we've experienced a steadily increasing number of clients who come to us for this service. We've

invoked the license to cover over one million musical
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works in the past year alone.
At this point, it's not uncommon, in fact, for 115 licenses through MRI to be the largest single source of musical work reproduction and distribution licenses in our clients' license portfolios, covering more works than those which are licensed on a voluntary basis from any single major music publisher or from any publisher licensing agent.
Now, I'm sure the Office is wondering just who are these services who rely so extensively on the license.
MS. PETERS: Yes, go ahead.
MR. WATKINS: And if it can be used more extensively, then why isn't it used more extensively? Well, we, obviously, have client confidentiality issues that, unfortunately, preclude us from talking too openly about who our clients are and our own clients have their own concerns and their own issues with the music publishers, which, as you're painfully aware, they've been negotiating over for about a decade at this point.
And during this time period, the services have
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been unwilling, frankly, to jeopardize these negotiations, oftentimes out of a concern that the publishers view the compulsory license as very confrontational.
The services rightly suspect that some music publishers have reservations about the compulsory license. It's nondiscretionary, it's royalty rate regulated, and it's royalty advance free. Moreover, many services have offerings which are not covered by the 115 license, such as video offerings, and they cannot afford to have publishers withhold licenses for non-covered 115 uses in retaliation for covered 115 uses.
But we now find that the overwhelming majority of music publishers accept our Section 115 licenses without objection. As the Office itself has observed, the music publishers seem to have evolved in their thinking about the scope of the 115 license. And we

expect that even fewer publishers will object once we start paying them royalties, statutory royalties, at the determined rates on behalf of our clients who were brave enough to invoke the license when the landscape

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was more unsettled.

There is, of course, another reason that the 115 license has not been used more extensively, and that's because it cannot be used without some administrative cost and, admittedly, yes, one of those costs is the fee that our company charges to invoke and administer it.

The services, who face many other challenges in their businesses, would very much like to have a costless 115 license rather than the license that exists currently. And while no one can blame them for that, it is hard to understand why they would not expect to incur some cost in connection with music publishing license administration. For example, traditional record distributors, like the major record labels, have built our large departments and committed significant overhead expense to the administration of music publisher licenses.

Moreover, the cost of a 115 licensing campaign are certainly less than the cost of the alternative, which is to engage in a laborious, resource intensive, voluntary licensing campaign, with the tens of

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thousands of music publishers who control works and digital music service catalogs.

Most of these publishers would almost assuredly seek royalty advances, which is an additional cost, as well as unregulated royalty rates. And at the end of the day, a voluntary licensing campaign may not succeed on obtaining the necessary licenses and, perhaps more importantly, the necessary copyright data which will be required to report and account.

But MRI is not insensitive to the issue of cost. It's a very legitimate concern. And as the Office is aware, we strongly favor any changes in the regulations which will tend to lead in the direction of electronic as opposed to paper delivery of notices and accounting statements.

Currently, statutory license runs at our company cause us to incur several thousands of dollars in costs for printing and paper supplies. We also kill a lot of trees during these environmentally sensitive times. And we look forward to addressing the necessary notice and recordkeeping issues when the Office deems that to be appropriate.

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For those of our clients who have come to realize that the benefits of the 115 license greatly outweigh its costs and that most music publishers are now accustomed to the statutory licensing of their works, these are exciting times.

This is because the office has proposed to validate a licensing strategy that our clients decided to undertake on their own, without the benefit of the Office's views and in the face of some resistance to the use of the 115 license from the publishers.

In our initial comments, we stated that we take no position as to the substantive issues in the NPRM and we realize now that that was something of a misstatement. Certainly, we endorse any action by the Office which would tend to bolster the validity, scope and effectiveness of Section 115 licenses that we have invoked for our clients.

Conversely, we have some concern that if the proposed rulemaking does not issue, for whatever reason, then publishers who still contest the validity of the licenses that we have invoked might proffer the fact that the rulemaking did not proceed as evidence

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that the licenses were not properly invoked in the first place.

What we should have said about our position is that MRI takes no sides on the partisan issues which have heretofore made Section 115 reform impossible. While music publishers and services have squabbled over what is covered by the 115 license, to no avail, we have responded to a marketplace need to use it in exactly the manner proposed by the NPRM.

We urge the Office to take this into account as it moves forward. And I'd be happy to address any questions that you might have about our experience in

this area.
MS. PETERS: Okay. I'd just clarify -- I want to make sure -- you said that you use it both for interactive and non-interactive streaming.
MR. WATKINS: The overwhelming majority of clients who hire us to do this are hiring us for interactive streaming. There have been some instances of being hired to do it for non-interactive streaming, but it's very discreet, much smaller, a much smaller set.

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MS. PETERS: Okay. Thank you.
MS. TIVER: Madam Register and members of the Copyright Office, good morning. I am Lisa Tiver. I'm the SVP of Legal and Business Affairs at Ecast Network. We are an interactive music service delivered to the out of home. So, yes, we are primarily intended for public use.
I would like to thank you for the opportunity to testify today on behalf of the Business Music Industry Coalition, which consists of B-to-B member music service providers.
While my testimony reflects the common interests that the coalition members share, I would respectfully request that the coalition members have the opportunity to supplement in writing issues that are better addressed by the individual coalition members.
So who we are. We offer music services to any business that serves the public, such as bars, restaurants, supermarkets, gymnasiums, retailers, essentially anywhere, outside of the home or car, where music can be played and heard by consumers.

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The B-to-B music service providers employ a number of business models to create a viable business. These range from conventional pay-per-use and subscriptions to increasingly prevalent subscriptions that are ad supported.
Even in the business market, we, too, are seeing the realities of the consumer markets, such that patrons will not pay for music, and increasingly now venues are less willing to pay directly for music,

instead preferring an advertiser-supported model. The concept of paying for music, at least directly, we are finding, is also increasingly antiquated.

The B-to-B music service providers are delivering to businesses music that is being played and most, but not all, of our members use the digital sound recording to deliver the music. It is important to note that in so doing, we make use of the musical work that was licensed by the copyright owner for sale and distribution and we make such use without changing the format and without creating a new recording or use, as is in the case of the rights of karaoke, VDO, ringtones, et cetera.

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Because the music is being played in the public, we pay the appropriate royalty to the PROs for that performance.

As far as the mechanical right, other than for digital sales, direct licenses are required of all music services for the mechanical right whenever it may be implicated.

The proposed rule would provide some relief on the mechanical issue for a few services, but will result in continuing, if not increased unfairness to many other services, and, in all likelihood, will threaten the long-term viability of the B-to-B services.

While certain services will qualify for the expanded 115 license and, with that, CRB set rates in excess of the CRB, some of us will continue to operate in an environment where copyright owners seek to extract royalties on an ad hoc and delayed basis, ensuring, if at all possible, increased disharmony and demand for legislative reform.

In light of the changes in music distribution and the competition among music services, as well as

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the overall need for the music licensing reform, there is no justification for a few to be advantaged while the others continue in this ad hoc world.

The B-to-B music providers maintain substantial research and licensing departments to clear the underlying published rights per recording. The

major labels deliver to us some 10,000 recordings per week. Some of us are expending two to three times more in research and clearance costs than we're actually paying out in royalties. And still, the result is a repertoire that is only a fraction of the music available today and a fraction of what could possibly be offered if we were to operate in a 115 environment.

We will spend great time and resources to clear up to 95 percent of the songs, to be left with a few percentage points uncleared and, therefore, we're unable to use that music. And we can spend years e-mailing, calling and persuading publishers, to get no response.

Recently, somebody on my team tracked down a co-writer who was surfing on the south coast of New Zealand. He was somewhat surprised. But he had a

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one-third share of a song that was absolutely crucial. It was a hit song that we needed to get on our network. It is, at best, forensic science to find some of these publishers.

Meanwhile, this uncleared song is now playing at a bar near you on the Consumer's Eye portal and for which the publisher is receiving nothing. And we can all only hope that the digital fine might have been paid for in the first place.

The B-to-B music market is now being cannibalized by music service providers who are primarily in the consumer market, as well as these privately owned devices with stored playlists, digital lockers and the like, and this rulemaking will only increase the cannibalization that we face.

Increasingly, today, music played in public venues is music programming offered by satellite digital audio radio and, also, in a multitude of venues, we see employees and patrons of bars and restaurants accessing their personal playlists stored on iPods, handheld devices, and streaming from their digital lockers, which enables them now to access their

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music anytime, anywhere, anyplace.

We also see many other examples of extraordinary access to music. For example,

Simplified.com, which enables you to share simultaneously with 30 of your closest friends your playlist and they, in turn, can share with 30 of their closest friends, and so on.

The fact is the consumer, whether in home or out of home, has extraordinary expectations regarding music and a limited repertoire just won't do. Those of us with a limited repertoire simply cannot compete.

The natural evolution of the consumer-focused services operating under 115 and offering these huge repertoires is to expand into the public market, but with the advance of Section 115, as they remain primarily for private use. These services still remain intended primarily for private use and even if that was their sole intention, they have no control over who and where they are accessed nor are they likely to care.

These various entrants' already acquired share of the business music market is unclear. But in the aggregate, the competition from these entrants is

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certainly proving very painful to the bottom line of genuine and licensed B-to-B music service providers.

Any further loss in customers reduces revenue in a business with substantial fixed costs, which include substantial costs dedicated to the clearance and research of music, and addressable markets that do not include individual consumers.

Collectively, the B-to-B services pay millions in royalties every year. The encroachment of B-to-C and personal use devices into the traditional B-to-B market will deliver, at best, limited royalty revenue for copyright holders and will require expensive policing of a fractured market, venue by venue.

Consequent of the extraordinary services offered to the consumer, access to music at home is only limited by how much music there is in this world. Increasingly, consumers expect this universal access outside of the home, as well.

The consumer, certainly under the age of 30, is not going to be satisfied with a limited livery of golden-backed catalog and a few hits. Increasingly, the B-to-B services are being turned off, and yet the

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music is still playing.

The B-to-B services whose business is focused on serving these public establishments are handicapped. We cannot license all the music. We are left to negotiate and clear rights with some 140,000 publishers, give or take 20,000. We are further limited by lack of access of publishing data, in particular, fee releases. This is simply not available. And there are still key iconic back catalogs that refuse to license for anything less than exorbitant upfront fees.

We maintain an onerous overhead and risk of statutory damages, while competing against public devices and B-to-B services, with their more complete and comprehensive libraries. Our business is facing atrophy.

Our final and important point that we wish to make is in a digital portable world, continuing to draw a distinction between music providers, predominantly serving the consumer market, i.e., primarily intended for private use, and those serving the business market, is redundant.

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The competitive landscape of the business music market, like any music market, has changed and the music market is set to continue this extraordinary evolution, and it has completely blurred the distinction between private and public use.

Continuing this distinction in a world where you can take your music on a small handheld device, your phone, or a device so small you can wear it as a necklace and play it anywhere, anytime, will result in the demise of the B-to-B services.

In addition, this disparity in licensing rules will cause a loss of significant revenue to the publishers. There is no equivalent section to Section 115 for services intended for public use in 2008.

There is no reason to treat private and public services differently. This proposed rule is a partial solution intended for the music providers in the consumer market, but the consequence, even if unintended, is to enable those services to further

penetrate the B-to-B market with legislative advantage, thus favoring the consumer music industry and creating

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gross unfairness for the B-to-B services.

We note replies filed and comments made regarding our claim should be disregarded, because Section 115 was passed intended to govern private use only.

This rule was passed to legislate in a different era when the concern was in-home pianolas, as far removed from B-to-B services as it is from ad-supported subscription services with four million tracks accessed from an out-of-home central server and tiny portable devices downloading music via broadband connections.

With respect, this reply is failing to see the woods from the trees. To continue to make a distinction from the early 20th century, well before broadband and the Internet were imagined, and the order of the day was licensing the invented pianola, operating perforated music rolls, and sold into private home, is increasingly redundant and unfair.

Moreover, rational thought requires a more reasonable examination of the technology that does not put form over substance. B-to-B music service

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providers are providing a service that plays music in the establishments of their clients. It is only the result of changes in technology that give rise to the current discussion of whether a mechanical right is implicated. If stripped down to the basic economic activity, no distinction can be made of the DJ spinning a record for airplay and a play that is occurring in these establishments.

So in conclusion, the Copyright Office has demonstrated tremendously the shift to propose this rule, but rulemaking should encompass the perspectives of all services affected by the proposed rule.

The B-to-B services have existed for decades and we have paid millions of dollars in royalties. Yet, a public policy continues to disadvantage us with respect to consumer intended services. We will not be here in five years to have this discussion.

Therefore, we respectfully request the Copyright Office to reconsider and return to urging Congress for a comprehensive solution that provides needed relief, clarity and stability for all of the stakeholders.

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MS. PETERS: Thank you. There are lots of questions. You may have some yourselves. But in any case, the order in which we're going to go, we're going to start the questioning with Tanya and then go to Steve Ruwe. And then we're going over here to Steve Tepp, and then David, and then me.

I'm hoping that my staff has very nicely asked all the questions.

So, Tanya, let's go.

MS. SANDROS: Okay. Thank you. And thank you so much for coming today and informing us once again on your views and positions in the 115 debate.

I certainly have been in this debate since the beginning of time and I continually feel like I'm standing on the edge of a black hole waiting to be sucked in, because it's so complicated and so convoluted. I think even the discussion and presentations today underlie that feeling and where we've been for a very long time.

I want to start, though, with an understanding of what it is everyone expects to be licensed under 115. Now, there's a lot of talk about interactivity

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and interactive streams and non-interactive streams, and we've said from the very beginning we can't see a legal distinction if you're going to talk about reproductions made in the course of a stream.

But it's very clear to us that when you read the comments of the proponents of the rule itself, that the focus is primarily on interactive streaming, and I understand that from an economic value and economic perspective.

But we've said again and again that our perspective and what we have to do is look at what the law says, and what we need to decide is whether DPDs are made in the course of a stream, without regard to whether it's an interactive stream or a non-interactive

stream.
Certain people on this side seem to think no DPDs are made, certainly nothing that would be compensable or considered to be a DPD. The proponents, obviously, think there are. But I struggle every time I look at the comments trying to understand this distinction between interactive streaming. And I must say that when I read the comments of NMPA and RIAA and

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DiMA, that what you really seem to be asking for is a license for interactive streaming itself, without regard necessarily to whether or not a DPD is being made.
I'd first like you to speak to that point.
Jacqueline?
MS. CHARLESWORTH: I'm happy to do that. I think that, as we've heard today, in enacting the DPD amendments in 1995, Congress also was enacting Section 114. And I think there is a great deal of legislative history there that supports the distinction between interactive and non-interactive streaming in terms of the economic value of the activity and the ability to displace record sales.
And so I believe that as a matter of sort of looking at the proper interpretation here and the legal backdrop and what Congress was concerned with, drawing that line makes sense in terms of Congress' intent in enacting these amendments.
But I also want to offer a slightly different perspective here that's not so grounded in the technicalities of the statute, which is I think, as

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matter of administrative law, that looking at this record, hearing all the commentators, thinking about the policy issues -- because you're not just wedded to the actually technicalities of the statute, I don't think, in this proceeding. You're allowed to consider what makes good sense as a matter of policy. And I believe that you have the discretion to adopt a rule that addresses the perceived problem in the marketplace and doesn't go so far as to disrupt the industry practices in another area.
In other words, I just consider it to be

within your discretion in reviewing the marketplace, taking into consideration the record before you, to draw that line, and I also think it's consistent with congressional intent in the way they approached this problem.

MS. SANDROS: Can I just stop you for a minute?

Are you suggesting that we have authority to craft a regulation based upon policy that would be potentially contrary to the statute itself?

MS. CHARLESWORTH: I don't think it's contrary

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to the statute. I didn't mean to suggest that. I apologize if I did. I think it's entirely consistent with the statute. I think if you look at the legislative history, that passage that we cited, it's very clear that Congress believed that streams delivered phonorecords.

What I'm suggesting is that given that backdrop that you have the ability to adopt a rule that says that, then there's a second set of considerations here, which is let's look at the industry, how it will be affected, look at the record here, and, as a matter of policy, I believe it's within your discretion to adopt a rule that addresses the concerns before you as a matter of industry practices.

I don't think that you are compelled to pay attention only to the text of Section 115 and not the marketplace. I think that both are considerations here. I think 115 supports it. I think you have the discretion to adopt a rule that supports the industry consensus.

MS. SANDROS: Okay. Let me go back to my original question.

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My first question was are you intending to license interactive streams without regard to whether or not phonorecords are actually made at all interactive streams.

MS. CHARLESWORTH: I think it's pretty clear, from our remarks, we believe phonorecords are made in all interactive streams.

MS. SANDROS: You do.

MS. CHARLESWORTH: At least as we understand the technology today and have looked at it. We think that there is support in the record of the CRB proceeding for this proposition.

Is it conceivable that some service out there might want to litigate that issue? Yes. That's a problem that exists in copyright law generally.

And this goes to your safe harbor question. Whenever you adopt a rule, someone can choose not to use the license. Right?

So they can choose to litigate it. They can say, "You know what? We think the rule doesn't work," whatever it is, or "We don't think our activity falls within this rule." There's always that issue. There's

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always the boundaries of whatever law is there or whatever rule is set.

So we certainly favor the adoption of a rule and we don't think it precludes anyone who believes that, for some reason, they're not making DPDs, against what I would say at least is the technology of today in interactive streaming, from testing that.

So we favor the adoption of the rule in that sense.

MS. SANDROS: Okay. But let me just explore it a little farther, because let's assume, for sake of argument, that copies and phonorecords are made in interactive streams. That doesn't really answer the other question, though, whether or not copies and phonorecords or DPDs are made in the course of a non-interactive stream.

And what I've heard, I think, throughout the discussions today and in the comments, it's quite possible that you do get what would be considered a DPD in the course of an interactive stream, whether it's a buffer copy, such as NMPA has talked about, or whether it's a cache copy.

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And I'm troubled by the adoption of a rule that would specify that it's only those DPDs that are made in the course of interactive and ignore or overlook anything that's made in the course of a non-interactive stream.

I think that's a very troublesome business model for all perspectives, because the economics itself, at the end of the day, really isn't an issue for the Copyright Office; it's an issue for the Copyright Royalty Judges.

And what we're just trying to determine is whether or not digital phonorecords are made in the course of any stream whatsoever and, at that point in time, once you have made that determination, then you're looking at what the value of those DPDs are.

MS. PETERS: And I would just like to jump in. Bill Patry brought up the issue of that there are no copies, that there aren't fixations. And I would like the response of the music publishers to -- and perhaps Professor Goldstein -- that interpretation.

Prof. GOLDSTEIN: It really goes right to the heart of the question. I think I can answer your

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question, address the point that Bill made, and, Tanya, answer yours, as well.

Let me give you the quick answer to yours and then you'll see where it fits into the larger setting in the framework that Bill has laid out.

Whether or not something is a phonorecord is, as I testified, a question of its economic consequence. Economic consequence, not in the sense that the CRB is concerned with, but rather the very definition of what is a copy or, in this case, a phonorecord, turns on whether it has economic consequence. So, let me drop that one there and then give you the larger analysis.

The starting point, of course, for purposes of Section 115, is Section 106(1) and Section 106(3), which say there is an exclusive right to reproduce phonorecords, and an exclusive right to distribute phonorecords to the public.

For that, I turn to the definition of phonorecords in the statute; material objects, sounds other than those, et cetera, that are fixed by any method now known from which the sounds can be perceived, reproduced or otherwise communicated, either directly

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or with the aid of a machine or device.

So you say, well, that is the definition of

phonorecord for purposes of infringement. Where can I get some content for that concept of what a phonorecord is, in addition to this definition?

Of course, the definition, as it's given, certainly says that copies made in the course of streaming, or phonorecords made in the course of streaming from which the work can be perceived, reproduced or otherwise communicated, are phonorecords. One place to go is to the definition of "fixed" in a tangible medium of expression. The reason it's a logical place to look to is the term "fixed" is used in the definition of phonorecord.

So you look to the separate provision, the separate definition, a work is "fixed in a tangible medium of expression when" ... and so on.

Now, Bill is quite right. That provision defines what is a copyrightable work. But it also offers some help if you're looking for what does "fixed" mean in terms of its economic consequence.

It says when you're asking, generally, is

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this an infringing copy, is this an infringing phonorecord, you can look at this for help, even though it is the measure of what is a copyrightable work and there needn't be absolutely symmetry between what is an infringing copy and what is a protectable work.

But they're close and there's help here in the sense that it says a work is fixed -- and bear with me for a moment 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, when the embodiment is sufficiently permanent or stable, to permit it, the work.... The reference to "it" is to work, not to the embodiment.

The embodiment is already taken care of by "sufficently permanent or stable to permit to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

Now, okay, well, that -- if I were looking for help, for definition of "fixed" for purposes of what's an infringing copy, if I were a judge deciding the Cablevision, the Cartoon Network case, I might well

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look, as the court did -- although it viewed it somewhat more mandatorily than I think it was entitled to -- to this as a model of what is economic consequence. Fixed means it has economic consequence. The economic consequence is that it enables it to be perceived, reproduced, or otherwise communicated.

That seems fine. But that's not necessary in the case of Section 115, where we're not ranging at large over copyrighted works generally or rights generally. We're ranging, rather, within the limited framework of Section 115, phonorecords, and what the economic consequence -- this, Tanya, comes back to the question you raised -- what the economic consequence of fixation is in the context of Section 115.

Now, that economic consequence, as I've testified, is interactive works have greater -- interactive streaming, rather, has greater economic consequence of the sort addressed by the 1995 DPRA amendments than does non-interactive streaming. These are the interactive streams that are displacing sales of CDs. So I think there's a more -- one can look at the fixed in a tangible medium of expression

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definition.

When we're dealing with this really separate planet of Section 115, it's helpful to look at its internal economics, which I think make that decision by its parallel to Section 114, and the fact that you have an industry agreement across the industries affected as to what has economic consequence.

I think, given any ambiguity, the room exists for the Copyright Office to say, "Yes, we'll resolve that ambiguity in favor of that."

MS. CHARLESWORTH: If I could add, just to respond specifically to something Mr. Joseph said on this issue.

He, looking to the statute, talked about reproduction, perception or communication. And I think, going to what Professor Goldstein is saying, the value of a phonorecord of a musical work is in your ability to hear it. And I think that if you render an entire work -- that's the critical distinction between what

we're talking about here and maybe what was going on in Cablevision. There is really no difference from listening to the work from a CD than listening to it

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from an interactive stream. In both cases, you choose to hear the work and you listen to it. It exists for the same amount of time.

And so you're looking at a copy that is -- it's not any more transient or fleeting than the copy you would listen to from a CD. And so I think if you understand the value in that sense, it gives more meaning to the statutory framework.

MS. SANDROS: Bruce, do you want to respond?

MR. JOSEPH: Well, certainly, and to the last point in particular, a CD -- the suggestion that the fixation persists for the same amount of time with a CD as it does in these buffers I simply don't understand.

Sure, any work that is perceived by performance is perceived over the length of time that it takes to have the performance. That's sort of tautological. And indeed if you were listening to an analog radio broadcast today, there is a mini-fixation in the resistors and the transistors and it is still getting into your ear, and it is persistent for the length of time that the performance is rendered. But the statute can't mean that, because I haven't heard

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anyone ever make a credible argument that listening to a transistor radio gives rise to a DPD right or gives rise to a reproduction or a distribution.

So that simply makes no sense. With a CD, the fixation persists far beyond the rendering of the performance. Indeed, it is fixed and, indeed, that's precisely the concept that when Professor Goldstein was writing his treatise, he said was the purpose the DPD amendments of Section 115 were intended to achieve; yet, another excerpt from the treatise, "the amendments to add DPDs to Section 115 anticipate that, in the future, recorded music will not only be sold in record stores and from websites, but also be broadly distributed through digital transmissions that, originating in unfixed electronic impulses akin to a performance -- unfixed electronic impulses akin to a

performance, will ultimately take form in a hard copy that is functionally indistinguishable from a store-bought tape or a compact disk, and the amendments seek to achieve some measure of parity between the traditional and emerging markets."

So in that regard, if that's what the purpose of Section 115 was, it's not clear to me how any of the rest of this fits within the purpose of Section 115.

In direct response to Tanya's question, I think with respect to interactive versus non-interactive, it is not possible to simply say by virtue of being non-interactive -- or by virtue of being interactive, you have a DPD.

If there are economic ramifications as a result of an interactive performance, that's to be fixed in valuing the performance right. It's not suddenly to create a second right that because there may be a greater economic impact, it's now a distribution. You do have the legal basis to say clearly that non-interactive are out, and that's the second sentence of the definition.

MS. SANDROS: Okay. I'm glad you brought that up, because let's look at the second sentence. What it says is that "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."

But I think what we've been talking about, that there are certainly situations where there are non-interactive streams which may well have buffer copies that may be sufficiently non-transient to be considered fixed or cache copies that would be there.

MR. JOSEPH: Well, not non-interactive. I'm not aware of any cached copies that occur. I mean, I can't say never, because, obviously, technologies are different, but in certainly the general run of non-interactive streaming, that doesn't happen.

But listen to what you've just said. What you've just said is that last sentence is a nullity, because if, by definition, there is -- you can't look

at those -- if there are copies at the receiving end, you can't look at those copies at the receiving end in construing that sentence, because if there were no copies at the receiving end, there would be no DPD.

MS. SANDROS: I agree.

MR. JOSEPH: Nothing would have been distributed. So the only --

MS. SANDROS: I'm not disagreeing with that.

MR. JOSEPH: So are you saying that that

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sentence was meaningless?

MS. SANDROS: No. I'm saying that it basically seems to also anticipate that you could have a non-interactive stream used by the same technology that you do an interactive stream, which could, in fact, have a fixed copy at the end, either in the cache or in the server or the RAM, that would be sufficiently fixed to be a phonorecord, making this not an exemption of those what would then be considered DPDs.

This does not give an exemption, I don't think, to non-interactive streams, because there's a possibility that you will have a phonorecord in the process of making that stream.

MR. JOSEPH: But I think it talks about the embodiment, the reproduction occurring between the inception of the transmission and the endpoint. The transmitting entity doesn't have any control over what the user does at the endpoint.

And to include that which happens at the endpoint in your construction, again, would read this sentence out of the statute. It would have no significance, because if what is transmitted in the

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context of a non-interactive stream leads to DPDs, then the sentence has meaning. But if it doesn't lead to DPDs, then you would never reach the sentence in the first place.

I think I probably didn't articulate that as clearly as I might have, I recognize. But where would that sentence ever have meaning if it's construed to take into account the endpoint?

MR. RUWE: When there is no copy made at the endpoint.

MS. SANDROS: When there is no copy. I mean, if we're arguing about buffers and --
MR. JOSEPH: But then there's no DPD.
MS. SANDROS: That's right. We agree.
MR. JOSEPH: But wait. So then the sentence would -- you would never reach the sentence. If you didn't have a DPD in the first place, you wouldn't need that sentence to exclude the non-interactive streams from DPDs, because there was no DPD.
So unless you're saying the sentence is just a tautological redundancy, maybe that's redundant, it would have no meaning. And we all know Congress

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doesn't do that. At least we are obligated, we are bound -- let me rephrase. We are bound to construe the statute in such a way that assumes that Congress doesn't do that.
MS. SANDROS: Okay. I was thinking this may be a good time for us to do our demonstration, because we're talking about non-interactive streams and whether --
Did you have something to say?
MR. RUWE: Well, I could follow this line, but I'd rather go to something else.
MS. SANDROS: Well, this actually is part of the same line, because what we're talking about, are non-interactive streams, which may, in fact, create cache or copies.
MR. TEPP: Tanya, could I say something?
MS. PETERS: So what are you going to do? Are you going to do this?
MS. SANDROS: Yes. Go ahead.
MR. Patry: Having been there, I can say, in disagreement with Jacqueline, there was no intent by Congress to include streaming within 115. The debates

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about interactive versus non-interactive for that are just not the case.
The only reason 115 was there was, as I said, it was a political holdup. The music publisher was like a bear with their paw in the stream and they wanted to continue doing that.
What they were catching, the fish they were

catching was, as Jacqueline said, displacement of sales of phonorecords. Right? That's it. There's no reason to call this or grace it with anything else other than what that is.

Now, what's compensable -- and I agree with Professor Goldstein's analysis of the two poles of it, which is that, yes, indeed, the definition of "fixed" has only to do -- was there for protectability, not infringement. Where we disagree is this assumption that because something is fixed, it has economic value. That's just not the case.

The economic value here is for the streaming, which is compensable under Section 1064 or Section 106(6), depending upon the subject matter. That's what you pay for.

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The music publishers are paid under 1064 for streaming. What's going on here is just an effort to say, well, because there's a fixation, automatically, there must be economic value. That's just not true, a separate economic value apart from the stream. Congress wanted the music publishers to get their rights under 1064, and that's why the PROs were very concerned with the one-pie theory.

So to me, this is just sort of a technical way to say that we should double dip. It was not Congress' intent at all.

MS. PETERS: Jacqueline?

MS. CHARLESWORTH: If I may respond, briefly. First of all, I think you're just ignoring -- you may have been there, maybe you were not there on that day when they wrote --

MR. Patry: Oh, I think I was there all day.

MS. CHARLESWORTH: Okay. I was not there, I will say that. I am reading the record as it was created.

MS. PETERS: I was around.

MS. CHARLESWORTH: In the Senate report,

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however it got there, Congress put it there somehow, whether you were there or not --

MR. Patry: Not on the Senate side.

MS. CHARLESWORTH: Well, the Senate report

describes a process by which you deliver a high speed burst of data to render -- to play back a recording and it describes that as delivering a phonorecord. It's there three times.

And so I think to say -- I just disagree with your interpretation of the legislative history.

In terms of the "double dipping" argument, I think the reality is you have overlapping rights here. We're in a regulated market on both ends, whether it's the performance right or the reproduction right. They're not -- neither is a free market.

And you have processes in place to evaluate the particular value of the copies that are being made, namely, the CRB proceeding. And so this double dipping argument, where you have overlapping rights in the same activity, which is not unknown -- you can have a public performance and a reproduction.

You can have -- I mean, there's no rule in

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copyright law that says you can't implicate two rights in the same activity. I think that's just a falsity. In fact, in 115, it says twice it can be both. That's what we're dealing with here.

So I think there are -- I guess the point of saying it's a regulated market is there are protections in terms of evaluating the value of those copies. The copyright owners are subject to oversight in the form of a court or in the form of the CRB, and this actually gets to a point of Mr. Joseph's, as well.

The agreement that we're talking about is not what I would call a private agreement. It was the result -- it came after litigation in a public proceeding and it is the outcome of that public proceeding. It was part of that regulated process.

So I think, again, this goes to the issue of 115 as being sort of a unique creature, DPDs as being unique in copyright law.

MR. PATRY: Absolutely, if there is a distribution, if there was a DPD, then the music publishers should get paid for that, just like they got paid for distributing the hard copy. No issue there.

0109

If there is something that was a stream in a

performance, you should get paid for that, too. That's not double dipping. The double dipping comes from saying that there is a stream, but something that's not a DPD, but you should still get paid because we're going to read that as including something that's fixed.

To me, that's the issue. That's where the double dipping occurs. And that's the line that Congress didn't want to do.

Absolutely, get paid for everything that is within your rights, just don't get paid for this third category, which is neither fish nor fowl, and, therefore, bears shouldn't eat it.

MS. PETERS: Well, as somebody who was also there, I actually -- and who talked to music publishers afterwards, people did not really know what was coming. And so it's really hard to say -- I think they had ideas and that very much informed the debate at the time. But nobody foresaw what's out there today or how things are out there today. But it's very hard here to make sense of what you do.

MS. SANDROS: Let me ask one more question of

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Steve, since you represent the record companies.

In the context of 114, interactive services are not covered. They have to license the public performance of the sound recording outside of the license.

When the record companies actually license for the public performance of the sound recording, also, obviously, the copyright owners, the reproduction and the distribution right, do you include that in your agreements?

MR. ENGLUND: There are a lot of companies that have a lot of agreements and I have not read all of them.

MS. SANDROS: But what is the industry practice?

MR. ENGLUND: I've not actually read very many of them. My general sense is that the services are well represented in negotiations and ask for the full panoply of rights that is arguably included, and there are provisions that address server copies and that address performances.

22 So probably, generally, yes, licenses would
0111
1 not be strictly limited to performance with the service
2 left to wonder about the status of other copies.
3 MS. SANDROS: Okay.
4 MS. PETERS: Steve?
5 MR. RUWE: As I understand, while Music
6 Reports does work with companies that have
7 non-interactive services, but also license for DPDs,
8 and you, by implication -- I want to understand
9 this -- maybe there are some services that -- well, if
10 they're non-interactive, they don't -- but there is an
11 acknowledgement by some that there are DPDs being
12 created by non-interactive.
13 MS. PETERS: Or that they're seeking a
14 license.
15 MR. WATKINS: It generally comes down
16 to -- because we actually administer the license, we
17 have these real philosophical debates about trying to
18 fit what we're doing into the old regime.
19 So oftentimes, we'll debate how should we
20 describe the configurations on the notice and this can
21 be a lot of fun for us. And in the one instance that
22 I'm talking about, it involved cached copies on mobile
0112
1 devices for a non-interactive service, and it was a
2 very, very discreet instance. So a very unique set of
3 circumstances, very unusual.
4 MR. RUWE: Speaking of cache copies for
5 non-interactive services --
6 (CROSSTALK)
7 MR. RUWE: These are two files created by
8 Pandora's service. The one created at 8:21 is the one
9 that is paused right now. The one created at 8:24 is
10 what is going to be performed when this one is
11 complete.
12 It bloated up about two-thirds of the way
13 through. If I were to fast-forward and get to the next
14 song or skip the rest of this song, another song will
15 play and we can wait, but we'd expect, at this point,
16 from prior observation, that at about this point in the
17 play of the song, the next song will load in its
18 entirety. No further data will be added to it, that

is, in the course of its playing. This is a service that operates under the 114 license.

MR. ENGLUND: I'm not sure that it is completely undisputed that all features of the service

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are not interactive.

MS. PETERS: We understand that.

MR. ENGLUND: This seemed like the place to --

MR. RUWE: But under the definition that has been proposed, the dividing line for non-interactives and interactives, I understand it's in dispute under 114, but we haven't seen the public agreement yet as to seeing how --

MR. ENGLUND: With respect to any particular service, you could imagine there being disputes about what's interactive and what's not interactive, and there's no outcome of this proceeding that will resolve that for all time and for all services.

MR. RUWE: But we should adopt that distinction not only in 114, but, in addition, in 115, which doesn't reference it explicitly, except for where there is no reproduction made under 115(d).

MS. SANDROS: This is just basically to show that with a purported non-interactive service, based upon what the proponents themselves have been talking about, about what's covered in terms of a DPD, we just wanted to put it out there for discussion purposes to

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show that there was something that would fall on the other line and, basically, based upon your definition, would, in fact, be a DPD, and just wanted you to respond to it and tell us what you think.

Jacqueline?

MS. CHARLESWORTH: I will respond. I think my response is the same as before, which is that some of this comes down, frankly, a question of what's a reasonable policy, what's a policy that will confirm industry practices and not disrupt them.

I think that the 114 dividing line is not a model of absolute clarity. I think from time to time, there may be disputes. I think we would have the same potential issue perhaps under the settlement, although I think, in most cases, it will be clear. And if a

service isn't sure, they would have the benefit of the license if they chose to go down that route.

MR. CARSON: While we're on the subject, to some of you who have relied on the Cartoon Network case, saying buffer copies aren't really phonorecords because they don't meet the fixation requirement, is there anyone here who would say, based upon what we

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just saw, that those copies we saw there were sitting there for -- well, because it was paused, were sitting there for four hours, were not sufficiently fixed to qualify as phonorecords?

MR. JOSEPH: I think I would want more information about how they were created and what the source of the creation was, what the technology was, whether they were fixed in the normal operation of the technology. That's the first time I've seen that. So it's hard to answer.

MS. PETERS: It's Jonathan's client, right? I mean, his member.

MR. CARSON: He knows everything about the technology.

MR. POTTER: Even in the worst case scenario, I suppose, under someone's view of the world, if the service is non-interactive, we have an agreement which says there's no DPDs.

MR. RUWE: So that agreement trumps whatever the law is.

MS. CHARLESWORTH: I just want to clarify. It doesn't say that. It really just talks about

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interactive versus non-interactive.

MS. PETERS: It covers interactive, right.

MR. JOSEPH: I'm sorry. This highlights the absurdity of relying on an agreement that nobody has ever seen -- I'm sorry -- that nobody but the proponents and possibly the Copyright Royalty Judges have ever seen, but certainly not in the record of this proceeding and certainly not in any context that anyone has had an opportunity to comment on.

The parties can't even agree on what the agreement says and now they're telling us they can't agree whether they can tell us what the agreement says.

That is absurd, as a matter of regulatory policy.
MS. PETERS: Okay. Did you have any more questions, Steve?
MR. RUWE: Jonathan, the agreement, as it stands, is between the parties. It is not yet adopted. If it were, if there was a publisher that was not represented by Jacqueline's organization, that Pandora didn't have coverage for, would that be a problem?
Would that fixation or the phonorecord created be a problem?

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MR. POTTER: If the agreement is adopted, no, because if the agreement is adopted by the CRB, it becomes regulation.
MS. SANDROS: With respect to interactive services, from what we've heard so far, the Pandora would be non-interactive service. And as we understand it so far, nothing would be covered by what we've heard or what the CRB is considering.
The question is would, in fact, that publisher have an option to come in and sue your client.
MR. POTTER: The publisher always has an option to sue. Sometimes they even use it.
MS. SANDROS: But you understand the point.
MR. POTTER: We understand why we were in Congress. We understand why we'll be back in Congress.
MS. PETERS: And I was just going to say and I think that you'll be back, yes.
MR. POTTER: Absolutely.
MS. PETERS: Steve?
MR. TEPP: I've got a number of questions in different areas, but since we're on cache copies, let me see if I can go to a couple of those.

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In the interactive context, because it's obvious we're not going to get very far in the non-interactive context this morning, are the cache copies that are created playable if the user somehow, by whatever means, is able to identify them and independently, outside of the context of the service that created them, find it and play it?
So if I have an interactive service, I request song X, it plays; a cache copy is created on my hard

drive somewhere. I then turn off the service, get off the Internet entirely, go to my hard drive, find the file, can I play that song?

MR. POTTER: Sometimes. If the service works in that it caches copies and if the service works so that it doesn't disappear when you turn your computer off or you turn the service off.

As I described, every service using different technologies with different browsers, with different CODECs, with different CBNs, will operate differently. And there are instances in which the music publishers and songwriters' witness showed that copies can be persistent, and there are instances in which the copies

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may not be persistent.

MR. TEPP: Is there ever a case --

MR. POTTER: And there will be instances in which copies are not made unless one wants to take a position that putting together a zillion fragments all at different times is a copy.

MR. TEPP: Well, I can't imagine who would say that.

But is there ever a case where there's a persistent cache copy that's not playable, even if it could be identified?

MR. ENGLUND: I think if you read Dr. Mayer-Patel's testimony, what you'll find is that sometimes persistent copies are playable and sometimes they are not playable.

MS. CHARLESWORTH: A lot of it has to do with encryption technology. What he did is he analyzed a lot of the cache copies, at least in each of the services he looked at.

His conclusion was, effectively, it was like a limited download. That is, there were some -- for those services, there were some authentication or

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something that had to occur to replay it, but the file was there.

MR. TEPP: Okay. Then let me try and wrap it up by asking it this way, in a more conclusory way.

Is there any dispute that such a persistent copy, regardless of whether it's encrypted, constitutes

a copy or a phonorecord, as that term is defined in Section 101 of Title 17?

MR. POTTER: I think we would say it has to be done on a case-by-case basis, because if it can't be rendered, then arguably it's not a phonorecord.

If it's a piece of plastic and nobody owns needles anymore and nobody owns -- or a piece of vinyl and nobody owns -- is it a phonorecord? I suppose you bought it as a phonorecord.

Is it a phonorecord if it cannot be rendered?

MR. RUWE: Not by that machine.

MR. ENGLUND: Just because you don't have the machine that renders it I don't think is the test that the statute sets forth. The statute sets forth whether you can render it with the aid of a machine or device, not with the machine or device that you have in your

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current possession.

MR. PATRY: But I think that's why the Cablevision court was modest in what it did and why one should be modest in the more broad-based context of regulations.

MR. TEPP: I don't follow.

MR. PATRY: Well, if the answer is it depends and it depends a lot, and if the Cablevision court said it depends and we're not going any further than the record here, I don't know how you do that by broad-based regulation. I don't see how you can draft a regulation that's going to take a position for things that are so incredibly diverse and dependent upon a lot of variables.

MR. TEPP: Well, I can imagine ways to do that.

MR. PATRY: Well, I can't imagine any good reason for doing it, even if it's possible.

MR. TEPP: Well, I won't have a debate with you, but okay.

MR. PATRY: That's why we're here.

MR. TEPP: Let me move on then to the buffer

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copy issue, and I don't want to discuss it in the context of whether Cartoon Network or Cablevision, whatever you want to call it, is correct on that point,

on which, at this stage, I'll express no opinion.
But given that we've heard this morning, that buffer copies exist for a wide range of duration based on a wide range of variables, some under the control of the transmitting body, some under the control of the user, and some at the mercy of network conditions at the time, can we agree that in the universe of both non-interactive and interactive streaming, and distinguish, in response, between those two, if you feel it's appropriate, that there are some buffer copies that do constitute phonorecords, as that term is defined in Section 101?
MR. POTTER: No.
MR. JOSEPH: And I would agree, no, especially as to non-interactive streaming as it is most commonly done, again, aside from the cached Pandora situation, where the purpose of a buffer is a fragmentary -- and by the way, I do object to the term "buffer copy," because that actually, if you read the Copyright Act,

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implies a conclusion.
But if you speak of the buffer and the buffer takes in small pieces, and, again, there may -- is it conceivable that there's a line where the small piece becomes too large? I don't know and I don't have an answer to that question.
But its purpose is transitory. In other words, it exists solely to facilitate the rendering, then to be overwritten, which is the nature of the buffer.
And in order to permit the accumulation of the bits and the consistency of the transmission, I don't believe that function is other than transitory and, therefore, in the functional concept of transitory, that is not a phonorecord, as I would construe a phonorecord.
MR. TEPP: So are you disputing the Second Circuit's decision either in regard to the notion that at least somewhere between 1.2 seconds, data in buffers can constitute a reproduction, simply because buffers in their nature are meant to be overwritten at some point in time?

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MR. JOSEPH: I don't know that they said that. I am disputing -- if the function of the buffer is to acquire data solely for the purpose of rendering and then to be overwritten by the new data that will be rendered, I don't think the time distinction of 1.2 seconds or seven seconds or 10 seconds is or should be relevant in determining whether that is more than transitory for the purpose of fixation.

I don't think that disputes what the Second Circuit said. I think the Second Circuit only had a particular case before it and said, in that case, both in light of the duration and the function, and it did refer to the function, and CoStar refers to the function, that that is transitory within the meaning of fixation and, therefore, you do not have a phonorecord.

Yes, I do believe that.

MR. TEPP: So there is an intent requirement, as well as a durational one for superseding it?

MR. JOSEPH: A functionality requirement.

MR. TEPP: A functionality requirement. Okay. So even where the buffer embodies the entirety of the song, as I think NMPA said earlier this morning wasn't

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at least sometimes the case, you would argue that because it's a buffer that's intended to be overwritten, that that does not constitute a fixation and, thus, not a phonorecord.

MR. JOSEPH: I believe the better reading is that that is not a phonorecord, that's correct.

MR. PATRY: What I would contest is that fixation is the right way to look at it at all. The way to look at it, fixation has to do with protectability, as I believe Professor Goldstein agreed, too.

The question is, is this conduct something that gives rise to economic value that courts have historically regarded as infringing, and I think the answer to that is no.

MS. PETERS: Don't you have to deal with is it a reproduction?

MR. PATRY: Sure. And the question is how do you figure out whether it's a reproduction or not. The way that some people are looking at it here is because

it's a fixation, then automatically you get to that result.

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So what I'm disputing -- understanding that others disagree, I'm not saying I'm right, I'm just saying this is how I look at it.

MS. PETERS: Right, okay.

Prof. GOLDSTEIN: Just so the record remains correct, I nowhere said that fixation is irrelevant to the question of whether something is a phonorecord. It's right in the definition of phonorecord that it must be fixed.

The added point, the concept of intent, Steve, as you have addressed it, and the notion of something being overwritten is a really thorny area.

There's a famous story in the history of contemporary art of a drawing by Willem de Kooning being erased by Robert Rauschenberg, a rather dramatic act. As a consequence of it being overwritten, presumably, by what Rauschenberg did, are we saying that there really never was a fixed copy created by, or a work embodied in a fixed copy by, Willem de Kooning? I would hate to rest the future of an industry on that distinction.

MR. PATRY: But your distinction goes to

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whether it's protectable, not infringement.

MR. _____: Whether it's fixed.

MR. PATRY: Right, and, therefore, protectable.

MR. _____: Also, an infringement if it were copying something else.

MR. PATRY: Well, if it was there, of course, the alleged activity was erasing and, therefore, not copying.

MR. _____: Let's say if somebody said -- just to extend the hypothetical, it's a good point, Bill -- someone sued Willem de Kooning for copying their drawing and his, and if subsequently his was erased, it was overwritten by Rauschenberg, I'm immune from infringement because my copy has been overwritten by Rauschenberg.

MR. PATRY: But the basis for that would be

saying that's not protectable.
MR. _____: No, no, no. I'm saying it's not an infringing copy, because the de Kooning copy of another work is not an infringing copy because it's been erased, it's been overwritten.

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That's a great way to get off the hook, you erase your infringing copy.
MR. TEPP: Does everyone on the panel accept that there is some sort of, if not intent -- what was the term you used, Bruce?
MR. JOSEPH: Functionality.
MS. PETERS: Functional.
MR. TEPP: Functional, thank you. Functional, functionality aspect to fixation?
MR. JOSEPH: Well, you know my view.
MR. TEPP: Yes, I agree that we do.
MS. PETERS: Yes, we do.
MR. JOSEPH: And I refer to CoStar.
MR. TEPP: So what does that mean for RAM? Is anything in RAM, not just buffers, but any RAM data not fixed because RAM functions to erase either by being overwritten or simply disappearing when the computer loses power?
Prof. GOLDSTEIN: That's MAI against Peak.
MR. TEPP: Right. Well, I'm trying to find out if we're overturning MAI v. Peak today.
Prof. GOLDSTEIN: In CoStar, the dicta in CoStar

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to which Bruce refers was addressing a quite different context from the facts of CoStar.
The dicta in CoStar were talking about the truly fleeting reproductions, copies that are made, as a work makes its way in bit packets across the Internet, instantly copied and disappeared, instantly copied and disappeared.
That's what CoStar was addressing, a world apart from RAM as addressed in MAI and several other opinions following MAI against Peak.
MR. JOSEPH: But not a world apart from the kinds of buffers that we're talking about that are intended to simply gather those fleeting bits for long enough to assemble them and make sure the transmission

is consistent and continuous.
MS. PETERS: We understand your position.
MR. TEPP: Let's try and take another step then.
If that's right that -- I think if that's taken to its logical extreme, nothing that goes through a buffer is ever fixed and, similarly, I think nothing that goes through a network server, between the server

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copy and the end user, is ever fixed, at least as the Copyright Act uses that term -- so what's left for IDPDs, if anything? The statute clearly envisions something that is an incidental DPD, incidental to the ultimate creation of a DPD.
So let's assume for a moment that a DPD is created on the end, call it a cache copy, if you like. What is ever an incidental DPD if none of those other things are ever fixed? Okay.
MS. PETERS: Well, I'll look at Bill, since, obviously, you were part of the legislative process. What do you think?
MR. PATRY: Well, the real question is, is an incidental compensable or not.
MR. CARSON: The CRJs are supposed to set a rate for it.
MR. PATRY: But I think the answer is, no, it shouldn't be compensable.
MR. ENGLUND: The statute is clear that there is a category of things called incidental DPDs.
MS. PETERS: Right, exactly.

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MR. ENGLUND: I'm not sure I fully understood Mr. Tepp's question, suggesting that no buffers are ever reproductions or phonorecords. If he was taking Bruce's arguments to a logical conclusion, I think --
MR. TEPP: I think that is what I said.
MR. ENGLUND: We certainly think that what an incidental DPD is, is an interactive stream, and we would point to the sentence that Jacqueline has quoted a couple of times this morning.
MR. TEPP: All right. Let's leave behind the world of --

MS. PETERS: No, it's not all right.
MR. TEPP: Well, no, it's not all right, but we're not getting anywhere. So I'm just going to move on.
The issue of specifically identifiable, clearly, the phonorecord has to be specifically identifiable to be a DPD. There is at least some dispute over by whom it must be specifically identifiable.
So maybe if we can start with Professor Goldstein, but certainly anyone is welcome to chime in.

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What does the statute require in terms of by whom a phonorecord must be specifically identifiable and what is the authority for that conclusion?
Prof. GOLDSTEIN: Let me just take the statute.
Let's see. This is 115(d), "Each individual delivery of phonorecord by digital transmission results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord," and so on.
I read it, as I think the NPRM reads it, as just plain meaning, it doesn't require that it be identified by the transmitter. It just says by or for any transmission recipient, and then goes on.
So I really have nothing to add to what I see as the plain meaning of the statute.
MS. CHARLESWORTH: I just want to add one comment. I think to interpret it as requiring the service to be able to identify it would create a rule, frankly, that would cause services to engage in maybe willful blindness about what they were distributing.
I mean, I think that would be a gigantic loophole and clearly inconsistent with Congress' intent.

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MR. JOSEPH: Well, except that Congress clearly expressed its intent. Congress, in the two most authoritative pieces of legislative history that exist, the Senate report and the House report, said that specifically identifiable was with reference to the transmitting service.
And in one of the reports, I don't recall as I sit here whether it was the Senate or the House report,

they went so far as to say, of course, that's what we mean, because we couldn't essentially -- and when you say "of course," presumably, that's because you couldn't think that anybody could take it differently.

We're in a context here where you have a statute that required, at least for the first two years of its existence, a per phonorecord fee and unless that per phonorecord fee -- unless the service knew and could identify that a DPD had been created, how could they pay the per phonorecord fee, which was the status of the fee for '95 at least through '97.

The idea that this is plain on its face confuses and reorders the words "specifically identifiable" and the word "reproduction." The

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reproduction is by or for any transmission recipient and specifically identifiable hangs as a modifier that is not clearly linked to anything.

MR. CARSON: Doesn't that mean it's linked to anything?

MR. JOSEPH: I'm sorry?

MR. CARSON: Doesn't that mean that it is, in fact, linked to anything?

MR. JOSEPH: No. Well, I think it means that it is linked ambiguously, and that is the whole point. When the plain text is ambiguous, you look to the structure of the statute and the legislative history. You cannot conceivably read that sentence, and I think you've just agreed with me, and conclude that the meaning is unambiguous and it is plain.

And we gave examples, by the way, in the NAB comments, of other sentences with a similar structure, where it is absolutely clear that the modifier, which then follows, is followed by a noun and the noun is by or for an object, that the modifier is not referring to the object, and exactly the same structure that we have here.

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MR. TEPP: As a practical matter, Jacqueline, you discussed the concern about willful blindness on the part of transmitting entities, if the rule were to be clear that it must be specifically identifiable by such transmitting entities.

Under what factual circumstances could that happen? I'm having a difficult time imagining either a straight download or a cache copy that couldn't be identified by the transmitting entity.

Certainly, in the case of a cache copy, it would make no -- it wouldn't serve its purpose as a cache copy to facilitate a future performance of the work, if it weren't identifiable by the transmitting entity.

MS. CHARLESWORTH: I think what I had in mind was more full downloads, permanent downloads, where you could design a service, and I think there are real world examples of services that distribute downloads and don't track what they're distributing.

MR. CARSON: How would those services make money?

MS. CHARLESWORTH: Well, they put out devices

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that encourage people to copy what's being transmitted and permanently store it. In the case of the satellite radio companies, we've seen that.

And to say that if you're encouraging that kind of copying but you're not tracking what you're distributing, you're immune from copyright law, if you create a rule that says that, I think that you're basically encouraging services to engage in that kind of activity and not pay royalties for it.

I think Judge Posner, actually, in the Aimster case, there's a great passage there, but talks about this issue of -- goes into Grokster issues and similar issues. If you're putting out content and you're just turning a blind eye, but you know what's going on generally and you're being economically rewarded for it, that's not a reason to say there's no copying. The law has to consider that.

MR. JOSEPH: Except that the Audio Home Recording Act makes it very clear that home recording based from transmitted performance is perfectly acceptable. And I think there's a fallacy in what we've just heard, and that is that performance plus

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home recording is not equivalent to distribution, and that exists in all kinds of services.

There are tape recorders at home today that, even in the old technology, that record from the analog when a radio station broadcast its performances. And if the suggestion is that somehow those radio broadcasters are responsible for a DPD that is being created by the home recorder, then I would submit we have now strayed into an area that is completely incompatible with the Audio Home Recording Act, with congressional understanding from time immemorial and from the entire structure of the act. It highlights the slippery slope that this rule is actually putting us on and the errors of it.

MR. TEPP: I've taken a lot of time.

MS. PETERS: David?

MR. CARSON: Professor Goldstein, I'd like to give you an opportunity to respond to something Bruce Joseph said when he was quoting from your treatise. And I didn't get all the words down, but I just wanted to get some clarification here, because in essence, I think what he was saying, from page 7:30, was that you

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were saying that server copies are not subject to the Section 115 license.

That may be a poorly reconstructed version of what Bruce was reading, but I hope perhaps you will recall what he was referring to and can clarify.

Prof. GOLDSTEIN: I certainly do. He referred to my treatise twice and the second reference was entirely consistent with my testimony and what I believe about the purposes of the DPRA.

A little story to preface this. More years ago than I want to count, I was deposed as an expert witness in a case where Bruce and one of his partners was on the other side.

They came into the deposition room with the then three volumes of my treatise, larded with yellow Post-its, and I was thrown into complete fear for a period of less than transitory duration, because I knew that I would not testify to anything I didn't believe in and I wouldn't put in my treatise anything I didn't believe in.

I will tell you that over the course of what I think was a three-hour deposition, they did not open to

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one of those Post-its.
The same with respect to the point that he was just making about the server copies. You should not have opened the treatise to that Post-it, Bruce.
In saying that server copies are not subject to the compulsory license, what I was saying in that version of the treatise, which still exists and you're using a current version, is that for that reason, server copies are fully subject to the reproduction right, Section 106, and not subject to compulsory licensing, which is true, as an abstract matter.
I have since been educated in reading -- in fact, I wrote a note when I read the NMPR. I said I would be interested to see what you highlighted at the outset, that this was one of the issues, this was a non-delivered copy, and how do we deal with the reality of it.
And so I said I would be interested to see how they deal with it, and I made a note when I saw how you dealt with it. It doesn't lend itself to an elegant resolution, how to deal with the reality that server copies have to be made for the compulsory license to
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work. But it's a solution and there were suggestions, I think, in the RIAA testimony that you referred to in the report of how to deal with it. I made a note on the report when I read it. I said when updating next time, include this.
MS. PETERS: It's going to change.
Prof. GOLDSTEIN: And so you'll be comforted, Bruce, that it will be updated to reflect this.
It is not an elegant solution. It's one that does have historical precedent under the old Section 1(e), when people were making masters, which I was aware of when I wrote that, didn't think it was something -- I really don't talk about industry practice that much in the treatise, that I felt comfortable talking about. But, now that it's in a document issued by the Copyright Office, I do feel comfortable doing that and will so amend the treatise.
MR. JOSEPH: I'm delighted to see that your academic writing will change to conform to your

expressed views here.
Prof. GOLDSTEIN: No. It will change to reflect the realities of the world. That's totally unfair.

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MS. PETERS: And we were really talking about where the compulsory license was being used and whether or not the server copy could be encompassed within that license, not server copies outside the compulsory license.
MR. CARSON: So let's take a situation where everyone would accept that you're within the scope of the license per DPD. Let's just talk about a pure download that is licensed under Section 115. There are copies made in the course of the transmission, intermediate copies made between the server and the final copy that is downloaded.
Now, I think based on what we've seen and heard so far, some of you at least would contest whether those copies are copies that would be recognized as copies that would give rise to liability but for the license. But there are reproductions made in the course of that transmission, and there is, of course, the server copy.
Let's start with industry practice. When you're using the statutory license for a DPD, is the server copy part of that license, and if it isn't, how

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do you clear the right for that server copy?
MR. WATKINS: I don't think the statutory license -- the instance you just described, ironically, the one instance where everyone agrees that the license applies is the one instance where it's never used, because the record companies grant the license through to the service. So the actual statutory license is never invoked and never used, very, very rarely, in that circumstance.
MR. CARSON: Well let's take that case. When the record company grants a license through to the service, is there an express provision in that license that covers the server copy?
MR. WATKINS: I would let Steve talk about that, if he wants to. I can.
MR. ENGLUND: My sense is -- and, again, there

are lots of agreements with lots of services and I've not read most of them -- that where the record companies are responsible for clearance of the mechanical rights, that the agreements probably tend to say, more or less, that, but don't tend to parse out more finely some characterization of Section 115.

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MR. CARSON: Okay. So I'm hearing –
Yes, Jacqueline?
MS. CHARLESWORTH: The Harry Fox license, which is based on 115, does expressly include the server copy.
MR. CARSON: What I'm hearing from Les is -- I'd like to know if anyone has any different experience or understanding -- is that, strictly speaking, the Section 115 license is never, in practice, used for a download service.
Is that the case?
MR. ENGLUND: I thought he was saying the opposite.
MR. WATKINS: No. That is actually what I was saying.
MS. PETERS: He said streaming.
MR. WATKINS: I mean for a download service, it's not used.
MS. PETERS: That's what I meant.
MR. WATKINS: Yes.
MS. PETERS: You basically do streaming.
MR. WATKINS: We have never done that. Our

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company has never been asked to do that, and I believe that it's industry practice to never do that.
MR. CARSON: So we have no real world experience with the Section 115 license for the one thing everyone can agree it was constructed for, which is downloads.
MR. ENGLUND: Jacqueline's point is that most people do DPD licensing on the basis of agreements that incorporate by reference Section 115. Sometimes, in the case of Fox, they may have a specific server copy provision. Sometimes they may not.
I certainly believe that the better reading of Section 115 is the one you set forth in the NPRM, which

is to say that copies that are made as part of a process of delivering a DPD, but are not actually themselves delivered, are encompassed within the scope of the license.

That question has never been litigated purely in the context of a license obtained by compulsory process. The closest it comes to having been litigated is the Farm Club case, and the closest one that gets to an answer is an implication that I think somebody read

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earlier this morning that comes near the end of the opinion that if the transmission were a DPD, the server copy would be covered, but it says the opposite.

MS. PETERS: You said that.

MR. JOSEPH: I did point that out this morning.

MS. PETERS: I remember you saying that, yes.

MS. CHARLESWORTH: In the Farm Club case, just to be clear, the infringement claim was based only on the server copy, just to clarify the record.

So standing alone, without further license authority, it's a reproduction and that's the issue.

MR. CARSON: Is there anyone here who maintains that in the hypothetical situation where someone actually did use the statutory license to deliver a DPD, a pure download, anyone who maintains that that would not cover the server copy? Okay.

Anyone here who maintains that if there were any reproductions made in the course of that transmission, they would not be covered by the Section 115 statutory license? Okay.

Anyone here who maintains that there do not

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exist, in the real world, streaming services which do result in the creation of DPDs at the end of the process?

MS. PETERS: You need to say that again.

MR. CARSON: Are there not some streaming services in existence which, in fact, do result in the creation of DPDs at the end of the process? Anyone deny that that happens in the real world?

MR. ENGLUND: Streaming?

MR. CARSON: Streaming. I'm not going to make

a distinction between interactive or non-interactive. Are there streaming services which do, by virtue of the way they operate, result in the creation of DPDs?

To put the question -- does anyone assert that there are not such services?

MR. JOSEPH: I assert that I do not know if there are such services, but I do not deny that it is possible that such services exist, particularly in the interactive world.

MR. CARSON: Okay. And let's explore that a bit more. I think we've been told that there are interactive streaming services which, at the end of the

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process, result in a copy remaining on the hard drive, which, at some future point, can be used to render another performance.

Do you have any view on whether such a service does result in a DPD?

MR. JOSEPH: I am only hesitating because I haven't discussed that particular conclusion with the client that I am representing here. But I understand the scope of the question, and to the extent there is such a case, that strikes me as the closest you would come to it.

MR. CARSON: Okay.

MS. PETERS: Do you agree with that? How would you answer the question?

MR. PATRY: I think that it's definitional and technical. So I'm not quite sure what you -- if you mean streaming in the real-time sense.

If you mean streaming in the real-time sense, are you talking about something which also does something else? Because this is a bit like what Jacqueline is saying.

If you had something that did one thing and

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something else, if your question is directed toward the something else, then, yes, of course, it's something else, too.

So I think it would have to be a bit more fact specific. You would also have to know what happens at the end of the day to the something else at the end.

If it's a something else that results in a

permanent copy, that isn't affected by being overwritten, that isn't affected by you turning your computer off and turning it back on again, yes, you're going to get different things. And your question certainly goes there, but you would have to have a lot more to figure out what the answer is.

MR. CARSON: Okay. We've got enough people here that someone can surely tell me if I'm right about what I understand to be the case.

There are some services out there, interactive streaming services, which, as the performance is being transmitted, so that you are hearing it simultaneously with the transmission, a copy is also being made on the recipient's device which can subsequently be played again either at the volition of the person whose device

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it is or by connecting to that service again and the service instructs your device to replay it. Those do exist.

MS. CHARLESWORTH: That is correct.

MR. ENGLUND: Dr. Mayer-Patel described it.

MS. PETERS: Yes. And Jonathan would agree.

MR. POTTER: I'm not sure what was happening when I turned my back, but --

MR. CARSON: Never turn your back on me, Jonathan.

MR. POTTER: I think the answer is there are interactive streaming services which also simultaneously to delivering -- streaming some of the songs -- do deliver a copy of that song, and I'm not using any technical terms of art here. I'll let Mr. Goldstein and Mr. Patry fight about whether I'm saying it right.

But they do deliver a copy of that song to the hard drive so that for future bandwidth management, when you want to tee up that song again, if that's your favorite song, they don't want to keep sending it to you over and over again. So they absolutely deliver it

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to your hard drive and it's an efficiency thing.

So, yes, in those contexts, especially in an interactive world, where we've conceded the production of DPDs and the royalty and the obligation for DPDs, I

have no trouble agreeing with that.
MS. PETERS: Just what he said, because he conceded.
MR. PATRY: But the question is agreed to as what, as a compensable thing or not. He may have his agreements, but if you have a service that does caching for efficiency and stuff is a different question than to say that, yes, that's a DPD, that's compensable, versus something that is a necessary incident to a performance.
MS. PETERS: But isn't that up to the CRJs?
MR. CARSON: If it's compensable or not.
MS. PETERS: Yes.
MR. CARSON: If it's a DPD.
MS. PETERS: If it is a DPD, is it compensable?
MR. CARSON: Okay. As the Register said in her opening statement, the proposed rule was rather

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ambitious. Just in case there are any doubts -- and when one reads the comments, one certainly can have some doubts -- let me make clear that there was no intention on the part of the office to suggest that if you engage in streaming, you are necessarily infringing anyone's reproduction rights.
The concept, perhaps it was flawed in its execution, but the notion was to provide, in fact, what would be a safe harbor, an opportunity for people who wanted to clear those rights so that they didn't have to face a situation where they're being sued for infringement of the reproduction right, would have an ability to say, "No, I am within the scope of the Section 115 license. I have paid whatever the rate is, so I am clear." Not a requirement to use that license, but an option. And, in fact, some of the comments we received in the first round actually suggested that we should make that more explicit.
The comment filed by Electric Frontier Foundation and others, for example, expressly said what you really should do is don't go out, don't go farther than you need to, don't say this is necessarily a

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reproduction, this is necessarily a phonorecord, this

is necessarily a DPD. Simply offer the safe harbor so that people who wish to take advantage of the license may do so. For those who think they don't need the license, there is no implication that they should have gotten the license. They can fight it out if anyone wishes to assert rights against them.

So the question is if what was in the original proposal is too far, and certainly some of you think it went too far, is there value in a rule that clarifies that there is a safe harbor, that the license may be used for those who wish to use it in order to ensure that they have covered those rights; is that a valuable thing to do?

MR. WATKINS: Well, we certainly think so, because we have clients that opted as long as seven years ago to make that exact choice. They basically went out and did that. And so certainly we wouldn't want to see any rulemaking that retreated somewhere from that safe harbor. So I absolutely believe that there's some value in that. There are other services that aren't our clients and have chosen to take the

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other path.

MR. CARSON: Anyone else have any views on that?

MR. ENGLUND: I think it depends. As users of the compulsory license, the concept of a safe harbor seems like a good thing. So in that sense, sure. I think the question is what it really means to have a safe harbor. To some degree, Section 115 is inherently a safe harbor. You can take a license if you want a license. If you don't take a license, you don't, so maybe you get sued.

And in Register Peters' opening comments, there was a description of what a safe harbor provision might look like, and hearing the words of those comments, I had a hard time telling how that rule might be different from the first sentence of Section 115(d). So it is not clear to me that a rule that says a phonorecord is a DPD if it's delivered improves on the status quo.

MR. CARSON: What about a rule that clarified that when you do have a DPD, the Section 115 license

covers all the other reproductions made for the
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purposes of effectuating that DPD?
MR. ENGLUND: I think that would be very helpful.
MR. CARSON: Anyone think that would not be a good idea?
MR. PATRY: One question that I had, David, on that is -- so when we talk about safe harbors, 512 is a safe harbor.
MR. CARSON: Different kind.
MR. PATRY: Different kind, very different kind, and it's a different kind that doesn't say you are secondarily liable. It says if you do these things, you are okay, and if you don't do them, you might still not be secondarily liable if you're off the hook under the traditional secondary liability analysis.
The way I had always thought of everything after 106, including 115, is that it's essentially an affirmative defense. It is you did something, but you're off the hook if you fit within this category, whether it's 108 for library photocopying, or whether it's 115 for engaging in reproduction or distribution.
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If you comply with 115, then it's not infringement.
That's why 106 says notwithstanding the other provisions, blah, blah, blah, it's not an infringement to. That's at least the way I have classically thought of that and I think most people do.
I think what you're proposing is something sort of more like 512, which is to say we're not saying that you needed this or not, but if you do it, you can get it. But if what you get is something that ordinarily you only get because, indeed, it is an excused infringement because of the license, I'm not quite sure how conceptually you sort of thread those two things.
The other thing is that if you do it, please don't do anything that's written in such a way that it implicates audiovisual works.
MS. PETERS: We wouldn't do that.
MR. PATRY: Question. I should have stayed

home.
MR. JOSEPH: If you're going to --
MR. CARSON: Bruce, you can talk, but I had recognized Jonathan.

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MR. JOSEPH: Oh, I'm sorry. I apologize. I didn't notice that.
MR. POTTER: Our members would appreciate a safe harbor rather than the status quo. Anything that provides some protection and that provides authorization for doing all the things that we think we're authorized to do, particularly when we take the license, it's just important for plugging holes that might otherwise exist and for risk management purposes.
Some argued two years ago, when we were in the legislative context, that, in fact, the 115 statute is simply a license and is not defining the scope of any rights. Others argued that absent the right, you wouldn't need the license. So, of course, the license has to be parallel with the rights.
I defer those higher judgments to you or to the treatise writers. We have something which we think is workable in the context of our agreement. We certainly wouldn't mind a safe harbor that provides us even more comfort.
MR. CARSON: Bruce?
MR. JOSEPH: Section 115, unlike most of the

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sections after 106, does have that odd provision that confirms that a DPD is a distribution and it creates the concept of a DPD, and it actually says that DPDs are subject to the exclusive rights. So I think it is more than simply a license. But I don't think that's relevant necessarily, David, to your question.
The question of whether it is a good thing to make the statutory license available as a safe harbor I have to reserve judgment on, as I said earlier, and would certainly appreciate the opportunity to get back to you.
But what I can say, as I sit here, that if you were to do that, it would be important to do it in a way that doesn't carry an implication that, in any particular case, there are DPDs or there are

reproductions or distributions occurring.
You have, for example, the rule of doubt when it comes to registrations. You could certainly conceivably -- and I throw this out in the abstract, again, subject to thinking through the ramifications of it -- say that we have not decided whether or not there is a DPD or is not a DPD in any particular case.

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We haven't looked at the particular cases, but if a service believes that there is a DPD, we certainly will, as the filing agency, accept the form. And to the extent that there is that license, it also covers the server copies and all other copies.
That would, obviously, have to be refined and I do think we need to look at that carefully and think about it. I think it's an interesting idea that's worth considering. That's as far as I'm able to go right now.
MR. CARSON: Now, there's at least one party at the table for whom that kind of a solution would be less than what they might have hoped for and what the original proposal would have promised. So I'd like to get their reaction to that.
MS. CHARLESWORTH: I think without seeing -- and I don't mean to punt overly, but without seeing the rule, it's really hard for me to say exactly what our reaction would be.
Obviously, we want clarification. We would like to put some of these issues to rest. I think my concern is that it won't actually put any issues to

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rest, that we will just be prolonging what I've referred to repeatedly as a state of uncertainty. So I would have to reserve judgment and really see the rule and consult with my clients on that.
Obviously, we have a point of view about what these activities are and we certainly don't want that point -- the opposite side of the coin of what Bruce Joseph is saying is we certainly don't want there to be any suggestion that they are not what we say they are.
So I think maybe the devil is a bit in the details here and we certainly would look forward to reviewing anything you put out in that regard.

MR. WATKINS: I just wanted to add. I think if you do go in that direction, that it will be important to tackle the notice and recordkeeping issues with some speed, because unlike in the traditional context, where the 115 license has not -- it's just served as the background, basically, for private arrangements that don't actually comply with the formalities, where physical record distributors, for example, really never use the 115 license.

I think, in this case, services will actually

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be required to comply and complying will cause them, as I mentioned earlier, to incur significant costs and there are significant problems with --

MR. CARSON: We're certainly aware of those problems and, in some ways, while less weighty perhaps, those are not your problems to solve in terms of the regulatory authority we have. But it's on our agenda after this, I think, not as part and parcel of this, or we'd never get it done. So we certainly recognize the issue and one might have to be even more creative to solve that one.

MS. PETERS: Does anyone else want to say anything before we end? If not, I want to thank each and every one of you for adding to our dilemma. No, I'm being facetious.

I've worked with these issues, I think, almost since I came to the Copyright Office and they don't get any easier.

I agree with Jonathan that ultimately there needs to be a legislative fix. But we are where we are and we want to assist as much as we can, and we will take into consideration every comment that was filed.

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We will take into consideration every word that was said. And I'm not sure what we will do, so I don't know, but we will have to deliberate. And you haven't necessarily made our job any easier, but I don't know that you've made it any harder.

MR. TEPP: The best we could hope for.

MS. PETERS: But in any case, thank you very much.

(Whereupon, at 1:04 p.m., the hearing was

concluded.)