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MAY 28 2001

GENERAL COUNSEL  
OF COPYRIGHT

In the Matter of

Mechanical and Digital Phonorecord  
Delivery Compulsory License

Docket No. RM 2000-7

**REPLY COMMENTS OF MP3.COM, INC.**

MP3.com, Inc. ("MP3.com"), by its attorneys, hereby submits its reply comments in response to the Copyright Office's Notice of Inquiry in the above-captioned proceeding.<sup>1</sup> As MP3.com demonstrated in its initial comments, and as we discuss in these reply comments, it not only is necessary and appropriate for the Copyright Office to conduct a rulemaking proceeding to clarify and implement the Section 115 "mechanical" compulsory license as it applies to "incidental digital phonorecord deliveries" ("IDPDs"), but it also is necessary and appropriate for the Office to take immediate action by adopting interim licensing provisions that will permit online music service providers to deliver streaming audio to consumers while protecting the interests of copyright owners.

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<sup>1</sup> 66 Fed. Reg. 14099 (March 9, 2001).

## DISCUSSION

### I. There Is a Compelling Need For The Copyright Office To Act

MP3.com's initial comments in this proceeding explained why it has become imperative that the Copyright Office promptly commence a rulemaking proceeding to clarify and implement Section 115 as it applies to IDPDs and to take the even more immediate step of establishing interim licensing procedures that can be relied upon by online music services until the issues raised in the rulemaking proceeding are resolved. As we described, the technological issues and concerns about consumer demand that previously slowed the deployment of online music services have been swept away in the past few years. Unfortunately, however, uncertainty about the application of the copyright law to various online music business models – and, in particular, uncertainty surrounding publishing rights issues – has fostered a litigious atmosphere that is impeding the fulfillment of the online music revolution. Moreover, as MP3.com's experience demonstrates, even when an online music provider attempts to operate in accordance with an expansive interpretation of the music publishers' rights, the existing marketplace licensing mechanisms are neither capable of meeting the demand for clearances in a timely fashion nor do they protect against litigation.

As MP3.com explained in its initial comments, the principal marketplace mechanism for clearing publishing rights is the Harry Fox Agency ("HFA"), which represents more than 25,000 publishers. The problem is that HFA does not represent the publishers of an unknown, but not insignificant, number of songs, including songs written by major artists. For example, an infringement action recently filed against MP3.com by Randy Newman, Tom Waits, and Ann and Nancy Wilson of the band "Heart" – artists who claim not to be represented by HFA – seeks

damages relating to the alleged copying of several songs that MP3.com licensed through HFA. In addition, the difficulties associated with marketplace licensing are evidenced by the fact that MP3.com has not yet obtained licenses for more than half of the nearly million song titles it submitted to HFA more than six months ago, due to the sheer volume of licenses requested and difficulties in matching databases.

What plainly is needed is an effective and efficient statutory license mechanism for clearing publishing rights in the online environment. As amended by Congress in 1995, Section 115 of the Copyright Act is supposed to provide such a solution. Unfortunately, however, under the Copyright Office's current rules, using Section 115 to clear music publishing rights turns out to be an even less viable option for online music providers than marketplace licensing. The problem is that while Congress drew a distinction between "incidental" DPDs and DPDs "in general," there are no rules offering any guidance as to what does or does not constitute an IDPD. Furthermore, the Copyright Office has expressly "deferred" adopting any IDPD-specific rates or terms and has not yet established a practical way for on-demand streaming services to invoke the compulsory license with respect to the hundreds of thousands of song titles that such services typically seek to offer consumers.

The problems confronting music services that would like to invoke the Section 115 compulsory license with respect to IDPDs need to be addressed now and they need to be addressed by the Copyright Office.<sup>2</sup> Waiting for Congress to "fix" Section 115 will leave those

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<sup>2</sup> Even if a viable marketplace mechanism existed for obtaining all of the licenses that are needed to operate in the digital environment, it would still be necessary for the Office to adopt rules to facilitate the use of the Section 115 compulsory license by online music providers. Nothing in the history of Section 115 suggests that Congress intended for the availability of compulsory

who want to use the license in limbo for too long.<sup>3</sup> As MP3.com urged in its initial comments in this proceeding, the Copyright Office needs to initiate a rulemaking to clarify and implement Section 115 as it applies to IDPDs. In addition to providing guidance as to what does and does not constitute an IDPD, this rulemaking will allow the Office to address the logistical problems inherent in a licensing scheme that potentially applies to millions of uses of hundreds of thousands of separately copyrighted works owned by tens of thousands of copyright owners.<sup>4</sup> Moreover, in order to ensure that online music services have access to a workable compulsory license mechanism even while this rulemaking is pending, MP3.com again urges that the Office immediately adopt interim notice and recordkeeping requirements that will allow online music services engaging in on-demand streaming to invoke the Section 115 compulsory license but that will not leave copyright owners unprotected.

MP3.com's arguments regarding the need for the Copyright Office to act, both by commencing a rulemaking proceeding to clarify and implement Section 115 as it applies to IDPDs and by adopting interim licensing procedures that can be relied upon while the

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licensing to turn on the feasibility of marketplace licensing.

<sup>3</sup> Moreover, leaving it up to Congress to address the practical concerns that are impeding the compulsory licensing of IDPDs cannot be justified unless it is assumed that the 1995 amendments were intended to be ineffective – an absurd conclusion that the Office is not at liberty to reach.

<sup>4</sup> In this regard, MP3.com reiterates its recommendation that the Office consider an approach to statutory licensing for IDPDs that is modeled on the cable and satellite compulsory licensing schemes – schemes that allow copyright users to give copyright owners constructive notice of the use of their works (through filings submitted to the Copyright Office) and that require copyright owners to submit claims for the royalties due them.

rulemaking proceeding is pending, are echoed in the comments filed by the Recording Industry Association of America, Inc. ("RIAA"). On the other hand, the National Music Publishers' Association and the Songwriters' Guild of America ("NMPA/SGA") jointly contend that it would be "inadvisable" for the Copyright Office to attempt to formulate rules addressing the application of Section 115 to IDPDs "because rapidly changing technology would soon make any rule obsolete." Instead, NMPA/SGA suggest that the courts be relied upon to provide a timely resolution to the issues that RIAA and MP3.com believe should be addressed by the Copyright Office.<sup>5</sup>

The notion that the courts can clarify and implement Section 115 more rapidly than the Office defies both common sense and the Office's own precedents.<sup>6</sup> Moreover, turning to the courts almost certainly will lead to varying and conflicting results, thereby exacerbating the uncertainty that currently exists. And, of course, compared to the expert agency with responsibility for administering a variety of compulsory licenses, the judiciary is particularly ill-

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<sup>5</sup> NMPA/SGA also argue that "voluntary negotiations" offer a better way of resolving the issues relating to the application of Section 115 to IDPDs than the adoption of rules by the Copyright Office. While voluntary negotiations represent the preferred mechanism for establishing compulsory license rates and terms under Section 115, defining the scope of the license and establishing the process by which the license is invoked are matters more appropriately dealt with through rulemaking. Indeed, if the very scope of the license is subject to voluntary negotiation, Congress' intent to subject certain activities to compulsory licensing could effectively be nullified by private agreement.

<sup>6</sup> See, e.g., *Public Performance of Sound Recordings: Definition of a Service*, Docket No. RM 2000-3B, 65 Fed. Reg. 77292, 77294 (December 11, 2000) (rejecting requests that, in lieu of adopting a clarifying rule, the Office defer to federal court litigation on the scope of the Section 114 compulsory license).

suiting to establishing the types of notice and recordkeeping requirements that are needed, both as part of an interim set of licensing procedures and as part of more permanent rules.

In short, if Congress' intent to extend the Section 115 license to online music is to be fulfilled, it is up to the Copyright Office to adopt the necessary rules clarifying what online activities require licenses and establishing procedures whereby licenses can readily be claimed and royalty payments can efficiently be calculated and distributed. Absent Copyright Office action, it is virtually certain that the uncertainty and litigation that has plagued the online music environment will continue indefinitely.

## **II. The Copyright Office Has the Authority To Adopt Rules Clarifying and Implementing Section 115 As It Applies To IDPDs**

Congress enacted legislation extending the Section 115 compulsory license to cover IDPDs in 1995. However, the lack of clear definitional and procedural rules has frustrated the ability of online music providers to take advantage of this legislation. As a result, nearly six years after Congress acted, MP3.com is unaware of any instance in which the right to make IDPDs has been cleared using the Section 115 compulsory license mechanism.

This fact, in and of itself, suggests that Congress intended for the Copyright Office to exercise its inherent authority to adopt regulations to fill in the gaps in the statutory scheme and to clarify and implement Section 115 as it applies to IDPDs.<sup>7</sup> Indeed, as noted above, to

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<sup>7</sup>See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress" (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (omission in original)); see also *FDA v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation

conclude otherwise would attribute to Congress the absurd intent to extend compulsory licensing to IDPDs in a manner that makes the use of such compulsory licensing completely impracticable.

In any event, it is not necessary to look solely to the Office's inherent or implicit powers to find the requisite authority for the adoption of rules clarifying and implementing Section 115 as it applies to IDPDs. As both RIAA and MP3.com pointed out in their comments, Section 702 of the Copyright Act specifically confers broad discretion on the Office to adopt rules in furtherance of its administration of the compulsory license provisions of the Act, including Section 115. Moreover, the 1995 amendments to Section 115 themselves contain an express delegation of authority to the Office to adopt rules to implement the extension of the compulsory license to DPDs and IDPDs. Specifically, Section 115(c)(3)(D) directs the Librarian of Congress to "establish requirements by which copyright owners may receive reasonable notice of the use of their works under [Section 115], and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries."

The authority conferred on the Copyright Office by Section 115(c)(3)(D) is broad enough to allow the Office to adopt rules governing the various operational aspects of the Section 115 compulsory license as it applies to IDPDs, including the process by which digital music services invoke the license and the process by which royalty payments are calculated and distributed. In particular, Section 115(c)(3)(D) provides the Office with the requisite authority to adopt the interim licensing procedures proposed by MP3.com and RIAA. Those procedures, to reiterate, would permit digital music services to invoke the Section 115 compulsory license by filing a

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from Congress to the agency to fill in the statutory gaps.").

notice of intent with the Copyright Office. Such notice would include the name, address, and phone number of the service invoking the license along with information identifying the works being used. In addition, the interim procedures would require the compulsory licensee to maintain and periodically file with the Copyright Office information regarding the licensee's use of particular works. This information would thus be available to determine what royalties, if any, are due with respect to those uses.<sup>8</sup>

Nothing in the Act limits the Office's authority to adopt such rules, either on an interim basis or otherwise. While Section 115(b)(1) generally provides that a person seeking to obtain a compulsory license to make physical phonorecords must first attempt to serve a separate "notice of intent" directly on the copyright owner of each work being licensed and that service on the Copyright Office is sufficient only if the Office's records do not identify the copyright owner's name and address, the specific grant of authority in Section 115(c)(3)(D) to establish "reasonable" notice requirements with respect to the application of Section 115 to IDPDs should take precedence over the general requirements contained in Section 115(b)(1). Moreover, principles of statutory construction recognize that a statute need not be applied literally if such application would lead to an absurd result outside the intent of Congress.<sup>9</sup> In the case of the

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<sup>8</sup>In order to clarify that the Office's "deferral" rule was not intended to foreclose the availability of the Section 115 license, the Office should make clear that the interim procedures can be invoked retroactively to cover IDPDs made in the past.

<sup>9</sup>*See, e.g., Sykes v. Columbus & Greenville Railway*, 117 F.3d 287, 290 (5<sup>th</sup> Cir. 1997) (notwithstanding the lack of ambiguity in statutory language, the court went beyond the plain language to avoid an "absurd result."); *see also United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202 (1979) (literal interpretation of a statutory provision that would "bring about an end completely at variance with the purpose of the statute" must be rejected.); *see also Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (citing principle that



extension of Section 115 to the digital environment, it is clear not only that Congress wanted to foster the creation of a "celestial jukebox" offering consumers a vast array of music choices, but also that Congress intended these amendments to be interpreted in a manner designed to achieve the bill's intended purposes.<sup>10</sup> Subjecting IDPD licensing to the Section 115(b)(1) procedures, which were developed for use in licensing the manufacture and distribution of physical phonorecords, would clearly frustrate the accomplishment of these purposes by imposing on potential compulsory licensees the impossibly burdensome logistical task of finding and submitting individual notices to tens of thousands of copyright owners for hundreds of thousands of works.

Furthermore, the Office itself has recognized that its authority under Section 115(c)(3)(D) encompasses the establishment of rules relating both to the notice of intent that must be given to invoke the Section 115 license and to the manner by which licensees account for their use of the license to make IDPDs.<sup>11</sup> Although the rules adopted by the Office subject persons seeking a compulsory license to make DPDs to the same notice of intention requirements as apply to persons seeking a license to make physical phonorecords, nothing in the decision suggests that

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"Congress cannot be presumed to do a futile thing.").

<sup>10</sup>See H. Rep. No. 104-274 at 12-13; S. Rep. No.104-128 at 14. As MP3.com noted in its initial comments, the legislative history of the Section 115 amendments also indicates that Congress foresaw and authorized departures from the existing statutory provisions if such provisions "are not readily applicable to the new digital transmission environment." S. Rep. 104-28 at 98.

<sup>11</sup>See *Notice and Recordkeeping for Making and Distributing Phonorecords*, Docket No. RM 98-7C, 64 Fed. Reg. 41286, 41287 (July 30, 1999) (adoption of "interim" regulations governing the submission of notices of intention to make DPDs "fulfills the section 115(c)(3)(D) requirement for notice").

the Office either was compelled to reach this result or intended it to apply to IDPDs.<sup>12</sup> Indeed, the fact that the rules adopted by the Office were designated as "interim" and were to be revisited after two years strongly supports the conclusion that the Office understood that it has the discretion to adopt a notice of intention process for DPDs and IDPDs that varied from the process specified in Section 115(b)(1) for physical phonorecords.

Finally, MP3.com submits that the various sources of rulemaking authority discussed herein also empower the Copyright Office to adopt rules clarifying what activities do and do not constitute IDPDs. As indicated above, Congress expressly directed the Office to adopt rules governing the notice that must be given to invoke the compulsory license for particular uses of copyrighted works and the records that must be kept with respect to the "uses" made pursuant to the license. Inherent in the authority to adopt such rules is the authority to define the "uses" to which those rules apply. It is inconceivable that Congress intended to tie the Office's hands by requiring it to establish rules without the ability to describe the activities to which those rules apply.<sup>13</sup>

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<sup>12</sup>In fact, as previously noted, the Office ultimately decided to "defer" adopting any IDPD-specific rules.

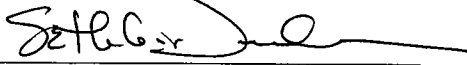
<sup>13</sup>See also *Public Performance of Sound Recordings: Definition of Service*, *supra* note 7 (concluding that the Office has authority to conduct a rulemaking to determine whether a compulsory license under the Office's administration applies to particular conduct).

## CONCLUSION

Immediate action by the Copyright Office to resolve the logistical and other obstacles currently impeding the application of the Section 115 compulsory license to on-demand music services is both necessary and appropriate. MP3.com again urges the Office to move as quickly as possible to take the actions recommended herein.

Respectfully submitted,

**MP3.COM, INC.**

By: 

Seth A. Davidson  
Lisa Chandler Cordell  
Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, NW  
Suite 600  
Washington, DC 20036  
(202) 939-7900  
*Counsel for MP3.com, Inc.*

May 23, 2001

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**WRITTEN STATEMENT OF THE HONORABLE HENRY J. HYDE  
BEFORE THE SUBCOMMITTEE ON  
COURTS, THE INTERNET AND INTELLECTUAL PROPERTY  
COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES  
MAY 17, 2001**

The present disagreement over the ability of record companies and online services to make the reproductions of musical compositions necessary to launch digital music services is a troublesome obstacle to efforts to meet consumers' demand for music on the Internet. I understand that record companies and online services have been negotiating with music publishers to find a business solution to this disagreement. My sincere hope is that the parties will come to a negotiated solution quickly to resolve their differences, and that the marketplace will work to provide consumers with the music they desire.

However, it is important to recognize that a voluntary agreement is not necessary for the use of musical works in digital music services. During my tenure as Chairman of this Committee, the Committee worked with both the music publishers and the recording industry to enact the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"). Among other things, the DPRA clarified that the mechanical compulsory license found in Section 115 of the Copyright Act applies to the digital world. We did so at the music publishers' insistence, and with the support of the recording industry. At the time I believed, and I still believe, that the DPRA gave record companies and online services whatever rights they may need to make reproductions in the operation of digital music services.

It is therefore very disappointing to me that some are now asserting that the compulsory license we enacted in 1995 is insufficient to grant the necessary rights to get digital music services up and running. This is contrary to what I believe to have been one of the key purposes of the DPRA: to allow legitimate operators to rely upon the compulsory license to launch their services.

My hope is that the disagreement between music publishers and the recording industry and Internet music companies will be resolved quickly through business negotiations and I understand that the Copyright Office is considering a rulemaking to clarify the application of the mechanical compulsory license to certain specific types of services. I support action by the Copyright Office to effectuate the intent of the DPRA to enable electronic music delivery, and I hope that the Office will take such action quickly, to help meet the consumer demand for digital music that exists today.



**DRAFT UCC ARTICLE 2B:  
PROPOSED EXEMPTION FOR COMPULSORY LICENSES  
UNDER SECTION 115 OF THE COPYRIGHT ACT**

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**Submitted to the UCC Article 2B Drafting Committee  
by National Music Publishers' Association and  
The Harry Fox Agency, Inc.**

National Music Publishers' Association, Inc. ("NMPA") and its music licensing subsidiary, The Harry Fox Agency, Inc. ("HFA") (together, "NMPA/HFA"), write to urge that proposed UCC Article 2B ("Article 2B") expressly exempt from its terms the compulsory license for the making and distribution of phonorecords of nondramatic musical works prescribed by section 115 of the U.S. Copyright Act. Without such an exemption, Article 2B would improperly impose state law terms on a license created and governed by federal law. It would also needlessly interfere with a compulsory licensing system for musical recordings that has operated well for nearly a century, serving the growth of a major entertainment industry, without any request from any of the participants in that industry for such regulation, without any study of the longstanding customs and practices or structure and economics of the industry affected, and without any justification for such a disruptive intrusion into an area in which Congress has, pursuant to the Copyright Clause of the U.S. Constitution, calibrated the delicate balance involved in promoting the creation and dissemination of musical works.

## I.

### BACKGROUND

#### A. National Music Publishers' Association and The Harry Fox Agency

NMPA is the principal trade association representing the interests of music publishers in the United States. The more than 600 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. For over eight decades, NMPA has served as the leading voice of the American music publishing industry in Congress and in the courts.

NMPA's wholly owned subsidiary, HFA, was founded in 1927. It acts as a licensing agent for over 18,000 music publishers, licensing most of the music used on U.S.-produced CDs, tapes and records. In 1996, HFA issued some 210,775 licenses under the compulsory licensing provisions of the Copyright Act and collected approximately \$404 million in royalties from such licenses on behalf of its publisher clients. Although the aggregate figures for last year are not yet available, HFA saw an increase in its licensing activities in 1997.

#### B. The Compulsory License

Each year, hundreds of thousands of licenses are issued in the United States pursuant to section 115 of the Copyright Act for the making and distribution of phonorecords of nondramatic musical works. Such licenses are typically memorialized on a short form that incorporates by reference the compulsory license terms of section 115. An example of a compulsory license form is attached hereto as Exhibit A.



Notwithstanding the vast number of compulsory licenses issued pursuant to section 115 every year, NMPA/HFA is not aware of any initiative by industry participants to alter existing industry practice for the issuance of these licenses. Unlike software licensing -- the original focus of Article 2B -- the system for compulsory licensing of musical works is longstanding and well established. Indeed, NMPA/HFA submits that the sudden introduction of new license terms into the compulsory music licensing system, which has been operating successfully for nearly 100 years, can only be disruptive of well-developed and successful industry practices.

1. **History**

The section 115 compulsory license -- or “mechanical” license, as it is called in the music industry -- represents a statutory limitation on the exclusive rights of reproduction and distribution otherwise enjoyed by the authors of musical works under the Copyright Act. *See* 17 U.S.C. §§ 106, 115. Under section 115 of the Act, once a copyright owner has authorized distribution of phonorecords of a nondramatic musical work to the public in the United States, “any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of [section 115], obtain a compulsory license to make and distribute phonorecords of the work.” 17 U.S.C. § 115(a). That is, a license is available to anyone who wants to produce a compact disc (“CD”), audiocassette or record containing the work, or who

wants to distribute a copy of the work by means of digital transmission -- resulting in what is referred to by section 115 as a “digital phonorecord delivery” (“DPD”).<sup>17</sup>

Section 115, like the rest of the Copyright Act, was enacted by Congress pursuant to the Copyright Clause of the Constitution, which grants Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. Const. art. I, § 8, cl. 8. Congress included the compulsory license provision in the 1909 Copyright Act because it was concerned about the possibility of “‘a great music monopoly’” in the hands of a single piano roll manufacturer that had exclusive contracts with many music publishers. 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.04[A] (1997) (quoting H.R. Rep. No. 60-2222, at 6 (1909))

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<sup>17</sup> A “digital phonorecord delivery” is defined in section 115 of the Copyright Act as

each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

17 U.S.C. § 115(d).

compulsory licenses -- thereby leaving this field to federal regulation as Congress intended.<sup>2/</sup> The reporter's notes to section 2B-105 recognize that there may be instances in the copyright context where the provisions of Article 2B are preempted under the Supremacy Clause. March Draft § 2B-105 note 2. This is such an instance.

We discuss below several provisions of proposed Article 2B and how they conflict with the objectives of the compulsory licensing provision of the Copyright Act.

### III.

#### ANALYSIS OF SPECIFIC PROVISIONS OF OF PROPOSED ARTICLE 2B

Initially, we must stress that the following discussion represents only a preliminary review of the most obvious problems presented by proposed Article 2B and does not provide an exhaustive analysis of all the ways in which the Article might interfere with the compulsory licensing scheme created by section 115. These problems alone, however, demonstrate the fundamental conflict between federal law and proposed Article 2B as applied to the compulsory mechanical license.

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<sup>2/</sup> NMPA/HFA can discern no rational reason why trademark and patent licenses should be generally exempted from the scope of Article 2B, but not compulsory licenses under section 115 of the Copyright Act. See March Draft § 2B-103(b)(2)(B).

**A. Section 2B-201 -- Formal Requirements**

Under section 2B-201, in order for a license calling for payment of \$20,000 or more in royalties to be enforceable, a written record “authenticated by the party against which enforcement is sought” is required except under certain specified circumstances. March Draft § 2B-201.

Section 115 of the Copyright Act does not require an “authenticated record” for a compulsory license to be enforceable. *See* 17 U.S.C. § 115(b), (c)(1) (setting forth notice and registration requirements, but no “authenticated record” requirement, for compulsory licenses); 37 C.F.R. § 201.18 (detailing required content of notice to be served on copyright owner or filed with Copyright Office by compulsory licensee, but imposing no requirement that licensor sign or acknowledge notice). The statute of frauds provision embodied in section 2B-201 of Article 2B is therefore at odds with the compulsory licensing scheme devised by Congress, which imposes its own set of requirements on compulsory licensors and licensees.

**B. Section 2B-203 -- Offer and Acceptance; Varying Terms; Conditional Offers; Section 2B-209 -- Terms When Contract Created by Conduct**

The above-referenced sections of proposed Article 2B address contract formation and set forth guidelines for determining the terms of the contract in a “battle of the forms” situation. They make little sense in the context of the compulsory licensing scheme of section 115, however, because section 115 *requires* a licensor to “accept” a licensee’s offer to establish a license in accordance with the statutorily

prescribed terms. Indeed, no act of acceptance is statutorily required. The compulsory license is deemed granted so long as the licensee complies with the statutory requirements.

These proposed sections are also inconsistent with the reality that a compulsory licensor lacks the bargaining power or ability to demand additional or more favorable terms from the licensee, as the licensee can always fall back on his statutory rights.

**C. Section 2B-401 -- Warranty and Obligations  
Concerning Quiet Enjoyment and Noninfringement**

Proposed section 2B-401 provides that, unless specifically disclaimed in the license, a licensor of “informational property rights” is warranting that the information and rights “shall be delivered free of the rightful claim of any third person by way of infringement or the like” and also that “no person holds a claim to or interest in the information which arose from an act or omission of the licensor, other than a claim by way of infringement or the like, which will interfere with the licensee’s enjoyment of its license interest.” March Draft § 2B-401(a), (b)(1). The proposed section adds that if the “informational property rights” being licensed are also subject to compulsory licensing, then the warranty is “subject to” such rights. March Draft § 2B-401(c)(1). Article 2B does not, however, exempt compulsory licenses from the implied warranty requirement.

Section 115 of the Copyright Act does *not* require such warranties to be made by the copyright owner in the compulsory license context and, likewise, the



## Responses of National Music Publishers' Association

### To Questions for Hearing Record From Senators Hatch and Leahy

April 30, 2001

#### I. Questions from Senator Hatch:

*One argument we have heard in favor of a compulsory license is that music has so many pieces to license and there have been substantial disputes between the record labels, the publishers and technology companies like MP3.com about how to get the publishing rights cleared in the volume demanded by online offerings . . . . Would any of you be interested in commenting on this particular problem and suggest ways to remedy it?*

As you are aware, songwriters and music publishers already operate pursuant to the statutory compulsory license in section 115 of the Copyright Act. MP3.com has mischaracterized its experience in clearing publishing rights with the Harry Fox Agency ("HFA"), and in fact substantial progress has been made recently between MP3 and HFA, which we describe in detail below. There has been no increase in the number of licenses necessary to distribute music since the emergence of online digital music services, and music has been successfully distributed for decades under the current legal regime. As we demonstrate in detail in the answers that follow, no new compulsory license is necessary -- nor would it be beneficial.

*Mr. Hank Barry argues that we have created compulsory licenses in the past for publishing rights in music and in rebroadcast of television programming because it was difficult to clear the rights to the myriad creative interests involved in making up a broadcast day. Would anyone like to explain why that analogy does or does not obtain in the online music and entertainment world?*

NMPA does not believe that any new compulsory license is warranted to promote the availability of music over the Internet. What is necessary for a vibrant online music market to take root is for "services" such as Napster to cease their promotion and facilitation of online infringement. At both the Committee's initial hearing on music and the Internet, held July 11, 2000, and the April 3, 2001 hearing, witnesses representing companies and interests offering appropriately licensed music services acknowledged the virtual impossibility of competing with rogue entities that make other people's music available to anyone for nothing. Until Napster and its imitators follow the law by seeking necessary licenses and making the necessary payments to creators and rights holders, law-abiding companies will remain at a serious, if not fatal, commercial disadvantage.

As Mr. Barry knows, at the time Napster launched its service, the company was eligible -- like any other Internet music service -- for compulsory licenses under the terms and conditions of section 115 of the Copyright Act for the making of

“digital phonorecord deliveries” (“DPDs”) of musical compositions. It chose not to use the compulsory licensing system available to it. Napster has therefore forfeited eligibility for compulsory licensing through its continued infringement. The company now urges Congress to establish a new compulsory license regime that would reward it with access to all musical compositions (and all sound recordings), presumably at a rate it finds acceptable and with few if any administrative responsibilities for Napster. NMPA believes that the existing section 115 compulsory license provides an adequate framework for Napster and other Internet distributors of music to secure licenses at a reasonable rate.

*I have heard a number of entertainment companies say that acceptable protection for online content simply does not exist yet, that existing Digital Rights Management and watermarks, wrappers, or encryption, is simply not good enough to protect valuable content. Yet we have a number of technology companies here today who believe that they have such a solution, and now we have announcements of online initiatives from all five major labels, which suggests the technological protections have developed recently. Would any of you care to comment on the state of technological protection for content?*

The technology for protection of digitally distributed content is still in its infancy. The field is extremely complex and combines disparate academic fields of study including computer science, encryption mathematics, digital signal processing and acoustics. Our experience with reviewing the different technologies offered by various vendors (large and small) is that a technology is “tamper-proof” or “hacker proof” only as a matter of degree. Today, there is no single copy protection technology that meets the requirement of consumer convenience, strong protection, practicality and reasonable cost.

In addition to copy protection technology, use tracking mechanisms are equally important to ensure a vibrant digital music business where all of the participants, including songwriters and publishers, get properly paid for the uses of their creations. While “fingerprinting” technology is useful to identify unauthorized music files on computer servers, such a function is distinct from managing legitimate delivery to consumers of copy protected music. For example, The Harry Fox Agency has proposed for several years, most recently in the “SDMI” process, that the license number corresponding to the mechanical license (and any other relevant license number) authorizing a digital distribution be included in the header of each downloaded or streamed file. Inclusion of the mechanical license number would permit automated spot checking of websites and allow automated auditing of a licensed website. It is a given that different website operators may secure the authority to distribute a song from their website from different parties. In order for a songwriter, publisher or their agent (HFA, for example) to check that a website has such authority, it is essential that a license number corresponding to the license granting the operator the authority to execute such distribution appear in the header of the digital music files being distributed from their website.

Although digital rights management technology vendors profess to have the solution to this problem, they and the record labels have resisted attaching license



numbers to digital music files. While we have been given a number of reasons for this resistance (including the "header" can only accommodate so much data), all can be technologically surmounted. By continuing to resist inclusion of this license information in the "header," the record companies make it much more difficult for music publishers to audit record company compliance with our licensing agreements. Furthermore, because the primary clients of digital rights management vendors are the record labels (because the record labels control the distribution of sound recordings), the technology they have developed and adopted so far has been responsive to the interests of record labels, not those of music publishers. An important principle arises from our experience with digital rights management: technology alone is not the only challenge facing an effective digital rights management regime. The economic tensions that have been a part of the music business for decades are also a significant factor in whether the right technology is made available. We remain hopeful that on-going discussions between the music publishing community and the RIAA will resolve this issue.

There is an important additional factor to consider: the "consumer-friendliness" of the protection and management technologies. A near-perfect copy protection technology is of little help to the music industry if it frustrates consumers. It is our experience that the easier and more versatile the technology is for consumers, then the easier they are to "hack" or bypass. Conversely, the more tamper-resistant the technology is, the more difficult it becomes for legitimate consumers to access their purchased content and for the music licensing community to implement the technology. Currently, the Achilles heel of all of these technologies is a product called "Total Recorder." This packaged software product, generally available, pretends to be the computer operating system that it is the sound card hardware that produces the musical sound. This means that after legitimate content is legitimately decrypted by the copy protection and rights management software, the Total Recorder software can copy the decrypted digital sound data constituting the song into a separate file, typically in MP3 format, that would be "clear" of encryption. In other words, truly piracy-proof digital music delivery technology must protect the entire chain of delivery, from the website to the speaker. This last state of affairs will only occur if the entire industry agrees on a copy protection and rights management model that meets everyone's needs and is implemented across all platforms at each point in the chain of digital music delivery. So far, as mentioned above, that has not occurred.

In summary, copy protection technology is still developing. "Perfect" systems from a technological perspective are not yet perfect from a business market perspective. Digital rights management technologies are improving but so far, music publishers are at the mercy of the record companies regarding which digital rights management technology is used and what information is included in the identifying "headers." Industry-wide resolution of this issue remains elusive. We are confident that these problems can be resolved, but as this answer indicates, there are some significant issues remaining.

*For all panelists: The premise of this hearing is that digital content is coming soon to digital devices to be enjoyed by consumers soon. Based on our discussion today, how soon is soon, and when will the promise become reality?*

Mr. Chairman, for music, the question is not when the content is coming – digital delivery of music is here. NMPA members have licensed more than thirty enterprises, most of them fledgling businesses less than five years old, to distribute recordings of music over the Internet. EMusic and MP3.com are among the licensees. These companies have chosen to respect the rules laid down by Congress by obtaining licenses and paying compensation to the copyright owners. Our licensing arrangements demonstrate that music publishers are fully prepared to license any Internet music service if that service is prepared to follow the law.

Furthermore, NMPA has every incentive to license its works in the digital environment. Some digital music services imply that music copyright owners are deliberately impeding the issuance of licenses for online music services. This suggestion is both inaccurate and illogical. Music publishers only get paid when their work is used; if it is not used, no revenue is generated. NMPA members are eager (and economically motivated) to license their works in the new digital environment.

*For all panelists: Is there any point you feel should be raised or that you would like to further respond to for the completeness of our record?*

We would like to respond to the suggestion of some that a new “blanket” statutory license be created for digital music distribution.

Music website operators (including MP3.com in its written testimony) often propose that digital music distribution be governed by a “blanket licensing” scheme without further elaborating on the complexities of current blanket licensing. NMPA believes that blanket licensing is inappropriate to the licensing of digital phonorecord deliveries, for the following reasons.

Blanket licensing is a process that the performing rights societies (e.g. ASCAP, BMI and SESAC) use to license and collect performance royalties from radio and television stations for performances of songs on radio and television. Created during the World War I era to address the practicalities of keeping track of the public performance of musical works on radio and in live performances, the blanket license is premised on the impracticality of reviewing every radio or television station’s play log or programming for every minute the station is on the air or every location where the music is played. Instead, statistical sampling of a smaller number of radio and television stations is employed to estimate how many times a particular work is performed.

Sections 111 and 119 of the Copyright Act establish limited compulsory licenses for the retransmission of certain broadcast signals under modified blanket licensing. Royalties deposited pursuant to the terms of these compulsory licenses are subject to a complex, two-phase distribution proceeding. In phase one, groups of eligible rights holders demonstrate how much of the overall royalty pool should be allocated to

each group. In phase two, disputes regarding the allocation of royalties among claimants within each group are resolved. Such a system may be appropriate in the context of the transmission of copyrighted material employing technologies that, at least for now, do not provide a ready means for identifying individual rights holders. It is not appropriate, however, to impose by law a licensing regime developed for the specific facts of the cable or satellite industries where (as in the case of certain Internet music services) the transmitter is the originator of the transmission and has control over the material being made available to subscribers, and where technology is available to facilitate accurate licensing on behalf of the affected rights owners.

It is inaccurate for music website operators to state that blanket licensing resolves technical licensing problems in the digital era. First, the compulsory license of section 115 is available to any entity wishing to distribute music over the Internet. Second, website operators routinely collect information on millions of visits to their websites which they use in marketing their products and attracting advertising revenue. It is disingenuous for the same website operators to claim that it is impractical for them to account for each use of the works that they are licensing (as a justification for blanket licensing) when they already have that detailed information in digital form in their databases. In other words, website operators are ideally equipped for this kind of accounting task.

The principal reason for advocacy of a blanket license by web-based music services is that it transfers the royalty distribution burden from users to copyright owners in a manner that costs the creators of the work significantly more than per-use accounting. Digital technologies are particularly well suited, however, to performing the accounting tasks associated with licensing uses of works in a networked environment and ensuring accurate payments to the appropriate rights owners and creators. Congress recognized this fact when it enacted section 1202 of the Copyright Act to protect copyright management information from intentional interference.

*Mr. Murphy: Could you comment on the publishing issues and how you believe your members will be able to meet the demands of licensing hundreds of thousands of songs where you have in the past licensed ten to twelve at a time?*

The assertion that HFA can only license ten to twelve songs at a time is inaccurate. In recent years, HFA has routinely issued licenses for approximately 250,000 titles annually. Everyone at HFA is aware, however, that the digital economy is changing the licensing paradigm from individual licenses to bulk licenses, and we are adapting to this new reality promptly – along with the rest of the music industry. Our transformation is not complete, and the process has not been error free, but we are confident that HFA has made rapid progress and is performing as well as or better than any other digital music licensing entity. HFA anticipates it will have a smoothly functioning digital licensing mechanism in the very near future.

Here are some examples from the HFA-MP3 relationship to prove our point. Presently, HFA and MP3 are working under the terms of an interim license under which the MyMP3 service may operate while permanent licenses are issued. This is a

critical fact that MP3 omitted entirely from its testimony. With respect to permanent licenses, MP3 has submitted a database of 914,914 titles for licensing, and HFA has completed a file matching and validation search on each one. As of April 5, 2001 HFA had issued permanent licenses for 32,885 songs. Between April 5 and April 20, 2001, HFA issued permanent licenses for an additional 131,072 songs. In conducting our analysis of the MP3 database, HFA determined that 64,482 were duplicate requests. In other words, HFA has reviewed the entire file and has resolved (by permanent licensure or by confirmation that a request was a duplicate) 228,439 of the records. The "10 to 12 licenses at a time" criticism is simply misplaced.

There is no question that a substantial number of requests are pending. A significant portion of the unresolved requests, however, are due to incomplete information submitted by MP3. We continue to work with MP3 to perfect the song-clearance mechanism so that we can issue licenses for whatever number of songs that MP3 submits to us. It should be noted, however, that users of the copyrighted material have responsibilities as well. A company cannot simply "rip" CDs with impunity (that is, disassemble lawfully purchased CDs which contain the necessary licensing information), disregard data retention and quality requirements in this process, and then blame the licensing entity for a failure to respond promptly. A substantial portion of the 686,000 titles that are pending are due to MP3's incomplete database. HFA is committed to resolving the pending MP3 license requests; but we ask that the necessary minimum identifying data be submitted to us so that we can ensure proper compensation of the lawful copyright owners.

*Mr. Murphy: You have testified that the Harry Fox Agency has provided MP3.com with an electronic copy of its licensing database and I understand you will not support litigation against MP3.com while you mutually attempt to address problems faced in issuing licenses for these songs.*

The Chairman's understanding on this point is correct. The President of HFA (Gary Churgin) confirmed this fact in a letter to MP3.com dated March 29, 2001.

*I have some questions about how this is working practically, and must how the clearance process will work. First, how many song titles are on that database and does the Harry Fox Agency represent all of the publishers for each of those songs? If not, with respect to how many of these songs does the Harry Fox Agency represent 100 percent of the publishers?*

MP3 has advanced the notion that HFA must represent all of the owners of each work in order to issue a license – which betrays a fundamental misconception of the copyright law on this point. 17 U.S.C. § 201(a) states: "Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work." The leading treatise notes that "one joint owner" has the right "to license the work without the consent of the other joint owners" and "an authorization to [a user] from one joint owner will be an effective defense to an infringement action brought by another joint owner." NIMMER ON COPYRIGHT § 6.10. A long series of cases encompassing most of the major federal circuits is cited in support of

these propositions, which we will not repeat here. *Id.* The result of this well-settled aspect of copyright law is that HFA need not represent “all of the publishers for each of the songs” in order to issue a license upon which MP3 may rely; if HFA represents one co-owner of a musical work, that is sufficient to issue a license.<sup>1</sup>

With respect to the second part of the question, the number of songs for which HFA represents at least one owner is constantly changing (and growing). The now over 27,000 music publisher principals represented by HFA have historically owned or administered approximately 90% of the compositions in the American repertoire. HFA’s publisher principals collectively own more than 2.5 million copyrighted musical works. We are continually acquiring more titles and publishers.

*Second, online music services such as MP3.com have testified that they want to offer consumers access to a vast library of music, exceeding 900,000 titles. For those songs whose publishers are not represented by Harry Fox, could you help us understand how an online music provider would go about identifying the publishers and obtaining licenses from them?*

Some background information on the 914,914 titles in the MP3 database is necessary. First, 64,482 of the titles are confirmed duplicates. Second, an unspecified portion of the 914,914 were placed there by MP3 through their music hosting service for independent artists (without record label affiliation and in most cases not containing copyrighted musical work). It is obvious that HFA would not have these MP3-facilitated songs in its database.

In the relatively rare instances where MP3 presents sufficient licensing information<sup>2</sup> to HFA, and HFA represents none of the copyright owners of the underlying musical work, MP3 (or any other online music provider) could do the following to identify the publisher and obtain a license: (1) directly contact the publisher, which would be listed in the sound recording license that the music provider must obtain from the record labels (most of the artists are affiliated with such labels); or (2) use the compulsory license provisions of section 115(b) of the Copyright Act and either determine the copyright owner from the Copyright Office records or, in the case no such owner is listed, file notice with the Office pursuant to that section (and its implementing regulations at 37 CFR § 201.18<sup>3</sup>) and distribute the work pursuant to the statutory compulsory license.

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<sup>1</sup> In the event HFA licenses through one joint owner, that owner owes an accounting for profits to the other co-owners. See Nimmer § 6.12[B].

<sup>2</sup> In the case of a previously issued CD, a licensable match requires the song title and two of the following: (1) artist, (2) album, or (3) catalogue number or UPC code.

<sup>3</sup> A good summary of the compulsory licensing mechanism for music is found in Copyright Office Circular 73, available at the Office’s website: <http://www.loc.gov/copyright/circs/circ73.pdf>.

*Third, given that there are many songs whose publishers are not represented by the Harry Fox Agency and that even where you represent a publisher claiming an interest in a song there may be other publishers in that same song that you don't represent, do you have any practical suggestions for businesses like MP3.com who have paid the major rights holders in most of their music library to avoid infringement suits from the myriad smaller, independent publishers and other rights holders who might have some interest in one or more of the many songs they offer?*

There is no "given" that "many songs" are published by entities not represented by HFA. As noted above, the over 27,000 publisher principals represented by HFA have historically owned or administered approximately 90% of the compositions in the American repertoire, and the recent growth in the number of publishers whom HFA represents is substantial. Furthermore, also as noted above, when HFA represents one owner of a musical work, it may license a third party to use the work, and that party is insulated against an infringement action by any other co-owners.

In the relatively rare circumstance when HFA represents none of the publishers of a work that MP3 seeks to use, as mentioned before, we suggest: (1) contacting the publisher directly, after identifying the publisher through either Copyright Office records or through the information contained on the sound recording license; or (2) invoking the compulsory license in section 115 and filing "notice of intention" to use the work with the Copyright Office.

## II. Questions from Senator Leahy:

*3. Concerns have been expressed that "copyright management" measures being developed by copyright owners to control the distribution of their digital works may erode the first sale doctrine. If a customer pays for the personal use of a copyrighted work, the rights holder may use technological means to ensure that the work is not posted on a web site for use by others. Do you believe that the marketplace will sort out the scope of copyright management measures since customers who believe they are not getting what they pay for will simply stop buying?*

The question raises several issues. First, is there a need for an expanded "digital first sale doctrine" as some have suggested? NMPA believes the answer is no. The first sale doctrine, in section 109 of the Copyright Act, provides, in pertinent part,

Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

The Digital Media Association ("DiMA") and other advocates of expansion of the first sale doctrine argue that a consumer who purchases a digital

download should be able to forward that download to someone else, provided the consumer deletes her original copy. A similar proposal was offered during consideration of the Digital Millennium Copyright Act and rejected by Congress because Members recognized that: (1) unlike in the physical world, in the digital context the owner of a copyrighted work did not relinquish the original copy, and (2) relying on the "honor system" to ensure that the "original" copy would be deleted or otherwise rendered inaccessible in the digital environment would open the door to widespread abuses and encourage disrespect for the law. The advent of Internet-based peer-to-peer file propagation software has demonstrated that Congress's concerns were warranted. In addition, it is inconsistent for DiMA to advocate a philosophy that copyright is an anachronism in the digital age but then ask Congress to apply an inapplicable copyright concept to restrict the right of songwriters and publishers to apply digital rights management technology to protect their creations.

Forced to acknowledge that the "honor system" would not work, in law or in practice, DiMA now asserts that technologies are available to enforce the limits of a digital first sale doctrine. But there is no evidence that consumers desire or would benefit from a change in the law that would result in the deployment of "forward and delete" technologies. As the Senator's question implies, the pertinent inquiry is not whether technology can be deployed to police a first sale privilege, but whether controls can be employed to serve the legitimate interests of copyright owners in curbing unauthorized uses of their works and the desire of consumers to enjoy works in new ways. NMPA believes that the marketplace is the only venue flexible enough to respond to this challenge effectively in the many contexts and business models in which it is likely to arise.

Finally, it is important to recall that Congress has examined the first sale doctrine as it relates to works in digital form in at least three instances and, each time, has found that the special vulnerability of such works warranted an exception to – rather than an expansion of – the first sale privilege. In responding to the introduction of compact disc technology by enacting the prohibition against the unauthorized rental of phonorecords, in making that prohibition permanent, and in enacting a similar provision prohibiting the unauthorized rental of copies of computer programs, Congress has recognized that allowing exercise of first sale privileges in copies of works in digital form would lead to unacceptable levels of copying that would prejudice the legitimate interests of copyright owners. Certainly the concerns underlying these legislative reforms apply with equal magnitude with regard to the reproduction and distribution of copies over the Internet.

*5. The Copyright Office issued a Notice of Inquiry on March 9, in response to a petition by the RIAA, stating that: "there is considerable uncertainty as to the interpretation and application of the copyright laws to certain kinds of digital transmissions of prerecorded musical works. It is also apparent that the impasse presented by these legal questions may impede the ability of copyright owners and users to agree upon royalty rates under section 115 . . . ." 66 Fed. Reg. 14099, 14101 (2001).*

*(A) Do you agree with this statement and, if so, please explain how the uncertainty over the legal questions presented in the petition is affecting voluntary licensing agreements for new online music services?*

NMPA filed comments in response to the Notice of Inquiry on April 23. Those comments made clear that NMPA does not agree with the statements and explained the reasons why it believes the existing legal framework is adequate to allow marketplace to address licensing issues that have arisen as well as those that might arise in the future. A copy of those comments is attached to this response.

NMPA does not believe that there is "considerable uncertainty as to the interpretation and application of the copyright laws to certain kinds of digital transmissions of prerecorded musical works." In enacting the Digital Performance Rights in Sound Recordings Act in 1995, Congress extended the existing compulsory license in section 115, which covers the making and distribution of phonorecords of protected musical compositions, to certain Internet uses.

In enacting these important changes into law, Congress did not attempt to anticipate every possible business model for making music available to Internet users. Nor, as we discuss below, did Congress assign that burden to the Copyright Office. Rather, it provided general definitions establishing the principle that songwriters and music copyright owners – like record companies – should be compensated fairly and in a manner that reflects the economic significance of those business models for current as well as new sources of publisher and writer income.

We believe the model Congress has adopted is working, and can continue to work for the benefit of songwriters, music publishers, record companies and companies seeking to offer innovative music services. Music publishers, through HFA, have already issued licenses to more than 30 music service providers covering downloads as well as interactive streaming services, and we are prepared to license others.

There is no question that some have constructed specious arguments to evade the obligation to pay reasonable royalties for covered services. Napster, for example, has argued that its "service," which provides the means for the distribution of billions of unauthorized downloads of protected music, is exempt from infringement liability and royalty payment obligations under a parade of theories, including the assertion of a defense under the Audio Home Recording Act, a "staple article of commerce" defense, and claimed eligibility for a "safe harbor" under the service provider liability provisions of the Digital Millennium Copyright Act. We are gratified that, as to each of these purported defenses and privileges, both the Ninth Circuit Court of Appeals and Judge Patel's court have found that music publishers and record companies are likely to prevail on the merits.

What is needed now, in NMPA's view, is for entrants into the digital music services market to cease efforts to evade their responsibilities under the law and to engage in good faith efforts to obtain the required licenses. Voluntary negotiations,



under the regime established by Congress, in NMPA's view will yield the fairest result for music creators and copyright owners, for commercial users of their works, and for consumers. In the event voluntary negotiations fail, Congress has provided for an arbitration mechanism that will resolve disputes and allow the music to be used.

*(B) In 1995, the Digital Performance Right in Sound Recordings Act expanded the scope of the mechanical license, under 17 U.S.C. sec. 115, to include the right to distribute, or authorize the distribution of, by digital transmission both hard copy phonorecords and "digital phonorecord deliveries" or "DPDs." DPDs are defined in the Act but a subset of DPDs, called "incidental DPDs" which are also subject to the mechanical licensing process, are not defined. One of the issues before the Copyright Office is to determine what is and what is not an "incidental DPD." Is this a question that the Copyright Office for the Congress should determine in the first instance?*

Congress has already spoken to this question, and it has expressed a strong preference for the resolution of these issues through voluntary, private negotiations. As the Senator observes, Congress expressly defined the term "digital phonorecord delivery" ("DPD") in its 1995 amendments to section 115. It did not, however, create a statutory classification known as "incidental digital phonorecord delivery." In fact, Congress did not even use the term "incidental digital phonorecord delivery" in section 115. Instead, it merely directed that any "rates and terms" for DPDs established through voluntary negotiations or arbitration proceedings distinguish between (1) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (2) digital phonorecord deliveries in general." 17 U.S.C. sec. 115(c)(3)(C).

Had Congress wished to create pre-defined, static categories known as "incidental DPDs" and "general DPDs," it certainly could have done so. It did not. Nor did Congress choose to assign responsibility for creating such static definitions to the Copyright Office, which it certainly could have done. Instead, it wisely recognized that the distinction of "incidental" versus "general" could only be made in the fact-specific context of a voluntary rate-setting negotiation or a Copyright Arbitration Royalty Panel ("CARP") proceeding and with respect to the particular business models and technologies known at the time.

The legislative history of section 115 supplies a number of illustrative examples of DPDs that might be considered "incidental" to the making of transmissions constituting DPDs, but does not suggest that an exhaustive list would be possible or at all necessary to create. Congress's approach clearly demonstrates that it sought to leave the "incidental" and "general" DPD concepts flexible and subject to definition through voluntary negotiations or arbitration based upon the specific activities and technologies at issue at the time. NMPA urges that the approach adopted by Congress be given the opportunity to work.

*(C) The Copyright Office is currently considering the applicability of the section 115 mechanical license to two new services for the delivery of music: "On-demand*

*streaming" (which permits users to listen to real-time streamed music they want when they want it) and "Limited Downloads" (which permits users to download music for listening for only a limited time). According to the Notice of Inquiry, these types of services were not "anticipated" when the Congress expanded the scope of section 115 to cover digital transmissions. Is legal uncertainty over the applicability of section 115 to these new services having any effect on the deployment of such services and, if so, please explain what that effect is?*

As we have discussed, Congress did not create static categories in section 115 and provided, in the legislative history, only a non-exhaustive list of examples of what might constitute an incidental digital phonorecord delivery, based upon the technologies known at the time. No effort was made to anticipate or prospectively deal with any new technology.

But saying that certain services were not anticipated in section 115 will not lead one to the conclusion that section 115 does not provide the mechanism for dealing with the new services discussed in the Notice or Inquiry or any others that might arise in the future. Congress established its clear preference for issues related to the licensing of new, interactive music services to be dealt with in private, voluntary negotiations and, if those negotiations fail, by arbitration before a Copyright Royalty Arbitration Panel. This decision by Congress was the appropriate one in 1995 and remains so. To have chosen otherwise – or to choose otherwise now – would invite every new entrant into the online music market to bring what should remain private business matters to Congress or to the Copyright Office. Others might simply be tempted to use Congressional or regulatory pressure on rights owners and creators in an attempt to exact a more favorable deal. This is hardly a prescription for rapid introduction of legitimate services for the distribution of music or any other form of creative content.

As noted above, voluntary negotiations have resulted in the issuance of licenses for rights in musical compositions to more than 30 companies. NMPA is pleased to report that it is involved in negotiations with affected users over potential rates for the very services outlined in the Copyright Office Notice of Inquiry. Progress in these voluntary negotiations is being made. It is apparent to us, however, that any progress toward voluntary resolution of licensing issues would be undermined by injecting these business decisions back into the policy arena before the regime set out by Congress in 1995 has been given an opportunity to work.

*(D) Various music publishers filed suit in December 2000 against UMG for copyright infringement alleging that UMG was copying sound recordings on servers for its new online music subscription service, *Farmclub.com*, and stating that: "UMG recently obtained a judgment from this court that the operator of another Internet music service, *MP3.com, Inc.*, had willfully infringed UMG's sound recording copyrights by placing copies of those sound recordings on its public servers – precisely what UMG has done here without plaintiff's permission." Would clarifying the scope of the mechanical license under section 115 of the Copyright Act in the context of such new online music*

*services help avoid the undue delay and undue distraction from litigation?*

No, clarification of section 115 would not have avoided the need for the litigation against UMG.

UMG has admitted in the litigation that it made computer server copies of copyrighted musical works and that these constitute phonorecords. Instead of seeking a license for these actions, it attempted to rely on licenses previously obtained from HFA that were expressly limited to CD's, audiocassettes, and LP's. No clarification of the statute would help avoid a dispute such as this. UMG has alternatively argued that there was no need for a license because the server copy was not distributed. If this were the case, then only the reproduction right in section 106(1) was violated, the compulsory license under section 115 was not available, but UMG is liable nonetheless for infringing the exclusive reproduction right of the plaintiffs. Even under this alternative argument, no statutory clarification would have helped avoid the litigation. HFA and UMG are sophisticated members of the music industry with ample access to legal counsel: there is no possibility that one of the parties to the litigation "misunderstood" the law such that a statutory clarification is needed.

**Question from Senator Kohl:**

*While all of the panelists are primarily concerned with access to the online entertainment marketplace, they must also understand that they have a responsibility to parents. The Internet makes it even more difficult for parents to police the songs that their children hear, the images they see and the games that they play. I'd like the panelists to discuss what their company or industry plans to do to help parents as online entertainment becomes more readily accessible to all consumers, especially children.*

With the exception of the sheet music market, music publishers do not generally sell a "product" directly to consumers. Rather, they license a separate business entity -- usually a record company -- to make and distribute recorded versions of that music. Thus, as a general matter, music publishers are not involved in the marketing of recorded music to the public, and have no right or ability to control the advertising, packaging or labeling of sound recordings issued by record companies.

Music publishers believe that government intrusion into decisions about the content of a musical work raises important First Amendment concerns. Indeed, the Federal Trade Commission has stated that First Amendment concerns dictate that industry self-regulation should prevail in determining practices in connection with the marketing and labeling of works for explicit content. NMPA supports that view.

At the same time, however, music publishers understand the concern of parents who wish to know more about the music to which their children listen. NMPA is troubled, therefore, by the findings of the Federal Trade Commission's April 24 follow-up report on the marketing of violent entertainment to children. The FTC observed that the "recording industry, unlike the motion picture and electronic game industries, has not

visibly responded to the Commission's [September 2000] report" urging all three industries to move quickly toward more effective self-regulation both in limiting the advertising of inappropriate material to young audiences and in providing rating information useful to parents.

The follow-up report noted, among other things, that none of the major record company or artists web sites it surveyed provided links to an educational web site that could provide parents and other consumers with information about the record industry's system for labeling explicit content. NMPA would encourage the record industry to develop and implement such a site, and NMPA would be pleased to assist in the education effort by establishing an appropriate link from its own web site and encouraging individual music publishers to do the same. Moreover, we stand ready to explore with the recording industry other ways in which we might assist in promoting the availability of information about parental advisory labels.

Finally, we would note that HFA posts lyrics to some of the titles its publishers own or administer at its "songfile" website and also posts a disclosure at the page where such lyrics may be viewed that some of the lyrics may not be appropriate for children.



**Sussman &**  
**Associates**  
*A Professional Corporation*

May 3, 2001

Margo Scott  
Vice-President  
Business & Legal Affairs  
Atlantic Recording Corporation  
1290 Avenue Of The Americas  
New York, NY 10104

**Re: Prince Street Music**

Dear Ms. Scott:

Thank you for your attached letter and Notice of Intention to obtain a Compulsory License for Making and Distributing Phonorecords, dated April 12, 2001. Please be advised Prince Street Music does not agree with Atlantic Recording Corporation's stand that digital downloads and interactive and/or non-interactive streaming fall under the compulsory license provision of the United States Copyright Act.

Your request and notice are unacceptable to Prince Street Music and have been denied. Please contact our licensing agent, The Harry Fox Agency, Inc. for licensing of the above referenced.

I can be reached at 310-550-8004 if you have any questions.

Regards,



Tom Snell

Enc.

cc: Michael Masser  
Peter Panos - HFA  
Charles Sussman