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Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

In the Matter of MECHANICAL AND DIGITAL PHONORECORD DELIVERY COMPULSORY LICENSE	)	Docket No. RM 2000-7

REPLY COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION
AND THE SONGWRITERS' GUILD OF AMERICA
IN OPPOSITION TO THE PROPOSED RULEMAKING PROCEEDING
AND IN FAVOR OF CONVENING A CARP TO DETERMINE
THE RATES AND TERMS FOR DIGITAL PHONORECORD DELIVERIES

In urging the Copyright Office to conduct a rulemaking proceeding, the Recording Industry Association of America ("RIAA"), along with the Digital Media Association ("DiMA") and MP3.com, Inc. ("MP3.com"), [1] seek to enlist the Office to enact a broad legislative agenda in their favor and at the expense of the owners of copyrighted musical works. They seek to minimize their obligation to pay – or to pay nothing at all – for the right to reproduce and distribute copyrighted musical works over the Internet. They seek exemptions from the express statutory obligations in section 115 in order to further their own commercial interests. They seek to have the Copyright Office engage in a laborious and time-consuming exercise of identifying, analyzing and

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[1] On May 20, 2001, it was announced that Vivendi Universal, which owns RIAA member Universal Music Group, has agreed to acquire MP3.com in a $372 million transaction.

classifying still-evolving digital technologies – technologies mutating on a daily basis – with no apparent benefit to consumers of online music.

Moreover, recognizing that such an ambitious rulemaking effort could take many months or even years, RIAA further seeks an interim declaration by the Copyright Office that online music services may bypass the express requirements of the Copyright Act and copy and distribute all the music they want without notifying the copyright owners and without paying them anything.

The relief that petitioners request flies in the face of the express provisions of the Copyright Act, well-settled principles of administrative law and common sense. The Act directs that the royalty rates and terms for the use of copyrighted musical works by online music services – including the distinction between "general" and "incidental" DPDs – be determined in a fact-specific manner through voluntary negotiations or, should those not succeed, by a Copyright Arbitration Royalty Panel ("CARP"). No where in section 115 did Congress provide for interrupting that process to conduct a far-reaching rulemaking proceeding to "clarify" the statute or its terms.

Here and elsewhere, RIAA has asserted that an alleged "lack of clarity" concerning music publishing rights has held up record companies' entry into the online marketplace. But the reality is otherwise. It is RIAA and its member companies that have themselves held up that process.

At the close of last year, recognizing that negotiations had failed to reach an agreement respecting the licensing of online services, the National Music Publishers' Association ("NMPA") and the Songwriters Guild of America ("SGA") petitioned the Copyright Office to convene a CARP to set the rates and terms for DPDs. This was in keeping with the schedule mandated by the statute and implementing regulations, which provided a period for voluntary negotiations and a deadline – December 2000 – for the filing of a petition for a CARP. Rather than proceed to a CARP as the statute provides, however, RIAA has sought to have the Office put off the rate-setting proceeding and conduct a prefatory rulemaking of unprecedented scope. The rulemaking proposed by RIAA could easily consume the remainder of the two-year period during which the rates and terms to be determined by the CARP would apply. RIAA's request would thus delay, rather than facilitate, a determination of what online services should be paying music owners for the use of their works.

NMPA/SGA respectfully submit that the Copyright Office should convene the requested CARP so that the rate-setting process can go forward. Indeed, Congress has so mandated:

> "In the absence of license agreements negotiated under [section 115], upon the filing of a petition . . . the Librarian of Congress *shall* convene a copyright arbitration royalty panel . . . ." (emphasis added).

17 U.S.C. § 115(c)(3)(D). The Office has no such statutory mandate – or even authority – to conduct the rulemaking proceeding sought by RIAA.

Moreover, to attempt through rulemaking to corral the business models and technologies existing at this moment into a fixed set of rules to be applied to the online services of the future would only serve to increase uncertainty and impede efforts to find marketplace solutions. If anything is certain, it is that the technologies for delivery of music on the Internet will change – very likely at a rapid pace. Business models too will evolve. There is no standard business model for such services today, and the models that will exist when the industry has had some opportunity to mature are not yet known.

Additionally, technology has advanced to the point where any digital distribution of copyrighted music can easily and without detection be captured for permanent use by the recipient – even if the music is delivered in a "streaming" format. Any rules adopted following what would necessarily be a lengthy and involved notice and comment process would likely be outdated by the time they went into effect and could thus prove a hindrance to the developing digital music industry.

RIAA's brash suggestion that the Copyright Office shortcut the statutory rate-setting mechanism and grant online services an immediate blanket license with no current royalty obligation is untenable and directly at odds with the compulsory licensing provisions of section 115. The blanket license proposal is even less credible in light of RIAA's related proposal to eliminate summarily the statutory requirement that copyright users provide copyright owners with notice of the use of their works – which would all but guarantee that copyright owners will never receive a penny for the "interim" exploitation of their works. There is simply no basis in law or fact to require that music copyright owners underwrite the record companies in this manner. Indeed, such an action would likely amount to an unconstitutional taking.

For these reasons, NMPA/SGA respectfully urge the Copyright Office to reject the rulemaking petition in its entirety in favor of the voluntary negotiation and arbitration processes that Congress expressly provided in section 115 of the Copyright Act.

I.
SUCH A SWEEPING RULEMAKING WOULD EXCEED THE AUTHORITY OF THE COPYRIGHT OFFICE AND VIOLATE EXPRESS PROVISIONS OF THE COPYRIGHT ACT

It is true, as RIAA points out, that the Copyright Office issues interpretive rules to aid in the administration of the compulsory licensing provisions of the Copyright Act (RIAA Comments at 26), but this is not what RIAA and other commenting parties seek to have the Copyright Office do here. This is not a question of merely establishing administrative procedures or filling in a single definition that is missing within the statutory framework. Rather, those supporting a rulemaking proceeding have in effect asked the Copyright Office to rewrite substantial portions of the compulsory licensing provisions embodied in section 115.

Section 702 of the Copyright Act permits the Copyright Office "to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under [the Copyright Act]." 17 U.S.C. § 702. There is no suggestion in the Copyright Act that it is the function or duty of the Copyright Office to create a schedule of online business models and technologies and the royalty obligations associated with each of them. Indeed, such rulemaking would be manifestly inconsistent with the statutory scheme embodied in section 115.

As explained in NMPA/SGA's opening comments, Congress, in enacting section 115, provided a detailed definition for the term "digital phonorecord delivery" ("DPD"). By contrast, Congress chose to avoid creating a static category of business models or technologies to be treated as "incidental DPDs." Congress did not even employ the term "incidental DPD" in section 115. Rather, Congress expressly directed that any distinction between "digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery" and "digital phonorecord deliveries in general" be made *in the process of voluntary negotiations or by a CARP.* 17 U.S.C. § 115(c)(3)(C)-(D).

Similarly, while it cannot be disputed that to deliver music online – in streaming form or otherwise – requires the making of multiple, nontemporary copies of the works to be so delivered, the nature and number of server and intermediate copies required to operate a streaming service, and whether such copies fall within the ambit of section 115, are not matters that can be fruitfully debated in the abstract.[2] Rather, these are questions that are best answered in the context of an actual service.

Congress' preference for voluntary negotiations and arbitration over regulatory intervention makes sense. Recognizing that the particulars of the online music industry would be evolving at a rapid pace, Congress wanted to ensure that the system was a flexible one. Royalty rates and terms for DPDs are thus to be negotiated by the parties or decided by a CARP based on the actual activities in which the copyright users are engaged. Furthermore, it is only in the course of setting such rates that the parties or CARP are to identify any DPDs that are "incidental" in nature.

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[2] We note that the question whether copyrighted musical works may be reproduced onto computer servers to operate an online service without obtaining a license from the copyright owners has already been answered by a federal court – in the negative. *TeeVee Toons, Inc.* v. *MP3.com, Inc.*, No. 00 Civ. 3951 (JSR), 2001 WL 290063 (S.D.N.Y. Mar. 26, 2001); *UMG Recordings, Inc.* v. *MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), *later proceeding*, No. 00 Civ. 0472 (JSR), 2000 U.S. Dist. LEXIS 13293 (S.D.N.Y. Sept. 6, 2000). That court, of course, had the benefit of actual facts to guide its analysis.

A. The Copyright Office Cannot and Need Not Rule On Myriad Aspects of Streaming Technology

RIAA's and other parties' request for rulemaking by the Copyright Office concerning the legal status of streaming activities, including whether such technologies are exempt from licensing under section 115, well illustrates why the Copyright Office should instead stay its hand.

It is readily apparent from the Copyright Office's Notice of Inquiry ("Notice") and the first round of comments that the proposed rulemaking could not be confined to the discrete questions whether streaming or "limited" downloads constitute "incidental" DPDs under section 115. To examine these issues necessarily would give rise to a plethora of subissues and additional concerns, many identified in the Notice. Indeed, on the streaming question alone, the Notice queries:

> Are some or all the copies of a musical work made that are necessary to stream that work incidental DPDs? If temporary copies can be categorized as incidental DPDs, what is the definition of "temporary"? Some "temporary" copies may exist for a very short period of time; others may exist for weeks. Is the concept of a "transient" copy more relevant than the concept of a "temporary" copy? If fragmented copies of a musical work are made, can each fragment, or the aggregation of the fragments of a single work, be considered an incidental DPD? If a fragmented copy can be an incidental DPD, does it make a difference in the analysis whether the copy is temporary or is permanent? Aren't incidental DPDs subject to section 115's definition of digital phonorecord deliveries? If so, does the requirement that a DPD result in a "specifically identifiable" reproduction by or for a transmission recipient rule out some of the copies discussed above from consideration as incidental or general DPDs?

Notice, 66 Fed. Reg. 14099, 14101-02 (Mar. 9, 2001).

Thus, the Copyright Office raises a host of questions and the parties have raised – or would raise – many more. But these are not questions that can properly be answered in a notice and comment proceeding divorced from specific facts and circumstances. Indeed, many might never *have* to be addressed to determine royalty rates and terms for particular online services.

An adequate examination of the myriad issues raised by the Office and commenting parties concerning streaming alone would require voluminous testimony and documentary evidence regarding technological advances in distribution of digital music, as well as the economics of this emerging industry. For example, music publishers could and would submit evidence to demonstrate that various streaming software, including the widely used Windows Media player, make complete and accessible copies of streamed recordings on consumers' hard drives. Moreover, NMPA/SGA would show that there is widely available software such as Total Recorder that permits end users to capture complete copies of files streamed to their computers.[3] The difference between "streaming" and the transmission of what is commonly referred to as a "full DPD" has thus collapsed to the point that it is illusory.[4]

Aside from the technological debate, wholly ignored by RIAA and the other commenting parties is the economic impact of interactive streaming services on music owners. In the era of the celestial jukebox, consumers will no longer be buying as many CDs. A decline in CD sales is, of course, rendered still more likely by the fact that consumers have the capability to capture permanent files of the music streamed to them through such services. Certainly in considering the legal status of streaming, the

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3 Total Recorder is available for purchase over the Internet for $11.95. *See* http://www.totalrecorder.com/ (visited May 22, 2001).

4 In light of the technological realities, DiMA's position that streaming does not involve the making of DPDs (*see generally* DiMA Comments) lacks all credibility.

Copyright Office would have to consider its potential to displace sales of physical phonorecords and even DPDs.[5] But how can the economics of streaming possibly be analyzed apart from an understanding of the particulars of the music subscription services that will offer it?

RIAA acknowledges that the rulemaking proceeding it envisions, in addition to involving written comments and public hearings, might need to include "consultations with the affected industries." (RIAA Comments at 17 n.5.) This is an understatement to say the least. To develop an adequate evidentiary record upon which the Copyright Office could act would in fact require, at a minimum, an opportunity for interested parties to present testimony from experts in the music publishing, recording and online services industries, as well as in business, economics and computer technologies. This testimony would need to be tested through examination by the Copyright Office and the interested parties. Finally, the Copyright Office – which, of course, is not a tribunal or a congressional committee – would have to consider and weigh the conflicting evidence to arrive at conclusions of fact and law.[6] By the time the

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5 *See* S. Rep. No 104-28, at 15 (1995) (explaining that in enacting the Digital Performance Rights in Sound Recordings Act of 1995 ("DPRSRA"), Congress was cognizant of concerns "that certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for the use of their work.").

6 On appeal, a court will invalidate a rule that is not adequately supported by evidence in the record. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). In *State Farm*, the Supreme Court invalidated NHTSA's revocation of a rule requiring passive restraints when the agency failed to consider evidence regarding air bags. *Id.* at 46-48. Likewise, in *Bowen v. American Hospital Assoc.*, the Supreme Court made it clear that *State Farm* did not apply solely to rule revocations. 476 U.S. 610, 626-27 (1986). The Court invalidated a regulation by the Department of Health and Human Services concerning procedures relating to health care for disabled infants on the ground that it was not a reasoned action by the

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Copyright Office had satisfactorily completed the undertaking (if it could), many of its findings would be obsolete because they would be based upon outdated facts and assumptions.

Such a wide-ranging "rulemaking" proceeding is wholly without precedent and would exceed the powers delegated to the Copyright Office.[7] Moreover, to engage in such an exercise would consume an inordinate amount of time and would not be an efficient use of the parties' resources – resources that would be better spent addressing the rates and terms for the actual services, *i.e.*, MusicNet and Duet, that the record companies purportedly seek to launch in the near future. Rather than resolve their licensing issues in the real world by focusing on the negotiating process or proceeding to

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agency. *Id.* ("Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision . . . .").

7 As explained in our previous submission, *Satellite Broadcasting and Communications Assoc. v. Oman*, 17 F.3d 344 (11th Cir. 1994) and *Cablevision Systems Development Co. v. Motion Picture Assoc. of Am., Inc.*, 836 F.2d 599 (D.C. Cir. 1988), cited by RIAA, do not remotely begin to address the type of rulemaking sought herein by RIAA and other commenting parties. In *Satellite Broadcasting* the technology was well understood, which left to the Office the relatively straightforward task of interpreting the relevant statutory provision to provide a legal answer to the question whether Congress had intended satellite broadcasters to be exempt from the compulsory license scheme. 17 F.3d at 348. In *Cablevision*, the Copyright Office made an administrative determination of how "gross receipts" should be calculated under section 111 of the Copyright Act. 836 F.3d at 606. Notably, in *Cablevision*, section 111 expressly provided that the Register of Copyrights *should* prescribe regulations in this area. Likewise, the rulemaking conducted by the Copyright Office concerning AM/FM signals transmitted over the Internet involved the application of an express statutory exemption to a well-defined activity. 65 Fed. Reg. 77292 (Dec. 11, 2000). As in *Satellite Broadcasting* and *Cablevision*, the Office was not required first to examine and make factual findings concerning a whole host of activities to which its rules potentially could apply. Finally, in none of these matters was the Copyright Office engaging in wholesale amendment of the Copyright Act, as would be the case here.

a CARP, however, the record companies inexplicably prefer to create their own regulatory roadblock.

B. "Limited" Downloads Are Simply DPDs for Which the Record Companies Seek a Discount

RIAA and DiMA purportedly seek "clarification" from the Copyright Office concerning the legal status of "limited" downloads transmitted to consumers to be available for a certain period of time or a certain number of uses. RIAA evidently does not dispute that "limited" downloads are transmitted as complete downloads and thus meet the definition of a DPD as set forth in section 115. Rather, RIAA asks the Copyright Office to further classify such full downloads as "incidental" DPDs or as DPD "rentals."

The actual question here is not one of statutory interpretation but of economics. What RIAA ultimately seeks is a discounted royalty rate for "limited" downloads. Once again, this is exactly the type of issue that Congress contemplated would best be resolved through voluntary negotiations or arbitration. Even if it had the authority, it would be an absurd waste of effort for the Copyright Office to engage in a protracted exercise to decide upon a label for "limited" downloads when the real question is how much copyright owners should be paid for this use of their music.

As with streaming, the particular services and business models involved are critical to a determination of rates and terms for "limited" downloads. How long or for how many uses will the "limited" downloads be available? Will an end user's renewal of his or her subscription to the service extend the availability of the song? Obviously, a consumer's ability to access a recording three times or for three days has different economic implications than a download that will be available indefinitely so long as that consumer continues to subscribe to the service.

The correct approach for licensing of a service offering "limited" downloads is to examine the particular parameters of that service – but here the Copyright Office is instead being asked to make a determination on "limited" downloads in the abstract. Unless the Office were to consider and taxonomize every possible permutation of "limited" downloads (which list is probably limit*less*), a rulemaking proceeding on this issue could never result in useful rules of general applicability. And, of course, even a Darwinian effort at taxonomy would be completely beside the point if technology evolves to the point where any "limited" DPD can be converted to a permanent file – thus rendering "limited" DPDs extinct.

RIAA's repeated suggestion that the Copyright Office in the alternative could classify "limited" downloads as "rentals" also misses the point. Whether it might be appropriate to license certain species of "limited" downloads at "rental" rates is again a matter of economics that would most appropriately be raised and addressed in negotiations or a CARP.

In this regard, NMPA/SGA observe, however, that it is clear that the Record Rental Amendment of 1984, codified in relevant part at 17 U.S.C. § 115(c)(4), cannot properly be applied to digital transmissions of music for the simple reason that online services do not distribute DPDs by "rental, lease or lending" (or acts or practices of that nature). A rental, lease or loan contemplates the return of the object rented, leased or loaned to its owner. *See, e.g., Webster's Third New International Dictionary of the English Language* (unabridged) (Merriam-Webster 1993) ("lend; 1a: to give into another's keeping for temporary use on condition that the borrower return the same or its equivalent."). By contrast, the making of a DPD – even a "limited" DPD – does not envisage the return of the DPD to the transmitting entity. *Cf.* Notice at 14102 (defining "limited" DPD as a "time-limited or other use-limited download to a storage device (such as a computer's hard drive), using technology that causes the downloaded file to be available for listening only either during a limited time or for a certain number of times").

Furthermore, it is abundantly clear from the legislative history that Congress never intended that the rental provision would or could apply to digital transmissions. The rental amendment was enacted in 1984 to combat the perceived problem of establishments that rented LPs and CDs (then a brand-new format) to consumers, who would in turn make audio tapes of the sound recordings, thereby displacing record sales. S. Rep. No. 98-162, at 2-3 (1983). The legislative history refers repeatedly to "records," "discs" and "CDs." *See generally* S. Rep. No. 98-162; H.R. Rep. No. 90-987 (1984). Indeed, in a prescient moment, the House report explains that the legislation was not intended to apply to "prerecorded data signals processed by computer technologies." H. Rep. 98-987 at 4.[8]

II.

THE PROPOSED INTERIM "BLANKET" LICENSE IS WHOLLY WITHOUT PRECEDENT, VIOLATES SETTLED PRINCIPLES OF ADMINISTRATIVE LAW AND WOULD BE IN DIRECT CONFLICT WITH SECTION 115

Baldly asserting that there is "good cause," RIAA asks the Copyright Office immediately to grant online services the right to use copyrighted music free of charge merely by filing a list of songs with the Copyright Office "without being required

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[8] While the rental amendment required the Copyright Office to issue regulations to implement the section 115 provision, such regulations have never been promulgated. As the leading treatise observes: "It may be that the need for such regulations is remote. To date, the record companies apparently have not consented to any rental, leasing or lending of phonorecords." *Nimmer on Copyright* § 8.04[H][2]. Notably,
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to identify [or serve notice upon] the owner or owners of copyright in those works, and irrespective of whether the copyright owner is identified in the registration or other public records of the Copyright Office." (RIAA Comments at 19.) To this end, RIAA suggests that the Office simply abandon the notice and comment procedures mandated by the Administrative Procedure Act ("APA"). (*Id.* at 19 n.8).

Although RIAA explains that, assuming a rate is established, copyright owners can be paid retroactively for this wholesale taking of their works, it is difficult to see how, inasmuch as RIAA's plan assures that neither the owners nor the users will be aware of whose songs are being used. Moreover, under RIAA's proposed regime, music publishers would be forced to bear the very real and substantial risk that the Internet services blissfully transmitting their copyrighted works to the public without the burden of royalty payments will not have the means to settle up at the end of their free ride.

That record companies chose to delay their entry into the online market can hardly be viewed as the sort of emergency that would permit the Copyright Office to suspend due process. The good cause exception to the procedures mandated by the APA is a narrow one to be invoked only rarely. *United States v. Garner*, 767 F.2d 104, 121 (5th Cir. 1985) (invalidating regulation issued by Secretary of Agriculture without notice and comment); *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (EPA should have provided opportunity for notice and comment before issuing rule). The exception is applicable in cases of emergency, in cases where notice and comment is believed to be unnecessary due to the inconsequential nature of the rules and, on occasion, where a

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NMPA/SGA are unaware of any instance where the record companies have authorized online "rentals" of their sound recordings.

congressional deadline requires swift regulatory action that does not permit a notice and comment proceeding. Plainly, none of these circumstances obtains here.

RIAA's reliance on *National Customs Brokers and Forwarders Association of America, Inc. v. United States*, 59 F.2d 1219 (Fed. Cir. 1995), as support for the unprecedented assertion of agency authority it proposes is misplaced. In *National Customs*, the U.S. Customs Service issued an interim regulation without notice and comment which raised the permissible value of merchandise entered by a consignee into the United States without a broker to $200. Unlike here, the court found that Congress had expressly called for a change in the regulations. *Id.* at 1222. Also unlike here, the court found persuasive the fact that the affected parties' "rights and obligations [we]re not otherwise changed," *id.* at 1223 – there was no taking of property.

The present matter is more analogous to the situation in *Texas Food Industry Association v. Department of Agriculture*, 842 F. Supp. 254 (W.D. Tex. 1993). In enjoining the operation of an interim regulation issued without notice and comment by the Department of Agriculture concerning the labeling of meat, the court explained that the agency lacked sufficient information to issue the interim rule, was ruling on a contentious subject and could not be excused by time pressure. *Id.* at 258-60. RIAA's proposed interim rule would be similarly "contentious" – as RIAA itself acknowledges (RIAA Comments at 4). Furthermore, it would require the consideration of evidence concerning the economic and practical effects of a blanket license that the Copyright

Office does not have before it. Finally, the Office is not facing any deadline for the proposed rules, which, of course, were not mandated or even contemplated by Congress.[9]

In this regard, it is notable that in recent hearings held by the Subcommittee on Courts, the Internet and Intellectual Property of the House Judiciary Committee, key Members of Congress continued to express their preference for industry negotiation over government regulation:

> As in the past, it is my belief that the parties involved in the difficult issues presented here today should first try to resolve their differences through private negotiations.

Statement of Hon. Howard Coble, Chairman, Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary, Oversight Hearing on Music on the Internet (May 17, 2001).

> There are even suggestions that Congress should alter the licensing scheme into a "blanket" license so that users of compositions pay royalties into a pool and the Copyright

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[9] RIAA's assertion that amendments to the notice and recordkeeping requirements of the Copyright Act have previously been made by interim rule (RIAA Comments at 20) is disingenuous. The Copyright Office did issue an interim rule in July of 1999 effecting certain amendments to its regulations concerning notice and recordkeeping for making and distributing phonorecords. 64 Fed. Reg. 41286 (July 30, 1999). This interim rule was only issued, however, after the Office published a notice of inquiry concerning the specific topic, 63 Fed. Reg. 47215 (Sept. 4, 1998), in which the Office expressly stated that it was issuing the interim regulations "without prejudice to the parties who, at the appropriate time, may propose final regulations that may differ significantly from the interim rules based upon the developing business trends in the industry." 64 Fed. Reg. 41286. In fact, comments and reply comments were filed by various affected parties in response to the notice of inquiry, 63 Fed. Reg. 47215 (Sept. 4, 1998), and the Office reopened the comment period twice after that. 63 Fed. Reg. 65567 (Nov. 27, 1998); 63 Fed. Reg. 69251 (Dec. 16, 1998). In other words, notice and public comment were conducted with respect to these regulatory proposals.

The notice and recordkeeping amendments cited by RIAA merely adjusted preexisting obligations of the affected parties and did not draw any objectors. 64 Fed. Reg. at 41286. By contrast, the radical course RIAA is proposing here as an "interim" measure is entirely different in substance and character.

> Office divvies up the money between the publishers. Let me state that I am one Member who would be concerned with proposals limiting the ability of songwriters and publishers to negotiate licenses for their compositions . . . . In short, I hope we can let the market work before we introduce more regulations into an already heavily-regulated content industry.

Statement of Hon. John Conyers, Jr., Ranking Democratic Member, House Committee on the Judiciary, Oversight Hearing on Music on the Internet (May 17, 2001). Not only is the RIAA proposal contrary to law, but it is inconsistent with the sentiments of key Members of Congress on the committee with jurisdiction over this matter.

Finally, the blanket license RIAA seeks to have the Copyright Office award the record companies by fiat conflicts with express provisions of the Copyright Act.

First, for the reasons explained above, it would contravene Congress' express mandate that the royalty rates and terms for licensing DPDs be established through a process of voluntary negotiation or, if such negotiations fail, through a CARP. 17 U.S.C. § 115(c)(3)(C)-(D). These are the only permissible means under section 115 (excluding appellate review) pursuant to which a zero or deferred royalty rate could properly be imposed.

Second, the proposed interim "relief" suggested by RIAA, pursuant to which music services would have no royalty obligations for an indefinite period of time (or perhaps forever) with respect to the online reproduction and distribution of copyrighted musical works directly conflicts with the statutory requirement that "[r]oyalty payments *shall be made* [by copyright users] on or before the twentieth day of each month." 17 U.S.C. § 115(c)(5) (emphasis added).

In addition to violating the statutory mandate that music owners receive royalties for the use of their works, RIAA's proposed interim rule would likely constitute a regulatory taking in violation of the Fifth Amendment to the Constitution. The Supreme Court has identified "several factors . . . that have particular significance [in regulatory takings analysis]: 'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.'" *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 523 (1998) (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979)). Each of these factors is evident in the RIAA proposal.

In *Eastern Enterprises*, the Supreme Court invalidated a scheme to fund health benefits for retired coal miners through imposition of retroactive liability on coal companies with no direct relationship with the miners to whom the benefits were directed. *Id.* at 537. The Court rejected this scheme, which imposed "severe retroactive liability on a limited class of parties that could not have anticipated the liability," where "the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29.

To enact RIAA's interim "blanket license" here likewise would: (i) impose a substantial economic burden on music copyright owners by suspending royalty payments to them and prohibiting their filing litigation to obtain such royalties; (ii) interfere with reasonable investment-backed expectations, given that music publishers have since 1909 been able to rely on either private negotiations or the terms of the mechanical compulsory license to obtain payment for the use of their works and have obtained commercial funding based on this well-settled regime; (iii) do so in a retroactive manner, in that millions of copyrighted musical works that would be subject to the proposed RIAA regime were created prior to the proposed interim regulation; and (iv) constitute extraordinary and unanticipated governmental action, in that certain discrete members (songwriters and music publishers) of the overall music industry would be singled out to bear a substantial burden not related or proportionate to past actions or conduct. As such, RIAA's proposal is constitutionally defective.

Finally, the precipitous elimination of the longstanding system of individual notice and licensing under section 115 is not within the authority of the Copyright Office. Indeed, such a step would obviously violate section 115, which requires that "[a]ny person who wishes to obtain a compulsory license . . . shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention [to make and distribute phonorecords of a copyrighted work] *on the copyright owner*" so long as the owner can be identified – a requirement that is expanded upon in existing regulations. 17 U.S.C. § 115(b)(1) (emphasis added); 37 C.F.R. § 201.18 (1999).[10]

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[10] RIAA's suggestion that because performance rights are licensed on a blanket basis the making and distribution of DPDs must also be licensed on that basis is untenable. Most obvious, of course, is the fact that the two different licensing systems, representing two different payment streams, have coexisted for decades. But more significantly, such a fundamental alteration in the section 115 licensing scheme cannot be effected through regulation. Congress opted to retain the individualized notice requirement of section 115 when it amended the statute in 1995 to include DPDs as a licensable category of phonorecords. Moreover, Congress expressly recognized that the right to be compensated for the making and distribution of DPDs of a copyrighted work was independent of any performance right in that work: "A digital phonorecord delivery is each individual delivery of a phonorecord by digital transmission of a sound recording . . . *regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.*" 17 U.S.C. § 115(d) (emphasis added).

The related argument advanced by Consumer Electronics Association ("CEA") and Clear Channel Communications, Inc. ("CCC") in their comments that music

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Apart from the facial invalidity of RIAA's self-serving call for the end of the statutory notice requirement, NMPA/SGA additionally object to RIAA's proposal to eliminate individualized notice on the grounds that such an action would be arbitrary and unreasonable. Why should a compulsory licensee be allowed to file a notice of intention with the Copyright Office (covering potentially thousands of works) without having to identify the owner or owners of copyright in those works, thus leaving it up to copyright owners to try to figure out if any their works is being used by an online service?

In this regard, the comments of Supertracks.com, Inc. ("Supertracks") concerning its "BridgePort" Internet radio technology are informative:

> Because of BridgePort's[] architecture, it becomes possible to enforce and track the legal rights of copyright holders in ways never possible before. As content is streamed from the BridgePort application, a transaction record is created. This record tracks in exact numbers the times a song was reproduced or performed, which ensures that the appropriate rights owners can be paid accurately for use of the content. Tracking content consumption becomes an exact science, not an exercise in statistical sampling. For the first time rights owners can know the exact use of their works and have the framework to be paid precisely for each use.

(Supertracks Comments at 3.) If the Copyright Office is to act in this area, NMPA/SGA suggest that it should not be to eliminate the requirement that copyright users notify copyright owners when they seek to use their music – which would be moving backwards

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publishers are "double dipping" in attempting to preserve their two historic revenue streams in the online world (CEA/CCC Comments at 4) is similarly specious. Unlike traditional radio, which involves only a performance at the time the music is broadcast, a "streaming" transmission over the Internet not only constitutes a performance but results in a perfect digital reproduction on the recipient's computer.

– but rather to update the notice and recordkeeping requirements to require electronic reporting, as described above, from record companies and other online users.

RIAA's transparent attempt to have the Copyright Office immunize the efforts of its member companies to defer paying the owners of copyrighted music for the commercial exploitation of their works for as long as possible is a misuse of the regulatory process. In addition to violating established principles of administrative law, the proposed interim "blanket license" is plainly inconsistent with the Copyright Act. RIAA's attempt to gain an unfair advantage over music copyright owners – as well as their online competitors who have already entered into licensing agreements with music publishers – should be soundly rejected. *See* 17 U.S.C. § 702 (Copyright Office can only promulgate regulations that are "not inconsistent with law").

CONCLUSION

For the foregoing reasons, in response to the Copyright Office's Notice of Inquiry dated March 9, 2001, NMPA/SGA respectfully submit that the Copyright Office should decline to conduct a rulemaking proceeding or issue interim rules as requested by RIAA and other commenting parties and should instead convene a CARP, as previously requested, to determine the rates and terms for DPDs as provided in section 115 of the Copyright Act.

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Respectfully submitted,

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