

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Library of Congress

OCT 31 2008

Notice of Proposed Rulemaking)
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)
Mechanical and Digital Phonorecord)
Delivery Rate Determination)
Proceeding)
)

37 C.F.R. Part 385
Docket No. 2006-3 CRB DPRA

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION AND
THE NATIONAL ASSOCIATION OF BROADCASTERS

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October 31, 2008

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TABLE OF CONTENTS

	<u>Page</u>
Introduction and Summary	1
Commenters and Their Interest in the Proposed Rule	2
I. The Copyright Royalty Judges Lack Authority To Declare Interactive Streams To Be Digital Phonorecord Deliveries.	4
II. The Proposed Rule Declaring Interactive Streams To Be <i>Per Se</i> Digital Phonorecord Deliveries Is Contrary to Law.	6
A. The Proposed Rule Violates Section 115 by Failing To Require a Delivered, "Specifically Identifiable" Phonorecord as a Condition of a Digital Phonorecord Delivery.	6
1. A Digital Phonorecord Delivery Must Result in the Delivery of a Specifically Identifiable Reproduction.	6
2. The Proposed Rule Violates this Fundamental Requirement of Section 115.....	7
3. The Copyright Royalty Judges Have Made Clear that There Is No Basis for the Proposed Statement Declaring an Interactive Performance To Be a <i>Per Se</i> Digital Phonorecord Delivery Absent a Delivered Phonorecord.....	8
B. The Proposed Rule Improperly Equates Concepts of Performance with Distribution and Thus Violates the Fundamental Obligation To Construe the Copyright Act as a Harmonious Whole.	8
1. The Proposed Rule Improperly Equates Performance with Distribution.	9
2. Construing Interactive Streaming To Implicate Reproduction and Distribution Rights Cannot Be Reconciled With the Carefully Crafted Provisions of Section 114 of the Copyright Act.	11
3. Construing Interactive Streams To Implicate Reproduction and Distribution Rights Cannot Be Reconciled with Congress' Decision To Subject to the Section 115 Statutory License Only Those Musical Works that Have Been Recorded and Distributed Under Authority of the Copyright Owner.....	12

4.	Construing Interactive Streams To Implicate Reproduction and Distribution Rights Cannot Be Reconciled with the Fundamental Copyright Principle of Publication.	13
C.	Nothing in the Copyright Office’s July 16, 2008 Notice of Proposed Rulemaking Supports the Proposed Rule.	14
III.	Declaring Interactive Streaming Necessarily To Implicate the Reproduction and Distribution Rights Is Bad Policy.	16
A.	The Proposed Rule’s Expansion of the Distribution Right Beyond Economically Rational Boundaries Will Impose Unreasonable Burdens on the Development of Legitimate Digital Services.	16
B.	It Is Bad Policy To Subject Services Making Interactive Streams to the Section 115 Statutory License, Which Is Antiquated and Unworkable.	18
C.	The NPRM May Well Have Unintended Adverse Consequences Beyond Interactive Audio Streaming.	19
IV.	The Proposed Rule Should Not Define Interactive Streams in a Manner that Is Inconsistent with Section 114 and with Common Usage.	20
V.	The Foregoing Concerns Can Be Addressed With Relatively Minor Changes to the Proposed Rule that Will Continue To Allow the Settling Parties To Use the Section 115 License for Interactive Streams on the Terms of the Settlement.	22
A.	Corrections to the Proposed Rule To Remove the Improper Implication that Interactive Streams Are DPDs.	22
B.	Corrections To Clarify the Defined Terms “Interactive Stream” and “Stream.”	23
C.	The Revisions to the Proposed Rule Recommended Herein Will Preserve the Legitimate Scope and Effect of the Settlement.	24
	Conclusion	24

Introduction and Summary

CTIA– The Wireless Association (“CTIA”)® and The National Association of Broadcasters (“NAB”) (collectively, “Commenters”) offer these comments on the Copyright Royalty Judges’ October 1, 2008, Notice of Proposed Rulemaking in the mechanical and digital phonorecord delivery rate determination proceeding (the “NPRM”).¹ That notice sought comments on the rules proposed (the “Proposed Rule”) under a settlement agreement related to “interactive streaming” and “limited downloads” among the various participants in the pending section 115 proceeding (the “Settlement”).

Commenters are pleased that the parties to the Settlement have reached an agreement to resolve their pending litigation. Commenters are concerned, however, that certain provisions of the Proposed Rule are beyond the legitimate scope of an agreement on the rates and terms of the section 115 statutory license and are likely to have significant adverse consequences beyond that scope. In these comments, Commenters present their concerns and propose a few simple changes in the Proposed Rule that do nothing to alter the economics or legitimate legal consequences of the statutory license rates and terms set forth in the Settlement, but which alleviate the risk that the Proposed Rule will have inappropriate effects beyond the statutory license. For the reasons discussed below, Commenters respectfully submit that:

- The Judges should strike the sentence stating that “an interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. § 115(c)(3)(C) and (D)” in the definition of “interactive stream” in Proposed Rule § 385.11, since it is beyond the scope of the Judges’ authority, contrary to law, bad policy and, in any event, is not properly part of the definition as it does not serve to define an “interactive stream.”
 - Pursuant to the Register of Copyrights’ August 19, 2008 Memorandum Opinion, the Copyright Royalty Judges lack authority to adopt a regulation declaring an interactive stream to be a digital phonorecord delivery.
 - The statement would violate express requirements of section 115, and the Copyright Royalty Judges’ February 4, 2008 Order, by declaring that an interactive stream is a digital phonorecord delivery without regard to whether the stream results in the delivery of a specifically identifiable reproduction of a phonorecord.
 - The statement cannot be reconciled with the Copyright Act’s longstanding distinction between the public performance and distribution rights, as described in this context by Congress and the U.S. District Court for the Southern District of New York, and cannot be harmonized with numerous provisions of the Act, including section 114’s treatment of interactive

¹ Notice of Proposed Rulemaking, Copyright Royalty Board, *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, Docket No. 2006-3 CRB DPRA, 73 Fed. Reg. 57,033 (proposed Oct. 1, 2008) (to be codified at 37 C.F.R. pt. 385).

services, section 115's condition for the availability of the statutory license, and section 101's definition of "publication."

- The statement would create bad policy by expanding the scope of the distribution right beyond its natural, economically rational boundaries; imposing unwarranted burdens on legitimate music services; improperly fostering arguments that streaming services are subject to antiquated, administratively burdensome licensing procedures (even in order to provide clip samples for otherwise licensed services); and threatening unintended adverse consequences beyond interactive audio streaming.
- The statement is wholly unnecessary to effectuate the full operation and intent of the Proposed Rule.
- The Judges should clarify (by the addition of just one word) the terms "stream" and "interactive stream" to eliminate the substantial potential for confusion between the Proposed Rule, on the one hand, and section 114 and ordinary usage, on the other.

The changes suggested by Commenters will not interfere with the viability of the Settlement. Services wishing to use the section 115 license to apply to interactive streams that qualify under the Settlement will still be entitled to do so, on the terms set forth in the Proposed Rule. The changes, however, will remove the threat that the Proposed Rule will be read to have any effect or significance beyond the implementation of the Settlement.

Commenters and Their Interest in the Proposed Rule

CTIA is an international organization representing all sectors of wireless communications – cellular, personal communication services, and enhanced specialized mobile radio. A nonprofit membership organization founded in 1984, CTIA represents providers of commercial mobile radio services ("wireless telecommunications carriers"), mobile virtual network operators, aggregators of content provided over wireless networks, equipment suppliers, wireless data and Internet companies, and other contributors to the wireless universe. A list of CTIA's members appears at http://www.ctia.org/membership/ctia_members.

As part of its ordinary functions, CTIA frequently participates in administrative proceedings to represent the interests of its members. Among other proceedings, CTIA recently filed comments with the Copyright Office in connection with the Office's still-pending July 16, 2008 Notice of Proposed Rulemaking on the scope of the section 115 statutory license (the "Copyright Office Section 115 NPRM").² CTIA also has filed numerous *amicus* briefs in federal courts on behalf of the wireless industry on a variety of issues, including copyright issues. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *U.S. v. ASCAP (Application of Am. Online, Inc.)*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (holding that downloads are not public performances).

² *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Notice of Proposed Rulemaking*, 73 Fed. Reg. 40,802 (proposed July 16, 2008).

CTIA and its members have a substantial interest in the Proposed Rule. Wireless technology not only provides consumers with first-rate communications service, but also provides a convenient and important means for wireless consumers to receive digital performances of a variety of types of copyrighted works, including performances of recorded music. Members of CTIA, including the four largest U.S. wireless carriers, offer or make available interactive streaming of recorded music to wireless devices or are considering doing so, and would, therefore, be bound by the terms, rates and other determinations reflected in the Proposed Rule. In addition, in connection with a variety of their services, including ringtones and ringback tones,³ CTIA members make short clip samples of recorded music available for streaming over the Internet to permit customers to preview the service. The Proposed Rule purports to specifically address such clip samples in section 385.14(d).

NAB is a non-profit association of radio and television stations and broadcasting networks, serving and representing the interests of the American broadcasting industry. Among NAB's organizational purposes is the representation of its members in administrative and judicial proceedings addressing matters of interest to those members. NAB and its members have a vital interest in the Proposed Rule and in ensuring that copyright laws are interpreted rationally in the digital world.⁴

Some of NAB's radio members either offer interactive streaming of recorded music as one of the services that they provide from their Internet websites or intend to do so during the term of the Proposed Rule. Accordingly, they could be bound by the terms, rates and other determinations of the Proposed Rule.

Commenters and their members strongly support efforts to protect the legitimate rights of copyright owners. Indeed, Commenters and their members are among the leading legitimate performers and distributors of recorded music, and pay for the right to do both. Music publishers, and their songwriters, earn substantial performance royalties as compensation for Commenters' members' public performances of musical compositions, and substantial mechanical royalties for Commenters' members' offerings of downloadable music content, whether in the form of full track downloads or ringtones.

Commenters, however, strongly oppose duplicative compensation to music publishers (or to any copyright owner, for that matter) and redundant, burdensome rate-setting and

³ The Judges are familiar with ringtones. Ringback tones are performances of recorded music made to individuals placing calls to wireless customers, which replace the ringing that the caller hears when he or she calls a mobile telephone.

⁴ The interest of NAB's members in the subject matter of the Proposed Rule is reflected in the fact that NAB filed Comments on August 28, 2008 in response to the Copyright Office's Section 115 NPRM and participated in the September 19, 2008 Hearing held by the Copyright Office. Comments of the National Association of Broadcasters, Docket No. 2000-7, Notice of Proposed Rulemaking, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries (Aug. 28, 2008); Transcript of Public Hearing, Section 115 Notice of Proposed Rulemaking 53-66 (Sept. 19, 2008) (hereinafter "Sept. 19 Hearing Tr."). NAB also participated in the Copyright Office's original 2001 Notice of Inquiry on section 115. Reply Comments of the National Association of Broadcasters, Docket No. RM 2000-7, Request for Public Comment, Mechanical and Digital Phonorecord Delivery Compulsory License (May 23, 2001).

administrative systems for the same economic transaction. There is no justification for declaring, as the NPRM proposes, that “interactive streams” subject to the public performance right (and the applicable exceptions and limitations thereto) are also DPDs subject to the mechanical license. It makes no sense to burden those wishing to provide legitimate, licensed streaming music services with overlapping claims by different agents of the same copyright owner. It makes even less sense to subject those wishing to provide clip samples (which have no function other than to foster other, licensed and compensated uses of recorded music) to claims that they are subject to the enormously burdensome and unwieldy administrative requirements of the mechanical license, whether that license is obtained by operation of the statutory procedures of section 115 or outside of those procedures. Yet the Proposed Rule, by improperly declaring “interactive streams” to be DPDs, would have just that effect.

Commenters’ right to comment on the Proposed Rule is particularly appropriate and essential where, as here, the Proposed Rule seeks to expand the DPD right set forth in section 115(c)(3)(G)(i) beyond its reasonably expected and lawful scope. The DPD right is grounded in the reproduction and distribution rights, yet the Proposed Rule purports to extend that right to cover acts that are pure performances, subject to the public performance right (and its applicable exceptions and limitations). This, in turn, implicates the interests of a range of parties, including Commenters, who did not participate in the proceeding that gave rise to the Settlement in reliance on the understanding that the proceeding would be confined to its lawful scope—setting rates and terms only for activities properly within the scope of section 115, not for activities beyond that scope. Just as the parties to a settlement may not declare an over-the-air radio broadcast or the digital transmission of a display of a photograph to be a DPD or set a section 115 statutory license rate for that activity, they may not declare an interactive performance to be a DPD subject to section 115.

In sum, CTIA’s and NAB’s members perform services, or contemplate during the term of the Proposed Rule performing services covered by the Proposed Rule, and thus could be subject to the rates, terms and other determinations of the Proposed Rule. Accordingly, Commenters have the right to comment on the Proposed Rule under section 801(b)(7).⁵

I. The Copyright Royalty Judges Lack Authority To Declare Interactive Streams To Be Digital Phonorecord Deliveries.

The Proposed Rule’s declaration that “[a]n interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D)” should be deleted because the Copyright Royalty Judges lack authority to promulgate such a regulation.

⁵ CTIA and NAB have the right to comment on the Proposed Rule on behalf of their members under the principles of associational standing as set forth in *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977). NAB and CTIA’s members would have a right to comment in their own right, the interests the associations seek to protect are germane to their purpose, and nothing in the current proceeding requires the participation of individual members. *Id.* Nevertheless, to forestall any controversy over the issue, AT&T Mobility, Clear Channel Communications, Sprint, T-Mobile, and Verizon Wireless, each of which provides performances that the Proposed Rule defines as “interactive streams” and thus would or may be subject to the Proposed Rules, are participating in these comments in their individual capacities as well as in their capacities as members of the associations.

The Register has made clear that the Judges do not have authority to issue this regulation. In a Memorandum Opinion on Material Questions of Substantive Law, the Register of Copyrights advised the Copyright Royalty Judges that they “do not have the authority to issue rules setting forth the scope of the activities covered by the [section 115] license,” 73 Fed. Reg. 48,396, 48,399 (Aug. 19, 2008). The Judges are required to comply with the Register’s ruling. See 17 U.S.C. § 802(f)(1)(A)(ii) (providing that “the Copyright Royalty Judges shall apply the legal interpretation embodied in the response of the Register of Copyrights” to referred material questions of substantive law (emphasis added)).

The declaration in the Proposed Rule that an interactive stream is a digital phonorecord delivery is one of the kinds of regulation that the law forbids. It is a declaration that a defined type of activity falls within the scope of section 115.

This is not a case that falls within the scenario identified by the Register as one where the Judges may need to address whether particular types of DPDs fall within the section 115 license in the process of setting rates for different types of DPDs.⁶ See 73 Fed. Reg. at 48,399. First, the Proposed Rule does not merely pose the question of whether a particular type of DPD falls within the statutory license; it goes further—addressing a more fundamental legal question. The Proposed Rule takes a position on whether a particular type of activity is a DPD (implicating the reproduction and distribution rights) in the first place.

Second, the Proposed Rule arises in the context of a settlement, so there has been no proceeding on which to base the determination of such a fundamental legal question and the full factual record has not been developed. Indeed, the Digital Media Association (DiMA) requested referral to the Register of this very question—whether an interactive stream is a DPD. The Judges decided that the issue could not be referred as a matter of law in light of the lack of factual information relating to the “circumstances and types of activities that could be considered ‘interactive streaming,’ and the extent to which those factual circumstances and types of activities result in reproductions of musical works.” *Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Docket No. 2006-3 CRB DPRA, Order Denying Motion of the Digital Media Association for Referral of a Novel Material Question of Substantive Law at 2 (Feb. 4, 2008). In other words, the Judges concluded that the legal question could not be answered without a full factual explication of the activities and reproductions involved in interactive streaming. The Proposed Rule makes no reference to any such factual information and, as discussed in Section II.B, below, does not even attempt to address the activities and reproductions involved in “interactive streaming.”

In any event, there is no need to make such a fundamental legal determination here. The settling parties are free to propose rates for any DPDs that may be created in the context of a given activity, provided that a service wishes to use the section 115 statutory license for that activity. This does not require a declaration that every incident of “interactive streaming” is a DPD. It merely requires the setting of a rate under the license “to the extent that” the activity involves DPDs. Suitable language to effectuate such a result is provided in Section V, below.

⁶ The Register stated that where, as here, such a question had not previously been determined, it would be a novel question of law that should be referred to the Register. 73 Fed. Reg. at 48,399.

II. The Proposed Rule Declaring Interactive Streams To Be *Per Se* Digital Phonorecord Deliveries Is Contrary to Law.

The Proposed Rule's declaration that "[a]n interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D)," Proposed Rule § 385.11 (definition of "interactive stream"), is contrary to the Copyright Act in numerous respects. The Copyright Royalty Judges may not adopt a rule that is contrary to law, regardless of whether or not the parties to a proceeding may agree.⁷

A. The Proposed Rule Violates Section 115 by Failing To Require a Delivered, "Specifically Identifiable" Phonorecord as a Condition of a Digital Phonorecord Delivery.

Section 115 introduces the concept of "digital phonorecord delivery" as a species of distribution, implicating the distribution and reproduction rights of section 106. The definition of "digital phonorecord delivery" expressly requires that a reproduction of a phonorecord (i) be delivered to a recipient and (ii) be "specifically identifiable." The Proposed Rule ignores both of these requirements.

1. A Digital Phonorecord Delivery Must Result in the Delivery of a Specifically Identifiable Reproduction.

The essence of a DPD is that a reproduction of a phonorecord of a musical work is "delivered" (in the sense of a distribution) to the recipient of a transmission. As the definition of "digital phonorecord delivery" expressly provides: "A 'digital phonorecord delivery' is 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." 17 U.S.C. § 115(d) (emphasis added).

The Copyright Office, discussing when a transmission resulted in a DPD in the Copyright Office Section 115 NPRM, confirmed the import of the definition. First, there must be a reproduction. Then, in the words of the Copyright Office, for the "reproduction . . . to qualify as a DPD under the statutory criteria, the reproduction must meet all the criteria specified in the

⁷ See, e.g., *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961 (9th Cir. 2003) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." (quoting *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936))); *Ashton v. Pierce*, 716 F.2d 56, 60 (D.C. Cir. 1983) ("[F]or regulations to be valid they must be consistent with the statute under which they were promulgated." (citation omitted)); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("[W]e must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." (internal quotations omitted)).

definition: (1) it must be delivered, (2) it must be a phonorecord, and (3) it must be specifically identifiable.”⁸ Copyright Office Section 115 NPRM, 73 Fed. Reg. at 40,808.⁹

2. The Proposed Rule Violates this Fundamental Requirement of Section 115.

The Proposed Rule ignores this fundamental definition of a DPD. The Proposed Rule’s definition of “stream” does not require any type of delivered phonorecord. To the contrary, it actually prohibits reproductions except for a narrowly defined class of “streaming cache reproductions,” and even those reproductions are not required. In short, the Proposed Rule would provide that real-time interactive streaming, where there is no delivered phonorecord, constitutes a “digital phonorecord delivery.” That is contrary to law.¹⁰ Further, nothing in the Proposed Rule requires that any reproduction created by interactive streaming be “specifically identifiable.” That, too, is contrary to law.

⁸ Both the Senate and House Reports on the DPRA make clear that the term “specifically identifiable” refers to identification by the transmitting service:

The Committee notes that the phrase “specifically identifiable reproduction,” as used in the definition, should be understood to mean a reproduction specifically identifiable to the transmission service. Of course, a transmission recipient making a reproduction from a transmission is able to identify that reproduction, but the mere fact that a transmission recipient can make and identify a reproduction should not in itself cause a transmission to be considered a digital phonorecord delivery.

S. Rep. No. 104-128, at 44 (1995); *accord* H.R. Rep. No. 104-274, at 30 (1995) (same, without the words “of course” and other minor word differences). The Copyright Office itself has recognized the importance of the DPRA Senate and House Reports in construing the very act at issue here. In the Office’s own words, “Turning to the legislative history is appropriate where, as here, the precise meaning is not apparent and a clear understanding of what Congress meant is crucial to an accurate determination of how Congress intended the digital performance right and the statutory scheme to operate.” *Public Performance of Sound Recordings: Definition of a Service: Final Rule*, 65 Fed. Reg. 77,292, 77,298 (Dec. 11, 2000). In particular, the Office stated that “we place great weight on the passages in the 1995 House and Senate Reports.” *Id.* at 77,298 (emphasis added). Nevertheless, in the Copyright Office Section 115 NPRM, the Register proposed to ignore this clear statement on the asserted, but clearly erroneous, ground that the statutory text was unambiguous in its reference. Copyright Office Section 115 NPRM, 73 Fed. Reg. at 40,809-10.

⁹ Although the Copyright Office has not adopted the Proposed Rule set forth in the NPRM, and has, since publication of the NPRM, expressed doubts about its validity, *see infra* Section II.C, the Office’s statement of the legal requirements for a DPD are unassailable.

¹⁰ Similarly, nothing in the definition of “interactive stream” requires a delivered phonorecord.

3. The Copyright Royalty Judges Have Made Clear that There Is No Basis for the Proposed Statement Declaring an Interactive Performance To Be a *Per Se* Digital Phonorecord Delivery Absent a Delivered Phonorecord.

The Copyright Royalty Judges have already expressed a view on the question of whether “interactive streaming” necessarily constitutes a digital phonorecord delivery. That view is contrary to the conclusion expressed in the Proposed Rule.

In rejecting DiMA’s request to refer to the Register of Copyrights the issue of whether an interactive stream constituted a DPD, the Judges found that the issue could not be resolved as a pure question of law. Rather, the Judges concluded that the issue required examination of the facts relevant to the interactive stream. As the Judges noted, “[t]he Register could not render a determination as to whether ‘interactive streaming’ is a digital phonorecord delivery without inquiring into the factual circumstances and types of activities that could be considered ‘interactive streaming,’ and the extent to which these factual circumstances and types of activities result in reproductions of musical works.” *Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Docket No. 2006-3 CRB DPRA, Order Denying Motion of the Digital Media Association for Referral of a Novel Material Question of Substantive Law at 2 (Feb. 4, 2008) (emphasis added). Similarly, the Judges concluded that “in order to determine what types of deliveries result in a digital phonorecord delivery, there must be a factual inquiry into what are the means, methods and results of the delivery.” *Id.*

There has been no such factual inquiry in connection with the Proposed Rule. Nor is the Proposed Rule limited to a particular set of facts relating to the existence or non-existence of delivered phonorecords. As discussed above, the definitions of “stream” and “interactive stream” say nothing about “the extent to which these factual circumstances and types of activities result in reproductions of musical works.” DiMA’s Executive Director, Jonathan Potter, acknowledged before the Copyright Office that the parties to the settlement chose not to address whether and where reproductions were made, because different variables related to the technologies used would “produce wildly differing results” and argued that “to the extent that our settlement chose not to dive too deeply into details . . . we would ask you to focus on creating clarity and not necessarily relying intensively on how you’re going to get there.” Sept. 19, 2008 Hearing Tr. at 36, 39-40. The Judges, however, in adopting a regulation, do not have the luxury of ignoring the law and not addressing “how you’re going to get there.” Thus, there is no basis for adopting the conclusion that an “interactive stream” (as defined in the Proposed Rule) is a DPD.

B. The Proposed Rule Improperly Equates Concepts of Performance with Distribution and Thus Violates the Fundamental Obligation To Construe the Copyright Act as a Harmonious Whole.

Apart from the Copyright Act’s definitional barriers to construing interactive streams as *per se* DPDs, the Proposed Rule’s assertion that all “interactive streams” are DPDs, with its implied conclusion that digital performances meeting the definition of “interactive streams” necessarily also implicate the distribution right, is inconsistent with the structure of the Copyright Act and with numerous specific provisions of the Act. Thus, it must be rejected.

“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). Courts must interpret a statute as a balanced and coherent regulatory scheme and “fit, if possible, all parts into an harmonious whole.” *Id.* (citations omitted); *see also K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (observing that plain meaning is determined not only by statutory language itself but by “the language and design of the statute as a whole”).

As will be discussed in greater detail in the sections that follow, the Copyright Act consistently differentiates between the public performance right and other rights. A number of these distinctions, including express distinctions in section 114, apply to interactive audio performances of the type identified as “interactive streams” in the Proposed Rule. In addition, the construction advanced in the Proposed Rule cannot be reconciled with the condition set forth in section 115, itself, for when a musical work is eligible for the statutory license. Nor is the Proposed Rule consistent with the statutory definition of one of the most fundamental concepts of copyright law, the definition of “publication,” which provides that “a public performance or display of a work does not of itself constitute publication.” 17 U.S.C. § 101. For these reasons, and others, the Proposed Rule’s declaration that an “interactive stream” is a DPD would violate the well-established canon of statutory construction that a statute must be construed in such a way as to produce a harmonious whole.

1. The Proposed Rule Improperly Equates Performance with Distribution.

The tie between digital phonorecord deliveries and the distribution right is clear from the text of section 115 and its legislative history. For example, section 115 provides that a DPD is actionable as infringement unless the person making the DPD (or the sound recording copyright owner) “has obtained a compulsory license under this section or has otherwise been authorized by the copyright owner of the musical work to distribute or authorize the distribution, by means of a digital phonorecord delivery, of each musical work embodied in the sound recording.” 17 U.S.C. § 115(c)(3)(G)(i) (emphasis added). Further, the statutory license granted by section 115 is a license “to make and distribute phonorecords of the [musical] work” and is available only if the person’s “primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.” *Id.* § 115(a)(1); *see, e.g., id.* § 115(b)(1) (requiring notice before “distributing any phonorecords of the work”); *id.* § 115(c)(1) (royalties “for phonorecords made and distributed”); *id.* § 115(c)(2) (providing that a royalty is payable “for every phonorecord made and distributed” and defining when a phonorecord is considered “distributed”); *id.* § 115(c)(3) (license includes the right to “distribute or authorize the distribution of a phonorecord . . . by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance”) (emphasis added).

Likewise, the House Report of the Digital Performance Rights in Sound Recordings Act of 1995, Pub. L. No. 104-39, the legislation that introduced the concept of DPDs, explains that DPDs were added “to confirm that the existing ‘mechanical rights’ of writers and publishers (i.e.

the right to be paid when compact discs and cassettes embodying their music are distributed) apply to certain distributions of phonorecords by digital transmission (referred to in the bill as ‘digital phonorecord deliveries’).” H.R. Rep. No. 104-274, at 28 (emphasis added). The corresponding Senate Report makes clear that Congress intended DPDs as a species of distribution, not as a form of public performance:

The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD's. The intention is not to substitute for or duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers.

S. Rep. No. 104-128, at 37 (1995) (emphasis added).

The Proposed Rule, however, would ignore Congress’ fundamental distinction between performances and distributions (or DPDs). Instead it would define “interactive stream” in terms that relate to the performance right, without regard to the existence or non-existence of any distribution, and then declare all interactive streams to be distributions.

The Proposed Rule defines a “stream” as a digital transmission to an end user “to allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission.” Proposed Rule § 385.11 (definition of “stream”). That is the essence of performance—real time or near real-time listening. *See, e.g., U.S. v. ASCAP*, 485 F. Supp. 2d at 442-46 (holding that downloads are not performances and contrasting streaming, which results in real-time or near real-time performance, with downloads, which do not).

If there were any residual doubt, the Proposed Rule could not be more express about the intent to duplicate the performance right. The definition of “stream” requires that to be a “stream,” and thus to qualify as an “interactive stream,” a transmission must be “also subject to licensing as a public performance of the musical work.” Proposed Rule, § 385.11 (definition of “stream” clause (3)). In other words, a “stream” is a performance. It has nothing to do with “distribution.”

The definition of “interactive stream” does not cure this defect. *See* Proposed Rule § 385.11 (definition of “interactive stream”). To the contrary, the definition highlights the performance-oriented focus of the Proposed Rule. Interactivity is defined in terms of the nature of “the performance of the sound recording” and whether that performance is exempted from the sound recording performance right or is subject to statutory licensing under section 114(d). *Id.* (emphasis added). Section 114(d), of course, deals with exemptions and licenses of the sound recording performance right under section 106(6). 17 U.S.C. § 114(d)(1) (“[t]he performance of a sound recording publicly by means of a digital audio transmission . . . is not an infringement of section 106(6)”) (emphasis added); *id.* § 114(d)(2) (“[t]he performance of a sound recording

publicly by means of a digital audio transmission. . . shall be subject to statutory licensing” (emphasis added)).¹¹

While the transmission resulting in a DPD may also constitute a public performance, 17 U.S.C. § 115(d), the concepts are distinct. A DPD, by virtue of being a DPD, is not a public performance and does not implicate the public performance right. A public performance is not, *per se*, a DPD. In short, the Proposed Rule declaring that an “interactive stream” is a DPD would do precisely what the Senate Report said section 115 was not to do—“duplicate performance rights in musical works.” *Accord U.S. v. ASCAP*, 485 F. Supp. 2d at 447 (“[I]n light of the distinct classification and treatment of performances and reproductions under the Act, we agree with the Applicants and with the *amici* writing in support of their position that Congress did not intend the two uses to overlap to the extent proposed by ASCAP in the present case.”).

2. **Construing Interactive Streaming To Implicate Reproduction and Distribution Rights Cannot Be Reconciled With the Carefully Crafted Provisions of Section 114 of the Copyright Act.**

The conflict between the Proposed Rule and copyright law is evident in the potential effect of the rule on sound recording rights applicable to interactive performances by digital transmission. Congress created a detailed statutory structure applicable to digital sound recording performances, with the intent of addressing all relevant rights. The scheme includes exemptions for certain transmissions, statutory licenses of the performance and ephemeral recording right for others, and specific provisions governing interactive streaming. *See* 17 U.S.C. §§ 114, 112(a), 112(e).

It is clear from the structure of the Act, the context, and the legislative history that the detailed statutory license structure was intended as a comprehensive, carefully balanced, congressional solution to the issue of sound recording rights in digital performances. *See, e.g.*, H.R. Rep. No. 104-274, at 14 (“[I]t is important to strike a balance among all of the interests affected” by the new performance right; “That balance is reflected in various limitations on the new performance rights.”); *id.* at 13 (“[T]he bill has been carefully drafted to accommodate foreseeable technological changes.”).

Among the provisions expressly addressing the sound recording performance right for interactive transmissions are sections 114(d)(3) and 114(e)(2). Section 114(d)(3) imposes limitations with respect to the exclusive licensing of interactive performances under the section 106(6) right, but section 114(d)(4) is express that the same limitations do not apply to the reproduction and distribution rights. Similarly, section 114(e)(2) grants authority for collective negotiation of the section 106(6) right, but grants no such authority with respect to the reproduction or distribution rights.

¹¹ As Commenters discuss in Section IV, below, while the Proposed Rule’s definition of “interactive stream” relies on section 114, it curiously does not rely on the closest analog in that section, the definition of “interactive service” provided in 17 U.S.C. § 114(j)(7).

A rule concluding that interactive streaming implicates the reproduction and distribution rights cannot be reconciled with these distinctions drawn by Congress in section 114. It would, for example, be inconsistent for Congress to have limited the right to grant exclusive licenses for interactive streaming under the public performance right, if the same sound recording licensor could grant exclusive reproduction and distribution rights for the digital phonorecord deliveries that those interactive streams constitute. It would be similarly absurd for Congress to have granted authority for collective negotiations of the public performance right in interactive transmissions, but not to have granted similar authority for any other rights that it understood to be implicated by those interactive transmissions.

That, however, would be the precise effect of the Proposed Rule. If the Proposed Rule is correct that interactive streams are DPDs, implicating the musical work reproduction and distribution rights, it would appear to follow that those same streams implicate the corresponding sound recording reproduction and distribution rights. A phonorecord is, after all, a fixation of a sound recording. 17 U.S.C. § 101. Section 115(c)(3)(G) expressly provides that “[a] digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by section 502 through 506 and section 509, unless” the DPD of the sound recording has been authorized by the sound recording copyright owner. 17 U.S.C. § 115(c)(3)(G). In short, the Proposed Rule construes the Copyright Act in a way that reaches a paradoxical result that is contrary to fundamental principles of statutory construction.

3. Construing Interactive Streams To Implicate Reproduction and Distribution Rights Cannot Be Reconciled with Congress’ Decision To Subject to the Section 115 Statutory License Only Those Musical Works that Have Been Recorded and Distributed Under Authority of the Copyright Owner.

The Proposed Rule’s misconstruction of copyright law also is evident in the detrimental effect of the Rule on a composer’s ability to control which of his or her musical works is eligible for reproduction and distribution under the section 115 statutory license. When Congress first enacted section 115 in 1976, it established a clear rule: only those musical works for which phonorecords “have been distributed to the public in the United States under the authority of the copyright owner” were subject to the statutory license. 17 U.S.C. § 115(a)(1); Copyright Law Revision, H.R. Rep. No. 94-1476, at 107-08 (Sept. 3, 1976) (the “1976 House Report”).¹² Conversely, Congress decided that, before a musical work was recorded and distributed to the public, a record company could not record or distribute it under section 115.

The Proposed Rule states that the public performance by interactive digital transmission of a song is a “digital phonorecord delivery”—that is, it creates phonorecords and constitutes a distribution of those phonorecords to the public. The unavoidable consequence of that logic is that if a composer authorizes an interactive digital public performance of a musical work that has never been recorded, that composer also will have authorized the creation and distribution of

¹² The issue of what works were subject to the license was described as “the most controversial issue in the 1909 act” (at least with respect to the mechanical license). 1976 House Report at 107.

phonorecords of the work. Simply allowing the public to listen to a demo of a song from his or her website, from a third party website, or to a mobile device, by interactive streaming (and not download) would constitute making a DPD, which is a distribution. By allowing such a performance, the songwriter will have yielded any rights to control the first recording and distribution of the song. That clearly is not what Congress intended or provided in enacting section 115, and cannot be harmonized with the Proposed Rule.

4. Construing Interactive Streams To Implicate Reproduction and Distribution Rights Cannot Be Reconciled with the Fundamental Copyright Principle of Publication.

Nor can the Proposed Rule be reconciled with the statutory definition of “publication.” Publication is defined as the “distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership,” but the Act expressly provides that “a public performance or display of a work does not of itself constitute publication.” 17 U.S.C. § 101 (emphasis added). Under the Proposed Rule, digitally transmitted interactive streams constituting a public performance of a work would also constitute distribution to the public of that work. That would appear to lead to the conclusion that, contrary to the plain meaning of the definition of “publication,” every public performance of a work by interactive stream would constitute publication.¹³ In other words, the Proposed Rule directly conflicts with the statutory directive that public performance is not, of itself, publication.

Moreover, such a conclusion could have profound effects for Copyright Office registration practices and for substantive issues such as the availability of statutory damages and attorneys’ fees in cases of infringement. Today, works performed by interactive stream but not otherwise distributed may be considered unpublished. Under the Proposed Rule, they would need to be registered as published works. They could not be included in an unpublished collection, significantly increasing the costs and administrative burdens of registration for both copyright owners and the Copyright Office. Such a construction also would trigger the mandatory deposit requirement of section 407(a) of the Copyright Act for works that were never intended to be published within the meaning of that provision. Further, the scope of the work would depend on the “unit of publication,” which would become the “unit of performance.” Substantively, such a rule would potentially expand the scope of statutory damages and attorneys’ fees, a result that should not be effected by this Proposed Rule. More fundamentally, the Proposed Rule could change which works fall within the scope of U.S. copyright law, as section 104 bases decisions as to national origin on whether the work was published and where and when it was first published.

The Proposed Rule threatens to turn settled principles of copyright law on their head and cannot be reconciled with an obligation to construe the Copyright Act as a harmonious whole. The declaration that interactive streams are DPDs should not be adopted.

¹³ In some cases, it could be argued that the distribution coincident with an interactive stream was not by “sale or other transfer of ownership.” Such an argument, however, would be difficult in any case in which the streamed performance was sold, and, in any event, the Proposed Rule would introduce newfound ambiguity into prior decisions that works either were, or were not, published.

C. Nothing in the Copyright Office's July 16, 2008 Notice of Proposed Rulemaking Supports the Proposed Rule.

The parties to the Settlement may attempt to argue that the Copyright Office has agreed that interactive streaming is a DPD, relying on the Copyright Office Section 115 NPRM. That Proposed Rule met strong resistance on diverse legal and policy grounds from numerous commenters and has not been adopted.¹⁴ Thus, it provides no support for the Proposed Rule.

An NPRM is not a regulatory determination by an agency and has no force of law or effect. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound.").¹⁵ Moreover, in a hearing held by the Copyright Office on September 19, 2008, the Register of Copyrights recognized "that our proposed rule was rather ambitious and, arguably, inconsistent with the more conservative approach that we have taken over the years in addressing the Section 115 compulsory license." Sept. 19, 2008 Hearing Tr. at 3 (publication pending following opportunity for corrections). Indeed, the Register had previously stated, in testimony to Congress, that "Characterizing streaming as a form of distribution is factually and legally incorrect and can only lead to confusion." *Section 115 Reform Act (SIRA) of 2006: Hearings before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary* at 6 (May 16, 2006) (Statement of Marybeth Peters, Register of Copyrights) (emphasis added). The Register acknowledged that it was the Office's "intention to be provocative in order to . . . see how far we could go" and that most commenters believed that the proposal "did, in fact, go too far." Sept. 19, 2008 Hearing Tr. at 3.

The Register had based the Copyright Office's proposed rule on the proposed finding that the buffers created in order to effectuate streamed performances were, in fact, distributed phonorecords that qualified as DPDs. Copyright Office Section 115 NPRM, 73 Fed. Reg. at 40,808-09. In the time between the publication of the proposed rule and the date comments were due, the Second Circuit issued a decision that undermined that premise. In *The Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), the Second Circuit held that

¹⁴ *See* Comments of The National Association of Broadcasters; Comments of CTIA - The Wireless Association; Comments of Google, Inc./YouTube LLC; Comments of Verizon Communications; Comments of Electronic Frontier Foundation, Public Knowledge, Center for Democracy and Technology, Consumers Union, Consumer Federation of America, U.S. PIRG, and the Computer & Communications Industry Association; Muzak LLC, DMX, Inc., Ecast Inc., TouchTunes Music Corporation and AMI Entertainment, *available at* <http://www.copyright.gov/docs/section115/comments-3/>.

¹⁵ Indeed, giving weight to a proposal in an NPRM would be antithetical to the purpose of notice and comment rulemaking, which, among other things, "is both (1) to allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules, which might be lost if the agency had already put its credibility on the line in the form of 'final' rules. People naturally tend to be more close-minded and defensive once they have made a 'final' determination." *Nat'l Tour Brokers Ass'n v. U. S.*, 591 F.2d 896, 902 (D.C. Cir. 1978).

buffers used in a cable network's in-network digital video recording servers are not "fixed" and are not "copies." The court relied on the Copyright Act's definition of "fixation" (a necessary element included in the definition of "phonorecord") to hold that the fixation requirement imposes

two distinct but related requirements: the work must be embodied in a medium . . . such that it can be perceived, reproduced, etc., from that medium (the "embodiment requirement"), and it must remain thus embodied "for a period of more than transitory duration" (the "duration requirement"). Unless both requirements are met, the work is not "fixed" in the buffer, and as a result, the buffer data is not a "copy" of the original work whose data is buffered.

Id. at 127 (citations omitted). The court ruled that fixation requires embodiment for more than "transitory" duration, and that, where "each bit of data . . . is rapidly and automatically overwritten as soon as it is processed," the embodiment is merely transitory. *Id.* at 130; *accord* H.R. Rep. No. 94-1476, at 53 (1976) ("[T]he definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on television or other cathode ray tube or captured momentarily in the 'memory' of a computer." (emphasis added)).

The Second Circuit thus joined the Fourth Circuit, which had previously concluded that temporary RAM downloads made in the course of transmission by a digital transmission system were not copies fixed for a period of more than transitory duration. *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004) ("When an electronic infrastructure is designed and managed as a conduit of information and data that connects users over the Internet, the owner and manager of the conduit hardly 'copies' the information and data in the sense that it fixes a copy in its system of more than transitory duration." (emphasis added)).

Buffers of the type discussed in the Copyright Office's NPRM are precisely analogous to the buffers at issue in *Cartoon Network* and *CoStar*. Data representing brief segments of a work typically are present in such a buffer for only so long as necessary to effectuate a real-time performance. The data are then overwritten. That is the essence of "transitory" duration.¹⁶ *See, e.g., id.* at 551 ("Transitory duration . . . is qualitative in the sense that it describes the status of transition.").

The Copyright Office's Proposed Rule, like the Proposed Rule here, is contrary to law for many reasons beyond the fact that buffers are not phonorecords. As discussed in more detail in the comments cited in footnote 14, the Copyright Office's Proposed Rule cannot be reconciled with section 114 (including the extensive structure for licensing sound recording performances by non-interactive streaming), section 115's condition for statutory licensing, section 101's definition of publication, multiple parts of section 110, or the requirements contained in section

¹⁶ In *Cartoon Network*, the data remained for 1.2 seconds before they were overwritten, 536 F.3d at 130, but there was no indication from the Second Circuit that 1.2 seconds is an outside limit.

115 that each DPD be “specifically identifiable” and that each reproduction have as its “primary purpose” distribution to the public. Moreover, it is bad public policy.

The Copyright Office is still considering how to address the question of whether streaming implicates the DPD right and is subject to the section 115 license, and there is good reason to believe that any final regulation that may be issued will differ substantially from the nonbinding NPRM. Thus, the Office’s NPRM provides no support for the Proposed Rule at issue here.

III. Declaring Interactive Streaming Necessarily To Implicate the Reproduction and Distribution Rights Is Bad Policy.

Apart from the legal deficiencies of the Proposed Rule, it also is bad policy. A declaration that a performance such as an interactive stream also is necessarily a distribution would expand the scope of the distribution right beyond its natural, economically rational boundaries. Such an expansion could impose unwarranted and duplicative licensing burdens on legitimate services, making it even more difficult than it already is for those services to develop.

In addition, the section 115 license is generally acknowledged to be antiquated and administratively burdensome. The license is an unworkable alternative for many services that make performances by digital transmission, even if the proposed fee is zero. For example, interactive streaming of clip samples are performances that have no purpose other than to promote other royalty-bearing performances or downloads, it makes no sense to declare that such performances necessarily constitute DPDs, thus implicating the reproduction and distribution rights – even if royalty free. Once the performance is declared a DPD, the service must either bear the administrative burdens of the section 115 statutory license (including advanced notification and reporting), bear the burdens of obtaining licenses by other means, or face an increased risk that copyright owners will assert claims of infringement liability, citing the Judges’ regulation.

Further, a blanket declaration that interactive streams are DPDs will likely have unintended adverse consequences. The Copyright Office has, for example, expressed the preliminary view that there is little legal basis for distinguishing interactive streams from other digital performances of recorded music. *See infra* Section III.C. If the Judges declare that such interactive performances always implicate the distribution right, services will be subject to claims that the same rule should apply not only to non-interactive performances of recorded music, but also to interactive and non-interactive performances of other types of works, including audiovisual works. Particularly where, as here, there has been no consideration of such unintended consequences, and there is no need to make a broad declaration, the Judges should not do so.

A. The Proposed Rule’s Expansion of the Distribution Right Beyond Economically Rational Boundaries Will Impose Unreasonable Burdens on the Development of Legitimate Digital Services.

Historically, the bundle of copyright rights matched the common-sense different means by which a work could be exploited. Thus, the making of a public performance required a

license to make the performance; the reproduction and distribution of copies required licenses for those rights. In the rare cases where a single economic activity incidentally required the exercise of multiple rights, the law either provided an exemption (*e.g.*, the section 112(a) ephemeral recording exemption for copies made solely to facilitate performances), or the existence of a single licensor and licensing regime obviated any inefficiency and led to a unitary payment to a single payee.

When the economic activity is a performance—in other words, the transmission of a work in real time in order to provide a real-time listening experience for the recipient—and that performance is licensed, the copyright owner is fully compensated for the entire economic value of the use of its work by the fees it receives for the performance. The mere fact that the copyright owner has chosen to authorize a second agent to collect for the reproduction and distribution rights does not increase the economic value of the use of the work; it should not create added liability. Nor should it subject the transmitting entity to a second, entirely distinct, licensing regime that may involve a second costly fee litigation.

A streamed performance is a single economic activity, with a single economic value. It is not reasonable to ask the rate courts or the Copyright Royalty Judges to differentiate the value of the performance from the value of a putative distribution that occurs when the performance is made. Experience demonstrates that such a division is not practicable. *See, e.g.*, Copyright Royalty Board, Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order, 72 Fed. Reg. 24,084, 24,102 (May 1, 2007) (the Judges' webcasting decision, stating "We are left with a record that demonstrates that . . . copyright owners and performers are unable to secure separate fees for the section 112 [ephemeral recording] license. The license is merely an add-on to the securing of the performance right granted by the section 114 [performance] license."); Copyright Royalty Board, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services: Final Rule and Order, 73 Fed. Reg. 4,080, 4,098 (Jan. 24, 2008) (it is "evident that the parties consider the Section 112 license to be of little value at this point in time"; the record "demonstrates that the license is merely an add-on to the securing of the performance rights granted by the Section 114 license").¹⁷

It is difficult to imagine a less efficient system than one that would require users (and, for that matter, copyright owners) to spend tens of millions of dollars to litigate the fair market value of a streamed public performance in not one, but two, rate courts, and then face the prospect of spending tens of millions of dollars more to litigate a mechanical fee before the Copyright Royalty Judges. The Judges should not adopt a regulation that threatens to impose such unreasonable burdens on digital music services.

¹⁷ Whatever the legal merits of the Register's directive that the Judges must separate out the ephemeral and performance components of certain sound recording fees, Copyright Office, Notice, Review of Copyright Royalty Judges Determination, 73 Fed. Reg. 9,143 (Feb. 19, 2008), the Judges' decisions based on the records in the webcasting decision and satellite radio case leave little doubt about the impracticality and artificiality of such a division.

B. It Is Bad Policy To Subject Services Making Interactive Streams to the Section 115 Statutory License, Which Is Antiquated and Unworkable.

The Judges should not stretch to expand the reach of section 115 and the distribution right beyond their reasonable scope. As the Copyright Office repeatedly has recognized, the section 115 license is an antiquated license, rooted in the physical distribution of recordings, is administratively burdensome, and has never served as a workable option, even for those seeking to use the license as it was originally envisioned.

In testimony before the Senate Judiciary Committee, Register Peters has described the section 115 license as an “antiquated statutory scheme” that is “not up to the task of meeting licensing needs of the 21st Century.” *Music Licensing Reform: Hearings Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (July 12, 2005) (Statement of Marybeth Peters, Register of Copyrights) (“The Register’s July 12, 2005 Testimony”). Register Peters made clear that, among other reasons, due to the inefficiencies and administrative burdens imposed by the license, the use of the section 115 license, “other than as a de facto ceiling on privately negotiated rates, has remained at an almost non-existent level.” *Id.* According to Register Peters, “[t]here is no debate that section 115 needs to be reformed.” *Id.*

Three weeks earlier, before the House Intellectual Property Subcommittee, the Register described the section 115 license as “outdated” and suffering from “fundamental problems.” *Music Licensing Reform: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. at 1 (June 21, 2005) (Statement of Marybeth Peters, Register of Copyrights). Further, the Register acknowledged that “those problems—based in the statutory framework—are beyond my power to cure by regulation.” *Id.* at 4.

The problems with section 115 as a workable statutory license have been well documented. See generally The Register’s July 12, 2005 Testimony (discussing difficulties encountered “under this antiquated statutory scheme”). They include the difficulties engendered by the need to identify, and then search Copyright Office records to locate and notify, the copyright owner of each musical work to be distributed before the work is distributed, 17 U.S.C. § 115(c)(1); 37 C.F.R. § 201.18, the obligation to make payments for each phonorecord that has been “distributed,” 17 U.S.C. § 115(c)(2), the obligation to make payments directly to each copyright owner that has been located, *id.* § 115(c)(6), and the obligation to provide monthly and annual statements of account to each, *id.* § 115(c)(5); 37 C.F.R. § 201.19.

Jonathan Potter, the Executive Director of the Digital Media Association, confirmed these problems, testifying that the section 115 “license clearance process is so cumbersome as to be dysfunctional.” *Section 115 of the Copyright Act: In Need of Update?: Hearings Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong., at 4 (Mar. 11, 2004) (Statement of Jonathan Potter, Executive Director, Digital Media Association). He observed that “[f]inding copyright owners can be almost impossible” given that “[o]nly about 20 percent of musical works are registered in the Copyright Office” and that “[f]or pre-1978 works, copyright owner information is available only on card files that must be searched manually in the Copyright Office on a song-by-song basis.” *Id.* He also noted that “[i]f a copyright owner is identified, the licensee must notify the owner using a 2-page form for

each individual composition, and send the form and then monthly statements of use and royalty checks by certified or registered mail.” *Id.* Thus, “[t]he process of identifying and providing notice to a copyright owner, or determining that notice is not possible because there is no registration data or the data is incorrect, might take several weeks per copyright.” *Id.* at 5.

More recently, Register Peters confirmed that the “Section 115 compulsory license remains a dysfunctional option for licensing the reproduction and distribution of musical works.” *Reforming Section 115 of the Copyright Act for the Digital Age: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. at 2 (Mar. 22, 2007) (Statement of Marybeth Peters, Register of Copyrights). The Register candidly acknowledged that “[r]egulatory changes . . . cannot address the inherent problems with the statutory license. . . . Congress must take action and make the necessary structural changes.” *Id.*

It makes no sense to stretch the law beyond recognition by implying that services making performances by interactive streaming are also subject to the mechanical license, where the economic value of the activity is in the public performance for which the music publisher already is compensated. It similarly makes no sense to declare that the interactive streaming of promotional clip samples, which have no value apart from the service they promote, are DPDs, or to adopt a regulation establishing burdensome procedures for a DPD license for such samples. The promoted service itself generates a full fee for the musical work copyright owner, a fact confirmed by the zero fee established in the Proposed Rule. Yet, despite these facts, if an interactive stream of a clip sample is declared to be a DPD, a service will be subjected to the outdated and unworkable burdens of obtaining the section 115 statutory license, obtaining a license from another source, or facing claims of infringement based on the Judges’ regulation. That is bad policy.

C. The NPRM May Well Have Unintended Adverse Consequences Beyond Interactive Audio Streaming.

If the Proposed Rule is adopted unchanged, it likely will have copyright consequences extending beyond interactive streaming in ways not anticipated by the Judges. For example, the Proposed Rule may inadvertently subject noninteractive performances to the section 115 license. While the Proposed Rule on its face only purports to subject interactive streams to the section 115 license, neither the parties to the Settlement, nor the Proposed Rule, offers a legal basis for distinguishing interactive performances of recorded music from non-interactive performances. Indeed, the Copyright Office has expressed the preliminary view that there was no basis for such a distinction. Copyright Office Section 115 NPRM, 73 Fed. Reg. at 40,807 (“[T]he Office, at this time, can discern no basis for distinguishing between interactive and non-interactive streams in determining whether a particular transmission does or does not result in a DPD.”). Thus, the Proposed Rule, if adopted, could lead to arguments that non-interactive streams are DPDs, too.

Moreover, if digitally transmitted performances of recorded music implicate the distribution right, by what reason do digitally transmitted performances of other types of copyrighted works escape the distribution right? In their comments on the Copyright Office’s Section 115 NPRM, commenters, including Google, argued, for example, that a declaration that interactive streaming constituted a DPD could have significant ramifications for the licensing of

audiovisual works and all works contained therein.¹⁸ Those commenters argued that, if there is any logic behind the declaration proposed in the NPRM, and that logic applies to audiovisual works, the distribution rights in a digitally transmitted audiovisual work and all works contained in the audiovisual work (including any musical works) would be implicated. Music included in audiovisual work soundtracks is not within the scope of the section 115 statutory license, which is limited to the inclusion of musical works in “phonorecords,” a term that, in turn, excludes the sound track of audiovisual works. *See* 17 U.S.C. §§ 115(a) and (d), 101 (definition of “phonorecord”). While the license granting rights to perform the audiovisual work may include all necessary rights (including the distribution right), there is no assurance that licensees would have believed such rights were needed. The commenters argued to the Copyright Office that a rule declaring interactive streaming to implicate the distribution right “would force streaming services offering audiovisual content to negotiate new voluntary reproduction rights licenses or risk incurring infringement liability—an extremely daunting, if not crippling, prospect given the lack of any database of copyright ownership and ‘split’ data, the difficulty of identifying music in audiovisual works, the huge cumulative transaction costs, etc.” Comments of Ad Hoc Coalition of Streamed Content Providers, Docket No. RM 2000-7, at 11 (Aug. 28, 2008):

By declaring interactive streaming necessarily to implicate the distribution right, the NPRM threatens adverse consequences that have not been fully identified or assessed. The Judges should not risk or countenance such potential consequences, especially when they easily may be avoided by the minor amendments recommended herein.

IV. The Proposed Rule Should Not Define Interactive Streams in a Manner that Is Inconsistent with Section 114 and with Common Usage.

Above and beyond the numerous legal and policy problems with the Proposed Rule’s statement that interactive streams are DPDs *per se*, the Proposed Rule also inappropriately defines “interactive stream” and “stream” in a manner that is confusingly inconsistent with section 114 and common usage. It is particularly inappropriate for the Judges to adopt such definitions, under their name and with their imprimatur, when the law relating to music performance and distribution rights as well as the law relating to the section 115 statutory license continue to evolve.¹⁹ Adoption of regulations containing those definitions threatens to cause confusion and lead to misinterpretation of the significance of the Proposed Rules. A few simple wording changes, which will not alter the legitimate goals of the Settlement, can eliminate any such threat.

¹⁸ *See* Comments of Ad Hoc Coalition of Streamed Content Providers, Docket No. RM 2000-7, at 11 (Aug. 28, 2008).

¹⁹ *See, e.g.,* Determination of Rates and Terms, Docket No. 2006-3 CRB DPRA, at 9-12 (Oct. 2, 2008) (explaining the nearly century-long history of the section 115 statutory license, and musing at the oddity that “virtually no one” uses it); *Reforming Section 115 of the Copyright Act for the Digital Age: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. of the Judiciary*, 110th Cong. (Mar. 22, 2007) (statement of Marybeth Peters, Register of Copyrights) (describing the history of the statutory and regulatory changes to the section 115 statutory license and the need for further reform).

Section 114 defines an “interactive service” as “one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.” 17 U.S.C. § 114(j)(7). The section then goes on to use that term repeatedly. Most notably, the section provides that a service other than an “interactive service” is entitled to a statutory license under section 114, but only if a set of twelve conditions are met. *Id.* §§ 114(d)(2)(A) and (C). It is, therefore, possible to operate a service that provides streams that are not “interactive,” but still fail to qualify for the section 114 statutory license.

Rather than mirror section 114, and define an interactive stream as one that enables the performance of a sound recording on request, the Proposed Rule defines “interactive stream” as a stream that is not exempt under section 114(d)(1) and does not qualify for the statutory license under section 114(d)(2). Proposed Rule § 385.11 (definition of “interactive stream”). As a result of these inconsistent definitions, it is possible to have a stream that is not “interactive” within the meaning of section 114, yet nonetheless is “interactive” for purposes of the Proposed Rule.

The Proposed Rule would provide that a fully non-interactive transmission—one that was programmed in advance by the service without any ability of the recipient to choose either particular sound recordings or particular programs—would still be a “digital phonorecord delivery” if any of the twelve statutory license conditions of section 114(d)(2)(A) and (C) were not met. Thus, for example, under the Proposed Rule, failing to meet the sound recording performance complement or making a prior announcement of the title of a sound recording that was going to be played, could change a non-interactive stream into an “digital phonorecord delivery.”²⁰ While such conditions may be appropriate to determining the availability of the section 114 statutory license, they have nothing to do with whether a given stream is a digital phonorecord delivery.

Moreover, the Proposed Rule’s definition of the term “stream” includes requirements and conditions that are not related to whether a transmission is a stream as that term is generally used. Specifically, the Proposed Rule adds a limitation on the type of technology that is used—the technology must be “designed such that the sound recording does not remain accessible for future listening.” Proposed Rule § 385.11 (definition of “stream”). This implies that a stream using an unencrypted technology that may be recorded by the recipient if the recipient has the necessary software or other technology is not a “stream.”

Whether a transmission is a stream, however, does not depend on whether the technology is designed as required in the Proposed Rule. A stream simply is a transmission “that is constantly received by, and normally presented to, an end-user while it is being delivered by a streaming provider.” Wikipedia Online Encyclopedia entry for “Streaming media,” http://en.wikipedia.org/wiki/Streaming_media (last visited Oct. 31, 2008). While the “normal” usage is real time listening, there is no requirement that the technology prevent recording. In discussing a popular streaming format, Real Audio, the same source notes that “[s]everal features

²⁰ Some of the conditions do not even protect any interest of the musical work copyright owner who is the beneficiary of section 115. Thus, for example, clause (iv) of section 114(d)(2)(C) disqualifies from the statutory license performances of sound recordings with visual images that are likely to cause confusion as to the association of the record company or performing artist with a particular product or service. 17 U.S.C. § 114(d)(2)(C)(iv).

of this program have proven controversial (most recently, [the current version's] ability to record unprotected streaming media from web sites)." *Id.* (entry for RealAudio), <http://en.wikipedia.org/wiki/RealAudio> (last visited Oct. 31, 2008). While the recording feature may be "controversial," it does not make the transmission any less "streaming media" or any less a "stream."

The limitation contained in the Proposed Rule is not germane to whether a transmission is a stream. Just as a broadcast is a broadcast, regardless of whether the listener attaches a cassette recorder to his or her radio, streaming is streaming regardless of whether the listener is able to make a recording on his or her computer or on his or her receiver.

Similarly, while the Proposed Rule purports to rely on the conditions applicable to the section 114 statutory license to define when a "stream" is an "interactive stream," the technology requirement included in the definition of "stream" adds a condition on the term "interactive stream" that is nowhere found in section 114. The twelve conditions imposed by sections 114(d)(2)(A) and (C) include certain requirements related to the technology used, and they are incorporated into the Proposed Rule in the definition of "interactive stream." *See, e.g.*, 17 U.S.C. §§ 114(d)(2)(A)(ii), (C)(vi). None, however, is as broad as the technology mandate contained in the definition of "stream." If the goal of the Proposed Rule is harmonization with section 114, the technology requirement contained in the proposed definition of "stream" does not accomplish that goal.

Section 801(b) gives the parties to the Settlement the right to reach an agreement on the rates and terms for reproductions and distributions under the statutory license. It does not, however, give them the right to invoke the authority of the Judges to seek to redefine underlying terms or to attempt to alter underlying legal rights and defenses. As demonstrated in Section V, *infra*, The parties' Settlement, including definition of the scope of activities to which the parties intend the rates and terms therein to apply, can be effectuated fully without causing unwarranted confusion by minor wording changes to make clear that the only effect of the defined terms used in the Settlement, and the Judges' adoption of the Proposed Rule, is to define the activities that qualify for the rates and terms agreed in the Settlement.

V. The Foregoing Concerns Can Be Addressed With Relatively Minor Changes to the Proposed Rule that Will Continue To Allow the Settling Parties To Use the Section 115 License for Interactive Streams on the Terms of the Settlement.

The concerns discussed above do not require radical changes to the Proposed Rule. As demonstrated below, minor amendments can eliminate the concerns presented above, while at the same time fully preserving the legitimate legal and economic effect of the Settlement. The proposed amendments are reflected in redline in Exhibit A, hereto.

A. Corrections to the Proposed Rule To Remove the Improper Implication that Interactive Streams Are DPDs.

The Judges should reject the second sentence of the definition of "interactive stream." That sentence has nothing to do with defining the term "interactive stream"; rather, it proposes a statement of law that is contrary to law, beyond the Judges' authority, and bad public policy.

Because an “interactive stream” is not necessarily a DPD, and so there is no ambiguity about the purpose of the definition of “interactive stream” in the Proposed Rule, the Judges should make clear that the license is available to the extent an interactive stream results in a DPD, without the need to define when an interactive stream does result in a DPD. This can be accomplished with the following changes:

In section 385.10(a), insert “digital phonorecord deliveries to the extent that they are made in the course of” between “for” and “interactive streams” and insert “made pursuant to the statutory license provided in 17 U.S.C. 115” between “digital music services” and “in accordance with.” Section 385.10(a) would, thus, provide: “This subpart establishes rates and terms of royalty payments for digital phonorecord deliveries to the extent that they are made in the course of [qualifying]²¹ interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services made pursuant to the statutory license provided in 17 U.S.C. 115, in accordance with the provisions of 17 U.S.C. 115.”

In section 385.10(b) insert “digital phonorecord deliveries in the course of making” between “authorizes” and “interactive” and insert “the statutory license provided in” between “pursuant to” and “17 U.S.C. 115”. Section 385.10(b) would, thus, provide: “A licensee that makes or authorizes digital phonorecord deliveries in the course of making [qualifying] interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services pursuant to the statutory license provided in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations.”

In section 385.11, strike from the definition of “interactive stream” (which, as discussed below, should be changed to “qualifying interactive stream”) the second sentence: “An interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(3)(C) and (D).”

In section 385.17, insert the following sentence at the end: “Nothing in this part shall be construed as a determination that any interactive stream does or does not result in a digital phonorecord delivery or require a license under 17 U.S.C. 115.”

B. Corrections To Clarify the Defined Terms “Interactive Stream” and “Stream.”

The concerns discussed in section IV may easily be addressed by changing the defined terms “interactive stream” and “stream” to “qualifying interactive stream” and “qualifying stream,” respectively, and then making conforming changes throughout the Proposed Rule. Such a change will make clear that the definitions do not seek to alter basic concepts of section 114 or common usage, but instead define when those activities qualify for the statutory license under the terms set forth in the Settlement. This change will clarify the intent and effect of the Proposed Rule. Indeed, the only valid purpose under section 801(b) of any definition advanced

²¹ The insertion of the word “qualifying” is discussed in Section V.B., *infra*.

by the parties to the Settlement is to define when an activity qualifies for the terms agreed in the Settlement. The parties to a Settlement have no right to propose regulations that intend a broader effect.

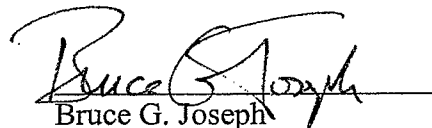
C. The Revisions to the Proposed Rule Recommended Herein Will Preserve the Legitimate Scope and Effect of the Settlement.

The changes to the Proposed Rule requested in these Comments preserve the effect and proper scope of the Settlement. Any service that is making interactive streams that it believes include the making of DPDs still will be entitled to use the statutory license at the rate and under the terms agreed to by the parties to the Settlement. The scope of activities covered by the Settlement will remain exactly the same—interactive streams as defined in the Proposed Rule will qualify, and will now bear the more accurate name: “qualifying interactive streams.”

Conclusion

As the foregoing demonstrates, the Judges should not adopt a regulation declaring that interactive streams are DPDs. Such a rule would be beyond the Judge’s authority, contrary to law, and bad policy. Moreover, the Judges should modify the defined terms “interactive stream” and “stream” contained in the Proposed Rule to eliminate potential confusion between the Proposed Rule and the concept of interactivity as it is defined by Congress in section 114 and between the Proposed Rule and commonly understood concepts of streaming.

Respectfully submitted,



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October 31, 2008

Exhibit A (Only Includes Sections Containing a Proposed Revision)

§ 385.10 General.

(a) This subpart establishes rates and terms of royalty payments for digital phonorecord deliveries to the extent that they are made in the course of qualifying interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services made pursuant to the statutory license provided in 17 U.S.C. 115, in accordance with the provisions of 17 U.S.C. 115.

(b) *Legal compliance.* A licensee that makes or authorizes digital phonorecord deliveries in the course of making qualifying interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services pursuant to the statutory license provided in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations.

§ 385.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

~~*Interactive*~~ Qualifying interactive stream means a qualifying stream of a sound recording of a musical work, where the performance of the sound recording by means of the qualifying stream is not exempt under 17 U.S.C. 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. 114 (d)(2). ~~An interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(3)(C) and (D).~~

Licensee means a person that has obtained a compulsory license under 17 U.S.C. 115 and its implementing regulations.

Licensed activity means qualifying interactive streams or limited downloads of musical works, as applicable.

Limited download means a digital transmission of a sound recording of a musical work to an end user, other than a qualifying stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for –

(1) An amount of time not to exceed one month from the time of the transmission (unless the service, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request for the end user made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription no longer than a subscription renewal period of three months, whichever is shorter; or.

(2) A specified number of times not to exceed 12 (unless the service, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a general digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).

Offering means a service's offering of licensed activity that is subject to a particular rate set forth in § 385.13(a) (e.g., a particular subscription plan available through the service).

Promotional royalty rate means the statutory royalty rate of zero in the case of certain promotional qualifying interactive streams and certain promotional limited downloads, as provided in § 385.14.

Record company means a person or entity that

- (1) Is a copyright owner of a sound recording of a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under the common law or statutes of any State, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive licensee of the rights to reproduce and distribute a sound recording of a musical work; or
- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the copyright owner of the sound recording.

Relevant page means a page (including a web page, screen or display) from which licensed activity offered by a service is directly available to end users, but only where the offering of licensed activity and content that directly relates to the offering of licensed activity (e.g., an image of the artist or artwork closely associated with such offering, artist or album information, reviews of such offering, credits and music player controls) comprises 75% or more of the space on that page, excluding any space occupied by advertising. A licensed activity is directly available to end users from a page if sound recordings of musical works can be accessed by end users for limited downloads or

qualifying interactive streams from such page (in most cases this will be the page where the limited download or qualifying interactive stream takes place).

Service means that entity (which may or may not be the licensee) that, with respect to the licensed activity,

(1) Contracts with or has a direct relationship with end users in a case where a contract or relationship exists, or otherwise controls the content made available to end users;

(2) Is able to report fully on service revenue from the provision of the licensed activity to the public, and to the extent applicable, verify service revenue through an audit; and

(3) Is able to report fully on usage of musical works by the service, or procure such reporting, and to the extent applicable, verify usage through an audit.

Service revenue. (1) Subject to paragraphs (2) through (5) of the definition of “Service revenue,” and subject to U.S. Generally Accepted Accounting Principles, *service revenue* shall mean the following:

(i) All revenue recognized by the service from end users from the provision of licensed activity;

(ii) All revenue recognized by the service by way of sponsorship and commissions as a result of the inclusion of third-party “in-stream” or “in-download” advertising as part of licensed activity (i.e., advertising placed immediately at the start, end or during the actual delivery, by way of qualifying interactive streaming or limited downloads, as applicable, of a musical work); and

(iii) All revenue recognized by the service, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a relevant page of the service or on any page that directly follows such relevant page leading up to and including the limited download or qualifying interactive streaming, as applicable, of a musical work; provided that, in the case where more than one service is actually available to end users from a relevant page, any advertising revenue shall be allocated between such services on the basis of the relative amounts of the page they occupy.

(2) In each of the cases identified in paragraph (1) of the definition of "Service revenue," such revenue shall, for the avoidance of doubt,

(i) Include any such revenue recognized by the service, or if not recognized by the service, by any associate, affiliate, agent or representative of such service in lieu of its being recognized by the service;

(ii) Include the value of any barter or other nonmonetary consideration;

(iii) Not be reduced by credit card commissions or similar payment process charges, and

(iv) Except as expressly set forth in this subpart, not be subject to any other deduction or set-off other than refunds to end users for licensed activity that they were unable to use due to technical faults in the licensed activity or other bona fide refunds or credits issued to end users in the ordinary course of business.

(3) In each of the cases identified in paragraph (1) of the definition of "Service revenue," such revenue shall for the avoidance of doubt, exclude revenue derived solely in connection with services and activities other than licensed activity, provided that advertising or sponsorship revenue shall be treated as provided in paragraphs (2) and (4) of

the definition of "Service revenue." By way of example, the following kinds of revenue shall be excluded:

- (i) Revenue derived from non-music voice, content and text services;
- (ii) Revenue derived from other non-music products and services (including search services, sponsored searches and click-through commissions); and
- (iii) Revenue derived from music or music-related products and services that are not or do not include licensed activity.

(4) For purposes of paragraph (1) of the definition of "Service revenue," advertising or sponsorship revenue shall be reduced by the actual cost of obtaining such revenue, not to exceed 15%.

(5) Where the licensed activity is provided to end users as part of the same transaction with one or more other products or services that are not a music service engaged in licensed activity, then the revenue deemed to be recognized from end users for the service for the purpose of the definition in paragraph (1) of the definition of "Service revenue" shall be the revenue recognized from end users for the bundle less the standalone published price for end users for each of the other component(s) of the bundle; provided that, if there is no such standalone published price for a component of the bundle, then the average standalone published price for end users for the most closely comparable product or service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used. In connection with such a bundle, if a record company providing sound recording rights to the service.

(i) Recognizes revenue (in accordance with U.S. Generally Accepted Accounting Principles, and including the avoidance of doubt barter or nonmonetary

consideration) from a person or entity other than the service providing the licensed activity and;

(ii) Such revenue is received, in the context of the transactions involved, as consideration for the ability to make qualifying interactive streams or limited downloads of sound recordings, then such revenue shall be added to the amounts expended by the service for purposes of § 385.13(b). Where the service is the licensee, if the service provides the record company all information necessary for the record company to determine whether additional royalties are payable by the service hereunder as a result of revenue recognized from a person or entity other than the service as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service to calculate the additional royalties and indemnify the service for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.

~~Stream~~ Qualifying stream means the digital transmission of a sound recording of a musical work to an end user –

(1) To allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future licensing from a streaming cache reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction, and

(3) That is also subject to licensing as a public performance of the musical work.

Streaming cache reproduction means a reproduction of a sound recording of a musical work made on a computer or solely for the purpose of permitting an end user who has previously received a qualifying stream of such sound recording again from local storage on such computer or other device rather than by means of a transmission; provided that the user is only able to do so while maintaining a live network connection to the service, and such reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Subscription service means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of three years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services, and including any use of such a service on a trial basis without charge as described in § 385.14(b).

§ 385.12 Calculation of royalty payments in general. [Unchanged]

§ 385.13 Minimum royalty rates and subscriber-based royalty floors for specific types of services.

(a) *In general.* The following minimum royalty rates and subscriber-based royalty floors shall apply to the following types of licensed activity:

(1) *Standalone non-portable subscription – qualifying streaming only.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings only in the form of qualifying interactive streams and only from a non-portable device to which such qualifying streams are originally transmitted while the device has a live network connection, the minimum for use in step 1 of § 385.12(b)(1) is the lesser of subminimum II as described in paragraph (c) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(1) is the aggregate amount of 15 cents per subscriber per month.

(2) *Standalone non-portable subscription – mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings either in the form of qualifying interactive streams or limited downloads but only from a non-portable device to which such qualifying streams or downloads are originally transmitted, the minimum for use in step 1 of § 385.12(b)(3) is the lesser of the subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 30 cents per subscriber per month.

(3) *Standalone portable subscription service.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can

listen to sound recordings in the form of qualifying interactive streams or limited downloads from a portable device, the minimum for use in step 1 of § 385.12(b)(1) is the lesser of subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 80 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 50 cents per subscriber per month.

(4) *Bundled subscription services.* In the case of a subscription service made available to end users with one or more other products or services as part of a single transaction without pricing for the subscription service separate from the product(s) or service(s) with which it is made available (e.g., a case in which a user can buy a portable device and one-year access to a subscription service for a single price), the minimum for use in step 1 of § 385.12(b)(1) is subminimum I as described in paragraph (b) of this section for the accounting period. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 25 cents per month for each end user who has made at least one play of a licensed work during such month (each such end user to be considered an “active subscriber”).

(5) *Free nonsubscription/ad-supported services.* In the case of a service offering licensed activity free of any charge to the end user, the minimum for use in step 1 of § 385.12(b)(1) is subminimum II described in paragraph (c) of this section for the accounting period. There is no subscriber-based royalty floor for use in step 2 of § 385.12(b)(3).

(b) *Computation of subminimum I.* For purposes of paragraphs (a)(2), (3) and (4) of this section, and with reference to paragraph (5) of the definition of “service

revenue” in § 385.11 if applicable, subminimum I for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service during the accounting period –

(1) In cases in which a record company is the licensee under 17 U.S.C. 115 and a third-party service has obtained from the record company the rights to make qualifying interactive streams or limited downloads of a sound recording together with the right to reproduce and distribute the musical work embodied therein, 17.36% of the total amount expended by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum I for an accounting period shall be 14.53% of the amount expended by the service for such rights for the accounting period.

(2) In cases in which the relevant service is the licensee under 17 U.S.C. 115 and the relevant service has obtained from a third-party record company the rights to make qualifying interactive streams or limited downloads of a sound recording without the right to reproduce and distribute the musical work embodied therein, 21% of the total amount expended by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such sound recording rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum I for an accounting period shall be 17% of the amount expended by the service for such sound recording rights for the accounting period.

(c) *Computation of subminimum II.* For purposes of paragraphs (a)(1) and (5) of this section, subminimum II for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used by the relevant service during the accounting period –

(1) In cases in which a record company is the licensee under 17 U.S.C. 115 and a third-party service has obtained from the record company the rights to make qualifying interactive streams and limited downloads of a sound recording together with the right to reproduce and distribute the musical work embodied therein, 18% of the total amount expended by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum II for an accounting period shall be 14.53% of the amount expended by the service for such rights for the accounting period.

(2) In cases in which the relevant service is the licensee under 17 U.S.C. 115 and the relevant service has obtained from a third-party record company the rights to make qualifying interactive streams or limited downloads of a sound recording without the right to reproduce and distribute the musical work embodied therein, 22% of the total amount expended by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such sound recording rights for the accounting period, except that for licensed activity occurring on or before December 31,

2007, subminimum II for an accounting period shall be 17% of the amount expensed by the service for such sound recording rights for the accounting period.

(d) *Computation of subscriber-based royalty rates.* For purposes of paragraph (a) of this section, to determine the minimum or subscriber-based royalty floor, as applicable to any particular offering, the service shall for the relevant offering calculate its total number of subscriber-months for the accounting period, taking into account all end users who were subscribers for complete calendar months, prorating in the case of end users who were subscribers for only part of a calendar month, and deducting on a prorated basis for end users covered by a free trial period subject to the promotional royalty rate as described in § 385.14(b)(2), except that in the case of a bundled subscription service, subscriber-months shall instead be determined with respect to active subscribers as defined in paragraph (a)(4) of this section. The product of the total number of subscriber-months for the accounting period and the specified number of cents per subscriber (or active subscriber, as the case may be) shall be used as the subscriber-based component of the minimum or subscriber-based royalty floor, as applicable, for the accounting period.

§ 385.14 Promotional royalty rate.

(a) *General provisions.* (1) This section establishes a royalty rate of zero in the case of certain promotional qualifying interactive streaming activities, and of certain promotional limited downloads offered in the context of a free trial period for a digital music subscription service under a license pursuant to 17 U.S.C. 115. Subject to the requirements of 17 U.S.C. 115 and the additional provisions of paragraphs (b) through (e) of this section, the promotional royalty rate shall apply to a musical work when a record

company transmits or authorizes the transmission of qualifying interactive streams or limited downloads of a sound recording that embodies such musical work, only if –

(i) The primary purpose of the record company in making or authorizing the qualifying interactive streams or limited downloads is to promote the sale or other paid use of sound recordings by the relevant artists, including such sound recording, through established retail channels or the paid use of one or more established retail music services through which the sound recording is available, and not to promote any other good or service:

(ii) Either –

(A) The sound recording (or a different version of the sound recording embodying the same musical work) is being lawfully distributed and offered to consumers through the established retail channels or services described in paragraph (a)(1)(i) of this section, or

(B) In the case of a sound recording of a musical work being prepared for commercial release but not yet released, the record company has a good faith intention of lawfully distributing and offering to consumers the sound recording (or a different version of the sound recording embodying the same musical work) through the established retail channels or services described in paragraph (a)(1)(i) of this section within 90 days after the commencement of the first promotional use authorized under this section (and in fact does so, unless it can demonstrate that notwithstanding its bona fide intention, it unexpectedly did not meet the scheduled release date);

(iii) In connection with authorizing the promotional qualifying interactive streams or limited downloads, the record company has obtained from the service it authorizes a written representation that –

(A) In the case of a promotional use commencing on or after October 1, 2010, except qualifying interactive streaming subject to paragraph (d) of this section, the service agrees to maintain for a period of no less than five years from the conclusion of the promotional activity complete and accurate records of the relevant authorization and dates on which the promotion was conducted, and identifying each sound recording of a musical work made available through the promotion, the licensed activity involved, and the number of plays of such recording;

(B) The service is in all material respects operating with appropriate license authority with respect to the musical works it is using for promotional and other purposes; and

(C) The representation is signed by a person authorized to make the representation on behalf of the service;

(iv) Upon receipt by the record company of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular service is in a material manner operating without appropriate license authority from such copyright owner, the record company shall within five business days withdraw by written notice its authorization of such uses of such copyright owner's musical works under the promotional royalty rate by that service;

(v) The qualifying interactive streams or limited downloads are offered free of any charge to the end user and, except in the case of qualifying interactive streaming

subject to paragraph (d) of this section or in the case of a free trial period for a digital music subscription service, no more than five sound recordings at a time are streamed in response to any individual request of an end user;

(vi) The qualifying interactive streams and limited downloads are offered in a manner such that the user is at the same time (e.g., on the same web page) presented with a purchase opportunity for the relevant sound recording or an opportunity to subscribe to a paid service offering the sound recording, or a link to such a purchase or subscription opportunity, except –

(A) In the case of qualifying interactive streaming of a sound recording being prepared by commercial release but not yet released, certain mobile applications or other circumstances in which the foregoing is impracticable in view of the current state of the relevant technology; and

(B) In the case of a free trial period for a digital music subscription service, if end users are periodically offered an opportunity to subscribe to the service during such free trial period; and

(vii) The qualifying interactive streams and limited downloads are not provided in a manner that is likely to cause mistake, to confuse or to deceive, reasonable end users as to the endorsement or association of the author of the musical work with any product, service or activity other than the sale or paid use of sound recordings or paid use of a music service through which sound recordings are available. Without limiting the foregoing, upon receipt of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular use of such work under this section violates the limitation set forth in this paragraph (a)(1)(vii), the record

company shall promptly cease such use of that work, and within five business days withdraw by written notice its authorization of such use by all relevant third parties it has authorized under this section.

(2) To rely upon the promotional royalty rate, a record company making or authorizing qualifying interactive streams or limited downloads shall keep complete and accurate contemporaneous written records of such uses, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, where each promotion is authorized (including the internet address if applicable), the beginning and end date of each period of promotional activity authorized, and the representation required by paragraph (a)(1)(iii) of this section; provided that, in the case of trial subscription uses, such records shall instead consist of the contractual terms that bear upon promotional uses by the particular digital music subscription services it authorizes; and further provided that, if the record company itself is conducting the promotion, it shall also maintain any additional records described in paragraph (a)(1)(iii)(A) of this section. The records required by this paragraph(a)(2) shall be maintained for no less time than the record company maintains records of usage of royalty-bearing uses involving the same type of licensed activity in the ordinary course of business, but in no event for less than five years from the conclusion of the promotional activity to which they pertain. If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under this paragraph (a)(2) with respect to a specific promotion or relating to a particular sound recording of a musical work, the record company shall provide complete and accurate documentation within 10 business days, except for any information required under paragraph (a)(1)(iii)(A) of this section,

which shall be provided within 20 business days, and provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the record company shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the record company does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the record company (but not any third-party service it has authorized) shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(3) If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under paragraph (a)(1)(iii)(A) of this section by a service authorized by a record company with respect to a specific promotion, the service shall provide complete and accurate documentation with 20 business days, provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the service shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the service does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the service (but not the record company) will be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(4) The promotional royalty rate is exclusively for audio-only qualifying interactive streaming and limited downloads of musical works subject to licensing under 17 U.S.C. 115. The promotional royalty rate does not apply to any other use under 17 U.S.C. 115; nor does it apply to public performances, audiovisual works, lyrics or other uses outside the scope of 17 U.S.C. 115. Without limitation, uses subject to licensing under 17 U.S.C. 115 that do not qualify for the promotional royalty rate (including without limitation qualifying interactive streaming or limited downloads of a musical work beyond the time limitations applicable to the promotional royalty rate) require payment of applicable royalties. This section is based on an understanding of industry practices and market conditions at the time of its development, among other things. The terms of this section shall be subject to de novo review and consideration (or elimination altogether) in future proceedings before the Copyright Royalty Judges. Nothing in this section shall be interpreted or construed in such a manner as to nullify or diminish any limitation, requirement or obligation of 17 U.S.C. 115 or other protection for musical works afforded by the Copyright Act, 17 U.S.C. 101 *et seq.* For the avoidance of doubt, however, except as provided in paragraph (a) of this section, statements of account under 17 U.S.C. 115 need not reflect qualifying interactive streams or limited downloads subject to the promotional royalty rate.

(b) ~~Interactive~~ Qualifying interactive streaming and limited downloads of full-length musical works through third-party services. In addition to those of paragraph (a) of this section, the provisions of this paragraph (b) apply to qualifying interactive streaming, and limited downloads (in the context of a free trial period for a digital music subscription service), authorized by record companies under the promotional royalty rate

through third-party services (including Web sites) that is not subject to paragraphs (c) or (d) of this section. Such qualifying interactive streams and limited downloads may be made or authorized by a record company under the promotional royalty rate only if –

(1) No cash, other monetary payment, barter or other consideration for making or authorizing the relevant qualifying interactive streams or limited downloads is received by the record company, its parent company, any entity owned in whole or in part by or under common ownership with the record company, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration used to promote the sale or paid use of sound recordings or the paid use of music services through which sound recordings are available;

(2) In the case of qualifying interactive streaming and limited downloads offered in the context of a free trial period for a digital music subscription service, the free trial period does not exceed 30 consecutive days per subscriber per two-year period; and

(3) In contexts other than a free trial period for a digital music subscription service, qualifying interactive streaming subject to paragraph (b) of this section of a particular sound recording is authorized by the record company on no more than 60 days total for all services (i.e., qualifying interactive streaming under paragraph (b) of this section of a particular sound recording may be authorized on no more than a total of 60 days, which need not be consecutive, and on any one such day, qualifying interactive streams may be offered on one or more services); provided, however, that an additional 60 days shall be available each time the sound recording is re-released by the record company in a remastered form or as a part of a compilation with a different set of sound recordings than the original release or any prior compilation including such sound recording.

(4) In the event that a record company authorizes promotional uses in excess of the time limitations of paragraph (b) of this section, the record company, and not the third-party service it has authorized, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved. In the event that a third-party service exceeds the scope of any authorization by a record company, the service, and not the record company, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(c) ~~Interactive~~ Qualifying interactive streaming of full-length musical works through record company and artist services. In addition to those of paragraph (a) of this section, the provisions of this paragraph (c) apply to qualifying interactive streaming conducted or authorized by record companies under the promotional royalty rate through a service (e.g., a Web site) directly owned or operated by the record company, or directly owned or operated by a recording artist under the authorization of the record company, and that is not subject to paragraph (d) of this section. For the avoidance of doubt and without limitation, an artist page or site on a third-party service (e.g., a social networking service) shall not be considered a service operated by the record company or artist. Such qualifying interactive streams may be made or authorized by a record company under the promotional royalty rate only if --

(1) The qualifying interactive streaming subject to this paragraph (c) of a particular sound recording is offered or authorized by the record company on no more than 90 days total for all services (i.e., qualifying interactive streaming under this paragraph (c) of a particular sound recording may be authorized on no more than a total of 90 days, which

need not be consecutive, and on any such day, qualifying interactive streams may be offered on one or more services operated by the record company or artist, subject to the provisions or paragraph (b)(2) of this section); provided, however, that an additional 90 days shall be available each time the sound recording is re-released by the record company in a remastered form or as part of a compilation with a different set of sound recordings than prior compilations that include that sound recording;

(2) In the case of qualifying interactive streaming through a service devoted to one featured artist, the qualifying interactive streams subject to this paragraph (c) of this section of a particular sound recording are made or authorized by the record company on no more than one official artist site per artist and are recordings of that artist; and

(3) In the case of qualifying interactive streaming through a service that is not limited to a single featured artist, all qualifying interactive streaming on such service (whether eligible for the promotional royalty rate or not) is limited to sound recordings of a single record company and its affiliates and the service would not reasonably be considered to be a meaningful substitute for a paid music service.

(d) ~~Interactive~~ Qualifying interactive streaming of clips. In addition to those in paragraph (a) of this section, the provisions of this paragraph (d) apply to qualifying interactive streaming conducted or authorized by record companies under the promotional royalty rate of segments of sound recordings of musical works with a playing time that does not exceed the greater of

(1) 30 seconds, or

(2) 10% of the playing time of the complete sound recording, but in no event in excess of 60 seconds. Such qualifying interactive streams may be made or authorized by a

record company under the promotional royalty rate without any of the temporal limitations set forth in paragraph (b) and (c) of this section (but subject to the other conditions of paragraphs (b) and (c) of this section, as applicable). For clarity, this paragraph (d) is strictly limited to the uses described herein and shall not be construed as permitting the creation or use of an excerpt of a musical work in violation of 17 U.S.C. 106(2) or 115 (a)(2) or any other right of a musical work owner.

(e) *Activities prior to the publication date.* Notwithstanding paragraphs (a) through (d) of this section, in the case of licensed activity prior to the publication date, the promotional royalty rate shall apply to promotional qualifying interactive streams, and to limited downloads offered in the context of a free trial period for a digital music subscription service, that in either case are authorized by the relevant record company, if the condition set forth in paragraph (a)(1)(i) of this section is satisfied, subject only to the additional condition in paragraph (b)(1) of this section, and provided that a free trial period for a digital music subscription service authorized by the relevant record company shall be considered to be of 30 days' duration. In the event of a dispute concerning the eligibility of licensed activity prior to the publication date for the promotional royalty rate, a service asserting that its licensed activity is eligible for the promotional royalty rate shall bear the burden of proving that its licensed activity was authorized by the relevant record company and shall certify that the condition in paragraph (b)(1) of this section was satisfied.

§ 385.15 Timing of payments. [Unchanged]

§ 385.16 Reproduction and distribution rights covered. [Unchanged]

§ 385.17 Effect of rates.

In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo. Nothing in this part shall be construed as a determination that any interactive stream does or does not result in a digital phonorecord delivery or require a license under 17 U.S.C. 115.

crb - Comments of CTIA and NAB on Docket No. 2006-3 NPRM

From: "Astle, Matt" <MAstle@wileyrein.com>
To: <crb@loc.gov>
Date: 10/31/2008 3:38:12 PM
Subject: Comments of CTIA and NAB on Docket No. 2006-3 NPRM

OCT 31 2008

Attached please find the Comments of CTIA--The Wireless Association and The National Association of Broadcasters, submitted in response to the Copyright Royalty Board's Oct. 1, 2008 Notice of Proposed Rulemaking in Docket No. 2006-3 CRB DPRA (73 Fed. Reg. 57,033).

If you have any questions or problems opening or reading the document, please contact me.

Thank you,
Matt Astle



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