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SECTION 115 OF THE COPYRIGHT ACT: IN NEED OF AN UPDATE?

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
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CONTENTS

MARCH 11, 2004

	Page
The Honorable Lamar Smith, a Representative in Congress From the State of Texas, and Chairman, Subcommittee on Courts, the Internet, and Intellectual Property	1
The Honorable Howard L. Berman, a Representative in Congress From the State of California, and Ranking Member, Subcommittee on Courts, the Internet, and Intellectual Property	2

WITNESSES

The Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, The Library of Congress	
Oral Testimony	4
Prepared Statement	5
Biography	18
Mr. Jonathan Potter, Executive Director, Digital Media Association	
Oral Testimony	19
Prepared Statement	20
Biography	30
Mr. Carey R. Ramos, Counsel, Paul, Weiss, Rifkind, Wharton and Garrison, on behalf of the National Music Publishers Association	
Oral Testimony	31
Prepared Statement	32
Biography	36
Mr. Cary Sherman, President and General Counsel, Recording Industry Association of America	
Oral Testimony	37
Prepared Statement	38
Biography	42

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement by the Honorable Lamar Smith	54
Prepared Statement by the Honorable Howard Berman	57
Letter to Chairman F. James Sensenbrenner, Jr. from Eric Polin, Partner, Wixen Music Publishing, Inc. with attached letter to David O. Carson, Esq., General Counsel, United States Copyright Office and letter to the Honorable Marybeth Peters, Register of Copyright, United States Copyright Office from Eric Polin, Partner, Wixen Music Publishing, Inc.	59
Letter to Chairman Lamar Smith and the Honorable Howard Berman from Marilyn Bergman, President and Chairman of the Board, American Society of Composers, Authors and Publishers (ASCAP)	66
Letter to Chairman Lamar Smith from the Honorable Marybeth Peters, Register of Copyrights, United States Copyright Office	69
Letter to the Honorable Lamar Smith and the Honorable Howard Berman from Frances W. Preston, President, Chief Executive Officer, Broadcast Music, Inc. (BMI)	72

SECTION 115 OF THE COPYRIGHT ACT: IN NEED OF AN UPDATE?

THURSDAY, MARCH 11, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 12 p.m., in Room 2141, Rayburn House Office Building, Hon. Lamar S. Smith (Chair of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

Today's oversight hearing is on "Section 115 of the Copyright Act: In Need of an Update." I'll recognize myself for an opening statement, then the Ranking Member, and then we'll proceed to hear the testimony of the witnesses today.

Let me open this hearing by recognizing a simple truth: Most people don't think about music licenses when they listen to music at home, in their car, or on their iPods. Technology continues to change how we hear music. From piano rolls, to vinyl records, to eight-tracks, to CD's, and now MP3's, Americans have many ways to enjoy music. Only within the past decade have Americans been able to regularly access music transmitted in digital form.

Digital formats not only ensure that the listener hears a perfect reproduction, but they also create new business models. Yet the laws that govern music licensing have changed infrequently. Some testifying today feel that more changes to the Copyright Act are required to update it. Others feel that existing laws are adequate.

Online music has quickly become a growth industry generating additional revenues for artists and providing legal alternatives to online pirate, peer-to-peer sites. No longer can a music pirate attempt to rationalize his or her theft by saying that there are no legal online alternatives.

I'm pleased to see that the catalogues of online music services continue to expand. It is true that a few artists have chosen not to make their recordings available online, and that is certainly their right. It is also my right to listen to music on 45's instead of on a CD; not that I would make that choice. So I would urge artists who have not made their music available online to enter the 21st century.

This Subcommittee examined online music issues a few years ago to determine if Congressional intervention was warranted. The Subcommittee decided to wait until the market matured. Although

the focus of the Committee several years ago was on webcasting, the public has expressed a far greater interest in legal downloading. This change is an important reminder to Congress, as we review section 115 of the Copyright Act.

Although some in Washington may believe that we can predict the future, Congress has repeatedly proved it cannot. The role of Congress should be to set general guidelines for the marketplace, without preventing new business models from developing.

I am concerned that laws and procedures first designed in the piano-roll era may not be adequate for the digital era. So I am pleased to see that the Copyright Office already is updating some of the procedural requirements of section 115.

The private sector is often the best place to resolve the disputes that inevitably arise as new business models evolve. I am pleased that the RIAA, the NMPA, the Harry Fox Agency, and the Songwriters Guild agreed in October 2001 on some basic principles concerning online music subscription services. However, it might have been better if online webcasters had been a party to this agreement. Since this was not the case, I look forward to hearing from the witnesses today on webcasting concerns related to section 115. We should clarify the legal issues that remain outstanding, to ensure that this market continues to grow.

This concludes my opening statement, and the gentleman from California, Mr. Berman, is recognized for his opening statement.

[The statement of Mr. Smith follows in the Appendix]

Mr. BERMAN. Thank you, Mr. Chairman. Our private sector witnesses appear to share a strong interest in the success of the legal music marketplace: The business survival of Digital Media Association members depends on the success of the legitimate online music services. The success of new legal music offerings like downloads and DVD audio will provide vital new sources of royalties for members of the National Music Publishers Association. RIAA members will benefit in a number of ways, through the distribution of their works in secure new formats, through their ownership of some online music services, and through the royalties generated by independent services.

Our witnesses are similarly united in the desire to stem music piracy. Though in different ways, piracy, both online and off, bedevils DiMA, NMPA, and RIAA members alike. Since the success of new music formats and online music services is a critical element in stemming the piracy tide, our witnesses have additional reasons to work to achieve the success.

So at least at the macro level, the interests of our private sector witnesses today are strongly aligned. Unfortunately, this alignment of interests doesn't translate into an alignment of strategies for stimulating the legal music marketplace. Our witnesses appear to disagree pretty strongly about the availability, scope, cost, and convenience of both voluntary and statutory licenses for making reproductions of copyrighted musical compositions. NMPA appears to maintain that such licenses are easily obtained, and points to the success of iTunes Music Store as proof. Our other witnesses appear to strongly disagree.

Clearly, the legitimate online music marketplace has made tremendous strides in the past few years, and these strides dem-

onstrate that copyright owners are fully committed to its development. In fact, all our witnesses deserve—including the Copyright Office—deserve some measure of credit for these advances.

In 1999, only the pirate version of Napster provided music consumers an opportunity to download a wide variety of popular music. Today a number of legitimate services, including Napster Version 2, iTunes, Rapsody, PressPlay, MusicNow, and many others, offer consumers cheap, legal mechanisms for downloading hundreds of thousands of songs.

Unfortunately, despite their meteoric growth, legal online music services still represent the equivalent of a fly on the back of the online piracy elephant. The 30 million downloads sold by iTunes in the past year are encouraging, but are nothing compared to the billions of copyrighted songs illegally downloaded through peer-to-peer services every month. The approximately 500,000 songs available through most legal music services represent an exponential increase from a few years ago, but pale in comparison to the millions of different songs available through the illegal services.

While the downloading revolution calls into question the long-term viability of music—physical music formats, they will continue to make up the lion's share of the music market in the near term. Thus, it is clear that music copyright owners must mitigate—migrate to secure physical formats. If they continue to make music available on unprotected CD's, they are driving their own piracy problem.

The rollout of new secure physical formats, unfortunately, has been less than dramatic. Only a handful of albums have been released on copy-protected CD's in the U.S. DVD audio has not penetrated the marketplace. And the pre-loading of music on personal computers or other devices hasn't gotten much traction. Clearly, something must be done to make new legal music offerings, both online and off, more competitive with the abundance of conveniently available, free, illegal music.

As I have noted, success in achieving this challenge will benefit all of our private sector witnesses. And my questioning of the witnesses will be directed through the prism of two interrelated questions. First, does 115 facilitate or hinder the rollout of new legal music offerings? Secondly, depending on the answer to the first question, what, if anything, should Congress do to change Section 115? I'll be interested in hearing our witnesses. Thank you, Mr. Chairman.

[The prepared statement of Mr. Berman follows in the Appendix]

Mr. SMITH. Yes. Thank you, Mr. Berman. And without objection, the opening statements of other Members will be made a part of the record, as will the complete statements of all of our witnesses.

Also, in the interest of time today and because there are time constraints, without objection, I will make a part of the record the complete biographies of all of the witnesses today, too.

Mr. SMITH. Our witnesses today are the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, The Library of Congress; Jonathan Potter, Executive Director, Digital Media Association; Carey R. Ramos, Counsel, Paul, Weiss, Rifkind, Wharton and Garrison, on behalf of the National Music

Publishers Association; and Cary Sherman, President and General Counsel, Recording Industry Association of America.

Ms. Peters, we'll begin with you.

STATEMENT OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE OF THE UNITED STATES, THE LIBRARY OF CONGRESS

Ms. PETERS. Mr. Chairman, Mr. Berman, distinguished Members of the Subcommittee, I appreciate the opportunity to appear before you today to testify regarding possible revisions of the compulsory license for the making and distributing of phonorecords. Technological developments have changed how the music industry makes and markets its products to consumers. Computers and digital technology allow anyone to reproduce a sound recording and the musical work embodied in it, and distribute those works to the world with the stroke of a key.

Because of these changes, Congress adjusted the compulsory license in 1995, to provide for the making and distribution by transmission of digital phonorecords. Record companies and most publishers have favored the continued existence of this license when the issue has come up for review. Yet despite changes to Section 115 in 1995, businesses still find it difficult to use the compulsory license to provide digital downloads and on-demand performances.

Today, NMPA in its testimony states its member companies do not find the license an impediment to launching new services. They take the position that 115 is not broken, and doesn't need to be fixed. I question this position. How does a service like MusicNet or iTunes clear the rights in the music, rights that need to be cleared quickly? It seems extremely difficult.

The compulsory license requires searching Copyright Office records to determine the owner of each work; serving notices of intention to use each and every work on a copyright owner identified in the records of the office. Where the owner of the musical composition is not identified, a notice for that work must be filed with the Copyright Office itself. The Office has not received any notices from music services.

If the compulsory license isn't used, then a voluntary negotiated license is necessary. NMPA says its licensing affiliate, the Harry Fox Agency, can accommodate the licensing of these musical compositions. The recording industry states that 40 percent of the works to be licensed cannot be licensed by Fox. And of course, under the compulsory licenses, record companies could license musical compositions; but to our knowledge, they are not using the compulsory license.

With respect to the administrative provisions, relief is in sight. Today we did propose rules that were published in the Federal Register. And they would, to the extent possible, get rid of many of the obstacles; but not all of the obstacles.

Unfortunately, a service wishing to use compulsory licenses will still need a large amount of time and money to identify the copyright owner of each work, in order to serve the required notice.

More importantly, there are some fundamental problems regarding the scope of the license. Emerging businesses that provide eas-

ily accessible music in multiple digital formats need to make multiple reproductions. The question is: Does 115 cover them?

These questions currently before the office deal with this issue. In the midst of our consideration of these questions, RIAA, NMPA, and Harry Fox concluded an agreement that represented a marketplace solution to the licensing problems associated with these models. This does eliminate legal ambiguities. It does not, however, solve the legal questions for a service that wants to use the Section 115 compulsory license to clear rights.

Moreover, many online music services, such as those represented by DiMA, disagree, and object to the solutions reached. And I am not optimistic that these issues can be resolved by means of a Copyright Office regulation.

So the question for you is, what, if anything, should be done? My first choice would be to eliminate the license and replace it with a collective licensing system—a collective licensing system similar to that used throughout the world and already in place in this country for clearing public performance of music. I'm referring to the ASCAP and BMI models of voluntary blanket collective licensing. They seem to be the most cost-effective, time-efficient method to ensure that there are no infringed rights or economic harm to the copyright owner resulting from unauthorized online uses.

Voluntary blanket license would seem particularly useful when there are hundreds of thousands of songs to be transmitted. And they can adapt to new technology, and they work well internationally; unlike compulsory licenses, which are limited to a particular country.

In conclusion, I do think change is necessary. The compulsory license either needs to be eliminated, or it needs to be made workable. I look forward to working with you on this.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Mr. Chairman, Mr. Berman, and distinguished members of the Subcommittee, I appreciate the opportunity to appear before you to testify on the Section 115 compulsory license, which allows for the making and distribution of physical phonorecords and digital phonorecord deliveries. The compulsory license to allow for the use of nondramatic musical works has been with us for 95 years and has resulted in the creation of a multitude of new works for the pleasure and consumption of the public, and in the creation of a strong and vibrant music industry which continues to flourish to this day. Nevertheless, the means to create and provide music to the public has changed radically in the last decade, necessitating changes in the law to protect the rights of copyright owners while at the same time balancing the needs of the users in a digital world.

BACKGROUND

1. Mechanical Licensing under the 1909 Copyright Act

In 1909, Congress created the first compulsory license to allow anyone to make a mechanical reproduction (known today as a phonorecord) of a musical composition[1] without the consent of the copyright owner provided that the person adhered to the provisions of the license. The impetus for this decision was the emergence of the player piano and the ambiguity surrounding the extent of the copyright owner's right to control the making of a copy of its work on a piano roll. The latter ques-

[1] The music industry construed the reference in Section 1(e) of the 1909 Act as referring only to a nondramatic musical composition as opposed to music contained in dramatico-musical compositions. *See* MELVILLE B. NIMMER, NIMMER ON COPYRIGHT, § 16.4 (1976). This interpretation was expressly incorporated into the law by Congress with the adoption of the 1976 Act. 17 U.S.C. § 115(a)(1).

tion was settled in part in 1908 when the Supreme Court held in *White-Smith Publishing Co.* v. *Apollo Co.*[2] that perforated piano rolls were not "copies" under the copyright statute in force at that time, but rather parts of devices which performed the work. During this period (1905–1909), copyright owners were seeking legislative changes which would grant them the exclusive right to authorize the mechanical reproduction of their works—a wish which Congress granted shortly thereafter. Although the focus at the time was on piano rolls, the mechanical reproduction right also applied to the nascent medium of phonograph records as well.

Congress, however, was concerned that the right to make mechanical reproductions of musical works might become a monopoly controlled by a single company. Therefore, it decided that rather than provide for an exclusive right to make mechanical reproductions, it would create a compulsory license in Section 1(e) of the 1909 Act which would allow any person to make "similar use" of the musical work upon payment of a royalty of two cents for "each such part manufactured." However, no one could take advantage of the license until the copyright owner had authorized the first mechanical reproduction of the work. Moreover, the initial license placed notice requirements on both the copyright owners and the licensees. Section 101(e). The copyright owner had to file a notice of use with the Copyright Office—indicating that the musical work had been mechanically reproduced—in order to preserve his rights under the law, whereas the person who wished to use the license had to serve the copyright owner with a notice of intention to use the license and file a copy of that notice with the Copyright Office. The license had the effect of capping the amount of money a composer could receive for the mechanical reproduction of this work. The two cent rate set in 1909 remained in effect until January 1, 1978, and acted as a ceiling for the rate in privately negotiated licenses.

Such stringent requirements for use of the compulsory license did not foster wide use of the license. It is my understanding that the "mechanical" license as structured under the 1909 Copyright Act was infrequently used until the era of tape piracy in the late 1960s. When tape piracy was flourishing, the "pirates" inundated the Copyright Office with notices of intention, many of which contained hundreds of song titles. The music publishers refused to accept such notices and any proffered royalty payments since they did not believe that reproduction and duplication of an existing sound recording fell within the scope of the compulsory license. After this flood of filings passed, the use of the license appears to have again became almost non-existent; up to this day, very few notices of intention are filed with the Copyright Office.

2. The Mechanical License under the 1976 Copyright Act

The music industry adapted to the new license and, by and large, sought its retention, opposing the position of the Register of Copyrights in 1961 to sunset the license one year after enactment of the omnibus revision of the copyright law. Music publishers and composers had grown accustomed to the license and were concerned that the elimination of the license would cause unnecessary disruptions in the music industry. Consequently, the argument shifted over time away from the question of whether to retain the license and, instead, the debate focused on reducing the burdens on copyright owners, clarifying ambiguous provisions, and setting an appropriate rate. The House Judiciary Committee's approach reflected this trend and in its 1976 report on the bill revising the Copyright Act, it reiterated its earlier position "that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music," but "that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low." H. Rep. No. 94–1476, at 107 (1976), citing H. Rep. No. 83, at 66–67 (1967).

To that end, Congress adopted a number of new conditions and clarifications in Section 115 of the Copyright Act of 1976, including:

- The license becomes available only after a phonorecord has been distributed to the public in the United States with the authority of the copyright owner (§ 115(a)(1));
- The license is only available to someone whose primary intent is to distribute phonorecords to the public for private use (§ 115(a)(1));
- licensee cannot duplicate a sound recording embodying the musical work without the authorization of the copyright owner of the sound recording (§ 115(a)(1));

[2] 209 U.S. 1 (1908).

- A musical work may be rearranged only "to the extent necessary to conform it to the style or manner of the interpretation of the performance involved," without "chang[ing] the basic melody or fundamental character of the work," (§ 115(a)(2));
- A licensee must still serve a Notice of Intention to obtain a compulsory license on the copyright owner or, in the case where the public records of the Copyright Office do not identify the copyright owner and include an address, the licensee must file the Notice of Intention with the Copyright Office (§ 115(b)(1));
- A licensee must serve the notice on the copyright owner "before or within thirty days after making, and before distributing any phonorecords of the work." Otherwise, the licensee loses the opportunity to make and distribute phonorecords pursuant to the compulsory license (§ 115(b)(1));
- A copyright owner is entitled to receive copyright royalty fees only on those phonorecords made[3] and distributed[4] after the copyright owner is identified in the registration or other public records of the Copyright Office (§ 115(c)(1));[5]
- The rate payable for each phonorecord made and distributed is adjusted by an independent body which, prior to 1993, was the Copyright Royalty Tribunal.[6]
- A compulsory license may be terminated for failure to pay monthly royalties if a user fails to make payment within 30 days of the receipt of a written notice from the copyright owner advising the user of the default (§ 115(c)(6)).

The Section 115 compulsory license worked well for the next two decades, but the use of new digital technology to deliver music to the public required a second look at the license to determine whether it continued to meet the needs of the music industry. During the 1990s, it became apparent that music services could offer options for the enjoyment of music in digital formats either by providing the public an opportunity to hear any sound recording it wanted on-demand or by delivering a digital version of the work directly to a consumer's computer. In either case, there was the possibility that the new offerings would obviate the need for mechanical reproductions in the forms heretofore used to distribute musical works and sound recordings in a physical format, *e.g.*, vinyl records, cassette tapes and most recently audio compact discs. Moreover, it was clear that digital transmissions were substantially superior to analog transmissions. In an early study conducted by the Copyright Office, the Office noted two significant improvements associated with digital transmissions: a superior sound quality and a decreased susceptibility to interference from physical structures like tall buildings or tunnels. *See* Register of Copyrights, U.S. Copyright Office, Copyright Implications of Digital Audio Transmission Services (1991).

3. The Digital Performance Right in Sound Recordings Act of 1995

By 1995, Congress recognized that "digital transmission of sound recordings [was] likely to become a very important outlet for the performance of recorded music." S. Rep. No. 104–128, at 14 (1995). Moreover, it realized that "[t]hese new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners." *Id.* For these reasons, Congress made changes to Section 115 to meet the challenges of providing music in a digital format when it enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Pub. L. 104–39, 109 Stat. 336, which also granted copyright owners of sound recordings an exclusive right to perform their works publicly by means of a digital audio transmission, 17 U.S.C. § 106(6), subject to certain limitations. *See*

[3] Congress intended the term "made" "to be broader than 'manufactured' and to include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords." H. Rep. No. 1476, at 110 (1976).

[4] For purposes of Section 115, "the concept of 'distribution' comprises any act by which the person exercising the compulsory license voluntarily relinquishes possession of a phonorecord (considered as a fungible unit), regardless of whether the distribution is to the public, passes title, constitutes a gift, or is sold, rented, leased, or loaned, unless it is actually returned and the transaction cancelled." *Id.*

[5] This provision replaced the earlier requirement in the 1909 law that a copyright owner must file a notice of use with the Copyright Office in order to be eligible to receive royalties generated under the compulsory license.

[6] In 1993, Congress passed the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103–198, 107 Stat. 2304, which eliminated the Copyright Royalty Tribunal and replaced it with a system of *ad hoc* Copyright Arbitration Royalty Panels (CARPs) administered by the Librarian of Congress.

17 U.S.C. § 114. The amendments to Section 115 clarified the reproduction and distribution rights of music copyright owners and producers and distributors of sound recordings, especially with respect to what the amended Section 115 termed "digital phonorecord deliveries." Specifically, Congress wanted to reaffirm the mechanical rights of songwriters and music publishers in the new world of digital technology. It is these latter amendments to Section 115 that are of particular interest today.

First, Congress expanded the scope of the compulsory license to include the making and distribution of a digital phonorecord and, in doing so, adopted a new term of art, the "digital phonorecord delivery" ("DPD"), to describe the process whereby a consumer receives a phonorecord by means of a digital transmission, the delivery of which requires the payment of a statutory royalty under Section 115. The precise definition of this new term reads as follows:

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

17 U.S.C. § 115(d). What is noteworthy about the definition is that it includes elements related to the right of public performance and the rights of reproduction and distribution with respect to both the musical work and the sound recording. The statutory license, however, covers only the making of the phonorecord, and only with respect to the musical work. The definition merely acknowledges that the public performance right and the reproduction and distribution rights may be implicated in the same act of transmission and that the public performance does not in and of itself implicate the reproduction and distribution rights associated with either the musical composition or the sound recording. In fact, Congress included a provision to clarify that "nothing in this Section annuls or limits the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission." 17 U.S.C. § 115(c)(3)(K).

Another important distinction between traditional mechanical phonorecords and DPDs brought about by the DPRA is the expansion of the statutory license to include reproduction and transmission by means of a digital phonorecord delivery of a musical composition embodied in a sound recording owned by a third party, provided that the licensee obtains authorization from the copyright owner of the sound recording to deliver the DPD.[7] Thus, the license provides for more than the reproduction and distribution of one's own version of a performance of a musical composition by means of a DPD. Under the expanded license, a service providing DPDs can in effect become a virtual record store if it is able to clear the rights to the sound recordings. More importantly, the DPRA allows a copyright owner of a sound recording to license the right to make DPDs of both the sound recording and the underlying musical work to third parties if it has obtained the right to make DPDs from the copyright owner of the musical work. *See* 17 U.S.C. § 115(c)(3)(I), S. Rep. No. 104–128, at 43 (1995).

Apart from the extension of the compulsory license to cover the making of DPDs, Congress also addressed the common industry practice of incorporating controlled composition clauses into a songwriter/performer's recording contract, whereby a recording artist agrees to reduce the mechanical royalty rate payable when the record company makes and distributes phonorecords including songs written by the performer. In general, the DPRA provides that privately negotiated contracts entered

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[7] "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 sections 502 through 506 and section 509, unless—

> (I) the digital phonorecord delivery has been authorized by the copyright owner of the sound recording; and
>
> (II) the owner of the copyright in the sound recording or the entity making the digital phonorecord delivery 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)(H)(i).

into after June 22, 1995, between a recording company and a recording artist who is the author of the musical work cannot include a rate for the making and distribution of the musical work below that established for the compulsory license. There is one notable exception to this general rule. A recording artist-author who effectively is acting as her own music publisher may accept a royalty rate below the statutory rate if the contract is entered into after the sound recording has been fixed in a tangible medium of expression in a form intended for commercial release. 17 U.S.C. § 115(c)(3)(E).

The amended license also extended the current process for establishing rates for the mechanical license to DPDs. Under the statutory structure, rates for the making and reproduction of the DPDs can be decided either through voluntary negotiations among the affected parties or, in the case where these parties are unable to agree upon a statutory rate, by a Copyright Arbitration Royalty Panel ("CARP"). Pursuant to Section 115(c)(3)(D), the CARP must establish rates and terms that "distinguish between digital phonorecord deliveries where the reproduction or distribution of the phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and digital phonorecord deliveries in general."

The difficult issue, however, is identifying those reproductions that are subject to compensation under the statutory license, a subject I will discuss in greater detail.

REGULATORY RESPONSES

1. Notices of Intention to Use and Statements of Account

Section 115(b) requires that a person who wishes to use the compulsory license serve a notice of his or her intention to use a musical composition with the copyright owner before or within thirty days after making, and before distributing any phonorecords. Regulations in place since the enactment of the 1976 Copyright Act followed the statutory scheme and required that a separate Notice of Intention be served for each nondramatic musical work embodied or intended to be embodied in phonorecords to be made under the compulsory license. Following the statutory scheme, the regulations provided that if the registration or other public records of the Copyright Office do not identify the copyright owner of a particular work and include that owner's address, the person wishing to use the compulsory license could file the Notice of Intention with the Copyright Office. 37 C.F.R. § 201.18. The regulations also implemented the statutory requirement that each licensee pay royalties, on a monthly basis, to each copyright owner whose musical works the licensee is using, and that each licensee serve monthly statements of account and an annual statement of account on each copyright owner. 37 C.F.R. § 201.19.

The regulations governing this requirement were amended after the passage of the DPRA in order to accommodate the making of DPDs. Initial amendments to the rules were promulgated on July 30, 1999, and addressed when a DPD is made, manufactured, or distributed for purposes of the Section 115 license such that the obligation to pay the royalty fee attaches. The amended regulation provided that a DPD be treated as a phonorecord made and distributed on the date the phonorecord is digitally transmitted. The amended regulation also provided a mechanism for the delivery of a usable DPD where, in the first instance, the initial transmission failed or did not result in a complete and functional DPD. 64 FR 41286. (July 30, 1999). Because these rules were dealing with new concepts applicable to developing services in a nascent industry, the Office adopted the rules on an interim basis and left the door open to revisit the notice and recordkeeping requirements.

Two years later, the Office initiated a second rulemaking proceeding to address concerns of musical work copyright owners and users of the compulsory license, especially those developing new digital music services with the intention of developing extensive music libraries with hundreds of thousands of titles in order to offer these recordings to their subscribers for a fee. *See* 66 FR 45241 (August 28, 2001). Both sides wanted easier ways to meet the requirements for obtaining the license, including more convenient methods to effect service of the Notice of Intention to use the license on the copyright owners, a provision to allow use of a single notice to identify use of multiple works, a simplification of the elements of the notice, and a provision to make clear that a notice may be legally sufficient even if the notice contains minor errors.

We thought many of these suggestions were appropriate and perhaps long overdue. Thus, we are pleased to announce that the Office is publishing today in the Federal Register proposed amendments to the regulations governing the notice and recordkeeping requirements that are designed to increase the ease with which a person who intends to utilize the license may effect service on the copyright owner and provide the information required to identify the musical work. We are aware that many interested parties will not find the proposed changes sufficient to create a

seamless licensing regime. However, the extent of any change we can make in the regulations is limited by the scope of the law and, as we explain in the current notice, a number of the changes proposed by the interested parties would require a change in the law. Nevertheless, we believe the proposed amendments represent progress in meeting the needs of digital services seeking use of the license as a means to clear the rights to make and distribute a vast array of musical works in a DPD format, and they also offer improvements to the copyright owners who receive compensation under the Section 115 license. Specifically, the new rules propose the following notable changes:

- A copyright owner may designate an authorized agent to accept the Notices of Intention and/or the royalty payments, although the rules do not require that a single agent perform both functions;
- In the case where the copyright owner uses an authorized agent to accept the notices, the rules would require the copyright owner to identify to whom statements of account and royalty payments shall be made;
- A person intending to use the compulsory licence may serve a Notice of Intention on the copyright owner or its agent at an address other than the last address listed in the public records of the Copyright Office if that person has more recent or accurate information than is contained in the Copyright Office records;
- A Notice of Intention may be submitted electronically to a copyright owner or its authorized agent in cases where the copyright owner or authorized agent has announced it will accept electronic submissions.
- Multiple works may be listed on a single Notice of Intention when the works are owned by the same copyright owner or, in the case where the notice will be served upon an authorized agent, the agent represents at least one of the copyright owners of each of the listed works;
- If a Notice of Intention includes more than 50 song titles, the proposed rules give the copyright owner or its agent a right to request and receive a digital file of the names of the copyrighted works in addition to the original paper copy of the Notice.
- A Notice of Intention may be submitted by an authorized agent of the person who seeks to obtain the license;
- Harmless errors that do not materially affect the adequacy of the information required to serve the purposes of the notice requirement shall not render a Notice of Intention invalid.
- In order to recover the Copyright Office's costs in processing Notices of Intention that are filed with the Office, the filing fee that has been required for the filing of a Notice of Intention with the Copyright Office when the identity and address of the copyright owner cannot be found in the registration or other public records of the Copyright Office will also be required when a Notice of Intention is filed with the Office after the Notice has been returned to the sender because the copyright owner is no longer located at the address identified in the Copyright Office records or has refused to accept delivery; and
- The fee charged for the filing of a Notice of Intention with the Copyright Office will be based upon the number of musical works identified in the Notice of Intention. We are studying the costs incurred by the Office in connection with such filings and I will submit to Congress new proposed fees that cover such costs. The resulting fee should be considerably lower per work than the current fee.[8]

I am hopeful that these proposed changes will facilitate the use of the license for both copyright owners and licensees, and I expect to adopt the proposed rules in final form after considering comments on the proposed rules and making any necessary modifications. I believe that these changes represent the best that the Office can do under the current statute, but I recognize that it may be advisable to amend Section 115 to permit further changes in the procedure by which persons intending to use the compulsory license may provide notice of their intention. I will discuss some possible amendments later in my testimony.

[8] The fee for the filing of Notices of Intention may be changed only after a study has been made of the costs connected with the filing and indexing of the Notices. The fee adjustment must be submitted to Congress and may be instituted only if Congress has not enacted a law disapproving the fee within 120 days of its submission to Congress. 17 U.S.C. § 708(a)(5), (b).

Moreover, these regulations only address the technical requirements for securing the compulsory license. During the last rate adjustment proceeding, questions of a more substantive nature arose with respect to DPDs, requiring the Office to publish a Notice of Inquiry to consider the very scope of the Section 115 license. I will now turn to a discussion of those issues.

2. Consideration of what constitutes an "incidental digital phonorecord delivery"

In 1995 when Congress passed the DPRA, its intent was to extend the scope of the compulsory license to cover the making and distribution of a phonorecord in a digital format—what Congress referred to as the making of a digital phonorecord delivery. Since that time, what constitutes a "digital phonorecord delivery" has been a hotly debated topic. Currently, the Copyright Office is in the midst of a rulemaking proceeding to examine this question, especially in light of the new types of services being offered in the marketplace, *e.g.* "on-demand streams" and "limited downloads." *See* 66 FR 14099 (March 9, 2001).

The Office initiated this rulemaking proceeding in response to a petition from the Recording Industry Association of America ("RIAA"), asking that we conduct such a proceeding to resolve the question of which types of digital transmissions of recorded music constitute a general DPD and which types should be considered an incidental DPD. RIAA made the request after it became apparent that industry representatives found it difficult, if not impossible, to negotiate a rate for the incidental DPD category, as required by law, when no one knew which types of prerecorded music were to be included in this category.

Central to this inquiry are questions about two types of digital music services: "on-demand streams" and "limited downloads." For purposes of the inquiry, the music industry has defined an "on-demand stream" as an "on-demand, real-time transmission using streaming technology such as Real Audio, which permits users to listen to the music they want when they want and as it is transmitted to them," and a "limited download" as an "on-demand transmission of a time-limited or other use-limited (i.e., non-permanent) download to a local storage device (*e.g.*, the hard drive of the user's computer), using technology that causes the downloaded file to be available for listening only either during a limited time (*e.g.*, a time certain or a time tied to ongoing subscription payments) or for a limited number of times." The Office has received comments and replies to its initial notice of inquiry. I anticipate that we will conclude the proceeding this year after either holding a hearing or soliciting another round of comments from interested parties in order to get a fresh perspective on these complex and difficult questions in light of the current technology and business practices.

The perspective of music publishers appears to be clear. They have taken the position that both on-demand streams and limited downloads implicate their mechanical rights. Moreover, they maintain that copies made during the course of a digital stream or in the transmission of a DPD are for all practical purposes reproductions of phonorecords that are covered by the compulsory license. The recording industry supports this view, recognizing that while certain reproductions of a musical work are exempt under Section 112(a), other reproductions do not come within the scope of the exemption. For that reason, the recording industry has urged the Office to interpret the Section 115 license in such a way as to cover all reproductions of a musical work necessary to operate such services; and, we are considering their arguments. In the meantime, certain record companies and music publishers have worked out a marketplace solution.

a. Marketplace solution

In 2001, the RIAA, the National Music Publishers' Association, Inc. ("NMPA"), and the Harry Fox Agency, Inc. ("HFA") entered into an agreement concerning the mechanical licensing of musical works for new subscription services on the Internet. Licenses issued under the RIAA/NMPA/HFA agreement are nonexclusive and cover all reproduction and distribution rights for delivery of on-demand streams and limited downloads and include the right to make server copies, buffer copies and other related copies used in the operation of a covered service. The license also provides at no additional cost for "On-Demand Streams of Promotional Excerpts," which are defined as a stream consisting of no more that thirty (30) seconds of playing time of the sound recording of a musical work or no more than the lesser of ten percent (10%) or sixty (60) seconds of playing time of a sound recording of a musical work longer than five minutes.

The industry approach to resolving the problems associated with mechanical licensing for digital music services is both innovative and comprehensive, resolving certain legal questions associated with temporary, buffer, cache and server copies of a musical work associated with digital phonorecord deliveries purportedly made

under the Section 115 license, as well as the use of promotional clips. The Office welcomes the industry's initiative and creativity, and fully supports marketplace solutions to what really are commercial transactions between owners and users.

However, parties should not need to rely upon privately negotiated contracts exclusively to clear the rights needed to make full use of a statutory license, or need to craft an understanding of the legal limits of the compulsory license within the provisions of the private contract. The scope of the license and any limitations on its use should be clearly expressed in the law.

The 1995 amendments to Section 115, however, do not provide clear guidelines for use of the Section 115 license for the making of certain reproductions of a musical work needed to effectuate a digital transmission other than to acknowledge that a reproduction may be made during the course of a digital performance, and that such reproduction may be considered to be an incidental DPD.

But are they? Section 115 does not provide a definition for incidental DPDs, so what constitutes an "incidental DPD" is not always clear. While some temporary copies made in the course of a digital transmission, such as buffer copies made in the course of a download, may qualify, others—such as buffer copies made in the course of a transmission of a performance (*e.g.*, streaming)—are more difficult to fit within the statutory definition. In either case, it is clear that such copies need to comply with the statutory definition in order to be covered by the compulsory license. In other words, the copies must result in an "individual delivery of a phonorecord 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), Similar questions can be raised with respect to cache copies and intermediate server copies made in the course of (1) downloads and (2) streaming of performances.

Apparently because of such uncertainties, the RIAA/NMPA/HFA agreement includes a section entitled "Legal Framework for Agreement." It contains two provisions that delineate how temporary copies made in order to provide either a limited download or an on-demand stream fit within the statutory framework of the Section 115 license. Specifically, it provides that

> under current law the process of making On-Demand Streams through Covered Services (from the making of server reproductions to the transmission and local storage of the stream), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproduction and any temporary or cached reproductions through to the transmission recipient of the On-Demand Stream) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act;[and]
>
> that under current law the process of making Limited Downloads through Covered Services (from the making of server reproductions to the transmission and local storage of the Limited Download), viewed in its entirety, involves the making and distribution of a DPD, and further agree that such process in its entirety (i.e., inclusive of any server reproductions and any temporary or cached reproductions through to the transmission recipient of the Limited Download) is subject to the compulsory licensing provisions of Section 115 of the Copyright Act.

Paragraph 8.1(a) and (b), respectively, of the RIAA/NMPA/HFA Licensing Agreement (as submitted to the Copyright Office on December 6, 2001).

Of course, the parties' interpretation with respect to the scope of the Section 115 license is not binding on the Copyright Office or the courts. It merely represents their mutual understanding of the scope of the Section 115 license as a term of their privately negotiated license, an understanding that I believe is not shared by everyone in the world of online music services. This is an issue that I will address in the rulemaking proceeding concerning digital phonorecord deliveries, and it is quite possible that I will reach a different interpretation as to what falls within the scope of the license, especially with respect to on-demand streams.

The critical question to be decided is whether an on-demand stream results in reproductions that reasonably fit the statutory definition of a DPD, and creates a "phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient," as required by law. Unless it does so, such reproductions cannot be reasonably considered as DPDs for purposes of Section 115, no matter what position private parties take within the four corners of their own agreement. What is more clear is that the delivery of a digital download, whether limited or otherwise, for use by the recipient appears to fit the statutory definition, since it must result in an identifiable reproduction in

order for the recipient to listen to the work embodied in the phonorecord at his leisure.

b. Possible legislative solutions

The Section 115 compulsory license was created to serve the needs of the phonograph record industry and has operated reasonably well in governing relationships between record companies and music publishers involving the making and distribution of traditional phonorecords. However, the attempt to adapt the mechanical license to enable online music services to clear the rights to make digital phonorecord deliveries of musical works has been less successful. With respect to problems involving the requirement that licensees give notice to copyright owners of their intention to use the compulsory license, I believe that I have exhausted the limits of my regulatory authority with the notice of proposed rulemaking published today. With respect to problems involving the scope and treatment of activities covered by the Section 115 compulsory license, I may soon be able to resolve some of the issues in the pending rulemaking on incidental digital phonorecord deliveries, but it seems clear that legislation will be necessary in order to create a truly workable solution to all of the problems that have been identified.

At this point in time, I do not have any specific legislative recommendations, but I would like to outline a number of possible options for legislative action. I must emphasize that these are not recommendations, but rather they constitute a list of options that should be explored in the search for a comprehensive resolution of issues involving digital transmission of musical works. I certainly have some views as to which of these options are preferable, and in many cases those views will be apparent as I describe the options. I would be pleased to work with the Subcommittee and with composers, music publishers, record companies, digital music services and all interested parties in evaluating these and any other reasonable proposals.

The options that should be considered fall into two distinct categories: (1) legal questions concerning the scope of the Section 115 license, and (2) technical problems associated with service of notice and payment of royalty fees under the Section 115 license.

Among the options that should be considered relating to the scope of the license are:

- **Elimination of the Section 115 statutory license.** Although the predecessor to Section 115 served as a model for similar provisions in other countries, today all of those countries, except for the United States and Australia, have eliminated such compulsory licenses from their copyright laws. A fundamental principle of copyright is that the author should have the exclusive right to exploit the market for his work, except where this would conflict with the public interest. A compulsory license limits an author's bargaining power. It deprives the author of determining with whom and on what terms he wishes to do business. In fact, the Register of Copyrights' 1961 Report on the General Revision of the U.S. Copyright Law favored elimination of this compulsory license.

  I believe that the time has come to again consider whether there is really a need for such a compulsory license. Since most of the world functions without such a license, why should one be needed in the United States? Is a compulsory license the only or the most viable solution? Should the United States follow the lead of many other countries and move to a system of collective administration in which a voluntary organization could be created (perhaps by a merger of the existing performing rights organizations and the Harry Fox Agency) to license all rights related to making musical works available to the public? Should we follow the model of collective licenses in which, subject to certain conditions, an agreement made by a collective organization would also apply to the works of authors or publishers who are not members of the organization? Will the creation of new digital rights management systems make such collective administration more feasible?

  In fact, we already have a very successful model for collective administration of similar rights in the United States: performing rights organizations (ASCAP, BMI and SESAC) license the public performance of musical works—for which there is no statutory license—providing users with a means to obtain and pay for the necessary rights without difficulty. A similar model ought to work for licensing of the rights of reproduction and distribution.

  As a matter of principle, I believe that the Section 115 license should be repealed and that licensing of rights should be left to the marketplace, most likely by means of collective administration. But I recognize that many parties with stakes in the current system will resist this proposal and that there

would be many practical difficulties in implementing it. The Copyright Office would be pleased to study the issue and prepare a report for you with recommendations, if appropriate. Meanwhile, there are a number of other options for legislative action that merit consideration.

- **Clarification that all reproductions of a musical work made in the course of a digital phonorecord delivery are within the scope of the Section 115 compulsory license.** This may well be something that I will be able to do in regulations issued in the pending rulemaking on incidental phonorecord deliveries, but if I conclude that it is beyond my power to reach that conclusion under current law, consideration should be given to amending Section 115 to provide expressly that all reproductions that are incidental to the making of a digital phonorecord delivery, including buffer and cache copies and server copies,[9] are included within the scope of the Section 115 compulsory license. Consideration should also be given to clarifying that no compensation is due to the copyright owner for the making of such copies beyond the compensation due for the ultimate DPD.
- **Amendment of the law to provide that reproductions of musical works made in the course of a licensed public performance are either exempt from liability or subject to a statutory license.** When a webcaster transmits a public performance of a sound recording of a musical composition, the webcaster must obtain a license from the copyright owner for the public performance of the musical work, typically obtained from a performing rights organazation such as ASCAP, BMI or SESAC. At the same time, webcasters find themselves subject to demands from music publishers or their representatives for separate compensation for the reproductions of the musical work that are made in order to enable the transmission of the performance. I have already expressed the view that there should be no liability for the making of buffer copies in the course of streaming a licensed public performance of a musical work. *See* U.S. Copyright Office, DMCA Section 104 Report 142–146 (2001); Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, Oversight Hearing on the Digital Millennium Copyright Act Section 104 Report, December 12–13, 2001. I have also pointed out that it is inconsistent to provide broadcasters with an exemption in Section 112(a) for ephemeral recordings of their transmission programs but to subject webcasters to a statutory license for the functionally similar server copies that they must make in order to make licensed transmissions of performances. DMCA Section 104 Report, U.S. Copyright Office 144 n. 434 (2001). In this respect, the playing field between broadcasters and webcasters should be leveled, either by converting the Section 112(a) exemption into a statutory license or converting the Section 112(e) statutory license into an exemption.

  I can also see no justification for providing a compulsory license which covers ephemeral reproductions of sound recordings needed to effectuate a digital transmission and not providing a similar license to cover intermediate copies of the musical works embodied in these same sound recordings, but that is what Section 112 does in its current form. Parallel treatment should be offered for both the sound recordings and the musical works embodied therein which are part of a digital audio transmission.
- **Expansion of the Section 115 DPD license to include both reproductions and performances of musical works in the course of either digital phonorecord deliveries or transmissions of performances,** *e.g.*, in the course of streaming on the Internet. As noted above, many of the problems faced by online music services arise out of the distinction between reproduction rights and performance rights, and the fact that demands are often made upon services to pay separately for the exercise of each of these rights whether the primary conduct is the delivery of a DPD or the transmission of a performance. Placing both uses under a single license requiring a single payment—a form of "one-stop shopping" for rights—might be a more rational and workable solution.

Among the options that have been proposed relating to service of notice and payment of royalty fees under the Section 115 license are suggestions by users who

[9] Technically, these are phonorecords rather than copies. *See* 17 U.S.C. § 101 (definitions of "copies" and "phonorecords"), but terms such as "buffer copy" and "server copy" have entered common parlance.

have expressed their frustration with the cumbersome process involved in securing the Section 115 license, including:

- **Adoption of a model similar to that of the Section 114 webcasting license, requiring services using the license to file only a single notice with the Copyright Office stating their intention to use the statutory license with respect to all musical works.** Section 115 currently requires the licensees to serve notices identifying each musical work for which they intend to make and distribute copies under the compulsory license. This system has worked fairly well and is sensible with respect to the traditional mechanical license, but do such requirements make sense for services offering DPDs of thousands of musical works? The current system does have the virtue of giving a copyright owner notice when one of its works is being used under the compulsory license. Removing that requirement would mean that a copyright owner would find it much more difficult to ascertain whether a particular work owned by that copyright owner is being used by a particular licensee under the compulsory license. However, removing that requirement would avoid—or at least defer—the problems compulsory licensees currently have in identifying and locating copyright owners of particular works. The problems might be only deferred rather than avoided because the licensee would still have to identify and locate the copyright owner in order to pay royalties to the proper person—at least when the copyright owner has registered its claim in the musical work.
- **Establishment of a collective to receive and disburse royalties under the Section 115 license.** Again, Section 114 may provide a useful model. Royalties under the Section 114 statutory license, which are owed to copyright owners of sound recordings rather than of musical works, are paid to SoundExchange, an agent appointed through the CARP process to receive the royalties and then to disburse them to the copyright owners. Such a model might be worth emulating under the Section 115 license, especially if the requirement of serving notices of intention to use the compulsory license on copyright owners is abandoned. While such a scheme offers obvious benefits to licensees, copyright owners (and, in particular, those copyright owners who are readily identifiable under the current system) might find themselves receiving less in royalties than they receive under the current system, since administrative costs of the receiving and disbursing entity presumably would be deducted from the royalties and the allocation of royalties might result in some copyright owners receiving less than they would receive under the current system, which requires that each copyright owner be paid precisely (and directly) the amount of royalties derived from the use of that copyright owner's musical works.
- **Designation of a single entity, like the Copyright Office, upon which to serve notices and make royalty payments.** I am skeptical of the benefits of this approach, which would shift to the Copyright Office the burden of locating copyright owners and making payments to them. The administrative expense and burden would likely be considerable, and giving a government agency the responsibility to receive such finds, identify copyright owners and make the appropriate payments to each copyright owner is probably not the most efficient means of getting the royalties to the persons entitled to them.
- **Creation of a complete and up-to-date electronic database of all musical works registered with the Copyright Office.** I suspect that proponents of this solution have very little knowledge of the difficulty and expense that would be involved in creating an accurate and comprehensive list of owners of copyrights in all musical works. Determining who owns the copyright in a particular work is not always a simple matter. Someone reviewing the current Copyright Office records to determine ownership of a particular work would have to search both the registration records and the records of documents of transfer that are recorded with the Office. While basic information about post-1977 registrations and documents of transfer is available through the Office's online indexing system, in any case where ownership of all or some of the exclusive rights in a work have been transferred it would be necessary to review the copy of the actual document of transfer maintained at the Copyright Office (and not available online) to ascertain exactly what rights have been transferred to whom. Chain of title can often be complicated. Addresses of copyright owners are not available in the Office's online indexes. And the information in the Office's current registration and recordation systems could not easily be transformed into a database containing current copy-

right ownership information. Moreover, neither registration nor recordation of documents of transfer is required by law; therefore, there are many gaps in the Office's records. Where there is a record, it is not necessarily up to date. It is difficult to fathom how the Office could create an accurate, reliable and comprehensive database of current ownership of musical works. While the registration and recordation system works reasonably well when a person is seeking information on ownership of a particular work, such information must usually be interpreted by a lawyer (especially if there have been transfers of ownership). The system is not well-suited for the type of large-scale licensing of thousands of works in a single transaction that is desired by online music services.

- **Shifting the burden of obtaining the rights to the sound recording copyright owner.** Online music services generally transmit performances or DPDs of sound recordings that have already been released by record companies. The record company already will have obtained a license—either directly from the copyright owner of the musical work that has been recorded or by means of the section 115 statutory license—for use of the musical work. The record company may well have already obtained a section 115 license to make DPDs of the musical work as well, and one would expect that this will increasingly be the case. Because record companies already have substantial incentives and presumably have greater ability to clear the rights to the musical works that they record, consideration should be given to permitting online music services—who must obtain the right to transmit phonorecords of the sound recording from the record company in any event—*see* 17 U.S.C. § 115(c)(3)(H)(i) (quoted above in footnote 7)—to stand in the shoes of the record company as beneficiaries of the compulsory license for DPDs. The online music company could make royalty payments to the record company for the DPDs of the musical works, and the record company (which might charge the online music company an administrative fee for the service) could pass the royalty on to the copyright owner of the musical work. As noted above, Section 115(c)(3)(I) already appears to permit the record company to license the right to make DPDs of the musical compositions to other online music services. Clarification of this provision and expansion to provide for funneling royalty payments through the record companies might lead to more workable arrangements.
- **Creation of a safe harbor for those who fail to exercise properly the license during a period of uncertainty arising from the administration of the license for the making of DPDs.** Under current law, a person who wishes to use the Section 115 compulsory license must either serve the copyright owner with a Notice of Intention if he can identify and locate the copyright owner based on a search of Copyright Office records or file a Notice of Intention with the Copyright Office if he cannot so identify or locate the copyright owner. While the expenses involved in this process may be considerable, it is hard for me to agree that there is uncertainty about how to comply with the license. On the other hand, currently Section 115 exacts a harsh penalty for those who fail to serve the Notice of Intention or make royalty payments in a timely fashion: they are forever barred from taking advantage of the compulsory license with respect to the particular musical work in question. I have reservations about creating a "safe harbor" for the making of unauthorized DPDs during a time when a service has failed to comply with the requirements of the license, but I believe consideration should be given to affording a service the opportunity to cure its default and use the compulsory license prospectively, even if the service is liable for copyright infringement for the unauthorized transmissions made prior to the service's compliance.
- **Extension of the period for effectuating service on the copyright owner or its agent beyond the 30 day window specified in the law.** There is merit in this proposal, especially in light of the current provision that absolves a licensee from making payments under the statutory license until after the copyright owner can be identified in the registration or other public records of the Copyright Office. Difficulties in ascertaining the identities and addresses of the copyright owners may also justify a more liberal approach. I could imagine a system that, for example, required a service to serve the copyright owner with a Notice of Intention within 30 days of the service's first use of the musical work or within one year of the time when the copyright owner is first identified in the records of the Copyright Office—whichever date is later—but with an obligation to make payments retroactive to the date on which the copyright owner was first identified in the Copyright Office

records. Under such a system, services would only have to search the Office's records once a year in order to avoid liability for failing to have ascertained that a copyright owner's identity has become available in the Office's records.

- **Provision for payment of royalties on a quarterly basis rather than a monthly basis.** It is my understanding that most licenses *negotiated* with copyright owners under Section 115 (*e.g.*, the licenses given by the Harry Fox Agency in lieu of actual statutory licenses) provide for quarterly payments rather than the monthly payments required under the compulsory license. It is also my understanding that one of the reasons for the statutory requirement of monthly payments, as well as some of the other statutory requirements, was a determination that use of the compulsory license should only be made as a last resort, and that licensees should be encouraged to obtain voluntary licenses directly from the copyright owners or their agents, who would offer more congenial terms. Users might find a requirement of quarterly payments rather than monthly payments to be beneficial, but copyright owners presumably would prefer to receive their payments more promptly; moreover, if a licensee defaults on payment, a quarterly payment cycle would be more disadvantageous to the copyright owner than a monthly cycle. Amending Section 115 to require quarterly payments might lead many more licensees to elect to obtain statutory licenses rather than deal directly with publishers or their agents. Consideration should be given to whether that would be desirable.
- **Provision for an offset of the costs associated with filing Notices with the Office in those cases where the copyright owner wrongfully refuses service.** In general, I believe that persons using a statutory license should bear the cost associated with obtaining the license. However, if the copyright owner has wrongfully refused to accept service of a Notice of Intention, there is something to be said for the notion of shifting those additional costs incurred by the licensee as a result of the wrongful refusal.

In general, I do support the music industry's attempt to simplify the requirements for obtaining the compulsory license and its desire to create a seamless licensing regime under the law to allow for the making and distribution of phonorecords of sound recordings containing musical works.

However, the need for extensive revisions is difficult to assess. Prior to the passage of the DPRA, each year the Copyright Office received fewer than twenty notices of intention from those seeking to obtain the Section 115 license. Last year, two hundred and fourteen (214) notices were filed with the Office, representing a significant jump in the number of notices filed with the Office over the pre-1995 era. Yet, the noted increase represents only 214 song titles, a mere drop in the bucket when considered against the thousands, if not hundreds of thousands, of song titles that are being offered today by subscription music services. While we acknowledge that this observation may merely reflect the reluctance of users to use the license in its current form to clear large numbers of works, as well as the fact that users may file with the Office only when our records do not provide the identity and current address of the copyright owner, it may also represent the success of viable marketplace solutions.

Certainly we have heard few complaints about the operation of Section 115 in the context of the traditional mechanical license. To the extent that reform of the license is needed, it may be that the traditional mechanical license should be separated from the license for DPDs, and that two different regimes be created, each designed to meet the needs of both copyright owners and the persons using the two licenses.

In any event, the critical issue centers on clarifying the scope of the compulsory license in the digital era. I have outlined only a few possible approaches to reform of the Section 115 compulsory license. While there is a clear need to correct some of the deficiencies in Section 115, I believe that it is important for all the interested parties—copyright owners, record companies, online music services and others—to work together to evaluate various alternative solutions in the coming months. I commend you, Mr. Chairman, for convening this hearing to discuss the problems associated with the use of the Section 115 license in a digital environment, and I look forward to working with you, members of the Subcommittee, and the industries represented at this table to find effective and efficient solutions to make the Section 115 compulsory license available and workable to all potential users and strike the proper balance between their needs and the rights of the copyright owners.

MARYBETH PETERS, REGISTER OF COPYRIGHTS
BIOGRAPHICAL INFORMATION

Marybeth Peters became the United States Register of Copyrights on August 7, 1994. From 1983-1994 she held the position of Policy Planning Adviser to the Register. She has also served as Acting General Counsel of the Copyright Office and as chief of both the Examining and Information and Reference divisions. Ms. Peters is a frequent speaker on copyright issues; she is the author of The General Guide to the Copyright Act of 1976.

Ms. Peters received her undergraduate degree from Rhode Island College and her law degree, with honors, from The George Washington University Law School. She is a member of the bar of the District of Columbia.

Ms. Peters, is a member of The Copyright Society of the U.S.A., where she serves as a member of the Board of Trustees, the Intellectual Property Section of the American Bar Association, the U.S. Chapter of the Association litteraire et artistique internationale (ALAI), the American Intellectual Property Law Association (AIPLA) and the Computer Law Association.

Ms. Peters, from 1986 to 1995 was a lecturer in the Communications Law Institute of The Catholic University of America's law school and previously served as adjunct professor of copyright law at The University of Miami School of Law and at The Georgetown University Law Center.

During 1989-1990 Ms. Peters served as a consultant on copyright law to the World Intellectual Property Organization in Geneva, Switzerland.

Mr. SMITH. Thank you, Ms. Peters.
Mr. Potter.

STATEMENT OF JONATHAN POTTER, EXECUTIVE DIRECTOR, DIGITAL MEDIA ASSOCIATION

Mr. POTTER. Thank you, Mr. Chairman, Mr. Berman, and Members of the Subcommittee, for the opportunity to speak this morning about the importance of reforming Section 115.

This Subcommittee leads the battle against piracy, and we applaud your promotion of enforcement and education. Today's hearing focuses on the third, most powerful weapon against piracy: the marketplace, where royalty-paying DiMA companies like AOL, Apple, Microsoft, Yahoo, and RealNetworks compete every day against online black markets.

Millions of people who lawfully enjoy and purchase music online illustrate the power of consumer choice and of offering great music with flexible usage rules and fair prices. But we need to do even better. And we need your help to modernize Section 115, to ensure that our services and the creators to whom we pay royalties prevail against scofflaw alternatives.

115 reform can be summarized in three points: First, why the Section 115 mechanical compulsory license, which should promote the growth of music markets and royalties payments, instead is inhibiting legal royalty-paying online media services. Second, why the private market for music publishing rights does not effectively substitute for the 115 license. And third, how Congress can streamline and clarify the law to benefit songwriters, music publishers, record companies, online services, and consumers, all while helping to curb piracy.

First, license and payment administration reform. Online services must clear licenses for hundreds of thousands of songs owned by more than 40,000 publishers. In an age of digital databases and online banking, it seems silly to require card file searches to identify copyright owners or to send notices and royalties by certified mail. We thank Register Peters for announcing today that some administrative processes will be streamlined. And we urge you to provide the Register authority to fully improve these licensing rules.

The scope of the 115 license also needs clarification. It is uncertain whether 115 authorizes only the copies of songs that are delivered to consumers, or also the copies that are a necessary part of the distribution process, such as server copies. And it is also uncertain whether 115 can authorize subscription services.

Most difficult is the risk associated with streaming services that perform songs on demand to subscribers who pay a monthly fee. Online music services pay performance royalties to ASCAP, BMI, and SESAC for this activity; but music publishers assert that these performances also implicate mechanical reproduction rights.

Since August 2001, Register Peters has publicly agreed with DiMA that only one right and royalty are implicated. However, because the Copyright Act has strict liability standards and very expensive statutory damages, some companies, including our members, have agreed to pay double royalties as litigation insurance. This is wrong. And we ask you to clarify in legislation that a second royalty is not due.

My second point is that, contrary to others' suggestion, the private market cannot solve the 115 administration or statutory license scope issues. The Harry Fox Agency licenses only about 65 percent of available music. So even if Harry Fox, RIAA, and DiMA resolved all issues privately, 35 percent will remain stuck in the dysfunctional 115 licensing regime.

Also, though HFA functions for many publishers as an issuer of variations of the compulsory license, it has stood as a gatekeeper, without guidance from courts or the Congress, deciding on a voluntary basis whom to license, on what terms, and whether to offer less rights than are available under Section 115, or to insist on more rights than the law requires. Moreover, HFA refuses to disclose in advance what works and what rights it can license. And then it denies about 50 percent of all license requests that are submitted by online services.

Conversely, ASCAP and BMI license all comers for all musical works in a user-friendly manner. You sign a form; you get licensed. You play by the rules, and you will not be sued for infringement.

Third, since private markets cannot provide effective solutions, DiMA suggests legislation as follows: Authorize full modernization of the 115 process, including electronic searches, notice, and payments. Additionally, good-faith licensees who try to pay royalties deserve safe-harbor protections against infringement liability.

Second, modernize 115 so it licenses all reproduction associated with online distribution, including server and network copies.

Third, confirm that online performance services do not implicate a second right or royalty, and that limited download subscription services are covered by Section 115.

Fourth, provide a percentage-of-revenue royalty option which will promote product and service innovation, including more anti-piracy options.

And finally, the Subcommittee should consider a statutory blanket license for the entire music repertory. An agent like ASCAP, or the Harry Fox Agency, if it chooses, could efficiently license all compositions and accept industry royalties to all copyright owners. A blanket license would enable services to launch without litigation risk, and ensure prompt royalty payments and distributions, which benefits music publishers, composers, and songwriters.

Mr. Chairman, DiMA looks forward to working with you, with Mr. Berman, with Register Peters, and my colleagues at the witness table and others, toward a more workable, efficient, and modern mechanical compulsory license. Thank you.

[The prepared statement of Mr. Potter follows:]

PREPARED STATEMENT OF JONATHAN POTTER

Mr. Chairman, Representative Berman, and Members of the Subcommittee:

Thank you for inviting me to testify today on behalf of the innovative, royalty-paying online music services offered by DiMA member companies, including by AOL, Apple, Microsoft, MusicMatch, Napster, RealNetworks, and Yahoo!. DiMA companies' success is critical to America's music industry, so I appreciate the opportunity to share the great strides that our companies have made toward building attractive royalty-paying online music services. More importantly, however, I will highlight how Section 115 of the Copyright Act—which should be a building block of online music services' growth—instead remains the most significant roadblock impeding our industry's progress, and how this Subcommittee might consider updating

the law to benefit all the relevant constituencies—artists, publishers, recording companies, online services, and consumers.

DiMA members express their appreciation to Chairman Smith and Representative Berman for focusing the Subcommittee on curbing copyright piracy through a balanced approach that combines enforcement of the laws and public education. DiMA agrees with the Subcommittee that enforcement and education are critical foundations of any effort to deter piracy of copyrighted works. But, we believe firmly that piracy cannot be combated successfully unless consumers are offered a better choice—legal, royalty-paying services that include quality music, flexible usage rules, great personalization and first-class customer service, all for a fair price. By modernizing Section 115 of the Copyright Act and by clarifying how it applies to different types of digital music services, Congress can assist DiMA companies and the music industry compete against and curb piracy by ensuring the availability of the most comprehensive, most attractive royalty-paying offerings.

In recent years this Subcommittee has responded several times to promote the business and legal environment of legitimate online services. A statutory license was provided for webcasters in 1998, and the Small Webcasters Settlement Act was enacted in 2002. Both of these measures established a relatively stable legal environment for webcasting, and stimulated the creation of thousands of Internet radio stations. Most recently this Subcommittee moved CARP reform legislation through the House and DiMA hopes this legislation will soon become law.

In May 2001, three company CEOs, representing the online media and recording industries, testified before this Subcommittee that music publishing licenses were the single greatest impediment to launching great online music services. In December 2001 Register of Copyrights Marybeth Peters testified that music publisher representatives were taking advantage of legal uncertainties with respect to the application of § 115 to new digital services and were aggressively demanding licenses for services already licensed by other collecting societies. Register Peters urged Congress to fix the problem by amending the law

In the same December 2001 hearing, Messrs. Ramos and Sherman also testified, but from a different songbook. They promoted a so-called "landmark" agreement between the recording and music publishing industries and The Harry Fox Agency, that they claimed would solve the problems identified in the May 2001 hearing and permit new subscription services to launch, gain publishing licenses easily and on a nondiscriminatory basis, and curb piracy.

As the Subcommittee is aware, there has been recent good news in the online music industry. Every month tens of millions of Americans visit AOL Music, the iTunes Music Store, Rhapsody and the RealNetworks Music Store, Napster, MusicMatch, Yahoo Music and MSN Music. These services stream more than 500 million songs and videos every month, sell more than two million downloads each week.

But again we are before this Subcommittee discussing how the outdated Section 115 of the Copyright Act continues to retard the success of online services. Although the online music situation has improved, it is not good enough—for songwriters, music services, record companies or, we hope, for Congress. What is holding back online music services today is the same impediment of three years ago: the inability of legal music services to easily obtain and pay for clear, certain, risk-free music publishing licenses, notwithstanding nearly 100 years of federal policy which favors clarity, simplicity, and straightforward licensing.

Congress established the Section 115 compulsory "mechanical" reproduction license in 1909 to facilitate the licensing of musical works for piano rolls. Congress's goal at that time, and during the 100 years since, has been to promote the development of new music markets by making copyrighted compositions widely available, while also ensuring that copyright owners are aware of uses of their work and that royalties are paid.

Fast-forward almost 100 years and the underlying goals and principles remain the same. Royalty-paying online services are precisely the type of new music market that Congress intends to promote; and the Section 115 compulsory mechanical license could and should be playing an important role in building online music services with broad catalogs and the ability to compete with online black markets. Unfortunately, Section 115 is not very useful to online services, because (i) the licensing process is unworkable for digital music services; and (ii) its ambiguous scope causes uncertainty, risk, and excessive double-dip royalty payments.

The § 115 licensing process is dysfunctional because:

(a) it imposes outdated paper-based and traditional mailing requirements that hinder prospective licensees' ability to efficiently identify copyright owners, license their works and pay them royalties. While these systems may have

been acceptable for licensing a few works at a time for compact discs, they cannot support the launch of a new online music service with a catalog of hundreds of thousands of songs;

(b) its licensing and pricing standards were designed for simple physical, manufactured products, and simply are not feasible in the world of digital distribution;

(c) its requirements are scrupulously precise and its penalties for noncompliance are harsh. Failure to comply strictly with these cumbersome requirements not only subjects a service to infringement liability, it also disqualifies a service form obtaining a compulsory license to that work forever. And do not underestimate the chill in the online music industry created by the Copyright Act's combination of a strict liability standard with extraordinarily high statutory penalties. Though intended to protect copyright owners and to be used against pirates, this combination of strict liability, high monetary penalties and a detailed, outdated statute is promoting fear and paralysis rather than innovation and new markets.

There are several disagreements about the scope of § 115's application to legal, royalty-paying digital music services:

(a) there is disagreement about whether on-demand Internet radio services which merely perform music require mechanical reproduction licenses, though they do not permit users to make or possess any reproduction; DiMA and the Register of Copyrights believe that on-demand performances may justify a higher performance royalty than pre-programmed radio services (and ASCAP and BMI charge almost a 50 percent surcharge for on-demand performances), but that the server-based and incidental reproductions associated with performance services are either royalty-free fair use or should be exempted from royalties under the ephemeral recording exemption that is provided to terrestrial broadcasters in § 112 of the Copyright Act;

(b) there is disagreement about whether the § 115 license extends to subscription services, which charge consumers monthly in contrast to download services that charge per song purchased;

(c) there is disagreement about whether the § 115 license extends to all reproductions that are necessarily made to support distribution of a song, e.g., by a download store, or whether incidental network and transient reproductions or server copies require an additional license and payment.

Though the law and its impacts are complex, the overall result of the shortcomings of § 115 are quite simple. This compulsory, guaranteed-to-be-available publishing license that Congress intended to be a meaningful alternative to direct licenses with 10,000 publishers and thereby promote new music markets and generate royalties to songwriters, is instead so administratively burdensome and of such uncertain scope that it is no alternative at all, and is undermining rather than promoting innovation and new royalty-paying markets.

To compete most effectively against online black markets DiMA companies' music selection must be comprehensive—we need all the music that a compulsory licenses promises. To achieve stability and promote innovation, we need clarity with respect to whether and how § 115 applies to online music business models of today and in the future.

Several times the compulsory mechanical license has been updated to account for changing technologies and business models, but the evidence that it needs additional revision is overwhelming and conclusive. DiMA urges the Subcommittee to update this law for the next generation new market—innovative online services that with your support can be commercially successful and the best weapon against piracy.

I. WHAT ARE THE PROBLEMS WITH THE SECTION 115 COMPULSORY MECHANICAL LICENSE?

A. The license clearance process is so cumbersome as to be dysfunctional

The most apparent deficiencies of the mechanical compulsory license are its administrative requirements, which are obligated by the statute and Copyright Office regulations.

§ 115(b)(1) requires users of compulsory mechanical licenses to "serve notice of intention [to use the compulsory license] on the copyright owner" prior to a musical work's use (emphasis added). Regulations require copyright owners to receive actual

advance notice of the intended use of a work by certified or registered mail. However,

- Finding copyright owners can be almost impossible. Only about 20 percent of musical works are registered in the Copyright Office; many are not registered until several months after publication; and registrations are rarely updated when ownership rights are transferred.
- For 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.
- If 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.
- If the copyright owner cannot be located users must file a similar 2-page form in the Copyright Office, and pay a $12 administrative fee per composition. This fee is prohibitively expensive considering that typically 25% of copyright owners cannot be located, meaning a comprehensive online service might have to pay the fee (and fill out the form) hundreds of thousands of times.

The 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. This is not helpful when a service is competing against online black markets that have no licensing costs, no marketing costs, no content acquisition costs, and have made the song available while the royalty-paying service is still filling out forms and sending registered mail.

At minimum, even merely as a matter of government oversight, modernization and customer service, there is no escaping that this licensing process does not work. And if the compulsory mechanical license is to continue to exist, we urge the Subcommittee to at least ensure that it is administrable, efficient, and employs modern technology.

E. The scope of 115 does not comport with the necessary manufacturing practices of the digital download business or the physical recording business.

The antiquated Section 115 undermines online services because it requires that royalties be paid for every reproduction that is "made and distributed." This was reasonable for 90+ years when most observers believed that each reproduction or phonorecord—a piano role or a vinyl record or compact disc—was intended for distribution and, thus, deserved a royalty. For online services, however, not every fixation or reproduction is intended for distribution, because many reproductions necessarily occur in the electronic process of delivering a download.

Read literally, § 115 might mean that reproductions that are not distributed, but which are necessary to the manufacturing or distribution process (e.g., server copies, archive copies and network and cache copies and buffer copies), are not eligible to be licensed pursuant to § 115. And if that is the case then digital download stores and subscription services may be risking crushing infringement lawsuits, because these technologically necessary copies are not currently being licensed separately with each of more than 10,000 music publishers.

This is also an issue for the traditional recording industry, whose compact disc manufacturing process requires production of a so-called "glass master" that the factory uses to stamp each blank CD into a phonorecord. Does the § 115 license, by implication and based on historical practice, cover this reproduction though it clearly is not intended for distribution?

The risk is even greater for online services than it is for physical CD manufacturers. Product manufacturers might have a waiver and estoppel defense based on decades of not being sued with respect to the glass master, but online services, whether independent or owned by traditional record companies, have no such defense available. The infamous MP3.com and Farmclub lawsuits brought by music publishers against online music services that had not secured reproduction rights licenses for their server copies, are evidence of the enormous swords that the current Copyright Act has handed to publishers to shut down new services that have not complied with the publishers' views about what licenses are required for server copies.

Congress could not possibly have intended that a compulsory license must be accompanied by a direct license for the very same work with respect to the very same activity; otherwise the compulsory license would have no value at all. This, however, is the absurd result if the § 115 license does not cover all necessary reproductions made in the process of manufacturing the reproductions that are intended for distribution.

F. It is Unclear Whether or How § 115 Applies to Subscription Services and their Specific Offerings.

Today—more than two years after they were the subject of the "landmark" HFA-RIAA agreement that was to have solved associated publishing disputes—the activities at the heart of today's online music subscription services remain burdened by controversy and disagreement about what rights they implicate and what licenses are necessary.

Generally these services (which may be of particular interest to the Subcommittee because they are at the heart of the new legal university-based services) incorporate two separate products—limited downloads and on-demand streams (or on-demand radio).

With respect to on-demand streaming services, music publishers claim a mechanical right is implicated by the server copies and other reproductions of the composition which are merely intended to facilitate the licensed performance (which generates performance royalties, e.g., to ASCAP, BMI or SESAC). In this instance the publishers' mechanical right claims are not associated with distribution of a song, but rather because they claim that on-demand streams substitute for distributions that would have generated mechanical royalties. This analysis absurdly would obligate on-demand streaming services to pay two royalties to the same publishers for a single activity, although the performance rights organizations are already receiving a 50% surcharge for on-demand performance royalties as compared to pre-programmed Internet radio. Nevertheless, the double-dip royalty has been agreed to by the recording industry in the RIAA-HFA agreement. Fortunately the Copyright Office has maintained a principled position in this dispute, and in 2001 recommended that Congress clarify that performance royalties pay completely for on-demand performances, and that mechanical royalties should not be obligated by Internet radio performances, including by on-demand performances.

Another issue concerns whether limited downloads (which are generally locked on a consumer's PC hard drive and are usable only for a period covered by a subscription fee) are licenseable under § 115(g)(4), which applies to phonorecords made for the purpose of distribution by "rental, lease or lending." The Harry Fox-RIAA agreement explicitly covers subscription services under § 115, but DiMA companies report to me that some publishers have disagreed with that view. If Congress wishes for innovative distribution services to flourish, including those that are explicitly and effectively substituting for online black markets, then clarification would be helpful.

Questions have been raised as the applicability of § 115(g)(4) to subscription services generally, perhaps because the subscription payment is not tied to a specific work that is being licensed. Here again we urge the Subcommittee to clarify the law based on simple goals that have withstood the test of time—promoting new markets and assuring payment of royalties. By focusing on these goals DiMA believes these scope issues will be resolved favorably, both for innovative royalty-paying services and the creators whose works are winning consumer loyalty.

G. Requiring royalties to be calculated on a penny-rate and per-work basis is overly restrictive in a dynamic market when consumer offerings and prices are changing dramatically to meet demand

In the 1976 Act § 115(c)(2) required licensees to pay royalties of 2¾ cents for each work embodied in a phonorecord, and authorized future rate adjustments to be negotiated or determined by arbitration. In the almost 30 years since the rate has always been set at a fixed penny-rate for each work embodied in a phonorecord. Today's rate is 8.5 cents per work; in 2006 the rate will increase to 9.1 cents per work. This fixed-rate per-work royalty rate calculation creates several problems in today's music dynamic music industry.

The most significant problem is that the rate structure cannot adapt to products and services that are changing in response to consumer demand and in an effort to inhibit piracy. Calculating royalties on a per-work or per-reproduction basis was reasonable during the several decades when albums and CDs included a fixed number of reproductions of songs. Today, however, copy-protected and copy-limited CDs and downloads are being offered, but they often include or permit several reproductions of the work. For example:

- A dual-session CD includes two versions of every song, each version in a different format. This ensures consumer flexibility, e.g., the ability to play the CD in a traditional CD player and a computer, but it also limits consumers' ability to use the PC to copy the songs or to convert them into unprotected formats.

  Consumers perceive a copy-protected dual-session CD as a single product that plays in the same devices as a traditional CD, or perhaps as a product

with less value than the traditional unprotected CD that also played in multiple devices but permitted unlimited copying. Publishers, however, opportunistically view the dual-session CD as being two reproductions and, thus, obligating two royalties. Should, however, this CD generate double- or triple-royalties to publishers because in an effort to stem piracy the CD has two or three copy-protected reproductions of works rather than a single unprotected reproduction? Recently the Harry Fox Agency issued its formal opinion that multiple-session CDs require multiple royalties.

- Similarly, an online service could test-market downloads that limit consumers to making three copies on CD or portable devices, but publishers have suggested that this would require four royalties—one for the original download and three more for the authorized consumer reproductions. One major recording company has actually prohibited online services from limiting how many copies of downloaded songs can be made, or sought an indemnification from the online service, for fear that this anti-piracy limitation would trigger double, triple, and quadruple mechanical royalties, or more.

In addition to the royalty issues associated with innovative products and services, today's sound recording prices are also innovative—they have dropped dramatically in response to consumer demand, and in an effort to retain market share in the competition against piracy. Three years ago CDs with about twelve songs were priced at $11 wholesale and $16 retail, and mechanical royalties were less than 10% of the wholesale price. Today downloads are priced at about 70 cents wholesale and as low as 79 cents retail, and publishers are receiving 12 percent of the wholesale price and often 10 percent or more of the retail price. In 2006 downloads may be priced at $1.19, but DiMA companies expect they are just as likely to be priced at 69 cents; only time will tell. Whatever happens to prices, the publishers proportional share of revenue should not dramatically increase or decrease, but rather should adjust along with industry economics.

Regardless of whether the publishers' interpretation of current law is correct, the issue for this Subcommittee is whether the law should be amended so as to not even permit the publishers' argument that it (a) requires only fixed-price royalties when all other prices are changing dramatically; and (b) imposes multiple royalties solely because the publishers works are being protected against unauthorized copying; and (c) creates risk rather than certainty whenever a new technology or business model (e.g., limited downloads and on-demand streams) is developed. And more generally, is § 115 designed to promote new legal markets by simplifying the payments of royalties, or to promote piracy by requiring multiple royalties, fixed price royalties and increasing risk?

II. THE HARRY FOX AGENCY DOES NOT OFFER A SERVICE THAT ADEQUATELY SUBSTITUTES FOR A WELL-CRAFTED ADMINISTRABLE § 115 LICENSE.

Some may claim that the § 115 license is outdated and irrelevant, and that the Harry Fox Agency licenses the same mechanical right more efficiently. The facts prove otherwise.

First, Fox licenses only between 60 and 65 percent of available compositions, compared to the § 115 license which covers 100 percent. If royalty-paying online music services are to compete with royalty-free online black markets, we need the ability and right to license 100 percent of the music that is supposed to be available under a § 115 compulsory license.

Second, a compulsory license is available as a matter of right to all prospective licensees. By contrast, the Harry Fox Agency—unlike ASCAP, BMI or SoundExchange—is not required to and does not have the rights to license to all. When a prospective licensee seeks licenses for a new business model or technology, even if seeking only to bulk license the rights otherwise available through the § 115 process and willing to pay full statutory royalties, HFA often refuses to license, or its member publishers do not permit it to license, or licensing is endlessly delayed. I have personally been told by a senior HFA executive that if an innovative business developer wants a license, she must be prepared to demonstrate the strength of the idea, the financial strength of the company, and to negotiate a royalty rate. This does not sound like ASCAP, BMI or SoundExchange, who post their license forms on public websites in an effort to attract licensees with a simple and nondiscriminatory process.

Third, HFA is capable of providing a license that has rights equivalent to § 115 rights, but it also can and does offer more rights or less rights when it suits its own institutional interests or those of its member publishers.

- In a widely-reported litigation between music publishers and the Universal Music Group concerning UMG's Farmclub online music service, billions of dollars in statutory damages were implicated when the court found that UMG's licenses from HFA did not include all rights that were otherwise available under § 115, but rather included fewer rights. If the largest recording company in the world and all of its sophisticated lawyers were confused by HFA and § 115, and as a result inadvertently infringed copyrights in approximately 25,000 songs, the existing § 115 is obviously flawed for the online music industry and HFA is obviously not the solution.
- The reverse occurred several months later, when the recording industry sought to avoid future infringement suits and Farmclub-like litigations by signing an agreement with HFA that would provide the rights that otherwise would be provided under § 115. In this instance HFA refused to provide a license for only the rights available under § 115, and instead required the recording industry to also license and pay for non-existent mechanical rights associated with on-demand streaming—license terms that the recording industry did not want and that the Register of Copyrights has said are not necessary.

Fourth, even when HFA cooperates in licensing online services, and commits to expedite license clearances and provide legal certainty, it fails to provide the quality of service that business requires, and that Congress should expect, from a compulsory licensor. Consider the following:

- HFA refuses to disclose to licensees which publishers it represents except on a song-by-song basis in response to a formal license request. This secretiveness is contrary to common business practice, when a seller or licensor eagerly discloses what is available so as to attract purchasers or licensees.
- Moreover, every publisher retains the right to withdraw works from any HFA license. This creates significant hardship among licensees who rely on HFA, only to later have works withdrawn from their available catalog.
- When a service submits a license request and a list of compositions to HFA the response often takes 1–2 weeks, or longer. The response typically has three categories—songs that are licensed, songs that are not in the HFA catalog, and "we don't know."
- In the two and a half years that record companies and online services have been operating pursuant to the RIAA-HFA agreement, the experience of our members and other licensees has been that 40–60 percent of the millions of licenses requested have been denied, either because the songs are not in HFA's repertoire or, more frequently, because HFA cannot determine whether they are or not in the HFA repertoire. According to HFA's own responses to the prospective licensees, the largest majority of license denials are because the HFA database—even after almost $20 million in recent investment—has not been able to match the composition data submitted with the license request—title, composer, album, UPC code, etc—to a particular song. Some might suggest that online services are submitting faulty data to HFA, but our members report that the data they submit to HFA is precisely the data provided to the online service by the record company.
- Even HFA's confident "yes" responses have included errors, and it is the online services that bear the very high legal risk which results. On hundreds of occasions, HFA responses to license requests have included false positives—approvals for compositions that actually are not in HFA's repertoire. Why is this a problem? Because a service that relies on HFA's approval will immediately make that song available for distribution, and be liable for infringement under the strict liability standards of the Copyright Act. There is no safe harbor for well-intended licensees, and HFA's contract with licensees does not indemnify licensees, even in the limited situation of false positives. Moreover, once a service has made available on its website an HFA "false positive," current section 115 permanently disqualifies that service from ever utilizing the § 115 compulsory license with regard to that composition.

So unless HFA can license with absolute confidence and legal certainty 100% of available compositions, and can approve and process licenses expeditiously, without regard to new technologies or business models and without coercively imposing unwanted license terms or denying license terms that are desired, HFA can never be an adequate substitute for an efficient and comprehensive § 115 compulsory license.

VI. THE UNWORKABLE AND INEFFECTIVE § 115 LICENSING PROCESS LEAVES LICENSEES NO CHOICE EXCEPT TO LICENSE THROUGH HFA, AND TO YIELD TO AGGRESSIVE HFA PRACTICES.

In October 2001, following the stinging infringement verdict against Universal Music Group in the Farmclub lawsuit, the recording industry signed a license with the National Music Publishers Association and HFA to enable the launch of licensed online music services, in a manner that supposedly was free of legal risk. At the December 2001 hearing of this Subcommittee Messrs. Sherman and Ramos, who also join me before you today, congratulated their industries for their so-called "marketplace" agreement that reportedly resolved all the music publishing problems that theretofore had prevented licensed online music services from launching. However, as we have discussed above, the agreement solved very few of the fundamental publishing problems for online services.

This RIAA-HFA agreement is remarkable for several reasons. Most notably, as described by Mr. Ramos in that December 2001 hearing, the recording and publishing industries agreed that the process of producing and delivering "on-demand streams"—which are, of course, performances—"entail[s] the making and distribution of copies of musical works and, accordingly, constitute digital phonorecord deliveries (or 'DPDs') within the meaning of Section 115 of the Copyright Act." In other words, the recording industry agreed that a transitory performance constitutes a "distribution" of a phonorecord, which heretofore had only been associated with physical manifestations such as piano rolls, vinyl records, cassettes and compact discs—and downloads which incorporate a possessory experience.

Hopefully the Subcommittee will agree with the Register of Copyrights, who opined in the August 2001 Section 104 Study and in the December 2001 hearing that reproductions made in the technical process of delivering a performance—even an on-demand performance—are royalty-free fair use (a defense, by the way, that Universal Music Group did not raise in the Farmclub lawsuit); indeed, Register Peters suggested that copyright law should be clarified to ensure that such reproductions are exempted from royalty obligations—just as terrestrial broadcasters' ephemeral recordings are exempted by § 112 of the Copyright Act.

But there is no principled legal basis to conclude—as the publishers and recording industry did in their agreement—that reproductions associated with the delivery of performances are "made and distributed" and therefore covered by § 115 only if the performances are "on-demand" and not if the performances are part of a pre-determined program. However, no record label or online service that licenses music from HFA can complain about this unprincipled position, since the Agreement contains a specific silencer clause that prohibits signatories from disagreeing publicly—including before this Subcommittee—with HFA's imposition of payment obligations for nonexistent rights.

What the recording industry wanted was to license to online services the right to offer consumers two new subscription offerings: on-demand streams and tethered downloads. Tethered downloads are downloads that cannot be removed from the subscriber's hard drive. They cannot be copied to a blank CD or an MP3 player or uploaded to the Internet. The consumer experience is limited compared to a CD, but the entirety of the song is actually distributed to and then located on the consumer's PC. There is no disagreement that tethered downloads are reproductions that are made and distributed, and therefore are covered by the § 115 license. That is the license that the recording industry sought from the Harry Fox Agency. Yet, HFA refused to grant them that license, unless they also licensed on-demand streams.

If there had been in place a workable § 115 compulsory license, the recording industry would have been able to license every composition desired for the tethered download subscription services, and never would have signed a mechanical license for on-demand streams that they did not need or want, never paid the Harry Fox Agency a $2,000,000 advance that was never recouped, and would not still be paying $83,000/month to extend that unwanted and unnecessary license.

But the reality is that § 115 is antiquated, inefficient, and perhaps legally insufficient, which left the recording industry no choice but to accept rights they did not need as the price for the rights they wanted.

As discussed in other parts of this testimony, the results of the HFA license have been disastrous. Licensees get no advance notice as to what publishers or compositions HFA does or does not represent. More than 50% of license requests have not been granted. Licensees have paid millions of dollars in advances to HFA, but still do not know what royalty rate will be charged them. And, there have been no reports that any of the millions of dollars paid by recording companies and online services to HFA have been paid to songwriters or publishers.

Of course Messrs. Sherman and Ramos's rosy predictions of December 2001 have not come to pass, which is why we are here today. But regardless of the administrative hurdles that continue unabated, it is essential that the Committee now implement the Register's recommendation—that transitory performances of sound recordings or compositions should not trigger a mechanical license or a reproduction right or royalty of any kind.

VII. SOLUTIONS ARE AVAILABLE THAT WILL ENSURE FULL COMPENSATION TO RIGHTSHOLDERS, REDUCE SERVICES' LEGAL RISK AND PROMOTE INNOVATIVE COMPREHENSIVE OFFERINGS THAT CAN EFFECTIVELY COMPETE AGAINST PIRACY.

DiMA appreciates that today's oversight hearing does not require endorsement of a single solution, and so I will take this opportunity to suggest several alternatives that we believe merit this Committee's consideration. Given the need for online services to expand to meet consumer demand and to help fight online piracy, we urge the Subcommittee to rapidly consider the available alternatives and to move quickly toward a legislative proposal that will make the Section 115 license effective and efficient. The end result of any of our suggested alternatives would serve to promote Congress's historical goals with respect to the § 115 mechanical compulsory license—simple and straightforward availability of compositions, and assurance of royalties to songwriters and publishers.

1. *Modernize Administration of § 115 License. If the Committee chooses to simply improve the efficiency of the existing § 115 license, several steps are necessary and appropriate:*
   a. Congress should direct the Copyright Office (or a contractor) to create an electronically searchable database of all known registered copyrighted works. DiMA and our companies want to pay creators all the royalties that are due, but copyright owners that cannot be found cannot be paid.
   b. End the requirement of separate notices for each song licensed, of paper-based forms, and of notice and payment by registered or certified mail. Instead Congress should authorize batch electronic filing of reports that compositions will be used or have been used, have notices transmitted electronically to registered copyright owners or maintained in the Copyright Office if works are not registered. Of course, Congress should also authorize timely and transparent electronic payments of royalties.
   c. Today the Copyright Office does not accept payments on behalf of songwriters and publishers, and if a work is not registered or the registration not up-to-date, the licensee can use the work royalty-free. Instead, to ensure that creators are paid by licensees, Congress could direct the Copyright Office (or an agent) to accept royalties on behalf of Copyright owners whose works are licensed, with payment to be made when the copyright owner registers the work or updates registration information.
   d. Perhaps most importantly, licensees that have attempted in good faith to utilize the compulsory mechanical license should not be penalized for the inadequacies of the Copyright Office process or the Harry Fox database. Rather, any legislation should provide good faith licensees with "safe harbor" protection against penalties or infringement liability, so that section 115 becomes a tool for mutual benefit, not a trap for the unwary.
2. *Modernize the Scope of the § 115 License to Cover "All Necessary" Reproductions or Phonorecords.* As discussed earlier, some have argued a literal interpretation of Section § 115 that covers only phonorecords that actually have been "made and distributed," but excludes the physical means used to produce them. This interpretation, if accepted by a court, would expose to infringement liability the glass master and stamper copies that are inherently necessary for the production of record albums and CDs, as well as the many copies of a work that necessarily are made as part of the technological underpinnings of a digital download service. This would undermine 95 years of Congressional intent to promote the production and distribution of sound recordings that generate royalties for songwriters and publishers. Clarifying this ambiguity would not be complicated, and would meaningfully reduce the legal uncertainty associated with digital distribution.
3. *Clarify that § 115 Does Not Apply to Performance Services, and That it Does Apply to Limited Download Subscription Services.* As discussed earlier, the Harry Fox Agency has aggressively exploited the ambiguities of § 115 to demand licenses for on-demand performances, notwithstanding the Register of Copyrights' conclusion that no such license is required, and that royalties asso-

ciated with such performances should be performance royalties rather than mechanical royalties. We urge the Committee to act on this recommendation. Additionally, clarity regarding the application of § 115 to subscription services generally would be helpful, to confirm the general belief that limited download subscription services are covered by the § 115 license.

4. *Clarify Legal Authority to Set Percentage-of-Revenue Royalties.* As discussed earlier, the availability of a percentage-of-revenue alternative for calculating mechanical license royalties would provide helpful rate flexibility at a time of product and service innovation and price fluctuation. Some have expressed concern that publishers' revenue would be disproportionately reduced in comparison to sound recording revenue or consumer electronics revenue. They worry, for example, that companies might give music away for free in order to sell associated goods and services, so the revenue bases for calculating publishing royalties would be substantially reduced. Such a concern is at best hypothetical. This has never been a problem for European publishers, who for several decades have calculated mechanical royalties on a percentage-of-revenue basis. Additionally, for several decades here in the United States—during economic booms and busts when broadcast revenue goes up and goes down—publishers have collected billions of dollars in performance royalties based on percentage of revenue calculations.

5. *Convert the § 115 license into a blanket license, and conform it structurally with all modern compulsory and statutory licenses.* The mechanical compulsory license is provided only on a per work basis because in 1909 when the license was developed, and in 1976 when it was modified, licensees typically licensed only a handful of compositions at one time in order to produce a piano roll or composition book or a record album.

   Today, however, online services require hundreds of thousands or even a million licenses simultaneously, as they compete—against each other and against online black markets—to offer consumers the most comprehensive music selection possible. Only with a blanket license can services be confident of non-infringing access to all available music for purposes of lawful commercial distribution, which is precisely Congress's goal during the past 100 years. Only through a blanket license can services launch free of legal risk, which would free tremendous resources for marketing, customer service, and improving systems to deliver royalties electronically.

   I am not suggesting that the Congress consider granting online music services an all-you-can-eat-for-one-low-price license, nor am I suggesting that services would avoid providing detailed reports of use to ensure that royalties are paid accurately to deserving songwriters. Rather I am suggesting that just like ASCAP, BMI, SoundExchange, and license administration collectives in Europe, the Copyright Office or its designee simply could grant licenses on a non-discriminatory basis for the use of all copyrighted compositions for all necessary associated reproductions, contingent upon the regular filing of detailed reports of how compositions are used and which compositions are used. This would not transfer the burden of royalty accounting to songwriters, and would not eliminate the technological problems facing the Copyright Office and HFA today. But it would enable services to create robust offerings without legal risk, and to pay more money to songwriters and less to lawyers—and that is a win-win for America.

Three years ago Mr. Ramos promised this Subcommittee that the Harry Fox Agency would bulk license, electronically, on a non-discriminatory basis, and enable online music services to launch without legal distress if they work with HFA. Instead HFA licenses only whom they please and when they please, rejects more than 50% of license requests submitted by licensees, hides their database from licensees that pay millions of dollars to use the repertoire and pay the songwriters that HFA represents, and causes more risk than it mitigates by aggressively seeking to license rights that do not exist and by providing false positives when licenses are approved.

It is time for Congress to provide for today's online music environment the same rights it provided in 1909, 1976, and what this industry needs—a compulsory mechanical license that relieves legal risk to well-intended royalty-paying services, that promotes new markets for music, and assures royalty payments to songwriters. A simple, updated, functional risk-free non-discriminatory § 115 license would be a win-win for creators, distributors and consumers.

Thank you.

Jonathan Potter

Executive Director of the Digital Media Association

Named one of Washington's top technology lobbyists by *The Legal Times' Tech Counsel* magazine, and one of the "25 Unsung Heroes of the Internet" by *Interactive Week* magazine, Jonathan Potter has served as Executive Director of the Digital Media Association (DiMA) since its creation in June 1998. Under his tenure, DiMA has become a formidable Congressional and Executive Branch advocate. Today, DiMA represents the leading companies providing online audio and video content

Mr. Potter also serves as DiMA's principle spokesperson. An engaging speaker and effective advocate, he frequently testifies before Congress on behalf of the association, and is actively involved in developing and influencing Internet public policy and legislation. Additionally, Mr. Potter was instrumental in creating EDiMA, the European Digital Media Association.

Prior to DiMA, Mr. Potter was a Washington, D.C.-based consultant and attorney, focused largely on intellectual property and technology-oriented public policy issues. While practicing law and consulting, his clients included computer and consumer electronics companies, investment banks and thrifts, major museums, health insurers, cable and satellite providers, and real estate developers. During the 1990s, Mr. Potter represented and advised clients on the development of several significant legislative accomplishments, including the Digital Millenium Copyright Act, the Digital Performance Right in Sound Recordings Act, the Audio Home Recording Act and the Fairness in Musical Licensing Act.

While in law school, Mr. Potter served as a political consultant to several Members of the U.S. Senate and the U.S. House of Representatives, as well as several tax-exempt organizations.

Mr. Potter is a graduate of New York University School of Law and the University of Rochester.

Mr. SMITH. Thank you, Mr. Potter.
Mr. Ramos.

STATEMENT OF CAREY R. RAMOS, COUNSEL, PAUL, WEISS, RIFKIND, WHARTON AND GARRISON, ON BEHALF OF THE NATIONAL MUSIC PUBLISHERS ASSOCIATION

Mr. RAMOS. Initially, I would like to thank the Chairman, Mr. Berman, and the distinguished Members of the Committee for the opportunity to appear here today on behalf of the National Music Publishers Association.

I thought it might be helpful, for starters, if I explained a little bit about what NMPA is and what a music publisher is. The National Music Publishers Association, which was founded over 80 years ago, is the leading organization representing the interests of music publishers in the United States.

What is a music publisher? A music publisher is a company or, in many instances, an individual, that represents the interests of songwriters by promoting their songs; by publishing their songs in sheet music; and by licensing the use of their songs for reproduction and distribution in CD's, on the Internet, through public performances, and exercising the other rights available under the copyright law.

I want to stress, the role of the music publisher is to represent the interests of the songwriter. The music publishing industry, unlike the record industry, is very unconcentrated. The Harry Fox Agency, alone, represents over 27,000 music publishers. There are many music publishers who, as I said, are individuals. In fact, they are songwriters who have set up their own music publishing companies to represent them in licensing their music. That is a very common practice in the industry.

And the typical arrangement between the songwriter and the music publisher is a split of all the licensing royalties that are received. Today, the average, I would say, is about three-quarters going to the songwriter, and a quarter going to the music publisher. Obviously, in the case of the songwriter who has his own music publishing firm, they would collect 100 percent.

But when we talk about royalties here today, most of these royalties are going to the music publisher—forgive me, are going to the songwriter. And most of the costs associated with running systems to make licenses available are borne by the songwriter. That is important to keep in mind.

In that respect, I'd just like to give a little bit of economic context. There's a lot of discussion here about law, but what's actually going on in the marketplace? To date, the Harry Fox Agency, which licenses over 90 percent of the commercially significant music that is distributed in the United States—and I emphasize commercially significant, because there are lots of obscure songs out there which Harry Fox may not represent. To date, the Harry Fox Agency has collected $2.6 million for digital distribution of music on the Internet, total to date. That is less than 0.2 percent of all the collections by the Harry Fox Agency. Most of the HFA's collections are for physical delivery. So far, this has been a very small part of their business.

iTunes, which reports that it has made 30 million downloads since it was launched last April, has paid Harry Fox $150,000, or Harry Fox has received $150,000. Those licenses are going through the record companies. That's how much that Harry Fox has received so far. Harry Fox expects to receive much more. And this is the main message that the music publishers, the music publishing industry, has today for the Committee. They believe in the Internet. It is in their commercial interest to license their songs, because they don't distribute music. Unless they grant licenses, they won't collect royalties; they won't make any money.

They have been working as hard as they can to make music available on the Internet, to increase that $2.6 million, that 0.2 percent, to a much more significant figure. They are committed to doing that. And the Harry Fox Agency has adopted a number of significant changes, which would not be reflected in the law because they're done in the private marketplace, to achieve that.

They do bulk licensing. They do not license on a song-by-song basis; they do bulk licensing. They do it electronically. They don't require you to mail the application; they do it electronically. They have a quick turnaround, which they have shortened in recent months to 4 hours on a license request. They have agreed in the case of co-owned works to license the entire work, even if they do not represent all of the co-owners; a major concession that is an expensive and potentially risky issue for them to undertake, but they have stepped up to the plate and done that.

The Harry Fox Agency, as I have said, is committed to making a wide array of music available on the Internet and to work on a private marketplace basis to achieve those results. It's doing that now and, as I said, it has every reason to continue doing so. Thank you.

[The prepared statement of Mr. Ramos follows:]

PREPARED STATEMENT OF CAREY R. RAMOS

Mr. Chairman, Mr. Berman, and Members of the Subcommittee, thank you for this opportunity to testify on behalf of the National Music Publishers' Association (NMPA) on the "Mechanical Compulsory License" under section 115 of the Copyright Act. NMPA is the principal trade association representing the interests of music publishers in the United States. The more than 800 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. For more than eighty years, NMPA has served as the leading voice of the American music publishing industry—from large corporations to small businesses—before Congress and in the courts.

The Harry Fox Agency ("HFA") is the licensing affiliate of the NMPA. It provides an information source, clearinghouse and monitoring service for licensing musical copyrights, and acts as licensing agent for more than 27,000 music publisher principals, which in turn represent the interests of more than 160,000 songwriters

BACKGROUND

Enacted in 1909, the Mechanical License is the oldest statutory license in copyright law. This statutory mechanism allows commercial users of nondramatic musical works to invoke the compulsory license and reproduce and distribute such works at a royalty rate set by the statute, as long as the terms and conditions of section 115 are followed. The 1909 Act set the statutory rate at 2 cents per song, and this rate did not change for *679 years*, when Congress added a rate-adjustment mechanism for the statutory rate. Since that time, the statutory rate has increased—usually by industry negotiation—and today stands at 8.5 cents per song. If the mechanical right statutory rate had increased commensurate with the Consumer Price Index, the rate today would be 37 cents per song. At 8.5 cents, the current "mechan-

ical rate" thus represents a substantial bargain as compared to the rate set by Congress in 1909.

While the 8.5 cents statutory rate acts as a ceiling, it does *not* act as a floor. Music copyright owners are free to negotiate lower rates with users of copyrighted musical works, and often do. In some instances, contractual provisions such as "controlled composition clauses" in the recording contracts of certain artists require the composers of musical works to accept 75% or less of the statutory rate. As a result, the average actual rate paid for musical works is significantly less than 8.5 cents per song.

The most significant recent amendment of section 115 occurred in 1995, when the Digital Performance Right in Sound Recordings Act confirmed that the reproduction and distribution rights of music copyright owners are implicated—and the statutory compulsory license is available—when a phonorecord is transmitted electronically by a "digital phonorecord delivery" ("DPD"). Unfortunately, while Congress and the music industry assumed in 1995 that the Internet would provide an exciting new medium for the distribution of music, the environment turned sour in 1999 with the launch of the Napster service. Since then, unfortunately, piracy has dominated Internet distribution of music. No royalties from these "peer-to-peer" transmissions of copyrighted musical works are received by authors, songwriters, and music publishers. Since 1999, when Napster was launched, music publishers have seen their mechanical royalties plummet by 22 percent.

Although unauthorized P2P services continue to dominate Internet delivery of music, the recent launch of Apple's iTunes service—and other paid download services—has finally begun to fulfill the promise that the Internet offered as a legitimate marketplace for music. NMPA and its members are excited about these new services and strongly support their efforts.

It should be emphasized that our members have every economic incentive to issue as many licenses to new, legitimate Internet music services as possible. It is only through license agreements that our members are compensated. As of today, NMPA has issued over 1.75 million licenses for musical works to 39 different companies offering digital musical services. These licenses represent the vast majority of musical works for which there is any meaningful level of consumer demand.

Pursuant to the 1995 Act, NMPA and RIAA negotiated an agreement in 1997 whereby "digital" rates and terms for "downloads" of musical works would mirror the rates for "physical phonorecords" sold between January 1, 1998 and December 31, 2007. In the Fall of 2001, NMPA, HFA and RIAA negotiated a second agreement, under which the two sides agreed that: (1) compulsory licenses under section 115 would be made available to subscription services offering "limited downloads" and "on-demand streams" of musical works, and (2) the subscription services could launch their businesses at the time of the agreement and pay royalties in the future when royalty rates for such transmissions were set. HFA has entered into similar subscription licensing arrangements with Full Audio, Listen.com the new Napster.

CARP REFORM BILL

Mr. Chairman and Mr. Berman, we thank you for your help in drafting and advancing the "CARP Reform" bill to passage in the House. There are many changes in this legislation that are helpful to music publishers, through both a reform of the general "arbitration" style of rate- setting and distribution of royalties and various technical amendments to section 115.

PRESENT EVALUATION OF SECTION 115

In the view of NMPA, no additional legislative changes to section 115 are necessary at this time. The basic principles of the section 115 compulsory license remain reasonable and appropriate, even in the digital era. In exchange for the guaranteed right of music users to reproduce and distribute nondramatic musical works, music copyright owners are guaranteed a return on their works (currently 8.5 cents per song, or up to $1.04 for a 12-song album that typically retails for $15). A rate-adjustment mechanism promotes voluntary agreements among music copyright owners and those who would use their works commercially, while affording "the copyright owner a fair return for his creative work" pursuant to the various factors under section 801(b)(1)). These principles make as much sense in the digital era as they did in the physical phonorecord era.

The recent success of iTunes confirms that current law is not an impediment to consumer demand for digital delivery of music when a commercially viable product is made available. In the last few years, this committee has heard from critics of section 115 that the unwieldy music publisher community impedes the mass licensing of music, and thus the electronic availability of wide ranges of music. These crit-

ics have suggested that amendments to section 115 would facilitate cheaper and faster access to musical works, and thus greater public acceptance of lawful sources of digitally-transmitted music. The recent success of iTunes shows, however, that the critics of section 115 should have spent less time lobbying Congress and more time developing products that U.S. consumers of music actually desired. The creators of iTunes appear to have figured out what U.S. music consumers actually want—easy access to and reasonable prices for downloads from vast libraries of online music.

The Harry Fox Agency, the licensing arm of NMPA, represents over 27,000 music publishers. It has invested enormous sums of money on IT improvements in the past few years to ensure that large-scale electronic licensing is a reality. Tremendous strides have been made in the last few years. The available catalogue is well in the hundreds of thousands of musical works. And it will continue to grow.

A CAUTIONARY NOTE

There is a great economic incentive for industries to encourage Congress to endorse by legislation the technological "flavor of the month." Given section 115's prominent role in licensing music over the Internet and via other new technologies, copyright policy-makers should be particularly cognizant of the rapid technological change in this arena. Let me give a concrete example.

Under Section 104 of the DMCA, the Copyright Office was directed to write a report on the impact of recent copyright law amendments on electronic commerce and technological development. The Copyright Office transmitted this report in August of 2001, and one of its recommendations was to exempt from the reproduction right "temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work." The Office noted that it had been persuaded by webcasters that such copies had "no economic value."

There are both legal and technological problems with the Section 104 Report.

Legal Flaws. The Report predates our subscription services agreements with RIAA, Listen.com and others and, unlike those agreements, does not distinguish between on- demand and radio-style streaming. This is a critical distinction. To the extent that the Report recommends a statutory exemption from mechanical licensing for radio-style streaming, we respectfully submit that no exemption is needed. Publishers have never required, and have now expressly agreed not to require, mechanical licenses for such streaming. To the extent that the Report may be construed to seek a statutory exemption for on-demand streaming, however, such legislation would seriously impair the copyright in musical works and deprive songwriters and music publishers of a vital source of licensing income.

The Report correctly concludes that streaming involves the copying of musical works. The "aggregate effect" of streaming, it states, "is the copying of the entire [musical] work." [1]

The Report, however, then proceeds to consider whether so-called "buffer" copies made in the course of streaming are nevertheless a "fair use" of copyrighted music. Applying the factors codified in Section 107 of the Copyright Act, the Report concludes that, because two of the four factors (the transformative nature and economic value of the use) favor the user rather than the copyright owner, a "strong case" could be made that the making of a "buffer" copy in the course of streaming is a fair use not subject to the payment of royalties.[2] The law is crystal- clear, however—and the Report acknowledges—that the doctrine of fair use "is limited to copying by others which does not materially impair the marketability of the work which is copied." [3] In conducting the fair-use analysis, the law requires that consideration be given to whether, "if [the use] should become widespread, it would adversely affect the potential market for the copyrighted work." [4] Here, there can be no question that *on-demand* streams—which allow consumers to choose the songs they want, when they want to hear them—will displace record sales, and therefore directly affect "the marketability of the work that is being copied," or the "potential market for the copyrighted work," so as not to qualify as a fair use. Under these circumstances, it defies economic reality to say that 'buffer" copies are fair use. Indeed, it would do violence to the fair use doctrine to do so.

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[1] Report at 132.

[2] Report at xxiv.

[3] Report at 138 (quoting *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 566-67 (1985)).

[4] Report at 139 (quoting *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984)).

The potential for the on-line delivery of music to displace record sales, in fact, was Congress's principal concern in enacting the Digital Performance Right in Sound Recordings Act of 1995 (the "DPRA"). The legislative history of the DPRA states that the Act was intended to respond to the concern that "certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for the use of their work."[5] Or, in the words of then-Register of Copyrights Ralph Oman, "[W]ill what you call the 'celestial jukebox' replace Tower Records and the corner outlet stores and their glitzy stock of CD's, tapes, and records?"[6]

Chairman Sensenbrenner put it this way: "[N]ew interactive services are being created which allow consumers to use their TV's and computers to order any recording at any time. These subscriber services threaten sales of CD's, records and tapes."[7]

The Report did not consider on-demand streams in its analysis. It appeared to address only radio-style webcasting (for which, as noted, we do not seek mechanical licenses in our agreements with the RIAA and similar services). Given the direct and substantial impact that on- demand streaming will have on record sales, there is no basis for concluding that "buffer" copies made in the course of streaming a song on demand are a fair use of the underlying copyrighted work.

Finally, the fair use doctrine is ill-suited to the inquiry and analysis undertaken by the Report here. It is an equitable doctrine, to be applied in fact-specific circumstances. To apply it broadly, without the benefit of a fully developed factual record, as the Report does, is inconsistent with the terms of Section 107.

Technology. On the technological front, in June of 2002, NMPA engaged an expert in computer streaming technology (Dr. Andrew Cromarty) and delivered a report to the Copyright Office showing that, as of June 2002, "temporary" buffer copies incidental to digital transmissions of a sound recording were often *not* temporary, provided the consumer with many benefits of a permanent copy, and therefore *did* have economic value.

Dr. Cromarty explained that the "temporary" copy is not so temporary, rather, it is saved permanently on the hard-drive of a consumer's computer in a "cache". This is done to provide the user a functionality equivalent to ownership: immediate playback on demand of the previously streamed content, and continuous playback in case the internet connection is unstable. These variations on streaming technology will continue to be made—especially because the competitive pressure from popular downloading services like iTunes will induce streaming services to offer download-like functionality. The point is simply that reliance on a term like "temporary buffer copy" in a dynamically changing technological context could create significant adverse, unintended consequences. This would especially be the case if such a malleable category were deemed exempt from copyright law: this would provide an incentive to use technology that barely met the definition while providing an economically significant benefit for which the consumer would be charged. In this situation, it would be unfair for the technology company to reap all of the benefit and for the artist to be uncompensated.

In short, NMPA respectfully suggests that Congress treat with great caution a legislative request from any industry based on the assumption that a particular technology of the moment is here to stay and that the law should be amended to accommodate it. As we have seen over and over again, rapid technological change is inevitable. A change in the law, however, is much less certain.

CONCLUSION

In summary, NMPA believes that section 115 is not in need of legislative change. While NMPA members continue to be battered by Internet piracy, we are enthusiastic about the new music download and subscription services and believe that they will ultimately prevail over unlawful copying. NMPA strongly supports these new business models through the licensing process both because it is in our economic interest and because it is the right thing to do. The basic policies set forth in section 115 remain wise and reasonable and do not require revision at this time.

Thank you for this opportunity to testify, and I look forward to answering your questions.

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[5] S. Rep. No. 104–128 at 362 (1995).

[6] *Performers' and Performance Rights in Sound Recordings,* 103d Cong. 4 (1993) (statement of Ralph Oman, Register of Copyrights, accompanied by Marybeth Peters, Policy Planning Adviser to the Register of Copyrights).

[7] 141 Cong. Rec. H10,098-108 at 10,103 (1995) (statement of Rep. Sensenbrenner).

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Carey R. Ramos co-chairs the firm's Communications and Technology Group and Intellectual Property Litigation Group. His practice concentrates on intellectual property and technology matters including litigation, transactions and counseling.

Mr. Ramos has represented prominent clients in widely publicized patent, copyright and trademark actions involving music, motion pictures, computer technology, telecommunications and the fashion industry. He is currently representing songwriters and music publishers in copyright infringement actions against Internet companies Napster, Music City (Morpheus), Kazaa, Grokster and Aimster.

Mr. Ramos has extensive experience in transactions involving intellectual property rights in technology and entertainment media. Among other representations, Mr. Ramos serves as outside general counsel to the DVD Forum (the international association of companies developing standard formats for digital versatile disc equipment and media).

Mr. Ramos has lectured extensively in the United States and Asia on intellectual property, the Internet, computer software, technology and antitrust issues. He has authored numerous articles on copyright, patent, antitrust and computer law, the Internet and the application of intellectual property law to new technologies.

Mr. Ramos is a member of the Association of the Bar of the City of New York, the American Bar Association, the Practicing Law Institute's Intellectual Property Advisory Committee, the American Intellectual Property Law Association and the Computer Law Association.

Mr. Ramos joined Paul, Weiss, Rifkind, Wharton & Garrison LLP in 1981 and was elected to partnership in 1988. From 1979 to 1981, Mr. Ramos practiced at the Washington, D.C., firm of Wald, Harkrader & Ross. In 1984, he took a one year's leave of absence from Paul, Weiss to work for the Japanese firm Nagashima & Ohno (now Nagashima Ohno & Tsunematsu) in Tokyo. He is a member of the Bars of the State of New York and the District of Columbia and is admitted to practice in the U.S. Supreme Court, the U.S. Courts of Appeals for the Second, Fifth, Sixth, Ninth, D.C. and Federal Circuits and the U.S. District Courts for the Southern, Eastern and Northern Districts of New York and the District of Columbia.

Mr. Ramos attended the Massachusetts Institute of Technology and Yale College and received a bachelor of arts degree, *magna cum laude*, from Yale University in May 1976. In June 1979, he received a doctor of jurisprudence degree from Stanford Law School, where he served as a note editor of the *Stanford Law Review*.

Mr. SMITH. Thank you, Mr. Ramos.
Mr. Sherman.

STATEMENT OF CARY SHERMAN, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Mr. SHERMAN. Thank you, Mr. Chairman, Representative Berman, and Members of the Subcommittee. I am Cary Sherman, president of the Recording Industry Association of America. I'm grateful for the opportunity to present our views concerning the operation of the 115 mechanical compulsory license.

I'd like to thank you for focusing attention on this arcane, but important, subject. As you know, while very few people are familiar with how musical works are licensed, it has a profound effect on the manner in which consumers are able to enjoy music. Whether consumers will be able to buy new physical products that combine in a single disc both CD technology and new high-resolution formats like DVD and super-audio CD's, a disc that will play in whatever devices the consumer may have, depends on the efficient and successful operation of the mechanical license.

Whether consumers will enjoy the convenience of having their new computers or portable music players come with the music they want already on the machine also depends on a functional licensing system. And these are just two examples of the kinds of new products and services that are awaiting licensing.

Record companies have had a long and generally successful business relationship with music publishers, based on Section 115. However, that relationship has not been without its rough spots, and we are in a rough spot now. I'd like to briefly describe some problems that we are presently experiencing with the operation of the mechanical licensing system that are affecting our ability to bring consumers the exciting new formats I mentioned and many others. We are hopeful that, with your encouragement, we will be able to resolve our differences with the publishers in the marketplace. But presently, we are not making much progress, and so we can't rule out the possibility that addressing these issues legislatively may be necessary.

The case of the new dual-disc format is a good illustration. This is a disc that will offer consumers the ability to enjoy new music on their existing CD players as well as the new DVD or super-audio CD player they may own or buy in the future. These products come with multiple versions of the same music in what is basically the different languages of the different players on which they can be used; much as a user manual might offer the same instructions in different languages, so that any user can read it.

We believe it is clear that under Section 115, the required payment is one mechanical royalty per song, per disc. That is not just a sensible reading of the statute; it is a sensible business result. The user can only listen to the music on one player at a time.

Moreover, consumers are demanding added value for their music dollars, and the industry must deliver attractive new products to get them back into the habit of buying instead of taking music for free. What better than a dual disc that gives them the flexibility of transitioning from their existing CD players to the new high-resolution formats of the future?

To our surprise, the publishers issued a notice informing licensees that any disc with more than a single version of the same music on it would require separate and specific licensing, and requiring that licensees make a specific offer for payment in addition to the prevailing statutory rate. This would fundamentally change the economics of the industry by requiring multiple payments for the same music, when consumers are getting no more music, just a more convenient way of listening to it.

We may think that we're right on the law, but as a practical matter, our companies cannot obtain licenses and pay the royalty required by law, because the compulsory licensing provisions of Section 115 are too cumbersome to be used. Therein lies the problem. We theoretically have a right to a license, but, as a practical matter, we can't exercise that right.

The administrative burdens of current Section 115 are not the only problem. Existing regulations provide for a per-unit, penny-rate royalty. That worked fine when record companies sold only a few types of physical products. But that rigid structure has not adapted well to new technologies in the current dynamic marketplace. Record companies would like to sell and license a variety of great new products, but the cents-rate structure doesn't translate well for these new offerings.

Take for example the new subscription services that offer, for a monthly fee, a combination of streams for listening and various kinds of downloads that offer everything from temporary to permanent ownership. How do you even calculate the cents-rate for that service?

A percentage royalty rate, by contrast, would enable these products to be launched and find an appropriate price point in a dynamic marketplace. The amount of the royalty would adjust automatically, as market conditions varied. Most foreign countries base mechanical royalty rates on a percentage of the selling price. Why can't we?

These are complex issues, and resolving them is not easy. But if the overall purpose of Section 115 was to ensure the ready availability of musical compositions, that objective is no longer being achieved. We sincerely hope that we will be able to resolve these problems quickly in negotiations with our music publisher colleagues. But time is of the essence. The marketplace won't wait. The plague of piracy continues to spread. If we cannot get there on our own, we may be back to ask for your help. Thank you very much.

[The prepared statement of Mr. Sherman follows:]

PREPARED STATEMENT OF CARY H. SHERMAN

I am Cary Sherman, President of the Recording Industry Association of America ("RIAA"), and I am grateful for the opportunity to present our views concerning the operation of the mechanical compulsory license provided by Section 115 of the Copyright Act. I would like to begin by thanking the Subcommittee, under the leadership of Chairman Smith and Ranking Minority Member Berman, for focusing its attention on the arcane but important subject of mechanical licensing of musical works.

As you probably know, RIAA is the trade group that represents the U.S. recording industry. Its member record companies create, manufacture or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States and comprise the most vibrant national music industry in the world. As such, we have somewhat mixed feelings about Section 115. On the one hand, RIAA's

members have historically obtained the vast majority of mechanical licenses. On the other hand, as creators, we respect the rights of songwriters and other creators to exercise control over, and receive fair compensation for, use of their creative works. We do not in principle favor compulsory licensing, although after nearly a century of compulsory mechanical licensing, it is so woven into the fabric of the music publishing industry that it is difficult to contemplate the music business without it.

Record companies have had a long, broad-based business relationship with the owners of musical work copyrights, based on Section 115. That relationship has generally been successful for both the music industry and consumers. However, that relationship has not been without rough spots, and we are in a rough spot now. This afternoon I will describe some problems that we are presently experiencing with the operation of the mechanical licensing system that are affecting our ability to bring consumers exciting new formats for the music they enjoy. We're hopeful that with your encouragement we will be able to resolve our differences with the publishers concerning these issues, as a business matter, in the marketplace. But presently, we are not making much progress. Congress could facilitate resolution of these issues by extending to physical product mechanical license negotiations the antitrust exemption that section 115 already provides for negotiations concerning downloads—as the House has voted to do in H.R. 1417 (the CARP reform bill). However, the antitrust exemption is not a complete solution to the present problems in the mechanical licensing system, so we can't rule out the possibility that it might ultimately be helpful to do something more to address some of these issues legislatively or through Copyright Office rulemaking.

BACKGROUND

It might be helpful if I began with some background concerning the compulsory mechanical license. Compulsory licensing of "mechanical" reproductions of musical works—that is, reproductions of sound recordings of musical works—has been part of U.S. copyright law since 1909, when Congress extended the rights of music publishers to mechanical reproductions. The recorded music business was in its infancy in 1909, so the compulsory license has provided the framework for the relationship between the recording and music publishing industries since the very beginning.

Section 115 continues the basic structure of the 1909 Act compulsory license. In contrast to later statutory licenses and the practice in many foreign markets, Section 115 requires copyright users to license every individual work by following cumbersome procedures. The regulations provide even more cumbersome procedures for reporting usage information. Because the official procedures are so cumbersome, the marketplace long ago adopted workarounds. For example, the National Music Publishers' Association's subsidiary The Harry Fox Agency and others offer a simpler process for obtaining and reporting usage under mechanical licenses of essentially statutory scope. Even with these workarounds, record companies have borne a very large mechanical license administrative burden, but the system has generally worked.

In addition, current Section 115 regulations provide for a per-unit penny-rate royalty set for long periods of time. As I describe below, that rigid structure has not adapted well to new technologies in the current dynamic marketplace. A percentage royalty increasingly looks like a better way of addressing new consumer products and services, and greater short term flexibility to respond to market conditions would improve the mechanical licensing system.

MECHANICAL LICENSING ISSUES ARE IMPEDING INTRODUCTION OF NEW PRODUCTS AND SERVICES

Anyone who has read the newspapers in the last several years has heard about the tremendous pain that piracy has inflicted on the whole music industry. Sales of recorded music products have declined some 25% over the past three years, depriving the public of creative new music as record companies have been forced to slash their artist rosters and support for new artists, as well as costing thousands of jobs due to retail store closings and record company retrenchment. Our colleagues the music publishers and songwriters feel this pain too, although less acutely due to the performance and other revenue streams they receive.

We are working hard to lure customers back through a range of exciting new consumer product and service offerings. These include physical discs (we call them "multisession discs") that can be played on computers, SACD and DVD players, as well as CD players; computers and portable players preloaded with a broad array of music that consumers can "unlock" on a per-tune basis or as part of a subscription service; CDs and DVDs with extra tracks or even albums that consumers can buy, or keys to extra content that consumers can download from the Internet; and

downloads and physical products with digital rights management systems that protect artists' rights while allowing users to make a limited number of personal use copies. We're also trying to develop new revenue streams by, for example, licensing master ring tones for use on cellphones.

It is important that mechanical licenses be as available for these new offerings as they always have been for more traditional offerings. Toward that end, we have tried hard to work with publishers to keep them abreast of these offerings and work out any issues. However, disagreements concerning the application of the Section 115 license, and the inflexibility of the per-unit statutory royalty set for a 10 year period (in contrast to a percentage royalty) are impeding the introduction of these offerings in the U.S. By contrast, in other countries, mechanical royalty rates are usually based on a percentage of the sales price. It is possible that mechanical licensing issues in the U.S. could lead to a situation where foreign markets have access to new consumer products that cannot be released in the U.S.

The situation concerning multisession discs is instructive. Multisession discs can take many forms. Record companies are currently testing DualDisc, a format that typically contains an album encoded for traditional CD players on one side and the same album for DVD players on the other. Most SACD discs are also multi-session, including stereo and surround-sound SACD sessions and CD sessions. We think that these new consumer products are compelling for a number of reasons—they provide a single product playable on most consumer music players, they offer a new convenience to consumers, they reduce duplicative inventory, and they move the marketplace to products of higher quality and greater capacity than the CD. More importantly, we know that if we want consumers to buy our music, we have to let them play the music in whatever players they have. Multisession discs are the way to allow consumers to play music on the various platforms that are available.

It's the "multisession" technology—putting differently-encoded renderings of the same music for each format on a single disc—that makes this possible. Thus, one disc could have two to five renderings of the same recordings. We believe it is clear that the Section 115 license covers multisession discs and that the required payment is one mechanical royalty (*e.g.,* 8.5 cents) per disc. However, the Harry Fox Agency ("HFA") has suggested that each multisession disc is in fact two to five "phonorecords," requiring specific licensing (and in the case of compulsory licenses, presumably payment at the statutory rate) for each session. But despite the merits of multisession discs, paying more than a single mechanical royalty would be unwarranted as a business proposition.

Nonetheless, HFA has notified its licensees that it will not issue licenses on any other basis without specific publisher consent. From what I have heard, many individual publishers seem to have embraced HFA's view that payment of 2 to 5 mechanical royalties per disc is required, so individual company agreements have been few and far between. I am not hopeful that individual negotiations will meet market demand within a time that might help reverse the bite of piracy.

Because this issue arises under a compulsory license and affects all of both industries, we have sought to discuss the issue with HFA on an industry basis. Citing antitrust concerns, the publishers have declined. As you probably know, later compulsory licenses in the Copyright Act contain language granting authority for collective negotiation of matters relevant to the operation of the compulsory license "notwithstanding any provisions of the antitrust laws." As a result of an amendment in 1995, Section 115 contains an antitrust exemption for mechanical license negotiations concerning downloads. For historical reasons that exemption does not apply to physical products. We are grateful that in H.R. 1417 (the CARP reform bill), the House voted unanimously to remedy this historic anomaly and extend the Section 115 antitrust exemption to physical products.

While we believe that extension of the antitrust exemption to physical products is important to help us bring consumers exciting new formats for the music they enjoy, the antitrust exemption is not a complete solution. Among other things, it would only allow us to do a private deal with HFA, not to obtain access to the 30–40% of works not licensable through HFA. Thus, it is possible that there may need to be a change in the Section 115 regime itself.

It is likely that the section 115 regime ultimately will need to move toward a percentage royalty to give it the flexibility to adapt and retain its vitality in the face of technological innovation. When record companies sold only a few types of physical products, the cents rate worked well. But record companies are now selling, licensing or contemplating a great variety of products, including not only multisession discs but preloaded offerings that consumers can "unlock" through online transactions; offerings with bonus material; products with digital rights management systems that allow limited personal use copying, and subscription devices that offer both streams and limited downloads for a single monthly fee. These products are

distributed through different channels and have different economics. Applying the cents rate to some of the models is often impossible and economically infeasible. A percentage royalty rate, by contrast, would enable these products to launch and find an appropriate price point in a dynamic marketplace. The amount of the royalty would also adjust automatically as market conditions varied. The Section 115 regime also would benefit from the flexibility to adjust rates more frequently, and if necessary to open up rates between scheduled CARP proceedings to address new consumer product offerings.

THE SUBSCRIPTION SERVICES AGREEMENT IS A MODEL OF HOW SUCH ISSUES CAN BE RESOLVED

We have previously hit bumps in the road of our relationship with the publishers when questions have arisen concerning the application of the compulsory license to new technologies. But we have been able to resolve them. For example, several years ago, questions concerning the application of the compulsory license to subscription services, and our consequent inability to obtain licenses for those services promptly, became an impediment to the launch of services. We resolved those issues through a Subscription Services Agreement between RIAA, NMPA and HFA that provided a framework for licensing services. That agreement had its desired effect of allowing new services to enter the marketplace. In late 2001, RIAA and NMPA asked the Copyright Office to adopt regulations implementing the same framework as the agreement, to make clear that services can rely upon the compulsory license as to all musical works, and not just those licensable through HFA. We hope that the Copyright Office will act in the near future upon our joint request to adopt regulations implementing the agreement.

CONCLUSION

We're hopeful that with your encouragement we will be able to resolve our differences with the publishers concerning the current generation of new formats as a business matter, just as we did in the case of the Subscription Services Agreement. This is a critical time for everyone in the music industry. Without new products to excite consumers, we risk losing an entire generation of music lovers to piracy. Record companies are working hard to meet that challenge, but we need the help of others in the industry to achieve that goal.

Cary Sherman
President
Recording Industry Association of America

Cary Sherman is the president of the Recording Industry Association of America (RIAA). The trade group's more than 350 member companies are responsible for creating, manufacturing, or distributing 90 percent of all legitimate sound recordings sold in the United States.

As the president, Mr. Sherman represents the interests of the $12 billion U.S. sound recording industry -- the largest market for prerecorded music in the world. He coordinates the industry's legal, policy and business objectives and his responsibilities include technology, licensing, enforcement, and government affairs issues, among others.

National Journal has described Mr. Sherman as an "intellectual property guru" and "one of the top copyright attorneys in the country."

Before joining the RIAA as General Counsel of the organization in 1997, Mr. Sherman was a senior partner at the Washington, D.C. firm of Arnold & Porter, where he was the head of the firm's Intellectual Property and Technology Practice Group. One of his special areas of expertise during his 26 years at Arnold & Porter was reconciling developing technologies and intellectual property laws.

Mr. Sherman graduated from Cornell University in 1968, and Harvard Law School in 1971. A long-time musician and songwriter, Mr. Sherman is an officer of the board of the Levine School of Music in Washington, D.C. He also serves on the boards of the Copyright Society and BNA's *Patent, Trademark and Copyright Journal*, and has served on numerous other boards, including the Washington Area Lawyers for the Arts, The Computer Law Association, and *The Computer Lawyer*. He is also co-author of a two-volume treatise published by BNA Books, *Computer Software Protection Law*.

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Mr. SMITH. Thank you, Mr. Sherman.

Let me address my first question to all the witnesses who are here today. And this is only slightly digressing, but it's a little bit of a question on behalf of songwriters. I am just curious—and maybe, Ms. Peters, we'll start with you—whether you think that royalty payments should be a flat rate, or a percentage amount?

Ms. PETERS. I don't have a preference one way or the other. I think, whatever it is, it has to work. And certainly, with the hundreds of thousands of songs, it seems that if you go song by song, it may not be the appropriate model.

Mr. SMITH. Okay. Mr. Potter?

Mr. POTTER. We believe there should be the option. We think there should be the option of a percentage of revenue. We think it adds flexibility for innovative products and services, as Mr. Sherman was describing. We think it's worked at least reasonably well in Europe for a long time. Songwriters have been paid through a percentage-of-revenue royalty.

Mr. SMITH. Okay. Mr. Ramos?

Mr. RAMOS. We believe that the rates should be, as it has been for close to a century, a flat rate, a set rate. And there are a couple of reasons for that. And this is really with the songwriters' ultimate interests in mind.

First, if you have a percentage rate, that would subject us to the risk that companies which took licenses would use music as a loss leader. iTunes is a good example. And I'm not accusing Apple or iTunes, because I think it's a wonderful service. But it's no secret that Apple's primary interest is in selling computers and iPods. And the music is what attracts people to their site to buy that equipment. If they offer the music, they'll sell the equipment. It's a wonderful business model for them. It may not be a good business model for songwriters, who don't sell computer equipment. That's one significant concern.

The other concern is that—is really an auditing concern. Computers, if they can do one thing, they can count. They can count the number of times that songs are downloaded. And to simply assign a number to each count and say, "That's how much the songwriter gets," we think is a simple, easily audited system; where we don't have to get into questions about how much revenue they earned, and did they take deductions for, you know, this item or that item. It's just a much simpler system. Thank you.

Mr. SMITH. Okay. And Mr. Sherman?

Mr. SHERMAN. Well, we feel strongly that the time has come to look at a percentage royalty. We think it will solve many of the problems that we're presently confronting in the marketplace, and make irrelevant many of the legal issues that have surrounded the offering of these new services.

It is true that there is always a risk that a company like Apple would look at music as a loss leader, but record companies don't look at it that way. Record companies have exactly the same interests as music publishers in the way that they license. And in any event, there are certainly mechanisms that we'd be able to agree upon to avoid that kind of risk.

Mr. SMITH. Okay. Thank you, Mr. Sherman. It sounds like two for percentage, one for flat rate, and one for whatever works best.

What about additional royalty payments for second-session CD's, Mr. Sherman?

Mr. SHERMAN. We feel that this is a counterproductive proposal, frankly. We think that we, as an industry, ought to be offering consumers more value on the physical discs that we're selling. The notion of asking record companies to pay more in order to provide more convenience for consumers doesn't make a lot of sense to us. They're still getting just one music album; it just happens to play in two different ways.

Mr. SMITH. Thank you. Okay. Mr. Ramos?

Mr. RAMOS. Mr. Sherman and I are in agreement that this should be negotiated, and we think that it can be. One matter of clarification——

Mr. SMITH. This should be what?

Mr. RAMOS. Mr. Sherman and I are in agreement that this is a matter that should be negotiated. In fact, we've been working to do that. And this Committee has assisted us in that regard by passing the CARP reform legislation, which will include an antitrust exemption to give us, you know, protection from potential lawsuits, in order to be able to do that.

But the most important thing I wanted to say is that the Harry Fox Agency policy is not that they would collect multiple royalties for each of these sessions; but rather, that each of the sessions needs to be licensed. What the rates should be, is a different question.

In the marketplace today, these products, these SACD and DVD audios, generally sell for prices substantially higher than CD's. So there is additional value there, and we think that should be reflected in a fair rate paid to the songwriter.

Mr. SMITH. Okay. Thank you. Mr. Potter?

Mr. POTTER. The additional value, I think, would be reflected in a higher royalty if we were on a percentage-of-revenue system. So if the prices are higher for super-audio CD's, that would address the additional value issue.

We are troubled by the idea of negotiating in the private market the laws, essentially, which would then extend to the 35 or higher percentage of music that the Harry Fox Agency does not control. Mr. Ramos said 90 percent of commercially significant music. I would think there's a definition of "commercially significant music" that extends to small songwriters and small record labels who sell smaller amounts, but whose royalties are just as valuable.

Mr. SMITH. Okay. Thank you, Mr. Potter.

Mr. Ramos, I want to squeeze in one more question. Ms. Peters, in her written testimony, at least, said that one option was to eliminate Section 115, in favor of a system that we have in Europe where you have a collaborative effort, and various organizations would merge. What do you think of that idea? And would you be willing to participate? Just be very brief, if you will.

Mr. RAMOS. I will. The music publishers favor marketplace solutions. So if we were to ship to—I mean, they would certainly be open to considering repealing 115, doing away with the compulsory license, and going to a marketplace solution. No question about it.

I think, Mr. Chairman, you might want to ask that question to my clients' customers, on this side here——

Mr. SMITH. If my time had not expired, that was my intent.

Mr. RAMOS. Yes.

Mr. SMITH. With everybody's allowance, perhaps, Mr. Sherman, can you respond very quickly? And then we'll go to Mr. Potter.

Mr. SHERMAN. Well, by and large, we would be open to considering anything that would create a workable system. The problem that we've got is not whether it's compulsory licensing or not; it's that we have a system that just is no longer functional in the digital age.

Mr. SMITH. Something has to happen. Yes, Mr. Potter.

Mr. POTTER. I think if the Harry Fox Agency wanted to, you know, go visit the Justice Department and get a consent decree to operate with transparency and in a blanket license manner, where they licensed all comers on a non-discriminatory basis, we would be open to that sort of system.

Mr. SMITH. Thank you all. The gentleman from California is recognized for his questions.

Mr. BERMAN. Thank you, Mr. Chairman. I had a chance to meet with both the—at separate times, thank God—with the music publishers and with DiMA, on some of these 115 issues. And my first question is for Mr. Potter. This whole issue of the principle versus the money; the issue of what should be—changing the licensing mechanism, versus how much you're paying to do it, and to what extent are you standing on a—and fighting for a principle here which isn't central to the fundamental business of how much money are you having to pay.

The publishers come to me and they say, "We're willing to negotiate and be reasonable on money, but there is this principle that we think is important, and we don't want to change that principle."

Let me put it a different way. You take the position that for on-demand—that the Harry Fox Agency's position on on-demand streaming services, that they should obtain licenses for the server, catch, buffer, and other reproductions that may occur in the course of an on-demand stream. The law shouldn't be interpreted to require a royalty for such reproductions. And they apparently refuse to take an available license from the Harry Fox Agency, your members do, for these reproductions. And instead, you're asking us to exempt them from incurring any copyright liability.

When we met, one of your member companies noted that it had begrudgingly taken a license to the one-click patent from Amazon, even though it harbored reservations about that patent's validity; reservations that Mr. Boucher and I have been interested in, a question in the larger context that we've been interested in, in some legislation that we've introduced.

The company chose to take a license, despite these reservations, due to business considerations. Amazon is a distributor of that company's products. The company doesn't want to pay seven to ten million in patent litigation costs. I mean, understandable reasons why principle didn't have to get in the way of doing business.

Your association is not asking that Congress pass legislation to protect your members from liability against these questionable patent claims. What's the difference between the two situations? If fear of infringement liability, potential litigation costs, and the desire to maintain a good relationship with a business partner justify

licensing a questionable patent from a fellow technology company, why don't the same business considerations justify licensing questionable uses of copyrights—questionable in your mind, uses of copyrights from music publishers? If you can work out the price, what's the difference whether it's one license, or two licenses, or three licenses?

Mr. POTTER. In the first instance, Mr. Berman—and I appreciate the question. I recall the conversation well. I think that the Congress is considering patent reform. And the Patent Office is studying a whole lot of these issues, as to whether they should be issuing those sorts of patents. So in fact, some of those companies who were paying those litigation insurance royalties, if you will, have approached the Congress and asked it. So it is a similar circumstance, in that regard.

As a second matter, if the Congress would like to guarantee a zero royalty, then perhaps my members would be willing to agree that everything can be licensable; but only if the license is available. The problem is, the licensing system doesn't work. If they license all comers, for all uses, on a percentage-of-revenue basis, this issue probably, perhaps, goes away. But there is a—we have a strict liability statute. We have a very expensive statutory damages statute. So if you do not take a license for everything that someone views, and you're wrong, you're out of business. You are cold-cock out of business, with an injunction, lickety-split. So we have a problem where it is true gun-to-the-head licensing.

With all due respect, Universal Music has marvelously sophisticated lawyers. They thought through their Farm Club business plan for a long time before they launched it. I am confident they did not think they were infringing on the 115 compulsory license.

The recording industry has signed a deal with the Harry Fox Agency which these gentlemen touted two and a half years ago as resolving these issues. It hasn't done the job. I'm not sure what is the ultimate solution, but giving on principle in order to make a business deal ultimately might work, but it has to be a package deal.

Mr. BERMAN. All right. Well, are we in recess? Is there a bomb attack? Or are there a lot of votes coming up? [Laughter.]

Mr. GREEN. [Presiding.] There are a fair number of votes coming up. We're just finding out if these are the final votes of the day, and then we'll notify Members and make a decision accordingly.

Mr. BERMAN. Right.

Mr. GREEN. I'd like to proceed on with my questions at this time. Ms. Peters, just so I understand clearly your testimony and your concept of perhaps eliminating the statutory—115 statutory license, is that because you believe that that provision can no longer be stretched and tweaked enough to work with modern technology and the changing marketplace?

Ms. PETERS. In part. In part, what I'm really saying is that it only works for activities within the United States; that as it exists today, it's very hard to have it adaptable to all the possible permutations that may come up. And there really just doesn't seem to be the need. I don't see a need where you're saying the marketplace can work here.

Mr. GREEN. Okay. Thank you. A question for each of the witnesses. Would you support making the 115 statutory license similar to the Harry Fox license?

Mr. POTTER. No. The Harry—what you're suggesting, sir, is that the Harry Fox/RIAA agreement which essentially blends over all the gray areas and all the disputes by sort of just characterizing everything as the reproductions that happen to occur while you're doing your service, whether it's a distribution service or a streaming service you're willing to pay for. The answer is, no.

We have a situation in this country where the terrestrial broadcasters have an absolute flat exemption for the reproductions they make that facilitate licensed performances. So they don't pay a reproduction right. They are not subject to that liability.

There is a—you know, I heard Ms. Peters a week or so ago in the Satellite Home Viewer Act testimony, and I've heard her speak otherwise, about how competitive services, equivalent services, should be treated alike as a matter of law. And that's been a DiMA principle since the day we founded this organization.

Merely because our services choose to use the Internet as a pipe, instead of the radio as a pipe, the terrestrial airwaves as a pipe, should not mean we are subject to more liability, to more royalties, or to any discriminatory legal treatment.

Mr. GREEN. If I can, real quickly, from Mr. Ramos and Mr. Sherman.

Mr. RAMOS. We would certainly favor the application of the Harry Fox agreement, the license agreement we made with RIAA, to the music publishing industry, generally. We think that that would be a good thing for the marketplace, and we would fully support that.

Mr. SHERMAN. The—if you're asking the question more broadly, about the relationship between the Fox license and the 115 license, the fact of the matter is that the Fox license only works marginally better than the 115 system. We operate under the Harry Fox license right now. That's where 99.999 percent of the licensing is done. And we just aren't getting licensed what we need. This system isn't working.

And the examples that I gave earlier about multi-session discs, percentage royalty, those are the problems. Because when the Fox Agency says "No," there's no way to get the issue resolved. And that's the problem we're facing.

Mr. GREEN. Okay. Thank you.

At this point, we're going to break. We have one 15-minute vote, and two 5-minute votes. With your indulgence, we'll return and finish up our questioning at that point. The Committee stands in recess until that point.

[Recess.]

Mr. GREEN. We'll resume our hearing. And I appreciate the patience of the witnesses.

Mr. Boucher of Virginia, the time is yours for questions.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I want to commend our witnesses for joining us here today, and for your patience while we had to attend votes on the floor.

Ms. Peters, let me ask you this. Do you believe that when there is a download of digital music, that both a performance royalty and a mechanical royalty should be paid?

Ms. PETERS. I think, the answer's going to be "It depends." Clearly, when there is a download, there is a reproduction. And the question is whether or not there is also a performance. And if in fact the licensed activity is the download, and the transmission is made only to enable that licensed activity, we have taken the position that that is not a separate—we don't believe that that's a separate economic activity; and in our Section 104 report we concluded that that would be a fair use.

Mr. BOUCHER. And so under the state of facts as you have phrased the state of facts, you would not support an interpretation of existing law to require that both a performance royalty and a mechanical royalty be paid; is that correct?

Ms. PETERS. In that specific fact situation, if it's just the mere transmission——

Mr. BOUCHER. Right, as you have described it.

Ms. PETERS. Right. No. For us, the beneficiaries are the music publisher and the songwriter. And you should look at what is the purpose of the activity, and the price should be set according to the value of that activity. And splicing it up, saying, "This is a performance, and this is a reproduction," doesn't make sense to us, because we believe the transmission just enables the download.

Mr. BOUCHER. Okay. Thank you. Do you believe that the statute should be amended to clarify that view?

Ms. PETERS. Every time you amend a law and you start doing exceptions, the question is: Do you do damage? We're in a time period where technology is changing and bringing about different results. I'm not sure. I'd have to really look at what the language would be, before I would ever want to say there should be an exception.

Mr. BOUCHER. Well, I mean, I understand the care with which you answer all of your questions here. But let's presume that the language is written in such a way—perhaps in a draft that your office would assist us in constructing—as to carry forward your intent. Would you not agree that some statutory clarification, to prevent this double-dipping, would be appropriate?

Ms. PETERS. We actually would support that. Of course, you realize that the performing rights organizations would be very strongly opposed.

Mr. BOUCHER. Oh, I understand that. But I'm asking you.

Ms. PETERS. Yes.

Mr. BOUCHER. All right.

Ms. PETERS. Yes.

Mr. BOUCHER. Thank you. Let me further carry forward my questioning to you, with respect to incidental server copies. When music is made available for legal downloading across the Internet, typically, a lot of caching occurs, in order to promote the efficiency of the delivery of the music and speed up the delivery times. And under current law, some have interpreted the separate making of caching copies on servers located throughout the Internet to require the separate payment of royalty fees for each of these copies.

A separate copy has to be made for every bit rate. A separate copy has to be made in every format in which the music is delivered. And before long, when you multiply this out, you could be talking about a thousand or more copies made solely for the purpose of delivering a single song across the Internet.

And the question is, should these incidental copies, made only for the purpose of effectuating the delivery, require the payment of separate fees with respect to each of those? Or should we treat this essentially as one copy?

Ms. PETERS. This is exactly the question that we have before us in an ongoing rulemaking proceeding. And we do intend to address that in our rulemaking, so I'm not going to prejudge at this moment where we're coming out. But we will be dealing with this shortly.

Mr. BOUCHER. So you're saying you are aware of the problem——

Ms. PETERS. Oh, absolutely. It's currently before us.

Mr. BOUCHER.—and you have a rulemaking that addresses it?

Ms. PETERS. We have before us a variety of questions on the scope of the Section 115 compulsory license.

Mr. BOUCHER. All right. Okay. Let me ask you about another key concern. And that is that with regard to the publisher copyright interest, the songwriter/publisher interest, the Harry Fox Agency, as I understand it, has the current authority to clear something on the order of 60 to 65 percent of the inventory of music that companies would like to place on the Internet for lawful download. But that leaves on the order of 35 to 40 percent of the music unaccounted for, in terms of even identifying who owns the publisher interest in that music.

And given the current structure of minimum statutory damages in the copyright law for every incident of a violation, a person would place that music on the Internet for lawful download at his peril. And the burden really does, under current law, rest on the person who wants to use that music, to identify who owns the publisher interest and then obtain clearance of that copyright. And that's a very difficult process. It involves going through card files, and it's a very laborious and time-consuming process, and is practically impossible in the current state of things.

Would you support some kind of statutory provision that would enable the more efficient clearance of that interest with regard to the 30—or to 35 to 40 percent of music for which the Harry Fox Agency does not have clearance authority?

Ms. PETERS. I think, actually, I've sort of answered that. We have to have a system that works. We have to be able to license material. To the extent that today there's a statutory license that's there, and where you can't find copyright owners you file with us and there's no liability, that system doesn't work. So, yes, I certainly do favor a system that enables clearance of these works.

Mr. BOUCHER. Well, thank you. And would you agree that this is something we will need to address statutorily?

Ms. PETERS. Yes.

Mr. BOUCHER. Okay. Thank you.

Mr. Chairman, my time has expired. But Mr. Chairman, with your indulgence, let me just ask Mr. Sherman if he could also offer a comment on that last question.

I perceive that the labels have a need to have a more efficient clearance process for these publishing interests that really are very difficult to identify. Would you agree with that?

Mr. SHERMAN. I don't think this is an issue that divides anybody, you know. I think everybody wants a system that works. I think that the Fox Agency would love to be able to speak for 100 percent of the publishers, if it can. And certainly, labels and other licensees of the music would like that, as well. Any system that can help get us there would be a plus.

Mr. BOUCHER. And you agree that a statutory system of some kind that promotes the more efficient clearance would be appropriate?

Mr. SHERMAN. I don't know whether a statutory system is necessary. It's possible to do something with some kind of voluntary collective approach. But we'd be interested in talking about anything that would work.

Mr. GREEN. The gentleman's time having expired——

Mr. BOUCHER. Thank you very much, Mr. Chairman.

Mr. GREEN. And Mr. Berman, I think we have time for you to ask one more question.

Mr. BERMAN. Thank you, Mr. Chairman. And I appreciate that the votes and the late start here prevent us from getting into it as deeply as we might want; but let me ask one more question.

Let me ask this one to Mr. Ramos. Mr. Potter has identified a number of problems arising from situations where, due to the architecture of digital technology—we've just been discussing this, in fact—music performances may also necessitate reproduction of the musical work. He expresses frustration that on-demand streaming companies have to seek a performance license from the performing rights organizations, and then seek a reproduction license from music publishers. In fact, that's a frustration he's been expressing for a long time.

However, on-demand streaming companies apparently do not have the same frustrations with securing both reproduction and performance licenses from the owners of sound recordings. I assume this is because owners of the sound recordings can act as a one-stop shopping location; while antitrust rules prohibit the performance rights organizations and music publishers from granting both performance and reproduction licenses.

Getting away from the issue of "Is it a performance or is it"—assuming both are implicated, as I think there's a basis for saying, should Congress now explore amending the antitrust laws so on-demand streaming companies could obtain all necessary rights to the musical work from one entity?

Mr. RAMOS. In my view, that would not be necessary. And the reason is that I think that the mechanisms exist to obtain those licenses currently. I think the only question is what the rate should be.

I do not perceive there to be a significant obstacle to licensing, to have to obtain a license from the PRO's as well as Harry Fox. And indeed, as a practical matter, since most of these services will engage in downloads as well as streaming—I realize there may be some companies that focus on just one or the other—they will have

to deal with both of those organizations in any event. And as a result, I think it will be equally efficient if it's licensed separately.

The key is the rate, is coming up with a fair rate. The deal that we made with RIAA was designed to facilitate that, to allow the services to get up and running so that we would not—the music publishers would not be an obstacle; and to give us a framework that we could then arrive at a rate.

Unfortunately, the level of activity in on-demand streaming has been relatively small, as compared to downloads. Consumers, it appears, want to own the music, and they appear to be more interested in the download services. And as a result, there has been little economic data that we can use to arrive at what we think would be a fair rate. But currently, the rate is zero from Harry Fox, as a practical matter. They don't have to—the deal is: Use now; pay later. And it's only when we arrive at a rate, will they have to pay.

So for those two reasons, I think this is not an obstacle. And I think, at least at this time, an antitrust exemption would not be necessary. I wouldn't rule out the possibility that at some point in the future, when we actually get into real negotiations on what the rate should be—and hopefully, I would have those with Mr. Potter, as well—that we might, among us, conclude that we need some assistance from Congress in the form of an antitrust exemption, or some statutory amendment to facilitate that. But at least at this stage, sitting here today, I don't think that's necessary.

Mr. GREEN. Thank you. I'd like to thank the witnesses for their testimony. The Subcommittee very much appreciates your contribution.

This concludes the oversight hearing on section 115 of the Copyright Act. The record will remain open for 1 week. Thank you for your cooperation. The Subcommittee stands adjourned.

[Whereupon, at 1:35 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Statement of the Honorable Lamar Smith
Chairman, Subcommittee on Courts, the Internet, and Intellectual Property

Oversight Hearing on
"Section 115 of the Copyright Act: In Need of An Update"
March 11, 2004

Let me open this hearing by recognizing a simple truth - most people don't think about music licenses when they listen to music at home, in the car, or on their iPods.

Technology continues to change how we hear music. From piano rolls, to vinyl records, to 8 tracks, to CDs and now MP3s, Americans have many ways to enjoy music. Only within the past decade have Americans been able to regularly access music transmitted in digital form.

Digital formats not only ensure that the listener hears a perfect reproduction, but they also create new business models. Yet the laws that govern music licensing have changed infrequently. Some testifying today feel that more changes to the Copyright Act are required to update it; others feel the existing laws are adequate.

Online music has quickly become a growth industry generating additional revenues for artists and providing legal alternatives to online pirate P2P sites. No longer can a music pirate attempt to rationalize his theft by stating that there are no legal online alternatives.

I'm pleased to see that the catalogs on online music services continue to expand. It is true that a few artists have chosen not to make their recordings available online and that is their right. It is also my right to listen to music on 45's instead of on a CD, not that I would make such a choice. So I would urge artists who have not made their music available online to enter the 21st Century.

This Subcommittee closely examined online music issues a few years ago to determine if Congressional intervention was warranted. The Subcommittee decided to wait until the market matured. Although the focus of the Committee several years ago was on webcasting, the public has expressed a far greater interest in legal downloading.

This change is an important reminder to Congress as we review Section 115 of the Copyright Act. Although some in Washington may believe that we can predict the future, Congress has repeatedly proven it cannot. The role of Congress should be to set general guidelines for the marketplace without restricting new business models from developing.

Although I have raised a few issues in the online music context, I look forward to hearing all of the concerns of the witnesses. I am concerned that laws and procedures first designed in the piano roll era may not be adequate for the digital era. So, I am pleased to see that the Copyright Office plans to update some of the procedural requirements of Section 115.

I do believe that the private sector is often the best place to resolve the disputes that inevitably arise as new business models evolve. I am pleased to see that the RIAA, the NMPA, the Harry Fox Agency, and the Songwriter's Guild agreed in October 2001 on some basic principles concerning online music subscription services.

However, I would be a much happier Chairman if online webcasters had been a party to this agreement. Since this was not the case, I look forward to hearing from the witnesses today on webcasting concerns related to Section 115. We should clarify the legal issues that remain outstanding to ensure that this market continues to grow.

This concludes my opening statement. The gentleman from California, Mr. Berman, is recognized for his opening statement.

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN

Mr. Chairman,

I look forward to what should be a truly compelling hearing today. While the title may be dull, and the statute in question impenetrable, the dynamics are really quite interesting.

Our private-sector witnesses appear to share a strong interest in the success of the legal music marketplace. The business survival of Digital Media Association members depends on the success of their legitimate, online music services. The success of new legal music offerings, like downloads and DVD-Audio, will provide vital new sources of royalties for members of the National Music Publishers Association. Recording Industry Association of America members will benefit in a number of ways: through the distribution of their works in secure new formats, through their

ownership of some online music services, and through the royalties generated by independent services.

Our witnesses are similarly united in the desire to stem music piracy. Though in different ways, piracy - both online and off - bedevils DiMA, NMPA, and RIAA members alike. Since the success of new music formats and online music services is a critical element in stemming the piracy tide, our witnesses have additional reasons to work to achieve this success.

So, at least at the macro level, the interests of our private-sector witnesses are strongly aligned. Unfortunately, this alignment of interests does not translate into an alignment of strategies for stimulating the legal music marketplace.

In particular, our witnesses appear to disagree pretty strongly about the availability, cost, scope, and convenience of both voluntary and statutory licenses for making reproductions of copyrighted musical compositions. NMPA appears to maintain that such licenses are easily obtained, and points to the success of the iTunes Music Store as proof. Our other witnesses appear to strongly disagree.

Clearly, the legitimate online music marketplace has made tremendous strides in the last few years, and these strides demonstrate that copyright owners are fully committed to its development. In fact, all our witnesses, including the Copyright Office, deserve some measure of credit for these advances. In 1999, only the pirate version of Napster provided music consumers an opportunity to download a wide variety of popular music. Today, a number of legitimate services, including Napster Version 2, iTunes, Rhapsody, pressplay, MusicNow, and many others, offer consumers cheap, legal mechanisms for downloading hundreds of thousands of songs.

Unfortunately, despite their meteoric growth, legal online music services still represent the equivalent of a fly on the back of the online piracy elephant. The 30 million downloads sold by iTunes in the past year are encouraging, but are nothing compared to the billions of copyrighted songs illegally downloaded through peer- to-peer services every month. The approximately 500,000 songs available through most legal music services represent an exponential increase from a few years ago, but pale in comparison to the millions of different songs available through the illegal services. Through admittedly anecdotal accounts, I understand that many users of legal online services still frequent illegal P2P services to obtain otherwise unavailable tracks.

While the downloading revolution calls into question the long-term viability of physical music formats, they will continue to make up the lion's share of the music market in the near-term. Thus, it is clear that music copyright owners must migrate to secure physical formats. If they continue to make music available on unprotected CDs, they are driving their own piracy problem.

Unfortunately, the rollout of new, secure physical formats has been less than dramatic. Only a handful of albums have been released on copy-protected CDs in the U.S., DVD-Audio has not penetrated the marketplace, and the pre-loading of music on PCs or other devices hasn't gotten much traction.

Clearly, something must be done to make new legal music offerings, both online and off, more competitive with the abundance of conveniently available, free illegal music. As I have noted, success in addressing this challenge will benefit all of our private-sector witnesses. Therefore, I intend to examine the testimony of our witnesses through the prism of two inter-related questions. First, does Section 115 facilitate or hinder the rollout of new legal music offerings? Second, depending on the answer to the first question, what, if anything, should Congress do to change Section 115?

I am very interested in hearing our witnesses' arguments on these question, so I yield back the balance of my time.

March 26, 2004

Congressman F. James Sesenbrenner, Jr.
2449 Rayburn House Office Building
Washington, D.C. 20515-4905

Re: Oversight hearing on Section 115 of the Copyright Act

Dear Congressman Sesenbrenner:

Thank you for providing us this opportunity to add our comments to the record of the oversight hearing held on March 11, and for allowing our voice, as an independent music publisher, to be heard.

The primary issue before that committee was whether or not Section 115 of the Copyright Act needs to be modified in light of such new and emerging technologies as permanent DPDs, on-line music subscription services (including time-limited downloads and streaming services), and so-called multi-session disks. In general, we believe the answer is no. However, certain terms may need to be set forth or explicitly defined in the Act. Secondarily, within the context of the above, there is the issue of how to deal with certain incidental technological creations (e.g., cache copies) that are created as part of the transmission process. We will address that issue last.

First, regarding permanent DPDs, there is no reason to make any modification in the Copyright Act, as provisions for this format are already explicitly set forth. We view permanent DPDs as being merely an extension of physical phonorecords. Furthermore, the market place is already handling the licensing of permanent DPDs in an efficient manner. In general, the procedure is that the record labels are acting to clear these rights from the publishers on behalf of their artists. The labels then may sublicense these rights to services such as iTunes. Overall, this procedure works very smoothly.

Second, regarding on-line subscription services, the marketplace has already begun to deal with this issue. On-line music subscription services such as MusicNet and FullAudio have already, consummated, or are in the process of consummating, agreements with many major publishers, including ourselves. Furthermore, similar services embodying the same issues (e.g., digital jukeboxes and ringtones) are routinely licensed every day. The RIAA/NMPA agreement is a bankrupt attempt to circumvent the market, and the basic tenet of which is, to borrow a phrase from the comics, "I'll gladly pay you Tuesday for a hamburger today." Please refer to my attached letter to the Copyright Office for additional details of our opinion on this matter.

Third, regarding so-called multi-session disks, provisions are already in place for each

record label's own artists (i.e., the so-called controlled composition provision normally present in each artist agreement). What the record labels would like to do now is to foist this restriction upon everyone else, as well. However, this is not valid, since a record label's artists are receiving additional compensation (such as royalty advances, and album financing), so that if they choose to give up some of their publishing royalties, they have voluntarily made a calculated decision.

By placing multiple versions on the same disk, it's not so much "added-value" to the consumer as it is decreased cost to the record companies. Hypothetically, suppose each version of a song was instead issue on a separate disk. Then consumers would be free to buy the versions they actually needed. The marketplace would determine how many disks of each version were used, sold and manufactured. Most likely, on average, consumers would buy more than one version, but far less than all the versions possible. Eventually, the marketplace would determine which format(s) survived and which format(s) ceased to exist. In the real world, some sort of compromise between paying for only one usage and paying for every multiple usage is reasonable. However, all versions contained on a disk should be licensed and the rate should be determined by the marketplace.

Finally, regarding cache copies and the like, we believe they are merely incidental to the process, and provide no direct value to the consumer. As long as the consumer cannot directly access and obtain a benefit from these files, there should be no additional royalty due.

Thank you again for providing us this opportunity to provide our comments. I would be more than happy to address any further questions you may have regarding these issues.

Sincerely,

Eric Polin
Partner

cc: Randall Wixen
Erik Szabo

January 24, 2002

Wixen Music Publishing, Inc.

David O. Carson, Esq.
Office of the Copyright General Counsel
P.O. Box 70977
Southwest Station
Washington, DC 20024

RECEIVED
JAN 29 2002
GENERAL COUNSEL
OF COPYRIGHT

Re: Mechanical and Digital Phonorecord Delivery Compulsory License
Docket No. RM 2000-7B

Dear Mr. Carson:

Our company provides music publishing administration for such well-known songwriters as Neil Young, Jackson Browne, the Doors, Tom Petty, Styx, Michael McDonald, Richard Marx, Weezer, Journey, Barry Mann, and Cynthia Weil. We would like to take this opportunity to respond to the Copyright Office's request for additional public comment on its Notice of Inquiry in light of the RIAA/NMPA/HFA agreement.

We have already commented on several issues regarding this matter in our letter to the Register of Copyrights dated September 26, 2001 (a copy of which is included here for your easy reference). I will refer you to that letter for our comments concerning those issues raised by paragraph 9.2 of the RIAA/NMPA/HFA agreement. We also object to several other provisions of the agreement as follows:

- Paragraph 3.3 of the RIAA/NMPA/HFA agreement provides that if a license is requested for a HFA member publisher's composition, that HFA will also issue such licenses on behalf of the share of such composition controlled by a non-member publisher, regardless of the non-HFA publisher's desire.

- Paragraph 3.5 extends paragraph 3.3 to included compositions which are not controlled whatsoever by a HFA member publisher. It also establishes incentive fees payable to HFA by the particular RIAA member for HFA recruiting non-members to participate under the terms of the agreement.

- Paragraph 8 provides that NMPA and HFA agree to recognize On-Demand streaming downloads and Limited Downloads as subject to the compulsory license provisions of the U.S. Copyright Act, that they are bound to publically support this position, and that they are forbidden from

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forbidden from commencing, supporting, or in any way condoning legal actions to the contrary.

The RIAA/NMPA/HFA agreement also raises several other issues. First, we are appalled that the agreement was made without any agreement as to the actual rate that will be paid for the use of compositions on so-called digital subscription services. We do not necessarily agree that a digital phonorecord delivery (DPD) or the use of such through a subscription service constitutes a mechanical usage or that it should be subject to a compulsory license provision. However, if it is determined that such is the case, a download is a download. The license rate for a so-called temporary download should be just as much as that for a permanent download. Record companies would like to build into U.S. copyright law the provision for a reduced rate on temporary downloads. This is a similar situation to when record companies re-release phonorecords on their so-called 'budget' or 'mid-line' series. However, the reduced rate for these products is negotiated in the market place. There is no need to mandate these rates in Federal legislation.

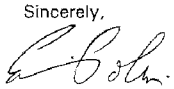
Second, compulsory mechanical license provisions are not appropriate for these uses. It seems to us that the limits applied to copyright ownership under U.S. copyright law (e.g., the compulsory mechanical license provisions, the "fair use" doctrine, copyright ownership expiration) were established in order to offset the potential negative effects that monopoly ownership of copyrights might cause to the economy and/or the dissemination of information. These concerns might have been valid at the beginning of the twentieth century when songwriters were on a more equal footing with entertainment companies. However, in this day of the Internet and rapid entertainment industry consolidation, it is the oligopoly of the big five record companies (BMG, EMI, Universal, Sony, and Warner) wielding monopolistic power over intellectual property that is of greater concern.

Finally, neither the NMPA nor HFA can truly claim to represent songwriters' or music publishers' interests in this matter. With the blurring of the boundaries between these companies' record divisions and their publishing divisions, so that arm-length dealings between the two becomes subjugated to the bottom line interests of the corporate whole, it is ludicrous for the multi-national publishing companies to propose that they represent the best interests of music publishing or songwriters. So what we have is the NMPA/HFA representing the interests of a few major publishing companies owned by entertainment conglomerates that also own the records companies represented by

the RIAA. In light of foregoing, the RIAA/HFA agreement is like having the left hand shake the right hand.

Thank you for providing us this opportunity to provide our comments. Please do not hesitate to contact me you should have any questions about or wish to discuss the foregoing.

Sincerely,



Eric Polin
Partner

cc: Randall Wixen
Erik Szabo

September 26, 2001

Wixen Music Publishing, Inc.

Marybeth Peters
Register Of Copyrights
c/o Copyright Arbitration Royalty Panel (CARP)
P.O. Box 70977
Southwest Station
Washington, DC 20024-0977

Re: Proposed amendments to the regulations governing the content and service of certain notices on the copyright owner of a musical work

Dear Ms. Peters:

Our company provides music publishing administration for such well-known songwriters as Neil Young, Jackson Browne, the Doors, Tom Petty, Styx, Michael McDonald, Richard Marx, Barry Mann, and Cynthia Weil. We would like to take this opportunity to provide our comments in regard to the above-noted proposed amendments.

First and foremost, it appears that the primary purpose of these proposed changes is to make it easier for licensees to obtain compulsory mechanical licenses. We do not believe this to be desirable goal. To the contrary, we believe it should be more difficult for licensees to obtain compulsory mechanical licenses. Record clubs, as a matter of practice, already skirt the entire mechanical licensing process. We are opposed to any rule changes that would serve to further erode the copyright owner's intellectual property rights.

Second, the proposed amendments would allow songs with the same copyright owner to be combined onto one notice of intention. We are opposed to this change. In addition to the reasons previously mentioned, we have found that as a matter of practice, licensees are often unable to distinguish between the agent of the copyright owner and the actual copyright owner. We often receive royalty statements and checks combining multiple copyright owners who we represent. This creates reduced efficiency and more work, since we must either return the statements and checks to the licensee for correction or else manually correct the statements and re-issue checks ourselves. We see the proposed rule change as further contributing to this problem. Licensees should be required to determine the actual copyright owner of each song and send out a separate notice of intention of each song.

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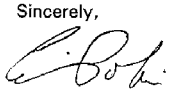
Third, the proposed amendment would allow the licensee's agent to sign the notice. If this is permitted, then it should also be mentioned in the notice that the licensee shall remain primarily liable for fulfillment of the compulsory license provisions of the U.S. Copyright Act. Further, the licensee's direct contact information (e.g., street address, phone number, fax number) should be provided in the notice.

Finally, the proposed amendment would provide that certain so-called "harmless errors" should not cause potential licensees to be denied the use of the license if such errors do not affect the legal sufficiency of the notice. To this end, the Copyright Office is proposing to add a new section to the statute which would clarify that such errors will be considered harmless and will not affect the validity of the notice. We are opposed to this change in its entirety. It is the job of the judiciary to determine legal sufficiency. Such a modification would encourage the filing of inaccurate notices and lead to licensees' false complacency that by merely filing a notice (no matter the accuracy) they were immune to any legal action.

Thank you for providing us this opportunity to provide our comments. Please do not hesitate to contact me should you have any questions about or wish to discuss the foregoing.

Sincerely,



Eric Polin
Partner

cc: Randall Wixen
Erik Szabo

ASCAP

MARILYN BERGMAN
President and
Chairman of the Board

March 17, 2004

Hon. Lamar Smith
2231 Rayburn House Office Building
Washington, DC 20515

Hon. Howard Berman
2221 Rayburn House Office Building
Washington, DC 20515

Re: Oversight Hearing on "Section 115 of the Copyright Act: In Need of an Update"

Dear Chairman Smith and Representative Berman:

I write on behalf of the more than 175,000 composer, lyricist and publisher members of the American Society of Composers, Authors and Publishers (ASCAP). As the Subcommittee is fully familiar with ASCAP and its operations, there is no need to restate them here. It is enough to note that ASCAP licenses the nondramatic public performing rights of its members' copyrighted musical compositions to all who perform their music publicly, including those who do so over the Internet.

ASCAP did not intend to comment on the subject matter of the Oversight Hearing, as it was to deal with "mechanical" rights – the rights of reproduction and distribution of musical works – and not with performing rights. ASCAP does not license mechanical rights, and, indeed, may not do so under the terms of the antitrust consent decree which governs its operations.

However, a disappointing exchange between Representative Boucher and the Register of Copyrights at the hearing compels us to comment, for the exchange, we believe, did not state what the law is, nor correctly state what it should be.

Representative Boucher asked the Register if there is a performance when there is a download, and the Register restated her position, set forth in the so-called "Section 104 Report" under the Digital Millennium Copyright Act, that the performing right was valueless in the context of downloads, and that statutory "clarification" might, in some circumstances, be warranted to make that point.

We strongly disagree. Current law is clear that the performing right *is* implicated in downloads. And there is neither a need nor a justification for changing the law.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS
NEWYORK 3849022 v1 (2K) ASCAP Building One Lincoln Plaza New York New York 10023
212.621.6000 Fax: 212.621.6203 E-Mail: info@ascap.com

When Congress passed the 1976 Copyright Act, it did so with foresight, for it recognized that *any* process that resulted in a public performance of music implicated the performing right. It further recognized that it could not legislate for any particular technology, but rather that the principle applied even for technological uses not yet invented:

> A performance may be accomplished "either directly or by means of any device or process," including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.

H. Rep. No. 94-1476, 94th Cong., 2d Sess., 63 (1976).

Congress reaffirmed this view when it considered the use of music on the Internet. Indeed, the current law can be simply stated by reference to the reports of both this Committee and its Senate counterpart on the Digital Performance Right in Sound Recordings Act of 1995: *Every transmission of a copyrighted musical work to the public constitutes a public performance of that work*:

> Under existing principles of copyright law, the transmission or other communication to the public of a musical work constitutes a public performance of that musical work. . . . New technological uses of copyrighted sound recordings are arising which require an affirmation of existing copyright principles and application of those principles to the digital transmission of sound recordings, to encourage the creation of and protect rights in those sound recordings and the musical works they contain.

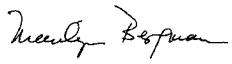
H. Rep. No. 104-274, 104th Cong., 1st Sess., 22 (1995); *accord*, S. Rep. No. 104-128, 104th Cong., 1st Sess., 27 (1995). Those principles have not changed one iota since the reports were written.

Congress should not make the mistake the Copyright Office has made, and confuse the existence of rights with their valuation in the marketplace. Certainly, different uses of different rights may be valued differently in the marketplace. One can say that the performing right may have great value for Internet streaming services which are the equivalent of over-the-air broadcasts, and relatively little value for downloads which are the equivalent (and no more) of record purchases. But that broad-brush generalization does not account for the many nuances of use which only the marketplace may accurately value. For example, a "download" resulting in a copy which may be listened to only once, and which then is erased from the home user's device, is the functional equivalent of a performance. It would be wrong to deprive the songwriter and music publisher of the right to be paid for their performing right in that circumstance simply because the label "download" is attached to the process. With all respect, legislation simply cannot make such subtle distinctions, while the marketplace can – especially in an environment which changes daily as new technologies and uses arise.

The Internet users of music, represented by DiMA at the hearing, expressed no dissatisfaction with performing rights licensing that would even suggest, let alone justify, a legislative change or "clarification."

Indeed, the hearing revealed a very interesting fact: The Internet users of music, represented by DiMA, were unstinting in their praise for ASCAP's licensing mechanism and practices. DiMA's representative held ASCAP up as an example of a licensing system that works on the Internet – the shining model for all in the world of Internet music to follow. It is curious, then, that DiMA and its supporters would simultaneously seek to deprive ASCAP's members of their rights. It is even more curious that, while some individual DiMA members have negotiated or are negotiating licenses with ASCAP, DiMA has not met with us to negotiate an industry-wide license, despite our invitations to do so. We respectfully suggest that DiMA and its members should, quite literally, put their money where their mouth is. Rather than call for unnecessary legislative action which would deprive creators and copyright owners of their intellectual property, DiMA should use the marketplace system it so admires. It will find us receptive and reasonable if it does so.

Respectfully submitted,



Marilyn Bergman

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

March 23, 2004

Dear Mr. Chairman:

I am writing to clarify the record in connection with my written testimony for the March 11 oversight hearing on "Section 115 of the Copyright Act: In Need of an Update." In reviewing that testimony, I realize that I may have mischaracterized section 115(c)(3)(H)(i) – a provision that had been added with the passage of the Digital Performance Rights Act of 1995 – as an expansion of the scope of the license when, in fact, it was merely a clarification of the scope of the license.

In my written testimony, I said:

> Another important distinction between traditional mechanical phonorecords and DPDs brought about by the DPRA is the expansion of the statutory license to include reproduction and transmission by means of a digital phonorecord delivery of a musical composition embodied in a sound recording owned by a third party, provided that the licensee obtains authorization from the copyright owner of the sound recording to deliver the DPD.[1] Thus, the license provides for more than the reproduction and distribution of one's own version of a performance of a musical composition by means of a DPD. Under the expanded license, a service providing DPDs can in effect become a virtual record store if it is able to clear the rights to the sound recordings. More importantly, the DPRA allows a copyright owner of a sound recording to license the right to make DPDs of both the sound recording and the underlying musical work to third parties if it has obtained the right to make DPDs from the copyright owner of the

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[1] "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 sections 502 through 506 and section 509, unless-

(I) the digital phonorecord delivery has been authorized by the copyright owner of the sound recording; and

(II) the owner of the copyright in the sound recording or the entity making the digital phonorecord delivery 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)(H)(i).

> musical work. See 17 U.S.C. §115(c)(3)(I), S. Rep. No. 104-128, at 43 (1995).

In fact, it was the Copyright Act of 1976 – and not the DPRA – which first permitted someone other than the copyright owner of a sound recording to use the mechanical license to duplicate a musical work embodied within the sound recording provided that the licensee's reproduction and distribution of the sound recording had been authorized by the sound recording copyright owner. The DPRA provided for similar treatment of someone other than the sound recording copyright owner who wished to use the compulsory license to make digital phonorecord deliveries.

Section 115(c)(3)(H)(i), which was cited in my written testimony, confirms that a person who wishes to make digital phonorecord deliveries must either be the copyright owner of the sound recording or have authorization from the copyright owner of the sound recording. In addition, the person who wishes to make the DPD must either have authorization from the copyright owner of the musical work or obtain a compulsory license unde section 115.

What I should have said in my written testimony, in place of the paragraph quoted above, is:

> The DPRA also clarified that the statutory license for digital phonorecord deliveries permits reproduction and transmission by means of a digital phonorecord delivery of a musical composition embodied in a sound recording owned by a third party, provided that the licensee obtains authorization from the copyright owner of the sound recording to deliver the DPD. Thus, the license provides for more than the reproduction and distribution of one's own version of a performance of a musical composition by means of a DPD. Under the expanded license, a service providing DPDs can in effect become a virtual record store if it is able to clear the rights to the sound recordings. More importantly, the DPRA allows a copyright owner of a sound recording to license the right to make DPDs of both the sound recording and the underlying musical work to third parties if it has obtained the right to make DPDs from the copyright owner of the musical work. See 17 U.S.C. §115(c)(3)(I), S. Rep. No. 104-128, at 43 (1995).

I request that this letter be included in the record of the hearing in order to clarify and correct my written testimony.

Sincerely,

Marybeth Peters

Marybeth Peters
Register of Copyrights

The Honorable Lamar Smith
Subcommittee on Courts, the Internet,
and Intellectual Property
B-351A Rayburn House Office Building
Washington, DC 20515

Frances W. Preston
President
Chief Executive Officer

April 2, 2004

The Honorable Lamar Smith
Chairman
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
B351A Rayburn H.O.B.
United States House of Representatives
Washington, DC 20515

The Honorable Howard Berman
Ranking Minority Member
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
B336 Rayburn H.O.B.
Washington, DC 20515

Re: Oversight Hearing on "Section 115 of the Copyright Act: In Need of an Update?"

Dear Mr. Chairman and Ranking Minority Member:

The purpose of this letter is to express the views of Broadcast Music, Inc. ("BMI") for the written record of the Subcommittee's recent oversight hearing on "Section 115 of the Copyright Act: In Need of an Update?" As you know, BMI is a collective copyright clearance organization that distributes public performing right royalties to its affiliated songwriters, composers and music publishers. BMI represents approximately 300,000 affiliates with a repertory of some 4.5 million musical works, as well as thousands of foreign works through its affiliation agreements with over sixty foreign performing right societies. BMI issued the first commercial Internet copyright license for music performed on websites in April 1995 and has continued to provide licensing solutions for the evolving online music marketplace and new media users of music.

On behalf of BMI, I commend you and your subcommittee for leadership on copyright law issues and for producing a body of law that is able to accommodate technological and global business changes.

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Ordinarily, BMI would not provide comments at a hearing on section 115 which covers "mechanical license" rights (*i.e.*, licenses for the rights of reproduction and distribution of musical works), and does not cover the public performing right (found in section 106(4)) since BMI licenses the latter and not the former.

However, two lines of discussion occurred at the hearing that clearly implicate the interests of BMI.

First, the Register of Copyrights (Marybeth Peters) testified that the means to create and provide music to the public has radically changed in the past decade, necessitating changes in the law. She set forth several possible options for legislative action. In so doing, she praised the performing right organizations (BMI, ASCAP and SESAC) for their "very successful model for collective administration of . . . the public performance of musical works," recommending that "a similar model ought to work for licensing of the rights or reproduction and distribution". BMI is grateful to the Register for her praise. During a time of blinding technological change, we have worked hard to earn it. For over six decades, BMI has been collecting license fees and distributing royalties to songwriters, composers and publishers. Throughout its entire history, BMI has prided itself on innovative thinking and service to the customer.

The Register also suggested, among her options, that the Subcommittee consider expansion of the section 115 digital phonorecord delivery ("DPD") license to include both reproductions and performances of musical works under a single license requiring a single payment. BMI believes that great care must be taken by Congress if it acts in this area to ensure that no harm is done to the economic interests of songwriters, composers and music publishers in the name of "streamlining" the licensing process. Without the songwriters' contribution, there would be no creative spark for the entire music business.

The Register's suggestion addressed the fact that downloads of musical works and on-line audio streaming transmissions of musical works include elements related to both the public performing right as well as the reproduction and distribution rights of the musical work. Rights in the copyrighted sound recording are also implicated. As a result, an Internet music service needs to obtain multiple licenses to transmit music on the Internet. This situation is not in fact different from the broadcasting industry, the background music industry and other users of recorded music who have had to obtain multiple rights in music. BMI submits that any amendment to Section 115 that effectively curtails either the mechanical right in streaming or the public performing right in downloads would deprive songwriters and publishers of the full economic value of their works.

In a comment made to the Register, Representative Berman constructively suggested that the Subcommittee consider an antitrust exemption in section 115 to permit rights holders of both the performing right and the reproduction/distribution rights in the

musical work mutually to agree about the offer of such licenses covering digital phonorecord deliveries. In BMI's view, any antitrust exemption should be tailored narrowly to fit the needs of rights holders and users in the digital on-line environment. Such an amendment to the law would allow the performing right organizations to work together with music publishers who control the mechanical license rights to musical works, to offer digital online music users combined licenses addressing their business needs. This change in the law would allow the marketplace to ensure that the rights holders are adequately compensated for all the rights affected.

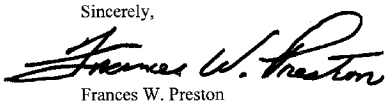
Second, in what was otherwise a generally constructive hearing, a note of discord was sounded when Representative Boucher questioned the Register about an element in her section 104 Report regarding the applicability of the public performing right to digital downloads of music when no contemporaneous rendering takes place. While the Register stated that it would be difficult to define those instances when the public performing right in downloads should be considered fair use, the Register, after being prodded by several follow-up questions, stated that a statute "could" be drafted to this effect.

When Congress passed the Digital Performance Right in Sound Recordings Act of 1995, it clarified the application of section 115 to DPDs and expressly preserved the applicability of the public performing right to digital transmissions. In reviewing the Act, a respected commentator observed that the "prudent course would seem for purveyors of the new digital services to pay royalties under both theories [*i.e.*, performance and mechanical]." Nimmer on Copyright 2:8.24(C)(2003). BMI agrees. Any legislative attempt to simplify the relationship between a public performance and a download in the digital environment is fraught with peril. New technologies and business models on the Internet blur the line between the reproduction right and the performing right. A statute would be almost impossible to draft. Put simply, a viable alternative exists – the marketplace should resolve the issue of the appropriate value of the public performing rights in downloads in all of these various different permutations.

A marketplace solution to "one-stop shopping," if facilitated by the antitrust law, could preserve the concept of marketplace valuation, would build upon the divisibility of rights in the 1976 Copyright Act, and would promote the availability of collective licenses to the benefit of the public. It would be consistent with European and other foreign licensing responses to these developments. By contrast, any effort to take a hatchet to existing law and eliminate the economic value of the rights of songwriters, composers and music publishers would have an opposite effect, and would be extremely detrimental to songwriters and composers.

BMI prefers a constructive approach rather than a destructive one and is ready, willing and able to work with the Subcommittee on improvements to section 115 of the Copyright Act. Mr. Chairman, BMI is grateful for this opportunity to submit our thoughts. We look forward to working with you, your Subcommittee, the Copyright Office and other interested parties to create a law that works to the benefit of creators and the public.

Sincerely,



Frances W. Preston

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