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Sound Recordings:
Developments and Prospects in U.S. Law

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1. S. 2500, Performance Rights Act, introduced by Senators Hatch, Leahy, Feinstein & Cornyn, December 18, 2007.

   See also H.R. 4789, Performance Rights Act, introduced by Representatives Berman, Issa, Conyers, Shadegg, Harman and Blackburn, December 18, 2007.

2. H. Con. Res. 244, introduced by Representative Green, with 52 cosponsors (and ultimately 186 cosponsors), October 31, 2007.

3. Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on Judiciary, United States House of Representatives, 110th Congress, 1st Session, July 31, 2007, Hearing on "Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century"

4. Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on Judiciary, United States House of Representatives, 110th Congress, 1st Session, March 22, 2007, Hearing on "Reforming Section 115 of the Copyright Act for the Digital Age."

5. Notice of Roundtable Regarding the Section 115 Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 72 Fed. Reg. 30039 (May 30, 2007)

II

110TH CONGRESS
1ST SESSION

S. 2500

To provide fair compensation to artists for use of their sound recordings.

IN THE SENATE OF THE UNITED STATES

DECEMBER 18, 2007

Mr. LEAHY (for himself, Mr. HATCH, Mrs. FEINSTEIN, and Mr. CORKER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide fair compensation to artists for use of their sound recordings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Performance Rights Act''.

SEC. 2. EQUITABLE TREATMENT FOR TERRESTRIAL BROADCASTS.

(a) PERFORMANCE RIGHT APPLICABLE TO RADIO TRANSMISSIONS GENERALLY.—Section 106(6) of title 17, United States Code, is amended to read as follows:

''(6) in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission.''.

(b) INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING PERFORMANCE RIGHT.—Section 114(d)(1) of title 17, United States Code, is amended—

(1) in the matter preceding subparagraph (A), by striking ''a digital'' and inserting ''an''; and

(2) by striking subparagraph (A).

(c) INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING STATUTORY LICENSE SYSTEM.—Section 114(j)(6) of title 17, United States Code, is amended by striking ''digital''.

(d) ELIMINATING REGULATORY BURDENS FOR TERRESTRIAL BROADCAST STATIONS.—Section 114(d)(2) is amended in the matter preceding subparagraph (A) by striking ''subsection (f) if'' and inserting ''subsection (f) if, other than for a nonsubscription and noninteractive broadcast transmission,''.

SEC. 3. SPECIAL TREATMENT FOR SMALL, NONCOMMERCIAL, EDUCATIONAL, AND RELIGIOUS STATIONS AND CERTAIN USES.

(a) SMALL, NONCOMMERCIAL, EDUCATIONAL, AND RELIGIOUS RADIO STATIONS.—

(1) IN GENERAL.—Section 114(f)(2) of title 17, United States Code, is amended by adding at the end the following:

''(D) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that has gross revenues in any calendar year of less than $1,250,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $5,000 per year, in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.

''(E) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that is a public broadcasting entity as defined in section 118(f) may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $1,000 per year, in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any

other administrative, judicial, or other Federal Government proceeding.''.

(2) PAYMENT DATE.—A payment under subparagraph (D) or (E) of section 114(f)(2) of title 17, United States Code, as added by paragraph (1), shall not be due until the due date of the first royalty payments for nonsubscription broadcast transmissions that are determined, after the date of the enactment of this Act, under such section 114(f)(2) by reason of the amendment made by section 2(b)(2) of this Act.

(b) TRANSMISSION OF RELIGIOUS SERVICES; INCIDENTAL USES OF MUSIC.—Section 114(d)(1) of title 17, United States Code, as amended by section 2(b), is further amended by inserting the following before subparagraph (B):

''(A) an eligible nonsubscription transmission of—

''(i) services at a place of worship or other religious assembly; and

''(ii) an incidental use of a musical sound recording;''.

SEC. 4. AVAILABILITY OF PER PROGRAM LICENSE.

Section 114(f)(2)(B) of title 17, United States Code, is amended by inserting after the second sentence the fol-

lowing new sentence: ''Such rates and terms shall include a per program license option for terrestrial broadcast stations that make limited feature uses of sound recordings.''.

SEC. 5. NO HARMFUL EFFECTS ON SONGWRITERS.

(a) PRESERVATION OF ROYALTIES ON UNDERLYING WORKS.—Section 114(i) of title 17, United States Code, is amended in the second sentence by striking ''It is the intent of Congress that royalties'' and inserting ''Royalties''.

(b) PUBLIC PERFORMANCE RIGHTS AND ROYALTIES.—Nothing in this Act shall adversely affect in any respect the public performance rights of or royalties payable to songwriters or copyright owners of musical works.

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110TH CONGRESS
1ST SESSION

H. CON. RES. 244

Supporting the Local Radio Freedom Act.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 31, 2007

Mr. GENE GREEN of Texas (for himself, Mr. CONAWAY, Mr. ARCURI, Ms. BEAN, Mr. BERRY, Mr. BONNER, Mr. BOOZMAN, Mr. BROWN of South Carolina, Mr. CAMP of Michigan, Mr. CARDOZA, Mr. CARTER, Mr. CHABOT, Mr. COLE of Oklahoma, Mr. CRENSHAW, Mr. DAVIS of Kentucky, Mr. DENT, Mr. ELLSWORTH, Mrs. EMERSON, Mr. GARRETT of New Jersey, Mr. GOODE, Ms. GRANGER, Mr. GRAVES, Mr. AL GREEN of Texas, Mr. HOEKSTRA, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. JONES of North Carolina, Mr. KIND, Mr. KINGSTON, Mr. LAMPSON, Mr. MANZULLO, Mr. MCHENRY, Mr. MOORE of Kansas, Mr. MURPHY of Connecticut, Mr. NEUGEBAUER, Mr. ORTIZ, Mr. PEARCE, Mr. PENCE, Mr. POE, Mr. POMEROY, Mr. RAHALL, Mr. RAMSTAD, Mr. ROGERS of Alabama, Mr. ROGERS of Michigan, Mr. RUPPERSBERGER, Mr. RYAN of Ohio, Mr. SESSIONS, Mr. SHULER, Mr. SHUSTER, Mr. SOUDER, Mr. TURNER, Mr. WICKER, Mr. WILSON of South Carolina, and Mr. WYNN) submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

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CONCURRENT RESOLUTION

Supporting the Local Radio Freedom Act.

Whereas the United States enjoys broadcasting and sound recording industries that are the envy of the world, due to the symbiotic relationship that has existed among these industries for many decades;

Whereas for more than 80 years, Congress has rejected repeated calls by the recording industry to impose a per-

formance fee on local radio stations for simply playing music on the radio and upsetting the mutually beneficial relationship between local radio and the recording industry;

Whereas local radio stations provide free publicity and promotion to the recording industry and performers of music in the form of radio air play, interviews with performers, introduction of new performers, concert promotions, and publicity that promotes the sale of music, concert tickets, ring tones, music videos and associated merchandise;

Whereas Congress found that ''the sale of many sound recordings and the careers of many performers benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting'';

Whereas local radio broadcasters provide tens of thousands of hours of essential local news and weather information during times of national emergencies and natural disasters, such as September 11th, and Hurricanes Katrina and Rita, as well as public affairs programming, sports, and hundreds of millions of dollars of time for public service announcements and local fund raising efforts for worthy charitable causes, all of which are jeopardized if local radio stations are forced to divert revenues to pay for a new performance fee;

Whereas there are many thousands of local radio stations that will suffer severe economic hardship if any new performance fee is imposed, as will many other small businesses that play music including bars, restaurants, retail establishments, sports and other entertainment venues, shopping centers and transportation facilities; and

Whereas the hardship that would result from a new performance fee would hurt American businesses, and ultimately the American consumers who rely on local radio for news, weather, and entertainment; and such a performance fee is not justified when the current system has produced the most prolific and innovative broadcasting, music, and sound recording industries in the world: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air, or on any business for such public performance of sound recordings.

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Statement of

Marybeth Peters
The Register of Copyrights
before the
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on Judiciary
United States House of Representatives

110th Congress, 1st Session
July 31, 2007

Hearing on "Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century"

Chairman Berman, Ranking Member Coble, and Members of the Subcommittee, thank you for the opportunity to appear before you to testify about the need to update the public performance right for sound recordings. The marked decline in record sales and its ripple effects throughout the industry bring us together once again to discuss legislative options that would allow performers and record companies to receive reasonable compensation for their creative endeavors, while at the same time ensuring that the use of new technologies for bringing music to the consumer are not hampered.

As you know, in 1995 Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA")[1] that, for the first time, granted to copyright owners of sound recordings[2]

[1] Pub. L. No. 104-39, 109 Stat. 336 (1995).

[2] When discussing sound recordings, it is important to consider their relationship to other related copyrighted works. A CD, the embodiment of a sound recording, actually includes two copyrighted works. The first is the sound recording itself - the aggregate sounds of music, lyrics and musical instrumentation and production. The second is the underlying musical composition - consisting of the written notes and lyrics - that is contained in the sound recording. Although both works are protected under copyright law, they do not share equal protection. Currently, musical works enjoy a full right of public performance, while the performance right in sound recordings is limited to performances by digital transmission.

a limited public performance right. Congress took this step after carefully considering the effect that new digital technologies would have on the sale of records - a primary source of revenue for performers and the record industry. It determined at that time that copyright owners of sound recordings required more protection under the law to guard against unlawful copying and believed that a limited performance right for public performances by means of digital transmission subject to a statutory license was an adequate solution.

I believe the creation of this limited performance right for sound recordings was a step in the right direction. This initial step helped foster the growth of new services that make legitimate use of music transmitted over digital networks such as the Internet and satellite radio services. However, continued technological developments as well as new business models – both legitimate and illegitimate – have given consumers more choices and greater flexibility in how they listen to and obtain their music, but often they do not allow the creators to share in the profits gained from the use of their works. This is particularly true of the technological developments in the area of broadcasting and the services that compete with broadcasting. Terrestrial broadcasters have long enjoyed the freedom to use the newest record releases without any payment to the artists or the record companies. While in the past, broadcasters' argument that airplay promotes the sale of records may have had validity, such a position is hard to justify today in light of recent technological developments and the alternative sources of music from other music services, and declining record sales. So what is to be done?

In answering that question, it is important to gauge the extent of the problem and craft an appropriate response just as Congress did when it first created the limited performance right. Then as now, the goal of any legislative change would be to preserve and "protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues from traditional sales, . . . without hampering the arrival of new technologies, and

without imposing new and unreasonable burdens on radio and television broadcasters."[3] Of course, in 1995, Congress accepted the notion that terrestrial over-the-air broadcasts offered no threat to the record industry and actually promoted the sales of records. The actual turn of events since that time, however, casts doubt on this premise and the sufficiency of the limited performance right to achieve this goal.

Record sales continue to drop precipitously and revenues from other sources are not making up the short fall. Last year, consumers purchased 588.2 million albums. This figure is a marked decrease over the number sold just six years earlier when the number of album sales topped out at 785.1 million.[4] But the decline in record sales tells only part of the story.

A recent article in Rolling Stone recounts how the decline in music sales has had ominous consequences for everyone associated with the record industry, noting that "more than 5,000 record-company employees have been laid off since 2000" and that "about 2, 700 record stores have closed across the country since 2003."[5] Such numbers might suggest that the interest in music has waned, but that is not the case. The article goes on to observe that "[d]espite the industry's woes, people are listening to at least as much music as ever. Consumers have bought more than 100 million iPods since their November 2001 introduction, and the touring business is thriving, earning a record $437 million last year. And according to research organization NPD Group, listenership to recorded music -- whether from CDs, downloads, video games, satellite radio, terrestrial radio, online streams or other sources -- has increased since 2002. The problem the business faces is how to turn that interest into money."[6]

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[3] S. Rep. No. 104-128, at 14-15 (1995).

[4] Brian Hiatt and Evan Serpick, *The Record Industry's Decline*, Rolling Stone (June 19, 2007), http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline, citing sales figures provided by Nielsen SoundScan.

[5] *Id.*

[6] *Id.*

While I have long supported a full performance right for sound recordings, I recognize that the time may still not be right to seek this change.[7] Nevertheless, I strongly urge Congress to expand the scope of the performance right for sound recordings to cover all analog and digital by broadcasters as a way to enable creators of the sound recordings to adapt to the precipitous decline in revenue due to falling record sales. Such an approach has multiple benefits. It would provide performers and record producers with an ongoing and growing source of revenue, and it would also level the playing field between, on the one hand, digital music services and webcasters who today pay a performance royalty on each digital transmission and, on the other hand, broadcasters who pay nothing for their use of sound recordings when transmitted over-the-air.

Is an exemption for terrestrial broadcasters justified?

Although Congress recognized the existence of a "mutually beneficial economic relationship between the recording and traditional broadcasting industries"[8] when it passed the DPRA in 1995, a claim broadcasters' continue to assert,[9] significant doubts exist with regard to the amount of promotional value gained from the performance of sound recordings by terrestrial radio as compared to exposure to new music from other sources. Today listeners are not limited to what they hear on traditional radio to inform their choices. Consequently, whatever promotional value that may have existed in 1995 has been diluted by the increase in alternative media, such as satellite radio and digital music services, through which listeners can listen to the current top 10 or find and experience music by new groups. In fact, a finding was made in the

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[7] An overview of the history of the struggle to obtain a full performance right for sound recordings and the Office's longstanding position in support thereof is recounted in David Carson's statement to this subcommittee during hearings on "Internet Streaming of Radio Broadcasts." See Statement of David Carson, General Counsel, United States Copyright Office before the House Committee on the Judiciary, Subcommittee on Courts, the Internet and Intellectual Property, July 15, 2004. http://www.copyright.gov/docs/carson071504.pdf

[8] S. Rep. No 104-128, at 15 (1995); and H. Rep. No. 104-274 at 13 (1995).

[9] NAB, *NAB Responds To musicFirst Coalition*, NAB Press Release (June 14, 2007).

2002 webcasting ratesetting proceeding that whatever promotional value that existed for webcasting was similar to that of traditional over-the-air broadcasting.[10] Moreover, broadcasters' claims ignore the fact that songwriters and music publishers receive payments for the same public performances for which performers and record companies do not. The broadcasters' rhetoric never accounts for this inconsistency and it fails to explain why airplay provides promotional value to performers and record companies but not to the songwriters and music publishers.

It is also worth noting that the exemption for broadcasters was based upon an understanding that promotional airplay led to record sales. Sales, however, have plummeted and continue to spiral downward. One reason for declining sales is the continued widespread use, even in the wake of the Supreme Court's ruling in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*,[11] of peer-to-peer file sharing services which permit millions of users to obtain infringing copies of sound recordings, with devastating effect on the legitimate market for phonorecords. Alongside this practice is the availability of new technology that allows a listener to rip a stream of music and copy the song for future use.

[10] 67 FR 45252, 45255 (July 8, 2002).

[11] 545 U.S. 913 (2005).

Of course, terrestrial broadcasters are not responsible for the actions of its listeners. Nevertheless, this $20 billion broadcast radio industry continues to advocate for the right to use sound recordings, without payment. Why? So it can use the music as a hook to get listeners and, by extension, profit-generating advertising dollars.[12] This arrangement stands in stark contrast to most of the other businesses, such as satellite radio and digital music services, that derive their existence from the public performance of sound recordings and are direct competitors of broadcasters. These services compensate the performers and record companies for the works they use even though such businesses presumably provide at least as much promotional value to sound recordings as broadcasters. Understandably, digital music services have been pushing back and seeking parity with terrestrial broadcasters on this point as a way to strike a competitive balance in the marketplace.[13] They maintain that terrestrial broadcasters should also pay the performance royalty for sound recordings especially now that terrestrial radio is positioned to transition to a digital format on a wide scale basis.

Certainly, when the transition is complete, and that time is near,[14] broadcasters stand to gain an even greater marketplace advantage over the other music services. Electronic companies are manufacturing and marketing digital radio receivers for those who wish to receive clear, digital radio signals over the airwaves. Today, consumers can choose from a variety of receiver models which are available in thousands of retail outlets at prices that continue to drop. The automotive industry is also feeding the market for

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[12] Olga Khafir, Traditional Radio to Pay for Play, Business Week, (July 4, 2007), http://www.businessweek.com/technology/content/jul2007/tc2007073_639316.htm

[13] Kenra Marr, *Shaken Internet Radio Stations Face Specter of New Fees Sunday*, Washington Post, (July 13, 2007), D03, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/12/AR2007071202169.html

[14] HD Digital Radio Alliance, *HD Radio Celebrates Major Milestone: Rollout in Top 100 Markets* (May 14, 2007), http://www.hdradio.com/the_buzz.php?thebuzz=93 (Noting that earlier this summer, HD Radio completed rollout of services in the nation's top 100 markets).

HD radio. BMW already offers HD radio as a factory-installed option across its entire product line, with Jaguar and Hyundai offering it in their premium sedans scheduled for introduction in 2008. In addition, eleven automotive manufacturers will begin offering HD radio as an option on 55 models in the next 18-24 months.[15]

As HD radio technology enjoys wider implementation, innovative features continue to arise. Companies are busy designing and manufacturing new products to capture and record HD radio signals. In fact in the UK, one of the more popular HD radio devices, sold under the brand name "The Bug," features functions that allow the listener to record over 30 hours of audio; program the device to record specific programs at specified times; and upload recorded programs onto a personal computer in a transferable file.[16] The combination of these capture and transfer capabilities provides recipients the means to edit and store specific sound recordings from a prerecorded program, and allows for further distribution of these sound recordings to others via electronic transfers over the Internet or by other means. Capabilities such as these in combination with the digital quality of HD radio transmissions further threaten traditional sales of sound recordings.[17]

The answer to the problem is to find a way to minimize the threat of unauthorized copying and to ensure that performers and record companies receive compensation from the use of their contributions.

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[15] *Id.*

[16] PURE Digital, *Radio With Attitude - Bug Too: Fact Sheet* (June 2006), http://www.videologic.com/Factsheets/VL-60802.pdf

[17] While a court recently and, in my view, correctly rejected a motion to dismiss a claim of copyright infringement based on the marketing of a similar device by a satellite radio service as part of its subscription service operating under the section 114 statutory license, *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, 2007 WL 136186, 2007 Copr.L.Dec. ¶29,312, 81 U.S.P.Q.2d 1407, 35 Media L. Rep. 1161 (S.D.N.Y., January 19, 2007), a similar suit against a consumer electronics manufacturer offering a similar device for use with free over-the-air digital broadcasts might well reach a different result.

Reevaluating the Sound Recording Performance Right

This hearing provides the opportunity once again to consider how to address the latest threats to the market viability of creators of sound recordings. The answer is clearly not to inhibit the roll out of HD radio; nor is anyone suggesting a slowdown on this or future technological fronts. A piecemeal solution is also not the answer. Instead the answer is removing the current limitations placed on this increasingly crucial right, so that performers and producers of sound recordings can enjoy the ability to adapt to market changes armed with the same set of rights as other copyright owners. Thus, I believe the best approach would be to grant copyright owners of a sound recording a performance right for all audio transmissions, both digital and analog, subject to a statutory license.

Such an approach has a number of advantages. First, it would establish legal equity among similarly situated parties with respect to users and creators. Second, it would provide a much needed and dependable source of income to performers and record companies from performances both in the United States and abroad, thereby ensuring that the creators have an incentive to invest their time and talents in producing new works. And finally, it would ensure that minimal safeguards are utilized to protect the copyright owners from unauthorized copying in accordance with the conditions already set forth in the statutory license.

a. Legal equity

Earlier, I discussed why broadcasters are no longer justified in receiving an exemption from the performance right from sound recordings. Primary among those reasons is the need to establish parity among those commercial competitors who depend upon the use of sound recordings. Currently, digital music services pay two different groups of rightholders for each digital transmission of a sound recording. They pay the

performers and record companies for the performance of the actual sound recording and they also pay the appropriate performing rights organizations, e.g., BMI, ASCAP and SESAC, for the performance of the musical work embodied therein. Terrestrial broadcasters, on the other hand, pay only the latter royalty due to an exemption in Section 114, based on the purported promotional value they provide to the record companies. However, in light of declining sales over the past seven years, the expansion of new avenues for distribution of music, and the continuing threat from unauthorized copying, this argument is unsustainable.

Congress has the power to remedy this situation and strike the proper balance in favor of producers as well as performing artists who create sound recordings. The question should no longer be whether Congress should provide performance rights for sound recordings, at least with respect to audio transmissions, but whether the right should be subject to statutory licensing and, if so, how to evaluate and tailor such a license in order to ensure innovation and monetary incentives for the creation of works for the enjoyment of the public. Stated another way, the challenge of copyright in this context, as it is in general, is to strike the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[18]

In striking this balance, I would propose expanding the section 114 license to cover all non-interactive audio transmissions and to remove the current exemptions for broadcasters and for business to business establishments. Like the broadcasters and the digital music services, the core of their businesses rely heavily upon the use of sound

[18] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

recordings to generate its revenues and there is no apparent reason why either of these businesses should not pay a performance royalty to the performers and record companies.

Although some have asserted that granting performance rights to copyright owners of sound recordings amounts to a tax, this is clearly not the case. A tax is a charge levied by, and paid to, the state. A payment for use of a property right, on the other hand, is made to the owner of the right and the amount and terms of the payment are set by negotiations between a willing buyer and a willing seller. In fact, aside from not being a tax, a grant of performance rights to copyright owners of sound recordings would be exactly the type of private property right the Constitution indicates should be available to authors in order "To promote the Progress of Science and useful Arts."[19] In addition to providing strong incentives for the continued creation of new works, granting performance rights to copyright owners of sound recordings offers the advantage of providing legal equity. It also offers increased harmony with international law, which I will discuss shortly.

However, in expanding the license to cover terrestrial broadcast programming, it would be appropriate to reexamine the conditions set forth in the license to protect against unauthorized copying. I recognize that it has been asserted that certain provisions within the existing 114 statutory license, such as programming restrictions designed to limit unauthorized copying by the recipient of the performance, may pose problems to the current broadcast business model. At this time, I am not persuaded that those problems would be significant or that it would be undesirable to require broadcasters to comply with those restrictions. However, to the extent that there would be such problems, any amendments to the 114 license to cover broadcast transmissions

[19] U.S. Constitution, Article I, Section 8.

could surely address them, while at the same time including broadcast-friendly measures to reduce unauthorized copying by the recipient of performances.

It is also worth noting that expansion of the section 114 license to include all audio transmissions will result in a direct payment of these additional royalties to featured artists and non-featured musicians and vocalists by guaranteeing that they collectively receive 50% of the distributions of receipts from the statutory licensing of transmissions,[20] an outcome of great importance to the performers. Moreover, expansion of the statutory license would include a provision protecting copyright owners of musical works from having their royalty fees affected by the royalties granted to owners of sound recordings.[21] Certainly, the purpose underlying any expansion of the public performance right for sound recordings is not to disrupt or diminish the generation of revenues for the public performance of musical works. These are separate streams of income that flow to different rightsholders for the use of different works. In fact, ASCAP reported a five percent increase in performance royalties in 2006[22] underscoring just how important these revenue streams are to the songwriters and publishers and why they need to be preserved.

This increase in ASCAP's stream of revenue is likely due to the fact that songwriters and publishers receive a performance royalty from all performances of their works, including royalties for terrestrial airplay. Because songwriters and publishers

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[20] 17 U.S.C. 114(g)(2)

[21] 17 U.S.C. 114 (i) "No Effect on Royalties for Underlying Works.— License fees payable for the public performance of sound recordings under section 106 (6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6)."

[22] Brian Hiatt and Evan Serpick, *The Record Industry's Decline*, Rolling Stone (June 19, 2007), http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline, citing sales figures provided by Nielsen SoundScan.

receive these royalties for performances of their works, they appear to have been able to offset the noted decline of revenues due to decreased sales of phonorecords. Performers and record companies, on the other hand, having only a limited performance right for some, but not all, digital transmissions have not received sufficient revenues to weather the shift in market preferences from sales to performances. Thus, amending the statutory license to include all audio transmission would level the playing field for those businesses providing music in today's market, and it would have the beneficial effect of compensating performers and record producers for their efforts in creating the sound recording in the same way that songwriters and publishers receive compensation for their efforts in writing and publishing the music embodied therein.

b. The International Situation

Our failure thus far to recognize a meaningful performance right for sound recordings (the term phonograms is used in many countries) places the United States, which considers itself a world leader in copyright protection, well outside the mainstream of international law.[23] Many countries of the world, and virtually all industrialized countries, recognize performance rights for sound recordings, including performances made by means of broadcast transmissions. Most of these countries belong to international treaties that provide protection for performers and producers of sound recordings.

The first international treaty including a performance right for sound recordings was the International Convention for the Protection of Performers, Producers of Phonogram Recordings and Broadcasting Organizations, known as the Rome

[23] The US, UK and other common law countries frequently provide copyright protection; other countries protect the contributions of performers and producers of sound recordings under "neighboring (related) rights" regimes. No international treaty offering protection for the performers or producers of sound recordings is considered a copyright treaty per se.

Convention.[24] It was concluded in 1961 and entered into force in 1964. Abraham Kamenstein, U.S. Register of Copyrights, served as rapporteur-general of the Diplomatic Conference. Article 12 provided protection for secondary uses of phonograms; secondary uses were defined as use of phonograms in broadcasting and communication to the public. The U.S. never adhered to the Rome Convention.

In 2002 the WIPO Performances and Phonograms Treaty (the WPPT), concluded in 1996 and ratified by the U.S. in 1998, came into force. Today, that treaty has 62 members with many additional European Union countries soon to join.[25] Article 15 of the WPPT provides for the right to equitable remuneration to performers and producers for the broadcasting and communication to the public of their phonograms., i.e., secondary uses of phonograms. This Article, however, allows a country to declare that it will apply this right only to certain uses or declare that it will not provide this right at all. Because of the inadequacy in our law in the area of performance rights for sound recordings, the U.S., in its instrument of ratification, included a reservation concerning its commitments under Article 15; specifically the U.S. stated that it would limit itself to protection of only certain acts of public performances by digital means. It made clear that public performances of sound recordings in over-the-air broadcasts were not subject to equitable remuneration.

Thus, the U.S., a leader in the creation, distribution and world-wide licensing of recorded music, is not a party to the Rome Convention; and, while a party to the WPPT, the U.S. has limited its obligation for protection to only certain digital transmissions, and specifically has exempted over-the-air broadcasts. With respect to the lack of protection

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[24] This treaty is administered by the International Labor Organization, UNESCO and WIPO.

[25] Item Note, Council of European Union, Brussels, 12 July 2007 on Agreed principles with regard to the ratification of the 1996 WIPO Treaties.

for over-the-air broadcasts of sound recordings, the United States stands out as the most prominent industrialized country without this protection.[26]

In most countries of the world broadcasters pay royalties to recordings artists and record producers. These countries recognize the incredible value of a recording artist's interpretation of a musical composition or other artistic work. More often than not, a performer is the reason for the popularity and endurance of a particular musical recording.

Equally important is the fact that when our sound recordings are exploited in countries that are signatories of only the Rome Convention, there is usually no payment for the performance of those sound recordings despite the fact that royalties have been collected in these countries for their use. And, the breadth of our reservation in the WPPT also results in WPPT member countries denying payment for broadcasting and other public performances of sound recordings. U.S. performers and producers would have much to gain if Congress broadened the public performance right to include analog and digital broadcasts of sound recordings. One industry estimate, in 1990, suggested that U.S. performers were losing $27 million a year in potential foreign performance royalties.[27] A more recent industry estimate places the loss due to performers and labels for performances in foreign broadcasts at about $70 million.

c. Incentives for continued creation

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[26] Ironically, two countries that the United States has long urged to upgrade their copyright laws – China and Singapore – have used the United States' example as an excuse to adopt weaker performance rights for sound recordings.

[27] Mathew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, Vanderbilt Journal of Entertainment and Technology Law, Vol. 6, No. 2, Spring 2003, at 191.

Congress has repeatedly recognized the emergence of technological threats to the creators of sound recordings. In 1971[28], 1976[29], 1995[30] and 1998[31] it re-calibrated the rights of copyright owners of sound recordings to address these threats. Now, as traditional record sales continue to decline[32] (and the rate of decline far outpaces the emergence of download sales) and HD radio has begun to experience wide implementation and acceptance, Congress again finds itself considering how to address the latest threat to the market viability of creators of sound recordings. And something must be done.

What is needed is a change to ensure that performers and record companies can continue to make a viable living from their craft. As I have suggested, an expansion of the performance right for sound recordings would I believe provide fair compensation to the creators and serve as a significant stimulus to ensure that creators continue to develop new works throughout the 21st Century. But whatever course Congress chooses, it should be aware of the need for strong incentives for creators to continue their artistic endeavors and the equal need for incentives to encourage the continued development of new technological advances that enable legitimate exploitation of and access to musical and other works. In the absence of corrective action, new technologies will pose an unacceptable risk to the survival of what has been a thriving music industry. In order for the industry to continue to enrich society, performers and record labels must be able to

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[28] Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

[29] Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541 (1976).

[30] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

[31] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2286 (1998)

[32] Lars Brandle, *Piracy, Shrinking Sales Send Global Music Market Down 5%*, Billboard, (July 3, 2007).

make a living by creating the works that broadcasters, webcasters and consumer electronic companies are so eager to exploit for profit.

Mr. Chairman, as always, we at the Copyright Office stand ready to assist you as the Committee considers how to address the new challenges that are the subject of this hearing

REFORMING SECTION 115 OF THE COPYRIGHT ACT FOR THE DIGITAL AGE

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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PREPARED STATEMENT OF MARYBETH PETERS

Statement of

Marybeth Peters
The Register of Copyrights

Before the

Subcommittee on Courts,
the Internet, and Intellectual Property
of the House Committee of the Judiciary

110th Congress, 1st Session
March 22, 2007

Hearing on "Reforming Section 115 of the Copyright Act for the Digital Age"

Chairman Berman, Ranking Member Coble, and Members of the Subcommittee, thank you for inviting me to testify before you today on Section 115 of the Copyright Act and how best to reform it. Section 115 provides a compulsory license for the making and distribution of physical phonorecords and digital phonorecord deliveries. This Subcommittee has had a number of hearings over the past three years concerning Section 115 to identify its problems and explore potential solutions. During this time, industry groups that were originally divided about the need for reform have now all agreed that reform is necessary, although they have never been able to agree on how to accomplish this goal.

Let me say at the beginning of my testimony that I believe that reform of the digital music licensing system is the most important music issue currently before Congress. It is an important issue not only to digital music services who want to offer robust music services utilizing thousands of legal copies of musical works, but it is also important to the songwriters and copyright owners who deserve compensation when others use their works. If music licensing reform is successful, consumers will be able to access more legal music online, through

a variety of competing services, and be less tempted by piratical services that today can already offer every song ever written for free.

History of Section 115

Almost a century ago, Congress added to the Copyright Act the right for copyright owners to make and distribute, or authorize others to make and distribute, mechanical reproductions (known today as phonorecords) of their musical compositions. Due to its concern about potential monopolistic behavior, Congress also created a compulsory license to allow anyone to make and distribute a mechanical reproduction of a musical composition without the consent of the copyright owner provided that the person adhered to the provisions of the license, most notably paying a statutorily established royalty to the copyright owner. Although originally enacted to address the reproduction of musical compositions on perforated player piano rolls, the compulsory license has for most of the past century been used primarily, when used at all, for the making and distribution of physical phonorecords and, more recently, for the digital delivery of music online.

Twice since its inception in 1909, Congress has amended section 115, first in 1976, when Congress enacted the 1976 Copyright Act - a wholesale revision of the copyright law, and again in 1995, with the passage of the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), to accommodate the delivery of music by means of a digital transmission. The changes adopted in 1976 were implemented to ease the burdens placed on the copyright owners, clarify ambiguous provisions and establish a mechanism to adjust the royalty rates over time, whereas the changes made in 1995 were in response to the emergence of new digital technology that, for the first time, provided a quick and inexpensive way to deliver music directly to the consumer's computer. To accommodate these new delivery methods,

Congress modified section 115 to provide expressly for the reproduction and delivery of a phonorecord by means of a digital transmission. Congress took these steps in order to reaffirm the mechanical rights of songwriters and music publishers in on-line environment.

My Office has also updated the regulations that govern the functioning of the existing statute, most recently in June 2004. Regulatory changes, however, cannot address the inherent problems with the statutory license, and the Section 115 compulsory license remains a dysfunctional option for licensing the reproduction and distribution of musical works. Hence, its primary purpose today is to provide a ceiling for the royalty rate used in privately negotiated licenses.

However, that could change and the Section 115 license could become a useful tool for delivering music in a digital environment, if changes can be made to transform the license from a historical relic into a viable mechanism for licensing music on-line. In order for Section 115 to be workable for songwriters, music publishers, online music companies, and consumers, Congress must take action and make the necessary structural changes.

The Need for reform

Recognizing the importance of enabling legal music services to compete with illegal sources of on-line music, Congress has tried to update our laws to combat illegal sources of music on several occasions and the courts have expanded the theory of secondary liability expressly to cover activities that induce others to infringe.[1] Congress has also held oversight

[1] *MGM Studios, Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073 (C.D.Cal. 2003), aff'd, 380 F. 3d 1154 (9th Cir. 2004), cert. Granted, 545 U.S. 1032 (2004), vacated and remanded by, 545 U.S. 913 (2005).

hearings on how to make legal services more able to compete with illegal sources. A primary focus of Congressional inquiry has been the reform of Section 115.[2]

The need for reform became crystal clear during a hearing on March 11, 2004, before this Subcommittee.[3] Interested parties testified about the difficulties they have encountered in licensing the use of nondramatic musical works under the antiquated statutory scheme. They voiced complaints about the notice requirements, lack of clarity over what activities are covered by the license, which rights are implicated, and problems with use of a per-unit penny-rate royalty. A key issue identified by the music services involved the use of business models, e.g., streaming, that required the user to pay one agent for the publishers and songwriters to clear the reproduction and distribution rights (often referred to as the mechanical right) and then to pay a second agent for the same copyright owners to clear the public performance right for use of the same musical works. While it was widely recognized that the performance right could be cleared easily with blanket performance licenses from the three performing rights societies, it became

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[2] *See Oversight Hearing on "Copyright Office Views on Music Licensing Reform": Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 109th Cong. (2005)(statement of Marybeth Peters, Register of Copyrights) (available at http://www.copyright.gov/docs/regstat062105.html). *See also Music Licensing Reform: Hearing Before the Subcomm. On Intellectual Property of the Senate Comm. on the Judiciary*, 109th Cong. (2005) (statement of Marybeth Peters, Register of Copyrights) (available at http://www.copyright.gov/docs/regstat071205.html), *Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 109th Cong. (2005)(statement of Marybeth Peters, Register of Copyrights) (available at http://www.copyrigth.gov/doc/regstat051606.html).

[3] *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 108th Cong. (2004)(statement of Marybeth Peters, Register of Copyrights) (available at http://www.copyright.gov/docs/regstat031104.html). The difficulties involved in licensing musical works have been apparent since before the hearing in 2004. For example, in December 2001, I testified before you on a report I had delivered to you pursuant to Section 104 of the Digital Millennium Copyright Act, Pub. L. 105-304 (1998), in which I addressed some of the issues involved in music licensing that you and I have been grappling with over the subsequent years. *Digital Millennium Copyright Act Section 104 Report: Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. (2001)(statement of Marybeth Peters, Register of Copyrights) (available at http://www.copyright.gov/docs/regstat121201.html). *See also Digital Millennium Copyright Act Section 104 Report* (2001) (available at http://www.copyright.gov/reports/studies/dmca/dmca_study.html).

apparent that no similar mechanism existed to clear the reproduction and distribution rights with equal ease.

Recognizing the need to explore these issues further, the leadership of this Committee asked me in July of 2004 to bring together representatives of the National Music Publishers' Association, Inc. ("NMPA") and its subsidiary The Harry Fox Agency, Inc. ("HFA"); the Recording Industry Association of America ("RIAA"), and the Digital Music Association ("DiMA") to see if agreement could be reached on a general framework of reform. Although the parties willingly participated and agreed to consider a blanket licensing approach, reaching consensus on the details proved impossible.

Subsequently, at the request of this Subcommittee, I prepared model legislation for reform of Section 115 that was centered around the creation of Music Rights Organizations ("MROs"). The hallmark of the proposal was the creation of licensing organizations that would offer blanket licenses covering both the mechanical and the performance rights needed to transmit digitally the musical works in the MRO's repertoire. Essentially, the MROs would offer "one-stop shopping" to the extent the licensee could get a single license covering a multitude of musical works even when the performance, reproduction and distribution all take place in the course of a single transmission.

The proposal, however, was not embraced by the affected parties. Instead, they returned to the drawing board and, in late 2005 and early 2006, they participated in a broader series of discussions on how to reform Section 115 hosted by the Subcommittee. From these discussions, a number of issues were resolved through various compromises that resulted in the introduction of H.R. 5553, the Section 115 Reform Act of 2006 ("SIRA") on June 8, 2006 by Mr. Smith and Mr. Berman. This legislation was marked up in this Subcommittee on the same date, and was

incorporated into a larger package of bills that was originally scheduled for full Committee markup last September.

Key Issues

In reviewing the possible options for reform of Section 115, there are four key issues that must be addressed in any legislation: 1) Scope of the license and clarification of rights; 2) Collection and distribution of royalty fees; 3) Efficiency of the licensing process; and 4) Rate setting procedures.

1. Scope of the Statutory License and Clarification of the rights

One of the major frustrations facing online music services today, and what I believe to be the most important policy issue that Congress must address, is the lack of clarity regarding which licenses are required for the transmission of music. Let me explain why I believe this to be the case.

Today consumers can listen to music streamed over the Internet or, rather than purchase a physical CD, they can order a digital copy from iTunes or a similar service for about 99¢. While a stream of music can be viewed primarily as a public performance, it is necessary to make server, cache, and other intermediate copies[4] of the sound recording and the musical work[5] embodied therein in order to facilitate the delivery of the performance. Similarly, the purchase of a digital phonorecord delivery of the same recording can be viewed primarily as a mere reproduction and delivery of a copy for private use, but this is not a settled area of the law.

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[4] 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" are commonly used to refer to these reproductions.

[5] A "musical work" refers to a composition (e.g., the specification of notes and lyrics, such as a written page of music) while a "sound recording" refers to the fixation of a particular performance of a composition such as on an audio compact disc.

Publishers maintain that any transmission of a sound recording involves a public performance of the musical work embodied therein and the issue is now being considered by the rate court in the Southern District of New York.

But why is this important? If both the mechanical and the performance rights are implicated and the money goes to the same copyright holders, why not make a single payment to one agent for the digital transmission of the work? The answer is that the current music licensing structure does not allow for that option. In the United States, the performance right is licensed by three performing rights organizations: the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. Collectively, the repertoires administered by these three performing rights organizations account for virtually all musical compositions in the marketplace. However, consent decrees have limited some of these organizations abilities to license both the performance and the mechanical rights. As a result, the mechanical right is licensed under the provisions of the Section 115 statutory license, or directly through the publisher or an agent acting on behalf of the publisher. The largest agent acting in this capacity is The Harry Fox Agency, which has authority to issue mechanical licenses for more than 1.6 million songs on behalf of more than 31,000 publishers worldwide.[6]

The reality of digital transmissions, though, is that in many situations today it is difficult to determine which rights are implicated, and to what extent. Hence, there is a need to clarify the rights involved with different types of digital transmissions in order to determine whether a royalty is owed and at what rate. For example, do the intermediate copies made by routers and computer caches during the delivery of a work to a consumer qualify as "digital phonorecord

[6] HFA Reports 2006 Collections, Susan Butler, N.Y. Billboard Magazine Online (March 16, 2007).

deliveries?" Moreover, would such copies be compensable under a Section 115 license or should such copies be exempted under the law because they have no inherent value except to facilitate the already-licensed transmission of a public performance of a musical work? Finally, clarification of whether the delivery of a reproduction of a musical work for use by the consumer is also a public performance is needed to determine whether a separate license fee must be paid to the performing rights organizations.

As we have seen, licensors have rarely turned down the opportunity in the digital age to seek royalties, even when the basis for their requests is weak at best. Online music companies rightly complain that they need certainty over what rights are implicated and what royalties are payable so that they can operate without fear of being sued for copyright infringement. Although the term "rights clarity" may sound obscure, the issue is at the heart of any music licensing reform effort. Moreover, if the statutory license is to be functional, it is important to identify which reproductions are covered by a Section 115 license and to insure that all necessary reproductions for making a digital transmission can be easily licensed either under Section 115 or under a separate statutory license.

Yet today, music services have forged ahead and have begun offering legitimate music services to everyone's benefit even though the rights questions remain unresolved. In doing so, they are exposed to demands from the agents for both the mechanical and the performance rights and are threatened with lawsuits if they do not acquiesce. And, in fact, music services and the performing rights organizations are engaged in active litigation in the Southern District of New York. In that case, the parties are seeking a determination as to whether a digital phonorecord delivery is also a public performance. Common sense and sound policy counsel that the transmission of a reproduction of a musical work without any rendering of the recording at the

time of delivery should implicate only the reproduction and distribution rights. But the law is ambiguous on this point and the parties are at odds, so they turn to the courts for an answer.

In the meantime, music services operate under the threat of further suits and without any guidance on how to proceed. A far simpler and more direct approach to the problem would be for Congress to amend the law to clarify which rights are implicated in the digital transmission of a musical work. For example, it may well be advisable to amend the law to clarify what constitutes a public performance in the context of digital transmissions, or to provide that when a digital transmission is predominantly a public performance, any reproductions made in the course of transmitting that performance will not give rise to liability. By the same token, it may well be advisable to clarify that when a digital transmission results in the receipt of a copy that may be performed on more than one occasion after its receipt, there is no liability for any public performance that might be embodied in the transmission (because the transmission is a reproduction and distribution for which the copyright owner is being compensated). Alternatively, you should consider creating a licensing structure that covers all the rights involved in the digital transmission of music. While either solution would bring stability to the marketplace and set the stage for the development of more and varied on-line music services, it is critical that the question be addressed as an initial matter before attempting to resolve the other issues associated with music licensing.

2. Collection and Distribution of Royalties

Under the current Section 115 license, licensees must serve notice upon and pay each copyright owner or his or her designated agent directly for the use of his or her musical works. The need for each licensee to identify, serve notice, and pay the individual copyright owners creates major inefficiencies for the licensee especially when the identity of the copyright owner

is not readily known or ascertainable. One way to eliminate these inefficiencies is to specify one or perhaps more agents whose responsibility it would be to collect and distribute royalties. Such a system has already been established under the Section 114 statutory license. Royalties under the Section 114 license, which are owed to the copyright owners of sound recordings rather than that of musical works, are paid to SoundExchange, an agent appointed by the rate setting body to receive the royalties and then disburse them to the copyright owners.

Adoption of this collecting model would, however, give rise to important administrative issues that would need to be addressed. First is the question of administrative costs and what these costs cover. Ideally, an agent should be allowed to deduct only those costs associated with the collection and distribution functions accorded to it by law. Such organizations should not have wide discretion to tap the royalty pools to fund lobbying efforts, lawsuits not directly associated with the collection and distribution of the royalties or tangential licensing practices not associated with the statutory license. Second, the law should include authority for the appointing body to oversee the activities of the agent, including rulemaking authority to establish regulations governing the type and amount of information that must be submitted to determine the extent of use of specific musical works. Third, the law should include guidance on how the royalties will be distributed among the beneficiaries. The agent should not have discretion on how to allocate the funds to copyright owners who have not actively chosen the agent to represent their interests. And finally, provision should be made to govern the retention and use of royalties for works of copyright owners who cannot be identified or located and to insure transparency of all activities.

Should Congress choose to adopt such a licensing scheme, interested parties will have more to say about the organizational structure of the governing board. While this is indeed an

important issue, suffice it to say that the law should require the governing body to include representatives of all stakeholders – that is, music publisherse and songwriters -- in such proportions that a reasonable balance can be maintained among the varied interests of the respective stakeholders.

3. Efficiency of the licensing process

In addition to delineating the rights involved in a digital transmission, creation of a blanket licensing scheme predicated on the filing of a single notice would be a workable model to create efficiencies for all stakeholders. Licensees would be able to minimize their transactions to clear the rights to use the music, copyright owners would receive full compensation for use of their works, and consumers would benefit from the development of new and robust legitimate music services that offer not only current hits but virtually any music that consumers want. I have suggested this approach on a number of occasions and still believe that it is an approach worth pursuing. Users have also suggested amending Section 115 to allow for quarterly payment of royalty fees in place of the current requirement to make monthly payments as a way to streamline the payment process. Given that most licensees in the marketplace appear to operate on a quarterly basis, a simple change to the accounting period would be make the statutory license more workable for those who cannot negotiate licenses in the marketplace. Undoubtedly there are other measures that can be adopted to minimize the costs associated with the administration of a statutory license and careful consideration should be given to any such proposal.

4. Rate setting procedures

Currently, rates set pursuant to Section 115 reflect a unit price for each reproduction and distribution, a pricing structure which suits the making of physical phonorecords. However, it

should be noted that certain music services offer a variety of options for enjoying music at a fixed monthly subscription rate, rather than charging a per stream or per download rate. Such services have stated that it will have difficulty in utilizing a statutory license that requires payment on a per unit rate and would prefer a percentage of revenue option.

While I have testified that the current Section 115 does not specifically require a per unit rate, parties have expressed concern that the rate setting body would continue to set a per unit rate as has been the practice throughout the history of the license. Consequently, it may be advisable to adopt amendments that would clarify that the rate setting body has the flexibility to set a schedule of rates depending upon the services offered by the business and the manner in which it prices its offerings, while ensuring that copyright owners are fairly compensated. In any event, authority to set rates for a modified Section 115 license should remain with the Copyright Royalty Judges, the entity created by Congress to establish rates and terms for the statutory licenses in the copyright law, and they should have some discretion to establish interim rates when new services become operational.

Legislative Options

The fundamental question is how to structure an effective and efficient licensing system. First, because there are inherent difficulties in crafting an entirely new licensing system, you should start by asking what is the minimal amount that needs to be done to alleviate the problems that face the music services under the current licensing structure and focus on making these changes. No doubt interested parties will use this opportunity to approach this Subcommittee and ask that it include a number of issues marginally related to the reform of Section 115. That appears to have been the case last year with respect to the Section 115 Reform Act. However, I

would urge this Subcommittee to focus on a narrow bill that addresses only the most important core issues. Consideration of other issues will only delay this important reform effort.

To reach this objective, I suggest two substantively different options: either create a Section 114 style blanket license or provide for wholesale sublicensing with a safe harbor provision for the sublicensors. Both approaches would create a workable licensing system that would allow music services to make digital transmissions of all available musical works. The first, however, requires a substantial restructuring of the Section 115 license whereas the second sublicensing option requires only minimal modifications to achieve its objective.

Option 1: A Section 114 style licensing system for digital transmissions

Section 115 provides a statutory license to utilize a nondramatic musical work to make and distribute phonorecords of sound recordings, but it does so on a song-by-song basis. Section 114, on the other hand, offers a blanket license covering the public performance right for sound recordings embodied in digital transmissions. Moreover, the Section 114 license is simpler to administer. It requires the filing of a single notice of use with the Copyright Office, and it authorizes the Copyright Royalty Judges ("CRJs") to set rates and terms of payment for use of the license, one of which is the designation of an agent to collect and distribute royalty fees. Rights owners, artists, and online companies have been supportive of this model since the agent designated by the CRJs, SoundExchange, strives to identify and pay all rightholders, and it is my understanding that its actions are generally regarded as transparent.

The problems associated with clearing the mechanical rights for musical works are fundamentally the same as those associated with clearing the performance rights for sound recordings. Hence, adoption of a Section 114 style license for Section 115 would solve most of the difficulties associated with clearing the rights to make and distribute the musical works

needed to facilitate a digital transmission or to make a digital phonorecord delivery. It would provide one-stop shopping to the music services both for the license and for the payment of the royalty fees. In addition, it would eliminate uncertainty with respect to the rates that apply to the use of music, provided that the license allows the CRJs to set rates for new business models as they emerge. The system would also offer substantial advantages to the rightsholders. Under a blanket license system, there are economies of scale that reduce the administrative costs associated with the collection and distribution of the royalties. Moreover, a blanket license increases the possibility that a creator's works will be used because the works are readily available and no special effort is required to locate the rights holder and clear the license.

Option 2: Sublicensing

Currently, record labels may sublicense the mechanical rights to musical works under a privately negotiated license, provided that it is a term of the license, or apparently through Section 115.[7] It appears that this sublicensing can work efficiently since it conveys all of the rights necessary for download services to operate legally. Moreover, record companies have presumably cleared the rights to use the underlying musical work in their sound recordings either through private licenses or use of Section 115. For this reason, it makes sense for music services to look to the record companies to clear the rights to use both the sound recording and the musical work embodied therein.

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[7] *See* 17 U.S.C. § 115(c)(3)(I) and S. Rep. 104-128 at 43 (1995). The Senate report language makes clear that the purpose of this provision was to allow record companies to sublicense the mechanical rights. Specifically, it states that "[t]he changes to S. 227 are intended to allow record companies to license not only there own rights, but also, if they choose to do so, the rights of writers and music publishers to authorize digital phonorecord deliveries. If a record company grants a digital transmission service a license under both the record company's rights in a sound recording and the musical work copyright owner's rights, the record company may be liable to the extent determined in accordance with applicable law."

Record companies, however, have been unwilling to sublicense all music services because of the exposure they assume under such arrangements. Record companies are concerned that should a sublicensee fail to make timely payments for use of a musical work, the record company may be responsible for those payments. Nevertheless, sublicensing is an efficient way for online music services to obtain all the rights needed to make and distribute phonorecords in today's digital marketplace and some thought should be given to creating incentives for the record companies to increase their willingness to sublicense more services. For example, the sublicensing provision could be amended to create a safe harbor for those companies that sublicense the mechanical rights to a digital music service and the safe harbor should cover sublicenses negotiated in the marketplace as well as those obtained under Section 115. Under such a provision, which would require minimal amendments to existing law, record companies would be responsible for clearing the rights and administering the sublicense, including the collection and distribution of the royalties for the reproduction and distribution of the musical works. However, the record companies would not be legally responsible to copyright owners in the event of a music service's failure to make the required payments. Rather, the music service would retain responsibility for making the appropriate royalty payments in a timely manner and would be the subject of any infringement action arising from an uncompensated use.

Should such an approach be considered, the law would also have to impose certain requirements upon the record company to govern whether (and if so, to what extent) record companies would be permitted to make any deductions for administrative costs involved in sublicensing, and whether the royalties for the statutory license should reflect those costs so that they are borne by the licensees rather than the copyright owners or the record companies.

Each of these two options could resolve one of the two key problems I have identified with music licensing today: the difficulty online music services have in clearing the rights to very very large numbers of musical works in a system which currently requires licensing on a work-by-work basis. However, neither option addresses the other key problem: the sometimes apparently duplicative claims by two different agents of the same copyright owner – that two different licenses–one for public performance and one for reproduction and distribution–must be obtained in order to make a digital transmission of a musical work. I have already suggested some ways to resolve this problem, but further thought needs to be given to how to correct what has become a dysfunctional model for licensing music rights.

Other Options for Consideration

Over the past three years, I have offered and commented on a number of different options in addition to the two identified above, ranging from an outright repeal of Section 115 to the creation of a Music Rights Organization ("MRO") system which would combine all necessary rights for digital transmissions into a single blanket license issued by the entity authorized to license the public performance right of the musical work. However, there was an outcry from all sections of the music industry over the disruption they believed would occur under these two options. Nevertheless, I continue to believe an MRO option is worth considering. While music publishers have historically been well-served by the allocation of licensing authority to performance rights organizations for performance rights and to publishers and other agents for reproduction and distribution rights, that division of labor is archaic, inefficient and unfair (at least to licensee) in this age of digital transmission of music. As the lines between performance and distribution have become blurred, the opportunities for confusion and even abuse have become intolerable. It is noteworthy that music publishing is the only industry in which this has

become a problem, and the reason clearly is that music publishing is the only copyright industry in which such a division of licensing authority has predominated. However, I recognize that the political difficulties that the proposal faced in 2005 are likely to reappear should the Subcommittee revisit my MRO proposal.

Similarly, last year's Section 115 Reform Act tackled most of the difficult core issues associated with music licensing in today's world and offered workable answers, e.g., blanket licensing, coverage of the intermediate copies and hybrid offerings, a rate setting mechanism, and a means to administer the license with the authorization of the creation of designated agents.[8] Nevertheless, controversy over tangential issues and the details concerning implementation resulted in lack of consensus. For this reason, I have suggested a narrower and more focused approach to reforming Section 115 to deal only with the specific problems identified with the functionality of the license.

Regardless of which option you chose to pursue and whether it is one I have identified, Congress must solve the rights clarity issue in order for any legislation to succeed in creating a viable licensing structure for the music industry.

I look forward to working with this Subcommittee to see that Section 115 reform legislation is enacted into law as soon as possible. Thank you again for the opportunity to appear before you today.

[8] It did not, however, address claims by performance rights organizations that the performance right must be licensed by services that offer downloads of music.

grantees are to distribute copies of the Activity and Expenditure Report as follows:

• The original SF 269A, signed invoice or list of expenditures and the Stand Down After Action Report is mailed to: U.S. Department of Labor, Procurement Services Center, Room S–4307, Attn: Cassandra Mitchell, 200 Constitution Avenue, NW., Washington, DC 20210.

• Original sales receipts of items purchased with USDOL–VETS funding, a copy of the SF 269A, signed invoice or list of expenditures, comparison of actual versus planned activities and expenditures, Stand Down After Action Report, and copies of all PSC 272s sent to HHS/PMS is to be submitted to the appropriate DVET/GOTR.

If the DVET/GOTR does not recommend approval of a particular expenditure, he/she will notify the grantee in writing with an explanation for the disapproval and instruct grantee to electronically return the funds within 15 calendar days to the HHS/PMS account if already drawn down. All FY 2007 Stand Down awarded funds must be electronically drawn down by no later than November 30, 2007. If Stand Down funds are not electronically drawn down by the grantee within 90 days following the above stated due date, the USDOL may reallocate these funds for other purposes accordingly.

Any grantee who fails to comply with guidance set forth in the Stand Down Special Grant Provisions and reporting requirements will not be considered favorably from any future funding from U.S. Department of Labor Veterans' Employment and Training Service.

VII. Agency Contacts

Questions regarding this announcement should be directed to the Director for Veterans' Employment and Training/GOTR in your State. Contact information for each DVET/GOTR is located in the VETS Staff Directory at the following webpage: *http://www.dol.gov/vets/aboutvets/contacts/main.htm* or access the directory from the agency Web site at *http://www.dol.gov/vets*.

VIII. Other Information

Current competitive HVRP grantees are not eligible for a separate non-competitive Stand Down grant award as described in this announcement. Current competitive HVRP grantees are authorized to utilize existing funds for Stand Down purposes.

Appendices: (Located on U.S. Department of Labor, Veterans' Employment and Training Service Webpage *http://www.dol.gov/vets* follow link for 2007 Stand Down Grants and Required Forms listed under announcements.)

Appendix A: Application for Federal Assistance SF–424
Appendix B: Budget Information Sheet SF–424A
Appendix C: Certifications and Assurances Signature Page
Appendix D: Survey on Ensuring Equal Opportunity for Applicants
Appendix E: Stand Down After Action Report

Signed at Washington, DC, this 23 day of May, 2007.

Cassandra R. Mitchell

Grant Officer.

[FR Doc. E7–10258 Filed 5–29–07; 8:45 am]

BILLING CODE 4510–79–P

LIBRARY OF CONGRESS

Copyright Office

Notice of Roundtable Regarding the Section 115 Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice announcing public roundtable.

SUMMARY: The Copyright Office announces a public roundtable discussion concerning the use of the statutory license to make and distribute digital phonorecords, including for a limited period, and to make phonorecords that facilitate streaming. This discussion is an adjunct to the comments filed in the current rulemaking exploring these issues. The roundtable will also address the statutory requirement to provide notice of intention to obtain the compulsory license.

DATES: The public roundtable will be held in Washington, DC on June 15, 2007, in the Copyright Office Hearing Room at the Library of Congress, Room LM–408, 4th Floor, James Madison Building, 101 Independence Avenue, SE, Washington, DC from 9:30 a.m. to 4:30 p.m. Requests to participate or observe the roundtable shall be submitted in writing no later than close of business on June 6, 2007.

ADDRESSES: Requests to observe or participate in the roundtable should be addressed to Joe Keeley, Attorney Advisor, and may be sent by mail or preferably by e–mail to *musiclicense@loc.gov. See* **SUPPLEMENTARY INFORMATION** for alternative means of submission and filing requirements.

FOR FURTHER INFORMATION CONTACT: Joe Keeley, Attorney Advisor, or Stephen Ruwe, Attorney Advisor, Office of the General Counsel, P.O. Box 70977, Southwest Station, Washington, DC 20024–0977. Telephone: (202) 707–8350. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

Background

Section 115 of the Copyright Act, title 17 of the United States Code provides a statutory license for the making and distribution of phonorecords of nondramatic musical works. Historically, the statutory rates have established the ceiling for the mechanical licenses issued in the marketplace. In 1995, Congress passed the Digital Performance Right in Sound Recordings Act, Pub. L. No. 104–39, 109 Stat. 336, which amended section 115 to include the right to distribute a phonorecord by means of a ''digital phonorecord delivery'' (''DPD''). The statute includes a definition of a DPD and explains the process for establishing rates for these phonorecords. In addition, it acknowledges the existence of additional DPDs ''where the reproduction or distribution of the phonorecord is incidental to the transmission which constitutes the [DPD]'' 17 U.S.C. 115(c)(3)(D), and requires that a separate rate be set for these phonorecords. However, the law does not identify which DPDs can be classified as incidental or provide any guidelines for making this decision.

For this reason, the Copyright Office published a Notice of Inquiry in the **Federal Register**, 66 FR 14099 (March 9, 2001), requesting comment on the interpretation and application of the mechanical and digital phonorecord compulsory license, 17 U.S.C. 115, to certain digital music services. The Recording Industry Association of America (''RIAA'') had suggested in its petition for this rulemaking that section 115 be interpreted in such a way as to cover all reproductions made to operate services offering On–Demand Streams and Limited Downloads, as defined in the March 9, 2001, notice. At about the same time, RIAA entered into separate negotiations with the National Music Publishers Association and the Harry Fox Agency, Inc. and reached an agreement concerning several of the issues involved in the original Notice of Inquiry. Because this side agreement addressed the key issues raised in the earlier Notice of Inquiry, the Copyright Office sought additional comments on

the original questions. 66 FR 64783 (December 14, 2001).

The incidental DPD debate has been hotly contested and, along with the reform of section 115, the subject of numerous hearings before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary (March 23, 2007; May 16, 2006; June 21, 2005; and March 11, 2004) and the Senate Judiciary Committee, Subcommittee on Intellectual Property (July 12, 2005). Yet, in spite of all the attention, the legal issues remain unresolved. Consequently, the Office is again focusing on the rulemaking process and is hosting the roundtable discussion as a way to refresh the existing record in order to ascertain the scope of the 115 license in relation to certain digital music services.

In addition to the issues raised in the March 9, 2001, Notice of Inquiry, on August 28, 2001, the Copyright Office issued a Notice of Proposed Rulemaking to amend the rules associated with service of a Notice of Intention to Obtain Compulsory License (''Notice'') under section 115. 66 FR 45241 (August 28, 2001). The purpose of the amendments was to streamline the notification process and make it easier for the licensee to serve the copyright owner with Notice for multiple musical works. After considering the comments received in that rulemaking proceeding, the Office adopted regulations that allow, among other things: service on an agent; the listing of multiple works on a single Notice; the filing of a single Notice to cover all possible configurations, including those not listed specifically on the Notice; and use of an address other than the one listed in Copyright Office records. 69 FR 34578 (June 22, 2004).

In issuing its Final Rule, the Office recognized that the purpose of the Notice requirements in section 115 of the Copyright Act, is ''merely to give notice to the copyright owner of a licensee's intention to use the copyright owner's musical work to make and distribute phonorecords subject to the terms of the section 115 compulsory license.'' 69 FR 34581 (June 22, 2004). The Office now seeks to address whether there are compelling reasons to further streamline the Notice process.

Roundtable Topics

The Office is identifying a number of key issues for discussion and encourages the participation of persons who can address these issues from the perspectives of law, policy and the practical needs of the affected industries. The Office also encourages input from persons who can speak to the technological aspects involved in the making of a digital transmission, especially with respect to the making of specific reproductions during the course of a transmission. In addition, the Office invites participants to identify any other actions they believe the Office should undertake, pursuant to its regulatory authority, to make the section 115 license more workable and/or efficient.

Topic 1: How do ''Limited Downloads'' Fit Within the Scope of the Section 115 License?

The March 9, 2001, Notice of Inquiry addressed a petition for clarification of the status of Limited Downloads within the section 115 license. The petitioning party, the RIAA, characterized a Limited Download as an on–demand transmission of a time–limited or other use–limited download to a storage device (such as a computer's hard drive), using technology that causes the downloaded file to be available for listening only either during a limited time or for a certain number of times. The Notice of Inquiry, as well as the resulting comments, focused largely on whether Limited Downloads fit within the scope of section 115 as either incidental digital phonorecord deliveries (''incidental DPDs''), as provided for in 17 U.S.C. 115(c)(3)(D), or distributions of phonorecords by rental lease or lending, as provided for in 115 U.S.C. 115(c)(4). Since a DPD is defined as an ''individual delivery of a phonorecord which results in a specifically identifiable reproduction,'' and since a Limited Download would appear to be the specifically identifiable reproduction that is the end result of the DPD, could that same Limited Download also be considered ''incidental to the transmission which constitutes the digital phonorecord delivery?'' Can a DPD in fact result in a reproduction which is incidental to itself or should a Limited Download be characterized as a general DPD,[1] albeit potentially valued at a different rate. The Office welcomes further discussion on each of these approaches.

In considering whether a Limited Download can be viewed as an incidental DPD, the Office takes note of the fact that the language of 17 U.S.C. 115(c)(3)(D) identifies an incidental DPD as a reproduction or distribution of a phonorecord that is incidental to the transmission which constitutes the digital phonorecord delivery. This would seem to indicate that an incidental DPD cannot exist without an underlying DPD. Given this condition, could a Limited Download ever be considered an incidental DPD? If the Limited Download is considered a general DPD, are there also incidental DPDs made in the course of delivering the Limited Download?

Alternatively, reliance on the section 115 provision for rental, lease or lending of a phonorecord as a way to clear the rights to the use of the musical work in Limited Downloads is not self–evident. A plain reading of the statutory language[2] seems to envision that any coverage provided by the section 115 license for phonorecord rental, lease or lending is predicated on a further distribution of a phonorecord already in existence. Furthermore, use of the provision appears to require a licensee to make two payments, once under 17 U.S.C. 115(c)(2) for the making and distribution of the phonorecord and again for subsequent acts of rental, lease or lending of that phonorecord. It is also worth noting that royalty determinations for every such act of rental, lease or lending are dependent upon the revenue received by the licensee for the underlying reproduction and distribution.[3] As a matter of practicality, it seems the rental, lease or lending provision is uniquely suited to traditional, non–digital, uses of the

[1] Section 115(d) defines a ''digital phonorecord delivery'' as ''each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real–time, non–interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.''

[2] ''A compulsory license under this section includes the right of the maker of a phonorecord of a nondramatic musical work under subsection (a)(1) to distribute or authorize distribution of such phonorecord by rental, lease, or lending (or by acts or practices in the nature of rental, lease, or lending). In addition to any royalty payable under clause (2) and chapter 8 of this title, a royalty shall be payable by the compulsory licensee for every act of distribution of a phonorecord by or in the nature of rental, lease, or lending, by or under the authority of the compulsory licensee. With respect to each nondramatic musical work embodied in the phonorecord, the royalty shall be a proportion of the revenue received by the compulsory licensee from every such act of distribution of the phonorecord under this clause equal to the proportion of the revenue received by the compulsory licensee from distribution of the phonorecord under clause (2) that is payable by a compulsory licensee under that clause and under chapter 8. The Register of Copyrights shall issue regulations to carry out the purpose of this clause.'' 115 U.S.C. 115(c)(4)

[3] *Id.*

section 115 license, in which a phonorecord is not parted with permanently, but instead returned to the licensee who may rent it multiple times. The Office welcomes alternative views on application of the section 115 provision for rental, lease or lending of a phonorecord to Limited Downloads.

Topic 2: Does ''Streaming'' Fit Within the Scope of the Section 115 License?

The March 9, 2001, Notice of Inquiry sought clarification of the status of streaming,[4] specifically with respect to ''on–demand streams'' within the section 115 license. In the previous Notice of Inquiry, the Office recognized that streaming necessarily involves a making of a number of copies of the musical work—or portions of the work––along the transmission path to accomplish the delivery of the work. Copies are made by the computer servers that deliver the musical work (variously referred to as ''server,'' ''root,'' ''encoded,'' or ''cache'' copies), and additional copies are made by the receiving computer to better facilitate the actual performance of the work (often referred to as ''buffer'' copies). Some of these copies are temporary; some may not necessarily be so. 66 FR 14101 (March 9, 2001).

Similar to its consideration with regard to Limited Downloads, the Office welcomes further information regarding whether the reproductions made in the course of streaming enjoy coverage under the section 115 provisions as incidental DPDs. Again, the Office takes note of the fact that the language of 17 U.S.C. 115(c)(3)(D) identifies an incidental DPD as a reproduction or distribution of a phonorecord that is incidental to the transmission which constitutes the digital phonorecord delivery.

The Office, therefore, seeks further information as to whether the reproductions made to facilitate a stream result in a DPD as defined in section 115(d),[5] focusing on the requirement that the DPD must result in ''a specifically identifiable reproduction by or for any transmission recipient.'' Does streaming result in such specifically identifiable reproductions? And if a DPD is made in the course of streaming, does the streaming process also produce incidental DPDs for purposes of section 115? The Office welcomes the participation of individuals who can provide technical expertise in considering these questions.

Topic 3: Do Server Copies Necessary to Transmit Limited Downloads or Streams Fit Within the Scope of the Section 115 License?

The Office welcomes further information as to whether server copies, or other copies not actually delivered to the public for private use, fit within the scope of the section 115 license, perhaps as incidental DPDs. The language of 17 U.S.C. 115(c)(3)(D), which identifies an incidental DPD *as a reproduction or distribution* of a phonorecord that is incidental to the transmission which constitutes the digital phonorecord delivery could indicate that server copies may be considered incidental DPDs. On the other hand, the section 115(a)(1) requirement that ''a person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use'' may cut against consideration of a server copy as an incidental DPD, at least in cases where the server copy is used for purposes of streaming. Does the fact that the law indicates that an incidental DPD can be either a reproduction or a distribution minimize the importance of the 115(a)(1) requirement or nullify it in the case of an incidental DPD?

Topic 4: Notice Requirements

The Office amended its regulations governing Notice several years ago to allow service on agents of copyright owners as a way to make the license more functional. 69 FR 34578 (June 22, 2004). However, the section 115 license remains largely unused by most parties to previous rulemaking proceedings who expressed an interest in employing it. The Office, therefore, seeks information as to whether there are compelling reasons to further streamline the Notice process.

Specifically, the Office seeks further information on the benefits and burdens of the existing Notice requirements; the potential to eliminate information (data fields) currently required in a Notice; and services and technology that may be employed by either the Office or third parties to assist in the Notice process. The Office also seeks further information on the following previously suggested, yet heretofore unimplemented, methods for streamlining the Notice process:

a.Filing of ''Universal'' or ''Database'' Notices.

Current regulations allow that a Notice may address the works of multiple copyright owners only so long as such Notice is served on an agent of a copyright owner, and all of the works addressed by such Notice are owned or co–owned by copyright owners who have authorized their agent to accept Notice on their behalf. The Office seeks further information concerning additional changes to allow the filing of a single, universal ''Database'' Notice upon agents of copyright owners. Such a ''Database'' Notice would be effective only to the extent it addresses works owned or co–owned by the copyright owners represented by the agent on whom the Notice is served. Similar proposals regarding ''Database'' Notices have been suggested in previous proceedings. One such proposal put forward by DiMA, would have allowed the licensee, in the case of electronic submissions, to serve directly on copyright owners a single ''Database'' Notice listing multiple works by multiple owners. 69 FR 11571 (March 11, 2004).

The Office undertakes further inquiry regarding service of a single ''Database'' Notice to consider another proposal similar to DiMA's that would allow service of ''Database'' Notices on agents of copyright owners, as opposed to service of ''Database'' Notices directly on copyright owners. In its earlier consideration for allowing ''Database'' Notices, the Office found that section 115 ''does not anticipate that the copyright owner should have to search a licensee's universal database Notice to determine which of the copyright owner's works a licensee intends to use.'' 69 FR 11571 (March 11, 2004). In seeking further information regarding service of a ''Database'' Notice on agents of copyright owners, the Office recognizes the continually advancing search and sort capabilities of word processing, spreadsheet, and other electronic data management applications that are in increasingly wide use. Given such capabilities, would it be reasonable to require agents of copyright owners served with Notice to provide not only the name and address of the person to whom Statements of Account and monthly royalties are to be made, but also information regarding the works owned by the copyright owners the agent represents? And, assuming for purposes of this discussion copyright owners can provide this information, can and should the Office issue regulations under section 115 to allow service of a blanket ''Database'' Notice on a copyright owner (or an agent of one or more copyright owners) that does not specify any particular musical work, but simply states that the user intends to

[4] While the March 9, 2001, Notice of Inquiry set out to address ''On-Demand Streams'' only, the Office will consider all types of streaming, regardless of their interactive nature, in determining their place within the scope of the section 115 license, which unlike the section 114 license makes no distinction between interactive and noninteractive uses of copyrighted works.

[5] *See supra* n.1.

use the section 115 license to make and distribute DPDs for all musical works owned by that particular copyright owner (or all copyright owners represented by that particular agent)?

The Office takes note of the actions among interested parties to develop data exchange standards for information relating to media content, exemplified by the establishment of ''Digital Data Exchange.'' (*See www.ddex.net.* Are there additional emerging business solutions that may efficiently aid the administration of ''Database'' Notices? Would the adoption of a uniform standard for the exchange of digital data allow for the use of a universal ''Database'' Notice? Are there legal impediments to allowing service of a universal ''Database'' Notice on agents of copyright owners?

b.Authority of Agents

Current regulations allow a potential licensee to choose to serve Notice on either the copyright owner or an agent of the copyright owner with authority to receive the Notice. Previous rulemaking proceedings have considered that the regulations may set a higher standard for establishing an agency relationship than that applied as a matter of agency law. 69 FR 11568 (March 11, 2004). Currently, the regulations provide for service of the Notice on either the copyright owner or an agent of the copyright owner with authority to receive the Notice. The Office seeks further input as to whether an agent with authority to accept Notices includes general registered agents of copyright owners of the sort that may be required as a condition of enjoying corporate or other similar legal status by copyright owners in their respective jurisdictions. And if not, whether the regulations should be so amended.

Participation and Filing Requirements

Parties wishing to observe or participate in the roundtable discussion must submit a written request no later than close of business on June 6, 2007. Requests to observe the roundtable or to participate as a member of the roundtable must indicate the following information:

1. The name of the person, including whether it is his or her intention to observe the roundtable or to participate as a member of the roundtable;

2. The organization or organizations represented by that person, if any;

3. Contact information (address, telephone, and e–mail); and

4. Information on the specific focus or interest of the observers or participants (or his or her organization) and any questions or issues they would like to raise.

The capacity of the room in which the roundtable will be held is limited. If the Office receives so many requests that the room's capacity is reached, attendance will be granted in the order the requests are received.

The preferred method for submission of the requests to observe or participate is via email. If sent by e–mail, please send to musiclicense@loc.gov. Alternatively, requests may be delivered by hand or submitted by mail.

If hand delivered by a private party, an original and five copies of the request to observe or participate should be brought to Room 401 of the James Madison Building between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, Library of Congress, James Madison Building, LM–401, Washington, DC, 20559–6000.

If delivered by a commercial courier, an original and five copies of a request to observe or participate in the roundtable must be delivered to the Congressional Courier Acceptance Site (''CCAS'') located at 2nd and D Streets, NE, Washington, DC between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM 401, James Madison Building, 101 Independence Avenue, SE, Washington, DC. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a request to observe or participate should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Please be aware that delivery of mail via the U.S. Postal Service or private courier is subject to delay. Therefore, it is strongly suggested that any request to observe or participate be made via email.

Dated: May 24, 2007

Marybeth Peters,

Register of Copyrights.

[FR Doc. E7–10363 Filed 5–29–07; 8:45 am]

BILLING CODE 1410–30–S

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

DATE: Weeks of May 28, June 4, 11, 18, 25, July 2, 2007.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of May 28, 2007

Tuesday, May 29, 2007

1:30 p.m. NRC All Hands Meeting (Public Meeting) (*Contact:* Rickie Seltzer, 301–415–1728), Marriott Bethesda North Hotel, Salons A–E, 5701 Marinelli Road, Rockville, MD 20852.

Wednesday, May 30, 2007

9:25 a.m. Affirmation Session (Public Meeting) (Tentative): a. USEC Inc. (American Centrifuge Plant), LBP–07–06 (Initial Decision Authorizing License), Geoffrey Sea Letter ''in preparation of late-filed contentions'' (Tentative).

b. Shieldalloy Metallurgical Corp. (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility), Docket No. 40–7102–MLA, Appeal of Loretta Williams from LBP–07–05 (Tentative).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

9:30 a.m. Briefing on Results of the Agency Action Review Meeting (AARM)—Materials (Public Meeting) (*Contact:* Duane White, 301–415–6272).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

10:15 a.m. Discussion of Security Issues (Closed–Ex.1).

Thursday, May 31, 2007

9 a.m. Briefing on Results of the Agency Action Review Meeting (AARM)—Reactors (Public Meeting) (*Contact:* Mark Tonacci, 301–415–4045).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 4, 2007—Tentative

Thursday, June 7, 2007

1:30 p.m. Meeting with the Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting) (*Contact:* Frank Gillespie, 301–415–7360).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 11, 2007—Tentative

There are no meetings scheduled for the Week of June 11, 2007.

Week of June 18, 2007—Tentative

There are no meetings scheduled for the Week of June 18, 2007.

Week of June 25, 2007—Tentative

There are no meetings scheduled for the Week of June 25, 2007.