

Comments to Copyright Office re: digital downloads

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Filed under

Supporting Documents

The Public Interest Commenters endorse the broad goals of the Copyright Office (CO) in this rulemaking. We support the goal of reducing the legal uncertainty associated with operating a digital music service in today's marketplace. We agree with the CO that digital music services should be able to rely on the Section 115 license to "cover all musical works embodied in phonorecords made and distributed to the public for private use including those phonorecords made on the end-users' RAM [random access memory] or hard drive, on transmission service's servers, and all intermediate reproductions on the networks through which transmission occurs." 73 Fed. Reg. at 40806. We also endorse the CO's conclusion that "a regulation clarifying that all copies made in the course of or for the purpose of making a DPD [digital phonorecord delivery] are included within the Section 115 license should not be construed as an indication that all such copies would be infringing but for their inclusion within the scope of the license." 73 Fed. Reg. at 40811 n.11.

The Public Interest Commenters, however, are concerned that controversies surrounding ancillary issues could jeopardize the goals of this rulemaking. In light of the uncertainty regarding the scope of the Copyright Office's regulatory authority, the more this rulemaking delves unnecessarily into controversial issues with implications beyond Section 115, the greater the likelihood that any final rule may be the subject of litigation that undermines the goal of reducing legal uncertainty for parties seeking to rely on Section 115. In particular, it seems both extraneous and premature in this rulemaking to address the proper application of the reproduction and distribution rights to new digital technologies in light of the evolving legal precedent in this area. Accordingly, the Public Interest Commenters urge the CO to take a conservative approach and focus this rulemaking narrowly on the specific issues that are critical to the application of Section 115, avoiding ancillary questions that may entangle this rulemaking in unnecessary controversy.

Fortunately, the NPRM itself suggests a constructive solution that would minimize the uncertainties that threaten this rulemaking, while still meeting the goals of clarifying the scope of the Section 115 compulsory license. A narrowly tailored rule developed along these lines would:

- Stand by the view that all relevant distributions and reproductions of musical compositions needed to implement digital download and streaming services are "licensable" under the Section 115 compulsory license. Section 115 can then act as a "safe harbor" for those music services that wish to use Section 115 without testing the question of whether each of their activities requires a license as a matter of copyright law.
- Avoid addressing ancillary questions regarding the scope of the reproduction and distribution rights as applied to new digital technologies. In particular, the Public Interest Commenters believe there is no need for the CO to take any position on whether specific copies made and disseminated in the course of delivering a DPD qualify as phonorecords, constitute distributions within the meaning of Section 106(3), or otherwise require a license. Those questions should be left to courts to decide on a case- by-case basis.

