

**LIBRARY OF CONGRESS****Copyright Office****37 CFR Part 201 and 255**

[Docket No. RM 2000–7]

**Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries****AGENCY:** Copyright Office, Library of Congress.**ACTION:** Interim rule and request for comments.

**SUMMARY:** The Copyright Office is announcing an interim regulation to clarify the scope and application of the Section 115 compulsory license to make and distribute phonorecords of a musical work by means of digital phonorecord deliveries. The Office seeks comments on the interim regulation.

**EFFECTIVE DATE:** December 8, 2008. Comments must be received in the Office of the General Counsel of the Copyright Office no later than January 6, 2009.

**ADDRESSES:** If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Room 401, 101 Independence Avenue, SE., Washington, DC 20559, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office. If delivered by a commercial courier, an original and five copies of a comment or reply comment 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 403, James Madison Building, 101 Independence Avenue, SE., Washington, DC 20559. 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 comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:***Background*

On July 16, the Copyright Office published a notice of proposed rulemaking (the “NPRM”) to amend its regulations to clarify the scope and application of the Section 115 compulsory license to make and distribute phonorecords of a musical work by means of digital phonorecord deliveries (“DPDs”). 73 FR 40802. Specifically, the notice proposed to amend the definition of “digital phonorecord delivery” to clarify that a digital phonorecord delivery under the compulsory license provided under 17 U.S.C. 115 includes the following: permanent digital downloads of phonorecords; limited downloads, which use technology that causes the downloaded file to be available for listening only either during a limited time (e.g., a time certain or a time tied to ongoing subscription payments) or for a limited number of performances; and all buffer copies delivered to a transmission recipient. The NPRM also put forward that the Section 115 license included coverage for all reproductions made to facilitate the making and distributing of DPDs.

In the course of its analysis, the Office categorized a number of different types of reproductions that can be made for the purpose of making DPDs: Server–end Complete Copies, Recipient–end Complete Copies, Server–end Buffer Copies, and Recipient–end Buffer Copies.<sup>1</sup> As described in the NPRM, a Server–end Complete Copy is a copy of a sound recording of an entire musical work which resides on the server of a digital music service and serves as the source of the transmission that results in a DPD. A Recipient–end Complete Copy is a copy of a sound recording of an entire musical work which is made on the recipient’s computer or device during the course of the transmission. A Server–end Buffer Copy is a copy of a portion of a sound recording of a musical work (which, along with a number of other buffer copies, typically will cumulatively constitute a recording of the entire musical work) that is made

on the transmitting entity’s server and typically exists for a short period of time, sometimes a few seconds or less. A Recipient–end Buffer Copy is a copy of a portion of a sound recording of a musical work (which, along with a number of other buffer copies, typically will cumulatively constitute a recording of the entire musical work) that is made on the recipient’s computer or device and typically exists for a short period of time, sometimes a few seconds or less.

In the NPRM, the Office proposed that a DPD would exist whenever a transmission includes any of the following: a Recipient–end Complete Copy and/or a Recipient–end Buffer Copy. The Office tentatively proposed that both of these kinds of copies satisfied the statutory requirements of being “phonorecords” that are “specifically identifiable.” The Office indicated that Server–end Copies did not satisfy the requirements for a DPD because they are not “delivered.”

The Office proposed to interpret the compulsory license as including a license to make Server–end copies as well as all other intermediate copies used to facilitate a digital transmission that results in the making and distribution of a DPD, even though those copies may not themselves constitute DPDs. Thus, a Server–end copy that is the source of a transmission that results in a DPD, such as a download, will be included within the scope of the compulsory license, although it is not itself a DPD for which payment would be required. On the other hand, a Server–end copy that is the source of a transmission of a performance that does not result in the making and distribution of a DPD would not fall within the scope of the compulsory license.

With respect to limited downloads, the Office proposed the following conclusion: “While policy reasons might exist for distinguishing such a limited download from a permanent reproduction, we can find no basis in the statute for considering a limited download to be something other than a phonorecord. Moreover, the fact that a limited download is a phonorecord does not in any way prevent the Copyright Royalty Judges from valuing it differently and setting a lower rate.” 73 FR at 40808. Accordingly, the Office tentatively concluded that limited downloads, like other Recipient–end Complete Copies, satisfy the requirements for DPDs.

In response to requests by some interested parties and in light of the intervening decision of the United States Court of Appeals for the Second Circuit in *The Cartoon Network LP v.*

<sup>1</sup> We call these reproductions “copies” not in the technical sense as defined in 17 U.S.C. 101, but in the more general dictionary sense in which the term “copies” is understood. We recognize that these reproductions are of sounds other than those accompanying a motion picture or other audio visual work, which when fixed in material objects from which sounds may be perceived would properly be categorized as “phonorecords.” Additionally, we acknowledge that parties disagree on the copyright implications of the reproductions, an analysis of which is contained herein.

*CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. Aug. 4, 2008), the Office extended the comment period and, on September 19, 2008, conducted a hearing. Having considered the comments and the testimony at the hearing, the Register of Copyrights now issues this interim regulation and requests comments.

#### *Summary of Interim Regulation*

In the NPRM, the Office proposed to define a “digital phonorecord delivery” as including all buffer copies made in the course of streaming, which would have meant that all music streaming activity would be included within the scope of the compulsory license.<sup>2</sup> However, in light of the recent comments and testimony, and the uncertainty created by the Second Circuit’s *Cartoon Network* opinion concerning the fixation of buffer copies, the interim regulation announced today is more modest in scope than the proposed regulation. The Office is not currently prepared to issue a regulation that definitively addresses whether such copies are within the scope of the compulsory license, except to the extent the transmission also results in the making of copies which more certainly qualify as DPDs. As such, the interim regulation takes no position on whether or when a buffer copy independently qualifies as a DPD, or whether and when it is necessary to obtain a license to cover the reproduction or distribution of a musical work in order to engage in activities such as streaming.

The interim regulation clarifies that (1) whenever there is a transmission that results in a DPD, all reproductions made for the purpose of making the DPD are also included as part of the DPD, and (2) limited downloads qualify as DPDs. The interim regulation does not attempt to define the threshold at which a DPD occurs. That remains contested, as discussed below.

#### **Authority To Issue Regulations**

The Office requested comments on whether the issues raised in the NPRM could be addressed in an administrative rulemaking. In response, the Digital Media Association (“DiMA”) as well as the Business Music Industry; Verizon Communications; CTIA—The Wireless Association (“CTIA”); the National Association of Broadcasters (“NAB”);

Google/YouTube; and Electronic Frontier Foundation, Public Knowledge, Center for Democracy and Technology, Consumers Union, Consumer Federation of America, U.S. PIRG, and the Computer & Communications Industry Association (collectively referred to as “Public Interest Commenters”) raised questions and concerns regarding the Office’s authority to issue a rule that would have a wide-reaching impact on activities outside the scope of Section 115.

For example, Verizon, CTIA, and NAB argued that the proposed rule is a substantive rule of copyright law and therefore is not a matter relating to administration of the functions and duties of the Copyright Office. They asserted that the proposed rule would both reinterpret substantive principles of copyright law and fundamentally reset the balance between copyright owners and users. They maintained that the proposed rule is distinguishable from any judicially approved exercise of Office rulemaking authority under Sections 701 or 702. Further, they noted that authority under Sections 701 and 702 is distinguishable from the authority granted to the Register to make determinations on “material questions of substantive law” under Chapter 8, which is accompanied by specific procedural limitations that indisputably are not present in association with the proposed rule. In addition, DiMA asserted that the Office’s authority to issue a rule at this time, in the midst of the Copyright Royalty Board (the “CRB”) ratemaking proceeding, is foreclosed and that to do so would impermissively interject the Office into the CRB proceeding. DiMA maintains that this result would contravene specific provisions of the Copyright Act that narrowly circumscribe the Office’s authority to be involved in a CRB rate-setting proceeding.

On the other hand, SESAC noted the Office’s specific and limited scope of authority under Section 115, and asserted that the Office should not go beyond its statutory authority and opine on the relative values of separate and independent rights implicated in a given transmission. Similarly, the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. (“ASCAP/BMI”) acknowledged the Office’s statutory mandate to address administration of the Section 115 license. However, they specifically noted that any statements by the Office affecting the definition or applicability of the performance right are beyond the limited authority granted to the Office to administer Section 115. Other comments, such as the one filed

by the Recording Industry Association of America (“RIAA”), and a joint filing by National Music Publishers Association, including its wholly owned licensing subsidiary, The Harry Fox Agency, Inc.; the Songwriters’ Guild of America; the Nashville Songwriters Association International; and the Association of Independent Music Publishers, (Collectively “Copyright Owners”) expressed the view that the Register does possess the authority to issue such rules.<sup>3</sup>

Section 702 authorizes the Register of Copyrights “to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title.” Among the functions and duties of the Register is the responsibility to issue regulations prescribing how a licensee shall file a notice of intention to use the statutory license, 17 U.S.C. 115(b)(1), and regulations governing the submission of monthly and annual statements of account. 17 U.S.C. 115(c)(4). Pursuant to this authority, the Register has issued regulations that, *inter alia*, govern the content of the notice and the statements of account associated with the use of the Section 115 license. See 37 CFR 201.18 and 201.19. These regulations include definitions of statutory terms, which clarify the application of the terms in the context of the statutory license thus enabling a licensee to understand how to accurately report the making and distribution of a phonorecord under Section 115.

Courts have recognized the Register’s authority to promulgate regulations interpreting the statute under the authority granted in Section 702 and specific provisions in the law, such as the statutory licenses. In *Cablevision Systems Development Co. v. Motion Picture Association of America, Inc.* (“*Cablevision*”) the court acknowledged Section 702 as the source of general authority for the Office to conduct rulemaking proceedings to carry out specific responsibilities. *Cablevision* 836 F.2d 599 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988). In *Cablevision*, the Register issued

<sup>3</sup> Most of the commenters who objected to the Register’s authority appear to have done so out of fear that the Register would address issues such as whether buffer copies constitute phonorecords—issues which, as set forth below, the Register has declined to resolve in this proceeding. Many of those commenters expressed concern that in order to address those issues, the rulemaking would have consequences for activities that have no relationship to the section 115 compulsory license. However, the more modest regulation announced today is more narrowly focused and would appear to have little if any applicability outside the scope of the compulsory license.

<sup>2</sup> The Office noted that the fact that the compulsory license is available for such activity should not be construed as meaning that a license is necessary for all such activity. Rather, the license would simply be available for online music services who do not wish to expose themselves to potential liability in cases where a musical copyright owner asserts that the making of, e.g., buffer copies constitutes an infringement of the reproduction right.

regulations under Section 111(d)(1) that directed cable systems to deposit royalty fees with the Copyright Office. Those regulations included an interpretation of the statutory term, "gross receipts," which was central to the calculation of royalty fees for the public performance of secondary transmissions of broadcast signals under the statutory license. Opponents of the regulation argued that the authority of the Register was limited to the "ministerial task of designing forms." The court, however, rejected this narrow approach, noting that authority to design forms has a substantial policy component and that the Copyright Office "certainly has greater expertise in such matters than the federal courts." Thus, under the court's reasoning, the issuance of a rule interpreting a statutory term for the purpose of administering the license was not a violation of the rulemaking authority granted to the Register, provided that the interpretation was reasonable.

Other circuits have reached the same conclusion. In *Satellite Broadcasting and Communications Association of America v. Oman* ("SBCA"), the court found that "the Copyright Office is a federal agency with authority to promulgate rules concerning the meaning and application of § 111." SBCA 17 F.3d 344, 347 (11th Cir. 1994). In reconsidering its earlier determination that a satellite carrier could be considered a cable system making it eligible to utilize the Section 111 statutory license, the court revised its determination in light of a final rule issued by the Copyright Office which concluded that a satellite carrier was not a cable system under Section 111. The court acknowledged that the interpretation of the agency was due deference unless arbitrary, capricious, or manifestly contrary to the provisions of the Copyright Act. *Id.*

The current rulemaking is consistent with the Office's practice of promulgating regulations to construe statutory terms that are critical to the administration of a statutory license administered by the Office. The Office is relying on both its general rulemaking authority under Section 702 and the specific grant of authority found in Section 115(b)(1) and (c)(4) to issue rules governing notices of intention and statements of account, in a manner parallel to what happened when it adopted a definition of "gross receipts" and construed the term "cable system," with the only difference being that the Office considered these terms under its power to promulgate rules under a different statutory license. See 17 U.S.C 115(b)(1); (c)(4) and § 111.

Opponents of the proposed regulation argue that notwithstanding these earlier cases, the authority of the Register to issue the proposed rule is foreclosed under *Gonzales v. Oregon*, 546 U.S. 243 (2006). They maintain that Title 17 provides the Register no general rulemaking authority, and consequently, the Office cannot issue the proposed rule. The parties, however, focus only on Section 702 and fail to recognize the express authority provided to the Register in Section 115. Moreover, *Gonzales* does not undermine the earlier rulings in *Cablevision* or *SBCA*. *Gonzales* recognizes, as do *Cablevision* and *SBCA*, that an agency's interpretation of a statute is due deference when the statute is ambiguous and when Congress has delegated the authority to the agency to promulgate rules carrying the force of law. *Gonzales*, 546 U.S. at 255 (citing *Chevron U.S.S., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *United States v. Mead Corp.*, 533 U.S. 218, 226–227 (2001)). The facts in *Gonzales*, however, led to a finding that the Attorney General lacked the authority to issue a regulation about the scope of "legitimate medical purpose" under his authority to adopt rules governing the registration of physicians. Specifically, the court found that the Attorney General had no authority to issue a rule that extended beyond registration practices to "an interpretation of the substantive federal law requirements (under 21 CAR § 1306.04 (2005)) for a valid prescription." *Id.* at 261. The court also rejected the position of the Attorney General that his authority to deregister physicians provided the necessary authority for the rule. The court rejected that approach because it would vest power in the Attorney General to criminalize actions of registered physicians—an activity not contemplated by the statute. *Id.* at 261, 262. Similarly, the court found that the regulatory authority claimed by the Attorney General was "inconsistent with the design of the statute" because the statute does not delegate rulemaking authority solely to the Attorney General. In some instances, he must share that authority with or defer to the Secretary of Health and Human Services. *Id.* at 265.

Unlike the disputed rule in *Gonzales*, the interim rule which is the subject of today's notice has meaning only for the Section 115 license. The interim rule is a clarification of the statutory definition of a DPD to incorporate the Office's determination that the Section 115 license covers server copies and

intermediate copies made to facilitate the making and distribution of a DPD and that a limited download is a DPD. The rule extends the traditional understanding of the scope of the Section 115 license, that phonorecords made for the purpose of making additional reproductions of the sound recording and the musical works embodied therein are covered under the license, to the digital realm. As the court in *Cablevision* noted, and as discussed previously, the authority to issue regulations for the filing of statements of account includes a "substantial policy component." Thus, the Office issues this rule under its authority to interpret statutory terms that are central to its role in promulgating regulations to account for the royalties owed for the making and distribution of phonorecords under the statutory license. Without this clarification, no guidance would exist regarding whether liability attached to these reproductions relative to the statutory license. In addition, the rule makes clear that DPDs includes digital phonorecords that may be limited either by time or number of uses, an issue that was raised in the original petition for a rulemaking but a conclusion that does not now appear to be in dispute.

The Office also finds no basis for DiMA's assertion that the Office is foreclosed from issuing a rule at this time, in the midst of the CRB ratemaking proceeding. The statute does not constrain the Office from issuing regulations for the purpose of administering a statutory license when the Copyright Royalty Judges are also conducting a concurrent rate setting proceeding for the same statutory license. Nor is there any reason for the Office to delay the issuance of its interim rule when, as here, the interim rule amends Copyright Office regulations to incorporate concepts that seemingly are not in dispute by the parties participating in this rulemaking proceeding. Moreover, to the extent that the interim rule adds clarity to an issue upon which the Register is competent to rule and may offer guidance to the Copyright Royalty Judges, there is nothing improper about the exercise of the Register's authority at this time. In any event, parties have an opportunity to comment specifically on the interim rule within the comment period, since this is an interim rule.

In its NPRM, the Office proposed a much broader regulation. Consequently, the Office discusses herein the original proposal and the reasons for adopting a more limited regulation.

## Discussion

### A. Digital Phonorecord Deliveries in General

As the Office stated in its NPRM, in considering whether the reproductions made by a transmission service are digital phonorecord deliveries and fit within the scope of the Section 115 license, the starting point is the statutory definition of a DPD. 17 U.S.C. 115(d). It defines a DPD, in relevant part, 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.

17 U.S.C. 115(d). In order for a reproduction of a sound recording to qualify as a DPD under the statutory criteria, the reproduction must meet all the criteria specified in the definition: (1) it must be delivered, (2) it must be a phonorecord, and (3) it must be specifically identifiable.

(1) *Delivery*. While several parties disputed the second and third criteria specified in the definition of a DPD, no parties put forward arguments against the proposed finding that reproductions identified in the NPRM as Recipient-end copies are “delivered” and therefore satisfy the first requirement for being a DPD.<sup>4</sup>

(2) *Phonorecord (Fixation)*. In considering whether the reproductions made by a transmission service are phonorecords, the Office’s NPRM turned to the definition found in 17 U.S.C. 101. The statute defines phonorecords as:

material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.

17 U.S.C. 101. The question is whether each reproduction made during the course of a digital transmission meets this definition and thus satisfies the second prong of the statutory definition for a DPD. The Office proposed that a buffer copy made in the course of a service’s transmission on either the Server-end or the Recipient-end is sufficiently fixed to meet the definition of a phonorecord. This proposal was strongly opposed by parties representing users of the works.

Parties such as DiMA, Verizon, CTIA, NAB, Google/YouTube, Public Interest Commenters, New Media Rights, and Cablevision disputed the Office’s conclusion that all buffer copies qualified as “fixed” phonorecords or copies. They uniformly cited to the Second Circuit’s decision in *Cartoon Network, which reversed Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007), a decision cited in the NPRM. 73 FR at 40809. They argued that the *Cartoon Network* decision undermines the legal analysis contained in the NPRM.

On the other hand, RIAA disagreed with the *Cartoon Network* decision, but found it unnecessary to debate the fixation issue. It argued that some copies created by transmission services are persistent enough that they would meet any definition of the term “fixed,” and services that wish to obtain a Section 115 license as a “safe harbor” should have that option. Copyright Owners also argued that the *Cartoon Network* decision is inapplicable to the transmission services in question because the buffer copies made by streaming music services are distinguishable from the ones considered in the *Cartoon Network* case. Under the view of the Copyright Owners, buffer copies made by streaming music services are more analogous to the RAM copies considered in cases cited in the Copyright Office’s *DMCA Section 104 Report*.

The Copyright Owners also concluded that the *Cartoon Network* decision’s analysis of the “duration” requirement is unsupported by the Copyright Act or prior judicial interpretation. They argued that the *Cartoon Network* court took a “stopwatch” approach by measuring the duration of the subject buffer copies and then opined that they did not last for a sufficient number of seconds. In response, the Copyright Owners asserted that Section 101 does not require that a copy last for any specified period of time. 17 U.S.C. 101. They argued that the *Cartoon Network* approach suffers from a lack of standards—statutory or otherwise—to

guide this judge-made “duration” requirement. The Copyright Owners instead endorsed the approach proposed in the NPRM, which examines whether the copies in question exist for a sufficient period of time to be capable of being “perceived, reproduced or otherwise communicated.” 73 FR at 40808. They stated that such an approach does not depend upon an arbitrary assessment. Moreover, it adheres to the overarching consensus of other courts that have considered this issue.

In the NPRM, the Office’s tentative conclusions relating to the status of buffer copies as phonorecords relied in part on the District Court’s decision in *Twentieth Century Fox*, which had concluded that buffer copies made in a somewhat different context than the streaming of music were infringing “copies” under the copyright law. 478 F. Supp. 2d at 621–22. The court rejected arguments by the defendant that the buffer copies did not qualify as “copies” because they were “not fixed” and were “otherwise de minimis.” *Id.* at 621. In finding the buffer copies were “fixed” the court reasoned,

The Copyright Act, however, provides that a work is “fixed” if it “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” Here, as discussed, the portions of programming residing in buffer memory are used to make permanent copies of entire programs on the Arroyo servers. Clearly, the buffer copies are capable of being reproduced. Furthermore, the buffer copies, in the aggregate, comprise the whole of plaintiffs’ programming.

*Id.* (citations omitted) (quoting 17 U.S.C. 101). The court relied in part on the Copyright Office’s *DMCA Section 104 Report*, noting,

Indeed, the United States Copyright Office, in its August 2001 report on the Digital Millennium Copyright Act (“*DMCA Report*”), has indicated that buffer copies are “copies” within the meaning of the Copyright Act. Specifically, the Copyright Office concluded that temporary copies of a work in RAM are generally “fixed” and thus constitute “copies” within the scope of the copyright owner’s right of reproduction, so long as they exist for a sufficient amount of time to be capable of being copied, perceived or communicated. (*DMCA Report* at xxii, 110–11).

*Id.* at 621–22.

The issue addressed in *Twentieth Century Fox* and in the *DMCA Section 104 Report* was whether temporary buffer copies meet the “fixation” requirement of the copyright law.

<sup>4</sup> Several parties disputed the proposed finding that every “delivery” constitutes a “distribution.” These arguments are addressed in a later section regarding the threshold requirements for use of the Section 115 license.

Phonorecords (a necessary element of a DPD; see 17 U.S.C. 115(d)) are defined as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. 101 (emphasis added). The statute defines “fixed” as follows:

A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

17 U.S.C. 101.

In the *DMCA Section 104 Report*, the Office interpreted the “more than a transitory duration” element of fixation as follows: “The dividing line, then, can be drawn between reproductions that exist for a sufficient period of time to be capable of being ‘perceived, reproduced, or otherwise communicated’ and those that do not.” *DMCA Section 104 Report* at 111. As noted above, the Southern District of New York had agreed with this analysis in *Twentieth Century Fox*. 478 F. Supp. 2d at 621–22.

In the NPRM, the Office reviewed that analysis and observed, “The Office has no reason to believe that developments in either technology or the law require us to revisit the above-stated conclusions. As such, Server-end Buffer Copies and Recipient-end Buffer Copies appear to be phonorecords and therefore satisfy the second requirement for being a DPD.” 73 FR at 40809. Nineteen days later, the United States Court of Appeals for the Second Circuit reversed the district court’s *Twentieth Century Fox* decision. *Cartoon Network*, 536 F.3d at 130. Among other things, the court took issue with the *DMCA Section 104 Report*’s analysis of buffer copies and fixation, stating, “[a]ccording to the Copyright Office, if the work is capable of being copied from that medium for any amount of time, the answer to both questions is ‘yes.’ The problem with this interpretation is that it reads the ‘transitory duration’ language out of the statute.” *Id.* at 129. The court concluded that the buffer copies made by a cable television service in the course of creating server copies “are not ‘embodied’ in the buffers for a period of

more than transitory duration, and are therefore not ‘fixed’ in the buffers.” *Id.* at 130.

The Office does not consider the Second Circuit’s opinion to be definitive on the issue involved in this rulemaking. The court’s reasoning leaves at least something to be desired and offers no guidance as to when a copy might be considered to be “embodied” for “a period of more than transitory duration.” Based on the *Cartoon Network* opinion, it appears that the duration requirement necessitates an embodiment for more than 1.2 seconds (the duration of the buffer copies at issue in that case) but does not require a duration of more than “several minutes.” *Id.* at 128, 131 (discussing *MAI Sys. Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993)). Indeed, it leaves open the possibility that a buffer copy that exists for several seconds might have sufficient duration to satisfy the fixation requirement. We can glean no principle from the Second Circuit’s opinion which offers any guidance as to where the line is to be drawn.<sup>5</sup>

While the Second Circuit’s opinion criticizes the analysis in the Office’s *DMCA Section 104 Report*, the latter did attempt to provide a guiding principle for determining when the duration requirement has been met:

In establishing the dividing line between those reproductions that are subject to the reproduction right and those that are not, we believe that Congress intended the copyright owner’s exclusive right to extend to all reproductions from which economic value can be derived. The economic value derived from a reproduction lies in the ability to copy, perceive or communicate it. Unless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated, the making of that copy should fall within the scope of the copyright owner’s exclusive rights. The dividing line, then, can be drawn between reproductions that exist for a sufficient period of time to be capable of being ‘perceived, reproduced, or otherwise communicated’ and those that do not.

*DMCA Section 104 Report* at 111.

For present purposes, we need not resolve whether the Second Circuit’s critique of the Office’s analysis is compelling. It is sufficient to note that the record in this rulemaking and the *Cartoon Network* opinion create

<sup>5</sup> Although the factual record in this proceeding is insufficient, it is quite possible that the buffer copies typically made in streaming exist for a longer period of time—and perhaps a considerably longer period of time—than the 1.2-second buffer copies at issue in *Cartoon Network*. If so, that case might be distinguishable on its facts.

sufficient uncertainty to make it inadvisable to engage in rulemaking activity based on the Office’s analysis in the *DMCA Section 104 Report*. Consequently, the interim rule does not address whether streaming of music that involves the making of buffer copies, but which makes no further copies, falls within the Section 115 compulsory license, or whether such buffer copies qualify as DPDs. It seems likely that in at least some, and perhaps many cases, buffer copies may constitute DPDs, but we do not reach any broad conclusions on that point in light of the current state of the law and the factual record before us.

As a practical matter, the marketplace may decide that issue. Most licenses that purport to be made pursuant to Section 115 are not, in fact, compulsory licenses. They are voluntary licenses between music publishers and licensees who agree to payment of the royalties at the rates that have been established for the actual compulsory license. To the extent that music publishers and licensees are willing to use the Section 115 model to license reproductions, including buffer copies, that are made in the course of streaming, then as a practical matter the marketplace may decide to treat buffer copies as DPDs, although not necessarily as DPDs entitled to the same royalty as more permanent copies.

While we leave open the question whether buffer copies may be DPDs that fall within the Section 115 compulsory license, we note that certain streaming services involve the making of cache copies. To the extent that cache copies are placed on the recipient’s hard drive and may exist for some indefinite period of time beyond the entire performance of the phonorecord, the Office understands that such copies would appear to satisfy the fixation/reproduction requirement.

(3) *Specifically identifiable*. Section 115 defines “digital phonorecord delivery,” in relevant part, 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.” 17 U.S.C. 115(d). With regard to interpretation of the phrase “specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording,” the Copyright Owners concurred with the tentative proposal in the Copyright Office’s NPRM, which offered that the plain meaning of the statute indicates that a reproduction may be either “specifically identifiable” by any transmission recipient or

“specifically identifiable” for any transmission recipient. In endorsing the view in the NPRM’s tentative proposal, they noted that contrary to arguments based upon a comment appearing in legislative history, Congress could easily have included a requirement that the reproduction be specifically identifiable to the transmitting service, but it did not.

However, several parties including, RIAA, Verizon, CTIA, and NAB raised questions regarding the Office’s proposed interpretation of the phrase. These parties agreed with the Office’s observation that the phrase “specifically identifiable” is “unique in copyright law,” but they went on to cast doubt on the grammatical construction used by the Office in arriving upon the tentatively proposed plain meaning. Verizon and NAB maintained that the phrasing could not mean that the phonorecord was “specifically identifiable” by the recipient, offering phrases with analogous grammatical structure to illustrate their point. For example, they pointed out that the phrase “an instantly recognizable painting by Picasso” does not indicate that the painting is “instantly recognizable” by Picasso. Similarly, they noted that in the statutory phrase “specifically identifiable reproduction by or for any transmission recipient,” the adjectival clause “specifically identifiable” is not linked to the transmission recipient. They therefore asserted that it is equally plausible to construe the “specifically identifiable” phrase as referring to the transmitting service.

RIAA also argued that the proposed interpretation is contrary to the statute’s legislative history. Verizon, CTIA, and NAB took a similar position arguing that the tentatively proposed rule would be inconsistent with the overall statute and that the phrase is ambiguous. They pointed to *Muniz v. Hofman*, 422 U.S. 454, 468 (1975) and *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 642 (1990) for the principle that where statutory language is susceptible to multiple constructions, it should be construed by reference to the legislative intent and the overall structure of the statutory provision. They went on to urge that the Office should follow its own previous reasoning that, where two interpretations of statutory language are both plausible: “Turning to the legislative history is appropriate where, as here, the precise meaning is not apparent and a clear understanding of what Congress meant is crucial to an accurate determination of how Congress intended the digital performance right and the statutory scheme to operate.”

*Final Rule, Public Performance of Sound Recordings: Definition of a Service*, 65 FR 77292, 77296.

Commenters’ attempts to indicate that there is ambiguity in the statute cited to the Senate and House Committee Reports on the Digital Performance Right in Sound Recordings Act (the “1995 House and Senate Reports”) as evidence of the proposed ambiguity. Reliance on such evidence is misplaced. As the Supreme Court has directed, extraneous material such as legislative history “are only admissible to solve doubt and not to create it.” *Railroad Com. of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 589 (1922). As Verizon and NAB’s comments reveal, the phrase has precisely the same generally applicable meaning as the phrase “instantly recognizable” as used in the phrase “an instantly recognizable painting by Picasso.”

Furthermore, even assuming we were persuaded by the arguments that the phrase “specifically identifiable” is ambiguous and should be read with reference to the legislative history, as is urged by Verizon, CTIA and NAB, the legislative history does not serve to clarify any supposed ambiguity in the meaning of the words “specifically identifiable” but rather suggests a limit on whom the adjectival clause “specifically identifiable” is to be applied. Construing the phrase in the manner suggested would require the insertion of additional language indicating that the adjectival clause “specifically identifiable” may only be applied “to the transmission service.” The Office declines commenters’ invitation to make such an insertion. Instead, the Office’s interim rule follows the principle of statutory construction that one “should not read words into a statute that are not there.” *U.S. v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002).

After considering the arguments raised by the parties, the Copyright Office accepts the structure of the phrase “specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording” as it is explained and advanced by Verizon, CTIA, and NAB. Throughout the course of this proceeding leading up to the Office’s tentatively proposed rule, the parties and the Office focused on two competing, yet flawed, interpretations. Under the previously proposed interpretations, a reproduction could be on the one hand “specifically identifiable” to the transmission service or on the other hand “specifically identifiable” by any transmission recipient or “specifically identifiable”

for any transmission recipient. However, in light of the comments submitted by Verizon, CTIA, and NAB, the Office agrees that the sentence does not link the adjectival clause “specifically identifiable” to the transmission recipient. It also recognizes that nothing in the sentence links the adjectival clause “specifically identifiable” to the transmission service. In keeping with the insightful examples of similarly constructed language provided by Verizon, CTIA, and NAB, the Office concludes that “specifically identifiable” plainly, unambiguously and without limitations means “specifically identifiable” to anyone or anything, including the transmission service, the transmission service’s computer, the transmission recipient, or the transmission recipient’s computer.

While the Office takes no position as to whether each individual delivery of a phonorecord by digital transmission results in a specifically identifiable reproduction, there can be little question that certain streaming services involve the making of legally recognizable copies. To the extent that such copies may be identifiable by any person or computer, including any identification as an essential step in actually making the phonorecord perceptible to the recipient, the Office understands that such copies would satisfy the requirement of being “specifically identifiable.”

## B. Incidental DPDs

The Office recognizes the parties’ views that certain reproductions created by transmission services may be categorized as so-called incidental DPDs. Section 115 requires that rates and terms shall distinguish between general DPDs and incidental DPDs. However, the statute does not offer a definition of incidental DPDs. Indeed, the statute does not specifically refer to incidental DPDs; it simply directs the Copyright Royalty Judges to set rates that “distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general.” The lack of a specific definition of incidental DPDs has created a great deal of confusion among those parties with an interest in the Section 115 license. The Office notes that the parties have seemed less interested in defining what constitutes an incidental DPD and more concerned about receiving clarification as to whether specific types of digital

transmissions services fall within the scope of the statutory license.

The parties urging the Office to interpret the meaning of incidental DPD have not offered specific suggestions as to how the Office should define the term. Rather they offered conclusions as to which specific types of digital transmission services should be deemed to create reproductions that fall inside or outside the definition of incidental DPD. Support for these conclusions was made largely on policy or economic grounds.

As indicated previously, the Office understands that an incidental DPD is nothing more than a subset of DPDs. However, we can find little reason to delineate the contours of that subset. Whether a DPD is “incidental” or “general,” it is included under the Section 115 license. The Office questions whether the concept of incidental DPDs as set forth in the statute lends itself to further clarification in a regulation of general application. The Office observes that the legislative history of the Digital Performance in Sound Recordings Act of 1995 indicates that Congress recognized the likelihood of several different types of digital transmission systems. The Office also recognizes Congress’ indication that certain DPDs may be incidental to the purpose of the transmission. S. Rep. No. 104–128 at 39.<sup>6</sup> However, the Office notes that, except for one discrete example of a type of service that would result in an incidental DPD, neither the statute nor the legislative history attempts to offer criteria for determining the purpose of a transmission.

The Office understands that neither the statute, the legislative history, nor the proposals submitted by commenters clearly propose any conclusive methods or criteria for determining the purpose of a transmission. Moreover, the only consequence of a determination that a digital phonorecord delivery is “incidental” is that a separate rate must be set for an incidental phonorecord delivery (although, in any event, it is inherent in the ratemaking provisions of Section 115 that several different rates may be set for various kinds of digital

phonorecord deliveries). In setting rates for the activities specified in Section 115, the Copyright Royalty Judges are to distinguish between general and incidental DPDs, and they have the authority to set different rates for different types of DPDs, depending on their analysis of the economics of the service and the other circumstances set forth in section 801(b)(1). The Office therefore proposes that any determination regarding the purpose of a transmission, upon which the determination of when a DPD is an incidental DPD appears to turn, should be made in the context of a factual inquiry before the CRJs, if such a determination proves to be relevant.<sup>7</sup>

### C. Limited Downloads

In the petition for a rulemaking that initiated this proceeding, RIAA characterized a limited download as an “on-demand transmission of a time-limited or other use-limited (i.e. non-permanent) download to a local storage device (e.g. the hard drive of the user’s computer), using technology that causes the downloaded file to be available for listening only either during a limited time (e.g. a time certain or a time tied to ongoing subscription payments) or for a limited number of times” and asked the office to determine whether and to what extent limited downloads come within the scope of the Section 115 license. RIAA *Petition* at 1. As the Office has previously indicated, and explains again in this Notice below, whether a service is interactive or non-interactive does not appear to be relevant in the context of the Section 115 license. Therefore, the Office’s regulatory text adopts a slightly altered characterization of limited downloads, as a subset of DPDs that “may be made available to the transmission recipient for a limited period of time or for a specified number of performances.” Applying the above-stated understandings regarding DPDs in general, the Office concludes that limited downloads fall within the definition for DPDs in that they are delivered; they satisfy the requirements for being a phonorecord; and they are specifically identifiable.<sup>8</sup> This

conclusion regarding limited downloads is reflected in the interim rule.

### D. Threshold Requirements for Use of the Section 115 License

Several parties expressed concern with the NPRM’s proposed interpretation of 17 U.S.C. 115(a)(1), which states 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, including by means of a digital phonorecord delivery.” Public Interest Commenters questioned the Office’s proposed understanding that DPDs are, by the fact of their having been delivered, distributed within the meaning of the copyright law. They urged the Office to avoid preempting any judicial resolution regarding whether Internet transmissions may result in distribution of “material objects.” Google/YouTube asserted that the Office’s proposal overlooks a legal distinction between copying that facilitates the delivery or “distribution” of a reproduction of a sound recording, on the one hand, and copying that merely enables the public performance of a sound recording, on the other. It also maintained that a “performance” to consumers, with or without the benefit of an intervening distribution entity, does not constitute the “distribution” of a copy of the content at issue. DiMA also argued that various types of streaming, other than interactive streaming, may or may not make reproductions at the recipient end of a transmission, and such reproductions may not always be for the “primary purpose” of making phonorecords.

Verizon, CTIA, and NAB claimed that the NPRM contained a near tautology when it asserted that by virtue of having been delivered, phonorecords are distributed within the meaning of copyright law. They also argued that the approach advanced by the Office all but reads the “primary purpose” requirement out of Section 115. They acknowledged that a primary purpose in making the DPD may be to distribute it. But they argued that the NPRM ignores the fact that, even if a buffer copy is a DPD, the primary purpose of making such a DPD is not to “distribute” anything. It is rather an essential step in

<sup>6</sup> “For example, if a transmission system was designed to allow transmission recipients to hear sound recordings substantially at the time of transmission, but the sound recording was transmitted in a highspeed burst of data and stored in a computer memory for prompt playback (such storage being technically the making of a phonorecord), and the transmission recipient could not retain the phonorecord for playback on subsequent occasions (or for any other purpose), delivering the phonorecord to the transmission recipient would be incidental to the transmission.” S. Rep. No. 104–128 at 39.

<sup>7</sup> The Office observes that nothing in the law prevents the CRJs from setting different rates for various kinds of incidental DPDs.

<sup>8</sup> The Office understands that there may be many types of limited downloads made available to transmission recipients for varying periods of time or number of performances. Nothing in the law prevents the CRJs from setting different rates for various kinds of limited downloads. The Office observes that the agreement submitted to the CRJs on September 22, 2008 assigns rates for specific types of limited downloads. See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 73 FR 57033, 57034 (Oct. 1,

2008)(proposed 37 CFR § 385.11 (definition of “Limited download”)). The Office notes that to the extent DPDs fall within the characterization of limited downloads as set forth in the Office’s interim rule (which is broader than the category identified in the submitted agreement) they are licensable under Section 115 regardless of the rates assigned to them, or indeed regardless of whether any rate has been assigned to them.



the effectuation of a performance. They then cited to statements made by the Register that a “stream” does not constitute a distribution and that buffer and other intermediate copies are for all practical purposes useless. Finally, they offered the argument that characterizing all buffers as distributed would undermine many established principles, provisions and practices of copyright law including fair use, the concept of publication, and registration practices.

As indicated above, the Office’s interim rule, unlike the NPRM, takes no position as to whether a buffer copy constitutes a phonorecord. However, it is apparent that when a transmission to an individual consumer does result in a DPD, the phonorecord is made for the purpose of allowing the recipient to make a private use of that phonorecord, even if that use is simply to hear the performance of the phonorecord contemporaneously with the transmission. Similarly, it appears that enabling a recipient to make such a private use is a service’s primary purpose in making phonorecords on a recipient’s device. The Office notes that Congress intended the Section 115 license to cover DPDs “regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.” 17 U.S.C. 115(d).

The Office’s interim rule also does not determine whether all phonorecords which satisfy the previously addressed requirements for being DPDs are necessarily “distributed.” This position is consistent with the Office’s prior legal conclusions as well as the Register’s statements and policy arguments to Congress that a stream in and of itself does not constitute a distribution. However, under the Office’s above-stated analysis, there is no dispute that limited download services as well as certain streaming services involve the making of legally recognizable copies that fit within the definition of a DPD. To the extent that such phonorecords exist on the recipient’s computer for some period of time beyond their performance, it is reasonable to consider the phonorecord as having been “distributed.” At the very least, where services involve the making of DPDs that exist on the recipient’s computer for some period of time beyond their performance and which can be used to replay the phonorecord, it would appear that such phonorecords have been “distributed.”<sup>9</sup> Whether the delivery of

a phonorecord that lasts no longer than the streamed performance constitutes a distribution is an issue that need not be resolved for purposes of this rulemaking.

#### **E. Non-DPD Copies Under the Section 115 License**

Among the commenters, Verizon, CTIA, and NAB were alone in disputing the tentative proposal in the NPRM stating that server copies, and all other intermediate copies, used to make DPDs under the Section 115 license fall within the scope of the license. They argued that the primary purpose in making server “phonorecords” is not “to distribute them to the public for private use” and that therefore they are not eligible for the 115 license. However, this argument misunderstands the Office’s interpretation in the NPRM of the coverage provided by the Section 115 license.

The Office understands that the Section 115 license has traditionally provided coverage beyond those phonorecords made and distributed to the public for private use, so long as such phonorecords were used to achieve the primary purpose of making and distributing phonorecords under the Section 115 license. Indeed, when it enacted Section 115 in 1976, Congress stated that it intended the license to cover “every possible manufacturing or other process capable of reproducing a sound recording in phonorecords.”<sup>10</sup> As stated in the NPRM, the right to make master recordings, which are used to make the phonorecords that are actually distributed has long been understood to be included in the Section 115 license. Similarly, server copies, as well as all other intermediate copies used to make and distribute DPDs under the Section 115 license, perform a function in the world of DPDs that is parallel to master recordings and manufacturing equipment in the physical world. Consequently, the interim rule confirms that server copies and intermediate reproductions may come within the scope of the license. The Office notes that a person seeking to operate under the Section 115 license must still satisfy the threshold requirements of the license. But, having done so, that licensee’s coverage may extend to phonorecords other than those that are

actually distributed provided that they are made for the purpose of making and distributing a DPD. On the other hand, server and intermediate copies that are the source of a transmission that does not result in the making and distribution of a DPD would not fall within the scope of the compulsory license. Finally, the Office notes that server and intermediate copies covered under the Section 115 license that are not distributed do not entitle the owner to separate royalty payments. 17 U.S.C. 115(c)(1).

#### **F. Issues Outside the Scope of This Proceeding**

##### *1. Interactive vs. Non-interactive*

The Office recognizes that nearly all of the commenters have expressed some preference to distinguish between phonorecords that are, or may be, made by Interactive Streaming Services versus those made by Non-interactive Streaming Services. As the Office stated in its NPRM, distinctions relating to interactivity are appropriate in the context of the Section 114 license, which is available only for noninteractive transmissions, and such distinctions may be appropriate to raise as a matter of economic value or policy before the CRJs—for example, in setting rates—or Congress. However, whether a service is interactive or non-interactive does not appear to be relevant in determining whether particular reproductions of phonorecords may be covered under the current Section 115 license, except perhaps under the last sentence of Section 115(d), which does address the potential for non-interactive to be relevant. However, this sentence must be read in its entirety, which provides:

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.

15 U.S.C. 115(d) (emphasis added).

The Office acknowledges that it may be more common for interactive streams to result in DPDs and that it may be relatively uncommon for non-interactive streams to do so. However, if phonorecords are delivered by a transmission service, then under the last sentence of 115(d) it is irrelevant whether the transmission that created the phonorecords is interactive or non-interactive. To the extent that each stream creates a DPD, it appears that the only proffered justification for

Charlesworth [http://www.copyright.gov/docs/section115/2008/rm\\_2000-7\\_NMPA\\_hearing\\_statement.pdf](http://www.copyright.gov/docs/section115/2008/rm_2000-7_NMPA_hearing_statement.pdf).

<sup>10</sup>H. Rep. No. 94-1476, at 110. See also, The Copyright Act of 1976, Transitional and Supplementary Provisions, Sec. 106 (“...parts of instruments serving to reproduce phonorecords mechanically ... such parts made on or after January 1, 1978, constitute phonorecords.”)

<sup>9</sup>NMPA referred the Office to evidence indicating that three leading streaming music services create such copies. See Statement of Jacqueline



distinguishing between the interactive and non-interactive transmissions is the business justification that interactive DPDs have a greater economic impact. The Office would not dispute a finding that non-interactive and interactive streams have different economic value, or even that a rate of zero might be appropriate for DPDs made in the course of non-interactive streams. Nor does it question the motivation for the industry's adoption of an agreement that distinguishes between the two. However, the Office maintains that any such distinctions can and should be addressed by different rates rather than being based on an unfounded assertion that non-interactive streaming cannot involve the making and distribution of phonorecords which are licensable under Section 115.

## 2. Policy Arguments

As has happened throughout this proceeding, a number of commenters proposed revisions that they would like Congress to adopt, including provisions that would expressly exempt transient copies made during the course of an authorized digital performance of a sound recording and declare that server copies made to facilitate an authorized public performance have no independent economic value. The Office notes, as it did in the NPRM, that such matters are beyond the scope of the current proceeding, not to mention the Office's regulatory power. Commenters also asserted that the proposed rule would have created problems regarding commenters' current understanding of other sections of the Copyright Act, such as the Section 114 and 112 licenses and Chapter 10's treatment of audio home recording. The interim rule, however, is limited to clarifying that reproductions created in the process of making a DPD are covered under the license and to acknowledge that a DPD may be limited either by time or to a specific number of plays. Consequently, there is no need to address the concerns raised by the parties about the effect of the proposed rule on other provisions in the copyright law.

## G. Regulatory Text

The text of the interim regulation adopted today is based upon the text proposed in the NPRM, but with some fairly significant modifications. The text defines a digital phonorecord delivery as follows:

"digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound

recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. Such a phonorecord may be permanent or it may be made available to the transmission recipient for a limited period of time or for a specified number of performances. A digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery.

The second sentence of the definition did not appear in the original proposed regulatory text. It is included in the interim regulation to clarify that any DPD requires that the phonorecord that is delivered must meet the requirements of fixation, including the durational requirement. However, the regulatory text takes no position on the threshold for satisfying that durational requirement, and therefore is not inconsistent with the approach taken in either the *DMCA Section 104 Report* or the *Cartoon Network* case.

The definition also makes clear that a DPD may be made available on a limited basis and that DPDs include any phonorecords made for the purpose of making the DPD. Thus, phonorecords such as server copies that are not sufficient to constitute a DPD (because they are not "delivered") but are nevertheless made for the purpose of delivering a DPD (such as a full or limited download or a cache copy at the end of the stream if that copy meets the fixation requirement) are nevertheless part of the DPD if a phonorecord is in fact delivered. And buffer copies, if they meet the fixation requirement, may also be DPDs or be included as parts of DPDs. If a buffer copy does not meet the fixation requirement, it is irrelevant whether it is part of a DPD because it cannot be an infringing "copy."

## List of Subjects

### 37 CFR Part 201

Copyright, General provisions.

### 37 CFR Part 255

Compulsory license fees,  
Phonorecords.

## Proposed Regulations

■ In consideration of the foregoing, the Copyright Office proposes to amend parts 201 and 255 of 37 CFR, as follows:

## PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

**Authority:** 17 U.S.C. 702.

■ 2. Amend § 201.18 as follows:

■ a. By redesignating paragraphs (a)(2) through (a)(6) as (a)(4) through (a)(8); and

■ b. By adding new paragraphs (a)(2) and (a)(3).

The revisions and additions to § 201.18 read as follows:

### 201.18 Notice of intention to obtain a compulsory license for making and distributing phonorecords of nondramatic musical works.

(a) \* \* \*

(2) A person is entitled to serve or file a Notice of Intention and thereby obtain a compulsory license pursuant to 17 U.S.C. 115 only if his primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.

(3) For the purposes of this section, a "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. Such a phonorecord may be permanent or it may be made available to the transmission recipient for a limited period of time or for a specified number of performances. A digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery.

\* \* \* \* \*

■ 3. Amend § 201.19 as follows:

■ a. By amending paragraph (a)(1) to add "including by means of a digital phonorecord delivery." after "of nondramatic musical works".

■ b. By redesignating paragraphs (a)(3) through (a)(12) as paragraphs (a)(4) through (a)(13); and

■ c. By adding a new paragraph (a)(3).  
The revisions to § 201.19 read as follows:

### 201.19 Royalties and statements of account under compulsory license for making and distributing phonorecords of nondramatic works.

(a) \* \* \*

(3) For the purposes of this section, a "digital phonorecord delivery" is each individual delivery of a phonorecord by

digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. Such a phonorecord may be permanent or it may be made available to the transmission recipient for a limited period of time or for a specified number of performances. A digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery.

\* \* \* \* \*

## **PART 255—ADJUSTMENT OF ROYALTY PAYMENTS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS**

■ 4. The authority citation for part 255 continues to read as follows:

**Authority:** 17 U.S.C. 702.

■ 5. Section 255.4 is revised to read as follows:

### **§ 255.4 Definition of digital phonorecord delivery.**

A “*digital phonorecord delivery*” is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. Such a phonorecord may be permanent or it may be made available to the transmission recipient for a limited period of time or for a specified number of performances. A digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery.

Dated: October 22, 2008.

**Marybeth Peters,**

*Register of Copyrights.*

Approved by:

**James H. Billington,**

*The Librarian of Congress.*

[FR Doc. E8-26666 Filed 11-6-08; 8:45 am]

**BILLING CODE 1410-30-S**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R09-OAR-2008-0728; FRL-8729-1]**

### **Approval and Promulgation of Implementation Plans; Revisions to the Nevada State Implementation Plan; Clark County**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** Under the Clean Air Act, EPA is taking direct final action to approve a revision to the Clark County portion of the Nevada State Implementation Plan (SIP). This revision consists of transportation conformity criteria and procedures related to interagency consultation and enforceability of certain transportation-related control measures and mitigation measures. The intended effect is to include the transportation conformity criteria and procedures in the applicable SIP.

**DATES:** This rule is effective on January 6, 2009, without further notice, unless EPA receives adverse comments by December 8, 2008. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

**ADDRESSES:** Submit comments, identified by docket number EPA-R09-OAR-2008-0728, by one of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions.

2. *E-mail:* [vagenas.ginger@epa.gov](mailto:vagenas.ginger@epa.gov).

3. *Mail or deliver:* Ginger Vagenas (AIR-2), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

**Instructions:** All comments will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected

should be clearly identified as such and should not be submitted through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> portal is an “anonymous access” system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

**Docket:** The index to the docket for this action is available electronically at <http://www.regulations.gov> and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Ginger Vagenas, EPA Region IX, (415) 972-3964, [vagenas.ginger@epa.gov](mailto:vagenas.ginger@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, “we,” “us” and “our” refer to EPA.

### **Table of Contents**

- I. Transportation Conformity
- II. Background for This Action
- III. State Submittal and EPA Evaluation
- IV. Public Comment and Final Action
- V. Statutory and Executive Order Reviews

### **I. Transportation Conformity**

Transportation conformity is required under section 176(c) of the Clean Air Act (CAA or Act) to ensure that federally supported highway, transit projects, and other activities are consistent with (“conform to”) the purpose of the SIP. Conformity applies to areas that are currently designated nonattainment, and to areas that have been redesignated to attainment after 1990 (maintenance areas) with plans developed under section 175A of the Act, for the following transportation related criteria pollutants: Ozone, particulate matter (PM<sub>2.5</sub> and PM<sub>10</sub>), carbon monoxide (CO), and nitrogen dioxide (NO<sub>2</sub>).

Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards