U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment. A preliminary ''Environmental Analysis Check List'' supporting this preliminary determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 110

Anchorage grounds.

Words of Issuance and Proposed Regulatory Text

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2030, 2035, 2071; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. Amend § 110.155, by revising paragraph (f)(2)(ii) to read as follows:

§ 110.155 Port of New York.

* * * * *

(f) * * *

(2) * * *

(ii) Romer Shoal. All waters bound by the following points: 40°28′28.9″ N, 073°56′46.0″ W; thence to 40°29′48.1″ N, 073°56′46.0″ W; thence to 40°31′23.2″ N, 074°00′ 51.0″ W; thence to 40°32′11.5″ N, 074°01′39.3″ W; thence to 40°32′12.4″ N, 074°02′04.6″ W; thence to 40°31′28.5″ N, 074°02′05.0″ W; thence to 40°30′14.2″ N, 074°00′05.0″ W; thence to the point of origin (NAD 83).

* * * * *

Dated: May 7, 2008.

Timothy V. Skuby,

Captain, U.S. Coast Guard, Acting Commander, First Coast Guard District.

[FR Doc. E8–16171 Filed 7–15–08; 8:45 am]

BILLING CODE 4910–15–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Parts 1190 and 1191

RIN 3014–AA22

Emergency Transportable Housing Advisory Committee

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meeting.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) has established an advisory committee to make recommendations for possible revisions to the Americans with Disabilities Act (ADA) and Architectural Barriers Act (ABA) Accessibility Guidelines to include provisions for emergency transportable housing. This notice announces the dates and times of upcoming committee conference calls.

DATES: The conference calls are scheduled for July 24 and August 21, 2008. Both calls will begin at 10 a.m. and will conclude no later than 1 p.m. (Eastern time).

ADDRESSES: Individuals can participate in the conference calls by dialing a teleconference number which will be posted on the Access Board's Web site at *http://www.access-board.gov/eth/.*

FOR FURTHER INFORMATION CONTACT: Marsha Mazz, Office of Technical and Information Services, Architectural and Transportation Barriers Compliance Board, 1331 F Street, NW., Suite 1000, Washington, DC 20004–1111. Telephone number (202) 272–0020 (Voice); (202) 272–0082 (TTY). These are not toll-free numbers. E-mail address: *mazz@access-board.gov.*

SUPPLEMENTARY INFORMATION: On August 23, 2007, the Architectural and Transportation Barriers Compliance Board (Access Board) established an advisory committee to make recommendations for possible revisions to the Americans with Disabilities Act (ADA) and Architectural Barriers Act (ABA) Accessibility Guidelines to include provisions for emergency transportable housing (72 FR 48251; August 23, 2007).

The committee will hold conference calls on July 24 and August 21, 2008 (a call that was previously scheduled for July 28 has been cancelled) to discuss a variety of outstanding issues yet to be resolved. Information about the committee, and the agenda, instructions (including information on requesting captioning), and dial in telephone numbers for the conference calls are available at *http://www.access-board.gov/eth/.* The conference calls are open to the public and interested persons can dial in and communicate their views during a public comment period scheduled during each conference call. Participants may call in from any location of their choosing.

To enable individuals who are Deaf or hard-of-hearing to participate, Federal Relay Conference Captioning (RCC) services will be provided on request. Requests for RCC should be made no later than three (3) business days in advance of each scheduled teleconference by contacting Marsha Mazz. Persons wishing to provide handouts or other written information to the committee are requested to provide them in an electronic format to Marsha Mazz preferably by e-mail so that alternate formats such as large print can be distributed to committee members.

Lawrence W. Roffee,

Executive Director.

[FR Doc. E8–16312 Filed 7–15–08; 8:45 am]

BILLING CODE 8150–01–P

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: Notice of Proposed Rulemaking.

SUMMARY: The Copyright Office of the Library of Congress is proposing 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.

DATES: Written comments must be received in the Office of the General Counsel of the Copyright Office no later than August 15, 2008. Reply comments must be received in the Office of the General Counsel of the Copyright Office no later than September 2, 2008.

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: Tanya M. Sandros, General Counsel, or Stephen Ruwe, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202)–707–8366.

SUPPLEMENTARY INFORMATION:

Background.

The copyright laws of the United States grant certain rights to copyright owners for the protection of their works of authorship. Among these rights are the right to make, and to authorize others to make, a reproduction of the copyrighted work, and the right to distribute, and to authorize others to distribute, the copyrighted work. 17 U.S.C. 106(1) and (3). Both the reproduction right and the distribution right granted to a copyright owner inhere in all works of authorship and are, for the most part, exclusive rights. However, for nondramatic musical works, the exclusivity of the reproduction right and distribution right are limited by the nonexclusive compulsory license set forth in Section 115 of Title 17, which allows third parties to make and distribute phonorecords of nondramatic musical works.

The Section 115 compulsory license can be invoked once a nondramatic musical work embodied in a phonorecord has been distributed ''to the public in the United States under the authority of the copyright owner.'' 17 U.S.C. 115(a)(1). Unless and until such an act occurs, the copyright owner's reproduction and distribution rights remain exclusive, and the compulsory license does not apply. Once distribution has occurred, the license permits anyone to make and distribute phonorecords of the musical work provided that they comply with all of the terms and conditions of Section 115. It is important to note that the compulsory license only permits the making and distribution of phonorecords of a musical work, and does not permit the use of a sound recording created by someone else. The compulsory licensee must either assemble his own musicians, singers, recording engineers and equipment to make a cover recording or obtain permission to use a preexisting sound recording before making a phonorecord that includes that sound recording. One who obtains permission to use another's sound recording is eligible to use the compulsory license to clear the rights for use of the musical work embodied in the sound recording.

The compulsory license was the first statutory license in U.S. copyright law, having its origin in the 1909 Copyright Act. It operated successfully for many years, and it continued under the 1976 Copyright Act with some modifications. However, in 1995, Congress passed the Digital Performance Right in Sound Recordings Act (''DPSRA''), Pub. L. No. 104–39, 109 Stat. 336, which amended Sections 114 and 115 of Title 17 to take into account technological changes which enable digital transmissions of sound recordings on a large scale. With respect to Section 115, the DPSRA expanded the scope of the compulsory license to include the right to distribute or authorize the distribution of a phonorecord by means of a ''digital phonorecord delivery.'' 17 U.S.C. 115(c)(3)(A).

For purposes of Section 115, a ''digital phonorecord delivery,'' is defined 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).

As a result of the DPSRA, the Section 115 license applies to two kinds of disseminations of nondramatic musical works: 1) the traditional making and distribution of physical phonorecords; and 2) digital phonorecord deliveries, commonly referred to as DPDs. However, in including DPDs within Section 115, Congress directed that rates and terms for DPDs should 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.'' 17 U.S.C. 115(c)(3)(D). This language has led to endless debates as to what constitutes an ''incidental DPD.''

As required by the DPSRA, in 1996 the Library of Congress initiated a Copyright Arbitration Royalty Panel (''CARP'') proceeding to adjust the royalty rates for DPDs and incidental DPDs. 61 FR 37213 (July 17, 1996). The parties to the proceeding avoided arbitration by reaching a settlement as to new rates for DPDs and the time periods for conducting future rate adjustment proceedings for DPDs. The parties could not reach agreement, however, on new rates for incidental DPDs because the representatives of both copyright owners and users of the Section 115 license could not agree as to what was, and what was not, an incidental DPD. The resolution of this impasse was to defer establishing rates for incidental DPDs until the next scheduled rate adjustment proceeding.

The Librarian of Congress accepted the settlement agreement of the parties and adopted new regulations setting rates for DPDs and a timeframe for future rate adjustments. 64 FR 6221 (February 9, 1999). Section 255.5 of 37 CFR specified royalty rates for DPDs ''in general,'' while § 255.6 of the rules expressly deferred consideration of incidental DPDs. The time table for future rate adjustment proceedings for general DPDs and incidental DPDs was set forth in Section 255.7 and provided

for proceedings at two–year intervals upon the filing of a petition by an interested party. The year 2000 was a window year for the filing of such petitions.

In accordance with this timetable, the Copyright Office received on November 22, 2000, a pleading from the Recording Industry Association of America (''RIAA'') styled as a ''Petition for Rulemaking and to Convene a Copyright Arbitration Royalty Panel If Necessary.'' The RIAA petition asked the Office to conduct a rulemaking proceeding to address the issue of what types of digital transmissions of prerecorded music are general DPDs, and what types are incidental DPDs. Specifically, RIAA asked the Office to determine the status of two methods used to deliver music digitally, On–Demand Streams and Limited Downloads, and whether and to what extent they come within the scope of the Section 115 license.

For purposes of the proposed rulemaking, RIAA characterized an ''On–Demand Stream'' as a ''on–demand, real–time transmission using streaming technology such as Real Audio, which permits users to listen to the music they want when they want and as it is transmitted to them,'' and a ''Limited Download'' as an ''on–demand transmission of a time–limited or other use–limited (i.e. non–permanent) download to a local storage device (e.g. the hard drive of the user's computer), using technology that causes the downloaded file to be available for listening only either during a limited time (*e.g.* a time certain or a time tied to ongoing subscription payments) or for a limited number of times.'' RIAA petition at 1.

RIAA steadfastly maintained that a rulemaking is necessary to determine the status of these two types of digital music delivery systems because the record companies and music publishers could not agree how to categorize them for purposes of the Section 115 license. RIAA stated its opinion that On–Demand Streams are more in the nature of an incidental DPD, for which there are currently no established royalty rates, whereas music publishers have taken the position that On–Demand Streams include the making of a general DPD for which they are entitled to full compensation. Consequently, RIAA asked the Office to determine whether On–Demand Streams are incidental DPDs and, if they were, to convene a CARP to set rates for these incidental DPDs.

With respect to Limited Downloads, RIAA suggested that they may be either (1) incidental DPDs or (2) more in the nature of record rentals, leases or lendings. The latter approach is based upon the provision in the Section 115 license which authorizes the maker of a phonorecord to rent, lease or lend it, provided that a royalty fee is paid.

Specifically, the statute states:

> A compulsory license under this section includes the right of the maker of a phonorecord of a nondramatic musical work ... 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.

17 U.S.C. 115(c)(4). RIAA noted that the Copyright Office has yet to adopt such regulations.

This provision was added to Section 115 in the Record Rental Amendment of 1984, Pub. L. No. 98–450, which also amended the first sale doctrine codified in section 109 to restrict the owner of a phonorecord from disposing of the phonorecord for direct or indirect commercial advantage by rental, lease or lending without authorization of the sound recording copyright owner. The legislative history of the amendment to Section 115 states that the amendment was made to emphasize ''that the right of authorization accorded to copyright owners of recorded musical works under revised section 109(a) is subject to compulsory licensing under revised Section 115'' and that it gives the copyright owner of a nondramatic musical work recorded under a compulsory license the right to a share of the royalties for rental received by a compulsory licensee (a record company) in proportion equal to that received for distribution under Section 115(c)(2). H.R. Rep. No. 98–987, at 5 (1984).

The Office was to issue appropriate regulations relating to the royalty for rental, lease or lending ''as and when necessary to carry out the purposes'' of Section 115(c)(4). S. Rep. No. 98–162, at 9 (1983). Thus far, there has been no need to issue such regulations because the Office has been unaware of any activity by sound recording copyright owners engaging in or authorizing the rental, lease or lending of phonorecords.

In summary, RIAA asserted that it is unclear whether the Section 115 license permits all of the reproductions necessary to make On–Demand Streams or Limited Downloads, and if it does, what royalty rates apply. Consequently, RIAA petitioned the Office to determine: 1) whether On–Demand Streams are incidental DPDs covered by the license; 2) whether the license includes the right to make server copies or other copies necessary to transmit On–Demand Streams and Limited Downloads; and 3) the royalty rate applicable to On–Demand Streams (if they are covered by the license) and Limited Downloads.

Prior to publication of a notice of inquiry, the Office received unsolicited comments from Napster, Inc. (''Napster''), Digital Music Associates, Inc. (''DiMA''); and MP3.com, Inc. (''MP3'') in response to the RIAA petition. In its comments, Napster opposed the RIAA petition and urged the Copyright Office to defer resolution of the issues to Congress, which it contended is the appropriate forum for resolving the types of questions raised by the petition. On the other hand, MP3 supported the RIAA petition and urged the Office to conduct a rulemaking proceeding to determine whether copies made in the course of On–Demand Streams are incidental DPDs, and whether the copies made that are necessary to stream musical works are covered by the Section 115 license. In the event the Office concluded that the disputed reproductions are covered, it also asked the Library to convene a CARP to ''determine the appropriate rate or rates (if any)'' for incidental DPDs.

Like RIAA and MP3, DiMA was especially concerned with the status of copies of musical works made in the course of streaming. In particular, DiMA noted that the status of temporary RAM buffer copies created in a user's personal computer during audio streaming was raised at the November 29, 2000, Copyright Office/National Telecommunications and Information Administration hearing on the Section 104 study mandated by the Digital Millennium Copyright Act of 1998 (''DMCA'') and urged that consideration of the same issue in a rulemaking proceeding be done in such a way as not to prejudice the outcome of that study. Thus, DiMA indicated that either the issue should be resolved in the Section 104 study, or that the Office should conduct a separate rulemaking proceeding devoted solely to the issue.

DiMA suggested, however, that the complexity of the issue counsels for legislative action rather than agency interpretation of the existing statute.

Although a number of parties urged the Office not to take up the questions, the Copyright Office published a Notice of Inquiry on March 9, 2001, 66 FR 14099, to gather information on the issues raised in the petition. The Notice asked for comments from interested parties on the interpretation and application of the Section 115 compulsory license to certain digital music services, namely, Limited Downloads and On–Demand Streams.

In response to the March 9, 2001, Notice of Inquiry, the Copyright Office received eight comments and ten reply comments. On December 14, 2001, the Office published a follow–up notice seeking comments on the March 9, 2001, Notice of Inquiry in light of an agreement negotiated by RIAA, National Music Publishers Association (''NMPA'') and Harry Fox Agency (''HFA'') concerning the interpretation and application of Section 115 to On–Demand Streams and Limited Downloads. Eight comments were submitted in response to that notice. Some of the comments are discussed below.

Subsequently, Congress passed the Copyright Royalty and Distribution Reform Act of 2003. This Act altered the administrative structure for determining rates and terms for various compulsory licenses in Title 17. It established the Copyright Royalty Judges, who assumed authority for determining rates and terms for the statutory licenses, including the Section 115 license. *See* 17 U.S.C. chapter 8.

Additional legislative activity took place with respect to reform of the Section 115 license, and for several years the Office's rulemaking activities were placed on the back burner as prospects for legislative reform, which could more comprehensively and effectively address the issues, were explored. On March 11, 2004, the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary held a hearing on ''Section 115 of the Copyright Act: In Need of an Update.'' Shortly after that hearing, the chairman of the subcommittee asked the Register of Copyrights to meet with the interested parties to explore ways in which Section 115 could be modernized by means of legislation that would address, among other things, the issues raised in this rulemaking. The Register's discussions with the parties made limited progress, and legislative options were again explored at a hearing of the subcommittee on June 21, 2005. The Subcommittee on Intellectual Property of the Senate Judiciary Committee also conducted a hearing on July 12, 2005. Following those hearings, interested parties continued to discuss legislative reform, leading to the introduction of the proposed Section 115 Reform Act (''SIRA''), H.R. 5553, in the 109th Congress, and a further hearing in the House subcommittee on May 16, 2006.

SIRA would have amended Section 115 to make clear that the compulsory license for DPDs covers ''the making and distribution of general and incidental digital phonorecord deliveries in the form of full downloads, limited downloads, interactive streams, and any other form constituting a digital phonorecord delivery or hybrid offering'' and that it covers ''all reproduction and distribution rights necessary to engage in'' those activities. H.R. 5553, Section 2. It also would have granted a royalty–free license ''for the making of server and incidental reproductions to facilitate noninteractive streaming.'' *Id.* Although SIRA was approved by the House Subcommittee on Courts, the Internet and Intellectual Property, the 109th Congress adjourned without further action on the bill. Since that time, there has been no further legislative action with respect to Section 115.

Early in the current Congress, the House subcommittee once again explored reform of Section 115 at a March 22, 2007, hearing. However, no legislation has been introduced and no visible progress has been made on reform of the section in the 16 months since that hearing.

Because of the lack of progress on legislative reform, the Office once again directed its attention to the possibility of regulatory reform a year ago. On June 15, 2007, the Copyright Office conducted a public roundtable to refresh the record in order to ascertain the scope of the Section 115 license in relation to certain digital music services. The roundtable participants expressed their analyses of the legal implication of current business models and offered insight regarding the technology employed in today's marketplace. Over 20 representatives of organizations and companies representing copyright owners, songwriters, record companies, online music services and others participated in the roundtable. Their views will be discussed below.

Purpose of this proceeding

Having considered the views expressed at the June 15, 2007, roundtable as well as the previous record in this rulemaking proceeding, and mindful of the attempts to develop legislation that would reform Section 115, the Office now proposes to amend its regulations in a way that would enable digital music services to utilize the compulsory license to clear all reproduction and distribution rights in musical works that might be necessary in order to engage in activities such as the making of full downloads, Limited Downloads, On–Demand streams and non–interactive streams.[1] As discussed below, certain parties (including, for example, some digital music services) disputed whether it is necessary to obtain a license for the reproduction or distribution rights in order to engage in some of these activities, while other parties (such as music publishers) contended that it is necessary to clear the reproduction and distribution rights in order to engage in any of these activities lawfully.[2]

The proposed regulatory changes take no position with respect to 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. However, the amendments would make the use of the statutory license available to a music service that wishes to engage in such activity without fear of incurring liability for infringement of the reproduction or distribution rights. Nor would the proposed regulations preclude licensees from arguing to the Copyright Royalty Judges that the royalty fees for certain of the licensed activities should be nominal or even free. Copyright owners presumably would argue for a substantial royalty. The Copyright Royalty Judges have the authority, based on a review of the record and consideration of the objectives set forth in 17 U.S.C. 801(b)(1), to conclude that the reasonable royalty fee for certain reproductions included within the license would be a rate of zero or, on the other hand, that all reproductions and

[1] The Office notes that the right to make and distribute a DPD does not include the exclusive rights to make and distribute the sound recording itself. These rights are held by the copyright owner of the sound recording and must be cleared through a separate transaction. *See* 17 U.S.C. 115(c)(3)(H). Certain transmission services, which operate under a Section 114(f) license to perform publically the sound recording, may operate under a separate statutory license to reproduce these sound recordings. *See* Section 112(e). However, a the right to distribute a sound recording is not included in the Section 112(e) license.

[2] The position of the music publishers with respect to non-interactive streaming is somewhat ambiguous. Music publishers supported the provision in SIRA which would have offered a royalty–free compulsory license for the reproduction and distribution rights implicated in non-interactive streaming.

distributions of phonorecords included within the license should be subject to the same royalty fee.

More specifically, the proposed regulations would allow the aforementioned services to employ 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 or hard drive, on transmission service's servers, and all intermediate reproductions on the networks through which transmission occurs.

In reaching this tentative interpretation, the Office has considered the parties' various interpretations of Section 115 which have evolved, as has ours, over the course of this proceeding. Moreover, the Office notes that both the continued legal uncertainty associated with operating music services in the current marketplace and the need to establish royalty rates for the statutory license highlight the need to resolve the outstanding questions concerning which reproductions of phonorecords made during the course of a stream falls within the scope of the statutory license and which, if any, do not. Such uncertainty has contributed to the current crisis in the music industry, due to the difficulty of obtaining licenses for all the rights required in order to offer various online music services in an environment in which it is not always apparent which rights must be cleared and how one can obtain them. While reasonable minds can differ on how to interpret Section 115 with respect to these reproductions, the Office proposes an approach which would support the making of all phonorecords made during the course of a transmission without regard to whether that transmission also involves the delivery of a public performance. With the publication of today's notice, the Office seeks public comment on its proposed interpretation.

Regulatory Authority

As a preliminary matter, the Office requested comments on whether the questions raised in this proceeding could be addressed in an administrative rulemaking. While most of the commenters did not challenge the Office's rulemaking authority in this proceeding, NMPA and Songwriter's Guild of America (''SGA'') did suggest that the Office may be without authority to consider which phonorecords made during a digital transmission could be covered under a Section 115 license.

NMPA and SGA argued that the Office has no authority to conduct a rulemaking to formulate a rule that would identify the general characteristics of an incidental DPD that distinguishes it from a general DPD. Moreover, NMPA contended that the Office has no authority to determine what types of activities, e.g., on–demand streams, constitute a DPD. It maintained that such determinations are so complex that they cannot be fixed by regulation and that such questions are best addressed by Congress through legislative changes or by the courts. NMPA also contended that rapid changes in technology would counsel against using a rulemaking proceeding to resolve these issues. The Consumer Electronics Association and Clear Channel Communications, Inc. (''CEA/Clear Channel'') supported NMPA's position with respect to the Office's authority to conduct this rulemaking and maintained that clarification of the law must come from Congress. *See also* Napster Reply Comment (arguing that Congress should balance the specific concerns of the interested parties and enact a legal regime that addresses their concerns).

Other commenters, such as DiMA and RIAA, expressed support for the rulemaking process for the purpose of deciding which activities are covered under the Section 115 license in order to clarify those activities for which rates must be set. But RIAA wanted the rulemaking to accomplish considerably more than just clarifying whether certain activities fall within the scope of the license and asked the Office to adopt rules governing records of use, notice requirements, and rentals, lease and lendings. The Office is likely to address at least some of these issues in a separate proceeding, but not in the current one.

The Office agrees that ideally, the resolution of the issues addressed herein should be made by Congress, and for that reason the Office has deferred moving forward in this rulemaking for several years. However, it seems unlikely that Congress will resolve these issues in the foreseeable future, yet the Office believes resolution is crucial in order for the music industry to survive in the 21st Century. The Copyright Office initiated this proceeding under its authority to establish regulations for the administration of its functions and duties under title 17. 17 U.S.C. 702. The Office exercises its authority under section 702 when it is necessary ''to interpret the statute in accordance with Congress' intentions and framework and, where Congress is silent, to provide reasonable and permissible interpretations of the statute.'' Cable Compulsory License; Definition of Cable System, 57 FR 3284, 3292 (January 29, 1992); *see also* Satellite Carrier Compulsory License; Definition of Unserved Household, 63 FR 3685, 3686 (January 26, 1998) (invoking section 702 authority to determine whether a local over–the–air broadcast signal may be retransmitted into the local market area under the provisions of the section 119 statutory license). Our authority to act is supported by *Satellite Broadcasting and Communications Ass'n of Am. v. Oman*, 17 F.3d 344 (11th Cir. 1994) (''SBCA''), and *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988) (''Cablevision''), where the Eleventh Circuit and the D.C. Circuit expressly acknowledged the Office's authority to provide reasonable interpretations of the cable statutory license. *See* SBCA, 17 F.3d at 347 (''The Copyright Office is a federal agency with authority to promulgate rules concerning the meaning and application of section 111''); *Cablevision,* 836 F.2d at 608–09 (same).

Section 115 gives the Register authority to administer the compulsory license insofar as the Register is to prescribe by regulation requirements for the compulsory licensee's Notice of Intention to Obtain a Compulsory License, 17 U.S.C. 115(b)(1), and to issue regulations establishing requirements for the payment of royalties and governing statements of account submitted by compulsory licensees. 17 U.S.C. 115(c)(5).

Moreover, the issues raised in this rulemaking are issues that will necessarily be resolved in the pending proceeding to determine rates and terms for the Section 115 compulsory license, Docket No. 2006–3 CRB DPRA. It will be the responsibility of the Register of Copyrights to review and, if necessary, correct the final determination of the Copyright Royalty Judges on material questions of substantive law, such as the questions addressed herein. 17 U.S.C. 802(f)(1)(D). *See also* 17 U.S.C. 802(f)(1)(B) (mandatory referral of novel material questions of substantive law to the Register of Copyrights). Because these issues will ultimately be presented to the Register for final administrative determination, it makes sense for the Register to offer guidance on those issues at this point in this ongoing rulemaking proceeding.

The scope of the Section 115 license

As a starting point, the parties offered a number of observations about the scope of the Section 115 license and Congress's intent in amending it to include DPDs. In comments early in the proceeding, some commenters maintained that Congress amended

Section 115 in 1995 merely to adapt the license to a digital distribution process and that the changes made to Section 115 did not expand or alter the reproduction and distribution rights, or blur existing lines between these rights and the copyright owner's exclusive right to perform the musical work. DiMA and others also argued that streaming does not involve a digital download of a phonorecord because the process uses a temporary memory buffer to store packets of data that are not fixed for purposes of copyright law. DiMA also maintained that these temporary copies cannot be fairly characterized as DPDs because these copies are not ''specifically identifiable reproductions,'' as required by the statutory definition of a DPD. DiMA and others maintained that unless the reproduction is specifically recognizable to the transmission service that initiated the transmission, it does not comport with the statutory definition.[3] Finally, as a matter of policy, DiMA asserted that there is no economic justification for requiring payment for these intermediate copies because the copies are made to facilitate a licensed performance and are part of a single economic event. The National Association of Broadcasters (''NAB'') concurred, maintaining that ''it would seem to turn the Section 115 license on its head if non–interactive streams required a license under Section 115, even though the recipient listens only once and does not end up with a reusable copy of the recording.''

Others took a different approach and asked the Office to focus on the purpose of the transmission. Some drew a distinction between subscription services and non–subcription services, arguing that in the case where the user cannot choose the song being played at a given time, and a permanent copy is not made, then the purpose of such a transmission is only to offer a performance. Alternatively, if the delivery of the song is interactive, in that the listener can choose to listen to a specific song at any time, the transmission of the song should be subject to the full mechanical rate because it replaces the need for the listener to buy a hard copy of the work.

The Office recognizes that nearly all of the commenters have expressed some preference to distinguish different types of transmissions such as those made by Download Services, Limited Download Services, On–Demand/Interactive Streaming Services, and Non–interactive Streaming Services. The Office understands that distinctions relating to interactivity are appropriate in the context of the Section 114 license and that such distinctions may be appropriate to raise as a matter of economic value or policy before the CRJs – e.g., in setting rates – or Congress. However, distinctions such as these do 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 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).

In the course of this proceeding, from the Notice of Inquiry through to the Office's June 15, 2007, Roundtable discussion, no participant offered any evidence or argument that streaming music services, whether they be real–time non–interactive subscription transmission services or on–demand interactive services, are able to operate in a way in which 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. It appears that in the course of all stream transmissions buffer reproductions are made on the recipient's device. In addition, in the course of at least some interactive stream transmissions, complete reproductions (as well as buffer reproductions) are made and distributed to the recipient. The Office considers whether these reproductions constitute phonorecords, or DPDs, in this Notice. Regardless of that analysis, the Office notes that they are in fact reproductions, making the last sentence of Section 115(d) (which excludes from the definition of DPDs certain non–interactive transmissions when no reproduction is made in the course of the transmission) inapplicable. Therefore, the Office, at this time, can discern no basis for distinguishing between interactive and non–interactive streams in determining whether a particular transmission does or does not result in a DPD and, therefore, it proposes to define a DPD without reference to the transmission types.

We now offer the following analysis regarding whether and how the basic technical activities of reproducing digital copies during a digital transmission fall within the scope of the Section 115 license for making and distributing phonorecords.

Discussion

At the outset, the Office notes that there is general agreement that all transmission services involve the making of complete reproductions known as ''Server Copies,'' which the Office will refer to as ''Server–end Complete Copies.''[4] The parties generally agree that certain transmission services, including Limited and Full Download Services, involve the making of complete reproductions on the recipient's computer. These services may or may not limit a recipient's use of a work. The Office will refer to these reproductions as ''Recipient–end Complete Copies.'' The parties also generally agree that all digital transmission services involve the making of reproductions known as ''Buffer Copies.''[5] The Office understands that buffer copies are made on both the transmitting service's server and on the recipient's computer. The Office will refer to these reproductions as ''Server–end Buffer Copies'' and ''Recipient–end Buffer Copies.'' The Office notes, however, that recognition of the various types of reproductions made during the course of a digital transmission is only the first step in the analysis.

A. Digital Phonorecord Deliveries, in general.

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 Office turns to the definition of a DPD. 17 U.S.C. 115(d). The statute 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

[3] By the time of the Roundtable DiMA accepted an alternative interpretation of the ''specifically identifiable'' requirement. *See* Infra, discussion of *Specifically identifiable.*

[4] While we refer to these reproductions as types of ''copies,'' we acknowledge that parties disagree on the copyright implications of the reproductions, which are analyzed herein.

[5] As discussed in greater detail herein, the Office understands that ''buffer copies'' are composed of packets of data that are deposited in temporary computer data storage, such as RAM, where these packets are assembled to an extent such that, while embodying less than the entire composition of a musical work, they constitute a material object from which sound recordings can be perceived, reproduced or otherwise communicated.

> 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 each type of reproduction identified above 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.* No party put forward any arguments that Server–end Copies are delivered as per the statutory requirement for a DPD. Indeed, the record indicates that Server–end Copies are retained by the transmission service. As such, the Office tentatively concludes that Server–end Complete Copies or Server–end Buffer Copies are not delivered and therefore do not satisfy the first requirement for being a DPD.[6] On the other hand, there is general agreement amongst the commenters that the reproductions created by transmission services on recipients' computers are delivered. Despite the fact that several parties chose not to specifically consider whether buffer copies are delivered, this general agreement regarding delivery of recipient–end copies appears to include both Recipient–end Complete Copies as well as Recipient–end Buffer Copies. As such, the Office proposes that such copies are delivered and therefore satisfy the first requirement for being a DPD.

(2) *Phonorecord.* In considering whether the reproductions made by a transmission service are phonorecords, the Office turns 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 though 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.

a. Server–end Complete Reproductions. There is general agreement among the commenters that a complete reproduction of a work created on a transmission service's server satisfies the statutory definition of a phonorecord. It is a material object from which fixed sounds can be perceived. While DiMA puts forward the notion that Server–end Copies used to facilitate licensed public performances should be exempted from liability, its argument was based on economic and policy rationales. Furthermore, DiMA did not offer any legal analysis by which such a copy might, under existing law, be excluded from being considered a phonorecord. As such, the Office tentatively finds that a Server–end Complete Copy is a phonorecord and therefore satisfies the second (but, as noted above, not the first) requirement for being a DPD.

b. Recipient–end Complete Reproductions. Likewise, the parties generally agree that the creation of a complete reproduction of a work on a recipient's computer satisfies the statutory definition of a phonorecord. However, certain parties argued that a complete reproduction created on a recipient's computer which is accessible for a limited time or number of plays should be distinguished as a matter of policy or for purposes of valuation. 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. As such, the Office proposes that a Recipient–end Complete Copy is a phonorecord and therefore satisfies the second requirement for being a DPD.

c. Buffer Reproductions. The Office recognizes that several commenters dispute any finding that buffer copies made by transmission services on either the Server–end or Recipient–end fall within the statutory definition of a phonorecord. The positions advanced by these parties rely on the notion that buffer copies are not sufficiently fixed, that they are fragmentary, that they are temporary, or that they are de minimis. As previously indicated, in the Office's consideration of these issues, it understands that buffer copies are composed of packets of data that are transmitted from one computer location to another temporary computer data storage, such as RAM, where they are assembled to an extent such that, while embodying less than the entire composition of a musical work, they constitute a material object from which sound recordings can be perceived, reproduced or otherwise communicated and, as such, are phonorecords for purposes of the copyright law.

A finding that buffer copies created by transmission services on computer memory devices are phonorecords is also consistent with the legal analysis set forth in the Office's DMCA Section 104 Report as well as subsequent rulings. The Section 104 Report correctly stated that RAM reproductions of copyrighted works are material objects. While allowing that certain RAM reproductions that exist only for a transitory duration may not exist as ''fixed'' copies, the Section 104 Report specifically pointed out that in general RAM copies are sufficiently fixed and noted that permanence is not required for fixation. Section 104 Report at 110–11. With regard to fixation, the Section 104 Report stated that the dividing line 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 107–129 (August 29, 2001). The Report further noted that:

> To determine whether the reproduction right is implicated, the focus is on whether there has been a fixation in a material object, not on the quantity of material that has been so fixed. The reproduction right is not limited to copies of an entire work. Photocopying a page or paragraph out of an encyclopedia implicates the reproduction right and may, in appropriate circumstances, be an infringement. Whether or not a copy of a portion of a work is infringing is a question not of whether the reproduction right is implicated, but of whether the copying is substantial.

Id at 123.

The Office understands that individual RAM reproductions made on a recipient's computer in the course of a transmission may, under various models, comprise small portions of copyrighted works. The Office also understands that NAB and DiMA challenged the extent to which such copies of small portions of works enjoy protection. Under their interpretation, the legislative history of DPSRA indicates that only the transmission and storage of an entire sound recording (and not fragments thereof) constitutes the making of a phonorecord. However,

[6] However, the fact that a server copy is not delivered does not necessarily place it outside the scope of the Section 115 license. *See* Infra discussion of Non–DPD copies under the Section 115 License.

the Office understands that title 17's language and purpose are broad and that portions of musical works should be treated the same as any other type of work. As stated in the Office's Ringtone Decision, Section 115 ''does not expressly exclude 'portions of works' from its scope and we cannot assume that such treatment was intended in the absence of clear statutory language to that effect.'' *In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Docket No. RF 2006–1, at 13 (October 16, 2006).

The Office's consistent findings regarding fixation and coverage of fragments of works support a finding that buffer copies meet the statutory definition of phonorecords. Additionally, even if one were to assume that the individual portions of works created by a transmission service on a recipient's RAM were not protectible, questions regarding the reproduction of a phonorecord would still not be settled. The Section 104 Report specifically addressed the matter, stating that ''Even if each individual copy [the assemblage of several data packets] were to be considered a de minimis portion under the test for substantial similarity, the aggregate effect is the copying of the entire work.'' DMCA Section 104 Report at 133. *See also, Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 621 (2007), (creation of a buffer copy is ''copying'').

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.

(3) *Specifically identifiable*. The Office recognizes that several parties argued that transmissions made by certain types of services should not be deemed to result in ''specifically identifiable reproductions'' within the meaning of the statutory definition of a DPD. More often than not, commenters' views did not delve into legal analysis of this unique phrase and instead put forward arguments based on economic fairness. In addition, the Office notes that certain commenters' interpretations of the phrase appear to have shifted over time. The Office therefore must determine whether and when a digital transmission results in a ''specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording.''[7]

Several commenters urged the Office to adopt an interpretation of ''specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording'' that would require that a reproduction be identifiable to the transmission service. To support this position, they cited to a passage from the legislative history of the DPSRA, which states ''the phrase 'specifically identifiable reproduction,'as used in the definition, should be understood to mean a reproduction specifically identifiable to the transmission service.'' S. Rep. No. 104–128 at 44. Under this interpretation, DiMA argued that Recipient–end Buffer Copies and *certain* Recipient–end Complete Copies (referred to as ''cache copies'' which are complete copies that exist temporarily on a recipient's computer to enable the recipient to hear the sound recording at substantially the same time as the transmission) are not specifically identifiable to the transmission service and therefore such copies do not satisfy the third requirement for being a DPD.

At this point, it is unclear to the Office under what circumstances a service's transmission may result in a reproduction that is specifically identifiable to the transmission service. The Office, therefore, seeks additional information regarding how the different transmission service models might result in Recipient–end Complete Copies or Recipient–end Buffer Copies that are specifically identifiable to the transmission service.

Of course, identification of the reproduction by the transmission service is not the only option. By the time of the Roundtable discussion DiMA had altered its position and joined other parties in advancing an alternative interpretation of ''specifically identifiable.'' *Id.* at 62–63. The alternative interpretation does not look beyond the language of the statute itself. Instead, it focuses on the language of Section 115(d) and simply requires that a transmission of a sound recording result in a reproduction of a phonorecord that is either specifically identifiable by any transmission recipient or specifically identifiable *for* any transmission recipient.

On the present record, the Office understands that reproductions of phonorecords appear to be ''specifically identifiable'' by both of these avenues. As to the first alternative, for the period of time during which each individual reproduction of a phonorecord exists on the recipient's computer, the Office understands that the specific file data for Recipient–end Complete Copies and Recipient–end Buffer Copies can be identified by the transmission recipient. The Office recognizes that it may be rare for a recipient to actually search out and identify the relevant data, and it may not always be easy to identify it. However, the Office understands that such identification is able to be performed by the transmission recipient. Furthermore, the Office notes that it is not actual identification but the possibility of specifically identifying that satisfies the statutory requirement. The Office also understands that the recipient's computer is necessarily able to specifically identify each individual reproduction of Recipient–end Complete Copies and Recipient–end Buffer Copies *for* the transmission recipient. The Office understands that such identification by the computer for the transmission recipient is a necessary step in the computer actually making the phonorecord perceptible to the transmission recipient. In other words, if a computer could not specifically identify each part of a stream, it would be unable to render the stream into a performance by assembling the parts in the proper order for performance. The statutory definition does not appear to require ''identifiability'' beyond that function.

While the Office understands commenters' desire to look to the legislative history (which states at one point that ''the phrase 'specifically identifiable reproduction,' as used in the definition, should be understood to mean a reproduction specifically identifiable to the transmission service'') for the meaning of a phrase that is so unique in copyright law, the parties advocating that interpretation have made no concrete argument why there is any reason to look beyond the plain text of the statute. Therefore, the Office proposes to follow canons of statutory construction which dictate that ''the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law–making body which passed it, the sole function of the courts is to enforce it according to its terms.'' *Caminetti v. United States*, 242 U.S. 470, 485 (1917). As such, the Office tentatively concludes that Recipient–end Complete Copies and Recipient–end Buffer Copies satisfy the requirement that a transmission of a sound recording must result in a reproduction of a

[7] The Office does not consider whether a server copy is specifically identifiable because, under the Office's analysis the server copy is not delivered and therefore does not fall within the definition of DPD. As a result, we only consider if and when Recipient–end Buffer Copies and Recipient–end Complete Copies are ''specifically identifiable.''

phonorecord that is either ''specifically identifiable *by* any transmission recipient'' or ''specifically identifiable for any transmission recipient'' and therefore such copies satisfy the third requirement *for* being a DPD.

The Office seeks comment on the above–stated analysis and proposals, which lead the Office to conclude that Recipient–end Complete Copies and Recipient–end Buffer Copies satisfy the definition for a DPD. 17 U.S.C. 115(d).

B. Incidental DPDs.

The Office recognizes commenters' 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. Because these parties have been unable to agree upon what constitutes an incidental DPD, they have been unable to negotiate rates for the making and distribution of these reproductions. Moreover, amidst the disagreement over the meaning of incidental DPDs, the Office notes that the parties seem 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.

RIAA's analysis began with the proposition that an incidental DPD is nothing more than a subset of DPDs. Along with other parties, RIAA encouraged the Office to interpret the meaning of incidental DPD in a rulemaking. NMPA, on the other hand, contended that it is not possible to define incidental DPDs through a definition of general application and suggested that the Office leave the matter to the industry to resolve these issues through negotiations or a rate setting proceeding. However, other parties, including DiMA, objected to the suggestion that the best approach is to leave the matter in the hands of the industry.

In any event, 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 on policy or economic grounds. The few arguments that certain types of services do not create incidental DPDs were made largely in terms of whether reproductions satisfy the definition of DPDs in general, a matter which the Office has already addressed herein. Commenters also addressed the purpose of the transmission for purposes of characterizing a reproduction as incidental, drawing a distinction between services whose purpose is distribution and those whose purpose is public performance.

As an initial matter, the Office is inclined to agree with the RIAA's analysis that an incidental DPD is nothing more than a subset of DPDs. However, we can find little reason to accept the invitation to delineate the contours of that subset. Whether a DPD is ''incidental'' or ''general,'' it is subject to the compulsory license. Consequently, 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 DPSRA 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. 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.[8]

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, 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.[9]

C. Non–DPD Copies Under the Section 115 License.

RIAA and others acknowledged that certain copies made by transmission services, such as undelivered Server–end Copies, are not DPDs.[10] Such parties have urged the Office to consider whether these copies are covered by the Section 115 license.

RIAA argued that delivery is not always required in order to operate under the Section 115 license and that delivery merely establishes the point at which copyright liability accrues. Thus, it opined that Section 115 covers all copies of a phonorecord made during a transmission, but that copyright liability attaches only upon the distribution of a DPD. Under such an approach, a service would incur liability only for those copies that are delivered and otherwise meet the requirements for DPDs. No obligation for payment would accrue for undelivered Server Copies. DiMA offered a similar approach in arguing that Server Copies are covered within the license, proposing that Server Copies are similar to professional manufacturing equipment used by vinyl record pressing plants or CD stamping facilities, for which no separate license is required. Other parties also argued that certain non–DPD copies are not

[8] ''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 high–speed 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.

[9] The Office also observes that nothing in the law prevents the CRJs from setting different rates for various kinds of incidental DPDs, or, for that matter, for various kinds of ''general'' DPDs.

[10] The proposals put forward in this NPRM also conclude that Server–end copies are not DPDs.

infringing. Their argument was not that coverage for non–DPD copies comes from Section 115 but rather that such non–DPDs fall within the ''fair use'' doctrine.[11]

The Office recognizes 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''[12] In fact, in the recording industry, the right to make master recordings that are used to make the phonorecords that are actually distributed has always been understood to be included in the Section 115 license. Thus, the Office tentatively concludes that Server–end Copies, as well as all other intermediate copies, used to create DPDs under the Section 115 license, perform an identical function in the world of digital phonorecord deliveries and, for the same reasons, fall within the scope of the license. Moreover, the Office notes that such copies are not distributed and, as a result, they do not entitle the owner to separate royalty payments. 17 U.S.C. 115(c)(1).

Threshold requirements for use of the Section 115 license

Under the above–stated proposals, the reproduction of Recipient–end Buffer Copies and certain Recipient–end Complete Copies created by Download Services, Limited Download Services, On–Demand/Interactive Streaming Services, and Non–interactive Streaming Services would satisfy the definition for DPDs. The question then arises whether these Services satisfy the threshold requirement for the Section 115 license. As expressed in Section 115(a)(1), ''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.''

The Office understands that digital phonorecord deliveries are, by the fact of their having been delivered, distributed within the meaning of the copyright law. This view is supported by the legislative history of the DPSRA which states that ''the digital transmission of a sound recording that results in the reproduction by or for the transmission recipient of a phonorecord of that sound recording implicates the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein.'' S. Rep. No. 104–128, at 27.

The Office takes notice that some commenters have asserted that certain DPDs, known as ''locked content'' which may be encrypted, otherwise protected by digital rights management, or degraded so as not to substitute for the sale of a non–degraded recording, should not be considered distributed until the product is ''unlocked.'' The Office points out that under the proposed findings contained herein, all delivered DPDs are considered distributed regardless of such so–called ''locks.''[13] Despite the presence of such technological protections, ''locked content'' appears to satisfy the requirements for being both phonorecords and DPDs. Of course, in a ratemaking proceeding a compelling case might be made that the royalties for such locked content should be significantly lower than for other DPDs or that no royalties shall be due for any DPD unless and until it is ''unlocked.''

Questions have also been raised as to whether reproductions which enable the recipient to hear the sound recording at substantially the same time as the transmission can be said to be for the primary purpose of facilitating private use of a phonorecord. It seems apparent that in the usual case, the recipient of a transmission of a phonorecord by an online service under any of the models discussed herein will be making a private use, even if that use is simply to hear the performance of the phonorecord contemporaneously with the transmission. Similarly, it appears that enabling the recipient to make such a private use is the services' primary purpose in making phonorecords on the recipient's device. Moreover, 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).

Rental, Lease or Lending.

In its initial petition, RIAA sought clarification on the question of whether a limited download should be considered to be in the nature of a rental, lease or lending. It has also asked the Office, in the event it determines a limited download to be in the nature of a rental, to clarify the interaction of section 109(b)(1)(A) of the Copyright Act, regarding the ''first sale doctrine,'' with Section 115(c)(4).

The National Association of Recording Merchandisers and Video Software Dealers Association (''NARM/VSDA'') opposed the idea that a limited download could be treated as a rental, lease or lending. They maintained that once a consumer receives a copy of a work, that work becomes the property of the consumer and the consumer cannot be made to pay for the use or possession of one's own property. Moreover, they asserted that a limited download cannot qualify as a rental because the recipient does not return anything at the end of the ''rental period.'' They viewed the transaction as substantially the same as the purchase of a CD in a store, even though the limited download transaction would by its very nature limit the use of the file for a period of time or a specified number of plays. The opposition stemmed from a concern that copyright owners would ultimately choose to limit a consumer's choice to limited downloads only, thereby covertly asserting control over private performances by limiting a consumer's right to control one's own purchases.

In the course of the roundtable discussion, the purpose of which was to refresh the record, the discussion turned to the question of whether a limited download may qualify as a rental, lease or lending. At that time, no participant advanced an argument that Download Services constituted a rental, lease or

[11] That argument can also be made with respect to some DPDs. The Office well understands how the fair use doctrine might operate in this context. See Section 104 Report at 133–141. However, we note that the determination of fair use requires a case–specific analysis. Services that wish to rely on the fair use defense are free to do so, knowing that they may have to litigate the issue and that the outcome of such litigation is not necessarily clear. But whether or not such use is fair does not prevent the inclusion of such activity within the scope of the compulsory license. The Section 115 license can operate as a safe harbor for services that wish to use it without testing the question of whether their use is actually fair. Use of the license need not be deemed an admission that the licensed acts would otherwise be infringing. *A fortiori*, a regulation clarifying that all copies made in the course of or for the purpose of making a DPD are included within the Section 115 compulsory 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.

[12] 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.''

[13] The Office understands that there may be other so–called ''locked content'' models which may involve the initial distribution of significant quantities of data to a recipient, yet such data may not satisfy the statutory requirements to be considered a phonorecord until subsequent distribution of the remaining essential data. In such cases, there would be no DPD until all of the required data has been delivered.

lending. This prompted the Register to specifically observe that ''nobody today is supporting that it's [a limited download is] a rental, lease, or lending.'' Marybeth Peters, Register of Copyrights, Section 115 Roundtable Transcript, at 26. No participants at the roundtable, which included representatives from the recording industries and NARM, disputed this conclusion. Thus, the Office sees no reason to accept the invitation to consider limited downloads to be acts of rental, lease or lending under Section 115(c)(4) because, as is explained above, limited downloads easily fall into the definition of DPDs and within the scope of the compulsory license for DPDs. Therefore, the Office does not propose to issue a rule that considers limited downloads to be in the nature of a rental, lease or lending.

Issues outside the scope of this proceeding.

A number of commenters raised a variety of issues that fall outside of the scope of the current proceeding. For example, DiMA has articulated a number of revisions that it 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, but such matters are beyond the scope of the current proceeding.

During the early stages of this rulemaking, some commenters proposed that the Office address additional issues. The Office considers those issues not addressed herein to be either moot due to the passage of time or peripheral, and does not propose to address them in its final rule.

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 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. A reproduction is specifically identifiable if it can be identified by the transmission recipient, or if a device receiving it can identify the reproduction for the transmission recipient, for purposes of rendering a performance of the sound recording. A digital phonorecord delivery includes a phonorecord that is made in the course of the transmission for the purpose of making the digital phonorecord delivery, so long as it is fixed for a sufficient period of time to be capable of being perceived, reproduced, or otherwise communicated. A digital phonorecord delivery also includes phonorecords which embody portions of a musical work so long as those portions are, individually or in the aggregate, sufficient to permit the recipient to render the sound recording which embodies the musical work.

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3. Amend § 201.19 as follows:

a. By revising 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. A reproduction is specifically identifiable if it can be identified by thetransmission recipient, or if a device receiving it can identify the reproduction for the transmission recipient, for purposes of rendering a performance of the sound recording. A digital phonorecord delivery includes a phonorecord that is made in the course of the transmission for the purpose of making the digital phonorecord delivery, so long as it is fixed for a sufficient period of time to be capable of being perceived, reproduced, or otherwise communicated. A digital phonorecord delivery also includes phonorecords which embody portions of a musical work so long as those portions are, individually or in the aggregate, sufficient to permit the recipient to render the sound recording which embodies the musical work.

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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. Revise § 255.4 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. A reproduction is specifically identifiable if it can be identified by the transmission recipient, or if a device receiving it can identify the reproduction for the transmission recipient, for purposes of rendering a

performance of the sound recording. A digital phonorecord delivery includes a phonorecord that is made in the course of the transmission for the purpose of making the digital phonorecord delivery, so long as it is fixed for a sufficient period of time to be capable of being perceived, reproduced, or otherwise communicated. A digital phonorecord delivery also includes phonorecords which embody portions of a musical work so long as those portions are, individually or in the aggregate, sufficient to permit the recipient to render the sound recording which embodies the musical work.

Dated: July 10, 2008

Marybeth Peters,

Register of Copyrights

[FR Doc. E8–16165 Filed 7–15–08; 8:45 am]

BILLING CODE 1410–30–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2007–1105; FRL–8580–2]

Revisions to the California State Implementation Plan, Mojave Desert Air Quality Management District and Ventura County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Mojave Desert Air Quality Management District and Ventura County Air Pollution Control District portions of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from marine coating operations and wood coating products. We are proposing to approve local rules to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by August 15, 2008.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2007–1105, by one of the following methods:

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

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), 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 *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 *www.regulations.gov* or e-mail. *www.regulations.gov* 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *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: Cynthia G. Allen, EPA Region IX, (415) 947–4120, *allen.cynthia@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules: MDAQMD Rule 1106 and VCAPCD Rule 74.30. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: June 3, 2008.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. E8–16019 Filed 7–15–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R03–OAR–2007–0176; FRL–8693–2]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Redesignation of the Greene County 8-Hour Ozone Nonattainment Area to Attainment and Approval of the Maintenance Plan and 2002 Base-Year Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a redesignation request and State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The Pennsylvania Department of Environmental Protection (PADEP) is requesting that the Greene County 8-hour ozone nonattainment Area (referred to also as the ''Greene County Area'' or ''Area'') be redesignated as attainment for the 8-hour ozone national ambient air quality standard (NAAQS). EPA is proposing to approve the ozone redesignation request for the Greene County Area. In conjunction with its redesignation request, the Commonwealth submitted a SIP revision consisting of a maintenance plan for the Greene County Area that provides for continued attainment of the 8-hour ozone NAAQS for at least 10 years after redesignation. EPA is proposing to make a determination that the Greene County Area has attained the 8-hour ozone NAAQS, based upon three years of complete, quality-assured ambient air quality monitoring data for 2003–2005. EPA's proposed approval of the 8-hour ozone redesignation request is based on its determination that the Greene County Area has met the criteria for redesignation to attainment specified in the Clean Air Act (CAA). In addition, the Commonwealth of Pennsylvania has also submitted a 2002 base-year inventory for the Greene County Area,