No. 08-448

In The
Supreme Court of the United States

CABLE NEWS NETWORK, INC., *et al.*,

Petitioners,

v.

CSC HOLDINGS, INC., *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The National Music Publishers' Association, Inc. (NMPA) respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus NMPA is a trade association representing the interests of music publishers in the United States. The approximately 800 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of United States copyrighted musical works. For nine decades, NMPA has served as the leading voice of the American music publishing industry in Congress and in the courts.

The licensing affiliate of NMPA—The Harry Fox Agency, Inc.—acts as licensing agent for nearly 35,000 music publishers, which in turn represent the

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[1] Pursuant to Rule 37.2(a), letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court, and counsel for *amicus curiae* timely notified each party's counsel of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

interests of more than 160,000 songwriters, in connection with the licensing of copyrighted musical works to make and distribute phonorecords in both physical and digital formats.

The court of appeals' ruling in this case, if not reviewed immediately, may profoundly disrupt the music industry. In particular, the decision below creates uncertainty in the place of widely shared expectations among copyright owners and distributors of musical works regarding the Copyright Act's application to interactive music services that are delivered through computers and other digital devices. Many view such digital services as the future of the music industry.

Accordingly, *amicus* and its members have a strong interest in this Court's review and reversal of the decision below to ensure that the still-nascent digital music industry is not irreversibly damaged in light of the court of appeals' destabilizing interpretation of the Copyright Act.

SUMMARY OF ARGUMENT

The effects of the erroneous interpretation by the court of appeals of the Copyright Act in this case are being felt, and will continue to be felt, far beyond the cable television industry that is litigating this case. In particular, the decision creates uncertainty in the field of interactive streaming of music to consumers over the Internet, which is a growing part of a billion dollar digital music industry. Review by this Court

and reversal of that erroneous interpretation is critical to ensure confidence and continued growth in the digital music industry.

I.

A. From the perspective of a music listener, interactive streaming of music can be analogized to a traditional jukebox. Music listeners use their computers to access online music services and select particular songs (or artists or genres of music) that they would like to hear, and their selections are immediately transmitted over the Internet and played for them on their computers through the use of streaming technology.

In order to allow the user to listen to the song, the entire musical work is transmitted by the interactive music service to the user's computer, where it is reproduced as a "buffer copy" composed of packets of data deposited in temporary computer data storage, such as RAM. The computer uses the buffer copy to play the song for the listener. Unlike downloading, streaming technology allows the song to begin playing even before all data comprising the song have been received by the user's computer.

The launch and development of interactive streaming services has been facilitated by industry understandings concerning the licensing of such buffer copies under the Copyright Act. At the same time, however, the lack of formal regulations by the Copyright Office to confirm the availability of licenses

for interactive streaming activities under Section 115 of the Copyright Act, the compulsory license provision for musical works, has been a significant impediment to the growth of interactive streaming services.

Under the Copyright Act, "phonorecords" are reproductions in the form of sound recordings (the Act uses the analogous term "copy" to refer to other types of reproductions). The Copyright Act defines "phonorecords" as "material objects in which sounds * * * 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. In similar fashion, the Copyright Act defines "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Ibid.* The Copyright Act further provides that a work is "fixed" in a tangible medium of expression when "its embodiment in a copy or phonorecord * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Ibid.*

The court of appeals below adopted a novel and flawed interpretation of the definition of "fixed" to hold that respondents' creation of buffer copies of petitioners' copyrighted television works did not

constitute the reproduction of copyrighted works "in copies." Pet. App. 10a-11a. The court appears to have ruled that data held in a computer buffer for 1.2 seconds are too "transitory" in "duration" to create "copies," Pet. App. 17a-18a, and that apparent ruling has been and will inevitably continue to be invoked to cast doubt on the status of buffer copies used to deliver "phonorecords" as well. That interpretation of the Copyright Act has the potential effect of excluding interactive music streaming from the scope of Section 115 of the Act, which provides a compulsory license for making and distributing phonorecords of nondramatic musical works. If a streamed buffer copy is not considered "fixed," mechanical licensing revenues, *i.e.*, revenues derived from licenses to make and distribute phonorecords in physical and digital formats, are directly threatened, and such revenues are an essential source of income for music creators.

B. Immediate review of the decision below is necessary to eliminate uncertainty that it has caused in pending proceedings concerning the application of the Section 115 compulsory license of the Copyright Act to digital uses in the music industry.

1. The Copyright Office has stated that it views the decision in this cable television case to be relevant to a currently pending and long awaited rulemaking in the music industry. The question of how interactive music streaming should be treated under the compulsory license provision of Section 115 of the Copyright Act has been studied by the Copyright Office for eight years. Finally, in July 2008,

the Copyright Office issued a notice of proposed rulemaking in which it concluded, after an analysis of the statutory language, case law, and its own prior interpretations, that "buffer copies meet the statutory definition of phonorecords" and therefore fit within the scope of the Section 115 license. *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 40,802, 40,809 (July 16, 2008).

The court of appeals' decision in this case was issued less than a month after the Copyright Office's proposed rulemaking. The decision caused the Copyright Office to extend the time for filing comments on its proposed rulemaking because that Office concluded that the ruling below "may be pertinent to the issues raised in this rulemaking." *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 47,113, 47,114 (Aug. 13, 2008). The Copyright Office subsequently held a public hearing on the proposed regulations, where the Register of Copyrights noted that the court of appeals' decision in this case is in tension with the Copyright Office's rationale for the proposed rule. Moreover, major Internet companies outside of the music industry, and others, invoked the decision below in their comments on the proposed music industry rulemaking to urge the Copyright Office to reverse its long-considered proposed regulations.

2. The ruling below also could have an adverse impact on a groundbreaking music industry settlement, achieved after years of costly litigation and negotiation. The Copyright Royalty Board (CRB), which is tasked under Section 115 with setting the "reasonable rates and terms" for the Section 115 compulsory license, is currently poised to adopt the settlement, which addresses the appropriate royalty rates and terms for interactive music streaming.

Nonetheless, even with the consent of all the relevant parties and the concurrence of the CRB, the court of appeals' decision could interfere with the conclusive nature of the settlement. Wireless carriers and others have challenged the settlement based on the decision below, and even if such royalty rates are finally adopted by the CRB, legal uncertainty could embolden some to disregard them as ineffective.

C. Significant current and future copyright litigation may be directly affected by the Second Circuit's erroneous decision in this case, particularly because the decision now governs in a jurisdiction that includes a major commercial center for copyrighted works. For example, a significant class action suit is pending in district court in the Second Circuit and alleges that YouTube LLC and its parent company Google Inc. have engaged in copyright infringement through their operation of a service that streams unlicensed videos that incorporate copyrighted songs. Moreover, because of the liberal venue provisions applicable to copyright actions, 28 U.S.C. § 1400(a), potential defendants would be able

to engage in forum shopping, and select district courts in the Second Circuit as the venue in which to bring actions for declaratory judgment that their buffer copies do not constitute fixed works that trigger copyright liability. The Second Circuit's decision could thus unfairly immunize interactive streamers from having to pay copyright holders the royalties that are required under the correctly interpreted Copyright Act.

II.

The decision below is based on an incorrect reading of the statute. Under the correct statutory definition of "fixed," it is the *work*—not "bits" of data that may comprise the work—that is the key to determining whether the work is fixed. A work that remains perceptible is considered to be fixed even if some of its bits have already passed through a buffer. Indeed, the overwhelming weight of authority agrees with the Copyright Office's interpretation of "fixed," most recently reflected in its notice of proposed rulemaking, which adheres to the functional definition of Section 101 of the Copyright Act in considering the ability to perceive, reproduce, or communicate a copyrighted work.

Just as importantly, the Second Circuit has created an uncertainty that will undermine existing music licensing practices and hinder private resolution of disputes as digital music distribution technologies continue to evolve. The court of appeals

adopted a novel reading of the statute and failed to limit its open-ended interpretation. This Court's immediate review is necessary to establish an acceptable degree of predictability for the digital music industry.

ARGUMENT

The court of appeals' erroneous interpretation of the Copyright Act in this case is creating uncertainty in the nascent field of interactive streaming of music to consumers over the Internet. *Amicus curiae* NMPA urges the Court to grant review of the three questions presented in the petition for a writ of *certiorari*, because each presents an issue that will have a significant and potentially irreparable impact on the future of the music industry. This *amicus* brief focuses, however, on an aspect of the second question presented which has particular importance for digital music streaming and the future of the digital music industry, *i.e.*, the repercussions of leaving unreviewed the Second Circuit's legal determination that the "buffer copies" created by respondents are not works that are "fixed," and are therefore immune from liability under the Copyright Act.

I. THE RULING BELOW THAT A "BUFFER COPY" IS IMMUNE FROM COPYRIGHT LIABILITY IN THE CABLE TELEVISION INDUSTRY HAS CREATED A STATE OF UNCERTAINTY IN THE MUSIC INDUSTRY

Digital music businesses must have access to a reliable, industry-wide copyright licensing framework that will allow them to grow their businesses. It is equally vital for music publishers and the songwriters they represent to have a means to be paid for the use by digital services of publishers' and songwriters' copyrighted musical works. The uncertainty produced by the decision below on whether "buffer copies" are immune from copyright liability threatens to undermine any licensing framework for interactive streaming, and that could have an irreversible negative impact on the legitimate music marketplace.

Immediate review of the decision below is necessary to eliminate the uncertainty it has caused in pending proceedings to determine the application of Section 115 of the Copyright Act, which is the compulsory licensing mechanism for those making and distributing copyrighted nondramatic musical works in both physical and digital form. 17 U.S.C. § 115. Major providers of Internet services, and others, are attempting to rely on the decision below to urge the Copyright Office to reverse a long-considered proposed regulation and to undermine the settled industry understandings of the role of Section 115 compulsory licensing in the digital music industry.

A. Interactive Streaming Of Music Relies On "Buffer Copies" And Thus Could Be Adversely Impacted By The Second Circuit's Decision Involving Cable Television

Interactive streaming is an increasingly important means for connecting consumers to music through the Internet. The opportunity to distribute music to individual listeners has expanded enormously with the technological innovations of the past decade, particularly with the increase of access to high-speed Internet in the home. The music industry has responded by offering a variety of methods by which individuals can obtain and listen to music through their computers and other digital devices.

Currently, the dominant model of digital delivery of music is to download a permanent digital file, for use on a computer or portable device (such as the iPod). In 2006, about 81 percent of the approximately $1.1 billion in online music services came from download services.

But there are other competing industry models for offering music to individual listeners, one of which is interactive streaming, which is usually offered on a subscriber basis. Interactive streaming of musical works based upon subscriber request is a substitute for, and displaces, the purchase of music, whether in physical formats such as compact discs, or as digital downloads. An interactive music streaming service earns income by charging a monthly fee for access to

its collection of music and/or by selling advertising space to third parties, which is displayed while a song is being heard.

From the perspective of a music listener, interactive streaming of music can be analogized to a traditional jukebox. Listeners use their computer to access online music services and select particular songs (or artists or genres of music) that they would like to hear, and their selections are immediately transmitted over the Internet and played for them through the use of streaming technology.

In order to allow the user to listen to the song, the entire musical work is transmitted by the interactive music service to the user's computer, where it is reproduced in a "buffer copy" composed of packets of data deposited in temporary computer data storage, such as RAM. The computer uses the buffer copy to play the song for the listener. Unlike downloading, streaming technology allows the song to begin playing before all data comprising the song have been received by the user's computer. *See Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 40,802, 40,808 (July 16, 2008); United States Copyright Office, Library of Congress, *DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act* 108 (Aug. 2001).

Leading American companies that operate interactive music streaming services include RealNetworks, Inc., MediaNet Digital and Napster, Inc. (recently acquired by Best Buy). Interactive music streaming and other types of digital music services are expected to grow dramatically in the coming years.[2]

The launch and development of interactive streaming services has been facilitated by industry understandings that the buffer copies made by such services in the streaming process are "digital phonorecord deliveries" subject to compulsory licensing under Section 115 of the Copyright Act. The lack of confirmation of such industry practice through formal rulemaking by the Copyright Office, however, has been an impediment to the rapid growth of such services, owing to lingering doubts concerning the applicability of the Section 115 license.

Under the Copyright Act, "phonorecords" are reproductions in the form of sound recordings (the Act uses the analogous term "copy" to refer to other types

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[2] *See, e.g.*, Jefferson Graham, *Music service Rhapsody's not afraid to take on iPod*, USA Today (Aug. 5, 2008), *available at* http://www.usatoday.com/tech/products/2008-08-05-rhapsody-music-online_N.htm (analyst "forecasts $600 million in U.S. subscription sales by 2012," of which interactive streaming is a subset "up from $235 million in 2007"); Brad Cook, *TMO Reports—Analyst Sees Subscription-Based Music Services Eclipsing Pay-Per-Download*, Mac Observer (May 17, 2005), *available at* http://www.macobserver.com/article/2005/05/17.12.shtml.

of reproductions). Section 115 provides that once phonorecords of a nondramatic musical work have been distributed to the public under the authority of the copyright owner, any other person may obtain a compulsory license to make and distribute phonorecords of the work at a statutorily prescribed royalty rate so long as that person's primary purpose is to distribute them to the public for private use. 17 U.S.C. § 115(a). As amended by Congress in the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4, 109 Stat. 336, 344-345, the Section 115 compulsory license includes the right to make and distribute not just physical phonorecord products such as compact discs, but also phonorecords "by means of a digital transmission which constitutes a digital phonorecord delivery." 17 U.S.C. § 115(c)(3)(A).

"Phonorecords" are defined as "material objects in which sounds" 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. In similar fashion, the Copyright Act defines "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Ibid.* The Copyright Act further provides that a work is "fixed" in a tangible medium of expression when "its

embodiment in a copy or phonorecord * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Ibid.*

The Second Circuit in the decision below applied a novel and flawed interpretation of the definition of "fixed" to hold that respondents' creation of buffer copies of petitioners' copyrighted television programming did not constitute reproduction of copyrighted works "in copies" and was thus immune from liability under the Copyright Act. Pet. App. 10a-11a. The court appears to have ruled that data held in a computer buffer for 1.2 seconds are too "transitory" in "duration" to create such "copies." Pet. App. 17a-18a. That apparent ruling has been and will inevitably continue to be invoked to cast doubt on the status of buffer copies used to deliver music "phonorecords" for purposes of excluding them from the Section 115 compulsory license altogether.

The century-old compulsory copyright license embodied in Section 115 that requires payment for use of copyrighted nondramatic musical works represents a careful and unique balancing of interests among musical work owners, music distributors and music consumers that Congress has entrusted the Copyright Office to administer. Because of the displacement of traditional music sales by interactive music streaming services, a reading of the Copyright Act that would have the potential effect of excluding interactive music streaming from the scope of Section 115 because a streamed buffer copy used to play a

musical work is somehow not considered "fixed" poses a substantial threat to mechanical licensing revenues, *i.e.*, revenues derived from licenses to make and distribute phonorecords in physical and digital formats, which are an essential source of income for music creators.[3]

B. The Decision Below Has Disrupted Rulemaking By The Copyright Office Regarding Copyright Licenses For Interactive Music Streaming That Was Coming To A Conclusion After Eight Years Of Study And Deliberation

The question of how interactive music streaming should be treated for purpose of the compulsory license embodied in Section 115 of the Copyright Act has been studied by the Copyright Office for eight years. The absence of an express rule confirming that licenses are available under Section 115 for the use of musical works by digital services offering interactive streams and the attendant uncertainty about that licensing availability has been detrimental to the

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[3] The preservation of mechanical licensing revenues was a primary concern of Congress in amending Section 115 to extend to digital transmissions of musical works. *See, e.g.*, S. Rep. No. 104-128, at 17 (1995) (in amending Section 115 to include DPDs, Congress wished to avoid "even a perception of uncertainty," and thus sought to "clarify[ ] and confirm[ ]" the mechanical rights of music copyright owners in the digital environment); H.R. Rep. No. 104-274, at 28 (1995) (purpose of DPD amendments was to "confirm" mechanical rights in context of digital transmissions).

music industry. An industry consensus has emerged, however, and it is supported by the Copyright Office, which has a long-standing interpretation of "fixed" on which it has relied to propose critical regulations for the music industry. The Second Circuit's opinion, if unreviewed, could unsettle all of that.

1. The Copyright Office first began considering the issue of what types of digital transmissions of prerecorded music are "digital phonorecord deliveries" subject to a compulsory license under Section 115 of the Copyright Act in 2000. *See* 73 Fed. Reg. at 40,803 (discussing history of proceedings). The Copyright Office issued two notices of inquiry in 2001 to collect evidence regarding technology and industry practices. *See id.* at 40,805. Following a series of significant industry developments, the Copyright Office conducted a public roundtable in June 2007 to refresh the record in anticipation of issuing a rule concerning the scope of the Section 115 compulsory license in relation to digital music services. *Ibid.* More than 20 organizations and companies representing copyright owners, songwriters, record companies, online music services and others participated in the 2007 roundtable. *Ibid.*

Finally, in July 2008, the Copyright Office issued a Notice of Proposed Rulemaking. The Copyright Office explained that "the continued legal uncertainty associated with operating music services in the current marketplace * * * highlight[s] the need to resolve the outstanding questions concerning which

reproductions of phonorecords made during the course of a stream fall within the scope of the statutory license and which, if any, do not." *Id.* at 40,806. The Copyright Office noted that such uncertainty "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." *Ibid.* The Office concluded, after an analysis of the statutory language, case law, and its own prior interpretations, that "buffer copies meet the statutory definition of phonorecords" and thus fit within the scope of the Section 115 license. *Id.* at 40,809.

The intervening court of appeals' decision in this case has substantially undermined that progress on the Copyright Office's resolution of those issues. The Copyright Office had relied on decisions from other circuits that treat temporary computer reproductions as sufficiently fixed to constitute copies under the Copyright Act. *Id.* at 40,808 (citing *DMCA Section 104 Report*, *supra*, at 107-129 (collecting judicial authorities)). But after issuance of the decision in this case, the Copyright Office extended the time for filing comments because it concluded that the ruling of the court below "may be pertinent to the issues raised in this rulemaking." *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 47,113, 47,114 (Aug. 13, 2008).

The Copyright Office then held a public hearing on its proposed regulations, where the Register of Copyrights noted that the Second Circuit decision was in tension with the Copyright Office's proposed approach. Transcript of Copyright Hearing at 5 (Sept. 19, 2008), *available at* http://www.copyright.gov/docs/section115/2008/rm_2000-7_hearing_transcript_9.19.08.pdf; *see also id.* at 2 (decision "put into question some of the premises on which our proposed rule was based"). Accordingly, despite its determination that regulatory clarification about the applicability of the compulsory license to digital music streaming would benefit the industry, the Copyright Office has yet to issue a final rule.

In addition, opponents of the Copyright Office's proposed regulation—including Verizon Communications, CTIA-The Wireless Association, the National Association of Broadcasters, the Ad Hoc Coalition of Streamed Content Providers (which is, in reality, Google, Inc., and its subsidiary YouTube LLC)—relied heavily on the decision below in written comments to oppose the proposed regulation's treatment of interactive music streaming for compulsory licensing.[4] By contrast, like the Copyright Office, all of the key stakeholders within the music industry—music publishers and songwriters, record

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[4] These comments are available on the Copyright Office's website at http://www.copyright.gov/docs/section115/comments-3 and http://www.copyright.gov/docs/section115/comments-3/reply.

labels and digital music companies—support the treatment of interactive streams as "digital phonorecord deliveries" within the Section 115 license.

2. The ruling below also may have an adverse impact on a groundbreaking music industry settlement, achieved after years of costly litigation and negotiation.

The Copyright Royalty Board (CRB), which consists of Copyright Royalty Judges appointed by the Librarian of Congress, is charged under Section 115 with setting the "reasonable rates and terms" for the Section 115 compulsory license, including for digital uses. 17 U.S.C. § 115(c)(3)(D). The CRB commenced a proceeding in January 2006 to determine such rates and terms. *See Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords*, 71 Fed. Reg. 1454 (Jan. 6, 2006). *Amicus* NMPA is a participant in those proceedings. After all of the participants had submitted written statements and oral testimony, and following a lengthy and intensive process of negotiation, NMPA and the other parties informed the CRB that they had reached a groundbreaking settlement regarding the appropriate royalty rates and terms for interactive music streaming. *See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding,* 73 Fed. Reg. 57,033 (Oct. 1, 2008) (proposed to be codified at 37 C.F.R. pt. 385).

This settlement represents the culmination of a long series of industry negotiations and understandings to clarify and resolve concerns surrounding the treatment of interactive streaming under the Section 115 compulsory license, as well as the intermediate copies required to facilitate these types of digital transmissions. Notably, the royalty rates and terms to which the parties agreed and which are embodied in the settlement are consistent with and would be supported by the Copyright Office's proposed regulations.

The Copyright Act authorizes the CRB to adopt such negotiated rates and terms on an industry-wide basis so long as the CRB concludes, based on the record before it and after a period of notice and comment, that the agreement provides a reasonable basis for setting statutory terms and rates. 17 U.S.C. § 801(b)(7)(A)(i) & (ii). After the conclusion of the notice and comment period, the CRB is expected to issue a final regulation containing the royalty rates and terms for interactive music streaming.

Nonetheless, even with the consent of all the relevant parties and the concurrence of the CRB, the Second Circuit's decision could interfere with the conclusive nature of the settlement. Wireless carriers and broadcasters who were not parties to the CRB proceeding have challenged the settlement based on the decision below. *See* Comments of the CTIA-The Wireless Association and The National Association of Broadcasters, at 14-15, Docket No. 2006-3 (Copyright Royalty Bd. Oct. 31, 2008). Further, even if such rates

are finally adopted by the CRB, the legal uncertainty could embolden some to disregard them as ineffective.

By contrast, reversal of the Second Circuit's erroneous interpretation of the Copyright Act would remove any residual doubts about the broad availability of compulsory licenses for interactive streaming of musical works under Section 115.

C. The Second Circuit's Decision May Affect Copyright Infringement Litigation Pending In The Second Circuit, And Will Lead To Forum Shopping

Current and future copyright litigation may also be directly affected by the Second Circuit's decision, particularly because the decision now governs in a jurisdiction that includes a major commercial center for copyrighted works.

Amicus NMPA is a plaintiff representing its music publisher members in a pending class action suit alleging that YouTube LLC and its parent Google Inc. have engaged in massive copyright infringement through their operation of a service that streams unlicensed videos that incorporate copyrighted songs. *See Football Ass'n Premier League Limited v. YouTube, Inc.*, No. 07-03582 (S.D.N.Y. filed May 4, 2007), *available at* http://www.youtubeclassaction.com/courtdox/2007-11-07YTAmdCplt.pdf. This enormous class action, in which copyright holders from the music, sports, news, and entertainment industries have come together to prohibit unauthorized

reproduction and performance of their copyrighted works through YouTube, could potentially be affected by the Second Circuit's erroneous holding in ways that would never be undone.

Further, because of the liberal venue provisions applicable to copyright infringement actions, 28 U.S.C. § 1400(a), potential defendants will be able to forum shop and select district courts in the Second Circuit to bring actions for declaratory judgment that their RAM buffer copies do not constitute fixed works that trigger copyright liability, in the hope that they will benefit from the uncertain boundaries of the new requirements for a work to be considered fixed. Aside from the enormous toll it would take on music publishers and songwriters to litigate such actions, the Second Circuit's decision could unfairly immunize interactive streamers from having to pay copyright holders the royalties that are required under a correct interpretation of Section 115 compulsory license.

II. THE COURT OF APPEALS REACHED A WRONG CONCLUSION AND DID SO IN A MANNER THAT CASTS A SHADOW OF UNCERTAINTY OVER NECESSARY PRIVATE NEGOTIATIONS IN THE MUSIC INDUSTRY

The decision below is based on an incorrect reading of the statute. And that erroneous interpretation creates uncertainty that will undermine existing licensing practices and hinder

private resolution of current and anticipated disputes as digital distribution technologies continue to evolve. This Court's immediate review is necessary to establish an acceptable degree of predictability for the legitimate digital music industry, which is already severely tested by the challenges of online piracy.

RAM buffer copies created by interactive streaming services in order to play back musical works for users are "phonorecords" as defined by Section 101 of the Copyright Act because the buffer copies are material objects in which sounds are "fixed" and "from which the sounds can be perceived, reproduced, or otherwise communicated, either with the aid of a machine or device." 17 U.S.C. § 101.

Such buffer copies manifestly meet the definition of "fixed" in Section 101, because the musical work exists in a sufficiently stable form to be perceived, reproduced, and communicated in its entirety. This interpretation is consistent with the overwhelming weight of authority, which agrees with the Copyright Office's interpretation of "fixed," and which adheres to the functional definition of Section 101 in considering the ability to perceive, reproduce or communicate a copyrighted work. *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993); *Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998); *Marobie-FL, Inc. v. National Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1177-1178 (N.D. Ill. 1997); *DMCA Section 104*

Report, *supra*, at 118-122 (collecting additional judicial authorities).

The court of appeals below rejected that consistent interpretation of other courts and the longstanding interpretation of the Copyright Office, on which the Copyright Office has relied most recently to propose critical regulations for the music industry on compulsory licensing in the digital music streaming context. Further, in adopting its novel reading of the Copyright Act, the court of appeals failed to establish any principles to limit its unsettling and open-ended ruling.

In determining that data held in a computer buffer for 1.2 seconds cannot give rise to an actionable "copy," the court of appeals misconstrued the statutory definition of "fixed" on which it relied. Section 101 provides that "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord * * * is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. Under the statutory definition of "fixed," it is the *work*—not any "bits" of data that may comprise the work—that is the key to determining whether the work is fixed. A work that remains perceptible is considered to be "fixed" even if some of its "bits" have already passed through a buffer.

The Second Circuit's contrary interpretation has left the music industry in an untenable position. A lack of certainty concerning the ready availability of

licenses for the reproductions required for the process of interactive streaming will inhibit the growth of legitimate digital music services and threaten the livelihood of music creators. The court of appeals' suggestion that its ruling is somehow fact specific, Pet. App. 17a, provides no useful guidance and only highlights the uncertainty engendered by the decision that will surely impede the private resolution of licensing issues in the digital music industry.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted.

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