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OF COPYRIGHT

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In Re:	**Docket No.** RM 2000-4
Section 114 Definition of Interactive Service	**PETITION FOR RULEMAKING**

PRELIMINARY STATEMENT AND NEED FOR RULEMAKING

Pursuant to 17 U.S.C. § 702, the Digital Media Association ("DiMA") respectfully requests that the Copyright Office commence a rulemaking to address the proper scope of the definition of a "service" in 37 C.F.R. § 201.35(b)(2), as distinct from an "interactive service" under Section 114(j)(7) of the Copyright Act. Specifically, DiMA urges the Copyright Office to adopt a rule clarifying that services engaged in the streaming of music programming over the Internet, or "webcasting," are not "interactive services" under Section 114 (j)(7) of the Copyright Act merely by virtue of offering the consumer some degree of influence over the streamed programming. As set forth below, such a rulemaking is necessary to clarify that a service making transmissions that otherwise meet the requirements for the statutory license under Section 114(f) of the Copyright Act is not rendered "interactive," and thus ineligible for the statutory licenses, simply because the consumer may have some input into a service's music programming.

DiMA further requests that the rule clarify that such a webcasting service is not an "interactive service" under § 114(j)(7) of the Copyright Act, and therefore

qualifies for the aforecited Digital Millennium Copyright Act ("DMCA") statutory licenses, as long as: (i) its transmissions are made available to the public generally; (ii) the features offered by the service do not enable the consumer to determine or learn in advance what sound recordings will be transmitted over the service at any particular time; and (iii) its transmissions do not substantially consist of sound recordings performed within one hour of a request or at a time designated by the transmitting entity or the individual making the request. Attachment A hereto contains the text of the rule (the "Proposed Rule") that DiMA requests the Copyright Office to adopt.

As explained below, this Rulemaking petition has been necessitated because the Recording Industry Association of America ("RIAA") has taken the position that consumer-influenced webcasting of any nature is not eligible for the DMCA statutory licenses – and, instead, constitutes infringement of the copyright rights of RIAA's members. DiMA's members disagree and believe that the consumer-influenced transmissions described herein are eligible for DMCA statutory licensing. A Rulemaking is necessary to resolve this issue in advance of the convening of the Copyright Arbitration Royalty Panel ("CARP") which will determine the statutory rates for sound recording performances (and certain reproductions) associated with webcasting. The relief sought by this Petition is necessary in order to define the appropriate bounds of the statutory license proceedings -- which will be before this CARP.

BACKGROUND

DiMA is a trade association whose membership is comprised of approximately 40 companies engaged in various forms of Internet multimedia activities.[1] Many DiMA members have implemented or are in the process of implementing, among their website offerings, "webcasting" technologies which provide the public with the opportunity to receive literally hundreds of Internet "radio stations." Several DiMA members, employing the latest in webcasting technologies, have developed Internet radio offerings that permit consumers to influence the "stream" of content made available to the public.

With the enactment of the DMCA in October 1998, sound recording performances via certain Internet webcasting transmissions became subject to copyright licensing for the first time. To facilitate and promote the public's access to these new technologies and to ensure that webcasting offerings would not be unduly constrained by sound recording copyright owners, however, Congress made a statutory license available to webcasters that comply with certain eligibility requirements set forth in the DMCA. These eligibility requirements, as discussed in more detail below, were designed generally to protect RIAA members from the alleged risk that consumers would be able

[1] DiMA's current members are: Adaptec; America Online; AudioBase; a2b Music; Audiosoft; barnesandnoble.com; Bestblues.com; CDNow; CMGI; DiscoverMusic.com; Discjockey.com; Earjam; Eclectic Radio Company; Emusic.com; Everstream; Gigabeat; Global Music One; iGroove.com; Intel; Kataweb SPA; Kataweb US; Knit Media; LAUNCH Media; LicenseMusic.com; Linxonic Corporation; Liquid Audio; Listen.com; ListenSmart.com; ; Live365.com; Loudeye Technologies; MTVi; Muzak; MyPlay.com; NetRadio Networks; RadioActive Media Partners; RadioWave.com; RealNetworks; Riffage.com; Rioport.com; SOUNDSBIG.com; Spinner.com; Sputnick7; The Dial; Tower Records; Tunes.com; TuneTo.com; WestwindMedia.com; and Wired Planet.

to make digital-quality reproductions of their sound recordings in a manner that would meaningfully diminish or impair the record labels' ability to make sales of those sound recordings to the public.[2]

The consumer-influenced webcasting technologies at issue herein offer the public the ability to listen to music online without payment of a fee (i.e., on a non-subscription basis). In keeping with the provisions of the DMCA, and to the extent that it is possible to do so, these webcasting technologies protect the direct transmissions of the sound recordings from unauthorized recording. Furthermore, these services offer a substantial promotional benefit to the sound recording copyright owners not only by providing valuable "airplay" for the sound recordings, which has always been recognized as an extremely important factor in promoting sales of sound recordings, but by including features that facilitate purchases of sound recordings by consumers. These features may include, but are not limited to, "click-to-buy" hyperlinks associated with the music played on the service.

Generally speaking, consumers who visit services offering this technology may listen to an extensive number of different Internet radio stations programmed

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[2] Under the DMCA, webcasters may secure licenses to perform sound recordings either through voluntarily negotiated arrangements with individual sound recording companies, some of whom have authorized the RIAA to negotiate on their behalf, or, failing that, by accessing the statutory license. The statutory license rate(s) for webcasting have yet to be established, but preliminary proceedings have begun in the above-referenced CARP-case that will result in the establishment of such rates (retroactive to the effective date of the statute). DiMA does not contest the RIAA members' entitlement to compensation for webcasting activities – consumer-influenced and otherwise – pursuant to the DMCA statutory license.

partially based upon their input or the input of other consumers. The type of input involved consists primarily of preferred genres and subgenres of music (e.g., classical, jazz, oldies, etc.), preferred artists, preferred radio stations, "ratings" of artists or recordings to indicate gradations of preference, and the like. As is the case with radio broadcasters, streams of content on each station are generated from vast libraries of recordings (often including more than 100,000 songs); but, in contrast to radio broadcasting, songs are selected according to criteria designed into a computer program (rather than a disc jockey). As with radio broadcasters, each station is available to the public and free. The distinguishing feature of the consumer-influenced stations is that the software-generated playlists applicable to these stations are influenced to some extent by limited input provided by listeners, which is then distilled through various artist-grouping and weighting factors applied (in the background) according to criteria developed by the services' programmers.

The identity and order of sound recordings played for any station is determined according to criteria designed to ensure compliance with the DMCA's statutory license requirements. Although listeners are able to identify the genres/subgenres to be played and to obtain representative artist information about a station's programming, and the "originating" listener is able to have limited influence over the frequency with which certain artists' works are transmitted, the listener is not told and cannot determine what sound recordings will comprise the playlist for any listening period and has no advance notice of what artists or recordings he or she will hear from one song to the next. In all events, at no time is any listener permitted to select

specific sound recordings for play on a station (as would be the case were musical works or programs available "on demand" or "specially created" for a listener).[3]

THE LEGAL ISSUE

Prior to the passage of the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (the "DPSRA"), U.S. copyright law did not recognize an exclusive right of public performance in a sound recording. In fact, prior to the adoption of the DPSRA, digital sound recording performances were treated much like those on broadcast radio: the promotional value of the public performance and the public policy in favor of free over-the-air broadcasting was deemed by Congress to outweigh any interest that the sound recording copyright holder might have in compensation from performance.

The DPSRA was enacted in response to the development of digital technology and the proliferation of services capable of delivering high-quality, digital transmissions of sound recordings to subscribers in their homes. The principal concern underlying the DPSRA's recognition of a right of public performance in sound recordings in certain, limited circumstances was that some digital transmission services, such as so-called "celestial jukebox," "pay-per-listen" or "audio-on-demand" services that allowed users to select individual sound recording performances, might significantly increase the potential for at-home reproduction of sound recordings or otherwise impede or supplant

[3] This Petition seeks a Rulemaking associated with the consumer-influenced webcasting technologies presently developed or employed by DiMA members in order to define the scope of the pending CARP. As such, we do not herein purport to identify every type of technology that could implicate similar issues.

the traditional market for the sale of sound recordings by the record labels comprising RIAA's membership. H.R. Rep. No. 104-274, at 10-15 (1995).

Under the DPSRA, most sound recording performances remained outside any license requirement, as such performances did not (and do not) increase the potential for at-home reproduction of sound recordings or otherwise threaten or impede record sales. Instead, it subjected only certain digital, audio-only transmissions to paying subscribers to a license requirement. Moreover, the DPSRA made available to "eligible" services a statutory, compulsory license from the recording companies (or their designated agent, the RIAA). The statutory license precludes an individual copyright owner from denying a consumer permission to perform its sound recordings, so long as the consumer is willing to abide by the statutory license rates and eligibility requirements (which focus on minimizing the risk that consumers could make digital-quality, at-home reproductions of sound recordings that would adversely affect the labels' sales of such recordings to the public).

Occasioned in large measure by the recent growth of digital audio transmissions over the Internet on a nonsubscription basis, the DMCA was enacted to make certain nonsubscription digital audio transmissions subject to licensing and to expand the statutory license created by the DPSRA to cover a subset of those transmissions, referred to as "eligible nonsubscription transmissions." An "eligible nonsubscription transmission" is defined as a:

> non-interactive, non-subscription transmission made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary

purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music related events." (17 U.S.C. § 114(j)(2) (1998)).

The DMCA established criteria that "eligible nonsubscription transmissions" must meet in order to qualify for the statutory license (which are substantially similar to those which had been established for the DPSRA statutory license). These include, inter alia, requirements:

- that the transmissions not exceed the "sound recording performance complement", which limits the number of works on a given album or compact disc which can be transmitted within a designated time period (except in the case of certain retransmissions of broadcast transmissions) (17 U.S.C. § 114(d)(2)(C)(i));

- that the transmitting entity not publish an advance program schedule or make a prior announcement of specific sound recordings to be transmitted – though prior announcements of featured recording artists for illustrative purposes are permitted (17 U.S.C. § 114(d)(2)(C)(ii));

- that the transmissions of sound recordings must include information encoded in the recordings, if any, that identify the title of the recording, the featured recording artist and related information (which requirement is for the promotional benefit of the record labels) (17 U.S.C. § 114(d)(2)(C)(ix));

- that the transmitting entity not knowingly perform the sound recording in a manner that is likely to cause confusion as to the affiliation or sponsorship of the copyright owner or recording artist (17 U.S.C. § 114(d)(2)(C)(iv));

- that the transmitting entity generally cooperate to prevent use of "search engines" or other technology to select a particular sound recording (17 U.S.C. § 114(d)(2)(C)(v));

- that the transmitting entity take no steps to cause or induce the making of copies and, where applicable, enable any optional technology which prevents copying (17 U.S.C. § 114(d)(2)(C)(vi));

- that the transmitting entity accommodate and not interfere with the transmission of technical measures used by sound recording copyright owners to identify or protect copyrighted works (so long as doing so

does not impose substantial costs on the transmitting entity or result in a perceptible degradation of the transmission) (17 U.S.C. § 114(d)(2)(C)(viii)); and

- that the transmissions not be part of an "interactive service" (17 U.S.C. § 114(d)(2)(A)(i)).

Under the DPSRA, an "interactive service" (which is not entitled to the statutory license) had been defined as a service that enables a consumer to receive, on request, a transmission of a particular sound recording. See 17 U.S.C. §114(j)(4) (1995). The DMCA added to that definition of an "interactive service" to include certain types of services that enable a member of the public "to receive a transmission of a program specially created for the recipient." The complete definition is as follows:

> (7) An 'interactive service' is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service. 17 U.S.C. 114(j)(7) (1998).

The legislative history accompanying this provision further states:

> The conferees intend that the phrase 'program specially created for the recipient' be interpreted reasonably in light of the remainder of the definition of 'interactive service.' For example, a service would be interactive if it allowed a small number of individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a

> large number of recipients of the service's transmissions a program consisting of sound recordings requested by a small number of those listeners. H. Rep. No. 105-796, at 87-88 (1998).

In sum, in both the DMCA and the DPSRA, Congress made the judgment that if certain digital-audio performances of sound recordings (such as music on demand) might adversely affect the market for sales of sound recordings to a material extent, the copyright holder could be permitted to preclude such performances (or dictate whatever license terms it chose for such performances); whereas the judgment was made that, with respect to any other digital-audio performances (including those having a positive promotional effect on record sales), the sound recording copyright owner would be entitled to receive fair compensation (in an amount to be voluntarily negotiated or set by a CARP) – but not to completely control whether the performance could be made at all. In making this determination, Congress, no doubt, considered the fact that copyrights in sound recordings are controlled by a mere handful of owners.

THE CONSUMER-INFLUENCED WEBCASTING TRANSMISSIONS HERE AT ISSUE ARE NOT "INTERACTIVE"

The DMCA language and legislative history indicate that services that offer a carefully limited degree of consumer input to influence their music programming, of the nature discussed herein, are not "interactive services" under § 114(j)(7) of the Copyright Act.

As set forth above, the selection and order of sound recordings transmitted over consumer-influenced stations are randomly generated by a computer in a manner designed to ensure compliance with the DMCA's statutory license provisions (e.g., the transmissions do not violate the sound recording performance complement, no playlist of

the transmission will be made available in advance, etc.). In addition, the actual transmissions on such consumer-influenced stations consist, at most, only partially of "rated" or "preferred" sound recordings or artists; and they include hundreds or thousands of sound recordings selected by the service without any direct consumer input.

Further, the recipients of transmissions do not:

- determine or select the particular sound recordings which become the basis of the transmission;
- determine or select the particular artists which become the basis of the transmission;
- select or obtain advance knowledge as to the particular songs or albums comprising the transmission; or
- select or obtain advance knowledge of the particular artists whose works comprise the transmission.

In fact, artist identification on the services is representative only. This is significant since the DMCA, § 114(d)(2)(C)(ii), and its accompanying legislative history, specifically state that such representative information does not render transmissions ineligible for the statutory license.

In sum, limited consumer-influenced transmissions should be viewed as "eligible nonsubscription transmissions" falling within both the letter and spirit of the DMCA statutory license structure. Most fundamentally, the statutory license provisions of the DMCA recognize the right of any entity, be it a corporation or an individual, to take advantage of the statutory license for the purpose of making certain transmissions (other than transmissions of sound recordings "on request") to the general public. In pertinent part, the legislative history to the DMCA concerning the definition of an interactive service states that "a service would not be interactive if it merely transmitted

to a large number of recipients of the service's transmissions a program consisting of sound recordings requested by a small number of those listeners." 17 U.S.C. § 114(j)(7) n. 70 (1998). That is precisely what is involved here.

It is significant that the actual transmissions of sound recordings over these consumer-influenced stations is generated by a computer according to programs and playlists created by the service, using listener input only as a guide; as such, listeners (including the "creator(s)" of consumer-influenced stations) never have the ability to determine or know in advance whether any particular song or album will be performed or even when, over an extended period, any particular artist's works will appear. The consumer-influenced stations thus are consistent with the legislative intent underlying the DMCA statutory license structure, as there is no meaningful risk that transmissions from consumer-influenced stations can be used as a means to make the kind of at-home recordings which genuinely could impair the ability of the RIAA's members to sell recordings to the public. Nor is there any difference in the risk of such recordings being made from consumer-influenced station transmissions than is posed by other types of transmissions which indisputably are eligible for the compulsory license.

CONCLUSION

For the foregoing reasons, DiMA respectfully requests that the Copyright Office commence a rulemaking proceeding to adopt the Proposed Rules set forth in Attachment A.

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New York, New York

Respectfully submitted,
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ATTACHMENT A – PROPOSED RULE

37 C.F.R. § 201.35 (b)(2) is amended by inserting the following at the end of that sentence:

A Service making transmissions that otherwise meet the requirements for the section 114(f) statutory license is not rendered "interactive," and thus ineligible for the statutory license, simply because the consumer may express preferences to such Service as to the musical genres, artists and sound recordings that may be incorporated into the Service's music programming to the public. Such a Service is not "interactive" under § 114(j)(7), as long as: (i) its transmissions are made available to the public generally; (ii) the features offered by the Service do not enable the consumer to determine or learn in advance what sound recordings will be transmitted over the Service at any particular time; and (iii) its transmissions do not substantially consist of sound recordings performed within one hour of a request or at a time designated by the transmitting entity or the individual making the request.