

**Before the United States Copyright Office  
Library of Congress  
Washington, D.C.**

In the Matter of	)	
Exemption to Prohibition on	)	
Circumvention of Copyright Protection Systems	)	Docket No. RM 2002-4
for Access Control Technologies	)	
_____	)	

**Comments of Digital Media Association (DiMA)**

**Proposed class of copyrighted works to be exempted:**

1. Copy-protected Red Book Audio format Compact Discs

**Brief summary of the arguments in support of the exemption proposed above:**

Technological controls applied to Red Book Audio format Compact Discs preclude licensed (including under a statutory license) and exempt transmitting organizations from exercising their otherwise lawful right to make multiple ephemeral recordings pursuant to section 112(e) of the Copyright Act, 17 U.S.C. § 112(e). Making and storing such ephemeral recordings on computer servers is necessary for most Internet radio streaming. As Congress recognized when exempting from liability circumvention for the purpose of making of a single ephemeral recording, 17 U.S.C. § 112(a), the ability to circumvent such technologies for the purpose of making ephemeral recordings implicates section 1201(a)(1). The exemption requested herein by DiMA therefore is justified for the narrow purpose of making permitted multiple ephemeral recordings, so as to facilitate Internet webcasting.

## Comments

Pursuant to the Notice of Inquiry published at 67 Fed. Reg. 63578 (October 15, 2002), the Digital Media Association (“DiMA”) submits these comments concerning the effect of technological controls applied to a class of works -- namely, copy-protected Red Book Audio format Compact Discs -- upon the ability of licensed (including under a statutory license) and exempt transmitting organizations to exercise their otherwise lawful rights to make multiple ephemeral recordings pursuant to section 112(e) of the Copyright Act, 17 U.S.C. § 112(e).

The exigencies of Internet radio require services to copy to a hard disk drive on a computer server the sound recordings that they will stream to the public. Smaller Internet webcasting services may be able to satisfy this need by making a single server copy, which copy is exempt pursuant to section 112(a). However, as the Office is aware, the vast majority of commercial webcasters require more than one server copy of a sound recording to accommodate streaming to a wide audience, different software applications and formats (*e.g.*, RealOne Player, Windows Media Player, MP3) and multiple bandwidths (*e.g.*, 56k dial-up access, DSL/cable broadband service).

Section 112(e) provides such transmitting organizations with a statutory license to make the multiple copies necessary to facilitate those transmissions. Pursuant to the Final Rule and Order of the Librarian of Congress in the Matter of Digital Performance of Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2 (July 8, 2002), transmitting organizations availing themselves of this statutory license to make ephemeral recordings are required to pay a fee, for the initial license period through December 31, 2002, calculated as a percentage of their sound recording public

performance royalty payments (or in the case of services to business establishments, a percentage of their gross proceeds).

The right to circumvent technological controls applied to a sound recording which may interfere with the making of ephemeral recordings is addressed under section 112(a)(2). That subsection provides that, if a technological measure prevents the making of an exempt ephemeral recording, then a copyright owner shall make available to such transmitting organization the means of circumventing that measure, to the extent that it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner does not provide the transmitting organization with the means of circumvention, then circumvention by such transmitting organization is explicitly exempted by section 112(a)(2) from liability under section 1201(a)(1). *See* 17 U.S.C. §112(a)(2), stating that “the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph 1 of this subsection.”<sup>1</sup> As set forth in the legislative history of the Digital Millennium Copyright Act:

Concerns were expressed that if use of copy protection technologies became widespread, a transmitting organization might be prevented from engaging in its traditional activities of assembling transmission programs and making ephemeral recordings permitted by section 112 for purposes

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<sup>1</sup> DiMA recognizes that the Copyright Office, in its Notice of Inquiry, took pains to distinguish between circumvention of access controls applied pursuant to section 1201(a) and other types of technological protection measures addressed in sections 1201(a)(2) and 1201(b). By referring explicitly to section 1201(a)(1) in section 112(a)(2), Congress made clear that, at least with respect to the categories of works (including musical works, certain literary works and sound recordings) implicated by section 112(a), circumvention of any protection applied against the making of an ephemeral recording thereof is potentially a circumvention of an access control that could be actionable under section 1201(a). Therefore, the narrow exception requested here by DiMA properly is cognizable under section 1201(a)(1) and in this proceeding.

of its own transmissions within its local service area and of archival preservation and security. To address this concern, the House bill and the Senate amendment propose adding to section 112 a new paragraph that permits transmitting organizations to engage in activities that otherwise would violate section 1201(a)(1) in certain limited circumstances when necessary for the exercise of the transmitting organization's privilege to make ephemeral recordings under redesignated section 112(a)(1). By way of example, if a radio station could not make a permitted ephemeral recording from a commercially available phonorecord without violating section 1201(a)(1), then the radio station could request from the copyright owner the necessary means of making a permitted ephemeral recording. If the copyright owner did not then either provide a phonorecord that could be reproduced or otherwise provide the necessary means of making a permitted ephemeral recording from the phonorecord already in the possession of the radio station, the radio station would not be liable for violating section 1201(a)(1) for taking the steps necessary for engaging in activities permitted under section 112(a)(1).

H.R. Rep. No. 105-796, at 78-79 (1998).

No equivalent exemption currently applies explicitly to the multiple ephemeral recordings made pursuant to section 112(e). This omission thus threatens to have a substantial adverse and injurious impact upon the rights of transmitting organizations that require the use of multiple ephemeral recordings. Certain types of copy protection currently being applied to sound recordings in the Red Book Audio Compact Disc format prevent the copying (commonly known as “ripping”) of the sound recording from the CD to a computer hard disk drive. Such technological protection measures apply equally to the hard disk drives in a webcaster’s server room and in a consumer’s home computers. Until now, such technical copy protection mechanisms may have been applied only sporadically to audio compact disc recordings released in the United States.<sup>2</sup>

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<sup>2</sup> See Gwendolyn Mariano, “Copy-protected CDs slide into stores,” <http://news.com.com/2100-1023-835841.html> (February 12, 2002); John Borland, “Universal copy-protected CD shuns players,” <http://news.com.com/2100-1023-277197.html> (December 18, 2001).

However, the RIAA in recent past has taken the position that CD copy protection is necessary.<sup>3</sup> At least one major record company announced its intention to apply copy protection to all promotional compact discs, so as to prevent all ripping to computer hard disk drives.<sup>4</sup> Although some news articles suggest that some labels may have delayed or placed on hold their plans to apply copy protection on a wide scale,<sup>5</sup> to the knowledge of DiMA, no recording label that previously has applied copy protection to its compact discs, or has expressed an interest in doing so, has publicly renounced all intention to apply copy protection more broadly in the future.<sup>6</sup>

A few webcasters operating under the statutory ephemeral recordings license receive promotional sound recordings from record labels. Most webcasters purchase commercially the recordings that they rip to their servers to facilitate their webcasts.

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<sup>3</sup> See “Why CD Copy Protection is Necessary,” [http://www.riaa.com/News\\_Story.cfm?id=494](http://www.riaa.com/News_Story.cfm?id=494), and Letter from Hilary Rosen to Rep. Rick Boucher (February 28, 2002), available online at [http://www.riaa.com/pdf/Boucher\\_letter\\_2-28-02.pdf](http://www.riaa.com/pdf/Boucher_letter_2-28-02.pdf)

<sup>4</sup> “BMG Announces Copy Management Initiative for Non-Commercial CD,” news release (April 8, 2002), [http://www.bmg.com/news/articles/general\\_article\\_020408.html](http://www.bmg.com/news/articles/general_article_020408.html)

<sup>5</sup> John Borland, “Labels loosening up on CD copy locks,” <http://news.com.com/2100-1023-956069.html> (September 3, 2002)

<sup>6</sup> Recent news reports indicate that some content owners are experimenting with protection technologies that rely upon passwords or personal identification numbers to “serialize” compact discs. DiMA has no concerns in this proceeding with respect to present uses of this technology, inasmuch as such serialization appears to be geared to the salutary purpose of providing consumers with positive incentives to purchase sound recordings. See “Bon Jovi takes on music pirates,” <http://news.bbc.co.uk/2/hi/technology/2271425.stm> (September 23, 2002); Noah Schachtman, “Can Bon Jovi Fool the Pirates,” <http://news.bbc.co.uk/2/hi/technology/2271425.stm> (September 19, 2002). Should these or similar types of codes be used in the future to track, limit or prevent copying to computer hard drives, the issues DiMA raises in these Comments would apply to such technological measures as well.

Thus, technological protection measures applied to a Red Book Audio Compact Disc, such as those applied to promotional and commercially-available compact discs by the labels in the United States and abroad, would prevent and, in fact, have prevented, webcasters from making on a server hard drive the ephemeral recordings necessary to engage in Internet radio.

If a webcaster or other transmitting organization is unable to make ephemeral recordings in the necessary formats, then these technological protections would thwart the services' ability to use the section 112(e) license, as well as Congressional intent to facilitate webcasting through enactment of that statutory multiple ephemeral recordings license.<sup>7</sup> Technological prevention of ephemeral recordings could result in a reduction in the number of sound recordings and musical works available for public performance, and, should the practice become widespread, a significant reduction in the number of webcasters that could effectively compete in the marketplace. In this regard, many (if not most) webcasters would lack the technical skill necessary to perform the circumvention, and might be prohibited by law to acquire the tools to circumvent pursuant to sections 1201(a)(2) and (b).<sup>8</sup>

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<sup>7</sup> See H.R. Rep. No. 105-796 at 89-90. DiMA notes that the Copyright Office consistently has taken the position that the license granted in section 112(e) is an "aberration" that should not have been enacted and should be rescinded. See Section 104 Report at 144 n. 434. The substantial adverse impact of such technological protection measures is the same regardless of whether the making of multiple ephemeral recordings is permitted by license or fair use alone, and DiMA's Comments would be equally applicable to the making of these ephemeral recordings under either section 112(e) or as a fair use.

<sup>8</sup> This problem may not effectively be answered by the possibility that some labels might change current practices and begin providing digital files to webcast services. First, not all digital files are created in equal quality or are optimized for the technology employed by particular webcast services. Many services expend substantial time, effort and money to acquire sound recordings ripped in a particular manner so as to produce

Should the practice of applying technological protection measures to Red Book Audio Compact Discs persist, or become more prevalent in the industry, Internet webcasters and webcasting as a competitive performance medium would be substantially adversely affected. Therefore, DiMA respectfully submits that a narrow exemption from section 1201(a) is necessary and appropriate for the class of works of Red Book Audio Compact Discs that incorporate technological protections against copying to server hard drives, for the benefit of those entitled to copy such works under the section 112(e) statutory license.

Respectfully submitted,

/s/

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consistent, high quality sound on their specific service. Indeed, some services believe that the sonic quality of their service provides them with a competitive advantage over other services. Second, the ability to rip directly from CD maintains the independence of the webcaster. Services are concerned that digital files may arrive with “strings attached,” such as additional license conditions and restrictions that otherwise are not imposed by the statutory license.