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**PUBLIC PERFORMANCE OF SOUND RECORDINGS: DEFINITION OF A SERVICE**


In enacting the DPRA, Congress had two purposes: (1) To ensure that recording artists and record companies will be protected as new technologies affect the way in which their creative works are used; and (2) to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services. H.R. Rep. No. 105-796, at 79-80 (1998). It soon became apparent, however, that with the rapid proliferation of the use of the Internet as a transmission medium and the confusion surrounding the question of how the DPRA applied to nonsubscription digital audio services, the gaps in the act needed to be addressed. H.R. Rep. No. 105-165, at 79 (1998).

A key element of the definition is the requirement that the transmission must be "non-interactive." Unless a service meets this criterion, it is ineligible for the statutory license. In addition, the primary purpose of the service must be 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)(6) (1998).

For purposes of the DMCA, an "eligible nonsubscription transmission" is defined as: a non-interactive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is 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)(6) (1998).

A key element of the definition is the requirement that the transmission must be "non-interactive." Unless a service meets this criterion, it is ineligible for the statutory license and, therefore, must negotiate a voluntary agreement with the copyright owner(s) of the sound recordings before performing the works by means of digital audio transmissions.

This distinction between interactive and non-interactive has always been critical to determining the rights of a copyright user under section 114, since Congress believed "interactive services [were] most likely to have a significant impact on traditional record sales, and therefore pose[d] the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales." S. Rep. No. 104-128, at 16 (1995). For this reason, interactive services are excluded from the limitations placed upon the new performance right and, consequently, must conduct arms-length negotiations with the copyright owners of the sound recordings before making a digital transmission of the works.

Congress first defined an "interactive service" in the DRPA as a service that: enables a member of the public to receive, on request, a transmission of a particular sound recording chosen 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 does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service. 17 U.S.C. 114(j)(4) (1995).

The second sentence was added to make clear that "the term 'interactive service' is not intended to cover traditional practices engaged in by, for example, radio broadcast stations, through which individuals can ask the station to play a particular sound recording as part of the service's general programming available for reception by members of the public at large." S. Rep. No. 104-128, at 33-34 (1995).

In the DMCA, Congress expanded this definition to include further explanation of the type of service that does not, in and of itself, make a service interactive. Specifically, the DMCA refined the definition of an "interactive service" 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 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).

In both cases, Congress sought to identify a service as interactive according to the amount of influence a member of the public would have on the selection and performance of a particular sound recording. Neither definition, however, draws a bright line delineating just how much input a member of the public may have upon the basic programming of the service. Consequently, the Digital Media Association ("DiMA") seeks clarification on this point and a regulation that would prohibit designating a service as interactive merely because it offers a consumer some degree of influence over the streamed programming.

**DiMA Petition**

On April 17, 2000, DiMA filed a petition for a rulemaking with the Copyright Office asking that the Office adopt a rule stating that a webcasting service does not become an interactive service merely because a consumer exerts some degree of influence over the streamed programming. DiMA seeks modification of the current regulation that defines a "Service" in order to better distinguish between activities that make a webcasting service non-interactive from those activities that make a service interactive. 37 CFR 201.35(b)(2). The amendment would add specific language to clarify that services which otherwise meet the requirements for the compulsory license set forth in section 114(f) do not become ineligible for the section 114 statutory license merely because they offer the consumer some degree of influence over the streamed programming. DiMA then proposes additional language which, in its view, would clarify that such a webcasting service is not an "interactive service" under section 114(j)(7) of the Copyright Act, provided that the service meet three criteria.

The text of the proposed amendment, to be added at the end of the current regulatory text, would read as follows:

> 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 section 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.

**DiMA Petition at 14, Attachment A--Proposed Rule.**

In support of its petition, DiMA argues that the consumer input is merely a guide to program selections and 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. **such [that] 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." Petition at 12. In summary, DiMA argues that consumer-influenced stations comply with the spirit and intent of the law because the contribution of the consumer does not increase the risk that the consumer will make copies of the transmissions and display the sale of a sound recording in the marketplace.

DiMA asserts that this issue must be resolved prior to the convening of the Copyright Arbitration Royalty Panel ("CARP") which will determine the rates for the section 114 statutory license "in order to define the appropriate bounds of the statutory license proceedings—which will be before this CARP." Petition at 2. DiMA requests this rulemaking for the purpose of defining the scope of the pending arbitration proceeding that will set rates and terms for the section 114 statutory license with respect to the known "consumer-influenced webcasting technologies presently developed or employed by DiMA members." Petition at 6 n.3.

**Comments**

Under section 702 of the Copyright Act, title 17 of the United States Code, the Register of Copyrights can "establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title." The question is whether a rulemaking proceeding is the appropriate forum for determining whether certain activities make a service "interactive." While this may, at first glance, appear to be an endeavor similar to the subject of the pending rulemaking regarding definition of a "service," that proceeding presents a situation involving a clearly defined class of services ("any entity that transmits an AM/ FM broadcast signal over a digital communications network such as the Internet").
See 65 FR 14227 (March 16, 2000). In contrast, it is debatable whether the DiMA petition has presented a clearly defined class of services. Moreover, assuming that this is an appropriate topic for a rulemaking proceeding, it is not clear whether there is sufficient information at this time to promulgate a regulation that could accurately distinguish between activities that are interactive and those that are not. The Office is concerned that it may be being asked to define a moving target.

Interested parties are invited to comment on: (1) Whether the Office should conduct the rulemaking on the subject addressed in the DiMA petition, and (2), if so, what issues should the Office address and what should the Office's conclusion be?

All interested parties are requested to file comments and replies with the Copyright Office in accordance with the information set forth in this document. The Copyright Office has posted the DiMA petition to its website (http://www.loc.gov/copyright/carp/DiMAPetition.pdf)

in order to facilitate the dissemination of the information presented in the petition.


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