



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

NOTICE OF INQUIRY.

PUBLIC PERFORMANCE OF SOUND RECORDINGS: DEFINITION OF A SERVICE

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2000-4]

Public Performance of Sound Recordings: Definition of a Service

AGENCY: Copyright Office, Library of
Congress

ACTION: Notice of inquiry.

SUMMARY: The Copyright Office is requesting comments on whether to grant a petition for rulemaking filed with the Copyright Office by the Digital Media Association. The petition requests an amendment to the rule that defines the term "Service" for purposes of the statutory license governing the public performance of sound recordings by means of digital audio transmissions. The requested amendment would expand the current definition of the term "Service" to state that a service is not interactive simply because it offers the consumer some degree of influence over the programming offered by the webcaster.

DATES: Written comments are due June 22, 2000. Reply comments are due July 7, 2000.

ADDRESSES: If sent by mail, an original and ten copies of comments and reply comments should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. If hand delivered, they should be brought to: Office of the General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue SE., Washington, DC 20559-6000.

FOR FURTHER INFORMATION

CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Senior

Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024; Telephone: (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:

Background

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Public Law 104-39, which created an exclusive right for copyright owners of sound recordings, subject to certain limitations, "to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. 106(6). Among the limitations on the performance was the creation of a licensing scheme for interactive digital audio services and a compulsory license for nonexempt, noninteractive, digital subscription transmissions, 17 U.S.C. 114(d)(2), (3) and (f) (1995). In addition, Congress exempted certain transmissions and retransmissions from the newly created performance right, 17 U.S.C. 114(d)(1) (1995).

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 some nonsubscription digital audio services, further legislation was needed to achieve these goals.

These changes were part of the Digital

Millennium Copyright Act of 1998 ("DMCA"), Public Law 105-304, which, among other things, amended sections 112 and 114 of the Copyright Act to clarify that "the digital sound recording performance right applies to nonsubscription digital audio services such as webcasting" and to address the licensing issues raised by the webcasters. Staff of the House of Representatives Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 at 50 (Comm. Print, Serial No. 6, 1998). Specifically, Congress amended section 114 by creating a new statutory license for nonexempt eligible nonsubscription transmissions (e.g., webcasting) and nonexempt transmissions by preexisting satellite digital audio radio services. 17 U.S.C. 114(f) (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.

17 U.S.C. 114(d)(3) (1998).

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 DPRA 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 activity 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

[[Page 33267]]

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).

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, DiMA¹ 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

¹DiMA is a trade association that represents approximately 40 companies that engage in various forms of Internet multimedia activities, including activities that permit consumers to influence the programming streamed to the public over the Internet.

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 displace 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,"² 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>)

[[Page 33268]]

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

Dated: May 18, 2000.
Marilyn Kretsinger,
Assistant General Counsel.

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²On March 16, 2000, in response to a petition from the Recording Industry Association of America, the Office published a notice of proposed rulemaking seeking comment on whether to amend its regulation that defines a "Service" for purposes of the statutory license governing the public performance of sound recordings by means of digital audio transmissions, in order to clarify that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act. 65 FR 14227 (March 16, 2000).

