



ANNOUNCEMENT

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

REQUEST FOR COMMENT

PUBLIC PERFORMANCE OF SOUND RECORDINGS: DEFINITION OF A SERVICE

The following excerpt is taken from Volume 67, Number 180 of the *Federal Register* of Tuesday, September 17, 2002 (pp. 58550-58551)

LIBRARY OF CONGRESS

Copyright Office
37 CFR Part 201
[Docket No. RM 2000-3C]

Public Performance of Sound Recordings: Definition of a Service

AGENCY: Copyright Office, Library of Congress.

ACTION: Request for comment.

SUMMARY: The Copyright Office of the Library of Congress is providing an opportunity to all interested persons to file comments to a motion requesting a stay of its final rule which clarifies that transmissions of a broadcast signal over a digital communications network are not exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act.

DATES: Oppositions are due no later than Tuesday, September 24, 2002. Replies are due no later than Friday, September 27, 2002.

ADDRESSES: An original and five copies should be hand delivered to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE., Washington, DC 20540.

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:

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(202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION: On December 11, 2000, the Copyright Office issued a final rule to clarify that the transmission of a sound recording as part of a retransmission

of an AM/FM broadcast signal over a digital communications network, such as the Internet, is subject to the limited digital performance right provided by section 106(6) of the Copyright Act, title 17 of the United States Code, and is not exempt under section 114(d)(1)(A)—the provision that specifically exempts a “nonsubscription broadcast transmission.” 65 FR 77292 (December 11, 2000).

Broadcasters have challenged the Copyright Office’s final rule and its interpretation of the relevant statutory provisions. On January 25, 2001, Bonneville International Corp., Clear Channel Communications, Inc., Cox Radio, Inc., Emmis Communications Corp., Entercom Communications Corp., Susquehanna Radio Corp. and the National Association of Broadcasters (hereinafter, “Broadcasters”) filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking a declaratory ruling that the Office’s rule was invalid. On cross summary judgment motions, the district court upheld the Copyright Office’s interpretation of the statutory exemption, finding the interpretation both reasonable and permissible. *Bonneville Int’l, et al. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001). An appeal of the district court’s decision is currently pending in the Third Circuit. See *Bonneville, et al. v. Peters*, Case No. 01-3720 (3d Cir.).

Under the Office’s interpretation of the section 114(d)(1)(A) exemption, FCC-licensed broadcasters who retransmit their AM/FM programming over the Internet may publicly perform the sound recordings that are part of that programming under the section 114 statutory license provided that the licensee pays the appropriate copyright royalty fees and abides by the terms of the statutory license. The rates and terms for use of this license and for the statutory license for making ephemeral phonorecords for the purpose of facilitating digital transmissions were recently adopted by the Library of Congress. See Final Order and Rule, Docket No. 2000-9 CARP

DTRA1&2, 67 FR 45239 (July 8, 2002). Under these rules, the first payment of copyright royalty fees for those operating under the section 112 and section 114 statutory licenses is due October 20, 2002.

Broadcasters, however, would like to stay the application of the Copyright Office’s interpretation of section 114(d)(1)(A). To this end, Bonneville International Corp., Clear Channel Communications, Inc., Cox Radio, Inc., Emmis Communications Corp., Entercom Communications Corp., Salem Communications Corp., Susquehanna Radio Corp. and the National Association of Broadcasters (hereinafter, “Movants”) filed a motion for stay¹ with the Copyright Office on September 11, 2002, asking “the Register of Copyrights to stay the Register’s December 11, 2000 final rule, 65 FR 77330 (December 11, 2000), to the extent that its application would otherwise require thousands of radio stations across the nation to pay retrospective royalties covering a four year period on October 20, 2002 and thereafter to make royalty payments on a monthly basis for broadcasting transmissions that Broadcasters contend are exempt from any such obligation pursuant to 17 U.S.C. 114(d)(1)(A).”

Because this rule was promulgated through a notice and comment proceeding in accordance with the Administrative Procedure Act, title 5 of the United States Code, Chapter 5, Subchapter II and Chapter 7, the Copyright Office is publishing this notice to announce the receipt of the motion to stay the December 11, 2000, final rule and to provide any person with an interest in this proceeding with an opportunity to comment on the motion.

Oppositions are due in the Copyright Office no later than close of business on Tuesday, September 24, 2002. Replies are due no later than Friday, September 27, 2002.

¹A copy of the motion to stay has been posted to the Copyright Office website at: <http://www.copyright.gov/carp/motiontostay.pdf>. Alternatively, copies of the motion are available in the Office of the General Counsel for copying.

Dated: September 13, 2002.

David O. Carson,
General Counsel.

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