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

In the Matter of	)	
Section 112 and 114 Statutory Licenses; Webcasting Of AM And FM Radio Stations By Broadcasters	)	Docket No. _____

PETITION FOR RULEMAKING

Pursuant to 17 U.S.C. § 702, the Recording Industry Association of America, Inc. ("RIAA") respectfully requests that the Copyright Office commence a rulemaking to address the proper scope of the "broadcast transmission" exemption in Section 114(d)(1)(A) of the Copyright Act and the statutory licenses in Section 112(e) and 114(d)(2) of the Act. Specifically, RIAA urges the Copyright Office to adopt a rule clarifying that a broadcaster's transmission of its AM or FM radio station over the Internet (hereinafter "Broadcaster AM/FM Webcast") is not exempt from copyright liability under Section 114(d)(1)(A) of the Copyright Act; thus, such a Webcast must either qualify for the statutory licenses in Sections 112(e) and 114(f)(2) of the Copyright Act or it is subject to the copyright owner's exclusive rights under Section 106(4) of the Act. Attachment A hereto contains the text of the rule that RIAA urges the Copyright Office to adopt.

BACKGROUND

In the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Congress created an exclusive right to perform sound recordings publicly by means of digital audio transmission. *See* 17 U.S.C. § 106(6). Congress, however, exempted certain "nonsubscription" transmissions from that right, including any noninteractive "nonsubscription broadcast transmission." *See id.* §§ 114(d)(1)(A)(i)-(iii) (1995). The term "broadcast transmission" was defined as a "transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission." *Id.* § 114(j)(3). If a digital audio transmission did not come within any of the DPRA Section 114 exemptions, then it either (a) had to qualify for the statutory license adopted in Section 114(d)(2) of the Act, which was limited to certain "subscription" transmissions or (b) it was subject to the copyright owner's exclusive rights under Section 106(6).

Following passage of the DPRA, a controversy arose as to whether the streaming of digital audio over the Internet – generally referred to as "webcasting" – fell within the Section 114(d)(1)(A) exemptions. In general, there are three forms of audio webcasting, all of which are typically provided on a "nonsubscription" basis: (1) transmission of an over-the-air AM or FM radio broadcast via the Internet by the broadcaster ("Broadcaster AM/FM Webcasts"); (2) retransmission of an over-the-air AM/FM radio broadcast via the Internet by a third party aggregator (such as Yahoo's Broadcast.com); and (3) transmission of original audio programming via the Internet. The broadcasters claimed that each of these forms of webcasting was within the DPRA's Section 114(d)(1)(A) exemptions. *See, e.g.*, Reply Comments of National Association of Broadcasters dated June 20, 1997, at 9-12, *submitted in* Copyright Office Review of The Copyright

Licensing Regimes Covering Retransmission of Broadcast Signals (hereinafter "Copyright Office Review") 457-60 (App. II, Docket No. RM-97-1). RIAA, on the other hand, took the position that webcasts did not come within any of these exemptions and were subject to the copyright owners' exclusive rights under Section 106(6). *See, e.g.,* Comments of RIAA, dated April 28, 1997, at 9-12, *submitted in* Copyright Office Review 512-15 (App. I, Docket No. RM-97-1).

In the Digital Millennium Copyright Act of 1998 ("DMCA"), Congress adopted several amendments to make clear that webcasting is not exempt from Section 106(6) but may qualify for a statutory license –

- First, Congress recognized that certain of the Section 114 exemptions were "the cause of confusion as to the application of the DPRA to certain nonsubscription services (especially webcasters) . . . ." H.R. 105-796, at 80 (1998). Accordingly, Congress deleted two of the three exemptions in Section 114(d)(1)(A) (1995), retaining only the exemption for a "nonsubscription broadcast transmission." 17 U.S.C. § 114(d)(1)(A) (1998).

- Second, Congress amended Section 114 by adding a new statutory license for "eligible nonsubscription transmission[s]." 17 U.S.C. § 114(d)(2)(C) (1998). That term was defined as encompassing most Internet webcasts, including "retransmissions of broadcast transmissions." *Id.* § 114(j)(6).

- Third, Congress created a new statutory license in Section 112 for ephemeral recordings that facilitate webcasts made pursuant to the Section 114 license. *See* 17 U.S.C. § 112(e).

Services that wished to use the new DMCA statutory license were required to file Initial Notices with the Copyright Office by December 1, 1999. *See* 64 Fed. Reg. 66,391 (Nov. 26, 1999). Approximately 1000 broadcasters have filed Initial Notices, suggesting

that they believe they are subject to the digital performance right. However, nearly all of these notices were filed with a reservation similar to the following:

> [T]he transmission service set forth herein files with the Library of Congress, Copyright Office, an initial notice stating the Service's intention to obtain statutory licenses, to the extent required, and applicable, and to the extent not exempt or otherwise licensed, under Section 114(f) and Section 112(e) .... Transmission service is an FCC-licensed broadcaster that believes it is exempt from any licensing requirements, and this initial notice is not intended to waive any claims of such exemption.

See, e.g., Initial Notice filed by Clear Channel Broadcasting, Inc. (Oct. 15, 1999) (citations omitted).

RIAA and representatives of broadcasters have had initial discussions regarding a voluntary agreement over the rates and terms for the statutory licenses, as contemplated by 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(A). However, these discussions have not advanced beyond the preliminary stage because the parties disagree over the threshold legal question of whether Broadcaster AM/FM Webcasts are subject to the digital performance right. Broadcasters contend that these webcasts come within the Section 114(d)(1)(A) exemption while RIAA believes that these webcasts, like any other webcast, must qualify for the Section 114 statutory license or else they are subject to the copyright owners' exclusive right under Section 106(6).

DISCUSSION

The terms and structure of the DMCA demonstrate that Broadcaster AM/FM Webcasts are not exempt from the digital performance right. In addressing webcasting specifically, the DMCA did not create *any* new exemptions; rather, it deleted two of the DPRA's exemptions that caused confusion with respect to webcasting. Indeed, under the DMCA it is perfectly clear that "retransmissions" of broadcast signals over the Internet

are not exempt from the digital performance right but are eligible for the Section 114 statutory license. As noted, the DMCA defines "eligible nonsubscription services" as specifically *"including retransmissions of broadcast transmissions."* 17 U.S.C. § 114(j)(6) (emphasis added). Likewise, the DMCA specifically states that certain of the statutory licensing conditions do not apply "in the case of a *retransmission of a broadcast transmission*" if the retransmitter does not have "the right or ability to control the programming of the broadcast station . . . ." 17 U.S.C. §§ 114(d)(2)(C)(i), (ii), (iii), (vii) & (ix) (emphasis added). All of these references to "retransmissions of broadcast transmissions" were explicitly requested by Broadcast.com (now part of Yahoo) during the DMCA negotiations to ensure that it and other "aggregators" who retransmit broadcast signals – at the behest of the broadcasters – would be eligible for the Section 114 statutory license.

As at least two commentators have recognized, there is no logical reason why the same radio signal should be subject to liability when retransmitted over the Internet by a third party aggregator acting on behalf of a broadcaster, but exempt when transmitted by the broadcaster itself:

> Why should a webcaster, such as NetRadio, that licenses a radio station signal be subject to webcasting license fees, when the radio station itself could webcast the same content free of performance license obligations? If the purpose of the new webcasting license is to prevent digital webcasts from replacing the sale of sound recordings, *it is unclear how the statute allows one subset of webcasters to avoid the license fees while requiring others to ante up.* Moreover, the flip side of the exemptions from programming and playlist restrictions available to secondary webcasters is that retransmitters that do have the right and ability to control the original broadcast programming – namely, radio station webcasters – are

> required to comply with the range of licensing requirements
> . . . .

David J. Wittenstein & M. Lorrane Ford, *The Webcasting Wars*, 2 J. INTERNET L. 1, 8 (1999) (emphasis added). Nevertheless, broadcasters continue to argue that they alone among all webcasters may transmit sound recordings around the world over the Internet without incurring any liability whatsoever under the DMCA. For the reasons set forth below, RIAA urges the Copyright Office to initiate a rulemaking proceeding to address this issue and to make clear that broadcasters are not entitled to special treatment under the DMCA – that Broadcaster AM/FM Webcasts are not exempt under Section 114(d)(1)(A) but may qualify for the Sections 112 and 114 statutory licenses.[1]

I. There is a Compelling Need To Resolve the Broadcaster AM/FM Webcast Issue

The issue of whether webcasts made by broadcasters are subject to the digital performance right in Section 106(6) is an important, fundamental question of copyright law that needs to be resolved. RIAA believes the answer to that question is clear. However, unless and until the Copyright Office speaks to the issue, there is virtually no possibility that RIAA will be able to convince the broadcasters to engage in meaningful negotiations; and there will be controversy over whether broadcasters who webcast their AM/FM signals must comply with the rates and terms adopted in the forthcoming arbitration proceeding. The pendency of the broadcaster issue also will adversely affect

[1] The purpose of this Petition is to request that the Copyright Office commence a rulemaking during which the Broadcaster AM/FM Webcast issue can be fully explored by all interested parties. The above discussion is intended to provide only a brief description of the underlying substantive issues. RIAA reserves the right to address the substantive issues fully at whatever time the Copyright Office designates for the submission of comments.

the possibility of settlement with several non-broadcast webcasters who argue, however incorrectly, that their rates and terms should vary depending upon whether Broadcasters' AM/FM Webcasts are exempt from the digital performance right.

The dispute over the meaning of Section 114(d)(1)(A) has implications for both the Section 114 and the Section 112 negotiations. Broadcasters who come within the Section 114(d)(1)(A) exemption obviously do not qualify for the Section 114 license. *See* 17 U.S.C. § 114 (j)(6) (defining services eligible for the Section 114 license as those that, among other things, are "not exempt" under Section 114(d)(1)). And if the broadcaster does not qualify for the Section 114 compulsory license, that broadcaster is ineligible for the Section 112(e) ephemeral recording license. *See* 17 U.S.C. § 112(e)(1).[2] Thus, until the Copyright Office rules, the parties will not agree on who qualifies for the Section 114 performance license, which, in turn, determines who qualifies for the Section 112 ephemeral license.

[2] The only services eligible for the Section 112(e) license are those that transmit pursuant to the Section 114 license or the Section 114(d)(1)(C)(iv) business-to-business exemption. Section 112(a) does permit broadcasters to make a single ephemeral recording, but only if that recording is used "solely" within the broadcaster's "local service area, or for purposes of archival preservation or security . . . ." 17 U.S.C. § 112(a)(1)(B). Broadcasters who webcast sound recordings over the Internet will not satisfy the "local service area" requirement and thus will not be eligible to make any ephemeral recordings. *See* H.R. Rep. 94-1476 at 103 (1996) (the term "local service area" in Section 112 has the same meaning as in Section 111(f)); 17 U.S.C. § 111(f) ("local service area" of a radio station "comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission"); 47 C.F.R. § 73.14 (primary service area of a radio station is "the service area of a broadcast station in which the groundwave is not subject to objectionable interference or objectionable fading.").

II. The Copyright Office Has The Authority To Resolve The Broadcaster AM/FM Webcast Issue

Section 702 of the Copyright Act authorizes the Copyright Office "to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title." As the Copyright Office has recognized, Section 702 "makes it plain that the Copyright Office is vested with authority to interpret provisions of the Act . . . ." *Cable Compulsory License; Definition of Cable System*, 57 Fed. Reg. 3284, 3290 (Jan. 29, 1992) (*citing* 17 U.S.C. § 702). *See also id.* at 3292 ("[T]he Office is charged with the duty to interpret the statute in accordance with Congress' intentions and framework and, where Congress is silent, to provide reasonable and permissible interpretations of the statute"). In the DMCA, Congress specifically recognized the important "longstanding role" the Copyright Office has played as expert adviser to each branch of the Government on issues of copyright law and policy. *See* H.R. Rep. 105-796 at 77 (DMCA Conference Report); 17 U.S.C. § 701(b).

The Copyright Office has frequently exercised its authority to interpret provisions in the Copyright Act that accord statutory licenses, and its decisions to do so have been affirmed by the courts. *See, e.g., Satellite Broad. and Communications Ass'n v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994) ("*SBCA v. Oman*")("The Copyright Office is a federal agency with authority to promulgate rules concerning the meaning and applicability of" statutory license provisions) (*citing Cablevision Sys. Dev. Co. v. MPAA, Inc.*, 836 F.2d 599, 608-9 (D.C. Cir. 1988)). The Copyright Office recently reaffirmed this authority. *See Satellite Carrier Compulsory License; Definition of Unserved Household*, 63 Fed. Reg. 3685 (Jan. 26, 1998).

The Copyright Office already has issued general rules regarding the filing of initial notices by those who seek the Section 112 and 114 statutory licenses. *See* 37 C.F.R. § 201.35. The Copyright Office has authority to amend these rules to clarify which services are eligible to file notices and therefore are not exempt under Section 114(d)(1)(A).

III. The Broadcaster AM/FM Webcast Issue Should Be Resolved, At Least Initially, In A Copyright Office Rulemaking And Not In Potentially Multiple Judicial Proceedings

The Broadcaster AM/FM Webcast issue is particularly apt for a rulemaking proceeding, where all interested parties can file comments on the issue and a rule can be issued after consideration of these comments. *Cf. Kappelmann v. Delta Air Lines, Inc.*, 539 F.2d 165, 171 (D.C. Cir. 1976) (decisions "involv[ing] both technical and policy questions which have industry-wide application ... are better made on an industry-wide basis in an agency rulemaking proceeding.") (citations omitted). Because this case does not involve the legal rights of only two individual parties, but implicates the interests of several industry groups and hundreds of companies, it is not suitable for resolution, in the first instance, by the courts. Indeed, absent a clear rule from the Copyright Office, various parties could end up engaging in multiple lawsuits in different forums throughout the country, since no single district court may be able to render an interpretation of the Act, and to enter a judgment, that would bind all of the hundreds of parties affected by Broadcaster AM/FM Webcasts.

In addition, past experience with similar issues has demonstrated that courts will defer to the Copyright Office's ruling on such matters, even where it directly contradicts a prior court interpretation. For example, in *SBCA v. Oman*, 17 F.3d 344 (11th Cir.

1994), the issue was whether satellite carriers qualified for the cable compulsory license in Section 111. In 1991 the Eleventh Circuit reversed the district court and held that Section 111 applied to satellite carriers. *See NBC v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991). Subsequently, the Copyright Office conducted a rulemaking and issued a regulation that satellite carriers did *not* qualify for the Section 111 compulsory license. *See* 57 Fed. Reg. 3284 (Jan. 29, 1992). Based on the Eleventh Circuit's holding in *NBC*, the district court invalidated the Copyright Office regulation. *See SBCA v. Oman*, 17 F.3d at 345. On appeal, however, the Eleventh Circuit reversed the district court (and itself), deferring to the Copyright Office's interpretive regulation. *Id.* at 348.

This recent precedent demonstrates that the Copyright Office's interpretation of Section 114(d)(1)(A) and the Section 112 and 114 statutory licenses will likely control. The parties should not be required to go through expensive and ultimately needless court proceedings, as in the *NBC* litigation. The Copyright Office should provide its expert interpretation at the outset and then, if appropriate, the parties can determine whether resort to the courts is necessary in an action to review the Copyright Office's rule.

IV. The CARP Is Not The Proper Forum To Resolve The Broadcaster AM/FM Webcast Issue

The issue here cannot and should not be resolved by a Copyright Arbitration Royalty Panel ("CARP"). A CARP has authority only "[t]o make determinations *concerning the adjustment of reasonable copyright royalty payments*" as provided in various statutory licenses, including Sections 112 and 114. 17 U.S.C. § 801(b)(1) (emphasis added). Sections 112 and 114 provides that the Librarian of Congress shall convene a CARP "to determine and publish in the Federal Register *a schedule of rates*

and terms . . . ." 17 U.S.C. §§ 112(e)(5) & 114(f)(2)(B) (emphasis added). Nothing in the Copyright Act authorizes a CARP to determine whether an entity is subject to the statutory license provisions or qualifies for an exemption in the Copyright Act.

Entrusting this issue of statutory interpretation to a CARP also makes little practical sense. It is the Copyright Office and not the CARP that has the relevant expertise to interpret the Copyright Act. The Copyright Office should not be relegated to reviewing CARP interpretations of the Copyright Act pursuant to the deferential standard in Section 802(f). It is the CARP that should defer to the Copyright Office's interpretations and not *vice versa*. *See SBCA v. Oman, supra,* 17 F.3d at 347 ("Copyright Office's interpretation of the Copyright Act should ordinarily receive deference") (*citing DeSylva v. Ballentine*, 351 U.S. 570, 577-78 (1956)).

Recent experience with legal issues in the context of CARP proceedings underscores the point that the proper interpretation of Sections 112 and 114 should not be committed to a CARP. In the 1997 Satellite Carrier Statutory License Rate Adjustment proceeding (Docket No. 96-3 CARP SRA), one party raised the legal issue of whether retransmission of local signals locally was permitted under Section 119. *See* 63 Fed. Reg. 3685 (Jan. 26, 1998) (describing history of the "local into local" issue). This legal issue was submitted to the CARP for resolution. Upon issuance of the Panel's report, the Copyright Office and Librarian of Congress found themselves in the awkward position of reviewing a legal interpretation of the Copyright Act – made by non-expert arbitrators – under the "arbitrary or contrary to law" standard required under Section 802(f). The Office and Librarian upheld the CARP's interpretation but explicitly reserved the authority to conduct a rulemaking on the issue, and in fact did revisit the issue via

rulemaking several months later. *See* 63 Fed. Reg. 3685. This procedure left open the possibility that the Copyright Office in a rulemaking could have interpreted the Copyright Act differently than it was interpreted by the CARP and the Copyright Office in the CARP proceeding – thereby calling into question the outcome of that CARP proceeding and perhaps requiring the reopening of the prior CARP proceeding. Such a result (which was avoided in the satellite carrier case when Congress passed legislation mooting the issue) would not be in any party's interest in this case.

Similarly, just this month the Copyright Office commenced a rulemaking proceeding to determine the scope of the definition of "network station" under the Section 111 compulsory license. *See Cable Compulsory License; Definition of a Network Station*, 65 Fed. Reg. 6946 (Feb. 11, 2000). This issue was initially addressed by a CARP in the context of a cable royalty distribution proceeding. *See Distribution of 1990, 1991 and 1992 Cable Royalties*, 61 Fed. Reg. 55653, 55659 (Oct. 28, 1996) (addressing whether Fox stations were "network stations" under Section 111). As the recent rulemaking shows, questions such as the interpretation of statutory license provisions are better resolved by the Copyright Office in the context of a rulemaking, rather than by a CARP.

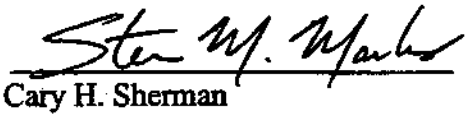
In addition, the Section 112/114 CARP proceeding is likely to be one of the most complicated in CARP/CRT history. Aside from the number of different parties, the CARP must set rates and terms for three different statutory licenses (Section 114(f) for webcasters, Section 112(e) for webcasters, and Section 112(e) for business-to-business services) that have never been addressed before. It also must establish different minimum fees and different rates and terms for different types of services. The CARP's

enormous task should not be complicated further with a purely legal question involving copyright law that is better suited for resolution by the Copyright Office and its expertise in such matters.

CONCLUSION

For the foregoing reasons, RIAA respectfully requests that the Copyright Office commence a rulemaking proceeding to adopt the proposed rule set forth in Attachment A.

Respectfully submitted,



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