8. Importation and Exportation

All importation and exportation of dichloralphenazone shall be in compliance with 21 CFR part 1312 after publication of the final rule in the **Federal Register**.

9. Criminal Liability

Any activity with dichloralphenazone not authorized by, or in violation of, the CSA or the Controlled Substances Import and Export Act shall be unlawful on or after 30 days from date of publication of the final rule in the **Federal Register**, except as authorized in that rule.

Regulatory Certifications

Regulatory Flexibility Act

The Deputy Administrator hereby certifies that this rulemaking has been drafted in a manner consistent with the principles of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). It will not have a significant economic impact on a substantial number of small business entities. Most handlers of dichloralphenazone or prescription products containing this substance are already registered to handle controlled substances and are subject to the regulatory requirements of the CSA.

Executive Order 12866

The Deputy Administrator further certifies that this rulemaking has been drafted in accordance with the principles in Executive Order 12866 Section 1(b). DEA has determined that this is not a significant rulemaking action. Therefore, this action has not been reviewed by the Office of Management and Budget.

Executive Order 12988

This regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

Executive Order 13132

This rulemaking does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive order 13132. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Plain Language Instructions

The Drug Enforcement Administration makes every effort to write clearly. If you have suggestions as to how to improve the clarity of this regulation, call or write Patricia M. Good, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, D.C. 20537, telephone (202) 307–7297.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, prescription drugs.

Under the authority vested in the Attorney General by Section 201(a) of the CSA [21 U.S.C. 811(a)], and delegated to the Administrator of the DEA by the Department of Justice regulations (21 CFR 0.100), and redelegated to the Deputy Administrator of the DEA pursuant to 28 CFR 0.104, the Deputy Administrator hereby proposes that 21 CFR part 1308 be amended as follows:

PART 1308—[AMENDED]

1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b) unless otherwise noted.

2. Section 1308.14 is proposed to be amended by redesignating the existing paragraphs (c)(15) through (c)(49) as (c)(16) through (c)(50) and by adding a new paragraph (c)(15) to read as follows:

§ 1308.14 Schedule IV.

* * * * *

(c) * * *

(15) Dichloralphenazone 2467

* * * * *

Dated: November 30, 2000.

Julio F. Mercado,

Deputy Administrator.

[FR Doc. 00–31356 Filed 12–8–00; 8:45 am]

BILLING CODE 4410–09–M

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2000–4B]

Public Performance of Sound Recordings: Definition of a Service

AGENCY: Copyright Office, Library of Congress.

ACTION: Petition for rulemaking, denial.

SUMMARY: On April 17, 2000, the Digital Media Association (''DiMA'') filed a petition with the Copyright Office, requesting that the Office initiate a rulemaking proceeding to amend 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. DiMA sought an amendment that, if adopted, 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. For the reasons set forth in this notice, the Copyright Office is denying the DiMA petition.

DATE: December 11, 2000.

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

Since the enactment of the Digital Performance Right in Sound Recordings Act of 1995 (''DPRA''), Public Law 104–39, copyright owners of sound recordings have enjoyed an exclusive right to perform their copyrighted works publicly by means of a digital audio transmission, subject to certain limitations and exemptions. Among the limitations on the newly created digital performance right was the creation of a statutory license for nonexempt, noninteractive, digital subscription transmissions. 17 U.S.C. 114(d)(2), (3) and (f) (1995).

This license was amended in 1998 in response to the rapid growth of digital communications networks, *e.g.,* the Internet, and the confusion surrounding the question of how the DPRA applied to certain nonsubscription digital audio services. These changes, included in the Digital Millennium Copyright Act of 1998 (''DMCA''), Public Law 105–304, expanded the section 114 statutory license to expressly cover nonexempt eligible nonsubscription transmissions and nonexempt transmissions made 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, instead, 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).

The distinction between interactive and non-interactive transmissions is central to determining whether a service that transmits performances of sound recordings is eligible to operate under the section 114 licensing scheme. Non-interactive services may make use of the statutory license, but interactive services incur full copyright liability under the digital performance right and, therefore, must conduct arms-length negotiations with the copyright owners of the sound recordings for a license before making a digital transmission of a sound recording. Congress imposed full copyright liability on interactive services because it 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).

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 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.

On April 17, 2000, the Digital Media Association (''DiMA'') filed a petition with the Office, seeking clarification on this point and an amendment to the regulation defining the term ''service.'' DiMA's proposed rule would amend 37 C.F.R. 201.35(b)(2) 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.

The effect of the amendment would be that a service would not be considered interactive merely because it offers a consumer some degree of influence over the streamed programming.

Shortly thereafter, the Copyright Office published a notice in the **Federal Register**, seeking comment from interested parties on two issues. First, the Office asked whether the petition articulated a proper subject for a rulemaking proceeding; and second, assuming the requested rule could be promulgated through a notice and comment proceeding, whether sufficient information existed ''to promulgate a regulation that could accurately distinguish between activities that are interactive and those that are not.'' 65 FR 33266, 33267 (May 23, 2000).

For the reasons set forth herein, the Copyright Office denies DiMA's petition.

Comments

Comments and reply comments were filed by the Recording Industry Association of America, Inc. (''RIAA'') and the Digital Media Association (''DiMA'').

Is a Rulemaking Proceeding Necessary or Appropriate?

DiMA seeks its proposed amendment to the definition of the term ''service'' based on its understanding that a consumer-influenced webcast would not be prohibited from using the section 114 statutory license. According to DiMA, this clarification is necessary in large part because copyright holders of the sound recordings have taken the untenable position that ''consumer-influenced webcasting *of any nature* is not eligible for the DMCA statutory license.'' DiMA comment at 4; DiMA reply at 9–11.

At the same time, DiMA states that it is impossible to discern all possible

permutations of features and functionalities that may be offered by a service which allows consumer input on programming selections. DiMA comment at 5. Nevertheless, DiMA asserts that its proposed rule establishes guidelines to be used to determine whether a specific service is interactive after a fact-intensive analysis of its activities. DiMA acknowledges, however, that the Office may determine that application of the rule, especially the guidelines set forth in the second half of the proposal, may involve evidentiary issues that bar adoption of the entire proposal. If this is the case, DiMA asks the Office to adopt, at a minimum, the first sentence of the proposed rule, which reads 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.

DiMA reply at 7. DiMA is expressly not asking the Copyright Office to determine whether any particular service is non-interactive. *Id.*

DiMA also argues that the rulemaking is necessary in order to ''define the appropriate bounds'' of the Copyright Arbitration Royalty Panel (''CARP'') ''proceeding which will determine the statutory rates for sound recording performances (and certain reproductions) associated with webcasting.'' DiMA Petition at 2; DiMA comment at 4; *see also* 64 FR 52107 (September 27, 1999).

RIAA opposes the DiMA petition. It asserts that DiMA's proposed change will not clarify current law, but actually change it. RIAA argues that clear standards for determining what constitutes an ''interactive service'' have already been set forth in section 114(j)(7). Specifically, section 114(j)(7) requires an ''interactive service'' to either ''enable[] a member of the public to receive a transmission of a program specially created for the recipient, or on 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.'' 17 U.S.C. 114(j)(7).

RIAA also argues that the determination as to whether a particular service is interactive requires a fact-intensive inquiry to determine whether the service offers the type of prohibited activity characterized in section 114(j)(7). Moreover, RIAA contends that the DiMA proposal fails to define a class of service that embodies these principles, offering instead, a rule meant to cover ''a myriad of services with different personalization features,'' which defy characterization into general categories. RIAA comment at 12. RIAA then cites potential problems with the proffered regulatory language due to the lack of precise definitions for concepts and terms such as ''preferences'' or ''incorporated into the Service's programming.'' *Id.* at 6.

RIAA also takes exception to DiMA's assertions that RIAA believes any amount of consumer influence automatically makes a service interactive. In fact, RIAA acknowledges that all music programming services are likely to be influenced by their consumers' tastes. RIAA comment at 3. For this reason, RIAA purports to examine each service on a case-by-case basis, asking the question ''whether the service offers 'programs specially created for the recipient' or whether it allows listeners to request particular sound recordings.'' RIAA reply at 2–3. Because it evaluates each service in this manner, RIAA maintains that DiMA's argument in support of this rulemaking proceeding is groundless.

The Copyright Office has considered DiMA's request to initiate a rulemaking to clarify that a service does not become interactive merely because consumers may have some influence on the music programming offered by the service and finds that this concept is not in dispute. RIAA readily acknowledges that consumers may express preferences for certain music genres, artists, or even sound recordings without the service necessarily becoming interactive. RIAA comment at 8. The Office agrees, and concurs with DiMA that certain passages from the DMCA Conference Report quoted in its comments support this interpretation. For example, the following passage in the DMCA Conference Report distinguishes between certain activities that make a service interactive and those that do not:

> [A] service would be interactive if it allowed a small number of individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a large number of recipients of the service's transmissions a program consisting of sound recordings requested by a small number of those listeners.

H.R. Conf. Rep. No. 105–797, at 87–88 (1998) (''DMCA Conference Report'').

However, the fact that some degree of consumer influence on a service's programming is permissible does not mean that a regulation to clarify that fact is necessary or even desirable. In fact, because the law and the accompanying legislative history make it clear that consumers can have some influence on the offerings made by a service without making the service interactive, there is no need to amend the regulations to make this point.

What is not clear, however, is how much influence a consumer can have on the programming offered by a transmitting entity before that activity must be characterized as interactive. The examples cited in the comments and gleaned from the legislative history are merely illustrative and do not identify with specificity those characteristics of a service that make it interactive.[1] Such a determination must be made on a case-by-case basis after the development of a full evidentiary record in accordance with the standards and precepts already set forth in the statute. DiMA appears to agree with this approach in theory and, in fact, expressly states that it does not seek a ruling on whether any particular service should be characterized as an interactive service. DiMA reply at 7.

Moreover, courts recognize that some principles must evolve over a period of time before an agency will have gathered sufficient information to formulate a general rule. *See Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 202–203 (1947) (acknowledging that ''the agency may not have sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule.''). *See also, WWHT, Inc.* v. *Federal Communications Commission,* 656 F.2d 807, 817 (D.C. Cir. 1981) (supporting agency's denial of rulemaking petition in case where rapid technological development in area makes it difficult to formulate effective regulations, or the state of development ''may be such that sufficient data are not yet available on which to premise adequate regulations.'').

In light of the rapidly changing business models emerging in today's digital marketplace, no rule can accurately draw the line demarcating the limits between an interactive service and a noninteractive service. Nor can one readily classify an entity which

[1] RIAA and DiMA discussed the services offered by Launch Media, Inc., through its LAUNCHcast service, and MTV, through its Radio SonicNet service, to illustrate the type of offerings that are in dispute. *See* RIAA comment at 6–7; DiMA reply at 18–21. From these descriptions, there is considerable doubt whether either offering would qualify as[a noninteractive service].*

*Corrected

makes transmissions as exclusively interactive or noninteractive. The statutory definition of an ''interactive service'' and the DMCA Conference Report make it clear that a transmitting entity may offer both types of service, either concurrently or at different times, and that ''the noninteractive components are not to be treated as part of an interactive service, and thus are eligible for statutory licensing.'' *See,* DMCA Conference Report at 88 (1998). The proposed amendment makes no mention of this nuance of the law.

Moreover, the Copyright Office is not persuaded that any new rules are necessary to discern which parties should participate in the current copyright arbitration royalty panel proceeding, the purpose of which is only to set rates and terms for the public performance of sound recordings made in accordance with the section 114 statutory license. 17 U.S.C. 114(f)(2)(A). The panel's responsibility is to establish the value of the performances and set appropriate rates, not to discern whether a particular service meets the eligibility requirements for using the license.

In short, the Office does not believe that DiMA has presented a persuasive case that a rulemaking on this issue is necessary, desirable, or feasible.

For these reasons, the Office denies DiMA's petition.

Dated: November 21, 2000.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 00–31458 Filed 12–8–00; 8:45 am]

BILLING CODE 1410–31–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[FRL–6914–9]

Outer Continental Shelf Air Regulations; Consistency Update for California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule—consistency update.

SUMMARY: EPA is proposing to update a portion of the Outer Continental Shelf (OCS) Air Regulations. Requirements applying to OCS sources located within 25 miles of states' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area (COA), as mandated by section 328(a)(1) of the Clean Air Act, as amended in 1990 (the Act). The portion of the OCS air regulations that is being updated pertains to the requirements for OCS sources for which the South Coast Air Quality Management District (South Coast AQMD) and Ventura County Air Pollution Control District (Ventura County APCD) are the designated COAs. The intended effect of approving the OCS requirements for the above Districts, contained in the Technical Support Document, is to regulate emissions from OCS sources in accordance with the requirements onshore. The changes to the existing requirements discussed below are proposed to be incorporated by reference into the Code of Federal Regulations and are listed in the appendix to the OCS air regulations.

DATES: Comments on the proposed update must be received on or before January 10, 2001.

ADDRESSES: Comments must be mailed (in duplicate if possible) to: EPA Air Docket (Air-4), Attn: Docket No. A–93–16 Section XXII, Environmental Protection Agency, Air Division, Region 9, 75 Hawthorne St., San Francisco, CA 94105.

Docket: Supporting information used in developing the rule and copies of the documents EPA is proposing to incorporate by reference are contained in Docket No. A–93–16 Section XXII. This docket is available for public inspection and copying Monday–Friday during regular business hours at the following locations:

EPA Air Docket (Air-4), Attn: Docket No. A–93–16 Section XXII, Environmental Protection Agency, Air Division, Region 9, 75 Hawthorne St., San Francisco, CA 94105.

EPA Air Docket (LE–131), Attn: Air Docket No.A–93–16, Section XXII, Environmental Protection Agency, Air Docket (6102), Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington DC 20460.

A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Christine Vineyard, Air Division (Air-4), U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 744–1197.

SUPPLEMENTARY INFORMATION:

I. Background Information

Why is EPA Taking This Action?

On September 4, 1992, EPA promulgated 40 CFR part 55 [1], which established requirements to control air pollution from OCS sources in order to attain and maintain federal and state ambient air quality standards and to comply with the provisions of part C of title I of the Act. Part 55 applies to all OCS sources offshore of the States except those located in the Gulf of Mexico west of 87.5 degrees longitude. Section 328 of the Act requires that for such sources located within 25 miles of a state's seaward boundary, the requirements shall be the same as would be applicable if the sources were located in the COA. Because the OCS requirements are based on onshore requirements, and onshore requirements may change, section 328(a)(1) requires that EPA update the OCS requirements as necessary to maintain consistency with onshore requirements.

Pursuant to § 55.12 of the OCS rule, consistency reviews will occur (1) at least annually; (2) upon receipt of a Notice of Intent under § 55.4; or (3) when a state or local agency submits a rule to EPA to be considered for incorporation by reference in part 55. This proposed action is being taken in response to the submittal of rules by two local air pollution control agencies. Public comments received in writing within 30 days of publication of this document will be considered by EPA before publishing a final rule.

Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. This limits EPA's flexibility in deciding which requirements will be incorporated into part 55 and prevents EPA from making substantive changes to the requirements it incorporates. As a result, EPA may be incorporating rules into part 55 that do not conform to all of EPA's state implementation plan (SIP) guidance or certain requirements of the Act. Consistency updates may result in the inclusion of state or local rules or regulations into part 55, even though the same rules may ultimately be disapproved for inclusion as part of the

[1] The reader may refer to the Notice of Proposed Rulemaking, December 5, 1991 (56 FR 63774), and the preamble to the final rule promulgated September 4, 1992 (57 FR 40792) for further background and information on the OCS regulations.