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

In Re: **Notice of Proposed Rulemaking** **Published March 16, 2000** **Regarding Digital Performance** **Right in Sound Recordings**	**Docket No. RM 2000-3**

MOTION FOR SUSPENSION OF PROCEEDINGS

ABC, Inc., AMFM, Inc., Bonneville International Corporation, CBS Corporation, Clear Channel Communications, Inc., Cox Radio, Inc., Emmis Communications Corporation and The Walt Disney Company ("Broadcast Movants") and National Association of Broadcasters ("NAB") respectfully move the Copyright Office for an order suspending the proceedings in the Proposed Rulemaking regarding Digital Performance Right in Sound Recordings (Docket No. RM 2000-3). The basis for the instant motion is that NAB has commenced a civil action for declaratory judgment—in which the petitioner for the Proposed Rulemaking, Recording Industry Association of America, Inc. ("RIAA"), has been named defendant—the outcome of which will be dispositive of the Proposed Rulemaking. In the circumstances, the resources of the parties, as well as those of the Copyright Office, would be better conserved by suspension of this Rulemaking.

BACKGROUND

Broadcast Movants have all filed conditional Notices of Intent to Participate in the Section 112/114 Copyright Arbitration Royalty Panel ("CARP") proceeding covering the October 28, 1998 - December 31, 2000 time period (Docket No. 99-6 CARP DTRA). The notices were filed conditionally given Broadcast Movants' belief that their simultaneous, non-subscription "streaming" of their over-the-air radio broadcast signals to listeners via the Internet is exempt from copyright liability pursuant to Section 114 of the Copyright Act.

For seventy-five years, NAB has represented the radio and television industries in Washington — before Congress, the Federal Communications Commission ("FCC"), the Copyright Office and other federal agencies, the courts, and on the expanding international front. NAB members operate more than five thousand (5,000) AM and FM radio stations licensed by the FCC to deliver over-the-air radio broadcasts to the public. Many NAB members have begun, and others are actively contemplating, simultaneously streaming their over-the-air radio station signals to listeners via the Internet on a non-subscription basis. NAB has actively represented its members' interests in respect of the passage of the Digital Performance Right in Sound Recordings Act ("DPRA") and the Digital Millenium Copyright Act ("DMCA") and has submitted comments before the Copyright Office, as well as participated in discussions with the RIAA, concerning the applicability of the DPRA and DMCA to its radio members' streaming activities.

On March 1, 2000, RIAA filed with the Copyright Office a Petition for Rulemaking ("Petition") "urg[ing] the Copyright Office to adopt a rule clarifying that a broadcaster's transmission of its AM or FM radio station over the Internet . . . is not exempt from copyright liability under Section 114(d)(1)(A) of the Copyright Act" and

that such transmissions must either qualify for the compulsory license or be authorized by the individual copyright owners. See Petition, at 1. According to RIAA's Petition there is a "compelling need" to resolve this "purely legal question involving copyright law," and, until this "important, fundamental question of copyright law" is resolved, there will be "controversy." Id., at 6, 13.

In response to the Petition, the Copyright Office published in the Federal Register, on March 16, 2000, a Notice of Proposed Rulemaking seeking comments on whether the issue of statutory interpretation should be addressed in a rulemaking and, if so, what the rulemaking should provide. Comments pursuant to the Notice are due April 17, 2000.

On March 27, 2000, seven business days after the Notice of Proposed Rulemaking was filed in the Federal Register, NAB filed, on behalf of its members, a complaint against RIAA in the U.S. District Court for the Southern District of New York (the "Court") seeking statutory interpretation of Sections 106(6) and 114 of the Copyright Act (the "New York Action"). A copy of NAB's complaint is annexed hereto.

In the New York Action, NAB requests a declaratory judgment that non-subscription simultaneous streaming of over-the-air radio broadcasts by FCC-licensed broadcasting entities is exempt from the digital performance right in sound recordings found in Section 106(6) of the Copyright Act and that such simultaneous streaming transmissions are subject neither to compulsory licensing under Section 114 of the Act nor to discretionary licensing by individual copyright holders.

DISCUSSION

The New York Action and the Proposed Rulemaking involve a single, identical issue of statutory interpretation, namely, whether Congress intended the

streaming activities of over-the-air radio station broadcasters to be exempt from the digital performance right or, alternatively, to be subject to compulsory or discretionary licensing. This "purely legal question" need not be addressed in parallel by the Court and the Copyright Office. Suspension of the Proposed Rulemaking pending the Court's ruling would conserve the resources of the parties, the Copyright Office, and entities participating in the comment period for the Proposed Rulemaking.

NAB agrees with RIAA that there is a "compelling need" for resolution of this threshold issue of statutory construction. Accordingly, NAB has prayed in its complaint for expedited review as authorized by Rule 57 of the Federal Rules of Civil Procedure, which provides, in relevant part, "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." Such expedited review should permit dependent proceedings, such as the CARP proceeding,[1] to go forward expeditiously, efficiently and with a clear objective.

Broadcast Movants and NAB submit that suspension of the pending Proposed Rulemaking in favor of expedited court review is warranted in the present circumstances. Agency deference to federal court adjudication is appropriate where the "issue at stake is legal in nature and lies within the traditional realm of judicial competence." See Goya Foods, Inc. v. Tropicana Products, Inc., 846 F.2d 848, 851 (2d Cir. 1988). See also Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 305 (1976) (refusing referral where "standards to be applied . . . are within the conventional competence of the courts"). The issue presented in the New York Action—statutory

[1] On March 21, 2000, the Register of Copyrights recognized that resolution of the statutory interpretation issue "may well decide issues that have a significant impact on the identity of the parties" to the CARP proceeding. Consequently, the Register of Copyrights suspended the CARP proceeding pending conclusion of any rulemaking to result from the Notice of Proposed Rulemaking published March 16, 2000.

interpretation—falls squarely within the conventional experience and competence of the federal judiciary. The New York Action involves application of traditional tools of statutory construction to the DPRA and DMCA, such as consideration of the plain language of Sections 106 and 114 of the Copyright Act and the legislative history of the DPRA and DMCA.

Because it involves primarily statutory interpretation, as opposed to intricate and technical questions of fact or regulatory policy, the New York Action is not a case requiring the Copyright Office's specialized experience and insight. Reliance on agency action in the first instance is therefore unnecessary. See generally Nader, 426 U.S. at 305 (refusing referral where "[t]he action brought by petitioner does not turn on a determination . . . that could be facilitated by an informed evaluation of the economics or technology of the regulated industry"); National Communications Ass'n v. American Telephone and Telegraph Co., 46 F.3d 220, 223 (2d Cir. 1995) ("[C]ourts [refer issues to administrative agencies in] cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency."); Goya Foods, 846 F.2d at 851 (referral to agency for primary exercise of jurisdiction advisable "'when the issue involves technical questions of fact uniquely within the expertise and experience of an agency'" (quoting Nader, 426 U.S. at 304)).[2]

The nature of the statutory interpretation at issue in the New York Action makes its resolution by the courts still more appropriate. The issue presented here is not where simultaneous radio streaming by FCC-licensed entities falls within the regulatory structure of the Copyright Act, but whether it falls within that structure at all. Such a

[2] We note in any event the Second Circuit's view that the doctrine of primary jurisdiction has no applicability to copyright cases. Miss America Organization v. Mattel, Inc., 945 F.2d 536, 544 (2d Cir. 1991).

fundamental issue of whether particular activities fall inside or outside of copyright parameters—hence, whether they entail potential legal liability—is one more appropriately addressed by the courts than an administrative agency. See Goya Foods, 846 F.2d at 853-54 (refusing referral to agency in part because declaratory judgment plaintiff was "entitled to have the infringement issue resolved promptly so that it may conduct its business affairs in accordance with the court's determination of its rights"). Accord Starter Corp. v. Converse, Inc., 84 F.3d 592, 596 (2d Cir. 1996).

Rulemaking resolution of what both parties agree is so fundamental an issue is at best an awkward means of squarely resolving the matter presented. Movants here agree completely with RIAA's repeated characterization of the statutory interpretation issue as "fundamental," "important," and "threshold." It is precisely for this reason that an approach which would shoehorn this fundamental definitional issue into an ill-fitting rulemaking framework – one which would bury a foundational policy decision in the fine print of the definition of "Service" in 37 C.F.R. § 201.35(b)(2) – would be inappropriate. Such a strained and artificial approach only reinforces the propriety of plenary court examination and resolution of the issue presented.

The Copyright Office should not be deterred from suspending the Proposed Rulemaking by the prospect—alluded to by the RIAA in its Petition—that court resolution of the legal issue presented inevitably will entail a multiplicity of lawsuits with potentially inconsistent outcomes. See Petition, at 9. The parties to the New York Action—major trade associations integrally involved in the legislative process underlying the DPRA and DMCA—represent substantially everyone interested in the resolution of the disputed legal issue. There is no reason to believe that, with both sides proceeding in good faith, the determination to be made by a distinguished and copyright-knowledgeable Circuit cannot and should not definitively resolve this issue for all time.

The Copyright Office plainly has the authority to entertain and grant the relief requested in this Motion. The informal "notice and comment" rulemaking procedures of a federal agency are governed by Section 4 of the Administrative Procedure Act ("APA"). 5 U.S.C. § 553. The APA does not appear to limit the Copyright Office's ability to fashion rules of procedure attendant and subsequent to the notice and comment period for the Proposed Rulemaking, including suspension of the Proposed Rulemaking pending adjudication of the New York Action. Much as the Copyright Office's March 21, 2000 Order recognized the propriety of suspending the scheduling of the CARP pending the outcome of the Proposed Rulemaking, prudential considerations here warrant suspension of the Proposed Rulemaking pending resolution of the New York Action.

CONCLUSION

For the reasons set forth above, Broadcast Movants and NAB respectfully submit that the Proposed Rulemaking should be suspended pending disposition of the New York Action.

Dated: March 29, 2000

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL ASSOCIATION OF BROADCASTERS, Plaintiff, - against – RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., Defendant.	C.A. No. **COMPLAINT**

National Association of Broadcasters, as and for its Complaint against the Recording Industry Association of America, Inc., alleges as follows:

NATURE OF ACTION AND PARTIES

1. This action for declaratory relief presents an issue of statutory construction of Sections 106 and 114 of the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, as amended.

2. Plaintiff, National Association of Broadcasters ("NAB"), is a not-for-profit corporation organized and existing under the laws of the District of Columbia.

NAB has its principal place of business in Washington, D.C.

3. Defendant, the Recording Industry Association of America, Inc. ("RIAA"), is a not-for-profit corporation organized and existing under the laws of the State of New York, and has its principal place of business in Washington, D.C.

JURISDICTION AND VENUE

4. This action arises under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, as amended ("Copyright Act" or the "Act"). Jurisdiction of this Court is proper under Sections 1331, 1338(a), and 2201(a) of the Judicial Code, 28 U.S.C. §§ 1331, 1338(a), and 2201(a).

5. This Court has personal jurisdiction over the defendant because the defendant resides in this district.

6. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (c) and 28 U.S.C. § 1400 because the defendant is subject to personal jurisdiction in this district.

FACTS AND GENERAL ALLEGATIONS

I. NAB Member Activities

7. For the past 75 years, NAB has acted as the principal trade association for the radio and television broadcast industries. NAB has represented the interests of these industries before Congress and various federal agencies and courts. NAB members operate more than five thousand (5,000) AM and FM radio stations licensed by the Federal Communications Commission ("FCC") to deliver over-the-air radio broadcasts to the public.

8. In addition to transmitting their radio broadcasts over-the-air, some

NAB members (or their affiliates) also transmit these same radio station signals to listeners via the Internet. This activity involves the "streaming" of radio broadcasts over the Internet. Transmission via over-the-air radio signals and transmission via Internet streaming occur simultaneously.

9. A number of NAB member companies have engaged in simultaneous streaming of radio broadcasts for the past several years. Other NAB members intend to engage in simultaneous streaming of their over-the-air radio broadcasts.

10. No additional license is required for an FCC-licensed radio station to stream its over-the-air signal simultaneously over the Internet. NAB members do not charge listeners any fee for receiving such audio streams.

II. Background of Performance Rights in Sound Recordings

11. U.S. copyright law confers a series of enumerated rights upon the owners of various works of creative expression. These are set forth in Section 106 of the Copyright Act. These enumerated rights are, in turn, subject to a series of limitations and exemptions, which are set forth in §§ 107 through 121 of the Act.

12. With respect to musical works, the copyright law long has recognized an exclusive right of public performance in a musical composition (i.e., the work of a composer). See 17 U.S.C. § 106(4). However, prior to 1971, U.S. copyright law did not recognize any copyright in *sound recordings* embodying such musical compositions.

13. In 1971, Congress first extended federal copyright protection to sound recordings on a provisional basis with the Sound Recording Amendment of 1971,

P.L. 92-140, 85 Stat. 391 (1971). The Sound Recording Amendment of 1971 created a limited copyright in *reproductions* of sound recordings for the purpose of preventing the widespread unauthorized reproduction and piracy of sound recordings that followed advances in duplicating technology. Congress made the provisional sound recording reproduction right permanent with enactment of the Copyright Act in 1976.

14. For more than two decades, from 1971 to 1995, the sound recording copyright remained a very limited proprietary right that applied only to sound recordings fixed in a phonorecord on or after February 15, 1972, and did not include any right to public performances of such sound recordings. Thus, although a public performance of a sound recording might require a license from the owner of the underlying musical composition (i.e., the composer or administering music publisher), no license was required from the owner of the copyright in the sound recording itself (i.e., the record label) with respect to such performance.

15. In rebuffing repeated efforts by the recording industry to expand the copyright rights in sound recordings to encompass public performances of those works, particularly by radio broadcasters, Congress recognized that free air-play of sound recordings by broadcasters provides mass audience exposure to artists and recordings, stimulating sales of those recordings, among other revenue-generating activity to the record labels. Congress properly regarded imposition of a new performance right obligation on broadcasters as both unwarranted and promotive of a windfall to the record industry.

A. Digital Performance Right in Sound Recordings Act of 1995

16. In 1995, with the Digital Performance Right in Sound Recordings

Act ("DPRA"), Congress incrementally expanded the scope of copyright protection afforded to sound recordings to include a new – but very limited – right for public performances of sound recordings by means of certain types of digital audio transmission. See 17 U.S.C. § 106(6). Exemptions from, and other limitations on, this right are set forth in Section 114 of the Copyright Act.

17. Much like the enactment of the Sound Recording Amendment of 1971, the DPRA was a limited and circumscribed response to technological advances, specifically, the emergence of digital audio services capable of delivering high-quality, digital audio transmissions of sound recordings to subscribers in their homes, generally without commercial interruption. Congress's concern was that such digital transmission services, as well as so-called "celestial jukebox," "pay-per-listen" and "audio-on-demand" subscription services, which would enable listeners to obtain a direct, time-certain transmission of a sound recording of their choice, might increase the potential for at-home reproduction of sound recordings or otherwise supplant the traditional market for the sale of sound recordings by the record labels. H. Rep. No. 104-274, at 5-9 (1995).

18. Consistent with the identified areas of concern, the new performance right was made applicable primarily to digital, audio-only transmissions to paying subscribers and to "interactive" digital, audio-only transmissions. These limitations are embodied in Section 114 of the Act. At the same time, Congress exempted other forms of digital audio transmission, including non-subscription streaming activities of NAB's radio station broadcast members, from the new performance right.

B. Digital Millennium Copyright Act of 1998

19. With the Digital Millennium Copyright Act of 1998 ("DMCA"),

Congress expanded the sound recording public performance right to cover certain non-subscription digital audio transmissions not theretofore subject to copyright protection. Congress did not, however, subject all non-subscription digital transmissions of sound recordings to the new performance right. Indeed, Congress left intact the DPRA's provisions exempting Internet streaming by radio broadcasters.

20. The non-subscription, simultaneous streaming activities of NAB's radio broadcast members remain, pursuant to amended Section 114, exempt from the limited public performance right in sound recordings found in Section 106(6) of the Act.

C. Licensing Framework Established by DPRA and DMCA

21. The licensing framework created by the DPRA and the DMCA reflects a scaling of concerns as to the potential for certain digital audio transmissions to supplant the market for sound recordings. Those transmissions perceived to have the highest potential to replace sales, such as those engaged in by interactive services, were made subject to discretionary licenses from individual rights holders. With respect to such transmissions, the transmitting entity must obtain a license directly from the individual rights holders on mutually-agreed terms and conditions. Any individual rights holder may, in his sole discretion, simply refuse to license the proposed transmission.

22. In a middle category, Section 114 of the Copyright Act, as amended by the DPRA and DMCA, provides that certain digital transmissions covered by, and not exempt from, the new Section 106(6) copyright in the public performance of sound recordings are subject to compulsory licensing. Compulsory licensing means that, despite copyright owners' exclusive copyright rights, individual copyright owners are statutorily compelled to grant permission, upon request, for a particular category or

categories of uses of their copyrights. In the event representatives of the copyright owners and representatives of the potential users of the copyright cannot agree on a negotiated license rate, any interested party may petition the Library of Congress to convene a Copyright Arbitration Royalty Panel ("CARP") for a determination of what constitutes a "reasonable" rate for a compulsory license for the particular category of intended use.

23. The final category implicates transmissions with little or no potential to replace sales of sound recordings, such as the streaming of over-the-air radio signals by NAB members. These transmissions were exempted from sound recording performance right liability.

24. Because the simultaneous streaming of over-the-air broadcasts by NAB member radio stations is exempt from the digital performance right of amended Section 106(6), such activity requires neither a compulsory license under Section 114 nor a discretionary license by individual copyright holders of sound recordings.

III. Controversy Between RIAA and NAB

25. The RIAA is a trade association representing the major record labels and numerous additional record companies in a variety of record industry matters.

26. The RIAA has been designated by its members as their negotiating agent for the purposes of negotiating the terms of statutory licenses under, among other provisions, Section 114 of the Copyright Act.

27. In the course of exploratory discussions between, on one side, NAB and certain of its members involved or interested in commencing streaming activities, and the RIAA on the other, RIAA has made plain its and its members' view

that a radio station's simultaneous streaming of its over-the-air broadcast signal is not exempt from the Section 106(6) digital performance right in sound recordings and is, accordingly, subject either to the compulsory license provisions of Section 114 or to the exclusive licensing authority of RIAA's members.

28. Consistent with this view, RIAA recently filed with the Copyright Office a Petition for Rulemaking ("Petition") "urg[ing] the Copyright Office to adopt a rule clarifying that a broadcaster's transmission of its AM or FM radio station over the Internet is not exempt from copyright liability under Section 114(d)(1)(A) of the Copyright Act" and that such transmissions must either qualify for the compulsory license or be authorized by the individual copyright owners.

29. In its Petition, RIAA argued: "[D]iscussions [between RIAA and representatives of broadcasters] have not advanced past the preliminary stage because the parties disagree over the threshold legal question of whether the Broadcaster AM/FM Webcasts are subject to the digital performance right." According to the RIAA, there is a "compelling need" to resolve this "purely legal question involving copyright law," and, until this "important, fundamental question of copyright law" is resolved, there will be "controversy," including (by implication) the possibility of copyright infringement claims being asserted against streaming radio broadcasters in the event such streaming is neither exempt nor subject to compulsory licensing.

30. In response to the Petition, the Copyright Office, on March 16, 2000, published in the Federal Register a Notice of Proposed Rulemaking ("Notice") seeking comments on whether the matter should be addressed in a rulemaking and, if so, what the rulemaking should provide. Comments are due by April 17, 2000.

31. In addition, at RIAA's initiation, the Copyright Office has convened a CARP proceeding to determine "reasonable" rates and terms for non-exempt digital transmissions that qualify for compulsory licensing. Many NAB radio broadcast entities have submitted notices of intent to participate in the CARP proceeding, without prejudice to the members' position in this action that simultaneous streaming of radio broadcasts is exempt from the digital performance right of Section 106(6). If this Court declares such simultaneous radio transmissions exempt, NAB radio broadcast members will not need to participate in what is anticipated to be an extremely time-consuming and expensive CARP proceeding.

CLAIM FOR RELIEF

Declaratory Judgment That Simultaneous Streaming Of Radio Broadcasts By Radio Stations Is Exempt From The Copyright Right In Public Performance Of Sound Recordings

32. NAB hereby repeats and realleges the allegations set forth in paragraphs 1-31 inclusive of its Complaint.

33. NAB is entitled on behalf of its members to a declaratory judgment that streaming activities by FCC-licensed broadcasting entities involving the simultaneous transmission of their over-the-air radio broadcasts are exempt from the digital performance right found in Section 106(6) of the Copyright Act and that such streaming activities require neither a compulsory license under Section 114 nor a discretionary license by individual copyright holders of such sound recordings.

34. NAB radio station broadcast members have a real and reasonable apprehension of a legal claim by RIAA's members, instigated, asserted, and/or funded by

RIAA, based on RIAA's members' asserted right to be paid for public performances of their sound recordings. This apprehension is based on (a) the course and ultimate breakdown of the parties' negotiations, (b) the RIAA's initiation of and participation in a CARP proceeding to determine a rate for compulsory licensing of the digital performance right in sound recordings, and (c) RIAA's Petition for Rulemaking and the statements made therein, which advert to the possibility that certain radio streaming activities are non-exempt digital transmissions that do not qualify for compulsory license protection.

35. NAB radio station broadcast members have engaged in a course of conduct that brings them into adversarial conflict with RIAA and its members in that (a) certain radio station broadcast members have engaged and are engaging in radio broadcast streaming activities that, according to RIAA, are subject to the digital performance right in sound recordings and (b) other radio broadcast members have the present ability and immediate intent to engage in streaming of radio broadcasts that, according to RIAA, are subject to the digital performance right in sound recordings.

36. This action presents a substantial, real, and immediate controversy between parties having adverse legal interests, such that declaratory relief is warranted. Absent declaratory relief, NAB members will suffer substantial hardship in that (a) NAB radio station broadcast members may incur considerable potential copyright liability (whether in the form of compelled royalties pursuant to compulsory licenses or actual or threatened copyright infringement claims in the absence of agreement upon licenses with individual rights holders at fees dictated by those rights holders) before their right to engage in simultaneous streaming of radio broadcasts without a license for the digital performance of sound recordings is finally adjudicated, and (b) NAB members will be

constrained, potentially needlessly and at great expense, to engage in litigation before the CARP over rates and terms of statutory licenses for such streaming.

37. There is, moreover, great urgency associated with the resolution of this dispute in light of (a) the Copyright Office Notice stating that written comments to the proposed rulemaking are due April 17, 2000, and (b) the necessity, if the streaming activities of NAB members are not found to be exempt under the Copyright Act, that NAB members affected by such ruling participate in the announced CARP proceeding to determine the statutory fees pertaining to such activities.

WHEREFORE, NAB prays that the Court:

A. Declare, adjudge, and decree that, pursuant to Section 114 of the Copyright Act, the streaming by FCC-licensed broadcasting entities, or their affiliates, of their over-the-air radio broadcast transmissions is exempt from the digital performance right in sound recordings created by Section 106(6) of the Copyright Act;

B. Declare, adjudge, and decree that the streaming by FCC-licensed broadcasting entities, or their affiliates, of their over-the-air radio broadcast transmissions requires neither a compulsory license under Section 114 of the Copyright Act nor a discretionary license by owners of the digital performance right in sound recordings created by Section 106(6) of the Copyright Act;

C. Issue the prayed-for declaratory relief on an expedited basis as authorized by Rule 57 of the Federal Rules of Civil Procedure;

D. Award NAB its costs, disbursements and reasonable attorneys' fees pursuant to 17 U.S.C. § 505; and

E. Award such additional and further relief, in law and equity, as the Court may be deem just and proper.

Dated: March 27, 2000
New York, New York

Respectfully submitted,

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