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GENERAL COUNSEL OF COPYRIGHT
SEP 1998
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In re:	)	
Mechanical and Digital Phonorecord	)	No. 96-4
Delivery Rate Adjustment Proceeding	)	CARP DPRA
	)	

RESPONSE OF THE COALITION OF INTERNET WEBCASTERS TO THE NMPA, SGA AND RIAA JOINT MEMORANDUM

The Coalition of Internet Webcasters ("the Coalition"), hereby briefly responds to the Joint Memorandum filed January 23, 1998 by the National Music Publishers Association ("NMPA"), Songwriters Guild of America ("SGA") and the Recording Industry Association of America ("RIAA") (hereinafter "Joint Memorandum").

The Copyright Office correctly has evaluated the posture of this proceeding under the rules, and has determined that it is advisable (if not necessary) to give public opportunity to file notices of intent to participate in a CARP proceeding in this matter. By July 31, 1998, in addition to the Coalition, BMI and USTA, NMPA, RIAA, Digital Cable Radio Associates and America Online, Inc. have filed such notices. Therefore, it appears that insofar as the Joint Memorandum had suggested that there was no need for a CARP, the Joint Memorandum is moot. Similarly, the Copyright Office has noted that the Coalition's initial Objections were timely filed, which appears to moot the "standing" and "ripeness" issues raised by the Joint Memorandum.

As to the most fundamental issue raised by the Coalition, i.e., that a streaming audio transmission is not a digital phonorecord delivery and, therefore, not an "incidental" digital phonorecord delivery, it is clear that a CARP has the authority to make a determination as to what is and what may not be subject to a statutory license. By approving of proposed rates and terms that, on their face, purport to encompass transmissions that are not subject to statutory licensing, the CARP would be acting contrary to law. Such rates and terms therefore would be required to be reversed by the Copyright Office or the United States Court of Appeals for the District of Columbia. The circumstance presented here would be no different than, for example, if the regulations proposed by the NMPA and RIAA were to impose a mechanical royalty fee upon digital audio radio broadcasts. In such circumstance, a CARP, the Copyright Office or the courts, respectively, would each have the power and the obligation to state that such regulations were beyond the statutory scope. Clearly, each tribunal retains that same power in this circumstance. Indeed, as noted in our Reply, the NMPA-RIAA proposed regulations provided that, "In any future proceeding under 17 U.S. 115(c)(3)(C) or (D), the characterization of a digital phonorecord delivery as 'incidental' and the royalty rates

payable for a compulsory license for Incidental DPDs shall be established de novo, ..." If the NMPA and RIAA propose that the Copyright Office or a CARP can determine such issues "in any future proceeding," they obviously have the authority to do so here and now.

Every CARP proceeding, as every Copyright Royalty Tribunal proceeding before it, involves both findings of fact and conclusions of law. The parties propose such conclusions to the Panel, see, e.g., 37 C.F.R. 251.52, and the Panel enters such conclusions as are necessary to the decision before it. Therefore, it hardly can be contended here that legal determinations integral to the scope of the rates and terms being decided are beyond the scope of the CARP's authority.

Furthermore, the Coalition articulated in its Objections and Reply Comments additional issues that would need to be addressed by a CARP. Specifically, if a Panel determines that a streaming media transmission can constitute incidental digital phonorecord delivery, the Coalition has contested the application of the physical rate to such transmissions. As another example, the Coalition has contested the time and purpose limitations on samples; and the definition of "Transient Phonorecords" as limited solely to copying that occurs solely to facilitate intermediate transmission, rather than to facilitate transmission of the performance to the user. These and other objections raised by the Coalition to the draft regulations also would be properly resolved by a CARP, in the absence of voluntary agreement among the affected parties.

WHEREFORE, the Coalition of Internet Webcasters renews its objections to the proposed regulations and the terms and rates set forth in the December 1, 1997, Notice of Proposed Rulemaking, and to the procedural objections set forth in the Joint Memorandum.

Respectfully submitted,

COALITION OF INTERNET WEBCASTERS

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Date: August 6, 1998

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 7, 1998, I served a copy of the foregoing Response of the Coaliiton of Internet Webcasters to the NMPA, SGA and RIAA Joint Memorandum, by first-class mail, postage prepaid, on each of the following:

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