The SR's provided scheduling ranks (as applicable) should be used as follows:

For receipt side reductions, the order for application of ranks is Upstream Rank (Priority), Receipt Rank (Priority), Delivery Rank (Priority), Downstream Rank (Priority).

For delivery side reductions, the order for application of ranks is Downstream Rank (Priority), Delivery Rank (Priority), Receipt Rank (Priority), Upstream Rank (Priority).

[FR Doc. 00–30979 Filed 12–8–00; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 42, 47, 56, 57, and 77

RIN: 1219–AA47

Hazard Communication (HazCom)

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice of public hearing and extension of comment period.

SUMMARY: MSHA is announcing a public hearing regarding the Agency's interim final rule on Hazard Communication and extending the comment period. The hazard communication requirements were published in the **Federal Register** on October 3, 2000 (65 FR 59048). The hearing will be held under section 101 of the Federal Mine Safety and Health Act of 1977.

DATES: The hearing will be held on December 14, 2000. The hearing will last from 9:00 a.m. to 5:00 p.m., but will continue into the evening if necessary. The comment period is extended until December 19, 2000.

ADDRESSES: The hearing will be held at the following location: Department of Labor, Office of Administrative Law Judges Courtroom, 800 K Street N.W., Suite 400N, Washington, D.C.

Comments may be transmitted by electronic mail, fax, or mail. Comments by electronic mail must be clearly identified as such and sent to this e-mail address: comments@MSHA.gov. Comments by fax must be clearly identified as such and sent to: MSHA, Office of Standards, Regulations, and Variances, 703–235–5551. Mail comments should be clearly identified as such and sent to MSHA, Office of Standards, Regulations, and Variances, 4015 Wilson Boulevard, Room 631, Arlington, VA 22203–1984. Interested persons are encouraged to supplement written comments with computer files or disks; please contact the Agency with any questions about format.

FOR FURTHER INFORMATION CONTACT: David L. Meyer, Director; MSHA Office of Standards, Regulations, and Variances; phone 703–235–1910.

SUPPLEMENTARY INFORMATION: We request that you notify us of your intention to make an oral presentation prior to the hearing date, but it is not required that you do so. The hearing will be conducted in an informal manner by a panel of MSHA officials. Although formal rules of evidence or cross examination will not apply, the presiding official may exercise discretion to ensure the orderly progress of the hearing and may exclude irrelevant or unduly repetitious material and questions.

The hearing will begin with an opening statement from MSHA, followed by an opportunity for members of the public to make oral presentations. The hearing panel may ask questions of speakers. At the discretion of the presiding official, the time allocated to speakers for their presentations may be limited. In the interest of conducting a productive hearing, MSHA will schedule speakers in a manner that allows all points of view to be heard as effectively as possible.

A verbatim transcript of the proceeding will be prepared and made part of the rulemaking record. A copy of the hearing transcript will be made available for public review.

MSHA will accept additional written comments and other appropriate data for the record from any interested party, including those not presenting oral statements. Written comments and data submitted to MSHA will be included in the rulemaking record. To allow for the submission of post-hearing comments, the comment period is extended and the record will remain open until December 19, 2000.

Dated: December 7, 2000.

J. Davitt McAteer,

Assistant Secretary for Mine Safety and Health.

[FR Doc. 00–31543 Filed 12–7–00; 1:20 pm]

BILLING CODE 4510–43–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2000–3B]

Public Performance of Sound Recordings: Definition of a Service

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office is amending its regulatory definition of a ''Service'' for purposes of the statutory license governing the public performance of sound recordings by means of digital audio transmissions in order to clarify that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act.

DATES: Effective 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, D.C. 20024. Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION:

Procedural History

On March 16, 2000, the Copyright Office published a notice of proposed rulemaking (''NPRM'') seeking comment on whether the transmission of an AM/FM radio broadcast signal over the Internet by the broadcaster that originates the AM/FM signal is exempt from copyright liability under the exemption to the digital performance right in sound recordings set forth in section 114 of the Copyright Act, title 17 of the United States Code. 65 FR 14227 (March 16, 2000). The Office initiated this rulemaking proceeding in response to a petition from the Recording Industry Association of America (''RIAA'').

In its petition, RIAA asked the 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).'' RIAA also believes that ''until the Office rules, the parties will not agree on who qualifies for the Section 114 performance license.'' Petition at 7.

The Office agreed with RIAA's observation and postponed the pending rate adjustment proceeding, the purpose of which is to set the rates and terms for the public performance of a sound recording by means of digital audio transmissions under the section 114 statutory license and to establish the rates and terms for the making of an ephemeral recording in accordance with the section 112 statutory license. *See* 63 FR 65555 (November 27, 1998); 64 FR 52107 (September 7, 1999). The Office took this action because it recognized that the outcome of the rulemaking would have the effect of deciding whether the rates and terms set in that

proceeding would apply to broadcasters who stream their AM or FM radio stations over the Internet. 65 FR 14227 (March 16 , 2000).

A finding that the section 114(d)(1)(A) exemption covered a digital transmission of an AM or FM radio station made by an FCC-licensed broadcaster, including transmissions made by the broadcaster over the Internet, would likely mean that broadcasters, who are currently parties to the rate adjustment proceeding, would withdraw from the proceeding since the rates and terms to be decided would not apply to any transmission made by an FCC-licensed broadcaster. This, in turn, would narrow the scope of the issues and evidence presented to the CARP.

After the publication of the NPRM, the National Association of Broadcasters (''NAB'') filed an action in the U.S. District Court for the Southern District of New York on behalf of its members, asking for a declaratory judgment that nonsubscription simultaneous transmissions of radio broadcasts via the Internet by FCC-licensed broadcasters are exempt from the limited sound recording performance right. *See National Ass'n of Broadcasters* v. *Recording Indus. Ass'n of Am.*, No. 00 Civ. 2330 (S.D.N.Y., filed March 27, 2000). The NAB then moved to suspend the rulemaking proceeding, Docket No. RM 2000–3, until the Court had ruled in this case.

Before making a decision on the merits of the motion to suspend, the Office published a second notice in which it requested comments on whether to grant the motion to suspend the rulemaking proceeding and await the decision of the U.S. District Court for the Southern District of New York. 65 FR 17840 (April 5, 2000).

For the reasons set forth herein, the Copyright Office is denying the NAB's motion to suspend this rulemaking and is announcing a final rule to clarify that a transmission by an FCC-licensed broadcaster of its AM or FM radio broadcast over the Internet is not exempt from the limited public performance right for digital transmissions under section 114(d)(1)(A).

The Commenters

In response to the NPRM, the Office received comments from the following commenters: BroadcastAmerica.com, Inc. (''BroadcastAmerica''); jointly, American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc. (collectively, the ''Performing Rights Organizations''); Digital Media Association (''DiMA''); jointly, Balogh Broadcasting Company, Inc., Big Mack Broadcasting, Inc., Hall Communications, Inc., KSTP-AM, L.L.C., KSTP–FM, L.L.C., LBJS Broadcasting Company, L.P., Lyle Broadcasting Corporation, M&M Broadcasters, Ltd., Rice Capital Broadcasting Inc., Twin Lakes Communications, Inc., Zimmer Broadcasting Company, Inc., Zimmer Communications, Inc., Zimmer Radio of Mid-Missouri, Inc., and ZRG of Illinois, Inc. (collectively, ''Broadcasters I''); jointly, AMFM, Inc., Bonneville International Corporation, CBS Corporation, Clear Channel Communications, Inc., Cox Radio, Inc., Emmis Communications Corporation, and National Association of Broadcasters (collectively, ''Broadcasters II''); State Broadcasters Associations (''State Broadcasters''); Criswell Center For Biblical Studies (''Criswell''); and jointly, The Recording Industry Association of America, Inc., Association for Independent Music, American Federation of Musicians, and American Federation of Television and Radio Artists (collectively, ''Copyright Owners''), including a separate memorandum, Copyright Liability of Broadcasters for Webcasting Their AM/FM Radio Signals, prepared by Robert Gorman (''Gorman'').

Reply comments were filed by Entercom Communications Corp., and five of the eight commenters: the Copyright Owners; Broadcasters I; DiMA; State Broadcasters; and Broadcasters II.

The Copyright Office's Authority To Conduct This Rulemaking

a. Authority to act. The Copyright Office stated in the NPRM that it initiated this proceeding under the rulemaking authority granted by 17 U.S.C. 702, 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.'' 65 FR 14227, citing 57 FR 3284, 3292 (January 29, 1992). Our authority to act is supported by *Satellite Broadcasting and Communications Ass'n of Am.* v. *Oman*, 17 F.3d 344 (11th Cir. 1994) (''SBCA''), and *Cablevision Sys. Dev. Co.* v. *Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988) (''Cablevision''), where the Eleventh Circuit and the D.C. Circuit expressly acknowledged the Office's authority to provide reasonable interpretations of the cable statutory license. *See*, *SBCA*, 17 F.3d at 347 (''The Copyright Office is a federal agency with authority to promulgate rules concerning the meaning and application of section 111''); *Cablevision*, 836 F.2d at 608–09(same). *See also, DeSylva* v. *Ballentine*, 351 U.S. 570, 577–78 (1956)(recognizing that Copyright Office's interpretation of the Copyright Act should ordinarily receive deference).

Most of the commenters do not challenge the Office's rulemaking authority in this proceeding. However, the Broadcasters suggest that the Office may be without authority to interpret the extent of the section 114(d)(1)(A) exemption. They argue that the interpretation of section 114(d)(1)(A) sought by RIAA in this proceeding—whether copyright liability does or does not attach to transmissions of radio stations over the Internet—is very different from previous rulemaking proceedings of the Office interpreting provisions of other compulsory licenses.

Specifically, the Broadcasters submit that *SBCA* and *Cablevision* are poor precedent for supporting rulemaking authority in this case. In *SBCA*, the Office determined that satellite carriers were not eligible for the cable compulsory license for their retransmission of over-the-air broadcast signals, thereby subjecting these retransmissions to copyright owners' exclusive rights. In *Cablevision*, the Office interpreted the meaning of the term ''gross receipts'' as it appeared in the section 111 cable compulsory license. According to the Broadcasters, the copyright liability of satellite carriers and cable systems was already established, and the Office was merely sorting out the terms of a compulsory license. In this proceeding, however, the Office is being called upon to decide whether any copyright liability exists at all for broadcasters who stream their radio signals over the Internet. If, according to the Broadcasters, there is no copyright liability for such activity because it is exempted by section 114(d)(1)(A), then the Copyright Office has no jurisdiction over that activity because it does not implicate the copyright laws. The Broadcasters conclude that the Copyright Office does not have any authority to address the status of broadcaster transmissions of radio signals over the Internet until such time as a federal court decides the issue.

If the Broadcasters' position is accepted, the Copyright Office's ability to administer section 114 of the Copyright Act will be frustrated. Section 114 treats the public performance of sound recordings by digital audio transmissions in one of three ways: the performance is either exempt from copyright liability, subject to copyright

owners' exclusive rights, or subject to statutory licensing. The Library of Congress and the Copyright Office are charged with conducting a copyright arbitration royalty panel (''CARP'') proceeding to set the rates and terms of the statutory license, and the Library has already begun the CARP process (and stayed its initiation pending the resolution of this rulemaking proceeding). Many broadcasters, and the NAB, have stayed out of the proceeding on the grounds that they qualify for the section 114(d)(1)(A) exemption. If these parties are not covered by the exemption (as the Office is determining today), they should be afforded the opportunity to participate in the CARP proceeding.[1] CARP proceedings are adversarial in nature, making it critical that the interests of all affected copyright owners and users are represented in the proceeding so that the CARP has a full and complete evidentiary record on which to render its determination. Without such information, the CARP cannot render a complete and accurate decision, thereby compromising the efficiency of the section 114 license.

Under the Broadcasters' approach, copyright users of sound recordings can effectively impede a CARP proceeding by claiming that their activities are not implicated by the proceeding until a federal court determines that they are. The Copyright Office would then be forced either to go forward with the CARP proceeding with an incomplete record, or to postpone the proceeding until after a ruling has been obtained from a federal court. If no ruling is obtained through private litigation, or conflicting decisions are handed down by the federal courts, the Library may not be able to have a CARP at all. The Copyright Office concludes that Congress intended no such result.

Broadcasters distinguish the *SBCA* case by observing that the issue therein was whether a satellite carrier was a ''cable system'' for purposes of Section 111 compulsory licensing. In contrast, according to Broadcasters, the issue here is whether their ''particular conduct falls under the purview of the Copyright Act.'' Broadcasters II Reply, at 9–11. They argue that because the activities of the satellite carriers in SBCA related to ''particular conduct admittedly implicating copyright liability,'' the Office had the power to determine whether that conduct was within the scope of the cable compulsory license. But they contend that where the activity is exempt under a specific statutory provision, the conduct may not be considered further by the Office under its authority to promulgate regulations to administer a compulsory license, the scope of which, but for the exemption, would otherwise include such activity.

The Office finds this distinction artificial and unpersuasive. Here, as in SBCA, the issue is whether a particular type of activity falls within the scope of a statutory compulsory license. The fact that Broadcasters claim to be exempt from the performance right for sound recordings does not deprive the Office of the ability to determine whether they are subject to the section 114 compulsory license. In order to determine whether broadcasters transmitting performances of their broadcast signals over the Internet are subject to the compulsory license, it is necessary to address their claim that they enjoy the exemption under section 114(d)(1)(A) when they engage in that activity. If they are exempt, then the inquiry proceeds no further. If they are not exempt, then there appears to be no dispute that their activity is subject to the section 114(f) compulsory license. Broadcasters cite absolutely no authority for the proposition that an agency may not determine whether conduct falls within a particular regulatory scheme administered by the agency when a claim of exemption is made by the party whose conduct is in question.[2]

In sum, the Copyright Office concludes that it does possess the authority to conduct this rulemaking, based on our responsibility to conduct a CARP proceeding to establish rates and terms for the section 114 license, as provided in section 114 itself and chapter 8 of the Copyright Act, and the Office's general rulemaking authority granted by section 702 of the Act.

b. Advisability of acting. Most of the comments address the advisability of the Copyright Office's undertaking of this rulemaking proceeding. Not surprisingly, those commenters representing broadcasters favor postponement or cancellation of this proceeding, pending the outcome of the NAB action in the Southern District of New York. For the reasons described below, the Office believes that it is appropriate to exercise its authority and resolve this rulemaking proceeding now.

First, the Copyright Office disagrees with the assertion that a federal court is better suited at this point to determine whether broadcaster transmissions over the Internet are exempted by section 114(d)(1)(A) of the Copyright Act. We do not question the competence or expertise of the United States District Court for the Southern District of New York to interpret the copyright laws, and ultimately this issue may be resolved by the courts following the Office's ruling. But in the first instance, where the law is complex and requires clarification, the general policy is to allow the agency to complete its action, particularly ''where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise.'' *Miss America Organization* v. *Mattel, Inc.*, 945 F.2d 536, 540 (2nd Cir. 1991), citing *McKart* v. *United States*, 395 U.S. 185 (1969); *see also*, *Cablevision*, 836 F.2d at 608 (''The Copyright Office certainly has greater expertise in such matters than do the federal courts.'')

Moreover, the Office has a long and extensive history of administering and interpreting the Copyright Act, especially the statutory licensing provisions of the Copyright Act. *See*, *e.g.*, 49 FR 13029 (April 2, 1984)(definition of gross receipts under section 111 license); 57 FR 3284 (January 29, 1992)(definition of a cable system under section 111 license); 62 FR 18705 (April 17, 1997)(establishing filing regulations for SMATV systems under section 111). The Office also produced for Congress two studies on the advisability of adopting a performance right for sound recordings. Copyright Implications of Digital Audio Transmission Services: A Report of the Register of Copyrights (1991); Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary House of Representatives, 95th Cong., Performance Right in Sound Recordings (Comm. Print 1978). And the Register of Copyrights testified before both the Senate and House of Representatives on the legislation that amended sections 106 and 114. *See* Digital Performance Right in Sound Recordings Act of 1995: Hearings on S. 227 Before the Senate Comm. On the Judiciary, 104th Cong., (March 9, 1995); Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Subcomm. On Courts and Intellectual

[1] Any broadcaster who wishes to participate and has not yet filed a notice of intention to do so in the pending proceeding should file such notice in accordance with the requirements set forth in a separate **Federal Register** notice addressing this issue.

[2] We note as well that the Broadcasters' distinction does not dispositively adjudicate the substantive rights of copyright users. In both situations, a party aggrieved by a decision of the Office can seek judicial review. Satellite carriers disagreed with the Office's negative determination of their eligibility for the section 111 license and brought the *SBCA* litigation. If broadcasters do not agree with the Office's determination in this proceeding, they likewise can seek judicial review.

Property of the House Comm. On the Judiciary, 104th Cong. (June 28, 1995). Thus, we believe we are well-suited to interpret section 114, including the extent of the section 114(d)(1)(A) exemption.

Second, not only have the commenters to the NPRM not cited any authority that the Copyright Office must defer to a federal court action, but they have not cited any cases where a government agency has deferred action to a federal court a matter before the agency. *Goya Foods, Inc.* v. *Tropicana Prods, Inc.,* 846 F.2d 848 (2d Cir. 1988), and *Nader* v. *Allegheny Airlines, Inc.,* 426 U.S. 290 (1976) are cited by the Broadcasters for the proposition that the matter of the section 114(d)(1)(A) exemption ''lies within the traditional realm of judicial competence.'' *Goya,* 846 F.2d at 851. Neither of these cases, however, involved a government agency deferring judgment to a federal court on a matter clearly within the agency's jurisdiction. In fact, both cases involved just the opposite; a court's decision not to stay a judicial proceeding pending the resolution of an agency proceeding. There is not, therefore, any legal authority that compels or counsels the Office to stay this proceeding in deference to the court in New York.

Third, there is a need to resolve the status of broadcast transmissions over the Internet for purposes of the CARP proceeding to establish rates and terms for the section 114 statutory license as quickly as possible. As discussed above, the success of a CARP proceeding depends upon a full and complete record. This means that all parties who are potentially subject to the section 114 license must be identified and given the opportunity to participate in the CARP proceeding. The NAB/RIAA litigation in the Southern District of New York may not be resolved for several years,[3] which leaves the Copyright Office two undesirable choices: postpone the CARP until that litigation is resolved, or proceed with what we believe would be an insufficient record and receive an incomplete decision from the CARP. Neither of these choices is acceptable; therefore, the Office is now deciding whether the simultaneous transmission of an over-the-air radio broadcast transmission made by an FCC-licensed broadcaster over the Internet is exempt from the digital performance right.

Fourth, NAB has sought a declaratory judgment from the New York district court and is not currently being sued for copyright infringement. There is considerable question whether NAB has presented the district court with a live case and controversy, and the RIAA has sought dismissal of the case on jurisdictional grounds. If the suit is dismissed, there will be no opportunity for a court to interpret the meaning of the section 114(d)(1)(A) exemption, at least until such time as a copyright infringement action is brought against a broadcaster for transmitting over-the-air radio broadcasts on the Internet. The Office needs to act now to move the CARP proceeding forward.

Finally, even if the New York district court rules, and the case is appealed through the Second Circuit, that is still not the final word from the federal court system. Other suits may be brought in other federal circuits, creating the potential for conflicting determinations. Thus, we believe it makes far greater sense for the Copyright Office to address the status of broadcast transmissions over the Internet and the section 114(d)(1)(A) exemption, given that it is the expert agency entrusted with the authority to interpret the meaning of the provisions of the Copyright Act.

Scope of the Section 114(d)(1)(A) Exemption

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (''DPRA''), Public Law 104–39, which created an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform sound recordings publicly by means of certain digital audio transmissions. Among the limitations on the performance right was the creation of a new compulsory license for nonexempt, noninteractive, digital subscription transmissions, 17 U.S.C. 114(f), and an exemption for certain nonsubscription transmissions. 17 U.S.C. 114 (d)(1)(A)(i)–(iii) (1995).

Congress passed the DPRA in response to the growth in the use of digital technology to provide recordings with superior sound quality (e.g., digital phonorecord deliveries) and the growth of digital transmission services that could offer a consumer a digital transmission of a particular sound recording on demand. Congress realized that these advancements offered new and better ways to distribute music to the consumer, but at the same time, it recognized that the current law was inadequate to protect the interests of the copyright owners whose livelihoods depend upon the revenues generated from the sales of their works. Thus, Congress created a limited performance right in sound recordings. S. Rep. No. 104–128, at 14 (1995) (hereinafter ''1995 Senate Report'').

In drafting the DPRA, Congress tried to balance the interests of the music industry,[4] traditional users of sound recordings,[5] and those who wished to utilize the new technologies to make transmissions of sound recordings. The expressed intent of Congress in passing the Act was ''to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.'' 1995 Senate Report at 15. This change, however, was not meant to alter or upset in any way the longstanding relationship between the record industry and broadcasters. Broadcasters II at 15, citing 1995 Senate Report, at 9; *accord* H.R. Rep. No. 104–274, at 6 (1995) (hereinafter ''1995 House Report'').

To strike the proper balance between these parties, Congress created three exemptions for nonsubscription transmissions, including an express exemption for a nonsubscription broadcast transmission. 17 U.S.C. 114(d)(1)(A)(i)–(iii)(1995). It is the scope of this exemption, which has been debated since the passage of the DPRA, *see* Reply Comments of the National Association of Broadcasters at 9–12 (dated June 20, 1997), submitted in Docket No. RM 97–1, that is the subject of this proceeding.

Broadcasters take a broad view of the exemption. Their position is that any transmission made by an FCC-licensed broadcaster, whether made over-the-air or over the Internet, falls within the scope of the section 114(d)(1)(A) exemption. Not surprisingly, Copyright Owners and DiMA take a different view and interpret the scope of the exemption more narrowly. Their position is that a

[3] At the time this **Federal Register** notice was prepared, RIAA's motion to dismiss NAB's claims was still pending in the court, and no further motions have been filed. It seems highly unlikely that the court will resolve the merits of the declaratory relief action in the near future.

[4] ''[T]he legislation is a narrowly crafted response to one of the concerns expressed by representatives of the music community, namely that certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for the use of their work.'' 1995 Senate Report at 15.

[5] Prior to the passage of the DPRA, FCC-licensed broadcasters, cable systems and satellite systems all transmitted or retransmitted sound recordings in their programming without incurring any copyright liability for the public performance of a sound recording. Congress, in acknowledging the promotional value to the record companies that flows to them through advertiser-supported, free over-the-air broadcasting, included specific exemptions in the law from the digital performance right for these users. *See* 17 U.S.C. 114(d)(1)(A), (B) and (C).

transmission of a radio signal over the Internet, generally referred to as a webcast, is subject to the copyright owner's public performance right, even when the transmission is made by an FCC-licensed broadcaster and is identical to an over-the-air transmission. *See* 17 U.S.C. 106(6). They further argue that Congress could not possibly have meant to exempt anything other than over-the-air broadcasts in the DPRA, because Congress had not even yet considered transmissions of sound recordings over the Internet and how they fit into the statutory scheme. This is a critical point, because the scope of the exemption did not change when Congress amended section 114 in 1998 with the passage of the DMCA.

To resolve this question, we examine the legislative history of the DPRA and the DMCA to discern what Congress intended to do and when it intended to do it. From this examination, it is clear that in 1995, Congress' focus was not on Internet transmissions of sound recordings, but rather on the emerging interactive services, *e.g.,* the pay-per-listen, audio-on-demand, or ''dial-up'' services for a particular recording or artist, and the existing noninteractive subscription services that offered nearly continuous play of music through cable and satellite services. *See* 1995 Senate Report at 22.

Consideration of Internet services came later once it became clear that the DPRA did not adequately address their operations. The House Manager's Report for the DMCA makes this point clearly:

> At the time the DPRSRA [Digital Performance Right in Sound Recordings Act] was crafted, Internet transmissions of music were not the focus of Congress' effort. Thus, while the DPRSRA created a statutory license for certain subscription services that existed at the time, not enough was known about how nonsubscription music services would evolve on the Internet or in other digital media. However, given the proliferation and evolution of such services as well as the licensing complexities described above, it is now appropriate to address the licensing of nonexempt nonsubscription digital audio transmissions.

Staff of the House of Representatives Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 at 51 (Comm. Print, Serial No. 6, 1998) (hereinafter ''House Manager's Report'').

It was during the DMCA debate in 1998 that Congress focused on the need to clarify how the law applied to the transmission of a sound recording by a noninteractive, nonsubscription service streaming music over the Internet. These services, now known in the industry as webcasters, had argued that they, like the broadcasters, were non-infringing users because noninteractive, nonsubscription transmissions were exempt under section 114(d)(1)(A)(i) (1995). The record industry did not agree, arguing that the transmissions were subject to the newly created digital performance right. DiMA at 4.

Congress revisited the issue and, ultimately, amended sections 114 and 112 to clarify ''that the digital sound recording performance right applies to nonsubscription digital audio services such as webcasting, addresses unique programming and other issues raised by Internet transmissions, and creates statutory licensing to ease the administrative and legal burdens of constructing efficient licensing systems.'' House Manager's Report at 50.

These changes were part of the Digital Millennium Copyright Act of 1998 (''DMCA''), Public Law 105–304, which among other things, amended section 114 by creating a new statutory license for nonexempt eligible nonsubscription transmissions (*e.g.,* webcasting) and nonexempt transmissions by preexisting satellite digital audio radio services to perform sound recordings publicly in accordance with the terms and rates of the statutory license. 17 U.S.C. 114(f)(1998). The DMCA also amended section 114(d)(1)(A) to ''delete two exemptions that were either the cause of confusion as to the application of the DPRA to certain nonsubscription services (especially webcasters) or which overlapped with other exemptions (such as the exemption in subsection (A)(iii) for nonsubscription broadcast transmissions). The deletion of these two exemptions [was] not intended to affect the exemption for nonsubscription broadcast transmissions.'' 1998 House Report at 80.

The question, however, is what constitutes a nonsubscription broadcast transmission for purposes of the DPRA, since its meaning remained unchanged when Congress amended section 114 in 1998. Both Copyright Owners and DiMA maintain that a ''nonsubscription broadcast transmission'' is nothing more than a traditional over-the-air broadcast made by an FCC-licensed broadcaster. Broadcasters disagree and argue that the definition of a ''broadcast transmission'' for purposes of the section 114 license is not so limited, but includes all transmissions of an AM or FM radio signal, even those over the Internet, if made by the FCC-licensed broadcaster.

In answering this question, Broadcasters and Copyright Owners each argue that the statutory language and licensing scheme, the legislative histories of the DPRA and the DMCA, and public policy considerations support its respective position.

Statutory Language and Legislative History

a. Statutory definitions. The DPRA established three exemptions from the digital performance right for certain nonsubscription transmissions, including an express exemption for a ''nonsubscription broadcast transmission.'' It read, in relevant part, as follows:

> (1) Exempt Transmissions and Retransmissions.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—
>
> (A)(iii) a nonsubscription broadcast transmission.
>
> 17 U.S.C. 114(d)(1)(A)(iii) (1995).

Broadcasters assert that the statutory language is clear and unambiguous on its face and that where this is so, one need not resort to the legislative history to discern the meaning of the statutory terms. Broadcasters I at 7; Broadcasters II at 18. Broadcasters II also rely on the well-established proposition that where a term is defined by the statute, an agency and the courts are constrained to adhere to this definition when interpreting the provisions of the act, citing *Fox* v. *Standard Oil*, 294 U.S. 87, 95–96 (1935).

Using these principles, the Broadcasters analyze the statutory definitions of the relevant terms set forth in section 114(j) to determine whether a webcast of an AM/FM radio station's programming is exempt. These terms were defined in the DPRA as follows:

> A ''broadcast'' transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.
>
> 17 U.S.C. 114(j)(2) (1995).
>
> A ''digital audio transmission'' is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.
>
> 17 U.S.C. 114(j)(3)((1995).
>
> A ''nonsubscription'' transmission is any transmission that is not a subscription transmission.
>
> 17 U.S.C. 114(j)(5) (1995)
>
> A ''transmission'' includes both an initial transmission and a retransmission.
>
> 17 U.S.C. 114(j)(9) (1995).[6]

[6] The definition ''transmission'' was amended in the DMCA. It now reads: ''A 'transmission' is either an initial transmission or a retransmission.'' 17 U.S.C. 114(j)(15) (1998).

All commenters agree that the statutory definitions for a ''transmission,'' a ''digital audio transmission,'' and a ''nonsubscription transmission'' are clear and that the transmissions in dispute qualify as nonsubscription, non-interactive, digital audio transmissions for purposes of the DPRA. *See* Broadcasters II at 20; Gorman at 28 n.89. The dispute lies with the definition of a ''broadcast transmission.'' Broadcasters argue that the pivotal element in the definition is the designation of the nature of the entity making the transmission—not the method of the transmission. In other words, the fact that an FCC-licensed broadcast station makes the transmission is dispositive. Thus, Broadcasters reason that any transmission made by a terrestrial broadcast station licensed by the FCC, whether disseminated over-the-air or transmitted over the Internet, fits the statutory definition of a ''nonsubscription broadcast transmission'' and therefore, is expressly exempt under the section 114(d)(1)(A)(iii) (1995) exemption and remains exempt under the current section 114(d)(1)(A) (1998) provision. Broadcasters I Reply at 6; Broadcasters II Reply at 17. Furthermore, they contend that transmissions made by FCC-licensed broadcasters ''do, in fact, comply with FCC content requirements to promote the public interest and serve the local community.'' Broadcasters II Reply at 17.

In creating a safe harbor for radio broadcasts, Congress identified key factors that ''place[d] such programming beyond the concerns that animated the creation of the limited public performance right in sound recordings in Section 106(6). Specifically, radio programs that (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill FCC licensing conditions; (4) promote, rather than replace, record sales; and (5) do not constitute ''multichannel offerings of various music formats.'''' Broadcasters II at 26–27 (footnote omitted), citing 1995 Senate Report at 15. Broadcasters argue that these characteristics apply equally to the transmission of a local radio broadcast signal whether transmitted over-the-air or streamed via the Internet; and consequently, all transmissions of radio broadcasts should be exempt without regard to the method of transmission. Copyright Owners and DiMA disagree with the Broadcasters' approach. They argue that the exemption for a ''nonsubscription broadcast transmission'' was adopted in order to shelter broadcasters from the new digital performance right, if and when they converted their over-the-air signals from an analog to a digital format. Gorman at 9; DiMA at 3. In direct opposition to the Broadcasters' approach, Copyright Owners focus on how the word ''terrestrial'' and the phrase ''licensed as such by the FCC'' are used in the definition of a ''broadcast station.'' *See also*, DiMA Reply at 2.

They contend that use of the word ''terrestrial'' limits the exemption to over-the-air transmissions made by a broadcast station and, thus, by implication, excludes from the exemption any nationwide transmissions by radio stations that broadcast via satellite. Gorman at 29. They point out numerous citations in the legislative history which make it abundantly clear that Congress meant to protect traditional over-the-air broadcast transmissions. For example,

> The sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. * * * H.R. 1506 does not change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.

1995 House Report, at 13 (emphasis added).

> [F]ree over-the-air broadcasts are available without subscription, do not rely on interactive delivery, and provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill a condition of the broadcasters' license. The Committee has considered these factors in concluding not to include free over-the-air broadcast services in the legislation.

Id. (emphasis added).

> The classic example of such an exempt transmission is a transmission to the general public by a free over-the-air broadcast station, such as a traditional radio or television station, and the Committee intends that such transmissions be exempt regardless of whether they are in a digital or nondigital format, in whole or in part.

1995 Senate Report at 19 (emphasis added).

They also argue that use of the phrase ''licensed as such by the FCC'' ''reflects Congressional intent to limit the scope of the exemption to those activities for which a broadcast station needs an FCC license.'' Gorman at 29 (footnote omitted). The focus here is on the nature of the transmission and not the characterization of the entity making the transmission. From this perspective, the only transmissions which are exempt under section 114(d)(1)(A) are those made by an FCC-licensed broadcaster under the terms of its license. In general, such transmissions are over-the-air transmissions made within the broadcaster's local service area. Webcasts of AM/FM radio signals are not so limited and, therefore, do not fit the statutory definition of a ''broadcast'' transmission for purposes of the DPRA. *Id.* at 29–30; *see also* DiMA Reply at 2.

Copyright Owners acknowledge that their interpretation of the exemption is narrower than the Broadcasters' but argue that the exemption for ''broadcast transmissions'' must be construed in this manner because the statute provides a complete exemption from the digital performance right in sound recordings. In making this argument, they rely upon the general rule of statutory construction that exemptions must be construed narrowly, ''and any doubt must be resolved against the one asserting the exemption,'' in order to preserve the purpose of the provision. *Tasini* v. *New York Times Co.*, 206 F.3d 161, 168 (2nd Cir. 2000). Specifically, they argue that a narrow interpretation of the exemption is particularly warranted in this context ''where denying the exemption would still leave AM/FM Webcasts eligible for a statutory license (rather than subjecting them to full copyright liability).'' Gorman at 19.

Broadcasters dispute Copyright Owners' contention that it is appropriate to read the exemption for broadcast transmission so narrowly. They claim that Copyright Owners ignore Congress' intent to construe the digital performance right narrowly and limit the right only to certain digital transmissions of sound recordings. Broadcasters II Reply at 24–25. Broadcasters argue further that it is inconceivable that after refusing for decades to grant copyright owners of sound recordings a sound recording performance right, Congress ''intended to sweep within a newly-created and narrowly-circumscribed performance right broadcaster transmissions over the Internet of their broadcast programming.'' Broadcasters II Reply at 21 (emphasis omitted).

Historically, the Copyright Office construes limitations on copyright narrowly, especially those rights constrained by a compulsory license. *See* 49 FR 14944, 14950 (April 16, 1984) and 57 FR 3284, 3293 (January 29, 1992). This tenet is fully consistent with the rules of statutory construction which require ''[s]tatutes granting exemptions from their general operation [to] be strictly construed, and any doubt must be resolved against the one asserting the exemption.'' *See* 73 Am. Jur. 2d 313 (1991); *Tasini*, *supra*.

Broadcasters argue that this precept favors their interpretation, asserting that the newly created digital performance right was narrowly crafted and not meant to disturb the traditional broadcasting system in place at the time the DPRA was passed. But once created, the right is to be defined by reference to the statute, and there is no reason to depart from the general rule that the exemption to the right must be narrowly construed. The key to determining the scope of the exemption is an understanding of the meaning of the term ''broadcast transmission.''

As previously discussed, Broadcasters assert that the exemption from the digital performance rights applies not only to traditional over-the-air broadcast transmissions, but also to transmissions of these signals over the Internet. The Broadcasters interpret the exemption in the broadest possible manner based upon their reading of the statutory definition for a ''broadcast transmission'' which defines the transmission solely on the basis that it was made by an FCC-licensed broadcaster. They argue that the language is clear and unambiguous and so the analysis ends here.

The Copyright Office does not agree. The use of the descriptive phrase ''terrestrial broadcast station licensed as such by the Federal Communications Commission'' involves much more than the mere designation of a particular entity. In fact, as the Copyright Owners argue, Congress appears to have chosen these words not only as a convenient way in which to identify the entity entitled to make a broadcast transmission, but also as a way to circumscribe which actions the entity may legally undertake within the scope of the section 114 exemption. Even if the Broadcasters' reading of the definition is a plausible one, the Copyright Owners' more limited interpretation, seconded by DiMA, is at least equally plausible. For this reason, the Office turns to the relevant legislative history in order to understand how Congress intended the law to operate.

Turning to the legislative history is appropriate where, as here, the precise meaning is not apparent and a clear understanding of what Congress meant is crucial to an accurate determination of how Congress intended the digital performance right and the statutory scheme to operate. *See also*, 57 FR 3284, 3293 (1992). Consequently, we place great weight on the passages in the 1995 House and Senate Reports which discuss and characterize broadcast transmissions.

As noted above, Congress used the descriptive term ''over-the-air'' frequently to identify those broadcasts it sought to protect under the exemption. Such transmissions are made in accordance with the terms of the FCC license issued to the broadcaster. If Congress had discussed or referenced any other type of transmission made by an FCC-licensed broadcaster, we might be more inclined to support the Broadcasters' interpretation of the statutory definition. This is not the case, and the Office concludes that Congress used the phrase ''licensed as such'' to serve two purposes. First, it identifies the entity entitled to make a broadcast transmission under an exemption to the digital performance right; and second, it specifies which transmissions made by the broadcaster are exempt, that is, those transmissions made over-the-air by the broadcasting entity under the terms of the FCC license.

b. Additional exemptions. Copyright Owners do not limit their analysis of the statutory language to the statutory exemption under consideration. This is only their starting point. They continue their analysis of section 114 under a second well-established rule of statutory construction which requires interpretation of each provision in a section in such a way as to produce a harmonious whole. 2A Sutherland, Stat. Const.§ 46.05 (6th ed. 2000); *see also* 57 FR 3284, 3292 (1992).

Of particular interest are the exemptions for a ''retransmission of a radio station's broadcast transmission'' set forth in sections 114(d)(1)(B) and (C) (1995). Section 114(d)(1)(B) restricts retransmissions to a 150-mile radius from the site of the radio broadcast transmitter, to the local communities served by the retransmitter, and those carried by a cable system or a noncommercial educational broadcast station. Similarly, section 114(d)(1)(C) exempts certain incidental transmissions, transmissions to and within business establishments, and those retransmissions made to deliver licensed programming to the user.

Copyright Owners argue that these provisions merely reflect congressional intent to grandfather existing retransmission services at the time of the passage of the DPRA. Gorman at 10; DiMA Reply at 2–3; *see also*, 1995 Senate Report at 22 (noting that a retransmission over the Internet which is being used to facilitate an exempt transmission or retransmission, would not qualify as an ''incidental'' retransmission under section 114(d)(1)(C)(1)).

Similarly, DiMA argues that Congress never intended to exempt broadcast retransmissions via the Internet; otherwise it would have enlarged these exemptions when it passed the DMCA, which it chose not to do. *See* DiMA at 5. In addition, DiMA argues that Congress would not have limited the exemption for a ''retransmission'' of a ''broadcast transmission'' by differentiating between radio transmissions made by terrestrial and non-terrestrial broadcast technologies, if it was content with exempting any transmission made by an FCC-licensed broadcaster. DiMA Reply at 2. Copyright Owners concur with DiMA on this point. In addition, they argue that the definition of an ''eligible nonsubscription transmission'' supports this interpretation because it includes retransmissions of broadcast signals. Had Congress meant to exempt any and all transmissions of a broadcast signal, it would not have included this wording in the definition of an ''eligible nonsubscription transmission,'' the newly created class of transmissions subject to the statutory license. DiMA Reply at 3.

Broadcasters counter the Copyright Owners' interpretation in regard to these exemptions, noting an exception to the 150-mile limitation for nonsubscription retransmissions by ''a terrestrial broadcast station.'' They also suggest that the limitations on retransmissions were directed only to those made by third parties, and not to a simultaneous transmission made directly by the FCC-licensed broadcaster. Broadcasters II Reply at 25. In addition, Broadcasters stress that a transmission of a radio program, even via the Internet, serves the needs and interests of the local community as required under the FCC license. For these reasons, Broadcasters argue that Congress created a specific exemption for certain retransmissions of nonsubscription radio broadcast transmissions, including those that are transmitted ''by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission.''

While it is clear that a broadcast transmission is exempt, it is equally clear that a retransmission of a radio signal (though technically a transmission)[7] is exempt only under certain circumstances. This fact alone undermines the Broadcasters' assertion that any transmission made by an FCC-licensed broadcaster is immediately and totally exempt. In addition, their

[7] A ''transmission'' is either an initial transmission or a retransmission. 17 U.S.C. 114(j)(15).

specific arguments on this point do not withstand scrutiny.

First, the exception to the 150-mile limitation is only for retransmissions made by ''a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission.'' 17 U.S.C. 114(d)(1)(B)(i)(I). Again, the fact that the entity making the retransmission must be licensed by the FCC sets limits on how far each retransmission can reach. In no case, however, could these retransmissions parallel the reach of the Internet or a retransmission made by a satellite. Second, the suggestion that the retransmissions discussed in section 114(d)(1)(B) refer only to those made by third parties and not to simultaneous retransmissions made by the originating broadcaster is groundless. There is no such distinction set forth in the statute. And finally, we see no significance to the fact that the retransmission of a radio signal may meet the license requirements for service to a local community, when in fact such a transmission exceeds the geographical limits established for the broadcast under the FCC license.

c. Expansion of the statutory license. Copyright Owners and DiMA contend that the original licensing scheme was conceived without any significant thought to the transmission of sound recordings by means other than the conventional over-the-air transmissions in use at the time. Copyright Owners at 12–13; DiMA at 4; *See also* House Manager's Report at 51. This became an obvious problem with the growth of the Internet and the rapid increase in the use of the new streaming technology to transmit sound recordings over the Internet.[8]

Copyright Owners contend that, in order to address this problem, Congress made a significant change to section 114 when it passed the DMCA. For example, it amended section 114(d)(2) to extend the statutory license to ''eligible nonsubscription transmissions'' and defined the term to include retransmissions of broadcast transmissions. 17 U.S.C. 114(j)(6). Copyright Owners argue that these changes support its position that the statutory scheme militates against exempting transmissions of AM/FM radio signals over the Internet.

First, they note that when Congress expanded the statutory license, it specifically considered the needs of the emerging services that wanted to stream sound recordings over the Internet. *See* 1998 House Report at 80, 82 and 84. They then claim that Congress never ''intended to single out any class of webcasters for special treatment, or for some webcasters to be exempt and others to be liable.'' Gorman at 24. Instead, they argue that Congress amended the DPRA to make all webcasters, including those who are also FCC-licensed broadcasters, eligible for the statutory license.

In addition, they note that in the case where the transmitting entity does not have the right or ability to control the programming of the broadcast station, special terms apply. Congress made these transmissions subject to the compulsory license but chose not to make these transmissions immediately subject to certain restrictions otherwise applicable to a nonexempt, nonsubscription transmission, except in the case where the broadcast station regularly violates the restriction and the copyright owners give notice to the service making the retransmission. *See* 17 U.S.C. 114(d)(2)(C)(i)–(iii), (ix).

Copyright Owners argue that ''[t]his language implies that where the transmitter can control the content of the signal, [it] must meet the conditions of the statutory license. Because the content of AM/FM signals can be controlled by the broadcaster, this suggests that Congress intended broadcast transmissions to be subject to the statutory license.'' Gorman at 25–26 (footnotes omitted). Otherwise, as DiMA points out, ''why would Congress have imposed licensing and 'notice and takedown' requirements on third parties that retransmit radio broadcasts, if the broadcaster itself could transmit the same programming over the Internet without a license and without restriction?'' DiMA Reply at 4 (footnote omitted).

The Copyright Office believes that the narrowly drawn safe harbors for retransmissions of radio signals illustrate Congressional intent to distinguish between a traditional over-the-air broadcast transmission of an AM/FM radio signal and a retransmission of that signal. Even though the statutory definition of a transmission includes both an initial transmission and a retransmission, Congress clearly chose to treat retransmissions of a radio signal differently. ''Retransmissions of radio station broadcast transmissions * * * are exempt only if they are not part of an interactive service and fall within certain specified categories.'' 1995 Senate Report at 19 (emphasis added). These restrictions limit the reach of a retransmission of an AM/FM radio signal and neither suggest nor allow for retransmission of an AM/FM radio signal to a national audience. Had Congress meant to exempt without limitation a further broadcast of a radio station's signal beyond the limits prescribed by its FCC license, it would not have restricted its retransmissions beyond the 150-mile limit to only those entities who make such transmissions under the terms of an FCC license, or limited subsequent retransmissions to the reach of a terrestrial broadcast station, terrestrial translator, or terrestrial repeater. 17 U.S.C. 114(d)(B)(i).

d. Ephemeral recordings. The DMCA amended section 112 to adjust for changes Congress made to section 114. Copyright Owners argue that Congress amended section 112(a) to make clear that a broadcast radio or televison station, licensed as such by the FCC, may make a single ephemeral copy of a sound recording in furtherance of its transmissions within its local service area even when those transmissions are made in a digital format. For purposes of section 112(a)(1), the term ''local service area'' is used as defined in section 111(f) of the Copyright Act. *See,* H.R. Rep. No. 94–1476, at 103 (1976). This provision limits the geographic reach of the signal and makes clear that it is not subject to worldwide distribution. In addition, Congress created a second statutory license in order to give those entities eligible for a section 114 statutory license and those exempt under section 114(d)(1)(C)(iv)[9] the right to make one or more ephemeral recordings to facilitate their transmissions under the section 112 statutory license. *See* 17 U.S.C. 112(e).

Under the Copyright Owners' construction of the section 112 amendments, a broadcaster would be unable to make ephemeral recordings under the exemption set forth in section 112(a)(1) for the purpose of streaming its radio signal because the transmission could not be limited to the station's ''local service area.'' Likewise,

[8] In fact, streaming was a novel and little recognized—much less used—technology in 1995. According to one radio analyst cited by DiMA, the number of worldwide radio broadcasts over the Internet has grown from a meager 56 stations in 1995 to more than 3500 today. DiMA Rely at 4 n.10.

[9] Section 114(d)(1)(C)(iv) provides that:

The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(C) a transmission that comes within [] the following categor[y]—

(iv) a transmission to a business establishment for use in the ordinary course of its business: Provided, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording complement. 17 U.S.C. 114(d)(1)(C)(iv).

broadcasters would be ineligible for the section 112(e) statutory license if AM/FM radio transmissions are exempt, since only a transmitting organization entitled to make transmissions under the section 114 license or the section 114(d)(1)(C)(iv) business exemption can make ephemeral recordings under the statutory license. Because Congress' intent was not to prevent broadcasters from making ephemeral recordings, Copyright Owners believe the only plausible construction of the statute requires the exemption for a ''nonsubscription broadcast transmission'' to exclude AM/FM webcasts. Gorman at 27.

Broadcasters offer a different interpretation of the effect of the new amendments. They contend they are eligible to make an ephemeral recording under section 112(a) because the ''local service area'' for a transmission over the Internet is global in scope. Broadcasters II Reply at 26. DiMA agrees with the Broadcasters on this point, citing the Conference Report to the DMCA:

> The addition to section 112(a) of a reference to section 114(f) is intended to make clear that subscription music services, webcasters, satellite digital audio radio services and others with statutory licenses for the performance of sound recordings under section 114(f) are entitled to the benefits of section 112(a) with respect to the sound recordings they transmit.

1998 House Report at 79. DiMA notes that each of the listed services has a ''local service area'' that extends beyond the traditional local community served by a terrestrial radio station and is either ''inherently national or global in scope.'' DiMA at 7.

Fortunately, the Copyright Office need not reach the question concerning the scope of the ''local service area'' for an Internet-originated program to resolve the question as it affects this proceeding, since it is the ''local service area'' of the FCC-licensed broadcaster that is relevant. The change to section 112(a) was made ''to extend explicitly to broadcasters the same privilege they already enjoy with respect to analog broadcasts.'' 1998 House Report at 78. The ''local service area'' of a broadcaster is defined by the terms of the FCC license under which it operates. The fact that an FCC-licensed broadcaster may choose to transmit its signal simultaneously over the Internet does not, by virtue of this action, enhance the ''local service area'' associated with the initial broadcast of the radio signal. To do otherwise would mean that the broadcasting area for a particular radio signal as defined by the terms of an FCC license would be totally meaningless, since the simultaneous transmission of a radio signal over the Internet makes the transmission instantly available anywhere in the world.

Consequently, we agree with the Copyright Owners that section 112(a) provides an exemption for making an ephemeral recording to a broadcaster who is transmitting its signal over-the-air in a digital format. It does not allow for the making of an ephemeral recording for the purpose of streaming that same signal over the Internet unless the transmission is made under the statutory license set forth in section 114. This interpretation is consistent with our analysis of the exemption for a broadcast transmission.

Policy Considerations

Industry analysts have questioned whether it would have been logical for Congress to craft a statutory licensing scheme which subjects a third party that licenses a radio station signal for streaming purposes to the statutory licensing provisions when the radio station itself could perform the same operation without any restrictions or restraints under a general exemption. *See* David J. Wittenstein & M. Larrane Ford, The Webcasting Wars, 2 J. Internet. L. 1,8 (1998); M. Powers, Broadcasters Sue Recording Industry; http://radio.about.com/entertainment/radio/library/weekly/aa/33000b.htm) (March 30, 2000).

Copyright Owners have asked the same question and conclude that it would be illogical to allow broadcasters to stream their AM/FM radio signal under an exemption but impose copyright liability on a third party when it retransmits the identical programming. Furthermore, they argue that ''[t]here is certainly nothing in the DPRA or DMCA to suggest that the right of a sound recording copyright owner to compensation should turn on whether the same transmission is made by the broadcaster or the broadcaster's agent.'' Gorman at 23; *see also* Wittenstein & Ford, *supra* at 8.

More importantly, however, DiMA argues that by allowing broadcasters to stream their programming over the Internet, broadcasters get a free pass to engage in the very activity that compelled Congress to pass the DPRA. For example, the law forbids an online service, subject to the statutory license, from playing multiple selections by the same recording artist during any three-hour period. DiMA states that should broadcasters be allowed to stream their programming over the Internet under the section 114(d)(1)(A) exemption, they could ignore the very program restrictions put into place to thwart unauthorized copying with impunity and gain market share—and a competitive advantage over non-broadcasting webcasters—by virtue of these practices. DiMA at 6; DiMA Reply at 4.

On the other hand, Broadcasters contend that it would be absurd to embrace the Webcasters and Copyright Owners' interpretation of the statute because it would mean that radio broadcasters would have to alter radically their programming practices in order to fit the requirements of the statutory license, negotiate voluntary licenses to do what they already do over-the-air, or cease streaming activities altogether. Broadcasters II at 13; Broadcasters II Reply at 28. They argue that such a harsh reading of the statute flies in the face of the stated intent of the DPRA because it would alter dramatically the longstanding relationship between the record industry and the broadcasters that Congress meant to preserve; a relationship which historically has had a beneficial and a promotional effect on the sale of records. Broadcasters I Reply at 11. Therefore, Broadcasters maintain that all streamed broadcasts of AM/FM radio signals made by an FCC-licensed broadcaster, whether over-the-air or via the Internet, fall within the safe harbor created in the section 114(d)(1)(A) exemption.

Broadcasters also assert that the acknowledged benefits that flow from the longstanding relationship between the record industry and broadcasters are not lost because a radio program is streamed over the Internet. ''If radio broadcasts are beneficial to the record industry on a local scale due to the public exposure afforded sound recordings from their airplay, that same broadcasting activity is all the more beneficial to the record industry on a national or global scale due to the even greater public exposure (leading to increased record sales) that those recordings will receive.'' Broadcasters II Reply at 32 (emphasis omitted).

DiMA disagrees. It argues that a broadcaster would receive the greater benefit if allowed to transmit its radio signal over the Internet under the section 114(a) exemption because webcasts create an additional revenue stream for a broadcaster apart from the advertising revenues that flow from the traditional over-the-air broadcast. Since all services competing in the Internet market compete for the same audience share and advertising dollars, DiMA argues that they should do business on the same basis and be subject to the same licensing requirements. Broadcasters counter this argument by focusing on the restrictions placed on

the type of advertising that broadcasters are allowed to do under their license, *e.g.,* restrictions on tobacco advertising and on promotions and contests, and the costs incurred in meeting their obligations to serve the needs of their communities. State Broadcasters Reply at 4. In fact, broadcasters argue that they will be at a competitive disadvantage if they cannot transmit sound recordings over the Internet under an exemption and, instead, are subject to potentially prohibitive license fees. *Id.* at 5.

Interestingly, Broadcasters rely on the fact that the programming on a transmission of an AM/FM radio signal over the Internet is identical to the programming transmitted on an over-the-air broadcast to support their position that these signals are, in both instances, exempt. They contend that Congress exempted broadcast transmissions because they ''comply with FCC content requirements to promote the public interest and serve the local community.'' Broadcasters II Reply at 17, 22. In addition, they argue that much of the value of the Internet transmission comes from the ability to retain listener loyalty, both those within the local community served by the over-the-air transmission and those ''who are traveling away from their home listening areas.'' Broadcasters I Reply at 3. Broadcasters also distinguish radio broadcast streams from Internet-originated programs on the basis that the radio stations generally program only a single channel, unlike the multiple channels of music programming offered by Internet-only services. Broadcasters II Reply at 27 n.14.

Yet, this distinction does not explain why a broadcaster licensed by the FCC can freely stream its radio programming over the Internet, but a third-party licensee of its content is subject to the statutory license. Both transmitting entities are providing exactly the same programming which must comply with FCC restrictions and serve the local communities. To resolve this apparent paradox, we believe that Congress defined discrete categories of transmissions (rather than transmitters), then evaluated the potential for displacement of record sales on the basis of the characteristics of those transmissions and applied the statutory restrictions and exemptions accordingly.

Using this approach, the Office has determined that the section 114(d)(1)(A) exemption does not cover transmissions of an AM/FM radio signal over the Internet. This conclusion is apparent when one considers that under the Broadcasters' entity-based interpretation, a broadcaster that created an Internet-only service indistinguishable from the services offered by non-broadcaster webcasters would be exempt from the digital public performance right, even though its transmissions are never part of an over-the-air broadcast. In fact, under the Broadcasters' interpretation, a broadcaster could cease broadcasting altogether, but continue to enjoy the exemption so long as it held the FCC license.

When Congress crafted the DPRA, it intended that the law would accommodate foreseeable technological changes and drafted the bill accordingly. At the same time, Congress understood that it could not predict how technology would develop or how it would alter the ways in which sound recordings were performed or distributed. Nevertheless, its intent was clear: ''[I]t is the Committee's intention that both the rights and the exemptions and limitations created by the bill be interpreted in order to achieve their intended purposes.'' 1995 Senate Report at 14.

The purpose for enacting the DPRA was two-fold: ''first, * * * to ensure that recording artists and recording companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services.'' House Manager's Report at 49.

The Copyright Office's determination to read the statutory definition of a ''broadcast transmission'' as including only over-the-air transmissions made by an FCC-licensed broadcaster under the terms of that license is consistent with Congress' intent in passing the DPRA. This approach preserves the traditional relationship between the record companies and the radio broadcasters as it existed in 1995. In effect, it allows for the continued transmission of an over-the-air radio broadcast signal without regard to whether the transmission is made in an analog or a digital format. Such signals, however, are limited geographically under the licensing standards of the FCC. At the same time, it subjects all other digital transmissions made by a noninteractive, nonsubscription service to the terms and conditions of the statutory license in order to compensate record companies for the increased risk that a listener may make a high-quality unauthorized reproduction of a sound recording directly from the transmission instead of purchasing a legitimate copy in the marketplace, a risk that is clearly greater when the recipient is receiving the transmission on a computer, which can instantly replicate and retransmit the transmission.

Congress' intent would be thwarted if an FCC-licensed radio broadcaster was allowed to transmit its radio signal over a digital communication network, such as the Internet, without any restrictions on the programming format. For example, as DiMA suggests, an FCC-licensed broadcaster could tailor its program to highlight a particular artist and announce its intent to do so in advance, thereby increasing the likelihood that a listener would be prepared to make a copy of the sound recording at the appointed time. Such a result would violate not only the letter of the law under our interpretation of the statute, but also the very spirit and intent of the law. For these reasons, the definition of the term ''Service'' shall be amended to reflect the determination of the Copyright Office that any entity that transmits an AM/FM radio signal over a digital communications network is subject to the terms of the statutory license set forth in 17 U.S.C. 114(d)(2).

List of Subjects in 37 CFR Part 201

Copyright.

In consideration of the foregoing, part 201 of 37 CFR is amended in the manner set forth below.

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Section 201.35(b)(2) is revised to read as follows:

§ 201.35 Initial Notice of Digital Transmission of Sound Recordings under Statutory License.

* * * * *

(b) * * *

(2) A *Service* is an entity engaged in the digital transmission of sound recordings, pursuant to section 114(f) of title 17 of the United States Code, and includes, without limitation, any entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2).

* * * * *

Dated: November 21, 2000.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 00–31457 Filed 12–8–00; 8:45 am]

BILLING CODE 1410–31–P

POSTAL SERVICE

39 CFR Part 20

Global Express Guaranteed: Changes in Postal Rates

AGENCY: Postal Service.

ACTION: Interim rule with request for comment.

SUMMARY: The Postal Service is changing the rates for Global Express Guaranteed (GXG) Document service and Global Express Guaranteed Non-Document service and announcing the inclusion of GXG in the current U.S. Postal Service collection pickup service.

EFFECTIVE DATE: The effective date will be concurrent with the effective date for the new domestic rates, tentatively set for January 7, 2001. Comments on the interim rule must be received on or before January 6, 2001.

ADDRESSES: Written comments should be mailed or delivered to Business Initiatives, Expedited/Package Services, U.S. Postal Service, 200 E. Mansell Court, Suite 300, Roswell, GA 30076–4850. Copies of all written comments will be available for public inspection between 9 a.m. and 4 p.m., Monday through Friday, in the Expedited/Package Services office, 200 E. Mansell Court, Suite 300, Roswell, GA.

FOR FURTHER INFORMATION CONTACT: Malcolm E. Hunt, 770–360–1104.

SUPPLEMENTARY INFORMATION: Global Express Guaranteed is the U.S. Postal Service's premium international mail service. GXG is an expedited delivery service that is the product of a business alliance between the U.S. Postal Service and DHL Worldwide Express, Inc. It provides time-definite service from designated U.S. ZIP Code areas to locations in over 200 destination countries and territories. Global Express Guaranteed consists of two mail classifications: Global Express Guaranteed Document Service and Global Express Guaranteed Non-Document Service. Regulations for Global Express Guaranteed service are currently set forth in section 215 of the International Mail Manual (IMM). These regulations were moved to IMM 210 pursuant to the notice published in the **Federal Register** on September 26, 2000. Numerous and successive expansions and changes to the service have been listed in previous **Federal Register** notices and are summarized in the final rule, which will be published in early December.

The Postal Service is changing the rates for Global Express Guaranteed service and is announcing the inclusion of this service in the current collection pickup service. The revised set of rates, set forth below, is based on experience gained with providing the service and more accurately reflects the actual costs of providing this service across the various rate groups. Additionally, the rate lanes for the Global Express Guaranteed Non-Document service are changed to an alpha character designation for clarity between the Document and Non-Document services.

Although the Postal Service is exempted by 39 U.S.C. 410(a) from the advance notice requirements of the Administrative Procedure Act regarding proposed rulemaking (5 U.S.C. 553), the Postal Service invites public comment on the interim rule at the above address.

The Postal Service is implementing the following rates and amending the International Mail Manual, which is incorporated by reference in the Code of Federal Regulations. See 39 CFR 20.1.

List of Subjects in 39 CFR Part 20

Foreign relations, International postal services.

PART 20—[AMENDED]

1. The authority citation for 39 CFR Part 20 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 401, 404, 407, 408.

2. Chapter 2 of the International Mail Manual is amended as follows to provide for the new rates and to include pickup service:

2 CONDITIONS FOR MAILING

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210 Global Express Guaranteed

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213.2 Destination Countries and Rate Groups

[The Individual Country Listings for Global Express Guaranteed (GXG) service rates will be amended to reflect the rate changes.]

213.3 Pickup Service

Collection service pickup is available for delivery addresses within the participating Global Express Guaranteed ZIP Codes. GXG collection service will be provided when a postal employee goes to a customer's location specifically to deliver or collect mail other than Global Express Guaranteed shipments and the employee is handed a Global Express Guaranteed shipment in addition to other mail to be collected. No pickup fee will be charged when Global Express Guaranteed shipments are picked up during a delivery stop or during a scheduled stop made to collect other mail not subject to a pickup fee. On-call or scheduled pickup services are currently not available for GXG Service.

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216.1 Document Service Rates/Groups

Weight not over (lbs.)	Rate group 1	Rate group 2	Rate group 3	Rate group 4
0.5	24.00	25.00	32.00	32.00
1	33.00	34.00	39.00	45.00
2	38.00	40.00	46.00	52.00
3	40.00	46.00	53.00	59.00
4	43.00	50.00	60.00	66.00
5	46.00	55.00	67.00	73.00
6	48.00	58.00	72.00	80.00
7	51.00	61.00	76.00	86.00
8	53.00	65.00	80.00	93.00
9	55.00	68.00	85.00	100.00
10	58.00	70.00	89.00	104.00
11	60.00	73.00	92.00	109.00