

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
Digital Audio Broadcasting Systems)
And Their Impact on the Terrestrial) MM Docket No. 99-325
Radio Broadcast Service)

**Reply Comments of the Digital Media Association
Concerning Digital Audio Content Control**

The Digital Media Association ("DiMA") submits these Reply Comments with respect to the Notice of Inquiry ("NOI") concerning Digital Audio Content Control (¶¶ 67-69) that was part of the Commission's April 15, 2004, Notice of Proposed Rulemaking in this docket. The NOI poses two central questions: "(1) does a problem exist that requires governmental intervention; and (2) to what extent can, and should, the Commission involve itself in this matter." DiMA limits these Reply Comments to its views as to the existence or potential of a problem, and provides background regarding Congress's effort to solve this problem as it concerns Internet radio.

Statement of Interest. DiMA companies are the leading providers of Internet webcasting services, music and media subscription services, digital downloads for sale, and technologies that protect music and media that is delivered by streaming or download. As they build and promote adoption of royalty-paying online music services, DiMA members compete directly against piracy. Accordingly, DiMA shares the recording industry's concern about the effects of online piracy.

Affirmation of the Problem. As webcasters of music programming, DiMA companies compete against and appreciate the value offered by broadcast radio, digital broadcast radio, cable radio and satellite radio. DiMA believes that all these services, like Internet radio, promote sound recording sales and subscription services. However, DiMA has acknowledged that misuse of performance media – including by consumers who might digitally record, catalog and redistribute sound recordings that were intended by the transmitter to be enjoyed as performances only – can potentially result in

their having substitutional effects rather than promotional effects with regard to sound recording sales and subscription services.

Accordingly, in the 1998 Digital Millennium Copyright Act, DiMA concurred with Congress' inclusion of modest anti-copying requirements as conditions of utilizing the webcasting statutory license for sound recordings. This statutory license, set forth in 17 U.S.C. § 114(d)(2)(C), includes three conditions relating to recording of webcasts and application of technical measures analogous to those addressed in this proceeding. In summary, the Copyright Act requires licensed transmitting entities (i.e., webcasters) to:

- cooperate to prevent, to the extent feasible without imposing substantial costs or burdens, consumers from automatically scanning webcast programming or channels to receive specific sound recordings. *Id.*, § 114(d)(2)(c)(v).
- refrain from affirmatively causing or promoting consumer recording of webcasts and, if available, to set the transmission technology so as to prevent direct digital recording of the webcast. *Id.*, § 114(d)(2)(c)(vi).
- accommodate and not interfere with transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, if the measures are technically feasible of being transmitted by the transmitting entity, do not impose substantial costs on the webcaster, and do not perceptibly degrade the digital signal. *Id.*, § 114(d)(2)(C)(viii).

DiMA believes that legitimate music services are essential to any effort to combat online piracy, and that the success of Internet webcasting, and the momentum gathered by online music stores and services such as Apple's iTunes, Napster, MusicMatch and RealNetworks' Rhapsody, demonstrate that royalty-paying commercial music services can win consumers with appealing products and compelling experiences. DiMA agrees that the potential exists for harm to the online music industry, the recording industry and performing artists if consumers were able to automate the typically cumbersome process of recording broadcast content and thereby create digital files that can easily be retransmitted over the Internet. Were this redistribution to occur on a broad scale without compensation, the harm would extend to legitimate Internet music services – who also compete against “free” music online – as well as the recording labels and performers.

Authority to Act. Clearly there is precedent for Congress considering whether new technologies upset the balance between creators and consumers, and specifically whether new scanning and recording technologies may create issues for the recording industry that merit

legislative or regulatory solutions. DiMA is uncertain, however, whether the Commission has such authority.

It seems, however, that the broadcast industry should be inclined to protect its programming against unauthorized redistribution, and that an industry consensus in this regard is achievable. If such a consensus is reached then perhaps government action would not be necessary.

DiMA appreciates the opportunity to file these Reply Comments, and to participate in further Commission activities with regard to digital audio content control.

Respectfully submitted,

Jonathan Potter
Executive Director
Digital Media Association
1615 L Street NW
Suite 1120
Washington, D.C. 20036
(202) 775-2660