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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
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16 THE DIGITAL MEDIA ASSOCIATION,
17 LAUNCH MEDIA, INC., LISTEN.com, INC.,
18 MTVi GROUP LLC, MUSICMATCH, INC.
and XACT RADIO LLC,

19 Plaintiffs,

20 v.

21 THE RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC.,

22 Defendant.

Case No.

**COMPLAINT FOR
DECLARATORY JUDGMENT**

23 The Digital Media Association ("DiMA"), on behalf of itself and its member
24 companies, Launch Media, Inc. ("Launch"), Listen.com, Inc. ("Listen"), MTVi Group LLC
25 ("MTVi"), MusicMatch Inc. ("MusicMatch"), and XACT Radio LLC ("XACT"), as and for their
26 Complaint against The Recording Industry Association of America, Inc. ("RIAA"), allege as
27 follows:
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1 **NATURE OF THE ACTION**

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3 1. This is a narrow action for declaratory relief presenting, purely and simply, an issue of
4 statutory construction under the Digital Millennium Copyright Act (“DMCA”), Pub. L. No. 105-
5 304, 112 Stat. 2860 (1998). Defendant RIAA has been designated by its recording company
6 members to act as their negotiating agent, pursuant to DMCA § 114(e), for purposes of § 114
7 statutory licensing. As described below, this action has been necessitated by RIAA’s May 25,
8 2001 filing, against each of the non-DiMA plaintiffs (referred to herein collectively as the
9 “plaintiff webcasters”), of a motion in a pending Copyright Arbitration Royalty Panel (“CARP”)
10 proceeding by which RIAA seeks to strike or limit those plaintiffs’ direct cases in that CARP on
11 the ground that certain of plaintiffs’ webcasting services are not eligible for the statutory license
12 under 17 U.S.C. § 114(f).

13 2. DiMA is a trade association whose membership is comprised of more than sixty
14 companies engaged in various forms of Internet multimedia activities.

15 3. Many DiMA members and Internet companies, including the plaintiff companies,
16 have developed and implemented, among their website offerings, "webcasting" technologies
17 which provide the public with the opportunity to listen to music from literally thousands of
18 Internet "radio stations." Several DiMA members and others, employing the latest in webcasting
19 technologies, have developed Internet radio offerings that permit varying degrees of consumer
20 input in respect of the "stream" of music content made available to the public. Plaintiffs believe
21 that this form of technology – referred to herein as "consumer-influenced" radio or webcasting
22 activities – is highly desired by the public.

23 4. In fact, consumer influence in radio has existed for decades pre-dating the Internet.
24 Listeners choose what radio stations they wish to listen to based on the type of music they prefer
25 to hear; and the pre-set station buttons on most radio receivers are emblematic of the fact that
26 listeners frequently change stations to suit their musical tastes. Traditional radio programmers
27 also employ both call-in request mechanisms and computer programs to help create station
28 playlists precisely to be responsive to consumer listening preferences.

1 5. Plaintiff webcasters have commenced operations of their consumer-influenced
2 webcasting services. In addition, several other members of DiMA have developed business plans
3 contemplating and/or desire to operate websites offering the public consumer-influenced Internet
4 radio services.

5 6. These webcasting services plainly involve public performances of sound
6 recordings which are owned or controlled by RIAA's members. Prior to recent legislation, such
7 performances of sound recordings were not the subject of copyright protection at all in the United
8 States. With the enactment of the DMCA in October 1998, however, these digital radio
9 webcasting transmissions are now subject to copyright licensing. But in order to ensure that
10 webcasting offerings would not be unduly constrained by sound recording copyright owners, the
11 DMCA created a statutory licensing scheme which makes a "compulsory" license available to
12 webcasters who comply with certain eligibility requirements set forth in the DMCA. These
13 eligibility requirements, as discussed in more detail below, were designed generally to protect
14 RIAA members from the alleged risk that webcasters might digitally deliver music to consumers
15 in a manner that would diminish or impair the record labels' ability to make sales of those sound
16 recordings to the public (for example, by facilitating consumers' ability to make digital-quality
17 reproductions of RIAA member sound recordings).

18 7. Under the DMCA's statutory license provisions, webcasters may secure licenses to
19 perform sound recordings either through voluntarily negotiated arrangements with the RIAA or,
20 failing that, by accessing the statutory license. The statutory license rate(s) for webcasting have
21 yet to be established. The DMCA, however, sets forth a specific procedure, known as CARP
22 proceedings, for determining statutory license fees; and industry-wide CARP proceedings that
23 will result in the establishment of sound recording performance fees for webcasting (retroactive to
24 the effective date of the statute) are underway. In fact, the parties' written direct cases (including
25 those of the plaintiff webcasters) were filed on April 11, 2001, and the CARP panel is scheduled
26 to be convened in late July 2001. Plaintiffs do not contest the RIAA members' entitlement to fees
27 for webcasting activities – consumer-influenced and otherwise – pursuant to the DMCA statutory
28 license.

1 8. Plaintiff webcasters are exemplars of the innovative consumer-influenced
2 webcasting technologies which have been developed and which offer the public new formats for
3 listening to music online without payment of a fee (i.e., on a non-subscription basis). Generally
4 speaking, consumers who visit these services' websites may choose to listen to a wide variety of
5 different Internet radio stations. All of the plaintiff webcasters offer consumers the opportunity to
6 listen to stations whose playlists are intended to appeal, in one fashion or another, to consumers'
7 indicated musical tastes. In each case, however: the stations' programs are available to any
8 member of the public who visits the site; the services' computers emulate the role of human "disc
9 jockeys" by transmitting particular sound recordings from the programs in accordance with the
10 eligibility requirements of the DMCA statutory license (as described below); and the computers,
11 not listeners, select the songs performed from a huge library of recordings without providing
12 advance information as to when or which sound recordings will be played.

13 9. The instant declaratory judgment lawsuit has been necessitated by the RIAA's
14 stated position that consumer-influenced webcasting is not eligible for the DMCA statutory
15 license – and, instead, may be totally subject to RIAA members' discretionary licensing activities
16 and control. Plaintiffs by this action seek a declaration that the existing consumer-influenced
17 sound recording performances by plaintiff webcasters qualify for the DMCA statutory license, 17
18 U.S.C. § 114 (1998), and therefore do not infringe the copyrights of the RIAA's recording
19 company members.

20 10. Thus, the controversy underlying this action is not whether plaintiffs are willing to
21 pay for their digital online performances of copyrighted sound recordings. Plaintiff webcasters
22 consistently have made clear to the RIAA (and its members) that they intend to pay sound
23 recording copyright owners appropriate royalties associated with their webcasting activities. The
24 controversy here, instead, is whether: (i) as plaintiffs contend, the specific consumer-influenced
25 webcasting services described herein are eligible for the statutory compulsory license under the
26 DMCA, the fees for which will be determined in the industry-wide CARP proceeding referred to
27 above; or (ii) such performances are ineligible for such licenses, as RIAA contends, thereby
28 emboldening the RIAA's members to seek to withhold licenses for such sound recording

1 transmissions – which effectively would deprive the public of consumer-influenced radio
2 offerings such as those developed and implemented by plaintiff webcasters.

3 11. At issue, therefore, is whether innovative new technologies should be impeded by
4 the RIAA's conduct. Congress clearly intended by the DMCA to promote the development of
5 new technologies. As set forth below, RIAA's interpretation of the law in an effort to restrict
6 Internet music transmissions by the plaintiff webcasters and other DiMA members should be
7 rejected as inconsistent with the statutory language and scheme, the DMCA legislative history
8 and sound policy.

9 12. The need for resolution of this dispute has become acute in light of recent events.
10 Direct written cases were submitted to the Copyright Office in connection with the CARP on
11 April 11, 2001, including by plaintiff webcasters. Subsequently, at the request of defendant
12 RIAA, industry-wide discussions (conducted in California and New York) were held among
13 representatives of the RIAA and the plaintiff webcasters concerning whether a mutually-
14 acceptable agreement could be reached as to what extents of consumer influence would qualify
15 for the § 114 statutory license (and what would not). Abruptly, however, RIAA broke off such
16 discussions; and, on May 24, 2001, certain RIAA member companies commenced an action for
17 copyright infringement against plaintiff Launch, alleging that Launch's service is not eligible for
18 the statutory license under § 114 of the Copyright Act. The next day, on May 25, 2001,
19 defendant RIAA filed a motion before the Copyright Office seeking to strike all or part of the
20 direct cases of the five plaintiff webcasters, and to direct the CARP not to set a fee for each of
21 their consumer-influenced services – arguing that plaintiff webcasters are not eligible (in whole or
22 part) for the § 114 statutory license.

23 13. Accordingly, a justiciable case or controversy exists as to whether the consumer-
24 influenced webcasting activities of each of the plaintiff webcasters qualify for the DMCA
25 statutory license. Declaratory relief is necessary in order to resolve the parties' dispute as to
26 whether each plaintiff webcaster is eligible for the § 114 license. As recent developments reflect,
27 absent such relief, each plaintiff webcaster is vulnerable to infringement claims being brought
28 against it despite the fact that the controversy at hand plainly is an industry-wide issue of

1 statutory interpretation that properly should be decided in a declaratory judgment – not
2 infringement – context.

3 **JURISDICTION AND VENUE**

4 14. This is an action for a Declaratory Judgment pursuant to Sections 2201 and 2202
5 of the Judicial Code, 28 U.S.C. § § 2201 and 2202. This Court has jurisdiction over the subject
6 matter of this action under Sections 1331 and 1338 of the Judicial Code, 28 U.S.C. §§ 1331 and
7 1338, in that this action arises under the United States copyright laws, 17 U.S.C. § 101 et seq.

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

10 **INTRADISTRICT ASSIGNMENT**

11 16. Assignment to the San Francisco Division is proper pursuant to Civil L.R. 3-2,
12 because a substantial part of the events giving rise to plaintiffs' claims occurred in San Francisco.

13 **PARTIES**

14 17. DiMA is a not-for-profit corporation organized and existing under the laws of the
15 State of Delaware; its principal place of business is in Arlington, Virginia.

16 18. DiMA functions as a trade association for more than 60 different multimedia
17 companies engaged in various forms of Internet multimedia activities.

18 19. Launch Media, Inc. is a corporation organized and existing under the laws of the
19 state of Delaware; its principal place of business is in Santa Monica, California.

20 20. Listen.com, Inc. is a corporation organized and existing under the laws of the state
21 of California; its principal place of business is in San Francisco, California.

22 21. MTVi Group LLC is a limited liability corporation organized and existing under
23 the laws of the state of Delaware. MTVi's principal place of business is located in New York,
24 New York; however, its Internet webcasting service that is the subject of this case, Radio
25 Sonicnet, is based in San Francisco, California.

26 22. MusicMatch, Inc. is a corporation organized and existing under the laws of the
27 state of Washington; its principal place of business is in San Diego, California.

28

1 28. The DPSRA was enacted in response to the development of digital technology and
2 the proliferation of services capable of delivering high-quality, digital transmissions of sound
3 recordings to subscribers in their homes. The principal concern underlying the DPSRA's
4 recognition of the right of public performance in sound recordings in certain, limited
5 circumstances was that some digital transmission services, such as so-called "celestial jukebox,"
6 "pay-per-listen" or "audio-on-demand" services, might increase the potential for at-home
7 reproduction of sound recordings or otherwise impede or supplant the traditional market for the
8 sale of sound recordings by the record labels comprising RIAA's membership. H. Rep. No. 104-
9 274, at 10-15 (1995).

10 29. Generally speaking, the structure of the DPSRA legislation derived from these
11 principles and concerns. Under that legislation, most sound recording performances remained
12 outside any license requirement (e.g., all analog and audio-visual transmissions of sound
13 recordings), as such performances did not (and do not) increase the potential for at-home
14 reproduction of sound recordings or otherwise threaten or impede record sales. Instead, it
15 subjected only certain digital, audio-only transmissions to paying subscribers to a license
16 requirement. Moreover, in order to constrain the labels' market power associated with the
17 creation of this new right, the DPSRA made available to "eligible" services a statutory,
18 compulsory license from the recording companies (or their designated agent). The statutory
19 license precludes an individual copyright owner from denying a user permission to perform its
20 sound recordings, so long as the user is willing to abide by the statutory license rates and
21 eligibility requirements (which focus on minimizing the risk that consumers could make digital-
22 quality, at-home reproductions of sound recordings that could adversely affect the labels' sales of
23 such recordings to the public). Only when the user making the digital audio transmissions fails to
24 meet the criteria for the statutory license must it obtain a license from individual rights holders.

25 30. Under the DPSRA, the criteria for qualifying for the aforementioned statutory
26 licensing mechanism included, among others, the following:

- 27 (1) the transmissions must not exceed the "sound recording
28 performance complement" (which limits the number of works on a

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given album or compact disc which can be transmitted within a designated time period) (17 U.S.C. § 114(d)(2)(C)(i));

- (2) the transmitting entity must not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings to be transmitted (17 U.S.C. § 114(d)(2)(C)(ii));
- (3) the transmissions must not be part of an “interactive service” (17 U.S.C. § 114(d)(2)(A)(i)); and
- (4) the transmission of the sound recordings must include information encoded in the recording, if any, that identifies the title of the recording, the featured recording artist and related information (which requirement is for the promotional benefit of the record labels). (17 U.S.C. § 114(d)(2)(C)(ix)).

B. Digital Millennium Copyright Act of 1998

31. The DMCA took effect on October 28, 1998. Occasioned in large measure by the recent growth of digital audio transmissions over the Internet on a nonsubscription basis, the DMCA amended the DPSRA, *inter alia*, by creating a newly-licensable class of nonsubscription digital audio transmissions and by modifying the statutory license scheme to make it applicable to certain of those transmissions.

32. With respect to the newly-licensable class of nonsubscription transmissions, the DMCA expanded the statutory license to cover a subset of those transmissions, referred to as “eligible nonsubscription transmissions.” An “eligible nonsubscription transmission” is defined as a:

non-interactive, non-subscription transmission made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music related events. (17 U.S.C. § 114(j)(2) (1998)).

33. Consistent with the fundamental purpose and spirit of the 1995 DPSRA legislation, which recognized a limited sound recording performance right subject to the availability of a statutory compulsory license protecting against the potential for abuse by the

1 record labels of the new digital-audio performance right, the DMCA established substantially
2 similar criteria that “eligible nonsubscription transmissions” must meet in order to qualify for the
3 statutory license. These include, inter alia:

- 4 (1) that the transmissions not exceed the sound recording performance
5 complement (except in the case of certain retransmissions of
6 broadcast transmissions) (17 U.S.C. § 114(d)(2)(C)(i));
- 7 (2) that the transmitting entity not publish an advance program
8 schedule or make a prior announcement of specific sound
9 recordings to be transmitted – though prior announcements of
10 featured recording artists for illustrative purposes are permitted (17
11 U.S.C. § 114(d)(2)(C)(ii));
- 12 (3) that the transmitting entity not knowingly perform the sound
13 recording in a manner that is likely to cause confusion as to the
14 affiliation or sponsorship of the copyright owner or recording artist
15 (17 U.S.C. § 114(d)(2)(C)(iv));
- 16 (4) that the transmitting entity generally cooperate to prevent use of
17 “search engines” or other technology to select a particular sound
18 recording (17 U.S.C. § 114(d)(2)(C)(v));
- 19 (5) that the transmitting entity take no steps to cause or induce the
20 making of copies and, where applicable, enable any optional
21 technology which prevents copying (17 U.S.C. § 114(d)(2)(C)(vi));
22 and
- 23 (6) that the transmitting entity accommodate and not interfere with the
24 transmission of technical measures used by sound recording
25 copyright owners to identify or protect copyrighted works (so long
26 as doing so does not impose substantial costs on the transmitting
27 entity or result in a perceptible degradation of the transmission).
28 (17 U.S.C. § 114(d)(2)(C)(viii)).

22 34. Under the DPSRA, an “interactive service” (which is not entitled to the statutory
23 license) had been defined as a service that enables a consumer to receive, on request, a
24 transmission of a particular sound recording. See 17 U.S.C. §114(j)(4) (1995). The DMCA
25 expanded the definition of an “interactive service” to include certain types of services that enable
26 a member of the public “to receive a transmission of a program specially created for the
27 recipient” (in addition to services that allow the recipient to receive on request a specific
28 recording). The complete definition is as follows:

1 (7) An ‘interactive service’ is one that enables a member of the
2 public to receive a transmission of a program specially created for the
3 recipient, or on request, a transmission of a particular sound recording,
4 whether or not as part of a program, which is selected by or on behalf of
5 the recipient. The ability of individuals to request that particular sound
6 recordings be performed for reception by the public at large, or in the case
7 of a subscription service, by all subscribers of the service, does not make a
8 service interactive, if the programming on each channel of the service does
9 not substantially consist of sound recordings that are performed within 1
10 hour of the request or at a time designated by either the transmitting entity
11 or the individual making such request. If an entity offers both interactive
12 and noninteractive services (either concurrently or at different times), the
13 noninteractive component shall not be treated as part of an interactive
14 service. 17 U.S.C. § 114(j)(7) (1998).

9 35. The legislative history accompanying this provision further states:

10 The conferees intend that the phrase ‘program specially created for
11 the recipient’ be interpreted reasonably in light of the remainder of the
12 definition of ‘interactive service.’ For example, a service would be
13 interactive if it allowed a small number of individuals to request that sound
14 recordings be performed in a program specially created for that group and
15 not available to any individuals outside of that group. In contrast, a service
16 would not be interactive if it merely transmitted to a large number of
17 recipients of the service’s transmissions a program consisting of sound
18 recordings requested by a small number of those listeners. H. Rep. No.
19 105-796, at 87-88 (1998).

16 36. In sum, it is apparent from both the DMCA and the DPSRA that Congress made
17 the judgment that, if certain digital-audio performances of sound recordings might adversely and
18 significantly affect the market for sales of sound recordings, the copyright holder could be
19 permitted to preclude such performances (or dictate whatever license terms it chose for such
20 performances); whereas the judgment was made that any other digital performances of sound
21 recordings (including those having a positive promotional effect on record sales) would entitle the
22 owner of the copyright in the recording to receive fair compensation (in an amount to be
23 voluntarily negotiated or set by a CARP) – but not to dictate whether the performance could be
24 made at all. In making this determination, Congress, no doubt, considered the fact that copyrights
25 in sound recordings are controlled by a small number of huge companies.

1 C. DiMA Rulemaking Petition and Copyright Office Decision

2 37. On April 17, 2000, DiMA filed a rulemaking petition with the Copyright Office,
3 seeking clarification as to the definition of an interactive service under the DMCA. This petition
4 was precipitated by RIAA's previously-articulated position that any degree of consumer influence
5 rendered a service "interactive." DiMA by its petition sought a rulemaking that: (i) would clarify
6 that RIAA's aforesaid position was not consistent with the law, and (ii) would potentially
7 establish guidelines regarding the definition of "interactive" under the statute.
8

9 38. On December 8, 2000, after having received comments from interested parties,
10 including RIAA and DiMA, the Copyright Office issued a decision in which it declined to
11 institute a rulemaking proceeding. Significantly, the Copyright Office determined that:

- 12 • it was precisely "because" the Copyright Office agreed with DiMA that
13 "the law and the accompanying legislative history make it clear that
14 consumers can have some influence on the offerings made by a service
15 without making the service interactive [that] there is no need to amend the
16 regulations to make this point" (65 Fed. Reg. 77330, at 77332);
- 17 • a service definitively may incorporate aspects of consumer influence and
18 still not be "interactive" for statutory license purposes (id.);
- 19 • for example, "consumers may express preferences for certain music genres,
20 artists or even sound recordings without the service necessarily becoming
21 interactive" (id.);
- 22 • nevertheless, the DMCA does not "draw a bright line delineating just how
23 much input a member of the public may have" on a service's programming
24 while remaining non-interactive (id.).

25 39. The Copyright Office decision also underscored the point discussed in section IA –
26 IB above that the interactive/non-interactive distinction in the statute exists largely because of a
27 concern that "interactive services [were] most likely to have a significant impact on traditional
28 record sales." Further, it noted that the "determination [of whether a particular service is
interactive or non-interactive] must be made on a case-by-case basis after the development of a
full evidentiary record." Id. at 77332.

40. As to the question of issuing guidelines, the Copyright Office declined and stated
that it would not adopt any "new rules . . . to discern which parties" are non-interactive and thus

1 “should participate in the current [CARP] proceeding.” It further made clear its view that the
2 responsibility of the CARP panel itself “is to establish the value of the performances and set
3 appropriate rates, not to discern whether a particular service meets the eligibility requirements for
4 using the [statutory] license.” (Emphasis added). Id. at 77333.

5 D. The CARP Filings Precipitating The Need For Declaratory Relief

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7 41. Subsequent to the Copyright Office’s Rulemaking decision, the plaintiff
8 webcasters – believing that they are eligible for the § 114 statutory licenses – filed their direct
9 cases in the CARP on April 11, 2001. The RIAA, by virtue of its CARP motion filed on May
10 25th against all the plaintiff webcasters, has disputed the eligibility issue as to each plaintiff
11 webcaster. Both the RIAA and the plaintiff webcasters (and apparently the Copyright Office)
12 agree that the issue of whether or not a particular service is eligible for the statutory license falls
13 within the province of the federal courts, not the Copyright Office or a CARP. This declaratory
14 judgment action thus is necessary to resolve this fundamental threshold legal issue separately as
15 to each of the plaintiff webcasters.

16 II. Each of The Plaintiff Webcaster’s Services Is
17 Eligible For the § 114 Statutory License

18 42. Since the commencement of their respective services, plaintiff webcasters have
19 engaged in transmissions of sound recordings to members of the general public over the Internet
20 on a nonsubscription basis.

21 43. The webcasting services offered by each plaintiff webcaster are described in their
22 respective witness statements submitted in the CARP proceeding on April 11, 2001. For the
23 Court’s convenience and in lieu of detailed descriptions herein, copies of the public versions of
24 such statements are attached hereto as Exhibits 1-5.

25 44. Each of the five plaintiff webcasters separately and individually avers that its
26 respective program transmissions meet (and have met) the eligibility requirements for the DMCA
27 statutory license.
28

1 45. All of the plaintiff webcasters' consumer-influenced services share some
2 characteristics in common. At the same time, however, they each have characteristics that differ
3 as between them in manners that the Court may deem meaningful. (We refer the Court to the
4 aforementioned CARP direct case filings of each plaintiff webcaster for a full description of each
5 service).

6 46. The following characteristics, among others, are common among all the plaintiff
7 webcasters' consumer-influenced Internet radio stations; and these in-common characteristics all
8 weigh in favor of a determination that each service is eligible for the DMCA statutory license:

9 (a) The selection and order of sound recordings transmitted over
10 plaintiff webcasters' consumer-influenced stations ultimately are generated by a computer in a
11 manner designed to ensure compliance with the DMCA's statutory license provisions (e.g., the
12 transmissions do not violate the sound recording performance complement, no playlist of the
13 transmission will be made available in advance, etc.). In addition, in each case, the actual
14 transmissions on such consumer-influenced stations consist, at most, only partially of sound
15 recordings or artists resulting from direct consumer input; and they include hundreds or thousands
16 of sound recordings generated without any direct consumer input.

17
18 (b) Further, the recipients of transmissions in all cases do not determine
19 the particular sound recordings or the particular artists which become the basis of the
20 transmission; and the recipients of the transmissions have no ability to select or obtain advance
21 knowledge as to the particular songs that are streamed on the stations.

22
23 (c) Artist identification on the services is representative only. This is
24 significant since the DMCA, § 114(d)(2)(C)(ii), and its accompanying legislative history,
25 specifically state that such representative information does not render transmissions ineligible for
26 the statutory license.

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1 (d) The "skip" functionality available on each plaintiff webcaster's
2 service permits skipping ahead only; it does not permit a consumer to move backward and
3 forward between songs. Consumers can never know which song they are "skipping forward to."
4 Significantly, the legislative history cautions specifically only against a skip feature that permits
5 skipping "backward and forward," because it – unlike this skip-forward-only-feature – would
6 provide consumers with the ability to locate, and potentially record, a specific recording.
7

8 (e) In all cases, the consumer-influenced stations are available to every
9 member of the general public. This is of significance because the statutory license provisions of
10 the DMCA recognize the right of any entity to take advantage of the statutory license for the
11 purpose of making certain transmissions (other than transmissions of sound recordings "on
12 request") to the general public. As required, the consumer-influenced stations here involved are
13 made available to the general public and do not make it possible for individuals to hear particular
14 sound recordings on request.
15

16 47. While these in-common characteristics of the services all weigh in favor of a
17 finding of eligibility, the reality is that each plaintiff webcaster's service has characteristics
18 unique to it that the Court may find probative of the eligibility issue for such service. Hence it is
19 critical, as the Copyright Office recognized in its rulemaking decision, that the Court evaluate
20 each service's circumstances on a case-by-case, fact-specific basis.

21 48. When the evidence is evaluated on such a service-by-service basis, each plaintiff
22 webcaster service's transmissions properly should be viewed as "eligible nonsubscription
23 transmissions" falling within both the letter and spirit of the DMCA. Because the actual
24 transmissions of sound recordings over each of these consumer-influenced services is generated
25 by a computer, using listener input only as a guide, listeners (including those who provide input
26 to the plaintiff webcasters' consumer-influenced services) never have the ability to determine or
27 know in advance whether any particular song will be performed or even when, over an extended
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1 period, any particular artist will appear. The consumer-influenced stations thus are consistent
2 with the legislative intent underlying the DMCA statutory license structure, as there is no
3 meaningful risk that transmissions from consumer-influenced stations can be used as a means to
4 make the kind of at-home recordings which could genuinely impair the ability of the RIAA's
5 members to sell recordings to the public. Nor is there any difference in the risk of such
6 recordings being made from consumer-influenced station transmissions than is posed by other
7 types of transmissions which indisputably are eligible for the compulsory license.

8 **III. The Need for Declaratory Relief**

9
10 49. Notwithstanding the foregoing, the RIAA has taken the position that plaintiff
11 webcasters' consumer-influenced webcasting offerings are "interactive" under the DMCA, do not
12 qualify for the DMCA statutory license and, therefore, may be prohibited *in toto* by its member
13 sound recording owners. On this stated basis, RIAA broke off the industry-wide negotiations that
14 were in process seeking to arrive at an agreement on what types of consumer-influence features
15 qualify for the statutory license; and it then filed a motion before the Copyright Office seeking to
16 strike plaintiff webcasters' CARP testimony and to direct the CARP not to set a fee for plaintiff
17 webcasters' consumer-influenced services.

18 50. RIAA's course of conduct (and that of its members) thus has created a reasonable
19 apprehension that plaintiff webcasters may face copyright infringement claims if they continue
20 the current operation of their services. This apprehension has been accentuated by the fact that
21 several RIAA member companies, in fact, filed a copyright infringement suit against plaintiff
22 Launch on May 24, 2001, in the Southern District of New York.

23 51. Moreover, the spectre of infringement litigation deriving from the aforesaid
24 circumstances and events has constrained other DiMA members from continuing or implementing
25 consumer-influenced webcasting offerings to the public pending resolution of this issue. One
26 DiMA member company (Incanta, Inc.) that was the subject of the RIAA motion to strike its
27 CARP case, in fact, has chosen voluntarily to withdraw from the CARP in the aftermath of the
28 aforesaid events. DiMA believes that the declaratory relief sought herein is necessary in order to

1 clear the path for many of its member companies to offer consumer-desirable services of the
2 nature described above without fear of litigation.

3 52. An actual controversy within this Court's jurisdiction thus exists between plaintiffs
4 and RIAA, in that:

5 (a) RIAA has alleged that consumer-influenced webcasting
6 transmissions made by plaintiff webcasters are not eligible for the DMCA statutory license and
7 that the services making such transmissions have infringed upon, and continue to infringe upon,
8 its member companies' copyrights; whereas plaintiffs contend to the contrary;

9 (b) RIAA has demanded that plaintiff webcasters refrain from
10 continuing to offer their consumer-influenced webcast services unless non-statutory, voluntary
11 licenses are secured for them, and has so advised plaintiff webcasters; whereas plaintiff
12 webcasters presently operate and intend to continue to operate such services in good faith reliance
13 on the § 114 statutory license;
14

15 (c) RIAA has submitted a motion to the Copyright Office seeking to
16 preclude plaintiff webcasters from obtaining a statutory license fee for their consumer-influenced
17 services in the CARP; and

18 (d) RIAA's aforesaid conduct and threats have constrained additional
19 DiMA members from offering other consumer-influenced webcast services to the public, which
20 they otherwise could and would implement.
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FIRST CLAIM FOR RELIEF

**Declaratory Judgment that Plaintiff Launch Media, Inc.’s
LAUNCHCast Service Is Eligible For the § 114 Statutory
License and Does Not Infringe RIAA-Member Copyrights**

53. Plaintiffs hereby repeat and reallege the allegations set forth in paragraphs 1-52 inclusive of the Complaint.

54. Launch Media, Inc. operates an Internet radio offering under the name of LAUNCHCast. As described in more detail in its CARP direct case submission attached hereto as Exhibit 1, Launch’s offering includes a service that provides listeners a limited ability to provide input in station programming by indicating their preferences of artists, genres, and pre-existing radio stations. Listeners can further indicate their music preferences by rating artists, songs and/or albums as they are being streamed. The LAUNCHCast computer algorithm which generates a station’s playlist takes into consideration, among several factors, these user preferences. The station playlists are generated based on many other factors as well, including information from music programmers, random selections, aggregate user preferences and the limitations established by the DMCA statutory license performance complement. The LAUNCHCast service also includes a number of “pre-programmed” stations whose playlists are unaffected by consumer-influence features (except insofar as a listener has the ability to “skip-forward” to the next recording on the playlist, without knowing what that recording will be).

55. RIAA has asserted that the consumer-influenced service operated by Launch is not entitled to the DMCA’s statutory license and thus infringes the copyrights of RIAA’s member companies. RIAA’s position is insupportable.

56. The transmissions made by Launch’s consumer-influenced service are eligible for DMCA statutory licenses.

57. Accordingly, plaintiff Launch is entitled to a declaratory judgment that transmissions from its consumer-influenced service are eligible for the DMCA statutory license, and hence do not constitute copyright infringement.

1 **SECOND CLAIM FOR RELIEF**

2 **Declaratory Judgment that Plaintiff Listen.com, Inc.’s**
3 **Listen Radio Service Is Eligible For the § 114 Statutory**
4 **License and Does Not Infringe RIAA-Member Copyrights**

5 58. Plaintiffs hereby repeat and reallege the allegations set forth in paragraphs 1-57
6 inclusive of the Complaint.

7 59. Listen operates an Internet radio offering under the name of Listen Radio. As
8 described in more detail in its CARP direct case submission attached hereto as Exhibit 2, Listen’s
9 offering consists of a service that enables listeners initially to choose among a variety of pre-
10 programmed stations sorted principally by genre or sub-genre; listeners are then offered the
11 ability to rate the songs that are being streamed on these pre-programmed stations on a scale of
12 “1” to “10”. A computer algorithm chooses which songs are to be streamed on a given station
13 upon consideration of, among other things: the user’s ratings, information provided by
14 professional programmers (such as chart hits and new releases) and the DMCA statutory
15 complement. Although users can have a limited amount of influence on station playlists through
16 the rating process, each station remains programmed by professional programmers who
17 ultimately decide the playlist, which is then filtered by Listen’s computer algorithm (among other
18 reasons, to ensure compliance with the DMCA performance complement rules). Listeners also
19 have the ability to "skip-forward" to the next recording on the playlist, without knowing what that
20 recording will be.

21 60. RIAA has asserted that the consumer-influenced service operated by Listen is not
22 entitled to the DMCA’s statutory license and thus infringes the copyrights of RIAA’s member
23 companies. RIAA's position is insupportable.

24 61. The transmissions made by Listen’s consumer-influenced service are eligible for
25 DMCA statutory licenses.

26 62. Accordingly, plaintiff Listen is entitled to a declaratory judgment that
27 transmissions from its consumer-influenced service are eligible for the DMCA statutory license,
28 and hence do not constitute copyright infringement.

1 **THIRD CLAIM FOR RELIEF**

2 **Declaratory Judgment that Plaintiff MTVi Group LLC's**
3 **Radio Sonicnet Service Is Eligible For the § 114 Statutory**
4 **License and Does Not Infringe RIAA-Member Copyrights**

5 63. Plaintiffs hereby repeat and reallege the allegations set forth in paragraphs 1-62
6 inclusive of the Complaint.

7 64. MTVi operates an Internet radio offering under the name of Radio Sonicnet. As
8 described in more detail in its CARP direct case submission attached hereto as Exhibit 3, MTVi's
9 offering includes a service that provides listeners with the ability to have limited input concerning
10 station programming or playlists in the form of listener preferences as to genres and subgenres.
11 Consumers can further indicate their tastes by rating the artist whose works are being streamed to
12 listeners on a "0" to "5" spectrum. These genre and artist preferences are taken into account by
13 the computer algorithm that generates the playlists for the stations. The algorithm's song
14 selection process also ensures that there are far more varied artist and album sources in station
15 playlists than are required by the DMCA statutory license performance complement; playlists
16 consist of no more than two songs by any given artist for any 86-song playlist (with no more than
17 one song by any artist in the first or second half of that playlist). The Radio Sonicnet service also
18 includes a number of "pre-programmed" stations whose playlists are unaffected by consumer-
19 influence features (except insofar as a listener has the ability to "skip-forward" to the next
20 recording on the playlist, without knowing what that recording will be).

21 65. RIAA has asserted that the consumer-influenced service operated by MTVi is not
22 entitled to the DMCA's statutory license and thus infringes the copyrights of RIAA's member
23 companies. RIAA's position is insupportable.

24 66. The transmissions made by MTVi's consumer-influenced service are eligible for
25 DMCA statutory licenses.

26 67. Accordingly, plaintiff MTVi is entitled to a declaratory judgment that
27 transmissions from its consumer-influenced service are eligible for the DMCA statutory license,
28 and hence do not constitute copyright infringement.

1 **FOURTH CLAIM FOR RELIEF**

2 **Declaratory Judgment that Plaintiff MusicMatch Inc.’s**
3 **MusicMatch Radio and Radio MX Services Are Eligible For the**
4 **§ 114 Statutory License and Do Not Infringe RIAA-Member Copyrights**

5 68. Plaintiffs hereby repeat and reallege the allegations set forth in paragraphs 1-67
6 inclusive of the Complaint.

7 69. MusicMatch operates an Internet radio service under the name of MusicMatch
8 Radio. As described in more detail in its CARP direct case submission attached hereto as Exhibit
9 4, MusicMatch's offering allows users to search for and connect to its pre-defined Internet radio
10 stations by providing genre, artist, tempo or era preferences. MusicMatch's station programming
11 algorithm does not incorporate individual consumer preferences, but rather, on a strictly opt-in
12 basis, it collects music play information from millions of its users. The algorithm uses this
13 community collective wisdom to make new music recommendations as well as to program its
14 stations. The consumer's individual preferences are used as search criteria to find the appropriate
15 station. Users access the pre-programmed stations through several convenient interfaces.
16 MusicMatch Radio offers traditional genre format stations as well as special promotional stations
17 listed on a simple interface within the MusicMatch Jukebox. The "Station Match" feature allows
18 the user to choose a station by mixing genres on a “slider”. The "Artist Match" stations are
19 accessed by the user identifying between one and twenty-five preferred artists. The "My Station"
20 feature performs the same function as the "Artist Match" feature but uses a consumer’s existing
21 Jukebox play logs as the search criteria for finding a pre-programmed station that MusicMatch
22 believes would appeal to a consumer. None of the user's disclosed or play log preferences
23 influences the content of the station they connect to; they merely act as a “smart” search engine.
24 All MusicMatch stations comply with the DMCA sound recording performance complement.
25 MusicMatch Radio allows limited skipping forward to the next song, but does not allow a pause
26 or skip backward feature (and prevents a consumer from defeating the DMCA sound recording
27 performance complement rules).

28 70. MusicMatch Radio has been offered since its inception on a nonsubscription basis.
Recently, MusicMatch launched a subscription-based, non-advertising radio product known as

1 Radio MX which possesses the same characteristics as described above and similarly qualifies for
2 a statutory license under the DMCA.

3 71. RIAA has asserted that the consumer-influenced service operated by MusicMatch
4 is not entitled to the DMCA's statutory license and thus infringes the copyrights of RIAA's
5 member companies. RIAA's position is insupportable.

6 72. The transmissions made by MusicMatch's consumer-influenced service are
7 eligible for DMCA statutory licenses.

8 73. Accordingly, plaintiff MusicMatch is entitled to a declaratory judgment that
9 transmissions from its consumer-influenced service are eligible for the DMCA statutory license,
10 and hence do not constitute copyright infringement.

11 **FIFTH CLAIM FOR RELIEF**

12 **Declaratory Judgment that the XACT Radio 13 Service Is Eligible For the § 114 Statutory License and Does Not Infringe RIAA-Member Copyrights**

14 74. Plaintiffs hereby repeat and reallege the allegations set forth in paragraphs 1-73
15 inclusive of the Complaint.

16 75. XACT operates an Internet radio offering under the name of XACT Radio, which
17 provides a "business-to-business" or "B-to-B" service to pre-existing broadcast radio station
18 operators enabling them to offer variations on their broadcast station offerings via the Internet.
19 As described in more detail in its CARP direct case submission attached hereto as Exhibit 5,
20 XACT currently offers four different pre-programmed affiliate radio stations, each featuring a
21 different genre. Listeners have a limited ability to influence the playlists on these stations by
22 indicating how often they would like to hear new music and by rating a list of various genres.
23 Users can further indicate their tastes by rating the artists and/or songs as they are being streamed.
24 XACT's computer algorithm chooses which songs are to be played upon consideration of, among
25 other things: the affiliated radio station's playlist, consumer preferences and the limitations
26 established by the DMCA statutory license performance complement. Although listeners can
27 have a limited amount of influence on station playlists through the rating process, each station
28 remains entirely "pre-programmed" in those circumstances where users do not choose to use that

1 feature (except insofar as a listener has the ability to “skip-forward” to the next recording on the
2 playlist, without knowing what that recording will be).

3 76. RIAA has asserted that the consumer-influenced service operated by XACT is not
4 entitled to the DMCA’s statutory license and thus infringes the copyrights of RIAA’s member
5 companies. RIAA's position is insupportable.

6 77. The transmissions made by XACT’s consumer-influenced service are eligible for
7 DMCA statutory licenses.

8 78. Accordingly, plaintiff XACT is entitled to a declaratory judgment that
9 transmissions from its consumer-influenced service are eligible for the DMCA statutory license,
10 and hence do not constitute copyright infringement.

11 **WHEREFORE**, plaintiffs pray for relief against defendant RIAA as follows:

12 (A) for a judicial determination and declaration that, separately as to the
13 consumer-influenced services owned by each of the plaintiff webcasters listed below, its
14 transmissions are eligible for the DMCA statutory license and, hence, do not constitute copyright
15 infringement:

- 16 (1) Launch Media, Inc.
- 17 (2) Listen.com, Inc.
- 18 (3) MTVi Group LLC
- 19 (4) MusicMatch, Inc.
- 20 (5) XACT Radio LLC

21 (B) for the recovery of plaintiffs’ full costs and reasonable attorneys’ fees
22 pursuant to 17 U.S.C. § 505.4; and
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(C) for such additional and further relief, in law and equity, as may be deemed just and proper.

Dated: June 1, 2001

Respectfully submitted,
WEIL, GOTSHAL & MANGES, LLP

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