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

In The Matter Of:

Docket No. 2000-9
CARP DTRA 1 & 2

Digital Performance Right
in Sound Recordings and
Ephemeral Recordings

**MOTION TO STRIKE PRE-HEARING MEMORANDUM
OF THE RIAA OR IN THE ALTERNATIVE FOR LEAVE
TO FILE PRE-HEARING MEMORANDUM**

The parties indicated below ("Broadcasters/Webcasters"), by and through their undersigned counsel, hereby move to strike the Pre-Hearing Memorandum ("RIAA Brief") submitted by the Recording Industry Association of America, Inc. ("RIAA"), on the grounds that such submissions are not permitted by the CARP rules. In the alternative, Broadcasters/Webcasters seek leave to file their own Pre-Hearing Memorandum within 30 days of the issuance of the ruling on the instant motion.

The first volume of the RIAA's written direct case contains a "Pre-Hearing Memorandum," which consists of a legal brief setting forth RIAA's argumentative view of the statutory authority governing this proceeding and thereafter applying this biased version of the "law" to the alleged "facts" contained in the testimony and exhibit portions of the RIAA's direct case.

The RIAA Brief is neither testimony nor an exhibit; therefore, according to CARP rules it does not belong in RIAA's direct written case. The RIAA Brief has no sponsoring

witness and is not subject to cross-examination. It is merely an opening argument clearly and unabashedly designed to color the CARP's opinions before the CARP reviews any actual testimony. This type of submission is wholly inappropriate in a written direct case and barred by CARP rules, 37 CFR § 251.43 (b) and (e).

ARGUMENT

POINT I

RIAA'S PRE-HEARING MEMORANDUM MAKES IMPERMISSIBLE LEGAL ARGUMENTS WELL BEYOND THE SCOPE OF ALLOWABLE INTRODUCTORY STATEMENTS

Rule 251.43 of the CARP Rules of Procedure clearly sets forth the parameters of written direct cases. The rule provides, among other things, that a party's "written direct case shall include all testimony, including each witness's background and qualifications, along with all the exhibits to be presented." 37 C.F.R. § 251.43(b). Briefs are permitted only after the record has been closed. See 37 C.F.R. § 251.52, providing for the submission of "proposed findings of fact and conclusions, briefs, or memorandum of law . . . at such time after the record has been closed as the chairperson directs." (Emphasis added.)

Broadcasters/Webcasters recognize that, as a general matter, introductory statements can be "useful tools" for the arbitrators. Order in Docket No. 96-6 CARP NCBRA at 4 (December 9, 1997). However, RIAA's "Pre-Hearing Memorandum," as its name implies, goes far beyond providing mere "descriptions of the contents of the written direct case" and "brief summaries of the testimony." *Id.* Instead, the RIAA Brief sets forth an argumentative, partisan analysis of the statutory criteria governing this proceeding. The Brief then argues that all of RIAA's testimony "leads to the same conclusion" that the rates and terms in the license

agreements the RIAA negotiated with 25 Webcasters are representative of the rates and terms that would have been negotiated by a "willing buyer"/"willing seller." (RIAA Brief, at p.12.)

In attempting to prove that these license agreements should govern this rate setting – which is, in fact, one of the central contested legal issues of this arbitration – RIAA offers a Brief fraught with legal argument. For example, RIAA repeatedly argues that its exhibits "provide the best evidence" of what the proper rate should be. See, e.g., RIAA Brief at 1, 5. Similarly, RIAA expends almost four full pages of the Brief outlining its own biased view of the "statutory background," "statutory standard" and "statutory guidance." See RIAA Brief at 1-4; see also RIAA Brief at 6 (discussing the "Legal Framework"). Such legal argumentation is clearly inappropriate at this stage of the proceeding and should be stricken from RIAA's direct case. See, e.g., Order in Docket No. 99-3 CARP DD 95-98, at 1 (Nov. 24, 1999) (striking a rebuttal case filed at an inappropriate stage of the proceeding.)

The RIAA Brief also crosses the line in making broad-brush legal conclusions couched as "summaries" of its witnesses' testimony. For example, RIAA argues that Linda McLaughlin's testimony "shows that Mr. Altschul's experience with Warner Bros. Records is typical in the industry." RIAA Brief at 8. Similarly, RIAA argues that the testimony of Mr. Katz and Mr. Ciongoli provides an "important consideration" for deciding what a "willing seller" would accept in the marketplace. RIAA makes similar pointed conclusions in discussing the testimony of most of its witnesses. It is the CARP's role, and not RIAA's, to decide what the witnesses' testimony in fact shows. RIAA will have the opportunity to present its views as to the weight and meaning of its witnesses testimony at a later stage in the proceeding – a "Pre-Hearing Memorandum" is not the correct vehicle for RIAA to inject legal and factual argument. Thus, the RIAA Brief must be stricken.

POINT II

THE COPYRIGHT OFFICE MUST STRIKE RIAA'S ATTEMPTS TO INJECT EVIDENCE NOT SPONSORED BY A WITNESS

Additionally, the RIAA Brief must be stricken because it provides evidence unsupported by a sponsoring witness. Once again, this is clear from the plain language of the rules: "No evidence, including exhibits, may be submitted in the written direct case without a sponsoring witness, except where the CARP has taken official notice, or in the case of incorporation by reference of past records, or for good cause shown." 37 C.F.R. § 251.43(e) (1999).

Despite the clarity of this most basic premise of CARP practice and procedure, RIAA injects superlatives about its witnesses' background and experience, among other things, which go beyond the testimony of the witnesses themselves. For example, the Brief describes Mr. Altschul's employer as "one of the oldest and largest record labels in the U.S." RIAA Brief at 7. Yet nowhere in his testimony does Mr. Altschul provide this factual tidbit. RIAA also impermissibly testifies that Thomas Nagle is a "nationally-recognized expert" without the aid of a supporting witness.

Such baldly factual assertions cannot be considered without a sponsoring witness. In a prior CARP proceeding, the Copyright Office granted a motion to strike a "glossary of terms" because it did not have a sponsoring witness, stating:

It would be inappropriate for the CARP to take official notice of the glossary definitions because they are not quoted from statutes, regulations or judicial rulings, and are certainly open to interpretation. As a result the glossary of terms is testimony which requires a sponsoring witness.

Order in Docket No. 94-3 CARP-CD 90-92, at 14 (Nov. 7, 1995). Similarly, the Copyright Office has recognized that while incorporation by reference of past testimony is permissible, summaries of such prior CARP testimony constitute evidence requiring a sponsoring witness. See Order in Docket No. 94-3 CARP-CD 90-92, at 6 (Nov. 7, 1995) (granting a motion to strike a summary of prior testimony because it did not have a sponsoring witness as required by § 251.43(e)). The CARP has not taken official notice of the Brief, nor would it be appropriate for the CARP to do so since the statements in the Brief are partisan and argumentative. Without meeting any of the exceptions allowable by applicable CARP regulations or practice, RIAA's entire Brief must be stricken.

POINT III

IF THE MOTION TO STRIKE THE RIAA BRIEF IS DENIED, THE COPYRIGHT OFFICE SHOULD GRANT LEAVE TO MOVANTS TO FILE THEIR OWN PRE-HEARING MEMORANDUM

If the RIAA Brief is to remain a part of RIAA's direct case, Broadcasters/Webcasters should be granted leave to file their own Pre-Hearing Memorandum. Fundamental fairness requires that if one party is given the opportunity to include a Pre-Hearing Memorandum in their written direct case despite the CARP rules disallowing such filings, then other parties to the proceeding should be afforded the same opportunity. Furthermore, Broadcasters'/Webcasters' submission of a Pre-Hearing Memorandum would be helpful to the arbitrators by counter-balancing the one-sided arguments presented to them in the RIAA Brief.

CONCLUSION

For the foregoing reasons, Broadcasters/Webcasters request that the RIAA Brief be stricken. In the alternative, Broadcasters/Webcasters request leave to file their own Pre-Hearing Memorandum within 30 days of the issuance of the ruling on the instant motion.

Respectfully submitted,

WEIL, GOTSHAL & MANGES LLP

WILEY, REIN & FIELDING

Adam I. Cohen / AS

By: Adam I. Cohen
Mark A. Jacoby
R. Bruce Rich
Kenneth L. Steintal
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Bruce G. Joseph / AS

By: Bruce G. Joseph
Thomas Kirby
Karyn K. Ablin
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Attorneys for:

Bet.com; Comedy Central; Coolink
Broadcast Network; Echo Networks, Inc.;
Entercom Communications Corp.;
Everstream, Inc.; Incanta, Inc.; Infinity
Broadcasting Corp.; Launch Media, Inc.;
Listen.com; Live365.com; The MTVi
Group LLC; Musicmatch, Inc.; Myplay,
Inc.; Netradio Corporation; Radioactive
Media Partners, Inc.; Radiowave.com, Inc.;
Spinner Networks, Inc.; Susquehanna
Radio Corp.; Univision Online; Westwind;
Xact Radio Network LLC

Attorneys for:

Clear Channel Communications, Inc.;
National Religious Broadcasters Music
License Committee; Salem
Communications Corp.

May 25, 2001

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion To Strike Pre-Hearing Memorandum of the RIAA or in the Alternative for Leave to File Pre-Hearing Memorandum was served on May 25, 2001, via hand delivery on the following:

Arthur Levine
Finnegan, Henderson, Farabow,
Garrett & Dunner
1300 I Street, N.W.
Washington, DC 20005
*Counsel for American Federation of
Television and Radio Artists*

David R. Berz
Sandra M. Aistars
Weil Gotshal & Manges LLP
1615 L Street, N.W., Suite 700
Washington, D.C. 20036
*Counsel for the AEI Music Network;
DMX Music, Inc.*

Barry I. Slotnick
Richards & O'Neil, LLP
885 Third Avenue
New York, NY 10022
*Counsel for Association for
Independent Music*

Patricia Polach
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
*Counsel for American Federation of
Musicians of the United States and Canada*

Michele J. Woods
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
*Counsel for the Recording Industry
Association of America, Inc.*

Denise Leary
National Public Radio, Inc.
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Counsel for National Public Radio, Inc.

Shirley Stanley