

ORIGINAL

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

RECEIVED

NOV 21 2003

GENERAL COUNSEL
OF COPYRIGHT

In the Matter of

DIGITAL PERFORMANCE RIGHT IN
SOUND RECORDINGS AND
EPHEMERAL RECORDINGS

Docket No. 2002-1 CARP DTRA 3
Docket No. 2001-2 CARP DTNSRA

**SOUNDEXCHANGE MOTION
FOR DECLARATORY RULING**

SoundExchange, Inc. (“SoundExchange”) hereby requests that the Copyright Office (“Office”) confirm that – contrary to the assertions of Royalty Logic, Inc. (“RLI”) – the Small Webcaster Settlement Act of 2002, Pub. L. 107-321, 116 Stat. 2780 (“SWSA”) requires neither the general appointment of a second official Designated Agent at the behest of a single copyright owner, nor the specific appointment of RLI as a Designated Agent. SoundExchange also requests that the Office declare that the “willing buyer/willing seller” standard, which includes an administrative feasibility analysis of the proposals of the parties, is the sole standard governing the decisionmaking process of the Copyright Arbitration Royalty Panel (“CARP”) in the above-captioned case.¹

¹ The Office has the authority to issue declaratory rulings on “legal questions identified prior to the initiation of the CARP when it appears that the Panel will benefit from the Office’s guidance” and where those rulings will assist in the efficient administration of the CARP proceeding. Order of July 16, 2001, in Docket No. 2000-9 CARP DTRA 1&2.

Introduction and Summary

This proceeding concerns the license terms for eligible nonsubscription services and new subscription services for the license period 2003-2004 under the Section 112 and 114 digital performance licenses. In an effort to avoid a “Webcaster II” CARP, the overwhelming majority of licensors and licensees negotiated and reached a comprehensive agreement upon all the rates and terms to apply to that license period. However, the objection of only *one* sound recording copyright owner, Lester Chambers, to what is fundamentally only *one* license term, the designation of SoundExchange as the sole Designated Agent to collect and distribute royalties under the statutory license, has forced this CARP proceeding.

Having forced a CARP to proceed on the issue of whether Chambers’ chosen agent, RLI, should receive Designated Agent status, RLI also has sought to foreclose the proper consideration of the issue by arguing that the outcome is determined as a matter of law. RLI has argued that the CARP must appoint a second Designated Agent in addition to SoundExchange, and further, that based upon the preference expressed by Mr. Chambers, that additional agent must be RLI. *See* RLI Direct Case, Direct Testimony of Lester Chambers at 5-7; Direct Testimony of Ronald H. Gertz at 2, 4-6, 11. RLI bases its argument on the language of Section 114(g)(3) of the SWSA, 17 U.S.C. § 114(g)(3), which refers to the possibility of other “designated agent[s]” and the ability of copyright owners and performers designating such agents to avoid paying some categories of costs that may be incurred by a nonprofit designated agent, which in this case is SoundExchange. This is a fundamental legal issue affecting the entire progress of the proceeding that should be addressed by the Copyright Office in the first instance.

As the Copyright Office has previously suggested, RLI's interpretation of the SWSA is wrong. Nowhere does the SWSA mandate that this or any future CARP appoint multiple Designated Agents, let alone specify that RLI must be an agent. Through this motion, SoundExchange asks the Office to declare that Section 114(g)(3) of the SWSA, rather than requiring the appointment of additional Designated Agents when demanded by individual copyright owners and performers, merely acknowledges the possibility that multiple agents could be designated to collect and distribute royalties. Contrary to RLI's suggestions, such a ruling does not deprive any provision of the SWSA of meaning. Rather, the SWSA fully accounts for the circumstances that exist either when a second Designated Agent is appointed (as was the case in the Webcaster I proceeding due to the insistence of the webcasters and broadcasters in a settlement of terms urged by the CARP), or when copyright owners and performers appoint a common agent to act on their behalf as provided by 17 U.S.C. §§ 112(e)(2) and 114(e)(1). The Office should also declare that the requirements of the SWSA can be satisfied by the ability of copyright owners and performers to appoint a common agent to negotiate direct licenses on their behalf and to collect and distribute royalties pursuant to those direct licenses separate and apart from a nonprofit agent without having the costs of a nonprofit agent deducted from those royalties.

SoundExchange also asks the Office to declare that the sole standard applicable to the CARP's determination in this proceeding is the "willing buyer/willing seller" test: what a willing buyer and a willing seller would agree to in marketplace negotiations. 17 U.S.C. § 114(f)(2)(B). This test includes an assessment of the "feasibility" and administrative efficiency of the proposals for agents offered by the parties to the proceedings. Application of this standard in the context of statutory license terms illustrates that the wishes of one

individual copyright owner cannot be equated with the views of the “willing seller” for purposes of establishing terms that will apply to all parties operating under the statutory license, when it is clear that the vast majority of willing sellers would not accept the royalty collection and distribution system proposed by that one individual. Instead, the “willing seller” analysis must be done on a collective basis, by looking at the preferences of the vast majority of “willing sellers.” Permitting individuals to assume the role of the “willing seller” and select their own Designated Agents would lead to a chaotic and unworkable royalty collection and distribution system.

SoundExchange is not requesting that the Office resolve the ultimate issue of whether RLI should be appointed as a second Designated Agent. Instead, SoundExchange seeks a ruling from the Office that the CARP is not required as a matter of law to appoint more than one Designated Agent under the SWSA and should not blindly accept RLI’s assertion that it must be designated based upon the request of one copyright owner. Consistent with its previous statements, the Office should declare that the CARP must apply the “willing buyer/willing seller” test based on the record evidence presented in this proceeding, including taking efficiency into account, when deciding whether RLI has demonstrated, based on the request of Lester Chambers, that the standard has been met and RLI should be permitted to serve as a second Designated Agent. Part of that efficiency determination involves consideration of the wishes of the vast majority of copyright owners and performers who are the “willing sellers” in the statutory marketplace.

SoundExchange requests this ruling from the Office at the outset of the proceeding in order to provide the CARP with guidance from the Office, which has expertise in interpreting the Copyright Act. The early determination of these issues that are central to the CARP

proceeding will increase the efficiency of the CARP hearings and minimize the potential bases for appeal after SoundExchange has expended significant resources on this proceeding.

Procedural Background

The issue of the appointment of a Designated Agent has been addressed in a number of previous proceedings, including the first pre-existing services proceeding (“PES I”), the initial webcasting proceeding (“Webcaster I”), and the second pre-existing services proceeding (“PES II”). In each of these proceedings, the CARP and/or the Librarian of Congress has suggested that a single agent or collective is likely to operate the most efficient royalty collection and distribution system.

1. The PES I Proceeding.

Appointment of SoundExchange as the sole Designated Agent for the collection and distribution of royalties is consistent with Office precedent all the way back to the PES I proceeding. When Section 114 was first enacted, the Copyright Act did not provide for the designation of collectives to collect and distribute statutory license royalties.² Nevertheless, in the first proceeding under the Section 114 statutory license to establish rates and terms for preexisting subscription services from June 1, 1998 through December 31, 2001, the Librarian recognized that “designat[ing] a single entity to collect and to distribute the royalty fees creates an efficient administrative mechanism,” and he appointed RIAA to serve in that capacity.

² As the Librarian of Congress (“Librarian”) has noted, read literally, Section 114(g)(1) of the Copyright Act states that each licensee should pay each copyright owner directly. *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule and Order in Docket No. 2000-9 CARP DTRA 1&2, 67 Fed. Reg. 45240, 45266 (July 8, 2002) (“Webcaster I Librarian’s Decision”) at 45266.

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, Final Rule and Order in Docket No. 96-5 CARP DSTRA 63 Fed. Reg. 25394, 25412 (May 8, 1998) (“PES I Librarian’s Decision”).³

2. The Webcaster I Proceeding.

In the Webcaster I proceeding, the CARP and the Librarian accepted most elements of a settlement of terms that had been negotiated by the parties at the strong urging of the arbitrators in that proceeding. At the insistence of the webcasters and broadcast simulcasters, the terms settlement included both SoundExchange and RLI as Designated Agents, and appointed SoundExchange as the sole Receiving Agent. *See* Webcaster I Librarian’s Decision at 45274 (codified at 37 C.F.R. § 261.4 (a) & (b)). Nevertheless, the Librarian expressed skepticism about the “benefit of this two-tier system,” which “add[s] expense and administrative burden” contrary to the express purpose of the system. Webcaster I Librarian’s Decision at 45267 n. 46.

In the Webcaster I proceeding, both the CARP and the Librarian held that, in setting terms applicable to the statutory license, the CARP must apply the “willing buyer/willing seller” standard that appears in Section 114(f)(2)(B) of the Copyright Act: “the standard for setting . . . terms is what the willing seller and the willing buyer would have negotiated in the marketplace.” Webcaster I Librarian’s Decision at 45266; Webcaster I CARP Report at

³ In the Notice and Recordkeeping Proceeding related to the first PES case, the Copyright Office noted that “it accepted in principle” that “royalties would be best collected and distributed by a single Collective,” even though a second collective (not RLI) offered to act as the collective for copyright owners who did not wish to be represented by RIAA. *Interim Regulations on Notice and Recordkeeping for Digital Subscription Transmissions*, Docket No. RM 96-3B at 6 (July 1, 1998) (“Interim Regulations”).

128-129. In choosing SoundExchange as the Designated Agent for copyright owners who do not select an agent on their own, the CARP identified the “licensees” as the “willing buyers” and the “licensors” as the “willing sellers” in this marketplace negotiation. Webcaster I CARP Report at 134.⁴

The Librarian in the Webcaster I case held that the terms applicable to the royalty collection and distribution process had to be administratively feasible because “[t]he purpose” of the collection and distribution “process . . . is to make *prompt, efficient and fair payments* to Copyright Owners and Performers *with a minimum of expense.*” Webcaster I Librarian’s Decision at 45267 n. 46 (emphasis added). The Librarian, who was identified by the Webcaster I CARP as having particular expertise in assessing feasibility, stated that he would reject terms the CARP adopted if those terms were “not feasible.” *Id.* at 45266. The overall goal is to “*maximize administrative efficiency* for the Copyright Owners and Performers, on the one hand, and Licensees, on the other hand.” *Id.* (emphasis added).

3. The PES II Proceeding.

In the recent PES II proceeding, which was resolved by a negotiated settlement among the parties to the proceeding, the Librarian again adopted terms that appointed a single non-profit collective – SoundExchange – as the sole Designated Agent to collect and distribute all royalties paid by the PES. *Determination of Reasonable Rates and Terms for the Digital*

⁴ In the Webcaster I proceeding, the CARP and the Librarian included both copyright owners and performers within the category of “willing sellers” for purposes of choosing Designated Agents. Webcaster I Librarian’s Decision at 45267; Webcaster I CARP Report at 133-134.

Perforamnce of Sound Recordings by Preexisting Subscription Services, Final Rule in Docket No. 2001-1 CARP DSTRA2, 39837, 39840 (“PES II Librarian’s Decision”).

In reaching this decision, the Librarian rejected RLI’s objection to not being included as a second Designated Agent for lack of standing. The Librarian reiterated his “skepticism about the benefit of the two-tier structure involving a Receiving Agent and more than one Designated Agent, which adds expense and administrative burdens to a process the purpose of which is to make prompt, efficient, and fair payments of royalties to copyright owners and performers with a minimum of expense.” *Id.* at 39839 n. 2.

In his PES II decision, the Librarian also rejected RLI’s legal arguments with respect to the SWSA, which in 2002 modified section 114(g) of the Copyright Act to provide that, for certain specified activities,

[a] nonprofit agent designated to distribute receipts from [the relevant statutory licenses] may deduct from its receipts, prior to the distribution of such receipts to any person or entity entitled thereto other than c o p y r i g h t o w n e r s a n d p e r f o r m e r s w h o h a v e e l e c t e d t o r e c e i v e r o y a l t i e s f r o m a n o t h e r d e s i g n a t e d a g e n t . . . t h e r e a s o n a b l e c o s t s o f s u c h a g e n t s i n c u r r e d a f t e r N o v e m b e r 1, 1995.

17 U.S.C. § 114(g)(3).

RLI asserted that this provision in SWSA provides copyright owners and performers with “the absolute right to choose a Designated Agent other than SoundExchange,” and mandated the designation of RLI as an additional Designated Agent. Comments of Royalty Logic, Inc. Objecting to Proposed Terms at 8 (submitted on March 3, 2003 in Docket No. 2001-1 CARP DSTRA 2). In approving SoundExchange as the sole Designated Agent for the PES statutory license, the Librarian squarely rejected RLI’s arguments:

The fact that more than one entity could serve as Designated Agents does not mean that there necessarily ought to be more

than one Designated Agent. . . . The fact that Congress has recognized that there have been and may continue to be more than one Designated Agent does not mean that this is a necessary or even a desirable outcome.

PES II Librarian's Decision at 39839 (footnote omitted).

The Librarian noted that “[o]n the other hand, it *could be* that [SWSA was intended] to give copyright owners and performers a means to avoid being subject to recoupment of SoundExchange’s litigation and other costs.” *Id.* at 39840 (emphasis added). However, even if this were the case, it would not lead to the conclusion that RLI or any other entity *must*, as a matter of law, be granted Designated Agent status under the terms set by this CARP or any regulations established by the Copyright Office. As the Librarian also noted, Sections 112 and 114 authorize copyright owners and performers to designate “common agents to negotiate, agree to, pay, or receive royalty payments” and that “it is plausible” that, by designating a common agent for these purposes, copyright owners and performers could “limit the costs of such agents to those specified in section 114(g)(4).” *Id.* at 39840 n. 4.

Discussion

1. The Small Webcaster Settlement Act Does Not Require the Appointment of RLI as a Designated Agent.

SoundExchange requests that, consistent with its prior rulings, the Office declare that the SWSA requires neither the existence of multiple Designated Agents nor the appointment of RLI as a second Designated Agent in this case. The CARP must make its determination based upon the record evidence presented by the parties, including the extensive evidence from SoundExchange about the greater efficiency and lower costs of SoundExchange as the single Designated Agent, and the infeasibility of multiple collectives.

RLI and Mr. Chambers have both asserted that the SWSA requires that RLI be appointed as a Designated Agent, even if only one copyright owner participating in this proceeding seeks that result. The Librarian has properly rejected these arguments. “The fact that more than one entity could serve as Designated Agents does not mean that there necessarily ought to be more than one Designated Agent.” PES II Librarian’s Decision at 39839. As discussed below, when the appointment of an additional Designated Agent is either arbitrary or infeasible (or both) under the facts and circumstances presented, the CARP and the Librarian remain free to reject the appointment. *See* Webcaster I Librarian’s Decision at 45266.

If RLI’s theory were a correct interpretation of the SWSA, a logical consequence could be that each copyright owner and performer entitled to statutory royalties would have an absolute right to have his or her own agent recognized as a Designated Agent for the purpose of collecting and distributing statutory royalties, creating a royalty system where there could be as many Designated Agents as there are royalty recipients. This potential outcome has no basis in statutory language and indicates the absurdity of the argument that the SWSA mandates the designation of a Designated Agent selected by an individual copyright owner and performer as a matter of law.

The CARP need not be concerned that a decision to appoint SoundExchange as the sole Designated Agent would deprive Lester Chambers or any other individual of the ability to use RLI’s services. As the Librarian noted in his PES II Decision, Sections 112 and 114 authorized copyright owners and performers to designate “common agents to negotiate, agree to, pay, or receive royalty payments” and that “it is plausible” that, by designating a common agent for these purposes, copyright owners and performers could “limit the costs of such

agents to those specified in section 114(g)(4).” PES II Librarian’s Decision at 39840 n. 4, *citing* 17 U.S.C. § 114(e)(1) (“Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and *may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.*”) (emphasis added).

Thus, copyright owners and performers who seek an alternative to SoundExchange may appoint RLI (or presumably anyone else) as their common agent,⁵ and have that common agent negotiate direct licenses with licensees on their behalf, and collect and distribute royalties under those direct licenses.⁶ With regard to those royalties, the copyright owners and performers who appoint RLI would be subject to the deduction only of the costs to which they agreed with RLI.

⁵ SoundExchange has frequently acted as a common agent, and indeed has that status again for some purposes while this proceeding is pending.

⁶ Unlike RLI’s proposal simply to distribute royalties pursuant to statutory license rates that have been established by SoundExchange through negotiation and litigation, common agents who participate in licensing works as well as collecting and distributing royalties to their members would be providing the whole range of activities that constitutes true competition with the activities of SoundExchange.

2. Application of the Willing Buyer/Willing Seller Standard Including Its Feasibility Component Does Not Support Appointment of an Additional Designated Agent to Accommodate Lester Chambers.

A. RLI's Request to Be Appointed a Designated Agent Must Be Reviewed Under the Willing Buyer/Willing Seller Standard.

SoundExchange also requests that the Office reiterate that the legal standard applicable to setting terms applicable to the statutory license is the “willing buyer/willing seller” standard that appears in Section 114(f)(2)(B) of the Copyright Act: “the standard for setting . . . terms is what the willing seller and the willing buyer would have negotiated in the marketplace.” Webcaster I Librarian’s Decision at 45266; Webcaster I CARP Report at 128-129. *See* 17 U.S.C. § 114(f)(2)(B) (“In establishing . . . terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish . . . terms that most clearly represent the . . . terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”). In addition, the Office should declare that the willing buyer/willing seller analysis in a proceeding to set terms for a statutory license for performances of sound recordings that come within its terms cannot focus solely on the views of a single copyright owner in the face of the contradictory views of the vast majority of such owners.

RLI appears to agree that the willing buyer/willing seller marketplace analysis applies to the terms at issue in this proceeding. RLI, however, appears to have the mistaken view that *one individual licensor* – Lester Chambers – may be treated as the “willing seller” for purposes of the marketplace analysis to set terms for the *statutory* license. When the CARP in the Webcaster I case identified the “licensees” as the “willing buyers” and the “licensors” as the “willing sellers” in marketplace negotiations over terms, Webcaster I CARP Report at 134, the CARP was discussing the “willing sellers” as a group. *Id.* The CARP certainly did not

suggest that each individual licensor would be treated as a separate “willing seller” for purposes of analyzing the statutory license marketplace and the possible appointment of additional Designated Agents, and the Librarian has expressly acknowledged the inefficiency of such an approach. “Read literally, section 114 appears to require that Services pay the statutory royalties to each Copyright Owner. As a practical matter, it would be impractical for a Service to identify, locate and pay each individual Copyright Owner whose works it is performed.” Webcaster I Librarian’s Decision at 45266. RLI’s proposal would result in an extremely chaotic marketplace with the appointment of numerous Designated Agents – potentially as many as one per royalty recipient – as its logical consequence.

B. The Willing Buyer/Willing Seller Test Requires a Feasibility Analysis.

SoundExchange requests that the Office declare that the CARP must find that the royalty collection and distribution system it recommends is feasible and represents a system that would most likely have been negotiated between willing buyers and willing sellers in the marketplace. Administrative feasibility and efficiency are key elements in determining the system that the vast majority of “willing sellers” – the copyright owners and performers represented by SoundExchange – would accept in marketplace negotiations. Now that the Librarian has made the criterion of feasibility explicit, Webcaster I Librarian’s Decision at 45266, the CARP must combine that analysis with the rest of its marketplace analysis, especially where, as here, a party such as SoundExchange has provided extensive evidence about the increased costs and inefficiencies of having multiple entities collect and distribute statutory royalties.

The CARP should consider in its marketplace analysis evidence presented by SoundExchange demonstrating that it would not be feasible for Mr. Chambers, as an

individual, to be treated as a “willing seller,” with the ability to force the appointment of an additional Designated Agent of his choice, rather than permitting RLI to avoid this analysis by arguing that an additional Designated Agent must be appointed as a matter of law. In effect, RLI has attempted to correct its own lack of standing to participate in the proceeding, *cf.* PES II Librarian’s Decision at 39839, by finding *one* copyright owner/performer, Lester Chambers, to request that RLI be granted Designated Agent status for purposes of the eligible nonsubscription services and new subscription services statutory licenses. But while Mr. Chambers’ request may solve RLI’s standing problem, it fails to address the additional administrative feasibility criterion that the Librarian has emphasized. *See, e.g.,* Webcaster I Librarian’s Decision at 45266 (emphasis added) (Librarian would reject terms that were “either arbitrary *or not feasible.*”)

RLI’s suggestion that another Designated Agent must be appointed as a matter of law, without the requisite feasibility analysis, should be rejected. SoundExchange should have the ability to demonstrate based on record evidence presented within the proper legal framework that the appointment of RLI as a second Designated Agent – or many Designated Agents to accommodate each individual copyright owner who wants to appoint an agent – would greatly complicate the royalty collection and distribution process, at significantly increased cost, to the point where such a designation would not be administratively feasible, especially on behalf of

one copyright owner.⁷ As part of the marketplace analysis, the CARP should consider all record evidence regarding the infeasibility of adding one additional Designated Agent – or, even worse, many Designated Agents – and how such designations would adversely impact the copyright owners and performers entitled to statutory royalties. The CARP should also consider record evidence demonstrating the infeasibility of RLI’s proposal to insert a third party escrow agent into a two-tier royalty collection and distribution process as the Receiving Agent.

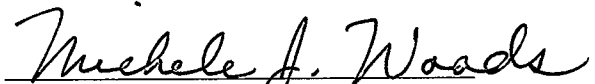
Furthermore, SoundExchange should have the opportunity to demonstrate that it would be arbitrary to require designation of RLI as a Designated Agent and the resulting cost increases in the circumstance where they are sought by one lone copyright owner/performer. The CARP should be free to weigh and consider this evidence on its merits, and to rule accordingly, without regard to RLI’s attempt to mandate as a matter of law its own appointment as a second Designated Agent based on a flawed interpretation of the SWSA.

⁷ While this proceeding involves a request by RLI to be appointed as a second Designated Agent at the request of Lester Chambers, the decision in this proceeding could have far-reaching consequences. If RLI’s argument that individual copyright owners and performers can name their own Designated Agents is accepted, numerous copyright owners and performers could seek to have a Designated Agent of their choosing authorized by the Librarian in future proceedings. Rejecting such efforts at some later date could be difficult if feasibility issues are not addressed in this proceeding.

Conclusion

In order to assist in the orderly administration of this CARP proceeding, SoundExchange respectfully requests that the Office declare 1) that the SWSA requires neither the general appointment of multiple Designated Agents nor the specific appointment of RLI as a Designated Agent at the behest of Mr. Chambers; 2) that the marketplace willing buyer/willing seller standard governs the adoption of terms in CARP proceedings; and 3) that an administrative feasibility analysis should be applied by the CARP as a component of that marketplace standard.

Respectfully submitted,

By: 

Ronald A. Schechter
Michele J. Woods
Michele T. Dunlop
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20006
(202) 942-5000
(202) 942-5999 (fax)


Counsel for SoundExchange, Inc.

November 21, 2003

CERTIFICATE OF SERVICE
Docket No. 2002-1 CARP DTRA3
Docket No. 2001-2 CARP DTNSRA

I hereby certify that a copy of the foregoing SoundExchange Motion was sent on November 21, 2003, by hand delivery, to the following party:

Seth Greenstein
McDermott, Will & Emery
600 Thirteenth Street, N.W.
Washington, DC 20005-3096

A handwritten signature in black ink, appearing to read 'KH', is written above a horizontal line.

Kevin Hough