Before the
LIBRARY OF CONGRESS
UNITED STATES COPYRIGHT OFFICE
Washington, DC

In the Matter of Digital Performance Right in Sound Recordings Rate Adjustment Proceeding	Docket No. 2001-1 CARP DSTRA 2

OPPOSITION TO SUPPLEMENTAL COMMENTS OF ROYALTY LOGIC, INC. OBJECTING TO PROPOSED TERMS

The Recording Industry Association of America, Inc. ("RIAA") opposes the Supplemental Comments Objecting to Proposed Terms filed by Royalty Logic, Inc. ("RLI") (the "Late Comments") on March 26, 2003, more than three weeks after the March 3, 2003 deadline for responding to the Copyright Office's Notice of Proposed Rulemaking ("NPRM"), which requested comments on a proposed settlement of the above-referenced proceeding with respect to the rates and terms to be established for the three preexisting subscription services. See 68 Fed. Reg. 4744 (Jan. 30, 2003).

DISCUSSION

I. RLI'S CONTINUED FAILURE TO IDENTIFY THE PARTIES COVERED BY ITS JOINT NOTICE OF INTENT PRECLUDES IT FROM PARTICIPATION

According to the NPRM, "any party who objects to the proposed rates and terms . . . must file a written objection with the Copyright Office and an accompanying Notice of Intent to Participate, if the party has not done so already." 68 Fed. Reg. 4744, 4745. Pursuant to a separate request for notices of intent to participate in this proceeding, published by the Copyright Office on November 20, 2001, "a joint Notice shall provide

the full name, address, telephone number and facsimile number (if any) of the person filing the Notice and it *shall contain a list identifying all parties to the joint Notice.*" 66 Fed. Reg. 58180, 58181 (emphasis added).

Given that RLI has no direct claim to any statutory royalties as it is neither a copyright owner nor a performer, its choice to participate in this proceeding is solely as an agent for copyright owners and performers who are entitled to receive statutory royalties. As such, its notice must be regarded as a joint notice and must comply with the joint notice rules set forth above. Cf. Order in Docket No. 2000-2 CARP CD 93-97 at 6 (June 22, 2000) (concluding that a claim filed in a royalty distribution proceeding on behalf of several copyright owners was a joint claim, not an individual claim, and had to meet the filing requirements for a joint claim); accord Order in Docket No. 2000-2 CARP CD 93-97 (Dec. 26, 2001), 66 Fed. Reg. 66433, 66438. Yet, RLI has failed to include the required list of parties on at least three separate occasions: (1) with the late-filed notice of intent to participate in this proceeding that it delivered to the Copyright Office on January 17, 2003; (2) with the notice of intent to participate that accompanied the comments it filed on March 3, 2003 in response to the NPRM ("RLI's Initial Comments"); and (3) with the notice of intent to participate that accompanied its Late Comments. Cf. Notice of Intent to Participate and Comments filed by RIAA and SoundExchange on December 20, 2001 (which was accompanied by an RIAA member roster and a list of all SoundExchange copyright owner members).

As of the date of this filing, RIAA is still unaware of a single copyright owner or performer that is represented by RLI. Although the Late Comments purport to include a list of copyright owners and performers that have recently decided to "affiliate" with RLI,

the Late Comments – when read closely – still fail to name a single copyright owner or performer that RLI represents. Indeed, the only passage in the Late Comments that "names names" is the first bullet-point on page 2, which states that RLI affiliates include "*copyright owners* of performances by Billboard-charted performers . . ." (emphasis added). That bullet-point goes on to list the names of various artists who, at some point in their careers, are or were associated with those unnamed copyright owners; however, it does not state that those unnamed copyright owners own any rights in the sound recordings that charted in Billboard nor does it state that RLI represents the Billboard-charted performers, despite RLI's attempt to suggest one or both of those conclusions. The other two bullet-points on page 2 fail to include any specifics whatsoever.[1]

RLI's failure to identify the actual copyright owners and performers on whose behalf it filed its joint notice of intent to participate in this proceeding violates the plain language of the Copyright Office's November 20, 2001 notice. As the Copyright Office is well aware, the requirement that joint notices list the parties covered by that notice is more than a procedural technicality; it is intended to ensure that all parties to a proceeding have sufficient notice regarding the identities of the parties that are covered by the joint notice and to permit opposing parties to determine whether a notice has been timely filed on behalf of each party that intends to participate in the proceeding. See June 22, 2000 Order in Docket No. 2000-2 CARP CD 93-97 at 9; cf. December 26, 2001 Order in Docket No. 2000-2 CARP CD 93-97, 66 Fed. Reg. 66433, 66434 (concerns with one of the parties' compliance with the rule requiring "that all claimants to a joint claim

[1] RIAA also notes that not a single copyright owner or performer, nor RLI acting as agent for any copyright owner or performer, has notified SoundExchange to date that RLI is a Designated Agent for the purposes of distributing statutory royalties paid by the eligible nonsubscription transmission services. See 37 C.F.R. 261.4(c).

be identified on the claim as filed with the Office" were among the factors that caused the Librarian of Congress to reject the initial report submitted by the CARP in a Phase II distribution proceeding for the program supplier category for the year 1997 and remand it to the CARP for additional proceedings; other concerns led the Librarian to reject the revised report submitted by the CARP and to remand the case to a new CARP for a new proceeding).

RLI's Late Comments, like its previous submissions in this proceeding, fail to comply with the plain requirements of the notice and should be rejected. Because RLI has already made three unsuccessful attempts to satisfy the notice requirements, it should not be given any further opportunity to cure the deficiencies in its notice(s).

II. RLI HAS FAILED TO ESTABLISH THAT IT HAS A "SIGNIFICANT INTEREST" IN THIS PROCEEDING

According to the NPRM, the Librarian of Congress may adopt the rates and terms in the proposed settlement without convening a CARP "unless there is an objection from a person with a *significant interest* in the proceeding who is prepared and eligible to participate in a CARP proceeding, the purpose of which is to adopt rates and terms for preexisting subscription services . . . ." 68 Fed. Reg. 4744, 4745 (emphasis added). Accord S. Rep. No. 104-128 at 29 (1995) ("if no opposing comment is received from a party with a substantial interest and an intent to participate in an arbitration proceeding, the Librarian of Congress should adopt the rates embodied in the [voluntary] agreement without convening an arbitration panel") quoted at 68 Fed. Reg. 4744, 4745; see also 37 C.F.R. § 251.63(b).

Although RIAA is unaware of any previous ruling from the Copyright Office interpreting the phrase "significant interest",[2] common sense dictates that a party purporting to have a "significant interest" in a royalty adjustment proceeding must have more than a *de minimis* interest in the royalties at stake in the proceeding. Moreover, basic notions of due process require a party purporting to have a "significant interest" in a rate adjustment proceeding to recite the facts upon which it claims to have such an interest and, if necessary, to produce evidence to support its claims. Otherwise, the Copyright Office is left with no basis upon which to assess the filing party's claim of a significant interest, and adverse parties are left with no ability to challenge the level of the filing party's interest in the proceeding short of participating in a full-blown arbitration.

RIAA submits that RLI bears the burden of establishing its "significant interest" in this proceeding and that RLI has repeatedly failed to meet this burden by not producing a list of the copyright owners or performers it purports to represent. Accordingly, the Office should conclude that RLI does not have a significant interest in this proceeding and reject its opposition to the parties' proposed settlement.

If RLI is permitted to disrupt the parties' voluntary settlement without first establishing that it has a significant interest in the rate adjustment proceeding, then the Copyright Office would be permitting RLI to force the settling parties into an extremely expensive, time-consuming and unwanted arbitration proceeding that could do serious

[2] RLI's reliance on the Copyright Office's June 21, 2000 Order in Docket No. 99-6 CARP DTRA is misplaced. The issue addressed there was the distinction between a party, such as a copyright owner, with a "specific" interest in the royalty fees to be established by a CARP and a party, such as a streaming technology provider that is not itself making digital audio transmissions under a statutory license, with a more general interest in those fees. The Order did not address the meaning of the phrase "significant interest" nor was it concerned with a situation where a party who did not file a timely notice of intent to participate in a proceeding was attempting to force the parties to a voluntary settlement into a CARP.

damage to one or more of the settling parties' economic interests. Moreover, the Copyright Office would be paving the way for anyone who merely alleges that it has a significant interest in a proceeding to object to a voluntary settlement and force the parties into a CARP. Such an outcome not only defies common sense, it would be in direct contravention of the Congressional policy favoring voluntary settlements. See Order in Docket No. 2000-9 CARP DTRA 1&2 at 1 (Dec. 20, 2001) ("There can be no doubt that sections 112 and 114 – and the entire compulsory license process – are designed to encourage the parties to negotiate rates for the compulsory licenses and to effectuate settlements reached by the parties.").

If the Office permits RLI to force the settling parties into a CARP, then there is a significant risk that the entire settlement will unravel and the parties will be forced to arbitrate the rates, notwithstanding the fact that RLI has expressly disclaimed any objection to the rates negotiated by the parties. Even if RLI is permitted to force the parties into a CARP that is narrowly focused on the issue of designated agents (which RIAA believes is impermissible, as described more fully in Section III below), this would set a dangerous precedent whereby any party, regardless of how small its and/or its members' or affiliates' (if any) aggregate royalty share is, would be permitted to seek designated agent status.

If the Copyright Office intends to recognize as designated agents all parties that request such designation, without requiring such parties to make any threshold showing whatsoever, then the number of designated agents entitled to a small share of the overall royalty pool is likely to proliferate. Should this occur, it would make the distribution system much more costly and less efficient for all involved and would defeat the very

purpose intended to be served by a statutory license – to minimize transaction costs in order to maximize distributions to copyright owners and performers. Moreover, the burdens and costs of allocating royalties to multiple small collectives could be such that SoundExchange could no longer afford to act as the receiving agent or would only be able to do so at great cost to the copyright owners and performers for whom the royalties are intended. The cost of allocating royalties to multiple small collectives would be amplified if statutory licensees are not required to provide SoundExchange with data on each sound recording performed that is adequate to permit SoundExchange to quickly and efficiently allocate royalties to the proper collective. Under these circumstances, copyright owners and performers might be better off if statutory licensees were required to pay each of them directly.

III. RLI MAY NOT FORCE THE SETTLING PARTIES INTO A CARP UNLESS RLI INTENDS TO FILE A DIRECT CASE, ACCOMPANIED BY A RATE REQUEST

Another problem with RLI's Late Comments – which RIAA has identified in previous filings – is that RLI still "object[s] to the proposed settlement [only] insofar as it would fail to designate RLI for the collection and distribution of statutory license royalties for the pre-existing subscription services." Late Comments at 1; see also RLI's Initial Comments at 1 ("RLI raises no objection to the rates agreed to by the parties. Specifically, RLI objects to proposed regulations for § 260.3(d)-(f)."). To the extent that RLI is not intending to file either a direct case or a rate request, its objection flies in the face of unambiguous Copyright Office regulations and prior Copyright Office rulings. See 37 C.F.R. § 251.43(a) ("[a]ll parties who have filed a notice of intent to participate in the hearing *shall* file written direct cases with the Copyright Office . . ."); 37 C.F.R.

§ 251.43(d) ("[i]n the case of a rate adjustment proceeding, each party *must* state its requested rate.") (emphases added); see also April 23, 2001 Order in Docket No. 2000-9 CARP DTRA 1&2 (dismissing forty-two parties to the Webcasting CARP for failing to file written direct cases); March 16, 2001 Order in Docket No. 2000-9 CARP DTRA 1&2 at 2 (noting that parties that do not file written direct cases are required to be dismissed from the proceeding). RIAA is unaware of any precedent that would permit the Office to commence a CARP on a limited basis as RLI has requested.

In the view of RIAA, the NPRM, along with Copyright Office regulations and decisions and Congressional intent all require a party that wishes to object to the rates and terms set forth in a proposed settlement agreement to arbitrate the entire subject of the settlement; such a party may not arbitrate – or force others to arbitrate – selected terms on a piecemeal basis. For this reason alone, the Copyright Office should reject RLI's objections to the proposed settlement agreement.

IV. RLI'S LATEST FILING SHOULD BE REJECTED BECAUSE IT IS MORE THAN THREE WEEKS LATE

Even if the Late Comments had included an actual list of parties that are represented by RLI in this proceeding, RIAA would be urging the Copyright Office to reject the Late Comments for lack of timeliness. The Late Comments were filed more than three weeks after the March 3, 2003 deadline for comments responding to the NPRM. As the Copyright Office is well aware, this is not the first time in this proceeding that RLI has made a required filing after the deadline. If the Copyright Office does not reject these late filings, RLI will continue to flout the rules and continue to interfere with the orderly administration and resolution of this and other Section 112 and 114 rate adjustment proceedings.

This is not a situation where RLI can claim that it was unaware of or inadvertently overlooked the March 3 filing deadline; after all, RLI's Initial Comments were filed in a timely manner on the day such comments were due. Nor is this a situation where an inexperienced *pro se* party failed to grasp the intricacies of Copyright Office procedure; to the contrary, RLI is represented by competent counsel with experience in Copyright Office proceedings.

Given the above, RIAA does not understand why RLI's filings with the Copyright Office are habitually late. To the extent that RLI seeks to excuse the delay in identifying its affiliates by citing difficulties in its recruitment efforts, RIAA submits that RLI has had almost eighteen months to recruit affiliates.[3] It is always possible that with more time RLI could recruit (more) affiliates, but the efficient administration of this proceeding requires that filing deadlines be established and that parties and potential parties adhere to those deadlines.

For RIAA, RLI's habitual lateness continues to cast doubt on its claim that allowing it to participate in the royalty distribution process would add efficiency to the system. Indeed, as RIAA has previously observed:

> if RLI were serious about representing copyright owners and performers – and were truly efficient and capable – it would have made it its business to know when and what to file in the relevant rate proceedings, and it would be expected to make such filings in a timely manner. In fact, RLI has

[3] As noted in Copyright Owners' and Performers' Joint Opposition to Motion to Permit Late Filing Of Notice Of Intent To Participate (Jan 29, 2003) at 7, Ron Gertz, the President and CEO of Music Reports Inc., the corporate parent of RLI, went public with his "proposal for RLI to be authorized as an alternative designated agent" to SoundExchange on October 4, 2001, when he provided written testimony as a rebuttal witness for webcasters and broadcasters seeking lower rates (and not copyright owners or performers) in the Webcaster CARP. See Written Rebuttal Testimony of Ron Gertz at 5, Rebuttal Case of the Broadcasters, Webcasters & Background Music Services, Vol. 2 of 3, in Docket No. 2000-9 CARP DTRA 1&2. On October 15, 2001, Mr. Gertz again expressed his desire for RLI to serve as a competing collective to SoundExchange when he testified on rebuttal before the arbitrators in the Webcaster CARP.

> failed to represent copyright owners and performers at every opportunity, going so far as to appear as a rebuttal witness on behalf of the eligible nonsubscription transmission services in the Webcaster CARP.

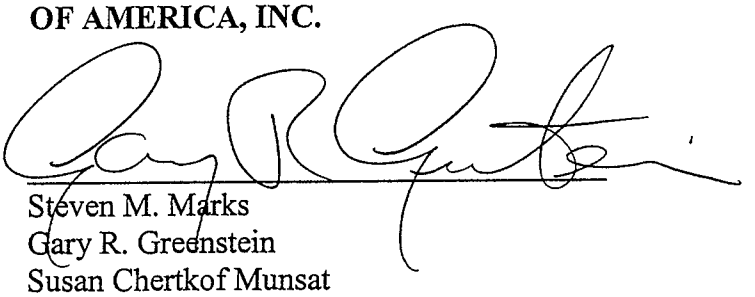
Joint Opposition to Motion to Permit Late Filing of Notice of Intent to Participate at 8-9 (filed January 29, 2003).

CONCLUSION

For all of the reasons set forth above, RIAA urges the Copyright Office to reject (i) RLI's Late Comments; (ii) RLI's noncompliant notice of intent to participate in the proceeding; (iii) RLI's Initial Comments objecting to the parties' proposed settlement; and (iv) RLI's request to convene a CARP on a limited basis. To do otherwise would effectively allow an entity with no direct interest in either paying or receiving royalties, and that has otherwise failed to establish a "significant interest" in the proceeding, to force the settling parties into a costly, time-consuming and unwanted arbitration.

Respectfully submitted,

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.



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April 4, 2003

CERTIFICATE OF SERVICE

I, Edward Hahn, of the Recording Industry Association of America, Inc., hereby certify that the foregoing Opposition to Supplemental Comments of Royalty Logic, Inc. Objecting To Proposed Terms was served on April 4, 2003 by facsimile transmission and first class U.S. Mail, postage-prepaid, on the following individuals:

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