

In the Matter of

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

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} Docket No. 2000-9 CARP DTRA 1&2
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LIBRARY
OF
CONGRESS

ORDER

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The Recording Industry Association of America, Inc. ("RIAA") and the Association for Independent Music (collectively, "Copyright Owners"), together with the American Federation of Television and Radio Artists and the American Federation of Musicians of the United States and Canada (collectively, "Performers") filed a motion seeking a clarification of the Librarian's final order in the proceeding setting the rates and terms for subscription digital audio services. See, 63 FR 25394 (May 8, 1998). Oppositions and replies were filed to this motion.

Copyright
Arbitration
Royalty
Panels

In 1998, the Librarian issued an order setting rates and terms for the transmission of sound recordings made by subscription services under the section 114 license. *Determination of reasonable rates and terms for the digital performance of sound recordings*, 63 FR 25394 (May 8, 1998). The Copyright Owners and Performers reject the Services'¹ current position that the CARP is **required** to use musical work fees, relied upon in the earlier proceeding, as the upper benchmark for setting the royalty rates that public broadcasters must pay when they webcast sound recordings. Motion at 1-2. The Copyright Owners and Performers argue that a CARP is not bound by the prior determinations of a CARP or the Librarian so long as there is a reasoned basis for departing from a prior ruling. In support of their position, Copyright Owners and Performers reference two prior CARP proceedings where the Librarian upheld the CARP's decision to deviate from prior precedent. See 61 FR 55653, 55658 (1996) (affirming the CARP's determination not to consider the harm to a claimant when its works are retransmitted by a cable system); 63 FR 25394, 25402 (May 8, 1998) (finding the CARP's failure to rely on past CRT precedent arbitrary because it failed to set forth a rationale for its deviation from past precedent).

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Copyright Owners and Performers also cite numerous passages from the Register's May 8, 1998, recommendation to illustrate the fact that the Register did not proclaim the musical work fees as the upper limit on the royalty fees that copyright owners of the sound recordings can receive for transmissions of their works. The first emphasizes the qualification that the Register's recommendation was based on a review of the record evidence in this proceeding. The others highlight the lack of sufficient record evidence upon which a determination could be made as to the relative value of the sound recordings and the musical works and the fact that the Register did not base her recommendation solely upon these fees. The Copyright Owners and Performers also rely

¹ The "Services" are: National Public Radio, Inc.; Bet.com; Comedy Central; Coollink Broadcast Network; Echo Networks, Inc.; Entercom Communications Corp.; Everstream, Inc. (has since withdrawn from the proceeding); Infinity Broadcasting Corp.; Launch Media, Inc.; Listen.com; Live365.com; The MTVi Group LLC; Musicmatch, Inc.; Myplay, Inc.; Netradio Corp.; Radioactive Media Partners, Inc.; Radiowave.com, Inc.; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind; Xact Radio Network LLC; Clear Channel Communications, Inc.; National Religious Broadcasters Music License Committee; Salem Communications Corp.; AEI Music Network, Inc.; and DMX Music, Inc.

upon the fact that the final royalty rate was calculated to achieve the specific policy objectives set forth in section 801(b)(1) rather than reflect a marketplace value for the performance of the sound recordings.

The Services filed an opposition to this motion, arguing that (1) the Library has no authority to issue a declaratory ruling; (2) the relief sought is contrary to law, and (3) the motion is without merit on the substance. Opposition at 1-2. Citing section 802(c) of the Copyright Act, the Services cite the statutory requirement that the CARP must act on the basis of prior CARP and Librarian determinations. They contend that Copyright Owners and Performers are merely trying to avoid the application of a relevant precedent which, if adopted, would have devastating consequences for their case.

The opposition suggests that if the motion were granted, it would decide the merits of certain issues properly placed before the CARP. Such action, they argue, is beyond the Library's authority to make procedural and evidentiary rulings under section 801(c). In addition, they argue that the CARP is required to consider the precedent of prior decisions issued by the CARP and the Librarian and the initial decision setting rates for section 114 is just such a precedent.

However, the Services recognize that a CARP may depart from precedent so long as it provides a reasoned explanation for its departure, but assert that there is no need to do so in this case. They contend that Copyright Owners and Performers made the argument that the value of the public performance of a sound recording is greater than the value of the public performance of the underlying musical work and lost. From this, they declare that "the Panel and the Register of Copyrights (and ultimately the Librarian of Congress) adopted the license fees for the performance of musical works as the upper bound benchmark for the sound recordings performance royalty." Opposition at 6.

CONCLUSION: The only issue presented is whether a prior decision setting rates and terms for subscription services operating under the section 114 license requires the CARP in this proceeding to use the same musical work fees as the ceiling for setting rates for the non-subscription services. The answer to this question is quite simply no. Section 802(c) of the Copyright Act states that the Panel "shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration royalty panel determinations, and rulings by the Librarian of Congress under section 801(c)." It does not require a CARP to adopt specific benchmarks used in a prior decision. Each CARP must base its findings on the record evidence presented by the parties in the current proceeding.

In the prior decision, the Register and the Librarian accepted the panel's conclusion that the fees paid for use of the musical works were not determinative of the value of the performance right in the sound recording, noting that neither party placed much weight on this marketplace reference point. 63 FR 25394, 25404. They also accepted the CARP's determination that the record was insufficient to determine whether performers and record companies deserve more for the performance of their sound recording than that received by the copyright owners of the underlying musical work. Consequently, this question was never resolved. Id.

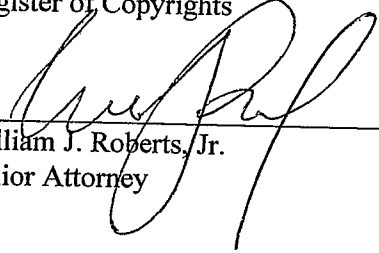
Instead, the Register and the Librarian used the musical work fees benchmark as a starting point for setting the fees for the subscription services and adjusted it downward because the record evidence, including the disputed contractual agreement, supported a determination that the value of the performance right in the sound recording did not exceed the value of the performance right in the musical works. *Id.* at 25410. Had there been record evidence to support the opposite conclusion, the outcome might have been different. Accordingly, the Register specifically stated that "the sum of these license fees [for the musical works] establishes the outer boundary of the 'zone of reasonableness' *for this proceeding.*" *Id.* at 25409 n.33 (emphasis added).

The musical work fees benchmark identified in a previous rate adjustment proceeding as the upper limit on the value of the performance of a sound recording may or may not be adopted as the outer boundary of the "zone of reasonableness" in this proceeding. This is a factual determination to be made by the CARP based upon its analysis of the record evidence in this proceeding.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY:



William J. Roberts, Jr.
Senior Attorney

DATED: July 18, 2001