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In the Matter of	)	
	)	
Digital Performance Right in Sound	)	**Docket No. 2002-1 CARP DTRA3**
Recordings and Ephemeral Recordings	)	**Docket No. 2001-2 CARP DTNSRA**
	)	

ORDER

On February 1, 2002, the Library of Congress published a list of 46 names of arbitrators who are eligible to serve on a Copyright Arbitration Royalty Panel (CARP) during 2002 and 2003. 67 FR 5000 (February 1, 2002). Pursuant to 37 C.F.R. §251.4(b), parties had any opportunity to consider these nominees and file any objections to a listed arbitrator during the 45-day pre-controversy discovery period. For this reason and to avoid any delay associated with the consideration of an entirely new list of nominees,[1] the arbitrators for the current proceeding shall be selected from the list published on February 1, 2002. In this way, the proceeding can proceed in an orderly manner without delay. Any objection to this approach should be filed with the Office no later than January 9, 2004.

Under the rules governing the CARPs, the parties to a proceeding may state their objections to one or more arbitrators on the list during the 45-day pre-controversy discovery period. 37 C.F.R. §§251.4 and 251.32. The 45-day pre-controversy discovery period for this proceeding began on October 8, 2003, with the filing of written direct cases and ended on November 22, 2003, without the filing of any objections to any arbitrator pursuant to §251.4(b). However, the parties were unable to consider any specific financial conflicts, because the Copyright Office was unable to provide the parties with a list of identified financial conflicts, as required under §251.32(b)(2), within the period proscribed by the regulations due to delays in review by its financial disclosure committee.

Consequently, the Office is now providing the parties with a list of identified conflicts for their consideration. Parties shall have until January 21, 2004, to review the attached list of conflicts and file their comments and objections with the Office. This schedule serves two purposes: 1) it allows for the initiation of this proceeding without unnecessary delay, and 2) it provides ample time to the parties to review the attached list of conflicts and to file their comments. Accordingly, all objections and comments about the arbitrators are due on or before January 21, 2004.

List of Identified Conflicts

The Library of Congress is complying with the provisions of §252.32 by providing the attached list to the parties to the proceeding. As provided in §251.32(b)(2)(iii), the list does not contain the names of the affected arbitrators, but rather identifies the nature of the conflict of interest. The list is to be used by the parties to the proceeding in formulating their objections to listed arbitrators as provided in §251.45. After the Library has received filings pursuant to §§251.4 and 251.32 from all parties to this proceeding, the Library shall proceed with the selection of arbitrators.

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[1] Section 251.3(b) requires the Librarian to publish "after January 1, 1998, and every two years thereafter," a list of nominees who are eligible to serve on a CARP for a two-year period. The list of nominees for consideration for service on a CARP during 2004 and 2005 has yet to be compiled for publication.

The Library has arranged the conflict of interest list in chart form so that the parties may easily identify the nature of the conflicts for a particular arbitrator. Two boxes have been provided adjacent to the name of each arbitrator, allowing the parties to indicate with a check whether or not they would be willing to waive specific conflicts. The Library has listed all conflicts for a particular arbitrator to permit the parties to make an overall evaluation of the arbitrator, instead of listing the conflicts separately and asking the parties to respond only to the identified conflict. The financial information provided by the arbitrators falls into four distinct categories: earned income, pre-employment income, unearned income, and self-identified conflicts.

Earned income means all income received during the preceding twelve months derived as a result of employment or personal effort, including, but not limited to the following: compensation for services, including fees, commissions and similar items; gross income derived from business (and net income if the individual elects to include it); gains derived from dealings in property; interest; rent; royalties; dividends; annuities; income from life insurance and endowment contracts; pensions; income from discharge of indebtedness; and distributive share of partnership income. The amount of the earned income is not included and was not provided to the Librarian as part of the financial disclosure statement.

Unearned income identifies the entities from which the listed arbitrators currently derive unearned income or in which they hold financial assets (stocks, etc.). Unearned income consists of rents, royalties, dividends, interest, capital gains, and similar amounts received as a return on investments. The amount and/or value of the unearned income and assets are not included and was not provided to the Librarian as a part of the financial disclosure statement.

Income derived from pre-employment identifies the entities by which listed arbitrators have been employed within the past five years. Employment includes any business relationship involving personal services including, but not limited to, personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, or trustee. The value of the employment, as well as its nature and extent are not identified, and were not provided to the Librarian as part of the financial disclosure statement.

The self-identified category includes those entities, which certain listed arbitrators identified as representing a potential conflict of interest. The financial disclosure statement completed by each listed arbitrator requested that they identify any entities which they knew would represent a conflict of interest in a CARP proceeding, and asked whether they would be willing to dispose of the financial interest and/or disclose it to the parties. However, those arbitrators willing to disclose these acknowledged conflicts were instructed not to dispose of these interests at this time.

Waiver of a conflict would enable the listed arbitrator with the conflict to remain eligible for selection in the cable distribution proceeding. The parties are not obligated to respond to the attached list, but all parties are encouraged to return it. For the reasons stated herein, parties who return the completed chart to the Office of the Copyright General Counsel's Office must do so on or before January 21, 2004, by 5:00 pm. If sent by mail, the list should be addressed to Copyright Arbitration Royalty Panel, PO Box 70977, Southwest Station, Washington, DC 20024.

Please note that as of December 29, 2003, the Library of Congress no longer accepts in-person, on site deliveries from non-governmental, commercial couriers or messengers. Therefore, submissions sent by a commercial courier **must** be delivered to the Congressional Courier Acceptance Site ("CCAS"), located at 2nd and D Streets, N.E., between 8:30 a.m. and 4:00 p.m. If hand delivered by a party, the list should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room 403, First and Independence Avenue, S.E., Washington, DC 20540. *See* 68 FR 70039 (December 16, 2003).

Wherefore, **IT IS ORDERED** that any party who wishes to file objections to any arbitrator, in accordance with 37 C.F.R. §§251.4 and 251.32, must do so on or before January 21, 2004. Moreover, objections to the use of the list of nominees published on February 1, 2002, must be filed on or before January 9, 2004.

SO ORDERED

Marybeth Peters
Register of Copyrights

BY: Tanya M. Sandros
Tanya M. Sandros
Senior Attorney

DATED: December 30, 2003

Name of Party:_____

IDENTIFIED CONFLICTS
FOR NOMINATED ARBITRATORS

CONFLICTS	**WILLING TO WAIVE CONFLICTS**	
	Yes	**No**
Arbitrator #1:	☐	☐

A. Earned Income

- Provident Music Group
- Brentwood Music, Inc.
- Integrity Inc.

B. Pre-Employment

- Provident Music Group
- CBS Cable Networks, Inc.
- David Dean
- Mojave Music
- William Byrd Productions
- Hot Hits, Inc.
- OH Boy Records
- Papago Music, Inc.

C. Self-Identified Conflicts

- David Dean d/b/a/ Rainbow at Midnight Records
- Inflight Entertainment, Inc.
- Integrity Inc.
- Marty Robbins, Inc.
- Brentwood Music, Inc.
- Zomba Recording Company
- Estate of Marizona Robinson
- Z Music, Inc.

WILLING TO WAIVE CONFLICTS

	Yes	No
Arbitrator #2	☐	☐

A. Earned Income
- Foster Pepper & Shefelman (Minzel & Associates)

B. Pre-employment
- Numerous clients listed appear to be unrelated to entertainment industry.

C. Assets and Unearned Income
- Financial Network Investment Corporation

Arbitrator #3	☐	☐

A. Earned Income
- Dechert Price & Rhoads (law firm) - clients not listed.

B. Assets and Unearned Income
- AOL/Time Warner
- General Electric
- RCN Corp.

C. Pre-employment
- Dechert Price & Rhoads - clients not disclosed.

Arbitrator #4	☐	☐

A. Earned Income
- 3rd Eye Entertainment, LLC
- Ames, Roy C.
- Bally Boy Entertainment, LLC
- Fishhead Music
- Forefront, LLC
- Gulf Coast Music, LLC
- Prime Entertainment Group
- River Region Sound, LLC
- Sound of New Orleans

B. Pre-Employment
- G-money
- Iguanas
- 1 Shot Records
- Adversity Records
- Dinosaur Records
- Funky Touch

WILLING TO WAIVE CONFLICTS

	Yes	No
Arbitrator # 5	☐	☐

A. Earned Income
- Stanger & Dreyfus (law firm) - Clients not listed.

B. Pre-Employment
- Numerous clients, none appear related to entertainment industry.

Arbitrator #6	☐	☐

A. Earned Income
- Friend, Hudak & Harris (law firm) - clients not listed.

B. Pre-employment
- No information provided.

C. Self-identified conflicts
- None checked. Further states that E.W. Scripps and others in that industry are clients of the firm.

Arbitrator #7	☐	☐

A. Earned Income
- Numerous clients listed, no apparent conflicts.

B. Assets and "unearned" income
- AOL/Time Warner stock
- Comcast stock
- News Corp. Ltd.

C. Pre-employment
- Numerous clients listed, no apparent conflicts.

D. Self-identified conflicts
- "Modest" stock holdings.

Arbitrator #8	☐	☐

A. Earned Income
- Lists spouse's law firm of Dornbush, Mensch, Mandelstam, and Schaeffer

B. Assets and unearned income
- AOL stock
- General Electric stock

WILLING TO WAIVE CONFLICTS

	Yes	No
Arbitrator #9	☐	☐

A. Earned Income
- Patula, ADR (law firm) - clients not listed.
- Royalty/damages from intellectual property law.

B. Pre-employment
- No information given.

Arbitrator #10	☐	☐

A. Earned Income & Pre-employment
- General Partner in a 1500 member law firm of Jones, Day, Reavis & Pogue. This firm has numerous clients in the entertainment and intellectual property field. If considering a waiver, contact the Copyright Office for a complete list.

Arbitrator #11	☐	☐

A. Earned Income
- Gibson Guitar

B. Pre-employment
- Gaylord Entertainment
- Sherrard & Roe (law firm)
- Clients in entertainment industry undisclosed.

Arbitrator #12	☐	☐

A. Earned Income
- Intellectual property matters including copyright internet service providers.

Arbitrator #13	☐	☐

A. Earned Income
- Birch, Stewart, Kolosh & Borch (law firm) clients undisclosed.
- Managing partner of Harness, Dickey & Pierce (law firm) clients undisclosed.

B. Pre-employment
- States to his knowledge, his firm has no clients with matters pending before CARP.

	WILLING TO WAIVE CONFLICTS	
	Yes	No
Arbitrator #14	☐	☐

A. Earned Income
- Private practice - clients undisclosed.

B. Pre-employment
- Sills, Law Essad, Fiedler & Charbareau (law firm) - clients undisclosed.

Arbitrator #15	☐	☐

A. Earned Income
- Schippers & Bailey (law firm) - clients not disclosed.

Arbitrator #16	☐	☐

A. Earned Income
- Aplington, Kaufman, McClintock, Steele & Barry (law firm) - clients undisclosed.

B. Assets and Unearned Income
- Two brokerage accounts revealed, but individual stock holdings undisclosed.

Arbitrator #17	☐	☐

A. Earned Income
- Clients listed, appear unrelated to entertainment industry except service as CARP arbitrator.

B. Assets and Unearned Income
- Stocks listed, appear unrelated to entertainment industry.

Arbitrator #18	☐	☐

A. Earned Income
- Tabet DiVito & Rothstein (law firm) - clients undisclosed.

B. Pre-employment
- Judicial dispute resolutions.

WILLING TO WAIVE CONFLICTS

	Yes	No
Arbitrator #19	☐	☐

A. Earned Income

- Partner in Quinlan & Carroll (law firm) - clients undisclosed; resume states worked on copyright issues. Lack of disclosure of clients renders determination of possible conflicts impossible.

B. Pre-employment

- Office of the Illinois Attorney General

Arbitrator #20	☐	☐

A. Earned Income

- Baker & McKenzie (law firm) - clients undisclosed, but indicates income from firm is de minimus.

B. Assets and Unearned Income

- AOL/Time Warner stock
- Viacom stock
- General Electric stock.

C. Pre-employment

- No information disclosed.

Arbitrator #21	☐	☐

A. Earned Income

- U.S. Department of Education

Arbitrator #22	☐	☐

A. Assets and Unearned Income

- AOL/Time Warner stock
- Tribune Co. stock

Arbitrator #23	☐	☐

A. Pre-employment

- Baltimore Orioles Designated Hitters Club (volunteer organization).

WILLING TO WAIVE CONFLICTS

	Yes	No
Arbitrator #24	☐	☐

A. Earned Income
- Sole practitioner - clients undisclosed.

B. Assets and Unearned Income
- AT&T stock

Arbitrator #25	☐	☐

A. Earned Income
- Coghlan, Kokankos & Cook (spouse's law firm)

B. Pre-employment
- Circuit judge of the state of Illinois

Arbitrator #26	☐	☐

A. Earned Income
- Texas Board of Law Examiners

B. Pre-employment
- Thompson & Knight (law firm).

Arbitrator #27	☐	☐

A. Earned Income
- Beveridge & Diamond (law firm) - clients undisclosed.

Arbitrator #28	☐	☐

A. Assets and Unearned Income
- Comcast stock

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In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2002-1 CARP DTRA3

Docket No. 2001-2 CARP DTNSRA

ORDER

Scope of this Proceeding

On August 18, 2003, the Office announced the precontroversy schedule for the hearing phase of this proceeding the purpose of which is to resolve the dispute over the contested terms in the proposed agreement published on May 20 that concern the selection and responsibilities of the Designated Agent(s), and to make any necessary conforming changes to the uncontested terms of payment set forth in that agreement. See Procedural Order, Docket Nos. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA (August 18, 2003).

At that time, the Office had also indicated that rates and terms applicable to noncommercial entities may be an issue to be determined during the hearing phase of this proceeding. However, no party with a significant interest in setting rates and terms applicable to noncommercial entities filed an objection to the proposed rates and terms announced in the August 21, 2003, **Federal Register** notice or the required Notice of Intent to Participate. 68 FR 50493 (August 21, 2003).

Consequently, the rates and terms applicable to noncommercial entities announced in the August 21 **Federal Register** notice will be adopted as final regulations pursuant to 37 C.F.R. § 251.63(b) and will not be a subject for consideration by the CARP in this proceeding. Similarly, the rates and uncontested terms applicable to the use of sound recordings in eligible nonsubscription transmissions made by commercial webcasters and noncommercial webcasters under a statutory license, 17 U.S.C. § 114(d), and the making of related ephemeral phonorecords under a second statutory license, 17 U.S.C. § 112(e), including the making of ephemeral phonorecords by business establishment services are a settled issue, and not a matter for further consideration by the CARP in this proceeding. See Order, Docket Nos. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA (August 18, 2003).

Initial Meeting

The Office had scheduled a meeting for Thursday, September 25, 2003, in order to allow parties unfamiliar with the process an opportunity to review the rules and regulations governing this proceeding. However, only three parties–the Recording Industry Association of America ("RIAA"), the American Federation of Television and Radio Artists ("AFTRA"), and the American Federation of Musicians of the United States and Canada ("AFM")–have filed the Notice of Intention to Submit a Written Direct Case as requested in the August 18 Procedural Order, and all three parties have participated in past proceedings. Consequently, the need for this meeting no longer exists and, therefore, the meeting **IS CANCELED**.

New Precontroversy Discovery Schedule

The precontroversy schedule announced in the August 18 Order is being adjusted in observance of a religious celebration that coincides with the previous date for filing direct cases.

Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule for this proceeding, the purpose of which is to consider disputed terms that concern the selection and responsibilities of the Designated Agent(s), is as follows:

ACTION	**DATE**
Filing of Written Direct Cases	October 8, 2003
Requests for Underlying Documents Related to Written Direct Cases	October 17, 2003
Responses to Requests for Underlying Documents	October 23, 2003
Completion of Document Production	October 28, 2003
Follow-up Requests for Underlying Documents	October 31, 2003
Responses to Follow-up Requests	November 5, 2003
Motions Related to Document Production	November 10, 2003
Production of Documents in Response to Follow-up Requests	November 14, 2003
All Other Motions, Petitions and Objections	November 21, 2003

Only those parties who filed the Notice of Intention to Submit a Written Direct Case–RIAA, AFTRA, and AFM–are entitled to receive copies of a party's direct case on October 8, 2003. However, a party who failed to file this Notice may still file a direct case on October 8 with the Office. In order to be properly filed, such a party must also **deliver** copies of its direct case to RIAA, AFTRA, and AFM on that same date, October 8, 2003. All parties must then adhere to the discovery schedule set forth in this Order.

SO ORDERED

Marybeth Peters
Register of Copyrights

BY: Tanya M. Sandros
Tanya M. Sandros
Senior Attorney

DATED: September 24, 2003

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In the Matter of	}	
	}	**Docket No. 2002-1 CARP DTRA3**
Digital Performance Right in Sound	}	
Recordings and Ephemeral Recordings	}	**Docket No. 2001-2 CARP DTNSRA**
	}	

ORDER

On November 10, 2003, SoundExchange filed a Motion to Compel Discovery Production from Royalty Logic, Inc. ("RLI"). It also filed a Motion for Declaratory Ruling with the Office on November 21, 2003, in which it requested a ruling from the Office declaring: 1) that the Small Webcaster Settlement Act of 2002 ("SWSA") does not require the appointment of multiple Designated Agents nor the specific appointment of RLI as a Designated Agent; 2) that the marketplace standard governs the adoption of the payment terms in this proceeding, and 3) that an administrative feasibility analysis should be applied by the CARP as a component of that marketplace standard. Thereafter, RLI made two additional filings with the Office on November 21, 2003, a Motion for Partial Reconsideration of the Office's November 19 order and a Petition for Decision on the Written Pleadings.

This order addresses three of the four pleadings–SoundExchange's motion to compel, RLI's motion for reconsideration of an earlier order, and RLI's petition to forego formal hearings. SoundExchange's Motion for Declaratory Ruling will be addressed in a separate order.

1) Petition of Royalty Logic, Inc. for Decision on Written Pleadings.

RLI has petitioned the Office pursuant to 37 CFR § 251.41(b) to dispense with formal hearings and to have the CARP decide the outstanding payment issues on the basis of the written pleadings or, in the alternative, to have the Office convene a status conference to discuss ways to streamline and reduce the expense of this proceeding. RLI contends that there are no outstanding disputes concerning genuine issues of material fact which would necessitate an oral hearing. However, it wants to retain an option to have a hearing in the event disputes arise regarding any factual assertions made in a party's rebuttal case.

SoundExchange responds that the petition is premature and that no decision should be made until the Office resolves its motion for a declaratory ruling. It also questions RLI's position that no genuine issue of material fact remains in light of RLI's request for the submission of rebuttal testimony to contest the direct cases filed by the parties. Moreover, it opposes RLI's suggestion that the Office convene a meeting to discuss ways to streamline this proceeding and reduce expenses on the basis that such a meeting would serve no useful purpose until the Office rules on the legal questions posed in SoundExchange's motion for a declaratory ruling.

Ruling: RLI's request for a meeting at this time is denied and the following issue is designated to the CARP for its consideration: whether to suspend formal hearings and proceed to decide the disputed terms of payment on the written pleadings.

Section 251.41(b) of the CFR allows the Librarian to dispense with formal hearings when the controversy does not involve any genuine issue of material fact or when all parties to the proceeding agree, in writing, that a grant of the petition is appropriate.

Because SoundExchange has not agreed to proceed solely on the basis of the written pleadings, the only basis for granting the petition would be the absence of any unresolved questions over facts material to this case. Yet, whether disputes remain concerning genuine issues of material fact is an open question in light of RLI's request for an opportunity to file rebuttal testimony, which could include disputed material facts. Because neither condition for granting the petition exists, the petition cannot be granted at this time.

However, upon a showing of good cause, the CARP may suspend or waive the provisions of subpart E, see 37 CFR § 251.42, including the requirement that the CARP conduct a formal hearing in accordance with section 251.47. Because the CARP must weigh the evidence and the arguments of the parties in making its decision, the decision whether to hold formal hearings or proceed solely on the basis of the written pleadings should be left to the CARP, especially where, as here, potential questions may arise over factual issues material to the outcome of the proceeding. Therefore, the issue of whether to proceed on the basis of the written pleadings is designated to the CARP for its consideration. Moreover, at this stage of the proceeding, the CARP is in the best position to discuss ways to streamline the proceeding and contain costs. Consequently, questions and proposals for addressing these issues should be addressed to the CARP.

2) Motion of Royalty Logic, Inc. for Partial Reconsideration of November 19 Order.

On November 19, the Copyright Office issued an order requiring RLI to strike all but the introductory section and the last paragraph of its 16-page opening statement.[1] RLI contends this order was overbroad, and is asking the Office to reconsider its November 19 Order and allow RLI to include two additional statements in its opening statement as background for the presentation of its Direct Case. These statements articulate the standard to be applied in this case and make reference to the regulations proposed in Appendix A of RLI's direct case. SoundExchange does not oppose RLI's request.

Ruling: RLI may incorporate the following two statements into its Direct Case in addition to the material allowed under the November 19 Order:

> "Chambers believes that terms and conditions that most clearly represent the terms and conditions that would have resulted from a marketplace negotiation between a willing buyer and a willing seller are those set forth in the regulations proposed in Appendix A hereto. Therefore, Chambers hereby requests that the CARP designate RLI as a Designated Agent, adopt the alternative regulations attached as Appendix A and make any necessary conforming changes to the uncontested terms of payment."

RLI may submit a revision of its Direct Case to the Office no later than January 7, 2003.

---

[1] On December 1, 2003, RLI filed a revision of its Direct Case in accordance with the Office's Order of November 19, 2003.

These statements summarize Chambers' position without any corresponding legal argument or interpretation of fact and, thus, may be included in an opening statement. Had RLI made its case for including these statements in its opposition to the initial motion, the Office would have considered the merits of its position at that time. However, in the case where an opening statement is rife with inappropriate materials interspersed and interwoven with statements that may be considered appropriate for an opening statement, the Office will not take it upon itself to identify and extricate each and every statement from the whole presentation that may be included in an introduction or an opening statement. Instead, it will consider only those introductory and summary statements that clearly meet the standards and that can stand alone without any further explanation.

3) SoundExchange Motion to Compel Discovery Production from RLI.

In accordance with the discovery schedule governing this proceeding, SoundExchange filed a motion to compel discovery production from RLI, requesting production of documents related to Lester Chambers' status as a copyright owner of sound recordings, records about the amount of royalties collected and administered by Music Reports Inc. ("MRI"), and the licensing agreements between RLI and MRI. SoundExchange contends that RLI should produce these documents or, in the case where responsive documents do not exist, should have stated this fact affirmatively in response to the request for the documents at the time prescribed in the discovery schedule for responses.

RLI responds that it has now provided SoundExchange with documents pertaining to Lester Chambers' ownership and performance of specific sound recordings, and documents concerning the royalties administered by MRI. As to the other requests, RLI contends that it cannot produce the requested documents because there are no documents to produce. Based upon RLI's response to the motion to compel production, SoundExchange concedes that there are no longer any outstanding discovery issues for consideration by the Office.

Ruling: The Motion to Compel Production is moot. RLI has indicated that it has produced all responsive documents that exist. However, should it be revealed at a later time that responsive documents do exist and were not produced, RLI is precluded from introducing those documents into the record. See Order, Docket No. 2000-2 CARP CD 93-97 at 2 (October 10, 2000). Moreover, it may be appropriate that the testimony related to such documents be stricken from the case. Motions to strike testimony in this situation are to be directed to the CARP for its consideration. Id. at 4.

SO ORDERED

Marybeth Peters
Register of Copyrights

BY: Tanya M. Sandros
Tanya M. Sandros
Senior Attorney

DATED: December 17, 2003

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In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2002-1 CARP DTRA3

Docket No. 2001-2 CARP DTNSRA

ORDER

Section 251.43(a) of the CARP rules, 37 C.F.R., provides that "[a]ll parties who have filed a notice of intent to participate in the hearing shall file written direct cases with the Copyright Office, and with other parties in the manner in which the Librarian of Congress shall direct...." Failure to file a written direct case in this proceeding constitutes grounds for automatic dismissal. *See* Order in Docket Nos. 2000-9 CARP DTRA 1&2 (March 16, 2001 and April 28, 2001). Consequently, the Library is dismissing the forty-four parties in this proceeding that have failed to file written direct cases.

Wherefore, **IT IS ORDERED** that the following parties are **DISMISSED** from this proceeding: BET Interactive, LLC; America Online, Inc.; MTV Networks, a division of Viacom Inc.; MusicMatch, Inc.; Yahoo! Inc.; Listen.com; Recording Industry Association of America, Inc.; Washington University in St. Louis; Educational Media Foundation (EMF); Aritaur Communications, Inc.; American Federation of Musicians of the United States and Canada (AFM); MusicChoice; National Religious Broadcasters Music License Committee (NRBMLC); Salem Communications Corp.; Clear Channel Communications, Inc.; Sirius Satellite Radio Inc.; WAY-FM Media Group, Inc.; Beethoven.com, LLC; University of Louisiana at Monroe (KXUL); University of Wisconsin at Madison (WSUM); Susquehanna Radio Corp.; Educational Information Corporation (WCPE); Oregon State University (KBVR FM); Lakeshore Communications, Inc. (WORQ); Plymouth-Canton Community Schools (WSDP Radio); National Federation of Community Broadcasters (NFCB); American Federation of Television and Radio Artists (AFTRA); Digital Media Association, Inc. (DiMA); Bonneville International Corporation; XM Satellite Radio, Inc (XM); Meyer Multimedia Services a division of Meyer Broadcasting Corporation; KYCC; Louisiana State University and Agricultural and Mechanical College (KLSU Radio); Houston Community College Southwest (iRadio); Western Washington University (KUGS-FM); Entercom Communications Corp.; Detroit Industrial Underground; Webcaster Alliance; whereveRadio.com; Hot Spots Hawaii, Inc.; Emmis Communications Corp.; ASGAARD Interactive Multimedia, LLC/Hardradio.com; RealNetworks, Inc.; and RBC Ministries.

SO RECOMMENDED.

Marybeth Peters
Register of Copyrights

SO ORDERED.

James H. Billington
The Librarian of Congress

DATED: November 12, 2003

COP 2003-000125-COR

United States Government

Memorandum

Office of the Librarian
Library of Congress

November 24, 2003

TO: James H. Billington
Librarian of Congress

FROM: Elizabeth Pugh
General Counsel

SUBJECT: Dismissal Order in CARP Proceeding (CCM #COP2003-000125)

Attached are (1) a memorandum from the Register of Copyrights regarding the above subject and (2) an Order dismissing 44 parties from the proceeding to set rates and terms for the digital performance right pursuant to Section 114 of the copyright statute (Title 17) and for the making of ephemeral recordings under Section 112. We have reviewed the attachments and recommend that you sign the Order.

The parties who are the subject of the attached Order failed to adhere to the relevant copyright regulations by failing to file a written direct case in this matter. The most likely reason for their not filing a direct case is that the parties reached settlement, setting the rates and terms for webcasters for 2003-2004 and the only issue left is whether there will be one or more collectives to receive and disburse the royalties.

This is not a controversial matter. The proposed order is merely a procedural matter, but one that is necessary under copyright regulations.

If you agree with our recommendation, please sign on the last page of the original and four copies. You may keep one copy for your files and return the others to the Copyright Office.

If you have any questions, please contact Michael Hughes, Associate General Counsel, or me.

Attachments

cc: Marybeth Peters
David Carson

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United States
Government

MEMORANDUM

LIBRARY
OF
CONGRESS

to: Dr. James Billington
The Librarian of Congress

from: Marybeth Peters
Register of Copyrights

via: Elizabeth Pugh
General Counsel

date: November 12, 2003

subject: Rate Adjustment Proceeding for Compulsory Licenses under 17 U.S.C. §§ 112, 114

Attached for your review, consideration and approval is an Order in the proceeding to set the rates and terms for the digital performance right in sound recordings under 17 U.S.C. § 114 and for the making of ephemeral recordings under 17 U.S.C. § 112. The Order dismisses forty-four parties to the proceeding for failure to file a written direct case.

This proceeding was originally scheduled to set rates and terms for webcasters for 2003-2004. However, a settlement was reached and the only remaining issue for the CARP relates to whether there will be one or two collectives to receive and disburse royalties. Because of the limited interest in this issue, most of the parties who had originally indicated their intent to participate in the CARP proceeding have chosen not to participate.

Section 251.43(a) of the CARP rules, 37 C.F.R., provides that "[a]ll parties who have filed a notice of intent to participate in the hearing shall file written direct cases with the Copyright Office, and with other parties in the manner in which the Librarian of Congress shall direct...." A written direct case contains testimony sponsored by a witness or witnesses. The purpose of this requirement is to allow full examination and cross-examination of all testimony before the CARP renders its determination. Full prosecution of the written direct cases is essential to compiling a complete and accurate record. Written direct cases in this proceeding were due on October 8, 2003. None of the forty-four parties listed in the Order filed a written direct case; therefore, they must be dismissed. You have the authority to issue this Order under section 801(c) of the Copyright Act. Pursuant to this section, you may make any necessary procedural rulings prior to the convening of a CARP. The proposed order is such a necessary procedural order because it is administratively inefficient and serves no purpose to allow parties who have chosen not to continue their participation to remain in the proceeding.

If you approve of the attached document, please sign the attached five copies. Please return four of the signed copies to me. The fifth is for your records.

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MEMORANDUM

LIBRARY
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to: Dr. James Billington
The Librarian of Congress

date: November 12, 2003

from: Marybeth Peters/mlp
Register of Copyrights

via: Elizabeth Pugh
General Counsel

subject: Rate Adjustment Proceeding for Compulsory Licenses under 17 U.S.C. §§ 112, 114

Attached for your review, consideration and approval is an Order in the proceeding to set the rates and terms for the digital performance right in sound recordings under 17 U.S.C. § 114 and for the making of ephemeral recordings under 17 U.S.C. § 112. The Order dismisses forty-four parties to the proceeding for failure to file a written direct case.

This proceeding was originally scheduled to set rates and terms for webcasters for 2003-2004. However, a settlement was reached and the only remaining issue for the CARP relates to whether there will be one or two collectives to receive and disburse royalties. Because of the limited interest in this issue, most of the parties who had originally indicated their intent to participate in the CARP proceeding have chosen not to participate.

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If you approve of the attached document, please sign the attached five copies. Please return four of the signed copies to me. The fifth is for your records.

In the Matter of	}	
	}	**Docket No. 2002-1 CARP DTRA3**
Digital Performance Right in Sound	}	
Recordings and Ephemeral Recordings	}	**Docket No. 2001-2 CARP DTNSRA**
	}	

ORDER

Section 251.43(a) of the CARP rules, 37 C.F.R., provides that "[a]ll parties who have filed a notice of intent to participate in the hearing shall file written direct cases with the Copyright Office, and with other parties in the manner in which the Librarian of Congress shall direct...." Failure to file a written direct case in this proceeding constitutes grounds for automatic dismissal. *See* Order in Docket Nos. 2000-9 CARP DTRA 1&2 (March 16, 2001 and April 28, 2001). Consequently, the Library is dismissing the forty-four parties in this proceeding that have failed to file written direct cases.

Wherefore, **IT IS ORDERED** that the following parties are **DISMISSED** from this proceeding: BET Interactive, LLC; America Online, Inc.; MTV Networks, a division of Viacom Inc.; MusicMatch, Inc.; Yahoo! Inc.; Listen.com; Recording Industry Association of America, Inc.; Washington University in St. Louis; Educational Media Foundation (EMF); Aritaur Communications, Inc.; American Federation of Musicians of the United States and Canada (AFM); MusicChoice; National Religious Broadcasters Music License Committee (NRBMLC); Salem Communications Corp.; Clear Channel Communications, Inc.; Sirius Satellite Radio Inc.; WAY-FM Media Group, Inc.; Beethoven.com, LLC; University of Louisiana at Monroe (KXUL); University of Wisconsin at Madison (WSUM); Susquehanna Radio Corp.; Educational Information Corporation (WCPE); Oregon State University (KBVR FM); Lakeshore Communications, Inc. (WORQ); Plymouth-Canton Community Schools (WSDP Radio); National Federation of Community Broadcasters (NFCB); American Federation of Television and Radio Artists (AFTRA); Digital Media Association, Inc. (DiMA); Bonneville International Corporation; XM Satellite Radio, Inc (XM); Meyer Multimedia Services a division of Meyer Broadcasting Corporation; KYCC; Louisiana State University and Agricultural and Mechanical College (KLSU Radio); Houston Community College Southwest (iRadio); Western Washington University (KUGS-FM); Entercom Communications Corp.; Detroit Industrial Underground; Webcaster Alliance; whereveRadio.com; Hot Spots Hawaii, Inc.; Emmis Communications Corp.; ASGAARD Interactive Multimedia, LLC/Hardradio.com; RealNetworks, Inc.; and RBC Ministries.

SO RECOMMENDED.

Marybeth Peters
Register of Copyrights

SO ORDERED.

James H. Billington
The Librarian of Congress

DATED: November 12, 2003

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From: Terrawn A Rogers
To: David Carson; Gina Giuffreda; ksmi@loc.gov; Marylyn L Martin; Michael Hughes; Robert Dizard; Yvonne French
Date: 11/17/03 3:20PM
Subject: E-mail (for body of e-mail screen): 20031117

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In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2002-1 CARP DTRA3

Docket No. 2001-2 CARP DTNSRA

ORDER

On October 17, 2003, SoundExchange, Inc. ("SoundExchange") filed a motion to strike Royalty Logic, Inc.'s ("RLI") direct case, a 16-page opening statement, and a restricted exhibit from RLI's direct case. RLI opposed the motion, asserting the validity of its opening statement under prior rulings of the Copyright Office and that the restricted material should no longer be classified as confidential. RLI also maintained that it has not made any inappropriate disclosures of Protected Materials to its counsel.

A. RLI's opening statement

SoundExchange maintains that the CARP rules and precedent do not provide for the submission of a statement containing extensive legal argument and factual assertions without a sponsoring witness. It also contends that RLI's opening statement cannot be construed as a simple introduction because the statement includes legal argument, including RLI's interpretation of sections 112 and 114 of the Copyright Act, and a discussion of the Small Webcaster Settlement Act of 2002 ("SWSA") with a focus on its impact on sections 112 and 114. Moreover, the statement makes factual assertions as a predicate to RLI's discussion of its legal interpretations of the law. SoundExchange argues that such factual assertions go well beyond an acceptable summary of a witness's testimony and would only be allowable if offered by a sponsoring witness. In its reply, however, it allows that "the second half of page 15 contains a summary of the witness testimony presented in RLI's direct case that would be permissible standing on its own."

In support of its opening statement, RLI characterizes the submission as an outline of its case and maintains that the statement merely sets forth the facts and circumstances of the issues to be resolved. It also argues that striking the introductory statement would prejudice its case because it would be unable to set forth the terms and conditions,[1] as required by the rules, and it would prevent RLI from putting its evidence in context for the arbitrators.

Discussion

An introductory statement may be included in a party's direct case. Introductions are limited in scope and should include only descriptions of the contents of the written direct case and brief summaries of the testimony. Order, Docket No. 2000-9 CARP DTRA1&2 at 6 (June 25, 2001). An introduction may not include legal argument. "Legal argument on the written direct cases is reserved for later portions [of the proceeding]." Order, Docket No. 96-6 CARP NCBRA at 4 (December 9, 1997). Yet, legal argument comprises the bulk of RLI's opening statement and, in most instances, factual assertions are included merely to provide background for the legal analysis; an observation that RLI does not dispute. In fact, RLI acknowledges that it sets forth background facts and other aspects surrounding the case so that it

[1] SoundExchange has not moved to have Appendix A, which simply states RLI's proposed regulations, stricken from RLI's direct case. Thus, its inclusion in the opening section of RLI's presentation is not in dispute.

can then "demonstrate[] how as a matter of law the RLI proposal most clearly represents the terms that would have been agreed upon by a willing buyer and willing seller." Such use of factual information as foundation for the presentation of extensive legal argument exceeds the acceptable limits for what constitutes an appropriate introduction and cannot be included in an opening statement.

Moreover, factual assertions and opinions of affected parties are not appropriate components of an introduction. Statements which go beyond the identification of a witness and include an explanation of the witness's position constitute evidence for consideration by the arbitrators and must be offered by a sponsoring witness. Examples of such assertions in the opening statement, include detailed statements about the identity of Lester Chambers ("Chambers") and how he believes the outcome will affect him and other similarly situated copyright owners, and a section outlining RLI's pedigree, its experience and the reasons why it is important that the panel designate it to collect and distribute royalty fees under the proposed rules. The appropriate place for these types of factual and opinion statements is in the witnesses' own testimony so that the statements are available for examination by the parties and the arbitrators.

Thus, the only portions of the opening statement that meet the requirements for an introduction are section I (Introduction), which sets forth Chambers' request to adopt certain regulations governing the collection and distribution of the royalty fees collected pursuant to sections 112 and 114 of the Copyright Act, and the last paragraph beginning on page 15, which identifies the RLI witnesses and designates testimony of one of its witnesses from a past proceeding for consideration in this proceeding.

Disposition

Wherefore, **IT IS ORDERED** that Royalty Logic, Inc.'s 16-page opening statement is stricken, except for section I, Introduction, and the last paragraph of the statement. Royalty Logic, Inc. may file a modified document by December 1, 2003, that includes only section I (Introduction) and the last paragraph of the current submission as a substitution for Royal Logic, Inc.'s current direct case found at Tab 1.

B. The Gertz Rebuttal Exhibit

SoundExchange argues that the rebuttal testimony of Ronald Gertz ("Gertz") submitted under seal violates the protective order issued in a prior proceeding, Docket No. 2000-9 CARP DTRA1&2 ("Webcasting I"). Under that protective order, Gertz had access to certain information because he appeared as a witness in that proceeding. The provisions of the order, however, prohibited Gertz from sharing that information with anyone not authorized to receive such information and expressly limited the use of such information to the proceeding for which it was offered. Order in Docket No. 2000-9 CARP DTRA1&2 at 6 ¶¶ 2 & 6 (March 29, 2001).

Nevertheless, Gertz evidently provided Restricted Protected Materials from the Webcasting I proceeding to RLI's counsel without getting proper authorization to disclose the information to RLI's counsel or to include it in RLI's direct case for this proceeding.

Consequently, SoundExchange, as the substitute for the Recording Industry Association of America, Inc. ("RIAA"), asks that the Gertz rebuttal exhibit be stricken and that the Office ascertain whether Gertz has destroyed all other protected materials to which he had access or affirm that he has not shared such information "with anyone who is not a signatory to the March 29, 2001 Webcaster Protective Order, or used for any purpose unrelated to that particular CARP proceeding." Motion at 4-5. Moreover, SoundExchange asks the Office to clarify the steps a party should take when it seeks to include Restricted Protected Materials from a prior proceeding as part of its direct case.

RLI responds that the testimony in the exhibit was no longer considered confidential under the Webcasting I Protective Order because Yahoo!, Inc. had agreed to disclose this information and because the fact referenced in the question posed to Gertz appeared in the unredacted portions of the Librarian's Final Order and Rule. 67 FR 45239, 45260 (July 8, 2002). RLI also maintains that there was no unauthorized disclosure of the protected information to its counsel because RLI's counsel had direct knowledge of the particular clause prior to the Webcasting I proceeding by virtue of the fact that he participated in the negotiations leading to the license agreement which contained the particular clause at issue. In any event, RLI maintains that the disputed testimony was included only because it interpreted section 251.43(c) of the CARP rules as requiring a party to include all prior testimony of a witness in the case where a party wished to designate portions of that testimony in a subsequent proceeding.

Discussion

Section 251.43(c) of the CARP rules allows a party to include portions of past proceedings in a subsequent direct case. It also states that "[c]omplete testimony of each witness whose testimony is designated (i.e., direct, cross and redirect) must be referenced." RLI has focused on the words "complete testimony" and, apparently, it has read those words as requiring a party to include actual copies of all testimony of a witness from a past proceeding when a party wishes to use some portion of that testimony in a subsequent proceeding. This reading of the rule is understandable, but the interpretation is overbroad.

The purpose of the rule apart from authorizing the use of past records in a future proceeding is to make clear that testimony from past proceedings must be *referenced*. It only requires that the complete testimony be cited if used in a subsequent direct case. In fact, a party should only include in the direct case those portions of a witness's past testimony that are relevant to the subsequent proceeding. See 37 CFR § 251.48(a) (allowing only for the admission of relevant and material evidence).

The fact is RLI included the disputed exhibit only because it misunderstood the rules to require it to do so and not because it had any relevance to this proceeding. Moreover, RLI states without reservation that, for purposes of this proceeding, the specific information in the disputed exhibit is irrelevant. Thus, the Gertz rebuttal exhibit is stricken in the first instance for lack of relevancy.

However, this does not conclude the issues raised by SoundExchange. It has asked the Office to clarify the proper procedure for making available Restricted Protected Materials from a prior proceeding and to confirm that such materials from the Webcasting I

proceeding to which Gertz had access "have been destroyed, and have not been shared with anyone who is not a signatory to the March 29, 2001 Webcaster I Protective Order."

Protective orders have been adopted in CARP proceedings in order to allow parties to submit evidence of a confidential nature without fear that it will be disclosed or misused by the parties to a proceeding. Each order includes specific provisions that set forth procedures for obtaining the necessary clearance for disclosing Restricted Protected Materials to parties who are not signatories to the original protective order. Parties who participate in a CARP proceeding and who sign a nondisclosure certificate are bound by the procedures in the protective order governing that specific proceeding. Consequently, information designated as confidential in the Webcasting I proceeding can be disclosed only under the procedure set forth in paragraph 12 of the Webcasting I Protective Order.

Paragraph 12 provides two alternative means for obtaining permission for disclosure. A party seeking disclosure of the information may either serve written notice on the producing party and work out an agreement, or "make application under seal to the Librarian of Congress for a determination that the material in issue should not be considered Protected Materials or for such ruling as is appropriate." These procedures should be used when information is still covered by a protective order. However, disclosure of any formerly protected information through publication of a Final Determination and Order of the Librarian removes the items from any further protection under the provisions of the protective order. For this reason, the Office allows all parties to review the final determination and order prior to publication. See Order, Docket No. 2000-9 CARP DTRA1&2 (June 20, 2002).

RLI makes the case that the information was no longer subject to the protective order because it had been included in the Final Determination and Order of the Librarian. 67 FR 45239 (July 8, 2003). Yet, at the same time, it appears that RLI was unsure of the status of the information, thus, choosing to submit it under seal. In which case, Gertz was obligated to comply with the terms of the protective order and notify RIAA of his intention to use the information in this proceeding. The fact that RLI's counsel may have had independent knowledge of the protected information does not relieve Gertz of his responsibilities under the Webcasting I Protective Order. The evidence that included the disputed material was not offered into evidence in the Webcasting I proceeding by RLI's counsel.[2] Consequently, by the terms of the Webcasting I Protective Order, Gertz had to notify the party that produced the information and obtain permission to use the information in this proceeding, or make a request to the Office for an appropriate ruling on the use of the disputed material in this proceeding, but he did not do so. In fact, there is no evidence that he took any steps to follow the procedures in paragraph 12 of the Webcasting I Protective Order. Thus, Gertz's actions constitute a technical violation of the Webcasting I Protective Order. Yet, it is difficult to see how RIAA was harmed when disclosure of the information was to a person who had prior knowledge of the specific fact from an independent source, and it appears that the information had already been disclosed in the July 8 Order. For that reason, no further sanctions are deemed necessary for violating the Webcasting I Protective Order with respect to the Gertz Rebuttal Exhibit.

---

[2] Of course, RLI could have offered any information that it obtained outside the Webcasting I proceeding into its direct case under the protective order governing this proceeding, including information that may have also been offered into evidence in a past proceeding.

SoundExchange has also requested that the Office instruct Gertz to confirm that he has destroyed any other protected materials to which he had access and that he has not shared such materials with other persons who are not subject to the Webcasting I Protective Order. However, pursuant to paragraph 15 of the Webcasting I Protective Order, copies of Protected Materials need not be destroyed until a Reviewing Party, i.e., Gertz, receives notice from a Producing Party that the proceeding has been concluded, at which time the Reviewing Party will have twenty-one (21) days in which to "return to counsel for the Producing Parties all copies of the Protected Materials provided pursuant to this order and all copies reproduced by a Reviewing Party or destroy the same." Thus, the Office has no basis for taking any action with respect to the disposal of materials protected under the Webcasting I Protective Order until such time as a party fails to provide the required assurances that the documents have been destroyed in accordance with the procedures set forth in that order.

On the other hand, RLI has offered no opposition to SoundExchange's request for assurances that Gertz has complied with the Webcasting I Protective Order in all other aspects and has not shared such materials with persons who are not covered by the Webcasting I Protective Order. Therefore, Gertz shall supply RIAA with the necessary assurances in accordance with this order.

Disposition

Wherefore, **IT IS ORDERED** that the restricted exhibit is stricken from the direct case of Royalty Logic, Inc. **IT IS FURTHER ORDERED** that Ronald Gertz shall provide the Recording Industry Association of America, Inc. with written assurances that he is in full compliance with the Webcasting I Protective Order by December 1, 2003.

SO ORDERED

Marybeth Peters
Register of Copyrights

BY: Tanya M. Sandros
Tanya M. Sandros
Senior Attorney

DATED: November 19, 2003

In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2002-1 CARP DTRA3

Docket No. 2001-2 CARP DTNSRA

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ANNOUNCEMENT

On September 24, 2003, the Copyright Office issued an Order revising the precontroversy discovery schedule. However, a date was inadvertently omitted from the Order. Therefore, to reiterate the instructions in both the August 18 Procedural Order and the September 24 Order regarding the filing and service of written direct cases, only those parties who filed the Notice of Intention to Submit a Written Direct Case–RIAA, AFTRA, and AFM–are entitled to receive copies of a party's direct case on October 8, 2003. However, a party who failed to file this Notice (hereinafter "Non-notice party") may still file a direct case on October 8 with the Office. In order to be properly filed, such a party must also **deliver** copies of its direct case to RIAA, AFTRA, and AFM on that same date, October 8, 2003. All parties must **deliver** copies of their direct cases to all Non-notice parties by October 10, 2003. All parties must then adhere to the discovery schedule set forth in this Order.

Dated: October 3, 2003

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In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2002-1 CARP DTRA3

Docket No. 2001-2 CARP DTNSRA

PROCEDURAL ORDER

This Order addresses four matters in the above-captioned proceeding. First, the Order announces the consolidation of the above-captioned proceedings. Second, the Order sets forth a new precontroversy discovery schedule for parties in this proceeding and announces the date of a meeting to discuss administrative issues. Third, the Order directs each party in this proceeding to file a Notice of Intention to Submit a Written Direct Case. Fourth, the Order sets a new briefing schedule for filing oppositions and replies to the pending motion to adopt the interim protective order.

Proceeding to Set Rates and Terms for New Subscription Services

On May 20, 2003, the Office published a notice announcing proposed regulations to set rates and terms for the use of sound recordings by means of eligible nonsubscription transmissions and transmissions made by new subscription services. 68 FR 27506 (May 20, 2003). However, the Office had never formally consolidated the proceeding to set rates and terms for new subscription services, Docket No. 2001-2 CARP DTNSRA, with the proceeding to set rates and terms for eligible nonsubscription transmissions, Docket No. 2002-1 CARP DTRA3. Instead, it had dismissed without prejudice a motion to consolidate these two proceedings based upon a finding that adoption of the proposed regulations would render the motion moot. Order, Docket No. 2002-1 CARP DTRA3 (dated April 10, 2003).

Because many of the parties participating in each of these proceedings are the same and have already addressed the issues in these proceedings in their earlier negotiations, the Office is reconsidering the question of consolidation *sua sponte*. As a general observation, the Office notes that most parties had expressed no opposition to the original motion to consolidate and those who had, Collegiate Broadcasters, Inc., Intercollegiate Broadcasting System, Inc., and Harvard Radio Broadcasting Co., have subsequently withdrawn from the proceeding to set rates and terms for eligible nonsubscription transmissions of sound recordings. Moreover, the proposed rates and certain of the proposed terms applicable to both dockets are being adopted under section 251.63(b). Because the remaining terms apply equally to the parties in both proceedings, consolidation of the proceedings to consider these disputed issues before a single CARP promotes efficiencies for both the Office and the parties.

Wherefore, **IT IS ORDERED** that Docket Nos. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA are consolidated into a single proceeding.

Initial Meeting and New Precontroversy Discovery Schedule

The Office is announcing the precontroversy discovery schedule for this proceeding the purpose of which is to resolve the dispute over the contested terms in the proposed agreement published on May 20 that concern the selection and responsibilities of the Designated Agent(s), to make any necessary conforming changes to the uncontested terms of payment set forth in that agreement, and, if necessary, to establish rates and terms applicable to noncommercial licensees.

On July 3, 2003, RIAA, the American Council on Education, and the Intercollegiate Broadcasting System, Inc., jointly with Harvard Radio Broadcasting Co., Inc. filed a petition for adjustment of rates and terms for statutory licenses applicable to certain noncommercial entities. This agreement will be published in the near future in the **Federal Register** pursuant to 37 C.F.R. § 251.63(b). If any person or entity with a significant interest in those rates and terms files an objection and a notice of intent to participate in this CARP proceeding, that party and all other parties with an interest in rates and terms applicable to noncommercial entities must adhere to the following precontroversy schedule and be prepared to file their direct cases on October 6, 2003.

The Office is also announcing the date for a meeting, prior to the submission of direct cases, to discuss administrative issues. This meeting will be held on **Thursday, September 25, 2003,** at **2 p.m.** in Room LM-414 of the James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20554.

Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule for this proceeding is as follows:

ACTION	**DATE**
Filing of Written Direct Cases	October 6, 2003
Requests for Underlying Documents Related to Written Direct Cases	October 16, 2003
Responses to Requests for Underlying Documents	October 21, 2003
Completion of Document Production	October 28, 2003
Follow-up Requests for Underlying Documents	October 31, 2003
Responses to Follow-up Requests	November 5, 2003
Motions Related to Document Production	November 10, 2003
Production of Documents in Response to Follow-up Requests	November 13, 2003
All Other Motions, Petitions and Objections	November 19, 2003

Notice of Intention to File Written Direct Cases

The Office recognizes that a number of parties to this proceeding have already withdrawn their Notices of Intent to Participate, and it anticipates that additional parties will withdraw before the deadline for submitting written direct cases. Thus, to avoid burdening the active participants in this proceeding from serving written direct cases on those parties that are not, or will not, be active, the Library is requiring all parties that filed a Notice of Intent to Participate and that intend to file

written direct cases to submit a Notice of Intention to Submit a Written Direct Case **no later than September 22, 2003.**

A Notice of Intention to Submit a Written Direct Case shall state the party's intention to file a written direct case on October 6, 2003, and to be an active participant in this proceeding. In addition, the notice shall provide the name, address, telephone number, and facsimile number of one person (counsel, or if not represented by counsel, the party) on whom copies of filings and submissions should be served. The names and addresses so provided shall comprise the service list for the remainder of the proceeding.

Any party that fails to file such a notice shall forfeit the right to receive service copies of the written direct cases from the parties on October 6, 2003. Failure to submit a Notice, however, does not result in automatic dismissal from this proceeding. A party who fails to file this notice but who, in fact, files a written direct case on October 6, 2003, will be added to the service list. These parties must then be served with copies of the other parties' direct cases by Friday, October 10, 2003. All parties must then adhere to the discovery schedule set forth in this Order.

Protective Order

On April 29, 2003, the Library set a schedule for the filing of any oppositions and replies to the April 25, 2003, motion of the Copyright Owners and Performers requesting the adoption of a protective order. The April 29 Order also adopted an interim Protective Order pending disposition of the motion. The Office received oppositions to the motion from Collegiate Broadcasters, Inc. and the National Religious Broadcasters Music License Committee. However, the date for filing replies was vacated by order dated May 20, 2003, in order to allow the Copyright Owners and Performers to conclude their settlement negotiations with noncommercial entities. Consequently, the motion to adopt the Protective Order submitted April 25, 2003, has never been fully briefed.

Thus, the Library is reopening its consideration of the Copyright Owners and Performers' motion for Protective Order at this time so that it can conclude its consideration of the merits of the parties' concerns with respect to the proposed Protective Order and enter a final Protective Order.

Wherefore, **IT IS ORDERED** that any further oppositions to the proposed Protective Order be filed with the Copyright Office no later than September 4, 2003, and replies be filed no later than September 11, 2003.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: Tanya M. Sandros
Tanya M. Sandros
Senior Attorney

DATED: August 18, 2003

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In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2002-1 CARP DTRA3

Docket No. 2001-2 CARP DTNSRA

ORDER

This Order reaffirms the original determination that Lester Chambers has a significant interest in the outcome of this proceeding that would require the Library to reject a proposed settlement and initiate a CARP proceeding for the purpose of setting rates and terms of payment for the current license period, defines the scope of the current proceeding, and discusses the role of Royalty Logic, Inc. ("RLI") in this proceeding.

Background

On May 8, 2003, certain parties[1] to the current proceeding proposed an industry-wide settlement, setting rates and terms of payment for the use of sound recordings in eligible nonsubscription transmissions for the 2003 and 2004 statutory licensing period and for the use of sound recordings in transmissions made by new subscription services from 1998 through December 31, 2004, when such transmissions are made in accordance with the statutory licenses set forth in 17 U.S.C. §§ 112 and 114. The Copyright Office published this agreement (the "proposed agreement") in the **Federal Register** on May 20, 2003, in accordance with section 251.63(b) of the CARP regulations, title 37 of the Code of Federal Regulations, seeking comment on the proposed rates and terms.[2]

Section 251.63(b) of the CARP rules permits the Librarian of Congress to adopt the rates in a negotiated agreement, provided that no party with a significant interest and an intent to participate in a CARP proceeding files an objection to the proposal. Three entities filed objections, SRN Broadcasting and Marketing, Inc. ("SRN"), Lester Chambers ("Chambers"), and Royalty Logic, Inc. Specifically, SRN opposed the rates set forth in the proposed settlement, whereas Chambers and RLI objected to certain proposed terms of payment regarding distribution of the royalty fees to copyright owners and performers. Consequently, it is necessary to determine whether these commenters have a significant interest in the proceeding that would require rejection of the settlement and initiation of a CARP proceeding for the purpose of setting rates and terms for the relevant license periods.

---

[1] The following parties petitioned the Copyright Office to publish the proposed settlement in the **Federal Register**: SoundExchange, currently an unincorporated division of the Recording Industry Association of America, Inc., the American Federation of Musicians of the United States and Canada, the American Federation of Television and Radio Artists, the Digital Media Association, Music Choice, and the following radio broadcasting groups and representatives: Bonneville International Corporation, Clear Channel Communications, Inc., the National Religious Broadcasters Music License Committee, Salem Communications Corporation and Susquehanna Radio Corporation.

[2] The proposed agreement, however, did not include rates and terms for similar transmissions made by certain noncommercial entities. Separate rates and terms applicable to certain noncommercial entities are the subject of another agreement and will be published at a future time.

The Office has made an initial determination that Chambers has a significant interest in the outcome of this proceeding based upon his objection to the proposed agreement, but it was unable to make this initial finding with respect to SRN.[3] For this reason, an order was issued on July 8, 2003, posing two questions. First, the Order requested parties to this proceeding, including Chambers and SRN, to comment on whether SRN had a significant interest. It then asked the parties to discuss whether the Library had the authority to adopt rates and terms to which no party objected and convene a CARP to address only those terms to which Chambers objected.

In response to the July 8 Order, the Recording Industry Association of America ("RIAA") and the American Federation of Musicians of the United States and Canada ("AFM") and the American Federation of Television and Radio Artists ("AFTRA") (jointly "the Performers") filed comments and replies with the Office, arguing that neither Chambers nor SRN had made the requisite showing of a significant interest to require rejection of the proposed settlement. However, RIAA and the Performers both agreed that if Chambers were found to have a sufficient interest, a CARP could be convened for the limited purpose of addressing the disputed terms. Not surprisingly, Chambers and RLI supported the initial determination with respect to Chambers' interest and argued in favor of a CARP for the limited purpose of considering the disputed terms.[4] However, SRN made no showing on its own behalf in response to the July 8 Order, and whether SRN had a signitificant interest became a moot issue when the Office dismissed SRN on procedural grounds for failure to comply with its orders and the rules governing this proceeding. Order of Dismissal, Docket No. 2002-1 CARP DTRA3 (August 15, 2003).

Consequently, this Order resolves the question whether a CARP shall be convened because of Chambers' objection, as well as the scope of such a proceeding. It also discusses RLI and its role in this proceeding.

Significant Interest – The Chambers Objection

CARPs are lengthy, complex, and expensive proceedings that are convened to adjust rates and terms for statutory licenses only when the participants cannot reach an agreement during the negotiation phase of the proceeding or when a person with a significant interest opposes a settlement agreement and demonstrates an intent to participate in the CARP proceeding. With respect to Chambers, an initial determination was made that he had demonstrated a "significant interest" in the outcome of the current proceeding sufficient to require that the Library convene a CARP to settle the disputed issues rather than adopting the rates and terms in the proposed agreement. See Order, Docket No. 2002-1 CARP DTRA3

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[3] RLI's objection was not addressed in the July 8 Order because the objection paralleled the concerns of Chambers, making a determination of RLI's interest at that time unnecessary since a CARP proceeding could proceed solely on the strength of Chambers' objection.

[4] Chambers and RLI filed another joint comment on July 29, 2003, responding to the reply comments of RIAA. Permission was not sought to submit these comments, nor had any provision been made for the submission of any surreplies. Parties were instructed to file replies to the initial comments only. Therefore, the Chambers/RLI July 29 comment has not been considered.

(July 8, 2003). RIAA and the Performers, however, maintain that Chambers does not have the requisite significant interest. Because the parties had not had an opportunity to address that determination prior to the July 8 Order, we are revisiting this issue in light of the comments filed by RIAA and the Performers.

In general, RIAA argues that the statute does not provide for a stand-alone challenge to a term of payment and, thus, such a challenge does not establish a significant interest that would require the Library to convene a CARP.[5] RIAA notes that references to significant interest in the statute and regulations apply only to rates, and not terms, citing to the statutory provision that requires the Librarian to determine whether a petitioner has a significant interest in a requested rate adjustment, 17 U.S.C. § 803(a)(1), and to the regulatory provision that permits the Librarian to adopt the rate embodied in a proposed settlement after a notice-and-comment proceeding. It also notes that sections 114(f)(2)(B) and 112(e)(4) of the statute authorize a CARP to establish both rates and terms and that no provision in the law authorizes the Library to convene a CARP merely to consider terms of payment. Because nothing in the statute or the regulations ties a significant interest to the terms, RIAA maintains that the "significant interest" analysis does not apply to Chambers' objection and, therefore, the Office is not required to convene a CARP merely to consider a term of payment.

RIAA also argues that should the Office apply the "significant interest" analysis to the Chambers objection, it should conclude that Chambers lacks a significant interest in the outcome of this proceeding because no single objection to a term of payment can rise to the level of significance needed to force all other parties into a CARP. In support of this proposition, RIAA references the legislative history of the Digital Performance Right in Sound Recordings Act and cites the passage that characterizes terms as "such *details* as how payments are to be made, when, and other accounting matters (such as are prescribed in section 115)." S. Rep. No. 104-128, at 30 (1995). In essence, RIAA argues that one such *detail* "when raised by one individual, . . . is not significant enough to force all parties to the underlying proceeding who have an interest in the terms to undertake an extraordinary, expensive CARP proceeding," RIAA reply comment at 9, especially where the party's intent is to argue that, in the words of RIAA, "it is entitled to be a 'free rider' and not pay expenses relating generally to collection and distribution of compulsory license royalties and the establishment of royalty rates on behalf of all those who are entitled to them." Id. at 8.

Moreover, RIAA contends that Chambers' concerns can be addressed without convening a CARP if his concern is merely whether RLI can negotiate agreements on his behalf and collect all of his royalties. Should Chambers wish to appoint RLI as its agent and provide written notification of this arrangement to SoundExchange (the Receiving Agent designated in the proposed settlement), RIAA states that SoundExchange would honor such an arrangement, as nothing prohibits SoundExchange from paying RLI on behalf of Chambers.

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[5] The Performers adopted all the arguments put forth by RIAA except for RIAA's contention that there is no statutory basis for a challenge to the terms portion of a settlement. However, the Performers did not articulate any rationale for their decision not to adopt RIAA's position on this point.

Chambers, on the other hand, does not believe that his concerns can be addressed merely by appointing RLI as his "common agent." He contends that the proposed regulations governing the activities of a Designated Agent could be interpreted to vest more rights in the Designated Agent than those which may be exercised by a common agent. For that reason, he seeks to have RLI named as a Designated Agent as a way to prevent SoundExchange from deducting certain costs without prior approval. Moreover, Chambers expressed concern that he would need to incur additional costs associated with gathering information to monitor the collection and distribution process should he be required to receive his royalties from SoundExchange rather than a Designated Agent of his choosing.

Ruling

A copyright owner whose works are used under the section 112 and 114 licenses clearly has a significant interest in a proceeding that will establish rates and terms of payment that, in turn, determine the copyright owner's level of compensation for use of his or her works. Because Chambers opposes certain terms of payment that affect the amount of administrative costs that may be deducted from his share of the royalty fees prior to a distribution, his interest is clearly significant.

Specifically, Chambers opposes the provisions in the proposed agreement that name SoundExchange as the sole Designated Agent because it would allow SoundExchange to deduct the maximum amount of costs allowable under the law, see 17 U.S.C. § 114(g)(3), without prior approval. For this reason, Chambers seeks to have another agent, RLI, named as a Designated Agent. Chambers clearly has a significant interest in being able to elect to receive his royalties from a Designated Agent other than the single agent designated in the proposed agreement. As a result of a recent amendment to section 114, a Designated Agent may deduct substantial costs from the royalties it distributes to copyright owners and performers, including, for example, costs "incurred in participating in negotiations or arbitration proceedings." 17 U.S.C. § 114(g)(3)(C). The same amendment gives a copyright owner or performer the right to avoid those potentially substantial costs by "elect[ing] to receive royalties from another designated agent," 17 U.S.C. § 114(g)(3). Thus, Congress has already resolved the alleged "free rider" problem asserted by RIAA, concluding that copyright owners and performers are entitled to avoid deduction of a particular Designated Agent's costs by electing another Designated Agent.

Because the law gives a copyright owner or a performer a potential choice among Designated Agents and a means to avoid certain deductions, a copyright owner or performer who wishes to argue for the designation of a second agent has the right to seek an alternative designation in the only forum available to him at this stage of the proceeding. The fact that most copyright owners and performers have not objected to the single Designated Agent named in the proposed agreement is no reason to impose that choice on others who have a right to make an alternative choice and avoid certain costs.

RLI's Role in the Current Proceeding

In its objection to the proposed terms, RLI argues that its interest in this proceeding flows in part from its prior appointment as a Designated Agent for the distribution of section 112 and 114 royalty fees. Comments of RLI Objecting to Proposed Terms at 2-3 (filed June 11,

2003). It also states that its business objective is to provide "broad 'common agent' services . . . to copyright owners and performing artists with respect to the administration and distribution of royalty payments to be made to them pursuant to both voluntary and statutory licenses," maintaining that it cannot achieve this goal unless it is named as a Designated Agent in the current proceeding. Id. at 3. Moreover, RLI purports to preserve the rights of copyright owners and performers to choose among different Designated Agents by making sure they have a choice.

RIAA maintains that RLI's role as a Designated Agent in the 1998-2002 eligible nonsubscription services proceeding does not provide a basis for establishing RLI's significant interest in the outcome of this proceeding, noting that the initial designation was the result of a settlement agreement between the parties to that proceeding with respect to the terms of payment. RIAA reply comment at 6-7.

Ruling

Because RLI has no right to collect royalties on its own behalf, its interest in this proceeding is dependent upon the extent to which any copyright owners or performers who are entitled to receive royalties from the use of their works wish to have RLI designated as an agent and make the case for such designation to the CARP. See 68 FR 39837, 39839 (July 3, 2003). Of course, RLI may represent the interest of any beneficiary of the license in negotiations or in a CARP proceeding, provided that the party in interest files a notice of intent to participate and expressly authorizes RLI to represent its interest in the proceeding.[6] Consequently, RLI may participate in this proceeding not on its own behalf, but only to represent the interests of Chambers, the only RLI affiliate with a bona fide interest that has filed the requisite notice of intent to participate in the current proceeding.

Scope of the CARP Proceeding with Respect to the May 20 Proposal[7]

The July 8 Order also inquired whether the Library could convene a CARP for the limited purpose of considering disputed terms in the event it determined that no controversy remained with respect to the proposed rates. While disputing the need for a CARP to consider Chambers' sole objection to a term of payment for the reasons previously discussed, RIAA does not question the Library's authority to adopt undisputed rates and terms set forth in the May 20 proposed settlement and convene a CARP for the limited purpose of considering disputed terms, provided that the settling parties agree to make the issues relating to those terms severable.

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[6] According to the comments of Lester Chambers and Royalty Logic, Inc., filed with the Office on July 15, 2003, in response to the Office's July 8 Order, Chambers and other RLI affiliates have authorized RLI "to represent them in connection with voluntary negotiation and arbitration proceedings."

[7] On July 3, 2003, RIAA, the American Council on Education, and the Intercollegiate Broadcasting System, Inc., jointly with Harvard Radio Broadcasting Co., Inc. filed a petition for adjustment of rates and terms for statutory licenses applicable to certain noncommercial entities. This agreement will be published in the near future in the **Federal Register** pursuant to 37 C.F.R. § 251.63(b). Any disputes over the proposed rates and terms will also be considered in this proceeding by the same Panel. See, Procedural Order, this proceeding, dated August 18, 2003.

In fact, the settling parties[8] have expressly agreed to such an action, should it become necessary, in order to avoid the cost of a more extensive CARP proceeding; and on July 16, 2003, they filed a motion to amend the May 8 joint petition for adoption of rates and certain terms for statutory licenses applicable to eligible nonsubscription services, new subscription services and business establishment services. The purpose of the motion was to amend the provisions with respect to severability "to permit certain portions of the Proposed Regulations to be severed from the others so that . . . the Office may adopt the royalty rates and terms as to which there is no controversy and convene a Copyright Arbitration Royalty Panel ("CARP") proceeding limited to issues concerning collection and distribution procedures for section 112(e) and 114 royalties." Motion to Amend at 2. No party has opposed the motion.

Chambers and RLI are in agreement with RIAA and the Performers on this issue, noting that the CARP process is the only forum for resolving disputed issues that are within the jurisdiction of the CARP, i.e., statutory rates and terms of payment. Chambers and RLI do not believe, nor in fact does RIAA,[9] that a participant must object to rates in order to register an objection to a proposed term. Moreover, they note that such a requirement would lead to needless litigation, increased costs, and do nothing to further the goal of supporting settlement agreements and narrowing the issues for adjudication.

Ruling

The Library shall adopt the undisputed rates and terms in the proposed agreement pursuant to 37 C.F.R. § 251.63(b), and a CARP shall be convened for the limited purpose of addressing the disputed terms concerning the designation of SoundExchange as the sole "Designated Agent" for purposes of collecting and distributing the section 112(e) and section 114 statutory royalties. The provisions of the proposed settlement that have been identified as being in dispute are sections 262.4(b), (g) and (h). Motion to Amend Joint Petition For Adoption of Rates and Certain Terms (July 16, 2003) at 3-5. Moreover, the CARP shall have jurisdiction to make any necessary conforming changes to the uncontested terms of payment.

Sections 112 and 114–and the entire rate setting process for the compulsory licenses–are designed to encourage parties to negotiate rates and terms for these licenses and to effectuate settlements reached by the parties. For this reason, the CARP regulations provide a mechanism for the adoption of rates without convening an arbitration panel. See 37 C.F.R. § 251.63(b). Moreover, Congress has specifically endorsed the adoption of a negotiated agreement as to rates and terms without convening a CARP where the public has had an opportunity to comment on the proposal and no controversy remains with respect to these matters. S. Rep. No. 104-128, at 29 (1995).

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[8] See footnote 1.

[9] RIAA does not take the position that a party must object to rates in order to object to terms. RIAA reply comments at (June 18, 2003). Rather, it maintains that, in this case, Chambers' objection is not one to which the "significant interest" analysis can and should be applied. Id.

In the current situation, the proposal has been offered to the public and only a single dispute remains with respect to a single issue. Consequently, it would undermine the strong public policy in favor of settlements evinced in the structure of the rate setting process and impose needless expense on the parties if the Librarian could not adopt the uncontested provisions of the settlement and convene a CARP for the limited purpose of resolving the disputed terms. Where the public has had an opportunity to file an objection to any provision in the agreement, the parties to the settlement have agreed to sever the disputed terms from the uncontested provisions of the settlement, and the Library has determined that adoption of the uncontested provisions is in the public interest, Congressional intent is best served by adopting the undisputed provisions and initiating a CARP for consideration of the contested terms.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: Tanya M. Sandros
Tanya M. Sandros
Senior Attorney

DATED: August 18, 2003

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In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2002-1 CARP DTRA3

Docket No. 2001-2 CARP DTNSRA

ORDER

This Order addresses four matters in the above-captioned proceeding. First, the Order addresses a joint motion filed by certain parties proposing rates and terms for the section 112 and 114 statutory licenses for certain services and requesting that the proposal be published by the Library under section 251.63(b) of the CARP rules, 37 C.F.R. Second, the Order addresses a motion filed by certain parties to consolidate this proceeding with a new proceeding to set rates and terms under the section 112 and 114 licenses for new subscription services. Third, the Order sets forth a new precontroversy discovery schedule for certain parties in this proceeding not covered by the joint proposal mentioned above. And fourth, the Order addresses a motion filed by Collegiate Broadcasters, Inc. to bifurcate this proceeding as between commercial and non-commercial entities making use of the section 112 and 114 licenses for eligible nonsubscription services.

Joint Proposal

On April 3, 2003, the Library of Congress received a joint proposal to set rates and terms for the section 112 and 114 statutory licenses for eligible nonsubscription and new subscription transmissions, other than simulcasts of AM and FM radio broadcast programming and transmissions made by certain noncommercial entities as identified in the joint proposal, from the Recording Industry Association of America, the American Federation of Musicians of the United States and Canada, the American Federation of Television and Radio Artists, and the Digital Media Association. The Library will soon publish in the **Federal Register** the terms of the joint proposal pursuant to section 251.63(b) of the CARP rules, which allows the Librarian to propose for adoption settled royalty rates and terms. Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS VACATED** for services covered by the joint proposal.

Motion to Consolidate

On February 24, 2003, the Digital Media Association, America Online, Inc., Listen.com, Inc., MusicMatch, Inc., and Yahoo, Inc. filed a motion requesting the Library consolidate this proceeding with the CARP proceeding to establish section 112 and section 114 rates and terms for new subscription services, Docket No. 2001-2 CARP DTNSRA. The joint proposal, described above, covers both nonsubscription and new subscription services. If the proposal is adopted, the motion to consolidate is moot. Wherefore, **IT IS ORDERED** that the motion to consolidate **IS DISMISSED WITHOUT PREJUDICE** and may be refiled in the event that the joint proposal is not adopted and a CARP becomes necessary.

New Precontroversy Discovery Schedule

The Small Webcaster Settlement Act of 2002, Public Law No. 107-321, amended section 114(f) of the Copyright Act to provide, among other things, that noncommercial webcasters have until May 31, 2003, to negotiate settlements of rates and terms for the section 112 and 114 licenses for nonsubscription transmissions. The Small Webcaster Settlement Act defines a "noncommercial webcaster" as a webcaster that is:

> (I) exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); (II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

17 U.S.C. § 114(f)(5)(E)(i). The Library recognizes that requiring the submission of written direct cases before May 31 will compromise noncommercial webcasters' ability to take full advantage of the period provided in the Act.

Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS VACATED** for rates and terms for the use of sound recordings in eligible nonsubscription transmissions (17 U.S.C. §§ 112 & 114) for noncommercial webcasters.

IT IS FURTHER ORDERED that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS AMENDED** for noncommercial webcasters as follows:

ACTION	**DATE**
Filing of Written Direct Cases	June 30, 2003
Requests for Underlying Documents Related to Written Direct Cases	July 10, 2003
Responses to Requests for Underlying Documents	July 15, 2003
Completion of Document Production	July 21, 2003
Follow-up Requests for Underlying Documents	July 25, 2003
Responses to Follow-up Requests	July 30, 2003

Motions Related to Document Production	August 4, 2003
Production of Documents in Response to Follow-up Requests	August 7, 2003
All Other Motions, Petitions and Objections	August 13, 2003

The precontroversy discovery schedule announced in the February 6, 2003, Order remains unchanged for those parties who are not covered by the joint proposal and who are not noncommercial webcasters as defined in the Small Webcaster Settlement Act.

Motion to Bifurcate

On March 3, 2003, Collegiate Broadcasters, Inc. ("CBI") filed a motion to bifurcate this proceeding to permit noncommercial webcasters to present their written direct cases at a later date than other parties in this proceeding and to permit them to present their evidence and have it considered by the CARP separately from the other parties. CBI points out that allowing noncommercial webcasters to file later (they propose August 5, 2003) will allow such webcasters to fully negotiate settlements under the terms of the Small Webcaster Settlement Act.

Wherefore, **IT IS ORDERED** that the motion to bifurcate **IS GRANTED IN PART AND DENIED IN PART**. The motion is granted in that the Library has amended the precontroversy discovery schedule for noncommercial webcasters and is permitting them to submit their written direct cases at a later date (see above). This also means that precontroversy discovery on their written direct cases will be conducted separately from the other parties in this proceeding. However, the Library does not have the authority to instruct the CARP as to how it will hear and consider the evidence presented by noncommercial webcasters. Consequently, the Library is denying this aspect of CBI's motion. Nevertheless, we encourage the CARP to schedule hearings and proceedings in this docket in such a manner as to minimize, as much as possible, the costs of participation that will be borne by noncommercial webcasters.

SO ORDERED

Marybeth Peters
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Senior Attorney

DATED: April 10, 2003

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In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

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On April 3, 2003, the Library of Congress received a joint proposal to set rates and terms for the section 112 and 114 statutory licenses for eligible nonsubscription and new subscription transmissions, other than simulcasts of AM and FM radio broadcast programming and transmissions made by certain noncommercial entities as identified in the joint proposal, from the Recording Industry Association of America, the American Federation of Musicians of the United States and Canada, the American Federation of Television and Radio Artists, and the Digital Media Association. The Library will soon publish in the **Federal Register** the terms of the joint proposal pursuant to section 251.63(b) of the CARP rules, which allows the Librarian to propose for adoption settled royalty rates and terms. Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS VACATED** for services covered by the joint proposal.

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The Small Webcaster Settlement Act of 2002, Public Law No. 107-321, amended section 114(f) of the Copyright Act to provide, among other things, that noncommercial webcasters have until May 31, 2003, to negotiate settlements of rates and terms for the section 112 and 114 licenses for nonsubscription transmissions. The Small Webcaster Settlement Act defines a "noncommercial webcaster" as a webcaster that is:

> (I) exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); (II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

17 U.S.C. § 114(f)(5)(E)(i). The Library recognizes that requiring the submission of written direct cases before May 31 will compromise noncommercial webcasters' ability to take full advantage of the period provided in the Act.

Wherefore, **IT IS ORDERED** that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS VACATED** for rates and terms for the use of sound recordings in eligible nonsubscription transmissions (17 U.S.C. §§ 112 & 114) for noncommercial webcasters.

IT IS FURTHER ORDERED that the precontroversy discovery schedule announced in the Order in Docket No. 2002-1 CARP DTRA3 (February 6, 2003) **IS AMENDED** for noncommercial webcasters as follows:

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The precontroversy discovery schedule announced in the February 6, 2003, Order remains unchanged for those parties who are not covered by the joint proposal and who are not noncommercial webcasters as defined in the Small Webcaster Settlement Act.

Motion to Bifurcate

On March 3, 2003, Collegiate Broadcasters, Inc. ("CBI") filed a motion to bifurcate this proceeding to permit noncommercial webcasters to present their written direct cases at a later date than other parties in this proceeding and to permit them to present their evidence and have it considered by the CARP separately from the other parties. CBI points out that allowing noncommercial webcasters to file later (they propose August 5, 2003) will allow such webcasters to fully negotiate settlements under the terms of the Small Webcaster Settlement Act.

Wherefore, **IT IS ORDERED** that the motion to bifurcate **IS GRANTED IN PART AND DENIED IN PART**. The motion is granted in that the Library has amended the precontroversy discovery schedule for noncommercial webcasters and is permitting them to submit their written direct cases at a later date (see above). This also means that precontroversy discovery on their written direct cases will be conducted separately from the other parties in this proceeding. However, the Library does not have the authority to instruct the CARP as to how it will hear and consider the evidence presented by noncommercial webcasters. Consequently, the Library is denying this aspect of CBI's motion. Nevertheless, we encourage the CARP to schedule hearings and proceedings in this docket in such a manner as to minimize, as much as possible, the costs of participation that will be borne by noncommercial webcasters.

SO ORDERED

Marybeth Peters
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Senior Attorney

DATED: April 10, 2003

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

ORDER

On October 11, 2001, the Copyright Office received a petition from Music Choice, Inc. requesting that the Office consolidate the CARP proceeding to determine reasonable rates and terms for the public performance of sound recording by pre-existing satellite digital audio radio services and pre-existing subscription services with the proceeding to establish rates and terms for the performance of sound recordings by new subscription services. 17 U.S.C. 114. In a Notice published in the **Federal Register**, the Office sought comment on the Music Choice petition. 66 FR 58180 (November 20, 2001). Subsequent to publication of the Notice, Music Choice filed a motion with the Office requesting that its petition be withdrawn because its new subscription service, Backstage Pass, ceased operation on January 2, 2002.

The Office received comments on consolidation from the Digital Media Association ("DiMA"); the Recording Industry Association of America, Inc., the American Federation of Television and Radio Artists, and the American Federation of Musicians of the United States and Canada (collectively "RIAA"); and XM Satellite Radio, Inc. and Sirius Satellite Radio, Inc. (collectively "XM/Sirius"). DiMA favors consolidation, arguing that it would promote administrative efficiency by reducing substantial duplication in the presentation of evidence and would create a richer evidentiary record that would promote greater consistency in the legal rationales underlying the rates established for each service. RIAA and XM/Sirius oppose consolidation. RIAA submits that the issue has been mooted by the requested withdrawal of Music Choice's petition, and notes that there is no overlap in the identity of the parties (other than RIAA) in the two proceedings. Both RIAA's and XM/Sirius's comments stress that different legal standards to be applied in determining rates for new subscription services versus pre-existing subscription and satellite radio services are likely to complicate a consolidated proceeding rendering it administratively inefficient and inappropriate.

In considering Music Choice's motion to withdraw its petition, we see no reason not to grant it. None of the commenters opposes the motion. The Office does not agree, however, that withdrawal of the petition moots the issue of consolidation. The Office considers the matter of consolidation of like proceedings when it appears that such consolidation might promote economic efficiency, and a motion or petition for consolidation is not a prerequisite to such consideration. With regard to consolidating Docket No. 2001-1 CARP DSTRA 2 with Docket No. 2001-2 CARP DTNSRA, we find consolidation to be unnecessary. First, the participants in the two proceedings are not the same, with the exception of RIAA. Consequently, there will not be multiple parties burdened by the expense of presenting duplicative evidence in both proceedings. The only

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party that might face this burden, RIAA, wants separate proceedings. Second, DiMA is not a party in this proceeding and, while it is a trade organization that represents users of sound recordings under 17 U.S.C. 114, it does not purport to represent the views of any of the parties in either proceeding. The sound recording users which did file comments, XM and Sirius, strongly oppose consolidation. On CARP matters such as consolidating proceedings, the views of the parties to the proceedings receive greater weight than those of non-parties. In sum, the Copyright Office will not consolidate Docket No. 2001-1 CARP DSTRA 2 with Docket No. 2001-2 CARP DTNSRA and both proceedings will be handled by separate CARPs.

Wherefore, **IT IS ORDERED** that Music Choice's motion to withdraw its petition to consolidate Docket No. 2001-1 CARP DSTRA 2 with Docket No. 2001-2 CARP DTNSRA **IS GRANTED**.

DATED: January 28, 2002

SO ORDERED.

Marybeth Peters,
Register of Copyrights.

By: _____
William J. Roberts, Jr.,
Senior Attorney.