



In the Matter of
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

} **Docket No. 99-6 CARP DTRA**
 } **Docket No. 2000-3 CARP DTRA2**

LIBRARY
 OF
 CONGRESS

ORDER

Now that the Copyright Office has completed its rulemaking proceeding addressing the scope of the section 114(d)(1)(A) broadcast transmission exemption, the Library can address scheduling and going forward with this proceeding. In establishing a schedule, however, the Library must address the pending motion for consolidation.

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The consolidation motion is filed by ABC, Inc.; AEI Music Network, Inc.; America Online, Inc.; American Broadband Productions, LLC; BET.com; CBS Corporation; CDnow Online, Inc.; Digital Bitcasting Corp.; The Eclectic Radio Company LLC; Everstream, Inc.; iGroove.com, Inc.; Launch Media, Inc.; Live365.com; MTV Networks; NetRadio Corporation; RadioWave.com, Inc.; Rolling Stone Radio/Real Networks; Tunes.com, Inc.; The Walt Disney Company; Westwind Media.com, Inc.; Yahoo, Inc.; AMFM, Inc.; Clear Channel Communications, Inc.; National Public Radio; and Music Choice (collectively referred to as the "Movants").

Copyright
 Arbitration
 Royalty
 Panels

Movants request that the Library consolidate this proceeding (which will establish royalty rates for the period October 28, 1998, through December 31, 2000) with the rate adjustment proceeding for the 2001-2002 rates. Under Movants' requested approach, both proceedings will be conducted separately but will take place concurrently during the same 180-day arbitration proceeding and before the same CARP. In addition, Movants request that the Library set a date for the filing of written direct cases in this proceeding that coincides with the date for the filing of written direct cases for the 2001-2002 rate adjustment proceeding.

P.O. Box 70977
 Southwest
 Station
 Washington
 D.C. 20024

Movants offer several arguments in support of their request.¹ First, Movants submit that it does not make any sense to convene separate back-to-back or overlapping CARP proceedings to address essentially the same issues with essentially the same parties, witnesses, and evidence. Movants submit that it would be economically and administratively inefficient to commence the CARP in this proceeding when the CARP in the next proceeding is already eligible to begin, and describe a series of duplicative evidentiary submissions that will result if two separate CARPs are convened. See Movants' Motion at 5-6.

Telephone:
 (202)707-8380

Facsimile:
 (202)252-3423

Second, Movants assert that the Library has the authority to order a consolidation by virtue of 17 U.S.C. 801(c), which provides that the Librarian may "make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by [a CARP]..." Movants dispute any implicit prohibition against consolidation contained in 17 U.S.C. 114(f)(2)(C)(ii) (which provides that section 112 and 114 rates are effective for two-year intervals, unless the parties agree otherwise), asserting that the congressional purpose of two-year intervals—to account

¹ Some of these arguments have become moot, and are not addressed here, due to the time that has passed while the Library has conducted the RIAA rulemaking. The same is true for certain arguments made by RIAA in its opposition to the consolidation motion.

for changed circumstances in a rapidly developing industry—is not frustrated in this instance because the 2001-2002 proceeding will begin shortly.

Third, Movants assert that there is no prejudice to copyright owners to have one CARP conduct rate adjustments for two periods, instead of separate CARPs. Copyright owners will expend the same amount of time and effort in separate proceedings as they will in a consolidated proceeding. Furthermore, to the extent that copyright owners have yet to receive any royalty payments, an interest component can be factored into the decision for the 1998-2000 period and has no bearing on the issue of whether a single CARP can address two time periods. In sum, Movants submit that consolidation will only produce benefits to both sides of these proceedings.

RIAA opposes Movants' request for several reasons. RIAA challenges the notion that the Library possesses the authority to order consolidation. RIAA submits that the structure and timing of rate adjustments under sections 112 and 114 "were the product of a hard-fought legislative agreement between RIAA and the webcasters—an agreement that the webcasters now seek to undo." RIAA Opposition at 6. Both the language and the legislative history contemplate a proceeding for the 1998-2000 period, and a separate proceeding for the 2001-2002 period, unless the parties agree otherwise. Consolidation would subvert Congress' intent by having a CARP decide rates for four years, instead of two. Further, RIAA argues that Movants are attempting to get through consolidation what they could not get under the express terms of the statute, namely the agreement of all parties for one CARP to establish rates beyond the 1998-2000 period. Ordering consolidation would, in RIAA's view, subvert the direction of the statute.

RIAA also cites Recording Industry Ass'n of America v. CRT, 662 F.2d 1 (D.C. Cir. 1981) (RIAA v. CRT), for the proposition that the Library may not have as much discretion in consolidating rate adjustment proceedings as it does in royalty distribution proceedings. In that case, the Tribunal was reversed for attempting to hold annual proceedings to adjust the 17 U.S.C. 115 rates for inflation because the Copyright Act prescribed a different schedule. Given the section 112 and 114 directions for proceedings every two years, RIAA intimates that the Library's authority to make procedural rulings under chapter 8 may be circumscribed.

Further, RIAA argues that a decision to consolidate should not be influenced by any concern of the Library's to ensure prospective rates for the 2001-2002 period. Congress made webcasters' liability effective beginning October 28, 1998, even though it created a statutory scheme that could not possibly yield final rates until much later. In addition, RIAA notes that Movants themselves have not demonstrated any particular concern over retrospective rates and did not make any efforts to commence this proceeding as soon as possible.

RIAA also asserts that Movants have exaggerated the benefits that will accrue from a consolidated proceeding. Costs could be less under RIAA's approach if the decision of the CARP for the 1998-2000 period eliminates the need to litigate the 2001-2002 period. Even if a second CARP is required, testimony from the prior proceeding may be designated, thereby reducing costs associated with presenting the same testimony. In addition, some or all of the arbitrators from the first CARP may serve on the second CARP, thereby reducing the costs of educating a new panel.

Finally, RIAA submits that it would be extremely prejudiced by consolidation of the two proceedings. Consolidation will prevent the RIAA from utilizing the precedent of the first proceeding to negotiate rates for the second and will effectively grant webcasters a four-year statutory license instead of a two-year license. Further, consolidation will further delay the establishment of rates and the making of payments for the 1998-2000 period, and such delay cannot be adequately compensated by CARP-imposed interest payments.

In reply, Movants² reaffirm that the Library has authority to consolidate this proceeding with the 2001-2002 proceeding because consolidations are strictly procedural and do not affect the substantive rights of the parties. The Movants also assert that RIAA v. CRT, cited by RIAA as authority prohibiting a consolidation, is easily distinguished since the Tribunal attempted to set rates more frequently than the statute permitted, which is not the case here.

Discussion

Before the merits of Movants' consolidation proposal may be weighed, two issues must be addressed. First is the question of whether the Library has the authority to order consolidation. Movants urge that the Library possesses such authority through the general authority granted by section 802(c), which allows the Librarian to make procedural rulings in CARP proceedings, while RIAA intimates that the Library does not, pointing to the two-year cycle of rate adjustments prescribed in sections 112 and 114. Second is the issue of whether the CARP is capable of handling a consolidated proceeding within a 180-day time frame, an issue to which neither party devotes much attention.

As to the question of authority, the Library is persuaded that it does have the authority to order consolidation of rate adjustment periods for the section 112 and 114 licenses. RIAA admits that the Library has correctly exercised its authority to consolidate royalty distribution proceedings, but intimates that a rate adjustment—particularly a section 112/114 rate adjustment—is a different matter. The Library does not, however, perceive any differences between the two categories of proceedings. Consolidation of the 1998-2000 proceeding with the 2001-2002 proceeding is purely a procedural matter. The substantive rights of the parties are not affected in a consolidation, and the only difference is that the same CARP will hear both cases. The difference is not material because the identity of the arbitrators could be the same in separate proceedings as they are in a consolidated proceeding.

RIAA's citation to RIAA v. CRT is inapposite because the Tribunal attempted to conduct rate adjustment proceedings (described as mini-proceedings) with greater frequency than the statute allowed. This is not the case here, where the Library would only be consolidating two existing proceedings.

² In addition to Movants' reply, the Library received a reply from the American Federation of Musicians and the American Federation of Television and Radio Artists supporting RIAA's opposition to the motion for consolidation.

Further, the Library does not draw the same implication from the language of the section 112 and 114 licenses that RIAA does; namely, that the statute's reference to rate adjustment proceedings at two-year intervals means that they must be conducted sequentially every two years and can never be consolidated. The section 111 license, for example, refers to annual distribution proceedings taking place "[a]fter the first day of August of each year," but there has never been any suggestion that such language binds the Library to separate, annual proceedings without consolidation. 17 U.S.C. 111(d)(4)(B). Although RIAA suggests that a rate adjustment proceeding is statutorily different from a royalty distribution on this point, it provides nothing to support this assertion. As a practical matter, distribution proceedings often lend themselves to consolidation because the statute schedules them annually. It is unlikely that the Library would order a consolidation of two rate adjustment proceedings where the statute schedules adjustments to take place at five-year intervals, which is the case with most of the compulsory licenses in the Copyright Act, as opposed to two-year intervals. However, there is nothing in the Copyright Act which permits consolidation of royalty distribution proceedings, yet forbids consolidation of rate adjustment proceedings. In sum, the Library agrees with Movants that it does have authority under section 802(c) to consolidate this proceeding with the 2001-2002 rate adjustment proceeding.

The second matter is the predicted work load of the CARP. If, in the view of the Library, a consolidated proceeding will be so complicated and involve significantly larger amounts of testimony and evidence than a single proceeding, then consolidation is not an option. The 180-day arbitration period can become very short where too much material is assembled through consolidation, as the Library has learned from certain prior proceedings. Not much attention is paid to this issue in the parties' pleadings, although it appears that because of the relatively nascent nature of the webcasting industry, there will not be considerable amounts of additional testimony for the 2001-2002 proceeding. Consequently, the Library determines that a CARP presiding over a consolidated proceeding will not be overburdened and is capable of rendering a well-reasoned decision within the 180-day time frame.

With these two important considerations resolved, what is left is a balancing of the advantages and disadvantages of consolidation. Movants argue that consolidation promotes administrative efficiencies, reduces costs, and prevents duplication resulting from two separate proceedings. RIAA argues that resolution of the 1998-2000 proceeding first will promote settlements and possibly eliminate the need for a second proceeding. However, in order for that to be the case, the 1998-2000 proceeding must be completely resolved, which would not occur until well into next year even under the most immediate schedule. This would require extensive postponement of the 2001-2002 proceeding, with the undesirable result that rates and terms for 2001-2002 would most likely be determined after the end of 2002. As the Library made clear in its discussions with the parties regarding scheduling, we are committed to establishing, whenever feasible, rates and terms for compulsory licenses prior to the commencement of the periods during which those rates and terms are effective.

There is also the matter of the considerable passage of time from when the 1998-2000 proceeding was supposed to have begun. The delay was brought about for several reasons, particularly the parties' desire to continue to negotiate and the RIAA's petition for rulemaking on the section 114(d)(1)(A) broadcast transmission exemption. It is noteworthy that RIAA states in its petition for rulemaking that longstanding and continuous disputes with broadcasters over the

scope of the exemption have prevented settlement negotiations from going forward. If that is the case, a petition for rulemaking seeking a resolution from the Copyright Office at an earlier point in the negotiations would have allowed this proceeding to commence more expeditiously and would not have resulted in such a lengthy delay of the commencement of the 1998-2000 proceeding.

Given these factors, the Library concludes that the equities favor a consolidation of the 1998-2000 and 2001-2002 proceedings. Consolidation will avoid duplication of evidence, reduce the overall cost of the proceeding, and yield a timely established royalty fee for the 2001-2002 period. Further, consolidation will not affect the substantive rights of the parties to present their evidence for both time periods, nor will it cause them prejudice.

Finally, the necessary procedural measures have been completed to enable consolidation. The Library has received a petition for rate adjustment for the 2001-2002 period, published the **Federal Register** notice seeking comment on the petition (65 FR 55302 (September 13, 2000)), and received Notices of Intent to Participate from interested parties. The 2001-2002 proceeding is, consequently, procedurally ready to be consolidated with the 1998-2000.

In consolidating the 1998-2000 proceeding with the 2001-2002 proceeding, the Library is assigning a new single docket number to the consolidated proceedings. It is important to note, however, that the proceedings remain separate in terms of the evidentiary submissions and the establishment of rates and terms. This point is discussed further below. All that we have done by consolidating the two proceedings is to allow a single CARP to determine the rates and terms for both periods in the same 180-day period. We now turn to the schedule for these consolidated proceedings.

Schedule

The following is the precontroversy discovery schedule for the consolidated proceedings:

ACTION	DATE
Negotiated Protective Order	February 1, 2001
Filing of Written Direct Cases	February 5, 2001
Requests for Underlying Documents Related to Written Direct Cases	February 14, 2001
Responses to Requests for Underlying Documents	February 21, 2001
Completion of Document Production	February 26, 2001
Follow-up Requests for Underlying Documents	March 2, 2001

Responses to Follow-up Requests	March 8, 2001
Motions Related to Document Production	March 12, 2001
Production of Documents in Response to Follow-up Requests	March 16, 2001
All Other Motions, Petitions and Objections	March 21, 2001
Initiation of Arbitration	May 21, 2001

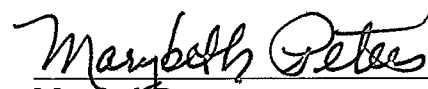
Since these will be consolidated proceedings, the CARP will be establishing rates and terms for two periods (1998-2000 and 2001-2002) based upon the evidence presented for each of the two periods. We are not requiring that parties submit separate written direct cases for each of the periods (although that is certainly permissible), but we do direct the parties to organize their written direct cases, testimony, and proposed findings in such a way as to clearly distinguish between the two periods. Likewise, the parties should be mindful of this distinction when proposing a hearing schedule to the arbitrators. Neither the CARP, nor the Librarian, should be put in the position of determining after the fact for which period particular testimony or evidence was submitted.

In addition, in preparing for the exchange of documents requested through discovery, the parties to this consolidated proceeding are directed to immediately begin negotiating the terms of a protective order to preserve the confidentiality of the exchanged documents. Separate confidentiality orders may be negotiated for each period, or a single agreement may be reached covering both periods.

Confidentiality concerns are not valid reasons for failing to submit timely filed written direct cases, or for failing to timely exchange requested documents in accordance with the procedural schedule described above. If a protective order has not been negotiated and submitted to the Librarian by February 1, 2001, the Library will enter its own protective order the following day that will govern this proceeding.

Wherefore, **IT IS ORDERED** that the motion for consolidation of the 1998-2000 proceeding with the 2001-2002 proceeding **IS GRANTED**. The consolidated proceeding before the CARP will be conducted in accordance with the schedule announced in this Order.

SO ORDERED.



 Marybeth Peters
 Register of Copyrights

DATED: December 4, 2000