

ORIGINAL

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

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MAR 12 2003

GENERAL COUNSEL
OF COPYRIGHT

In the Matter of)
)
)
Digital Performance Right in Sound)
Recordings Rate Adjustment Proceeding)
_____)

Docket No. 96-5 CARP-DSTRA

**REVISED RIAA PETITION
TO ESTABLISH TERMS GOVERNING SOUNDEXCHANGE**

Pursuant to 17 U.S.C. § 114(f)(1), 37 C.F.R. § 251.63(b) and the remand order in *Recording Industry Association of America v. Librarian of Congress*, 176 F.3d 528 (D.C. Cir. 1999) (“*RIAA v. Librarian*”), the Recording Industry Association of America, Inc. (“RIAA”), on behalf of itself and its presently unincorporated division SoundExchange¹, hereby submits this Revised Petition to Establish Terms Governing SoundExchange, the collective established by the RIAA to collect and distribute the statutory royalties paid by the three preexisting subscription services under the designation of the Librarian of Congress (“Librarian”). See Final Rule and Order in Docket No. 96-5 CARP-DSTRA, 63 Fed. Reg. 25394 (May 8, 1998) (“Final Rule and Order”), *remanded in RIAA v. Librarian*.

On April 17, 2001, the RIAA submitted to the Librarian the following two documents: (1) RIAA Petition to Establish Terms Governing the RIAA Collective and to

¹ SoundExchange is a collecting rights entity that was formed from a previous RIAA collective in November 2000 to administer the royalties for statutory licenses established by the DPRA and DMCA. SoundExchange is jointly controlled by representatives of artists and copyright owners, and the representatives are hoping to separately incorporate SoundExchange in the near future. SoundExchange’s responsibilities include negotiating voluntary agreements based on the statutory licenses, and collecting, verifying and distributing the royalties paid by the licensees.

Suspend CARP Proceedings (“RIAA Petition #1”) and (2) Memorandum in Support of RIAA Petition to Establish Terms Governing the RIAA Collective. Attached to RIAA Petition #1 was Attachment A that set forth RIAA’s proposed amendments to certain terms that were adopted by the Librarian in the Final Rule and Order. On May 21, 2001, counsel for RIAA requested a revision to Attachment A to reflect a change in proposed section 260.3(f). On June 22, 2001, counsel for RIAA requested a further revision to proposed section 260.3(f).

On July 23, 2001, the Copyright Office published a notice of proposed rulemaking seeking comments on the proposed regulations that will govern SoundExchange when it collects and distributes the royalties paid by the three preexisting subscription services. 66 Fed. Reg. 38226. Comments on the proposed terms were due by August 22, 2001. On August 22, 2001, the American Federation of Musicians of the United States and Canada (“AFM”) and the American Federation of Television and Radio Artists (“AFTRA”) filed a request for an extension of the filing date for comments to September 19, 2001.

On September 4, 2001, the Copyright Office extended the period for filing comments to the proposed regulations that will govern SoundExchange. 66 Fed. Reg. 46250. On September 21, 2001, the Copyright Office again extended the period for filing comments to the proposed regulations. 66 Fed. Reg. 48648. On October 10, 2001, the Copyright Office again extended the period for filing comments. 66 Fed. Reg. 51617. A Notice of Intent to Participate and Objections of the American Federation of Musicians and the American Federation of Television and Radio Artists to Certain Proposed Terms Contained in the RIAA Petition to Establish Rates and Terms Governing the RIAA

Collective and to Suspend CARP Proceedings (“Notice of Intent and Objection”) was filed on October 17, 2001. Since that time, no additional comments have been filed with the Copyright Office with respect to this proceeding nor has the Copyright Office issued final amendments to the terms governing SoundExchange, as required by the decision in *RIAA v. Librarian*.

On December 4, 2002, the president signed into law the Small Webcaster Settlement Act of 2002 (“SWSA”), Pub. L. No. 107-321, 116 Stat. 2780. Among other things, the SWSA amended 17 U.S.C. § 114(g) and those amendments affect certain terms set forth in 37 C.F.R. § 260. The amendments that affect terms also resolved the two objections set forth by AFM and AFTRA on October 17, 2001. On January 17, 2003, the RIAA, AMF, AFTRA, Music Choice, DMX Music, Inc. (“DMX”) and Muzak LLC (“Muzak”) submitted a Joint Petition for Adjustment of Rates and Terms for Statutory Licenses Applicable to Preexisting Subscription Services and Request for Immediate Stay of Obligation to File Direct Cases (“Joint Petition”). The Joint Petition made further amendments to 37 C.F.R. § 260.

In light of the remand of the Final Rule and Order, the SWSA and its changes to the law governing a collective’s ability to deduct certain costs from statutory royalties prior to the distribution of such royalties to copyright owners and performers and its clarification that featured recording artists and the administrator(s) of the accounts provided in 17 U.S.C. § 114(g)(2)(B) & (C) shall receive their royalties directly, and the amendments made to Part 260 in the Joint Petition, RIAA hereby revises its previous proposed amendments to 37 C.F.R. § 260. RIAA’s revised, proposed amendments are set

forth in Exhibit A attached hereto. The material changes to the proposed amendments previously submitted by the RIAA include:

- § 260.3(c) – requiring parties entitled to royalties to provide the designated agent with adequate information necessary for payment; clarifying the obligation of a designated agent to distribute royalties on a reasonable basis that values performances by a Licensee equally; permitting parties to agree with the designated agent on alternative distribution methodologies; and permitting parties entitled to royalties to enter into agreements with the designated agent for alternative payment protocols (e.g., letters of direction identifying alternate payees).
- § 260.3(d) – conforming the costs that the designated agent may deduct to the SWSA and permitting parties to agree with the designated agent to deduct additional costs.
- Deleting what had been included as proposed § 260.3(e).
- § 260.3(e) – identifying SoundExchange as the designated agent.
- § 260.6(a) – clarifying that agreements between a designated agent and parties entitled to royalties regarding audit rights take precedence over the terms set forth in § 260.6.
- § 260.6(b) – clarifying that a calendar year may be subject to audit only once.
- § 260.6(c) – moving the Copyright Office’s obligation to publish a notice of intent to audit from § 260.6(d) to § 260.6(c).
- § 260.6(g) – replacing the proposed changes to what was § 260.6(h) with new changes that extend the audit right to all parties entitled to receive royalties under 17 U.S.C. § 114(g)(2).

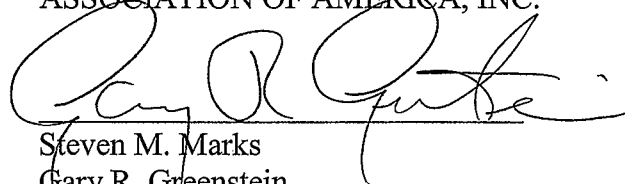
As noted above, subsequent to the remand in *RIAA v. Librarian*, AFTRA and AFM filed their Notice of Intent & Objection. No other parties to this proceeding have objected to RIAA’s previous proposed amendments. RIAA understands that AFTRA and AFM consent to the proposed terms set forth in Exhibit A attached hereto and that they will be filing a motion with the Copyright Office withdrawing their Notice of Intent & Objection.

As stated in previous pleadings, RIAA does not believe it is necessary or appropriate for the Copyright Office to commence a CARP proceeding to adopt any terms governing SoundExchange. However, RIAA is submitting this Petition in order to avoid a CARP and to finalize the terms left open by the remand of this proceeding. If the terms proposed in Exhibit A are adopted, then there will be no need for a CARP proceeding. Should the Librarian decide to proceed with a CARP proceeding, then RIAA reserves its right to withdraw this Petition, in whole or in part.

RIAA shall not be deemed to have accepted as precedent or approved, accepted, agreed to, or consented to any principle underlying, or which may be asserted to underlie, this Petition.

Respectfully submitted,

RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC.



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March 12, 2003

CERTIFICATE OF SERVICE

I, Edward Hahn, of the Recording Industry Association of America, Inc., hereby certify that the foregoing Revised RIAA Petition to Establish Terms Governing SoundExchange was served on March 12, 2003 by facsimile transmission and first class U.S. Mail, postage-prepaid, on the following individuals:

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Edward Hahn

ATTACHMENT A

PROPOSED TERMS GOVERNING RIAA COLLECTIVE

§ 260.2 **Royalty fees for the digital performance of sound recordings.**

...

(d) *Delete*

§ 260.3 **Terms for making payment of royalty fees.**

...

(c) The agent designated to receive the royalty payments and the statements of account shall have the responsibility of making further distribution of these [fees] *payments* to those parties entitled to receive such payments according to the provisions set forth at 17 U.S.C. 114(g)(2); ***Provided that the designated agent shall only be responsible for making distributions to those parties who provide the designated agent with such information as is necessary to identify and pay the correct recipient for such payments. The agent shall distribute royalty payments on a reasonable basis that values all performances by a Licensee equally based upon the information provided by the Licensee pursuant to the regulations governing records of use of performances by Licensees; Provided, however, that parties who have designated the agent may agree to allocate their shares of the royalty payments made by any Licensee among themselves on an alternative basis. Parties entitled to receive payments under 17 U.S.C. 114(g)(2) may agree with the designated agent upon payment protocols to be used by the designated agent that provide for alternative arrangements for the payment of royalties consistent with the percentages in 114(g)(2).***

(d) The designated agent may deduct *from the payments made by Licensees under 260.2, prior to the distribution of such payments to any person or entity entitled thereto, all incurred costs permitted to be deducted under 17 U.S.C. 114(g)(3); Provided, however, that any party entitled to receive royalty payments according to 17 U.S.C. 114(g)(2) may agree to permit the designated agent to deduct any additional costs.*

(e) Commencing June 1, 1998, and until such time as a new designation is made, ***SoundExchange, which currently is an unincorporated division of the Recording Industry Association of America, Inc., shall be the agent [receiving] that receives*** royalty

payments and statements of account *under this part 260 and shall continue to be designated as such if it should be separately incorporated.*

§ 260.4 **Confidential information and statements of account.**

...

§ 260.5 **Verification of statements of account.**

...

§ 260.6 **Verification of royalty payments.**

(a) *General.* This section prescribes general rules pertaining to the *method of* verification of the payment of royalty fees *by the designated agent* to [those] *interested* parties [entitled to receive such fees, according to terms promulgated by a duly appointed copyright arbitration royalty panel, under its authority to set reasonable terms and rates pursuant to 17 U.S.C. 114 and 801(b)(1), and the Librarian of Congress under his authority pursuant to 17 U.S.C. 802(f)]; *Provided, however, that the designated agent and any interested person may agree as to an alternative method of verification.*

(b) *Frequency of verification.* Interested parties may conduct a single audit of the *designated agent* [entity making the royalty payment] during any given calendar year *and no calendar year shall be subject to audit more than once.*

(c) *Notice of intent to audit.* Interested parties must [submit] *file with the Copyright Office* a notice of intent to audit the *designated agent.* [entity making the royalty payment with the Copyright Office which shall publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice]. Such *notice of intent* [notification of interest] shall also be served at the same time on the *designated agent* [party] to be audited. *Within 30 days of the filing of the notice of intent, the Copyright Office shall publish in the Federal Register a notice announcing such filing.*

(d) *Retention of records.* The *interested* party requesting the verification procedure shall retain the report of the verification for a period of three years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, shall serve as an acceptable verification procedure for all *interested* parties.

(f) *Costs of the verification procedure.* The interested parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more, in which case, the ***designated agent*** [entity which made the underpayment] shall bear the costs of the verification procedure.

(g) *Interested parties.* For purposes of this section, interested parties are those [copyright owners] ***individuals or entities*** who are entitled to receive royalty [fees] ***payments*** pursuant to 17 U.S.C. 114(g)(2), or their designated agents.

§ 260.7 Unknown copyright owners.

If the designated [collecting agent] ***agent*** is unable to identify or locate a copyright owner who is entitled to receive a royalty payment under this part, the ***designated*** [collecting] agent shall retain the required payment in a segregated trust account for a period of three years from the date of payment. No claim to such payment shall be valid after the expiration of the three year period. After the expiration of this period, the ***designated*** [collecting] agent may use the unclaimed funds to offset the cost of the administration of the collection and distribution of the royalty [fees] ***payments***.

Note: Portions in bold and italics represent new language to be added to the current regulations; brackets indicate deleted material from the current regulations.

GARY R. GREENSTEIN
ASSOCIATE COUNSEL FOR
BUSINESS AND LEGAL AFFAIRS



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MAR 12 2003

GENERAL COUNSEL
OF COPYRIGHT

March 12, 2003

BY HAND

The Honorable Marybeth Peters
Register of Copyrights
U.S. Copyright Office
James Madison Memorial Building
Room LM-403
First and Independence Avenue, SE
Washington, DC 20599-6000

Dear Register Peters:

Enclosed please find for filing an original and six copies of the Revised RIAA Petition to Establish Terms Governing SoundExchange in Docket No. 96-5 CARP-DSTRA. Please date-stamp the sixth copy and return it to the messenger hand-delivering the document to your office.

Thank you, and please call me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gary R. Greenstein".

Gary R. Greenstein
Associate Counsel, Business and Legal Affairs
(202) 828-0126

Enclosures

ORIGINAL