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In the Matter of Distribution of 1992, 1993, and 1994 Digital Audio Royalty Funds	**Docket No. 95-1 CARP DD 92-94**

LIBRARY
OF
CONGRESS

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RECOMMENDATION AND ORDER

On June 24, 1996, Broadcast Music, Inc, the American Society of Composers, Authors and Publishers, SESAC, Inc., The Harry Fox Agency, Inc., Copyright Management, Inc., The Songwriters Guild of America, and the Gospel Music Coalition (collectively the "Settling Parties") filed a motion ("Motion") requesting the Librarian of Congress (Librarian) to dispense with formal hearings and to have the Copyright Arbitration Royalty Panel (CARP) decide the controversy in the above captioned proceeding based on the written pleadings submitted by the parties. Oppositions to the Motion were filed by Eugene "Lambchops" Curry and TAJAI Music ("Curry") and Alicia Carolyn Evelyn ("Evelyn"). The Settling Parties filed separate replies to these oppositions.

I. The Pleadings

The Motion

The Settling Parties assert that no genuine issue of material fact exists with respect to the distribution of the 1992-94 Musical Works Funds and request that the Librarian of Congress grant their motion to dispense with formal hearings pursuant to 37 CFR 251.41(b). The Settling Parties submit that the Librarian has authority to grant

their petition in the absence of any genuine issue of material fact, and furthermore, should grant their petition in the interest of "public policy and fundamental fairness." Motion at 2.

The Settling Parties define the controversy as determining the relative entitlement of the three remaining parties to the DART royalties deposited with the Copyright Office for the period between October 28, 1992, and December 31, 1994. They cite the statutory basis for the distribution of these funds as "the extent to which, during the relevant period ... each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." 17 U.S.C. 1006(c)(2) (1994). Since the statute appears to offer two discrete ways to evaluate a claimant's share of the royalty pool, the Settling Parties chose "to establish [their] entitlement based on evidence of sales of recordings."[1] Motion at 3.

The Settling Parties assert that they presented evidence in their direct case which established their entitlement to the lion's share of the royalty pool. Their approach was first to define the relevant universe of record sales based on Sound Scan[2] data, and then to calculate the two remaining claimants' share of this universe using either record sale data from the Sound Scan data base or representations of sales supplied by Curry and Evelyn for the relevant time. Motion at 3-7. The Settling Parties accept the

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[1] **The members of the Settling Parties each reserved their right to introduce evidence on the dissemination of musical works to the public in transmissions in subsequent proceedings. Reply to Opposition of Alicia Carolyn Evelyn to Motion to Decide the Controversy on the Written Record at 3, n3.**

[2] **Sound Scan is a point-of-sale tabulation service that records actual sales data for albums, cassettes, singles, and compact discs. Motion at 3.**

calculations which yielded the highest result as Curry and Evelyn's entitlement. Motion at 6. The Settling Parties define their entitlement as all funds remaining after deducting Curry and Evelyn's share. Id. at 7.

Because neither Curry nor Evelyn challenged their formulation or offered an alternative method for defining the universe of record sales, the Settling Parties conclude that the submitted record contains no genuine issues of material fact. Motion at 5-6. The Settling Parties also assert that the failure of Curry and Evelyn to present any evidence in their direct case which would result in an award greater than their analysis further supports their conclusion that there is no genuine issue of material fact in this proceeding. Motion at 8.

The Oppositions & Replies

Separate oppositions to the Settling Parties' Motion were filed by Curry and Evelyn. Curry filed his opposition with the Copyright Office on July 1, 1996, and Evelyn filed her opposition with the Office on July 3, 1996. Both of these filings were received in a timely manner in the Office. The Settling Parties, however, assert that Curry violated the Librarian's order when he mailed nine copies of his opposition to Michael J. Remington at Leonard, Ralston, Stanton & Remington via standard, United States mail. Reply to Opposition of Eugene "Lampchops" Curry to Motion to Decide the Controversy on the Written Record 1-2, n1. The scheduling order requires that "[s]ervice of all motions, objections, oppositions and replies must be made ... by means no slower than overnight express mail on the same day the pleading is filed."

Recommendation and Order (February 21, 1996) at 5. Failure to make a timely filing reduces the response time for the party whom the pleading is directed against and creates administrative ineffiencies. Therefore, the Librarian articulated its intent to strike any pleading which is not served or filed timely. Recommendation and Order at 11 (May 9, 1996). Thus, the Librarian strikes Curry's opposition for failing to comply with the service rules.

In opposition to the Settling Parties' motion, Evelyn avers that genuine issues of material fact exist. Additionally, she requests that the Librarian not accept the comments of the Settling Parties pertaining to the selection of arbitrators who will serve on the arbitration panel.[3] Opposition to Motion of Settling Parties to Resolve the Controversy in the Above-Referenced Proceeding Solely on the Written Pleadings[4] at 1.

After a lengthy recitation of the history of the negotiation process and the discovery period, Evelyn raises several issues which she identifies as genuine issues of

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[3] **The Office notes that each party to a proceeding has an opportunity to file objections to one or more of the persons on the list of potential arbitrators with the Librarian of Congress. 37 CFR 251.4 The regulation requires the objecting party to "plainly state the grounds and reasons for each person claimed to be objectionable." For the purpose of ascertaining objections, the Library maintains a public file with background and biographical information on each of the listed arbitrators. The rules, however, do not contemplate parties filing objections to other parties comments or objections to listed arbitrators, and will not consider an objection to another party's comments as a proper filing under this rule.**

The Office accepts the Settling Parties comments on certain listed arbitrators as an expression of their preferences based on their articulated selection criteria: knowledge of copyright law, prior judicial experience, lack of conflicts of interest with the music and broadcasting industries, and no current involvement in an active CARP proceeding. The Library, however, is not bound by any parties proffered list of arbitrators, although it gives full consideration to each objection or comment filed with the Library.

[4] **The complete title of Ms. Evelyn's opposition is "Opposition to Motion of Settling Parties to Resolve the Controversy in the Above-Captioned Proceeding Solely on the Written Pleadings and to the Suggestion of the Settling Parties that the Librarian, Upon Recommendation of the Register of Copyrights, Accept the List of Ten Individuals Named by the Settling Parties and Select Only Two Arbitrators, Allowing the Two then to Select a Third from the List of Ten, Otherwise Unidentified by the Settling Parties." (Evelyn Opposition). The Library requests that parties limit the length of the title of their pleadings in all future filings.**

material fact.[5] First, she claims royalties on her works used in TV movies, e.g., *Shout! The Story of John O'Keefe*. Evelyn Opposition at 3,7. Second, she asserts that ASCAP and BMI have record sales which may violate their antitrust consent decrees. Id. at 4. Third, she questions "whether Dart funds can be turned over to agencies which, in this proceeding, have been shown to fail to pay their members monies collected by those agencies in the names of thr [sic] unpaid authors ...[or] if the agencies cannot account for repertoire that the agencies have acknowledged and/or paid." Id. at 4-5. Fourth, she questions the Settling Parties method of measuring their entitlement against the relevant universe of sales, since it does not include computer sales, record sales, or mail order sales. Id. at 5,6. Fifth, she claims that the Settling Parties have not supplied any relevant evidence in support of their claim. Id. at 5,6. Sixth, she claims that "Settling Parties have not revised their Chart A[6] to include additional titles or works for which I presented evidence, ..., RE 'I'm Counting on You'." Id. at 5. Seventh, she disputes Mr. Fine's assumption that there are an average of only ten songs per CD. Id. at 6. And finally, she asserts that the Sound Scan data did not include recordings by the Crests, Jackie Wilson, or other artists who recorded her songs. Id.

In reply, the Settling Parties argue that "Ms. Evelyn's direct case is the

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[5] **The Library notes that Evelyn raises some issues which are simply not germane to the DART distribution proceeding. Our recitation of both germane and non-germane issues serves merely as a factual presentation of her position, and NOT as an endorsement of her characterization of these items. The Library recognizes that the only relevant issues in this proceeding concern the distribution of musical recordings to the public in digital and analog form, and the dissemination of musical works to the public in transmissions. All other issues are outside the scope of this proceeding.**

[6] **A chart from Alison Smith's testimony which lists titles of Evelyn's work that appeared on records released in the United States. Evelyn provided this information to the Settling Parties during the negotiation phase of the proceeding. Direct Case of Settling Parties, Alison Smith's Testimony at 5.**

only relevant document from which disputed facts may be ascertained." Reply to Opposition of Alicia Carolyn Evelyn to Motion to decide the Controversy on the Written Record (Reply to Evelyn) at 2. They also dispute Evelyn's claim that the Settling Parties did not include all her works in their calculation of her entitlement, and again assert that they accepted all her representations regarding her song titles. Id. at 3. Because the Settling Parties made a determination of Evelyn's entitlement based on the Sound Scan data, even though she provided no evidence of record sales or performances during the relevant time period, they state that there can be no genuine issue of material fact as to her sales figures. Id at 4. Furthermore, the Settling Parties assert that computer sales, record sales, and mail order sales cannot be included in the universe of record sales, unless a party makes an evidentiary showing. Id. at 5.

II. Discussion

Section 251.41(b) allows the Librarian of Congress to dispense with formal hearings, and have the CARP decide the controversy on the written pleadings, if all parties to a proceeding agree in writing to this approach, or the controversy involves no genuine issue of material fact.

The substantive law in this case, chapter 10 of the Copyright Act, identifies which facts are material. Section 1006(c) states that allocation of royalties in the Musical Works Funds shall be "based on the extent to which, during the relevant period...each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." 17 U.S.C.

1006(c). The statute, therefore, establishes which facts are material: 1) facts showing how musical works were distributed to the public in the form of digital musical recordings or analog musical recordings; and 2) facts showing how musical works were disseminated to the public in transmissions. Only facts related to these two categories, for the 1992-94 time period, are relevant to a distribution of DART royalties in this proceeding.

The Settling Parties assert that they have supplied the facts, and the only facts, which are to be used in this proceeding. For the first category -- distribution to the public in recordings -- the Settling Parties submit that the only facts to be considered are record sales. Further, they submit that the only record sales which should be considered are those measured by Sound Scan. Using the sales figures provided by Sound Scan, the Settling Parties fashioned a distribution formula to determine each of the non-settled parties' share of the Musical Works Funds.

While the Settling Parties' proposal may be one way of determining the measurement of distribution of musical works in recordings, it is clearly not the only way. The Settling Parties make several assumptions. First, they assume that only record sales should be counted. Section 1006(c) does not specify records sales, but instead talks simply of distributions. Consequently, a CARP may consider evidence of musical work distributions other than record sales. Second, the Settling Parties assume that Sound Scan is the only way to measure record sales. Even if record sales are the only distributions of recordings considered, there are clearly genuine factual disputes regarding the means of determining record sales, whether all titles for each claimant have been

properly included, and the number of sales for each work.

Finally, the Settling Parties, using the Sound Scan data, propose a formula for determining each of the non-settled parties shares of the Musical Works Funds. Chapter 10 of the Copyright Act does not prescribe a formula for determining the distribution of recordings, and a CARP could, with justification, select the Settling Parties formula, or fashion a formula of its own. Because this is the first DART distribution, there are not only genuine issues of material fact, but there are questions as to which facts are the material ones.

There are also genuine issues of material fact regarding the second statutory criteria, dissemination of musical works in transmissions to the public. Although the Settling Parties disregard this category for assessing their entitlement to royalties in this proceeding, Evelyn contends that she is entitled to recover royalties for her musical works transmitted in movies during the relevant period. The Settling Parties, however, believe that no evidence on public performance, or additional evidence on record sales, can be introduced in this proceeding once the parties file their direct cases with the Librarian. Motion at 6, n4. This assumption, however, ignores §251.46(d) which states:

> Each arbitrator may examine any witness *or call upon any party for the production of additional evidence at any time*. Further examination, cross-examination, or redirect examination may be allowed by a CARP panel, but only to the extent that it is directly responsive to the inquiry of the arbitrator. (emphasis added).

Although the Settling Parties did not believe evidence on public performance was germane to a determination of the 1992-94 DART royalty funds, the CARP panel could

decide otherwise, and request additional evidence from all parties to evaluate the second statutory criteria.

III. The Determination

In sum, it is apparent from a review of the pleadings and the law that genuine issues of material fact remain. Therefore, **IT IS ORDERED**, that the Motion of the Settling Parties **IS DENIED**.

Nevertheless, upon a showing of good cause, the regulations governing the CARP proceeding grants the CARP authority to suspend or waive the provisions of subpart E, under Chapter 251, part E of the regulations. 37 CFR 252.42. This being so, **it is further ORDERED** that the following issue is designated to the CARP for their consideration:[7] whether to suspend formal hearings and proceed to decide the controversy as to the determination of the distribution of the 1992-94 DART royalty funds on the written pleadings.

SO RECOMMENDED.

Marilyn J. Kretsinger
Acting General Counsel.

SO ORDERED.

James H. Billington
The Librarian of Congress.

DATED: July 25, 1996

[7] **The CARP operates under the Administrative Procedure Act, subchapter II of chapter 5 of title 5, which allows an agency "in rule making or determining claims for money or benefits or applications for initial licenses ..., when a party will not be prejudiced thereby, [to] adopt procedures for the submission of all or part of the evidence in written form." 5 U.S.C. 556(d).**