PUBLIC APPENDIX – MATERIAL UNDER SEAL IN SEPARATE SUPPLEMENT

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 02-1244

Consolidated with Case Nos.
02-1246, 02-1247, 02-1248 & 02-1249

BEETHOVEN.COM, *et al.*,
Petitioners,

v.

THE LIBRARIAN OF CONGRESS,
Respondent.

On Petition to Review an Order of the Librarian of Congress

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEETHOVEN.COM LLC, *et al.*, Petitioners, v. LIBRARIAN OF CONGRESS, Respondent.	Case No. 02-1244 (Consolidated with case nos. 02-1246, 02-1247, 02-1248, and 02-1249 (consolidated petitions).)

MOTION TO STRIKE BRIEFS OF CERTAIN PETITIONERS RELYING ON MATERIALS AND FACTUAL ALLEGATIONS OUTSIDE THE RECORD OF THE PROCEEDING

The Librarian of Congress and Joint Petitioners the Recording Industry Association of America, Inc. ("RIAA"), the America Federation of Television and Radio Artists ("AFTRA"), and the American Federation of Musicians ("AFM") (collectively "Movants") hereby move this Court to strike the briefs submitted by certain Petitioners because those briefs improperly contain factual allegations and supporting materials outside the record of the proceeding below. Consideration of this extra-record material is precluded expressly by Section 802(g) of the Copyright Act, which provides that this "court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, *on the basis of the record before the Librarian*, that the Librarian acted in an arbitrary manner." 17 U.S.C. 802(g) (emphasis added). As grounds for this Motion, Movants state as follows:

Background

1. On June 20, 2003, two groups of Petitioners who are statutory licensees pursuant to the compulsory licenses in sections 112 and 114 of the Copyright Act (referred to collectively herein as "Licensee Petitioners") filed briefs that relied on materials and factual allegations outside the record of this proceeding. One brief was submitted by Salem Communications Corp., the National Religious Broadcasters Music License Committee, and Live 365, Inc.[1] ("Salem Brief"). The other was filed by Petitioners/Intervenors Beethoven.com LLC, Inetprogramming Incorporated, Internet Radio Hawaii, Wherever Radio, and Intervenor Educational Information Corporation (WCPE) ("Beethoven.com Brief").

2. The Licensee Petitioners are seeking review of a decision that was reached by the Librarian of Congress based on a record created in trial-type proceedings before a Copyright Arbitration Royalty Panel ("CARP") under strict procedures designed to afford all parties the right to conduct discovery and cross-examination. Administrative proceedings for the establishment of rates and terms for the section 112 and 114 statutory licenses are governed by the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103-198, 107 Stat. 2304 ("Reform Act" or "Act"). The Reform Act created a whole new arbitration scheme that is heavily dependent on the creation of a formal record. Thus, the Act creates ad hoc arbitration panels designed to review the evidence and consider the arguments of concerned parties. See 17 U.S.C. 802(c). Implementing rules of the Copyright Office expressly accord parties discovery rights to obtain and test the evidence,

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[1] Live365 moved to withdraw its petition on July 7, 2003. The motion was granted by this Court on July 9, 2003.

37 C.F.R. § 251.45(c), and contemplate a structured, formal trial-type, fact-finding proceeding for the orderly presentation and consideration of evidence and argument. *See, e.g.*, 37 C.F.R. § 251.41; 37 C.F.R. § 251.43; 37 C.F.R. § 251.45(a)-(d).

3. The record of the proceeding before the Copyright Arbitration Royalty Panel ("CARP") closed once all evidence had been submitted by the parties. The last date on which material was submitted for the record of the proceeding before the arbitrators was February 1, 2002. Once the CARP issued its report on February 20, 2002, that record was reviewed by the Librarian of Congress ("Librarian"), whose June 20, 2002 decision (published in the *Federal Register* on July 8, 2002) is the subject of the petitions in this case. Many of the cited references that are outside the record are dated after February 20, 2002.

4. The Salem Brief contains at least two references to material about the Yahoo! agreement – which both the Salem Petitioners and the Petitioners in the group of Movants discuss in their briefs at considerable length – from outside the record. The material is found in footnotes 11 and 12, as well as in Addendum B which consists of two June 2002 articles supporting these references. Addendum B2 contains allegations about Yahoo!'s motivations for entering into a voluntary agreement with RIAA from Mark Cuban, an individual who never testified during the CARP proceeding, and whose statements would have been vigorously contested by the copyright owners and performers if he had made them during the CARP proceeding and suggested that they were an accurate reflection of the deal between RIAA and Yahoo! that resulted after he had left the company.

5. The Beethoven.com brief relies on and cites to even more material outside the record, and makes multiple references to materials that never were introduced into the record of the CARP proceeding and are dated after February 2002. A partial list of these materials follows:

- Most items in the list of "Other References" on page ix are dated after the close of the record and the issuance of the CARP report in February 2002 and are cited in support of factual allegations in the brief at pages 5-7 and 12. These items include a July 1, 2002 article, congressional hearing testimony from 2003, a letter from Members of Congress from April 2002, a statement to Congress from June 2002, and another article from July 12, 2002 (date is found on page 7). None of this material was presented to the CARP arbitrators, and participants in the hearings had no opportunity to test the material or the witnesses sponsoring it through cross-examination, or to introduce additional contextual material on redirect examination. The copyright owners and performers would certainly have done so had the materials been created before the close of the record and been properly introduced into the CARP proceeding – for instance, they would have been able to offer another letter from Members of Congress emphasizing that the proceeding should be permitted to run its congressionally mandated course, as well as testimony and statements from other witnesses in the cited congressional hearings who supported their views.
- Page ix also includes a section for "URLs" with a list of six websites, which were never introduced into the record of the CARP proceeding, and are likely to contain

content that changes frequently.[2] The arbitrators never saw these websites during the course of the proceeding, and none of the hearing participants had the opportunity to conduct cross-examination about their contents.

- There are also frequent references to material from outside the record within the text of the Beethoven.com brief. For instance, post-record e-mail correspondence from Mark Cuban about the Yahoo! deal is quoted on pages 5-6 to support various factual allegations, such as the allegation that the deal was built around multicasting to 250 viewers using a single stream of programming – an allegation that the evidence from the record would demonstrate is false.[3] *See generally* the testimony of Steven Marks and David Mandelbrot; RIAA Exhibit No. 075 DR (RIAA/Yahoo! agreement). Had the copyright owners and performers been given the opportunity to cross-examine Mr. Cuban and refute this testimony on the record, they would certainly have done so.

Argument

6. Consideration of this extra-record material is precluded expressly by Section 802(g) of the Copyright Act, which provides that this "court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, *on the basis of the record before the Librarian*, that the Librarian acted in an arbitrary manner." 17 U.S.C. 802(g) (emphasis added). The record before the Librarian consists of "the record

[2] For this very reason, the CARP decided that parties could not demonstrate websites during the CARP proceeding, although they were permitted to introduce static screen shots, which were subject to advance review and cross-examination by all parties. *See, e.g.*, Tr. at 4025 (Comedy Central), 4554 (MTV), 4776 (Listen.com), 5017 (AOL/Spinner), 6917 (BET.com).

[3] Mr. Cuban sold Broadcast.com to Yahoo! in 1999, and the final deal between RIAA and Yahoo! was not reached until late 2000. In fact, no aspect of the agreement was finalized when Yahoo! took over negotiations. *See* Tr. 11242:8-14 (Mandlebrot).

created in the arbitration proceeding," *id.* at 802(f), and certainly does not include materials that were not even in existence when the case was submitted to the Librarian for review. The Reform Act mandates that the CARP "act on the basis of a fully documented written record," 17 U.S.C. 802(c), requiring that decisions of a CARP must be provided in a written report setting forth "the facts that the arbitration panel found relevant to its determination." 17 U.S.C. 802(e). The emphasis in the Reform Act on the creation and consideration of a formal record at every stage of the proceeding obviously would be undermined if parties were permitted to appeal the record-based decision by relying on untested, extra-record evidence.

7. These provisions for review based on the formal record must be strictly construed and applied because Section 802(g) contains a waiver of sovereign immunity. According to well-established principles, "[j]urisdictional grants waiving sovereign immunity are strictly construed and may not be expanded beyond the terms expressly set forth in the grant." *Ramey v. Bowsher*, 9 F.3d 133, 135 (D.C. Cir. 1993). *See also Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *St. Louis Fuel and Supply Co. v. F.E.R.C.*, 890 F.2d 446, 449-50 (D.C. Cir. 1989) (noting that "we are bound to honor the canon that waivers of the sovereign's immunity must be strictly construed"). This matter goes to the Court's jurisdiction because sovereign immunity is jurisdictional, *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994), and thus should be resolved prior to addressing the merits of the issues before the Court. *See Ruhrgas AG v. Marathon Oil*

Co., 526 U.S. 574 (1999); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998).[4]

8. Strict adherence to these principles is especially important in this case, where many of the contentions of these briefs are founded on extra-record material. The reliance on extra-record material is not only impossible to reconcile with the scope of review authorized by Section 802(g), it is also unfairly prejudicial to the Movants. The material was not part of the record below, and thus there was no opportunity to present opposing evidence or to test it through cross-examination. Movants are now placed in the untenable position of adhering to this Court's rules and limiting their briefs to the contents of the record, thus allowing the extra-record material to go unrefuted. Even if they attempted to refute the material, addressing factual allegations based on websites that might have changed since the Beethoven.com brief was written would be almost impossible. And if the record for this proceeding were somehow expanded to include congressional testimony from Mr. Mandelbrot (Beethoven.com Brief at 6 n.3) that was never introduced into the record below, in fairness Movants would also want the ability to present the Court with the congressional testimony of other witnesses at congressional hearings on CARP matters, including Ms. Rosen of RIAA. Allowing the parties to repeatedly expand beyond the record in this way would lead to a nearly impossible task

[4] Licensee Petitioners' references to material outside the record are also contrary to Rule 28(a)(7) of the Federal Rules of Appellate Procedure, which requires "a statement of facts relevant to the issues presented for review *with appropriate references to the record.*" (Emphasis added.) Rule 28(a)(9)(A) goes on to specify that the argument section of the brief must contain "appellant's contentions and the reasons for them, *with citations to the authorities and parts of the record.*" Fed. R. App. Pro. 28(a)(9)(A). *See National Petrochemical & Refiners Ass'n v. E.P.A.*, 287 F.3d 1130, 1149 (D.C. Cir. 2002).

for this Court in trying to sort out and evaluate the Librarian's decision based on material that was before neither the CARP nor the Librarian.

9. There is no provision for including in briefs factual allegations based on material outside the record. Were this practice to be permitted, the process of briefing appeals, especially in cases like this one that reflect rapidly evolving industries, would be unwieldy and difficult to control. There are many developments in the marketplace and statements made by various parties that the Movants would like to bring to the attention of this Court, both to support their arguments and to place the extra-record materials relied on by the Licensee Petitioners in proper context, but of course if all parties were allowed to expand the scope of appeal in this fashion, it would be impossible to determine where the material relevant to a particular appeal ends. Instead, this Court has said that "the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997); *see also Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.") (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, (1971)).

10. While there is a limited category of material of which judicial notice may be taken pursuant to Federal Rule of Evidence 201(f), the material introduced by Licensee Petitioners from outside the record does not fit into this category, which is limited to facts that are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready

determination by resort to sources whose accuracy cannot be reasonably questioned." The factual allegations made in the extra-record materials introduced and cited by Licensee Petitioners fall into neither category and must be stricken. Indeed, were citation to extra-record material and additional factual development on appeal permitted, Movants would strongly dispute the accuracy of the facts alleged in this material.

Relief Requested

11. Movants request that this Court instruct the Licensee Petitioners to submit amended versions of their briefs from which all references to material outside the record and any text or argument based on such references have been removed. While Movants have noted the most obvious references to extra-record material, they find it difficult to determine all instances in which a statement in one of the Licensee Petitioner briefs is affected by such material, and they should not be put to the burden of trying to do so. Instead, Licensee Petitioners, who are in the best position to know when they relied on material outside the record, should remedy their error by submitting amended briefs.

Conclusion

For the foregoing reasons, this Court should strike all material from outside the record from the briefs of Licensee Petitioners, and order them to submit amended versions of their briefs from which all such material, all references to it, and any text or argument based on such references have been removed.

Respectfully submitted,

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July 18, 2003

CERTIFICATE OF SERVICE

I, Daniel Lee, hereby certify that I have served two copies of the foregoing Motion to Strike Briefs of Certain Petitioners Relying on Materials and Factual Allegations Outside the Record of the Proceeding, this 18th day of July, 2003, by first class mail, to the following counsel of record:

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* Due to problems with U.S. mail delivery to government offices, the motion has been served on July 18 by email, and two copies will be hand-delivered on July 21.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEETHOVEN.COM LLC, *et al.*, Petitioners, v. LIBRARIAN OF CONGRESS, Respondent.	Case No. 02-1244 (Consolidated with case nos. 02-1246, 02-1247, 02-1248, and 02-1249 (consolidated petitions).)

REPLY IN SUPPORT OF MOTION TO STRIKE

The Librarian of Congress ("Librarian") and Joint Petitioners the Recording Industry Association of America, Inc. ("RIAA"), the America Federation of Television and Radio Artists ("AFTRA"), and the American Federation of Musicians ("AFM")[1] hereby reply to the oppositions of Salem Communications Corp. and the National Religious Broadcasters Music License Committee ("Salem Petitioners") and Beethoven.com LLC, Inetprogramming Incorporated, Internet Radio Hawaii, Wherever Radio, and Intervenor Educational Information Corporation (WCPE) ("Beethoven.com Petitioners") (collectively "Licensee Petitioners").

Both oppositions illustrate the central principle underlying the Motion to Strike ("Motion"): factual allegations and supporting materials outside the record of the proceeding below have no place in an appeal to this Court pursuant to Section 802(g) of the Copyright Act. This Court's clear jurisdictional mandate to "modify or vacate a decision of the Librarian *only* if it finds, *on the basis of the record before the Librarian*, that the Librarian acted in an arbitrary manner," 17 U.S.C. 802(g) (emphasis added), leaves no room for extra-record evidence. The extra-record factual allegations made by both groups of petitioners involve hotly contested issues

[1] The RIAA, AFTRA, and AFM are referred to herein as "Owner and Performer Movants."

of fact, which the Owner and Performer Movants would contest with both documentary evidence and witnesses were this case still in trial-type proceedings before the CARP.

I. A MOTION TO STRIKE IS APPROPRIATE WHERE EXTRA-RECORD EVIDENCE IS INCLUDED IN BRIEFS CONTRARY TO THIS COURT'S JURISDICTIONAL MANDATE.

Relying on *Stabilisierungsfonds Fur Weiñ v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981), Licensee Petitioners assert that motions to strike are "disfavored." However, *Stabilisierungsfonds* relied on authority construing Fed.R.Civ.P. 12(f) (a court may strike an "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter") and denied a motion to strike because the "points raised in the motion might have been presented, concisely, in the reply brief" and "[t]here was no need for appellants to burden this court with a motion to strike." (647 F.2d at 201.) This case is quite different. It arises under Section 802(g), which sharply limits this Court's direct review jurisdiction "only" to "the record before the Librarian." The issue is jurisdictional and thus must be raised by parties and considered by the Court. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999).

Furthermore, unlike *Stabilisierungsfonds*, if a ruling on this Motion is deferred, Movants would be forced to respond to the Licensee Petitioners' use of extra-record material by including in their brief more extra-record material. This would improperly place this Court in the position of a trier of fact, a result that undermines the administrative process and perverts the limited scope of judicial review allowed by Section 802(g). A motion to strike is therefore the only way in which this issue can be properly raised under this statutory scheme for it is the only way to limit the material before the Court to the record before the Librarian, consistent with the demands of Section 802(g). Granting the motion to strike will also serve as strong notice to future litigants under Section 802(g) that this Court will not tolerate attempts to go outside the record, thereby potentially saving this Court the burden of dealing with this issue in future cases.

II. NONE OF THE REASONS PROFFERED FOR RELYING ON EXTRA-RECORD MATERIAL JUSTIFY ITS CONSIDERATION IN THIS PROCEEDING.

A. Licensee Petitioners Cannot Rely on Extra-Record Material for Any Purpose.

Licensee Petitioners struggle to distance themselves from reliance on extra-record material as the basis for their arguments. The Salem Petitioners argue that they only note that post-hearing developments tend to "confirm" arguments based on the record of the proceeding. Opp. at 4. The Beethoven.com Petitioners claim that many of their extra-record references are "background," Opp. at 5, and are "not evidence per se," Opp. at 2, and that while they may "refer[] to" extra-record citations that are "mere quotations" in the statement of facts, they are not in fact "relying" on them or "citing [them] as evidence." Opp. at 6. These distinctions do not stand up to scrutiny. However characterized, extra-record references are obviously being submitted for consideration by this Court in some manner. The Owner and Performer Movants are prejudiced by the inability to rebut extra-record statements that they believe are incorrect or inaccurate, whether those statements are offered as evidence or for another purpose. The Librarian and the CARP are prejudiced by never being accorded an opportunity to consider this evidence and any rebuttal evidence in the trial-type administrative proceedings created by this statutory scheme.

The Salem Petitioners argue that this Court "can be relied upon not to give [post-hearing statements] more weight than is appropriate." Opp. at 3. The Beethoven.com Petitioners argue that discrepancies between the record and certain extra-record statements only relate to the weight this Court should give those statements. Opp. at 6. But that is exactly the problem. The appellate court is not the appropriate forum in which to weigh evidence and make credibility determinations. Those functions are reserved for the trier of fact, which in this case is the CARP as reviewed by the Librarian. *National Ass'n of Broadcasters v. Librarian of Congress,* 146 F.3d 907, 930 (D.C. Cir. 1998) ("[I]t is emphatically not our role to independently weigh the evidence or determine the credibility of witnesses – two duties entrusted solely to the Panel and, before it, the Tribunal."). To give one example, even if this Court were to attempt to determine the weight attributable to post-record material, there is no factual, record basis on which to determine the appropriate weight of the hotly disputed, allegedly confirmatory post-hearing statements about the Yahoo! agreement. The evidence that Owner and Performer Movants would offer to challenge those statements is nowhere in the record of this proceeding, and cannot be developed consistent with the appellate process.

B. The Cited Extra-Record Material is Not Appropriate for Judicial Notice.

The extra-record material in the briefs of the Licensee Petitioners does not fall within the recognized categories of information to which this Court may accord judicial notice. The suggestion that statements of opinion in the media and unfounded allegations are subject to judicial notice simply because they were published is a distortion of that doctrine, which permits notice to be taken of facts that are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

The quotations from Mark Cuban in an article posted on an Internet website subsequent to the Librarian's ruling – cited by both sets of Petitioners – clearly fail the test. The Beethhoven.com Petitioners also cite an article referring to Mr. Cuban's comments. Both groups suggest that Mr. Cuban's factual assertions have some relationship to the actual agreement reached between RIAA and Yahoo! – an agreement that is central to the issues before this Court. It is this basic premise that is heavily contested by the Owner and Performer Movants. This Court is being asked to take notice of highly controversial allegations of fact to which the Owner and Performer Movants could respond only by reference to further extra-record material, some of which has not been reported in the media and would have to be provided through affidavits or witness testimony.

The Salem Petitioners make similar use of an article discussing Yahoo!'s cessation of certain streaming operations after the CARP decision was issued. Although the quoted fact may not be in dispute, the context surrounding it clearly is disputed. The Salem Petitioners' use of this information to "confirm" their views of the impact of the CARP rates is *not* a generally accepted fact showing "whether the [Librarian's] decision was correct or not," Opp. at 1 (citation omitted),[2] and *is* subject to significant question. The asserted relationship of Yahoo!'s action and the CARP rates would be strongly disputed by the Owner and Performer Movants if they were able to introduce witnesses and other evidence about Yahoo!'s significant later webcasting activities before a trier of fact.

C. Licensee Petitioners' Reliance on Legislative Materials is Misplaced.

Similarly, the other extra-record material cited by the Beethoven.com Petitioners is not properly before this Court. Mr. Mandlebrot's testimony is cited based on his role in the CARP proceeding. Beethoven.com Opp. at 8. But Beethoven.com is citing the witness statement of Mr. Mandlebrot at a legislative hearing – not his record testimony from the CARP proceeding – for the truth of the matters he asserts. That is manifestly improper.

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[2] The cases cited by the Salem Petitioners in support of the ability of this Court to look at extra-record information indicating whether or not a decision was correct, Opp. at 1, involve appeals of agency action under the Administrative Procedure Act. Here, this Court's authority is based on a specific, narrow statutory provision allowing review "only . . . on the record before the Librarian." 17 U.S.C. 802(g).

Given the opportunity, the Owner and Performer Movants would vigorously cross-examine Mr. Mandlebrot and offer evidence countering his statements, but there is no procedure for them to obtain and place such evidence before this Court. Absent this opportunity, the Owner and Performer Movants are prejudiced because his hearsay statements go to the core of one of the disputed issues in this case – the use of the Yahoo! agreement as a benchmark. And the Librarian is prejudiced by the inability, as the decision-maker, to consider such "evidence" developed through the adversarial fact-finding procedures mandated by statute.

The Beethoven.com Petitioners interpret the statement made by the Register at a legislative hearing as contradictory to certain other statements the Librarian made in this case. Opp. at 8. The Librarian's statements in this case that these Petitioners had every opportunity to participate in the underlying CARP proceeding, made in the previously filed Motion to Dismiss, are not contradicted by the Register's report to Congress on the statements from certain entities on the alleged reason for their lack of participation. The Register does not say that these entities in fact were unable to participate in the proceeding, but rather that they said they failed to participate in CARP proceedings because they did not feel they could afford the arbitrator fees. The record reflects that the Librarian and the Copyright Office provided plenty of notice about all phases of the proceeding through Federal Register publications and their other orders. The circumstances surrounding the failure of certain Petitioners to take advantage of the opportunity to participate would have to be developed in the record, but there is no procedure for such factual development in appellate proceedings.

The extra-record letter from certain Members of Congress to the Librarian raises similar concerns. The assertion (Beethoven.com Opp. at 11) that this letter is cited for the undisputed point that the rates and terms in the proceeding are critical to the survival of certain webcasters is clearly incorrect. The Owner and Performer Movants would dispute these allegations with respect to many webcasters, and have had no opportunity to test the validity of this assertion based on discovery and consideration of evidence on the financial situation of the webcasters to whom this point allegedly applies. They will not have that opportunity before this Court.

D. General Citations to Website URLs Are Not the Proper Subject of Judicial Notice.

The Beethoven.com Petitioners simply ignore the concern Movants raised about the Petitioners' citation to URL addresses for various websites. None of the parties to the proceeding knows what is on these websites on a given day, so it is not possible for Movants to respond to any information potentially contained therein. The practice followed in the proceeding below was to use fixed screen shots of web pages that could be reviewed by all parties and subjected to cross examination. It is too late to adopt that practice here.

III. THE PURPORTED CONSTITUTIONAL CLAIMS OF THE BEETHOVEN.COM PETITIONERS DO NOT PERMIT THEM TO IGNORE THE JURISDICTIONAL LIMITS OF SECTION 802(g).

The Beethoven.com Petitioners, who failed to participate in the proceeding below, argue at length that this Court should basically ignore the clear mandate of Section 802(g) to review the Librarian's decision "only" on "the basis of the record before the Librarian" because such extra-record material is (according to these non-parties) essential "to avoid depriving petitioners of due process and violating the separation of powers." Opp. at 12. The Beethoven.com Petitioners say this Court has "discretion" to ignore the mandate of Section 802(g) and "consider facts outside the record as needed to provide meaningful judicial review." *Id.* These contentions are meritless.[3]

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[3] Contrary to the assertions of the Beethoven.com Petitioners, Opp. at 1, the Motion does not raise standing issues. Movants only seek to have the Beethoven.com Petitioners use material within the extensive record of the proceeding in support of their constitutional arguments.

As noted, the language of Section 802(g) expressly allows judicial review of the Librarian's decision "only" on "the basis of the record before the Librarian." This language is a condition to the waiver of sovereign immunity contained in Section 802(g) and thus must be strictly construed. "The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The Supreme Court has made clear that "[a] necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 287 (1983). *See also Lane v. Pena*, 518 U.S. 187, 192 (1996) ("limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied"), *quoting Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). Under these principles, this Court has no "discretion" to set aside this Congressionally imposed limitation on the waiver of sovereign immunity contained in Section 802(g).

Contrary to the contention of the Beethoven.com Petitioners, there is a judicial forum – other than this Court – in which these non-party petitioners can present their constitutional arguments without being limited to the record before the Librarian. Specifically, these challenges to the arbitration costs statutorily imposed on participants by 17 U.S.C. 802(c) and 17 U.S.C. 802(h)(1), and the participation requirements imposed by the Librarian's regulations, can be brought in district court in a suit seeking "non-statutory" judicial review. *See, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328-29 (D.C. Cir. 1996) (holding that non-statutory judicial review was available to review allegedly *ultra vires* Presidential decisions not subject to review under the APA); *see also Five Flags Pipe Line Co. v. Department of Transportation*, 854 F.2d

1438, 1439-40 (D.C. Cir. 1988) (explaining that non-statutory review is available initially in district court). *Cf. Verizon Maryland, Inc. v. Public Service Com'n of Maryland*, 535 U.S. 635 (2002) (relying on *Ex Parte Young* doctrine to allow equitable review of constitutional claims despite a claim of Eleventh Amendment immunity). Requiring the Beethoven.com Petitioners to litigate such claims in district court would permit the creation of a proper factual and legal record based on their contentions, a record that is wholly absent before this Court because of the complete failure of these entities to participate in the administrative proceedings below. In light of this availability of district court review, there is no need for this Court to consider the extra-record materials that these non-parties seek to introduce for the first time in this Court.[4]

IV. RESOLUTION OF THIS MOTION PRIOR TO CONTINUATION OF BRIEFING IS ESSENTIAL TO THE ORDERLY CONDUCT OF THIS APPEAL.

Movants strongly disagree with the suggestion by the Salem Petitioners that any issues related to extra-record material in their briefs can be resolved by the merits panel in the context of deciding this entire matter. Opp. at 4. Proceeding in that manner would put the Movants in the untenable position of having to choose whether to allow factual allegations that they dispute to go unrefuted, or to include responsive material refuting the allegations in their opposition and reply briefs despite their belief that such material is improper. Instead, the Motion should be resolved prior to the resumption of briefing so that the Movants will know the scope of the arguments to which they must respond.

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[4] Of course, such a district court suit could not challenge the Librarian's Section 802(f) decisions reviewable in this Court under Section 802(g). Review of such Section 802(f) decisions lies solely within this Court's exclusive jurisdiction under Section 802(g). *See, e.g., Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute").

Conclusion

For the foregoing reasons and the reasons stated in their initial Motion to Strike, Movants ask this Court to strike all extra-record material from the briefs of Licensee Petitioners, and order them to amend their briefs to remove all such material, all references to it, and any text or argument based on such references.

Respectfully submitted,

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August 14, 2003

CERTIFICATE OF SERVICE

I, Daniel Lee, hereby certify that I have served two copies of the foregoing Reply in Support of Motion to Strike, this 14th day of August, 2003, by first class mail, to the following counsel of record:

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* Due to problems with U.S. mail delivery to government offices, the motion has been served on August 14 by email, and two copies will be hand-delivered on August 15.

by adding that the Office will process requests granted expedited processing status "as soon as is practicable." EFOIA sec. 8(a) (codified as 5 U.S.C. 552(a)(6)(E)(iii)).

E. Electronic Reading Room

The FOIA requires agencies to make available for inspection and copying statements of policy and interpretations not published in the **Federal Register**. and administrative staff manuals and instructions to staff that affect the public. 5 U.S.C. 552(a)(2). The Office maintains these materials in paper form in its Public Information Office. *See* 37 CFR 203.4. The EFOIA requires agencies to make available by "computer telecommunications or * * * by other electronic means" all reading room materials that are created on or after October 1. 1996. EFOIA sec. 4 (codified at 5 U.S.C. 552(a)(2). The statute envisions that agencies will develop both a traditional reading room and an electronic reading room. The Office proposes an interim regulation stating which materials are available on-line or in an accessible electronic format.

List of Subjects in 37 CFR Part 203

Freedom of Information Act. Policies and procedures.

Interim Regulations

In consideration of the foregoing. the Copyright Office is amending part 203 of 37 CFR. chapter II. in the manner set forth below:

PART 203—FREEDOM OF INFORMATION ACT: POLICIES AND PROCEDURES

1. The authority citation for part 203 is amended to read as follows:

Authority: 17 U.S.C. 702: and 5 U.S.C. 552. as amended.

2. Section 203.3 is amended by revising paragraph (i) to read as follows:

§ 203.3 Organization.

* * * * *

(i) The Copyright Office maintains an "electronic reading room" by making available certain documents and records on its World Wide Web page and by providing access to documents that affect the public in electronic format pursuant to 5 USC 552(a)(2). Copyright Office records in machine-readable form cataloged from January 1. 1978. to the present. including registration information and recorded documents. are available on the Internet. Frequently requested Copyright Office circulars. announcements. and recently proposed as well as final regulations are available on-line. The address for the Copyright Office's home page is: http://www.loc.gov/copyright: information may also be accessed by connecting to the Library of Congress' home page on the World Wide Web. The address is: http://www.loc.gov. Other Copyright Office documents may be provided on disk when so requested.

3. Section 203.4 is amended by revising paragraph (f) and adding a new paragraph (i) to read as follows:

§ 203.4 Methods of operation.

* * * * *

(f) The Office will respond to all properly marked mailed requests and all personally delivered written requests for records within twenty (20) working days of receipt by the Supervisory Copyright Information Specialist. Inquiries should be mailed to: Copyright Office. GC/I&R. P.O. Box 70400 Southwest Station. Washington. D.C. 20024. If hand delivered. materials should go to: Copyright Public Information Office. LM 401. James Madison Memorial Building. Library of Congress. 101 Independence Avenue. S.E.. Washington. D.C. Office hours are from 8:30 a.m. to 5:00 p.m.. Monday through Friday. excluding holidays. If it is determined that an extension of time greater than ten (10) working days is necessary to respond to a request due to unusual circumstances. as defined in paragraph (i) of this section. the Supervisory Copyright Information Specialist shall so notify the requester and give the requester the opportunity to:

(1) Limit the scope of the request so that it may be processed within twenty (20) working days. or

(2) Arrange with the Office an alternative time frame for processing the request or a modified request. If a request is denied. the written notification will include the basis for the denial. names of all individuals who participated in the determination. and procedures available to appeal the determination.

* * * * *

(i) The Supervisory Copyright Information Specialist will consider requests for expedited processing of requests in cases where the requester demonstrates a compelling need for such processing. The term "compelling need" means:

(1) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual: or

(2) With respect to a request made by a person primarily engaged in disseminating information. urgency to inform the public concerning actual or alleged Federal Government activity. Requesters for expedited processing must include in their requests a statement setting forth the basis for the claim that a "compelling need" exists for the requested information. certified by the requester to be true and correct to the best of his or her knowledge and belief. The Office will determine whether to grant a request for expedited processing and will notify the requester of such determination within ten (10) days of receipt of the request. If a request for expedited processing is approved. documents responsive to the request will be processed as soon as is practicable. Denials of requests for expedited processing may be appealed to the Office of the General Counsel. who will expeditiously determine any such appeal.

§ 203.6 [Amended]

5. Section 203.6(b)(6) is amended by revising the parenthetical at the end of the sentence to read "(at no less than $20.00 per hour or fraction thereof)."

Dated: October 21. 1997

Marybeth Peters.

Register of Copyrights.

[FR Doc. 97-28418 Filed 10-27-97; 8:45 am]

BILLING CODE 1410-30-P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 258

[Docket No. 96-3 CARP SRA]

Rate Adjustment for the Satellite Carrier Compulsory License

AGENCY: Copyright Office. Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress. upon recommendation of the Register of Copyrights. is announcing the adjustment of the royalty rates for superstation and network signals under the satellite carrier compulsory license. 17 U.S.C. 119.

EFFECTIVE DATE: January 1. 1998.

ADDRESSES: The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the General Counsel. James Madison Memorial Building. Room LM-403. First and Independence Avenue. S.E.. Washington. D.C. 20540.

FOR FURTHER INFORMATION CONTACT: David O. Carson. General Counsel. William J. Roberts. Jr.. Senior Attorney for Compulsory Licenses. or Tanya M. Sandros. Attorney Advisor. P.O. Box

70977. Southwest Station. Washington. D.C. 20024. Telephone (202) 707-8380.

SUPPLEMENTARY INFORMATION:

Recommendation of the Register of Copyrights

I. Background

Congress passed the Satellite Home Viewer Act of 1988 to create a compulsory copyright license. codified at section 119 of the Copyright Act. for the retransmission of over-the-air television broadcast signals. 17 U.S.C. 119. Similar in many ways to the cable compulsory license enacted by Congress in 1976. the satellite carrier compulsory license permits satellite carriers to retransmit TV signals to their subscribers upon semiannual submission of royalty fees and statements of account to the Copyright Office. The royalty fees collected by the Copyright Office are deposited with the United States Treasury for subsequent distribution to copyright owners of programming retransmitted by the satellite carriers.

Section 119 identifies two types of television broadcast signals that are subject to compulsory licensing: superstations and network signals. A superstation is the signal of any commercial independent television station licensed by the Federal Communications Commission. Examples of superstations retransmitted by satellite carriers under section 119 are WTBS. Atlanta and WGN. Chicago. A network station is defined as follows:

(A) A television broadcast station. including any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station. that is owned or operated by. or affiliated with. one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States: or

(B) A noncommercial educational broadcast station (as defined in section 397 of the Communications Act of 1934).[1]

17 U.S.C. 119(d)(2). Examples of network signals carried by satellite carriers are ABC. CBS. and NBC. A station of the Public Broadcasting Service (PBS) would also be considered a network signal under the statute.

Under the section 119 license. satellite carriers can retransmit any superstation they choose to any subscriber located anywhere in the United States. However. such is not the case with the retransmission of network signals. Satellite carriers may only make use of the license to retransmit a network signal to a subscriber who resides in an "unserved household." An "unserved household" is defined as a household that:

(A) Cannot receive through the use of a conventional outdoor rooftop receiving antenna. an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network. and

(B) Has not. within 90 days before the date on which that household subscribes. either initially or on renewal. to receive secondary transmissions by a satellite carrier of a network station affiliated with that network. subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

17 U.S.C. 119(d)(10). Service of network signals to subscribers who do not reside in unserved households is an act of copyright infringement. subject to the remedies of chapter 5 of the Copyright Act. unless the carrier is able to negotiate a private agreement with copyright owners to license all the copyrighted works on those network signals.

In creating the section 119 license in 1988. Congress established different royalty rates for superstation and network signals. based upon approximations of what cable paid for such signals under the section 111 cable compulsory license. 17 U.S.C. 111. The original rate for a superstation was 12 cents per subscriber per month. The original rate for a network was 3 cents per subscriber per month. Congress. however. authorized a rate adjustment procedure to change these rates in 1992.

II. The 1992 Rate Adjustment

At the time of passage of section 119. the Copyright Royalty Tribunal was still in existence. However. rather than invest the Tribunal with authority to adjust the section 119 rates. as was the case for all other compulsory licenses in the Copyright Act. Congress instead gave the task to an ad hoc arbitration panel assembled solely for that purpose. The Tribunal was given authority to review the decision of the arbitration panel. as is the Librarian in this proceeding. but under a different standard of review.

Congress also established a number of factors for the arbitration panel to consider in reaching its determination. The statute provided:

In determining royalty fees under this paragraph. the Arbitration Panel shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station. the fee established under any voluntary agreement filed with the Copyright Office in accordance with paragraph (2).[2] and the last fee proposed by the parties. before proceedings under this paragraph. for the secondary transmission of superstations or network stations for private home viewing. The fee shall also be calculated to achieve the following objectives:

(i) To maximize the availability of creative works to the public.

(ii) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(iii) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution. technological contribution. capital investment. cost. risk. and contribution to the opening of new markets for creative expression and media for their communication.

(iv) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 119(c)(3)(B) (1988).

The arbitration panel was given 60 days to reach its determination: it delivered its report to the Copyright Royalty Tribunal on March 2. 1992. The panel recommended that the royalty fee for network signals be raised from 3 cents to 6 cents per subscriber. 57 FR 19061 (May 1. 1992). For superstations. the panel recommended a two-tiered rate structure. The panel was impressed with Congress' consideration of the application of syndicated exclusivity protection on the satellite industry. With respect to cable retransmissions of broadcast signals. broadcasters may purchase exclusive rights to broadcast programming within their local market. and any cable operator importing the same programming into the broadcaster's local market is required to black it out. Congress directed the FCC in 1988 to consider adopting syndicated exclusivity rules for the satellite industry. but the Commission ultimately determined that it was not technically feasible for satellite carriers to black-out programming. See 6 FCC Rcd. 725 (1991). To make up for this technological deficiency. the panel imposed a higher royalty rate to compensate for the loss of exclusivity protection.

For superstations. if they had been retransmitted by a cable system rather than a satellite carrier and would have been subject to the FCC's syndicated exclusivity rules. the panel adopted a rate of 17.5 cents per subscriber per month. 57 FR at 19061 (1992). For

[1] This is the definition of a network signal after the 1994 amendments to section 119. The earlier definition was the same one appearing in section 111 of the Copyright Act.

[2] No such voluntary agreements were reached.

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signals that would not have been subject to the syndicated exclusivity rules for cable (known as "syndex proof" signals), the panel adopted a rate of 14 cents per subscriber per month. *id.*

The Copyright Royalty Tribunal, reviewing the panel's decision only under a contrary to law standard, adopted the rates recommended by the arbitration panel. 57 FR 19052 (1992). The Tribunal did, however, substitute a new effective date for the rates, because it determined that the panel misapplied the statute. *Id.* at 19053 (rates effective on date of issuance of Tribunal's order, May 1, 1992, not January 1, 1993 date recommended by panel). No appeal of the Tribunal's order was taken.

III. Satellite Home Viewer Act of 1994

The rates adopted by the Tribunal in 1992 were to last only until the end of 1994, when the section 119 license was slated to expire. However, in 1994, Congress passed the Satellite Home Viewer Act of 1994, which extended the section 119 license another 5 years. In reauthorizing the license, Congress made several changes to its provisions. Another rate adjustment—this proceeding—was scheduled to take place, and the duty of conducting the proceeding was given to a copyright arbitration royalty panel (CARP), with review by the Librarian of Congress.

The most significant change to section 119 made by the 1994 amendments, for purposes of this proceeding, was a change in the factors to be applied by the CARP to determine the new royalty rates. Rather than focus on the price paid by the cable industry for similar retransmissions, Congress required that the royalty fees for superstations and network signals represent the fair market value. 17 U.S.C. 119(c)(3)(D) (1994).

Although Congress intended to replace the statutory criteria for adjusting the royalty rates from the 1988 Act with the new "fair market value" standard, a scrivener's error was made in the 1994 Act. The result was that the original provisions of section 119(c)(3)(B) remained, and the new provisions inadvertently replaced the subparagraph determining those parties subject to pay the section 119 royalty fees. Certain copyright owners to this proceeding requested clarification of the statute, and the Library issued an order prior to commencement of the CARP instructing the CARP to apply only the new fair market value provisions, and to disregard the old criteria of section 119(c)(3)(B). Order in Docket No. 96-3 CARP SRA (January 6, 1997).

The royalty rates adopted in the 1992 rate adjustment were incorporated into the 1994 Act, subject to adjustment in this proceeding. The rates adopted in this Order shall remain effective until December 31, 1999, the current date for the section 119 compulsory license.

IV. This Proceeding

Pursuant to section 119(c)(2), the Librarian of Congress initiated this proceeding with publication of a **Federal Register** notice on June 11, 1996, establishing a voluntary negotiation period and a precontroversy discovery schedule.[3] 61 FR 29573 (June 11, 1996). The schedule was vacated on September 19, 1996, at the request of certain copyright owner parties. Order in Docket No. 96-3 CARP SRA (September 19, 1996), and rescheduled on October 29, 1996. Order in Docket No. 96-3 CARP SRA (October 29, 1996). The CARP was convened on March 3, 1997.

The following parties submitted written direct cases to the CARP: (1) Joint Sports Claimants ("JSC"), representing national sports associations including Major League Baseball, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association; (2) the Public Broadcasting Service ("PBS"); (3) the Commercial Network Claimants ("Commercial Networks"), representing the National Broadcasting Co., Inc., Capital Cities/ABC, Inc. and CBS, Inc.; (4) the Broadcaster Claimants Group ("Broadcaster Claimants Group"), representing certain commercial television stations whose signals are retransmitted by satellite carriers; (5) the Program Supplier Claimants ("Program Suppliers"), representing various copyright owners of motion pictures, television series and specials; (6) the Music Claimants ("Music Claimants"), representing the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.; (7) the Devotional Claimants ("Devotional Claimants"), representing various copyright owners of religious programming; (8) the Satellite Broadcasting & Communications Association ("SBCA"), representing AlphaStar Television, Inc., BosCom, Inc., Consumer Satellite Systems, DirecTV, Inc., EchoStar Communications Corp., Netlink USA, PrimeStar Partners L.P., Prime Time 24 Joint Venture, Southern Satellite Systems, Inc., and Superstar Satellite Entertainment; and (9) American Sky Broadcasting L.L.C. ("ASkyB").

[3] The voluntary negotiation period proved unsuccessful as no agreements were reached.

The CARP held oral hearings on the written cases and evidence, and oral argument on the proposed findings of fact and conclusions of law. The CARP submitted its report to the Librarian on August 29, 1997.

The CARP concluded that rates for both networks signals and superstations should be adjusted upwards to 27 cents per subscriber per month. In addition, the Panel determined that no royalty fee should be paid for the retransmission of superstations within the superstations' local markets, and that it had no authority to set a royalty rate for retransmissions of network signals within their local markets. The Panel recommended July 1, 1997, as the effective date for the new rates.

Section 802(f) of the Copyright Act provides that "[w]ithin 60 days after receiving the report of a copyright arbitration royalty panel * * *, the Librarian of Congress, upon the recommendation of the Register of Copyrights shall adopt or reject the determination of the panel." 17 U.S.C. 802(f). Today's order of the Librarian fulfills this statutory obligation.

V. The Librarian's Scope of Review

The Librarian of Congress has, in previous proceedings, discussed his narrow scope of review of CARP determinations. See 52 FR 6558 (February 12, 1997) (DART distribution order); 61 FR 55653 (October 26, 1996) (cable distribution order). The salient points regarding the scope of review, however, merit repeating.

The Copyright Royalty Tribunal Reform Act of 1993 created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review: the Librarian and the Court of Appeals for the District of Columbia Circuit. Section 802(f) directs the Librarian to either accept the decision of the CARP or reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." *Id.* If the Librarian accepts it, then the determination of the CARP has become the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different than the "arbitrary" standard described in the Administrative Procedure Act (APA). 5 U.S.C. 706(2)(A).

Review of the caselaw applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency is generally considered to be arbitrary when it:

(1) Relies on factors that Congress did not intend it to consider;

(2) Fails to consider entirely an important aspect of the problem that it was solving;

(3) Offers an explanation for its decision that runs counter to the evidence presented before it;

(4) Issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;

(5) Fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and

(6) When the agency's action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Manufacturers Ass'n v. *State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983); *Celcom Comm. Corp.* v. *FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp* v. *FAA*. 758 F2d 685 (D.C. Cir. 1985).

Given these guidelines for determining when a determination is "arbitrary," prior decisions of the courts reviewing the determinations of the former Copyright Royalty Tribunal have been consulted. The decisions of the Tribunal were reviewed under the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: provided that the Tribunal adequately articulated the reasons for its decision, specific determinations were granted a relatively wide "zone of reasonableness." See *National Ass'n of Broadcasters* v. *CRT*, 772 F.2d 922 (D.C. Cir. 1985); *Christian Broadcasting Network* v. *CRT*, 720 F.2d 1295 (D.C. Cir. 1983); *National Cable Television Ass'n* v. *CRT*, 689 F.2d 1077 (D.C. Cir. 1982); *Recording Industry Ass'n of America* v. *CRT*, 662 F.2d 1 (D.C. Cir. 1981). As one panel of the D.C. Circuit succinctly noted:

> To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a "zone of reasonableness."

Recording Industry Ass'n of America v. *CRT*, 662 F.2d 1, 9 (D.C. Cir. 1981). Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal, he must be presented with a detailed rational analysis of the CARP's decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 103-286, 103 Cong., 1st Sess. 13 (1993). Thus, to engage in reasoned decisionmaking, the CARP must "weigh all the relevant considerations and * * * set out its conclusions in a form that permits [a determination of] whether it has exercised its responsibilities lawfully." *National Cable Television Ass'n* v. *CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982). This goal cannot be reached by "attempt[ing] to distinguished apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broadcasting Network, Inc.* v. *CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983).

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination.

VI. Review of the CARP Report

Section 251.55(a) of the rules provides that "[a]ny party to the proceeding may file with the Librarian of Congress a petition to modify or set aside the determination of a Copyright Arbitration Royalty Panel within 14 days of the Librarian's receipt of the panel's report of its determination. 37 CFR 251.55(a). Replies to petitions to modify are due 14 days after the filing of the petitions. 37 CFR 251.55(b).

The following parties filed petitions to modify: SBCA, EchoStar Communications Corp. ("EchoStar"), and commercial Networks. Replies were filed by JSC, Broadcaster Claimants Group, PBS, Program Suppliers, Commercial Networks, Music Claimants and Devotional Claimants (collectively, "Copyright Owners"), PBS, JSC and Broadcaster Claimants Group (collective, "Certain Copyright Owners"), and EchoStar.

Satellite carriers oppose the decision of the CARP, while copyright owners are generally supportive of it. SBCA offers numerous reasons why, in its view, the Panel's decision is arbitrary and contrary to law. EchoStar confines its comments to the Panel's decision not to establish a royalty rate for the local retransmission of network signals by satellite carriers, and Commercial Networks request a "clarification" of the Panel's ruling in order to construe it to mean that the 27 cent fee for network signals applies to any local retransmission of network stations to subscribers in unserved households. Certain Copyright Owners challenge EchoStar's standing to file a § 251.55 petition to modify in this proceeding.

Section 251.55 of the rules assists the Register of Copyrights in making her recommendation to the Librarian, and the Librarian in conducting his review of the CARP's decision by allowing the parties to the proceeding to raise specific objections to a CARP's determination. As required by section 802(f) of the Copyright Act, if the Librarian determines that the Panel in this proceeding has acted arbitrarily or contrary to the provisions of the Copyright Act, he must "after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee * * *." 17 U.S.C. 802(f).

VII. Review and Recommendation of the Register

As discussed above, the parties to this proceeding submitted petitions to the Librarian to modify the Panel's determination based on their assertions that the Panel acted arbitrarily or contrary to the applicable provisions of the Copyright Act. These petitions have assisted the Register in identifying what evidence and issues in this large proceeding, in the eyes of the petitioners, are areas where the Panel may have acted improperly, thereby requiring the Librarian to substitute his own determination. The law gives the Register the responsibility to make recommendations to the Librarian regarding the Panel's determination, 17 U.S.C. 802(f), and in so doing she must conduct a thorough review.

After reviewing the Panel's report and the record in this proceeding, the Register has determined that there are 6 primary aspects of the Panel's decision that warrant detailed discussion and analysis:

(1) Whether the Panel correctly interpreted and applied the statutory standard for determining royalty fees;

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(2) Whether the Panel acted arbitrarily in adopting the license fees paid by cable networks as the benchmark for determining section 119 fees:

(3) Whether the Panel should have made certain adjustments in the benchmark rates it adopted:

(4) Whether it was permissible for the Panel to adopt the same rate for superstations and network signals:

(5) Whether the Panel correctly declined to adopt a royalty rate for local retransmission of network signals by satellite carriers: and

(6) Whether the Panel supplied the appropriate effective date for the newly established royalty fees.

SBCA has made additional arguments in its petition to modify as to why the Panel's decision should be set aside. These arguments. which primarily involve evaluation of the evidence and allege deficiencies in the discovery rules for CARP proceedings. are addressed at the end of this section.

A. Determination of Fair Market Value

1. Action of the Panel

A fundamental dispute between satellite carriers and copyright owners in this proceeding is the meaning of the term "fair market value" as used in section 119(c)(3)(D) of the Copyright Act. That section provides:[4]

In determining royalty fees under this paragraph. the Copyright Arbitration Panel shall establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions. In determining the fair market value. the Panel shall base its decision on economic. competitive. and programming information presented by the parties. including—

(i) The competitive environment in which such programming is distributed. the cost for similar signals in similar private and compulsory license marketplaces. and any special features and conditions of the retransmission marketplace:

(ii) The economic impact of such fees on copyright owners and satellite carriers: and

(iii) The impact on the continued availability of secondary transmissions to the public.

17 U.S.C. 119(c)(3)(D).

The Panel examined this provision. and the legislative history. and determined that fair market value meant the prize that would be negotiated in a free market setting as compensation for the satellite carriers' right to retransmit network and superstation signals containing the copyright owners' copyrighted programming. The Panel stated that:

[T]he language. structure. and legislative history of the 1994 amendments to section 119 suggest the Panel is directed to determine actual *fair market value* and "in determining the fair market value * * * base its decision * * *" upon the non-exhaustive list of *considerations.* We interpret the phrase "base its decision" to require the Panel to *consider* each enumerated type of information but. the weight to be accorded each consideration must necessarily depend upon the quality and quantity of the evidence adduced and *its relative significance to a determination of actual fair market value.* All evidence falling within the enumerated types of information must be considered but the evidence which is more probative of *fair market value* must be accorded greater weight than less probative evidence * * * The Panel agrees that the fair market value rate is that which most closely approximates the rate that would be negotiated in a free market between a willing buyer and a willing seller.

Panel Report at 17 (emphasis in original).

2. Arguments of the Parties

SBCA asserts that the Panel misapprehended the meaning of "fair market value." and that it should have determined the section 119 fees in accordance with what cable operators pay for distant signals under the section 111 cable compulsory license. SBCA Petition to Modify at 12. "Fair market value is a Congressionally defined term. and thus cannot be considered under the 'traditional' sense. as urged by the [Copyright] Owners." *Id.* at 14. SBCA cites certain 1994 floor statements at length as evidence that Congress intended that section 119 royalty rates be set on a parity with cable rates.

DeConcini: Copyright license parity with cable is the central feature of the fair market standard articulated in this legislation. The inclusion of specific guidance to the arbitration panel to take into consideration the competitive environment in which satellite programming is distributed is essential to ensure that satellite carriers are not required to pay higher royalty fees than cable operators * * * I am confident that the arbitration panel will take steps to ensure that the royalty fee paid by satellite carriers are on par with those paid by cable operators. The guiding criteria for the arbitration panel to establish fair market value in this legislation will accomplish that objective.

* * * The fact that the Senate agrees with the House on this compromise language is due to the criteria that defines fair market value in the bill. I have long opposed the imposition of royalty fees based simply on the mechanical application of some conceptual fair market value formula * * * The arbitration panel will take steps to ensure that the royalty fees paid by satellite carriers are on par to those paid by cable operators. The guiding criteria for the arbitration panel to establish fair market value will accomplish this objective.

140 Cong. Rec. S14105. 14106 (daily ed. Oct. 4. 1994).

Brooks: In the hard-fought compromise reached on this bill. the factors to be considered under the bill's "fair market value" determination have been made more specific. I would note that in determining fair market value. we intend that the copyright arbitration panel consider all the factors raised by the parties. including cable rates.

140 Cong. Rec. H9270 (daily ed. Sept. 20. 1994).

Hughes: [L]egislation contemplates that the panel will look to the competitive environment in which section 119 retransmissions are distributed as well as the costs of distribution of similar signals in similar private and compulsory license marketplaces. including the cable copyright fees under section 111. This will help ensure that there is vigorous competition and diversity in the video programming distribution industry.

140 Cong. Rec. H9271 (daily ed. Sept. 20. 1994).

Synar: I am also hopeful that any fee resulting from the fair market value standard does not disadvantage the delivery of satellite transmissions vis-a-vis the delivery of cable retransmission under the section 111 compulsory license * * * It is my hope that the fees set for satellite retransmissions under the fair market value standard will. among other things. reflect the competitive environment in which those retransmissions are distributed. There is little question that Congress would like to ensure that there is vigorous competition and diversity in the distribution of video programming and the determination of fair market value fees should reflect that intent.

140 Cong. Rec. H9272 (daily ed. Sept. 20. 1994).

According to SBCA. these floor statements provide clear Congressional direction that the royalty fees for section 119 are to be either identical or substantially similar to those paid by cable operators under section111. SBCA provided testimony demonstrating that cable operators pay 9.8 cents per subscriber per month for superstations. and 2.45 cents per subscriber per month for network signals. and submits that the Librarian should adopt these rates. SBCA Petition to Modify at 18.

Copyright Owners contend that the Panel acted correctly in attributing the plain meaning to the term "fair market value." and properly rejected SBCA's position that the rates paid by cable under section 111 is the governing factor in determining fair market value. Copyright Owners Reply at 12. Copyright Owners' note further that even one of SBCA's own expert witnesses. Mr. Harry Shooshan. conceded at the hearing that Congress intended to accord the conventional meaning to "fair market value." *Id.*

[4] As discussed above. section 119(c)(3)(D) is the appropriate statutory provision governing the adjustment of royalty rates. Section 119(c)(3)(B). which also prescribes royalty adjustment factors. was inadvertently left in the statute after the 1994 amendments.

Copyright Owners also submit that portions of floor statements delivered at the time of passage of the 1994 Satellite Home Viewer Act are not proper legislative history and must be given little, if any, weight. *Id.* at 14–15 (citing *Overseas Educ. Ass'n. Inc.* v. *FLRA*, 876 F.2d 960 (D.C. Cir. 1989); *In the Matter of Sinclair*, 870 F.2d 1340 (7th Cir. 1989)). Rather, the text of the statute is the principle source for determining its meaning. *Id.* at 15 (citing *West Virginia Hosp.* v. *Casey*, 499 U.S. 83 (1991)).

3. Recommendation of the Register

The Panel determined that the term "fair market value" should be accorded its plain meaning—i.e., the price a willing buyer and a willing seller would negotiate in a free marketplace—and that the economic, competitive, and programming information presented by the parties provided the evidence to determine what fair market value royalty rates would be under the satellite carrier compulsory license. The Register concludes that this decision is not arbitrary, nor is it contrary to law.

Both SBCA and Copyright Owners contend that the meaning of "fair market value" is a matter of statutory interpretation. Moreover, it is a well-established principle that, in interpreting the meaning of a statute, the language of the law is the best evidence of its meaning. Sutherland Stat. Const. § 46.01 (5th Ed.).

The express words of the statute charge the Panel with determining the fair market value of retransmitted broadcast signals by satellite carriers. *Id.* (plain meaning of the statute governs its interpretation). The Panel determined that "fair market value" meant the price that would be negotiated between a willing buyer and a willing seller in a free marketplace. Panel Report at 17. The Register determines that this is not an arbitrary interpretation of the meaning of "fair market value," nor is it contrary to law. See Black's Law Dictionary 537 (5th Ed. 1989) (definition of "fair market value").

In the 1994 amendments Congress stated that "[i]n determining the fair market value, the Panel shall base its decision on economic, competitive, and programming information presented by the parties * * *" 119 U.S.C. 119(c)(3)(d). Congress then included in that amendment a nonexhaustive list of the types of "economic, competitive, and programming information" that the Panel must consider in fashioning royalty rates that represent fair market value. That the list is nonexhaustive is significant, for there may be other types of information presented by the parties that, while not falling within one of the enumerated categories, is nevertheless relevant to the issue of what the fair market value royalty rates should be. The Panel would be responsible for considering this type of information as well, if it were relevant to determining fair market value.

The Register does not interpret the enumerated categories of "economic, competitive, and programming information" (for example, costs in similar private and compulsory license marketplaces) as establishing criteria that define the meaning of "fair market value." To do so would, in the Register's view, run contrary to the plain meaning of the statute. Sutherland Stat. Const. § 47.07 (5th Ed.). Likewise, the Register does not see any support for the argument that one of the enumerated categories of information, such as the compulsory license fee paid by cable under 17 U.S.C. 111, must be accorded more weight than another. The House Committee Report to the 1994 amendments makes it clear that this should not be the case. See H.R. Rep. No. 703, 103d Cong., 2d Sess. 10 (1994) ("In order to aid the panel, the Committee adopted an amendment offered by Mr. Hughes directing the panel to consider economic, competitive, and programming information presented by the parties as well as the competitive environment in which such programming is distributed. This would, of course, include cable rates, but those rates are not to be a benchmark for setting rates under section 119; they are only one potentially [sic] piece of evidence in reaching the objective fair market value."). The Register, therefore, determines that the Panel did not act arbitrarily or contrary to law in determining the meaning of fair market value.

Although the Panel determined that its plain meaning of fair market value controlled their interpretation, the Panel nevertheless consulted the legislative history to the 1994 amendments and concluded that "[w]e find no support for the proposition that Congress did not mean what it said. The legislative history reveals no intent to attach a unique meaning to the commonly understood and well-established 'fair market value' term." Panel Report at 16.

A review of all floor statements offered at the time of passage of the 1994 amendments reveals considerable differences between the views of the two Chairmen and some of the members. These differences are accentuated by a later floor statement offered by Chairman Hughes when he introduced a bill that would make technical corrections to the 1994 Satellite Home Viewer Act. 140 Cong. Rec. E2290 (daily ed. November 29, 1994) (statement of Rep. Hughes).

The statement of Chairman DeConcini offers the greatest support to the argument that the rates established in this proceeding should approximate what cable pays under the cable compulsory license. 140 Cong. Rec. S14105 (daily ed. Oct. 4, 1994) ("I am confident that the arbitration panel will take steps to ensure that the royalty fee paid by satellite carriers are on par with those paid by cable operators"). Representative Synar's comments suggest his desire that a satellite rate adjustment produce rates comparable to the cable compulsory license, but he does not state that application of the fair market value standard should or must produce such comparability. The statements of Representative Brooks and Hughes provide that cable compulsory license rates are one of the factors to be considered by the Panel, but they do not indicate that they are the only or controlling factor.

The Register has consulted the caselaw in determining the weight to be accorded floor statements made by Congressmen during the passage of legislation. The caselaw provides that floor statements of legislators are to be given little weight *Garcia* v. *U.S.*, 469 U.S. 70, 78, (1984); *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969) ("Floor debates reflect at best the understanding of individual Congressmen"). The reasoning behind this principle was aptly described by the Federal Circuit Court for the District of Columbia:

> [I]t is necessary for judges to exercise extreme caution before concluding that statement made in floor debate, or at a hearing, or printed in a committee document may be taken as statutory gospel. Otherwise, they run the risk of reading authentic insight into remarks intended to serve quite different purposes. Furthermore, to the degree that judges are perceived as grasping any fragment of legislative history for insights into congressional intent, to that degree will legislators be encouraged to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to except * * *.

Int. Broth. of Elec. Wkrs. Loc. U. 474 v. *NLRB*, 814 F.2d 697 (D.C. Cir. 1987) (Buckley, concurring); see also *Overseas Educ. Ass'n. Inc.* v. *FLRA*, 876 F.2d 960, 975 (D.C. Cir. 1989) ("While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into *Congress'* understanding of the meaning of a particular provision") (emphasis in original).

Of greater importance in discerning the intent of Congress, as opposed to the statements of individual Members. is the fact that Congress changed the statute in 1994. When Congress decides to change a statute. the decision to do so signifies that it intended to change the meaning. *Brewster* v. *Gage*. 280 U.S. 327. 338 (1932); *United States v. NEC Corp*.. 931 F.2d 1493. 1502 (11th Cir. 1991); *In re Request for Assistance*. 848 F.2d 1151. 1154 (11th Cir. 1988). *cert. denied sub. nom*., *Azar* v. *Minister of Legal Affairs*. 488 U.S. 1005 (1989). That is what occurred here. If Congress had truly intended cable compulsory license rates to govern the adjustment of fees in this proceeding. then it would not have amended the statute in1994 to provide for a fair market value determination.[5]

In sum. while floor statements by some Members indicate an intent that fair market value be determined in various ways. by looking at the statute. committee reports. floor statements and colloquies the Register does not find any special meaning or limitation attached to the term "fair market value" and. therefore. must rely on the plain language of the statute and the plain meaning of the term. The Panel. in the view of the Register. therefore. did not act arbitrarily. or contrary to law in its interpretation of the meaning of "fair market value."

B. The Cable Network Fee Benchmark

1. Action of the Panel

In order to determine fair market value royalty rates as required by section 119(c)(3)(D). the Panel considered the voluminous testimony and exhibits presented by the parties. Witnesses for PBS. JSC. the Commercial Networks. SBCA. and ASkyB sponsored economic analyses and testified as to their calculation of fair market value. The copyright owners used empirical data of license fees paid to certain cable networks by multichannel video programming distributors (principally cable operators). while satellite carriers focused primarily on the license fees paid by cable operators under section 111.

The Panel specifically endorsed the approach taken by PBS. and its principal witness. Ms. Linda McLaughlin. Using data supplied by an industry survey group.[6] Ms. McLaughlin examined the license fees paid by multichannel video programming distributors ("MVPDs") to license the viewing rights to 12 popular basic cable networks. These networks are A&E. CNN. Headline News. Discovery. ESPN. the Family Channel. Lifetime. MTV. Nickelodeon. TNN. TNT. and USA. Ms. McLaughlin testified that these basic cable networks represented the closest alternative programming to broadcast programming for satellite homes. and that studies indicated that consumers value networks and superstations as least as highly as popular basic cable networks. Direct Testimony of Linda McLaughlin at 2–5. She then calculated a "benchmark" rate for these networks to be used by the Panel as representative of the fair market value of broadcast signals retransmitted by satellite carriers:

> * * * I have calculated a basic cable network benchmark price and used it to estimate a minimum compulsory license fee for satellite-retransmitted broadcast stations. The average license fee of the 12 popular basic cable networks was 18 cents in 1992—when the maximum satellite compulsory rate was 17.5 cents—and has risen to 24 cents in 1995. an annual increase of ten percent per year. The license fees for these 12 basic cable networks are forecast to increase to an average of 26 cents in 1997. 27 cents in 1998 and 28 cents in 1999. This suggests that the compulsory rate for satellite retransmitted stations should increase at least correspondingly with the average prices for basic cable networks. to an average at least 27 cents for the 1997–99 period.

Id. at 7.

The Panel endorsed Ms. McLaughlin's approach because it determined that it represented the closest model. of those presented. to a free market negotiation for satellite carriage of broadcast signals. and because it was the most conservative approach offered by the copyright owners. Panel Report at 29–30. The Panel rejected the analysis of JSC (Testimony of Mr. Larry Gerbrandt) as too narrow.[7] and the analysis of the Commercial Networks (testimony of Mr. Bruce Owen) as too speculative.[8] The Panel also rejected the analyses of SBCA and ASkyB because it determined that their analyses did not comport with the plain statutory meaning of the term "fair market value." *Id.* at 29–30.

2. Arguments of the Parties

SBCA contends that cable network license fees are not an appropriate benchmark because cable networks are fundamentally different from retransmission of broadcast signals. It asserts that "[e]xtracting an accurate. or even representative license fee per subscriber is basically impossible because multiple programming services are included within contracts. there are ceilings on aggregate license fees for MVPDs in some cases. free subscriptions in others. marketing and launch support provided by the cable networks. purchases of advertising time by the cable networks from MVPDs. and equity investments by each in the other." SBCA Petition to Modify at 20–21.

In reply. Copyright Owners assert that the Panel acted properly by utilizing cable networks as the benchmark of fair market value. and accepting the analysis of Ms. McLaughlin. Copyright Owners not that they wished to examine the license fees paid by satellite carriers to cable networks in particular. as opposed to the fee paid by all MVPDs in general. but SBCA refused to disclose through discovery the amounts that satellite carriers paid. Copyright Owners Reply at 17. They further note that while SBCA's witness. Mr. Jerry L. Parker. stated that a meaningful license fee could not be determined from satellite/cable network contracts. SBCA never produced the documents to support that assertion. *Id.* at 18. Copyright Owners assert that Ms. McLaughlin testified that the license fees presented by her analysis demonstrated at least the minimum amount that satellite carriers would pay for cable networks. and that her analysis offered the best evidence that was properly accepted by the Panel. *Id.*

3. Recommendation of the Register

In the Register's view. the Panel's decision to use cable network license fees as a benchmark for establishing the fair market value of section 119 rates was the product of rational decisionmaking. and its decision to use the PBS/McLaughlin approach was not improper.

Having determined that "fair market value" meant the price that would be paid by a willing buyer and seller in a free marketplace. it was not illogical for the Panel to give careful consideration to evidence of markets that most closely resembled the licensing of signals under section 119. In fact. section 119(c)(3)(D)(i) requires that the Panel consider "the cost for similar signals in similar private * * * marketplaces." 17 U.S.C. 119(c)(3)(D).

All three of the evidentiary presentations of the copyright owners—PBS. JSC. and Commercial Networks—

[5] There is no question that the principal factor for determining rates under the 1988 legislation was the rates paid by cable. 17 U.S.C. 119(c)(3)(B) (1988) (the Panel "shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station * * *.")

[6] The data was supplied by Paul Kagan Associates. a leading information and data company in the video industry.

[7] Mr. Gerbrandt isolated the license fees paid for two basic cable networks: TNT and USA. Tr. 2025–2026.

[8] Mr. Owen used regression analysis in an attempt to demonstrate that MVPDs are willing to pay proportionally higher license fees for network signals which contain more expensive programming. Direct Testimony of Bruce Owen at 7–10.

focused upon the fees paid to cable networks by MVPDs. SBCA's evidence of fair market value, the cable license fees paid under section 111, was less relevant to the Panel's determination because the Panel had rejected the notion that cable fees equaled fair market value. Panel Report at 29–30. The Panel's adoption of cable network fees as the benchmark was not unqualified, however, because it stated that "we agree with the satellite carriers that the economic model governing cable networks varies markedly from the economic model governing broadcasters." *Id.* at 29. Nevertheless, the Panel "adopt[ed] the copyright owners' *general* approach using the *most similar* free market we can observe." *Id.* at 30. After reviewing the record, the Register has determined that the Panel's conclusion is not "arbitrary" within the meaning of 17 U.S.C. 802(f).

SBCA contends that cable network fees are not a useful benchmark because the economics of cable networks are fundamentally different from those of broadcast networks and superstations. SBCA Petition to Modify at 20 (citing testimony of Mr. Harry Shooshan, Mr. John Haring and Mr. Edwin Desser). The testimony of Mr. Shooshan and Mr. Haring, in particular, suggest that there are some marked differences between the licensing of cable networks and broadcast signals. The Panel, however, took account of that. Panel Report at 29. Nevertheless, there was ample testimony that the two markets were also quite similar. Tr. 1202–04 (Mr. Robert Crandall); Tr. 1609 (Ms. McLaughlin); Tr. 1284 (Mr. Owen). The Panel weighed the evidence and accepted the copyright owners' approach using cable network fees because it was "the *most similar* free market we can observe." Panel Report at 30 (emphasis in original). Because this conclusion is grounded in the record, it is not arbitrary. *National Cable Television Ass'n, Inc.* v. *CRT*, 724 F.2d 176, 189 (D.C. Cir. 1983) (decisions grounded in the record within the zone of reasonableness).

Likewise, the Panel's decision to rely on the PBS/McLaughlin testimony to establish the cable network benchmark was adequately grounded in the record. Panel Report at 18–20. Again, the Panel stated that use of cable networks was by no means flawless and, to account for this, the Panel was adopting the "conservative" approach offered in Ms. McLaughlin's analysis. *Id.* at 31. The Register determines that the Panel's decision to accord the PBS/McLaughlin testimony controlling weight is consistent with its determination to utilize the plain meaning of "fair market value" as the proper standard for setting royalty fees. Further, it is well established that using evidence of analogous markets is the best evidence in determining market price. *See National Cable Television*, 724 F.2d at 187. For these reasons, the Register determines that the Panel did not act arbitrarily or contrary to the Copyright Act.

C. Adjustments to the Cable Network Fee Benchmark

1. Adjustment to the Benchmark for Delivery Costs

a. Action of the Panel. After establishing cable network license fees, as presented by Ms. McLaughlin, as the benchmark for determining the section 119 royalty rates, the Panel examined, *inter alia*, the special features and conditions of the retransmission marketplace to determine if an upward, or downward, adjustment in the benchmark was appropriate. One of the aspects of satellite retransmission of broadcast signals that differ significantly from the transmission of cable networks involved the costs of delivering the signals to the MVPDs. The Panel found this issue, along with that of advertising inserts (discussed *infra*), as being "among the most challenging issues for the Panel to resolve." Panel Report at 43.

The Panel found that the license fees charged for cable networks included the cost of delivering the cable network to the MPVD—i.e., making the signal readily available for reception by the MVPD for subsequent distribution to subscribers. *Id.* at 45. With satellite retransmission of broadcast signals, however, the satellite carriers absorb the costs of getting the broadcast signal from its geographic point of origin, and then delivering it to its subscribers. *Id.* The Panel considered whether the cost of delivering the signals should, therefore, be deducted from the benchmark.

The Panel declined to make such a deduction. The Panel found that there was no evidence presented to suggest that if satellite carriers and copyright owners negotiated in a free marketplace for the retransmission of broadcast signals, the copyright owners would offer satellite carriers a discount on license fees to accommodate delivery costs. The Panel discussed the testimony of Mr. Jerry L. Parker, an SBCA witness who offered testimony as to the history, nature and operation of the satellite industry:

> Mr. Parker was invited to demonstrate whether carrier costs impacted the rates negotiated between satellite carriers and cable networks. He could not. Indeed, Mr. Parker conceded, for example, that despite additional costs incurred by DBS[9] carriers (beyond those of HSD[10] carriers), DBS operators were unable to negotiate lower rates on that basis. Moreover, he declined to urge the Panel to set a discounted rate for DBS carriers to account for their higher costs than HSD carriers. We must similarly decline to discount the cable network benchmark to account for higher delivery costs of broadcast signals.

Panel Report at 45–46 (citations omitted).

b. Arguments of the Parties. SBCA vigorously contests the Panel's resistance to deducting delivery costs from the 27 cent benchmark figure, stating that "it must be recognized that all cable networks that are charging and receiving 27 cents have made the necessary investment and expense in distributing the signal * * *. None of the [c]opyright [o]wners or broadcasters in this proceeding incurred this necessary expense for satellite distribution of superstations or network stations." SBCA Petition to Modify at 22. SBCA cites the testimony of Ms. McLaughlin, who acknowledged that broadcast stations are not responsible, and do not incur the cost of, delivering their signal to satellite carriers for subsequent retransmission. *Id.* at 22–23. SBCA submits that "[t]he error in Ms. McLaughlin's analysis, implicitly accepted by the Panel, is that these expenses were basically the cost of the [s]atellite [c]arriers in distributing their own product." *Id.* at 23. SBCA asserts that the Panel understood that satellite carriers bore the cost of delivery, but then mistakenly categorized it as a "discount" to compensate carriers for their costs, when in fact it is a cost that must be borne by the copyright owners. *Id.* at 25–26.

SBCA submits that it demonstrated that the average delivery cost per signal, per subscriber, per month is 10 cents, and 6.5 cents for volume discounts. SBCA, therefore, contends that the 27 cent benchmark rate must be adjusted downward to between 17 and 21.5 cents. *Id.* at 23, f.n. 53.

In reply, Copyright Owners assert that SBCA mischaracterizes the transmission cost issue by suggesting that the major focus should be the structural nature of such costs, rather than whether they would result in any marketplace price adjustments. Copyright Owners Reply at 22. Copyright Owners cite Mr. Larry Gerbrandt's testimony that transmission

[9] "DBS" stands for Direct Broadcast Service, and is associated with high powered, high frequency direct broadcast satellite services. An example of a DBS operator is DirecTV.

[10] "HSD" stands for "Home Satellite Dish" and typically refers to satellite providers who operate at lower frequencies than DBS providers.

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costs do not yield different cable network license fees in the marketplace. and note that Mr. Jerry Parker was unable to demonstrate otherwise. *Id.* at 22-23.

c. Recommendation of the Register. The Panel discussed the issue of transmission costs quite extensively. finding that the record was devoid of credible evidence demonstrating that transmission costs of satellite carriers affected the rates negotiated between satellite carriers and cable networks. Panel Report at 45-46. The Panel expressly found that SBCA's witness. Mr. Parker. could not offer evidence of such an impact. and conceded that despite additional costs incurred by DBS carriers. DBS operators were unable to negotiate lower rates on that basis. Tr. 2528. The Panel grounded its determination in the record evidence. which is the hallmark of rational decision making. *National Cable Television Ass'n.* v. *CRT.* 724 F.2d 176 (D.C. Cir. 1983).

SBCA's discussion of transmission costs fails to focus on what impact. if any. they would have on negotiated license fees. and instead relates to which party should bear the cost. Costs can be shifted between parties in a business relationship. and SBCA asserts that their costs. when comparing delivery of broadcast signals with delivery of cable networks. must be shifted to copyright owners to prevent a windfall. However. costs can also be absorbed by a party as part and parcel of doing business. and must be when one party cannot shift the costs (or a portion thereof) to the other. Where there is no credible evidence demonstrating a party's ability to shift a cost. no change in the negotiated price should occur. The Panel found that to be the situation with transmission costs. and the Register has no grounds on which to reject that finding.

2. Adjustment to the Benchmark for Advertising Inserts

a. Action of the Panel. In addition to delivery costs. the Panel considered the issue of advertising inserts very significant. Cable networks typically grant MVPD's a certain number of time slots during the programming provided—known as advertising inserts—for the MVPDs to sell to advertisers. The monies raised from these inserts are retained by the MVPD. and can defray the cost of the license fee for the cable network approximately 8 cents per subscriber per month. Panel Report at 43-44. The Panel found. however. that because section 119(a)(4) requires satellite carriers to retransmit the signals of broadcast stations intact. they do not receive any advertising inserts for the retransmission of broadcast signals. *Id.* at 44. The Panel considered whether this should result in a downward adjustment of the benchmark rate.

The Panel declined to make an adjustment:

> [T]he satellite carriers naturally argue that because the benchmark is based upon the rate paid by multichannel distributors to cable networks. we must deduct $0.08 to obtain the 'real cost' of cable networks. The copyright owners counter that most satellite carriers don't insert advertising into cable network signals anyway. Indeed. HSD carriers don't possess the technology to insert advertising. Moreover. multichannel distributors *appear* to pay the same cable network license fee regardless of whether they insert advertising.
>
> If this last assertion is accurate. one would expect that in a hypothetical free market negotiation. broadcasters would similarly decline to reduce their license fees to satellite carriers for their lack of advertising availabilities and no benchmark adjustment would be appropriate. Both Ms. McLaughlin and Mr. Gerbrandt opined that. based upon their knowledge and experience. neither the availability of advertising inserts. nor the carriers [sic] ability to insert. affects the prices that cable networks charge. They did not support this opinion with any documentary evidence or empirical data. However. the satellite carriers allowed this testimony to stand essentially unrefuted. Indeed. Dr. Haring was explicitly invited to render an opposing opinion but forthrightly declined. In the final analysis. we accept the copyright owners' expert testimony and decline to deduct $0.08 from the benchmark as advocated by the satellite carriers.

Panel Report at 44-45 (citations omitted).

b. Arguments of the Parties. SBCA alleges that the Panel "completely misconceived the adjustment necessary to reflect the value for insertable advertising." SBCA Petition to Modify at 26. They note that the arbitration panel in the 1992 rate adjustment made a downward adjustment for advertising inserts. 57 FR 19058 (May 1. 1992). SBCA asserts that the "value of insertable advertising is significant." and that its value is "no less than 7.5 cents" per subscriber per month. *Id.* at 27.

As a "variation" on the advertising insert issue. SBCA offers that the increased national exposure of broadcast stations offered by satellite retransmissions increases the amount of revenue that copyright owners receive for the advertising slots that they retain. *Id.* at 28. SBCA submits that the Panel should have further adjusted downward for this value. and argues that it could not quantify the value because the necessary information was in the possession of the copyright owners who were not required to disclose it through the CARP discovery rules.[11]

In reply. Copyright Owners assert that the Panel fully considered the arguments of SBCA. and correctly rejected any downward adjustments for advertising inserts. Copyright Owners Reply at 23-24.

c. Recommendation of the Register. The Panel fully discussed what effect. if any. advertising inserts might have on the negotiated fee for retransmission of broadcast signals. Panel Report at 43-45. The Panel cited the testimony of Ms. McLaughlin and Mr. Gerbrandt that "based upon their knowledge and experience. neither the availability of advertising inserts. nor the carriers ability [sic] to insert. affects the prices that cable networks charge * * *. The satellite carriers allowed this testimony to stand essentially unrefuted. Indeed. Dr. Haring was explicitly invited to render an opposing opinion but forthrightly declined." *Id.* at 44. SBCA did not offer any testimony which incontrovertibly rebuts the testimony of Ms. McLaughlin and Mr. Gerbrandt. Consequently. the Panel's determination that no adjustment should be made is not arbitrary because it is grounded in the record.

D. Equality Between Superstation and Network Signal Rates

1. Action of the Panel

As discussed above. Congress established different royalty rates for superstation and network signals when it created the section 119 license. The initial rate for superstations was 12 cents per subscriber per month. and 3 cents per subscriber per month for network signals. This 4 to 1 ratio reflected the payment of royalties under the section 111 license. Under section 111. only copyright owners of nonnetwork programming are allowed to share in the royalty funds. Cable operators pay full value for retransmitting independent broadcast stations (of which superstations are a subset). and only one-quarter value for retransmission of network signals. 17 U.S.C. 11(f). The one-quarter value reflects Congress' determination in 1976 that approximately 25 percent of the programming on network signals is compensable nonnetwork programming. while the remainder is not. Congress

[11] SBCA alleges throughout its Petition to Modify that the CARP discovery rules. and particularly the Panel's application of the rule. precluded it from obtaining vital information from copyright owners to support its case. which resulted in negative inferences by the Panel as to the sufficiency of its presentation. This argument is addressed. *infra* in subsection G.

carried over this 4 to 1 ratio in the 1988 Satellite Home Viewer Act when it set the 12 cent and 3 cent rates in the statute.

The 1992 arbitration panel that adjusted the section 119 rates took into account the 4 to 1 ratio. but found that the amount of network programming on network stations had declined to approximately 50 percent. down from the 75 percent contemplated by section 111. That panel. however. set the network station rate at 6 cents. which represented roughly a 3 to 1 ratio to the superstation rate it set. because it was concerned with disruption in the satellite industry of carriage of network signals if it established a network signal rate at half (a 2 to 1 ratio) that of the superstation rate. 57 FR 19052. 19060 (May 1. 1992). The Copyright Royalty Tribunal. in reviewing the panel's decision on this matter. stated that:

> The Tribunal believes that the Panel was not bound by either a 4:1 ratio or a 1:1 ratio. When the Tribunal issued its declaratory ruling concerning network copyright owners. we did not intend to prejudge any future ratesetting. We noted that in cable and satellite. the pay-in may not necessarily correlate to the pay-out. Therefore. a 1:1 ratio is not required. However. we do believe the Panel had the authority to take our declaratory ruling into account. so that it was entitled to adjust the 4:1 ratio downward to reflect that network copyright owners are entitled to receive satellite royalties.

Id. at 19052.

The Panel in this proceeding rejected the notion that it was required to set different royalty rates for superstations and network signals. respectively. because it was seeking the fair market value of these signals. The Panel stated:

> We find no credible evidence that retransmitted network stations are worth less than retransmitted superstations. Indeed. even assuming *arguendo.* we were to conclude that network programming is worth less. or even wholly uncompensable. we find no record support for any particular ratio—no evidence was adduced as to the *present day* average proportion of network to non-network programming. And imposition of the original 4 to 1 ratio by rote. merely to replicate section 111 rates. would not be consistent with a fair market value analysis.

Panel Report at 40.

2. Arguments of the Parties

SBCA challenges the Panel's refusal to apply the 4 to 1 ratio. asserting that such ratio is binding precedent upon the Panel. SBCA Petition to Modify at 38. SBCA contends that Congress determined. under section 111. that network programming is not compensable. and carried this rationale into the rate structure of section 119. The fact that networks are allowed to share in the section 119 royalties. but not the section 111 royalties. "does not mean that the network signals are to be paid for any differently under the satellite license than under the cable license * * *" *Id.* at 39. Furthermore. SBCA submits that satellite carriers give added value to network signals by carrying them to unserved households who would not otherwise receive such signals. *Id.* at 41. SBCA contends that. if anything. there should be no fee for network signals. *Id.* at 40.

Finally. SBCA argues that the Panel erred by creating a 27 cent royalty rate applicable to PBS (defined under the statute as a network) because "PBS signals are free on the satellite by law." *Id.* at 41. These signals. SBCA contends. cannot possibly have a market value. and there should be no royalty fee for PBS signals. *Id.*

Copyright Owners contend that the Panel correctly rejected the 4 to 1 ratio because the new law requires a determination of fair market value. Copyright Owners Reply at 32. Copyright Owners note that the binding precedent referred to by SBCA was an interpretation of the 1988 Satellite Home Viewer Act. not the 1994 Act. and that nothing in the 1994 Act requires assignment of different rates for superstation and network signals. *Id.* at 33–34.

With regard to SBCA's contention that retransmission of PBS signals should not be compensated at the 27 cent level. Copyright Owners argue that such a contention "flies in the face of the fair market value evidence." and that the PBS signal available for free on the satellite is not the signal of the member stations that are at issue in this proceeding. *Id.* at 35.

3. Recommendation of the Register

The Panel did not err by rejecting the 4 to 1 ratio and adopting a network signal rate that was equal to the value of the superstation rate. The Panel correctly observed that while the 1992 arbitration panel generally followed the ratio set by Congress in the 1988 Act. the 1994 amendments changed any reliance upon a pre-set ratio by directing the Panel to determine only the fair market value for network and superstation signals. Panel Report at 40. There is not evidence in the 1994 Act. or its legislative history. that Congress intended the Panel to set a rate for network signals that is one-fourth of that for superstations (or any other ratio. for that matter) if that rate did not represent the fair market value of network signals.

SBCA asserts that the 1994 amendments contemplate a CARP establishing two rates—one for network signals. and another for superstations—thereby inferring that Congress contemplated rate differentiation (i.e. that one rate would be less than the other). Such an inference is belied by language in the House Report. however. which states that the rates set by the CARP in this proceeding "should reflect the fair market value of satellite carriers' secondary transmissions of superstations and network stations.". H.R. Rep. No. 703. 102d Cong.. 2d Sess. 7 (1994). The statute does not require or suggest that the rate for network signals. or superstations. be set at anything less than fair market value.

There is no binding precedent that required the Panel to apply a ratio in value between network signals and superstations. and set network signal rates lower than superstation rates. The 1992 arbitration panel applied a different criterion (rates paid by cable under section 111) to determine section 119 rates. and its decision therefore does not serve as precedent for this proceeding. Furthermore. even if the 1992 arbitration were binding precedent. the final order of the Copyright Royalty Tribunal (which constituted the final agency action in that proceeding) clearly stated that no differentiation between network and superstation rates was required. 57 FR 19052 (May 1. 1992) ("The Tribunal believes the Panel was not bound by either a 4:1 ratio or a 1:1 ratio."). The Panel. therefore. did not act arbitrarily by rejecting application of the 4 to 1 ratio.

The Register has also examined the record to determine whether. under a fair market value analysis and regardless of application of a pre-set ratio. the evidence required a differentiation in network and superstation rates. The Panel determined that there was "no credible evidence that retransmitted network stations are worth less than retransmitted superstations." Panel Report at 40. It was wholly within the Panel's discretion to arrive at such a determination. SBCA presented evidence demonstrating that network viewer ratings have declined. SBCA Proposed Findings of Fact and Conclusion of Law at 39. but it did not offer evidence as to what impact such a decline had relative to superstations. nor did it quantify the difference in value between network signals and superstations under a fair market value analysis. except to insist that all signals should be free. *See* SBCA Reply Findings of Fact and Conclusions of Law at 7. The Panel. consequently. did not act arbitrarily by adopting the same royalty rate for both network signals and superstations.

Finally, SBCA argues that because the Panel failed to take account of the fact that PBS signals are free on the satellite by law, it was error to accord them the same royalty rate as other network signals.[12] Section 605(c) of the Communications Act, 47 U.S.C., prohibits encryption of programs included in the National Program Service of the Public Broadcasting Service, essentially making the National Program Service free to all satellite home dish owners. Member stations of PBS, however, are not subject to 47 U.S.C. 605(c), and satellite carriers may charge their subscribers for retransmission of these stations. Furthermore, the National Program Service is not a network signal as defined under section 119(d)(2). Member stations of PBS are network signals under section 119(d)(2). Presumably, there are PBS programs available on the National Program Service that are the same programs available from PBS stations, although no such evidence was adduced in this proceeding. There are also likely to be different programs, particularly those produced by member stations. SBCA did not quantify by how much, under a fair market value analysis, the same programs on the National Program Service and PBS stations should reduce the royalty fee for PBS stations, beyond a blanket assertion that all PBS stations should be free. SBCA Reply Findings of Fact and Conclusions of Law at 68–69. The Panel concluded that there was "no credible evidence" warranting a conclusion that network signals were worth less, which would include PBS stations. The Register cannot find credible evidence to the contrary, and therefore the Panel's determination must be affirmed.

E. Local Retransmission of Network Signals

1. Action of the Panel

In setting the satellite carrier compulsory license royalty rates for networks and superstations, the Panel was asked to distinguish between satellite retransmission of "distant" broadcast signals, and satellite retransmissions of "local" broadcast signals. The Panel did make this distinction, setting a royalty rate of 27 cents for distant retransmission of superstations, and zero cents for local retransmission of superstations. Panel Report at 54.

While the Panel adopted a 27 cent rate for retransmission of distant network signals, *id.*, it declined to adopt a rate for local retransmission of network signals because it determined that it lacked subject matter jurisdiction to do so. *Id.* at 48. The Panel considered section 119(a)(2)(B), which provides that the satellite compulsory license is "limited to secondary transmissions to persons who reside in unserved households," and examined the section 119(d)(10) definition of an unserved household. The Panel concluded that:

> [N]etwork signals generally may not retransmitted to the local coverage area of local network signals. The separate rate request of ASkyB is explicitly intended to apply to retransmission of network signals to *served* households. Section 119 does not provide a compulsory license for these retransmissions. Hence, we lack subject matter jurisdiction to set a rate for local retransmissions of local *network* signals.

Panel Report at 48 (emphasis in original).

The Panel did acknowledge in a footnote that there may be "rare instances" where a household located within the local market of a network signal was, indeed, an unserved household within the meaning of section 119(d)(10). *Id.* at 48, f.n. 62. The Panel stated that "[t]hese households qualify as unserved but, under section 119, ASkyB would pay the conventional 'rate for non-local signals.'" *Id.*

2. Arguments of the Parties

EchoStar contends that the Panel committed reversible error in determining that it has no jurisdiction to set a royalty rate for local retransmission of network signals, and that the rate should be zero. EchoStar Petition to Modify at 1. According to EchoStar, the language of section 119 regarding the permissibility of local retransmission of network signals is nuclear, and the Panel should therefore have consulted the legislative history, rather than decide the matter on the basis of the statutory language. *Id.* at 7–8. EchoStar submits that the Congressional intent behind the unserved household restriction of section 119(a)(2)(B) was to protect the network-affiliate relationship from importation of distant signals of the same network, citing the recent Copyright Office Report on revision of the cable and satellite carrier compulsory licenses. *Id.* at 4. Because local retransmissions do not harm the network-affiliate relationship, EchoStar asserts that "[i]n light of the intent behind the compulsory license, therefore, the 'unserved household' limitation should be read as not precluding such local-into-local retransmissions—a form of retransmission which required technologies not in existence at the time of the legislation." *Id.* at 5.

In addition, EchoStar submits that the Panel should have interpreted section 119 flexibly enough to allow local retransmission of network signals, citing *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984) and *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975). *Id.* at 10. Finally, EchoStar argues that, since the section 119 license was modeled after the section 111 license, and local retransmission of network signals is permitted under section 111, the two statutes should be interpreted similarly. *Id.* at 11 (citing *Northcross* v. *Board of Education*, 412 U.S. 427 (1973).

Commercial Networks seek a clarification of the Panel's ruling on local retransmission of network signals, albeit from a completely different perspective. Commercial Networks request the Librarian to make clear that where local retransmission of a network signal does not violate the unserved household restriction (a circumstance acknowledged by the Panel likely to be rare), the rate for such retransmission is 27 cents per subscriber per month. Commercial Networks Petition to Modify at 1.

In reply, EchoStar opposes Commercial Networks position, and argues that the same rationale that the Panel used in adopting the zero rate for superstations applies with equal force to network stations that are locally retransmitted to unserved households. EchoStar Reply at 2.

Certain Copyright Owners object to EchoStar's position, and contend that EchoStar does not have standing under the rules to file a petition to modify the Librarian's decision when it was not an active party in this proceeding. Certain Copyright Owners Reply at 1. Certain Copyright Owners contend that the Panel correctly interpreted section 119 as preventing retransmission of local network signals to served households, and that the legislative history does not warrant a different conclusion. *Id.* at 3–6.

3. Recommendation of the Register

Two separate issues are presented by the local retransmission of network signals. First, there is the retransmission of a network station within that station's local market. The Panel categorized this as local retransmission to served households, and concluded that section 119 did not permit such retransmissions. Second, there is retransmission of a network station within that station's local market to subscribers who satisfy the definition of an "unserved household" in section

[12] PBS signals are defined as network stations under section 119(d)(2).

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119(d)(10). The Panel acknowledged that such retransmissions were permissible under section 119, though likely to occur in "rare instances," but was unclear as to what the proper royalty rate should be.

Local retransmission of network signals to served households presents a challenging issue. The Copyright Office declined to issue a declaratory ruling that such retransmissions are permissible, though it did not preclude addressing such a matter through a rulemaking procedure. Letter of the Acting General Counsel to William Reyner, August 15, 1996. Moreover, the Office has, in its recent report to the Senate on revision of the satellite and cable compulsory licenses, expressly endorsed the permissibility of such retransmissions, and requested Congress to "clarify" the statute on the matter. "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals." Report of the Register of Copyrights at xx (1997) (hereinafter "Register's Report"). As the agency responsible for administering the Copyright Act, the Office believes that it retains the authority to conduct a rulemaking proceeding to determine the permissibility of local retransmission of network signals to served households, regardless of the Panel's determination in this proceeding.

Nevertheless, the Register must determine whether the Panel's decision that such retransmissions are not permitted under section 119 is contrary to the provisions of the Copying Act.[13] The Register reviewed the language of section 119, and its legislative history, both in the context of this proceeding, and in her report to the Senate. Such review confirmed the Register's belief that Congress simply did not consider the issue of local retransmission of network signals to served households at the time of passage of section 119, principally because the technology to make such local retransmission did not commercially exist. It is evident from the history surrounding adoption of the unserved household restriction in 1998 that adoption of the restriction was motivated by concerns expressed by network affiliate stations that importation of distant network stations affiliated with the same network would erode their over-the-air viewership. Register's Report at 103–104. This suggests that if Congress had considered the issue, it might have condoned local retransmissions to served households. On the other hand, the section 119(d)(10)(A) portion of the definition of an "unserved household" does not specify receipt of what network signal over-the-air triggers the prohibition in making retransmissions of network signals. The language of section 119(d)(10)(A) could easily be read to prohibit retransmission by satellite whenever the subscriber receives an over-the-air signal of Grade B intensity from any network affiliate, including the local network affiliate that the satellite carrier intends to retransmit to the subscriber. This is the position that the Panel took.

In sum, the Register determines that the law is silent on this issue. Consequently, the Register cannot unequivocally say that the Panel's decision is arbitrary or contrary to law.

The second issue is the local retransmission of network signals to unserved households. The Panel appears to have presumed that such retransmissions are permissible. Panel Report at 48. The Register determines that they are permissible, as provided by the express terms of section 119. The Panel failed to articulate what royalty rate would be applicable to such local retransmissions. It mentioned, in a footnote, that the number of unserved households within a network station's local market were likely to be few, and cited the testimony of ASkyB's witness, Preston Padden, that ASkyB would, in those instances, "pay the conventional 'rate for non-local signals.'" *Id.* at 48, f.n. 62 (quoting written direct testimony of Mr. Padden). The Panel did not expressly state what the rate should be for all carriers making local retransmissions of network signals to unserved households.

Commerical Networks urge that the rate for such retransmissions should be 27 cents. EchoStar[14] argues that the rate should be zero, consistent with the Panel's adopted rate for local retransmissions of superstations. To the extent that the Panel sought to impose the 27 cent rate on local retransmissions of network signals to unserved households, the Register determines that such action is arbitrary. The Register cannot find testimony in the record that supports the conclusion that local retransimssion of network signals to unserved households has a fair market value rate of 27 cents, particularly where the Panel determined that the fair market value of local retransmissions of superstations was zero. Panel Report at 52. Likewise, the record does not support a conclusion that there is any differentiation between the fair market value of local retransimssions of network signals vis-a-vis superstations. Commercial Networks do not cite any testimony to the contrary in their petition to modify.

To the extent that the Panel failed to adopt a rate for local retransmissions of network signals to unserved households, the Register determines that such action is inconsistent with its task in this proceeding, and recommends that the Librarian substitute his own determination. 17 U.S.C. 802(g). The dearth of testimony on this issue and, for that matter, the Panel's cursory discussion of it, is not surprising because local retransmission of network signals to unserved households, and served households as well, is undoubtedly an unattractive business proposition to satellite carriers. Nevertheless, the issue was before the CARP, and requires a resolution.

The Register recommends that the Librarian adopt a zero rate for local retransmissions of network signals to unserved households because the Register is persuaded that the Panel's conclusions with respect to local retransmissions of superstations are equally applicable to local retransmissions of network signals to unserved households. Panel Report at 52-53. As noted above, there is no conclusive evidence to suggest that locally retransmitted network signals are of greater fair market value than locally retransmitted superstations. Accordingly, the Register recommends adoption of a zero rate for local retransmission of network signals to unserved households.

F. Effective Date of the New Rates

1. Action of the Panel

In announcing the royalty rate of 27 cents for distant retransmission of network and superstation signals, and zero cents for local retransmission of superstations, the Panel stated that the time period for payment of the rates would be from July 1, 1997, through December 31, 1999. Panel Report at 54.

2. Arguments of the Parties

SBCA contends that the Panel acted contrary to law by setting an effective

[13] Because the Panel's decision on this point is a conclusion of law, the arbitrary standard is not applicable.

[14] The Register agrees with Copyright Owners that EchoStar lacks standing to file a petition to modify the Panel's determination, and recommends dismissal of the petition. Section 251.55(a) of the rules, 37 CFR provides that only parties to the proceeding may file petitions to modify, and makes no provision for nonparties. EchoStar, though a member of, and represented by SBCA, was not a party to this proceeding because it did not file a Notice of Intent to Participate as required by the rules. *See* 37 CFR 251.45(a).

Dismissal of EchoStar's petition, however, does not preclude consideration of the issues surrounding local retransmissions of network signals, and the Register has considered these as required by section 802(g).

date of July 1. 1997. for the new rates. SBCA states that the Panel did not have any authority to set an effective date because section 119(c)(3)(C) states that the rates become effective as set forth in the Librarian's order. SBCA Petition to Modify at 46. Further. SBCA argues that the effective date of the new rates must be prospective only. *Id.* at 47. It notes that section 119 contemplates prospective application by discussing the rates "to be paid." *Id.* at 48–49 (citing section 119(c)(3)(A) and the 1988 House Report to the Satellite Home Viewer Act). SBCA argues that the caselaw prevents retroactive application of agency rulemaking unless the enabling statute expressly states otherwise. and submits that the Librarian's order in this proceeding effectively constitutes a rulemaking because the Copyright Office's rules are being amended to reflect the new rates. *Id.* at 50–51.

Additionally. SBCA argues that applying the July 1. 1997. effective date would cause substantial harm to the satellite industry. *Id.* at 55. SBCA submits affidavits of representatives of the satellite industry discussing their inability to adequately inform their subscribers on a timely basis of the rate increase. and the difficulty of adjusting distribution contracts to accommodate fee increases. *Id.* at attachment A.

Finally. SBCA takes the Librarian to task for not complying precisely with the procedural schedule established in the statute for this proceeding. Specifically. SBCA contests the Library's decision to temporarily suspend the schedule to address issues raised by ASkyB. so that the CARP was initiated on March 3. 1997. as opposed to January 1. 1997. as contemplated in section 119(c)(3)(A). SBCA argues that because the Library violated the time requirement of section 119(c)(3)(A). and such delay caused substantial harm to satellite carriers. "the Panel's report should be invalidated on due process grounds. particularly with respect to the prejudicial effective date directly resulting from the Librarian's failure to comply with a critically important statutory requirement." *Id.* at 55 (citing *Baumgardner* v. *Secretary. Dept. of Housing and Urban Development.* 960 F.2d 572 (6th Cir. 1992).

Copyright Owners assert that they have interpreted section 119 from the beginning of this proceeding as requiring an effective date of July 1. 1997. for the new rates. and that SBCA never challenged that position until now. thereby estopping SBCA from raising the issue. Copyright Owners Reply at 42–43. Copyright Owners also argue that the Librarian's good cause delay in commencing this proceeding does not invalidate it. and that the cases cited by SBCA are inapposite. *Id.* at 44–45. Copyright Owners also attach an accompanying motion to strike the affidavits offered by SBCA to corroborate its argument that the July 1 effective date will cause undue hardship on satellite carriers. SBCA opposes this motion.

3. Recommendation of the Register

Section 119(c)(3)(C) provides that:

The obligation to pay the royalty fee established under a determination which—

(i) is made by a copyright arbitration royalty panel in an arbitration proceeding under this paragraph and is adopted by the Librarian of Congress under section 802(f). or

(ii) is established by the Librarian of Congress under section 802(f) shall become effective as provided in section 802(g) or July 1. 1997. whichever is later. 17 U.S.C. 119(c)(3)(C). Clause (i) of section 119(c)(3)(C) described the situation where the Librarian adopts the decision of the CARP. while clause (ii) describes the situation where the Librarian has rejected the CARP's decision and substituted his own determination.[15] The effective date of the established rates is either July 1. 1997. or the date set pursuant to section 802(g). whichever date is later.

Section 802(g) governs judicial review of the Librarian's decision in this proceeding. The section gives "any aggrieved party who would be bound by the [Librarian's] determination." 30 days in which to notice an appeal with the United States Court of Appeals for the District of Columbia Circuit. The section then provides that "[i]f no appeal is brought within such 30-day period. the decision of the Librarian is final. and the royalty fee * * * *shall take effect as set forth in the decision.*" (emphasis added). Section 802(g) then provides that if an appeal is taken. "[t]he pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under section ( ) * * * 119 * * *" Nothing else is said in section 802(g) with regard to the possible effective date of royalty rates.

SBCA and Copyright Owners strongly disagree over the effective dates of the royalty rates established in this proceeding. SBCA believes that the effective date can be no sooner than 30 days after the Librarian's decision (i.e. November 26. 1997) at which time it will be known whether or not the Librarian's decision is final. while the Copyright Owners maintain that July 1. 1997. is the proper effective date. The Register has examined the governing language of sections 119(c)(3)(C) and 802(f). and notes an incongruity with respect to the July 1. 1997. date.

Section 119(c)(3)(A) provides that this proceeding was supposed to have started on January 1. 1997. Given the 180-day arbitration period. as provided by section 802(e). the latest the Panel could have delivered its report would have been June 29. 1997. The Librarian would then have the 60-day review period in which to either accept or reject the Panel's decision. which would place the date of final agency action at no later than August 28. 1997. This is almost two months after July 1. 1997. While Congress could have contemplated the Librarian completing his review in less than 60 days. it is hard to imagine that Congress could have expected him to complete it in just one day: the time period from delivery of the Panel's report on June 29 to the issuance of the Librarian's decision on July 1. 1997. The more likely explanation is that Congress envisioned the CARP delivering its report well before—at least two months—the 180-day deadline. Only in this manner could the Librarian have issued a decision that was before July 1. 1997. thereby justifying inclusion of the language "July 1. 1997." and "whichever date is later" in section 119(c)(3)(C).

Contrary to the assertions of the Copyright Owners. July 1. 1997. is not the statutorily prescribed effective date for the new royalty rates announced in today's decision. July 1. 1997. is only a contingency date in the event that this proceeding had ended before July 1. 1997. which it clearly did not. Rather. the Register must look to section 802(g). which provides that the effective date of the new rates is "as set forth in the decision." 17 U.S.C. 802(g). The Register interprets "decision" to mean the decision of the Librarian. and not the decision of the CARP. since section 802(g) only refers to the decision of the Librarian. Consequently. the Register concludes that only the Librarian of Congress has the authority to set the effective dates of the royalty rates in this proceeding. and it was contrary to law for the Panel to announce an effective date. *See* Panel Report at 54. The Register recommends that the Librarian reject the Panel's determination of an effective date.

The remaining issue is. if the Panel had no authority to set the effective date. what is the correct effective date for the Librarian to establish? Neither the statute. nor the legislative history. offers any guidance on this point.

[15] Interestingly. the statute does not address the situation. as in this proceeding. where the Panel's decision is accepted in part and rejected in part. Subclause (ii) most likely applies to this proceeding because the Librarian has established one of the royalty rates (the rate for local retransmission of network signals to unserved households).

Copyright Owners urge the July 1. 1997 date. and submit that SBCA is estopped from arguing for a later date since SBCA did not object to Copyright Owners' request to the Panel for a July 1. 1997. effective date. Copyright Owners Reply at 43–44. The Register recommends rejecting Copyright Owners' estoppel argument because the Panel did not have authority to set the effective date. and the matter is now being properly raised before the Librarian for the first time.

Copyright Owners also contend that July 1. 1997. must be the date because the evidence it presented to the Panel. particularly the PBS/McLaughlin testimony. was premised on a July 1. 1997. date. *Id.* at 42. According to Copyright Owners. if the Librarian adopts an effective date of January 1. 1998. he would have to increase the 27 cent fee to reflect the Panel's understanding of a thirty-month effective period for the new rates. *Id.* at 42–43.

The Register recommends rejection of Copyright Owner's contention for two reasons. First. the Panel accepts Ms. McLaughlin's testimony as a general matter to establish a workable benchmark. Panel Report at 31. The Panel did not accept her testimony. and its accompanying premises and assumptions. as *the* precise analysis of what the royalty rates should be. *Id.* Furthermore. although the Panel stated that "Ms. McLaughlin's analysis yielded a rate of $0.27 per subscriber per month averaged over the three year statutory period." Panel Report at 30. a July 1 effective date accounts for only half of the year. and Ms. McLaughlin did not so limit her testimony. PBS Proposed Findings of Fact and Conclusions of Law at 18–19.[16]

In the Register's view. an effective date later than July 1. 1997. does not significantly undermine the Panel's use of the 27 cent benchmark generally. or its later decision to adopt that figure specifically. nor does a later effective date require an upward adjustment.

The second. and most significant. reason for not setting the effective date at July 1. 1997. involves the issue of retroactive rulemaking. Although the Librarian's decision today involves review of the Panel's determination. it is also a final rule with respect to setting the rates. The Copyright Office has previously determined that it lacks the authority to engage in retroactive rulemaking. 54 FR 14217 (1989). The United States Court of Appeals for the District of Columbia Circuit. the only court with jurisdiction to consider an appeal of today's decision. has expressly held that the Copyright Act does not confer retroactive rulemaking authority. *Motion Picture Ass'n of America. Inc.* v. *Oman.* 696 F.2d 1154. 1156 (D.C. Cir. 1992). The Register does not believe that the Librarian has the authority to set an effective date for the new royalty rates which is prior to the issuance of today's decision.

Given this limitation. the issue still remains regarding the proper effective date. Copyright owners obviously desire an effective date as soon as possible. so that they may reap the benefits of the higher rates. There are. however. significant administrative considerations surrounding implementation of the new rates. Satellite royalty rates are calculated on a monthly basis. so that an effective date other than the first day of a month will require application of two sets of royalty rates (the old rates and the new rates) to one monthly calculation. The Register finds this not only burdensome to satellite carriers calculating the rates. but to the Copyright Office as well in administering the section 119 license and examining the statement of account. The Register. therefore. counsels against adopting an effective date that is other than the first day of a month.

Also. there are significant costs to the Copyright Office associated with implementing the new rates. New statement of account forms must be created and sent to satellite carriers. and staff must be trained to examine for application of the new rates. The Register notes that satellite statements of account for the second accounting period of 1997 are due to be filed no later than January 30. 1998. 27 CFR 201.11(c). An effective date in the second accounting period of 1997 would cause significant burden and hardship to the Copyright Office to prepare to collect royalties and issue and process statements of account generated by the new royalty fees by the January 30. 1998. due date. Consequently. the Register recommends that the new royalty rates adopted in today's decision. not be effective until January 1. 1998.

In recommending a January 1. 1998. effective date. the Register draws support from section 119(c)(3)(C). As discussed above. Congress apparently contemplated the possibility of the issuance of a final decision in this proceeding before (perhaps even well before) July 1. 1997. Congress could have chosen simply to make the decision effective on the date of adoption. but instead chose July 1. 1997. as the later effective date. July 1 is the first day of an accounting period which. has the final decision issued on or before that date. would have allowed the Copyright Office ample time to prepare for implementation of the new rates. Because today's decision is issuing only two months from the end of the 1997/2 accounting period. a January 1. 1998. effective date is consistent with Congressional intent.

The parties have raised two other issues. discussed above. which the Register briefly addresses. First. SBCA alleges that because initiation of the CARP was delayed 2 months to enable the Librarian to rule on the matter of whether local retransmissions should be a part of this proceeding. the entire proceeding is invalid. The Register agrees with Copyright Owners that the cases cited by SBCA for this rather remarkable contention are inapposite. *United States* v. *Amdahl Corp.*. 786 F.2d 387 (Fed. Cir. 1986) involved a contract entered into by the Treasury Department that was statutorily outside the scope of its authority. Contracting outside the scope of authority differs significantly from postponing procedural dates for good cause. *Albenga* v. *Ward*. 635 F. Supp. 660 (S.D.N.Y. 1986) involved an agency that created rules beyond its authority. Again. this is significantly different. Finally. *Baumgardner* v. *Secretary. Dept. of Housing and Urban Development.* 960 F.2d 572 (6th Cir. 1992) involved the failure of an agency to timely deliver an accurate complaint. As SBCA notes. the court in this case did not find the agency action invalidated because the delay was not sufficiently prejudicial. The Register cannot find any convincing evidence of irreparable prejudice incurred by SBCA as a result of the brief delay. particularly where the Register is recommending a January 1. 1998. effective date.

Furthermore. the Register notes that the same claim of invalidity has been raised in a Copyright Royalty Tribunal proceeding. and expressly rejected by the D.C. Circuit. The Court stated: "It would be irrational and wholly unprecedented for a court to direct an agency to scrap a year's hearings and decisionmaking effort and start over because its proceeding did not conclude precisely on time." *National Cable Television Ass'n. Inc.* v. *CRT.* 724 F.2d 176. 189 n. 23 (D.C. Cir. 1983). The Register agrees with this view. and recommends rejection of SBCA's argument.

Second. in support of its position that satellite carriers would be unduly harmed by a July 1. 1997. effective date. SBCA submitted affidavits of satellite

[16] Ms. McLaughlin's testimony was based upon her projection of what the average cable network license fees would be for 1997 (26 cents). 1998 (27 cents) and 1999 (28 cents). not the actual figures. *Id.* at 19.

representatives. Copyright Owners moved to strike these affidavits. and SBCA opposed. The Register's recommendation of a January 1. 1998. effective date has mooted the issue. The Register does recommend. however. that the affidavits be stricken. The record is closed in this proceeding by order of August 14. 1997. section 251.55 does not permit submission of additional evidence. Although the matter of the effective date is for the Librarian. and not the CARP. to decide. such affidavits could only be accepted if the Librarian determined that the record needed to be reopened to take additional testimony. Since the matters discussed in SBCA's affidavits are moot. the Register recommends that they be stricken.

C. Additional Issues Raised by SBCA

SBCA raises several additional issues in its Petition to Modify. Because these issues all relate to evidence not adduced during the course of the proceeding. and the weight to be accorded evidence that was adduced. they are addressed together.

1. The first issue involves the history of retransmission consent negotiations under the communications law. Under retransmission consent. an MVPD must obtain the permission of a broadcaster before the MVPD can retransmit the broadcaster's signal to the MVPD's subscribers. Retransmission consent negotiations took place between the cable industry and broadcasters in 1993 and 1996. SBCA attempted to show that little compensation was obtained by broadcasters for permission to retransmit their signals in an effort to prove that the fees under the section 111 license represent actual fair market value. The Panel stated that "[w]e agree that these retransmission consent negotiations are relevant to a determination of fair market value and represent potentially probative evidence. Unfortunately. the evidence adduced is so vague and replete with qualifiers as to provide little guidance." Panel Report at 34. The Panel noted cross-examination testimony of Ms. McLaughlin and Mr. Gerbrandt indicating that some compensation was paid. but also noted that Mr. Shooshan's and Mr. Haring's testimony discussed retransmission consent negotiations only in the context of local. and not distant. retransmissions. *Id.* at 35. The Panel concluded that the "testimony upon which SBCA relies lacks sufficient scope and specificity to rebut or modify the PBS-McLaughlin analysis." *Id.*

SBCA submits that it could not present further evidence on the compensation received by copyright owners and broadcasters for retransmission consent negotiations because "discovery procedures do not allow the Carriers to determine those amounts." SBCA Petition to Modify at 35. SBCA asserts that the failure to present such information "should not be then turned against the Carriers to say that the retransmission consent negotiations cannot be properly quantified." *Id.*

Copyright Owners contend that the Panel correctly evaluated the evidence of retransmission consent negotiations and found it unavailing in making an adjustment to the benchmark. Copyright Owners Reply at 27-31.

2. The second issue involves the issue of the costs incurred by cable networks in assembling the clearances for their programming. SBCA attempted to show at hearing that copyright owners do not have costs in the broadcast signal retransmission context. and therefore an appropriate downward adjustment of the benchmark must be made. The Panel stated that the clearance costs in the cable network arena are unknown. but did not agree that a downward adjustment of the benchmark was required:

> In a hypothetical free market. it is quite conceivable that the higher the costs broadcasters must pay to clear their signals for DTH[17] distribution. the higher the royalty rates they would charge satellite carriers. Accordingly. the impact of high clearance costs on fair market value (based upon a hypothetical free market analysis) could be positive rather than negative. No adjustment to the cable network benchmark is required.

Panel Report at 41.

SBCA argues that it could not determine the costs to copyright owners for clearances of cable networks since such information was not within the scope of discovery. and therefore one should not assume. as the Panel did. that such costs could automatically be shifted to satellite carriers. SBCA Petition to Modify at 30.

Likewise. SBCA argues that it could not quantify at hearing the added benefit that satellite retransmission gives copyrighted programming (digital picture quality. inclusion in electronic guides) because of "the absence of any ability to take discovery." *Id.* at 31-32. The Panel determined that "no quantifiable benefit was identified and no evidence adduced" to demonstrate added value by satellite retransmission." Panel Report at 40. SBCA asserts that "the Panel held the Carriers to an unworkable standard of proof." SBCA Petition to Modify at 32.

[17] "DTH" stands for "direct to home."

In reply. Copyright Owners contend that the Panel acted correctly. Copyright Owners Reply at 24-27.

3. A third issue involves quantifying the effect on advertising revenues and superstation fees of satellite retransmissions of broadcast signals. SBCA asserts that they quantified "as well as could be in a regime which denies discovery" that advertising revenues are higher because copyright owners known that their programming reaches a wider audience due to satellite retransmission. SBCA Petition to Modify at 36. Likewise. SBCA asserts that "superstation taxes"—the amounts charged to broadcasters by copyright owners—are greater. particularly in the sports context. because copyright owners know that satellite retransmissions result in greater viewership. *Id.* at 37-38. SBCA presented evidence that both the professional baseball and basketball leagues extracted additional compensation from WGN in Chicago and WTBS in Atlanta—both superstations known to be widely distributed on satellite—though the amount was not quantified. SBCA Proposed Findings of Fact and Conclusions of Law at 72-73.

The Panel addressed the potential for increased advertising revenue due to satellite retransmissions. stating:

> The fundamental mission of broadcasters is to expand their audiences to maximize advertising revenues. At their own expense and risk. the satellite carriers developed a DTH market which expands the broadcasters [sic] reach at no cost to the broadcasters. However. we agree that no empirical evidence demonstrating an increase in advertising revenues was adduced. Though the broadcasters (and hence the copyright owners) clearly benefit from expanded reach. these benefits may not be amenable to measurement and quantification. The copyright owners further argue that because most basic cable networks also advertise. to the extent that broadcasters to benefit from expanded reach. the benefit is already reflected in the cable network benchmark. We agree *to a point.* Broadcast stations rely upon advertising revenue to a much greater extent than do cable networks (excepting those cable networks which command very low or even negative royalty fees). It naturally follows that the benefits which accrue to broadcasters have *not* been *fully* reflected in the cable network benchmark price. Though some downward adjustment from the copyright owners *general* approach seems appropriate. we are unable to quantify such an adjustment. However. our decision to adopt the most conservative approach (PBS-McLaughlin) reflects this consideration.

Panel Report at 36-37. The Panel did not use the term "superstation tax" in its discussion.

SBCA complains that the Panel ignored its evidence of increased revenues from satellite retransmissions. and that it is "no excuse that the [o]wners refused to divulge the extent of the compensation." SBCA Petition to Modify at 38. SBCA asserts that not subtracting this added-value from the benchmark would result in "vastly overcompensat[ing]" copyright owners. *Id.*

In reply. Copyright Owners assert that the Panel correctly determined that. while such revenues might conceptually result in a downward adjustment. SBCA failed to quantify such an adjustment. Copyright Owners Reply at 31.

4. The fourth issue concerns the impact of increased royalty fees on the satellite industry and the continued availability of retransmitted broadcast signals. The Panel accepted Ms. McLaughlin's testimony that the 27 cent fee would not significantly adversely impact satellite:

> Although Ms McLaughlin did not perform a demand elasticity study. she testified that after the 1992 rate increases. the number of broadcast stations retransmitted and the percentage of satellite subscribers to retransmitted broadcast signals remained constant. She concluded that despite an increase in the compulsory license rate to $0.27 per subscriber per month. the number of subscribers to retransmitted broadcast stations would continue to grow at substantially the same rate as the number of satellite subscribers generally. Ms. McLaughlin also examined the retail prices charged by satellite distributors and concluded that if the rates for retransmitted broadcast signals were increased to $0.27 per subscriber per month and *not* passed on to subscribers. those rates would constitute only 30% of the average retail prices charged to subscribers leaving sufficient profit margin for the satellite carriers to avoid significant adverse impact to them or their subscribers.
>
> Again. we recognize that *any* rate increase. particularly if rates are set above those paid by their entrenched competitor. tends to adversely impact the satellite carriers. However. the satellite carriers did not attempt to quantify the impact of increased rates and adduced no credible evidence that the availability of secondary transmissions would be interrupted. Accordingly. we conclude that a rate increase to $0.27 per subscriber per month would have no significant adverse impact upon the satellite carriers or the availability of secondary transmissions to the public.

Panel Report at 46–47 (citations omitted).

SBCA contends that the Panel had no evidence upon which to base its conclusion that a dramatic rate increase would not adversely affect satellite carriers and their subscribers. SBCA Petition to Modify at 42. Rather. SBCA asserts. the evidence. including that relied upon by Ms. McLaughlin. "shows that satellite carriers have yet to earn a profit. especially in the DBS market. and that the C-Band market is waning." *Id.* SBCA notes that Ms. McLaughlin did not perform a demand elasticity analysis for increased rates. and that her testimony that the 1992 rate increase did not impact subscriptions or the number of signals carried was not based upon anything in the record. *Id.* at 42–43. SBCA also mentions that the 1992 panel reduced its initial rate increase because of a concern for disruptive impact. 57 FR 19061.

SBCA also charges that the Panel ignored its evidence regarding the disruptive impact of a rate increase. It points to the testimony of Mr. Parker who stated that there is a limit on the package rate to be charged consumers. and that satellite carriers have traditionally gone back to cable networks to demand concessions in order to keep prices down. SBCA Petition to Modify at 44. SBCA argues that any increases in the rates should be examined in light of the impact lower fees would have on copyright owners. According to SBCA. there is no evidence that suggests that the current fees of section 119 have any adverse impact on the copyright and broadcast industries. *Id.* at 45.[18]

In reply. Copyright Owners assert that it was completely within the discretion of the Panel to accord weight to Ms. McLaughlin's testimony that satellite carriers would not be adversely impacted by the increased royalty rates. Copyright Owners Reply at 36. Copyright Owners argue that Mr. Parker's testimony is nonspecific. and that the testimony of Mr. Edwin Desser and Mr. James Trautman show that satellite carriers are owned by large corporate enterprises that can well afford the proposed rate increase. *Id.* at 39–40.

Recommendation of the Register

The Register is addressing these four arguments presented by SBCA together because they contain a common thread: the absence of evidence adduced before the Panel and. where evidence was produced. the weight and sufficiency to be accorded it.

Given the limited scope of the Librarian's review in this proceeding. "the Librarian will not second guess a CARP's balance and consideration of the evidence. unless its decision runs completely counter to the evidence presented to it." 61 FR 55663 (Oct. 28. 1996) (citing *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Auto Insurance Co.*. 463 U.S. 29. 43 (1983). In the case of the impact of a rate increase on the satellite industry. the Panel chose to accord weight to Ms. McLaughlin's testimony that her proposed rate increase would not adversely affect the satellite industry. rather than Mr. Parker's testimony. It was clearly within the Panel's discretion to do so. There is record testimony that supports the Panel's conclusion. and the Librarian's review need go no further. *Recording Industry Ass'n of America. Inc.* v. *CRT.* 662 F.2d 1. 14 (D.C. Cir. 1981) (decision must be upheld where decisionmaker's path may reasonably be discerned).

The remaining issues contested by SBCA—the impact of retransmission consent negotiations. added value from digital picture/electronic guides and avoidance of clearance costs. and increased advertiser revenue and compensation from expanded markets—predominately involve the matter of evidence not presented to the CARP. In essence. SBCA contends that if the discovery rule of 37 CFR 251.45(c)(1) were broader. it could have presented evidence to the Panel on these issues that would have caused the Panel to reduce the 27 cent royalty fee. Instead. according to SBCA. the Panel punished it for failure to present the necessary evidence to quantify the reductions. and the 27 cent rate. consequently. is unfairly high.

Section 251.45(c)(1) of the rules provides that. after the exchange of the written direct cases. a party "may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony." 37 CFR 251.45(c)(1). The Librarian has clarified that discovery is limited in CARP proceedings:

> Discovery in CARP proceedings is intended to produce only the documents that underlie the witness' factual assertions. It is not intended to augment the record with what the witness might have said or put forward. or to range beyond what the witness said. Any augmentation of the record is the prerogative of the arbitrators. not the parties.

Order in Docket No. 94-3 CARP CD 90-92. 1–2 (October 30. 1995). There are several reasons for the limited discovery practice. CARP proceedings are relatively short in duration (180 days) and. like this proceeding. begin and end according to statutorily specified deadlines. There is not sufficient time to conduct wide-ranging discovery.

[18] Regarding the economic impact of royalty fees on copyright owners. the Panel stated that "[t]he parties devoted little hearing time to this issue." Panel Report at 46. The Panel did "accept the obvious. general notion that higher royalty rates provide greater incentive to copyright owners while lower rates would render broadcast stations a * * * less attractive vehicle at the margin for program supplies.'" *Id.* (citation omitted).

particularly where, as in the case, the litigation is quite complex and involves the technically-oriented testimony of numerous witnesses. There are also cost considerations. Broad discovery rules would considerably increase the cost of CARP proceedings, without necessarily producing a corresponding increase in the quality of the evidentiary presentations. The parties may, therefore, as of right only request documents which underlie a witness's factual assertions.

The rules do not, however, prohibit a party, once the CARP has begun, from petitioning the Panel to take discovery on an issue or issues that it believes are critical to the resolution of the proceeding. As noted above, augmentation of the record is the prerogative of the CARP, and the Panel has the discretion to decide whether or not to allow additional discovery beyond that of section 251.45(c)(1). *See* 37 C.F.R. 251.42 (CARP may waive the rules upon a showing of good cause). SBCA complains that the Panel might have reduced the royalty rates based on the issues it raised had it allowed additional discovery. Yet, SBCA never petitioned the Panel to take such discovery. The Panel cannot be faulted for not reopening the record and allowing additional discovery when it was asked to do so. *See National Ass'n of Broadcasters* v. *CRT*, 772 F.2d 922, 936–937 (D.C. Cir. 1985) (claimant failed to petition Tribunal to allow it to adduce additional evidence regarding opposing party's alleged lack of copyright ownership).

The issue remains as to whether the Panel should have reopened the record, on its own motion, and allowed SBCA to take discovery on the issues it rates: i.e. whether it was arbitrary for the Panel not to do so. In the Register's view, the Panel did not act arbitrarily. Regarding the value of retransmission consent negotiations, the Panel found that Ms. McLaughin, and Messrs. Gerbrandt, Shooshan and Harin offered testimony regarding the probative value of retransmission consent negotiations on the fair market value of retransmitted broadcast signals. Panel Report at 34–35. The Panel found this testimony to be unsupportive of the proposition that retransmission consent negotiations affected the fair market value analysis. *Id.* at 35. Because there is record evidence to support the Panel's determination, the Panel did not act arbitrarily.

With regard to the purported added value to broadcast signals by satellite retransmission in digital format, and attractive electronic guides provided the subscribers, the Panel determined that "no quantifiable benefit was identified and no evidence adduced that this benefit would materially affect fair market value * * *." Panel Report at 40. As the Copyright Owners correctly point out, any added value from digital picture quality and electronic guides would occur for both broadcast and cable network programming. Copyright Owners Reply at 25. SBCA could have presented evidence that demonstrated that satellite carriers pay a lower fee for licensing cable networks as a result of digital picture quality and electronic guides provided by the carriers. Such evidence, if it exists, is in the sole possession of the satellite carriers. SBCA presented no such evidence. The Panel, therefore, cannot be faulted from finding no evidence to support added value from these items.

Regarding clearance costs saved by broadcasters and copyright owners from satellite retransmissions, the Panel stated:

> SBCA further argues that in a free market, it would be virtually impossible for satellite carriers to negotiate directly with every copyright owner of every program contained in each day's signal they retransmit. Accordingly, they reason, broadcasters would invariably by compelled by market forces to clear all rights and negotiate with satellite carriers for retransmission of their entire signals. Those costs which the broadcasters would incur in purchasing the clearances are unknown. Hence, SBCA concludes that the section 119 rates should not be raised without considering the broadcasters' cost savings. We tend to agree with both of SBCA's premises but not its conclusion. In a hypothetical free market, it is quite conceivable that the higher the costs broadcasters must pay to clear their signals for DTH distribution, the higher the royalty rates they would charge satellite carriers. Accordingly, the impact of higher clearance costs on the fair market value (based upon a hypothetical free market analysis) could be positive rather than negative. No adjustment to the cable network benchmark is required.

Panel Report at 41.

SBCA contends that Copyright Owners never put on any evidence demonstrating their cost savings, and it should not therefore be presumed that clearance costs would be passed on to satellite carriers. SBCA Petition to Modify at 30. SBCA's argument, however, is one of emphasis rather than evidence. SBCA asked the Panel to quantify what the average cost *might* be, in a *hypothetical market*, for clearance costs, and how satellite carriers and broadcasters *might* allocate such costs. Not surprisingly, SBCA does not indicate what, if any evidence, would conclusively demonstrate what such costs might be, or who might bear them.[19] It is not reversible error for the Panel to reason that in a marketplace which does not exist, clearance costs might have a positive effect on the cable network benchmark, rather than a negative one.[20]

Finally, with regard to the purported increase in advertising revenues and compensation from expanding coverage of broadcast signals by satellite retransmission, the Panel found that it could not quantify any potential reductions of the cable network benchmark. Panel Report at 37. While allowing SBCA expanded discovery on these points might have assisted the Panel in quantifying a downward adjustment to the cable network benchmark, the Register cannot determine anything in the record that compelled it. Furthermore, the Panel did conclude that its choice of the "conservative" PBS/McLaughlin cable network benchmark reflected its inability to quantify any increased advertising revenues that copyright owners might receive from expanded markets through satellite retransmission. *Id.* In the Register's view, the Panel's action was the product of rational decisionmaking.

H. Conclusion

Having fully analyzed the record in this proceeding and considered the contentions of the parties, the Register recommends that the Librarian of Congress adopt the royalty rate, effective January 1, 1998, of 27 cents per subscriber per month for retransmission of any distant superstation and network signals by satellite carriers to subscribers for private home viewing.

In addition, the Register recommends that the Librarian not adopt any royalty fee for the local retransmission of superstation signals, as defined under 17 U.S.C. 119(d)(11), and for the local retransmission of a network signal, as defined under § 119(d)(11), to any subscriber residing in an unserved household, as defined in § 119(d)(10).

Finally, the Register recommends that the petition to modify the Panel's decision filed by EchoStar be dismissed, and the motion of Copyright Owners to dismiss attachment A of SBCA's petition to modify (and the

[19] SBCA does cite a statement of FCC Commissioner Dennis that broadcasters might have to bear these costs. SBCA Petition to Modify at 30 (citing "In re Compulsory Copyright License for Cable Retransmissions," 4 FCC Rcd. 6711 (1989) (Commissioner Dennis, concurring). However, Commissioner Dennis' statement is speculative, describing what might happen to broadcasters "in some cases." 4 FCC Rcd. at 6711, and is far from conclusive evidence.

[20] In fact, the Panel did not make any change to the benchmark for clearance costs.

accompanying argument and discussion) be granted.

Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter of the adjustment of the royalty rates for the satellite carrier compulsory license. 17 U.S.C. 119. the Librarian of Congress fully endorses and adopts here recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation. the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order. and amending the rules of the Library and the Copyright Office. announcing the new royalty rates for the section 119 compulsory license.

The Librarian is also dismissing the petition to modify filed by EchoStar. and is dismissing the affidavits contained in attachment A of SBCA's petition to modify. and the accompanying discussion and argument.

List of Subjects in 37 CFR Part 258

Copyright. Satellites. Television.

Final Regulation

In consideration of the foregoing. the Library of Congress amends part 258 of 37 CFR as follows:

PART 258—ADJUSTMENT OF ROYALTY FEE FOR SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS

1. The authority citation for part 258 continues to read as follows:

Authority: 17 U.S.C. 702. 802.

2. Section 258.3 is revised to read as follows:

§ 258.3 Royalty fee for secondary transmission of broadcast stations by satellite carriers.

(a) Commencing May 1. 1992. the royalty rate for the secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

(1) 17.5 cents per subscriber per month for superstations.

(2) 14 cents per subscriber per month for superstations whose signals are syndex-proof. as defined in § 258.2.

(3) 6 cents per subscriber per month for network stations and noncommercial educational stations.

(b) Commencing January 1. 1998. the royalty fee for secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

(1) 27 cents per subscriber per month for distant superstations.

(2) 27 cents per subscriber per month for distant network stations.

(3) No royalty rate (zero) for a superstation secondarily transmitted within the station's local market. as defined in 17 U.S.C. 119(d)(11).

(4) No royalty rate (zero) for a network station secondarily transmitted within the station's local market. as defined in 17 U.S.C. 119(d)(11). to subscribers residing in unserved households. as defined in 17 U.S.C. 119(d)(10).

Dated: October 23. 1997.

So Ordered.

James H. Billington,

The Librarian of Congress.

[FR Doc. 97-28543 Filed 10-27-97: 8:45 am]

BILLING CODE 1410-33-M

DEPARTMENT OF DEFENSE

DEPARTMENT OF TRANSPORTATION

Coast Guard

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900-AI69

Miscellaneous Educational Revisions

AGENCIES: Department of Defense. Department of Transportation (Coast Guard). and Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the educational assistance and educational benefit regulations of the Department of Veterans Affairs (VA). It removes a number of provisions that no longer apply or otherwise have no substantive effect. and makes other changes for the purpose of clarification.

DATES: This final rule is effective October 28. 1997.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer. Assistant Director for Policy and Program Administration. Education Service. Veterans Benefits Administration. 202-273-7187.

SUPPLEMENTARY INFORMATION: This document affects 38 CFR part 21. subparts C. D. G. H. K. and L. It removes provisions that are obsolete. duplicative. or otherwise without substantive effect. and makes changes for the purpose of clarification. This document makes no substantive changes. Accordingly. there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

The Department of Defense (DOD) and VA are jointly issuing this final rule insofar as it relates to the Post-Vietnam Era Educational Assistance Program (VEAP) and the Educational Assistance Test Program (EATP). These programs are funded by DOD and administered by VA. DOD. the Department of Transportation (Coast Guard). and VA are jointly issuing this final rule insofar as it relates to the Montgomery GI Bill—Selected Reserve program. This program is funded by DOD and the Coast Guard. and is administered by VA. The remainder of this final rule is issued solely by VA.

The Secretary of Defense. the Commandant of the Coast Guard. and Acting Secretary of Veterans Affairs hereby certify that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. 5 U.S.C. 601-612. This final rule makes no substantive changes. Pursuant to 5 U.S.C. 605(b). this final rule. therefore. is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers for programs affected by this final rule are 64.117. 64.120. and 64.124. This document also affects the Montgomery GI Bill—Selected Reserve program which has no Catalog of Federal Domestic Assistance number.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure. Armed forces. Civil rights. Claims. Colleges and universities. Conflict of interests. Education. Employment. Grant programs-education. Grant programs-veterans. Health care. Loan programs-education. Loan programs-veterans. Manpower training programs. Reporting and recordkeeping requirements. Schools. Travel and transportation expenses. Veterans. Vocational education. Vocational rehabilitation.

author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

§ 114 · Scope of exclusive rights in sound recordings[46]

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

(d) Limitations on Exclusive Right.—Notwithstanding the provisions of section 106(6)—

(1) Exempt transmissions and retransmissions.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(A) a nonsubscription broadcast transmission;

(B) a retransmission of a nonsubscription broadcast transmission: *Provided*, That, in the case of a retransmission of a radio station's broadcast transmission—

(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however—

(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

(ii) the retransmission is of radio station broadcast transmissions that are—

(I) obtained by the retransmitter over the air;

(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

(III) retransmitted only within the local communities served by the retransmitter;

(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: *Provided*, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

(C) a transmission that comes within any of the following categories—

(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: *Provided*, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522 (12)), of a transmission by a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

(iv) a transmission to a business establishment for use in the ordinary course of its business: *Provided*, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).

(2) STATUTORY LICENSING OF CERTAIN TRANSMISSIONS.—

The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if—

(A)(i) the transmission is not part of an interactive service;

(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and

(iii) except as provided in section 1002(e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer;

(B) in the case of a subscription transmission not exempt under paragraph (1) that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998, or in the case of a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service—

(i) the transmission does not exceed the sound recording performance complement; and

(ii) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted; and

(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998—

(i) the transmission does not exceed the sound recording performance complement, except that this requirement shall not apply in the case of a retransmission of a broadcast transmission if the retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission, unless—

(I) the broadcast station makes broadcast transmissions—

(aa) in digital format that regularly exceed the sound recording performance complement; or

(bb) in analog format, a substantial portion of which, on a weekly basis, exceed the sound recording performance complement; and

(II) the sound recording copyright owner or its representative has notified the transmitting entity in writing that broadcast transmissions of the copyright owner's sound recordings exceed the sound recording performance complement as provided in this clause;

(ii) the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facilitated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998;

(iii) the transmission—

(I) is not part of an archived program of less than 5 hours duration;

(II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks;

(III) is not part of a continuous program which is of less than 3 hours duration; or

(IV) is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—

(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration, except that the requirement of this subclause shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;

(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;

(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;

(vii) phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner, except that the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(viii) the transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners; and

(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity, except that the obligation in this clause shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace.

(3) LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES.—

(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: *Provided, however*, That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if—

(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services; *Provided, however*, That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 50 sound recordings; or

(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: *Provided*, That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

(D) The performance of a sound recording by means of a retransmission of a digital audio transmission is not an infringement of section 106(6) if—

(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

(E) For the purposes of this paragraph—

(i) a "licensor" shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

(ii) a "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

(4) RIGHTS NOT OTHERWISE LIMITED.—

(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

(B) Nothing in this section annuls or limits in any way—

(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

(ii) the exclusive rights in a sound recording or the musical work embodied therein under sections 106(1), 106(2) and 106(3); or

(iii) any other rights under any other clause of section 106, or remedies available under this title as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(e) AUTHORITY FOR NEGOTIATIONS.—

(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

(2) For licenses granted under section 106(6), other than statutory licenses, such as for performances by interactive services or performances that exceed the sound recording performance complement—

(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments: *Provided*, That each copyright owner shall establish the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees: *Provided*, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

(f) LICENSES FOR CERTAIN NONEXEMPT TRANSMISSIONS.[47]

(1)(A)[48] No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by subsection (d)(2) of this section during the period beginning on the effective date of such Act and ending on December 31, 2001, or, if a copyright arbitration royalty panel is convened, ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting the determination of the copyright arbitration royalty panel or an order setting the terms and rates (if the Librarian rejects the panel's determination). Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Librarian of Congress licenses covering such subscription transmissions with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(B) In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph. In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the copyright arbitration royalty panel may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in subparagraph (A).

(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe—

(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational; and

(II) in the first week of January 2001, and at 5-year intervals thereafter.

(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I) of this subparagraph; or

(II) on July 1, 2001, and at 5-year intervals thereafter.

(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.

(2)(A) No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services specified by subsection (d)(2) during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Librarian of Congress licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(B) In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including—

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).

(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated in accordance with regulations that the Librarian of Congress shall prescribe—

(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational; and

(II) in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I); or

(II) on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.

(3) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

(4)(A) The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.

(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(C) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

(5)(A) Notwithstanding section 112(e) and the other provisions of this subsection, the receiving agent may enter into agreements for the reproduction and performance of sound recordings under section 112(e) and this section by any 1 or more small commercial webcasters or noncommercial webcasters during the period beginning on October 28, 1998, and ending on December 31, 2004, that, once published in the Federal Register pursuant to subparagraph (B), shall be binding on all copyright owners of sound recordings and other persons entitled to payment under this section, in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress. Any such agreement for small commercial webcasters shall include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee. Any such agreement may include other terms and conditions, including requirements by which copyright owners may receive notice of the use of their sound recordings and under which records of such use shall be kept and made available by small commercial webcasters or noncommercial webcasters. The receiving agent shall be under no obligation to negotiate any such agreement. The receiving agent shall have no obligation to any copyright owner of sound recordings or any other person entitled to payment under this section in negotiating any such agreement, and no liability to any copyright owner of sound recordings or any other person entitled to payment under this section for having entered into such agreement.

(B) The Copyright Office shall cause to be published in the Federal Register any agreement entered into pursuant to subparagraph (A). Such publication shall include a statement containing the substance of subparagraph (C). Such agreements shall not be included in the Code of Federal Regulations. Thereafter, the terms of such agreement shall be available, as an option, to any small commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement.

(C) Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Librarian of Congress under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).

(D) Nothing in the Small Webcaster Settlement Act of 2002 or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Librarian of Congress of July 8, 2002, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(E) As used in this paragraph—

(i) the term "noncommercial webcaster" means a webcaster that—

(I) is 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;

(ii) the term "receiving agent" shall have the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002; and

(iii) the term "webcaster" means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefor to make eligible nonsubscription transmissions and ephemeral recordings.

(F) The authority to make settlements pursuant to subparagraph (A) shall expire December 15, 2002, except with respect to noncommercial webcasters for whom the authority shall expire May 31, 2003.

(g) Proceeds from Licensing of Transmissions.—

(1) Except in the case of a transmission licensed under a statutory license in accordance with subsection (f) of this section—

(A) a featured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

(2) An agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall distribute such receipts as follows:

(A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission.

(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

(C) 2 ½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

(D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

(3) A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto other than copyright owners and performers who have elected to receive royalties from another designated agent and have notified such nonprofit agent in writing of such election, the reasonable costs of such agent incurred after November 1, 1995, in—

(A) the administration of the collection, distribution, and calculation of the royalties;

(B) the settlement of disputes relating to the collection and calculation of the royalties; and

(C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and this section, including those incurred in participating in negotiations or arbitration proceedings under section 112 and this section, except that all costs incurred relating to the section 112 ephemeral recordings right may only be deducted from the royalties received pursuant to section 112.

(4) Notwithstanding paragraph (3), any designated agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts, the reasonable costs identified in paragraph (3) of such agent incurred after November 1, 1995, with respect to such copyright owners and performers who have entered with such agent a contractual relationship that specifies that such costs may be deducted from such royalty receipts.

(h) Licensing to Affiliates.—

(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6), the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and

conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

(2) The limitation set forth in paragraph (1) of this subsection shall not apply in the case where the copyright owner of a sound recording licenses—

(A) an interactive service; or

(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(i) No Effect on Royalties for Underlying Works.—License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

(j) Definitions.—As used in this section, the following terms have the following meanings:

(1) An "affiliated entity" is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or nonvoting stock.

(2) An "archived program" is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.

(3) A "broadcast" transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

(4) A "continuous program" is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.

(5) A "digital audio transmission" is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

(6) An "eligible nonsubscription transmission" is a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1)

that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(7) An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

(8) A "new subscription service" is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(9) A "nonsubscription" transmission is any transmission that is not a subscription transmission.

(10) A "preexisting satellite digital audio radio service" is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(11) A "preexisting subscription service" is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(12) A "retransmission" is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as

provided in this section, a transmission qualifies as a "retransmission" only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

(13) The "sound recording performance complement" is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) by the same featured recording artist; or

(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively:

Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

(14) A "subscription" transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

(15) A "transmission" is either an initial transmission or a retransmission.

§ 115 · Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords[49]

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) Availability and Scope of Compulsory License.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain

(OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4832(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

OSM has determined and certifies pursuant to the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 918

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 28, 1997.

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR Part 918 is amended as set forth below:

PART 918—LOUISIANA

1. The authority citation for Part 918 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 918.15 is amended in the table by adding a new entry in chronological order by "Date of final publication" to read as follows:

§ 918.15 Approval of Louisiana regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	* *	* * *
October 24, 1997	May 8, 1998	Sections 105.; 2537.A.11.; 2725.A., A.2., A.3., A.3.a., C.1., F; 2907.C.5.; 3705.A.2., A.2a., A.2.b.; 3711.A., B.1. through B.6.; 3717.A., A.2., A.3.; 4501.A.3., A.4.; 5333.A.1. through A.13.; 5411.A.; 5413.A.; 5503.A.2.; 5507.A.4.; 6507.A.2.; 6913 .B.; 6915.B.1.; 6917.A.; 7105.C.

[FR Doc. 98–12249 Filed 5–7–98; 8:45 am]

BILLING CODE 4310–05–M

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 260

[Docket No. 96–5 CARP DSTRA]

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the determination of the reasonable rates and terms for the compulsory license permitting certain digital performances of sound recordings.

EFFECTIVE DATE: May 8, 1998.

ADDRESS(ES): The full text of the public version of the Copyright Arbitration Royalty Panel's report to the Librarian of Congress is available for inspection and copying during normal working hours in the Office of the General Counsel, James Madison Building, Room LM–403, First and Independence Avenue, SE., Washington, DC. 20540.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya Sandros, Attorney Advisor, Copyright Arbitration Royalty Panel (CARP), PO Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

I. Background

The Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA), Public Law 104–39, 109 Stat. 336, amended section 106 of the Copyright Act, title 17 of the United States Code, to give sound recording copyright owners an exclusive right, subject to certain limitations, to perform publicly sound recordings by digital audio transmissions. 17 U.S.C. 114. The bill affords certain digital transmission services a compulsory license to perform digital sound recordings publicly. The purpose of the bill is "to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters." S. Rep. No. 104-128, at 15 (1995).

All non-exempt digital subscription transmission services are eligible for the statutory license, provided that they are non-interactive and comply with the terms of the license. The statute requires that the service not violate the "sound recording performance complement,"[1] not publish in advance a schedule of the programming to be performed, not cause any receiving device to switch from one program channel to another, include in each transmission certain identifying information encoded in each sound recording, pay the royalty fees and comply with the associated terms, and comply with any recordkeeping requirements promulgated by the Copyright Office.[2] 17 U.S.C. 114(d)(2)(A)-(E) and 114(f)(2)-(5).

The reasonable terms and rates of the section 114 statutory license are determined by voluntary negotiations among the parties and, where necessary, compulsory arbitration conducted under chapter 8 of the Copyright Act, title 17. 17 U.S.C. 114(f).

II. The CARP Proceeding To Set Reasonable Rates and Terms

On December 1, 1995, the Librarian of Congress (Librarian) initiated the statutorily mandated six month negotiation period within 30 days of the enactment of the DPRSRA, pursuant to section 114(f)(1) of the Copyright Act, with the publication of a notice initiating the voluntary negotiation process for determining reasonable terms and rates of royalty payments. *See* 60 FR 61655 (December 1, 1995). In the notice, the Library instructed those parties with a significant interest in the establishment of the reasonable terms and rates for the section 114 license to file a petition with the Copyright Office no later than August 1, 1996, in the event that the interested parties were unable to negotiate an agreement. *Id.*

Accordingly, the Recording Industry Association of America (RIAA) filed a petition with the Copyright Office in which it asked the Office to initiate an arbitration proceeding pursuant to chapter 8 of the Copyright Act. After making a determination that the petitioner RIAA had a significant interest in the proposed CARP proceeding, the Librarian published a notice setting the schedule for the 45-day precontroversy discovery period and announcing the date for the initiation of the 180-day arbitration period. 61 FR 40464 (August 2, 1996). The exchange of documents during the precontroversy discovery period did not proceed smoothly, requiring the Office to reschedule portions of the discovery period and vacate the scheduled date for the initiation of the CARP. *See* Order in Docket No. 96-5 CARP DSTRA (September 18, 1996); Order in Docket No. 96-5 CARP DSTRA (November 27, 1996). The Librarian announced the initiation of the 180-day arbitration period following the conclusion of the discovery period and the resolution of all pending motions. 62 FR 29742 (June 2, 1997).

The Parties

There are four parties to this proceeding: three digital audio subscription services (the Services) and the Recording Industry Association of America (RIAA).

1. The Recording Industry Association of America, Inc. (RIAA)—RIAA represents a collective, consisting of more than 275 record labels, established for the express purpose of administering the rights of these sound recording copyright owners. RIAA represents the interests of its members who are the copyright owners of more than 90% of all legitimate sound recordings sold in the United States. Record companies own the copyrights in the sound recordings.

2. Digital Cable Radio Associates (DCR)—A digital audio service established in the United States in 1987 by the Jerrold Communications Division of General Instrument Corporation. Current partners include Warner Music, Sony Corporation, EMI, Time Warner Cable, Continental Cablevision, Comcast Cable, Cox Cable, and Adelphia Cable.

3. Digital Music Express, Inc. (DMX)—A digital music subscription service established in 1986 as International Cablecasting Technologies, Inc. In 1997, DMX merged into TCI Music, Inc., a publicly traded company with approximately 80% of its shares held by TCI, Inc.

4. Muzak, L.P.—With roots dating back to 1922, Muzak is America's oldest background music provider for businesses. In the 1920s and 1930s, Muzak was part of the consumer music market until driven out of that market by the growing popularity of radio. Muzak remained out of the market until March, 1996, when it began providing 27 channels of digital music under the name DiSHCD, as part of Echostar's satellite-based DiSH Network.

The Position of the Parties at the Commencement of the Proceeding

RIAA, representing the interests of the sound recording copyright owners, requested a royalty rate set at 41.5% of a Service's gross revenues resulting from U.S. residential subscribers, or in some circumstances, a flat rate minimum fee. Report of the Copyright Arbitration Royalty Panel (Report) ¶ 33. RIAA also agreed to be named the single entity to collect, administer, and distribute the royalty fees. Report ¶ 184. RIAA proposed additional terms concerning the timing of payments, statements of accounts, retention of records, and audits. Report ¶ 33.

The three digital audio subscription services requested a royalty rate ranging from a low of 0.5% to a high of 2.0% of gross revenues resulting from U.S. residential subscribers, and unanimously opposed a flat rate minimum fee. Report ¶¶ 34-36, 172. The Services proposed that a single private entity or a government agency be named for purposes of administering the royalty fees, but proposed submitting payments on a quarterly basis rather than a monthly basis. Report ¶¶ 184-185. In addition, the Services proposed terms concerning recordkeeping and audits, confidentiality of business records, and payment terms for distributing license fees among featured artists and nonfeatured musicians and vocalists.

[1] (7) The "sound recording performance complement" is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) By the same featured recording artist; or

(ii) From any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States, if no more than three such selections are transmitted consecutively: *Provided*, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

17 U.S.C. 114(j)(7).

[2] See Notice of Proposed Rulemaking, 61 FR 22004 (May 13, 1996); Notice of Proposed Rulemaking, 62 FR 34035 (June 24, 1997).

The Panel's Determination of a Reasonable Rate

The Panel evaluated the four statutory objectives,[3] and their component parts, in light of the evidence and determined that the digital audio subscription services should pay a royalty fee of 5% of gross revenues resulting from U.S. residential subscribers. Report ¶¶ 196, 200. This rate represents the midpoint of the range of possible license rates that the Panel considered appropriate (but not the midpoint of the parties' proposals). The Panel further concluded that there was no reason to impose a minimum license fee on the Services at this point, and consequently, it rejected RIAA's proposal to set a minimum fee based on a flat rate. Report ¶ 204.

In making this determination, the Panel followed the precedent set in prior rate adjustment proceedings conducted by the former Copyright Royalty Tribunal and other CARP panels which, as a first step, determined a range of possible rates after considering different proposed rates based on negotiated licenses or analogous marketplace models. Report ¶ 123. *See also*, 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884 (January 5, 1981), and the 1997 Rate Adjustment of the Satellite Carrier Compulsory License Fees, 62 FR 55742 (October 28, 1997). Each party offering a "benchmark" rate contends that the rate it offers represents the cost for similar products in analogous markets. The Panel considered three benchmarks, weighing each in light of the record evidence to determine whether the proposed models shed light on how the marketplace would value a performance license in sound recordings. Once the Panel identified the useful models, it used the corresponding rate information to craft a range of potential royalty rates for the section 114 license, then chose the rate within the range which would further the stated statutory objectives.

RIAA and the Services proposed rates based on three distinct marketplace models in which rates are set through arms-length negotiations. Report ¶ 124. The Services proposed two benchmarks for consideration by the Panel: Negotiated license fees for a sound recording performance right and the license fees the Services pay the performing rights organizations for use of the underlying musical works. RIAA put forth a single model for the Panel's consideration: Cable television network license fees. The Panel found the Services' models helpful in setting the rate for the digital performance right, but rejected the RIAA model for the reasons stated herein.

Both RIAA and the Services seemed to agree that the best proxy for reasonable compensation is a marketplace rate. The Panel, however, noted that the DPRSRA instructs the CARP to set reasonable rates, which need not be the same as rates set in a marketplace unconstrained by a compulsory license. In support of its interpretation, the Panel cited the statutory factors which must be considered in setting the rate. *See* Report ¶¶ 10, 124.

The Panel's Evaluation of the RIAA Benchmark

The benchmark proposed by the recording industry analogizes the cost of programming for cable television networks with the cost of procuring the right to perform the sound recordings. The analogy, however, did not withstand scrutiny by the Panel, which reasonably found that the cable television network license fees model did not represent rates for an analogous product in a comparable marketplace. Its conclusion rested on a number of findings which described analytical deficiencies in the two studies offered in support of the 41.5% proposed royalty rate. Report ¶¶ 126–150.

The RIAA model proposed using the purchase price of programming for cable television networks to determine the price the Services would pay for the right to publicly perform sound recordings, if negotiated in a free market. RIAA's Proposed Findings of Fact and Conclusions of Law (PF) ¶ 62; RIAA Proposed Conclusions (PC) ¶ 18. RIAA presented two studies that illustrate the amount of money cable television networks pay for their programming: (1) The Kagan study,[4] and (2) the Wilkofsky Gruen Associates[5] study. RIAA Exhibits (Exs.) 14 and 15, respectively. Both studies argued that the analogy between cable television networks and the digital audio services was apt because the digital audio services and the cable television networks compete head-to-head for carriage on cable and DBS systems, and for consumer time and discretionary income. Report ¶ 130.

The Kagan study analyzed data concerning the revenues and programming expenses of 31 basic cable television networks from the 1985–96 period. It concluded that a cable television network spends, on average, approximately 40% of its gross revenues for programming. RIAA Exhibit (Ex.) 14 at 7. The Panel, however, discounted the 40% figure because it represented the costs of license fees to all copyright owners, and it included the costs of programming during the start-up years, when a new cable television network may pay more than 100% of its revenues in programming costs. Report ¶¶ 127, 129, 149. Failure to adjust for these factors made it impossible for the Panel to assess the costs for the right to publicly perform the sound recordings apart from the costs of the other copyrighted works which make up the program.

Their second study, prepared by Wilkofsky Gruen Associates (WGA), analyzed only cable movie networks because Wilkofsky, the expert for the study, claimed that the "pricing characteristics and dynamics" of the cable movie networks were comparable in three fundamental ways: The lack of commercials, the generation of revenues through subscriptions, and the purchase of programming from third parties. Wilkofsky Written Direct Testimony (W.D.T.) at 3–5. This study concluded that the cable movie networks pay a weighted average of 41.5 % of their revenues for programming that they acquire from outside sources and by analogy, the Services should pay the same. *Id.* at 3.

The Panel rejected the conclusion of the WGA study because it ignored the following fundamental differences in market demand and cost characteristics between the cable movie networks and the digital audio services. Report ¶¶ 133–145.

[3] (1) to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 114, 115, and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under section 114, 115, and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 801(b)(1).

[4] The Kagan study was prepared by Paul Kagan Associates, a media research company that tracks and publishes financial data concerning the media and entertainment industries.

[5] Wilkofsky Gruen Associates is an economic consulting firm that specializes in the communications and entertainment industries.

1. The study provided no evidence to show that any of the movie networks directly compete with digital audio services. In fact, when people watch a movie, they devote their entire attention to the film for a period of time, and generally, do not repeat the experience with the same movie. On the other hand, subscribers to digital audio services choose to listen to the same music again and again while engaged in other activities. In other words, the subscriber chooses each service for different reasons, and therefore, they do not represent choices in the same market. Report ¶¶ 143, citing Rosenthal Written Rubuttal Testimony (W.R.T). at 13, Transcript (Tr). 1251 (Rubinstein).

2. The cable movie networks compete against other cable and broadcast stations for exclusive rights to motion pictures. Exclusive rights are highly prized, and consequently, command a premium price, but they are not implicated in the market for digital audio transmissions. Consequently, the Panel found that RIAA's failure to adjust for this aspect grossly overstated the value of programming costs in its cable movie network analogy. Report ¶¶ 137–142.

3. The Panel further discounted the analogy because RIAA ignored the promotional benefit that flows to the record companies from the constant airplay of their sound recordings. Report ¶¶ 144–145. *See also discussion infra.*

The Panel's Determination of Reasonable Terms

In addition to establishing a reasonable rate for the sound recording performance license, the Panel must also establish reasonable terms for implementing the license. The Senate Committee Report makes clear that terms include "such details as how payments are to be made, when, and other accounting matters." S. Rep. No. 104–128, at 30 (1995).

RIAA and the Services proposed specific terms concerning minimal fees, payment schedules, late fees, statements of account, and audits. From these, the Panel adopted the following terms:

1. RIAA shall have sole responsibility for the distribution of the royalty fees to all copyright holders. Report ¶¶ 184, 205.

2. The license fee payments shall be due on the twentieth day after the end of each month, beginning with the month succeeding the month in which the royalty fees are set. Report ¶¶ 185, 206.

3. The Services shall make back payments over a 30-month period. The first back payment, 1/30th of the total arrearage, shall be delayed for six months. Report ¶¶ 187, 206(a).

4. A Service shall be subject to copyright liability if it fails to make timely payments. Liability for copyright infringement shall only come about for knowing and willful acts which materially breach the statutory license terms. Report ¶¶ 188, 206(b).

5. A late fee of 1.5% per month or the highest lawful rate, whichever is lower, will be imposed from the due date until payment is received. Report ¶¶ 189, 206(a).

6. Services shall submit monthly statements of accounts and payment to RIAA. Only information to verify the royalty payments need be provided on the monthly statements of account. Report ¶¶ 190, 205, 207.

7. Safeguards must be established to protect against disclosure of confidential financial and business information, which includes the amount of the royalty payment. Access to this information shall be limited to employees of RIAA, who are not employees or officers of the copyright owners or the recording artists, for the purpose of performing their assigned duties during the ordinary course of employment, and to independent auditors acting on behalf of RIAA. Report ¶¶ 191, 208.

8. The digital audio services shall maintain accurate records on matters directly related to the payment of the license fees for a period of three years. Report ¶¶ 192, 209.

9. Interested parties may conduct only one audit of a digital audio service during any given year. Report ¶¶ 193, 210(c).

- Interested parties must file a Notice of Intent to Conduct an Audit with the Copyright Office. Such notice shall be published in the **Federal Register**. Report ¶¶ 193, 210(a)–(b).
- RIAA must retain an auditor's report for a period of three years. Report ¶¶ 193, 210(d).
- An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, may serve as an audit for all interested parties. Report ¶¶ 194, 210(e).
- Interested parties shall pay for the cost of the audit, unless an independent auditor concludes that there was an underpayment of five (5) percent or more. Report ¶¶ 195, 210(f).

The Panel chose not to adopt RIAA's minimum fee proposal and the Services' proposed payment schedule for the distribution of royalties to the featured artists and the nonfeatured musicians and vocalists. The Panel found that the timing of payments to the performing artists was not within the scope of the proceeding. Report § 204; Report at 56 n.21.

The Panel's Evaluation of the RIAA Proposal To Adopt a Minimum Fee

RIAA proposed the imposition of a minimum fee as a means to insure a fair return to the copyright owners in light of business practices that might erode the value of the statutory license fee. RIAA PF ¶¶ 126–147. Specifically, RIAA sought a minimum fee to minimize the effect of discounts or credits, to address shifts in business models, and to avoid diluting the value of the sound recording when audio digital services add new channels to their offerings. *Id.* The Panel ultimately rejected this suggestion because it found that the rationale for a minimum fee was based on unsupported speculation about the business structure of the Services. Report ¶ 204.

III. The Parties' Reaction to the Determination of the Panel

The regulations governing the CARP proceedings allow parties to file petitions to modify or set aside the determination of the Panel within 14 days of its filing date. The petition must state the reasons for the petition, including relevant references to the parties' proposed findings of fact and conclusions of law. Parties who wish to file replies to a petition may do so within 14 days of the filing of such petition. See 37 CFR 251.55(a), (b).

Accordingly, on December 12, 1997, RIAA filed a Petition to Reject the Report of the CARP (Petition), contending that the Panel acted both contrary to the Copyright Act and arbitrarily in reaching its determination. In its petition, RIAA requests the Librarian to set aside the Panel's determination and set a new rate that should not be less than double the Services' 1996–2001 payments for the public performance of the underlying musical works.

RIAA contends that the Panel's determination was arbitrary and contrary to law for the following reasons:

1. The Panel disregarded precedent set by the former Copyright Royalty Tribunal (CRT or Tribunal) in applying the statutory criteria for determining a reasonable rate for the public performance right. Petition at 6, 14–15.

2. The Panel used the rates set in a corporate partnership agreement as a benchmark for establishing the new compulsory license rate. This was inappropriate because the public performance in sound recordings

license agreement was not negotiated independently, but as part of a larger complex agreement. *Id.* at 20–27.

3. When the Services publicly perform a sound recording, two groups of copyright owners receive royalties: The copyright owners in the underlying musical works, and for the first time, the record companies and performers. The Panel determined that the record companies and performers were not entitled to more royalties for their public performance right than those received by the copyright owners in the underlying musical works for the public performance of their works. RIAA contends that CRT precedent supports a determination that just the reverse is true. *Id.* at 14–15.

4. The compulsory license allows the Services to perform sound recordings publicly without infringing copyright prior to the setting of the royalty rate, so long as the Services agree to pay their accumulated royalty obligation once the rates are determined. The Panel created a payment schedule that allows the Services to pay these fees over a three year period. RIAA contends that this payment schedule is contrary to law. *Id.* at 7 n.1.

5. RIAA also contends that the CARP failed to provide a reasoned explanation for proper review, made conclusions inconsistent with its findings, made findings without record support, and failed to make findings in support of conclusions. *Id.* at 2.

RIAA, however, does not suggest that the Librarian disregard all the findings of the Panel. Instead, it recommends adopting the Panel's approach "to determine a reasonable rate—provided that the Librarian makes the necessary adjustments to account for the precedent and considerations that the Panel ignored." Petition at 51–52. RIAA further allows that the Librarian need not consider the cable network benchmark in its analysis, since the Panel's analysis of the remaining benchmarks supports an upward adjustment of the 5% rate of gross revenues set by the CARP. Petition at 52 n.9.

On December 29, 1997, in response to the RIAA petition to reject the CARP report, the Services filed a reply to RIAA's Petition to Reject the CARP Report (Reply to Petition). The crux of the Services' argument in support of adopting the Panel's report is that "[w]hen examined as a whole, the Panel's Report is eminently reasonable and amply supported by the record." Reply to Petition at 12. Specific arguments of the Services in support of the Panel's report are discussed below in conjunction with RIAA's arguments to reject the report.

IV. The Librarian's Scope of Review of the Panel's Report

The Copyright Royalty Tribunal Reform Act of 1993 (the Reform Act), Public Law 103–198, 107 Stat. 2304, created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review that result in final orders: the Librarian of Congress (Librarian) and the United States Court of Appeals for the District of Columbia Circuit. Section 802(f) of title 17 directs the Librarian either to accept the decision of the CARP or to reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." 17 U.S.C. 802(f). If the Librarian accepts it, then the determination of the CARP becomes the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals. 17 U.S.C. 802(g).

The review process has been thoroughly discussed in prior recommendations of the Register of Copyrights (Register) concerning rate adjustments and royalty distribution proceedings. Nevertheless, the discussion merits repetition because of its importance in reviewing each CARP decision.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency action is generally considered to be arbitrary when:

1. It relies on factors that Congress did not intend it to consider;

2. It fails to consider entirely an important aspect of the problem that it was solving;

3. It offers an explanation for its decision that runs counter to the evidence presented before it;

4. It issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;

5. It fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and

6. Its action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Mfrs. Ass'n. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983);

Celcom Communications Corp. v. *FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp.* v. *FAA*, 758 F.2d 685 (D.C. Cir. 1985).

Given these guidelines for determining when a determination is "arbitrary," prior decisions of the District of Columbia Circuit reviewing the determinations of the former CRT have been consulted. The decisions of the Tribunal were reviewed under the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its award of royalties to each claimant. See *National Ass'n of Broadcasters* v. *Copyright Royalty Tribunal*, 772 F.2d 922 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986) (*NAB* v. *CRT*); *Christian Broadcasting Network* v. *Copyright Royalty Tribunal*, 720 F.2d 1295 (D.C. Cir. 1983) (*Christian Broadcasting* v. *CRT*); *National Cable Television Ass'n* v. *Copyright Royalty Tribunal*, 689 F.2d 1077 (D.C. Cir. 1982) (*NCTA* v. *CRT*); *Recording Indus. Ass'n of America* v. *Copyright Royalty Tribunal*, 662 F.2d 1 (D.C. Cir. 1981) (*RIAA* v. *CRT*). As the D.C. Circuit succinctly noted:

> We wish to emphasize * * * that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully * * *.

Christian Broadcasting v. *CRT*, 720 F.2d at 1319 (D.C. Cir. 1983), quoting *NCTA* v. *CRT*, 689 F.2d at 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal, he must be presented by the CARP with a rational analysis of its decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 103–286, at 13 (1993). This goal cannot be reached by "attempt(ing) to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broadcasting* v. *CRT*, 720 F.2d at 1319.

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination. 17 U.S.C. 802(f).

V. Review and Recommendation of the Register of Copyrights

The law gives the Register the responsibility to review the CARP report and make recommendations to the Librarian whether to adopt or reject the Panel's determination. In doing so, she reviews the Panel's report, the parties' post-panel motions, and the record evidence.

After carefully reviewing the Panel's report and the record in this proceeding, the Register finds that the Panel's adoption of the DCR negotiated license fee as the starting point for making its determination is arbitrary. This conclusion compels the Register to set aside the Panel's final determination and reevaluate the record evidence before making a recommendation to the Librarian.

Section 802(f) states that "(i)f the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be." During that 60-day period, the Register reviewed the Panel's report and made a recommendation to the Librarian not to accept the Panel's report, for the reasons cited herein. The Librarian accepted this recommendation, and on January 27, 1998, issued an order stating that the Panel's report was still under review. See Order, Docket No. 96–5 CARP DSTRA (January 27, 1998).

The full review of the Register and her corresponding recommendations is presented herein. Within the limited scope of the Librarian's review of this proceeding, "the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it." Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55757 (1997), citing 61 FR 55663 (October 28, 1996) (Distribution of 1990, 1991 and 1992 Cable Royalties). Accordingly, the Register accepts the Panel's weighing of the evidence and will not question findings and conclusions which proceed directly from the arbitrators' consideration of factual evidence.

The Register also adopts the Panel's approach in setting reasonable rates and terms for the digital performance license in sound recordings pursuant to 17 U.S.C. 114(f)(2), but sets aside those findings and conclusions that are arbitrary or contrary to law.

a. Methodology for Making Rate Determination

Use of a Marketplace Standard in Setting the Royalty Rate

The standard for setting the royalty rate for the performance of a sound recording by a digital audio subscription service is not fair market value, although CARPs and the Copyright Royalty Tribunal (CRT or Tribunal) in prior rate adjustment proceedings under sections 115 and 116 considered comparable rates negotiated under marketplace conditions when making their determinations.

In light of this practice, the Panel followed the same approach established in prior rate adjustment proceedings conducted by the Tribunal and the CARPs in making its determination. Namely, the Panel considered the parties' presentations of different rates negotiated in comparable marketplace transactions and first determined whether the proposed models mirrored the potential market transactions which would take place to set rates for the digital performance of sound recordings. Report ¶ 123. These benchmarks were then evaluated in light of the statutory objectives to determine a reasonable royalty rate. *Id.*

The Panel noted that RIAA and the Services "seem to agree that the best proxy for reasonable compensation is to look to marketplace rates." Report ¶ 124. The parties also agreed that the rates should be based on gross revenues and further agreed on the definition of "gross revenues." Report ¶ 125; RIAA PF ¶ 55; Services Joint Reply to RIAA's Proposed Findings of Fact and Conclusions of Law (Services' RF) ¶ 51.

While the Panel agreed with the parties on these two points, it noted that the statute requires the Panel to adopt reasonable rates and terms, and that reasonable rates and terms are not synonymous with marketplace rates. Report ¶ 124. Unlike a marketplace rate which represents the negotiated price a willing buyer will pay a willing seller, *see* Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (1997) (applying a fair market standard, as set forth at 17 U.S.C. 119(c)(3)(D), in setting royalty rates for the retransmission of broadcast signals by satellite carriers), reasonable rates are determined based on policy considerations. *See RIAA* v. *CRT*, 662 F.2d 1.[6] Congress granted the record companies a limited performance right in sound recordings in order to "provide [them] with the ability to control the distribution of their product by digital transmissions," but it did so with the understanding that the emergence of new technologies would not be hampered. S. Rep. No. 104–128, at 15 (1995). Consequently, Congress specified that the terms were to be reasonable and calculated to achieve the following four specific policy objectives:

1. To maximize the availability of creative works to the public;

2. To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

3. To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and

4. To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. 17 U.S.C. 114(f)(2) and 801(b)(1).

RIAA takes exception to this interpretation and argues that the Panel failed to follow CRT precedent that "interpreted the Section 801(b)(1) factors as requiring it to establish a market rate." Petition at 33. In support of its position, RIAA relies upon the 1982 CRT rate adjustment proceeding to determine reasonable rates and terms for the statutory noncommercial broadcasting license, 17 U.S.C. 118, where the CRT stated:

> The Tribunal has consistently held that the Copyright Act does not contemplate the Tribunal establishing rates below the

[6] In reviewing how the Tribunal analyzed the statutory criteria, the court noted that "other statutory criteria invite the Tribunal to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users." *Id.* at 8.

reasonable market value of the copyrighted works subject to a compulsory license.

1982 Adjustment of Royalty Schedule for Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting: Terms and Rates of Royalty Payments, 47 FR 57924 (December 29, 1982). RIAA further contends that the Panel not only ignored the CRT precedent requiring it to set marketplace rates, but improperly shifted the emphasis to ensure the financial viability of the copyright users. Petition at 33.

In response, the Services contend that the Panel's analysis comports with CRT precedent on both points, noting that the CRT did consider evidence on how a proposed rate would affect the user industry in its proceedings to set rates under sections 111 and 116. Reply to Petition at 26. For example, in the 1980 rate adjustment proceeding to set the royalty rate for jukeboxes, the CRT considered the evidence and found "only that marginal jukebox owners would be threatened by the new rate." *Id.* In fact, the Tribunal stated that it was "satisfied that adequate attention (had) been given to the small operator. * * * (and adopted) an amendment to the proposed fee schedule that was proposed for the benefit of such (small) operators." 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 888 (1981).

The Register finds that the Panel correctly analyzed how to determine a reasonable rate under section 114. Section 801(b)(1) states that one function of a CARP is to determine reasonable rates "as provided in sections 114, 115, and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118." The provision further states that the CARP must determine the rates under sections 114, 115, and 116 to achieve the four statutory objectives. The law does not state that these objectives are applicable in a rate adjustment proceeding to determine rates under sections 111 or 118. Therefore, RIAA's reliance on CRT precedents for setting rates under section 118 is without merit. Furthermore, the Panel's analysis is consistent with the prior CRT determinations establishing rates for the section 115 and 116 licenses.

In the 1980 jukebox rate adjustment proceeding, the CRT set the rate "[o]n the basis of the marketplace analogies presented during the proceeding, taking the record as a whole, and with regard for the statutory criteria. * * * That rate takes account both of what is paid for music elsewhere under similar circumstances and, since it is a flat rate, of the Tribunal's concern for the smaller, less profitable operators." 46 FR 889 (1981). To recognize that this rate was not a negotiated marketplace value, one need only read Commissioner James's dissent admonishing the majority for setting a rate on "an ability to pay theory." He characterized the majority's actions as follows:

> In essence, the majority reached a conclusion on the premise that a true market value would result in too large an increase in fees. The majority was set on course by what they deemed were the guiding standards of the statute which referred to minimizing the disruptive impact on the economic structure of the industries involved. It was the majority view and opinion that a large increase in fees would be oppressive to the industry and would "impact on small operators."

Id. at 891 (footnote omitted).

The Court of Appeals upheld the Tribunal's approach in its 1980 jukebox rate adjustment proceeding, stating that:

> In its decision, the Tribunal acknowledged that the rate which it approved could not be directly linked to marketplace parallels, but it found that such parallels served as appropriate points of reference to be weighed together with the entire record and the statutory criteria. Although we agree with ASCAP that the analogous marketplace evidence is significant, we do not believe that the Tribunal was bound by that evidence to select a fee rate within the $70–$140 "zone" which, according to ASCAP, governs this case. The Tribunal carefully weighed the evidence derived from the marketplace analogies and other evidence specifically in light of the four statutory criteria of section 801(b) and arrived at a royalty rate for coin-operated phonorecord players of $50 per machine.

Amusement and Music Operators Ass'n v. *Copyright Royalty Tribunal,* 676 F.2d 1144, 1157 (7th Cir. 1982), *cert. denied,* 459 U.S. 907 (1982) (*AMOA* v. *CRT*). The D.C. Court of Appeals engaged in a similar analysis when it considered the Tribunal's determination to raise the royalty rate for making and distributing phonorecords of copyrighted musical works from 2 cents to 4 cents. In that case, the copyright owners argued that Congress intended the Tribunal to set a high royalty rate under a bargaining room theory, which would create a rate ceiling for stimulating future negotiations outside the license. The D.C. Circuit found that while Congress had considered this possibility, it chose not to codify this approach, but rather to express its will through specific statutory criteria and allow the Tribunal to interpret and apply these objectives to the record evidence in a rate adjustment proceeding. *RIAA* v. *CRT,* 662 F.2d at 8–9. Furthermore, the Court ascertained that Congress did not rank the criteria in order of importance so that the Tribunal, and subsequently, the CARP, could:

> To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, * * * choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a "zone of reasonableness."

Id. at 9. *See also Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968); *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 585–586 (1942); *Hercules, Inc.* v. *Environmental Protection Agency,* 598 F.2d 91, 107 (D.C. Cir. 1978).

b. Benchmarks

The Panel's Disposition of the Proposed Benchmarks

The Register has reviewed the analysis of the Panel and its disposition of the three benchmarks and finds that the Panel's primary reliance on and manipulation of the DCR negotiated license fee was arbitrary. The Register also finds that the record evidence does not support the Panel's calculation of a specific range of fees for the public performance of the musical compositions. These flaws compel the Register to reexamine the record evidence and propose a rate based on her analysis while providing deference, where appropriate, to the findings of the Panel.

The Register, however, did not evaluate further the record evidence concerning either the cable television network fee or the proposed minimum fee in her deliberations to determine the appropriate rate because no party to the proceeding challenged either of these findings or continued to rely upon these matters in presenting its arguments to the Librarian.[7] Therefore, the Register forgoes a review of the Panel's analysis in these areas. This does not mean, however, that the Register and the Librarian will always forego an independent review of a Panel's actions. See, *e.g.* Distribution of the 1992, 1993, and 1994 Musical Works Funds, 62 FR 6558 (February 12, 1997)

[7] "RIAA strongly disagrees with the CARP's conclusion that the Services should devote a smaller percentage of their revenues to license fees than do other cable networks. While the range of percentages is large, there are no cable networks that consistently spend as little as 5 percent. Nevertheless, RIAA has not challenged the CARP's decision to reject the cable network analogy." Petition at 52 n.9 (citations omitted). Furthermore, RIAA did not raise any challenge to the Panel's decision not to grant a minimum fee.

(recommending an upward adjustment to one party's award, although no party made a request for the adjustment); Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (1997) (recommending the adoption of a zero rate for local retransmission of network signals to unserved households).

The Panel's Adoption of the DCR Negotiated License Fee and its Subsequent Manipulations of This Rate to Establish a Range of Potential Royalty Rates was Arbitrary[8]

The Panel found that the digital performance license negotiated as part of a larger partnership agreement between DCR and its two record company partners, Warner Music and Sony Music, was a useful benchmark for determining the section 114 royalty fee because it provided a "useful precedent," although there were problems with using the rate for this license fee since only 60% of the industry engaged in the negotiations setting the rate.[9] Report ¶¶ 166, 200. To address this problem the panel adjusted the figure upward to reach a base rate figure arguably applicable to 100% of the recording industry market. *Id.* The Panel then doubled this number to account for the statutory provision which requires an equal distribution of the royalties collected pursuant to the compulsory license between the record companies and the recording artists. *Id.; also* 17 U.S.C. 114(g). While recognizing that a pure doubling of the base rate was inappropriate, the Panel determined that these manipulations of a "freely negotiated rate" set a reasonable range of rates for further consideration in light of the statutory criteria. *Id.*

RIAA opposes the use of the negotiated license fee as a benchmark for setting the compulsory license fee for the following reasons: (1) It was merely one provision in a complex transaction involving eleven interrelated agreements, RIAA PF ¶ 92; Petition at 22; Wildman[10] W.R.T. at 12–15; Transcript (Tr.) 2213–14 (Wildman); (2) the record companies interested in investing in the digital audio service would share the cost of a higher rate, thereby creating a strong incentive to create a low rate; (3) the license fee was not for the right to perform sound recordings publicly, but for the acknowledgement that a right should exist, RIAA PF ¶ 84; Tr. 2102 (Vidich);[11] (4) the record companies never viewed the established rate as precedential, citing the license provision that the rate will be superseded if Congress establishes a performance right in sound recordings, DCR Exs. 7, 8 & 15 at ¶ 9; Vidich W.R.T. at 7; Tr. 2106–2107 (Vidich); Del Beccaro[12] W.D.T. at 9, and the most favored nations clause, DCR Exs. 7, 8 & 15 at ¶ 6; (5) the record companies did not enjoy the degree of leverage in setting the rate that the Services imply in their proposed findings; (6) the fee did not represent an industry-wide agreement on the value of the performance right; instead, only three record companies, "collectively responsible for only about 35% of the sound recordings performed by DCR," negotiated the rates, RIAA's Reply to Proposed Findings and Conclusions of Law (RIAA RPF) ¶ 39; Tr. 1014 (McCarthy);[13] and (7) the DCR digital performance license differed in significant ways from the statutory license. For example, the DCR license requires the company to pay royalties on its revenues from international sources which are not recoverable under the DPRSRA, RIAA PF ¶ 83; Tr. 965 (Del Beccaro); Tr. 1014 (McCarthy); Tr. 2137 (Vidich), and it did not contemplate a distribution of a portion of the royalties to recording artists as required under the new law, RIAA PF ¶ 82.

In response, the Services assert that the Panel "did not rely on the DCR license rate in isolation," and argue that its determination was informed by testimony from the parties who participated in the negotiations. Reply to Petition at 20. More specifically, the Services argue that the inclusion of the performance license within a larger, complex commercial agreement makes it more meaningful, because DCR did not purchase a license for the public performance of sound recordings. Rather, in exchange for a partnership agreement, DCR acknowledged that the right should exist for a particular rate. The Services neglect, however, to discuss why this observation is important in their initial findings. Services RF ¶ 75–77. Later, the Services argue that the Panel's decision to use the DCR license fee as an appropriate benchmark rested on a weighing of the evidence and invoke the Panel's discretion to evaluate the testimony and fashion its decision accordingly. Reply to Petition at 20–21. The Services, however, fail to address RIAA's additional concerns about the negotiated license, except to note that the partner record companies never operated a joint advertising venture nor took advantage of the provisions which gave them some measure of control over programming. Services RF ¶¶ 80–81.

While the Register agrees with the Services that the Panel carefully considered the rationale for and the circumstances surrounding the negotiations setting the DCR license rate, she finds the Panel's adoption of this benchmark and its subsequent adjustments arbitrary. In the first instance, the benchmark offered by the Services cannot represent a license for a right to perform sound recordings, because no such legal right existed at the time of the negotiations. Woodbury[14] W.D.T. at 12; RIAA PF ¶ 84; Tr. 2102 (Vidich). DCR allowed that, in fact, it did not negotiate for a performance license in sound recordings; and instead, characterized the transaction as selling "to its record company partners the recognition they sought 'that the right existed for a particular rate.'" Services PF ¶ 102. To underscore this distinction, DCR insisted on a clause which stated that the United States law did not require DCR to pay a fee or royalty for the public performance of any sound recording, even though DCR agreed, as part of a complex commercial transaction, to pay its partner record companies what it calls a public performance license fee. Services PF ¶¶ 111, 136. An article in the press announcing the deal echoed this distinction. It noted that not only did the transaction allow DCR use of the record companies' repertoire, it also required DCR to support a performance right in sound recordings. DCR Ex. 27 (Paul Verna, *Time Warner Breaks New Cable Ground: Enters Cable Radio Venture With Sony,* Billboard, Feb. 6, 1996, at 1).

Consequently, the Register rejects the Panel's premise that the rate set for a nonexistent right would represent accurately the value of the performance right once it came into existence, especially where the parties

[8] Negotiated license fees and certain business information, which the Register has considered throughout her review, are not being published in the Register's review because the information is subject to a protective order. See Order Docket No. 96–5 CARP DSTRA (September 18, 1996).

[9] Sony Music and Warner Music signed a partnership agreement with DCR in January 1993. A third record company, EMI, joined the partnership in April 1994, under substantially the same terms. Report ¶ 164.

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[11] Senior Vice-President of Strategic Planning and Business Development at Warner Music Group and a member of the Board of Directors of Digital Cable Radio Associates.

[12] President and Chief Executive Officer of Digital Cable Radio Associates.

[13] Senior Vice-President and Chief Financial Officer of Digital Cable Radio Associates.

[14] A vice-president at the economic consulting firm of Charles River Associates, Inc.

acknowledge that the agreement encompassed more than the purported value of the coveted right, namely the recognition from the audio service that a performance right in sound recordings should exist. RIAA PF ¶¶ 94–95; Tr. 2209–12 (Wildman); Wildman W.R.T. at 9–12. Arguably, that recognition was more valuable consideration to the record companies than the license fee itself.

The conclusion that the DCR license fee may serve as the benchmark for setting the section 114 rates is undermined further by the very nature of the partnership agreement. All parties agree that the agreement concerning the performance right was merely one of eleven interdependent co-equal agreements which together constituted the partnership agreement between DCR and the record companies. Such strong ties between provisions in a negotiated document raise the question of how much give-and-take occurred in negotiating the final terms. Courts recognize that complex transactions encourage tradeoffs among the various provisions and lead to results that most likely differ from those that would result from a separately negotiated transaction.[15] While DCR freely entered into the partnership agreement, the record contains no evidence that it would have freely entered into a separate performance license for sound recordings. To the contrary, the Service's own witness admits that it is unlikely that a stand-alone performance license would have been negotiated. Woodbury W.D.T. at 15. Accordingly, the Register concludes that it was arbitrary for the Panel to rely on a single provision extracted from a complex agreement where the evidence demonstrates that the provision would not exist but for the entire agreement. Under similar circumstances, the Southern District Court of New York found that "plucking one term out of the contract is likely to yield a fairly arbitrary result." *American Society of Composers Authors and Publishers* v. *Showtime/The Movie Channel, Inc.* *(ASCAP)*, published at 912 F.2d 572, 590 (S.D.N.Y. December 20, 1989) (No. 13–95 (WCC)) (rejecting proposal to rely upon provisions in guild agreement concerning payment of revenues where such provisions were part of a set of terms governing compensation, benefits, and working conditions).[16]

Another problem with adopting the DCR license fee is that it is not an industry-wide agreement, but rather the product of negotiations among only three record companies, which together account for approximately 35% of the sound recordings performed by DCR. RIAA PF ¶ 82; RIAA RPF ¶ 39. The arbitrators understood the limited nature of the negotiations and made an adjustment to the license fee based on the mistaken assumption that the DCR license fee represented the value of the sound recordings owned by the three record companies party to the agreement, which purportedly represented 60% of the record industry. Report ¶¶ 166, 200. This assumption arose from a statement made by the Services in the summary statement contained in the Services' joint reply to RIAA's proposed findings.[17] The statement, however, has no support in the record. See Petition at 21 n.3; Reply to Petition at 21–22. Consequently, the Panel's upward adjustment of the base figure on the merits of this assertion was arbitrary.

This is not to say that the fact that the DCR license fee was negotiated with companies owning rights to only 35% of the relevant works renders that license fee irrelevant. It is, however, a further deficiency which in combination with the other deficiencies discussed herein, renders the Panel's reliance on the DCR license fee as its exclusive benchmark inappropriate.

Furthermore, the Panel's decision to rely on the DCR license fee deviates from CRT precedent where that agency refused to adopt, as an industry-wide rate, a set of rates negotiated by only certain of the affected parties as part of a general understanding involving issues in addition to the rate of compensation. Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting, 43 FR 25068 (June 8, 1978). While no Panel need slavishly adhere to the past practices of the CRT, it must articulate a reasoned explanation for its deviation from past precedent. Distribution of 1990, 1991, and 1992 Cable Royalties, 61 FR 55653, 55659 (October 28, 1996). Otherwise, its actions may be construed as arbitrary or contrary to law.[18]

The Register also finds that even if the 60% figure had record support, it would be arbitrary to adjust a negotiated license fee that purports to represent the market value of the digital performance right in sound recordings. Under the license agreement, DCR agreed to pay a percentage of its gross revenues for the right to perform sound recordings digitally, but only a portion of these fees were paid to each of DCR's three record company partners, allocated on the basis of the DCR playlist.[19] Tr. 2123–24 (Vidich); Services PF ¶ 111. Therefore, the license fee—to the extent that it was a license fee—already accounted for all copyright fees owed to the record industry, and it was inappropriate for the Panel to make any further adjustment. The Services seem to realize the Panel's error in this respect and note that the Panel was under no obligation to make an upward adjustment, since the license fee reflected the value of the sound recording and not the sum of the percentage amount each partner record company negotiated for use of its works. Reply to Petition at 22.

Furthermore, the Register finds that the Panel's conclusion that the DCR license fee "provides a useful precedent for setting a royalty rate in this proceeding" was arbitrary. Report ¶ 200. The only support for this finding was Woodbury's testimony that the trade article announcing the deal between DCR and its new record company partners, Sony and Warner, illustrated its precedential value, at least for the record companies. Woodbury W.D.T. at

[15] For example, in resolving a dispute between ASCAP and Showtime/The Movie Channel, Inc. over the fee for a "blanket" license, the Southern District Court of New York stated that:

> it is fair to assume that in any negotiation that encompasses as many disparate issues as do the guild agreements, the negotiators will agree to tradeoffs, among the various negotiated items. ... The process of negotiation is thus likely to yield a complex pattern of results, most of which would have been different if the individual issue had been negotiated entirely separately from the others. Accordingly, plucking one term out of the contract is likely to yield a fairly arbitrary result.

ASCAP v. *Showtime/The Movie Channel, Inc.*, published at 912 F.2d 572, 590 (S.D.N.Y. Dec. 20, 1989) (Civ. No. 13–95 (WCC) (footnote omitted).

[16] This is not to say that in any case in which a CARP relied on a license fee that was part of a larger agreement containing a number of provisions unrelated to the license fee, such reliance would necessarily be arbitrary. But in light of the other deficiencies in the CARP's reliance on the DCR license, discussed herein, and especially in light of the fact that the license fee was for the exercise of a nonexistent right, the Register is compelled to conclude that in this case, the CARP's reliance on the DCR license fee as its exclusive benchmark was arbitrary.

[17] "DCR entered into a performance license with three record companies that represent approximately 60% of all recorded music sold in the United States." Services RF at 2.

[18] Section 802(c), of the Copyright Act, directs the CARP to "act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c)."

[19] For example, if the DCR license fee had been 5% of gross receipts (equaling $100,000) and 40% of the sound recordings on DCR's playlist were owned by DCR's record company partners, then DCR would pay 40% of the license fees ($40,000) on a prorata basis to these partners. The remaining 60% ($60,000) represents the value of the digital performance of works owned by non-partnership record companies performed during the relevant time period—a sum that DCR would not actually pay under the terms of its license agreement.

The 5% license fee value does not represent the actual value of the negotiated fee because this information is subject to a protective order. *See* n.8 *supra*.

16. Mr. Woodbury's statements on the precedential value of the agreement, however, are full of qualifications, and he readily acknowledged that "a successful negotiation may have required that Warner and Sony compensate Music Choice for including the performance rights payments as part of the partnership agreement. The effect of this compensation may have restrained Warner and Sony in their choice of a higher fee level." *Id.*

In addition, the partnership agreement itself fails to support the Panel's finding. It includes material redacted subject to the protective order. DCR Exs. 7, 8 & 15 at ¶ 6, and a provision that the rate will be superseded if Congress establishes a performance right in sound recordings. DCR Exs. 7, 8, & 15 at ¶ 9. Vidich W.R.T. at 7; Tr. 2106–2107 (Vidich); Del Beccaro W.D.T. at 9. Because the partnership agreement included language that undermined any precedential value of the digital performance license included therein, the Register finds that the Panel's reliance on the DCR license fee as precedent was an arbitrary action. *See Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29 (1983) (agency action is arbitrary where the agency offers an explanation for its decision that runs counter to the record evidence).

In setting a range of possible rates for the section 114 license, the Panel made further adjustments to the base figure to account for the payments to the recording artists. Under the DPRSRA, recording artists are entitled to half of the royalties collected under the compulsory license. 17 U.S.C. 114(g). RIAA argues that the DCR license fee must be adjusted to account for this provision in the law that entitles recording artists to a share of the royalties, because the record companies were under no obligation to share the royalties. RIAA RPF ¶ 40; Petition at 28. RIAA also argued for additional upward adjustments of the benchmark to compensate the record companies for certain differences between the DCR license and the compulsory license, including compensation for loss of royalties generated from foreign and commercial subscribers, and loss of revenue due to a shift in how the Services offer their product to subscribers.

RIAA anchors its arguments for these requested adjustments on the presumption that the responsibility of the Panel was "to determine the royalty [rate] that would be produced through free market negotiations, absent the compulsory license." RIAA RPF ¶ 41. This presumption, however, misrepresents the Panel's duty, which is to establish reasonable rates and terms. See discussion *supra* concerning the use of a marketplace standard in setting the royalty rate. While RIAA may have a reasonable expectation that a Panel would make appropriate adjustments to a marketplace benchmark that the Panel adopts for further consideration in light of the statutory objectives, and that is not to say that the requested adjustments are appropriate, there is no justification for making the adjustments where the benchmark value does not fulfill that function. Therefore, having found that the DCR license fee does not represent the marketplace value of sound recordings, the Register need not consider further arguments on adjusting the rate.

For the reasons cited above, the Register finds that the Panel was arbitrary in relying on the DCR license fee for the purpose of establishing an accurate evaluation of the marketplace value for the performance right.

The Panel's Determination of a Specific Range of Fees for the Public Performance of the Musical Compositions Was Arbitrary

The Services pay separate license fees to Broadcast Music, Inc. (BMI), the American Society of Composers, Authors, and Publishers (ASCAP), and SESAC, Inc. for the public performance of the underlying musical works in the sound recordings. The Services introduced evidence on what they pay the performing rights organizations for the public performance of the musical works to illustrate the industry practice that "licensing rates ordinarily paid in the recording and music industries for the use of copyrighted works are far less than 41.5%, and generally are within the low single digit range for use of copyrighted music and sound recordings." Rosenthal [20] W.R.T. at 3; Tr. 1646, 1669–70, 1674 (Massarsky).[21]

Using the license fees DMX and DCR [22] pay for the right to perform musical compositions in the BMI and SESAC repertories and the anticipated payments that ASCAP will receive upon resolution of a rate dispute between itself and the Services, and not the interim rates that the Services currently pay ASCAP, which are usually lower than the final determination of the rate court, the Panel set an upper limit on the value of the performance right for the musical compositions. Report ¶¶ 167(B)–(G). In making this determination, the Panel accepted Massarsky's testimony that ASCAP license fees are "generally greater than, but at least no less than, BMI license fees," and made its calculations accordingly. Report ¶ 167(E); see also RIAA PF ¶¶ 106–108.[23] In addition to setting an upper limit on the amount the Services would pay for these performance licenses, the Panel announced a lower limit for this benchmark but provided no discussion on how it arrived at this figure.

RIAA accepts the Panel's determination for an upper limit valuation for the performance right in musical works, but challenges the Panel's determination of the lower limit of this value. Petition at 16–20. RIAA contends that because the Panel had actual figures upon which to base its calculation, it was arbitrary to set a lower limit. *Id.* at 17.

From an examination of the record, the Register cannot determine how the Panel derived the lower limit figure, but she has identified at least one way that the Panel could have settled upon the lower figure. It entails the use of the interim rates which the Services pay ASCAP currently, instead of relying on a figure equal to or greater than the rate paid to BMI. Tr. 1669 (Massarsky). Tr. 1028–1029 (McCarthy). Use of such an approach, however, is expressly

[20] An attorney with the law firm of Berliner, Corcoran & Rowe, L.L.P., in Washington, D.C., who represents recording artists, writers, production companies, record companies, and multimedia companies.

[21] An economic consultant with the firm of Barry M. Massarsky Consulting, Inc.

[22] The Services pay an interim rate set in 1989 to ASCAP for the performance of the musical works in its repertoire. Tr. 1029 (McCarthy); Tr. 1656 (Massarsky). DCR also pays an interim rate to BMI. These rate disputes are currently the subject of adjudication before the "rate court" in the Southern District of New York. Services RF ¶¶ 52–53; 100–105. Pending the outcome of the rate cases, DCR has agreed to pay BMI the same contractual rate that DMX pays for the musical works performance license. Tr. 1653 (Massarsky).

[23] CRT and judicial precedent supports the Panel's premise that ASCAP usually receives slightly higher royalty fees for the public performance of its works than does BMI. In *American Society of Composers, Authors, and Publishers* v. *Showtime/The Movie Channel*, 912 F.2d 563 (2nd Cir. 1990), the court affirmed the rate court decision that a "blanket" license rate for use of ASCAP works should be set slightly higher than the rate the cable network pays for a BMI license. This result reflected the agreed upon 55–45 ratio that ASCAP and BMI adopted in dividing their share of the royalties for compulsory licenses paid by cable system operators for retransmissions of broadcast signals. See also 1978 Cable Royalty Distribution Determination, 45 FR 63026 (Sept. 23, 1980) (CRT determined that of the 4.5% royalty share awarded to the music claimants' group in the 1978 cable distribution proceeding, ASCAP would receive 54%, BMI, 43%, and SESAC, 3% of the royalties.); 1987 Cable Royalty Distribution Proceeding, 55 FR 11988 (March 30, 1990) (CRT again adjusted the distribution percentages for cable royalties so that ASCAP received a 58% share of the disputed royalties and BMI received the remaining 42% share).

disavowed by two of the Services' own expert witnesses who agree that it is inappropriate to rely on interim rates to determine competitive market rates. Woodbury W.R.T. at 19 n.70; Tr. 2710–2711 (Woodbury); Tr. 1029 (McCarthy). The Register concurs with these witnesses's assertions, and therefore rejects any figure which uses an interim rate in calculating a value when specific evidence exists in the record discounting this methodology and nothing supports its use.

Nor could the Panel consider just the individual license fees which the Services pay to a single performing rights organization in setting the lower limit, having rejected a similar argument when the Services initially proposed making this comparison. Report ¶ 168. A single license fee covers only those musical works under the control of the individual performing rights organization granting the license. Therefore, a Service must obtain a "blanket" license from every performing rights organization in order to have the freedom to play virtually any musical composition without infringing its copyright. Hence, the total value attached to the performance of the underlying musical works would be the sum of the license fees paid to each of the performing rights organizations, just as the value of the digital performance right in sound recordings would be the fees paid to all record companies. See Report ¶ 168.

The Register perceives no rational connection between the Panel's factual conclusions and its decision to set a lower limit for this benchmark. Where the record provides clear evidence of what the Services actually pay for the performance licenses, and the witnesses agree that the interim rates which are currently being paid represent *de minimis* value for these licenses, the Panel need not look beyond this information to determine the value of the benchmark. For the reasons discussed above, the Register does not consider the Panel's lower limit on the performance license fees for musical compositions when proposing a royalty rate for the section 114 license.

Use of Benchmarks Approximating Marketplace Value in Setting the Section 114 Rate

A benchmark is a marketplace point of reference, and as such, it need not be perfect in order to be considered in a rate setting proceeding. In the 1980 rate adjustment proceeding for coin-operated phonorecord players, the Tribunal considered different marketplace models and found that each analogy had distinguishing characteristics, but nevertheless considered them in conjunction with the record evidence and the statutory objectives. 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884, 888 (1981) ("While acknowledging that our rate cannot be directly linked to marketplace parallels, we find that they serve as an appropriate benchmark to be weighed together with the entire record and the statutory criteria"). The U.S. Court of Appeals for the Seventh Circuit approved the Tribunal's approach, stating that:

> We think that the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets (*e.g.*, with respect to volume and industry structure) and the regulatory environment. It is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissibility. No authority cited by AMOA would require the Tribunal to reject the ASCAP/SESAC analogies. Comparable rate analogies have been repeatedly endorsed as appropriate ratemaking devices.

AMOA v. *CRT*, 676 F.2d at 1157. See also *San Antonio* v. *United States*, 631 F.2d 831, 836–37 (D.C. Cir. 1980), *clarified*, 655 F.2d 1341 (D.C. Cir. 1981); *Burlington Northern, Inc.* v. *United States*, 555 F.2d 637, 641–43 (8th Cir. 1977).

When setting the rates for the statutory performance license in sound recordings, the benchmarks are merely the starting point for establishing an appropriate rate. The deciding body uses the appropriate marketplace analogies,[24] in conjunction with record evidence, and with regard for the statutory criteria, to set a reasonable rate.

In this proceeding, the Register finds that both the negotiated DCR license fee and the marketplace license fee for the performance of the musical works are useful at least in circumscribing the possible range of values under consideration for the statutory performance license in sound recordings. While the DCR license fee purports to represent a negotiated value for a right to which, by law, the record companies were not entitled (in addition to the recognition that the right should exist), the Register acknowledges that the value of the DCR license provides minimal information as to the value of the performance right ultimately granted in the DPRSRA, although it does provide some guidance for assessing the proposed rate. See Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates (115 Rate Adjustment Proceeding), 46 FR 10466, 10483 (Feb. 3, 1981) ("We find that the foreign experience is relevant—because it provides one measure of whether copyright owners in the United States are being afforded a fair return").

On the other hand, the second reference point—the negotiated license fees for the performance of music embodied in the sound recordings—offers specific information on what the Services actually pay for the already-established performance right of one component of the sound recording. The Panel recognized this reference point's usefulness and used it to further support its choice of a royalty rate. Report ¶ 201. The question, however, is whether this reference point is determinative of the marketplace value of the performance right in sound recordings; and, as the Panel determined, the answer is no. Report ¶¶ 169, 201.

Initially, neither the Services nor RIAA placed much weight on this marketplace reference point, although RIAA has consistently argued that the value of the performance right in sound recordings is greater than the value of the performance right in the underlying musical works. RIAA RPF ¶ 16, Petition at 10–16. On the one hand, the Services argue that the musical composition is the key to a successful recording. Services RF ¶ 10–12, citing Tr. 1664 (Massarsky), and on the other hand, RIAA contends that a song lacks feeling until the recording artist breathes life into the song. Morris[25] W.D.T. at 1–2; Petition at 12–13. Because neither side presented conclusive evidence on this point, the Panel observed only that both groups are "parents of the music." Report ¶ 169.

RIAA faults the Panel for its lack of discussion on the question of whose rights in the phonorecord are more valuable. Petition at 10–16. While the Register agrees that the Panel did not make specific citations to record evidence, its finding that "[t]here was insufficient and conflicting evidence to make a determination that the

[24] A Panel is free to reject a proposed benchmark that does not reflect accurately the characteristics and dynamics of the industries subject to the proposed rate. *See e.g.*, Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting, 43 FR 25068–69 (1978) (CRT found voluntary license between BMI, Inc. and the public broadcasters, Public Broadcasting System and National Public Radio, of no assistance in setting rate for use of ASCAP repertoire); Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, 47 FR 52146 (November 12, 1982)

[25] A country music artist who has recorded 14 albums, including five number one songs.

performers and record companies deserve a larger percentage from the Services than granted to the music works," was supported by the record evidence. Report ¶ 169.

To make its point, RIAA presented an analysis of revenues from record sales in support of its argument that the marketplace values the contributions of the record companies and the performing artists more than it values the contributions of the copyright owners in the musical compositions. RIAA's PF ¶¶ 112–120; Petition at 10–16. This evidence showed that copyright owners of the musical composition receive between 5–20% of the wholesale price for the sound recordings based on sales of CDs and cassette tapes—approximately 5% from the average wholesale price for an average CD and 12% from an average cassette.[26] RIAA PF ¶¶ 115, 119. Recording artists, on the other hand, receive 7–10% of the average wholesale price for a typical CD and 15–20% for a typical cassette, leaving approximately between 56–88% of the revenues from sales for the record companies. RIAA ¶ PF 116.

The Services disagreed with RIAA's interpretation of the marketplace data, contending that the reason the "(r)ecord companies receive a bigger percentage of revenues from the sale of sound recordings (is) because they have a bigger monetary investment in the record production costs, as well as the leverage to minimize the royalties paid to songwriters, music publishers, and recording artists." Services RF ¶¶ 118–120. They also oppose RIAA's implication that the record companies should receive more value from the performance right in sound recordings than the songwriters receive for a similar right because the record companies garner more revenue from the use of the mechanical license than do the songwriters and composers.

The Services accurately note that the mechanical license and the digital performance license represent different and distinct rights to the copyright holders under the law, and they make no attempt to tie the value of the rights associated with the mechanical license to the value of the digital performance right, a right newly recognized with the passage of the DPRSRA. Even RIAA, the proponent of the assertion, fails to explain why the relative value of the mechanical license to the various owners and users has any application to the determination of the value of a digital performance license in sound recordings. Consequently, where no clear nexus exists between the values of different rights, the model serves no practical purpose in computing the value of the digital performance right.

Hence, RIAA's contention that the data supports its assertion that the marketplace places a higher value on the contributions of the record companies and the recording artists in the creation of the phonorecord fails, because it does not discuss the constraining effect the mechanical license has on the copyright owners in setting a value on their reproduction and distribution right. Record companies pay the copyright owners of the musical compositions no more than the statutory rate for the right to reproduce and distribute the musical composition in a phonorecord. The record company then, in turn, sells the phonorecord at a fair market price. Because both groups do not share equal power to set rates in an unfettered marketplace, it is unreasonable to compare the value of the reproduction and distribution right of musical compositions—a rate set by the government at a level to achieve certain statutory goals—with the revenues flowing to record companies from a price set in the marketplace according to the laws of supply and demand, and then to declare that the marketplace values the sound recording more than the underlying musical composition. Consequently, RIAA's evidence sheds no light on the relative value of the sound recording performance right and the musical works performance right.[27]

In addition to the foregoing discussion, the Register notes that Congress did not intend for the license fees paid under the new digital performance license to "*diminish* in any respect the royalties payable to copyright owners of musical works for the public performance of their works." S. Rep. No. 104–128, at 33 (1995) (emphasis added). See also 17 U.S.C. 114(i). Although this statement does not express Congress' intent that the license be set below the value of the public performance right in the musical works, it indicates that Congress considered the possibility that such would be the outcome, and sought through express legislation to protect the current value of the performance right in musical works.

Based on a review of the record evidence, the Register concurs with the Panel's conclusion that there was insufficient evidence to determine that the performers and record companies deserve a larger percentage from the Services than that received by the copyright holders in the musical works. That being so, the Register finds no basis for making an upward adjustment to the musical works performance license fees to establish a broader range of potential rates.

c. Statutory Objectives

Section 801(b)(1) of the Copyright Act states that the rates for the section 114 license shall be calculated to achieve certain statutory objectives. The Panel evaluated each statutory objective and made a finding as to whether the Services or RIAA furthered that objective. If the Services contributed more to furthering the objective, the Panel gave more consideration to setting a rate at the lower end of the possible range, and conversely, if the record companies made the more significant contribution, the Panel found this to favor a rate toward the upper end. Report ¶ 19((A)–(D)).

The Panel's analysis led it to set a rate toward the low end of its range, because a rate set toward the high end would thwart the statutory objectives under current market conditions. *Id.* The Panel expressly noted that a future Panel may reach an entirely different result based on the then-current economic state of the industry and new information on the Services' impact on the marketplace. Report ¶ 202.

RIAA contends that the Panel's findings that all factors favor setting a low rate is contrary to CRT precedent. Petition at 32. This contention relies on a statement from the D.C. Court of Appeals, which upon reviewing the CRT's 1980 Mechanical Rate Adjustment Proceeding concluded that the factors "pull in opposing directions." *Id.*, citing *RIAA* v. *CRT*, 662 F.2d at 9. But in making this statement, the court merely made an observation that the statutory objectives required the Tribunal to weigh opposing factors in determining how best to achieve each objective. It went on to say that the Tribunal had the responsibility of reconciling these factors in setting a reasonable rate, but the court did not preclude the possibility that the Tribunal might find that the application of the factors to the evidence consistently supported either a high rate or a low rate. *RIAA* v. *CRT*, 662 F.2d at 9.

[26] Interested parties are free to negotiate a rate below the statutory rate for the mechanical license and often do. Tr. 1660 (Massarsky).

[27] Even if there was some value to the comparison, RIAA does not appear to factor into its calculations the value of the sound recordings in those phonorecords that do not show a profit. According to the record, "approximately 85 percent of all sound recordings do not recoup the costs that are spent to make and to market those recordings. Indeed, over two-thirds of all sound recordings sell less than 1,000 copies." Report ¶ 105.

The Register approves the Panel's basic approach in utilizing the factors to determine its rate for the digital performance right and adopts the Panel's findings where the evidence supports its conclusions.

The Panel's determination that the statutory objectives supported setting a rate favoring the Services was not arbitrary

The Panel's ultimate conclusion that the best way to achieve the four statutory objectives was to set a low rate favoring the Services is supported by the evidence presented in this proceeding. How much weight to accord each objective is within the discretion of the Panel, which may accord more weight to one objective over the others so long as all objectives are served adequately. See *RIAA* v. *CRT*, 662 F.2d at 9. In *RIAA* v. *CRT*, the court reviewed the Tribunal's decision to raise the rate for making and distributing phonorecords from two cents to four cents. It found the copyright users' argument that the Tribunal failed to give adequate consideration to certain factors over others unavailing. In discussing the impact of the statutory objectives on the ratemaking process, the court stated:

> [T]he Tribunal was not told which factors should receive higher priorities. To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a "zone of reasonableness."

Id. at 9 (citations omitted). Hence, the Panel was free to find that a rate on the low end was reasonable so long as that rate fell within the "zone," and the "zone" was calculated to achieve the statutory objectives.

The Panel's analysis and application of the statutory objectives, however, are not without problems. The Register finds that on occasion, the Panel either did not perceive or misinterpreted the precedential underpinnings of the statutory objective.

A full discussion of the Panel's deliberations and the parties' responses concerning the evaluation and application of the four statutory objectives follows.

A. Maximize the Availability of Works. (17 U.S.C.801(b)(1)(A)).

The Panel found that the digital audio services "substantially increase the availability of recordings by providing many channels of uninterrupted music of different genres," noting the diversity of the music offered by the Services. Report ¶¶ 121–122. Based on this finding, the Panel concluded at the end of its report that "[t]o maximize the availability of creative works to the public * * * the rate should be set on the low side. A lower rate will hopefully ensure the Services' continued existence and encourage competition so that the greatest number of recordings will be exposed to the consumers." *Id.* ¶ 198(A).

RIAA alleges that the Panel misinterpreted this statutory objective because it focused on "whether the Services promote the sale of sound recordings," rather than "whether the proposed rate will maximize the availability of sound recordings." RIAA RPF ¶ 43; Petition at 37–41. In support of its position, RIAA recalls the 1980 jukebox rate adjustment proceeding, where the CRT concluded, in its discussion of section 801(b)(1)(A), that jukeboxes were not crucial to assuring the public of the availability of creative works. 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884, 889 (1981). The Tribunal, however, did find that "reasonable payment for jukebox performances will add incrementally to the encouragement of creation by songwriters and exploitation by music publishers, and so maximize availability of musical works to the public." *Id.* On the strength of past CRT precedent and the courts' recurring observation that compensation to the author or artist stimulates the creative force,[28] RIAA disputes the Panel's conclusion, contending that the best way to maximize the availability to the public is to ensure that copyright owners receive fair compensation for their works. Petition at 38.

The Services support the Panel's findings and conclusion but offer no legal support for their position except to note that "[t]he Courts have long held that under copyright law, reward to copyright owners is a 'secondary consideration' that ultimately serves the cause of promoting public availability of copyrighted works." Reply to Petition at 27 (citations omitted). The Services assert rightfully that the primary rationale for the copyright law is to stimulate the creation of artistic works for the benefit of the public. *Twentieth Century Music* v. *Aiken*, 422 U.S. 151, 156 (1975), citing *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring this monopoly * * * lie in the general benefits derived by the public from the labors of authors"). But in underscoring the primary purpose for the copyright law, the Court in *Aiken* acknowledges that this aim is achieved by allowing the copyright owners to receive a fair return for their labor, the position advanced by RIAA. *Id.* ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good"). *See also Sony Corp. America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984); *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948). The positive interplay between compensation and creation is a basic tenet of copyright law, and as such, its contribution to stimulating the creation of additional works cannot be set aside lightly.

In such matters where the Panel failed to discuss any relevant case law or past precedent construing the statutory objective before rendering its determination, the Register finds the Panel acted in an arbitrary manner. The finding is based on the Panel's failure to consider CRT precedent and to provide a rational basis for its departure from prior proceedings construing the same statutory objective. *See Pontchartrain Broad.* v. *FCC*, 15 F.3d 183, 185 (D.C. Cir. 1994) ("an unexplained departure from Commission precedent would have to be overturned as arbitrary and capricious"). *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29 (1983); *Celcom Communications Corp.* v. *FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp.* v. *FAA*, 758 F.2d 685 (D.C. Cir. 1985).

There is no record evidence to support a conclusion that the existence of the digital transmission services stimulates the creative process. Instead, the Panel made observations concerning the development of another method for disseminating creative works to the public—a valid and vital consideration addressed in the statutory objective concerning relative contributions from each party—but fails to discuss how the creation of a new mode of distribution will itself stimulate the creation of additional works.

[28] *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), quoting *United States* v. *Paramount Pictures*, 334 U.S. 131, 158 (1948). ("'[R]eward to the author or artist serves to induce release to the public of the products of his creative genius.'"); *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) (compensating authors "serve[s] the cause of promoting broad public availability of literature, music, and the other arts"); 115 Rate Adjustment Proceeding, 46 FR 10479 (1981) (In discussing section 801(b)(1)(A), the CRT looked to the purpose of the section 115 license which was "intended to encourage the creation and dissemination of musical compositions." Therefore, the Tribunal set the rate to "afford songwriters a financial and not merely a psychic reward for their creative efforts" as a way to maximize the availability of creative works).

Because the Panel failed to reconcile its determination with past CRT precedent and case law, the Register rejects both the Panel's findings and conclusions on this point as arbitrary. Instead, the Register concludes that the record companies and the performers make the greater contribution in maximizing the availability of the creative works to the public, a conclusion consistent with past CRT precedent.

B. Relative Roles of the Copyright Owners and the Copyright Users in Making Product Available to the Public. (17 U.S.C. 801(b)(1)(C)).

The statutory objective addressing the relative roles of the parties contains five different factors, which the Panel evaluated independently. In analyzing the first component of this objective, the relative creative contribution, the Panel found that both the recording companies and the performers make substantial creative contributions to the release of a sound recording. Report ¶ 87. Its determination credited the performers and the record companies for their work in making the musical work come alive. *Id.* ¶¶ 81–83. The Services were found to make no such significant contribution to the creation of the sound recording. Instead, their contribution was seen as more limited, since it merely enhanced the presentation of the final work through unique programming concepts. *Id.* ¶¶ 84–86. On balance, the Panel found "that the artists and the record companies provide greater creative contributions to the release of sound recordings to the public than do the Services," *id.* ¶ 87, a finding supported by CRT precedent.[29]

The Panel continued its consideration of the relative contribution of the owners vis-a-vis the users in making the product available to the public and determined that the Services made the greater contribution with respect to the four remaining factors: technological contributions, capital investment, costs and risks to industry, and the opening of new markets. Report ¶¶ 88, 93, 94, 97, 98, and 109.

In making this determination, the Panel focused on the technological developments made by the Services in opening a new avenue for transmitting sound recordings to a larger and more diverse audience, including the creation of technology to uplink the signals to satellites and transmit them via cable; technology to identify the name of the sound recording and the artist during the performance; and technology for programming, encryption, and transmission of the sound recording. *Id.* ¶¶ 89–92. In contrast, the Panel found that the record companies made no contributions in these areas. *Id.* ¶ 93.

The Panel also weighed the evidence presented in support of the parties' relative roles in making capital investments in equipment and technology, the third factor. The Panel determined that the Services made a substantial showing of their $10 million investment in equipment and technology, Report ¶ 95 and cites therein, whereas RIAA did not suggest that any capital investment was required on its part. *Id.* ¶ 97.

And finally, the Panel found that the fourth factor, the relative costs and risks incurred by the parties in making the product available to the public, was greater for the Services than for the record companies and the performing artists, even though the record companies do incur substantial costs and risks in producing the product used by the Services. *Id.* ¶¶ 98–108. In making its determination, the Panel balanced the costs and risks involved in producing the sound recordings against the cost and risks associated with bringing the creative product to market in a new and novel way. *Id.* ¶¶ 99–107. In support of its findings, the Panel noted that the Services have invested significant start-up costs and are currently undergoing a shift in how they market their services. *Id.* ¶¶ 55, 73–78, 99, and 102. In addition, the Services contend, and the Panel agrees, that the Services face new competition from the internet and digital radio. Consequently, it is far from clear whether the Services can survive. *Id.* ¶¶ 72, 99.

The Panel also found that record companies face tremendous risks when producing new sound recordings, citing the record companies' submissions showing that record companies fail to recover the production costs for approximately 85% of sound recordings, much less show a profit. *Id.* ¶ 105. The Panel, however, went on to find that the record companies have adapted to the vagaries of the music business, and as an industry, have shown consistent growth in units shipped and dollar value of records, CDs, and music videos from 1982–1996. *Id.* ¶ 108.

The Panel's key finding from its analysis of the third objective was that the Services contribute more to the opening of new markets for creative expression through the development of the digital audio services. *Id.* ¶ 109. The Panel credited the Services with opening new markets for creative expression because they expose the public to a broader range of music than does traditional over-the-air radio. Unlike traditional radio, the Services offer multiple channels for classical, jazz, traditional, alternative, and ethnic formats. *Id.* ¶ 110. Because subscribers frequently purchase new music heard for the first time on the service, the Panel found that record companies arguably benefit directly from the expanded musical formats offered by the Services. *Id.* ¶ 112. The Panel also found that the Services' future plans to offer subscribers an opportunity to purchase the sound recordings directly will "undoubtedly" open new markets for the record companies. *Id.* ¶¶ 114–115.

The record companies do not accept the Panel's findings concerning this statutory objective, and once again, take issue with the Panel's interpretation, positing that the Panel impermissively focused on "whether recording companies had made a particular contribution to the *Services* operations—and wholly ignored the contributions that the recording industry had made to the sound recordings themselves." Petition at 45–46. RIAA's predicate for its argument is its interpretation that the statutory phrase, "in the product made available to the public," 17 U.S.C. 801(b)(1)(C), refers only to the creation of the sound recordings and not to the Services' creation of a new means for bringing the sound recordings to the listener. Petition at 46.

In addition to this alleged fundamental flaw in interpretation, RIAA contends that the Panel "improperly collapsed (its cost/risk analysis) into a risk only (analysis)" and ignored empirical evidence in the record discounting the promotional value of the Services' offerings. *Id.* at 47–48. RIAA, however, fails to note that the Panel did acknowledge that the record companies incur significant costs and risks in their business. Report ¶¶ 105–107. But the Panel also found that the Services presented no additional risk to the record companies "*unless* the customers of the Services record the sound transmissions in lieu of purchasing these products at a retail store." Report ¶ 107 (emphasis added). Because the record companies introduced no evidence showing decreased overall sales of records and CDs, the Panel reasonably found that the record companies did not incur additional risk from lost sales due to the Services' activities. Report ¶¶ 107, 111.

[29] The CRT refused to award broadcasters a share of the cable royalties for their role in formatting radio stations. The Tribunal construed the claim as one for compilation which had a *de minimis* value. The U.S. Court of Appeals for the D.C. Circuit upheld the Tribunal's determination. *NAB* v. *CRT*, 772 F.2d at 931.

If anything, the Panel believed that the Services decreased the risk to the recording companies because the digital audio services have substantial promotional value. The promotional value comes from the constant airplay of new types of music not readily accessible in the marketplace, which in turn stimulates record sales. Report ¶ 110. In making this finding, the Panel relied on Simon's and Rubinstein's testimony that "subscribers frequently purchase new music precisely because they heard it on one of the Services." Report ¶ 112 citing Simon[30] W.D.T. at 1; Rubinstein W.D.T. at 34; Tr. 1442 (Rubinstein), and on the record industries' practice of supplying complimentary copies of their products to the Services for use on the air to promote the sales of an album. Tr. 1291 (Rubinstein); Tr. 1182–83, 1201 (Talley)[31]; DMX Ex. 3. *See also* Tr. 2248 (Wildman) ("Is there a benefit to the record company from getting music exposed that might become a hit that wouldn't get exposed otherwise? Of course there is").

Furthermore, RIAA's reliance on the preliminary DCR survey for the proposition that the Services do not promote sound recording sales is untenable where the record clearly shows that the record companies provide promotional copies to the Services. In fact, RIAA's own expert acknowledges "there (are) promotional benefits to recording companies from having their music played on radio stations or the digital music services." Tr. 2220 (Wildman).

In contrast to RIAA's fundamental objection to the Panel's interpretation of this statutory objective, the Services contend that the Panel made a reasonable determination that the phrase, "the product made available to the public," applied to both the sound recordings and the entire digital music service. Reply to Petition at 29. This finding is consistent with the 1980 rate adjustment proceeding for the mechanical license, where the CRT credited the record companies, the users of the musical compositions for purposes of the mechanical license, with developing new markets through technological innovations, and through the creation of record clubs, mail order sales, and television advertising campaigns. 46 FR 10480–81 (1981).

In making her determination on this point, the Register reflects on the statutory responsibilities of the Panel which is to set reasonable rates and terms for the public performance of sound recordings by *certain digital audio services*. (emphasis added). "In deciding to grant a new exclusive right to perform copyrighted sound recordings publicly by means of digital audio transmission, the Committee was mindful of the need to strike a balance among all of the interests affected thereby." S. Rep. No. 104–128, at 15–16 (1995). By its very nature, the section 114 license contemplates weighing the contributions of the users in creating and expanding the market for the performance of the sound recording in a digital technological environment. Without dispute, the evidence reveals a large investment of capital by the Services to create a new industry that expands the offerings of the types of music beyond that which one receives over the radio, through live performances, and other traditional means of public performance. Report ¶¶ 44, 49, 52, 99, 102–104, 110, 113; Simon W.D.T. at 3–4; Rubinstein W.D.T. at 13–14; Tr. 853–54 (Del Beccaro); Tr. 1237–40 (Rubinstein); Tr. 1476–78 (Funkhouser); DMX Ex. 32. Conversely, the record companies offered little or no evidence on their contributions relating to the key factors. Report ¶¶ 93, 97, 111.

From the foregoing analysis, the Panel concluded that the record companies contributed more in only one of the five areas under consideration in evaluating this statutory objective, and consequently, the rate should be set at a minimum level in favor of the Services. Report ¶ 198(C).

C. To Minimize Any Disruptive Impact on the Structure of the Industries Involved. (17 U.S.C. 801(b)(1)(D)).

The Panel determined that a rate set too high could cause one or all of the Services to abandon the business. Report ¶¶ 117–118; Troxel[32] W.R.T. 1, 5–6; Tr. 2553–2554; DMX Ex. 49(b). The Panel considered the nature of the Services' business, noting its need to increase its subscriber base just to reach a break-even point without the added obligation of paying an additional fee for a digital performance right. *Id.* ¶¶ 119(a)–(d). The Panel also calculated that the record companies would receive substantially less than a 1% increase in their gross revenues even if the rate were set at the highest proposed level (41.5% of gross revenues), underscoring the lesser impact of the license fees on the record industry. *Id.* ¶ 119.

RIAA implies that a low statutory rate for the digital performance right will have a negative impact on their future negotiations with other digital services. RIAA RPF ¶¶ 58, 105; Petition at 43. They also object to the Panel's constant reference to revenues generated from the distribution and reproduction rights and its alleged lack of consideration of CRT precedent. Petition at 43–44.

In support of the Panel's evaluation, the Services note that RIAA failed to introduce any evidence concerning the impact a low rate would have on the record companies and performing artists, in direct contrast to the abundance of financial information submitted by the Services in support of their assertion that a high rate could devastate the industry. Reply to Petition at 28.

While RIAA correctly states that the Panel considered the record companies' revenues generated from the exercise of other rights granted to them under the Copyright Act, the Panel's purpose was merely to demonstrate the financial health of the industries. The Panel never implied that the record companies should receive anything less than reasonable compensation under the DPRSRA, nor that their revenues from the exercise of the distribution and reproduction rights are meant to compensate them for the use of their creative works under the new statutory license. Rather, it determined that a reasonable rate for the digital performance right should be set at a level to allow the three companies currently doing business to continue to do so. This balance in favor of the Services supports both the statutory objective to consider the impact on the industries and Congressional intent not to hamper the arrival of new technologies. S. Rep. No. 104–128, at 15–16 (1995). The law requires the Panel, and ultimately the Librarian, to set a reasonable rate that minimizes the disruptive impact on the industry. It does not require that the rate insure the survival of every company. See 115 Rate Adjustment Proceeding, 46 FR 10486 (1981) ("We conclude that while the Tribunal must seek to minimize disruptive impacts, in trying to set a rate that provides a fair return it is not required to avoid all impacts whatsoever").

The Register acknowledges RIAA's uneasiness with the possibility that the rate which is ultimately adopted may have precedential value for their negotiations with other digital services, but such concern is misplaced. The rate under consideration applies only to the non-interactive digital audio subscription services, provided, of

[30] Senior Vice-President of Programming at Digital Cable Radio Associates.

[31] Executive Vice-President and Chief Technical Officer of Digital Music Express who oversees research and development, and technical operations worldwide.

[32] Chief Executive Officer and President of Digital Music Express since July 1997.

course, that they are eligible under the law and comply with all legal requirements. See 17 U.S.C. 114(d)(2). Congress, fully recognizing the threat that interactive services pose to the record companies, crafted the law so that they were ineligible for the compulsory license. The result of this decision is that record companies have an opportunity to negotiate an appropriate marketplace rate for a digital performance license with these services.

> Interactive services, which allow listeners to receive sound recordings "on-demand," pose the greatest threat to traditional record sales, as to which sound recording copyright owners (of sound recordings) must have the right to negotiate the terms of licenses granted to interactive services.

S. Rep. No. 104–128, at 24 (1995). Congress also included provisions in the DPRSRA to establish different rates for different types of digital audio subscription services. Section 114(f)(1) states that "(s)uch terms and rates shall distinguish among the different types of digital audio transmissions then in operation." This language gives the Panel and the parties broad discretion in setting rates for different types of digital audio services, when such distinction is warranted. Nor must the record companies accept the final rate from this determination for a new type of digital audio service which emerges before the next regularly scheduled rate adjustment proceeding. The law expressly allows for another rate-setting proceeding upon the filing of a petition. 17 U.S.C. 114(f)(4)(A)(i). Together, these provisions provide an opportunity to the record companies to make their case for a higher rate, where circumstances support such a determination.

In addition, as the market conditions change and the industry shows significant growth and profitability, another Panel will have an opportunity to make adjustments to the rate, and may well find that the changed circumstances favor an upward adjustment. In any event, the Register must make her recommendation based on the evidence in the current record before the Panel, which supports the Panel's determination that the best way to minimize the disruptive impact on the structure of the industries is to adopt a rate from the low range of possibilities. Report ¶ 198(D).

D. To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions. (17 U.S.C. 801(b)(1)(B)).

Usually this balance is struck in the marketplace through arms-length negotiations; and even in the case of a statutory license, Congress encourages interested parties to negotiate among themselves and set a reasonable rate which inevitably affords fair compensation to all parties. 17 U.S.C. 114(f)(1), (4); 115(c)(3); 116(b); 118(b); and 119(c). A statutory rate, however, need not mirror a freely negotiated marketplace rate—and rarely does—because it is a mechanism whereby Congress implements policy considerations which are not normally part of the calculus of a marketplace rate. See 115 Rate Adjustment Proceeding, 46 FR 10466 (1981) (determining that the mechanical license regulates the price of music to lower the entry barriers for potential users of that music).

The creation of the digital performance right embodied similar considerations. It affords the copyright owners some control over the distribution of their creative works through digital transmissions, then balances the owners' right to compensation against the users' need for access to the works at a price that would not hamper their growth.

In the current proceeding, the Panel considered proposed marketplace benchmarks, including all the economic data, and weighed the record evidence in light of the statutory objectives. This process is structured so that it affords the copyright owners reasonable compensation and the users a fair income—the purpose of the second statutory objective. See 17 U.S.C. 801(b)(1)(B). Accordingly, a recommended rate so calculated achieves this final statutory objective, in that it reflects the balance between fair compensation for the owners and a fair return to the users. As fully discussed above, the Register supports the Panel's methodology in reaching its determination (although she rejects as arbitrary the Panel's application of that methodology in some respects) and has adopted the Panel's overall approach in making her recommendation to the Librarian.

d. The Register's Recommended Rate

Rate setting is not a precise science. National Cable Television Assoc. Inc., 724 F.2d 176, 182 (D.C. Cir. 1983). ("Ratemaking generally 'is an intensely practical affair.' The Tribunal's work particularly, in both ratemaking and royalty distributions, necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within a 'zone of reasonableness' "). It requires evaluating the marketplace points of reference and tempering the choice of any proposed rate with the policy considerations underpinning the objectives of Congress in creating the license. Because this process requires the consideration of numerous factors, the CARPs, as the Tribunal before them, have considerable discretion in setting rates designed to achieve specific statutory objectives. *See* RIAA v. *CRT*, 662 F.2d at 9 ("To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a 'zone of reasonableness' ").

Discretion in setting rates, however, assumes that the underlying rationale for making a determination is sound—a finding which the Register could not make in this proceeding because the Panel's undue reliance on the rate in the DCR license agreement, and its subsequent manipulation of the license fee, were arbitrary actions. *See Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (Rate setting agency allowed to use a variety of regulatory methods in setting rates provided that the result is not arbitrary or unreasonable). Consequently, the Register recommended that the Librarian reject the Panel's determination, which he did, and set a new rate.

In formulating her recommendation as to the appropriate rate for the digital performance license, the Register, like the Panel, considered the relevant marketplace points of reference offered into evidence.[33] These reference points guided the Register in her task of setting a reasonable rate for the performance of digital sound recordings. But unlike the Panel, the Register gave more consideration to the rates paid for the performance right in the musical compositions, because these rates represent an actual marketplace value for a public performance right in the digital arena, albeit not the digital performance right in sound recordings. The Register took this approach after finding that the DCR negotiated license fee could not reflect accurately the

[33] The values of the relevant marketplace reference points, the DCR negotiated license fee and the license fee for the performance of the musical works, are subject to a protective order, and hence, their numerical values have been omitted. Nevertheless, the values of the performance rights embodied in these licenses figure prominently in the determination of the value for the digital performance right in sound recordings. In fact, the sum of these license fees establishes the outer boundary of the "zone of reasonableness" for this proceeding.

marketplace value of the digital performance right since no such legal right existed at the time the rate was negotiated, and the negotiating parties were unwilling to enter a licensing agreement for the digital performance right absent a partnership agreement.

Nevertheless, the Register did take into account the negotiated value of the digital performance right in the DCR license in making her determination that the statutory rate should be less than the value of the performance rights of the musical compositions. This determination followed from a review of the evidence on the relative value of the sound recording component and the musical works component of a phonorecord, which failed to support the record industry's assertion that the marketplace valued the sound recording component more than the musical works component. This being so, the Register evaluated the only other relevant marketplace point of reference, the negotiated DCR license fee. Because this fee is considerably lower than the total value of the marketplace license fees which each Service pays for the right to publicly perform the musical works, and while not a true marker for the value of the digital performance right, it supports a determination that the value of the performance right in the sound recording does not exceed the value of the performance right in the musical works.

In addition to these factors, the Register considered the statutory criteria and Congress' intent in creating the license. Unlike the Panel, which found that all four factors support a low rate, the Register found that the copyright owners did more "[t]o maximize the availability of creative works to the public," see 17 U.S.C. 801(b)(1)(A), and should receive fair compensation for their contributions in this area. However, the three remaining factors, especially the fourth factor, which requires that the rate be set "[t]o minimize any disruptive impact on the structure of the industries involved," see 17 U.S.C. 801(b)(1)(D), compels the Register to consider the economic health of the digital audio transmission industry.

The evidence clearly shows that the Services have been facing an uphill battle in their struggle to achieve profitability. At this time, the digital audio industry is still struggling to create a sustainable subscriber base, and as yet, no digital audio transmission service has shown a profit nor does any service expect to reach profitability in the near future. Unfortunately, the actual state of financial health within the industry is difficult to ascertain from the projected budgets put forward by the Services. Nevertheless, the 5% rate proposed by the Panel did not draw an objection from the Services, indicating a reasonable state of financial health to absorb at least a rate set at this level.

For the foregoing reasons, the Register recommends a rate that will not harm the industry at this critical point in its development and finds that a 6.5% rate achieves this aim and meets all other statutory objectives. This rate reflects the deference the Register accorded the value of the performance right in the musical works, the consideration of the financial health of the industry, and the recognition that copyright owners contribute the lion share's to the creation of new works for the public's enjoyment.

e. Terms

On June 2, 1997, the Services submitted general comments concerning proposed terms and conditions for the digital performance license pursuant to the March 28, 1997, Order of the Copyright Office. They later proposed specific terms concerning how the Services would make payment, how often they would pay, and procedures for verifying the accuracy of those payments, including terms on confidentiality, recordkeeping, and audits. Services PF ¶¶ 122–128; 284–304. Included in their submissions were proposed terms establishing a payment schedule for the distribution of royalties to the featured artists and the nonfeatured musicians and vocalists. Services PF ¶¶ 287–289. The Panel refused to adopt these terms because the Services failed to present any evidence or testimony to support their proposal, but more importantly, because the Panel found that "the issue of the timing of payments from the RIAA Collective to artists and other performers is not within the scope of this proceeding." Report at 56 n.21.

RIAA made similar proposals on how to administer the royalty payments, but offered two additional considerations, a minimum fee "equivalent to the rate adopted in this proceeding" and a late fee for untimely payments. RIAA PF ¶¶ 125–160. The Panel rejected the proposal to impose a minimum fee, see discussion supra, but accepted the RIAA proposal to impose a 1.5% late fee.

The Register supports and adopts the Panel's decision to reject the Services' proposed terms concerning further distribution of royalties to certain copyright owners by RIAA on the grounds that no evidence was introduced in support of the terms. Because this is a sufficient ground on which to reject the Services' proposed term, the Register need not address the Panel's determination that it lacked the authority to consider a payment schedule for the performing artists. The Register also need not address the Panel's rejection of the minimum fee because no party chose to challenge the Panel's decision. *See* n. 7, *supra*.

The parties' reactions to the terms adopted by the Panel

The Services did not file a post-panel motion to modify or set aside the Panel's determination, thereby signaling their acceptance of the Panel's resolution of any conflict between the parties concerning the terms. However, RIAA has raised two key items for further review by the Librarian: The adoption of a term which defines when copyright infringement occurs for purposes of the statutory digital performance license and the creation of a payment schedule that allows the Services to spread out their payment for the performances made between February 1996, the effective date of the Act, and November 1997, the month the Panel filed its report with the Librarian of Congress.[34] Petition at 7 n. 1.

The Panel's adoption of two of its terms was either arbitrary or contrary to law

The Register has determined that the Panel had no authority to set terms which attempt to delineate the scope of copyright infringement for the digital performance license, or alter a payment schedule already set by law. See Report ¶¶ 187–189, 206(a), (b).

1. *Payment of arrears.* The Panel adopted a term which allowed the Services to make back payments over a 30-month period for use of the sound recordings between February 1, 1996, and the end of the month in which the royalty rate is set and to delay the first payment for six months. Report ¶¶ 187, 206(a). The Register has determined, however, that adoption of this term is contrary to law.

Section 114(f)(5)(B) of the Copyright Act states that "(a)ny royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set." The "arrears" referenced in the statute refers to the copyright liability that accrued to the Services for those performances made since February 1, 1996, the effective date of the Act, and the end of the month in which the royalty rate is set.

[34] RIAA did not object to the Panel's refusal to grant its request for a minimum fee in its petition, nor does the Register find any reason to question the Panel's determination. As discussed supra, the Register finds the Panel's disposition on this issue to be well reasoned and supported by the evidence.

In spite of the express statutory language, the Panel fashioned a payment schedule to ease the burden on the Services in meeting this obligation.

The Panel found support for its action in the 1980 jukebox rate adjustment proceeding, in which the CRT raised the rate from $8 to $50, but did so in a progressive fashion. Report ¶ 186. The determination required the jukebox operators to make the first increased payment of $25 per jukebox per year on January 1, 1982, and a second $25 annual payment the following year. The CRT did not require the full $50 annual rate to be paid until January 1, 1984, approximately three years after setting the rate. 46 FR 884, 888, 890 (1981). The Tribunal adopted the phase-in payment schedule relying on its duty to set rates in accordance with the statutory objectives. It found that the gradual increase in payments furthered the objective concerned with minimizing the disruptive impact on the industries. *Id.* at 889. The Panel relied upon this CRT decision in adopting its phase-in program for payment of the arrears over a 30-month period.

The Services embrace the Panel's reliance on past CRT precedent for the inclusion of the phase-in payment term and claim that RIAA also agreed to allow the Services to make the "back payments" over a period of time. Reply to Petition at 14 n. 5. This assertion, however, is inaccurate. RIAA agreed that a phase-in schedule would be appropriate for the minimum fee, but never posited such a payment schedule for the arrears. See Tr. 2829 (RIAA closing argument). By comparing RIAA's statement on the proposal for making payments of a minimal fee,

> The recording industry proposes that the minimum fee be phased in to help minimize any disruptive effect from the fact that, for the first time, the services are going to be paying a fair fee—in fact, any fee at all for the performance of sound recordings.

Id. at 2829, see also RIAA PF ¶¶ 150–152, with its statement concerning the timing of the payment of arrears,

> In terms of the timing of the back payment, the statute leaves absolutely no question as to when the back payment from the services is due for the period from the Act's effective date through the date on which the Panel issues its decision.
>
> Section 114(f)(5)(B) says that "any royalty payment in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set."

Id. at 2829–2830, see also RIAA PF ¶ 157, it is absolutely clear that RIAA never agreed to a payment scheme for the arrears that would allow the Services to make partial payments over a 30-month period.

In another attempt to support the Panel's conclusion, the Services construe the statutory provision broadly and argue that arrears refers to "any royalty payment in arrears" and "does not specifically cover the back payment for the extended period between the 1995 Act's February 1, 1996, effective date and the time the Panel sets the performance rate." Services RF ¶ 157. This assertion, however, is inconsistent with the legislative history and the plain language of the statute.

Thus, the Panel had no authority to create a graded payment schedule for the payment of the arrears because the statute expressly stated when payment was to occur. Section 114(f)(5)(B) states, without qualification, that "[a]ny royalty payments in arrears shall be made on or before the twentieth day of the month *next succeeding the month in which the royalty fees are set.*" (emphasis added). It is a well-established principle that, in interpreting the meaning of a statute, the language of the law is the best evidence of its meaning. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); Norman S. Singer, Sutherland Statutory Construction sec. 46.01 (5th ed. 1992 rev.) Because the statutory language is clear on its face, the Register finds that the Panel's and the Services' reliance on the CRT 1980 jukebox decision is arbitrary and contrary to well-established principles of law. And even if the statutory language were ambiguous, the legislative history supports the Register's and RIAA's interpretation of section 114(f)(5)(B).[35]

Because the Panel's action exceeded its authority, the Register recommends that the Librarian reject the proposed term because its adoption would be contrary to law.

2. *Copyright infringement.* The Panel adopted a term which stated that "[i]f a Service fails to make timely payments, it will be subject to liability for copyright infringement. Such liability will only come about, however, for knowing and willful acts which materially breach the statutory license terms." Report ¶ 206(b). The Register has determined that this term is contrary to law.

RIAA contends that the Panel "usurped the authority of Article III courts by attempting to define the circumstances where the Services are liable for copyright infringement." Petition at 7 n.1. In response, the Services argue that the DPRSRA supports the Panel's suggestion that minor technical violations should not result in an infringement action. Services Reply to Petition at 14 n.5. Specifically, the Services point to section 114(j)(7)(B) which limits complement to the performance of sound recordings from a single album, which Congress included "[t]o avoid imposing liability for programming that unintentionally may exceed the complement." S. Rep. No. 104–128, at 35 (1995).

The Register acknowledges that Congress made provisions to protect users from copyright liability for programming that unintentionally exceeds the complement, see 17 U.S.C. 114(j)(7), but she finds it impermissible to expand a particular provision of the copyright law which limits copyright liability under one set of circumstances to include additional limitations not contemplated by Congress. *Fame Publishing Co.* v. *Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir.) *cert. denied*, 423 U.S. 841 (1975) ("We begin by noting that the compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule. Thus we should neither expand the scope of the compulsory license provision beyond what Congress intended in 1909, nor interpret it in such a way as to frustrate that purpose").[36]

But more importantly, in examining the legislative history, it is clear that Congress meant for the CARP to have limited authority in adopting reasonable terms.

> By terms, the Committee means generally such details as how payments are to be made, when, and other accounting matters (such as are prescribed in section 115). In addition, the Librarian is to establish related terms under section 114(f)(2). Should additional terms be necessary to effectively implement the statutory license, the parties may negotiate such provisions or the CARPs may prescribe them.

S. Rep. No. 104–128, at 30 (1995). This language clearly indicates that the CARP had authority to set reasonable terms only so far as those terms insured the smooth administration of the license. There is no indication in the statutory language or in the legislative history that the scope of the terms should go

[35] S. Rep. No. 104–128, at 30 (1995) ("If the royalty fees have not been set at the time of performance, the performing entity must agree to pay the royalty fee to be determined under this subsection by the twentieth day of the month following the month in which the rates are set").

[36] Congress defined the scope of the digital performance right granted to the copyright owner and under what circumstances a digital audio service infringes that right. *See, e.g.*, 17 U.S.C. 114 (d) and (e)(5).

beyond the creation of a workable administrative system and reach substantive issues, such as defining the scope of copyright infringement for those availing themselves of the statutory license.

Congress carefully delineated the scope of the digital performance right and the limitations on that right within the provisions of the statute. Section 114(d), entitled "Limitations on Exclusive Right," states with specificity when a performance by means of a digital audio transmissions is not an infringement, just as section 114(f)(5) defines when a public performance of a sound recording by means of a nonexempt subscription digital transmission is not an infringement. For the Panel to fashion a term further delineating the issue of copyright infringement when Congress has already acted is an improper exercise of authority beyond that granted under the statute.

Accordingly, the Register finds that the Panel had no authority to set a term construing the meaning of copyright infringement for purposes of section 114. See Report ¶¶ 188, 206(b). Because the Panel's action exceeded its authority, the Register recommends that the Librarian reject the proposed term because its adoption would be contrary to law.

f. Other Issues

1. *Effective date.* Section 114(f)(5)(B) states that payments in arrears for the performance of sound recordings prior to the setting of a royalty rate are due on a date certain in the month following the month in which the rate is set. Both the Panel and RIAA assume that the "date the royalty rate is set" is the date the Panel submits its report to the Librarian of Congress. See Report ¶ 186; Petition at 7 n.1. The Register disagrees with this assessment.

Section 802(g) governs judicial review of the Librarian's decision with respect to CARP determinations. The section allows an aggrieved party 30 days to file an appeal with the United States Court of Appeals for the District of Columbia Circuit, but does not relieve a party of his or her obligation to make royalty payments during the pendency of the appeal. In the event that no appeal is taken, the section states that "the decision of the Librarian is final, and the royalty fee * * * shall take effect as set forth in the decision." 17 U.S.C. 802(g). Neither section 114 nor chapter 8 makes further reference to the possible effective date of royalty rates.

As discussed in an earlier order setting a rate for the satellite compulsory license, 17 U.S.C. 119, the Register interprets the decision referenced in section 802(g) "to mean the decision of the Librarian, and not the decision of the CARP, since section 802(g) only refers to the decision of the Librarian. Consequently, the Register concludes that only the Librarian of Congress has the authority to set the effective dates of the royalty rates in this proceeding." Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55754 (1997). See also *RIAA* v. *CRT*, 662 F.2d at 14 ("When the statute authorizing agency action fails to specify a timetable for effectiveness of decisions, the agency normally retains considerable discretion to choose an effective date") (footnote omitted). This reasoning applies equally to the current proceeding, since no other guidance for setting the effective date is to be found in the statute or the legislative history.

The Register has pondered the question of an appropriate effective date and believes that the Panel's concern with minimizing the disruptive impact on the structure of the industries involved was well founded. See discussion supra concerning the economic health of the Services. Consequently, the Register proposes an effective date of June 1, 1998, which would require the Services to make full payment of the arrears on July 20, 1998, in addition to the payment for the month of June 1998, with subsequent payments to RIAA on the 20th day of each subsequent month. This date provides the Services with a measured amount of time to provide for any necessary adjustments in their business operations to meet their copyright obligations.

The Tribunal took a similar course when it set the effective date for implementing the rate increase for making and distributing phonorecords approximately six months after publication of its final rule. Section 115 Rate Adjustment Proceeding, 46 FR 10486 (1981). The Tribunal chose not to implement the rate change immediately in order to minimize the effect of the upward adjustment on the copyright users. The United States Court of Appeals for the District of Columbia Circuit upheld the Tribunal's decision to postpone the effective date because:

> The Tribunal's opinion demonstrates its concern "to minimize disruptive impacts" on the recording industry, and its view that the effective date of a royalty adjustment should be arranged so as to be "less disruptive to the industries." Although the Tribunal concluded that a single increase to the full four-cent rate would not be unduly disruptive, it was within the Tribunal's discretion to give the industry adequate lead time to prepare for the increase.

RIAA v. *CRT*, 662 F.2d at 14 (citations omitted).

2. *Value of an individual performance of a sound recording.* The Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording. Its entire inquiry focused on the value of the "blanket license" for the right to perform the sound recording, without once considering the value of the individual performance—a value which must be established in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, the Register has made a determination that each performance of each sound recording is of equal value and has included a term that incorporates this determination.

To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings. In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, each performance of each sound recording must be afforded equal value.

This determination does not alter the statutory provision that specifies how the copyright owner of the right to publicly perform the sound recording must allocate the statutory fees among the recording artists. See 17 U.S.C. 114(f)(2).

3. *Audit of the designated collective.* Although the membership of the collective represented by RIAA includes over 275 record labels which create more than 90 percent of all legitimate sound recordings sold in the United States, it does not represent the record companies responsible for the creation of the remaining 10% of the sound recordings. Report ¶ 20. Nevertheless, the Panel found, and the Register concurs, that the parties' suggestion to designate a single entity to collect and to distribute the royalty fees creates an efficient administrative mechanism. Report ¶ 184.

It is common practice, however, for the government body making such designations to implement safeguards to monitor the functions of the collective.[37] To this end, the Register recommends new terms that afford the copyright holders a right to audit the collective's practices in handling the royalty fees. The Register takes this step to insure copyright holders access to the records of the organization charged with the fiduciary responsibility of making an equitable distribution among those entitled to receive a portion of the funds, while at the same time preserving the confidentiality of the organization's business records. These terms mirror those formulated by the parties and adopted by the Panel which allow the collective to audit the business records of the Services to insure proper payment of the royalties.

4. *Deduction of administrative costs.* Neither the parties nor the Panel gave any consideration to the manner in which the collecting entity would deduct from payments to copyright owners its costs of administering the funds it receives and disburses. Nevertheless, the Panel should have addressed this key term of the compulsory license. Therefore, the Register finds it necessary to establish an additional term that permits the collecting entity to deduct from the royalties it pays to copyright owners the costs it incurs in administering the funds, so long as the costs deducted are reasonable and are no more than the actual costs incurred by the collecting entity.

5. *Unknown copyright owners.* The digital audio services will pay royalties on all sound recording performances without regard to the further disbursement of these fees to the numerous copyright holders. The collective will have little difficulty in identifying and locating the overwhelming majority of the copyright holders entitled to receive a portion of the fees, since the membership of the collective represents the interests of the copyright holders in over 90% of all sound recordings. Problems may arise, however, as RIAA attempts to identify and locate the copyright holders to the remaining 10% of the sound recordings. In anticipation of the likelihood that RIAA will not be able to locate all copyright holders, the Register recommends the adoption of a term that segregates the fees for unknown copyright owners into a separate trust account for future distribution to the rightful owner, or in the event that the owner is not found, allows the collective to use the funds after a period of three years, see 17 U.S.C. 507(b), to offset its administrative costs associated only with the collection and distribution of royalty fees collected under the statutory license.

6. *Rates for other types of digital audio services.* The rates and terms announced in this notice apply to DCR, DMX, and Muzak, the three digital audio transmission services participating in this proceeding, and to any other digital audio transmission service that avails itself of the compulsory license, provided that the service is of the same type. The Register raises this point to avoid any confusion over the Panel's statement which implies that the rates and terms set in this proceeding "shall be binding on all copyright owners of sound recordings and entities performing sound recording[s]." Report ¶ 1, citing 17 U.S.C. 114(f)(2). A general provision, however, must be read in conjunction with more specific statutory language; in this case, section 114(f)(4)(A), which provides for additional rate adjustment proceedings upon petition from any copyright owner or entity performing sound recordings when a new type of digital audio transmission becomes or is about to become operational.

VI. Conclusion

In considering the evidence in the record, the contentions of the parties, and the statutory objectives, the Register of Copyrights recommends that the Librarian adopt a statutory rate for the digital performance of sound recordings, pursuant to 17 U.S.C. 114, of 6.5% of gross revenues from subscribers residing within the United States.

In addition, the Register recommends that the Librarian adopt the reasonable terms propounded by the Panel except for those terms concerning the payment schedule for arrears and potential limitations on the scope of copyright infringement. The Register also recommends setting June 1, 1998, as the effective date for implementing the new rate and terms in order to ease the burden on each Service on meeting its initial obligations under the statutory license.

VII. The Order of the Librarian of Congress

Having duly considered the recommendations of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter to set reasonable terms and rates for the digital performance right in sound recordings, 17 U.S.C. 114, the Librarian of Congress fully endorses and adopts her recommendation to set the rate for the statutory license at 6.5% of gross revenues from U.S. residential subscribers. This rate shall apply to those digital audio services represented in this proceeding and any other eligible digital audio service of the same type that subsequently enters the market and makes use of the statutory license. The Librarian of Congress also adopts the Register's recommendation to reject the terms concerning potential limits on what constitutes copyright infringement and the proposed schedule for the payment of the arrears.

For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order which adopts new Copyright Office regulations setting reasonable terms and rates for the digital performance right in sound recordings.

List of Subjects in 37 CFR Part 260

Copyright, Digital Audio Transmissions, Performance Right, Sound Recordings

Final Regulation

In consideration of the foregoing, part 260 of 37 CFR is added to read as follows:

PART 260—USE OF SOUND RECORDINGS IN A DIGITAL PERFORMANCE

Sec.
260.1 General.
260.2 Royalty fees for the digital performance of sound recordings.
260.3 Terms for making payment of royalty fees.
260.4 Confidential information and statements of account.
260.5 Verification of statements of account.
260.6 Verification of royalty payments.
260.7 Unknown copyright owners.

Authority: 17 U.S.C. 114, 801(b)(1).

§ 260.1 General.

(a) This part 260 establishes terms and rates of royalty payments for the public performance of sound recordings by nonexempt subscription digital transmission services in accordance with the provisions of 17 U.S.C. 114 and 801(b)(1).

[37] A government's general policy toward the regulation of collective administration should be to limit government intervention to only "that which is necessary to facilitate the effective operations of the collective administration organization, consistent with the private character of the rights involved, while checking possible abuses by that collective in the least intrusive manner possible within" the overall context of the society involved. David Sinacore-Guinn, Collective Administration of Copyrights and Neighboring Rights, 544 (1993).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this part. a nonexempt subscription digital transmission service may engage in the activities set forth in 17 U.S.C. 114.

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

(a) Commencing June 1. 1998. the royalty fee for the digital performance of sound recordings by nonexempt subscription digital services shall be 6.5% of gross revenues resulting from residential services in the United States.

(b) A nonexempt subscription digital transmission service (the "Licensee") shall pay a late fee of 1.5% per month. or the highest lawful rate. whichever is lower. for any payment received after the due date. Late fees shall accrue from the due date until payment is received.

(c)(1) For purposes of this section. *gross revenues* shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

(i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service:

(ii) Licensee's advertising revenues (as billed). or other monies received from sponsors if any. less advertising agency commissions not to exceed 15% of those fees incurred to recognized advertising agency not owned or controlled by Licensee:

(iii) Monies received for the provision of time on the Programming Service to any third party:

(iv) Monies received from the sale of time to providers of paid programming such as infomercials:

(v) Where merchandise or anything or service of value is received by licensee in lieu of cash consideration for the use of Licensee's programming service. the fair market value thereof or Licensee's prevailing published rate. whichever is less:

(vi) Monies or other consideration received by Licensee from Licensee's carriers. but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee. for the provision of hardware by anyone and used in connection with the Programming Service:

(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service: and

(viii) Bad debts recovered regarding paragraphs (c)(1) (i) through (vii) of this section.

(2)Gross revenues shall include such payments as are in paragraphs (c)(1) (i) through (viii) of this section to which Licensee is entitled but which are paid to a parent. subsidiary. division. or affiliate of Licensee. in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "gross revenues" as defined in paragraph (c)(1) of this section for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

(d) During any given payment period. the value of each performance of each digital sound recording shall be the same.

§ 260.3 Terms for making payment of royalty fees.

(a) All royalty payments shall be made to a designated agent(s). to be determined by the parties through voluntary license agreements or by a duly appointed Copyright Arbitration Royalty Panel pursuant to the procedures set forth in subchapter B of 37 CFR. part 251.

(b) Payment shall be made on the twentieth day after the end of each month for that month. commencing with the month succeeding the month in which the royalty fees are set.

(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 to those parties entitled to receive such payment according to the provisions set forth at 17 U.S.C. 114(g).

(d) The designated agent may deduct reasonable costs incurred in the administration of the distribution of the royalties. so long as the reasonable costs do not exceed the actual costs incurred by the collecting entity.

(e) Commencing June 1. 1998. and until such time as a new designation is made. the Recording Industry Association of America. Inc. shall be the agent receiving royalty payments and statements of accounts.

§ 260.4 Confidential information and statements of account.

(a) For purposes of this part. confidential information shall include statements of account and any information pertaining to the statements of account designated as confidential by the nonexempt subscription digital transmission service filing the statement. Confidential information shall also include any information so designated in a confidentiality agreement which has been duly executed between a nonexempt subscription digital transmission service and an interested party. or between one or more interested parties: *Provided* that all such information shall be made available. for the verification proceedings provided for in §§ 260.5 and 260.6 of this part.

(b) Nonexempt subscription digital transmission services shall submit monthly statements of account on a form provided by the agent designated to collect such forms and the monthly royalty payments.

(c) A statement of account shall include only such information as is necessary to verify the accompanying royalty payment. Additional information beyond that which is sufficient to verify the calculation of the royalty fees shall not be included on the statement of account.

(d) Access to the confidential information pertaining to the royalty payments shall be limited to:

(1) Those employees of the designated agent who are not also employees or officers of a sound recording copyright owner or performing artist. and who. for the purpose of performing their assigned duties during the ordinary course of business. require access to the records: and

(2) An independent and qualified auditor who is not an employee or officer of a sound recording copyright owner or performing artist. but is authorized to act on behalf of the interested copyright owners with respect to the verification of the royalty payments.

(e) The designated agent shall implement procedures to safeguard all confidential financial and business information. including but not limited to royalty payments. submitted as part of the statements of account. Confidential information shall be maintained in locked files.

(f) Books and records relating to the payment of the license fees shall be kept in accordance with generally accepted accounting principles for a period of three years. These records shall include. but are not limited to. the statements of account. records documenting an interested party's share of the royalty fees. and the records pertaining to the administration of the collection process and the further distribution of the royalty fees to those interested parties entitled to receive such fees.

§ 260.5 Verification of statements of account.

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by interested parties 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).

(b) *Frequency of verification.* Interested parties may conduct a single audit of a nonexempt subscription digital transmission service during any given calendar year.

(c) *Notice of intent to audit.* Interested parties must submit a notice of intent to audit a particular service 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 notification of intent to audit shall also be served at the same time on the party to be audited.

(d) *Retention of records.* The 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 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 service 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 who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), their designated agents, or the entity designated by the copyright arbitration royalty panel in 37 CFR 260.3 to receive and to distribute the royalty fees.

§ 260.6 Verification of royalty payments.

(a) *General.* This section prescribes general rules pertaining to the verification of the payment of royalty fees to those 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).

(b) *Frequency of verification.* Interested parties may conduct a single audit of the entity making the royalty payment during any given calendar year.

(c) *Notice of intent to audit.* Interested parties must submit a notice of intent to audit the 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 notification of interest shall also be served at the same time on the party to be audited.

(d) *Retention of records.* The 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 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 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 who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), or their designated agents.

§ 260.7 Unknown copyright owners.

If the designated collecting agent is unable to identify or locate a copyright owner who is entitled to receive a royalty payment under this part, the 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 collecting agent may use the unclaimed funds to offset the cost of the administration of the collection and distribution of the royalty fees.

Dated: April 17, 1998.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 98–12266 Filed 5–7–98; 8:45 am]

BILLING CODE 1410–33–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL 325–6]

Approval and Promulgation of State Implementation Plans

CFR Correction

In title 40 of the Code of Federal Regulations, part 52 (§ 52.1019 to end), revised as of July 1, 1997, in appendix D to part 52, on page 610, in the first and second columns, equations d–1 and d–2 were inadvertently omitted. Additionally, the second line in the legend for Equation D–2 was incorrectly printed. The missing equations and corrected line should read as follows:

Appendix D to Part 52—Determination of Sulfur Dioxide Emissions From Stationary Sources by Continuous Monitors

* * * * *

$$\overline{X} \frac{\sum_{i=1}^{n} x_i}{n} \qquad \text{Equation D-1}$$

* * * * *

$$\text{C.I.}_{95} = \frac{t_{.975}}{n\sqrt{n-1}} \sqrt{n\left(\sum \chi_i^2\right) - \left(\sum \chi_i\right)^2}$$

Equation D-2

* * * * *

$t_{.975} = t_{1-a/2}$, and

* * * * *

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 980318066–8066–01; I.D. 022698A]

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 25; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; correction.

SUMMARY: This rule removes regulatory language inadvertently added, clarifies the raised footrope requirement for Small Mesh Area 1 & 2, and corrects an contrary to public interest sine immediate action is needed to close a portion of the waterway and protect the maritime public from the hazards associated with this fireworks display.

Background and Purpose

On August 31, 1998, Fireworks by Grucci submitted an applicant to hold a fireworks program on the waters of Upper New York Bay in Federal Anchorage 20C. The fireworks program is being sponsored by Hoboken Floors. This regulation established a safety zone in all waters of Upper New York Bay within a 360 yard radius of the fireworks barge approximate position 40–41–22N 074–02–22W (NAD 1983), approximately 360 yards northeast of Liberty Island, New York. The safety zone is in effect from 9:30 p.m. until 10:45 p.m. on Saturday, September 19, 1998. There is no rain date for this event. The safety zone prevents vessels from transiting a portion of Federal Anchorage 20C and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Recreational and commercial vessel traffic will be able to anchor in the unaffected northern and southern portions of Federal Anchorage 20C. Federal Anchorages 20A and 20B, to the north, and Federal Anchorages 20D and 20E, the south, are also available for vessel use. Marine traffic will still be able to transit through Anchorage Channel, Upper Bay, during the event as the safety zone only extends 125 yards into the 925-yard wide channel. Public notifications will be made prior to the event via the Local Notice to Mariners and marine information broadcasts.

Regulatory Evaluation

This final rule is not a significant regulatory action under section 3(f) of executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It has not been reviewed by the Office or Management and Budget under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979). The Coast Guard expects the economic impact of this final rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. This finding is based on the limited marine traffic in the area, the minimal time that vessels will be restricted from the zone, that vessels may safely anchor to the north and south of the zone, that vessels may still transit through Anchorage Channel during the event, and extensive advance notifications which will be made.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard considered whether this rule will have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

For reasons discussed in the Regulatory Evaluation above, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this final rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This final rule does not provide for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this final rule under the principles and criteria contained in Executive Order 12612 and has determined that this final rule does not have sufficient implications for federalism to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard has considered the environmental impact of this final rule and concluded that under Figure 2-1, paragraph 34(g), of Commandant Instruction M16475.1C, this final rule is categorically excluded from further environmental documentation. A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Regulation

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—[AMENDED]

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 1.05-1(g) 6.04-1, 6.04-6, and 160.5; 49 CFR 1.46.

2. Add temporary § 165.T01-144 to read as follows:

§ 165.T01-144 Safety Zone: World Yacht Cruises Fireworks, New York Harbor, Upper Bay.

(a) *Location.* The following area is a safety zone: all waters of New York Harbor, Upper Bay within a 360 yard radius of the fireworks barge in approximate position 40–41–22N 074–02–22W (NAD 1983), approximately 360 yards northeast of Liberty Island, New York.

(b) *Effective period.* This section is effective from 9:30 p.m. until 10:45 p.m. on Saturday, September 19, 1998. There is no rain date for this event.

(c) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on scene patrol personnel. U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a U.S. Coast Guard vessel via siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

Dated: September 10, 1998.

R.E. Bennis,

Captain, U.S. Coast Guard, Captain of the Port, New York.

[FR Doc. 98-25051 Filed 9-17-98; 8:45 am]

BILLING CODE 4910-15-M

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 253

[Docket No. 96-6 CARP NCBRA]

Noncommercial Educational Broadcasting Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress, upon the recommendation of the Register of Copyrights, is announcing the rates and terms of the noncommercial educational broadcasting compulsory license for the use of music in the repertoires of the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. by the Public Broadcasting Service, National Public Radio and other public broadcasting entities as defined in 37 CFR 253.2, for the period 1998–2002. The Librarian is adopting

JA-0081

the determination of the Copyright Arbitration Royalty Panel (CARP).

EFFECTIVE DATE: January 1, 1998.

ADDRESSES: The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the General Counsel, James Madison Memorial Building, Room LM–403, First and Independence Avenue, S.E., Washington, D.C. 20559–6000. It is also available on the Copyright Office's website: (http://lcweb.loc.gov/copyright/carp).

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney for Compulsory Licenses, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707–8380.

SUPPLEMENTARY INFORMATION:

I. Background

Section 118 of the Copyright Act, title 17 of the United States Code, creates a compulsory license for the public performance of published nondramatic musical works and published pictorial, graphic and sculptural works in connection with noncommercial broadcasting. Terms and rates for this compulsory license, applicable to parties who are not subject to privately negotiated licenses, are published in 37 CFR part 253 and are subject to adjustment at five-year intervals. 17 U.S.C. 118(c). As stipulated by the parties, the terms and rates adopted in today's order are effective for the period beginning January 1, 1998. They will be effective through December 31, 2002.

The noncommercial educational broadcasting compulsory license provides that copyright owners and public broadcasting entities may voluntarily negotiate licensing agreements at any time, and that such agreements will be given effect in lieu of any determination by the Librarian of Congress provided that copies of such agreements are filed with the Register of Copyrights within 30 days of their execution. Those parties not subject to a negotiated license must follow the terms and rates adopted through arbitration proceedings conducted under chapter 8 of the Copyright Act.

The Library published a notice in the **Federal Register** requesting comments from interested parties as to the need of a CARP proceeding to adjust the section 118 terms and rates. 61 FR 54458 (October 18, 1996). After a protracted negotiation period, several parties submitted proposals for royalty fees and terms with respect to certain uses by public broadcasting entities of published musical works and published pictorial, graphic and sculptural works. The Library published these proposals in the **Federal Register**, in accordance with 37 CFR 251.63, and adopted them as final regulations effective January 1, 1998. See 63 FR 2142 (January 14, 1998).

Certain parties notified the Library that agreement could not be reached for the use of musical works and that a CARP would be required. The Library initiated a CARP proceeding on January 30, 1998, and the CARP delivered its report to the Librarian on July 22, 1998. Today's final rule and order adopts that report.

II. Parties to This Proceeding

As noted above, certain parties could not reach agreement as to the proper adjustment of the royalty rates and terms for the use of musical works. The musical works at issue are those belonging to composers and publishers affiliated with the American Society of Composers, Authors and Publishers (ASCAP) and to composers and publishers affiliated with Broadcast Music, Inc. (BMI). The public broadcasting entities wishing to make use of these musical works are the Public Broadcasting Service (PBS), National Public Radio (NPR), and other public broadcasting entities as defined in 37 CFR 253.2.

ASCAP and BMI are both performing rights societies which, among other things, license the nonexclusive right to perform publicly the copyrighted musical compositions of their respective members. ASCAP and BMI filed separate written direct cases in this proceeding, and each sought a separate royalty fee for the use of musical works within their respective catalogues.

PBS is a non-profit membership corporation which, among other things, represents the interests of its member noncommercial educational broadcasting stations in rate setting and royalty distribution proceedings in the United States, Canada, and in Europe. NPR is a non-profit membership organization dedicated to the development of a diverse noncommercial educational radio programming service. PBS and NPR submitted a joint written direct case in this proceeding and are referred to in this final rule and order as "Public Broadcasters." The Corporation for Public Broadcasting (CPB), which provides funding for both PBS and NPR, is also represented in this proceeding, though it is not a user of music.

III. Prior History of Section 118 Rate Adjustments

Congress intended that the parties affected by the section 118 compulsory license negotiate reasonable license rates and terms. If the parties could not agree, the Copyright Royalty Tribunal (CRT) was to establish rates and terms in 1978 and at five-year periods thereafter if necessary. In section 118, Congress gave the CRT no statutory criteria beyond "reasonable" but did say that the CRT could consider "the rates for comparable circumstances under voluntary license agreements negotiated as provided in paragraph (2)." 17 U.S.C. 118(b)(3).

When Congress replaced the CRT with the current CARP system in 1993, it did not make any substantive modifications to section 118 or to the "reasonable terms and rates" standard prescribed by section 801. See Copyright Royalty Tribunal Reform Act of 1993, Public Law 103–198, 107 Stat. 2304.

For the initial license term of 1978–1982, the Public Broadcasters successfully negotiated a voluntary license with BMI that provided for a payment of $250,000 for the first year with certain possible adjustments for each of the succeeding four years. No agreement was reached for the use of ASCAP music by Public Broadcasters, and the CRT held a proceeding to establish rates and terms.

To determine what constituted a "reasonable" rate for ASCAP, the CRT examined the section 118 legislative history and found directives that the rate should reflect the fair value of the copyrighted material, that copyright owners were not expected to subsidize public broadcasting, and that Congress felt that the growth of public broadcasting was in the public interest. See 43 FR 25068 (June 8, 1978) (citing S. Rep. No. 94–473, at 101 (1975); H.R. Rep. No. 94–1476, at 118 (1976)). From its review of the legislative history, the CRT concluded that it had broad discretion based on the interests Congress had defined. 43 FR 25068 (June 8, 1978).

The CRT then looked at a number of different formulas submitted by ASCAP and Public Broadcasters for calculating royalties and concluded that there was no one ideal solution within the framework of a statutory compulsory license. 43 FR 25069 (June 8, 1978). Based on what it had before it, the CRT then concluded that an annual payment of $1.25 million was a reasonable royalty fee. It also provided for an inflationary adjustment during the 1978–1982 period and explained that the annual fee was not determined by application of a particular formula, but was "approximately what would have been produced by the application of several formulas explored by this agency during its deliberations." Id.

In adopting the annual fee, the CRT stated that its determination was made on the basis of the record before it, and stressed that "[w]hen this matter again comes before the CRT, the CRT will have the benefit of several years experience with this schedule. The CRT does not intend that the adoption of this schedule should preclude active consideration of alternative approaches in a future proceeding." Id. The CRT, however, never conducted another section 118 proceeding before its abolition in 1993, because voluntary licenses were negotiated for all subsequent periods. Today's decision is the first section 118 rate adjustment that has required a formal proceeding.

IV. Report of the Panel

After six months of hearings and written submissions of ASCAP, BMI, and Public Broadcasters, the CARP delivered its report to the Librarian. The Panel determined that Public Broadcasters should pay an annual fee of $3,320,000 to ASCAP, and $2,123,000 to BMI, for the public performance of works containing ASCAP and BMI music, respectively. The Panel also stated that these annual fees should be paid in accordance with the terms attached as an appendix to its report.[1] Costs of the proceeding (i.e. the arbitrators' fees) were assessed at one-third each to ASCAP, BMI, and Public Broadcasters.

In attempting to determine what constituted a "reasonable" fee for ASCAP and BMI, the Panel consulted the CRT decision described above and examined the same legislative history reviewed by the CRT. The Panel observed that while section 118 did not define the term "reasonable," the legislative history indicated that "reasonable" meant "fair value," and that "fair value" was the functional equivalent of "fair market value." Report at 9. The Panel noted that the parties also generally agreed that fair market value was the proper standard for determining rates, and that fair market value meant "the price at which goods and services would change hands between a willing buyer and a willing seller neither being under a compulsion to buy or sell and both having reasonable knowledge of all material facts." Id. In the Panel's view, although the CRT called it "fair value" rather than "fair market value," the rate determined for ASCAP in the 1978 proceeding was a fair market value determination. Thus, with respect to ASCAP, the Panel was adjusting the fair market value of ASCAP music in 1978 to its present fair market value and, for the first time, establishing the current fair market value of BMI music. Id. at 10–11.

To fix the fair market value of ASCAP and BMI music, respectively, the Panel searched for some type of method or formula that would establish a benchmark to assist in establishing fair market value. ASCAP and BMI, while employing somewhat differing adjustment parameters, advocated using music licensing fees recently paid by commercial television and radio broadcasters as a benchmark for valuing the license fees that Public Broadcasters should pay under section 118. Public Broadcasters urged the Panel to set license fees based upon prior voluntary licensing agreements between Public Broadcasters and ASCAP and BMI.[2] The Panel ultimately rejected each of the parties' approaches and adopted instead its own benchmark.

A. The ASCAP Approach

According to the Panel, ASCAP's proposed use of commercial television and radio license fees was premised on several assumptions: (1) that commercial license fees represented fair market value of ASCAP music, whereas past agreements between ASCAP and Public Broadcasters did not; (2) that in recent years, Public Broadcasters have more closely resembled commercial broadcasters due to the rise in commercialization of public television and radio, fiscal success, sophistication, and size; (3) that after adjusting for music usage, the Public Broadcasters should pay the same proportion of their revenues as license fees as do commercial broadcasters; and (4) that ASCAP's proposed methodology takes into account any perceived differences between Public Broadcasters and commercial broadcasters by excluding from Public Broadcasters' revenues any revenues derived from government sources. Only "private revenues," such as corporate underwriting and viewer/listener contributions, were considered under ASCAP's methodology because they, like commercial broadcasters' revenues, are audience sensitive. Id. at 13.

ASCAP's witnesses testified that its methodology yielded an annual fee of $4,612,000 for television plus $3,370,000 for radio—a total of $7,982,000. Id. at 14. ASCAP also performed a confirmatory analysis of this fee by projecting forward the ASCAP fee adopted by the CRT. ASCAP first calculated the ratio of 1995 Public Broadcasters' private revenues[3] to the Public Broadcasters' 1978 private revenues and multiplied this figure by the 1978 fair market value fee set by the CRT. That result was then multiplied by the ratio of 1995 ASCAP music use by Public Broadcasters to the 1978 ASCAP music use by Public Broadcasters. This methodology generated total license fees for 1995 for television and radio of $8,225,000, a figure that ASCAP asserted confirmed its primary methodology. Id. at 14–15.

B. The BMI Approach

According to the Panel, the BMI approach was quite similar to ASCAP's. However, in addition to examining Public Broadcasters' revenues and music use, BMI also examined Public Broadcasters' programming expenditures and audience size. BMI compared total revenues, programming expenditures, and audience size and determined that public television was 4% to 7% the size of commercial television, and that Public Broadcasters should therefore pay a music licensing fee between 4% and 7% of the fee that BMI anticipates commercial television will pay in 1997. BMI similarly concluded that public radio was 3% to 4% the size of commercial radio in recent years. Id. at 15. However, BMI acknowledged that a one-third downward adjustment for music use by public radio stations as compared to commercial radio stations was necessary, yielding a total fee between 1% to 2% of the fees BMI anticipates will be paid by commercial radio in 1997. This methodology yielded a license fee for BMI for 1997 for public television between $4 and $7 million and between $1 to $2 million for public radio. BMI recommended adopting the midpoint between these ranges, yielding $5.5 million for public television and $1.395 million for public radio—a total of $6,895,000. Id. at 15–16.

BMI also submitted that, regardless of its proposed fee, the Panel should not set a fee for BMI less than 42.5% of the

[1] The parties to this proceeding stipulated to the terms of payment. Consequently, only the rates are in issue in this proceeding.

[2] As the Panel observed, these were the primary approaches advocated by the parties. They also advocated alternative approaches and variants of the primary approach. The Panel noted, however, citing examples, that the parties equivocated with respect to these alternatives and sometimes disavowed them entirely. Id. at 11–12.

[3] Public Broadcasters' 1995 revenues were the most recently available annual revenues to ASCAP at the time it filed its written direct case.

combined ASCAP and BMI fees. This argument was based on BMI's assertion that 42.5% of the total share of music on public television belonged to BMI. BMI had no data on its relative share of its music on public radio, but submitted that using BMI's music share on public television was a good proxy for music on public radio in the absence of any evidence on the relative shares of ASCAP and BMI music on public radio. Id. at 16–17.

C. Public Broadcasters

Public Broadcasters argued that the best method for determining fair market value of ASCAP and BMI music was to use the 1992 negotiated licenses between Public Broadcasters and ASCAP and BMI as a benchmark, and then to adjust for any changed circumstances. Public Broadcasters asserted that this was the only method explicitly encouraged by the framers of section 118. Id. at 17.

While conceding that there is no precise definition of "changed circumstances" since the 1992 voluntary agreements with ASCAP and BMI, Public Broadcasters asserted that changes in their programming expenditures and music use offered the best indicators of "changed circumstances." Public Broadcasters performed an economic regression analysis with respect to programming expenditures and found a growth rate of 7.15% from 1992 through 1996. By mathematically increasing the combined ASCAP and BMI license fees payable under the 1992 agreements and determining that music use did not change during that time period, Public Broadcasters advocated a combined ASCAP/BMI license fee for both public television and radio of $4,040,000 per year. Id. at 18. Public Broadcasters then apportioned this fee between ASCAP and BMI based upon music usage and determined that BMI's share of music on public television was 38–40% of the total music usage. As did BMI, Public Broadcasters assumed that it was reasonable to use public television music usage as a proxy for public radio music usage. Id. at 19.

D. The Panel's Analysis

After examining the parties' approaches, the Panel concluded that "[b]oth *general* approaches * * * suffer significant infirmities." Id. at 19. The Panel agreed with Public Broadcasters that previously negotiated licenses with ASCAP and BMI were logical starting points to determine fair market value, but concluded that the agreements from 1982 through 1997 understate the fair market value of ASCAP and BMI music. The Panel also determined that, while licenses negotiated with similarly situated parties should be considered, ASCAP's and BMI's licenses with commercial broadcasters overstate the fair market value of music on public television and radio. Id. at 19–24. Instead, the Panel adopted its own methodology based upon the CRT's 1978 determination, yielding an annual fee of $3,320,000 for ASCAP, and $2,123,000 for BMI.

Because the Panel considered the voluntary license agreements that Public Broadcasters negotiated with ASCAP and BMI for the 1992–1997 license period to be a logical starting point to determining fair market value, the Panel first considered Public Broadcasters' approach. The Panel was particularly impressed with the fact that the ASCAP license agreements contained "no-precedent clauses" which, in essence, are statements that the rates and terms prescribed in the agreement have no precedential value in any future negotiation or proceeding before a CARP. These no-precedent clauses were included in the voluntary agreements at the insistence of ASCAP. The Panel concluded that "[t]his clause clearly evinces an attempt by ASCAP to protect itself from future tribunals which might be tempted to use the prior agreement as a benchmark for establishing fair market value. And such an attempt to protect itself is corroborative of ASCAP's genuine belief that the agreed rates were below fair market value." Id. at 22. The Panel made a similar finding with respect to "nondisclosure" clauses included in BMI's license agreements which forbade disclosure of the terms of the agreements to the public, including a CARP. Id. at 22–23. The Panel also concluded that the "huge disparity" between recent ASCAP/BMI commercial license rates and the rates for Public Broadcasters under private agreements underscored that the prior agreements were not indicative of fair market value. Id. at 23. Therefore, the Panel rejected Public Broadcasters' approach.

The Panel then focused on ASCAP and BMI's approach using commercial broadcaster license rates. The Panel rejected this approach because, while Public Broadcasters have become more "commercial" in recent years, "significant differences remain which render the commercial benchmark suspect." Id. at 24. Commercial broadcasters raise revenues through advertising and audience share, whereas Public Broadcasters have no such mechanism:

> In the commercial context, audience share and advertising revenues are directly proportional and also tend to rise as programming costs rise—increased costs are passed through to the advertiser. No comparable mechanism exists for Public Broadcasters. Increased programming costs are not automatically accommodated through market forces. Contributions from government, business, and viewers remain voluntary. For these reasons, commercial rates almost certainly overstate fair market value to Public Broadcasters and, even restricting the revenue analysis to "private revenues," as did ASCAP, does not fully reconcile the disparate economic models.

Id. at 24 (citations omitted).

Having rejected both sides' approaches, the Panel fashioned its own benchmark for determining fair market value of ASCAP and BMI music. The Panel's methodology was based upon the fundamental assumption that the fee set by the CRT in 1978 was the fair market value of ASCAP music under the section 118 license as of that time. According to the Panel, that assumption was "an eminently reasonable, and essentially uncontroverted, assumption. Indeed, this Panel is arguably bound by the 1978 CRT determination of fair market value of the ASCAP license." Id. at 25. The Panel took the 1978 rate and "trended [it] forward" to 1996 by adjusting for the change in Public Broadcasters' total revenues and the change in ASCAP's music share. This methodology yielded the fair market value of an ASCAP license to Public Broadcasters. The Panel then determined the fair market value of a BMI license to Public Broadcasters by applying its current music use share to the license fee generated for ASCAP for 1996. The Panel noted that its methodology was "similar to alternate analyses employed by both ASCAP and Public Broadcasters to demonstrate the reasonableness of their approaches." Id.

To "trend forward" the CRT's 1978 ASCAP license fee to the present, the CARP divided that fee ($1,250,000) by Public Broadcasters' total 1978 revenues ($552,325,000) and multiplied the result by Public Broadcasters' total 1996 revenues ($1,955,726), resulting in a "1996 trended ASCAP license fee" of $4,426,000, before adjusting the fee to take account of a decline in ASCAP's share of music usage. Id. at 26.

The Panel determined that the change in Public Broadcasters' revenues from 1978 to 1996,[4] along with changes in music share, were the best indicator of relevant changed circumstances which required an adjustment to the chosen benchmark. That is, Public Broadcasters would likely pay license fees that constitute the same proportion of their

[4] The most recent year for which data was available to the Panel. See footnote 7 infra

total revenues as did the license fees that they paid in 1978, the last occasion in which they paid fair market rates. Id. at 27. The Panel did acknowledge there was "no commonly accepted indicator that would allow a finder-of-fact to precisely adjust a fair market value benchmark to reflect relevant changed circumstances," noting that other factors, such as revenues, audience share, programming expenditures, and the Consumer Price Index have been used. Id. at 27–28.

> Of these, the Panel concludes that revenues is [sic] the best indicator of relevant changed circumstances because it incorporates the forementioned factors and others. Changes in audience share and programming expenditures are reflected in revenues. Changes in revenues over time also serve as a proxy for an inflation adjustment. While the CPI gauges inflation at the consumer level, revenues gauge inflation at the industry-specific level. Accordingly, in our analysis, an inflation adjustment from 1978 to 1996 is obviated.

Id. at 28 (citation omitted).

The Panel also determined that it was more appropriate to use Public Broadcasters' total revenues, rather than examine only "private" revenues, as advocated by ASCAP. There was no need to confine the analysis to private revenues, because the Panel did not accept ASCAP's use of commercial broadcasters' rates as the appropriate benchmark and because the Panel was concerned with Public Broadcasters' revenue trends (i.e., increases) over the relevant period, not with how the revenues were raised. Id. at 29.

Finally, with respect to revenues, the Panel explained why it used Public Broadcasters' 1996 revenues and 1978 revenues in its formula. Using the 1996 revenue data was important because it was the most recent data available to the parties and yielded the most accurate fee for the 1998–2002 period. Id. at 30. The Panel also rejected Public Broadcasters' assertion that the Panel should use Public Broadcasters' 1976 revenues, which were the most recent revenues available to the CRT when it set its fair market value fee in 1978. The Panel stated that the record did not necessarily support Public Broadcasters' assertion and noted that use of 1976 revenues would have actually yielded higher license fees. Id. at 31.

The Panel then adjusted the figure produced by its revenue growth trending formula to account for changes in the relative share of ASCAP music used by Public Broadcasters in 1996 as compared to 1978. The Panel determined that "the ASCAP share of total ASCAP/BMI music used by Public Broadcasters has declined from about 80%–83% in 1978 to about 60%–61% in 1996, representing about a 25% decline in its music share." Id. at 32. Accordingly, the Panel made a 25% downward adjustment to the "1996 trended ASCAP license fee" of $4,426,000, resulting in an ASCAP license fee of $3,320,000. Id. at 26. In order to determine this decline, the Panel was required to infer the proportion of music shares between ASCAP and BMI in 1978 because evidence of such music shares does not exist.[5] The Panel made this inference based upon two significant pieces of record evidence.

First, since 1982, both ASCAP's and BMI's negotiated fees with Public Broadcasters reflect relative shares of about 80%/20% of the music use of Public Broadcasters. While acknowledging that the voluntarily negotiated licenses were not indicative of fair market value, the Panel was "persuaded that the consistent division of fees reflects the parties' perception of respective music use shares, as confirmed by data available to each party." Id. at 33. Absent more reliable information, the Panel presumed that the 80%/20% split that had prevailed since 1982 also existed in 1978. The Panel felt buttressed in this assumption because "in its trending formula, ASCAP did not hesitate to use its music use data from *1990* as a proxy for 1978." Id.

Second, the Panel determined that the 80%/20% split in music share was corroborated by the fact that in 1978 the CRT adopted a $1,250,000 annual fee while being aware that BMI had negotiated a $250,000 annual fee. The Panel concluded, "presuming the CRT did not arbitrarily determine fees without regard to relative music share, we infer music use shares for ASCAP and BMI of 83% and 17%, respectively, for 1978." Id. at 33–34. The Panel then concluded that ASCAP's 1996 music share was 60%–61%, based upon an analysis presented by Public Broadcasters that it found "more comprehensive and more reliable" than BMI's analysis. ASCAP did not present a music share analysis. Id. at 32 n.42.

The Panel then took the $3,320,000 ASCAP fee and used it to determine BMI's fee. The Panel concluded that BMI's music share increased from about 17%–20% in 1978 to about 38%–40% in 1996. Selecting 39% as the appropriate figure, the Panel concluded that BMI's share of the combined ASCAP/BMI fees must also be 39%. The Panel calculated BMI's license fee of $2,123,000 by "[m]ultiplying the ASCAP license fee by .63934," which "yields the mathematical equivalent of 39% of the *combined* license fees of both ASCAP and BMI (39% × [3,320,000 + 2,123,000] = $2,123,000)." Id. at 27 n. 40.

The Panel offered several reasons why it was appropriate to derive BMI's fair market value share solely on the basis of music share. The Panel rejected ASCAP's assertion that the music contained in ASCAP's repertory is intrinsically more valuable than the music in BMI's inventory, finding no credible evidence for such a distinction. Id. at 35.

The Panel also rejected ASCAP and BMI's argument that the type of methodology adopted by the Panel is impermissible as a matter of law because section 118 requires that separate fees be set for ASCAP and BMI that are based upon separate evaluations of their respective licenses. The Panel found no proscription in the statute, the legislative history, or the 1978 CRT decision for a methodology which yields a combined fee, after which the combined fee is divided between ASCAP and BMI. While the Panel must set separate rates for ASCAP and BMI, the obligation to do so was "wholly distinct from the methodology we employ to determine those fees." Id. at 36.

The Panel undertook a separate approach to confirm its results for BMI by using the rate prescribed by the 1978 BMI negotiated license as a fair market value benchmark for 1978. The 1978 agreement is the only BMI or ASCAP agreement that did not contain a "no-precedent clause" or "nondisclosure clause." However, the Panel did not accept this figure as representative of fair market value because the circumstances surrounding the 1978 negotiation were not sufficiently explored. Instead, the Panel used the figure solely for corroborative purposes. Id. at 36–37.

The Panel used the same methodology for BMI as it did for ASCAP, dividing the 1978 BMI license fee by the Public Broadcasters' total 1978 revenues and multiplying the result by the Public Broadcasters' total 1996 revenues. After adjusting for the increase in BMI's music share between 1978 and 1996, the formula yielded a figure of $2,082,000, within 2% of the fee adopted by the Panel under its primary approach. The Panel noted that it could also "generate the ASCAP fee from the BMI fee just as we previously generated the BMI fee from the ASCAP fee—with similarly confirming results." Id.

[5] Evidence does exist, however, for the proportion of music shares for 1996.

In conclusion, the Panel stated that its methodology yielded what it believed to be the best result:

In adopting this methodology, we are fully cognizant of the several assumptions and inferences required. While we defend these assumptions and inferences as eminently reasonable, we must recognize the potential for imprecision. Such is the hazard of rate-setting based upon theoretical market replication. The methodologies advanced by the parties involve, we believe, less reasonable assumptions and inferences. We do not here advance a perfect methodology (none exists), merely the most reasonable and least assailable based upon the record before us.

Id. at 38 (citation omitted).

V. The Librarian's Scope of Review

The Librarian of Congress has, in previous proceedings, discussed his scope of review of CARP reports. See, e.g., 63 FR 25394 (May 8, 1998); 62 FR 55742 (October 28, 1997); 62 FR 6558 (February 12, 1997); 61 FR 55653 (October 26, 1996). The scope of review adopted by the Librarian in these proceedings has been narrow: the Librarian will not reject the determination of a CARP unless its decision falls outside the "zone of reasonableness" that had been used by the courts to review decisions of the CRT. Recently, the U.S. Court of Appeals for the District of Columbia Circuit issued its first decision reviewing a decision of the Librarian under the CARP process, and articulated its standard of judicial review for the Librarian's CARP decisions. *National Ass'n of Broadcasters* v. *Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998) (*NAB*). The court's determination is the pronouncement on the judicial standard of review in CARP proceedings, and warrants a consideration by the Register and the Librarian as to what effect, if any, the decision has on their review of a CARP decision.

NAB involved distribution of cable royalties for the 1990–1992 period. In that proceeding, the Librarian adopted the determination of the CARP, with some modifications, and explained why the CARP did not act in an arbitrary manner, or contrary to the provisions of the Copyright Act, that would have required a rejection of its report. The court reviewed the Librarian's decision in accordance with 17 U.S.C. 802(g), which provides that the court may only modify or vacate the Librarian's decision if it finds that he "acted in an arbitrary manner." The court undertook a discussion of how its review of the Librarian's decision under the section 802(g) arbitrary standard was different from its review of CRT determinations under the arbitrary standard set forth in chapter 7 of title 5 of the United States Code (i.e., the Administrative Procedure Act).

After a lengthy discussion of its prior review of CRT determinations, and the amendments made to title 17 by the Copyright Royalty Tribunal Reform Act of 1993 which eliminated the CRT and replaced it with the CARP system, the court determined that Congress did intend to change the scope of judicial review of the Librarian's CARP decisions:

We conclude that our review of the Librarian's distribution decision under subsection 802(g) is significantly more circumscribed than the review we made of the Tribunal decisions under section 810. As a result, in applying the "arbitrary manner" standard set forth in subsection 802(g), we will set aside a royalty award only if we determine that the evidence before the Librarian compels a substantially different award. We will uphold a royalty award if the Librarian has offered a facially plausible explanation for it in terms of the record evidence. While the standard is an exceptionally deferential one, we think it is most consistent with the intent of the Congress as reflected in the language, structure and history of the 1993 Act.

146 F.3d at 918.

Quite naturally, the principal focus of the *NAB* decision is on the court's review of the Librarian's decision, not the Librarian's review of the CARP determination. The court did state, however, that the word "arbitrary" that appears in section 802(f) of the Copyright Act (which gives the court its review authority), and the word "arbitrary" that appears in section 802(g) (which gives the Librarian his review authority) are "not coextensive." Id. at 923. The court further noted that the difference "is not a surprising administrative arrangement given the bifurcated review of royalty awards (first by the Librarian and then by this Court) and the deference to be accorded the Register's and the Librarian's expertise in royalty distribution." Id. But the court did not say how exacting the review of the CARP report by the Librarian and the Register should be.

Although the *NAB* court does not elucidate the standard of review to be applied by the Librarian and the Register, it does imply a difference between that review and the court's. If the Librarian's CARP decisions are entitled to an unusually wide level of deference, then his level of scrutiny of a CARP's decision must be higher than that which the court will apply to his decision.

The Register and the Librarian do not interpret the court's statements to mean that they must engage in a highly exacting review. The court did acknowledge that the CARP, not the Register or the Librarian, is the fact-finder in CARP proceedings and "is in the best position to weigh evidence and gauge credibility." Id. at 923, n.13. Moreover, the court stated that the Librarian would act arbitrarily if "without explanation or adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award." Id. at 923. It must be remembered that section 802(f) provides that the Librarian shall adopt a CARP's determination unless he finds that it acted arbitrarily or contrary to the Copyright Act.

The Register and the Librarian conclude that their scope of review as announced in prior decisions remains an appropriate standard. That is, the Register and the Librarian will review the decision of a CARP under the same "arbitrary" standard used by the courts to review decisions of the CRT. If the CARP determination falls within the "zone of reasonableness," the Librarian will not disturb it. See *National Cable Television Ass'n* v. *Copyright Royalty Tribunal*, 724 F.2d 176, 182 (D.C. Cir. 1983) (*NCTA* v. *CRT*). It necessarily follows that even when the Register and the Librarian would have reached conclusions different from the conclusions reached by the CARP, nevertheless they will not disturb the CARP's determination unless they conclude that it was arbitrary or contrary to law. This standard is higher than the court's review announced in *NAB*, yet is consistent with the provisions of section 802(f).

VI. Review of the CARP Report

Section 251.55(a) of the Library's rules provides that "[a]ny party to the proceeding may file with the Librarian of Congress a petition to modify or set aside the determination of a Copyright Arbitration Royalty Panel within 14 days of the Librarian's receipt of the panel's report of its determination." 37 CFR 251.55(a). Replies to petitions to modify are due 14 days after the filing of the petitions. 37 CFR 251.55(b).

The following parties filed petitions to modify: ASCAP, BMI, Public Broadcasters, and SESAC, Inc. ("SESAC"). Replies were filed by ASCAP, BMI, Public Broadcasters, and SESAC.

ASCAP, BMI, and Public Broadcasters all attack the Panel's adopted methodology as arbitrary and contrary to law, and each urges the Librarian to substitute his determination based upon that party's respective rate proposals.

SESAC filed a petition to modify for the limited purpose of challenging a certain statement made by the Panel in a footnote of its report regarding music use by Public Broadcasters.[6]

VII. Review and Recommendation of the Register of Copyrights

As discussed above, the parties to this proceeding submitted petitions to the Librarian to modify the Panel's determination based on their assertions that the Panel acted arbitrarily or contrary to the applicable provisions of the Copyright Act. These petitions have assisted the Register in identifying what evidence and issues in this proceeding require scrutiny. The law gives the Register the responsibility to make recommendations to the Librarian regarding the Panel's determination, 17 U.S.C. 802(f); and in doing so, she must conduct a thorough review.

Prior to reviewing the Panel's report and the parties' objections, the Register makes two important observations. First, the Register's review is confined to what the Panel did, not what it could have done. As described above, ASCAP, BMI, and the Public Broadcasters each proposed their own methodology—their own mathematical formula—for calculating the appropriate annual royalty fees for the 1998–2002 period. The Panel, however, adopted its own methodology. It is this methodology that the Register will review to determine whether it is arbitrary or contrary to law as provided by section 802(f) of the Copyright Act. The Register will not consider what the Panel could have done or what a party asserts it should have done, even if, had she heard this proceeding in the first instance, she would have chosen another methodology. Only if the Register determines that the Panel's methodology is, in whole or in part, arbitrary or contrary to the Copyright Act will she recommend another methodology. If one or more aspects of the Panel's methodology is flawed, yet the methodology as a whole withstands scrutiny, then the Register will recommend changes so that the Panel's approach conforms with section 802(f). If, and only if, the Panel's methodology is fundamentally flawed will the Register recommend that the Librarian reject the Panel's approach in its entirety and adopt a different methodology for fixing the section 118 royalty fees. See 63 FR 25398–99 (May 8, 1998).

Second, the Register embraces the proposition that rate adjustment proceedings are not precise applications of mathematical formulas which yield the "right" answer. The Panel acknowledged this by observing that its methodology is not perfect, but is "merely the most reasonable and least assailable based upon the record." Report at 38. The courts have also acknowledged that rate adjustments in the compulsory license setting involve estimates and approximations. *See NCTA* v. *CRT*, 724 F.2d at 182 ("The Tribunal's work * * * necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within the 'zone of reasonableness.'"). Therefore, in reviewing the various aspects of the Panel's selected methodology in this proceeding, and as a whole, the Register will not recommend rejecting the Panel's conclusions unless they draw no support from the record and are based upon irrational estimates or approximations.

A. Objections of ASCAP and BMI

ASCAP and BMI raise numerous objections to the Panel's methodologies and recommend that the Librarian adopt their respective approaches as the means of assessing fees in this proceeding. Because several of ASCAP's and BMI's objections overlap, they are addressed here in a single section.

1. The 1978 CRT fee was not a fair market value fee. The Panel accepted the CRT's $1.25 million fee as representing the fair market value of ASCAP music in 1978. BMI disputes this and offers several reasons why it considers the 1978 fee not representative of fair market value. First, BMI notes that the approach advocated by ASCAP to the CRT in 1978 took the rates paid by commercial broadcasters and discounted them by a range of 20% to 50%. This, in BMI's opinion, demonstrates that ASCAP was offering Public Broadcasters a subsidy. BMI Petition to Modify at 22. Second, BMI notes that representatives of ASCAP stated in an article appearing after the 1978 decision that they wanted to give Public Broadcasters a discount for the first 1978–1982 licensing period. Id.

Third, BMI notes that the CRT stated that it did "not intend that the adoption of [the $1.25 million fee] should preclude active consideration of alternative approaches in a future proceeding." Id. at 23 (quoting 43 FR 25069). BMI suggests that this statement is evidence that the CRT considered its fee to be "experimental," and, therefore, not fair market value. Id. at 23–24.

BMI submits that the Panel should have engaged in its own independent analysis of whether the 1978 fee represented fair market value before accepting the CRT figure. Failure to do so is, in BMI's view, arbitrary action. BMI asserts that it would have submitted information to the Panel on the inappropriateness of using the 1978 fee as a benchmark, if it had known that the Panel would reject BMI's methodology in favor of using the 1978 fee. BMI, therefore, charges that it was denied the opportunity to rebut use of the 1978 fee, particularly since it was not a party to the 1978 proceeding.

Recommendation of the Register

The Panel did not act arbitrarily in accepting the 1978 CRT fee as the fair market value of ASCAP music for that period. The CRT plainly acknowledged in 1978 that it was required to adopt a royalty fee that represented the "fair value" of ASCAP music, and stated that the $1.25 million fee was a "reasonable" fee that accomplished that task. 43 FR 25068 (June 8, 1978). The anecdotal evidence offered by BMI as to ASCAP's intentions in 1978 is far from conclusive proof that the 1978 fee was not fair market value, and was in fact a subsidy for Public Broadcasters. Furthermore, the Register is not persuaded that the CRT's statement that its fee did not "preclude active consideration of alternative approaches in a future proceeding" is evidence that the CRT was adopting a fee less than fair market value. Rather, the CRT seemed to be stating that there may, in the future, be better ways to calculate fair market value, but the fee adopted by the CRT was nevertheless the most representative of fair market value for that proceeding.

Concluding that the CRT's fee was not the fair market value of ASCAP music in 1978, or insisting that the Panel should have conducted its own study as to what was the fair market value of ASCAP music in 1978, would be dangerous precedent. Such an approach would encourage collateral attack on all previous decisions of the CRT and the CARPs. No future CARP could rely on

[6] SESAC objects to footnote 10 on page 6 of the Panel's report wherein the Panel states that "[t]he repertory of the third performing rights organization, SESAC, not a party to this proceeding, comprises only about one-half of one percent of PBS's music use." The task of the Register and the Librarian in CARP proceedings is to review CARP decisions, not to make corrections or modifications to statements made by the Panel at the behest of nonparties. However, the Register and the Librarian note that the Panel's statement regarding the music share of SESAC, a nonparty, is patently obiter dicta, and has no precedential value in this proceeding or future section 118 proceedings. The better practice in future proceedings would be for the CARP to avoid making statements that might be interpreted as affecting the rights or status of a nonparty. The Register notes that the parties to this proceeding expressly did not object to SESAC's petition to modify.

the determination of this Panel or any other in attempting to reach its fair market value assessment under section 118. This is not to say that a prior decision of the CRT or CARP cannot be questioned by future parties and, if clearly demonstrated to be in error, rejected by a CARP. Nor should a future CARP ever be required to base its evaluation of "fair market value" on a previous determination of fair market value by the CRT or a previous CARP. But the Register does not recommend declaring, based on unconvincing evidence, that this Panel acted arbitrarily in accepting the CRT's 1978 fee.

The Register is also not persuaded that BMI has been denied an opportunity to challenge the validity of the 1978 CRT fee. It is true that BMI did not know, until the Panel released its decision, that the Panel would use the 1978 fee as a basis for adopting its current fee. However, that will virtually always be the case in a rate adjustment proceeding or distribution proceeding when a CARP utilizes its own methodology as opposed to one offered by the parties. The Register will not reject the methodology of a Panel simply because the parties were not presented with the opportunity, during the hearing phase, to criticize and attack the Panel's chosen methodology. To do otherwise would effectively preclude a Panel from adopting a methodology other than one proposed by the parties.

Furthermore, the 1978 fee was very much a part of the record in this proceeding. The existence of the fee and the CRT decision adopting it were recognized and acknowledged by all parties to this proceeding, including BMI. ASCAP used the 1978 fee in its alternative methodology to verify the accuracy of its primary methodology. That BMI did not mount a serious evidentiary challenge to the accuracy of the fee is not due to lack of opportunity.

2. The Panel incorrectly used Public Broadcasters' 1978 revenues, rather than their 1976 revenues. Both ASCAP and BMI make this accusation. In order to "trend forward" from the $1.25 million 1978 ASCAP award, the Panel began with Public Broadcasters' 1978 annual revenues (the Panel's equation is fair market value in 1978 divided by 1978 Public Broadcaster revenues, or $1.25 million/$552.325 million). Report at 26. ASCAP and BMI assert that use of Public Broadcasters' 1978 revenues is flawed because the CRT did not have these revenue figures when it calculated the $1.25 million fee. Rather, the most recent figure available to the CRT was Public Broadcasters' 1976 revenues, which were $412.2 million. ASCAP notes that because the Panel used 1978 revenues instead of 1976 revenues, the effective rate of the 1978 rate is reduced, thereby devaluing the CRT's 1978 determination.

The effective rate of the 1978 CRT decision is, according to ASCAP, expressed as a percentage relative to Public Broadcasters' revenues. ASCAP Petition to Modify at 6. The $1.25 million fee divided by $412.2 million (the 1976 revenues) yields an effective rate of .303% of revenues. According to ASCAP, this means that the CRT in 1978 intended to give ASCAP a fee that represented .303% of Public Broadcasters' most recently known revenues (i.e., the 1976 revenues). By using the 1978 revenues, the Panel reduced the effective rate to .22% ($1.25 million divided by $552.325 million), which is not what the CRT intended to award. Both ASCAP and BMI assert that the Panel should have used the 1976 revenues and "trended forward" from there in order to maintain the effective rate of the CRT decision.

BMI asserts that there is another reason for using the 1976 data. As was the case for the CRT, the Panel used data to set a royalty fee beginning in 1998 that was only as recent as 1996.[7] The Panel's methodology takes account of only an 18-year period, 1978–1996. BMI submits that the Panel should have taken account of a 20-year period, 1976–1996, in order to obtain a more accurate trend and to make up for the lack of data for 1997 and 1998. BMI Petition to Modify at 28.

Recommendation of the Register

The Register determines that the Panel did not err in using Public Broadcasters' 1978 revenues, as opposed to 1976 revenues, as the basis of its trending methodology. If it could be conclusively demonstrated that the CRT used Public Broadcasters' revenues as the means of fashioning the $1.25 million 1976 fee, ASCAP and BMI's argument would be more persuasive. That is not, however, the case. Although the CRT "examined a number of formulas," it concluded "there is no one formula that provides the ideal solution, especially when the determination must be made within the framework of a statutory compulsory license." 43 FR 25069 (June 8, 1978). Although the CRT had Public Broadcasters' 1976 revenues before it, it is unclear what, if any, use it made of the data. The CRT said nothing about the $1.25 million fee representing a .303% effective rate of Public Broadcasters' revenues, nor is there any indication in the 1978 decision that the CRT was attempting to establish a fixed effective rate. ASCAP's argument presumes that the CRT did use a mathematical formula in adopting a fee, even though the decision suggests the contrary.

What is clear is that the CRT determined that the $1.25 million fee was the fair market value of ASCAP music in 1978, even if it did use data from 1976. Id. The Panel reached the same conclusion by stating that "the blanket license fee set by the CRT in 1978, for use of the ASCAP repertory by Public Broadcasters, reflects the fair market value of that license *as of 1978*." Report at 25 (emphasis added). If $1.25 million represented fair market value in 1978, then it was reasonable for the Panel to begin its analysis using Public Broadcasters' revenues from that same year, whether or not the CRT had access to such data. The Panel stated that it felt "comfortable" doing this because Dr. Adam Jaffe, Public Broadcasters' economic expert, had taken a similar approach in a different context. Report at 31 (Dr. Jaffe's formula used the 1992–1997 voluntary agreements with ASCAP and adjusted for changed circumstances from 1992, even though the parties presumably negotiated the 1992 agreement using only 1991 data). The Register sees nothing in the record that indicates it was arbitrary to take this approach.

BMI's argument that the Panel should have considered changes in revenues over a 20-year period, rather than 18 years, to account for the lack of information for 1998 Public Broadcasters' revenues, also has no merit. It will probably always be the case in a section 118 proceeding that data regarding revenues will not be completely current. Use of the Public Broadcasters' 1998 revenues, or 1997 revenues for that matter, would yield a fair market value fee that might be even more accurate than the Panel's. However, that data was simply unavailable. The Panel could have considered a 20-year period as a rough means of adjusting for lack of 1998 data. The fact that it did not do so was not arbitrary.[8]

3. The Panel did not provide for fee adjustments during the 1998–2002 period. ASCAP argues that it was

[7] At the time of filing of written direct cases in this proceeding, ASCAP and BMI had data of Public Broadcasters' revenues only up to 1995. However, Public Broadcasters introduced their 1996 revenues as part of their case. See Public Broadcasters Direct Exhibit 4.

[8] Furthermore, the Register questions the perceived accuracy of starting with 1976 data as a means of compensating for lack of 1998 data. The only thing this approach guarantees is a larger fee since it is known that Public Broadcasters' revenues were less in 1976 than they were in 1978.

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arbitrary for the Panel not to provide for interim adjustments to the ASCAP fee for each year of the 1998–2002 license period. ASCAP notes that the CRT provided for annual adjustments for inflation through use of the Consumer Price Index ("CPI") in its 1978 decision. and that the Panel should have. at a minimum. provided for similar adjustments. As an alternative to using the CPI. ASCAP recommends that the effective rate of the CRT's 1978 decision (.303% of Public Broadcasters' 1976 revenues) be applied to Public Broadcasters' revenues for each year of the 1998–2002 period to determine an annual fee.

Recommendation of the Register

The Panel considered whether to provide cost-of-living adjustments and expressly decided not to do so. concluding that "[g]iven the inherent vagaries and imprecision of estimating fair market value in an imaginary marketplace. we are comfortable concluding that the rate yielded for 1996 reasonably approximates a fair market rate for the entire statutory period." Report at 31.

The Register cannot say that the Panel's conclusion was arbitrary. The Panel recognized that the methodology it used to set the fees was based on "several assumptions and inferences" which. although "eminently reasonable" created a "potential for imprecision. Such is the hazard of rate-setting based upon theoretical market replication." Report at 38 (citing *NAB.* 146 F.3d at 932). The Panel admitted that it was not "advanc[ing] a perfect methodology (none exists). merely the most reasonable and least assailable based upon the record before us." Id.

The Panel also observed that the 1996 Public Broadcasters' revenue figures that it used in determining the fee may have been somewhat overstated due to changes in accounting procedures. Id. at 30. Based on this finding and the CARP's determination that use of revenues account for inflationary changes (id. at 28). the Register cannot say that the Panel was arbitrary or unreasonable in deciding not to provide for annual adjustments. In fact. the Panel's assessment that the 1996 revenue figures may have been an overstatement only supports its conclusion that no annual adjustment was necessary.

Certainly. the Panel could have required annual adjustments of ASCAP's fee based on annual changes in Public Broadcasters' revenues. as ASCAP now requests. But it was not required to do so. given the absence of record evidence compelling such a result.

4. The Panel arbitrarily excluded Public Broadcasters' ancillary revenues from their calculation. ASCAP asserts that the Panel excluded without explanation $122 million in "ancillary" revenues earned by the Public Broadcasters in 1996. "Ancillary" revenues. according to ASCAP. are comprised largely of the sale of public broadcasting merchandise such as videos. audiotapes. toys and books. ASCAP submits that ancillary revenues must be included in the Panel's calculation because the Panel acknowledged that gross revenues of Public Broadcasters were the best indication of their ability to pay. According to ASCAP. Public Broadcasters' 1996 revenues should be $2.077.776.000. instead of the $1.955.726.000 figure used by the Panel. ASCAP Petition to Modify at 9.

Recommendation of the Register

In discussing what comprised the Panel's determination of Public Broadcasters' 1996 revenues. the Panel stated that they were excluding "all 'off balance sheet income' such as revenues derived from merchandising. licensing. and studio leasing." Report at 30 (citing ASCAP Direct Exhibit 301 and ASCAP's Proposed Findings of Fact and Conclusions of Law (PFFCL)). While a specific explanation for exclusion of such income would be desirable. the Register does not find the Panel acted arbitrarily. First. the Register does not agree with ASCAP's conclusion that the Panel was setting Public Broadcasters' 1996 revenues as gross revenues from all sources. The Panel stated that it was using Public Broadcasters' total revenues. and cited CPB's fiscal year 1996 report for that figure. Report at 26. As ASCAP acknowledges. CPB does not include ancillary income in its calculation of annual revenues. ASCAP PFFCL at 39. ¶ 94. The total revenues figure. therefore. expressly did not include ancillary income.

Second. the Register concludes that it was reasonable for the Panel to exclude ancillary income. Merchandising of toys. tapes and books. and leasing studio facilities to others. are not part of the business of broadcasting music on public broadcasting stations. CPB apparently acknowledges this point as well. excluding ancillary income from its report of Public Broadcasters' revenues because ancillary income does not form a basis for awarding grants to Public Broadcasters. Id. ASCAP has failed to demonstrate that Public Broadcasters' activities such as selling books and toys are so closely tied to broadcasting activities that their revenues must be included in broadcast revenues. See Transcript (Tr.) at 1722 (Boyle) (stating that off balance sheet items "may or may not be relevant" in calculating Public Broadcasters' revenues).

5. The Panel arbitrarily concluded that overall music use remained static since 1978. Both ASCAP and BMI argue that it was arbitrary for the Panel to conclude that overall music use remained relatively constant from 1978 to 1996. given the fact that there was no reliable music use data available until 1992. ASCAP asserts that "[i]f there is no evidence to support an adjustment. the adjustment cannot be made. no matter how relevant it might be." ASCAP Petition to Modify at 14. Both ASCAP and BMI submit that the record. in fact. belies static music use. noting that there are many more public broadcasting stations. and consequently more programs broadcast. since 1976 and that the total volume of music use must therefore have increased substantially. BMI goes on to state that the record supports that. since 1992. use of BMI music has increased an average of 10% on public broadcasting stations. and that the Panel should have factored this into its analysis and awarded BMI a greater fee.

Recommendation of the Register

As described above. the Panel's methodology "trends forward" the CRT's 1978 fee and adjusts for changes in the relative shares of ASCAP and BMI music used by Public Broadcasters since 1978. The Panel did. however. consider whether any change to the methodology was required to account for changes in overall music usage since 1978. Evaluating the scant evidence on the subject. the Panel concluded:

> We find the music analyses presented by Public Broadcasters to be the most comprehensive and reliable. No credible data is available with respect to any trend in *overall* music usage by Public Broadcasters since 1978. However. we accept Public Broadcasters' conclusion that overall music usage has remained constant in *recent* years. Given the dearth of empirical. or even anecdotal. evidence to the contrary. it is reasonable to presume that overall music usage by Public Broadcasters has remained substantially constant since 1978. *See* ASCAP PFFCL 152 ("[T]here is no evidence in the record that total music use on the [Public Television and Public Radio] Stations has changed significantly since 1978.")

Report at 31–32 (citations omitted).

BMI and ASCAP attack the Panel's conclusion regarding music use. arguing. in essence. that the Panel is forbidden from fact-finding in the absence of thoroughly comprehensive record evidence. The Register cannot accept ASCAP and BMI's argument in this instance. There is no question that record evidence of music use prior to 1992 would place the Panel's conclusion on firmer ground. Complete and comprehensive evidence will always increase the accuracy of CARP decisions, but it is often such evidence does not exist, or is not presented in a CARP proceeding. See, e.g., 62 FR 55757 (October 28, 1997) (rejecting satellite carriers' argument that Panel decision must be rejected because satellite carriers had no access to evidence to rebut copyright owners' contentions). The Register believes that it is acceptable, given the inherent lack of precision of these proceedings, for a Panel to make reasonable inferences based on an examination of the best evidence available. The Panel's inference regarding music use satisfies this requirement.

In drawing its inference, the Panel examined the best evidence it had available to it: the music use analyses of the parties from 1992–1996. The Panel adopted Public Broadcasters' analysis as the "most comprehensive and reliable." Report at 31. The Panel concluded that Public Broadcasters' analysis demonstrated that overall music use in recent years has remained relatively constant. The Register has no grounds to question this finding. See, 61 FR 55663 (October 28, 1996) ("the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it.") Given that music use was static for a period of five years, the Panel reasonably inferred that this trend was predictive of music use from 1978 to 1991. The inference was backed by ASCAP's statement in its proposed findings that "there is no evidence in the record that total music use on the Stations has changed significantly since 1978. Nor is there any evidence in the record that the Stations' broadcasts of ASCAP music over the same period have changed significantly either in quality or quantity." ASCAP PFFCL at 152, ¶32. The five-year period, coupled with ASCAP's statement, provide sufficient support for the Panel's presumption regarding music use.

Moreover, the Register does not find that ASCAP's and BMI's assertions regarding the increase in the number of public broadcasting stations and programs broadcast require rejection of the Panel's inference. Both ASCAP and BMI presume that there is a direct correlation between number of stations and broadcast hours and the amount of music used. This certainly is a reasonable conclusion, but it is not a necessary one. It could, for example, be the case that public broadcasting stations prior to 1992 used far greater amounts of music than do public broadcasting stations today. Public Broadcasters' evidence tends to support that conclusion. See Public Broadcasters PFFCL at 50–51, ¶¶112–113. In sum, the Register will not, in the absence of concrete evidence to the contrary, allow an inference drawn by a party to trump an inference drawn by a Panel.[9]

6. The Panel's dependence on music share is irrelevant and unsupported by section 118. ASCAP submits that section 118 uncontrovertedly provides that copyright owners of music are entitled to compensation for use of their music by Public Broadcasters. The Panel's reliance on music share as opposed to music use, ASCAP insists, is irrelevant because music share does not necessarily have any correlation to music use. Further, ASCAP submits that reliance on music share is contrary to section 118 because music share presumes that ASCAP and BMI music is interchangeable, whereas section 118 requires establishing separate royalty fees for both catalogues of music.

Recommendation of the Register

The Register determines that the Panel's use of music shares to adjust for the amount of ASCAP and BMI music used on public broadcasting stations since 1978 is not contrary to section 118. The Panel addressed ASCAP's contention that its methodology was contrary to section 118 when it stated:

> [B]oth ASCAP and BMI argue that the type of methodology we advance here is impermissible, *as a matter of law*, because Section 118 requires that separate fees be set for ASCAP and BMI that are based upon *separate* evaluations of their respective licenses. The legislative history behind Section 118, they argue, proscribes any methodology that yields a combined fee, after which the combined fee is divided between ASCAP and BMI. The Panel finds no support whatever for this position in the legislative history of Section 118, the express language of the statute itself, or in the 1978 CRT decision cited by ASCAP. It is undisputed that the statute requires the Panel to set separate rates for ASCAP and BMI but that is an obligation wholly distinct from the methodology we employ to determine those fees.

Report at 35–36 (footnotes omitted) (citations omitted). The Register agrees.

The Register also concludes that the Panel's use of music shares is not arbitrary. The Panel used music shares to gauge changed circumstances since 1978, determining that the amount of ASCAP music, relative to BMI music, had declined from 1978. This is wholly consistent with the Panel's adopted methodology, and is one of the mechanisms necessary to that analysis to account for changed circumstances.

7. There is insufficient record evidence to support the Panel's inferential findings regarding music share. ASCAP and BMI argue that, assuming music share is relevant to the Panel's methodology, the absence of evidence for music shares prior to 1992 prevented the Panel from inferring the shares of ASCAP and BMI music on public broadcasting in 1978.

Recommendation of the Register

For the reasons stated in A5, supra, the Register will not question a reasonable inference of the Panel provided that it draws support from the existing record. The Panel determined that the ratio of ASCAP to BMI music in 1978 was in the range of 80/20 to 83/17. Report at 32. The Panel based this determination on the fact that, since 1981, both ASCAP and BMI negotiated fees that consistently reflected that share of music. The Panel stated that "we are persuaded that the consistent division of fees reflects the parties' perception of respective music use shares, as confirmed by data available to each party." Id. at 33.

The Panel also presumed music shares from 1978 to 1981 were at the same ratio, in the absence of evidence to the contrary. The Panel reasoned that this presumption was corroborated by the fact that the CRT, in awarding ASCAP a $1.25 million fee in 1978, was aware that BMI had negotiated a $250,000 fee. The Panel also relied on the fact that ASCAP itself used 1990 music use data as a proxy for 1978 data. *See* ASCAP PFFCL at 116, ¶266, n.6 ("Because reliable music use data were not available for 1978, ASCAP relied on music use data starting from 1990, the first ASCAP distribution survey year for which detailed information was readily retrievable. Thus, the trended fee assumes that music use on Stations did not change substantially from 1978 to 1990 (and there is no evidence in the record to contradict that assumption.")). The Register determines that these pieces of record evidence support the reasonableness of the Panel's presumptions regarding music share in 1978.

ASCAP also argues that the Panel's split of approximately 80/20 is inaccurate because the Panel mistakenly assumed that ASCAP relied upon its music share as a basis for negotiating its

[9] Given that the Register accepts the Panel's determination that music use has not increased, the Register rejects BMI's request for an adjustment to account for a ten percent increase in its music use.

fee in 1982, 1987 and 1992, when in fact it did not. The record appears far from clear on this point, particularly since Public Broadcasters submit that music share was important to them in negotiating the licenses. *See* Tr. at 2619–21 (Jameson). It is clear that BMI used its relative music share in negotiating its licenses with Public Broadcasters. *See*, Tr. at 3389 (Berenson). In any event, the Register agrees with the Panel that it was the parties' perceptions as to their music shares during their negotiations that is relevant:

> It is important to note that whether the music use shares we have adopted are actually accurate is not critical to our analysis so long as the parties perceived them to be accurate at the time they negotiated the agreements. As we have repeatedly expressed herein, our task is to attempt to replicate the results of theoretical negotiations. If the parties were to use the 1978 license fee as a benchmark, we have no doubt that the resulting fees from such negotiations would reflect the parties' perceived change in ASCAP's music share since 1978, just as they would reflect the parties' perceived change in Public Broadcasters' total revenues.

Report at 34.

8. It was arbitrary for the Panel to infer music share on public radio when no evidence of music use on public radio was presented. ASCAP faults the Panel's use of music share on public television as a proxy for music share on public radio. ASCAP argues that the Panel's citation to the negotiated licenses' historical use of television music use data as a proxy for radio is inappropriate because the Panel determined that those agreements are not representative of fair market value. Further, ASCAP submits that there was no probative evidence adduced that ASCAP ever acquiesced to the use of television data as a proxy for radio data. ASCAP Petition to Modify at 19.

Recommendation of the Register

The Register determines that the Panel's use of television data as a proxy for radio data is not arbitrary. The Panel's statement that Public Broadcasters and ASCAP and BMI used television music data as a proxy for radio data (since no party keeps track of music usage on public radio) was based on the testimony of Paula Jameson, Public Broadcasters' then general counsel, who participated in the fee negotiations. Tr. at 2621–23 (Jameson). Although ASCAP asserts that there is testimony to the contrary, the Register will not disturb the Panel's evaluation of testimony in the absence of compelling grounds to do so. See. *NAB*, 146 F.3d at 923, n.13 ("The Panel, as the initial factfinder, is in the best position to weigh evidence and gauge credibility").

9. The Panel made an arbitrary assumption that Public Broadcasters should pay the same rate of revenue now as they did in 1978 despite their increased commercialization. BMI charges the Panel with failure to include an adjustment in its methodology to account for Public Broadcasters' increased commercialization. BMI notes that the Panel did recognize the increased commercialization, and acknowledged that such commercialization might justify the need to narrow the divergence between fees paid by Public Broadcasters and commercial broadcasters, but then did not do anything about it. BMI submits that using Public Broadcasters' private revenues since 1978, as opposed to total revenues, "is a reasonable way to take into account the increased commercialization of public broadcasting in setting a rate based on the 1978 CRT fee." BMI Petition to Modify at 37.

Recommendation of the Register

While the Panel did observe that Public Broadcasters have become more commercialized in recent years, and that such a convergence between public and commercial broadcasting "may" justify a narrowing of the gap between the fees paid by Public Broadcasters and commercial broadcasters, that observation does not compel an adjustment to the Panel's methodology. The Panel also concluded that significant differences between Public Broadcasters and commercial broadcasters remain. See Report at 24 ("Though corporate underwriting may superficially resemble advertising * * *, the relevant economics are quite different"). Indeed, these differences specifically led the Panel to reject commercial fees as the benchmark for setting Public Broadcasters' fees. Id.

Moreover, the Panel expressly rejected the use of private revenues in its methodology as the means of accounting for increased Public Broadcasters' commercialization:

> [W]hen performing a *trending* analysis based upon the 1978 *Public Broadcasters'* rates, there is no need to restrict the analysis to private revenues because the methodology does not employ any data from the commercial context. In this instance, we need make no attempt to account for differences in the manner the two industries raise revenues. We need not massage the methodology to obtain an 'apples to apples' comparison. Accordingly, total revenues, reflecting the true increase in Public Broadcasters' ability to pay license fees, is the more appropriate parameter.

Report at 29–30.

There is ample testimony to support the Panel's determination that the economics of public broadcasting and commercial broadcasting are quite different. Written rebuttal testimony of Dr. Adam Jaffe at 14–17; Public Broadcasters Direct Exhibit 4. The Panel was, therefore, not compelled by the evidence to account for increased commercialization of Public Broadcasters in adopting their methodology, and it was not arbitrary to reject the use of private revenues as a means for adjusting for commercialization.

10. The Librarian should announce that ASCAP and BMI may seek rate parity with commercial broadcasters in future section 118 proceedings. BMI submits that, assuming that the Librarian does not choose to adopt a methodology that bases Public Broadcasters' fee on what commercial broadcasters pay for music, the Librarian should declare that "BMI is free to argue in a future CARP proceeding that Section 118 license fees should be set on the basis of a comparison to commercial broadcasting, under the facts and circumstances as they may develop in the future." BMI Petition to Modify at 58.

Recommendation of the Register

The task of the Register, and the Librarian, in CARP proceedings is to review the decision of a CARP panel, not to make pronouncements or declarations as to the character or nature of future proceedings. The Register recommends that the Librarian not accept BMI's invitation. The Register notes, however, that parties to a future section 118 proceeding, or any CARP proceeding for that matter, are free to submit any and all evidence they deem relevant to the rate adjustment or royalty distribution, as the case may be.

11. The Panel erred in its allocation of costs among the parties. ASCAP submits that the Panel erred because it did not follow prior CARPs' allocation of costs [10] in rate adjustment proceedings, and did not articulate a reason for its deviation. ASCAP asserts that the Panel should not have treated PBS and NPR as a single party for cost purposes, and instead should have equally split costs between ASCAP and BMI on the one hand, and PBS and NPR on the other. According to ASCAP, "[f]airness dictates an equal division of costs, which is consistent with prior

[10] "Allocation of costs" in a CARP proceeding are the monthly charges of the arbitrators. The costs of the Copyright Office and the Librarian are part of their operating budgets, and are not a part of a CARP's allocation of costs.

precedent and which imposes equal burdens of the proceeding on copyright owners and users." ASCAP Petition to Modify at 30.

Recommendation of the Register

Section 802(c) of the Copyright Act provides that "[i]n ratemaking proceedings, the parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct." 17 U.S.C. 802(c). ASCAP's request raises the question whether a cost allocation decision of a CARP is reviewable by the Librarian under section 802(f).

Section 802(f) of the Copyright Act is the source of the Librarian's review authority of CARP decisions. It provides in pertinent part that "[w]ithin 60 days after receiving the report of a copyright arbitration royalty panel under subsection (e), the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt or reject the determination of the arbitration panel." 17 U.S.C. 802(f). While the "determination" of the Panel is not defined in subsection (f), subsection (e) describes a CARP delivering "a report" of "its determination concerning the royalty fee or distribution of royalty fees, as the case may be." 17 U.S.C. 802(e). It thus appears that the Library's review authority extends only to a Panel's decision on the merits of a ratemaking or distribution proceeding—i.e., the actual setting of rates or allocation of royalties. Is this review authority broad enough to encompass a Panel's allocation of costs under subsection 802(c)?

The Register concludes that it is not. A plain reading of the statute limits the Librarian's review to the substance of the proceeding—the setting of rates or distribution of royalties—contained in the Panel's report, and does not include allocation of the arbitrators' costs among the parties to the proceeding. The fact that the Panel's decision on costs was also contained in its report on the merits of the proceeding does not change the result. Allocation of costs has no bearing on the Panel's resolution on the merits of the proceeding. Furthermore, the Panel in this case could have just as easily issued a separate order allocating costs, and was not required to include such a decision in its report to the Librarian. The Librarian's jurisdiction should not depend on where the CARP announces its allocation of costs.

Even if the Librarian had authority to review the Panel's allocation of costs, the Register would not recommend that the Librarian reject the Panel's allocation of one-third paid by ASCAP, one-third paid by BMI, and one-third paid by Public Broadcasters. The statute plainly gives the arbitrators broad discretion in allocating costs. 18 U.S.C. 802(c) (costs shall be allocated "in such manner and proportion as the arbitration panels shall direct"). The Register is also not persuaded that the language of subsection (c) that requires a CARP to act on the basis of "prior copyright arbitration royalty panel determinations" applies to allocation of costs. This provision is directed to "determinations" of CARPs—i.e. their decisions as to rates and royalty distributions.

The Panel concluded, for purposes of cost allocation, that "ASCAP, BMI, and Public Broadcasters constitute three separate parties." Report at 39. It reached its conclusion based "on the totality of circumstances including the 1978 CRT decision, the history of negotiations between the parties, and the manner in which the parties proceeded herein." Id. The Register believes that the CARP—and not the Register or the Librarian—is in the best position to evaluate these factors and apportion the costs. The Register, therefore, recommends that the Librarian not review or reject the Panel's allocation of costs.

B. Objections of Public Broadcasters

Public Broadcasters fault the Panel for rejecting use of prior negotiated agreements as the benchmark for setting ASCAP's and BMI's fees. In support of this position, Public Broadcasters offer the following three arguments.

1. The Panel violated section 118 by setting fair market value rates in the context of hypothetical free marketplace negotiations, as opposed to within the confines of section 118. Public Broadcasters do not challenge the Panel's evaluation of the meaning of fair market value—the price that a willing buyer and willing seller would negotiate—but they do contest the setting in which the Panel determined fair market value. The Panel stated:

> In the present context, a determination of fair market value requires the Panel to find the rate that Public Broadcasters *would* pay to ASCAP and to BMI for the purchase of their blanket licenses, for the current statutory period, in a hypothetical free market, *in the absence of the Section 118 compulsory license.*

Report at 9–10 (second emphasis added). Public Broadcasters charge that it was legal error for the Panel to determine fair market value outside the context of section 118, and that the Panel was required to take into account the purposes of section 118 in setting rates. Public Broadcasters Petition to Modify at 9–10 (citing the Librarian's recent section 114 rate proceeding for the proposition that reasonable rates are not the same as marketplace rates and that a statutory rate need not mirror a freely negotiated rate). This "fundamental error," according to Public Broadcasters, incorrectly led the Panel to reject prior negotiated agreements under section 118 as the benchmark for setting rates in this proceeding.

Recommendation of the Register

The Register determines that the Panel did not act contrary to section 118 by seeking to determine what rates the parties would negotiate in free, open marketplace negotiations, as opposed to within the context of section 118. Public Broadcasters attempt to create the notion that there are two kinds of fair market values: one negotiated in the context of the open marketplace, and another within the "particularized context of section 118." Public Broadcasters Petition to Modify at 9. The Copyright Act makes no such distinctions. The only provision for adjusting section 118 rates is contained in section 801(b)(1), which provides that a CARP shall set "reasonable" rates for section 118. Unlike other compulsory licenses, section 118 does not contain any criteria or prescriptions to be considered in adjusting rates, other than a direction that a Panel may consider negotiated agreements. See, e.g., 17 U.S.C. 119(c)(3)(B) (fair market value rates established with consideration of certain types of evidence); 17 U.S.C. 801(b)(1) (sections 114, 115 and 116 compulsory license rates adjusted to achieve specified objectives). Moreover, it is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, could truly reflect "fair market value." The Panel was, therefore, not required to consider fair market value confined to the context of section 118.[15]

Public Broadcasters' citation to the section 114 rate adjustment proceeding is also inapposite. Section 801(b)(1) of the Copyright Act prescribes that section 114 rates are to be adjusted to achieve four specific objectives. Because

[15] If this were the requirement, the only evidence in a section 118 rate adjustment proceeding presumably would be the agreements previously negotiated by the parties for the section 118 license. This is, obviously, precisely what the Public Broadcasters wanted the Panel to consider. However, if fair market value within the section 118 license were the standard, Congress presumably would not have provided that a CARP "may" consider negotiated agreements, but rather would have mandated such a consideration. See 17 U.S.C 118(b)(3).

section 114 rates must be observant of those objectives, they need not be market rates. See 63 FR 25409 (May 8, 1998). Such is not the case with section 118.

2. The Panel's erroneous analysis of the no-precedent and nondisclosure clauses of the voluntary agreements led the Panel improperly to reject the agreements as the benchmark. Public Broadcasters argue that the Panel improperly used the no-precedent clause in the ASCAP agreement, and the nondisclosure clause in the BMI agreement, as grounds for rejecting the previously negotiated agreements between ASCAP/BMI and the Public Broadcasters as the benchmark for adjusting rates in this proceeding. Because Public Broadcasters assert that fair market value rates must be determined in the context of section 118 (see supra), Public Broadcasters assert that the ASCAP no-precedent clause and the BMI nondisclosure clause have no relevance to the rates the parties would have negotiated; and it was, therefore, illogical for the Panel to conclude that the existence of these clauses was evidence that the voluntary agreements understated fair market value.

Recommendation of the Register

The Register determines that the Panel's analysis of the no-precedent and nondisclosure clauses of the ASCAP and BMI agreements was not arbitrary or contrary to the provisions of the Copyright Act. First, as discussed above, the Register rejects the position that the Panel was required to set fair market value rates confined to the context of section 118 negotiations. The Panel was, therefore, not bound to accept the prior negotiated agreements as the only evidence of fair market value.

Second, Public Broadcasters misperceive the significance of the no-precedent and nondisclosure clauses as they affected the Panel's decision to reject the negotiated agreements as the benchmark for fair market value. The Panel did not use these clauses as the only evidence that the negotiated agreements were not representative of fair market value. Rather, the Panel stated:

> The Panel does not here find that the mere existence of a no-precedent clause renders prior agreements unacceptable as benchmarks *per se*. Rather, after considering the totality of the circumstances, we find the no-precedent clause effectively corroborates ASCAP's assertion that it voluntarily subsidized Public Broadcasters in the past and now declines to continue such subsidization.

Report at 22 (footnote omitted). The record contains other evidence to support ASCAP's contention that the negotiated agreements were a subsidization to Public Broadcasters. See ASCAP's PFFCL at 126–130, ¶¶ 287–297. Because the Panel's rejection of prior agreements with ASCAP is supported by the evidence, the Register cannot disturb it.

The same can be said for BMI's nondisclosure clause. The Panel found that the presence of the clause in the negotiated agreements was to prevent use of below-market rates as a benchmark for setting future rates, and that "[n]o other plausible explanation has been offered by Public Broadcasters" as to the existence of the clause. The record also contains evidence, aside from the nondisclosure clause, that supports the conclusion that BMI considered the negotiated license to contain below market rates. See BMI PFFCL at 67–73, ¶¶ 183–194. The Panel's determination is, therefore, neither arbitrary nor contrary to the statute.

3. The Panel improperly relied upon the disparity between the rates paid by public broadcasters and commercial broadcasters for ASCAP and BMI music as evidence that the voluntary agreements represented a subsidy to Public Broadcasters. As further evidence that ASCAP and BMI had been voluntarily subsidizing Public Broadcasters in the negotiated agreements, the Panel cited the magnitude of the fee disparity that existed between public and commercial broadcasters. Public Broadcasters assert that the fact that commercial broadcasters pay considerably higher fees than public broadcasters is not evidence of a subsidization. Rather, it is demonstrative evidence that different users of the same goods and services can value such goods and services differently. Public Broadcasters also argue that the Panel "gave undue weight" to the testimony of one of BMI's witnesses in refuting Public Broadcasters' contention regarding the lack of probity of the fee disparity. Public Broadcasters Petition to Modify at 19.

Recommendation of the Register

The Panel expressly addressed Public Broadcasters' contention of the lack of probity of the fee disparity:

> Public Broadcasters have not, or can not, cite any factual bases which might account for the huge disparity between recent ASCAP/BMI commercial rates and the rates for Public Broadcasters under prior agreements (even after adjusting commercial rates based upon various parameters). Public Broadcasters merely offer the general, but unhelpful, observation that "[t]he differences in rates is accounted for by the fact that commercial and non-commercial broadcasters operate in separate and distinct markets." If, for example, evidence had been adduced demonstrating that Public Broadcasters pay less than commercial broadcasters for other music-related programming expenses (such as radio disk jockeys, musicians, producers, writers, directors, or other equipment operators), the Panel might feel more comfortable accepting the heavily discounted music license fees as fair market rates. Virtually no such evidence was adduced. To the contrary, it appears that Public Broadcasters pay rates competitive with commercial broadcasters for other music-related programming costs such as composers' "up front fees." Tr. 1636 [testimony of BMI witness Michael Bacon]. As discussed, *infra*, the Panel is cognizant that commercial and non-commercial broadcasters do, in fact, operate under different economic models and one should not be surprised that these models yield somewhat different results, including differences in fair market rates. It is the *magnitude* of the disparity that causes the Panel to further question whether the rates negotiated under prior agreements truly constituted fair market rates. We have concluded they do not.

Report at 23 (citation omitted).

The Register concludes that the Panel's explanation of its consideration of the fee disparity is well-articulated and reasonable, and is not arbitrary or contrary to the Copyright Act. And, as the Register has made clear on several occasions, absent compelling evidence to the contrary, the Register will not disapprove the weight accorded by a CARP to the testimony of a witness. See, e.g. 62 FR 55757 (October 28, 1997).

C. Conclusion

Having fully analyzed the record in this proceeding and considered the contentions of the parties, the Register recommends that the Librarian of Congress adopt the rates and terms for the use of ASCAP and BMI music by Public Broadcasters as set forth in the CARP's report.

Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty Panel in the matter of adjustment of the royalty rates and terms for the noncommercial educational broadcasting compulsory license, 17 U.S.C. 118, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order, and amending the rules of the Library and the Copyright Office, announcing new royalty rates and terms for the section 118 compulsory license.

List of Subjects in 37 CFR Part 253

Copyright, Music, Radio, Television.

Final Regulation

In consideration of the foregoing, the Library of Congress amends part 253 of 37 CFR as follows:

PART 253—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

1. The authority citation for part 253 continues to read as follows:

Authority: 17 U.S.C. 118, 801(b)(1) and 803.

2. Section 253.3 is added to read as follows:

§ 253.3 Performance of musical compositions in the repertory of ASCAP and BMI by PBS and NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).

(a) Scope. This section shall apply to the performance during a period beginning January 1, 1998, and ending on December 31, 2002, by the Public Broadcasting Service (PBS), National Public Radio (NPR) and other public broadcasting entities (as defined in § 253.2) engaged in the activities set forth in 17 U.S.C. 118(d) of copyrighted published nondramatic musical compositions in the repertory of the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), except for public broadcasting entities covered by §§ 253.5 and 253.6.

(b) Royalty rates. The following annual royalty rates shall apply to the performance of published nondramatic musical compositions within the scope of this section: $3,320,000 to ASCAP, and $2,123,000 to BMI.

(c) Payment of royalties. The royalty payments specified in paragraph (b) of this section shall be made in two equal payments on July 31 and December 31 of each calendar year, except for 1998, in which year the royalty payments shall also be made in two equal installments, the first of which shall be made within thirty (30) days from the date the Librarian of Congress renders his decision in *In the Matter of Adjustment of the Rates for Noncommercial Educational Broadcasting Compulsory License,* Docket No. 96–6 CARP NCBRA, and the second of which shall be made on December 31, 1998, subject to 17 U.S.C. 802(g).

(d) Identification of stations. PBS, NPR and/or the Corporation for Public Broadcasting (CPB) shall annually for the years 1999–2002, by not later than January 31 of each such calendar year, and in 1998, within thirty (30) days of the date the Librarian of Congress renders the decision in *In the Matter of Adjustment of the Rates for Noncommercial Educational Broadcasting Compulsory License,* Docket No. 96–6 CARP NCBRA, furnish to ASCAP and BMI a complete list of all public broadcasting entities within the scope of this section, as of January 1 of that calendar year. Such lists shall include:

(1) A list of all public broadcasting entities operating as television broadcast stations that are associated with PBS ("PBS Stations"), and the PBS licensee with which each PBS Station is associated ("PBS Licensees"), identifying which PBS Licensees are Single Feed Licensees and which are Multiple Feed Licensees, and which PBS Stations or groups of stations are Independently Programmed Stations, as those terms are defined in paragraph (e)(2) of this section;

(2) A list of all public broadcasting entities operating as television broadcast stations that are not associated with PBS ("Non-PBS Stations");

(3) A list of all public broadcasting entities operating as radio broadcast stations that are associated with NPR ("NPR Stations"), which list shall designate which NPR Stations have six (6) or more full-time employees and which NPR Stations repeat one hundred (100) percent of the programming of another NPR Station; and

(4) A list of all public broadcasting entities operating as radio broadcast stations that are not associated with NPR ("Non-NPR Stations"), which list shall designate which Non-NPR Stations have six (6) or more full-time employees.

(5) For purposes of this section, Non-PBS Stations and Non-NPR Stations shall include, but not be limited to, public broadcasting entities operating as television and radio broadcast stations which receive or are eligible to receive general operational support from CPB pursuant to the Public Broadcasting Act of 1967, as amended.

(e) Records of use. (1) PBS and NPR shall maintain and, within thirty-one (31) days after the end of each calendar quarter, furnish to ASCAP and BMI copies of their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs during the preceding quarter (including to the extent such information is reasonably obtainable by PBS and NPR the title, author, publisher, type of use, and manner of performance thereof). PBS and NPR will make a good faith effort to obtain the information to be listed on such cue sheets. In addition, to the extent the information is reasonably obtainable, PBS shall furnish to ASCAP and BMI the PBS programming feed schedules including, but not limited to, the PBS National Programming Service schedule. PBS and NPR shall make a good faith expeditious effort to provide the data discussed in this paragraph in electronic format where possible.

(2) PBS Licensees shall furnish to ASCAP and BMI, upon request and designation of ASCAP and BMI, music use reports listing all musical compositions broadcast by a particular PBS Station owned by such PBS Licensee showing the title, author, and publisher of each composition, to the extent such information is reasonably obtainable; provided, however, that PBS Licensees shall not be responsible for providing cue sheets for programs for which cue sheets have already been provided by PBS to ASCAP and BMI. PBS Licensees will make a good faith effort to obtain the information to be listed on such music use reports. In the case where a PBS Licensee operates only one (1) or more PBS Stations each of which broadcasts simultaneously or on a delayed basis all or at least eighty-five (85) percent of the same programming (a "Single Feed Licensee"), that Single Feed Licensee will not be obligated to furnish music use reports to either ASCAP or to BMI for more than one of its PBS Stations in each calendar year. In the case where a PBS Licensee operates two (2) or more PBS Stations which do not broadcast all or at least eighty-five (85) percent of the same programming on a simultaneous or delayed basis (a "Multiple Feed Licensee"), that Multiple Feed Licensee may be required to furnish a music use report for each PBS Station or group of stations which broadcasts less than eighty-five (85) percent of the same programming as that aired by any other PBS Station or group of stations operated by that Multiple Feed Licensee (such station or group of stations being referred to as an "Independently Programmed Station") in each calendar year. In each calendar year, ASCAP and BMI shall each be limited to requesting music use reports from PBS Licensees covering a total number of PBS Stations equal to no more than fifty (50) percent of the total of the number of PBS Single Feed Licensees plus the number of Independently Programmed Stations operated by Multiple Feed Licensees;

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provided, however, that ASCAP and BMI shall be entitled to receive music use reports covering not less than ninety (90) PBS Stations in any given calendar year. Subject to the limitations set forth above, PBS Stations shall be obligated to furnish to ASCAP and BMI such music use reports for each station for a period of no more than seven days in each calendar year.

(3) Non-PBS Stations shall furnish to ASCAP and BMI, upon request and designation of ASCAP and BMI, music use reports listing all musical compositions broadcast by such Non-PBS Stations showing the title, author and publisher of each composition, to the extent such information is reasonably obtainable. Non-PBS Stations will make a good faith effort to obtain the information to be listed on such music use reports. In each calendar year, ASCAP and BMI shall each be limited to requesting music use reports from no more than fifty (50) percent of Non-PBS Stations. Subject to the limitations set forth above, Non-PBS Stations shall be obligated to furnish to ASCAP and BMI such music use reports for each station for a period of no more than seven days in each calendar year.

(4) NPR Stations which have six (6) or more full-time employees shall furnish to ASCAP and BMI, upon request and designation of ASCAP and BMI, music use reports listing all musical compositions broadcast by such NPR Station showing the title, author or and publisher of each composition, to the extent such information is reasonably obtainable; provided, however, that NPR Stations shall not be responsible for providing cue sheets for programs for which cue sheets have already been provided by NPR to ASCAP and BMI. NPR Stations will make a good faith effort to obtain the information to be listed on such music use reports. In each calendar year, ASCAP and BMI shall each be limited to requesting music use reports from no more than fifty (50) percent of NPR Stations which have six (6) or more full-time employees. Notwithstanding the foregoing, if the number of NPR Stations with six (6) or more employees (from which ASCAP and BMI shall initially designate and request reports) falls below twenty-five (25) percent of the total number of all NPR Stations, then ASCAP and BMI may each request reports from additional NPR Stations, regardless of the number of employees, so that ASCAP and BMI shall each be entitled to receive music use reports from not less than twenty-five (25) percent of all NPR Stations. NPR Stations shall be obligated to furnish music use reports for each station for a period of up to one week in each calendar year to ASCAP and BMI.

(5) Non-NPR Stations which have six (6) or more full-time employees shall furnish to ASCAP and BMI, upon request and designation of ASCAP and BMI, music use reports listing all musical compositions broadcast by such Non-NPR Station showing the title, author and publisher of each composition, to the extent such information is reasonably obtainable. Non-NPR Stations will make a good faith effort to obtain the information to be listed on such music use reports. In each calendar year, ASCAP and BMI shall each be limited to requesting music use reports from no more than fifty (50) percent of the Non-NPR Stations which have six (6) or more full-time employees. Notwithstanding the foregoing, if the number of Non-NPR Stations with six (6) or more employees (from which ASCAP and BMI shall initially designate and request reports) falls below twenty-five (25) percent of the total number of all Non-NPR Stations, then ASCAP and BMI may each request reports from additional Non-NPR Stations, regardless of the number of employees, so that ASCAP and BMI shall each be entitled to receive music use reports from not less than twenty-five (25) percent of all Non-NPR Stations. Non-NPR Stations shall be obligated to furnish music use reports for each station for a period of up to one week in each calendar year to ASCAP and BMI.

So Ordered.

James H. Billington,

The Librarian of Congress.

Dated: September 17, 1998.

So Recommended.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 98-24986 Filed 9-17-98; 8:45 am]

BILLING CODE 1410-33-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300717; FRL-6027-1]

RIN 2070-AB78

Imidacloprid; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for the combined residues of imidacloprid and its metabolites containing the 6-chloropyridinyl moiety in or on sugar beets (tops, roots, molasses), barley (grain, straw, hay), wheat (grain, forage, straw, hay), as requested by Gustafson, Incorporated (PP 5F4584 and PP 4F4337); and cereal grains crop group (grain, forage, straw, hay, stover), sweet corn, safflower (seed, meal), legume vegetables crop group (seed, foliage), soybean meal, as requested by Bayer Corporation (PP 6F4765). Gustafson, Incorporated, and Bayer Corporation requested these tolerances under the Federal Food, Drug and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996.

DATES: This regulation is effective September 18, 1998. Objections and requests for hearings must be received by EPA on or before November 17, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, OPP-300717, must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), PO Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, OPP-300717, must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number OPP-300717. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

Federal Register of September 29, 1998 (63 FR 51825). The document amended certain regulations governing establishment registration and device listing by domestic distributors. The document was published with an error. This document corrects that error.

EFFECTIVE DATE: February 11, 1999.

FOR FURTHER INFORMATION CONTACT: Walter W. Morgenstern, Center for Devices and Radiological Health (HFZ-305), Food and Drug Administration, 2094 Gaither Rd., Rockville, MD 20850, 301-594-4699.

SUPPLEMENTARY INFORMATION: In FR Docs. 98-25796 appearing on page 51825 in the **Federal Register** of September 29, 1998, the following correction is made:

On page 51826, in the third column, amendatory paragraph four is corrected to read:

4. Section 807.20 is amended by revising paragraph (a)(4), by removing paragraph (c), by redesignating paragraph (d) as paragraph (c), and by adding paragraph (c)(3) to read as follows:

* * * * *

Dated: November 19, 1998.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98-31569 Filed 11-25-98; 8:45 am]

BILLING CODE 4160-01-F

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 251

[Docket No. RM 98-4 CARP]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and initiation of voluntary negotiation period.

SUMMARY: The Copyright Office is initiating the six-month voluntary negotiation periods, as required by the Digital Millennium Copyright Act of 1998, for negotiating terms and rates for two compulsory licenses, which in one case, allows public performances of sound recordings by means of eligible nonsubscription transmissions and by new subscription services, and in the second instance, allows the making of an ephemeral phonorecord of a sound recording in furtherance of making a permitted public performance of the sound recording. In addition, the Office is adopting procedural regulations to implement the Digital Millennium Copyright Act of 1998.

EFFECTIVE DATES: The effective date of the regulation is December 28, 1998. The effective date of the initiation of the six-month voluntary negotiation periods is November 27, 1998.

ADDRESSES: Copies of voluntary license agreements and petitions, if sent by mail, should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. If hand delivered, they should be brought to: Office of the General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE, Washington, DC 20559-6000.

FOR FURTHER INFORMATION: David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8380 or Telefax (202) 707-8366.

SUPPLEMENTARY INFORMATION: On October 28, 1998, the President signed into law the "Digital Millennium Copyright Act of 1998" ("DMCA" or "Act"). Public Law 105-304. Among other things, the DMCA amends sections 112 and 114 of the Copyright Act, title 17 of the United States Code, to create a new license, governing the making of an ephemeral recording of a sound recording, and to expand another to facilitate the public performance of sound recordings by means of certain audio transmissions. *See* 17 U.S.C. 112(e)(1) and 114(d)(2). In amending these sections, Congress sought to "first, further a stated objective of Congress when it passed the Digital Performance Right in Sound Recordings Act of 1995 (DPRA) to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services." H.R. Conf. Rep. No. 105-796, at 79-80 (1998).

In enacting the Digital Performance Right in Sound Recordings Act of 1995 (DPRA), Pub. L. 104-39, Congress created an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly the sound recordings by means of certain digital audio transmissions. Among the limitations on the performance was the creation of a new compulsory license for nonexempt, noninteractive, digital subscription transmissions. The DMCA expands this license to allow a nonexempt eligible nonsubscription transmission and a nonexempt transmission by a preexisting satellite digital audio radio service to perform publicly a sound recording in accordance with the terms and rates of the statutory license. 17 U.S.C. 114(a).

An "eligible nonsubscription transmission" is a noninteractive, digital audio transmission which, as the name implies, does not require a subscription for receiving the transmission. The transmission must also be made as part of a service that provides audio programming consisting in whole or in part of performances of sound recordings which purpose is to provide audio or entertainment programming, but not to sell, advertise, or promote particular goods or services. A "preexisting satellite digital audio radio service" is a subscription digital audio radio service that received a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998. *See* 17 U.S.C. 114(j)(6) and (10). Only two known entities, CD Radio and American Mobile Radio Corporation, qualify under the statutory definition as preexisting satellite digital audio radio services.

In addition to expanding the current 114 license, the DMCA creates a new statutory license for the making of an "ephemeral recording" of a sound recording by certain transmitting organizations. The new statutory license allows entities that transmit performances of sound recordings to business establishments, pursuant to the limitations set forth in section 114(d)(1)(C)(iv), to make an ephemeral recording of a sound recording for purposes of a later transmission. The new license also provides a means by which a transmitting entity with a statutory license under section 114(f) can make more than the one phonorecord specified in section 112(a). 17 U.S.C. 112(e).

Determination of Reasonable Terms and Rates

The statutory scheme for establishing reasonable terms and rates is the same for both licenses. The terms and rates for the two new statutory licenses may be determined by voluntary agreement among the affected parties, or if necessary, through compulsory arbitration conducted pursuant to Chapter 8 of the Copyright Act. Because the DMCA does not establish reasonable rates and terms for either the new section 112 or the expanded section 114 license, the statute requires the Librarian of Congress to initiate a voluntary negotiation period, the first phase in the rate setting process, within 30 days of enactment for the purpose of determining reasonable terms and rates for each license. *See* 17 U.S.C. 112(e)(4) and 114(f)(2)(A).

If the affected parties are able to negotiate an industry-wide agreement, then it will not be necessary for the parties to participate in an arbitration proceeding. In such cases, the Librarian of Congress will follow current rate regulation procedures and notify the public of the proposed agreement in a notice and comment proceeding. If no party with a substantial interest and an intent to participate in an arbitration proceeding files a comment opposing the negotiated rates and terms, the Librarian will adopt the proposed terms and rates without convening a copyright arbitration royalty panel. 37 CFR 251.63(b). If, however, no industry-wide agreement is reached, or only certain parties negotiate license agreements, then those copyright owners and users relying upon one or both of the statutory licenses shall be bound by the terms and rates established through the arbitration process.

Arbitration proceedings are initiated upon the filing of a petition for ratemaking with the Librarian of Congress during the 60 days immediately following the six month negotiation period. Arbitration cannot take place, however, unless a party files a petition even if the parties fail to negotiate a voluntary license agreement. 17 U.S.C. 112(e)(5) and 114(f)(1)(B).

The rates and terms established shall be effective during the period beginning on the effective date of the enactment of the DMCA and ending on December 31, 2000, or upon agreement by the affected parties, another mutually acceptable date. 17 U.S.C. 112(e)(5) and 114(f)(2)(A).

Initiation of Voluntary Negotiations

Pursuant to sections 112(e)(4) and 114(f)(2)(A), the Copyright Office of the Library of Congress is initiating the six-month voluntary negotiation periods for determining reasonable rates and terms for the statutory licenses permitting the public performance of a sound recording by means of certain digital transmissions and the making of a phonorecord in furtherance of these public performances. The negotiation period shall run from November 27, 1998, to May 27, 1999. Parties who negotiate a voluntary license agreement during this period are encouraged to submit two copies of the agreement to the Copyright Office at the above-listed address within 30 days of its execution.

Petitions

In the absence of a license agreement negotiated under 17 U.S.C. 112(e)(4) or 114(f)(2)(A), those copyright owners of sound recordings and entities availing themselves of the statutory licenses are subject to arbitration upon the filing of a petition by a party with a significant interest in establishing reasonable terms and rates for the statutory licenses. Petitions must be filed in accordance with 17 U.S.C. 803(a)(1) and may be filed anytime during the sixty-day period beginning six months after the publication of this document in the **Federal Register**. *See also* 37 CFR 251.61. Parties should submit petitions to the Copyright Office at the address listed in this notice. The petitioner must deliver an original and five copies to the Office.

Amendment of CARP Rules To Reflect Passage of the Digital Millennium Copyright Act of 1998

The DMCA creates two new compulsory licenses governing the public performance of certain audio transmissions and the making of ephemeral recordings to facilitate the transmission of certain public performances. In both instances, the reasonable rates and terms for the statutory license may be determined by a CARP, when voluntary negotiations prove unsuccessful. Therefore, the Copyright Office is amending its regulations to reflect the additional rate setting responsibilities of the Office and the CARP.

Section 553(b)(3)(A) of the Administrative Procedure Act, 5 U.S.C., states that general notice of proposed rulemaking is not required for rules of agency organization or practice. Since the Office finds that the following final regulations are rules of agency organization, procedure, or practice, no notice of proposed rulemaking is required.

List of Subjects in 37 CFR Part 251

Administrative practice and procedures, Hearing and appeal procedures.

For the reasons set forth in the preamble, the Copyright Office and the Library of Congress amend 37 CFR part 251 as follows:

PART 251—COPYRIGHT ARBITRATION ROYALTY PANEL RULES OF PROCEDURE

1. The authority citation for part 251 continues to read as follows:

Authority: 17 U.S.C. 801–803.

2. In § 251.2, redesignate paragraphs (b) through (g) as (c) through (h), respectively, and add new paragraph (b) and revise newly redesignated paragraph (c) to read as follows:

§ 251.2 Purpose of Copyright Arbitration Royalty Panels

* * * * *

(b) To make determinations concerning royalty rates and terms for making ephemeral recordings. 17 U.S.C. 112(e);

(c) To make determinations concerning royalty rates and terms for the public performance of sound recordings by certain digital audio transmissions. 17 U.S.C. 114;

* * * * *

§ 251.58 [Amended]

3. In § 251.58, paragraph (c) is amended by adding the number "112," after the number "111,".

§ 251.60 [Amended]

4. Section 251.60 is amended by removing the word "subscription" and adding in its place the phrase "the making of ephemeral recordings (17 U.S.C. 112), certain" after the term "(17 U.S.C. 111),".

5. In § 251.61, paragraph (a) is revised to read as follows:

§ 251.61 Commencement of adjustment proceedings

(a) In the case of cable, ephemeral recordings, certain digital audio transmissions, phonorecords, digital phonorecord deliveries, and coin-operated phonorecord players (jukeboxes), rate adjustment proceedings shall commence with the filing of a petition by an interested party according to the following schedule:

(1) Cable: During 1995, and each subsequent fifth calendar year.

(2) Ephemeral Recordings: During a 60-day period prescribed by the Librarian in 1999, 2000, and at 2-year intervals thereafter, or as otherwise agreed to by the parties.

(3) Digital Audio Transmissions: For preexisting digital subscription transmission services and preexisting satellite digital audio radio services:

(i) During a 60-day period commencing on July 1, 2001 and at 5-year intervals thereafter, or

(ii) During a 60-day period prescribed by the Librarian in a proceeding to set reasonable terms and rates for a new type of subscription digital audio transmission service; and for an eligible nonsubscription service or a new subscription service:

(A) During a 60-day period prescribed by the Librarian in 1999.

(B) During a 60-day period commencing on July 1, 2000, and at 2-year intervals thereafter.

(C) During a 60-day period prescribed by the Librarian in a proceeding to set reasonable terms and rates for a new type of eligible nonsubscription service or new subscription service, or

(D) As otherwise agreed to by the parties.

(4) Phonorecords: During 1997 and each subsequent tenth calendar year.

(5) Digital Phonorecord Deliveries: During 1997 and each subsequent fifth calendar year, or as otherwise agreed to by the parties.

(6) Coin-operated phonorecord players (jukeboxes): Within one year of the expiration or termination of a negotiated license authorized by 17 U.S.C. 116.

* * * * *

§ 251.62 [Amended]

6. In § 251.62, paragraph (a) is amended by removing the word "subscription" and adding in its place the phrase "ephemeral recordings, certain" after the word "cable,".

Dated: November 18, 1998.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 98-31657 Filed 11-25-98; 8:45 am]

BILLING CODE 1410-33-U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. NY29-1-187a; FRL-6193-5]

Approval and Promulgation of Implementation Plans; New York

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating a correction to the State Implementation Plan (SIP) for the State of New York regarding the State's general prohibition on air pollution. EPA has determined that this rule was erroneously incorporated into the SIP. EPA is removing this rule from the approved New York SIP because the rule does not have a reasonable connection to the national ambient air quality standards (NAAQS) and related air quality goals of the Clean Air Act. The intended effect of this correction to the SIP is to make the SIP consistent with the requirements of the Clean Air Act, as amended in 1990 ("the Act"), regarding EPA action on SIP submittals and SIPs for national primary and secondary ambient air quality standards.

EFFECTIVE DATE: This direct final rule is effective on January 26, 1999 without further notice, unless EPA receives adverse comment by December 28, 1998. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: All comments should be addressed to: Ronald Borsellino, Chief, Air Programs Branch, Environmental Protection Agency, Region II Office, 290 Broadway, New York, New York 10007-1866.

Copies of the documents relevant to this action are available for inspection during normal business hours at the following address:

Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007-1866.

FOR FURTHER INFORMATION CONTACT: Henry Feingersh, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th floor, New York, New York 10007-1866, (212) 637-4249.

SUPPLEMENTARY INFORMATION:

I. Correction to SIP

EPA has determined that Part 211.2 of Title 6 of the New York Code of Rules and Regulations (NYCRR), which was approved in 1984 as part of the SIP, does not have a reasonable connection to the NAAQS and related air quality goals of the Clean Air Act and is not properly part of the SIP.

Part 211.2 is a general prohibition against air pollution. Such a general provision is not designed to control NAAQS pollutants such that EPA could rely on it as a NAAQS attainment and maintenance strategy. After it came to the attention of EPA that Part 211.2 was not properly part of the SIP, EPA in turn brought the matter to the attention of the New York State Department of Environmental Conservation (NYSDEC). NYSDEC shared EPA's understanding that Part 211.2 was improperly approved into the SIP.

EPA, pursuant to section 110(k)(6) of the Act, is correcting the SIP since Part 211.2 is not reasonably related to the NAAQS-related air quality goals of the Act. Section 110(k)(6) of the amended Act provides: "Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise any such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and the public." It should be noted that section 110(k)(6) has also been used by EPA to delete an improperly approved odor provision from the Wyoming SIP. 61 FR 47058 (1996).

Since the State of New York's Part 211.2 has no reasonable connection to the NAAQS-related air quality goals of the Act, EPA has found that the approval of this State rule was in error. The State has reached the same conclusion and concurs with EPA's decision that Part 211.2 was submitted and approved in error and should be removed from the approved SIP. Consequently, EPA is removing 6 NYCRR Part 211.2 from the approved New York SIP, pursuant to section 110(k)(6) of the Act.

II. EPA Final Rulemaking Action

EPA is removing 6 NYCRR Part 211.2 of the New York air quality Administrative Rules from the approved New York SIP pursuant to section 110(k)(6) of the Act.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective January 26, 1999 without further notice unless the Agency receives relevant adverse comments by December 28, 1998.

If EPA receives such comments, then EPA will publish a timely withdrawal of the final rule informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this rule. Any parties interested in commenting on this rule should do so at this time. If no such comments are received, the public is advised that this action will be effective on January 26, 1999 and no further action will be taken on the proposed rule.

III. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.)

SUMMARY: The U.S. National Administrative Office (NAO) gives notice that on January 7, 2000 U.S. Submission #9901 was accepted for review. The submission was filed with the NAO on November 10, 1999 by the Association of Flight Attendants, AFL-CIO, and the Association of Flight Attendants of Mexico. The submission raises concerns about freedom of association and occupational safety and health at the privately owned Mexican airline company, Executive Air Transport, Inc. (TAESA). The submitters allege that Mexico has failed to fulfill obligations under the North American Agreement on Labor Cooperation (NAALC) in connection with freedom of association and protection of the right to organize, the right to bargain collectively, minimum labor standards, and occupational safety and health.

Article 16(3) of the North American Agreement on Labor Cooperation (NAALC) provides for the review of labor law matters in Canada and Mexico by the NAO. The objectives of the review of the submission will be to gather information to assist the NAO to better understand and publicly report on the Government of Mexico's compliance with the obligations set forth in the NAALC.

EFFECTIVE DATE: January 7, 2000.

FOR FURTHER INFORMATION CONTACT: Lewis Karesh, Acting Secretary, U.S. National Administrative Office, Department of Labor, 200 Constitution Avenue, NW, Room C-4327, Washington, DC 20210. Telephone: (202) 501-6653 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On November 10, 1999, U.S. Submission #9901 was filed by the Association of Flight Attendants, AFL-CIO, and the Association of Flight Attendants of Mexico (ASSA). The submission raises concerns about freedom of association and occupational safety and health at the privately owned Mexican airline company, Executive Air Transport, Inc. (TAESA).

The submission focuses on the attempts of the flight attendants to organize at TAESA. The submitters allege that efforts to organize at TAESA were hindered by the federal labor board and TAESA management. They assert that the Mexican government has failed to fulfill its obligations under Part 2 of the NAALC to enforce levels of protection, government enforcement action, private action, and procedural guarantees in connection with freedom of association, the right to bargain collectively, minimum labor standards, and prevention of occupational injuries and illnesses.

The procedural guidelines for the NAO, published in the Federal Register on April 7, 1994, 59 FR 16660, specify that, in general, the Secretary of the NAO shall accept a submission for review if it raises issues relevant to labor law matters in Canada or Mexico and if a review would further the objectives of the NAALC.

U.S. Submission #9901 relates to labor law matters in Mexico. A review would appear to further the objectives of the NAALC, as set out in Article 1 of the NAALC, among them improving working conditions and living standards in each Party's territory, promoting the set of labor principles, and encouraging publication and exchange of information, data development and coordination to enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory.

Accordingly, this submission has been accepted for review of the allegations raised therein. The NAO's decision is not intended to indicate any determination as to the validity or accuracy of the allegations contained in the submission. The objectives of the review will be to gather information to assist the NAO to better understand and publicly report on the freedom of association, the right to organize, and occupational safety and health raised in the submission, including the Government of Mexico's compliance with the obligations agreed to under Articles 2, 3, 4 and 5 of the NAALC. The review will be completed, and a public report issued, within 120 days, or 180 days if circumstances require an extension of time, as set out in the procedural guidelines of the NAO.

Signed at Washington, DC on January 7, 2000.

Lewis Karesh,

Acting Secretary, U.S. National Administrative Office.

[FR Doc. 00-813 Filed 1-12-00; 8:45 am]

BILLING CODE 4510-23-P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2000-3 CARP DTRA2]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Initiation of voluntary negotiation period.

SUMMARY: The Copyright Office is announcing the initiation of the voluntary negotiation period for determining reasonable rates and terms for two compulsory licenses, which in one case, allows public performances of sound recordings by means of eligible nonsubscription transmissions, and in the second instance, allows the making of an ephemeral phonorecord of a sound recording in furtherance of making a permitted public performance of the sound recording.

EFFECTIVE DATE: The voluntary negotiation period begins on January 13, 2000.

ADDRESSES: Copies of voluntary license agreements and petitions, if sent by mail, should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. If hand delivered, they should be brought to: Office of the General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE, Washington, DC 20559-6000.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION: In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Public Law 104-39, which created an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly the sound recordings by means of certain digital audio transmissions. Among the limitations on the performance was the creation of a new compulsory license for nonexempt, noninteractive, digital subscription transmissions. 17 U.S.C. 114(f).

The scope of this license was expanded in 1998 upon passage of the Digital Millennium Copyright Act of 1998 ("DMCA" or "Act"), Public Law 105-304, in order to allow a nonexempt eligible nonsubscription transmission and a nonexempt transmission by a preexisting satellite digital audio radio service to perform publicly a sound recording in accordance with the terms and rates of the statutory license. 17 U.S.C. 114(a).

An "eligible nonsubscription transmission" is a noninteractive, digital audio transmission which, as the name implies, does not require a subscription for receiving the transmission. The transmission must also be made as part of a service that provides audio programming consisting in whole or in part of performances of sound recordings which purpose is to provide audio or entertainment programming, but not to sell, advertise, or promote particular goods or services. A "preexisting satellite digital audio radio service" is a subscription digital audio radio service that received a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998. *See* 17 U.S.C. 114(j) (6) and (10). Only two known entities, CD Radio and American Mobile Radio Corporation, qualify under the statutory definition as preexisting satellite digital audio radio services.

In addition to expanding the current section 114 license, the DMCA also created a new statutory license for the making of an "ephemeral recording" of a sound recording by certain transmitting organizations. 17 U.S.C. 112(e). The new statutory license allows entities that transmit performances of sound recordings to business establishments, pursuant to the limitations set forth in section 114(d)(1)(C)(iv), to make an ephemeral recording of a sound recording for purposes of a later transmission. The new license also provides a means by which a transmitting entity with a statutory license under section 114(f) can make more than the one phonorecord specified in section 112(a). 17 U.S.C. 112(e).

Determination of Reasonable Terms and Rates

The statutory scheme for establishing reasonable terms and rates is the same for both licenses. The terms and rates for the two new statutory licenses may be determined by voluntary agreement among the affected parties, or if necessary, through compulsory arbitration conducted pursuant to Chapter 8 of the Copyright Act.

If the affected parties are able to negotiate voluntary agreements, then it may not be necessary for these parties to participate in an arbitration proceeding. Similarly, if the parties negotiate an industry-wide agreement, an arbitration may not be needed. In such cases, the Librarian of Congress will follow current rate regulation procedures and notify the public of the proposed agreement in a notice and comment proceeding. If no party with a substantial interest and an intent to participate in an arbitration proceeding files a comment opposing the negotiated rates and terms, the Librarian will adopt the proposed terms and rates without convening a copyright arbitration royalty panel. 37 CFR 251.63(b). If, however, no industry-wide agreement is reached, or only certain parties negotiate license agreements, then those copyright owners and users relying upon one or both of the statutory licenses shall be bound by the terms and rates established through the arbitration process.

Arbitration proceedings cannot be initiated unless a party files a petition for ratemaking with the Librarian of Congress during the 60-day period, beginning July 1, 2000. 17 U.S.C. 112(e)(7) and 114(f)(2)(C)(ii)(II).

On November 27, 1998, the Copyright Office initiated a six-month voluntary negotiation period in accordance with sections 112(e)(4) and 114(f)(2)(A) for the purpose of establishing rates and terms for these licenses for the period beginning on the effective date of the DMCA and ending on December 31, 2000. 63 FR 65555 (November 27, 1998). Parties to these negotiations, however, have been unable to reach agreement on the rates and terms, so in accordance with sections 112(e)(5) and 114(f)(1)(B) the Copyright Office has initiated arbitration proceedings to determine the rates and terms for use of the licenses through December 31, 2000. These proceedings are in progress. 64 FR 52107 (September 27, 1999).

Initiation of the Next Round of Voluntary Negotiations

Unless the schedule has been readjusted by the parties in a previous rate adjustment proceeding, sections 112(e)(7) and 114(f)(2)(C)(i)(II) of the Copyright Act require the publication of a notice during the first week of January 2000, and at 2-year intervals thereafter, initiating the voluntary negotiation periods for determining reasonable rates and terms for the statutory licenses permitting the public performance of a sound recording by means of certain digital transmissions and the making of an ephemeral recording in accordance with section 112(e).

This notice announces the initiation of these negotiation periods. They shall begin on January 13, 2000. Parties who negotiate a voluntary license agreement during this period are encouraged to submit two copies of the agreement to the Copyright Office at the above-listed address within 30 days of its execution.

Petitions

In the absence of a license agreement negotiated under 17 U.S.C. 112(e)(4) or 114(f)(2)(A), those copyright owners of sound recordings and entities availing themselves of the statutory licenses are subject to arbitration upon the filing of a petition by a party with a significant interest in establishing reasonable terms and rates for the statutory licenses. Petitions must be filed in accordance with 17 U.S.C. 112(e)(7), 114(f)(2)(C)(ii)(II), and 803(a)(1) and may be filed anytime during the sixty-day period beginning on July 1, 2000. *See also* 37 CFR 251.61. Parties should submit petitions to the Copyright Office at the address listed in this notice. The petitioner must deliver an original and five copies to the Office.

Dated: January 7, 2000.

David O. Carson,

General Counsel.

[FR Doc. 00–808 Filed 1–12–00; 8:45 am]

BILLING CODE 1410–33–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 00–001]

NASA Advisory Council, Life and Microgravity Sciences and Applications Advisory Committee, Space Utilization Advisory Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law. 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council, Life and Microgravity Sciences and Applications Advisory Committee, Space Station Utilization Advisory Subcommittee.

DATES: Wednesday, February 23, 2000, from 8:00 a.m. to 5:00 p.m.

ADDRESSES: Lunar and Planetary Institute, 3600 Bay Area Boulevard, Houston, Texas.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Uhran, Code UM, National Aeronautics and Space Administration, Washington, DC 20546, (202) 358–0813.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. Advance notice of attendance to the Executive Secretary is requested. The agenda for the meeting is as follows:

—Executive Presentations
—Response to Prior Recommendations
—Special Topics
—Development of Draft Recommendations
—Recommendations

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

traffic may resume normal operations. At the discretion of the Patrol Commander, between scheduled racing events, traffic may be permitted to resume normal operations.

(2) A succession of not fewer than 5 short whistle or horn blasts from a patrol vessel will be the signal for any and all vessels to take immediate steps to avoid collision. The display of an orange distress smoke signal from a patrol vessel will be the signal for any and all vessels to stop immediately.

(3) Spectators are required to maintain a safe distance from the racecourse at all times.

(c) *Dates.* This section is effective at 9 a.m. and terminates at 5 p.m. EDT each day on October 9 and 10, 1999.

Dated: September 3, 1999.

G.W. Sutton,

Captain U.S. Coast Guard, Acting Commander, Seventh Coast Guard District.

[FR Doc. 99-24402 Filed 9-17-99; 8:45 am]

BILLING CODE 4910-15-P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 99-5A]

Notice and Recordkeeping for Nonsubscription Digital Transmissions

AGENCY: Copyright Office, Library of Congress.

ACTION: Interim rule amendment.

SUMMARY: To adjust for changes brought about by the passage of the Digital Millennium Copyright Act of 1998, the Copyright Office of the Library of Congress is amending the regulation that requires the filing of an initial notice of digital transmissions of sound recordings under statutory license with the Copyright Office.

EFFECTIVE DATE: September 20, 1999.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION:

Background

On November 1, 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Public Law 104-39, 109 Stat. 336 (1995). The DPRA gave to sound recording copyright owners an exclusive right to perform their works publicly by means of a digital audio transmission. 17 U.S.C. 106(6). The new right, however, was subject to certain limitations, including exemptions for certain digital transmissions, 17 U.S.C. 114(d)(1), and the creation of a statutory license for nonexempt digital subscription services. 17 U.S.C. 114(d)(2).

The statutory license requires adherence to regulations under which copyright owners may receive reasonable notice of use of their sound recordings under the statutory license, and under which entities performing the sound recordings shall keep and make available records of such use. 17 U.S.C. 114(f)(2). On May 13, 1996, the Copyright Office initiated a rulemaking proceeding to promulgate regulations to govern the notice and recordkeeping requirements. 61 FR 22004 (May 13, 1996). This rulemaking concluded with the issuance of interim rules governing the filing of an initial notice of digital transmissions of sound recordings under the statutory license, 37 CFR 201.35, and the filing of reports of use of sound recordings under statutory license, 37 CFR 201.36. *See* 63 FR 34289 (June 24, 1998).

At the time these regulations were issued, only three noninteractive, subscription, digital transmissions services (DMX, Inc., Digital Cable Radio Associates/Music Choice, and Muzak, Inc.) [1] were in operation and considered eligible for the license. Consequently, the Office prescribed a period for filing initial notices which required any service already operating in accordance with the section 114 license to submit its notice within 45 days of the effective date of the regulation. Section 201.35(f) reads, in part, as follows: "A Service shall file the Initial Notice with the Licensing Division of the Copyright Office prior to the first transmission of sound recordings under the license, or within 45 days of the effective date of this regulation." (Emphasis added).

Subsequently, the President signed into law the Digital Millennium Copyright Act of 1998 ("DMCA"). Among other things, the DMCA expanded the section 114 compulsory license to allow a nonexempt, eligible nonsubscription transmission service and a preexisting satellite digital audio radio service to perform publicly a sound recording by means of certain digital audio transmissions, subject to compliance with notice and recordkeeping requirements. 17 U.S.C. 114(f).

The notice and recordkeeping requirements found in §§ 201.35 and 201.36 would appear to apply to any service eligible for the section 114 license, including those newly eligible to use the license under the amended provisions of the license. However, these regulations provide no opportunity for a newly eligible nonsubscription transmission service which was in service prior to the passage of the DMCA to make a timely filing of its initial notice of transmission. Therefore, the Copyright Office proposed an amendment to § 201.35(f) which would extend the period for filing the initial notice to October 15, 1999, in order to allow the eligible nonsubscription services which were in operation prior to the passage of the DMCA an opportunity to file their initial notice timely. 64 FR 42316 (August 4, 1999).

On September 2, 1999, the Recording Industry of America, Inc. ("RIAA") filed a comment supporting, in general, the Office's proposal to amend the date by which a nonexempt, eligible nonsubscription service already in operation could file a timely initial notice. RIAA expressed concern, however, that the proposed language is overly broad and would allow not only the newly eligible nonsubscription services an opportunity to file an initial notice timely, but inadvertently extend the filing period for any preexisting digital subscription services which had not filed in accordance with the original rule. To avoid any confusion on this point, the Office is amending the rule to indicate that any subscription service in operation prior to September 3, 1998, had until that date to file its initial notice with the Copyright Office, in addition to establishing an October 15, 1999, filing deadline for any eligible, nonsubscription service which is currently in operation. Of course, any new service which chooses to make use of the license may file its initial notice after these dates, so long as the service files its initial notice with the Licensing Division prior to the first transmission of a sound recording.

Regulatory Flexibility Act

Although the Copyright Office, located in the Library of Congress which is part of the legislative branch, is not an "agency" subject to the Regulatory Flexibility Act, 5 U.S.C. 601-612, the Register of Copyrights has considered the effect of the amendment on small businesses. The Register has determined that the amendment would not have a significant economic impact on a substantial number of small entities that would require provision of special relief

[1] These services were incorrectly identified in the August 4, 1999, notice as nonsubscription services.

for small entities. The amendment is designed to minimize any significant economic impact on small entities.

List of Subjects in 37 CFR Part 201

Copyright.

Final Regulations

For the reasons set forth in the preamble, part 201 of title 37 of the Code of Federal Regulations is amended as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

§ 201.35 [Amended]

2. Section 201.35(f) is amended by removing the phrase "or within 45 days of the effective date of this regulation." and adding in its place the folllowing: * * * or by September 3, 1998, in the case of a Service that makes subscription transmissions before or on that date, or by October 15, 1999, in the case of a Service that makes eligible nonsubscription transmissions before, or on, that date. * * *

Dated: September 10, 1999.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 99-24303 Filed 9-17-99; 8:45 am]

BILLING CODE 1410-31-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AZ 086-0017a FRL-6438-1]

Approval and Promulgation of Implementation Plans; Arizona State Implementation Plan Revision, Maricopa County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on a revision to the Arizona State Implementation Plan. This revision concerns two rules from Maricopa County: Rule 336—Surface Coating Operations; and, Rule 348—Aerospace Manufacturing and Rework Operations. This final action will incorporate these rules into the federally approved SIP and stop the sanctions and Federal Implementation Plan clocks started on February 9, 1998 when EPA published a final limited disapproval of the State's previous submittal of Rule 336. The intended effect of approving these rules is to regulate emissions of volatile organic compounds (VOCs) according to the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). Rule 336 controls VOC emissions from different surface coating operations using primarily metal and plastic substrates. Rule 348 controls VOC emissions from aerospace manufacturing and rework operations. EPA is finalizing the approval of this revision into the Arizona SIP under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards, and plan requirements for nonattainment areas.

DATES: This rule is effective on November 19, 1999 without further notice, unless EPA receives adverse comments by October 20, 1999. If EPA receives such comment, it will publish a timely withdrawal **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Written comments must be submitted to Andrew Steckel at the Region IX office listed below. Copies of the rule revisions and EPA's evaluation report for each rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule revisions are available for inspection at the following locations:

Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105;

Environmental Protection Agency, Air Docket (6102), 401 "M" Street, SW., Washington, D.C. 20460;

Arizona Department of Environmental Quality, 3003 North Central Avenue, Phoenix, AZ 85012; and,

Maricopa County Environmental Services Department, 1001 N. Central Ave., Phoenix, AZ 85004.

FOR FURTHER INFORMATION CONTACT: Jerald S. Wamsley, Rulemaking Office, AIR-4, Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744-1226.

SUPPLEMENTARY INFORMATION:

I. Applicability

The Maricopa County rules being approved into the Arizona SIP are Rule 336—Surface Coating Operations and Rule 348—Aerospace Manufacturing and Rework Operations. These rules were submitted by the Arizona Department of Environmental Quality to EPA on August 4, 1999.

II. Background

On March 3, 1978, EPA promulgated a list of ozone nonattainment areas under the provisions of the Clean Air Act, as amended in 1977 (1977 CAA or pre-amended Act), that included Maricopa County. 43 FR 8964; 40 CFR 81.305. On March 19, 1979, EPA changed the name and modified the geographic boundaries of the ozone nonattainment area to the Maricopa Association of Governments (MAG) Urban Planning Area. 44 FR 16391, 40 CFR 81303. On February 24, 1984, EPA notified the Governor of Arizona, pursuant to section 110(a)(2)(H) of the pre-amended Act, that MAG's portion of the Arizona SIP was inadequate to attain and maintain the ozone standard and requested that deficiencies in the existing SIP be corrected (EPA's SIP-Call, 49 FR 18827, May 3, 1984). On May 26, 1988, EPA again notified the Governor of Arizona that MAG's portion of the SIP was inadequate to attain and maintain the ozone standard and requested that deficiencies relating to VOC controls and the application of reasonably available control technology (RACT) in the existing SIP be corrected (EPA's second SIP-Call, 53 FR 34500, September 7, 1988). On November 15, 1990, the Clean Air Act Amendments of 1990 were enacted. Public Law 101-549, 104 Stat. 2399, codified at 42 U.S.C. 7401-7671q. In amended section 182(a)(2)(A) of the CAA, Congress statutorily adopted the requirement that nonattainment areas fix their deficient reasonably available control technology (RACT) rules for ozone and established a deadline of May 15, 1991 for states to submit corrections of those deficiencies. Section 182(a)(2)(A) applies to areas designated as nonattainment prior to enactment of the amendments and classified as marginal or above as of the date of enactment. It requires such areas to adopt and correct RACT rules pursuant to pre-amended section 172(b) as interpreted in pre-amendment guidance.[1] EPA's SIP-Call used that guidance to indicate the necessary corrections for specific nonattainment areas. The MAG Urban Planning Area is classified as serious;[2] therefore, this

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[1] Among other things, the pre-amendment guidance consists of those portions of the proposed post-1987 ozone and carbon monoxide policy that concern RACT, 52 FR 45044 (November 24, 1987); "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations, Clarification to Appendix D of November 24, 1987 **Federal Register** Notice" (Blue Book) (notice of availability was published in the **Federal Register** on May 25, 1988); and the existing control technique guidelines (CTGs).

[2] The MAG Urban Planning Area retained its designations of nonattainment and was classified by

Continued

ORIGINAL

89.7 WCPE

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January 26, 2001

Via USPS Next Day Service

Library of Congress
Copyright Office
Copyright Arbitration Royalty Panel
Attention: Ms. Gina Giuffreda
208 Second Street, SE
Washington, DC 20003

RECEIVED

JAN 31 2001

GENERAL COUNSEL
OF COPYRIGHT

Dear Friends,

In Re: Docket #2000-9 CARP DTRA 1 & 2
Comments Concerning Limited Participation and Limited Financial Obligation in the CARP proceeding

WCPE Radio a small non-profit entity. We stream our non-commercial educational radio station on the Internet without any fees, charges, advertisements, or profit-making devices; we only ask for voluntary donations and failure to donate does not limit any access to our Internet listening.

Because of the very limited nature of our involvement and concern in this proceeding, we do not feel that we need to have significant standing in the process. We do not believe we wish to file a written case or attend or participate in the Copyright Arbitration Royalty Panel (CARP) hearings.

We feel our limited concerns could best be represented by a focused pleading of an *amicus* nature to the panel. Because of the small scope of our involvement and our non-profit single-station status, we do not feel that we can bear the costs of the full procedure, but rather we would like to have our financial obligation limited to those specific items directly related to our burden on the CARP -- such as the incremental costs of serving papers upon the other participants, or the actual time which the CARP may take in directly addressing our specific case.

Sincerely,

JAN 26 2001

Deborah S. Proctor
General Manager, WCPE
President, Educ. Info. Corp.

Post Office Box 828 ✧ Wake Forest, North Carolina 27588-0828 ✧ (919) 556-5178

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Washington
D.C. 20024

Telephone:
(202)707-8380

Facsimile:
(202)252-3423

In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings } Docket No. 2000-9 CARP DTRA 1&2

ORDER

On December 11, 2000, the Library of Congress published the schedule for CARP proceedings in the above-captioned matter. 65 FR 77393 (December 11, 2000). The schedule set the due date for written direct cases on or before February 5, 2001, with arbitration beginning on May 21, 2001. The Library has now received pleadings from parties in the proceeding who are dissatisfied with this schedule.

A large group of parties known as the "Webcaster/Broadcaster Group" petitions the Library to push the schedule back for written direct cases until March 19, 2001, and initiation of the CARP until July 16, 2001. The National Religious Broadcasters Music License Committee and Salem Communications Corp. support the petition. The Recording Industry Association of America ("RIAA") supports these dates and urges the Library to establish that July 16, 2001, is the firm date for initiation and that July 17, 2001, will be the first day of hearings on RIAA's case. In addition, RIAA urges the Library to select only those arbitrators who will be able to hear written direct cases "for a minimum of four days per week, for a period of one month, beginning July 16, 2001." RIAA reply at 4.

New Schedule

The Library has considered the requests of the parties and is inclined to establish a new schedule. Before setting such a schedule, we make the following observations. First, this proceeding should have begun well over a year ago, but for repeated requests for additional time and the RIAA petition for rulemaking regarding the exemption for over-the-air radio broadcasts. We are now into the second period for rates for the section 114 and 112 licenses (2001-2002), with the first period (1998-2000) already passed. There is a need to commence this proceeding as soon as possible. Consequently, the schedule adopted today will be final, and no further requests for delays will be granted.

Second, it is obvious that this proceeding will be large and complex, with many hearing dates required. Scheduling such a proceeding does not depend solely upon the readiness of the parties. In order for the proceeding to be efficient and effective, considerable advance planning by the Library is required. Preparations must be made for the discovery period so that as many discovery matters as possible are resolved prior to the initiation of arbitration. In addition, qualified arbitrators must be identified who will be available for considerable hearing work

Given these considerations, and the requests of the parties, the Library announces the new–and final–schedule:

ACTION	DATE
Negotiated Protective Order	March 28, 2001
Filing of Written Direct Cases	April 2, 2001
Requests for Underlying Documents Related to Written Direct Cases	April 11, 2001
Responses to Requests for Underlying Documents	April 18, 2001
Completion of Document Production	April 23, 2001
Follow-up Requests for Underlying Documents	April 30, 2001
Responses to Follow-up Requests	May 4, 2001
Motions Related to Document Production	May 10, 2001
Production of Documents in Response to Follow-up Requests	May 14, 2001
All Other Motions, Petitions and Objections	May 16, 2001
Initiation of Arbitration	July 30, 2001

Additional Matters

In addition to announcing a new procedural schedule, the Library calls the parties' attention to the following. First, in order for the discovery period to proceed effectively, a protective order must be in place before the start of the 45-day discovery period. Parties are encouraged to negotiate the terms of a protective order for submission to the Library no later than March 28, 2001. If the Library does not receive a negotiated protective order on or before that day, it will enter its own protective order governing the proceeding on the following day.

Second, the Library is aware that this proceeding involves a number of parties that have never before participated in a CARP proceeding. The Library therefore directs all parties to familiarize themselves with the CARP rules contained in part 251 of 37 C.F.R. **ALL PARTIES MUST COMPLY WITH THE CARP RULES.** The rules may be accessed via the Internet at *www.loc.gov/copyright/title37*. Any questions regarding filing procedures should be directed to the CARP Specialist at the Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington D.C. 20540. Telephone: (202) 707-8380. Telefax: (202) 252-3423. Improperly filed pleadings will not be accepted.

Third, with respect to the CARP rules, the Library emphasizes that all parties that filed Notices of Intent to Participate in this proceeding must submit written direct cases. 37 C.F.R. 251.43(a). It is permissible for a party to formally join the written direct case of another participant in lieu of filing its own written direct case. For parties filing their first written direct case in a CARP proceeding, it is recommended they consult written direct cases filed in prior CARP proceedings for format and organization. Copies of these cases are available for inspection and copying by appointment with the CARP Specialist at the Copyright Office at 101 Independence Avenue, S.E., Room 403, Washington, D.C. 20554. Requests for copies may be made, for a fee[1], from the CARP Specialist. The written direct cases are not available on the Copyright Office's webpage.

Written direct cases must be delivered to each of the parties in this proceeding on or before April 2, 2001. 37 C.F.R. 251.45(b)(2)(i). By this, we mean that each of the parties must have copies of everyone's written direct case by 5 p.m. on April 2, 2001. Copies must also be filed with the Copyright Office by this time. Mailing a written direct case on April 2 does not satisfy the rule, nor does delivering it after 5 p.m. The purpose of the rule is to assure that all parties have each other's written direct cases by the close of business on April 2 so that all will have an equal amount of time to prepare their requests for underlying documents. Failure to file a written direct case, or to properly serve it, are grounds for dismissal of the party from the proceeding.

Fourth, as discussed above, this proceeding is very complex and involves the establishment of rates and terms for two separate periods (1998-2000 and 2001-2002). In preparing their written direct cases, the parties are reminded to carefully distinguish between these two periods in organizing and presenting their evidence. As required by 37 C.F.R. 251.43(d), each party must state its requested royalty rates and terms for both periods. These requests may be amended at later points in the proceeding as provided by the rules.

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[1] Fees for copies of documents made by Copyright Office staff are as follows: charge for time spent photocopying--$65 per hour or fraction thereof. Charge per exposure--$.40 per exposure photocopied. See 64 FR 29518, 29521 (June 1, 1999).

Finally, a review of the list of participants in this proceeding reveals a number of smaller-sized firms and concerns that desire to make use of the section 114 and 112 licenses. The Library has been contacted by several of these parties expressing concern over the costs associated with filing a written direct case and fully participating in the proceeding. They are particularly concerned that they will not know the extent of their financial exposure for payment of the arbitrators' charges until the proceeding is completed and have inquired as to whether there are ways to allow presentation of their views to the CARP while limiting both their cost of participating and their responsibility for payment of the arbitrators. Suggestions have included: waiving the requirement of filing written direct cases for these parties and allowing them to file written pleadings (in effect *amicus* briefs) at those junctures of the CARP proceeding related to their concerns; allowing these parties' written direct cases to be considered without oral hearings or testimony; and assessing the arbitrators' costs to smaller parties at a reduced rate or amount.

The Library does not express any opinion as to the advisability, or permissibility, of any of these suggestions. However, in the interest of conducting a proceeding that encourages participation and gathers the maximum amount of relevant evidence for the CARP's consideration, we solicit comments and proposals, if any, to address cost concerns for smaller-sized parties in this proceeding.

Wherefore, the above-described schedule for this proceeding **IS ADOPTED**. Comments and proposals regarding cost concerns for smaller-sized participants in this proceeding must be filed with the Copyright Office no later than February 1, 2001. Reply comments must be filed no later than February 12, 2001.

SO ORDERED.
Marybeth Peters
Register of Copyrights

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

DATED: January 18, 2001

u:\carp\dtra1&2\schedule.final.wpd
January 18, 2001

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	Docket No. 2000-9 CARP DTRA 1 & 2

COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The Recording Industry Association of America, Inc. ("RIAA") submits the following comments on cost concerns for "smaller-sized" parties in response to the Copyright Office's Order of January 18, 2001 ("Order").

RIAA shares the concern about the costs of participating in this proceeding. RIAA wishes to keep costs for all parties as low as possible, while ensuring that all parties are treated equitably and even-handedly. As a general matter, RIAA does not believe that the Copyright Office should discriminate against parties on the basis of their "size" (however that is defined), by requiring some to comply with one set of rules and others to comply with another set of rules; nor should parties be placed at a procedural disadvantage simply because they have organized themselves into larger groups. Moreover, in prior rulemakings, the Copyright Office has considered proposals to address the concerns of "smaller-sized" parties; experience has shown that these proposals often pose significant difficulties that might not be apparent at first glance. Until RIAA has an opportunity to review carefully any specific proposal or proposals advocated by the "smaller-sized" parties on the record in this proceeding, RIAA is not in a position to comment on what procedures, if any, should be adopted to respond to the concerns of the "smaller-sized" parties.

Respectfully submitted,

By: Michele J. Woods

Robert Alan Garrett
Ronald A. Schechter
Michele J. Woods
Jule L. Sigall
Brad R. Newberg
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for the Recording Industry Association of America, Inc.

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February 1, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of the Recording Industry Association of America, Inc. has been filed and served this 1st day of February, 2001, by first class mail and by facsimile, to the following persons:

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In the Matter of

Digital performance Right in Sound Recordings and Ephemeral Recordings } Docket No. 2000-9 CARP DTRA 1&2

ORDER

The Library of Congress issues this Order to address certain matters in the above-captioned proceeding. These issues were discussed at the March 14, 2001, meeting with the parties.

1. *New Precontroversy Discovery Schedule.* The Library is postponing the date for exchange of written direct cases to facilitate entry of the protective order in this proceeding. Adjustment of the date for written direct cases requires adjustment of the remaining precontroversy dates. The date for initiation of the CARP, July 30, 2001, and the date for submission of a negotiated protective order, March 28, 2001, remain the same.

ACTION	DATE
Filing of Written Direct Cases	April 11, 2001
Requests for Underlying Documents Related to Written Direct Cases	April 18, 2001
Responses to Requests for Underlying Documents	April 24, 2001
Completion of Document Production	April 27, 2001
Follow-up Requests for Underlying Documents	May 4, 2001
Responses to Follow-up Requests	May 10, 2001
Motions Related to Document Production	May 16, 2001
Production of Documents in Response to Follow-up Requests	May 18, 2001
All Other Motions, Petitions and Objections	May 25, 2001

2. *Protective Order*. As described above, the terms of a negotiated protective order must be submitted to the Library by close of business on March 28, 2001. The Library has before it a pending motion submitted by RIAA, AFTRA and AFM to accept a proposed protective order. One of the provisions of the proposed protective order is a requirement that all parties to this proceeding sign a non-disclosure certification for each category of protected materials. The Library finds this provision to be useful and will include it in the protective order that it enters on March 29, 2001. However, in order to enable signatures to be obtained on the certification forms prior to the exchange of the written direct cases, sufficient time is required after March 29, 2001. This is why the Library has postponed the schedule from April 2 to April 11 for the exchange of written direct cases.

Any party that has not executed a non-disclosure certification, as provided in the protective order to be issued on March 29, 2001, **by April 6, 2001,** will not be entitled to receive protected materials contained in the written direct cases as filed on April 11, 2001. However, a party is not precluded from executing a non-disclosure certification after this date in accordance with provisions set forth in the Protective Order, and following such execution will be entitled to receive copies of past and future protected materials.

3. *Notice of Intent to File Written Direct Case*. Many parties have filed Notices of Intent to Participate, and already a number of parties have formally withdrawn from this proceeding. The Library anticipates that additional parties will withdraw before the deadline for submitting written direct cases; and some will not file cases at all, requiring their dismissal from the proceeding. 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 March 28, 2001.**

A Notice of Intention to Submit a Written Direct Case shall state the party's intention to file a written direct case on April 11, 2001, and to be an active participant in this proceeding. In addition, it shall provide the name and address 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 this proceeding.

Any party that fails to file a Notice of Intention to Submit a Written Direct Case by March 28, 2001, shall forfeit the right to receive service copies of the written direct cases from the parties on April 11, 2001. 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 April 11, 2001, will be added to the service list. These parties must then be served with copies of the other parties' direct cases by 5 p.m., Friday, April 14, 2001. All parties must then adhere to the discovery schedule set forth in this Order.

4. *Service by the Copyright Office*. At the March 14, 2001, meeting with the parties, service of filings and pleadings on the parties was discussed. It was agreed that, where one counsel represented more than one party, the number of copies required to be served on that counsel would be worked out through individual agreements. There was not, however, a discussion on whom the Library will serve copies of the orders, announcements and decisions that the Library will issue in this proceeding. The Library's policy for serving these items will be as follows.

For those parties not represented by counsel, and for those parties represented by counsel that does not represent other parties in this proceeding, the Library will serve one copy of its orders, announcements and decisions. In the interests of saving costs, where the same counsel represents two or more parties to this proceeding, that counsel will receive only one copy of the Library's orders, announcements and decisions. The Library will not provide additional copies.

Likewise, the Office will not serve a party directly when that party is represented by counsel, nor will the Library serve more than one attorney for a party with copies of its orders, announcements and decisions. For this reason, each party must designate in its Notice of Intention to Submit a Written Direct Case a single attorney for purposes of service by the Library.

5. *Participation by small parties.* In the January 18, 2001, Order in this proceeding, the Library solicited comments regarding the participation of so-called "small parties" that do not submit written direct cases. Comments were received from Manning Broadcasting, Inc., SBR Creative Media, Inc., WCPE-FM, and the Performing Artists' Society of America favoring the submission of *amicus curae* briefs in lieu of written direct cases. The RIAA opposed such submissions.

Section 251.43(a) of the CARP rules provides that all parties to a proceeding must file a written direct case that 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. In addition, it is the parties to a rate adjustment proceeding who bear the cost of the proceeding. 17 U.S.C. 802(h)(1).

Participation by non-parties through submission of *amicus* briefs does not appear to be consistent with these provisions. The Library has serious reservations whether it, or the CARPs, possess the authority to allow such submissions under the current CARP regulations. While there may be some merit in the idea of accepting *amicus* briefs in

CARP proceedings, the merits should be first explored through the rulemaking process.

Consequently, the Library will not allow such submissions by any persons or entities who are not full, active participants in this proceeding. We are sensitive to the concerns of those who cannot individually afford the cost of full participation, and encourage them to pool their resources with those in like circumstances for the submission of one or more joint written direct cases as permitted by the rules.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: David O. Carson
David O. Carson
General Counsel

DATED: March 16, 2001

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March 16, 2001

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C. 20540

In the Matter of:	)	
DIGITAL PERFORMANCE RIGHT	)	**Docket No. 2000-9**
IN SOUND RECORDINGS AND	)	**CARP DTRA 1 & 2**
EPHEMERAL RECORDINGS	)	

MOTION TO STRIKE PROVISIONS FROM RATE REQUEST OF BROADCASTERS AND WEBCASTERS

The Recording Industry Association of America, the American Federation of Television and Radio Artists, the American Federation of Musicians of the United States and Canada, and the Association for Independent Music (collectively, "Copyright Owners and Performers") hereby request that the Copyright Office ("Office") strike two provisions that are contrary to the specific requirements of Section 114 from the rate request of the Broadcasters and Webcasters in the above-captioned proceeding.

On April 11, 2001, the Broadcasters and Webcasters filed their rate request, entitled "Broadcasters/Webcasters Proposed Rates and Terms for Royalty Fees for the Digital Public Performance and Ephemeral Recording of Sound Recordings by Eligible Nonsubscription Transmissions" ("Proposed Rates and Terms"), as part of their direct case. See Direct Case of Broadcasters and Webcasters, Exhibit 3 (Volume II). Two sections of this rate request are contrary to the explicit provisions of Section 114. One provision provides a schedule for the payment of arrears (Section 2(b), third sentence), and the other contains notice and recordkeeping provisions (Section 3). Both are contrary to the provisions of Section 114 and contrary to Office precedent, which Broadcasters and Webcasters ignore.

I. TERMS FOR MAKING PAYMENTS

A. Background

Section 114 (f)(4)(C) of the Copyright Act provides that after the Copyright Royalty Arbitration Panel ("CARP") determines the royalty rates under the compulsory license, "[a]ny royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set." 17 U.S.C. §114(f)(4)(C). When the royalty rates are set in this case, royalty payments that have accrued since October 28, 1998 will be in arrears and will be due in accordance with this provision.

Nevertheless, the third sentence of Section 2(b) of the Proposed Rates and Terms provides that "[f]or the period from October 28, 1998 through the calendar quarter in which the Librarian of Congress publishes this regulation as a final regulation, payment shall be due on the forty-fifth (45th) day after the end of the first full calendar quarter following such quarter."

B. Discussion

The third sentence of Section 2(b) should be stricken from the Proposed Rates and Terms because it is in direct conflict with a statutory provision, Section 114 (f)(4)(C), that addresses exactly the same term. This very issue was addressed in the Librarian of Congress's Final Report in the Section 114 Subscription Services Proceeding. The CARP in that case had extended the schedule for payment of arrears beyond the time period provided by the statutory provision, but the Librarian determined that "the Panel had no authority to set terms which . . . alter a payment schedule already set by law." Final Rule and Order in Docket No. 96-5 CARP DSTRA at 63 Fed. Reg. 25394, 25410

(May 8, 1998). The Register of Copyrights found that "the statutory language is clear on its face" and that the adoption of the alternative provision based on an earlier Copyright Royalty Tribunal decision was "arbitrary and contrary to well-established principles of law." Id. at 25411.

This situation is exactly the same. The CARP does not have authority to override the identical statutory provision on payment of arrears in order to give the Broadcasters and Webcasters several months longer (at a minimum) to pay the royalties that have been accruing since 1998. No additional time is required, because the Broadcasters and Webcasters have had an extraordinary amount of notice about their payment obligation, but if they wish to seek additional time they must petition Congress, not the CARP.

II. INFORMATION REGARDING USE OF SOUND RECORDINGS

A. Background

Section 114 provides that "[t]he Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings." 17 U.S.C. §114(4)(A). The statute also states that "[a]ny person who wishes to perform a sound recording publicly . . . may do so . . . by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation. . . . ." 17 U.S.C. §114(4)(B)(i).

The Recording Industry Association of America and its SoundExchange division have filed a petition requesting that the Copyright Office start the rulemaking proceeding that is needed to meet this statutory requirement. See Petition for Rulemaking to Establish Notice and Recordkeeping Requirements for the Use of Sound Recordings in

Certain Digital Audio Services ("Notice and Recordkeeping Petition"), attached as Exhibit A.

Yet Section 3 of the Proposed Rates and Terms asks the CARP to set terms that are properly the subject of this separate rulemaking proceeding. It contains provisions that not only require the "agent(s) designated to receive royalty payments under the statutory license to determine what sound recordings have been performed by services licensed under the statutory license," but to "reimburse the reasonable costs and expenses incurred by the service in collecting and providing the relevant information."

B. Discussion

Section 3 must be stricken from the Proposed Rates and Terms because its presence in the rate request is inconsistent with the procedures mandated by Congress to address the question of notice and recordkeeping requirements.[1] Despite Congress's clear intent, as expressed in Section 114(4)(A) and (B), to have the Librarian of Congress set the requirements through a separate rulemaking proceeding, Broadcasters and Webcasters have asked the CARP to rule on recordkeeping issues within the context of this proceeding. The CARP should only be presented with proposed rates and terms that it has the authority to adopt, and it does not have the authority to adopt the proposal in Section 3.

---

[1] The proposal itself also inappropriately places the burden of recordkeeping on the agent(s) designated to receive royalty payments, rather than placing it on entities that perform sound recordings as required by Section 114 (4)(A). The Office, however, need not reach that question because the statutory requirement for rulemaking on the issue makes this CARP proceeding the incorrect forum to address any proposal on the notice and recordkeeping requirements.

The parties will not be left without appropriate notice and recordkeeping requirements if the provision is stricken from the Proposed Rates and Terms. RIAA's Notice and Recordkeeping Petition addresses the need for information regarding the use of sound recordings under the statutory license. See Notice and Recordkeeping Petition at Exhibit B, Proposed Amended 37 C.F.R. §201.36. That proceeding, and not a CARP arbitration, is the proper forum in which to craft Congressionally mandated notice and recordkeeping regulations.

The previous Section 114 Subscription Services Proceeding, Docket No. 96-5 CARP DSTRA, provides a model that the Office should adopt in determining whether the CARP in this proceeding is permitted to address the topics covered in the Proposed Rates and Terms. To set notice and recordkeeping requirements for subscription services operating under the Section 114 license, the Copyright Office conducted a separate proceeding similar to the one contemplated by the RIAA Petition. That proceeding resulted in the regulations found at 37 C.F.R. §§201.36 - 37. See Interim Regulations in Docket No. RM 96-3B, 63 Fed. Reg. 34289 (June 24, 1998). Proposed regulations similar to those included in Sections 201.36 - 37, such as the notice and recordkeeping provisions in Section 3 of the Proposed Rates and Terms, must be addressed in the notice and recordkeeping proceeding mandated by statute, not in this CARP proceeding. Section 3 of the Proposed Rates and Terms is clearly inconsistent with the intent of Congress to have a separate notice and recordkeeping rulemaking proceeding, and cannot be considered by the CARP in this proceeding.

Conclusion

For the foregoing reasons, Copyright Owners and Performers request that the Copyright Office strike the third sentence of Section 2(b) and Section 3 in its entirety from the Proposed Rates and Terms of the Broadcasters and Webcasters.

Respectfully submitted,

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May 25, 2001

Before the
LIBRARY OF CONGRESS
Washington, DC 20540

In the Matter of:
DIGITAL PERFORMANCE RIGHT
IN SOUND RECORDINGS AND
IN EPHEMERAL RECORDINGS

No. 2000-9 CARP DTRA 1&2

RECEIVED

APR 4 2001

GENERAL COUNSEL
OF COPYRIGHT

WITHDRAWAL OF
NOTICE OF INTENT TO PARTICIPATE

Educational Information Corporation, d/b/a WCPE Radio, pursuant to the Rules of the Copyright Office, hereby withdraws its Notice of Intent to Participate as an individual entity in the proceedings of the Copyright Arbitration Royalty Panel (CARP) to determine the rates and terms of the statutory licenses for the performance of sound recordings by eligible non-subscription transmission services under 17 USC §114 and the making of ephemeral recordings under 17 USC §112.

WCPE reserves the right to Request Leave to Submit an *Amicus* Pleading and to do so, and WCPE reserves the future option to affiliate and/or partner with another entity or entities which are actively participating in one or both of these proceedings.

WCPE also hereby re-affirms its intention to make Ephemeral recordings under Section 112 License and affirms its intention to stream on the Internet under Section 114. WCPE does not believe that its Internet transmission services are required to rely upon either or both licenses, but provides this Notice out of caution and without prejudice to, or loss or waiver of, its rights.

This is 31st day of March, 2001.

Respectfully Submitted,

Deborah S. Proctor

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I, Deborah S. Proctor, do hereby certify that a copy of the foregoing Notice to Withdraw has been filed an served on this, the 31st of March, 2001, by First Class postage prepaid US mail to the following parties:

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Eric Pietras; Matt Zanon; WVKC Galesburg Knox Clg; 2 East South St; Box K-245; Galesburg, IL 61401
Rett Rich; Chris Cavallagro; WMCX; Monmouth Univ; 400 Cedar Ave; West Long Branch, NJ 07764
Joseph E. Jindra; KNCK Radio; 1390 West 11th Street; PO Box 629; Concordia, KS 66901
Michael Costanzo; Midcontinent Broadcasting Co.; 500 S. Phillips; Sioux Falls, SD 57104
Alison J. Shapiro; Fletcher, Heald & Hildreth PLC; 1300 N. 17th St, 11th Flr; Arlington, VA 22209
Larry Roberts; Fisher Radio Regional Group; 1212 N. Washington, Ste 307; Spokane, WA 99201
Jerry D. Sokolosky; 2143 Highway 64 North; PO Box 1756; Guymon, OK 73942
Hal S. Widsten; KWED(AM); 609 East Court Street; Seguin, TX 78155
Richard L. Sellers; KMRY; 1957 Blairs Ferry Road NE; Cedar Rapids, IO 52402
Mark A. Floyd; wsmonline.com; Gaylord Entertainment Company; 1 Gaylord Drive; Nashville, TN 372 4
Eugene J. Manning; WARX; Manning Broadcasting Inc; 880 Commonwealth Ave; Hagerstown, MD 21. K
Ron Carter; KOTK KWJJ; 2000 SW 1st Ave, Ste 300; Portland, OR 97201
Carl Gardner; Journal Broadcast Group Inc.; 720 E. Capitol Drive; Milwaukee, WI 53212
John Morris; WSWI/Univ. of Southern Indiana; 8600 University Blvd; Evansville, IN 47712
Michael Mitchel; J. Douglas Williams; 101 Centre, Suite R; Woodward, OK 73801
Charles L. Spencer; Hebert, Spencer, Cusimano & FRy, LLP; 701 Laural Street; Baton Rough, LA 70802
Stefan M. Lopatkiewicz; Tania W. Hanna; Dorsey & Whitney, LLP; 1001 Pennsylvania Ave; Ste 300 S
Washington, DC 20004
Ivy Golstein; WREF WLAD WDAQ; 198 Main Street; Danbury, CT 06810
Kimberly Henric; KMTS; 1322 1/2 Grand Avenue; Glenwood Springs, CO 81601

Deborah Proth
3/31/01

the effort to create a statutory license for webcasting. However, before exchanging rate proposals, DiMA advised us that it could not represent its members in negotiations concerning rates and terms of the DMCA statutory licenses and that we would need to negotiate with its members individually.[1]

The absence of an industry representative for webcasters has significantly complicated the statutory licensing process for copyright owners and has made it difficult to achieve our principal objective of statutory licensing – the minimization of transactional costs. According to Copyright Office records, there are approximately 736 web sites (other than AM/FM broadcaster sites) that have filed notices of intent to utilize the Section 114 statutory license; approximately 187 of these webcasters are currently webcasting audio. *See* RIAA Exhibit 126 DP.[2] The prospect of negotiating

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[1] In the Fall of 1999, we met with representatives of broadcast stations that stream their AM and FM radio signals over the Internet to discuss the possibility of negotiating statutory license rates and terms. However, the broadcasters took the position that their AM/FM webcasts of sound recordings are exempt from copyright liability. In December 2000 the Copyright Office ruled that AM/FM webcasts of sound recordings are subject to copyright liability. *See* RIAA Exhibit 125 DP. Several broadcasters have challenged this rule in court. To date, no broadcaster has paid RIAA anything for the right to transmit sound recordings as part of AM/FM webcasts – although, as discussed below, we have reached agreement with a webcaster that retransmits approximately 330 separate AM/FM radio stations and one that provides AM/FM webcasting sites for individual radio stations.

[2] Approximately 1,557 broadcasters have also filed notices availing themselves of the Section 114 statutory license. *See* RIAA Exhibit 126 DP.

id. § 110(7) (performances by vending establishments that make retail sales of copies or phonorecords of the work); and

id. § 110(10) (performances during social functions by nonprofit veterans' and fraternal organizations). With the exception of Sections 110(1) and (5)(A), none of the foregoing exemptions applies to sound recordings.

2. Sound Recordings

As noted in Section II.A.2. above, when Congress in the DPRA of 1995 first accorded a performance right to sound recordings, Congress limited that right to "digital audio transmissions." Thus, Congress effectively exempted analog transmissions (such as over-the-air radio broadcasts) from any sound recording performance right – while such transmissions remain subject to the Section 106(4) performance right for musical works. As a result, AM/FM radio stations, for example, pay license fees to musical work copyright owners for the broadcast of a CD but not to sound recording copyright owners.

Section 114(d)(1) of the Copyright Act, as amended by the DPRA and DMCA, contains several specific exemptions from the Section 106(6) digital performance right. For example, if over-the-air radio broadcasts switch to a digital broadcast, those transmissions will be exempt from the sound recording performance right under Section 114(d)(1)(A). Other exemptions are set forth in:

17 U.S.C. §§ 114(d)(1)(B) (certain retransmissions of over-the-air broadcasts);

id. § 114(d)(1)(C)(i) (transmissions incidental to an exempt transmission);

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C. 20540

In the Matter of:
DIGITAL PERFORMANCE
RIGHT IN SOUND RECORDINGS
AND EPHEMERAL RECORDINGS

No. 2000-9 CARP DTRA 1&2

DIRECT TESTIMONY OF
JAMES PATRICK DONAHOE
(Submitted by Clear Channel Communications, Inc.)

(1) My name is James Patrick Donahoe. I am employed as Executive Vice President--Radio Clear Channel Radio Group of Clear Channel Communications, Inc. and its subsidiaries (collectively "Clear Channel"), headquartered at 200 East Basse Road, San Antonio, Texas 78209-8328. My office is at 11995 El Camino Real, Suite 101, San Diego, CA, 92130.

(2) My primary duty is the supervision of the West Region of the Clear Channel Radio Group, which includes over 200 radio stations, many of which maintain Internet websites, some with and some without a streaming feature. My work with Clear Channel requires me to be generally familiar with both its broadcast and its Internet streaming operations. Also, I must have an

(14) From the standpoint of record companies, a listener to Internet streaming should be indistinguishable from a listener to a conventional over-the-air broadcast. Either form of transmission exposes potential purchasers to the recordings. I am told that, in connection with the present proceeding, there has been some suggestion that record companies may object to streaming. However, we have absolutely no indication from the field that record company representatives are less aggressive in their promotional contacts with stations that stream.

(15) From the standpoint of radio stations, streaming is very similar to broadcast transmissions. An important difference, however, is that the cost to broadcast over the air remains the same regardless of how many radios are tuned to a given program. By contrast, as more listeners access streamed content, more "bandwidth" must be provided, and providing bandwidth is the most expensive aspect of streaming. Thus, each new streaming listener imposes added cost on the station, something that does not occur with new broadcast listeners.

(16) The jury still is out as to whether Internet streaming will turn out to be economically viable and attractive for radio stations. To date there is very limited precedent for charging advertisers for streaming listeners. Nor is it yet

proven that streaming listeners add substantially to the ability of station websites to sell banners or other advertising. In fact, Clear Channel is reevaluating its streaming activities in light of the lack of profitability and uncertainty over issues such as those that are the subject of this proceeding.

(17) Typically, a listener accesses a streamed broadcast by going to the station's website and then clicking on a streaming button. However, once a listener accesses a stream, he/she can visit another website while continuing to listen to that stream. As a result, we still are exploring how a streaming feature affects the actual use of a website.

(18) At the present time, there are few opportunities to generate revenue from streaming. To date, we have identified advertising as the likely primary future revenue source from streaming. However, as already noted, the viability of such a strategy remains unclear.

(19) To date Clear Channel has found streaming to be unprofitable, even ignoring the costs of encoding/streaming software and hardware required at each station (which could easily be several thousand dollars per station) or any additional personnel requirements. Perhaps a profitable Internet streaming model someday may emerge, but Internet streaming currently is in its infancy

and any increased expense from any source, including increased royalty expense, could prove fatal.

(20) Exhibit 1 attached hereto lists the Clear Channel stations that streamed their broadcast as of March, 2001, and provides format and other information about those stations.

(21) We view Internet streaming as a marginal expansion of our broadcast operations. It very much is the tail on the broadcast dog. Streaming allows potential users who lack convenient access to a radio to receive our broadcast via their computer. Our streaming listeners generally are the same people who listen to our over-the-air broadcasts. A recent Arbitron/Edison Media Research study (Internet IV: Streaming at a Crossroads, February 2001) supports this. When Arbitron asked those who listen to radio stations online "which do they listen to most on the Internet," 54% responded with stations in the local area, suggesting that a majority of streamers are listeners of the over-the-air broadcasts. In addition, when Arbitron asked "does the time you spend listening to the station you listen to most online cause you to spend more or less time listening to that station over the air" 39% of those surveyed responded with "more" while 27% of those surveyed responded with "less," suggesting that streaming frequently is a substitute for over-the-air listening.

(22) Our streaming listeners are a very small fraction of our total listener hours.

(23) Clear Channel has used a variety of solutions for the streaming of its radio station web sites as the company's streaming operations have been historically the product of decentralized decisions. Currently, Clear Channel centrally hosts some its of streamed web sites, relies on Yahoo! (formerly Broadcast.com) to host a number of its streamed web sites and uses a number of independent ISPs to host the remainder of its streamed web sites. For centrally streamed web sites, Clear Channel generally uses Microsoft Windows 2000 servers running on Microsoft Windows Media Technologies and streams in Microsoft Windows Media format. For non-centrally hosted sites, the software and streaming formats vary, but consist primarily of Microsoft Windows Media and Real Networks Real Audio.

(24) If some royalty rate is required to be paid to recording companies, Clear Channel urges that it be keyed to the number of listeners exposed to music over time, permitting some linkage between the music usage of various stations and formats and the royalties paid. To this end, Clear Channel supports the fee and term proposal that has been developed by the radio parties to this proceeding.

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: **Digital Performance Right in Sound Recordings and Ephemeral Recordings**	**Docket No. 2000-9** **CARP DTRA 1&2**

TESTIMONY OF STEPHEN F. FISHER,
ENTERCOM COMMUNICATIONS CORP.

BACKGROUND

1. I, Stephen F. Fisher, am testifying in this proceeding on behalf of Entercom Communications Corp. ("Entercom"), and I submit this statement in support of Entercom's direct case.

2. Entercom is a Philadelphia-based radio broadcasting company with a portfolio of owned and operated radio stations in markets across the United States.

3. On November 2, 2000, Entercom submitted an Initial Notice stating its intent to obtain a statutory license under Section 114(f) and Section 112(e) of Title 17 of the United States Code, to the extent required by law, to cover streaming of its radio stations' over-the-air programming on the Internet.

4. Radio broadcasters' public performances of sound recordings in over-the-air transmissions are not and never have been subject to copyright liability. Radio airplay not only creates tremendous promotional value for record labels and artists, but it also is critical to the success of their creative efforts. Congress clearly had this in mind when it exempted "nonsubscription broadcast transmissions" from copyright liability under the newly created

Media Services division to provide Web site design and hosting services for Entercom stations that either had not developed sites or operated rudimentary Web sites.

Entercom's Streaming Operations

18. Entercom has always viewed streaming as an extension of its local radio stations. Many stations began streaming as a novelty and because providers offered them the service at no cost.

19. KNRK-FM and KGON-FM in Portland, Oregon were the first Entercom stations to stream. These stations started streaming in April 1996 and May 1997, respectively, under individual advertising barter arrangements with Mark Cuban's AudioNet (later to become Broadcast.com, and then acquired by Yahoo!). At that time, many radio stations were being approached by online "aggregators" who offered to transmit the stations' broadcast signals over the Internet at no charge. Streamed radio programming from different stations around the country was accessible at the aggregators' Web sites (for example, Broadcast.com) and, in some cases, from the radio stations' Web sites as well.

1998-2000

20. In mid-2000, Entercom entered into a multi-station streaming agreement with StreamAudio, replacing streaming arrangements between individual Entercom stations and their streaming service providers. By the end of 2000, some fifty-two Entercom stations were streaming their over-the-air programming with StreamAudio.

21. StreamAudio originally provided streaming services to Entercom's stations at no charge. It planned to recoup streaming costs by selling audio "gateway" advertisements. Gateway ads are played as lead-ins to a radio station's streamed programming when users connect. In theory, StreamAudio [

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]. However, I believe that StreamAudio has earned little, if any, revenue from streaming-related advertisements.

22. Faced with high bandwidth costs and without a viable advertiser-based streaming business, StreamAudio and other providers were forced to introduce streaming fees. In 2001, StreamAudio began charging Entercom stations a monthly fee. [

]

23. Overall, the streaming medium has taken a real hit over the last few months. Recently, Intel announced that it was shutting down its nine-month-old streaming division. Intel has provided the streaming network for StreamAudio, Entercom's streaming provider. Although StreamAudio is now working with other vendors, Intel's exit has heightened Entercom's uncertainty about the overall viability of the medium.

2001-2002

24. Currently, sixty-seven of Entercom's ninety-six stations operate Web sites. Fifty-two of those stations transmit their over-the-air signals on the Internet. A description of Entercom's streaming stations, including formats and locations, is attached at Exhibit 2.

25. Entercom has estimated that, by the end of 2002, up to eighty-one of its radio stations may be streaming their signals over the Internet, but it is difficult to make firm projections given uncertainties in today's Internet environment. One significant factor in the development of streaming is the cost of licensing the rights at issue in this proceeding.

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Streaming Audiences

26. Entercom stations' streaming audiences represent only a fraction of their total listenership. This audience appears to be largely comprised of existing listeners who stream as an alternative means of accessing their local stations.

27. Streaming audiences are unlikely to reach a critical mass at any time soon. In March 2001, Entercom's top [ ] streaming stations combined averaged only [ ] concurrent listeners.[3] The "peak concurrent connections," that is, the peak number of listeners to all seven stations at any one time, was [ ]. Those same seven stations attract an average cumulative over-the-air audience of more than [ ][4] Indeed, WEEI-AM in Boston alone reaches an average of [ ] 12+ persons at any one time.[5] The highest recorded audience, to date, for any single Entercom station is [ ] simultaneous listeners. Sports programming appears to be the largest draw.

28. Furthermore, the number of Web site visitors who choose to stream Entercom's radio broadcasts is a fraction of total Web site visitors. For instance, in March 2001, WEEI-AM reported that [ ] of a total of [ ] unique Web site visitors chose to stream.

LOCAL MEDIA INTERNET VENTURE

29. In late 1999, Entercom was approached by the EMMIS radio group to participate in a new joint venture to provide online content, technology and marketing services and to set up a national advertising sales force for its founders' radio stations. The joint venture

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[3] Based on listener connections over a twenty-four hour period measured during the course of a week in March 2001.

[4] 12+ CUME Persons between the hours of 6:00 A.M. and midnight from Monday to Sunday as reported in Arbitron Inc., *Radio Market Report*, Fall 2000.

[5] *Id.*

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LMiV is still to develop a national sales force, and local radio stations have little experience in online advertising sales. To date, Entercom's radio stations have generally packaged online advertising with over-the-air spots, if at all.

ECONOMICS OF STREAMING

35. Streaming is an expensive technology to implement and operate, with no proven economic return. As detailed below, Entercom and its radio stations are incurring ongoing costs associated with streaming, including (1) streaming fees; (2) Web site development and maintenance costs; and (3) capital and infrastructure costs to develop a viable Internet platform.

36. The LMiV joint venture illustrates the substantial capital investments that radio broadcasters, including Entercom, are making to develop a viable Internet platform. Recent financial projections indicate that LMiV will incur a $[ ] million loss in its first year of operation, with no guarantee of profitability in later years.

Streaming and Web Site Costs

37. Each streaming station currently pays StreamAudio a monthly fee of $[ ] as a contribution to bandwidth costs. This amounts to $[ ] per month for Entercom's fifty two streaming stations. Each station is required to lease or buy a PC encoder to convert the over-the-air signal for transmission to the streaming service provider. Entercom stations pay a deposit of $[ ] for leased or $[ ] for owned PC encoders.

38. Entercom's Internet management costs are at least $[ ] annually at the corporate level and more than $[ ] annually at the station level. These figures do not include additional training costs.

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39. Our radio stations use valuable airtime to promote their Web sites. The estimated value of this time, which could otherwise have been sold to other advertisers, is $[ ] million per year.

40. As described above, Entercom has made a significant capital investment in LMiV, comprising an upfront contribution of $[ ] million and a capital commitment of $[ ] million overall. In addition, Entercom's stations will contribute over-the-air and online advertising inventory in return for LMiV's Web site and streaming services. The value of this "bartered" advertising inventory could be as high as $[ ], depending on prevailing ad rates.

Streaming and Web Site Revenues

41. To date, streaming has delivered no discernable revenues to Entercom.

42. Entercom's overall Internet-related revenues have been [ ]. Total reported Internet-related revenues in 2000 were approximately $[ ]. While Entercom has targeted Internet revenues of roughly $[ ] in 2001, we do not expect these revenues to derive from streaming. Given the collapse of Internet advertising, it is highly unlikely that we will meet this target, in any event.

43. To my knowledge, no streaming radio station has been able to convince advertisers to pay more for over-the-air advertising spots streamed over the Internet. If Internet services are to succeed using an advertiser-based business model, they need to offer a competitive product that advertisers want to buy. This requires online audiences to reach a sufficient size to make the cost of advertising worthwhile. Over-the-air radio advertisers purchase radio spots on a cost per thousand "impressions" basis. Because most streaming radio stations cannot even deliver one thousand simultaneous listeners, at present there is simply no market to sell.

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Relative Contributions of the Services and Copyright Owners

55. As discussed in detail above, although radio streaming is still in its infancy, it already promises significant promotional benefits to recording labels and artists, with no incremental costs or investments on their part. Conversely, the radio industry has invested significant resources in developing the streaming medium, but has received little, if any, revenues in return. Entercom believes that the royalty rate for the performance of sound recordings via streaming of radio transmissions should take these realities into account.

PROPOSED ROYALTY RATES AND TERMS

56. Entercom adopts and incorporates by reference the accompanying Broadcasters/Webcasters Proposed Rates and Terms for Royalty Fees for the Digital Public Performance and Ephemeral Recording of Sound Recordings by Eligible Nonsubscription Transmissions ("Proposed Rates and Terms"), which Entercom submits is supported by my testimony and the testimony of the expert witnesses filed on behalf of Entercom and others.

57. As set forth more fully in the Proposed Rates and Terms, Entercom proposes a royalty rate, covering both the Section 114(f) and Section 112(e) licenses, as follows:

(a) $.0015 per listener-hour or per segmented-listener-hour for streaming stations paying on a per-listener-hour or per-segmented-listener-hour basis, and $.00014 per listener-song for streaming stations paying on a per-listener-song basis, excluding listeners within a 150-mile radius of the station's broadcast transmitter.

(b) a minimum annual fee of $250 per streaming station.

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:	:	Docket No. 2000-9 CARP DTRA 1&2
Digital Performance Right in Sound Recordings and Ephemeral Recordings	:	

TESTIMONY OF DAN HALYBURTON, SUSQUEHANNA RADIO CORP.

BACKGROUND

1. I, Dan Halyburton, am testifying in this proceeding on behalf of Susquehanna Radio Corp. ("Susquehanna"), and I submit this statement in support of Susquehanna's direct case.

2. Susquehanna is a wholly-owned subsidiary of Susquehanna Media Co. which, in turn, is a wholly-owned subsidiary of Susquehanna Pfaltzgraff Co., a diversified media and consumer products company.

3. On October 14, 1999, Susquehanna submitted an Initial Notice stating its intent to obtain a statutory license under Section 114(f) and Section 112(e) of Title 17 of the United States Code, to the extent required by law, to cover the transmission ("streaming") of its radio stations' over-the-air programming on the Internet.

4. Radio broadcasters' public performances of sound recordings in *over-the-air* transmissions are not and never have been subject to copyright liability. Radio airplay creates tremendous promotional value for record labels and artists and is critical to the success of their creative efforts. Therefore, when Congress created a limited digital performance right in sound

CONTAINS REDACTED MATERIAL

visual—that supplements the broadcast, and the Web sites shepherd visitors back to the radio. Materials that promote music and artists are common features of the stations' Web sites.[3]

15. There are numerous start-up and operating costs associated with hosting Web sites. Because the Web sites are extensions of the over-the-air programming, the stations must continuously update their Web sites to remain in sync with the information provided on-air. Web site content frequently includes graphics and materials relating to on-air promotions; calendar events announced on-air (*e.g.*, concerts, record releases and community events); radio interviews; current news; and radio scheduling information.

Streaming Operations

16. Streaming of radio programming is one element of Susquehanna's Web site content; it is not a stand-alone operation.

17. Susquehanna was one of the first radio broadcasters to stream. In the fall of 1995, Mark Cuban of AudioNet, a streaming provider (later to become Broadcast.com), approached KLIF/KKLF-AM a news/talk radio station in Dallas, offering to simultaneously stream the station's over-the-air signal via the Internet. At this time, streaming technology was in an early stage of development, and the service was offered without charge. KLIF/KKLF-AM became the first Susquehanna radio station to stream its over-the-air programming on the Internet. At that time, streaming was not sufficiently advanced to transmit music content.

18. Other Susquehanna stations soon followed suit. The stations streamed pursuant to a beta test arrangement with Broadcast.com until February of 1999, at which time, Susquehanna entered into a three-year streaming agreement with Broadcast.com. Under this agreement, all of Susquehanna's stations' streamed [

[3] For example, a station Web site might display photographs from a recording artist's live appearance in the studio to promote a new CD release.

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Streaming Audiences

21. We believe our streaming audiences are predominately local over-the-air listeners who use streaming as a new method of accessing Susquehanna's stations online. Streaming enables listeners to tune in to their local radio station in situations where they have no radio receiver or where reception is poor. In fact, data indicate that work-hours streaming connections to Susquehanna stations' Web sites are considerably higher than at other times of the day—and reach a peak during lunchtime hours. For a breakdown of hourly streaming connections to Susquehanna stations, see Exhibit 4.

22. Streaming audiences are still tiny as compared to those listening to the station over-the-air. In fact, a striking comparison can be made between Susquehanna's total weekly over-the-air listener hours and total weekly streaming listener hours. In February of 2001, a total of approximately [ ] hours per week were spent listening to Susquehanna stations over-the-air as compared to [ ] hours streaming.[7] Susquehanna streaming hours comprised approximately [ ] percent of total weekly (over-the-air and streaming) listener hours.

23. Radio stations' streaming operations are likely to remain a supplemental aspect of local radio operations for the foreseeable future. At least for now, radio stations have little incentive to target listeners from outside of their local service areas because those listeners are not included in the stations' ratings, and ratings, in turn, are the basis for advertising rates and sales. Roughly [ ] percent of Susquehanna's overall over-the-air advertising revenues are locally based. Even of the remaining nationally-based advertisements, a [

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[7] *See* Exhibit 5.

]. The fact that national radio advertising is often locally tailored underscores the local nature of radio business.

24. Many stations stream because it is uncharted territory. No one can predict the future. Streaming of over-the-air radio signals may eventually prove profitable; it may not. As with all new means of communication, the communicator must weigh the pros and cons and decide whether to embrace a technology that may reach new listeners, and serves existing audiences in new ways. One advantage over-the-air broadcasting has over streaming, at least at this point, is portability. Streaming has little chance of becoming truly complementary to, and even less chance of replacing, over-the-air transmissions until that time when the listener can access a streaming receiver while driving, walking down the street or lying on the beach.

ECONOMICS OF STREAMING

Streaming-Related Costs

25. Streaming is a costly process. First, large and complex data packages are required to stream audio information. When the transmission is accompanied by graphics, advertisements and/or song information, even larger and more complex data packages are needed. Accordingly, a station's stream of its live broadcast requires a sizeable amount of bandwidth, which also dictates the speed at which the transmissions occur and the efficiency with which the information is transmitted.[8]

26. Susquehanna's stations utilize Yahoo!broadcast's streaming services and contribute [

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[8] For a discussion on bandwidth, refer to the accompanying expert testimony of Professor Jonathan Zittrain.

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30. In addition, Susquehanna has incurred significant costs to develop and enhance its stations' Web site platform. This includes a project to update Susquehanna's existing listener database utilizing new Internet technology. Susquehanna has incurred roughly $[ ] on this project, as well as significant management time. The project is intended to modernize the company's local audience database in order to track listeners and improve the relationship between local listeners and the radio stations. For example, when a listener logs onto a station's streaming features, he or she may provide specific information relating to musical preferences, listening habits, and other personal information. Susquehanna can use this listener information for music testing, analyze listener trends and customize content, ad sales and formats accordingly. The information generated by this project may be useful to the recording industry which spends millions of dollars annually searching for ways to identify and target music preferences and markets.

Streaming-Related Revenues

31. All of the Susquehanna stations' streaming operations currently run at a loss. To date, Susquehanna stations have covered no revenues from streaming. As described above, unless streaming audiences increase significantly in the future, it is unlikely that streaming will generate sufficient revenues to cover costs.

32. Potential sources of streaming revenue include the sale of ad insertions (replacing over-the-air advertisements with streamed advertisements) and sponsorships on the audio players (*e.g.*, "banners" or "push-button" ads). Because streaming audiences have been so small, advertisers have been unwilling to support streaming as an advertising medium.

33. In addition, the potential exists—not yet realized by Susquehanna—for radio stations to derive commission revenues from the sale of music featured on the streamed transmission. Music sales may be generated directly by the radio station, or by a third party to

Before the

UNITED STATES COPYRIGHT OFFICE

Library of Congress
Washington, D.C.

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2000-9 CARP DTRA 1&2

Testimony of ADAM B. JAFFE

I. INTRODUCTION AND BACKGROUND

A. Qualifications

1. I am a Professor of Economics and Chair of the Department of Economics at Brandeis University in Waltham, Massachusetts. Prior to joining the Brandeis faculty in 1994, I was on the faculty of Harvard University. During academic year 1990-91, I took leave from Harvard to serve as Senior Staff Economist at the President's Council of Economic Advisers in Washington, D.C. At the Council, I had primary staff responsibility for science and technology policy, regulatory policy, and antitrust policy issues. I have served as a member of the Board of Editors of the American Economic Review, the leading American academic economics journal. I am currently an Associate Editor of the Rand Journal of Economics

into a corresponding fee in the current context. Third, one must consider whether any adjustments would be appropriate to correct for relevant economic differences between the benchmark situation and the one at hand. Finally, one must consider how much weight to give to each benchmark, based on its overall economic significance and the relative reliability of any adjustments that may be necessary in each case.

18. The identification of suitable benchmarks in this case is made difficult by the fact that we are attempting to value a new form of intellectual property, in the context of a new performance medium. We cannot, therefore, appeal to direct historical experience. Any market transactions we might observe within this new medium are likely to have been in place for only a short period of time, and to be relatively insignificant in terms of actual royalties paid under them. Parties seeking to make those agreements *themselves* face the same problem we do: they have had no real benchmarks or comparables on which to base their judgment as to what is a reasonable royalty.[12] We would expect it to take some time before there is

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entities to be the centralized licensor would drive the payment for those services to the level of cost (including a reasonable return on any necessary investment).

[12] In fact, proposed amendments to the ASCAP Consent Decree suggest that license fees negotiated by ASCAP and users in the first five years shall not be used as evidence of "reasonableness." See *United States v. ASCAP*, Civ. Action No. 41-1395 (WCC), Second Amended Final Judgment attached to Joint Motion to Enter Second Amended Final Judgment, at 13-14 (S.D.N.Y March 16, 2001). The DOJ cautions that "music users are fragmented, inexperienced, lack the resources to invoke rate court proceedings and are willing to acquiesce to fees requiring payment of a high percentage of their revenue because they have little if any revenue." See *United States v. ASCAP*, Civ. Action No. 41-1395 (WCC), *Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment*, at 35 (S.D.N.Y September 4, 2000).

related rights in closely related media that provide evidence on the competitive rate level. The problem with the first approach is that it is very difficult to know what adjustments would be necessary to an unreasonable rate to render it reasonable. In contrast, by starting with a tested rate in a related context, considering a range of possible adjustments, and being conservative as necessary, we can produce a much more reliable indicator of the reasonable rate in the case at hand.

III. THE BENCHMARK FEE MODEL

A. Identifying a benchmark reasonable fee level

21. The licenses governed by Section 114(f)(2)(B) are for a particular right (public performance of sound recordings, subject to specified statutory restrictions) in a particular, specified medium (digital transmissions by non-subscription services). Ideally, we would like a benchmark that provides evidence regarding the reasonable rate level for a license that is similar along both of these dimensions.

22. Unfortunately, both dimensions present at least some difficulty in identifying benchmark situations that offer a solid foundation for an inference regarding the reasonable fee level. The particular right at issue – public performance of sound recordings – did not exist (or may be said to have existed at "zero value") in the U.S. prior to 1995. Thereafter, U.S. copyright law created a limited public performance right for sound recordings, applicable (at least until quite recently) to relatively few users, that has a non-zero value. Hence, any available market experience with

valuing this right in the U.S. has been in place for only a limited time, has encompassed only limited economic activity and was itself negotiated in an environment where both parties had considerable uncertainty about the ultimate equilibrium value for the right.

23. For this reason, the best available starting point for a reasonable fee for the new public performance of *sound recordings* is the fee paid for the closely related public performance of *musical works*, rights which have enjoyed copyright protection for many years. The musical work is inextricably intertwined with the sound recording itself in producing the value of the public performance; in most cases, to make the performances at issue, a user needs both rights. Indeed, an argument can be made that any determination of the relative overall value of the two rights is inherently arbitrary.[13] Use of a royalty rate for performances of musical works to infer a reasonable royalty rate for performance of sound recordings is the approach taken by the CARP that determined fees for public performances of sound recordings by subscription digital cable radio services under the Digital Performance Right in Sound Recordings Act of 1995.[14] This approach was

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[13] As discussed further below, however, the idea that the *overall* value of the two rights cannot be distinguished does not imply that the royalty rate for the two should be the same. Because the promotional value of performances to owners of sound recordings is greater than the promotional value to composers and publishers, equality of the overall value of the two rights implies that the *royalty* rate on sound recordings should be lower.

[14] See discussion in Librarian of Congress Final Rule and Order, 63 Fed. Reg. 25394, 25404 (May 8, 1998); see Report of the Copyright Arbitration Royalty Panel, Docket No. 96-5 CARP DSTRA, at ¶ 197-202 (November 28, 1997).

also adopted by the Copyright Board of Canada.[15]

24. The digital cable radio CARP determined the sound recording rate on the basis of performance rights fees paid by certain digital cable radio licensees to the performing rights collectives that license musical works.[16] In the current context, the streamers are, in most cases, still in negotiation with ASCAP, BMI, and SESAC over license terms. While some streaming entities may have agreed to licenses for the performance of musical works, the vast majority of significant licensees have not. Hence we do not have available as a starting point a good base of a reasonable fee for performance of musical works within the internet medium.[17]

25. It is possible, however, to identify a well-established benchmark fee for performance of musical works in a closely related media context. Over-the-air broadcast radio has paid royalties for the right of public performance of musical works for over half a century. Over the decades, these royalties have been the subject of numerous negotiations between the

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[15] See Decision of the Copyright Board of Canada. Public Performance of Sound Recordings 1998-2002, August 13, 1999, at 30-32.

[16] While I believe that the musical works marketplace can be a reasonable benchmark for setting rates for performances of sound recordings, in my judgment the small number of licenses used as a benchmark rate in that case was subject to grave questions about their reasonableness, especially given the newness of the media context (as discussed above). Indeed, the reasonableness of the rates in the musical works performing licenses that formed the basis of that CARP decision are currently being challenged in the BMI Rate Court by the users who had originally signed those musical works licenses.

[17] As discussed further below, ASCAP and BMI have, in the internet setting, insisted on royalty formulas based on the licensee's revenue, subject to a minimum fee. If any streamers have accepted these licenses, it is likely that many are paying at the minimum fee level because streamer revenues are so low. It would be difficult to draw reliable inferences about the value of these rights from payments made at the minimum fee level.

over-the-air broadcasters and the organizations that represent composers and music publishers, ASCAP, BMI, and SESAC. In recent years, hundreds of millions of dollars have been paid every year by thousands of individual licensee stations to secure these rights.

26. The over-the-air musical work performance royalties experience is thus of great overall economic significance. In considering whether these rates are likely to be reasonable (consistent with a competitive market), we must consider the likelihood that ASCAP, BMI, and SESAC have market power for the reasons discussed above. Although there are three "centralized" licensors, they do not provide significant competitive discipline on one another, because most broadcasters need licenses from all three in order to operate. Hence, for all the reasons discussed above, in the absence of policy intervention, these collectives would be likely to exact fees significantly in excess of the reasonable level. However, the Consent Decrees under which ASCAP and BMI operate are designed to ensure that reasonable fee levels are maintained.[14] What this means is that if ASCAP or BMI attempts to insist on unreasonable fee levels, licensees have the option of invoking the Rate Court mechanisms to limit the rates to reasonable levels. Of course, use

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[14] Under the terms of the ASCAP Consent Decree, an ASCAP licensee can apply to the U.S. District Court that supervises the Decree for a determination of a reasonable rate. See *United States v. ASCAP*, 1950-1951 Trade Cas. (CCH) ¶ 62.595 (S.D.N.Y. March 14, 1950)(amended final judgment). This review mechanism is commonly referred to as the "ASCAP Rate Court." A "BMI Rate Court" was created in 1994, although even before that time BMI operated under the terms of a Consent Decree with the Justice Department. See *United States v. Broadcast Music, Inc.*, 1966 Trade Cas. ¶ 71,941 (S.D.N.Y 1966), decree modified, 1966-1 Trade Cas. ¶ 71,378 (S.D.N.Y. 1994).

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:	:	**Docket No. 2000-9**
	:	**CARP DTRA 1&2**
Digital Performance Right in Sound Recordings and Ephemeral Recordings	:	

TESTIMONY OF DAN MASON, PRESIDENT OF INFINITY BROADCASTING CORPORATION

INTRODUCTION AND BACKGROUND

1. I, Dan Mason, am testifying in this proceeding on behalf of Infinity Broadcasting Corporation ("Infinity"). On February 21, 2001, Infinity became a wholly owned subsidiary of Viacom Inc. ("Viacom"). Viacom initially obtained a majority interest in Infinity in May 2000 when CBS Corporation ("CBS"), Infinity's prior majority owner, merged with and into Viacom in May 2000.

2. Infinity operates radio stations in local radio markets across the United States.

3. On October 19, 1999, CBS submitted an Initial Notice stating its intent to obtain a statutory license under Section 114(f) and Section 112(e) of Title 17 of the United States Code, as amended, to the extent required by law, for the simultaneous streaming of over-the-air radio broadcast programming over the Internet.[1] It is the current policy of Infinity that its radio

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[1] CBS Corporation submitted the Initial Notice on behalf of itself and each of its Affiliates, including CBS Broadcasting Inc.; CBS Worldwide Inc.; CBS Mass Media Corporation; Infinity Broadcasting Corporation; and Network Enterprises Inc.

CONTAINS REDACTED MATERIAL

11. Most Infinity Web sites contain disc jockey biographies, content lists, contests, etc. The Web sites are direct brand extensions of the over-the-air radio stations, providing additional information to the audience without using valuable airtime.

12. In addition, some Infinity radio stations' Web sites provide the stations' playlists, along with excerpted music samples. By offering direct connections to music retailers, Infinity radio stations promote sales of music heard in their over-the-air broadcasts. For example: a loyal local station listener hears a new song on the radio by her favorite artist but does not catch the name of the tune. She logs onto the station's Web site and checks the list of the new songs the station is airing, allowing her to identify the song title. She clicks on the link for the sample to confirm that it is the same song she heard earlier. Then she clicks the direct connection to a music retailer and the artist and record label rack up another compact disc sale for the day.

13. Overall, Web site revenues represent a very small proportion—just over [ ]—of Infinity radio station revenues. It cannot be emphasized enough that, at this time, Infinity's Web sites are promotional vehicles for its radio stations and not independent revenue sources.

<u>INFINITY STATIONS PRESENTLY DO NOT ENGAGE IN STREAMING</u>

14. Infinity is in the radio business. Its goal is to maximize advertising revenues and radio listenership. Infinity's management is still skeptical of the benefits of streaming its programming on the Internet, even if a streaming provider offers such services at no cost. Accordingly, it is Infinity's current corporate policy for the stations not to stream their live audio, and the stations will only start doing so if and when Infinity believes that there is a sensible business model to support this activity. Infinity has made a business judgment that that

time has not arrived, and it is uncertain when or whether the conditions for profitability will materialize.

15. A few Infinity radio stations have experimented with streaming an occasional simultaneous concert or archived program. Such "one-off" streamed programs are only attractive when particular advertisers are willing to "sponsor" the streaming activity.

16. Whereas Infinity's management views the radio station Web site both as a platform for promoting the local radio brand and as an extension of the station's over-the-air activities (the "25th hour" of the station), we have no proof that streaming adds value to our broadcast radio business model. Advertisers have not yet conveyed to Infinity that they discern any added value from placing advertising in streamed programming on the Internet.

17. Internet streaming of radio broadcasts is a medium in its infancy that has shown neither any profitability to date nor any prospects for profitability before December 31, 2002. Imposing a royalty upon streamed broadcasts will make it significantly more expensive for radio stations to stream their over-the-air signals and will likely cause streamers to drop out of the market and prevent others from entering it at all.

PROMOTIONAL VALUE OF RADIO AIRPLAY TO RECORD LABELS

18. It is a well-accepted and well-documented operating principle in the record and radio industries that radio airplay is the single biggest driver of music sales in the United States. Mr. Michael Fine, in his accompanying expert testimony, describes the promotional value of radio airplay to the recording industry. For examples of the promotional value aspects of Infinity radio station Web sites, see Exhibit 2.

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In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2000-9 CARP DTRA 1&2

ORDER

The Library of Congress has received a considerable volume of discovery motions in this proceeding. The character of these motions can be broken down into three categories: 1) motions to compel document production; 2) motions to strike testimony; and 3) motions regarding procedural and substantive aspects of the proceeding. This Order addresses motions to compel document production. The remaining two categories will be dealt with in additional orders to follow.

Production of documents required by this Order must be completed by the close of business on July 6, 2001, unless otherwise indicated in this Order. Because of the size of this proceeding and the volume of motions, compliance with this date is obligatory. Failure to produce the required documents in a timely fashion is grounds for dismissal of the testimony related to those documents.

Consistent with previous rulings in CARP proceedings, production may be in electronic or hard copy form, organized in such a way as to be responsive to the documents sought. While the specifics of document production will not be repeated here, the parties are strongly advised to consult the following CARP orders discussing these requirements. *See* Order in Docket No. 94-3 CARP CD 90-92 (October 30, 1995); Order in Docket No. 96-5 CARP DSTRA (January 21, 1997); Order in Docket No. 96-6 CARP NCBRA (December 30, 1997).

Motions of Copyright Owners and Performers

The Recording Industry Association of America, Inc., Association for Independent Music, American Federation of Musicians, and American Federation of Television and Radio Artists (collectively, "Copyright Owners and Performers") have filed the following motions to compel production of documents underlying the testimony presented in others' written direct cases. All but two of these motions are directed to Broadcasters/Webcasters.[1]

1. Motion to compel production of documents underlying the testimony of Michael Fine.

[1] Broadcasters/Webcasters are: BET.com; Clear Channel Communications, Inc.; Comedy Central; Coollink Broadcast Network; Echo Networks, Inc.; Entercom Communications Corp.; Everstream, Inc.; Incanta, Inc.; Infinity Broadcasting Corp.; Launch Media, Inc.; Listen.com; Live365.com; MTVi Group LLC; MusicMatch, Inc.; MyPlay, Inc.; National Religious Broadcasters Music License Committee; NetRadio Corp.; RadioActive Media Partners, Inc.; RadioWave.com, Inc.; Salem Communications Corp.; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind Media.com, Inc.; and Xact Radio Network LLC.

1. Documents reflecting any licensing negotiations between RIAA and any of the 25 webcasters;

2. Documents underlying any of the rates and or terms set forth in the agreements;

3. Documents describing and enumerating the types of services for which each license is being granted;

4. Documents underlying particular statements contained in the agreements as specified in Broadcasters/Webcasters' initial and follow-up requests;

5. Documents reflecting any report required to be filed by the agreements (as the reports identifying transmitting services and music transmitted to show what is being purchased by the license); and

6. Documents underlying license negotiations that did not result in a license agreement.

Broadcasters/Webcasters assert that Copyright Owners and Performers have only produced a total of 16 pages of underlying documents for all 25 license agreements.

Copyright Owners and Performers object, arguing that Broadcasters/Webcasters' requests are designed not to obtain underlying information, which they argue they have already provided, but rather to attack and criticize the circumstances surrounding the negotiation of the agreements.

RULING: Steven Marks is a member of RIAA's Webcasting Negotiating Committee and has participated in the negotiations that produced the 25 agreements with various webcasters that he sponsors in this proceeding. His testimony, and in particular the royalty rates and terms in the agreements, are central to Copyright Owners and Performers' case, for they argue that the agreements are concrete marketplace evidence of the value of sound recording rights. These agreements contain numerous factual provisions regarding the royalties to be paid and the terms and conditions requiring payment. Copyright Owners and Performers are directed to produce all documents underlying the terms and provisions contained in these agreements, including any correspondence between the RIAA Webcasting Negotiating Committee and each of the 25 webcasters regarding the contents of the agreements. It is not a defense to a discovery request to assert that only Mr. Marks' statements in his testimony are subject to discovery, and not the facts (royalty fees, terms and conditions) contained in the 25 agreements which he sponsored.

In addition, Copyright Owners and Performers are directed to produce all documents, to the extent that they have not already done so, underlying Mr. Marks' assertions in his testimony regarding the circumstances of negotiations with webcasters and the various problems presented in these negotiations.

These are the categories of documents that Copyright Owners and Performers must produce because they underlie facts and assertions in both Mr. Marks' testimony and the 25 agreements he sponsors. It is apparent from Broadcasters/Webcasters' motion, however, that they are seeking, in the main, documents that reveal the relative bargaining positions of the participants to these negotiations to test whether the agreements are truly representative of marketplace negotiations.. This is an improper use of the CARP discovery process. Discovery is designed to produce documents that underlie facts and assertions made in the agreements and Mr. Marks' testimony, not the context or circumstances surrounding the negotiations that produced the testimony or the agreements. To the extent that Broadcasters/Webcasters seek these types of documents, their motion is denied. They may probe the context of the negotiation process through cross-examination of Mr. Marks and other Copyright Owners and Performers' witnesses and may present rebuttal testimony on this point.

3. *Testimony of Ron Wilcox, Paul Vidich, and Lawrence Kenswil.*

Ron Wilcox, Paul Vidich, and Lawrence Kenswil are executives with Sony Music, Warner Music Group, and Universal Music Group, respectively, which have entered into private licensing agreements with certain webcasters. For Mr. Wilcox, Broadcasters/Webcasters seek documents underlying his statements concerning Sony's agreements with MP3.com and two other unnamed webcasters. For Mr. Vidich, Broadcasters/Webcasters seek documents underlying certain statements regarding licensing agreements with Warner and locker services, webcasters and nonsubscription services. Specifically, Broadcasters/Webcasters seek production of these agreements. For Mr. Kenswil, Broadcasters/Webcasters seek all license agreements with webcasters, and documents surrounding negotiations that Universal Music Group had with the webcasters whom they licensed and did not license.

Copyright Owners and Performers respond that they have, for the most part, produced copies of the licensing agreements for Sony, Warner and Universal. With respect to Mr. Wilcox's testimony, they have produced the MP3.com and Launch Media agreements, but have not yet obtained permission of the third licensee with Sony to produce the agreement.

With respect to Mr. Vidich's testimony, Copyright Owners and Performers assert that they are licensing agreements with Warner and music video services, locker services, webcasters and subscription services. For the music video services, Copyright Owners and Performers have instructed Warner to contact the licensees and seek their permission to produce their agreements in this proceeding. For the locker services, they assert that they have produced both existing agreements. For webcasters, they have produced the Launch Media agreement. However, the two remaining agreements are with Echo Networks and an unnamed webcaster–both of whom are in the proceeding and are represented by Broadcasters/Webcasters–who have not permitted the agreements to be produced. For the subscription service, the agreement has not been produced because the service refuses permission to disclose it (the service is not in this proceeding).

With respect to Mr. Kenswil's testimony, Copyright Owners and Performers have produced some of the agreements for which they have obtained a waiver of confidentiality and are seeking permission from the remaining webcasters–one of whom is in this proceeding–that have license agreements with Universal.

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Copyright Arbitration Royalty Panels

6/25/01

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings } Docket No. 2000-9 CARP DTRA 1&2

LIBRARY OF CONGRESS

P.O. Box 70977
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ORDER

In the second discovery order issued in this proceeding since the filing of the written direct cases, the Library of Congress addresses motions to strike testimony filed by Copyright Owners and Performers[1] and the Broadcasters/Webcasters.[2] Oppositions and replies having been filed to these motions, they are ripe for disposition.

Motions of Copyright Owners and Performers

Copyright Owners and Performers have filed four motions to strike testimony from the written direct case of Broadcasters/Webcasters[3]:

1. Motion to strike the written direct case of Music Choice;

2. Motion to strike written direct cases of Incanta and Everstream;

3. Motion to strike the testimony of Stephen Fisher; and

4. Motion to strike provisions from the royalty rate requests of Broadcasters/Webcasters.

1. *Motion to Strike Written Direct Case of Music Choice*

Copyright Owners and Performers seek to strike the written direct case of Music Choice from the record of this proceeding. On April 26, 2001, Music Choice petitioned the Library to withdraw from this proceeding, and by order dated May 9, 2001, the Library granted Music Choice's request. The remaining business associated with Music Choice's withdrawal is the removal of its written direct case from the record.

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[1] "Copyright Owners and Performers" are the Recording Industry Association of America, the American Federation of Television and Radio Artists, the American Federation of Musicians of the United States and Canada, and the Association for Independent Music.

[2] "Broadcasters/Webcasters" are BET.com; Clear Channel Communications, Inc.; Comedy Central; Coollink Broadcast Network; Echo Networks, Inc.; Entercom Communications Corp.; Everstream, Inc.; Incanta, Inc.; Infinity Broadcasting Corp.; Launch Media, Inc.; Listen.com; Live365.com; MTVi Group LLC; MusicMatch, Inc.; MyPlay, Inc.; National Religious Broadcasters Music License Committee; NetRadio Corp.; RadioActive Media Partners, Inc.; RadioWave.com, Inc.; Salem Communications Corp.; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind Media.com, Inc.; and Xact Radio LLC.

[3] Copyright Owners' motion for declaratory ruling and to strike testimony will be addressed in a separate order.

RULING: Copyright Owners and Performers' motion is granted. The written direct case of Music Choice is stricken from the record.

2. *Motion to Strike Written Direct Cases of Incanta and Everstream*

Copyright Owners and Performers seek to strike the written direct cases of Incanta and Everstream from the record in this proceeding. On May 31, 2001, Incanta notified the Library that it was withdrawing from this proceeding; and on June 12, 2001, Everstream submitted similar notification.

RULING: Copyright Owners and Performers' motion is granted. The written direct cases of Incanta and Everstream are stricken from the record.

3. *Motion to Strike Testimony of Stephen Fisher*

Stephen Fisher is an executive with Entercom Communications Corp., one of the broadcasters in this proceeding. Copyright Owners and Performers sought documents underlying 22 assertions in his testimony, including the size of Entercom's over-the-air and Internet audiences, their costs and revenues associated with webcasting, copies of agreements summarized by Mr. Fisher, unidentified survey evidence referenced by him, and a particular Arbitron report cited as a source of his testimony. According to Copyright Owners and Performers, Broadcasters/Webcasters produced no documents.

Broadcasters/Webcasters state that they produced documents in response to these requests on the date for production of documents in response to follow-up requests and that Copyright Owners and Performers' motion is therefore moot.

In reply, Copyright Owners and Performers assert that Mr. Fisher's testimony should still be stricken because Broadcasters/Webcasters ignored, without excuse, the discovery deadline for producing documents in response to initial requests. They also state that Broadcasters/Webcasters have not produced documents underlying Entercom's costs and revenues for webcasting, the report summarized by Mr. Fisher, the unidentified survey evidence, and the Arbitron report.

RULING: In order for the precontroversy discovery schedule to proceed in CARP proceedings, it is critical that participating parties comply with the deadlines, particularly those for producing documents. It is troubling that Broadcasters/Webcasters did not produce documents in response to initial requests and waited, without excuse, until the deadline for production of documents in response to follow-up requests. While the Library is not striking the testimony related to these documents, Broadcasters/Webcasters are cautioned to strictly comply with future deadlines in this proceeding. If a deadline for action cannot be met, all parties, including Broadcasters/Webcasters, must notify the Library (or the CARP, where appropriate) immediately to seek additional time.

It would appear that, contrary to Broadcasters/Webcasters' assertion, the Copyright Owners and Performers' motion is not moot because certain underlying documents have not been produced. Broadcasters/Webcasters are given until close of business on July 6, 2001 to either produce documents underlying the following, or, where applicable, to inform Copyright Owners and Performers that underlying documents do not exist:

1. Fisher testimony at paragraphs 36 and 39-42 regarding costs and revenues of webcasting;

2. Fisher testimony at paragraph 53 regarding agreements entered into by KNDD-FM, Seattle, Washington, and certain record labels for record promotion. Copies of the agreements must be produced;

3. Fisher testimony at paragraph 46 identifying "survey evidence" that "indicates that listeners tend not to view these banner ads while streaming....";

4. Fisher testimony at 27, including footnotes 4 and 5, regarding streaming audiences. The Arbitron reports supporting the numbers offered in this paragraph, and footnotes 4 and 5, must be produced.

4. *Motion to Strike Provisions From Rate Request of Broadcasters/Webcasters*

Copyright Owners and Performers seek to strike two provisions from Broadcasters/Webcasters' schedule of rates and terms which they assert are contrary to 17 U.S.C. 114. One provision, section 2(b) of Broadcasters/Webcasters' proposed rates and terms, provides a schedule for the payment of arrears that have accrued since October 29, 1998. The provision provides that "for the period from October 28, 1998 through the calendar quarter in which the Librarian publishes this regulation as a final regulation, payment shall be due on the forty-fifth (45th) day after the end of the first full calendar quarter following such quarter." Copyright Owners and Performers argue that this request contradicts section 114(f)(4)(C), which provides that "[a]ny royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set."

The second provision is entitled "Information Regarding Use of Sound Recordings Under Statutory License" and contains notice and recordkeeping requirements to be performed by the agent designated to receive royalty payments. Copyright Owners and Performers assert that section 114(4)(A) and (B) call for the Librarian of Congress to establish notice and recordkeeping provisions through regulation, not through the CARP process. Copyright Owners and Performers have already petitioned the Library to conduct a rulemaking under those provisions.

In response, Broadcasters/Webcasters have amended section 2(b) of their proposed rates and terms to change the payment day from the 45th day to the 20th day to be consistent with the statute, and argue that section 114 does not require the Library to conduct a rulemaking for purposes of adopting notice and recordkeeping rules. They submit that a CARP proceeding is the better forum for creating these rules.

In reply, Copyright Owners assert that section 2(b) of the Broadcasters/Webcasters' proposal is still faulty because it measures quarterly payments from the date of publication of the Librarian's final determination, even though the Librarian has discretion to set the effective date of his determination. They also submit that tying payment to the date of publication does not make sense if the Librarian's decision is published early in a yearly quarter, which would make the royalty payment due before the quarterly period ended. With respect to section 3, Copyright Owners and Performers advise that rulemaking is not only the only path for establishing notice and recordkeeping provisions, but is the better path because, unlike a CARP proceeding, rulemaking permits public comment on the proposals.

RULING: With respect to section 2(b) of Broadcasters/Webcasters' proposed rates and terms, the change from the 45th day to the 20th day is still inconsistent with the statute. There is no provision in 17 U.S.C. 114(f)(4)(C) for the payment of arrears in the quarter following the quarter in which the Librarian makes his decision; rather, the statute requires payment of arrears to take place by the twentieth day of the month following the month in which the royalty fees are set. Section 2(b) is therefore stricken.

Copyright Owners and Performers' motion is also granted with respect to section 3 of Broadcasters/Webcasters' proposed rates and terms. The Library will determine the notice and recordkeeping regulations through a traditional notice and comment rulemaking proceeding. Section 3 is therefore stricken.

Motions of Broadcasters/Webcasters

Broadcasters/Webcasters have filed three motions to strike testimony from the written direct case of Copyright Owners and Performers:

1. Motion to strike testimony of Steven Marks and the exhibits he sponsors;

2. Motion to strike the pre-hearing memorandum of Copyright Owners and Performers;

3. Motion to strike portions of the testimony of James Griffin.

1. *Motion to Strike Testimony of Steven Marks and Exhibits*

Broadcasters/Webcasters move to strike the license agreements sponsored by Steven Marks, and his testimony related to the agreements, on the grounds that only Copyright Owners and Performers have access to meaningful information surrounding the negotiation of these agreements. In the alternative, Broadcasters/Webcasters request that the Library waive the confidentiality and non-cooperation provisions in the license agreements which prohibit the licensees from disclosing information related to the licenses that would assist Broadcasters/Webcasters in the preparation of their case.

Broadcasters/Webcasters charge that Copyright Owners and Performers have established a one-sided confidentiality system that allows Steven Marks to present favorable testimony as to the negotiations of RIAA and 25 webcasters while precluding Broadcasters/Webcasters from soliciting information from the licensee webcasters that would contradict Mr. Marks' premise that the agreements are the result of open and free marketplace negotiations. Broadcasters/Webcasters submit that Mr. Marks' testimony and the circumstances that produced the agreements cannot be verified without the testimony of the licensees. They assert that the confidentiality provisions in all 25 agreements prevent access to this testimony and note that the agreement with Yahoo! includes a provision forbidding Yahoo! to cooperate with Broadcasters/Webcasters in this proceeding.

In opposition, Copyright Owners and Performers state that all 25 of the license agreements contain the following confidentiality provision: "Except as required by law, Licensee shall not provide this Agreement, or disclose any of the terms and rates contained in this Agreement, to any person or entity without the prior consent of Licensor." Copyright Owners and Performers' Opposition at 4. Since they have already produced the agreements in this proceeding, Copyright Owners and Performers argue that this provision has no bearing on the licensees' ability to discuss the circumstances surrounding their negotiation with the Broadcasters/Webcasters. They state that Broadcasters/Webcasters are really asking the Library to grant them immunity from state laws prohibiting interference with contractual relations. With respect to the Yahoo! agreement, Copyright Owners and Performers concede that their agreement contains a non-cooperation clause with Broadcasters/Webcasters, but submit that this provision was part of the cost of negotiating the agreement. Waiving this provision would, according to Copyright Owners and Performers, discourage settlement in CARP proceedings.

In reply, Broadcasters/Webcasters state that since Copyright Owners and Performers have stated that the confidentiality provision does not prevent Broadcasters/Webcasters from soliciting information, and possibly testimony, from the licensees, they no longer press their motion on this point. However, with respect to the Yahoo! agreement, Broadcasters/Webcasters charge that Copyright Owners and Performers have effectively placed a gag order on Yahoo! which should be removed.

RULING: With respect to the license agreements other than the Yahoo! agreement, Broadcasters/Webcasters' motion is moot. Broadcasters/Webcasters' motion with respect to the Yahoo! agreement is designated to the CARP. In considering the motion, the CARP shall evaluate the relative importance of receiving testimony on the negotiation of the agreement and determine whether to grant the motion to strike or, in the alternative, to require the Copyright Owners and Performers to waive the non-cooperation provision in order to allow Broadcasters/Webcasters access to information concerning the negotiation of the agreement.

2. *Motion to Strike Pre-hearing Memorandum*

Volume one, tab B of Copyright Owners and Performers' written direct case contains a twelve-page "pre-hearing memorandum" that describes in detail the Copyright Owners and Performers' theory of this case and discusses what type of evidence its witnesses will present to support this theory. Broadcasters/Webcasters move to strike the memorandum on the grounds that it amounts to unsponsored testimony in violation of the rules and that it is legal argument not subject to cross-examination. Broadcasters/Webcasters acknowledge that the Library has permitted introductory descriptions of the contents of a written direct case and summaries of the testimony, but argue that the pre-hearing memorandum goes way beyond that and is a legal brief that "sets forth an argumentative, partisan analysis of the statutory criteria governing this proceeding," and then argues why the 25 license agreements fit Copyright Owners and Performers' perspective of the criteria. Broadcasters/Webcasters' Motion to Strike at 2. Broadcasters/Webcasters also charge that the memorandum inflates the credentials of its witnesses, using superlatives to characterize their qualifications that do not appear in any of the testimony. Finally, Broadcasters/Webcasters submit that if the memorandum is not stricken, they should be permitted to introduce one of their own for their written direct case.

Copyright Owners and Performers oppose, asserting that the memorandum is not a legal brief but is instead a summary of their testimony which is permitted by prior Library rulings. Order in Docket No. 96-6 CARP NCBRA (December 9, 1997). Copyright Owners and Performers also oppose allowing Broadcasters/Webcasters to amend their written direct case to include a similar statement, citing the same Order.

RULING: The Library dealt with a similar motion in Docket No. 96-6 CARP NCBRA. In that case, Public Broadcasters sought to strike the introductory statement to the written direct case of the American Society of Composers, Authors and Publishers ("ASCAP") or, in the alternative, to amend their introduction to address points made in ASCAP's introduction. The Library denied the motion, ruling that:

> Introductions to the written direct cases are useful tools to the arbitrators, assisting them in determining the contents of the cases and providing a general description of the presentation of the evidence. While an introduction provides a roadmap to a written direct case, it does not constitute evidence in the proceeding. All evidence presented must have a sponsoring witness, as required by section 251.43(e) of the rules. Likewise, introductions are not legal argument. Legal argument on the written direct cases is reserved for later portions of the proceeding and should not be included in the introduction. Parties to this proceeding and future proceedings are advised that introductions should be nothing more than descriptions of the contents of the written direct case, and may include brief summaries of the testimony. While ASCAP's introduction pushes the boundaries of this limitation, it does not cross it.
>
> Public Broadcasters' request to amend their introduction is also denied. Because introductions constitute neither evidence nor legal argument, there is no point in permitting Public Broadcasters to amend their introduction to refute statements made in ASCAP's introduction.

Order in Docket No. 96-6 CARP NCBRA at 4 (December 9, 1997).

Copyright Owners and Performers' pre-hearing memorandum exceeds the limitations set forth in the December 9, 1997 Order. Sections I sets forth, according to Copyright Owners and Performers, the statutory standards to be used in this proceeding and is straightforward legal argument. It is therefore stricken. The remaining sections (the introduction on page 1 and all of section II), while sometimes argumentative in tone, do describe the testimony contained in the written direct case and are nonetheless consistent with the December 9, 1997 Order. Broadcasters/Webcasters' motion is denied with respect to these provisions.

Broadcasters/Webcasters' motion to amend their case to include a summary is also denied. Broadcasters/Webcasters were aware that introductory statements summarizing the contents of the written direct cases were permissible and chose not to include one of their own.[4] It is now too late for such amendments.

3. *Motion to Strike Portions of Testimony of James Griffin*

Broadcasters/Webcasters seek to strike section 3 of James Griffin's testimony, wherein Mr. Griffin opines as to the economics of the webcasting businesses involved in this proceeding. Broadcasters/Webcasters assert that while Mr. Griffin's stated qualifications to offer such testimony may show some general experience with the technology underlying the delivery of digital media, there is "no evidence showing Mr. Griffin possesses any specialized knowledge, experience or training qualifying him to provide expert testimony regarding the economics of the webcasting business." Broadcasters/Webcasters' Motion at 2.

In opposition, Copyright Owners and Performers note that Mr. Griffin "runs not one but two companies that build businesses related to digital audio transmissions" and that his "actual business experience provides ample support for his testimony on the economic circumstances facing webcasters." Copyright Owners and Performers' Opposition at 1-2.

RULING: Broadcasters/Webcasters' motion is denied. Mr. Griffin possesses sufficient qualifications to survive a motion to strike section 3 of his testimony. He is subject to cross-examination, and the CARP shall accord the evidentiary weight to his testimony that it deems appropriate.

SO ORDERED.

Marybeth Peters
Register of Copyrights

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

DATED: June 25, 2001

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[4] Certain counsel for Broadcasters/Webcasters are the same counsel that represented Public Broadcasters in Docket No. 96-6 CARP NCBRA and brought the motion to strike against ASCAP.

u:\carp\dtra1&2\strike.order.wpd
June 22, 2001

In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings } Docket No.2000-9 CARP DTRA1&2

LIBRARY OF CONGRESS

COPYRIGHT OFFICE

Copyright Arbitration Royalty Panels

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

Telephone: (202)707-8380

Facsimile: (202)252-3423

ORDER

The Library of Congress has before it three motions. The first is filed by MusicMatch, Inc. requesting withdrawal from the proceeding and that their submitted testimony be stricken from the record. The second motion is filed by Broadcasters/Webcasters[1] seeking to file an amended Exhibit 2 to the written testimony of Michael Fine. These two motions are unopposed.

The third motion is filed by Broadcasters/Webcasters seeking reconsideration of the Library's July 6, 2001, Order denying Broadcasters/Webcasters' request for documents exchanged between witness Steven Marks and the RIAA Webcasting Negotiating Committee ("Committee") that discuss the 25 license agreements submitted by RIAA in its written direct case.

MusicMatch Motion

RULING: MusicMatch's motion is granted. The Library will remove its testimony from Broadcasters/Webcasters' written direct case.

Motion Seeking to Amend Michael Fine Testimony

RULING: Broadcasters/Webcasters' motion to file an amended Exhibit 2 to the written testimony of Michael Fine is granted.

Motion Seeking Reconsideration

The Library addresses for the third time Broadcasters/Webcasters' discovery requests regarding the testimony of Steven Marks. Steven Marks sponsors 25 webcasting licensing agreements struck between the Committee and various webcasters and submitted by RIAA in its written direct case as evidence of marketplace rates and terms for webcasting. In the initial round of discovery motions, Broadcasters/Webcasters sought to compel production of a number of documents associated with the 25 licensing agreements which it claimed underlay them. The Library granted Broadcasters/Webcasters' motion in part stating that "Copyright Owners and Performers are directed to produce all documents underlying the terms and provisions contained

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[1] "Broadcasters/Webcasters" are : Bet.com; Comedy Central; Coollink Broadcast Network; Echo Networks, Inc.; Entercom Communications Corp.; Infinity Broadcasting Corp.; Launch Media, Inc.; Listen.com; Live365.com; The MTVi Group LLC; Myplay, Inc.; Netradio Corp.; Radioactive Media Partners, Inc.; Radiowave.com, Inc.; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind; Xact Radio Network LLC; Clear Channel Communications, Inc.; National Religious Broadcasters Music License Committee; Salem Communications Corp.

in these agreements, including any correspondence between the RIAA Webcasting Negotiating Committee and each of the 25 webcasters regarding the contents of the agreements." Order in Docket No. 2000-9 CARP DTRA1&2 at 15 (June 22, 2001). And the Library directed production of documents that underlay "Mr. Marks' assertions in his testimony regarding the circumstances of negotiations with webcasters and the various problems presented in these negotiations." *Id.*

The Library also denied Broadcasters/Webcasters' request in part, stating:

> It is apparent from Broadcasters/Webcasters' motion, however, that they are seeking, in the main, documents that reveal the relative bargaining positions of the participants to these negotiations to test whether the agreements are truly representative of marketplace negotiations. This is an improper use of the CARP discovery process. Discovery is designed to produce documents that underlie facts and assertions made in the agreements and Mr. Marks' testimony, not the context or circumstances surrounding the negotiations that produced the testimony or agreements. To the extent that Broadcasters/Webcasters seek these types of documents, their motion is denied.

Id. at 15-16.

After issuance of the June 22 Order, a dispute arose between Broadcasters/Webcasters and RIAA over production of documents exchanged between Mr. Marks and the Committee regarding the negotiation process. The parties requested the Library to resolve the dispute. After a telephonic conference with the parties, the Library denied Broadcasters/Webcasters' request for production of documents exchanged between Mr. Marks and the Committee, stating that:

> "[s]uch documents do not underlie the terms and provisions of the 25 agreements within the meaning of the CARP discovery rules. Broadcasters/Webcasters do not identify any statements in Mr. Marks' testimony where he describes or discusses the content of his communications with the Committee which would support a request for underlying documentation."

Order in Docket No. 2000-9 CARP DTRA1&2 at 2 (July 6, 2001).

Broadcasters/Webcasters seek reconsideration of the July 6 decision. Their principal argument is that certain statements contained in Mr. Marks' testimony put the matter of his discussions with the Committee in issue, and therefore are subject to CARP discovery. They point to Mr. Marks' statements regarding the purpose of the Committee:

> [The purpose was] to establish negotiation objectives and strategy as well as to approve the rates and terms of all negotiated statutory licensing agreements. The Committee

> members have actively considered and discussed the various issues raised in the negotiations, primarily through their weekly telephone conferences and frequent e-mail correspondence. I have been responsible for implementing the Committee's determinations and conducting negotiations with webcasters and other potential licensees.

Motion at 3, citing Marks' testimony at 3. And they point to another passage where Mr. Marks states that:

> [I]n negotiating these agreements, we have taken into account a variety of considerations and issues that are important to the record industry, and we have responded to various issues raised by the webcasters. These considerations and issues are described in greater detail in the testimony submitted by other Committee members.... In all cases, we discussed (both internally and with our licensees) a wide variety of issues concerning rates and terms.

Id., citing Marks' testimony at 6-7. Broadcasters/Webcasters submit that the relevance of Mr. Marks' statements are bolstered by statements of Paul Vidich, Laverne Evans and Lawrence Kenswil who identify themselves as members of the Committee and affirm the testimony of Ron Wilcox, RIAA's witness who testifies as to the goals sought to be achieved by the Committee in negotiating the licensing agreements. Broadcasters/Webcasters conclude that because the licensing agreements are the centerpiece of RIAA's case, they are entitled to all documents exchanged between Mr. Marks and the Committee regarding negotiations with the 25 licensees.

RULING: Broadcasters/Webcasters' motion for reconsideration is denied. Recognizing that discovery requests must be directly tied to testimony, Broadcasters/Webcasters now cite passages from Mr. Marks' testimony regarding the Committee for which they seek underlying documents. Neither of these passages (or the statements from the Vidich, Evans and Kenswil testimony) were the subject of Broadcasters/Webcasters' original discovery requests and motion to compel. CARP discovery requires that "[t]he requesting party must identify the witness and the factual assertions for which supporting documents are sought." Order in Docket No. 96-5 CARP DSTRA at 2 (January 21, 1997); *see, also* Order in Docket No. 96-5 CARP DSTRA at 6-7 (November 27, 1996). Broadcasters/Webcasters did not do so, and it is too late now. Procedurally, their motion fails.

Broadcasters/Webcasters' motion fails substantively as well. Mr. Marks' statements are expository of the Committee; they do not put in issue specifics or details of the negotiations with the 25 licensees. If Mr. Marks had detailed one or more of his communications with the Committee concerning license negotiations, such statements might support a request for underlying documents. But discovery "is not intended to augment the record with what the witness might have said or put forward, or to range beyond what the witness said. Any augmentation of the record is the prerogative of the arbitrators, not the parties." Order in Docket No. 94-3 CARP CD 90-92 at 1-2 (October 30, 1995). Even if Broadcasters/Webcasters had made a timely request for the two passages from Mr. Marks' testimony, documents exchanged between

Mr. Marks and the Committee on the status and circumstances of negotiations with the 25 licensees would not be underlying documents within the meaning of the CARP discovery rules.

Today's ruling does not mean, however, that documents exchanged between Mr. Marks and the Committee on the status and circumstances of negotiations with the 25 licensees are necessarily forever beyond the scope of discovery in this proceeding. As noted above, augmentation of the record is within the prerogative of the CARP, *see* 37 C.F.R. 251.46(d), and the CARP may solicit testimony as to the status and circumstances of the negotiations. The Library takes no position on whether such testimony should be solicited. If the CARP does request such testimony, then all parties shall have an opportunity to conduct additional discovery in accordance with the usual discovery requirements. 37 C.F.R. 251.45(d). In that case, determinations relating to production of those documents would be made by the CARP.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: David O. Carson
David O. Carson
General Counsel

DATED: August 3, 2001

COPYRIGHT ARBITRATION ROYALTY PANEL
LIBRARY OF CONGRESS
WASHINGTON, DC

In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2000-9 CARP DTRA 1&2

ORDER

CARP arbitrators are permitted to "call upon any party for the production of additional evidence at any time."37 C.F.R. 251.46(d). Accordingly, this Panel directs the Parties, at the time they file their rebuttal cases, to produce additional testimony and documents as described below:

1. The CARP is obligated to set both rates and terms for certain statutory licenses. The direct cases of the Parties deal extensively with rates. While various parties have submitted proposed terms, little or no evidence has been offered to support the specific terms proposed. Terms that are not supported by record evidence are subject to reversal. *See* RIAA v. Librarian of Congress, 176 F.3d 528 (D.C. Cir. 1999). Accordingly, the Parties are directed to include in their rebuttal cases evidence in support of all their proposed terms. The Parties are further directed to enter into good faith discussions concerning reasonable and appropriate terms, including terms for royalty distribution and terms for the production of more than one ephemeral copy, and to file an executed stipulation setting forth any agreed terms. In this regard, the Parties are free to designate joint exhibits and joint sponsoring witnesses. The requirement to adduce evidence in support of terms applies both to terms agreed upon and to terms in dispute. The Panel's obligation to consider the interests of the public and other potential owners and licensees who are not participating in this proceeding requires record support for all terms, even those terms agreed to by the Parties herein.

2. The Parties have proposed certain rate "benchmarks." The Panel may decide that one or more of these benchmarks is a useful starting point, but should be adjusted for various factors raised in the evidence. Any Party who contends that a benchmark proposed by another Party, if adopted by

the Panel,[1] would require particular adjustments, should submit evidence that would permit the Panel to quantify the proper amount of any proposed adjustment.

3. Section 114(f)(2)(B) of the Copyright Law requires that the Panel's schedule of rates and terms "shall distinguish among the different types of eligible nonsubscription transmission services then in operation." Section 112(e) requires that the Panel set rates which include a minimum rate "for each type of service offered by transmitting organizations." Evidence in the direct cases suggests that there are multiple possible ways to categorize and define the different types of services eligible for section 112(e) and 114(f)(2)(B) licenses. In their rebuttal cases, the parties shall (a) describe how they believe the Panel should categorize the various services under §112(e) and §114(f)(2)(B) for purposes of setting separate rates, (b) submit precise language to define each such category, and (c) submit evidence to support such proposed categories, definitions, and rates.

August 13, 2001

SO ORDERED

ERIC E. VAN LOON
Chair

JEFFREY S. GULIN
Arbitrator

CURTIS E. VON KANN
Arbitrator

[1]Parties proposing adjustments to opposing party benchmarks are not deemed to tacitly accept the benchmark.

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WASHINGTON, DC

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AUG 14 2001

GENERAL COUNSEL
OF COPYRIGHT

In the Matter of	}	
	}	
Digital Performance Right in Sound	}	Docket No. 2000-9 CARP DTRA 1&2
Recordings and Ephemeral Recordings	}	
	}	

ORDER

On August 10, 2001, the Copyright Office ("the Office") issued its final two Orders relating to pre-controversy Party discovery and other motions in this matter. In these Orders, two motions were designated to the Copyright Arbitration Royalty Panel ("CARP" or "Panel") for resolution. That same day, at the Panel's invitation, the Parties submitted requests for additional evidence pursuant to 37 C.F.R. 251.46 (d). The Parties' requests were discussed with the Panel on August 13, 2001. This Order addresses both the matters designated by the Office and the Parties' August 10 requests.

I. MOTIONS DESIGNATED TO THE CARP

A. The RIAA Motion to Amend re 29 Licensing Agreements

As part of its written direct case, RIAA submitted testimony of five record company executives, which discussed various agreements involving sound recording licenses. Some, but not all, of these license agreements were attached as exhibits. RIAA seeks to amend its written direct case to include all 29 license agreements as exhibits -- several have already been entered into the record during oral testimony.

The Panel directs that all 29 agreements shall be admitted. The agreements shall be identified as RIAA exhibits, placed in binders, and delivered to opposing counsel and filed with the Office by August 24, 2001. By agreement of the parties, no discovery shall be conducted regarding these agreements. By August 31, 2001, the Webcasters/Broadcasters ("the Services") shall advise RIAA whether they wish to examine any of the RIAA witnesses who sponsored these 29 agreements. If requested, RIAA shall produce, during the rebuttal phase, the requested sponsoring witnesses or other appropriate witnesses if the original sponsoring witnesses are not available. Examination shall be limited to the subject licensing agreements.

B. The Services' Motion to Strike Steven Marks' Testimony and Exhibits

The Services seek to strike the testimony and exhibits of Steven Marks due to RIAA's failure to respond fully to the Office's June 22 and July 6 Orders by the July 16, 2001 deadline set for production in the July 6 Order. Orders, Docket No. 2000-9 CARP DTRA 1&2 (June 22, 2001 and July 6, 2001). RIAA counsel have indicated that 8,000 pages of material required by the Order were submitted by the deadline in what was believed at the time to constitute every item required. Subsequently, counsel discovered that, due to a computer program search error, an additional 4,000 pages of material existed which should have been produced. As soon as this mistake was discovered, RIAA counsel informed the Services' counsel and began to produce the additional material.

The Motion to Strike is denied. The Panel finds that there is no evidence to indicate any RIAA intention to disregard the Office's order. Rather, the Panel believes that RIAA made a good faith effort to produce in a timely fashion every appropriate document required. However, Mr. Marks' appearance as a live witness will be delayed until September 11, 2001 (unless the Parties by mutual consent agree that he appear earlier). This schedule will eliminate any prejudice which might otherwise have resulted from the Services' failure timely to receive the final 4000 pages of documents. Because the Panel will not be available after September 13, 2001, it is essential that all other testimony be completed by September 10th in order to make Mr. Marks' September 11th appearance possible. If necessary, the Panel is prepared to sit until late evenings in order to help the Parties achieve this. However, the Panel appreciates the Parties' efforts to date to focus their presentations and be economical in their use of time. This practice, which we are confident will continue, has enabled the proceeding to remain on schedule thus far.

II. THE PARTIES' EVIDENTIARY REQUESTS

CARP arbitrators are permitted to "call upon any party for the production of additional evidence at any time." 37 C.F.R. 251.46(d). However, section 251.46(d) may not ordinarily be used as a discovery tool available for counsel to circumvent applicable discovery rules[1] under section 251.45(c), or sponsorship requirements under section 251.47(k). *See* Order, Docket No. 96-6 CARP-NCBRA (April 6, 1998). Indeed, given the 180 day limit on CARP proceedings, a Panel should exercise its discretion under section 251.46(d) judiciously and should only call for the production of evidence which it regards as central to the determinations it must render. Accordingly, the Panel has carefully considered all of the Parties' requests and hereby grants those requests for additional evidence that it deems necessary to properly assess the parties' proposed

[1] Of course, for good cause, the Panel may allow additional discovery beyond the scope of section 251.45(c)(1). *See* section 251.42 (CARP may waive the rules upon a showing of good cause); 62 Fed. Reg. 55742, 55758 (Oct. 28, 1997).

rate methodologies and "benchmarks."

A. The Services Request for Additional Evidence

The Panel directs RIAA to produce to the Services, by August 24, 2001, the following:

(1) All documents exchanged between Steven Marks and the RIAA Negotiating Committee ("the Committee") reasonably related to the 26 license agreements between RIAA and webcasters ("the 26 agreements"). These include documents exchanged with members of the Committee or designees/agents of said members. Extraneous or personal information may be redacted.

(2) A log of documents withheld under (1), above, under any claim of privilege.

(3) All documents reasonably related to any change in the status of the 26 agreements including their renewal, termination, or rescission or the revision of rates or terms contained therein.

The documents produced under (1), (2), and (3) shall be numerically identified and provided to opposing counsel. On August 29, 2001, at 5 p.m., a conference shall be held before the Panel to (1) resolve any disputes regarding documents withheld under a claim of privilege,[2] (2) discuss which documents, if any, shall be admitted into the record, and (3) discuss whether any witnesses shall be presented for examination respecting the documents admitted into evidence hereunder.

[2] The Panel would expect relatively few documents to fall into this category.

B. RIAA's Request for Additional Evidence

The Panel directs the Services to produce to the Copyright Office and to the Owners and Performers, by August 24, 2001, the following:

(1) All forward-looking financial and non-financial projections for the DMCA Services created after October 28, 1998, including, but not limited, to business plans, strategic plans, presentations or other projections, such as those prepared for prospective or current investors, company management, a corporate parent, board of directors or licensors. This information is directly relevant to the testimony of Dr. Thomas Nagle. Dr. Nagle presented an "Economic Value Estimation" analysis upon which the Panel may rely to set appropriate royalty rates. On cross-examination, counsel for the Services challenged Dr. Nagle's conclusions as being based on poorly supported assumptions and projections. The Panel believes the Services' own estimates and projections are critical to a proper assessment of Dr. Nagle's analysis.

(2) All agreements between each of the Services herein, including National Public Radio, and any performing rights organization (ASCAP, BMI, or SESAC) for the performance of musical works. The Panel realizes that no party is advocating these specific agreements as a benchmark. However, the agreements may be relevant to certain issues which must be resolved in determining rates and terms for the licenses involved in this proceeding. Do not Serve C.O.

The Services are directed to produce the foregoing documents to the Copyright Office and opposing counsel on or before August 24, 2001. The documents produced shall be numerically identified and provided to opposing counsel. Any disputes on this matter, including requests for the production of witnesses for examination, shall be addressed by the Panel during the conferance at 5:00 p.m. on August 29, 2001.

III. ADDITIONAL WITNESSES

As discussed with counsel on August 13, 2001, the Panel believes that it would be extremely helpful during the rebuttal phase of the hearing to hear from knowledgeable representatives of Yahoo! and other RIAA licensees concerning the facts and circumstances surrounding the negotiation of their license agreements with RIAA.

Accordingly, the parties are directed to make good faith efforts to secure the appearance of such witnesses. The direct testimony of any such witness, with related exhibits, if any, shall be submitted, along with other rebuttal testimony, on or before October 4, 2001. Given that such witnesses are representatives of entities which are not parties to this proceeding, discovery concerning their testimony will only be allowed upon a showing of exceptional need.

August 14, 2001

SO ORDERED

Eric E. Van Loon
ERIC E. VAN LOON
Chair

JEFFREY S. GULIN
Arbitrator

Curtis E. von Kann
CURTIS E. VON KANN
Arbitrator

Before the

UNITED STATES COPYRIGHT OFFICE

Library of Congress
Washington, D.C.

In The Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings	**Docket No. 2000-9 CARP DTRA 1&2**

Rebuttal Testimony of ADAM B. JAFFE

I. INTRODUCTION AND OVERVIEW

I have been asked to review the arguments put forward by RIAA and its witnesses in its direct case, and to respond to a number of issues that were raised by the Panel or in cross-examination during my own direct testimony. I have structured this rebuttal testimony as follows. I begin in Section II by restating the conceptual economic argument as to why the market value of performance rights for sound recordings is likely to be no greater than the market value of performance rights for musical works, and addressing certain issues relative to this analysis that arose during the direct case. I then proceed in Section III to analyze a large new dataset that I have obtained that shows exactly how much is paid

1. The buyer side of the negotiation

The value that buyers put on the right of public performance of both musical works and sound recordings is derived from the value that they expect to realize by making public performances of music. In order for the buyers' valuations of the two rights to differ, it would have to be the case that there is some distinction in the manner or extent to which each right facilitates such performances. But no such differences exist. Buyers need both the sound recording and the musical work performance rights in order to make public performances. This means that each right is worthless to the buyers unless they also procure the other right. Conversely, once both sets of rights are procured, they each contribute symmetrically to the generation of the value through public performance. Because of this symmetry and mutual necessity, the buyers' "willingness to pay" for each right will be derived in the same way from the value that the buyers expect to derive from making performances. Hence, there is no difference in the buyers' "willingness to pay" for the musical work performance right and the sound recording performance right. Going into negotiations over either right, the buyers will be in the same position.

Note that it is important for this analysis that we are analyzing, in each case, blanket licenses for substantial portions of the repertoire.[1]

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[1] As discussed in my direct testimony, the appropriate economic interpretation of the willing buyer/willing seller test is that of a hypothetical competitive market. We can think of this market as being one in which competing non-exclusive licensors each

2. The seller side of the negotiation

The sellers of each right are not the same, but each comes to the hypothetical table from a similar position. In each case, the costs of producing the underlying intellectual property are sunk. Further, in each case, these costs (including compensation for the risks incurred) are covered by revenues earned in other markets. In the case of sound recording rights holders, these costs are covered by CD sales.[3] In the case of musical work rights holders, the costs are covered by the combination of mechanical royalties and over-the-air performance royalties. The digital performance royalty is incremental to this substantial revenue base in both cases. Finally, and most important, there is no incremental cost imposed on either the musical work or sound recording licensor by virtue of making the underlying intellectual property available for digital performance.[4,5] In such a situation,

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[3] Altschul, Transcript at 872-873; Katz, Transcript at 1051.

[4] There is evidence, discussed further below, that allowing digital performances actually *increases* the licensor's revenue in other markets, via promotional value. This would imply that the incremental cost is actually negative, and the licensor's minimally acceptable outcome would be a negative royalty, i.e., a payment from the licensor to the licensee. Alternatively, if it were believed that digital performances displace sales of CDs, this could be thought of as an incremental cost of the digital performance license, which would result in a minimum acceptable royalty greater than zero. As explained further below, the possibilities of promotion and displacement may lead to adjustments that have to be made to the otherwise equivalent values of sound recordings and musical works. Thus the argument in this section should be understood as establishing equivalence in the value of musical works and sound recordings before any consideration is given to either promotion or displacement.

[5] Altschul discussed Warner Bros. Record's expenses at length in both his written and his oral direct testimony. None of the costs he mentions, however, pertain to webcasting. (Altschul, Transcript at 805-821, and Direct Written Testimony of David Altschul at 14-21) Additionally, Katz and Himelfarb were both unable to identify

economics tells us that both the sound recording and musical work rights holders would approach this hypothetical negotiation for the performance right in the same way: they would recognize that there is no incremental cost to supply this market, and would simply hold out for as much of the user's overall performance value as they can get.[6]

Note that this analysis does not in any way suggest that the zero-incremental-cost of the right being transferred would lead to a zero royalty. Quite the contrary, intellectual property with zero incremental cost is routinely licensed at positive royalty rates. With respect to both musical works and sound recordings, we have a buyer (potential licensee) with some maximum willingness to pay which is derived from the value to the buyer of the performances, and we have a seller with a minimum willingness to accept equal to the zero incremental cost. The economics of bargaining, as well as common sense, suggests that the parties will reach agreement at some point in between. Economics cannot really tell us *where* in the interval between the buyer's maximum royalty and the seller's minimum royalty the parties will come out. It will depend on the stubbornness, negotiating skills, and perhaps bladder

additional costs specifically associated with webcasting under the statutory license. (Katz, Transcript at 1045-1046; Himelfarb, Transcript at 2868)

6 It is possible that at some future date it will cease to be the case that the cost of making sound recordings is covered by CD sales, and that digital performance royalties are no longer incremental. But there is no evidence in this proceeding that anyone anticipates such a dramatic transformation of the marketplace during the time period at issue here. (Katz, Transcript at 1034-1035, 1104) Griffin actually states that there is a possibility of an increase in sales in the short run for less well known artists. (Griffin, Transcript at 1588-1589)

control of the parties. These factors combine with the going-in valuations of the parties to determine the outcome. And because these going-in valuations on both the buyer's and seller's sides are the same with respect to musical works and sound recordings, there is no reason to expect that the outcomes would be higher for one or the other.

Because the minimum acceptable royalty for the licensors of both the musical work and the sound recording is zero, and the likely result of bargaining is an agreement somewhere between this zero valuation and the buyer's valuation driven by the value of performances, the outcome of the hypothetical negotiation depends, in effect, only on (1) the value to the buyer of the right to perform publicly, and (2) the fraction of that value that ends up, through negotiation, passing to the musical work and sound recording licensors. Again, unless there is some systematic difference between the negotiation skills of the respective licensors, there is no reason to believe that one or the other of these will constitute a larger share of the overall performance right.

The notion that parties that jointly create value will split that value equally is also confirmed by the very statute under which this proceeding occurs. The joint interest of the record label and the recording artist in the sound recording itself is analogous to the joint contribution of the sound recording and the musical work to a public performance. Further, there is no evidence that the magnitude of their original contributions to the underlying CD are the same. Yet Congress deemed that the labels and artists should split the sound recording digital performance royalty equally, i.e., that the value of the artist's contribution should be deemed equal to the value of the record label's contribution, just as I have suggested that the value of the sound recording and the musical work are similar.

B. Other issues pertaining to the relationship between sound recording and musical work valuations

1. Dr. Nagle's approach to valuation confirms the equivalence of sound recording and musical work

The view that the value of the sound recording performance right is driven *entirely* by the value to the buyer of making performances provides the foundation for the analysis undertaken by Dr. Nagle. As explained further below, I believe that Dr. Nagle's analysis is not informative as to the value of the sound recording performance right under the willing buyer/willing seller test. But I find it interesting, nonetheless, that in attempting to determine the value of the sound recording performance right, Dr. Nagle adopted a framework that is predicated on the assumption that the licensor of sound recording performance rights would approach this licensing on the basis of zero incremental cost, so that the value of the right is driven entirely by the valuation of the potential licensee.[7] That is, Dr. Nagle's analysis made no reference to, and drew no inferences from, the costs or risks incurred by

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[7] See Nagle, Transcript at 2561.

does not mean that the engine in the more expensive car is worth more than the engine in the second car.

It is clear that the value of an internet streaming services is derived from much more than just the sound recordings themselves. Indeed, if all one needed to derive value from internet streaming were sound recordings, it would be hard to understand why no one has managed to make any money in this business, since the sound recordings themselves have been available to anyone who filed for the statutory license. Thus the starting presumption should be that the various service offerings that are being considered differ with respect to the overall package of services that they offer users, but do not differ with respect to the value of the sound recordings themselves.

Consumer influence. Except to the extent that consumer influence affects the likelihood of displacement, it is not grounds, as a matter of economics, for a higher fee. People who have fancy stereos do not pay more for CDs; by the same token, the enhanced value associated with consumer influence is due to the technology of the webcaster. It does not increase the value of the underlying sound recording. Further, it is possible that consumer influence could increase promotional value; by allowing consumers to hear music more within a range of their

MATERIAL UNDER
SEAL DELETED

REDACTED

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Cost of litigation. The value of a CARP-determined statutory license as a substitute for a voluntary deal is inherently limited by the legal costs that parties expect would accompany that option. Put simply, the cost of relying on the statutory license would be the expected reasonable rate *plus* litigation costs. Thus, if the RIAA-proposed voluntary deal exceeded a reasonable rate, but exceeded it by less than the expected litigation costs, licensees would still agree to the proposed unreasonable rate.

Many licensees knew that their streaming activities might be limited during the arbitration period, and it was often true that even rates significantly above a reasonable level would still be cheaper than litigating in this proceeding. Examples of such concerns in the record are as follows:

[[

REDACTED

[87] See, for example, [[S REDACTED .]]

[88] See, for example, [[REDACTED]]

Before the
COPYRIGHT ARBITRATION ROYALTY PANEL
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
	)	
Digital Performance Right in Sound Recordings and Ephemeral Recordings	)	Docket No. 2000-9 CARP DTRA 1 & 2
	)	

BROADCASTERS', WEBCASTERS' AND
BACKGROUND MUSIC SERVICES' PROPOSED RATES AND TERMS

1. **General Terms**

(a) This part establishes terms and rates of royalty payments for the public performance of sound recordings by eligible nonsubscription digital transmission services in accordance with the provisions of 17 U.S.C. § 114(f)(2), the making of ephemeral reproductions by such digital transmission services in accordance with the provisions of 17 U.S.C. § 112(e), and the making of ephemeral reproductions of sound recordings in accordance with the provisions of 17 U.S.C. § 112(e) by a transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. § 114(d)(1)(C)(iv).

(b) *Services.*

For the purposes of this part, Services are those entities utilizing the licenses specified in 17 U.S.C. § § 114(f)(2) and 112(e) referred to in subsection (a) above.

(c) *Designated Agents.*

For the purposes of this part, Designated Agents are those agents **authorized by a Copyright Arbitration Royalty Panel to engage in the collection and distribution of royalty payments hereunder.**

(d) *Interested Parties.*

For the purposes of this part, Interested Parties are those copyright owners who are entitled to receive royalty payments pursuant to 17 U.S.C. § § 114(g)(2) and 112(e).

2. Royalty Fees for Public Performance and Ephemeral Recordings.

(a) *Royalty Fee for Eligible Nonsubscription Transmission Services.*

Commencing October 28, 1998, and continuing through December 31, 2002, the annual royalty fee for the digital public performance of sound recordings made by eligible nonsubscription transmission services, other than public broadcasting entities as defined in 37 C.F.R. § 253.2, shall be the following:

(1) For compensable sound recording performances that are simulcast performances, $ .00008 times the number of such compensable sound recording performances by the service, times the average number of listeners to such performances on the service.

(2) For all other compensable sound recording performances by the channel or station of the service, $ .00014 times the number of such compensable sound recording performances by the service, times the average number of listeners to such performances on the service.

(3) The royalty fees set forth in (1) and (2) shall be increased by three (3) percent for the year 2001, and by an additional three (3) percent for the year 2002.

(b) *Definitions and methods of computation.* For purposes of this section:

(1) "Compensable sound recording performances" are feature performances of sound recordings (performances other than commercial jingles, background, themes, signatures, bridges, cues, or music incidental to a sporting or other public event), of at least 30 seconds in duration, which require a license, but are not otherwise licensed by the service.

(2) A "simulcast performance" is a performance of a sound recording that is transmitted or retransmitted at the same time as the sound recording is being performed as part of an over-the-air radio broadcast transmission.

(3) Without limiting paragraph 4 below, at its option a service may calculate its royalty fee with respect to any channel or station on a listener hour basis, utilizing (as applicable):

(i) twelve (12) sound recording performances per listener hour in the case of performances covered by subsection (a)(1) above;

(ii) fifteen (15) sound recording performances per listener hour in the case of performances covered by subsection (a)(2) above; or

(iii) the average number of sound recording performances per listener hour on the channel or station.

(4) In calculating the fee under subsection (a), a service may, at its option, calculate the number of compensable sound recording performances, the average number of sound recording performances per hour, and the average listeners on the service or any channel or station of the service, using any commercially reasonable methods and sources of information, including reasonable estimates.

(c) *Minimum Fee.*

If the fee calculated pursuant to *subsection* (a) is less than $250 per calendar year, the service shall pay a minimum fee of $250 per calendar year, prorated on a quarterly basis.

(d) *Ephemeral Recordings.*

The rights granted for the fees set forth in subsections (a), (b) and (c) above also are inclusive of the right under section 112(e) to make as many ephemeral recordings as the Service determines are necessary and appropriate to facilitate the performances.

(e) *Royalty Fee for Business Establishment Services.*

Commencing October 28, 1998, and continuing through December 31, 2002, an annual royalty fee of $25,000 (prorated as applicable) covering as many ephemeral copies as a Service transmitting performances exempt under 17 U.S.C. § 114(d)(1)(C)(iv) determines are necessary and appropriate to facilitate such exempt performances. The annual royalty fee shall be increased by three (3) percent for the year 2001 and by an additional three (3) percent for the year 2002.

3. **Terms for Making Payments**

(a) All royalty payments hereunder shall be made to a single fund to be administered by the Designated Agent(s).

(b) **Until such time as a new authorization is made, Royalty Logic, Inc. and SoundExchange shall be the** authorized **Designated Agent(s)** for the collection and distribution of royalties hereunder. Each sound recording copyright owner may select either party as its Designated Agent.

(c) Royalty payments for the period commencing October, 28, 1998 through the last calendar quarter ending prior to the date on which the Librarian of Congress publishes this regulation as a final regulation shall be made in accordance with 17 U.S.C. § 114(f)(4)(C). Commencing with the calendar quarter in which the Librarian of Congress publishes this regulation as a final regulation, payment of the royalty fee (or quarterly installment of the minimum fee, if greater on a year-to-date basis) shall be made on a calendar quarterly basis, no later than the forty-fifth (45th) day after the end of each quarter in which the Service has engaged in digital transmissions of sound recording performances. A final adjustment will be made at the end of each calendar year for the amounts payable over the annual minimum fee.

(d) **The Service shall submit** quarterly **statements of account on a form reasonably agreed between and provided by the Designated Agent(s),** together with the quarterly **royalty payments.**

(e) **A statement of account shall include only such information as is necessary to calculate the accompanying royalty payment. Additional information beyond that which is sufficient to calculate the royalty** to be paid **shall not be included on the statement of account.**

(f) The Designated Agent(s) shall have the responsibility of making further distribution of these royalty payments to those parties entitled to receive such payments.

(g) The Designated Agent(s) may deduct a reasonable charge for administering the collection and distribution of royalty payments hereunder, not to exceed 20 percent of the amount of each gross distribution.

4. Confidential Information

(a) For the purposes of this part, Confidential Information shall include the amount of royalty payments, statements of account and any other information collected pertaining to the statements of account designated as confidential by the Service submitting the statement; *Provided* that all such information shall be made available to independent and qualified auditors conducting audits under Section 4 of this part for use in connection with such audits.

(b) In no event shall the Designated Agent(s) use any Confidential Information for any purpose other than royalty collection and distribution, provided however, that Designated Agents may report to recipients of royalty payments under this part the aggregate royalty fees paid by all Services and the aggregate performances or listener hours reported by the Services on which royalty payments are based if information concerning any individual Services cannot be identified.

(c) Access to the Confidential Information shall be limited to, and in the case of paragraphs (3) and (4) below shall be provided to:

(1) those employees of the Designated Agent(s) who are engaged in the collection and distribution of royalties hereunder, and who, for the purposes of performing their assigned collection and distribution duties during the ordinary course of business, require access to the records;

(2) an independent and qualified auditor, who is authorized to act on behalf of Interested Parties or Designated Agent(s) with respect to the verification of the royalty payments;

(3) in connection with future Copyright Arbitration Royalty Panel proceedings under 17 U.S.C. § § 114(f)(2) and 112(e), under an appropriate protective order, attorneys and other authorized agents of the parties to the proceedings, Copyright Arbitration Royalty Panels, the Copyright Office or the courts; and

(4) in connection with royalty disputes or claims by or among the Services, Interested Parties, Designated Agent(s), or other parties entitled to receive allocations of royalty payments under 17 U.S.C. § § 114(g)(2) and 112(e), under an appropriate confidentiality agreement or protective order, attorneys and other authorized agents of the parties to the dispute, arbitration panels or courts.

(d) The Designated Agent(s) shall implement procedures to safeguard all Confidential Information. Confidential Information shall be maintained in locked files.

(e) Books and records of the Service and of the Designated Agent(s) relating to the payment, collection, and distribution of royalty payments shall be kept for a period of three (3) years.

5. Verification of Statements of Account

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by Interested Parties or Designated Agent(s).

(b) *Frequency of verification.* Interested Parties or Designated Agent(s) may conduct a single audit of a Service, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three (3) calendar years, and no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* Interested Parties or Designated Agent(s) must file a notice of intent to audit a particular Service with the Copyright Office, which shall publish in the FEDERAL REGISTER a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the Interested Parties' or Designated Agent(s)' notice. The notification of intent to audit shall also be served at the same time on the Service to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, whose audit shall be binding on all Interested Parties and Designated Agent(s).

(d) *Retention of records.* The party requesting the verification procedure shall retain the report for a period of three (3) years.

(e) *Acceptable verification procedure.* Subject to section 4(f), an audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all Interested Parties and Designated Agent(s) with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to an Interested Party or Designated Agent, except where the auditor has a reasonable basis to suspect fraud and disclosure would prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with an appropriate agent or employee of the Service being audited, in order to remedy any factual errors and clarify any issues relating to the audit.

(g) *The costs of the verification procedure.* The Interested Part(ies) or Designated Agent(s) requesting the verification shall pay for the cost of the procedure, unless it is finally determined following an audit that there was an underpayment of fifteen (15) percent or more, in which case the Service which made the underpayment shall bear the reasonable costs of the verification procedure, not to exceed the amount of the underpayment as finally determined.

6. Verification of Royalty Payments

(a) *General.* This section prescribes the general rules pertaining to the verification of the payment of royalty fees by Interested Parties.

(b) *Frequency of verification.* Interested Parties may conduct a single audit of a Designated Agent upon reasonable notice and during reasonable business hours during any calendar year, for any or all of the prior three (3) calendar years, and no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* Interested Parties must submit a notice of intent to audit a Designated Agent with the Copyright Office, which shall publish in the FEDERAL REGISTER a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the Interested Parties' notice. The notification of interest shall also be served at the same time on the Designated Agent to be audited. Any such audit shall be conducted by an independent auditor identified in the notice, whose audit shall be binding on all Interested Parties.

(d) *Retention of records.* The Interested Party requesting the verification procedure shall retain the report of the verification for a period of three (3) years.

(e) *Acceptable verification procedure.* Subject to section 5(f), an audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all parties with respect to information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to an Interested Party, except where the auditor has a reasonable basis to suspect fraud and disclosure would prejudice the investigation of such suspected fraud the auditor shall review his/her tentative written findings with a appropriate agent or employee of the Designated Agent being audited,

in order to remedy any factual errors and clarify any issues relating to the audit.

(g) *Costs of the verification procedure.* **The Interested Parties requesting the verification procedure shall pay for the cost of the verification procedure,** unless it is finally determined following an audit that there was an underpayment of fifteen (15) percent or more; in which case the Designated Agent that made the underpayment shall bear the reasonable costs of the verification procedure, not to exceed the amount of the underpayment as finally determined.

7. Unclaimed Funds

If a Designated Agent is unable to make a royalty payment distribution to a copyright owner who is entitled to receive a royalty payment hereunder, the Designated Agent shall retain the required payment in a segregated trust account for a period of three (3) years from the date of payment. No claim for such payment shall be valid after the expiration of the three-year period. After the expiration of the period, the Designated Agent may use the unclaimed funds to offset the cost of the collection and distribution of royalty payments.

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November 6, 2001

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Broadcasters', Webcasters', and Background Music Services' Proposed Rates and Terms was served on November 6, 2001 via hand delivery on the following:

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CARP during that two-year period, identifies the interested parties and describes the nature of the record before the CARP.

A. Notices of Reliance Upon Compulsory Licenses

11. Section 114(f)(4)(B)(i) of the Copyright Act requires those who wish to rely upon the Section 114 compulsory license to file a notice with the Copyright Office, in accordance with regulations that the Office must adopt. On September 20, 1999, the Copyright Office directed eligible nonsubscription services to file initial notices by October 15, 1999 or, if they had not yet launched, prior to first transmission.[11] As of early 2001, initial notices were filed for nearly 2,300 web sites. The vast majority of these notices (1,557) were filed by AM/FM broadcast radio stations. Other than the AM/FM sites, only 187 sites were operating as of January 2001.[12]

12. The Copyright Office has not yet established initial notice requirements for the Section 112 statutory license. In a January 2, 2001 Order, the Office instructed parties who are participating in this proceeding to file such notices by January 22, 2001. All of the parties that filed direct cases in April 2001 filed notices indicating their intention to rely on the Section 112 ephemeral license.

B. Voluntary Negotiations

13. The DPRA and DMCA require the Copyright Office to initiate a six-month period during which interested parties may voluntarily negotiate Section 112 and 114 rates and terms. On November 27, 1998, the Librarian initiated a the voluntary

[11] *Notice and Recordkeeping for Nonsubscription Digital Transmissions*, 64 Fed. Reg. 50758 (Sept. 20, 1999).

[12] RIAA Exhibit 126 DP; Marks W.D.T. 4-5; Tr. 9062-63 (Marks).

negotiation period covering the timeframe October 28, 1998 through December 31, 2000.[13] On January 13, 2000, the Librarian initiated a second six-month period to negotiate rates and terms covering January 1, 2001 through December 31, 2002.[14]

14. In accordance with the Copyright Office orders and statutory directives, the RIAA sought to negotiate Section 112 and 114 agreements with various webcasters and business establishment services. RIAA is a trade association that represents the interests of the U.S recording industry. Its division, SoundExchange, has been designated – by sound recording copyright owners who account for approximately 90% of all sound recordings legitimately distributed in the United States – as the non-exclusive agent to collect and to distribute Section 112 and 114 royalties.[15]

15. RIAA was able to reach agreements with 26 webcasters during and subsequent to the formal negotiation periods. RIAA, however, was not able to negotiate an industry-wide agreement, or agreements with certain key parties, that would likely have avoided the need for a CARP to set rates and terms. Accordingly, on July 23, 1999 RIAA petitioned the Copyright Office to commence the CARP process for the period October 28, 1998 through December 31, 2000. On August 28, 2000 RIAA filed a second petition covering the period January 1, 2001 through December 31, 2002.

C. Notices of Intent to Participate

16. In response to RIAA's petitions, the Copyright Office directed interested parties to file notice of their intent to participate in the 1998-2000 CARP proceeding and

[13] 63 Fed. Reg. 65555 (Nov. 27, 1998).

[14] 65 Fed. Reg. 2194 (Jan. 13, 2000).

[15] Rosen W.D.T. 4; Tr. 438-39 (Rosen).

the 2001-02 proceeding.[16] Notices for the 1998-2000 proceeding were due on November 1, 1999, and notices for the 2001-02 proceeding were due on January 10, 2001.

17. In addition to RIAA, the AFIM, AFM and AFTRA filed notices of intent to participate in both the 1998-2000 and 2001-02 proceedings. AFIM is a trade organization that deals with issues facing thousands of independent record labels.[17] AFM is a labor organization that represents over 100,000 professional musicians who work as featured recording artists, non-featured session musicians in the recording industry, and live performances.[18] AFTRA is a labor organization representing over 80,000 performers and newspersons that are employed in the news, entertainment, advertising and sound recording industries.[19]

18. Approximately 43 Internet-only webcasters and 82 AM/FM broadcasters filed notices of intent to participate in the 1998-2000 proceeding, the 2001-02 proceeding or both. NPR filed notices to participate in both proceedings on its own behalf and behalf of non-commercial public radio stations qualified for funding from the Corporation for Public Broadcasting. In addition, AEI and DMX, which provide background music to business establishments, filed notices of intent to participate.

D. Copyright Office Rulings

19. During the pre-hearing phase, the Copyright Office issued several rulings that affect this proceeding. First, in a December 4, 2000 Order, the Copyright Office

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[16] 64 Fed. Reg. 52107 (Sept. 27, 1999); 65 Fed. Reg. 55302 (Sept. 13, 2000); 65 Fed. Reg. 77393 (Dec. 11, 2000).

[17] Tr. 2830 (Himelfarb).

[18] Bradley W.D.T. 1.

[19] Hessinger W.D.T. 1.

consolidated the 1998-2000 and 2001-2002 proceedings. The Order noted, however, that the proceedings would "remain separate in terms of the evidentiary submissions and the establishment of rates and terms."[20] The purpose of consolidation was simply to "allow a single CARP to determine the rates and terms for both periods in the same 180-day period."[21]

20. Second, RIAA requested that the Copyright Office clarify the scope of these proceedings. In a January 2, 2001 Order, the Copyright Office ruled that this proceeding involves the setting of Section 112 and 114 rates and terms for only eligible nonsubscription services and business establishment services. Section 112 and 114 rates and terms for new and preexisting subscription services will be set separately.[22]

21. Third, RIAA requested the Copyright Office to resolve the legal question of whether simulcasts (webcasts) of an AM or FM radio station over the Internet are subject to the Section 106(6) digital performance right in sound recordings. The broadcasters argued that Section 114(d)(1)(A) exempts all of their transmissions of sound recordings over the Internet – regardless of whether the transmission is a simulcast of their over-the-air signal or is a transmission made solely for the Internet, *e.g.*, a side channel. The Copyright Office conducted a rulemaking and concluded in December 2000 that the broadcasters' webcasts are not exempt but may qualify for the Section 112 and Section

[20] Dec. 4, 2000 Order at 5.

[21] *Id.*

[22] Jan. 2, 2001 Order.

114 statutory licenses. This ruling was upheld by the Eastern District of Pennsylvania in August 2001, and an appeal is pending before the Third Circuit.[23]

22. Fourth, the Digital Media Association ("DiMA"), on behalf of certain webcasters, filed a petition requesting the Copyright Office to adopt rules regarding the eligibility of personalized services for the Section 114 statutory license. Personalized services are those that permit the listener to influence the music to be heard, such as by rating artists. On December 11, 2000, the Office refused to conduct the rulemaking, concluding that the determination of eligibility was too fact specific for a rulemaking forum. In May 2001, several record companies filed a copyright infringement action against Launch Media, Inc., in the Southern District of New York, alleging that Launch's personalized service was outside the Section 114 compulsory license. Shortly thereafter several webcasters that offer personalized services filed a declaratory judgment action against RIAA in the Northern District of California.[24] Individual record labels then filed copyright infringement actions in the Southern District of New York against certain of these webcasters.[25]

23. Fifth, following the submission of written direct cases, the parties filed various discovery-related motions. The Copyright Office ruled on these motions in

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[23] *Bonneville*, 153 F. Supp. 2d 763 (affirming 65 Fed. Reg. 77292).

[24] Dec. 11, 2000 Personalized Services Order, 65 Fed. Reg. 77330; July 16, 2001 Order at 6-7; *Arista Records et al. v. Launch Media, Inc.*, No. 01 CV 4450 (S.D.N.Y. filed May 24, 2001); *The Digital Media Ass'n et al. v. RIAA*, No. C-01 2129 MEJ (N.D. Cal. filed June 1, 2001).

[25] *See Zomba Recording Corp., et al. v. MusicMatch, Inc*,, No. 01 Civ. 5091 (S.D.N.Y. filed June 8, 2001), *Arista Records, Inc. et al. v. XACT Radio LLC*, No. 01 Civ. 5090 (S.D.N.Y. filed June 8, 2001) & *Sony Music Entertainment, Inc., et al. v. MTVi Group LLC*, No. 01 CV 5092 (S.D.N.Y. filed June 8, 2001).

Orders dated August 13 and 14, 2001. Copyright Owners and Performers also requested the Office to issue rulings concerning the standard to be applied by the CARP in setting the Section 112 and 114 rates and terms; the precedential effect of certain determinations by the CARP and Librarian in the Subscription Services Proceeding; the nature of the terms that may be set by the CARP; the scope of the Section 112 ephemeral license for business establishment services; and the request by certain webcasters to obtain rates and terms for consumer-influenced services. The Office ruled on these motions in Orders dated July 16, 2001 and July 18, 2001.[26] These rulings are discussed below where applicable.

24. Finally, in an Order dated July 23, 2001, the Librarian formally convened this CARP, effective July 30, 2001.[27] Section 802(e) of the Copyright Act requires the CARP to submit its report within 180 days of the date on which it is convened. Accordingly, the Librarian established January 28, 2002, as the final date for the submission of the CARP report.

E. Written Direct Cases

25. On April 11, 2001, RIAA filed its direct case, along with proposed rates and terms. RIAA's direct case consisted of written testimony from 17 witnesses, as well as approximately 141 exhibits (most of which consisted of licensing agreements into which RIAA or individual record companies have entered). AFM, AFTRA and AFIM also submitted direct cases and supported RIAA's proposed rates and terms. Their cases

[26] July 16 Order; July 18 Order.

[27] 66 Fed. Reg. 38325 (July 23, 2001).

included testimony from five witnesses. RIAA, AFM, AFTRA and AFIM are referred to collectively as "Copyright Owners and Performers."

26. Of the 126 webcasting services (or representatives of such services) that had filed notices of intent to participate in these proceedings, the following 25 submitted direct cases (those in the left-hand column are Internet-only services and those in the right-hand column are AM/FM radio broadcasters or their representatives):

Table 1

List of Services Filing Direct Cases

Webcasters	Broadcasters
AOL/Spinner Networks, Inc	Clear Channel Communications, Inc.
BET.com	Entercom Communications Corp.
Comedy Central	Infinity Broadcasting Corp.
Coolink Broadcast Network	Susquehanna Radio Corp.
Echo Networks, Inc.	National Religious Broadcasters Music Licensing Committee
Everstream, Inc.	Salem Communications Corp.
Incanta, Inc.	
Launch Media, Inc.	
Listen.com	
Live365.com	
Music Match, Inc.	
MTVi Group LLC	
MyPlay, Inc.	
NetRadio Corp.	
Radio Active Media Partners, Inc.	
Radiowave.com, Inc.	
Univision Online	
Westwind Media.com, Inc.	
XACT Radio Network, LLC	

27. During the course of the hearings, seven of the above webcasters withdrew their cases (Coolink, Everstream, Incanta. Univision, Launch, Music Match and Westwind). The remaining parties are referred to collectively as the "Services." The

Services proposed rates and terms for the Section 114 webcaster performance license and the Section 112 ephemeral license for webcasters.

28. NPR submitted a separate direct case and a separate rate proposal covering public radio stations. AEI and DMX which have since merged, did the same. AEI and DMX are referred to collectively as the "Business Establishment Services." They submitted a Section 112 rate proposal for services that transmit sound recordings to business establishments. Both NPR and the Business Establishment Services supported the Services' proposed terms.

F. Direct Case Hearings

29. The CARP held a conference with the parties on July 30, 2001, to address various procedural issues. By order dated August 14, 2001, the CARP required the parties to produce various documents related to their direct cases, including documents for which the Copyright Office had previously denied discovery requests. The CARP conducted 31 days of hearings on the direct cases, commencing July 30, 2001 and ending September 14, 2001. A total of 49 witnesses testified during those hearings.

30. RIAA presented the following witnesses during the direct case hearings: Cary Sherman, Executive Vice President and General Counsel, RIAA; Hilary Rosen, President and Chief Executive Officer, RIAA; Linda McLaughlin, Vice President, National Economic Research Associates, Inc. ("NERA"); David Altschul, Vice Chairman and General Counsel of Warner Bros. Records; Paul Katz, Senior Vice President of Business Affairs for Zomba Music Publishing and Zomba Recording Corporation; Charles Ciongoli, Senior Vice President of Finance, Universal Music Group; James Griffin, Chief Executive Officer, Cherry Lane Digital, LLC; Ron Wilcox, Senior Vice President,

Librarian affirmed the CARP's conclusion that the term "fair market value" in Section 119 "should be accorded its plain meaning – i.e., the price a willing buyer and a willing seller would negotiate in a free marketplace . . . ."[36] *See infra* Section III.C. In several other proceedings, CARPs and the Copyright Royalty Tribunal ("CRT") have sought to establish royalty rates or to distribute royalties according to a fair market value standard. This precedent is discussed in succeeding sections where applicable.

49. The willing buyer/willing seller standard also has been applied in other areas of the law, *e.g.* where the Government under 28 U.S.C. § 1498 takes a compulsory license in patented or copyrighted works and must afford the owner "reasonable and entire" compensation; where a court must establish a "reasonable royalty" in patent infringement cases under 35 U.S.C. § 284; in eminent domain cases to determine just compensation under the Fifth Amendment; and in ASCAP Rate Court proceedings to determine reasonable royalties under the ASCAP Consent Decree. This authority also is discussed below where applicable.

B. Consideration of Voluntary Agreements

50. Congress sought to encourage voluntary agreements over Section 114 and Section 112 rates and terms. Thus, it did not include any rates or terms in Sections 114 or 112 (as it has done in certain other compulsory licensing provisions). Instead, Congress required the Copyright Office to establish a six-month negotiation period before a CARP could be commenced; and it determined that any agreements reached during those negotiations would take precedence over rates and terms set by a CARP.[37] Congress also

[36] Librarian's Satellite Carrier Order, 62 Fed. Reg. at 55747.

[37] 17 U.S.C. § 114(f)(2)(A).

made clear that the CARP could consider voluntary agreements in determining rates and terms for the remainder of the industry. Section 114(f)(2)(B) specifically states that:

> In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).

51. Section 112(e)(4) also permits the CARP to consider voluntary agreements negotiated for the making of ephemeral reproductions, although it does not contain the comparability language set forth in Section 114(f)(2)(B):

> In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms under voluntary license agreements negotiated as provided in paragraphs (2) and (3).

52. Similar provisions permitting consideration of voluntary agreements may be found in other compulsory licensing provisions of the Copyright Act. For example, Section 118(b)(3), which was enacted as part of the Copyright Act of 1976, permits the CARP to consider "rates for comparable circumstances under voluntary license agreements . . . ."[38] Furthermore, courts that apply the willing buyer/willing seller standard routinely consider rates and terms in voluntarily negotiated agreements as the best evidence of willing buyer/willing seller rates and terms. *See infra* at Section IX.B.

C. Evidentiary Considerations

53. Section 114(f)(2)(B) and Section 112(e)(4) both direct the CARP to base its decision on "economic, competitive and programming information presented by the

[38] *See also* 17 U.S.C. § 114(f)(1)(B); 17 U.S.C. § 115(c)(3)(D).

is a chart of the majors' expenditures on copyrighted content as a percentage of revenue from 1988 to 1997:

MATERIAL
REDACTED

116. Consistent with the experiences of the industry as a whole from 1988 to 1997, Warner Bros. Records spent [redacted] of its net sales on royalties to recording artists, music publishers, and background musicians and vocalists from 1997 to 1999.[121]

4. Value to Webcasters

117. Record labels consider the value their sound recordings bring to webcasters as an important factor when determining the rates and terms they will accept in the marketplace from webcasters.[122] As stated by Jay Samit, "we look at the value

[121] Tr. 809 (Altschul); Altschul W.D.T. 16.

[122] Tr. 1658 (Wilcox); Tr. 2012 (Vidich); 2111 (Evans); 2404-05 (Kenswil); 2800 (Samit).

that, first of all, our recordings bring to a new business. How key is that to their success and what their business is, and are they building a future revenue stream for us and our artists?"[123]

118. Record labels understand the tremendous value that can be derived from a business that is built off of sound recordings. And they are well aware of the potential of the webcasting business.[124] That potential is discussed further in the next Section.

5. Importance of Licensing Revenues and The Internet

119. Record labels are aware that revenues earned from the licensing of their sound recordings are becoming increasingly important in keeping their businesses successful. Primary among these licensing revenues are the new opportunities afforded by – and, if uncontrolled, threatened by – the performance of sound recordings over the Internet.[125] As stated by Paul Vidich, "Licensing income is very important to us. We're increasingly finding ourselves in a world in which we've got to find revenue to offset the costs of our business."[126]

120. The recording industry expects that licensing revenues – especially those from the Internet – will become increasingly important. The recording industry is likely to follow the model of the motion picture industry in relying on multiple streams of revenue to support the creative efforts of the industry. Rather than being in the business

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[123] Tr. 2800 (Samit).

[124] *See* Kenswil W.R.T. 1-3; Tr. 9418, 9421, 9423 (Marks); Tr. 7982-83 (Pearson).

[125] Tr. 1658-59 (Wilcox) ("licensing revenue will be crucial for profitability"); Tr. 2012 (Vidich); Tr. 2110-11 (Evans); Tr. 2800-01 (Samit).

[126] Tr. 2012 (Vidich).

of selling physical copies, record labels imagine themselves as being "in the business of monetizing recordings."[127]

121. Revenues from webcasting licenses will become a component to the overall revenue picture for record labels, and will play a role in determining the prices record labels will charge for other products, as well as how much investment record labels will make in creating sound recordings.[128]

122. The move towards multiple streams of revenue is being dictated by the lack of growth in the market for physical copies of sound recordings. After a period of growth in the 1990's, the total number of units of sound recordings leveled off in 1999 and 2000.[129] As stated by Jim McDermott of Sony:

> It is certainly part of our business strategy that the physical good is going to go away at some point, and we are an intellectual property business. How that gets carried or how it gets delivered is really irrelevant.
>
> But if it's just bits, we've got to get paid for the bits. I think there's an unfortunate perception that the value of music is really based around the cost of the physical carrier. So we've got a much -- and that's a burden that we kind of carry into other places, which is what we're trying to change.[130]

Accordingly, in order to continue the growth of the industry, record labels must rely upon new streams of revenue.[131]

[127] Tr. 2801 (Samit); *see also* Tr. 437 (Rosen); Rosen W.D.T. 12.

[128] Tr. 14204-06 (Wildman); Wildman W.R.T. 10-11.

[129] Tr. 434 (Rosen); Tr. 2800-01 (Samit) ("[T]he physical market is not growing."); Rosen W.D.T. 5-6 and Figs. 2 & 3.

[130] Tr. 12825 (McDermott).

[131] Tr. 868-69 (Altschul); Rosen W.D.T. 12.

123. The importance of the Internet and digital media to record labels is demonstrated by their focus on new media. Many of the major record labels have established separate operations to deal with new media.[132] For example, UMG operates a company called "eLabs" to explore investment and business opportunities in digital media.[133]

6. Effect on Sale of Physical Product

124. Record labels have concerns over whether the performance of their sound recordings over the Internet will substitute for the sales of physical copies of sound recordings. That substitutional effect has two components: (1) the unauthorized reproduction of sound recordings; and (2) the "displacement" of demand for sound recordings.[134]

a. Unauthorized Reproductions

125. The unauthorized reproduction of sound recordings from webcasters' performances under the statutory licenses is a significant concern for record labels. Record labels have lost substantial revenues to unauthorized reproductions over the Internet to services such as Napster.[135] The illegal downloading services have created a culture of infringement, in which the desire to get "something for nothing" through the Internet has been "ingrained" in the habits of consumers, especially youthful ones.[136]

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[132] *See* Tr. 892 (Altschul); Tr. 1684 (Wilcox); Tr. 2792-93 (Samit) (describing position of Vice President of New Media at EMI).

[133] Tr. 2399-400 (Kenswil).

[134] *See* Tr. 1037 (Katz) (discussing displacement); Tr. 1093-94 (Katz); Tr. 3833-34, 3855-3956 (Fisher).

[135] Tr. 1111-12 (Katz); Tr. 1782 (Wilcox); Tr. 2406 (Kenswil).

[136] Tr. 1111-12 (Katz).

releases. The ability to skip performances, a common feature provided by webcasters, is anti-promotional because it allows listeners to avoid those new releases record labels are trying to promote in favor of the recordings for which the listener has already developed a preference.[153]

138. Even though a service may be promotional, record labels still would require payment for the use of their sound recordings. Such a payment reflects the value that the use of the sound recording provides to the user. Accordingly, the mere fact that a use may be promotional for record labels would not lead record labels to agree to a license with a low or zero royalty.[154]

139. Record labels take into account the promotional benefit a licensee will provide when negotiating licenses for the use of their sound recordings.[155] As stated by Jay Samit, "We also look in the range of what are the promotional values [of the licensee's service], and we factor that into our negotiations and what we charge."[156] Accordingly, to the extent that a service is promotional, such promotional value would be reflected in the ultimate rates and terms that are negotiated.

8. Licensing Experience

140. When entering into negotiations, record labels rely on their extensive experience in negotiating agreements for the use of their copyrighted sound recordings,

[153] Tr. 12850-52 (McDermott); McDermott W.R.T. 3-6.

[154] Tr. 309 (Sherman); Tr. 517 (Rosen); [redacted].

[155] Tr. 1661-62 (Wilcox); Tr. 2012 (Vidich); Tr. 2410 (Kenswil); 2802 (Samit).

[156] Tr. 2802 (Samit).

both in traditional and new media.[157] The agreements that form the background of the record labels's experience are discussed extensively in Section IX below.

9. Costs Of Administering Compulsory License

141. In the context of a compulsory license, record labels must factor in the additional costs of license administration. There are significant costs associated with collecting and distributing royalties from the statutory licenses, in addition to the costs of monitoring compliance with the statute.[158]

142. Many of these duties fall upon SoundExchange,[159] which performs a number of functions in administering licenses: (1) its Data Administration Department receives the data concerning the public performance of sound recordings from the various music services that pay royalties to SoundExchange's members and processes performance logs and matches performances with copyright owners and performers;[160] (2) its Royalty Administration department receives information from those entitled to royalties, coordinates the annual distribution of royalties, and provides accounting services for the SoundExchange royalty accounts; and (3) its Licensing Department negotiates and drafts licenses with parties who wish to obtain voluntary licenses for

[157] Tr. 1882 (Wilcox) (noting that Negotiating Committee members "would bring [their] experience and [their own] negotiations to bear and offer input to the Committee based on those"); Tr. 2120-21 (Evans) ("I think what is a more accurate representation of what [the Negotiating Committee] did is based on all of our licensing experience and how we individually and separately have valued sound recordings."); Tr. 9416 (Marks).

[158] Tr. 9390-92 (Marks).

[159] SoundExchange is a member organization whose membership consists of approximately 280 companies that are affiliated with more than 2,000 record labels. These companies account for over 90% of the sound recordings legitimately sold in the United States. *See* Rosen W.D.T. 4-5; Kessler W.R.T. 2.

[160] A sample log from a music service was introduced into evidence as RIAA Exhibit 078 DR.

hypothetical negotiation, particularly in the absence of a compulsory license. As the *Micro Motion* court explained:

> [B]ecause Exac would have been unable to enter business without first securing a license from Micro Motion, Exac should have been willing to pay a significant portion of its expected profits as a royalty to Micro Motion.[191]

3. The Webcaster's Relationship to a Part of a Larger Organizations

160. Another facet of the webcasting industry that would affect the willing buyer's perspective is the fact that many webcasters are part of larger organization and serve strategic purposes other than earning revenue from webcasting. For example, the largest radio broadcaster groups are participating in this proceeding, such as Clear Channel ($ 1 billion in earnings on $ 2.4 billion in revenue in 2000),[192] Infinity Broadcasting ($ 1.260 billion in annualized operating cash flow on $ 2.33 six billion in annualized revenue)[193] and Susquehanna Radio Corp. ($ 212 million in revenue in 2000).[194] They claim an interest in this proceeding on behalf of their AM/FM webcasting operations.

161. For the radio broadcasters, many use webcasting to preserve their over-the-air audience, providing them a more convenient and better quality way to listen to the over-the-air programming.[195] David Juris of XACT Radio explained how his company was founded to help broadcasters prevent the erosion of their over-the-air audience to

191 *Id.*

192 Tr. 5925 (Donahoe); RIAA Exhibit 154 DP-X at 40.

193 Tr. 7766 (Mason); RIAA Exhibit 188 DP-X at 2.

194 Tr. 5428 (Halyburton)

195 *See, e.g.*, Halyburton W.D.T. ¶ 21.

webcasters. He explained that "[i]t was clear that this new medium, the Internet, was going to pose a significant threat to radio stations and the audiences. And we had already seen some erosion of audience away from traditional radio in terms of overall listening to other forms of music."[196] Thus, a radio broadcaster would webcast to help prevent this "erosion" of audience, and would spend money to do that even if the operation did not earn significant revenues.

162. Similarly, the large media and entertainment organizations have several webcasting companies in this proceeding. For example, MTVi, BET.Com and Comedy Central are all part of Viacom, and Spinner.com is part of AOL/TimeWarner. For these companies, the webcasting operation is designed to extend their various brands and attract listeners to other properties within the entire organization. This goal is easily seen with Comedy Central's webcasting operation, whose only purpose is to attract viewers to the Comedy Central cable network property.[197] In addition, the BET cable network created BET.com (including its webcasting service) to promote its television programming and other properties.[198]

163. With adjunct operations such as AM/FM webcasting or brand-enhancing webcasters, the value of the business is not necessarily reflected in profitability. Brad Porteus of MTVi explained why MTV Networks would invest and seek investors in Radio SonicNet:

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[196] Tr. 7067 (Juris); Tr. 7139 (Juris).

[197] Lyons W.D.T. ¶ 2.

[198] Tr. 6988-90 (Mills).

> [T]he equity up side as an investor and as an investment opportunity wasn't necessarily related to the profitability of the venture at hand, as much as it was the -- a perceived -- perceived equity up side as an investor based on the marrying of the MTV brand with the dotcom environment.[199]

Likewise, Fred McIntyre agreed that one must view all of AOL's operations in the Internet marketplace, not simply Spinner.com, and that AOL offers advertisers a package based on all of its properties.[200]

164. With respect to adjunct webcasting services like these, the price they might be willing to pay in the marketplace for the components of its business is not entirely dependent on the profit and loss of the webcasting service. Their larger parent organizations are often willing to spend significantly more than the webcasters' revenues to promote their brands and other properties. For example, in 1999 MTVi planned to open a "firehose" of $300 million over five years in promotional efforts for its Radio SonicNet webcasting service, despite revenues for 1999 of only [redacted].[201] These strategic goals would likely also encourage the webcaster to spend more on sound recording performance licenses it would need to operate the service.

4. The Webcaster Ability to Afford RIAA's Proposed Rates

165. Another factor the willing buyer would consider in its negotiation the statutory license rates is the effect those rates would have on its bottom line. As Dr. Nagle explained, this "bottom line" would be measured not at the present time, when all

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[199] Tr. 4654-55 (Porteus).

[200] Tr. 5120-21 (McIntyre).

[201] RIAA Exhibit 122 DP-X; RIAA Exhibit 013 RR (MTVi Radio SonicNet Financials).

operations, waiting for this proceeding meant never having to pay royalties no matter how many performances of sound recordings were made.[241]

193. In addition to the disincentives inherent in the statutory license, DiMA itself attempted to discourage webcasters from negotiating with the RIAA. Cognizant of the result in the last arbitration, DiMA urged webcasters to join its CARP "team," whose lawyers and economists have "a tremendous record of success in rate litigation " and " are certain to obtain a remarkably low rate ...."[242]

5. Issues in the Negotiations

194. The Negotiating Committee had a great deal of discussion, both as a group and within individual companies, over what the appropriate rates and terms for a statutory license might be. Because the services can vary a great deal, the Committee had to arrive at the best approach to satisfy a webcaster's individual format while still having parameters that would fit the webcasting industry as a whole. Everyone on the Committee had spent several years negotiating licenses, and they relied upon that experience in determining the proper rates and terms to offer in negotiations. RIAA attempted to obtain the highest rate and best terms that it could under the circumstances of the individual licensee. The realities of the marketplace dictate compromise, and by offering both a per performance model and a percentage of revenues model, RIAA could both tailor an agreement to the needs of webcasters, large and small, while remaining

[241] Tr. 9492-93 (Marks); Marks W.D.T. 5.

[242] Tr. 10446-49, 10451-57 (Marks); RIAA Exhibits 150 DP to 152 DP. Indeed, all of the remaining webcasters in this proceeding are members of DiMA. *See also* Tr. 4342 (Wise, NetRadio), Tr. 4468 (Pakman) and RIAA Exhibit 114 DP-X.

focused on industry-wide parameters.[243] As, Mr. Wilcox stated: "You go out and you try to make the best deal you can. There is no magic to it."[244]

195. In each agreement, the Negotiating Committee attempted to obtain not only the best royalty rate but also the most favorable terms possible regarding the issues that were important to them. This included, but was not limited to, security provisions, data requirements (such as specific demographic data and the ability to conduct surveys), free advertising in the form of industry service announcements and buy-buttons.[245] Another significant issue was the pricing metric.

a. Percentage of Revenue Metric

196. When RIAA began its negotiations, it focused on a percentage of revenue metric. The percentage of revenue approach was consistent with other licensing arrangements that copyright owners use, and the members of the Negotiating Committee were familiar with this model. It was also appropriate in that it adequately reflects the unique value in each sound recording. It became apparent, however, that identifying the relevant webcaster revenues can be problematic, particularly where the webcaster offers features other than those related to music. Identifying the appropriate revenue base is key because two otherwise identical percentage rates can produce widely variant royalties depending upon the revenue base against which they are applied.[246]

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[243] Tr. 1364-69 (Wilcox); Tr. 9485-88, 9493-94 (Marks).

[244] Tr. 1869 (Wilcox).

[245] Tr. 1667-68 (Wilcox); Tr. 9138-42, 13971, 14120 (Marks); [redacted]

[246] Tr. 9138-39, 9201-03 (Marks); Marks W.D.T. 7.

interactive services.[296] That evidence makes clear that these services offer the listener a high degree of control over the sound recordings that are performed on the service. This control makes it more likely that the listener can satisfy their music needs without purchasing sound recordings.[297]

229. The webcaster's own descriptions of their services confirm the added value of personalized services. XACT Radio claims that its service allows "[i]ndividual listeners [to] program the station brand at XACT Radio to play only the songs they really like, never ones that they don't."[298] Also, Brad Porteus of MTVi's Radio SonicNet explained how the personalized features of its service provided the listener more control over the programming than traditional radio, as it creates a different selection of sound recordings for each listener each time that listener logs onto the service.[299]

4. Minimum Fees

230. RIAA proposes that each webcaster shall pay a minimum annual fee of $5,000, provided that (a) any webcaster choosing the rate option set forth in Section 1(b) shall pay a minimum annual fee of $5,000 for every $100,000 of operating expenses; and (b) the minimum annual fee for the webcast of an AM/FM radio station reasonably classified as a news, business, talk or sports station shall be $500. The minimum annual fee shall be paid as a non-refundable advance against future royalties in that year, due upon the first monthly payment of each year.

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[296] *See, e.g.*, Fisher W.D.T. ¶¶ 19, 25, 31-35, 46, 51; McDermott W.D.T. 5-6; Tr. 1811-15 (Wilcox); Tr. 2075-76 (Vidich).

[297] Tr. 1508-12 (Griffin); McDermott W.R.T. 4-7.

[298] Tr. 7131 (Juris) & RIAA Exhibit 178 DP-X.

[299] Tr. 4663-67 (Porteus).

231. All of the RIAA statutory license agreements have minimum fees to support this request. Only one has a minimum fee lower than $5,000, and that agreement, as described below, supports the minimum fee for non-music AM/FM stations.[300] These minimum fees are consistent with the legislative history explaining why a minimum fee is required:

> A minimum fee should ensure that copyright owners are fairly compensated in the event that other methodologies for setting rates might deny copyright owners an adequate royalty. For example, a copyright arbitration royalty panel should set a minimum fee that guarantees that a reasonable royalty rate is not diminished by different types of marketing practices or contractual relationships. For example, if the base royalty for a service were a percentage of revenues, the minimum fee might be a flat rate per year ....[301]

See also Section III.E. *supra.*

232. The minimum fee based on operating expenses for those webcasters that choose the percentage of revenue option is supported by the RIAA agreements that utilize a percentage of revenue royalty rate. Every one of those agreements has a minimum fee based on some other financial aspect of the webcaster's business: operating expenses, capital raised or a per performance fee.[302] In fact, [redacted] paid the great

[300] Appendix A (List of Agreements).

[301] DMCA Conference Report 85-86.

[302] [redacted].

majority of its royalty fees to the RIAA in 1998-2000 based on the [redacted] percent of operating expenses minimum in that agreement.[303] This type of minimum fee is exactly what Congress had in mind when it passed the DMCA.

233. Based on the agreements that utilize an operating expenses minimum fee, RIAA proposes the following definition of "Operating Expenses":

> "Operating Expenses" means all of the webcaster's expenditures, whether direct or indirect, made in connection with the operation of the Web site through which digital audio transmissions of sound recordings licensed under Section 114 are made, including, but not limited to, salaries and bonuses, employee training and education, supplies, lease payments, payments to Internet service providers, payments to Internet access providers, advertising agency commissions, marketing costs, equipment costs that are not capitalized, depreciation, software and technology licenses, editorial content licenses, subscriber acquisition costs, costs in development and installation of bandwidth, and credit card servicing fees.[304]

As with the definition of gross revenues, RIAA believes that where a webcaster operates a DMCA-compliant service as part of a larger operation, reasonable allocation of operating expenses should be made so as to prevent the webcaster from minimizing its royalty fees. This is also justified by the availability of the per performance option for any webcaster who feels that such allocation would result in an inappropriately high royalty.

234. Copyright Owners and Performers have proposed a separate minimum fee for webcasts of AM and FM radio stations that are reasonably classified as news,

303 [redacted]

304 *See* [redacted]

MATERIAL UNDER SEAL DELETED

business, talk or sports stations. Because these stations use little music, the proposed minimum fee has been set at a level lower than that for other services – *i.e.*, $500 per year. [redacted][305]

5. Non-Commercial Webcasters

a. Rate Proposal

[MATERIAL REMOVED PURSUANT TO DECEMBER 6, 2001 LETTER FROM ARNOLD & PORTER TO COPYRIGHT OFFICE]

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305 [redacted]

266. [redacted]

5. **Most Favored Nations Provision**

267. [redacted]

VIII. COMPARABILITY

268. Section 114(f)(2)(B) permits the CARP to consider the rates and terms in voluntary agreements where such agreements involve "comparable types of digital audio transmission services and comparable circumstances." Section 112(e)(4) also permits the CARP to consider voluntary agreements, although it does not impose any comparability

343 [redacted]

344 *See* RIAA Exhibit 075 DR § 3.6.1; Tr. 9323-24 (Marks).

requirement. The language of Section 114 suggests that the CARP should address two issues in evaluating the RIAA Agreements. The first is whether the RIAA licensees offer "services" that are "comparable" to the services offered by the "willing buyer" in the marketplace that the CARP must replicate. The second is whether the "circumstances" of the licensees are "comparable" to those of that "willing buyer." The statute requires that the services and circumstances be "comparable," not identical." And the "willing buyer" must reasonably be understood to mean the typical buyer in the marketplace without a compulsory license. *See supra* Section III.

269. Professor Jaffe argues that the CARP should completely disregard the RIAA Agreements as evidence of marketplace rates. He does not do so on the basis of the Section 114 statutory text. Rather, Professor Jaffe argues that the RIAA exerted market power over the 26 licensees, preying on their individual circumstances to extract above-market rates. He says that each of the 26 RIAA licensees is so different from the typical webcaster who filed a notice of intent to rely on the compulsory license that the rates and terms to which those 26 licensees agreed are irrelevant to the CARP's analysis. Professor Jaffe did not undertake to adjust the rates in those agreements as the CARP requested and is commonly done in cases where a challenge is made to the comparability of market-negotiated prices. Rather, he asserts that no such adjustment can be made and that the Agreements should not be used at all.[345]

[345] Jaffe W.R.T. 65-66. *See also* Tr. 11672-73 (Fisher) (courts in eminent domain cases normally make adjustments to comparable sales being offered rather than reject them outright)

270. As explained in this section, the evidence is abundant that the 26 RIAA licensees offer services comparable to those offered by webcasters in general, including the webcasters participating in this proceeding. Furthermore, the circumstances faced by each of the 26 RIAA licensees are comparable to the circumstances that are faced by virtually every webcaster in the relevant marketplace, including the webcasters in this proceeding. For a voluntary agreement to qualify as a benchmark under Professor Jaffe's analysis, it would need to be with a webcaster who, like his theoretical competitive market, simply does not exist "in the marketplace" that the CARP must replicate

A. Comparability of Services

271. Comparability of "types of services," in the first instance, means whether the services fall within one of the four categories of compulsory licenses created by Section 114: (1) eligible nonsubscription services; (2) new subscription services; (3) preexisting subscription services; and (4) preexisting digital satellite audio radio services.[346] At that level, the RIAA licensees are comparable because they – like the Services – all operate "eligible nonsubscription services," the only category of service subject to this CARP.[347]

272. Comparability of types of services can also be assessed in several other respects within the category of "eligible nonsubscription services." Services can be compared by their business model, structure and status, such as whether the webcaster is a stand-alone operation or adjunct to another or larger business or whether it is a B2C or

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[346] *See* 17 U.S.C. § 114(d)(2).

[347] *See* Section _____ *supra* (describing Copyright Office ruling on scope of participants in this proceeding).

B2B webcaster, and whether it is still operational or yet to launch. The CARP can also compare the size of webcasters, measured either in financial terms (*e.g.* revenues, expenses, or market capital) or in terms of audience. They can be compared by programming, such as the number and nature of channels or types of sound recordings performed. Another area of comparison is technology, including streaming format, transmission bit rate and listener experience. While the statute is not clear as to what is required to be comparable, the RIAA licensees are comparable to other webcasters, including those in this proceeding, in all of the areas mentioned above.

1. Comparison of Business Models

273. A variety of business models have been adopted in the webcasting industry. This section explains the categories of webcasting services that are relevant to the CARP's rate-setting task.

a. B2C Webcasters

274. The core webcasting business model, generally referred to as a "B2C Webcaster," is one in which the webcaster performs sound recordings directly to consumers from its web site. This category is further divided into three subcategories: (1) Internet-only webcasters; (2) Aggregators; and, (3) Broadcasters.

(i) Internet-only Webcasters

275. Internet-only webcasters are those who originate their own audio programming and transmit it to listeners, usually through multiple genre channels. The channels are programmed by the webcaster, as opposed to being created by third parties as in the aggregator model described below. Unlike personalized services, the listener has no influence on which sound recordings are performed, apart from features such as

the traditional request line or a limited ability to skip forward to the next song in the playlist.[348]

276. Among the Services in this proceeding, Spinner.com, MTVi's Radio SonicNet, and NetRadio are examples of this category.[349] With respect to RIAA licensees, musicmusicmusic's RadioMOI.com, Multicast's On-the-I.com, Cablemusic.com, Cybertainment, MusicMatch, Radiofreeworld, Beem-me-up Broadcasting and Cornerband all currently operate Internet-only webcasting services.[350]

(ii) Aggregators

277. Aggregators are webcasters who collect multiple programming sources and offer them to listeners from a single location on the Aggregator's Web site. Rather than create audio programming itself, an Aggregator relies on others to create programming, and it provides the bandwidth and server space for the webcasts. The underlying webcasting sources can range from hobbyists to Internet-only webcasts to simulcasts of AM/FM radio stations. This allows the Aggregator to save on encoding and programming costs, and to aggregate the audience of multiple smaller webcasters for sale to advertisers.[351]

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[348] Griffin W.D.T. 13-14.

[349] *NetRadio*: Wise W.D.T. ¶ 4; *Spinner.com*: McIntyre W.D.T. ¶ 3; *MTVi*: Porteus W.D.T. ¶¶ 6-7.

[350] *Musicmusicmusic*: Tr. 9130-31 (Marks); Marks W.D.T. 23; *Multicast:* Tr. 9274-75 (Marks); Marks W.D.T. 26; *Cablemusic.com*: Tr. 9189-91 (Marks); Marks W.D.T. 23; *Cybertainment*: Tr. 9290-91; Marks W.D.T. 27; *MusicMatch*: Tr. 9352 (Marks); *Radiofreeworld*: Tr. 9232-33; Marks W.D.T. 24; *Beem-me-up Broadcasting*: Marks W.D.T. 30; *Cornerband*: Marks W.D.T. 30.

[351] Griffin W.D.T. 14-16; Tr. 8145-46 (Jeffrey) (describing audience aggregation).

278. Among the RIAA licensees, Yahoo!, Spacial Audio Solutions and KickRadio are aggregators that collect multiple webcasts into one site. On the Services's side, Live365.com and myplay.com fall into this category.[352]

(iii) Broadcasters

279. The Broadcaster subcategory refers to AM/FM radio stations that operate webcasting services, either in the form of simulcasts of AM/FM signals or as Internet-only webcasts sometimes known as side channels. The broadcaster operations are good examples of webcasting services that are adjunct to larger operations. For example, Clear Channel Communications is a multi-faceted communications company that operates simulcasting and Internet-only webcasting services through its Clear Channel Interactive subsidiary.[353]

280. In many cases, the radio station uses the services of a third party to operate its webcasting services. For example, Susquehanna Radio Corp. relies on Yahoo! Broadcast and RadioWave for services related to the simulcasts of its AM/FM stations.[354]

281. Several of the major broadcasting companies are participating in this proceeding, including Clear Channel, Susquehanna, Entercom, Infinity, Salem Communications and the National Religious Broadcasters Licensing Committee. Although RIAA does not have any agreements with broadcasters for simulcasts of AM/FM signals, it does have agreements with related entities such asYahoo! (which

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[352] *Yahoo!*: CARP Exhibit R1 at ¶ 6; *Spacial Audio Solutions*: Tr. 9271 (Marks); Marks W.D.T. 25-26; *KickRadio*: Tr. 13310-11 (Hackett); *Live365.com*: Jeffrey W.D.T. ¶¶ 1, 3; *myplay*: Pakman W.D.T. ¶ 5.

[353] Tr. 5870-71 (Donahoe).

[354] Halyburton W.D.T. ¶¶ 18-19.

aggregates AM/FM simulcasts) and CyberAxis (which creates simulcasts and web sites for broadcasters).[355]

b. B2B Webcasters/Syndicators

282. The category of webcasters generally known as syndicators includes those services that offer their audio programming to other web sites to attract consumers to their sites, similar to background music services used by traditional brick and mortar stores. These other Web sites include retail sites like EddieBauer.com and BarnesandNoble.com, or other entertainment sites like Bolt.com. The syndicator creates so-called "branded" radio stations for the visitors of the third-party site, which appears to the user as "Eddie Bauer Radio" or "Bolt Radio." Some syndicators also create branded radio stations for record company web sites that can be used to promote sound recordings.[356]

283. Syndicators charge a fee to the third-party site, sometimes in the form of a share of advertising revenue earned from the webcasts. Some also charge a per hour fee to customers for the syndicated streams. For example, [redacted] charges its customers [redacted] for syndicated webcasts.[357] They also customize the programming to the demographics of the web site's customers, seeking to provide music that complements the atmosphere that the retailer wishes to create on its Web site.[358]

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[355] *Yahoo!*: CARP Exhibit R1 at ¶ 6; *CyberAxis*: Tr. 9346-47 (Marks); Marks W.D.T. 29.

[356] Griffin W.D.T. 16-17; Tr. 1284-92 (Griffin); Moore W.D.T. ¶¶ 3-5; Tr. 7477-79 (Moore); Pearson W.D.T. ¶ 4.

[357] [redacted]

[358] Tr. 14069-77 (Marks); Marks W.D.T. 16-17; Moore W.R.T. ¶¶ 3, 5-6.

284. Often the third party can only offer webcasts on its Web site under the Section 114 compulsory license if it enlists the programming services of a syndicator. This is due to the limitation in Section 114(j)(6), the definition of "eligible nonsubscription transmission," which applies only where the "primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts or other music-related events."[359]

285. Websound, MoodLogic and OnAir.com exemplify the B2B webcaster category among the RIAA licensees. On the Services' side, RadioWave, RadioAMP and Listen.com are all syndicators.[360]

c. **Personalized Services**

286. In general, personalized services are those that allow their listeners some control over the programming they receive through the rating of artists, albums or songs, as well as providing listeners with a skip forward to the next song. The services typically create a separate playlist for each listener based in whole or in part on the ratings the listener provides. Although the listener will not know exactly which song will be coming next in his playlist, by supplying ratings and using the skip feature the listener has more control over the songs he hears than a listener of a traditional genre-based webcasting service.[361]

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[359] 17 U.S.C. § 114(j)(6); Tr. 14069-77 (Marks); Marks W.D.T. 16-17.

[360] *Websound*: Tr. 9337 (Marks); Marks W.D.T. 28-29; *MoodLogic*: Tr. 9339-40 (Marks); Marks W.D.T. 29; *OnAir*: Tr. 13071-72 (Purcell); Marks W.D.T. 25; *RadioAMP*: Moore W.D.T. ¶¶ 3-5; *RadioWave*: Pearson W.D.T. ¶ 4; *Listen.com*: Reid W.D.T. ¶ 10.

[361] Griffin W.D.T. 19; Porteus W.D.T. ¶¶ 9-13; Juris W.D.T. ¶¶ 8-9.

287. In its Motion to Exclude Personalized Services from this proceeding, Copyright Owners identified seven webcasters participating in this proceeding who offered personalized webcasts: MTV's Radio SonicNet, Listen.com, Launch.com, Incanta, XACT Radio, Echo Networks, and MusicMatch.[362] Of those seven, Launch.com, MusicMatch and Incanta withdrew from the proceeding, and four (MTV's Radio SonicNet, XACT Radio, Listen.com and Echo Networks) remain in this proceeding. Because of the constraints of the compulsory license, RIAA has not negotiated any licenses with personalized services.[363] The individual record companies have negotiated agreements with some of the companies in this proceeding, and these and others form the basis of the RIAA's rate proposal for such services.[364]

2. Comparison of Size and Financial Condition

288. RIAA licensees also compare favorably in the areas of financial size and audience. In terms of financial size, RIAA signed agreements with well-funded webcasters (Yahoo!, musicmusicmusic, OnAir.com) and small webcasters (RadioFreeWorld, Cybertainment, Beem-me-up Broadcasting). The webcasters in this proceeding (such as AOL's Spinner, Viacom's MTVi, Comedy Central, BET.com and Infinity) are not small – all have had significant financial backing.[365]

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[362] July 16, 2001 Order of the Copyright Office, at 5-6.

[363] RIAA has negotiated licenses with the modified MusicMatch service which permits a limited skip forward feature and identification of artists that the listener prefers. This service now falls within the Section 114 statutory license. *See* Tr. 9357-59 (Marks).

[364] *See* Section IX.A.2.a. *supra*.

[365] Yahoo earned over a billion dollars in revenue in 2000. *See* Marks W.D.T. 28. musicmusicmusic raised over $13.5 million and is traded on the Frankfurt stock exchange. *See* Tr. 12947, 12962 (Spegg). OnAir raised over $ 30 million in financing. *See* Tr. 13056 (Purcell); For RadioFreeWorld, Cybertainment, and Beem-me-up Broadcasting, see Tr. 9233, 10318 (Marks) and Tr. 11172 (Bechtold).

289. RIAA licensees include stand-alone webcasters (MusicMatch, RadioFreeWorld, Soundbreak.com) similar to NetRadio, XACT Radio and RadioAMP. They also include webcasters that are adjunct to larger organizations (Yahoo!, musicmusicmusic, cablemusic.com), similar to MTVi and Spinner.com.[366]

290. In terms of audience, RIAA licensees have achieved comparable listening hours to the webcasting industry generally. Cablemusic.com has been rated among the top sites on Arbitron's and Measurecast's rating services, with services such as Live365 and NetRadio. Yahoo's Internet-only stations alone have listening hours around the same levels as those in this proceeding. [redacted][367]

291. Also, several RIAA licensees have ceased operation or have yet to launch (Soundbreak.com, OnAir.com, Ijockey/NRJ Media), as have several webcasters in this proceeding (NetRadio, RadioWave, Westwind Media and Infinity).[368]

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[366] *RadioFreeWorld, Soundbreak*: Marks W.D.T. 24, 27; *MusicMatch*: Tr. 9352 (Marks); *MTVi*: Porteus W.D.T. ¶ 4; *AOL/Spinner*: McIntyre W.D.T. ¶ 1; *NetRadio*: Wise ¶ 3; *XACT Radio*: Juris W.D.T. ¶ 2; *RadioAMP*: Moore W.D.T. ¶ 1.

[367] Tr. 11344 (Mandelbrot); RIAA Exhibit 075 DR (Yahoo Agreement); Roy W.D.T. ¶ 21; Reid WD.T. ¶ 18; Pakman W.D.T. ¶ 12; Moore W.D.T. ¶ 14; and Pearson W.D.T. ¶ 22.

[368] *Soundbreak, OnAir.com, Ijockey*: Tr. 9371 (Marks); RadioWave: Tr. 13446-47 (Nagle); *NetRadio*: Tr. 13442 (Nagle); *Westwind*: Tr. 6927-28 (Mills); *Infinity*: Tr. 7731-32 (Mason).

3. Comparison of Programming and Technology

292. In terms of technology and the service offered to consumers, RIAA licensees are very much the same as webcasters in this proceeding and the industry typically. Mr. Griffin's video demonstration showed the similarities of user interface between NetRadio and RadioMOI.com, Yahoo! and Live365; he also demonstrated how Websound provides a service similar to those demonstrated by RadioAMP and RadioWave.[369] In addition, RIAA licensees use the same streaming formats as the rest of the industry (Real, Windows Media or MP3), and in many cases stream at similar bit-rates.[370]

293. As for the programming offered, most RIAA licensees, like most webcasters, provide a wide variety of channels with sound recordings from all genres, requiring access to sound recordings from all record labels.[371] At the other end of the spectrum, RIAA licensee (RadioFreeWorld) uses a small portion of compulsory license material, just as Comedy Central does.[372]

294. Notably, neither Professor Jaffe nor the Services take issue with the comparability of the "types of services" that RIAA licensees offer the participating webcasters or the industry generally. Therefore, as the above evidence shows, there is no

[369] RIAA Exhibit 208 DP; Tr. 1288-94 (Griffin).

[370] Tr. 13123-24 (Heilbronn) (Cablemusic uses only Windows Media streaming format); Tr. 13979 (Junkala) (Multicast uses MP3 streaming format at 32-160 kbps); Zittrain Rebuttal Exhibit 1 (Showing webcasters in this proceeding using bitrates of between 8 and 360 kbps).

[371] Tr. 5002 (McIntyre) (describing Spinner's 150 channels and variety of music); RIAA Exhibit 208 DP (James Griffin demonstration describing RadioMOI.com's large music database).

[372] Tr. 9232-33 (Marks); Lyons W.D.T. ¶ 5.

question that the RIAA agreements meet the first test of comparability provided in Section 114.

B. Comparability of Circumstances

295. The second aspect of comparability identified in Section 114 is comparability in "circumstances." Professor Jaffe evaluates the circumstances of the RIAA licensees to support his assertion that they succumbed to the market power of the RIAA in entering their license agreements, and did not view the compulsory license as a viable option.[373] While Professor Jaffe's arguments are not offered to help the CARP apply the comparability tests of Section 114, his analysis of circumstances reveals that the RIAA licensees were in nearly identical circumstances to all of the webcasters in this proceeding, and likely most of the webcasters generally "in the marketplace." As a result, the 26 RIAA licensees meet the second "comparability" test of Section 114.

296. The picture Professor Jaffe paints about the RIAA licensees is in many respects inaccurate.[374] For example:

- Professor Jaffe states that the [redacted] is not a valid benchmark, seemingly because [redacted] had a technology business in addition to its webcasting service, and "paid little attention to the terms of the streaming license because it was unimportant to [its] business."[375] [redacted] was asked whether webcasting was a small portion of [redacted] business, and whether the amount of money [redacted] would spend under the RIAA license was not substantial to its business. [redacted] answered "No,"

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[373] Jaffe W.R.T. 56-74.

[374] *See* Appendix B (describing Professor Jaffe's inaccuracies regarding RIAA licensee circumstances).

[375] Jaffe W.R.T. 70, n.96.

and further stated that [redacted] goal at the time was to reach 10,000 simultaneous users by mid-2000.[376]

- Professor Jaffe suggests that [redacted] signed a license because it was sent a cease and desist letter by RIAA's Piracy Division.[377] That letter concerned the unauthorized duplication and sale of phonorecords, and had nothing to do with [redacted] webcasting site.[378] In addition, [redacted] testified that the letter "in no way had any reasoning [sic] for getting licensed with the RIAA. . . . That was a different product altogether."[379]

- Professor Jaffe claims that [redacted] received additional consideration for signing its license.[380] As his only support, he points to the testimony of Mr. Marks that [redacted] did not feel that 15% of revenues was an appropriate rate, but that he would agree to that rate in exchange for a most favored nations clause and for additional rights regarding on-demand streaming.[381] The parties, however, did not sign an agreement for a percentage of revenues rate, but rather signed an agreement at a per performance rate. [redacted] was not given an MFN and was not given any rights regarding on-demand streaming.[382]

- Professor Jaffe asserts that [redacted] was concerned about whether its syndication service came within the scope of the statutory license.[383] In support, Professor Jaffe cites only to the testimony of Mr. Marks, but that testimony does not mention any concerns regarding

[376] [redacted].

[377] Jaffe W.R.T. 63 n.86, 70 n.96.

[378] Tr. 10351 (Marks); [redacted]

[379] [redacted]

[380] Jaffe W.R.T. 63, n.84.

[381] Tr. 9988 (Marks).

[382] [redacted].

[383] Jaffe W.R.T. 60, n.81.

statutory coverage of [redacted] syndication service.[384] Instead, it refers to an e-mail in which he stated: "Also, as far as syndication, that would be fine in a per performance deal. If we ended up in a gross revenue deal, we'd have to talk about the particular means of syndicating."[385] In testifying to [redacted] reasons for reaching agreement with RIAA, [redacted], did not mention any concerns over whether the company's service was covered.[386]

- Professor Jaffe cites two discovery pages (N13671-72[387]) as support for his claim that [redacted] viewed the record labels as a customer as well as a supplier. Those two pages are part of a 34-page business plan, in which [redacted] simply lists record companies as one of the many possible markets for it services, and does not go into any detail regarding [redacted] views on its relationship with the labels. There is no mention whatsoever of the compulsory license or its affect on [redacted] business relationships.

- Professor Jaffe states that the [redacted] agreement is an unreliable benchmark because [redacted] had concerns over whether its service came within the compulsory license. The e-mail from [redacted] that Professor Jaffe cites in support was sent to Mr. Marks on August 15, 2000.[388] By August 16, 2000, Mr. Marks had assured [redacted] service fell within the compulsory license.[389] Likewise, Professor Jaffe points to an August 24, 2000 e-mail where [redacted] asked Mr. Marks whether a specific part of [redacted] service

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[384] Tr. 10002-06 (Marks).

[385] Tr. 10005 (Marks); [redacted] ([redacted] correspondence binder), at October 7, 1999 e-mail (N11543).

[386] Tr. 13044-57 (Purcell).

[387] [redacted].

[388] [redacted]

[389] Tr. 10126 (Marks): [redacted]

came with the compulsory license.[390] [redacted] sent that e-mail to Mr. Marks at 7:01 p.m. on August 24th. By 7:02 a.m. the next morning, Mr. Marks had reported back to [redacted] that the service was within the statutory requirements.[391]

297. Even where Professor Jaffe's characterizations of the testimony are not inaccurate, he has merely identified the circumstances that a substantial number of webcasters encounter "in the marketplace," including many of the webcasters in this proceeding.[392] Had those webcasters entered into agreements with the RIAA, it is likely that Professor Jaffe would have "concerns" about using those license agreements as benchmarks too.[393] What his conclusions from these circumstances show is that hypothetical willing buyer in Professor Jaffe's analysis is not really that at all – instead, Professor Jaffe's "willing buyer" is one that has absolutely no motivation to enter an agreement with the willing seller because it can rely on a compulsory license.

1. Need for Certainty Over Rights and Fees

298. Professor Jaffe argues that the RIAA licensees entered into their license agreements to assuage concerns about uncertainty over whether they had the proper rights clearances to operate their business and how much they would have to pay for those rights. These concerns came from potential investors, potential customers and from within the company itself.[394]

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[390] Jaffe W.R.T. 60 n.81.

[391] [redacted].

[392] Tr. 14179-88 (Wildman); Wildman W.R.T. 18-19.

[393] Tr. 12502-503 (Jaffe) (saying he would have "significant concerns" if RIAA entered into an agreement with MTV due to the pending litigation regarding personalized services).

[394] Jaffe W.R.T. 58-60; Tr. 6481-82 (Jaffe).

299. Such concerns about uncertainty are found in many, if not all, webcasters. Several examples can be found among the webcasters in this proceeding. For example, [redacted] testified about concerns from potential investors:

[redacted][395]

John Jeffrey explained that Live365 began negotiations with the RIAA because "not having an agreement and not having certainty in what the rate is has created uncertainty with our investment discussions."[396]

300. Similarly, companies like Spinner.com, NetRadio, Echo Networks and XACT Radio are and were either seeking investment, undergoing an IPO or being acquired by another company.[397] For example, Echo Networks explained in its May 2001 business plan that it was [redacted][398] In

[395] Tr. 10859-60 (Charles).

[396] Tr. 8213 (Jeffery).

[397] *See* Tr. 5122-23 (McIntyre) (Spinner was purchased by AOL in 1999 for $400 million); Tr. 4286-87 (Wise) (NetRadio went public in 1999); Exhibit 102 DP-X (NetRadio 1999 Annual Report); RIAA Exhibit 011 RR at SERV 2182 ([redacted])

[398] RIAA Exhibit 50 DR-X at SERV 1958 (emphasis added).

each situation, concerns about rights and fees necessary to operate services would be important to investors.

301. As for the uncertainty relative to potential customers, many of the webcasters were in the same position as RIAA syndicator licensees in trying to attract potential third-party web sites to use their programming. Charlie Moore of RadioAMP explained that he had to address potential customer concerns about licensing and the DMCA.[399] NetRadio was trying to attract syndicator customers, and XACT Radio's entire business is providing webcasting for use by radio stations.[400] [redacted][401]

302. Related to this point is Professor Jaffe's next articulated concern about uncertainty over whether the compulsory license applies.[402] Again, many of the webcasters in this proceeding operate services that raised questions about how Section 114 should be applied to them. In addition to the "personalized services" identified in the Copyright Office's July 16, 2001 Order, various webcasters, such as BET.com, Live365 and myplay face questions about compliance with the compulsory license conditions.[403]

[399] Tr. 7497-99 (Moore).

[400] Tr. 4211-13 (Wise); Juris W.D.T. ¶¶ 4-5.

[401] Tr. 7070-73 (Juris).

[402] Jaffe W.R.T. 59-60.

[403] Tr. 7045-50 (Mills) (BET.com's service had not displayed artist, album and song title as required by Section 114); Tr. 8213 (Jeffrey) (describing sound recording performance complement compliance disputes with RIAA); Tr. 4398-4404 (Pakman) (examples of myplay's service not complying with the statute's requirements).

303. Professor Jaffe also notes that RIAA licensees wanted to limit uncertainty regarding company cost budgeting. It is likely that every company in the world would like to eliminate uncertainties about their cost budgets, including those webcasters in this proceeding. For example, John Jeffrey of Live365 explained that cost uncertainties prompted his company's settlement discussions with the RIAA.[404] Charlie Moore of RadioAMP testified that uncertainties related to statutory licensing rates affected RadioAMP's budget.[405]

304. It is clear from the evidence in this proceeding that most webcasters have faced uncertainty over the scope of the compulsory license and the fees they must pay for that license. The RIAA licensees were in no different position from those webcasters participating in this proceeding. In this respect they are comparable to the "willing buyer" for whom rates and terms are to be set.

2. Desire for Good Relationships with Record Companies

305. Professor Jaffe also asserts that most RIAA licensees signed an agreement with the RIAA in the hope that they would curry favor with record companies and receive benefits beyond the compulsory license.[406] Such benefits include "servicing" from the labels (*i.e.* receiving selected promotional CDs free or at a reduced charge), additional license agreements for services outside the compulsory license and settlement of infringement claims. Professor Jaffe admitted that none of these benefits are actually found in the RIAA license agreements, and that he was referring to perceived benefits

[404] Tr. 8213-14 (Jeffrey).
[405] Tr. 7573-74 (Moore).
[406] Jaffe W.R.T. 61-64.

outside of such agreements.[407] He also agreed that it would be typical of many webcasters in the marketplace to try to obtain such benefits from record companies.[408]

306. Nearly all of the webcasters in this proceeding have attempted to establish good relations with record companies and obtain benefits like servicing and additional licenses. [redacted] [409] [redacted] [410] Listen.com is partially owned by record companies and needs voluntary licenses to launch its subscription service.[411] RadioWave was a back-end streaming provider for several record companies.[412] Fred McIntyre of AOL/Spinner mentioned Spinner's relationship with its affiliated record company Warner Music Group as prompting settlement discussions with the RIAA.[413]

307. With respect to servicing, several webcasters claimed that record companies were already providing them with promotional copies of CDs. For example, Charlie Moore of RadioAMP claimed that his company was denied servicing by a Warner music label because it was not an RIAA licensee, yet he also testified that

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[407] Tr. 12504-06 (Jaffe).

[408] Tr. 12507-08 (Jaffe).

[409] Tr. 10859 (Charles).

[410] RIAA Exhibit 50 DR-X at SERV 1952; Tr. 7276-77, 7329-30 (Roy).

[411] Tr. 4825-26, 4845 (Reid).

[412] Tr. 7793, 7889-90 (Pearson discussing Alligator Records, EMI and WMG).

[413] Tr. 5099-5100 (McIntyre).

RadioAMP had been serviced by two of Warner's major labels. These companies would likely be motivated to maintain this relationship, just as the RIAA licensees.[414]

308. As for obtaining favorable settlement of infringement claims, as noted above, all of the personalized services in this proceeding potentially have that motivation for entering a license agreement with record companies.[415] Others like Live365.com, myplay.com and BET.com have webcasting services that have had questions about their compliance with the DMCA compulsory license conditions.[416] Many webcasters might want to avoid potential exposure to copyright infringement damages.

3. Desire for Publicity

309. Professor Jaffe also points out that several RIAA licensees issued press releases when they signed their voluntary license.[417] Of course, in an industry where each webcaster faces competition from potentially several hundred other webcasters, it is not surprising that a webcaster might seek to obtain publicity to distinguish itself from others. [redacted] In addition, some of these webcasters were quick to tout their relationships with record companies, even before any final deal was struck. [redacted]

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[414] Tr. 7528-30 (Moore); Moore W.D.T. ¶ 13; *see also* Tr. 5075-76 (McIntyre).

[415] *See, e.g.*, Tr. 10859-60 (Charles, MTVi/Sonic Net); Tr. 7117-19 (Juris, XACT); Tr. 7331 (Roy, Echo).

[416] *See supra* note 403 and accompanying text.

[417] Jaffe W.R.T. 64.

[418] *See, e.g.*, Roy W.D.T. ¶¶ 27-33 (Echo); Reid W.D.T. ¶¶ 19-23 (Listen.com); Jeffrey W.D.T. ¶¶ 14-21 (Live365); Porteus W.D.T. ¶¶ 29-36 (MTVi); Pakman W.D.T. ¶¶ 16-22 (myplay); Moore W.D.T. ¶¶ 17-22 (RadioAMP); Pearson W.D.T. ¶¶ 25-29 (RadioWave).

[redacted][419] Also, [redacted] often agreed in its agreements to provisions requiring a press release to announce the deal.[420]

4. **DMCA Streaming as Part of a Larger Business**

310. One other characteristic that Professor Jaffe noted among RIAA licensees was that several of them did not have DMCA-compliant webcasting services as their primary, stand-alone business. Rather, the webcasting service was adjunct to a larger organization operated by the licensee.[421] This characteristic is more prevalent in the webcasters in this proceeding than the RIAA licensees. MTVi's Radio SonicNet, Comedy Central, BET.com and Infinity are all parts of organizations that are all part of Viacom. [redacted][422] Spinner.com is part of AOL/Time Warner. Listen.com intends to make DMCA-compliant streaming a very small part of its business, if not eliminate it altogether.[423] Myplay.com is a locker service that has webcasting as only a fraction of its business, which it may discontinue.[424]

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[419] RIAA Exhibit 65 DR-X at SERV 0824-25.

[420] *See, e.g.,* [redacted];

[421] Jaffe W.R.T. 69-70.

[422] Tr. 10869 (Charles).

[423] Tr. 4828-30 (Reid).

[424] Pakman W.D.T. ¶12. *See also* Tr. 12595-96 (Jaffe).

determining the value of intellectual property; (3) the type of economic value estimation on which businesses routinely rely in pricing their products; and (4) accepted economic principles concerning the value of marketplace agreements involving the same rights as those under consideration.

A. Individual Record Company Agreements

316. The record contains approximately 115 agreements involving the licensing of sound recording rights over both traditional media and new media. These agreements, negotiated outside the compulsory licenses, "help explain, and confirm the reasonableness of, the approach that the RIAA Negotiating Committee has taken in its statutory licensing agreements with webcasters."[431] In negotiating these agreements, the record companies often hear webcasters and other licensees make many of the same arguments that the Services have made in this proceeding, *e.g.*, that their use of the sound recordings will promote sales, that their business is currently unprofitable, and that they, not the record companies, assume all the risk. The rates and terms in the non-statutory agreements reflect the marketplace response to these arguments.[432]

317. Tab B to the Restricted Version of RIAA's Rebuttal Case (which is reproduced in Appendix A hereto) contains a summary of the royalty rates and other consideration in those agreements, as well as various agreements obtained from the Services themselves (discussed *supra* at Section VI.B.5.). The charts on the following

[431] Wilcox W.D.T. 3. *See also* Evans W.D.T. 2; Samit W.D.T. 2; Kenswil W.D.T. 2.

[432] Vidich W.D.T. 3 ("These agreements are the product of marketplace negotiations between willing buyers and willing sellers confronting and resolving many of the concerns that we and webcasters have raised in statutory licensing negotiations and in this proceeding"); Tr. 1665-1666 (Wilcox); Wilcox W.D.T. 4; Kenswil W.D.T. 3-4.

pages shows graphically how RIAA's proposed per performance and percent of revenue rates compares with the rates in the new media deals. Before describing the non-statutory agreements, it is important to recognize that they contain more than simply a royalty rate. Record labels routinely receive consideration that must be taken into account in assessing the level of the royalty itself.[433] That additional consideration is described below.

1. Additional Consideration

a. Advances

318. Record labels generally insist on receiving an advance payment from licensees. An advance is important because it ensures that, regardless of what happens with the licensee's business, the label will receive a guaranteed amount of compensation for use of its copyrights. An advance is especially important if the licensee is a new company that does not have a proven record of paying royalty fees. In many negotiations, the amount of the advance will be heavily negotiated. The labels are often willing to lower the overall royalty rate in exchange for remuneration up-front.[434] Many of the individual label deals in the record require significant advances.[435]

b. Security

319. In licensing rights over the Internet, record labels are particularly concerned with security, *i.e.*, guarding against unauthorized reproductions of sound recordings. In almost every new media deal, it has been crucial for the individual record

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[433] Tr. 1667-1669 (Wilcox); Kenswil W.D.T. 4; Pipitone W.D.T. 5-6.
[434] Tr. 2418 (Kenswil); 2271-2272 (Pipitone).
[435] [redacted]

label to receive assurances that the licensee will use all reasonable means to prevent piracy.[436] Furthermore, the labels usually negotiate provisions that allow them to terminate the agreement in the event that the licensee breaches its security obligations or if the security measures are ineffective. Without these security provisions, a label may walk away from a deal entirely or ask for a substantially higher fee.[437]

320. Record labels recognize even the tightest security provisions are not foolproof. [redacted]

c. Data

321. Obtaining data from services is also very important to the record labels, because it increases market research capabilities and allows the labels to sell more efficiently. [redacted]

[436] RIAA Exhibits 020-022 DR, 024-025 DR, 036-038 DR, 049-054 DR, 055-058 DR, 086-107 DR, 109-111 DR, 114 DR & SX 22, 31-32.

[437] Tr. 1961-1962 (Wilcox), 2128 (Evans), 2277 (Pipitone).

[438] Tr. 1707 (Wilcox).

[439] Tr. 2028, 2037 (Vidich). *See also* RIAA Exhibits 020-022 DR, 024-025 DR, 037 DR, 049 DR, 051 DR, 053-055 DR, 058 DR, 088-095 DR, 097 DR, 099-100 DR, 102-104 DR, 106 DR, 111 DR, 114 DR & SX 22.

I. DESCRIPTION OF THE 26 RIAA LICENSING AGREEMENTS

A. musicmusicmusic, Inc. (Radiomoi)

1. Company Structure

1. musicmusicmusic, Inc. ("MMM") is a Delaware company with offices in Vermont, Canada and Europe. MMM is traded on the Frankfurt Stock Exchange and has various offices and Web sites throughout the world. MMM operates a B2C webcasting service at www.radiomoi.com that has been webcasting for almost three years and offers approximately 170 channels of music programming.[1] It also offers B2B syndication services for third-party Web sites, through its Industrial Sound Services business. It has annual revenues of approximately [redacted][2]

2. MMM is working on launching an interactive service and also has a B2B service where it makes background music transmissions to "brick and mortar" business establishments. It has an in-store kiosk business and other technology ventures.[3]

2. Course of Negotiations

3. [redacted][4]

4. [redacted]

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[1] Tr. 12939 (Spegg); Marks W.D.T. 23; RIAA Exhibit 127 DP.

[2] Tr. 9130 (Marks); Marks W.D.T. 23.

[3] Tr. 9130-31 (Marks).

[4] Tr. 9133 (Marks).

[redacted][5]

5. [redacted][6]

6. [redacted][7]

7. [redacted]

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[5] Tr. 9134-35 (Marks).

[6] Tr. 9140-43, 9150 (Marks), 12923-24 (Spegg).

[7] Tr. 9149, 9155 (Marks); RIAA Exhibit 060 DR.

[redacted][8]

8. [redacted][9]

9. [redacted][10]

10. [redacted][11]

11. [redacted][12]

[8] Tr. 9157-60 (Marks).

[9] Tr. 9170-77 (Marks); RIAA Exhibit 128 DR (MMM correspondence binder).

[10] Tr. 9150-54 (Marks); RIAA Exhibit 060 DR, at Webcasting Ephemeral Recording License Agreement, § 3.1.

[11] Tr. 9163-65 (Marks).

[12] Tr. 9184-85 (Marks).

12. A significant number of drafts were circulated between the two parties during negotiations, and the agreement was executed on April 26, 1999, two months after serious negotiations started, and four months after Mr. Spegg informed Mr. Marks that he wanted to negotiate.[13]

13. MMM was represented by its counsel, Travis Gerring, in the negotiations and Mr. Spegg testified that he was aware that he had the right to wait for this proceeding instead of signing a license with RIAA.[14]

14. As described below, RIAA and MMM have negotiated renewal of the license agreement, with somewhat different terms, through December 31, 2002.

3. The Agreement

15. The royalty rate in the final agreement was set at [redacted][15]

[13] Tr. 9162, 9166 (Marks); RIAA Exhibit 060 DR, at first recital paragraph; RIAA Exhibit 128 DR (MMM correspondence binder).

[14] Tr. 9160, 9787-88 (Marks), 12927-28 (Spegg); RIAA Exhibit 128 DR (MMM correspondence binder), at April 22, 1999 e-mail from L. Stevenson Parker to Steven Marks (RIAA N8457).

[15] RIAA Exhibit 060 DR: royalty rate at § 3.1, minimum fee at §§ 1.4, 3.1, ephemeral rate at Webcasting Ephemeral Recording License Agreement, § 3.1, public service announcements at § 3.5, data at § 3.9, links at § 3.6, buy buttons at § 3.7, surveys at § 3.8.

16. [redacted][16]

17. [redacted][17]

18. [redacted]

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[16] Tr. 9283-84, 9472-78 (Marks); RIAA Exhibit 60A DR: royalty rate at § 3.3(a), ephemeral rate at § 3.3(b), skip provision at § 2.3(c), termination provision at § 6.2(c).

[17] Tr. 9472-78 (Marks), 12925-26 (Spegg); RIAA Exhibit 60A DR, at §§ 2.1(c), 3.1(b), 3.3(c).

[redacted][18]

19. MMM is currently operational and [redacted][19]

4. Professor Jaffe's Concerns[20]

20. Mr. Spegg gave some of his reasons for signing an RIAA license when he testified. [redacted][22]

21. Professor Jaffe has stated that the MMM agreement may not be an appropriate benchmark because, in his view, MMM had concerns regarding the legality of its service

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[18] Tr. 13020-21 (Spegg).

[19] Tr. 12935 (Spegg); RIAA Exhibit 015 RR.

[20] This section addresses the factual underpinnings for Professor Jaffe's specific concerns with each particular licensee, whether those concerns were recited in his written or oral rebuttal testimony, or were identified in the demonstrative exhibit he presented during oral testimony. The only category not dealt with in this section is the general category of "Economically Significant Support for RIAA Proposed Fees," because Professor Jaffe's stated reasons for this category are the same for each licensee. Instead, this category is discussed at Section VIII(B)(5) of RIAA's Proposed Findings of Fact and Conclusions of Law.

[21] Tr. 12969 (Spegg).

[22] Tr. 12928-35, 13017-13020 (Spegg).

and therefore wanted an immediate license; the company received consideration beyond that in the license agreement, and it saw RIAA as its customer as well as a provider.[23]

22. These statements are either inaccurate, irrelevant, or both. Professor Jaffe states that his concern over legal uncertainty arose [redacted][24] These comments confuse the desire to operate within the statutory license with an interest in negotiating a voluntary agreement with RIAA.

23. [redacted][25]

24. [redacted]

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[23] Tr. 12439-41, 12448-49; Jaffe W.R.T. 60 n.81, 61, 70.

[24] Tr. 12448 (Jaffe).

[redacted][26] [redacted][27]

25. [redacted][28] [redacted]

Footnote continued from previous page

[25] Tr. 9134-35, 9618-21, 9640-41, 9643-44 (Marks), 12940-44 (Spegg).

[26] Jaffe W.R.T. 60, n.81.

[27] Tr. 9744-46, 9748-49 (Marks).

[28] Tr. 12439-41, 12449 (Jaffe); Jaffe W.R.T. 61.

[redacted][29]

26. Finally, the discovery pages Professor Jaffe cites (N13671-72[30]) as support for his claim that MMM viewed the record labels as a customer as well as a supplier [redacted] Furthermore, even if MMM viewed RIAA as a customer, there is no reason to think that would affect the rates and terms of its license or affect the panel's ability to view the MMM agreement as a benchmark. Agreements between suppliers and providers are typical of a willing buyer/willing seller marketplace.[31]

B. Lomasoft Corporation (cablemusic)

1. Company Structure

27. Lomasoft Corporation, located in San Diego, operates a B2C webcasting service at the Web site cablemusic.com and offers over 20 channels of music.[32] It launched in August 1999, and is featured on WindowsMedia.com, a Microsoft guide to

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[29] Tr. 9748-53 (Marks), 12956-57 (Spegg); RIAA Exhibit 128 DR (MMM correspondence binder), at March 20, 2001 e-mail from Steven Marks to the Negotiating Committee (N13828-29).

[30] RIAA Exhibit 128 DR (MMM correspondence binder), within March 28, 1999 e-mail from Wolfgang Spegg to Steven Marks (pages N13671-72 are in the binder as N8237-38).

[31] Tr. 14183, 14188 (Wildman). *See also* Section VIII of RIAA's Proposed Findings of Fact and Conclusions of Law.

[32] Marks W.D.T. 23; RIAA Exhibit 128 DP.

webcasters that also lists NetRadio.com, Music Choice and Radio Free Virgin. Cablemusic has ranked very high on the Arbitron and Measure Cast webcasting rankings since its launch. It has annual advertising revenues of approximately [redacted][33]

2. Course of Negotiations

28. [redacted] John Heilbronn of Lomasoft testified that the company was aware that it could operate cablemusic.com without signing an RIAA license.[34]

29. [redacted][35]

30. [redacted]

[33] Marks W.D.T. 23.

[34] Tr. 9189-90, 9192 (Marks), 13107-08 (Heilbronn).

[redacted][36]

31. [redacted][37]

32. [redacted][38]

33. [redacted]

Footnote continued from previous page
[35] Tr. 9192-97 (Marks)..

[36] Tr. 9199-9201 (Marks).

[37] 9205-08, 9548, 9818-29 (Marks).

[38] Tr. 9208-09, 9219-20, 9223-26 (Marks).

[redacted][39]

3. The Agreement

34. The agreement was finally executed on August 10, 1999, approximately four months after Mr. Gambale's first conversation with Mr. Marks at the SDMI conference. Throughout the negotiations, Lomasoft was represented by counsel: at times by an attorney from Cooley Godward, and day-to-day by an attorney named Rick Knock.[40]

35. [redacted][41]

36. Lomasoft's Web site, cablemusic.com, is currently operational and Lomasoft [redacted].[42] [redacted][43]

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[39] Tr. 9225-30 (Marks); RIAA Exhibit 129 DR (Lomasoft correspondence binder).

[40] Tr. 9220-21 (Marks); RIAA Exhibit 129 DR (Lomasoft correspondence binder).

[41] Tr. 9223-30 (Marks); RIAA Exhibit 061 DR: royalty rate at § 3.1, capital provision at § 3.1, minimum fee at §§ 1.8, 3.2, surveys at § 3.9, data at § 3.10, public service announcements at § 3.6, links at § 3.7, and buy buttons at § 3.8.

[42] Tr. 9829, 9896 (Marks), 13105-07 (Heilbronn); RIAA Exhibit 015 RR.

[43] Tr. 13114-16 (Heilbronn).

4. Professor Jaffe's Concerns

37. In his demonstrative exhibit, Professor Jaffe raised concerns that Lomasoft did not have proper information regarding its rights under the statutory license. However, his written and oral testimony do not cite to anything in the record to support this concern, and, as noted above, Lomasoft understood that it could operate without negotiating an agreement with RIAA and the company was represented by counsel who had significant involvement in the negotiations.[44]

38. Professor Jaffe implies that Lomasoft signed an agreement because of concerns about its coverage. In support of this, Professor Jaffe cites to RIAA N0754-56.[45] There are simply no concerns over coverage expressed anywhere in those e-mails which state that Lomasoft [redacted][46]

39. [redacted]

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[44] Tr. 13107-08 (Heilbronn); RIAA Exhibit 129 DR (Lomasoft correspondence binder).

[45] Jaffe W.R.T. 60 n.81.

[46] RIAA Exhibit 129 DR (Lomasoft correspondence binder), at February 25, 1999 e-mail from James Gambale to Alex Walsh, and follow-up e-mails (N0754-56 is in the binder as N8488-90).

[redacted][47] [redacted][48] [redacted][49] These types of cordial business relationships are typical of any marketplace, and there is no support for Professor Jaffe's assertion that these subsequent events somehow undermine the value of the Lomasoft license as a benchmark.

40. [redacted]

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[47] RIAA Exhibit 129 DR (Lomasoft correspondence binder), at September 13, 2000 e-mail from Dale Smith to Steven Marks and the response of Mr. Marks (N5010).

[48] *Id. See also* Tr. 9873-77 (Marks).

[49] Tr. 9834-44 (Marks); RIAA Exhibit 129 DR (Lomasoft correspondence binder), at April 26, 2001 e-mail from Craig Olson to Susan Munsat (N13495) and October 1, 1999 e-mail from Steven Marks to RIAA's technology and webcasting people (N13362).

[redacted][52]

C. **Radiofreeworld, Inc.**

1. **Company Structure**

41. Radiofreeworld, Inc. is a Northridge, California company that operates a B2C webcasting service at the Web site radiofreeworld.com. It offers one live channel that plays a wide variety of music, such as world music, pop, jazz, hip hop, techno and new age, as well as archived programs. SoundExchange member sound recordings are only a small portion of its recording library. Radiofreeworld is operated by one individual, and is reminiscent of an eclectic public radio station.[53]

2. **Course of Negotiations**

42. [redacted]

Footnote continued from previous page
[50] Tr. 13109-13 (Heilbronn).

[51] Tr. 13127-28 (Heilbronn).

[52] Tr. 13133-34 (Heilbronn).

[redacted][54]

43. [redacted][55] [redacted][56]

3. <u>The Agreement</u>

44. [redacted][57]

Footnote continued from previous page
[53] Tr. 9232-33 (Marks); Marks W.D.T. 24; RIAA Exhibit 129 DP.

[54] Tr. 9233-35 (Marks).

[55] Tr. 9232-34 (Marks).

[56] Tr. 9234-35 (Marks).

[57] Tr. 9234-38, 9249 (Marks); RIAA Exhibit 062 DR: royalty rate at §§ 1.6, 3.1, minimum fee at §§ 1.4, 3.2, security at § 4.3, public service announcements at § 3.6, buy buttons at § 3.7, and data at § 3.8.

45. Radiofreeworld is currently in operation and [redacted] It has also signed a renewal agreement with RIAA, under which [redacted][58]

4. Professor Jaffe's Concerns

46. Professor Jaffe states that Radiofreeworld did not have the proper information to make a decision about signing an RIAA license. The record, however, does not suggest that. [redacted][59] [redacted][60]

[58] Tr. 9235, 9478-79 (Marks); RIAA Exhibit 62A; RIAA Exhibit 015 RR.

[59] Tr. 12434-35 (Jaffe); Jaffe W.R.T. 57-58; RIAA Exhibit 130 DR (Radiofreeworld correspondence binder), at July 26, 1999 e-mail from Joey Latimer to Steven Marks and response thereto (N1750-51).

[60] Tr. 9910-11 (Marks).

47. Furthermore, Professor Jaffe points only to the first exchange of e-mails between the parties. The agreement was not signed until almost three months later. To the extent that the licensee's knowledge is relevant, Professor Jaffe admitted during oral rebuttal testimony that the important question is whether the licensee had proper information at the time it signed the license, and that an agreement could be a valid benchmark even if a party started negotiations with misconceptions, as long as it understood its rights when it signed the license.[61]

D. <u>NRJ Media Corp. (iJockey)</u>

1. <u>Company Structure</u>

48. NRJ Media Corp. ("NRJ") is a New York company that intends to offer a B2C Internet-only webcasting service known as iJockey at the Web site www.ijockey.com. NRJ plans to operate both an interactive and a non-interactive service. iJockey has not yet launched.[62]

2. <u>Course of Negotiations</u>

49. [redacted][63]

50. [redacted]

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[61] Tr. 12616-17 (Jaffe).

[62] Tr. 9251 (Marks); Marks W.D.T. 24; RIAA Exhibit 130 DP.

[redacted][64]

51. [redacted][65]

3. The Agreement

52. [redacted]

Footnote continued from previous page
[63] Tr. 9251-53 (Marks).

[64] Tr. 9251-55 (Marks).

[65] Tr. 9251-55 (Marks); RIAA Exhibit 138 DR (iJockey e-mail binders)—*see, e.g.*, September 21, 1999 memorandum from Shoshana Dweck to Steven Marks (RIAA N0919-25, 11099-11108).

[redacted][66]

53. [redacted][67]

4. Professor Jaffe's Concerns

54. [redacted][68] [redacted]

[66] Tr. 9252-55 (Marks); RIAA Exhibit 063 DR: royalty rate at §§ 1.7, 3.1, free performances at § 1.7, minimum fee at §§ 1.5, 3.2, security at § 4.3, surveys at § 3.6, public service announcements at § 3.6, buy buttons at § 3.7, and data at § 3.8.

[67] Tr. 9479-82 (Marks); RIAA Exhibit 063A DR; RIAA Exhibit 015 RR.

[redacted][69]

E. **JamRadio.com, Inc.**

1. **Company Structure**

55. JamRadio.com, Inc. ("JamRadio"), located in Monroe, NY, operated a B2C webcasting service at jamradio.com starting in late 1997. It offered 18 channels of music. It also webcast live performances, including concerts from artists such as the Grateful Dead. It ceased operations temporarily in May 2000.[70]

2. **Course of Negotiations**

56. [redacted][71]

57. [redacted]

Footnote continued from previous page
[68] Jaffe W.R.T.61-62.

[69] Tr. 10278 (Marks); RIAA Exhibit 138 DR (NRJ correspondence binder), at March 27, 2000 e-mails from Steven Marks to various members of the Negotiating Committee (N13036-39) (emphasis added).

[70] Marks W.D.T. 24; RIAA Exhibit 131 DP.

[redacted][72]

3. The Agreement

58. [redacted][73]

59. [redacted]

Footnote continued from previous page
[71] Tr. 9256-57, 9941-45 (Marks).

[72] Tr. 9943-56 (Marks); RIAA Exhibit 131 DR (JamRadio correspondence binder).

[73] Tr. 9257-58 (Marks); RIAA Exhibit 131 DR (JamRadio correspondence binder); RIAA Exhibit 064 DR: royalty rate at § 3.1, capital provision at §§ 1.2, 3.1, security at § 4.3, surveys at § 3.9, data at § 3.10, links at § 3.7, public service announcements at § 3.6, and buy buttons at § 3.8.

[redacted][74]

4. **Professor Jaffe's Concerns**

60. Professor Jaffe has not expressed any specific concerns with this licensee.[75]

F. Visual Dynamics, LLC

1. **Company Structure**

61. Visual Dynamics, LLC of Woodland Hills, California offered a B2C webcasting service at quicktracks.com that is no longer operating. Before Visual Dynamics ceased operation, it offered 12 channels of music.[76]

2. **Course of Negotiations**

62. [redacted][77]

[74] Tr. 9255-56, 9958-61, 9965-68 (Marks).

[75] The general concern over "Economically Significant Support for RIAA Proposed Fees" is discussed at Section VIII(B)(5) of RIAA's Proposed Findings of Fact and Conclusions of Law.

[76] Tr. 9258 (Marks); Marks W.D.T. 25.

[77] Tr. 9258-59, 9973-80 (Marks).

3. The Agreement

63. [redacted][78]

4. Professor Jaffe's Concerns

64. [redacted][79] [redacted][80] [redacted]

[78] Tr. 9258-59, 9993 (Marks); RIAA Exhibit 065 DR: royalty rate at §§ 1.6, 3.1, minimum fee at §§ 1.4, 3.2, security at § 4.3, public service announcements at § 3.6, buy buttons at § 3.7, and data at § 3.8.

[79] Jaffe W.R.T. 63 n.84.

[80] Tr. 9988 (Marks).

[redacted][81] Professor Jaffe's analysis is, therefore, completely contrary to the facts.

G. OnAir Streaming Networks, Inc. (formerly WWW.com)

1. Company Structure

65. OnAir Streaming Networks, Inc. ("OnAir"), an Irvine, California company, operated both a B2C Internet-Only webcasting service known as www.com and a syndication webcasting service.[82] It was started by Scott Purcell, who raised [redacted] in capital. The www.com B2C service offered 231 channels of music, while the syndication service provided branded Internet radio to thousands of Web sites. OnAir has since sold its operations to Loudeye Technologies, and its www.com webcasting service is now being operated by RadioAMP.com.[83]

2. Course of Negotiations

66. [redacted]

[81] RIAA Exhibit 065 DR.

[82] Marks W.D.T. 25; RIAA Exhibit 132 DP.

[redacted][84]

3. The Agreement

67. [redacted][85]

68. [redacted][86]

69. [redacted][87] Different

Footnote continued from previous page
[83] Tr. 9260 (Marks), 13032, 13043, 13056 (Purcell); Marks W.D.T. 25.

[84] Tr. 9260-66 (Marks), 13044, 13052-53 (Purcell); RIAA Exhibit 133 DR (OnAir correspondence binder).

[85] Tr. 9263-65 (Marks), 13051 (Purcell); RIAA Exhibit 066 DR: royalty rate at §§ 1.6, 3.1, free performances at § 1.6, minimum fee at §§ 1.4, 3.2, security at § 4.4, public service announcements at § 3.6, buy buttons at § 3.7, and data at § 3.8.

[86] Tr. 13052-53 (Purcell).

[87] Tr. 13043. (Purcell).

parts of OnAir's operations were acquired by Loudeye and by RadioAMP in early 2001. [redacted][88]

4. <u>Professor Jaffe's Concerns</u>

70. [redacted][89] [redacted][90] [redacted][91] [redacted][92]

71. [redacted][93] [redacted][94]

72. [redacted]

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[88] Tr. 9265 (Marks), 13043, 13051 (Purcell); RIAA Exhibit 015 RR.

[89] Jaffe W.R.T. 60 n.81.

[90] Jaffe W.R.T. 64 n.88.

[91] Jaffe W.R.T. 70.

[92] *Id.*

[93] Jaffe W.R.T. 60 n.81.

[redacted] He did not state that he had concerns over whether his service could be licensed.[95]

73. [redacted][96] [redacted][97] [redacted][98] [redacted]

74. [redacted]

Footnote continued from previous page

[94] Tr. 10005 (Marks); RIAA Exhibit 133 DR (OnAir correspondence binder), at October 7, 1999 e-mail from Steven Marks to Allan Alexander (N11543).

[95] Tr. 13044-57 (Purcell).

[96] Tr. 13069-71 (Purcell).

[97] Tr. 10036-39 (Marks); 13061-62 (Purcell).

[98] Tr. 13061-63 (Purcell).

[redacted][99]

H. eNashville.com

1. Company Structure

75. eNashville.com ("eNashville"), based in Nashville, Tennessee, intended to offer a B2C Internet-only webcasting service related to country music. The service, however, has not launched.[100]

2. Course of Negotiations

76. [redacted][101]

3. The Agreement

77. [redacted] The agreement was signed on February 10, 2000.[102]

4. Professor Jaffe's Concerns

78. Professor Jaffe has not expressed any specific concerns with this licensee.[103]

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[99] Tr. 13077-78 (Purcell).

[100] Marks W.D.T. 25; RIAA Exhibit 133 DP.

[101] Tr. 9267 (Marks).

[102] Tr. 9268 (Marks); RIAA Exhibit 067 DR: royalty rate at §§ 1.6, 3.1, minimum fee at §§ 1.4, 3.2, security at § 4.3, public service announcements at § 3.6, buy buttons at § 3.7, and data at § 3.8.

[103] The general concern over "Economically Significant Support for RIAA Proposed Fees" is discussed at Section VIII(B)(5) of RIAA's Proposed Findings of Fact and Conclusions of Law.

I. GaliMusica.com

1. Company Structure

79. GaliMusica.com ("GaliMusica"), based in New York, NY, intends to offer a B2C Internet-only webcasting service related to Latin music. The service has not yet launched, but plans to by the end of this year. GaliMusica is an entity that has a great number of technology-based businesses, and webcasting is one of those businesses.[104]

2. Course of Negotiations

80. [redacted][105]

3. The Agreement

81. [redacted]

[104] Tr. 9268 (Marks); Marks W.D.T. 25.

[105] Tr. 9268-69 (Marks); RIAA Exhibit 149 DR (GaliMusica correspondence binder).

[redacted][106]

4. **Professor Jaffe's Concerns**

82. [redacted][107] [redacted][108]

[106] Tr. 9268-69 (Marks); RIAA Exhibit 068 DR: royalty rate at §§ 1.6, 3.1, minimum fee at §§ 1.4, 3.2, security at § 4.3, surveys at § 3.7, data at § 3.9, public service announcements at § 3.6, and buy buttons at § 3.8; RIAA Exhibit 015 RR.

[107] Jaffe W.R.T. 58 n.78, 63 n.84, 70 n.96.

[108] Tr. 10355-63 (Marks).

83. [redacted][109] [redacted][110]

J. Spacial Audio Solutions

1. Company Structure

84. Spacial Audio Solutions ("Spacial"), located in Lubbock, Texas, is an aggregator of webcasters. Spacial offers a product known as Streaming Audio Manager ("SAM"), which other webcasters can use to create DMCA-compliant webcasts. Spacial also operates its aggregator service at www.audiorealm.com. It operates over 150 "stations," with 19 different music genres. Spacial is somewhat similar to Live365, a participant in this proceeding, except that Live365 operates through third-party Shoutcast technology, while Spacial developed its own technology to offer to individual webcasters.[111]

2. Course of Negotiations

85. [redacted]

[109] Jaffe W.R.T. 59 n.79.

[110] RIAA Exhibit 149 DR (GaliMusica correspondence binder), at February 10, 2000 e-mail from Richard George to Steven Marks (N11554-55).

[111] Tr. 9271 (Marks); Marks W.D.T. 25-26; RIAA Exhibit 134 DP.

[redacted][112]

86. The negotiations with Spacial show that some webcasters negotiated with the RIAA because the RIAA could work with each webcaster to develop the best solution for its business, something that the webcaster perceived could not be done by a panel setting rates and terms for an entire industry. As discussed in Section VII(A-B) of RIAA's Proposed Findings of Fact and Conclusions of Law, while the RIAA statutory agreements are an appropriate benchmark that the panel can use in setting industry-wide rates and terms, RIAA worked with webcasters to develop specific provisions that addressed individual webcaster concerns. As put by Spacial's negotiator, Mr. Bryan Payne, in his March 2, 2000 letter to Mr. Marks:

[redacted][113]

3. <u>The Agreement</u>

87. [redacted]

[112] Tr. 9271-74 (Marks); RIAA Exhibit 143 DR (Spacial correspondence binder). *E.g.*, December 29, 1999 e-mail from Bryan Payne to Steven Marks and attachment (RIAA N9096, 9110-19)

[113] RIAA Exhibit 143 DR (Spacial correspondence binder), at March 2, 2000 letter (N0104).

[redacted][114]

88. Spacial is still in operation. [redacted][115]

4. Professor Jaffe's Concerns

89. [redacted][116]

90. [redacted]

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[114] Tr. 9272-74 (Marks); RIAA Exhibit 069 DR: royalty rate at § 3.1, minimum fee at §§ 1.6, 3.2, security at § 4.3, surveys at § 3.8, data at § 3.9, public service announcements at § 3.6, and buy buttons at § 3.7.

[115] Tr. at 9274, 10343-44 (Marks); RIAA Exhibit 015 RR.

[redacted][117]

[redacted]

K. Multicast Technologies, L.L.C.

1. Company Structure

91. Multicast Technologies, L.L.C. ("Multicast"), is a Fairfax, Virginia company that operates a B2C webcasting service at www.on-the-I.com. Multicast believes that its patented technology of "multicasting" allows more people to be able to listen to CD-quality music through broadband connections than through traditional webcasting technologies. The On-the-I service, launched in December 2000, currently offers three channels of music (Alternative Rock, Classic Rock, and Drum and Bass), and uses live DJs and other traditional programming approaches similar to broadcast radio.[118]

2. Course of Negotiations

92. [redacted][120] [redacted]

Footnote continued from previous page
[116] Jaffe W.R.T. 63 n.84, 70 n.96.

[117] Tr. 10342 (Marks) (emphasis added).

[118] Tr. 9274-75 (Marks), 13940-41, 13955-56 (Junkala); Marks W.D.T. 26; RIAA Exhibit 135 DP.

[119] Tr. 13935, 13943 (Junkala); RIAA Exhibit 151 DR (Multicast correspondence binders).

[120] Tr. 13945-46 (Junkala).

[redacted][121]

93. [redacted]

[121] Tr. 9275-77, 9282-83 (Marks), 13946-47, 13951 (Junkala), 14010, 14024-25 (Freedman); RIAA Exhibit 151 DR (Multicast correspondence binders).

[redacted][122] [redacted][123]

94. [redacted][124]

3. **The Agreement**

[redacted]RIAA and Multicast eventually reached agreement and executed a license on April 17, 2000, [redacted][125] [redacted]

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[122] Tr. 9277-81 (Marks); RIAA Exhibit 151 DR (Multicast correspondence binders), at February 22, 2000 e-mail from Randy Freedman to Steven Marks (RIAA N4705-06), March 8, 2000 e-mail from Randy Freedman to Steven Marks (N3924-25).

[123] RIAA Exhibit 151 DR (Multicast correspondence binders), at December 12, 1999 e-mail from Thomas Marshall Eubanks to Steven Marks (RIAA N9094).

[124] Tr. 9279-81 (Marks).

[125] Tr. 9276-77, 9282-83, 9483 (Marks); RIAA Exhibit 70 DR: royalty rate at §§ 1.6, 3.1, minimum fee at §§ 1.4, 3.2, surveys at § 3.7, security at §§ 3.10, 4.3, public service announcements at § 3.6, and buy buttons at § 3.8.

[redacted]

96. The agreement was eventually renewed [redacted][127]

97. Multicast is still in operation [redacted][128]

4. Professor Jaffe's Concerns

98. [redacted][129] [redacted][130] [redacted]

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[126] Tr. 13950 (Junkala).

[127] Tr. 9283-84, 9482-84 (Marks); RIAA Exhibit 70A DR.

[128] Tr. 9274, 10370 (Marks); RIAA Exhibit 015 RR.

[129] Jaffe W.R.T. 70 n.96.

[130] Tr. 10366-68 (Marks).

[redacted][131]

99. [redacted][132]

L. SLAM Media, Inc.

1. Company Structure

100. SLAM Media, Inc. ("SLAM Media"), is a Seattle, Washington company that operated a B2C webcasting service known as Radio Free SLAM at www.slammedia.com starting in September 2000. Radio Free SLAM offers 11 channels of music that are designed to be an alternative to mainstream media outlets. SLAM has ceased operations.[133]

2. Course of Negotiations

101. The parties made initial contacts in January 2000, and after various negotiations mostly over the telephone they reached agreement and executed a license on April 30, 2000.[134]

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[131] Tr. 13986-88 (Junkala).

[132] Tr. 13972 (Junkala).

[133] Tr. 10348 (Marks); Marks W.D.T. 26; RIAA Exhibit 136 DP.

[134] Tr. 9291 (Marks); RIAA Exhibit 146 DR (SLAM Media correspondence binder); RIAA Exhibit 071 DR.

3. The Agreement

102. The agreement called for [redacted][135]

4. Professor Jaffe's Concerns

103. Professor Jaffe has not expressed any specific concerns with this licensee.[136]

M. Fansedge, Inc.

1. Company Structure

104. Fansedge, Inc. ("Fansedge"), based in Glenview, IL, intended to offer a B2C Internet-only webcasting service as part of an overall men's lifestyle and sports site. The service was tested, but was not launched to the public.[137]

2. Course of Negotiations

105. [redacted]

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[135] RIAA Exhibit 071 DR: royalty rate at §§ 1.6, 3.1, minimum fee at §§ 1.4, 3.2, surveys at § 3.7, data at § 3.9, public service announcements at § 3.6, and buy buttons at § 3.8.

[136] The general concern over "Economically Significant Support for RIAA Proposed Fees" is discussed at Section VIII(B)(5) of RIAA's Proposed Findings of Fact and Conclusions of Law.

[redacted][138]

3. The Agreement

106. The agreement provided for [redacted][139]

4. Professor Jaffe's Concerns

107. Professor Jaffe's demonstrative during oral rebuttal testimony had an X for Fansedge stating "lack of comparability." There is no reference to Fansedge not being comparable to the webcasting community in either Professor Jaffe's written or oral testimony.

N. Cybertainment Systems Corp. (Cybertunes)

1. Company Structure

108. Cybertainment Systems Corp. ("Cybertainment") is a West Palm Beach, Florida company that operates a B2C webcasting service known as Cybertunes at

Footnote continued from previous page
[137] Tr. 9290 (Marks); Marks W.D.T. 26-27; RIAA Exhibit 137 DP.

[138] Tr. 9291, 10349 (Marks); RIAA Exhibit 147 DR (Fansedge correspondence binder).

[139] RIAA Exhibit 072 DR: royalty rate at §§ 1.6, 3.1, minimum fee at §§ 1.4, 3.2, surveys at § 3.7, data at § 3.9, public service announcements at § 3.6, and buy buttons at § 3.8.

www.cybertunes.org. Cybertunes offers 8 channels of music in genres such as Alternative, Pop, Rock and Christian.[140]

2. Course of Negotiations

109. [redacted][141] [redacted][145]

3. The Agreement

110. Cybertainment signed a statutory license with RIAA on June 9, 2000. The agreement contained [redacted]

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[140] Tr. 11150-51 (Bechtold); Marks W.D.T. 27; RIAA Exhibit 138 DP.

[141] Tr. 11191-92 (Bechtold); RIAA Exhibit 148 DR (Cybertainment correspondence binder), at May 25, 2000 e-mail from Steven Marks to Vincent Castalucci (RIAA N9426).

[142] Tr. 11200-04 (Bechtold).

[143] Tr. 11154-55 (Bechtold).

[144] Tr. 11161-63 (Bechtold).

[145] Tr. 11184-86 (Bechtold).

[redacted][146] [redacted][147]

111. Cybertainment launched in November 2000 and remains operational. [redacted][148]

4. **Professor Jaffe's Concerns**

112. [redacted][149] [redacted]

[146] RIAA Exhibit 073 DR: royalty rate at §§ 1.6, 3.1, minimum fee at §§ 1.4, 3.2, surveys at § 3.7, data at § 3.9, public service announcements at § 3.6, and buy buttons at § 3.8.

[147] Tr. 11160-61, 11191-92, 11199-12000 (Bechtold).

[148] Tr. 9290-91,10350-51 (Marks), 11143, 11150, 11153-54 (Bechtold).

[149] Tr. 10351 (Marks); RIAA Exhibit 148 DR (Cybertainment correspondence binder), at March 14, 2000 letter from Donald J. Valdez to Bruce Buck Bechtold (RIAA N0658-60).

[redacted][150] [redacted][151]

O. Soundbreak.com

1. Company Structure

113. Soundbreak.com ("Soundbreak") was a West Hollywood, California company and a member of DiMA. It operated a B2C webcasting service at www.soundbreak.com. The soundbreak.com service launched in February 2000 and offered one channel of music programmed by live disc jockeys, as well as archived programs. Soundbreak's Vice President of Programming was one of the original video jockeys on MTV. Soundbreak obtained approximately [redacted] of funding and had well-known people in the music industry behind it. Soundbreak also planned to syndicate its webcasting service to other companies. It ceased operations in February 2001.[152]

2. Course of Negotiations

114. [redacted]

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[150] Tr. 11171 (Bechtold).

[151] Jaffe W.R.T. 63 n.86, 70 n.96.

[redacted][153]

3. The Agreement

115. [redacted][154]

Footnote continued from previous page

[152] Tr. 9292-93, 9296 (Marks); Marks W.D.T. 27; RIAA Exhibit 139 DP.

[153] Tr. 9292-96 (Marks); RIAA Exhibit 134 DR (Soundbreak correspondence binder).

[154] RIAA Exhibit 074 DR: royalty rate at §§ 1.6, 1.7, 3.1, ephemeral rate at §§ 2.1.2, 3.1, 20% increase for non-entertainment services at § 2.1.1(d), security at §§ 5.5, 5.6, surveys at § 3.3.3, public service announcements at § 3.3.1, buy buttons at § 3.3.2, and data at § 3.3.4. RIAA Exhibit 134 DR (Soundbreak correspondence binder).

116. Although Soundbreak eventually went out of business, [redacted][155]

4. Professor Jaffe's Concerns

117. [redacted][156] [redacted][157] [redacted][158]

118. [redacted][159] [redacted][160] [redacted]

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[155] Tr. 9295 (Marks); RIAA Exhibit 015 RR.

[156] Jaffe W.R.T. 60 n.81.

[157] Jaffe W.R.T. 63 n.84.

[158] Jaffe W.R.T. 70.

[159] Tr. 10049 (Marks).

[160] Tr. 10062 (Marks).

[redacted] There is nothing to suggest that these after-the-fact events had anything to do with the previously completed negotiations.[161]

119. [redacted][162] [redacted][163]

P. **Yahoo, Inc.**

1. **Company Structure**

120. Yahoo!, Inc. ("Yahoo"), based in Santa Clara, California, is one of the world's leading Internet communications, commerce and media companies, providing a network of services such as e-mail, an Internet search engine, and stock tracking to over 120 million users a month worldwide. It is also a member of DiMA. In 2000, Yahoo! [redacted][164]

121. Among Yahoo's services is Yahoo! Broadcast, formerly Broadcast.com, one of the first companies to stream audio on the Internet. Yahoo acquired Broadcast.com in mid-1999. Broadcast.com was also a DiMA member and took part in the negotiations over the DMCA amendments. Yahoo! Broadcast is an aggregator of

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[161] Tr. 10C74 (Marks).

[162] Jaffe W.R.T. 64-65.

[163] Tr. 10071-72 (Marks).

[164] Marks W.D.T. 27-28.

webcast signals, predominantly AM/FM broadcast signals that are retransmitted over the Internet. Yahoo also has a number of Internet-only music stations. Its Yahoo! Radio player collects and categorizes over 330 broadcast and Internet-only music stations into 24 different music genres.[165]

2. Course of Negotiations

122. [redacted]

[165] Tr. 11243-44 (Mandlebrot); Marks W.D.T. 27-28; RIAA Exhibit 140 DP.

[redacted][166]

123. [redacted][167]

124. [redacted]

[166] Tr. 9304-05, 10203, 10210, 10232-34, 14146-50 (Marks), 11301-11, 11319-32 (Mandlebrot); Marks W.D.T. 15-16, n.16; [redacted]; RIAA Exhibit 137 DR (Yahoo correspondence binder), at February 16, 2000 e-mail from Steven Marks to Paul Vidich (RIAA N14540—reproduced in entirety as RIAA Exhibit 019 RR and marked N14540A).

[167] Tr. 559-60 (Rosen); 9073-74, 9305-06, 10162-67, 10430-32 (Marks); Marks W.D.T. 15-16 n.16.

[redacted][168] [redacted][169]

125. [redacted][170]

126. [redacted][171]

127. [redacted]

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[168] Tr. 9309-13 (Marks); RIAA Exhibit 137 DR (Yahoo correspondence binder), at June 29, 2000 e-mail from Steven Marks to the Negotiating Committee (N14561).

[169] Tr. 9309-13 (Marks).

[170] Tr. 9302-03 (Marks).

[171] Tr. 9305-06 (Marks); Marks W.D.T. 15-16, n.16.

[redacted][172] [redacted][173]

3. **The Agreement**

128. [redacted]

[172] Tr. 9307-08 (Marks).

[173] Tr. 9309-13 (Marks).

[redacted][174]

129. Yahoo is currently in operation [redacted].[175]

[174] Tr. 9311-28 (Marks); RIAA Exhibit 075 DR: royalty rate at §§ 1.10, 1.11, 3.1-3.2, 3.5, rate for non-music stations at §§ 3.1, 3.2.4, ephemeral rate at §§ 2.1.2, 3.1, 3.4, MFN clause at § 3.6.1, security at § 5.4, public service announcements at § 3.7.1, buy buttons at § 3.7.2, and reporting requirements at §§ 4.1, 5.5-5.6; RIAA Exhibit 137 DR (Yahoo correspondence binder).

[175] Tr. 9313-16, 13827-28 (Marks); RIAA Exhibit 015 RR.

4. **Professor Jaffe's Concerns**

130. [redacted][176] [redacted][177] [redacted][178] [redacted][179]

131. [redacted][180] [redacted][181] [redacted]

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[176] Tr. 12726 (Jaffe); Jaffe W.R.T. 63.

[177] Tr. 12722-26 (Jaffe); Jaffe W.R.T. 65.

[178] Jaffe W.R.T. 68-69.

[179] Tr. 12726-27 (Jaffe); Jaffe W.R.T. 70.

[180] Tr. 10135-41 (Marks); RIAA Exhibit 137 DR (Yahoo correspondence binder), at August 13, 1998 e-mail from Steven Marks to Mark Cuban and responses (RIAA N11772-73) and December 4, 1998 e-mail from Steven Marks to Seth Greenstein (N11706).

[181] Tr. 10136 (Marks). *See also* Tr. 10140-41 (Marks).

[redacted]

132. [redacted][182] [redacted][183] [redacted][184] [redacted][185] [redacted].[186]

[182] Tr. 12726 (Jaffe).

[183] Jaffe W.R.T. 65.

[184] Tr. 10160 (Marks).

[185] Tr. 12729-30 (Jaffe).

[186] Tr. 12730-31 (Jaffe).

133. [redacted]

[redacted][190] [redacted]

[187] Tr. 11249-50 (Mandelbrot).

[188] RIAA Exhibit 075 DR § 3.7.3.

[189] *See* Notice of Intent to Participate, filed in Docket No. 2000-3 CARP DTRA 2 by Yahoo! on October 13, 2000.

[190] Tr. 10196-97 (Marks).

[redacted]

135. [redacted][192]

136. Finally, there is no evidence to suggest that the statutory license agreement Yahoo signed should be disregarded because Yahoo had businesses other than webcasting. If that is the case, AOL, MTV, and many of the other webcasters in this proceeding must also be viewed as not representative of the webcasting community.

Q. Spike, Inc. (SpikeRadio)

1. Company Structure

137. Spike, Inc. ("Spike"), a West Hollywood, California company that is a subsidiary of Spike Networks Ltd., an Australian company, operated a webcasting service at www.spikeradio.com. Spike launched in 2000 and provided 12 channels of music with

[191] Tr. 11332-33 (Mandlebrot).

[192] Tr. 13831-32 (Marks).

live DJs, and syndicated customized webcasting services to other companies. For example, it provided customized webcasts for Nike's Radio Free Sydney project during the September 2000 Summer Olympic Games.[193]

2. **Course of Negotiations**

138. [redacted][194]

[193] Tr. 9329 (Marks); Marks W.D.T. 28; RIAA Exhibit 141 DP.

[194] Tr. 9329-36 (Marks); RIAA Exhibit 135 DR (Spike Radio correspondence binder).

3. The Agreement

139. [redacted][195]

140. Spike is no longer in operation, [redacted][196]

4. Professor Jaffe's Concerns

141. [redacted][197] [redacted]

[195] Tr. 9335-37 (Marks); RIAA Exhibit 076 DR: royalty rate at §§ 1.6, 1.10, 3.1-3.2, ephemeral rate at §§ 1.3, 2.1.2, 3.3, security at §§ 4.3-4.4, surveys at § 3.9, data at § 3.10, public service announcements at § 3.7, and buy buttons at § 3.8.

[196] RIAA Exhibit 015 RR.

[197] Tr. 12435-36 (Jaffe); Jaffe W.R.T. 59, 64 n.88.

[redacted] [198] [redacted] [199]

142. [redacted] [200] [redacted] [201]

R. **Websound, Inc.**

1. **Company Structure**

143. Websound, Inc. ("Websound"), is a company with offices in California and Vermont that syndicates branded music programming to online retailers such as Eddie Bauer, Pottery Barn and Polo Ralph Lauren. Its service is similar in nature to Spike Radio. For a fixed monthly fee, Websound provides each of its customers with

[198] Tr. 10108-10 (Marks); Jaffe W.R.T. 64 n.88.

[199] Tr. 10097-98 (Marks).

[200] Jaffe W.R.T. 62-63 n.84.

music programming tailored to the retailers' marketing and demographic plan. Websound is affiliated with Rock River Communications, which creates branded music compilation CDs that companies such as Old Navy, The Gap, The Limited and Time Magazine sell to customers. [redacted][202]

2. Course of Negotiations

144. [redacted][203]

3. The Agreement

145. [redacted]

Footnote continued from previous page
[201] RIAA Exhibit 135 DR (Spike Radio correspondence binder), at August 21, 2000 e-mail from Nick Abrahams to Steven Marks (in binder as RIAA N9849-51).

[202] Tr. 9337 (Marks); Marks W.D.T. 28-29; RIAA Exhibit 143 DP.

[redacted][204]

146. Websound is currently operating [redacted][205]

4. **Professor Jaffe's Concerns**

147. [redacted][206] [redacted][207] [redacted]

Footnote continued from previous page

[203] Tr. 9337-38 (Marks); RIAA Exhibit 136 DR (Websound correspondence binder).

[204] Tr. 9338 (Marks); RIAA Exhibit 078 DR: royalty rate at §§ 1.6, 3.1.1, ephemeral rate at §§ 2.1.2, 3.1.2, free performances at § 3.1.1, security at § 5.5, surveys at § 3.2.3, data at § 3.2.4, public service announcements at § 3.2.1, and buy buttons at § 3.2.2.

[205] Tr. 9339 (Marks); RIAA Exhibit 015 RR.

[206] Tr. 12435-36 (Jaffe); Jaffe W.R.T. 59.

[207] RIAA Exhibit 136 DR (Websound correspondence binder), at August 15, 2000 e-mail from Billy Straus to Steven Marks (in binder as RIAA N9751).

[redacted][208] [redacted][209] [redacted][210]

S. MoodLogic, Inc.

1. Company Structure

148. MoodLogic, Inc. ("MoodLogic") is a San Francisco, California B2B company that specializes in providing music browsing services to other music companies like webcasters, broadcasters, and CD retailers. It has amassed a large database of information about sound recordings that can be searched to find music in a variety of ways. MoodLogic, a member of DiMA, plans to provide syndicated webcasting services as part of its overall suite of music-related products.[211]

2. Course of Negotiations

149. [redacted]

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[208] Tr. 10126 (Marks); RIAA Exhibit 136 DR (Websound correspondence binder), at August 16, 2000 e-mail from Steven Marks to Billy Straus (RIAA N5271).

[209] Jaffe W.R.T. 60 n.81.

[210] RIAA Exhibit 136 DR (Websound correspondence binder), at August 24, 2000 e-mail from Billy Straus to Steven Marks and Mr. Marks's response (in binder as RIAA N9869).

[211] Marks W.D.T. 29; RIAA Exhibit 142 DP.

[redacted][212]

3. **The Agreement**

150. [redacted]

[212] Tr. 9339-44 (Marks); RIAA Exhibit 139 DR (MoodLogic correspondence binder).

[redacted][213]

151. MoodLogic has yet to launch [redacted][214]

4. Professor Jaffe's Concerns

152. Professor Jaffe stated that the MoodLogic agreement is not an appropriate benchmark because the company had concerns regarding whether its service came within the statutory license.[215] The evidence in the record contradicts Professor Jaffe's position. On cross-examination, Mr. Marks was asked whether RIAA had any problems with MoodLogic's functionality. Mr. Marks stated that the issue of compliance with statutory requirements never arose in the negotiations with MoodLogic. [redacted][216] [redacted][217]

153. Professor Jaffe's only other issue with the MoodLogic license is that MoodLogic had a music database business. He therefore concludes that MoodLogic viewed the statutory license as unimportant to its business or that the statutory license

[213] Tr. 9341-44 (Marks); RIAA Exhibit 077 DR: royalty rate at § 3.2(a), 20% increase for non-entertainment services at § 2.1(a)(4), ephemeral rate at §§ 2.1(b), 3.2(b), minimum fee at §§ 1.11, 3.1, security at §§ 5.3-5.4, surveys at § 3.5, public service announcements at § 3.3, buy buttons at § 3.4, and data at § 3.6(b).

[214] Tr. 9339 (Marks); RIAA Exhibit 015 RR.

[215] Jaffe W.R.T. 60 n.81.

[216] Tr. 9503-05 (Marks).

[217] Tr. 10286 (Marks). *See also* Tr. 10293 (Marks).

was used to help its non-streaming business. There is no evidence for either of those conclusions, and he cites to none.[218]

T. She Sings Media, LLC

1. Company Structure

154. She Sings Media, LLC ("She Sings"), based in Washington, D.C., was founded by a singer/songwriter and intends to offer an online community about women and music. It plans to offer both B2C webcasting, as well as B2B syndication of webcasts. The head of the company, George McCabe, works for an investment banking company. She Sings has not yet launched.[219]

2. Course of Negotiations

155. [redacted][220]

3. The Agreement

156. [redacted]

[218] Jaffe W.R.T. 69-70.

[219] Marks W.D.T. 29; RIAA Exhibit 144 DP.

[220] Tr. 9345-46 (Marks); RIAA Exhibit 150 DR (She Sings correspondence binder).

[redacted][221]

157. She Sings has not launched its service as of yet, [redacted][222]

4. Professor Jaffe's Concerns

158. Professor Jaffe has not expressed any specific concerns with this licensee.[223]

U. CyberAxis, Inc.

1. Company Structure

159. CyberAxis, Inc. is a Phillips Ranch, California company that offers webcasting services to broadcast radio stations that wish to simulcast their over-the-air signal over the Internet. They produce and manage Internet streaming sites for radio stations such as KKBT-FM 100.3 in Los Angeles (www.thebeatla.com).[224]

[221] Tr. 9345-46 (Marks); RIAA Exhibit 079 DR: royalty rate at §§ 1.12, 3.1.1, capital provision at §§ 1.1-1.2, 3.1.1-3.1.2, ephemeral rate at §§ 2.1.2, 3.1.3, minimum fee at §§ 1.10, 3.1.4, security at §§ 4.4-4.5, surveys at § 3.2.3, data at § 3.2.4, public service announcements at § 3.2.1, and buy buttons at § 3.2.2.

[222] Tr. 9346 (Marks); RIAA Exhibit 015 RR.

[223] The general concern over "Economically Significant Support for RIAA Proposed Fees" is discussed at Section VIII(B)(5) of RIAA's Proposed Findings of Fact and Conclusions of Law.

[224] Marks W.D.T. 29-30; RIAA Exhibit 145 DP.

2. Course of Negotiations

160. [redacted][225]

3. The Agreement

161. [redacted][226]

[225] Tr. 9347-49 (Marks); RIAA Exhibit 142 DR (CyberAxis correspondence binder).

[226] Tr. 9348-49 (Marks); RIAA Exhibit 080 DR: royalty rate at §§ 3.2, 3.3(a), capital provision at §§ 1.4, 3.4(b), past performances at §§ 2.1(c), 3.2, advances at § 3.1, ephemeral rate at §§ 2.1(b-c), 3.2, 3.3(b), minimum fee at §§ 1.11, 3.1, security at §§ 5.3-5.4 , public service announcements at § 3.5, surveys at § 3.7, and buy buttons at § 3.6.

162. CyberAxis was in operation and recently stopped streaming because of legal issues with AFM and AFTRA. It plans on re-launching soon [redacted][227]

4. **Professor Jaffe's Concerns**

163. [redacted][228]

164. [redacted][229]

[227] Tr. 9347 (Marks); RIAA Exhibit 015 RR.

[228] Jaffe W.R.T. 59 n.79, 60-61 n.82, 70 n.76.

[229] Tr. 10328-29 (Marks).

V. The Buzz Bin.com, Inc.

1. Company Structure

165. The Buzz Bin.com, Inc. is a company located in Littleton, Colorado that intended to offer a B2C webcasting service in the Fall of 2001 with a focus on college students, but it went out of business before it could launch.[230]

2. Course of Negotiations

166. [redacted][231]

3. The Agreement

167. [redacted]

[230] Tr. 9371 (Marks); Marks W.D.T. 30; RIAA Exhibit 144 DR (the Buzz Bin correspondence binder), at April 17, 2001 e-mail from Susan Munsat to the Negotiating Committee (N14526-27).

[231] RIAA Exhibit 144 DR (the Buzz Bin correspondence binder).

[redacted][232]

4. Professor Jaffe's Concerns

168. Professor Jaffe has not expressed any specific concerns with this licensee.[233]

W. Beem-Me-Up Broadcasting, Inc. (Cleveland Christian Radio)

1. Company Structure

169. Beem-Me-Up Broadcasting, Inc. (Beem-Me-Up") is a Lorain, Ohio company that launched in April 2001 and offers a B2C webcasting service known as Cleveland Christian Radio. The site hosts one channel of contemporary Christian music.[234]

2. Course of Negotiations

170. [redacted][235]

3. The Agreement

171. [redacted]

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[232] RIAA Exhibit 081 DR: royalty rate at §§ 1.11, 3.2(a), advance at §§ 1.8, 3.1, ephemeral rate at §§ 2.1(b), 3.2(b), security at §§ 5.3-5.4, surveys at § 3.5, public service announcements at § 3.3, buy buttons at § 3.4, and data at § 3.6.

[233] The general concern over "Economically Significant Support for RIAA Proposed Fees" is discussed at Section VIII(B)(5) of RIAA's Proposed Findings of Fact and Conclusions of Law.

[234] Tr. 9371 (Marks); Marks W.D.T. 30; RIAA Exhibit 146 DP; RIAA Exhibit 141 DR (Beem-Me-Up correspondence binder), at April 17, 2001 e-mail from Susan Munsat to the Negotiating Committee (N13010).

[redacted][236]

172. Beem-Me-Up has launched and is currently in operation. [redacted][237]

4. Professor Jaffe's Concerns

173. [redacted][238]

174. [redacted][239] [redacted]

Footnote continued from previous page
[235] RIAA Exhibit 141 DR (Beem-Me-Up correspondence binder).

[236] RIAA Exhibit 082 DR: royalty rate at § 3.2, minimum fee at §§ 1.7, 3.1, security at §§ 5.3-5.4, surveys at § 3.6, public service announcements at § 3.4, buy buttons at § 3.5, and data at § 3.7.

[237] Tr. 9371 (Marks); RIAA Exhibit 015 RR.

[238] Jaffe W.R.T. 58 n.78, 63 n.84, 64 n.87.

[239] Tr. 10322-23 (Marks).

X. Kickradio.com, Ltd.

1. Company Structure

175. Kickradio, Ltd. is a Hong Kong corporation with offices in San Francisco. It plans to launch a webcasting service that centers on music communities and it will allow its members to become DJs for one-hour programs. It also plans to syndicate its service.[240]

2. Course of Negotiations

176. [redacted][241]

3. The Agreement

177. [redacted]

[240] Marks W.D.T. 30.

[241] RIAA Exhibit 140 DR (Kickradio correspondence binder).

[redacted][242]

178. Kickradio has not yet launched. [redacted][243]

4. Professor Jaffe's Concerns

179. [redacted][244] [redacted]

[242] RIAA Exhibit 083 DR: royalty rate at §§ 1.11, 3.1, ephemeral rate at §§ 2.1(b), 3.1(c), execution fee at § 3.1(b), security at §§ 5.3-5.4, surveys at § 3.4, public service announcements at § 3.2, buy buttons at § 3.3, and data at § 3.5.

[243] Tr. 10307-08 (Marks), 13287, 13296 (Hackett); RIAA Exhibit 015 RR.

[244] Tr. 9503-06, 10305 (Marks).

[redacted][245] [redacted][246] [redacted][247]

Y. Cornerband.com, Inc.

1. Company Structure

180. Cornerband.com, Inc. is located in Lubbock, Texas and operates a site oriented around local bands. It provides webcasts of recordings from both independent and major record labels, and syndicates its service through its Cornerband Audio Video Platform and Cornerband CornerCast Player. The service offers approximately 30 different genre stations featuring a 50-50 mix of major label music and music from unsigned bands. It plans to partner with local, alternative newspaper sites to promote local bands and their music.[248]

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[245] Tr. 13305-06, 13319 (Hackett).

[246] Tr. 13305-07, 13320-22 (Hackett).

[247] Jaffe W.R.T. 60 n.81.

[248] Marks W.D.T. 30; RIAA Exhibit 147 DP; RIAA Exhibit 153 DR (Cornerband correspondence binder), at April 17, 2001 e-mail from Susan Munsat to the Negotiating Committee (N13012-13).

2. Course of Negotiations

181. [redacted][249]

3. The Agreement

182. [redacted][250]

[249] RIAA Exhibit 153 DR (Cornerband correspondence binder).

[250] RIAA Exhibit 084 DR: royalty rate at §§ 1.13, 3.1, minimum fee at §§ 1.10, 3.2.2, advance at § 3.2.1, security at §§ 5.5-5.6, surveys at § 3.3.3, public service announcements at § 3.3.1, buy buttons at § 3.3.2, and data at § 3.3.4.

183. Cornerband is currently in operation [redacted][251]

4. Professor Jaffe's Concerns

184. [redacted][252] [redacted][253]

Z. Musicmatch, Inc.

1. Company Structure

185. Musicmatch is a company that started by developing a digital jukebox that can be placed on a computer. The service allows users to burn their CDs onto the jukebox and listen to all of their music in a jukebox format. It has been in business almost as long as any company in this proceeding. Musicmatch entered the webcasting business in November of 2000 and launched a site with 20-25 channels. At that point, they had signed up for the arbitration and were a member of DiMA.[254]

2. Course of Negotiations

186. [redacted]

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[251] Tr. 9371 (Marks); RIAA Exhibit 015 RR.

[252] Jaffe W.R.T. 60 n.81.

[253] RIAA Exhibit 153 DR (Cornerband correspondence binder), at October 26, 2000 e-mail from Susan Munsat to Scott Beck of Cornerband (RIAA N0357).

[redacted][255]

187. [redacted][256]

188. [redacted]

Footnote continued from previous page

[254] Tr. 9352, 9374-75 (Marks).

[255] 9353-54 (Marks); RIAA Exhibit 152 DR (Musicmatch correspondence binder).

[256] Tr. 9354-56 (Marks); RIAA Exhibit 152 DR (Musicmatch correspondence binder).

[redacted][257] [redacted][258]

189. [redacted][259]

190. [redacted][260]

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[257] Tr. 4791-92, 4897-98 (Reid); RIAA Exhibit 017 DR-X (Listen.com settlement agreement).

[258] Tr. 9356-59 (Marks); RIAA Exhibit 152 DR (Musicmatch correspondence binder).

[259] RIAA Exhibit 152 DR (Musicmatch correspondence binder).

[260] RIAA Exhibit 152 DR (Musicmatch correspondence binder), at July 6, 2001 e-mail from Steven Marks to Alasdair McMullan (N12859).

3. The Agreement

1. [redacted][261]

192. Musicmatch is currently in operation [redacted][262]

4. Professor Jaffe's Concerns

193. [redacted]

[261] Tr. 9360-63 (Marks); RIAA Exhibit 115 DR: royalty rate at § 3.2, minimum fee at §§ 1.13, 3.1(a), gross revenues definition at §§ 1.10, 3.3, adjustment provision at § 3.7, withdrawal at § 3.8, security at §§ 5.3-5.4, data at § 3.6, public service announcements at § 3.4, and buy buttons at § 3.5.

[262] Tr. 9371 (Marks); RIAA Exhibit 015 RR.

[redacted][263] [redacted][264]

194. [redacted][265] [redacted][266]

195. [redacted][267]

196. Furthermore, at approximately the same time that Musicmatch and RIAA settled their litigation, RIAA also settled the same litigation with Listen.com ("Listen").

[263] Tr. 12449-50 (Jaffe).

[264] Tr. 12489-90 (Jaffe).

[265] Jaffe W.R.T. 63.

[266] Jaffe W.R.T. 63; RIAA Exhibit 152 DR (Musicmatch correspondence binder), at July 10, 2001 e-mail from Gary Brotman to Jano Cabrera (in binder at N12528-29).

[267] RIAA Exhibit 152 DR (Musicmatch correspondence binder), at July 11, 2001 e-mail from Steven Marks to Gary Brotman and Mr. Brotman's response (N12527-28).

Listen, however, did not sign a statutory license and chose, instead, to participate in this proceeding. In fact, Robert Reid of Listen testified about his company's settlement and stated [redacted][268] [redacted][269]

197. Therefore, the evidence in the record is that: (a) Musicmatch signed a settlement agreement and a license agreement; (b) the agreements were negotiated separately and for separate consideration; and, (c) another participant in this proceeding—Listen.com—was able to sign a settlement agreement for the same litigation as Musicmatch without any requirement that it sign a license agreement. The proper conclusion is that the license agreement between Musicmatch and RIAA was not tied to the settlement of litigation as Professor Jaffe suggests.

[268] Tr. 4791-92 (Reid).

[269] Tr. 4897-98 (Reid). *See also* RIAA Exhibit 017 DR-X (Listen.com settlement agreement).

(emphasis added). Therefore, in accordance with the statute, the Panel should disregard RIAA's 26 Agreements in determining a reasonable fee for AM/FM Streaming.

33. While fully 1557 of the approximately 2300 web sites that have filed notices of intent to rely upon the 17 U.S.C. § 114 statutory license were radio broadcaster sites (Marks Written Dir. n. 2; Marks Tr. at 9062), *none* of RIAA's 26 license agreements is with a radio broadcaster. RIAA Exh. 060-084, 115 DR. This is not surprising given that broadcasters viewed RIAA's proposed rate set forth in many of those agreements as a "nonstarter." S. Fisher Tr. 7660-61. Thus, even RIAA's CEO, Hilary Rosen, admitted that its licenses were "representative more of the webcast community than of the broadcaster community." Rosen Tr. at 587.

34. Only two of the 26 agreements proffered by RIAA even relate to radio at all – those with Yahoo! and CyberAxis – covering radio retransmissions by third-party aggregators. RIAA Exh. 075 DR, 080 DR.

35. CyberAxis was clearly unsophisticated[6] and economically insignificant – paying fees of only [ ] under its RIAA license. RIAA Exh. 015RR. Moreover, CyberAxis

licenses with all three musical work performing rights organizations, was actually *lower* than the over-the-air benchmark fee. Jaffe Written Reb. at 36-37; Jaffe Tr. at 12415.

[6] CyberAxis' unsophistication and unawareness of DMCA licensing issues is evident from the RIAA – CyberAxis negotiations binder. *See* RIAA Exh. 142 DR at RIAA N10262. Significantly, RIAA itself conceded at the trial that virtually all of its licensees, save Yahoo! and MusicMatch, were unsophisticated and "essentially had no idea what they were doing legally." *See* Webcaster Findings ¶ 73; Rosen Tr. at 483-84; Marks Tr. at 10400.

TABLE OF CONTENTS

INTERIM PUBLIC VERSION

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of RATE SETTING FOR DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	Docket No. 2000-9 CARP DTRA 1 & 2

REPORT OF THE COPYRIGHT ARBITRATION

ROYALTY PANEL TO THE LIBRARIAN OF CONGRESS

Pursuant to 37 C.F.R. § 251.53, the undersigned members of the Copyright Arbitration Royalty Panel hereby submit the Panel's Report to the Librarian of Congress.

I. INTRODUCTION

A. SUBJECT OF THE PROCEEDING

This is a rate adjustment proceeding convened under 27 C.F.R. § 251 *et seq.*, pursuant to which this Copyright Arbitration Royalty Panel ("CARP" or "the Panel") has been empanelled to set compulsory license fees for eligible[1] nonsubscription digital audio

[1] There is dispute as to whether transmissions by certain parties to this proceeding (alleged to be "interactive" services and thus not eligible for licenses under 17 U.S.C. 114(d)(2)) meet the definition of eligible nonsubscription transmissions. However, the Copyright Office has ruled that "the Panel's responsibility is to ... set appropriate rates, and not to discern whether a particular service meets the eligibility requirements for using the license." 65 Fed. Reg. 77292, 77333 (Dec. 11, 2000). *See also* Docket No. 2000-9 DTRA 1 & 2, Order of July16, 2001, at 5-7,

transmissions of sound recordings as provided for in § 114 of the Digital Millennium Copyright Act ("DMCA"), as well as for the making of ephemeral copies to facilitate such transmissions, as provided for in § 112 of the DMCA. This CARP is setting fees for two license periods: (a) October 28, 1998 - December 31, 2000, and (b) January 1, 2001 - December 31, 2002.

The subject matter underlying this proceeding -- access to music – spans from ancient antiquity to state-of-the-art technology. Humankind's affinity for music extends from ancient campfires to today's capacity to transmit music across vast distances and hear it played with remarkable fidelity. The Panel is cognizant that the decision it renders today could significantly affect citizen access to music for years to come.

B. PARTIES TO THE PROCEEDING

The current[2] parties to this proceeding are: (i) the "Webcasters," namely, BET.com, Comedy Central, Echo Networks, Inc. ("Echo"), Listen.com, Live365.com, MTVi Group, LLC ("MTVi"), Myplay, Inc. ("MyPlay"), NetRadio Corp. ("NetRadio"), Radio Active Media Partners, Inc. ("RadioAMP"), RadioWave.com, Inc. ("RadioWave"), Spinner Networks Inc. ("Spinner.com"), and XACT Radio Network LLC ("XACT"); (ii) the FCC-licensed radio Broadcasters, namely, Susquehanna Radio

9 (hereinafter, orders of both the Copyright Office and the Panel respecting this docket shall be cited as "Order of" followed by the date of the order and page number).

[2] At the outset of the proceeding, Webcaster parties also included Coollink Broadcast Network, Everstream, Inc., Incanta, Inc., Launch Media, Inc., MusicMatch, Inc., Univision Online, and Westwind Media.com, Inc., which have since withdrawn or been dismissed from the proceeding. National Public Radio ("NPR") reached a private settlement with RIAA. Because RIAA, AFTRA, AFM, and AFIM propose the same rates and take similar positions on most issues, they are sometimes referred to collectively as "RIAA" or "Copyright Owners and Performers" for convenience. Similarly, Webcasters, Broadcasters, and the Business Establishment Services are sometimes referred to collectively as "the Services."

Corporation, Clear Channel Communications Inc., Entercom Communication Corporation, Infinity Broadcasting Corporation, and National Religious Broadcasters Music License Committee (collectively " the Broadcasters"); (iii) the Business Establishment Services, namely, DMX/AEI Music Inc. (also referred to as "Background Music Services"); (iv) American Federation of Television and Radio Artists ("AFTRA"); (v) American Federation of Musicians of the United States and Canada ("AFM"); (vi) Association For Independent Music ("AFIM"); and (vii) Recording Industry Association of America ("RIAA").

The Webcasters are internet services that each employ a technology known as "streaming,"[3] but comprise a range of different business models and music programming. *See e.g.*, Written Direct Testimony[4] of Zittrain at 2; Tr. 6917-33 (Mills); Tr. 4025-29 (Lyons); Tr. 4554-77 (Porteus); Tr. 7277-97 (Roy); Tr. 8151-90 (Jeffrey).

The Broadcasters are commercial AM or FM radio stations that are licensed by the Federal Communications Commission ("FCC").

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[3] The Webcasters' activity, sending music or other audio programming over the Internet to the listener's computer, is known as "streaming" because the webcaster "streams" packets of digitized transmissions in a time-dependent, location-dependent manner. *See* Griffin W.D.T. 4-8. To the listener, it seems like traditional radio, but unlike radio signals that are "broadcast," the streams are transmitted to individual recipients. The recipient's computer receives the streamed packets, reassembles them, and plays them back via common software programs known as "players." *See id*. Unlike "downloads," which may be permanently stored in the recipient's computer, the digits of streamed music are designed to be used once and then discarded. *See id.*

[4] Hereinafter, references to written direct testimony shall be cited as "W.D.T" preceded by the last name of the witness and followed by the page number. References to written rebuttal testimony shall be cited as "W.R.T" preceded by the last name of the witness and followed by the page number. References to the transcript record shall be cited as "Tr." followed by the page number and the last name of the witness. References to proposed findings of fact and conclusions of law shall be cited as "PFFCL" preceded by the name of the party that submitted same and followed by the paragraph number. References to reply proposed findings of fact and conclusions of law shall be cited as "RPFFCL" preceded by the party and followed by the paragraph number.

The Business Establishment Services, DMX/AEI Music,[5] deliver sound recordings to business establishments for the enjoyment of the establishments' customers. *See* Knittel W.D.T. 4

RIAA is a trade association representing record companies, including the five "majors" and numerous "independent" labels. Its SoundExchange division has been designated by RIAA member copyright owners (who account for about 90% of all sound recordings legitimately distributed in the United States) as the non-exclusive agent to collect and to distribute Section 112 and 114 royalties. *See* Rosen W.D.T. 4; Tr. 438-39 (Rosen).

AFTRA, the American Federation of Television and Radio Artists, is a national labor organization representing performers and newspersons. *See* Tr. 2830 (Himelfarb).

AFM, the American Federation of Musicians, is a labor organization representing professional musicians. *See* Bradley W.D.T. 1.

AFIM, the Association For Independent Music, is a trade association representing independent record companies, wholesalers, distributors and retailers. *See* Tr. 2830 (Himelfarb).

C. THE STATUTORY BACKGROUND

1. Music Copyright Law in General

Section 102 of the Copyright Act of 1976 identifies various categories of works that are eligible for copyright protection. *See* 17 U.S.C. § 102. These include "musical works" and "sound recordings." *Id.* at Section 102(2) and 102(7). The term "musical

[5] DMX/AEI Music is the successor company resulting from a merger between AEI Music Network, Inc. ("AEI") and DMX Music, Inc. ("DMX").

work" refers to the notes and lyrics of a song, while a "sound recording" results from "the fixation of a series of musical, spoken, or other sounds." *Id.* at Section 101. Thus, for example, the compact disc ("CD") entitled *Whitney Houston's Greatest Hits* contains Whitney Houston's rendition of *I Will Always Love You* and the CD entitled *Jolene* contains Dolly Parton's rendition of *I Will Always Love You.* Sherman W.D.T. 3-4. Each of the two renditions constitute distinct sound recordings and both the sound recordings and the single underlying musical work are "fixed" in the two CDs. *See id.* There are separate copyrights in each sound recording of *I Will Always Love You* and these copyrights are separate from the copyright in the underlying musical work. *See id.*

The copyright *owner* receives a bundle of exclusive rights including "performance" rights and "reproduction and distribution" rights. *See* 17 U.S.C. §106. Copyright owners of musical works are granted the exclusive right "to perform the copyrighted work publicly." *Id.* at 106(4). So, for example, the copyright owner has the exclusive right to authorize, or license, a radio broadcaster to publicly perform the musical work – to play a CD containing the copyrighted musical work such as *I Will Always Love You* over the radio. *See* Sherman W.D.T. 6-7. However, the Section 106(4) performance right does not extend to sound recordings. Accordingly, the broadcaster that publicly performs (broadcasts) *I Will Always Love You* must be licensed by the copyright owner[6] of the musical work, but need *not* be licensed by the copyright owner of the sound

[6] Songwriters who create musical works generally assign an interest in their copyrights to musical publishers who typically pay the songwriter an advance and a share of royalties that they collect for licensing the musical work. *See* Sherman W.D.T. 11-12. Songwriters and publishers typically bifurcate the administration of their rights. Performance rights in musical works are administered in the United States by three performing rights societies ("PROs") – the American Society of Composers, Authors and Publishers ("ASCAP"); Broadcast Music, Inc. ("BMI"); and SESAC, Inc. *See id* at 13. The PROs typically enter into licensing agreements on behalf of their member songwriters and publishers with thousands of businesses that perform musical works. The PROs

recording.[7] *See id.* Sections 106(1) and 106(3) grant copyright owners exclusive rights "to reproduce the copyrighted work in copies or phonorecords" and to "distribute copies or phonorecords of the copyrighted work to the public by sale ..." 17 U.S.C. §106(1), (3). Musical works may be reproduced and distributed within the meaning of Sections 106(1), (3) in three principal ways: (a) mechanical reproductions -- the recording of a musical work on a CD, cassette, computer file or other phonorecord;[8] (b) synchronizations -- the recording of a musical work on a soundtrack of a motion picture or other audiovisual work;[9] and (c) print – the printing of a musical work on sheet music or in books. *See* Sherman W.D.T. 9.

2. **The DPRA**

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act ("DPRA"), which added a new Section 106(6) to the Copyright Act. That provision grants copyright owners of *sound recordings* the exclusive right "to *perform* the copyrighted work publicly by means of a digital audio transmission." *See* 17 U.S.C. § 106(6) (emphasis added). This grants record companies and artists a new right: the

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generally grant "blanket licenses" that permit the licensee to perform any musical works within their repertories for a set license fee, as well as more limited licenses for specific purposes. *See id.* Publishers typically handle the licensing of reproduction and distribution rights in musical works through The Harry Fox Agency.

[7] Record companies normally handle the licensing of the copyright rights in their sound recordings. But, as previously mentioned, a division of RIAA known as SoundExchange acts on behalf of many record companies, including all of the majors, to license performance and reproduction rights that are subject to the statutory licenses in Section 112 and 114. *See* Sherman W.D.T. 14.

[8] The rights to authorize the recording and distribution of the phonorecord to the public are commonly referred to as "mechanical rights." *See id.*

[9] The rights to authorize these reproductions and distributions are commonly referred to as "sync rights." *See id.*

right to receive royalties when sound recordings are transmitted ("performed") over the internet. However, Congress limited this new Section 106(6) digital performance right through certain exemptions that it set forth in an amended Section 114 of the Copyright Act including, among others, exemptions for (a) nonsubscription broadcast transmissions; (b) retransmission of broadcast radio stations within 150 miles of their transmitters; and (c) transmissions to business establishments. *See* 17 U.S.C. § 114 (d)(1).

Congress also amended Section 114 to create a new compulsory license for certain subscription digital audio services, which transmit sound recordings to cable television and Direct Broadcast Satellite subscribers on a non-interactive basis. *See* 17 U.S.C. §114(d)(2). The compulsory license permits the services, upon compliance with certain statutory conditions, to make those transmissions without obtaining consent from, or having to negotiate license fees with, copyright owners of the recordings. *Id.* Congress established procedures to facilitate voluntary negotiation of rates and terms for the subscription services compulsory license. This included a provision authorizing copyright owners and services to designate common agents on a nonexclusive basis to negotiate licenses – as well as to pay, to collect, and to distribute royalties – and a provision granting antitrust immunity for such actions. *See* RIAA Exhibit 113 DP (setting forth Sections 114 and 801 of the Copyright Act as enacted in the DPRA); Sherman W.D.T. 23-24.

Absent agreement, the Copyright Office must convene a CARP to recommend royalty rates and terms for adoption by the Librarian of Congress. Congress directed the CARP to set a royalty rate for the subscription services' compulsory license that achieves the policy objectives in Section 801(b)(1) of the Copyright Act. *Id.*

Under the DPRA, copyright owners must allocate one-half of the compulsory licensing royalties that they receive from the subscription services compulsory license to recording artists. Forty-five percent of the royalties must be allocated to featured artists; 2½ percent of the royalties must be distributed by AFM to non-featured musicians; and 2½ percent of the royalties must be distributed by AFTRA to non-featured vocalists. *See* 17 U.S.C. § 114(g).

3. <u>The DMCA</u>

After passage of the DPRA, a dispute arose concerning the proper treatment of webcasters who stream sound recordings on a nonsubscription basis. The webcasters argued that they were exempt under the DPRA from the Section 106(6) digital performance right. The recording industry, on the other hand, took the position that the DPRA did not exempt webcasters and that webcasters were required to obtain the consent of copyright owners of the sound recordings that they transmit over the internet. *See* Sherman W.D.T. 24; Tr. 321 (Sherman).

Congress resolved that dispute in 1998 with the passage of the DMCA. It made clear in the DMCA that webcasting is subject to the Section 106(6) digital performance right and that webcasters who transmit sound recordings on an *interactive* basis, as defined in Section 114(j), must obtain the consent of, and negotiate fees with, individual owners of those recordings. However, webcasting would be eligible for compulsory licensing when done on a *non-interactive* basis. Accordingly, Congress created a new compulsory license in Sections 114(d)(2) & (f)(2) for "eligible nonsubscription transmissions," which include non-interactive transmissions of sound recordings by webcasters. 17 U.S.C. § 114(d)(2). To qualify for that compulsory license, the webcaster must comply with several conditions in addition to those that the DPRA applied to subscription services. As with the subscription services royalties, webcaster royalties are allocated on a 50-50 basis to copyright owners and to performers. *See generally* Sherman W.D.T. 24-28; RIAA Exhibit 114 DP at 79-91 (DMCA Conference Report); *Bonneville International Corp. et al v. Peters*, 153 F. Supp. 2d 763, 768-69 (E.D.Pa.2001), appeal pending.

Congress adopted the DPRA voluntary negotiation and CARP procedures for the DMCA webcaster performance license. *See* 117 U.S.C. § 114(e),(f). However, it changed the statutory standard by which a CARP must set rates and terms for the webcaster compulsory license. Congress provided that the CARP must adopt rates and terms for the webcaster performance license that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B).

Congress also recognized that webcasters who avail themselves of the Section 114 license may need to make one or more temporary or "ephemeral" copies of a sound recording in order to facilitate the transmission of that recording. Accordingly, Congress created a new compulsory license in Section 112(e) for such copies and extended that compulsory license to services that transmit sound recordings to certain business establishments under the Section 114(d)(1)(C)(iv) exemption created by the DPRA. *See generally* Sherman W.D.T. 24-28; RIAA Exhibit 114 DP at 89-91 (DMCA Conference Report).

Again, Congress adopted the DPRA voluntary negotiation and CARP procedures for the Section 112 ephemeral license. 17 U.S.C. 112(e)(2),(3). And Congress again directed the CARP to set rates and terms for this license that meet the willing buyer/willing seller standard applicable to the Section 114 webcaster performance license. 17 U.S.C. § 112(e)(4).

II. THE PROCEEDINGS

A. PRE-HEARING PROCEEDINGS

Pursuant to Section 114(f)(4)(B)(i), on September 20, 1999, the Copyright Office directed eligible nonsubscription services, that wish to rely upon the Section 114 compulsory license, to file appropriate notices with the Copyright Office by October 15, 1999 or, if they had not yet launched, prior to their first transmission. *See* 64 Fed. Reg. 50758 (September 20, 1999). As of early 2001, initial notices were filed for nearly 2,300 web sites, of which 1557 were filed by AM/FM broadcast radio stations. *See* RIAA Exhibit 126 DP; Marks W.D.T. 4.

Pursuant to the six-month voluntary negotiation provision of the DMCA, on November 27, 1998, the Librarian initiated a voluntary negotiation period covering the timeframe October 28, 1998 through December 31, 2000. *See* 63 Fed. Reg. 65555 (November 27, 1998). On January 13, 2000, the Librarian initiated a second six-month period for the parties to negotiate voluntary rates and terms covering January 1, 2001 through December 31, 2002. *See* 65 Fed. Reg. 2194 (January 13, 2000). RIAA, designated by virtually all of its members and several non-member record labels as their nonexclusive, common negotiating agent (*see* Tr. 321-22 (Sherman); Sherman W.D.T. 23-24), reached agreements with 26 webcasters during and subsequent to these two formal negotiation periods. However, apparently because an industry-wide agreement had not been reached, RIAA petitioned the Copyright Office on July 23, 1999 to commence the CARP process for the period October 28, 1998 through December 31, 2000. On August 28, 2000 RIAA filed a second petition covering the period January 1, 2001 through December 31, 2002.

In response to RIAA's petitions, the Copyright Office directed interested parties to file notice of their intent to participate in the 1998-2000 CARP proceeding and the 2001-02 proceeding. *See* 64 Fed. Reg. 52107 (Sept. 27, 1999); 65 Fed. Reg. 55302 (Sept. 13, 2000); 65 Fed. Reg. 77393 (Dec. 11, 2000). RIAA, AFIM, AFM, AFTRA, about 43 webcasters, and 82 broadcasters filed notices of intent to participate. NPR filed notices to participate on its own behalf and on behalf of non-commercial public radio stations qualified for funding from the Corporation for Public Broadcasting. AEI and DMX (prior to their merger) also filed separate notices of intent to participate.

B. <u>THE DIRECT CASES</u>

On April 11, 2001, RIAA filed its direct case. AFM, AFTRA and AFIM also submitted direct cases and supported RIAA's proposed rates. Twenty-five Webcasters and Broadcasters submitted direct cases. NPR submitted a separate direct case and a separate rate proposal covering public radio stations. AEI and DMX submitted direct cases and a Section 112 rate proposal for organizations that transmit sound recordings to business establishments.

The Panel conducted 31 days of hearings on the direct cases, commencing July 30, 2001 and ending September 14, 2001. A total of 49 witnesses testified.

RIAA presented the following witnesses during the direct case hearings: Cary Sherman, Executive Vice President and General Counsel, RIAA; Hilary Rosen, President and Chief Executive Officer, RIAA; Linda McLaughlin, Vice President, National

Economic Research Associates, Inc. ("NERA"); David Altschul, Vice Chairman and General Counsel of Warner Bros. Records; Paul Katz, Senior Vice President of Business Affairs for Zomba Music Publishing and Zomba Recording Corporation; Charles Ciongoli, Senior Vice President of Finance, Universal Music Group; James Griffin, Chief Executive Officer, Cherry Lane Digital, LLC; Ron Wilcox, Senior Vice President, Business Affairs and Administration, Sony Music, U.S. and Executive Vice President, Business Affairs and New Technology, Sony Music Entertainment Inc.; Paul Vidich, Executive Vice President, Strategic Planning and Business Development, Warner Music Group.; LaVerne Evans, Senior Vice President and General Counsel, Legal and Business Affairs, BMG Entertainment; Anthony Pipitone, President, Warner Special Products, Inc.; Lawrence Kenswil, President, Universal eLabs, Universal Music Group; Dr. Thomas Nagle, Chairman, Strategic Pricing Group, Inc.; Jay Samit, Senior Vice President, New Media, EMI Recorded Music; Steven Wildman, Professor of Economics and Telecommunications studies at Michigan State University; Robert Yerman, Director of Intellectual Property Practice for LECG, LLC; and Steven Marks, Senior Vice President, Business and Legal Affairs, RIAA.

The following witnesses testified on behalf of AFTRA during the direct case hearings: Greg Hessinger, National Executive Director of AFTRA: Jennifer Warnes, recording artist; and AFM presented testimony from Harold Bradley, recording artist; Kevin Dorsey, background vocalist and arranger. AFIM presented testimony from Gary Himelfarb, Founder, RAS Records.

Webcasters and Broadcasters presented the following witnesses during the direct case hearings: Professor William Fisher, Harvard Law School; Joe Lyons, Director of

New Business Development, Comedy Central; Michael Wise, Chief Financial Officer, NetRadio; David Pakman, President of Business Development and Public Policy, My Play; Brad Porteus, Vice President of MTVi Radio and General Manager of Internet Radio Operations for MTVi.; Rob Reid, Chairman, Listen.com; Quincy McCoy, Vice President of Radio and Music Programming, MTVi SonicNet; Fred McIntyre, Executive Director. Business Development, AOL Music, Spinner.com; Dan Halyburton, Senior VP, General Manager, Group Operations, Susquehanna Radio Corporation; Professor Michael Mazis, Kogod School of Business, American University; Michael Fine, Consultant; James P. Donahoe, Senior Vice President, Clear Channel Broadcasting; Professor Jonathan Zittrain, Harvard Law School; Paul Kempton, Founder and Senior Partner, Media Matrix Partnership; Adam Jaffe, Professor of Economics, Brandeis University and Chair of the Department of Economics and the Chair of the University Intellectual Property Policy Committee; Scott Mills, COO and Executive Vice President, BET Interactive LLC; David Juris, President and CEO, XACT Radio; Tuhin Roy, Executive Vice President of Strategic Development, Echo Networks, Inc.; Charles Moore, Vice President of Business Development, RadioActive Media Partners; Stephen Fisher, Executive Vice President and Chief Financial Officer, Entercom Communications Corp.; Dan Mason, President, Infinity Radio; Nathan Pearson, President and CEO, Radiowave.com; John Jeffrey, Executive Vice President of Corporate Strategy and General Counsel, Live365 Inc.; and Joe Davis, Senior Vice President for Operations, Salem Communications.

Webcasters and Broadcasters submitted, but subsequently withdrew written direct testimony from the following witnesses: David Bean, Vice President of Programming, Music Match, Inc.; Robert Ohlweiler, Senior Vice President of Business Development, Music Match, Inc.; Diego Ruiz, Vice President and General Manager, Univision Online, Inc.; Clifton Gardiner, President of Westwind Division, Radio One Networks, Inc.; Michael Peterson, Senior Vice President, Coollink Broadcast Network; Steven McHale, Co-Founder, President and Chief Executive Officer, Everstream, Inc.; Eric Snell, Chief Financial Officer, Incanta, Inc.; Robert D. Roback, President, Co-Founder, and Director, Launch Media, Inc.; and David Goldberg, Chief Executive Officer, Launch Media, Inc. *See* June 25, 2001 Order (Music Choice, Incanta and Everstream); Aug. 3, 2001 Order (Music Match); Aug. 29, 2001 Order (Univision Online and Westwind); Sept. 14 Order (Coollink); Tr. 13242-43 (Launch). Webcasters also had submitted written testimony from Alanis Morisette, a recording artist. By agreement of the parties, the Panel received that written testimony into evidence without Ms. Morisette presenting oral testimony at the direct case hearings. *See* Tr. 9862.

The following witnesses testified on behalf of the Business Establishment Services: Barry Knittel, President of AEI Music Markets Worldwide, and Doug Talley, Chief Technical Officer, AEI/DMX. DMX had submitted written testimony from Lon Troxel, its President and Chief Executive Officer, but that testimony was withdrawn. *See* Tr. 6571.

The following witnesses testified on behalf of NPR during the direct case hearings: Kenneth Stern, Executive Vice President, NPR, and Dr. Jane Murdoch, Vice President of Charles River Associates.

C. THE REBUTTAL CASES

The parties filed written rebuttal cases on October 4, 2001. The Panel conducted ten days of rebuttal hearings, commencing October 15, 2001 and ending October 25, 2001. A total of 26 witnesses testified.

The following rebuttal witnesses testified on behalf of RIAA during the rebuttal hearings: Barrie Kessler, Executive Director, Internal Operations and Data Management, Sound Exchange; Michael Williams, Executive Vice President of Finance and Operations, RIAA; James McDermott, Senior Vice President, New Technology and Electronic Music Distribution, Sony Music, U.S.; Lawrence Kenswil, President, Universal eLabs, Universal Music Group; Dr. Thomas Nagle, Chairman, Strategic Pricing Group, Inc.; Professor Richard Seltzer, Howard University; Dr. George Schink, Director LECG, LLC; Steven Marks, Senior Vice President, Business and Legal Affairs, RIAA; and Professor Steven Wildman, Michigan State University. RIAA had submitted written rebuttal testimony from Deane Marcus, Senior Vice President, Strategic Planning & Business Development, Warner Music Group; Carmine Coppola, Vice President and Chief Financial Officer, Sony Music International; and Prescott Price, Senior Vice President, Finance, EMI Group. By agreement of the parties, the Panel received that written testimony into evidence without those witnesses testifying at the rebuttal hearings. RIAA also submitted written testimony from Mark Ansorge, Vice President and Associate Counsel, Warner Music Group, Inc., but that testimony was subsequently withdrawn. *See* Tr. 13234.

AFTRA and AFM submitted written rebuttal testimony from Greg Hessinger, National Executive Director of AFTRA.

The following witnesses testified during rebuttal on behalf of the Webcasters and Broadcasters: Cindy Charles, MTVi; Charles Moore, Vice President of Business Development, RadioActive Media Partners, Inc.; Ronald Gertz, President and CEO, Music Reports, Inc.; Michael Fine, Consultant; Professor William Fisher, Harvard Law School; Professor Michael Mazis, Kogod School of Business, American University; David Fagin, recording artist; Professor Jonathan Zittrain, Harvard Law School; and Professor Adam Jaffe, Brandeis University.

NPR submitted written rebuttal testimony from Dr. Jane Murdoch, Vice-President, Charles River Associates. By agreement of the parties, the Panel received that written testimony into evidence without Dr. Murdoch's testifying at the rebuttal hearings. *See* Tr. 12393.

Shortly before the conclusion of the direct case evidentiary hearings, the Panel invited each of the 26 webcasters who had entered into voluntary agreements with RIAA to testify during the rebuttal hearings. Seven of the 26 RIAA licensees subsequently testified during the rebuttal hearings: Bruce Bechtold, President and CEO, Cybertainment; David Mandelbrot, Vice President and General Manager, Entertainment Division, Yahoo!, Inc.; Wolfgang Spegg, President and CEO, musicmusicmusic; Scott Purcell, Founder and CEO, OnAir Streaming Networks, Inc.; John Heilbronn, President, Cablemusic Networks, Inc.; Matthew Hackett, Founder and CEO, Kickradio.com; Jim Junkala, President and COO, Multicast Technologies; and Randy Freedman, Counsel, Multicast Technologies.

Lists of exhibits offered during the direct case and the rebuttal case hearings are attached hereto as Appendix C and Appendix D, respectively.

Hearings in this proceeding were interrupted twice by tragic external events. On the morning of September 11, 2001, the Library of Congress building in which the hearing was being conducted was evacuated abruptly by Capital Police; fortunately, the hearing was able to be resumed the following morning. Subsequently, on October 17, 2001, the rebuttal hearing was again interrupted due to fear of anthrax contamination, and the proceedings had to be relocated for eight days. The Panel wishes to express its appreciation and admiration for, and commend the thoughtfulness of, counsel for the parties and the legal staff of U.S. Copyright Office, whose conduct reflected the highest degree of consideration and professionalism throughout these difficult periods.

D. THE SUSPENSION OF PROCEEDINGS

On November 8, 2001, the parties jointly moved the Copyright Office to suspend the CARP proceedings for the period November 9, 2001 through December 2, 2001. The purpose of the suspension was to permit the parties to engage in settlement negotiations. By Order dated November 9, 2001, the Copyright Office granted the motion and set February 20, 2002 as the deadline for the submission of the final CARP Report. The negotiations resulted in a confidential settlement agreement between NPR (National Public Radio) and RIAA. The parties also reached an accord respecting all non-rate terms, excepting one contested issue relating to the designation of an agent to receive and distribute royalties in the circumstance where a copyright owner has not made a designation. Pursuant to joint request of the parties, on December 20, 2001, the Panel issued an order to reopen the record for the limited purpose of admitting into evidence the agreed-upon terms.

E. POST-HEARING SUBMISSIONS AND ARGUMENTS

Following resumption of the proceedings, the parties submitted Proposed Findings of Fact and Conclusions of Law, Replies thereto, and various other memoranda, pursuant to schedules established by the Panel. On December 20, 2001 and January 11, 2002, the Panel heard two days of oral arguments presented by counsel for the parties.

F. THE ENORMITY OF THE RECORD

This proceeding has spawned one of the most voluminous records in CARP history. It includes a written transcript approaching 15,000 pages, many thousands of pages of exhibits, and over 1000 pages of post-hearing submissions by extraordinarily able counsel. In these pages, the parties have raised literally hundreds of contentions relating to statutory construction, economic theory, technology, particulars of their respective industries, and a host of other subjects. Addressing all of these individual contentions, and the evidence supporting or contradicting each, would generate a final report of hundreds, perhaps thousands of pages. Such an endeavor is not required, nor is it practicable within the time constraints imposed under 37 C.F.R. § 251.53(a).

Accordingly, in this Report the Panel attempts to articulate only the principal grounds upon which our determinations are based. Of course, in arriving at these determinations, the Panel has carefully considered all of the parties' evidence and arguments. To the extent this Report comports with a particular proposed finding of a party, we accept that proposed finding. To the extent it does not, we reject that proposed finding.

III. THE STATUTORY CRITERIA FOR SETTING RATES AND TERMS

A. SECTION 114(f)(2)

1. The Statutory Language

The criteria for setting rates and terms for the Section 114 webcaster performance license are enunciated under 17 U.S.C. § 114(f)(2)(B), which provides in pertinent part:

> In establishing rates and terms for transmissions by eligible nonsubscription services ..., the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including –
>
> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
>
> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

The statute further directs the Panel to set "a minimum fee for each type of service" and grants the Panel discretion to consider the rates and terms for "comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements" negotiated under the voluntary negotiation provisions of the statute. 17 U.S.C. § 114(f)(2)(B).

2. The Relationship of the Statutory Factors to the "Willing Buyer/Willing Seller" Standard

The meaning of the "willing buyer/willing seller" standard was the subject of considerable testimony and argument. Indeed, prior to the hearing, dispute arose regarding the appropriate relationship between the statutory factors identified in § 114 (f)(2)(B)(i) and (ii), and the willing buyer/willing seller standard enunciated in the statute. In response to the written direct testimony of Services' witness William Fisher, RIAA filed a motion for declaratory ruling seeking clarification of the statutory standard. In an order issued on July 16, 2001, the Librarian ruled as follows:

> The statutory standard set forth in section 114(f)(2)(B) requires the Panel to determine the rates that a willing seller and a willing buyer would agree upon through voluntary negotiations in the marketplace. The Panel must use the "willing seller/willing buyer" standard to set rates for all non-interactive, nonsubscription transmissions made under the section 114 license, including those within 150 miles of the broadcaster's transmitter.
>
> In making its determination, the arbitrators should consider the two factors listed in section 114(f)(2)(B)(i) and (ii), but they should not limit their deliberations to these factors alone. Neither factor defines the standard for setting the rates. See, H.R. Rep. No. 105-796, 105th Cong., 2d Sess. 86 (1998) ("The test applicable to establishing rates and terms is what a willing buyer and willing seller would have arrived at in marketplace negotiations. In making that determination, the copyright arbitration royalty panel shall consider economic, competitive and programming information presented by the parties including, but not limited to, the factors set forth in clauses (i) and (ii)."). To the extent that a party's testimony is relevant to the analysis of what a willing buyer/willing seller would accept in the marketplace, it should be considered.

Order of July 16, 2001 at 5.

For further guidance in setting royalty rates that reflect the "willing buyer/willing seller" standard, the Librarian referred the Panel to his decision in the satellite rate adjustment proceeding. *See id.* In construing parallel language of 17 U.S.C. §119(c)(3)(D), the Librarian declared that "economic, competitive and programming information" must be considered by the Panel "if it were relevant to determining fair market value" but the weight to be accorded each factor depended upon its relative significance to a determination of fair market value. 62 FR 55742, 55746-47 (October 28, 1997).

Accordingly, the willing buyer/willing seller standard is the *only* standard to be applied. The two factors enumerated in the statute do *not* constitute additional standards or policy considerations. Nor are these factors to be used *after* determining the willing buyer/willing seller rate as bases to adjust that determination upward or downward. The statutory factors are merely factors to be considered, along with any other relevant factors, in *determining* rates under the willing buyer/willing seller standard.

3. The Nature of "The Marketplace"

The parties agree that the directive to set rates and terms that "would have been negotiated" in the marketplace between a willing buyer and a willing seller reflects Congressional intent for the Panel to attempt to replicate rates and terms that "would have been negotiated" in a *hypothetical* marketplace. *See e.g.*, RIAA PFFCL ¶¶ 77-82, Webcasters PFFCL ¶¶ 17-26. The parties further agree that the "buyers" in this hypothetical marketplace are the Services (and other similar services) and that this marketplace is one in which no compulsory license exists. *See id. See also* Noncommercial Education Broadcasting Rate Adjustment Proceeding 63 FR 49823, 49835 (September 18, 1998) ("It is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, could truly reflect fair market value.") But they bitterly dispute the identities of the "sellers" in this hypothetical marketplace.

RIAA asserts that a single collective of sound recording copyright owners (such as RIAA), offering a blanket license for sale, must be the appropriate seller in the hypothetical marketplace we seek to replicate. *See* RIAA PFFCL ¶ 94. Consequently, RIAA argues that the 26 voluntary agreements it recently negotiated with various webcaster licensees, pursuant to Section 114(f)(2)(A), would serve as perfect benchmarks. *See* RIAA PFFCL (Introduction at 1).

The Services' perception of the sellers, in the hypothetical marketplace envisaged by Congress, is starkly different. They assert that RIAA's vision "would eviscerate the protections sought by the Justice Department and implemented by Congress to prevent the exercise of market power [by the RIAA or the record companies]." Webcasters PFFCL ¶ 26. By contrast, the Services seem to envision a theoretical world of perfect competition. Accordingly, they press the notion of a theoretical "competitive market" where the sellers consist of a "non-trivial number" of collectives (essentially, multiple RIAAs) in competition with each other, with each offering a blanket license consisting of all copyrighted sound recordings.[10] Tr. 11667-69 (Fisher); Tr. 6431, 6659, 6603-05, 12704 (Jaffe). *See also* Webcasters PFFCL ¶¶ 20-26.

The Panel rejects the Services' view. We recognize that an antitrust exemption was required to enable RIAA to act as a non-exclusive, common agent in negotiating agreements under the statutory license at issue here. In the absence of a compulsory license, even if the designation of the single common agent were non-exclusive, extraordinary market power would be concentrated in that single entity. However, in the hypothetical marketplace, where no compulsory license would exist, RIAA would *not* enjoy such an exemption and services would necessarily negotiate directly with the *record companies*. Indeed, numerous internet services, which were not eligible for

[10] In support of this theory, the Services cite *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990).

statutory licenses, and at least one that was eligible [redacted], did reach agreements with individual record companies.[11] *See e.g.*, RIAA PFFCL ¶¶ 167-69, Appendix A. *See also* [redacted]xx.

Moreover, we see no Copyright Office or Copyright Royalty Tribunal precedent for the Services' "competitive market" construct in the compulsory license context. Perhaps upon a showing that the record companies themselves, or even the majors, could exert oligopolistic power, we would be tempted to import the *ASCAP v. Showtime* (*see* n.10 *supra)* concept of multiple licensing collectives, each selling the same product. However, no record evidence supports this proposition.[12] Finally, it is difficult to imagine the practicality of competing licensing collectives each offering full blanket licenses, and the Services could offer no example of such circumstances existing in the real world. *See* Tr. 6612 (Jaffe).

Neither, however, can the Panel fully adopt the RIAA stance. We recognize that the hypothetical marketplace we seek to replicate would operate more efficiently, with lower transactional costs, if a single collective designated by the services could negotiate with a single collective designated by the record companies. Even if such designations were non-exclusive, Congress clearly perceived antitrust concerns with such an arrangement. Congress authorized antitrust exemptions respecting such negotiations *only* within the context of the compulsory licenses. *See* 17 U.S.C. § 114(e). *See also* Webcasters PFFCL ¶ 21, n.7, 8. Consequently, the record companies could *not* designate

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[11] Of course, the existence of a single negotiated agreement between one DMCA compliant service and one record company does not establish that non-exclusivity alone would provide adequate protection from RIAA market power. *See* discussion of "non-exclusivity" *infra*.

[12] Indeed, contrary record evidence was adduced. *See* Tr. 8978-83 (Murdoch) (sound recording marketplace is a competitive marketplace).

a single negotiation agent for non-statutory licenses, whether non-exclusive or not. RIAA's reliance upon the DPRA Senate Report (see RIAA RPFFCL ¶ 19, n.30) is misplaced. The Report does state that non-exclusivity "should help" prevent RIAA from demanding supra-competitive rates but, again, only in the context of the compulsory license where RIAA can not withhold use of the copyrighted works. *Id.* Accordingly, in the hypothetical marketplace, where no compulsory license would exist to provide true protection, we do not perceive the hypothetical seller to be RIAA. The appropriate sellers would be the individual record companies.

Thus, the Panel perceives the Section 114(f)(2) hypothetical marketplace as one where the buyers are DMCA-eligible (also referred to as "DMCA-compliant") services, the sellers are record companies, and the product being sold consists of blanket licenses for each record company's repertory of sound recordings.

4. **The Appropriate Willing Buyer/Willing Seller Rate**

As noted, the statute directs us to "establish rates and terms that *most clearly* represent the rates and terms that would have been negotiated in the marketplace." 17 U.S.C. § 114(f)(2)(B) (emphasis added). In the hypothetical marketplace we attempt to replicate, there would be significant variations, among both buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors. Moreover, these parties would be negotiating rates for newly created property rights with no established pricing history.

One would, therefore, expect negotiations between diverse buyers and sellers to generate not a uniform rate, but a range of negotiated rates reflecting the particular circumstance of each negotiation. *See, e.g.*, Tr. 2618-20 (Nagle). Congress surely understood this when formulating the willing buyer/willing seller standard. Accordingly, the Panel construes the statutory reference to rates that "most clearly represent the rates...that would have been negotiated in the marketplace" as the rates to which, absent special circumstances, most willing buyers and willing sellers would agree.

B. SECTION 112(e)

The criteria for setting rates and terms for the Section 112 ephemeral licenses are enunciated under 17 U.S.C. § 112(e)(4), which provides in pertinent part:

> The copyright arbitration royalty panel shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive, and programming information presented by the parties, including –
>
> (A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and
>
> (B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

As does Section 114, this section further directs the Panel to set "a minimum fee for each type of service." 17 U.S.C.§112(e)(4). Although Section 112 does not explicitly grant the Panel discretion to consider the rates and terms for comparable types of services, it does explicitly grant discretion to "consider the rates and terms under voluntary license agreements" negotiated under the provisions of the statute. 17 U.S.C. § 112(e)(4).

Accordingly, while the language of the two sections varies in minor respects, the Panel interprets the criteria for setting rates and terms as essentially identical. *See* Order of July 16, 2001 at 5.

IV. RATE PROPOSALS OF THE PARTIES FOR WEBCASTING SERVICES

A. RIAA RATE PROPOSALS

The RIAA approach is simple and straightforward. It offers as a benchmark the agreements reached between the RIAA and 26 separate webcasters which, RIAA alleges, represent a broad range of webcaster business models and comparable circumstances. *See* RIAA PFFCL (Introduction at 7-9). RIAA asserts that these agreements, negotiated during the statutorily prescribed period for voluntary negotiations, *see* 63 Fed. Reg. 65555 (November 27, 1998), 65 Fed. Reg. 2194 (January 13, 2000), "involve the same buyer, the same seller, the same right, the same copyrighted works, the same time period and the same medium as those in the marketplace that the CARP must replicate."[13] RIAA PFFCL (Introduction at 8) (emphasis in original). RIAA further asserts that the rates and terms established by these 26 agreements are corroborated by substantial evidence of record including, *inter alia*, the following:

(i) Approximately 115 agreements between individual record companies and similar services;[14]

(ii) An analysis of intellectual property values under the criteria set forth in the *Georgia Pacific* patent infringement case; and

[13] With the exception of the "same seller," the Panel concurs with this litany. As discussed *supra*, in the hypothetical marketplace, we view the seller as not a single monopolistic collective, but rather the individual record companies. However, this distinction is rather minor because the RIAA conducted its negotiations under circumstances where it could not exert monopolistic power. The 26 agreements were all negotiated in "the shadow" of the compulsory license. Hence, RIAA could not deny use of the copyrighted work to any service that simply filed the appropriate notice pursuant to Section 114(f)(4)(B)(i). *See* 64 Fed. Reg. 50758 (September 20, 1999).

[14] Excepting one agreement with [redacted] these agreements involved licenses for different rights granted to non-DMCA compliant services. *See* RIAA PFFCL ¶¶ 167-69, Appendix A. *See also* [redacted].

(iii) An "economic value" estimation.

See Id. at 9.

Based upon these agreements, RIAA proposes the following rates for DMCA compliant webcasting services:

(a) For basic "business to consumer" (B2C) webcasting services, either 0.4¢ for each transmission of a sound recording to a single listener, or 15% of the service's gross revenues;

(b) For "business to business" (B2B) webcasting services, where transmissions are made as part of a service that is syndicated to third-party web sites, 0.5¢ for each transmission of a sound recording to a single listener; and

(c) For "listener-influenced" webcasting services,[15] where the transmissions are partly influenced by the listener, 0.6¢ for each transmission of a sound recording to a single listener. *See* RIAA PFFCL (Appendix C) for a more detailed description of proposed rates and qualifications.

RIAA further proposes a minimum fee, subject to certain qualifications, of $5,000 per webcasting service and a Section 112(e)(1) ephemeral license fee of 10% of each service's performance royalty payable under (a), (b), or (c) *supra. See id.* at 3-4.

B. WEBCASTER RATE PROPOSALS

Unlike the RIAA proposals, which are grounded in actual marketplace agreements, the Webcasters proposals are derived from a theoretical economic model.

[15] It should be noted that RIAA believes that such services are not DMCA-compliant and, accordingly, not eligible for the Section 114(f)(2) statutory license. *See* RIAA PFFCL (Appendix C, n.1). RIAA sets forth this proposal only in the event the Panel determines to set a royalty for such services.

The Webcasters' model is fundamentally premised upon the notion that, in the hypothetical marketplace we seek to replicate, copyright owners[16] would license their sound recording digital performance rights and ephemeral reproduction rights to webcasters at a rate no higher than the rates at which music publishers (through the PROs) have licensed their musical work analog performance rights to over-the-air radio broadcasters. *See* Webcasters PFFCL ¶¶ 276-78; Jaffe W.D.T. 16-19. Accordingly, Webcasters calculated their proposed per-performance and per-hour sound recording performance fee by extrapolation from the aggregate fees paid to ASCAP, BMI, and SESAC by over-the-air radio stations holding blanket performance licenses. Specifically, Webcasters utilized year 2000 data from 872 radio stations (those stations for which their expert was able to obtain relevant data), which they claim constitutes "a significant portion" of the total fees paid to the PROs in 2000. Webcasters PFFCL ¶ 276. *See also* Jaffe W.D.T. 25-32. By combining this fee data with data on the Arbitron "ratings" or listening audience of these stations, Webcasters converted the over-the-air music stations' fees paid to the PROs into an average fee paid by an over-the-air broadcaster per "listening hour." *See* Jaffe W.D.T. (Appendix B).

Based upon data from Broadcast Data Systems, Webcasters also calculated a fee per listener song by dividing the "listener hour" fee by the average number of songs played per hour by music-intensive format stations. This calculation produced a fee per song and fee per listener hour for the performance of musical works by the over-the-air radio stations of 0.02¢ per song and 0.22¢ per hour, respectively. *See* Jaffe W.R.T. 29-30,

[16] As discussed *supra*, Webcasters believe the copyright owners would be selling their rights through multiple, competing collectives, but the Panel rejects this view. We find that the Section 114 and Section 112 copyright sellers would be the record companies.

Figure 3. However, because, on average, webcasters play 15 songs per hour, compared to the 11 per hour played on over-the-air radio, the per-hour rate was adjusted to 0.3¢ per hour. *See* Webcaster PFFCL ¶ 277. We note, however, that the 0.3¢ figure is not derived by simply multiplying 0.2¢ by 15, as Webcasters suggest. *See id.* Rather, we presume, Professor Jaffe formulated a mathematical proportion and performed the following calculation: $11X = (15)(.22)$; therefore, $X = 0.3$¢.

Webcasters assert that the 0.02¢ per song and 0.3¢ per hour benchmarks should be adjusted downward for a variety of factors, but offer quantification for only one factor – difference in promotional value. *See* Jaffe W.D.T. 34-43, Tr. 6517-34 (Jaffe). Webcasters note that radio play unquestionably promotes the sale of record albums. However, sound recording copyright owners receive a greater benefit from the sale of phonorecords than do copyright owners of the underlying musical works. *See* Jaffe W.D.T. 37-38; Tr. 6525 (Jaffe). As discussed *supra*, musical works copyright owners receive payment for each sale of a phonorecord via licensing of their "mechanical" rights. However, the amount of remuneration is set by statute. *See* Jaffe W.D.T. 44-45; Tr. 6526 (Jaffe). By contrast, the profits that sound recording owners command from sales of their phonorecords are under no legal restraints. *See* Jaffe W.D.T. 46-47. If, as Webcasters assume, the value of the sound recording digital performance right is worth no more than the musical work analog performance right, Webcasters argue that the *total* remuneration received by each of the copyright owners derived from performances should be equal. *See* Jaffe W.D.T. 45-46. Webcasters accordingly argue that, if royalties paid to musical works copyright owners are to be used as a benchmark for royalties that should be paid to sound recording copyright owners, an adjustment is required to account for the greater promotional benefits received by the sound recording owners relative to the musical work owners.[17] *See* Jaffe W.D.T. 44-47.

To determine the appropriate adjustment, Webcasters assumed that 27% of all record album sales were directly attributable to record play on the radio.[18] *See* Jaffe W.D.T. 44. Webcasters then calculated the promotional value discount that reflects the difference in the total remuneration derived by sound recording owners and musical work owners from the sale of record albums promoted by over-the-air radio. *See id.* at 47; Webcasters PFFCL ¶ 293, n.124. This calculation implied that a sound recording royalty for over-the-air radio performances should be 52% of the estimated musical works royalty. *See id.* However, to be "conservative," Webcasters applied a discount of only 30% -- *i.e.*, they propose a Section 114(f)(2) royalty fee for sound recording digital performances that is 70% of the musical works analog performance benchmark royalty that they estimated. *See* Jaffe W.D.T. 48; Webcasters PFFCL ¶ 295; Tr. 6534 (Jaffe). Applying this discount to Webcasters per-performance benchmark of 0.02¢ and their per hour benchmark of 0.3¢, yields a proposed per-performance fee of .014¢ and a per-hour fee of 0.21¢.

[17] This, of course, assumes that these collateral benefits were, and would be, considered by the relevant parties in the negotiation of appropriate royalties for the respective rights. No persuasive evidence supporting this proposition was adduced.

[18] This assumption is also suspect. The Soundscan survey, upon which Webcasters rely, reflected only that 27% of the respondents identified "heard on radio" as what most influenced them to purchase record albums. *See* Fine W.D.T. ¶ 14. This does not necessarily imply that record sales increased 27% *solely due* to radio play.

In their PFFCL, Webcasters, for the first time in this proceeding,[19] propose an alternative royalty metric – a percentage-of-revenue fee structure, provided that each webcasting service could elect which fee structure to utilize. *See* Webcasters PFFCL ¶¶ 275, 283, 296. Webcasters propose a fee of 3% of a webcaster's gross revenues,[20] which they assert "is taken straight from the ASCAP/BMI/SESAC broadcast radio licenses." Webcasters PFFCL ¶ 283. Webcasters assert that "the PROs collectively receive approximately 3 percent of broadcast radio music station revenues directly attributable to over-the air radio." *Id.* With respect to this percentage of revenue fee structure, Webcasters apply *no* downward adjustment because "it is an alternative to be elected at the Webcaster's option." *Id.* at 296.

With respect to "business to business" syndicators and to "listener-influenced" webcasting services, Webcasters propose the same rates as proposed for basic webcasting services. *See id.* at 297-305. They argue *inter alia* that "[r]egardless of the type of service, the nature of the public performance is the same; and the value of the performance does not change merely because of the technology of the webcaster or the fact that the sound recording is heard when it is accessed at a third-party web site [syndicated] rather than the originating webcaster's site." *Id.* at 297.

Webcasters propose no *additional* royalty fees for the making of ephemeral copies under Section 112(e) because "[s]uch copies have no economic value separate or

[19] This proposal is surprising because heretofore Webcasters repeatedly asserted that a percentage of revenue metric is inappropriate. *See e.g.*, Jaffe W.D.T. 22; Tr. 4317-18 (determining the relevant revenues associated with Section 114 webcasting would "create[ ] enormous potential measurement problems.") Moreover, this proposal is untimely. *See* Order of November 3, 2001 (to which no party objected).

[20] Webcasters set forth their definition of "gross revenues" at Webcasters RPFFCL ¶¶ 64-65.

distinct from the value of the public performances they effectuate." *Id.* at 354. Respecting minimum fees, Webcasters assert that the only justification for imposing a minimum fee is to protect against a situation in which the licensee's performances are such that it costs the license administrator more to administer the license than it would receive in royalties. *See* Jaffe W.R.T. 31; Tr. 12387 (Jaffe). This is particularly true under the per-performance fee structure, which presumably provides the appropriate level of compensation for each use of the copyrighted work. *Id.* Moreover, Webcasters assert that the appropriate calibration for the minimum fee is the incremental costs to the license administrator of adding another license to the system regardless of how many performances they make. *See* Jaffe W.R.T. 32; Tr. 12388 (Jaffe). Accordingly, based upon the minimum fees allegedly charged by the PROs, Webcasters propose a minimum fee of $250 per annum. *See* Webcasters RPFFCL ¶ 163.

V. THE PANEL'S DETERMINATION OF ROYALTY RATES FOR WEBCASTER AND BROADCASTER SERVICES

A. APPLICATION OF THE SECTION 114(f)(2) AND SECTION 112(e) STATUTORY FACTORS

1. Section 114

Section 114(f)(2) directs the Panel to base its decision on information presented by the parties, including:

> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
>
> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. §114(f)(2)(B)

As we previously noted, these two factors do *not* represent additional criteria. They are merely factors to consider, along with any other relevant factors, in setting rates under the willing buyer/willing seller standard. *See* Order of July 16, 2001 at 5. The weight to be accorded each factor, if any, depends upon its relative significance to a determination of fair market value. *See id* citing Satellite Rate Adjustment Proceeding 62 FR 55742, 55746 (October 28, 1997).

As to the first factor (impact on sales), we cannot conclude with any confidence whether any webcasting service causes a *net* substitution or *net* promotion of the sales of phonorecords, or in any way significantly affects the copyright owners' revenue streams. The evidence adduced by RIAA on this issue, consisting entirely of anecdotes and unsupported opinion testimony, is unconvincing. (*See generally* RIAA PFFCL ¶¶ 124-39, 436-53.) Indeed, RIAA did not attempt to offer any *empirical* evidence to support its "concerns" that webcasting causes a net substitution of phonorecord sales. *Id.*

Webcasters also failed to present any compelling evidence. In addition to a plethora of similarly unsupported opinion evidence (*see e.g.*, Webcasters PFFCL ¶¶ 311, 315-19, 322), they produced some unpersuasive empirical evidence (*see generally* RIAA PFFCL ¶¶ 454-85) to support their claim that webcasting actually causes a net promotion of phonorecord sales.

For example, the Soundata survey presented by Mr. Fine evinced a net promotional effect of radio broadcasts, but said little about the net promotional effect of the internet -- and nothing about any net promotional effect of webcasting. *See* Fine W.D.T. 6-8. The study conducted by Professor Mazis suggested that the impact was, at best, *minimally* promotional. Over 80% of the respondents who listened to radio retransmissions indicated that listening did not affect their overall music purchases and another 9% were not sure; similarly, over 70% of the respondents who listened to internet-only streaming reported that listening did not affect their overall music purchases and another 5% were not sure. *See* RIAA Exhibit 102 RP (Tables 29 & 52); Tr. 5555-56 (Mazis). Moreover, the extremely low response rate raises additional questions about the survey. The 47% adult response rate and the 19% teen response rate[21] fall below generally accepted standards. *See* Tr. 12027-30 (Seltzer). Indeed, Dr. Seltzer's critique of the Fine and Mazis studies, while not flawless itself, nevertheless substantially undermines the reliability of the conclusions offered by these two witnesses.

After weighing the credibility of the various conflicting witnesses and assessing the strength of the proffered empirical evidence, the Panel concludes that, for the time period this CARP is addressing, the *net* impact of internet webcasting on record sales is indeterminate. In any event, as explained earlier (*see* discussion in Section III.A.2, *supra*), to the extent those factors influence rates that willing buyers and willing sellers would agree to, they will be reflected in the agreements that result from those negotiations.[22]

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[21] In fact, of the 757 teen respondents, 347 were directed to answer questions about webcasting. *See* Mazis W.D.T. 5-6; Mazis W.R.T. 2; RIAA Exhibit 102 RP (Tables 3, 40 & 63). Accordingly, the results presented by Professor Mazis reflect less than 9% of the 4000 teen panel members who were invited to participate in the survey.

[22] By contrast, it would be necessary to adjust theoretical models, such as the Jaffe formulation, that borrowed data from another marketplace. With a theoretical model, these factors would not already have been accounted for by the negotiating parties. In addition, the setting of prospective statutory rates could be affected by record evidence that clearly established that parties to agreements had misperceived relevant economic realities at the time of their negotiation. For example, if comparable marketplace agreements (used to set a rate for one period) were negotiated on the mutual assumption that webcasting caused a net decline in record sales, but the hearing record proved conclusively that it actually caused a net increase in sales, then the Panel's

Regarding the second factor (the relative creative, technological, and financial contributions of copyright owners and transmitters), we also find no persuasive evidence militating in favor of either copyright owners or services. *See generally* RIAA PFFCL ¶¶ 486-98; Webcasters PFFCL ¶¶ 333-52. Clearly, the streaming industry has made meaningful contributions and incurred significant costs and risks in connection with the services it offers to the public. Similarly, copyright owners have made meaningful contributions and incurred significant costs and risks in connection with the creation of their copyrighted recordings.

Again, we would expect these considerations to be fully reflected in any agreements *actually negotiated* between webcasters and copyright owners in the relevant marketplace. Accordingly, if such agreements exist, absent unusual circumstances, no rate adjustment would be required to determine willing buyer/willing seller rates. Relative contributions, costs, and risks would already be subsumed within the negotiated rates.

2. **Section 112**

Section 112(e) similarly directs the Panel to base its decision in part on information presented by the parties regarding these same two factors, specifically:

> i. whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and
>
> ii. the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative

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rate-setting for subsequent periods should reflect the reduction in royalty rates which this newly-established conclusion would naturally bring about in marketplace pricing.

creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. §112(e)(4).

Again, we find no persuasive evidence militating in favor of either copyright owners or streaming services.[23] And again, if agreements actually negotiated between webcasters and copyright owners in the relevant Section 114 marketplace can be observed, these considerations should already be subsumed in the rates negotiated by the parties.

B. PER-PERFORMANCE IS THE PREFERRED ROYALTY METRIC

At the outset of its analysis, the Panel must consider two foundational questions. The first relates to the type of metric to be adopted for the royalty rate. The second is whether rate determinations are best derived from theoretical economic analyses or from any of the licensing agreements in the record before us. We address each of these matters in turn.

Regarding the choice of a metric, we note that initially RIAA proposed a percentage-of-revenue option, but by the conclusion of the proceeding, it urged that only a per-performance model be adopted. *See* RIAA Comments Concerning Definitions of Gross Revenues and Performance at 2 (Jan. 18, 2002). A similar evolution in perspective on this issue occurred over the course of RIAA negotiations with the 26 licenses. Initially, RIAA negotiated two percentage-of-revenue agreements with licensees. RIAA

[23] A considerable amount of the hearing record consists of detailed testimony and exhibits concerning the economics of the recording, music publishing, broadcasting, and webcasting industries; how various streaming services operate; and the technology of the internet. While valuable as general background information, the Panel does not find that this evidence materially aids our determination of what royalty rates willing buyers and willing sellers would actually agree to for the licenses at issue.

Exs. [redacted] Soon, however, RIAA determined that per-performance licenses were more advantageous (*see* Tr. 9203 (Marks)), and it began to offer licenses on a per-performance basis. Thereafter, it reached per-performance agreements with a number of licensees. *See, e.g.*, RIAA Exs. [redacted].

From the evidence of record, the Panel concludes that three factors militate in favor of the per-performance approach. First, in reality, revenue merely serves as "a proxy" for what is truly being licensed. Jaffe W.D.T. 22. By contrast, a per-performance metric "is directly tied to the nature of the right being licensed." *Id.* The more intensively an individual service uses the rights being licensed, the more that service shall pay, and in direct proportion to the usage. *See id.* at 21. And unlike a per-hour fee structure, per-performance models appropriately capture partial performances resulting from a "skip song" feature. *See* RIAA RPFFCL ¶ 189.

Second, percentage-of-revenue models are difficult to utilize because identifying the relevant webcaster revenues can be complex, particularly where the webcaster offers features unrelated to music. A given percentage rate can produce widely variant royalties depending upon the revenue base against which it is applied. *See* Marks W.D.T. 7; Jaffe W.D.T. 22; Tr. 9138-39, 9201-03 (Marks); Tr. 4317-18 (Jaffe).

Third, because many webcasters are currently generating very little revenue, use of a percentage-of-revenue royalty for the statutory licenses at question could result in a situation in which copyright owners are forced to allow extensive use of their property with little or no compensation. This potentiality was something Congress specifically cautioned against in enacting DMCA. *See* DMCA Conference Report 85-86.

For these reasons, the Panel concludes that, where feasible to utilize, a per-performance fee metric is highly preferable to a percentage-of-revenue structure or to a per-hour fee structure, if such a rate can be reliably derived from the evidence of record.

C. A THEORETICAL ECONOMIC MODEL VERSUS NEGOTIATED AGREEMENTS

The second foundational issue relates to the type of evidence that can most reliably be used for deriving the royalty rates we must determine in this proceeding. On this issue, the two sides present starkly different viewpoints. RIAA argues that the best available evidence of the rate which willing buyers and willing sellers would agree to can be found in the 26 agreements it actually negotiated with licensees for the rights in question. The Services, on the other hand, contend that these agreements are fatally tainted in numerous respects and that willing buyer/willing seller rates are best derived from the thoughtful, theoretical model developed and explicated by Dr. Adam Jaffe, a distinguished economist. In essence, the parties ask us to choose between theory and practice, with each side pointing out numerous alleged flaws in the opposing party's presentation.

1. The Shortcomings of the Theoretical Model

Preliminarily, we recognize that rate-setting based upon theoretical market projections is a difficult endeavor. *See e.g., National Ass'n of Broadcasters v. Librarian of Congress,* 146 F.3d 907 (D.C. Cir. 1998). This is true in part because it is virtually impossible for a theoretician to identify all of the factors that might influence the structure of a market and the manner in which these factors will interact to establish rates. The complexity of real world markets makes predicting market rates highly susceptible to error. *See* Wildman W.D.T. 15. Real world participants in an actual marketplace discover relevant market-influencing factors as they negotiate deals, and these factors are reflected in the ultimate agreements reached. *See id.* Actual agreements contain embedded information that cannot be captured fully in the projections and estimates of theoretical analysts. *See* Tr. 3369-71 (Wildman). Factors that the analyst suspects might influence hypothetical negotiations should be subsumed and reflected in actual negotiated agreements, but the theorist's capacity for perfect projection is subject to the inherent limits of human fallibility. *See id.*

Moreover, theoretical models are necessarily based upon a series of logical assumptions and analogies. Each assumption or analogy inevitably involves some degree of uncertainty or inexactitude. The cumulative impact of a string of such assumptions may produce a model which differs substantially from real world experience. In this case, for example, the analysis offered by Professor Jaffe relies upon at least a dozen assumptions, as enumerated below:

(1) that different technologies (analog vs. digital) are analogous;

(2) that different sellers (PROs vs. record companies) are analogous;

(3) that different buyers (established over-the-air broadcasters vs. internet entrepreneurs) are analogous;

(4) that different copyrights (musical works vs. sound recordings) are analogous;

(5) that different delivery systems (over-the-air, where cost/listener remains constant vs. internet, where broadband cost/listener increases) are analogous;

(6) that different cost structures (individual song writers vs. integrated creative/production/marketing corporate entities) are analogous;

(7) that different demand structures (a finite universe of performing artists vs. the mass record-buying public) can be analogized;

(8) that infant and mature industries behave similarly;

(9) that different royalty metrics (percentage-of-revenue vs. per-performance) can be accurately converted from one to another;

(10) that "listener hours" can be accurately converted into "listener songs;"

(11) that an end-product number (a dollar volume amount) from one market can form the basis for a backward calculation to a different metric in a different market; and

(12) that a promotional impact in one industry (radio broadcasting) can be reliably quantified and then used as a rate reduction adjustment for a different industry (webcasting).

The Panel is uncomfortable with many of these assumptions and the cumulative effect casts significant doubt on the reliability of the ultimate conclusions. The Panel finds that this theoretical construct suffers serious deficiencies. Two examples are addressed below.

2. <u>The Model is Based upon a Different Market</u>

As discussed above, the webcasters' rate model is premised upon the fundamental assumption that in the Section 114(f)(2) hypothetical marketplace, copyright owners would license their internet sound recording performance rights to webcasters at a rate no higher than the rates at which music publishers (through the PROs) have licensed their musical work analog performance rights to over-the-air radio broadcasters. *See* Section IV.B. *supra.* Accordingly, Professor Jaffe calculated proposed performance fees by extrapolation from a large sample of aggregate fees paid to ASCAP, BMI, and SESAC by over-the-air radio stations holding blanket performance licenses.

This analysis by necessity engrafts concepts and presumptions from one marketplace onto another. Dr. Jaffe's model is thus based upon different buyers and different sellers, selling different rights from those at issue in this proceeding.

The Panel agrees with RIAA that the market for the performance of musical works is distinct from the market for the performance of sound recordings. Musical works and sound recordings do not compete in the same market, and they have different cost and demand characteristics. *See generally* RIAA PFFCL ¶¶ 523-35. Moreover, the Panel rejects Dr. Jaffe's premise that the value of performance rights in sound recordings are *necessarily* no greater than in musical works because costs are "sunk." *See id* at ¶ 552-67. This view assumes (erroneously, in our view) that sound recording owners have a static perspective and do not consider the costs of developing new sound recordings when negotiating fees. *See* Schink W.R.T. 6-7; Tr. 13576-78, 13584-89 (Schink).

As to the precise relative value of performance rights in sound recordings *vis-à-vis* musical works, we render no opinion. However, in determining the prices to which willing buyers and willing sellers would agree, the "true" relative value -- even if that could be precisely ascertained -- is less important than the parties' perception of that relative value. Thus, Professor Jaffe's theoretical calculations are far less powerful evidence in this regard than, for example, David Madelbrot's repeated testimony that one of the factors which led Yahoo! to sign the RIAA agreement was Yahoo!'s belief that the sound recording royalty rates in that agreement were "[redacted]" of what Yahoo! paid to the PROs for musical works royalties. Tr. 11250, 11270, 11287-89 (Mandelbrot).

In addition, many of the webcasters' arguments in support of Professor Jaffe's conclusions have significant limitations. *See generally* RIAA PFFCL ¶¶ 578-89 ("master use" and "synch" rights), 590-93 (statutory allocation), 610-21 (international evidence). And Webcasters can take no comfort in the prior Subscription Services Rate Proceeding, in which the Register simply found that neither side had produced compelling evidence of relative value. *See* 63 Fed. Reg. 25394, 25404 (1998). *See also* Order of July 18, 2001 at 2.

3. **The Conversion from Percentage of Revenues**

Regarding this issue, the Panel again agrees with RIAA that converting a rate from the metric in which it was negotiated into another metric to be used as a benchmark is usually a risky undertaking. *See* RIAA PFFCL ¶¶ 597-600; *cf. ASCAP v. Showtime*, 912 F.2d 563 at 579 (magistrate's opinion). Indeed, the listener-hour conversions calculated by Professor Jaffe bear little resemblance to the blanket license fees *actually paid* by some individual radio stations. *See e.g.*, RIAA PFFCL 602-04. For example, during the year 2000, one specific station which was analyzed actually paid four times the amount of fees to the PROs that Professor Jaffe's conversion calculation had predicted. Moreover, even if the conversion were mathematically correct, real world considerations may drive marketplace players to utilize one metric and strongly resist another. *See* Schink W.R.T. 6-7; Tr. 13541-53, 13650-69, 13676-78 (Schink).

Given the uncertainty inherent in any theoretical model and our numerous significant concerns regarding the limitations of this specific webcaster analysis, the Panel next examines whether the record before us affords better evidence.

D. COMPARABLE AGREEMENTS ARE THE BEST BENCHMARK

The Panel believes that the quest to derive rates which would have been negotiated in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements, if they involve comparable rights and comparable circumstances. This belief is buttressed by two factors.

The first is statutory. Both Sections 114 and 112 explicitly invite the Panel to consider the rates and terms negotiated under voluntary license agreements. *See* 17 U.S.C. §§ 114(f)(2)(B), 112(e)(4). Section 114 further invites the Panel to consider other agreements negotiated by comparable digital audio transmission services under comparable circumstances. *See* 17 U.S.C. § 114(f)(2)(B). Second, because as noted above, it is extraordinarily difficult to predict marketplace results from purely theoretical premises, it is clearly safer to rely upon the outcomes of actual negotiations than upon academic predictions of rates those negotiations might produce. *See* Tr. 3369-71 (Wildman).

Indeed, as Professor Jaffe himself testified, comparable marketplace agreements, if available, provide the best evidence of the prices to which willing buyers and willing sellers actually agree. Tr. 6618 (Jaffe) ("If you had available agreements that you believe represent reasonable rates for users that are comparable to the users being licensed by the proceeding, I think that would have been the best thing to do."). *Accord,* Tr. 13675 (Schink) (The best evidence for determining fair market rates is agreements actually negotiated in the marketplace). The Panel's next task, therefore, is to consider whether any of the agreements before us constitute such comparable agreements.

E. THE [redacted] LICENSE AGREEMENT

We concluded above that the Section 114(f)(2) hypothetical marketplace is one where the buyers are DMCA-compliant services, the sellers are record companies, and the product being sold consists of blanket licenses for each record company's repertory of sound recordings. Accordingly, the most reliable benchmark rate would be established through license agreements negotiated between these same parties for the rights described. Unfortunately, the record contains only one agreement that appears to meet all three of these parameters, namely, the agreement between [redacted]. *See* [redacted], testified that [redacted] was a fully DMCA-compliant service.[24] *See* Tr. [redacted] The agreement provided for a royalty rate of [redacted] per performance[25] with [redacted]. Regrettably, while directly on point, this agreement can be accorded little weight because it was never implemented, and

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[24] Curiously, the license agreement requires compliance with Section 114(d)(2)(C)(i) (the performance complement requirements) but it is silent as to compliance with Section 114(d)(2)(A) (the non-interactivity requirement).

[25] The agreement is silent respecting any ephemeral royalties under Section 112(e). *See* RIAA Exhibit [redacted]. This could be interpreted to mean either that (1) the [redacted] per performance fee *included* the making of ephemeral copies incident to the transmissions or (2) an unspecified additional fee could be due under Section 112(e). The agreement specifies that the Licensee is not granted [redacted] *Id.* at 3. It further provides that the agreement [redacted] and provides examples, none of which relate to making ephemeral copies. Although it is difficult to imagine that the parties intended additional, but unspecified, fees to be paid (or that the making of ephemeral copies would be unnecessary), in light of this unambiguous language, we cannot assume that the intended rate for making ephemeral copies was zero. *See generally* discussion of ephemeral royalties in Section V.N. *infra*.

[redacted] therefore never paid any royalties under it. Rather, [redacted] outsourced its streaming to a third party, which apparently deemed the agreed rate too high and elected instead to avail itself of the compulsory license rate set in this proceeding. *See* RIAA's Reply of October 24, 2001 to the Order of October 2, 2001. On balance, since no royalties were ever paid pursuant to its provisions, we conclude that this agreement is of virtually no use as a rate benchmark. *See* discussion in Section V.G.2. *infra.*

F. THE 26 RIAA LICENSE AGREEMENTS CONSTITUTE THE NEXT CLOSEST APPROXIMATION OF THE HYPOTHETICAL MARKETPLACE

The 26 agreements between RIAA and various services were the product of a marketplace with many characteristics similar to the hypothetical marketplace the Panel is directed to analyze. Although the seller in these negotiations was different (RIAA, rather than record companies), the buyers were the same, and the rights for sale were identical. Of course, the marketplace differed since the agreements were negotiated within the context of a compulsory license, while the hypothetical marketplace is one where no compulsory license would exist. *See* Section III.A.3. *supra.* However, the very fact that RIAA, a single designated negotiating agent of the record companies with potential to yield monopolistic power, negotiated the agreements under the shadow of the compulsory license, renders the agreements more, rather than less, comparable. Stated otherwise, because the agreements were negotiated with DMCA-compliant services in the context of a protective compulsory license, the distinction between *RIAA* as seller, in contrast to the *record companies* as sellers, becomes much less significant. So long as buyers could avail themselves of the compulsory license, RIAA was deprived of a monopoly seller's most effective power, i.e., the ability to withhold a product from the marketplace.

Thus, the 26 RIAA agreements were negotiated in a marketplace with two countervailing features not present in the hypothetical marketplace envisioned by Sections 112 and 114. The antitrust exemption, which allowed RIAA to negotiate for all copyright owners, had the effect of strengthening the seller's bargaining power. And the compulsory license, which allowed services to use all sound recordings without having a single license agreement, had the effect of strengthening the buyers' bargaining power. Based on a knowledgeable weighing of this voluminous record, including its own questioning and credibility assessments of more than 30 witnesses, the Panel concludes that neither of these factors has been shown to outweigh the other, and they should thus be deemed to be effectively counterbalancing. Accordingly, the relative market power of the buyer group and seller group in the hypothetical market would be roughly comparable to the relative market power of the buyer group and seller group in the market which produced these 26 agreements.

In the absence of additional agreements between DMCA-compliant services and record companies, therefore, the Panel concludes that the 26 RIAA license agreements constitute the next closest approximation of the hypothetical market. If analysis determines that a reliable benchmark can be gleaned from these license agreements, the Panel should look to that benchmark rather than the Webcasters' theoretical model, which attempts to deduce a rate through a series of assumptions drawn from a marketplace far removed from the one envisioned in this statute.

G. CLOSE SCRUTINY REQUIRED

For the reasons stated above, the 26 RIAA agreements constitute an appropriate starting point for rate-setting in this proceeding. However, these license agreements must be scrutinized to determine whether individual circumstances or anomalous conditions render them unreliable as benchmarks. This is particularly true under the circumstances present here, where the agreements were all recently negotiated within the context of a newly emerged industry (webcasting) involving newly-created rights (Sections 114 and 112). Because these are new rights, both RIAA and its licensees, including even the most sophisticated ones, negotiated these agreements without benefit of established historical standards. Both sides had "considerable uncertainty about the ultimate equilibrium value for the right." Jaffe W.D.T. 15-16. Such license agreements should be approached with caution, since they may not reflect fully educated assessments of the nascent businesses' long-term prospects. *Cf. ASCAP v. Showtime*, 912 F.2d 563 at 567, 579. The resulting licenses warrant less confidence as benchmarks than would comparable agreements negotiated over a long period, which had withstood the "test of time." *Cf. United States v. ASCAP*, No. 41-1395, 13-14 (S.D.N.Y. June 11, 2001).

Bearing in mind these cautions, we turn to the agreements themselves and note that, with one significant exception discussed at length *infra*, the 26 agreements *generally* provide Section 114(f)(2) webcaster rates of 0.4¢ per performance.[26] *See* RIAA Exs. 60 DR – 85 DR; Marks W.D.T. (Attachment B). Section 112(e) ephemeral license fees of about 10% of performance fees are generally provided in those agreements that expressly

[26] Those agreements prescribing a percentage-of-revenue metric generally fall in the 15% of revenue range.

grant such rights.[27] *See id.* Given the range of rates that one would expect to occur in a newly emerging marketplace such as the one we replicate, the Panel must now consider whether the 0.4¢ per performance and 10% ephemeral rates contained in most of these agreements truly reflect the rates that willing buyers and willing sellers would typically pay in a hypothetical marketplace.

1. The RIAA Negotiating Strategy

Considerable hearing time was devoted to examining the circumstances surrounding the negotiation of each of RIAA's agreements with the 26 licensees. Moreover, the Panel has studied each agreement thoroughly. From this evidence, a clear and definitive pattern is apparent. Before negotiating its first agreement, RIAA developed a strategy to negotiate deals for the purpose of establishing a high benchmark for later use as precedent, in the event a CARP proceeding were necessary. The RIAA Negotiating Committee reached a determination as to what it viewed as the "sweet spot" for the Section 114(f)(2) royalty, both on a percent-of-revenue basis and per-performance basis.[28] *See* Tr. 9415-16, 9418-19, 9422-26. It then proceeded to close only those deals (with the exception of Yahoo!) that would be in substantial conformity with that "sweet spot." *See* RIAA Exhibits 060 DR through 084 DR.

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[27] Curiously, as in the [redacted] agreement, many of the license agreements contain no grant of ephemeral rights, and they contain language virtually identical to that in the [redacted] agreement, which limits rights to those expressly granted. *See* note 25 *supra*. For the reasons previously stated, we do not consider such agreements as benchmarks for rights *not* granted. *See id.*

[28] This "sweet spot" was not based on any calculation of a reasonable rate of return for copyright owners' investment, nor upon any other economic study. It simply reflected the Negotiating Committee's instinct of what price the marketplace would bear. Tr 1865, 1879-81 (Wilcox); Tr. 9416 (Marks). Thus, these rates have no independent economic validity, they are meaningful only to the extent the marketplace has accepted them.

Numerous internal documents from months of negotiations with many licensees confirm this consistent RIAA strategy. Thus, for example, during negotiation of the critical first agreement, RIAA's Chief Negotiator Steven Marks wrote to the RIAA Negotiating Committee:

[redacted]

RIAA Exhibit 137 DR at RIAA N13617-18

Subsequently, MMM readily acquiesced in RIAA's request to separate the performance license from the ephemeral license. *See Id.* Because, for various reasons, MMM urgently sought to conclude a deal, it attempted little negotiation of the fundamental economic terms of the agreement – other than the minimum fee. *See* Tr. 9632-33; Services Ex. SX 43. *See generally* RIAA Exhibit 137 DR.

The record also reveals that during negotiations with Broadcast.com, Mr. Marks explained that a certain proposal was unacceptable to RIAA because it [redacted] He also informed Broadcast.com that [redacted] RIAA Exhibit 137 DR at RIAA N11732, N1009. Similarly, during a later stage of the negotiations with Yahoo! (which had acquired Broadcast.com), Mr. Marks expressed concern that the deal [redacted] RIAA Exhibit 137 DR at RIAA N11732.

RIAA asserts that the reference to "precedent" throughout the various negotiations was intended to mean "marketplace precedent" -- rather than precedents intended to be used in the CARP. *See e.g.*, RIAA RPFFCL ¶ 120. This explanation lacks credibility. RIAA meticulously crafted confidentiality clauses for each and every license agreement. These clauses prohibit any licensee from discussing the terms and conditions of the agreement with other parties. *See* RIAA Exs. 60 DR- 84 DR. But it simultaneously reserved its own right to use each agreement however it wished at the CARP proceeding. *See id.* These clauses belie the notion that RIAA's primary[29] concern was to establish precedents for other potential licensees.

As we have noted, in the statutory marketplace, one would expect to find some buyers - for various reasons – that are willing to pay higher rates for a product than most other buyers pay. But, if a seller is in a position to *temporarily* sacrifice volume, it can afford to negotiate deals only with those buyers willing to pay above-market rates. By engaging in this conduct, the Panel finds, RIAA created a virtually uniform precedent with rates above those that most buyers would be willing to pay.[30]

Moreover, RIAA devoted extraordinary efforts and incurred substantial transactional costs to negotiate successfully a relatively small number (26 agreements out of hundreds of services) of license agreements with mostly minor services -- services that promised very little actual payment of royalties. *See* discussion *infra* Section V.G.2; RIAA Exhibit 126 DP; Marks W.D.T. 4. Such sacrificial conduct makes economic sense

[29] We do not find that establishment of a high CARP benchmark was RIAA's *only* motivation. We do not doubt that RIAA sought to "sign up" as many licensees as it could – particularly "major players" like "AOL, Viacom and Yahoo!" (*see* Tr. 558-60 (Rosen)) – in hope of avoiding an expensive and risky CARP proceeding. RIAA hoped that if a major player fell in line, all others would follow. *See id. See also* Tr. 13876-77 (Marks).

[30] By contrast, the [redacted] license, involving the only DMCA-compliant service that negotiated with an individual record company, produced a royalty rate significantly less than the "sweet spot" RIAA rate. *See* Section V.E., *supra*.

only if calculated to set a high benchmark to be later imposed upon the much larger constellation of services.

In fact, RIAA reached agreement with only 26 of the 60 services with which it had "meaningful discussions." RIAA PFFCL ¶ 189. And RIAA offered virtually no evidence to explain why the majority of these services did not conclude an agreement. In the absence of alternative explanations, the Panel infers that this majority of buyers was simply unwilling to agree to the rates RIAA was seeking. Indeed, had RIAA *not* pursued this negotiating strategy, we would have expected to see a much broader range of negotiated rates. The tight range of rates among the 25 non-Yahoo! agreements suggests a take-it-or-leave-it approach. RIAA decided to deviate significantly from its 0.4¢ precedential rate on only one occasion – to successfully negotiate the deal with Yahoo. *See* n.26 *supra*.

Because RIAA was apparently able to close deals at its "sweet spot" with only a minority of licensees, the Panel finds that these non-Yahoo! agreements do not establish a reliable benchmark. Rather, they establish, at best, the high end of the rate range that some services (with special circumstances) might pay. Before addressing the Yahoo! agreement, however, we shall set forth additional bases for determining that the 0.4 ¢ rate (as represented by the 25 non-Yahoo! agreements) is not a useful benchmark.

2. Licensees That Paid Little or No Royalties Or Quickly Ceased Operating

Although RIAA has urged the Panel to adopt the rates represented in the 26 voluntary agreements it negotiated with licensees, one of RIAA's lead economic experts, Dr. Thomas T. Nagle, enunciated principles that would result in the Panel rejecting nearly all of these agreements. Dr. Nagle testified that the Panel should accord no weight to agreements with licensees which are unable to endure in the marketplace. *See* Tr. 2642-48 (Nagle). Dr. Nagle rested his overall analysis on the fundamental assumption that the current webcasting industry consists of a large number of marginal or insignificant entities (*see, e.g.*, Tr. 13393 (Nagle); Nagle W.D.T. 5) and that a dramatic "shake out" must and will occur. *See id.* This, in his view, is both inevitable and desirable because it will bring about market consolidation, which will result in the emergence of a far smaller number of viable webcaster companies. These, in turn, will be able to prosper and endure (operate at a "sustainable scale at this future point of viability" (Nagle W.D.T. 6)) and, not incidentally, be able to afford significantly higher royalty payments to copyright owners. RIAA Ex. 108 DP (Nagle analysis) at 15. The actions of the marginal economic entities which are fated to disappear in this process, in Dr. Nagle's view, are economically inconsequential and offer virtually no probative value as benchmarks for setting future royalty rates. Tr. 2642-48, 13393 (Nagle).

This testimony is significant because the majority of RIAA's 26 licensees fall into the category of smaller entities which are unlikely to endure. A number of them never launched their services, and another group, after launching, have already ceased operation. All but a handful of the 26 licensees either (1) paid zero royalties; (2) paid no royalties beyond the prescribed minimum (due to low revenues or because they streamed so few transmissions); or (3) quickly went out of business. These licensees include Cyberaxis; Multicast Technologies, Inc.; Cornerbrand.com; Beem-Me-Up Broadcasting; Spacial Audio Solutions; Cybertainment Sys. Corp.; Kickradio.com;[31] NRJ Media Corp.;

[31] The [redacted] agreement does not specify a "minimum." *See* RIAA Exhibit [redacted]. It requires a [redacted] advance, which was paid. However, the service has not yet launched, and the fee formula appears illusory. *See id. See also* Webcasters PFFCL ¶¶ 216-17, n.102.

JamRadio.com; MoodLogic, Inc.; She Sings Media, LLC; GaliMusica; OnAir.com;[32] Soundbreak.com; Spike Internet Radio, Inc;[33] Visual Dynamics, LLC; eNashville; Fansedge, Inc.; The Buzz Bin.com; and SLAM Media, Inc. *See* RIAA Exhibit 15 RR, 80 DR, 70 DR, 70A DR; 84 DR, 82 DR, 69 DR, 73 DR, 63 DR, 63A DR, 64 DR, 064A DR, 77 DR, 79 DR, 68 DR, 66 DR, 74 DR, 76 DR, 65 DR, 67 DR, 72 DR, 81 DR, 71 DR. Another licensee has paid *de minimis* royalties of less than [redacted] over two license terms.[34] *See* Tr. 9918-31 (Marks); RIAA Exhibit 15 DR, [redacted].

Apart from Dr. Nagle's opinion, several factors support the conclusion that agreements involving non-functioning or minimally-functioning services (under which few or no royalties have been paid) should carry significantly less weight as benchmarks than licensing agreements involving vibrant businesses that have paid significant royalties. First, smaller, economically marginal licensees that expected to earn little revenue, or to stream few transmissions, would care little, when negotiating their agreements, about the fee formula -- other than the minimum fee required. Second, services that quickly terminated their businesses tend to exhibit little business acumen or experience. *See e.g.*, Tr. 13390-92 (Nagle). In this new marketplace, agreements with licensees of these sorts should be accorded significantly less weight. *Cf. ASCAP v. Showtime*, 912 F.2d 563 at 567, 579. Indeed, a strict application of Dr. Nagle's opinion

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[32] Additionally, the Panel has concerns that OnAir.com perceived an RIAA license to be considerably more advantageous than a statutory license for its particular circumstances. *See* Webcasters PFFCL ¶ 209.

[33] Operators of Spike Internet Radio also appear to have been under time constraints that could have precluded negotiation of individual licenses with the record companies. *See* Webcasters PFFCL ¶¶ 253-54. *See also* Section V.G.3. *infra*.

that any agreement with a service that is not "economically viable" should be accorded *no* weight as a potential benchmark (*see* Tr. 2642-48, 13390-93 (Nagle)) would eliminate all but three or "potentially four" of the 26 agreements from *any* consideration.

The Panel renders no findings with regard to the inevitability of an industry "shake out" or any inherent characteristics of smaller services. However, the Panel does find that certain actions of a clear majority of the 26 licensees appear to demonstrate a significant lack of understanding with respect to important aspects of the DMCA. One clear example, described more fully in Section V.N.3. below, is the failure of a majority of the 26 to negotiate the right to make the ephemeral copies of sound recordings necessary to the successful operation of their services. This demonstrated lack of business acumen tends to further erode Panel confidence in the weight to be accorded these agreements as benchmarks.

3. **Licensees that Could Not Wait for the Statutory License**

As explained previously, *so long as* prospective licensees could avail themselves of the compulsory license, RIAA would be deprived of any significant potential to exercise monopolist power. *See* Section V.F. *supra.* However, if due to special circumstances, some licensees required immediate RIAA licenses, these licensees would no longer be shielded from the potential monopoly power of RIAA. And negotiating DMCA-compliant, voluntary licenses directly with the record companies may have been

[34] It also appears that the extremely unsophisticated operator of this service, [redacted], may have believed that an RIAA license agreement was *required* even under the statutory license. *See* RIAA Exhibit [redacted] at RIAA N1750.

unattractive.[35] Under such circumstances, the resulting rates must be deemed to constitute above-market rates. In addition to Spike Internet Radio (*see* n.33, *supra*), both musicmusicmusic ("MMM") and Websound fall into this category.

MMM was the very first license which RIAA negotiated at its predetermined "sweet spot." *See* Section V.G.1., *supra*. MMM had at least three reasons to need an immediate license: (1) to diffuse negative publicity stemming from a Canadian cease-and-desist order, (2) to generate positive press promotion by becoming the first RIAA licensee, and (3) to allay concerns of foreign investors respecting an upcoming initial public offering in Germany. Thus, MMM was extraordinarily eager to secure a voluntary license from RIAA. (*See* Webcasters PFFCL ¶¶ 150-53; RIAA Exhibit 128 DR.) Furthermore, MMM clearly perceived an RIAA license to be more valuable than a statutory license. (*See* Webcasters PFFCL ¶¶ 155-61.) In fact, Mr. Spegg of MMM candidly acknowledged that, because of these factors, [redacted][36] *See* Tr. 12929-33 (Spegg). Except as to the precise definition of the revenue base, MMM docilely accepted RIAA's proposed [redacted] of revenue fee model virtually without substantive negotiation. *See id.*

[35] For example, time may not have permitted such negotiations. Or, services might have found the prospect of negotiating a DMCA-compliant license with multiple record companies (that all had access to confidential RIAA records) quite unattractive. Indeed, only one service did conclude a DMCA compliant voluntary license. *See* Section V.E. *supra*.

[36] We assume this reasoning also applied to the renewal license (*see* RIAA Exhibit 60A DR). We also note that in the renewal agreement, MMM successfully negotiated a type of mutual MFN clause whereby [redacted] *See id.* This further renders the agreement less useful as a benchmark. It would be circular reasoning for the Panel to rely upon an agreement to establish a marketplace rate [redacted]

The Panel also finds that Websound felt a similar sense of urgency. Websound appeared to have been under two time pressures: (1) to resolve uncertainty regarding whether the service would qualify for the statutory license (*see* RIAA Exhibit 136 DR at N9422), and (2) to secure confirmation of its license status for its customers. *See id* at N9421-23, N9720, N9751, N9772-73. *See also* Tr. 10122-26 (Marks). It is also significant that Websound is a very minor player in this market. Despite acceding to one of the highest royalty rates, it has paid less than [redacted] since the agreement was executed in September 2000 – less than [redacted] of the fees paid by Yahoo! over a similar period. *See* RIAA Exhibit 15 RR.

For these reasons, the Panel concludes that the MMM and Websound agreements reflect buyers at the high end of the rate range and are, as such, of little use as benchmarks for the average marketplace rate.

Putting aside licensees which either (1) paid no royalties beyond the prescribed minimum, (2) quickly ceased operating, or (3) could not wait for the statutory license, only three of RIAA's 26 licensees remain: MusicMatch; Lomasoft; and Yahoo!. Each of these three merit individual discussion.

4. **<u>MusicMatch License Agreement</u>**

Because the negotiation of the MusicMatch agreement was closely associated with the settlement of infringement litigation initiated by RIAA, it cannot be reasonably characterized as the product of marketplace negotiations between a typical willing buyer and a typical willing seller. Indeed, in order to end RIAA's litigation against it, MusicMatch eventually accepted license fees and terms less favorable than those it had rejected prior to the litigation. *See* Webcasters PFFCL ¶¶ 137, 140-44; RIAA exhibit 115

DR; RIAA Exhibit 152 DR. The Panel also notes that this agreement contains a type of MFN clause [redacted][37] This provision further erodes the usefulness of this agreement as a benchmark for what willing buyers and willing sellers would agree to in a hypothetical marketplace where no statutory license (and therefore no CARP proceeding) existed. *See* n.37, *supra*. Accordingly, the Panel finds that this agreement reflects rates above those that willing buyers and sellers would normally negotiate and, in any event, its MFN clause renders it of little use as a benchmark.

5. **Lomasoft License Agreement**

The Lomasoft agreement, RIAA's second license, was negotiated shortly after the MMM license described previously. *See* Marks W.D.T. (Attachment B). With minor exceptions, it contained the same percentage of revenue fee model as the first license.[38] *See id.* The record indicates that Lomasoft is another small service, whose two operators had no prior music licensing experience. *See* Tr. 13109-13, 13119 (Heilbronn). Moreover, since concluding its license agreement with RIAA in August 1999, Lomasoft paid total royalties of approximately [redacted] (about [redacted] of Yahoo! payments). *See* RIAA Ex.15 RR.

The probative value of the Lomasoft license is also diminished because it has expired and not been renewed. *See* Tr. 13105, 13114 (Heilbronn). Apparently realizing that he initially overpaid, Mr. Heilbronn never seriously discussed renewal of the license.

[37] [Deleted due to correction of footnote 36.]

[38] RIAA informed Lomasoft that [redacted] (emphasis added). RIAA Exhibit 129 DR at RIAA N8552.

He testified that [redacted] Tr. 13115.

Evidently, Lomasoft deemed negotiations with RIAA a futile mismatch. We do not doubt this to be the case. Lomasoft negotiated a license agreement that does not even grant it the right to make multiple ephemeral copies (*see* RIAA Exhibit 61 DR at §§ 2.2, 2.5), although it appears that the company requires such copies. *Cf.* Tr. 14972-74. Indeed, Lomasoft believes that the *performance* license *did* grant it the right to make ephemeral copies at no additional charge (*see* Tr. 13106-07 (Heilbronn)), even though the agreement clearly excludes such rights. *See* RIAA Exhibit 061 DR at §§ 2.2, 2.5. This record reflects grossly mismatched negotiating parties.[39]

[39] In addition to Lomasoft, a clear majority of the original 26 RIAA agreements did *not* grant the right to make ephemeral copies, including original licenses for Radiofreeworld, NRJ Media, JamRadio, Visual Dynamics, OnAir.com, eNashville, GaliMusica, Spacial Audio Solutions, Multicast Technologies, SLAM Media, Fansedge, Cybertainment, Beem-Me-Up, and Cornerband. We recognize the possibility that some of these services may have erroneously perceived that they could operate their services without this right. *Cf.* Tr. 14970-71 (Garrett). But interestingly, of these licensees that ultimately renewed their licenses, each renewal contained the grant of rights to make ephemeral copies (for a specified fee). *See* RIAA Exhibits [redacted]; Tr. 14969 (Garrett) [redacted]. Because the record does not reflect that any of these licensees changed the manner in which they delivered their services from the first license to the second, we must assume that they required an ephemeral license all along. Moreover, RIAA's own expert witness testified that the process of "ripping" CDs to a server entails copying. *See* W.D.T. of Griffin 6. *See also* Tr. 8651 (Talley) (ephemeral [buffer] copies are produced whenever a CD is played). Thus, these licensee's lack of sophistication further enhanced RIAA's ability to secure above-market rates that it could later offer as benchmarks.

Given this totality of circumstances, we have little confidence that the Lomasoft agreement reflects a representative rate that willing buyers and willing sellers would normally negotiate.

6. **Weight To Be Given the 25 Non-Yahoo! Agreements**

For the reasons cited previously, and for many additional ones not addressed here,[40] the Services assert that none of the RIAA license agreements are entitled to any weight whatever in establishing the statutory royalty rates. *See* Webcasters PFFCL ¶ 65. Conversely, RIAA does not concede a single problem with regard to any of these license agreements and continues to offer them all as record support for its rate proposals. RIAA argues that all of these licensees, as well as the circumstances surrounding the negotiation of the license agreements, are representative of the real world marketplace. *See generally* RIAA PFFCL ¶¶ 271-314. For example, RIAA asserts that many webcasters are subject to time constraints, require prompt licensing for certainty or other reasons (*see id.* at 299-301), or desire positive publicity. *See id.* at 309. While the Panel agrees that the non-Yahoo! licensees are not unique, RIAA has certainly not shown that they are representative of the majority of webcasters. Doubtless, some licensees do share individual circumstances that would induce them to pay higher rates than services that do not share such circumstances. *See, e.g.,* Tr. 2614-18, 2762 (Nagle) ("soda on the beach" example). But such licensees merely establish the upper bounds of the expected rate range, not the rates to which more representative buyers would willingly agree.

[40] *See generally* Webcasters PFFCL ¶¶ 65-272. These additional arguments generally entail allegations that (1) the licensees were not comparable types of services; (2) the licenses were negotiated under non-comparable circumstances; or (3) the licenses negotiated reflect RIAA's unconstrained monopoly power.

As to those licensees that paid little or no royalties, RIAA notes that some of the Services that are party to this proceeding are of comparable size or have ceased operations. *See id.* at 288-91. This entirely misses the point. If those Services had reached agreements with RIAA, and then paid no royalties beyond the recited minimum, or quickly went out of business, the Panel would accord those agreements very little weight either. For the reasons previously cited, it is difficult to imagine how one could rely on such agreements with any confidence.

In sum, the Panel concludes that the 25 non-Yahoo! license agreements (as well as the [redacted] agreement) are unreliable benchmarks. They are entitled to very little weight for the purpose of determining the rate that willing buyers and willing sellers would normally negotiate in the relevant marketplace. The RIAA agreement with Yahoo!, however, is marketplace evidence of an entirely different character.

7. **The Yahoo! License Agreement**

Initially the Panel notes that Yahoo! alone accounts for over [redacted] of all royalties paid to RIAA under the 26 relevant voluntary licenses. *See* RIAA Exhibit 15 RR. And because it pays substantially lower rates than other licensees, the [redacted] payment percentage suggests that Yahoo! transmissions account for far more than [redacted] of all DMCA-compliant performances for which sellers have received payments. On this basis alone, barring special circumstances, the Yahoo! rates should be accorded significant weight.

There is another compelling reason for according the Yahoo! agreement great weight. Of all the parties with whom RIAA negotiated license agreements, Yahoo! is the only one with resources, sophistication, and market power comparable to that of RIAA.

Yahoo! is one of the world's leading internet companies. *See* Marks W.D.T. 27-28; Tr. 11384 (Mandelbrot); Panel Rebuttal Hearing Exhibit 1 at 1, 3, and 7. For the calendar year (2000) in which its license agreement with RIAA was executed, Yahoo! had net revenues of [redacted] and net income of [redacted]. Panel Rebuttal Hearing Exhibit 1 at 3. Thus, the Yahoo!-RIAA negotiation was the only one to reflect a truly arms-length bargaining process on a level playing field between two major players of comparable skill, size, and economic power.

(a) <u>Description of the Yahoo! Streaming Service</u>

In the audio streaming portion of its service, Yahoo! operates as an "aggregator" that serves as a portal for AM/FM radio stations and other webcaster sites. *See* Panel Rebuttal Hearing Exhibit 1 at 3. At the time the Yahoo! license agreement was negotiated, about [redacted] of its streaming performances were radio retransmissions[41] ("RR"), in which, pursuant to a business arrangement with an AM or FM radio station, Yahoo! transmitted that station's broadcast signal over the internet. At that time, internet-only ("IO") performances - - transmission of programming not simultaneously broadcast over-the-air by any radio station - - constituted the remaining [redacted] of Yahoo!'s transmissions. This approximate ratio was expected to continue for the next [redacted] *See* Panel Rebuttal Hearing Exhibit 1 at 5.

(b) <u>The Yahoo! Terms</u>

The pertinent terms of the Yahoo!/RIAA license agreement follow:

[41] Retransmission is defined in 17 U.S.C. §114(j)(12) to mean a further, simultaneous transmission of an initial transmission.

- An initial fee of [redacted] for the first [redacted] performances commencing retroactively to October 28, 1998; this is a lump sum payment that does not depend on the type of performance (RR versus IO) (*see* RIAA Exhibit 075 DR at § 3.1);

- After the initial [redacted] performances, the prescribed rate for IO performances is [redacted] per performance (*see id.* at § 1.11) and the rate for RR performances is [redacted] per performance (*see id.* at § 3.5.1);

- A lump-sum [redacted] payment for ephemeral recordings through December 31, 2000 and a lump-sum [redacted] payment for each subsequent renewal term (*see id.* at §§ 3.1, 3.4);

- A [redacted] lump sum fee for featured performances on non-music radio stations through December 31, 2000, plus [redacted] per year during each renewal term (*see id.* at §§ 3.1, 3.4);

- An initial term running from [redacted] (*see id.* at §§ 3.2.2, 3.2.3, 6.1.2);

- A type of MFN clause in which Yahoo! is entitled to [redacted] (*see id.* at § 3.6.1);

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- A confidentiality clause [redacted] (*see id.* at §§ 5.1, 5.2);
- A non-cooperation clause that [redacted] (*see id.* at § 3.7.3); and
- A "whereas" clause in which it is recited that approximately [redacted] of Yahoo!'s radio retransmissions are within a 150-mile radius of the originating radio station. *See id.* (introductory clauses).

Most of the performance fees paid by Yahoo! to date were paid under the undifferentiated, lump sum payment applicable to the first [redacted] performances. This payment basis continued until late 2000. *See id* at § 3.1; Tr. 11275 (Mandelbrot); RIAA Exhibit 15 RR; Webcasters PFFCL ¶ 107, n.50. That payment was the equivalent of a "blended" rate of [redacted] per performance ([redacted] performances) (*see* Tr. 11278 (Mandelbrot); Panel Rebuttal Hearing Exhibit 1 at 4; Webcasters PFFCL ¶ 107, n.51) and was explicitly so described by the parties. RIAA Ex. 137 DR at N0939. Beginning in late 2000, Yahoo! began paying fees under the differentiated rates of [redacted] per IO performance and [redacted] per RR performance. Because, in the near term, Yahoo!'s streaming activities were expected to remain at approximately [redacted] RR and [redacted] IO, Yahoo! perceived the [redacted] RR and [redacted] IO differentiated rates, for its performances in excess of [redacted], as tantamount to a blended rate of [redacted] (*see* Tr. 11279, 11292 (Mandelbrot), Panel Rebuttal Hearing Exhibit 1 at 7), and again, this was explicitly referenced during the negotiations. RIAA Ex. 137 DR at N0946. Indeed, that projection proved fairly accurate throughout the period up to the time of the hearing herein. *See* Tr. 11279, 11333, 11345 (Mandelbrot). The *total* performance fees paid by Yahoo! through August 2001, yielded an effective rate of [redacted]. *See* Webcasters PFFCL ¶ 108 n.52; Panel Rebuttal Hearing Exhibit 1 at 7.

(c) **<u>The Yahoo! Negotiation</u>**

Both the Services and RIAA agree that RIAA was highly motivated to reach an agreement with Yahoo! *See* RIAA PFFCL ¶ 123; Webcasters PFFCL ¶ 114. RIAA hoped that the news of an agreement with a "major player" would spur other webcasters to sign agreements and obviate the need for a CARP proceeding. *See id. See also* n.29, *supra*. However, RIAA was also keenly aware that any agreement with rates below its prior established benchmarks might be used against it at the CARP proceeding. *See e.g.*, RIAA Exhibit 137 DR at N11732. Accordingly, RIAA undertook two actions to protect itself against this risk. First, it insisted upon the non-cooperation clause that [redacted]. *See* RIAA Exhibit 75 DR at § 3.7.3. Second, RIAA demanded the "whereas" clause which recited that approximately [redacted] of Yahoo!'s radio retransmissions are within a 150-mile radius of the originating radio station. *See id* (introductory clauses). The significance of this clause is explained later in this section.

Naturally, Yahoo!'s primary concern, as characterized by its negotiator, was to negotiate a license agreement under which it would pay [redacted] regardless of whether its fees were expressed as a blended rate or as differentiated rates for RR and IO performances. Tr. 11299, 11255-57 (Mandelbrot). But, because [redacted] of its transmissions were RR performances, Yahoo! was willing to accept a higher IO rate in exchange for a lower RR rate in order to achieve the lowest overall effective rate for all its transmissions. *See id.* at 11253-56.

Indeed, both parties were willing to, and did, artificially raise the IO rate in exchange for artificially lowering the RR rate. *See id.* at 11256-57; 11281. This arrangement met the needs of both Yahoo! and RIAA. Yahoo! was pleased to achieve the lowest possible overall rate, while RIAA was pleased to raise the IO rate, so as to protect its .04¢ benchmark to the maximum extent possible. *See* id; Panel Rebuttal Hearing Exhibit 1 at 4; Tr. 11279-81, 11395-96 (Mandelbrot). *See also* Tr. 10237-38 (Marks); RIAA 137 DR at N14540 (Marks e-mail to negotiating committee member stating that this strategy [redacted]). Moreover, RIAA hoped that the confidentiality and non-cooperation clauses would prevent Yahoo! from later [redacted] the integrity of the [redacted] IO rate.[42] Tr. 11419, 11283-84 (Mandelbrot).

The Panel concludes that RIAA was less concerned about the lower RR rate for two reasons. First, since RIAA had not previously negotiated a license agreement with

[42] Clearly, RIAA was concerned about protecting its IO benchmark of 0.4¢ to the maximum extent possible. Early in the negotiations when a blended rate of [redacted] was on the table, RIAA expressed concerns that a stated blended rate [redacted] RIAA 137 DR at N11732. Notwithstanding, RIAA ultimately agreed to an effective (but *unrecited*) blended rate of [redacted]. *See* Section V.G.7.b., *supra; see also* Tr. 11395-96 (Mandelbrot) ("Q And was there discussion about why it was that the language was such that you not only couldn't participate, that you couldn't quote cooperate with any party opposing licensor and the CARP? A [redacted]

any webcaster that retransmitted radio signals,[43] it had no RR benchmark to protect. Second, and more importantly, RIAA clearly intended to rely upon the "whereas" clause which recited that approximately [redacted] of Yahoo!'s radio retransmissions are within a 150-mile radius of the originating radio station. *See id.* at 11409-12. Some context is required to appreciate the significance of this clause.

At the time of the Yahoo! negotiations, radio broadcasters were claiming in pending litigation that their retransmissions of their own radio signals over the internet were exempt from the copyright laws. And even if not all of their retransmissions were exempt, they argued, at least their own retransmissions to listeners *within 150 miles* of their radio stations were exempt under Section 114(d)(1)(B)(i).[44] *See* Tr. 9304-05, 10203, 10210, 10232-34, 14146-50 (Marks); Marks W.D.T. 15-16.

Naturally wishing to exploit the alleged "uncertainty" respecting these claims, Yahoo! negotiators cited them as one basis, among many, for a lower RR rate. *See id.*, Tr. 11307-08 (Mandelbrot). Understandably, they were also willing to agree to a "whereas" clause that implied that the low RR rate was somehow related to this alleged legal uncertainty respecting the 150-mile provision. In short, it cost Yahoo! nothing to accede to RIAA's insistence upon this clause. Both Yahoo! and RIAA, however, understood the obvious -- that *no uncertainty* existed as to whether any *Yahoo! retransmissions* were

[43] Subsequent to Yahoo, RIAA concluded an agreement with Cyberaxis, a small service that retransmitted a single radio station signal. *See* RIAA Exhibit 80 DR at § 1.7. This small operation [redacted]. *See id*, RIAA Exhibit 15 RR.

[44] These claims were subsequently rejected by the Librarian (*see* Order of July 16, 2001 at 5) and a federal district court. *See Bonneville Int'l, et al. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001), appeal pending. The Panel expresses no view concerning the merits of these claims. We have simply proceeded, in accordance with the Librarian's Order, to determine willing buyer/willing

exempt. *See* Tr. 11308-10; 11380-87 (Mandelbrot); 10181-83, 11380, 13853-55 (Marks). If an exemption could possibly apply to anyone, it would apply to *broadcasters* – not to third party transmitters such as Yahoo!. The only rational argument available to Yahoo! was that it would be at a competitive disadvantage should either of the alleged exemptions ultimately be validated. *See id.* Mr. Mandelbrot testified that Yahoo! understood that this argument was extremely weak and had no significant impact on the rates ultimately negotiated. *See id.* The Panel finds Mr. Mandelbrot's assertion credible and agrees that this argument did not significantly affect the negotiated rates. However, RIAA was conveniently left with the "whereas" clause, which enabled RIAA to argue before this Panel that the [redacted] RR rate reflects a "real" rate of [redacted] that had been discounted[45] to account for the alleged "legal uncertainty" at the time of the negotiation. *See e.g.*, RIAA PFFCL ¶¶ 122, 128.

(d) **Other Factors Affecting the Yahoo! Rates**

As described above, the Panel has concluded that Yahoo!'s [redacted] IO performance rate was elevated above the IO rate that the parties *would have* agreed upon, but for their agreement to lower the RR rate. Two other significant factors support an IO rate lower than [redacted] – the MFN clause and Yahoo!'s assessment of the cost of arbitrating the CARP proceeding.

The MFN entitled Yahoo! to [redacted].

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seller rates for various types of streaming, including broadcasters, based on the evidence before us.

[45] The alleged discount ostensibly reflects that Yahoo! paid only for those transmissions that were not "exempt," thereby reducing the otherwise [redacted] rate to the [redacted] RR rate.

Unlike the musicmusicmusic MFN clause that is [redacted], the Yahoo! MFN [redacted]. However, because the clause provides for the possibility of reduced royalties at some future time, it does add some indeterminate amount of value for Yahoo!.

Another significant factor relates to arbitration costs. RIAA and Yahoo! both understood that if Yahoo! had chosen to participate in this CARP proceeding, it would have been expected, as a "major player," to shoulder a significant portion of the arbitration costs. *See* Tr. 10142-45 (Marks); 111248-49, 11269-76 (Mandelbrot). Yahoo! estimated that these costs, along with lost "opportunity costs,"[46] could approach [redacted]. *See id.* at 11274-76. Naturally, Yahoo! was willing to accept inflated royalty rates if it could realize an even greater savings in arbitration costs. Of course, because RIAA was also motivated to save arbitration costs (that it would bear almost exclusively), it too was arguably willing to accept a somewhat *lower* rate if it believed settlement with Yahoo! would spur an industry-wide settlement and thereby avoid the necessity of RIAA incurring any arbitration costs.[47] On balance, however, we think the issue of arbitration costs militates in favor of Yahoo!. If Yahoo! reached agreement with RIAA, it definitively avoided arbitration costs. In contrast, if RIAA reached agreement with Yahoo!, the existence of many other unsigned licensees meant that RIAA still faced a

[46] Referring to costs associated with Yahoo! managers directing time and resources toward the CARP arbitration, rather than to developing new aspects of the business. *See* Tr. 11248-49, 11271-76 (Mandelbrot).

[47] RIAA President Hillary Rosen testified that there were really only three big players on the internet (namely, AOL, Viacom, and Yahoo!) and that RIAA's hope was that an agreement with Yahoo! would prompt the other two to follow. Tr. 559 (Rosen). Of course, it is quite unlikely that AOL and Viacom, who are as sophisticated as Yahoo! would agree to rates higher than Yahoo!'s. Thus, RIAA's goal of an "industry wide solution" really reflected a willingness to accept rates in the Yahoo! range if those could be established across the board.

substantial prospect of having to arbitrate, as indeed has happened. For this reason, we believe the concern about arbitration costs also implies somewhat *inflated* rates.

Other considerations arguably imply even further inflated rates for both RR and IO. *See* Webcasters PFFCL ¶¶ 121-27. For example, Webcasters argue that the Yahoo! agreement eliminated certain legal ambiguities for Yahoo! and provided other benefits that the statutory license does not afford. *See id.* at ¶ 126. However, it is unclear that the agreement actually resolves the legal ambiguities cited by the Webcasters. *See e.g.*, Tr. 11377-78 (Mandelbrot) (conceding that the agreement provides no more rights than permitted by the DMCA). The other alleged benefits are of minor consequence.[48]

(e) <u>**Impact of the Yahoo! Agreement**</u>

We began our discussion of the Yahoo!/RIAA agreement by noting its economic significance. First, Yahoo! accounts for both the vast majority (approximately [redacted]) of DMCA-compliant royalties paid and an even larger percentage of the number of performances transmitted. Second, this agreement also represents the results of a level playing field negotiation. Sophisticated business people with the legal and financial resources to press their interests forcefully sat on both sides of the negotiating table that produced this agreement. Indeed, the Yahoo! license agreement appears to be the sole

[48] RIAA argues that the Yahoo! rates actually reflect below-market rates based upon two factors. First, RIAA asserts that it "gambled that agreeing to a below-market rate with Yahoo would avoid the uncertainty and costs associated with a CARP proceeding." RIAA PFFCL ¶¶ 120-24. We already addressed these issues (settlement with Yahoo! obviously did not guarantee avoidance of CARP proceeding). *See* Section V.G.7. c and d, *supra*. Second, RIAA claims that it acceded to below-market rates in return for a large lump sum payment. *See* RIAA PFFCL ¶ 127. While there is obviously some value in receiving an advance payment, that value is substantially outweighed by the other factors at play. These other factors include (1) the total payments that would be due under the agreement (dependent upon the agreed rates) and (2) precedential value for the CARP proceeding. Moreover, in the voluminous record materials related to this

agreement where the rate was *not* the result of an essentially take-it-or-leave-it negotiating process. Third, the terms of this agreement provide, after the initial period, for different rates for different types of transmissions, a consideration which Section 114 (f)(2)(B) specifically directs us to employ in our rate-setting. Thus, the elements of this agreement, its economic significance, and the matching strengths of the parties who negotiated it, all support its use as the most reliable benchmark for what a willing buyer and a willing seller would agree to in the marketplace.

However, before reaching a final conclusion that the Yahoo! agreement constitutes the most representative benchmark available to us, the Panel must address one final argument. RIAA contends that three forms of corroborating evidence demonstrate that the 0.4¢ rate specified in most of the 25 non-Yahoo! agreements constitutes the most appropriate benchmark. We address this claim below.

H. RIAA'S "CORROBORATING EVIDENCE"

RIAA asserts that its proposed benchmark rates -- a performance royalty of 0.4¢ per performance plus an additional 10% ephemeral copy royalty -- are corroborated by three forms of record evidence, namely (1) 115 individual record company agreements, (2) an analysis of the standards enunciated in the *Georgia Pacific* case, and (3) an expert Economic Value Estimation. The Panel concludes that RIAA's argument is not persuasive and addresses briefly the principal deficiencies in each type of "corroborating evidence."

negotiation, the lump sum payment plays a minor role in the many evaluations exchanged both between the parties and within the RIAA Negotiating Committee.

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1. The 115 Record Company Agreements

For reasons similar to those enunciated in our critique of the Webcasters' benchmark, the Panel rejects these agreements as useful benchmarks for the Section 114 rights at issue here. While the licensees in these agreements (digital music users) are similar to Section 114(f)(2) buyers, except for the [redacted] agreement previously discussed, the record company agreements cover different rights not subject to the Section 114(f)(2) statutory license. By contrast, the 26 RIAA agreements license the precise rights at issue here. Moreover, to the extent the Panel were inclined to utilize these record company agreements, the effect would likely be to undermine, not corroborate, RIAA's proposals in that many of the agreements reflect rates below those which RIAA is proposing. For example, license agreements for [redacted] recite rates ranging from [redacted]. *See e.g.*, RIAA Exs. 90 DR - 95 DR. Yet, RIAA proposes 0.5¢ for webcasting syndication services and 0.6¢ for listener influenced webcasting services (neither are on-demand). *See* Section IV.A., *supra*.

2. The *Georgia Pacific* Analysis

RIAA expert, Dr. Robert Yerman, testified about certain criteria enunciated in the case of *Georgia Pacific v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), for the purpose of determining appropriate damages in patent infringement cases. After applying these criteria to the 26 RIAA agreements, he concluded that they generally support the rates proposed by RIAA. *See* Yerman W.D.T. 1, 5-6. The Panel agrees with Dr. Yerman's general conclusion that the 26 RIAA agreements are *potentially* compelling rate benchmarks. *See* Sections V.D. and V.F., *supra*. However, Dr. Yerman's conclusions are significantly undermined by two important factors. First, they were based solely upon a review of the text of the 26 agreements. He did not review any of the circumstances surrounding the negotiation of those agreements, as the Panel has done. *See e.g.*, Tr. 3727-29 (Yerman). Consequently, his analysis sheds no light on the weight to be accorded each agreement and really adds little to the notion (which we have already accepted) that comparable agreements are the best *potential* benchmarks.[49]

Another limitation on Dr. Yerman's analysis, as explicated by Webcasters' expert witness Prof. William Fisher (Fisher W.R.T. ¶13; Tr. 11606-07 (Fisher)), is that the *Georgia Pacific* case articulates standards for determining remedies for prior infringement. This context introduces an extraneous element, characterized as having "a punitive cast to it" (*id.* at 11606), which is not present in the non-infringement marketplace that the Panel is directed to replicate, and which undermines its usefulness for our purposes. Accordingly, the *Georgia Pacific* analysis does not, in any sense, undermine our previous reasoning.

3. **The Economic Value Estimation**

As described previously, RIAA witness, Dr. Thomas Nagle, conducted a pricing strategy analysis designed to predict the royalty rates that hypothetical webcasters would be willing to pay. He concluded that the rates proposed by RIAA are consistent with the rates he would recommend based upon this analysis. *See* Tr. 2531-32. The analysis seeks to ascertain the price that a theoretically viable webcaster would have been able to

[49] These comments apply equally to the testimony of Dr. Wildman. *See* W.D.T. (Wildman) 1, 3-5, 15-19.

afford and still remain viable at some point in the future beyond the statutory license period. *See* RIAA PFFCL ¶¶ 411-23.

As previously noted, Dr. Nagle contends that most webcasting services are not economically viable and will not survive. *See e.g.*, Tr. 13393 (Nagle); Nagle W.D.T. 5. Thus, he asserts, the current economic value of the statutory licenses must be estimated for webcasters that will operate at a "sustainable scale at this future point of viability." Nagle W.D.T. 6. That current value is determined by the price that such webcasters could afford to pay after first paying their other expenses, and retaining sufficient profit to earn "a reasonable return (which he places at 20 –30%) on their investment." RIAA Exhibit 108 DP (Dr. Nagle's analysis) at 15 - 16.[50] In essence, Dr. Nagle posits that record companies could extract every last penny from webcasters beyond the amount they needed to pay other expenses and derive such a return.

Dr. Nagle's analysis necessarily relies upon a myriad of highly questionable assumptions that appear inconsistent with foreseeable market conditions.[51] For example, Dr. Nagle assumes that the future viable webcaster will sell audio ads at $30 CPM, selling about 60% of its inventory by 2005 (his projected date of viability). *See* Tr. 2569-73. These figures appear overly optimistic. *See e.g.*, Tr. [redacted] audio ads are currently in the range of $5 to $15 with sales of less than 10% of inventory). Moreover, Dr. Nagle's estimate of projected unique listeners at the future date of viability is not based upon any reliable projection. He merely calculates the number of unique

[50] We view this allowance as quite arbitrary. If the webcasting industry represents the type of risk to investors that Dr. Nagle appears to suggest, a 20-30% return on investment may be inadequate.

[51] We recognize that some of these projections are partly based upon business plans of a few webcasting services. However, we do not regard these projections, which are intended for investors and appear to be constantly revised downward, as particularly reliable.

listeners he believes *are required* for profitability without regard to the likelihood of attracting that number of listeners. *See* Tr. 2570 (Nagle).

We conclude that Dr. Nagle's analysis does not support any particular rate level. Moreover, Dr. Nagle's analysis firmly supports use of the Yahoo! agreement as a reliable benchmark, as contrasted with the other 25 licensees, many of which have already failed the test of marketplace endurance. *See* Section V.G.2., *supra*. Accordingly, we now proceed to a determination of specific royalty rates.

I. DETERMINATION OF SECTION 114(f)(2) WEBCASTING RATES.

The Panel previously concluded that the 26 RIAA license agreements *potentially* constitute the best approximation of the hypothetical marketplace we attempt to replicate. However, the 25 non-Yahoo! agreements merit extremely little weight as benchmarks for the rates that willing buyers and willing sellers would normally negotiate in the relevant marketplace. Only the Yahoo! agreement reflects a reliable approximation of such rates in the marketplace we attempt to replicate.

As previously noted, the "bottom line" combined rate was of paramount importance to Yahoo!, but both parties also benefited from the artificially wide disparity between the RR and the IO rates. Significantly, the Yahoo! agreement also establishes that, in the actual marketplace, willing buyers and willing sellers negotiate RR rates considerably lower than IO rates. This seems eminently understandable.

The dramatically different RR and IO marketplace rates contained in the Yahoo agreement reflect essentially undisputed testimony that traditional over-the-air radio play has a tremendous promotional impact on phonorecord sales. Indeed, record companies have spent many millions of dollars over many decades to promote over-the-air play of their releases. *See, e.g.*, Tr. 530-33 (Rosen), 937-52 (Altschul), 1150-53 (Ciongoli), 1783-85 (Wilcox), 2412 (Kenswil), 5717 (Fine), 5886 (Donahoe), 7657 (S. Fisher). Also, endorsements from familiar, trusted radio station DJs are a key element in promoting sales. McDermott W.R.T. 4; Tr. 7709-10 (S. Fisher). To the extent that internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional impact is any less. Tr. 5894-95, 6002 (Donahoe); *see also* Tr. 12861 (McDermott). This factor was likely considered by RIAA and Yahoo!, and is evidently reflected in the resulting difference between RR and IO negotiated rates. Apparently, RIAA concerns about displacement of CD sales from internet performances do not apply equally to retransmissions of radio broadcasts. *See, e.g.*, Tr. 1112-15 (Katz); *see also* Jaffe W.R.T. 41-42.

In any event, the Panel's task is now clear. If the Yahoo!/RIAA agreement is to be used as a benchmark for determining the hypothetical marketplace rates, we must adjust downward the IO rate to offset the inflationary factors previously identified in Section V(G)(7)(c) and (d), and we must adjust upward the RR rate.

1. <u>The Internet-Only Webcasting Rate</u>

The Panel's analysis implies a willing buyer/willing seller marketplace rate somewhere between [redacted] (the artificially high IO-only rate) and the effective or blended rates. In the absence of compelling reasons to do otherwise, we select the midpoint[52] in that range as the approximate marketplace rate for IO performances.[53] In order to make this calculation, we must select which of the three effective or blended rates ([redacted]) to use as the endpoint. *See* Section V.G.7.b., *supra*.

The [redacted] effective rate is the least significant. This rate was never negotiated, nor even discussed by the parties. It merely reflects an historical fortuity that resulted from the particular mix of IO and RR performances that occurred from the effective date of the license agreement through an arbitrary date for which data was available.

However, respectable arguments can be made for use of either the [redacted] or [redacted] rates as endpoints. On balance, we find the rationale for using [redacted] to be more persuasive. The [redacted] blended rate constitutes the precise per-performance rate negotiated by the parties for the first [redacted] performances. It is also the precise fee actually paid for each performance and the rate under which the majority of Yahoo! performances were paid. By contrast, the [redacted] blended rate merely represents the parties expectation of the rate that *would* effectively be paid *if* the ratio of RR to IO

[52] Selection of a midpoint within a "zone of reasonableness" constitutes rational ratemaking. *Cf. National Cable Television Assoc. v. Copyright Royalty Tribunal*, 724 F.2d 176, 182 (DC Cir. 1983) ("ratemaking is an intensely practical affair...[that] necessarily involves estimates and approximations...that...lie within a zone of reasonableness" (internal quotation marks and citations omitted)).

[53] We note Webcasters' assertion that the Yahoo! agreement should not serve as a benchmark for webcasting because Yahoo!'s primary business model is *not* webcasting. *See* Webcasters PFFCL ¶¶ 101, 135. This argument has little merit. Webcasters consist of a diverse community of services, all utilizing streaming, but comprise a range of different business models including many services whose primary business model is not webcasting. *See e.g.*, Webcasters PFFCL ¶ 3; RIAA PFFCL ¶ 127. The Panel is aware of no substantial evidence that Yahoo! is not comparable to other webcasters for purposes of rate setting. And the fact that Yahoo! is an aggregator is similarly inconsequential. No party hereto has argued that agreements with aggregators are *per se* inappropriate as rate benchmarks for other basic webcasters, and we are aware of no record support for such an assertion.

performances remained at precisely [redacted]. This projection proved fairly accurate (but not precisely so) throughout the period up to the CARP proceeding. *See* Tr. 11279, 11333, 11345, 11402 (Mandelbrot). Moreover, both parties expected the ratio to decline over time, thereby yielding a slightly higher effective rate. *See* Tr. 10196-97 (Marks). Finally, selecting the [redacted] rate rather than the [redacted] rate gives some minimal weight to the higher rate, non-Yahoo! RIAA (and [redacted]) agreements. We believe this constitutes all the weight those agreements should be afforded.

The midpoint between [redacted] and [redacted] is 0.14¢ (rounded to the nearest hundredth cent). Accordingly, in the absence of persuasive contrary evidence, the Panel concludes that in the hypothetical marketplace, the Section 114(f)(2) performance royalty rate which willing buyers and willing sellers would normally have negotiated is 0.14¢ per performance for basic (business-to-consumers) webcasting services.

2. <u>The Radio Retransmissions Rate</u>

The Panel applies the same methodology to determine the appropriate RR rate. Our analysis implies an actual willing buyer/willing seller marketplace rate somewhere between [redacted] (the effective rate actually negotiated and paid by Yahoo! for the first [redacted] IO and RR performances) and [redacted] (the artificially low RR rate). In the absence of compelling reasons to do otherwise, we similarly select the midpoint[54] of 0.07¢ (again rounded to the hundredth cent) as the rate which most clearly reflects the performance

[54] The reader should not infer from this methodology that Yahoo! and RIAA necessarily agreed to artificially lower the RR rate by 50% and concomitantly raise the IO rate proportionally. Our analysis takes account of the other factors identified in addition to the artificiality factor. In each instance we select midpoints because we are unaware of record evidence that would lead us to another result.

rate which willing buyers and willing sellers would have commonly negotiated in the hypothetical marketplace.[55]

J. SECTION 114(f)(2) RATES FOR OTHER WEBCASTING SERVICES

We have determined the Section 114(f)(2) performance rates for basic business to consumer ("B2C") webcasting services and for webcasting services that retransmit radio broadcasts. In this section we consider rates for other categories of webcasting services.[56]

1. "Business to Business" Webcasting Services ("Syndicators")

RIAA claims that business to business ("B2B") webcasting services, where transmissions are made as part of a service that is syndicated to third party web sites, should pay a higher rate than B2C webcasters. The syndicator creates "branded" internet radio-like stations for third-party sites that appear to the user as, for example, "Eddie Bauer Radio" or "Bolt Radio." *See* Griffin W.D.T. 16-17; Tr. 1284-92 (Griffin), 7477-79 (Moore). The programming can be customized to the demographics of the sites' customers. *See* Tr. 14069-77 (Marks); Marks W.D.T. 16-17. And due to the limitation

[55] The Panel notes that the rates we have determined (0.07¢ for radio retransmissions and 0.14¢ for internet-only transmissions) are quite close to the rates [redacted]. *See* RIAA Ex. 137 DP at N945-46. At other points in the negotiation, RIAA also indicated [redacted] (RIAA Ex. 137 DR at N11721, 14544) [redacted] (*see id.* at N11732). This evidence suggests that our rates are well within a reasonably narrow range which includes rates [redacted].

[56] Of course, there are numerous possible categories of webcasting services -- limited only by one's imagination. In this discussion, we address only categories for which we believe the record *arguably* supports a separate rate.

set forth under Section 114(j)(6),[57] some third-party sites might not be eligible to offer webcasting without the services of a syndicator. *See* Tr. 14069-77 (Marks). In many respects, the syndicator is analogous to the business establishment music services that provide music in traditional brick and mortar stores.[58] *See* RIAA PFFCL ¶ 282; Moore W.R.T. 2. RIAA cites Websound, MoodLogic and OnAir.com as RIAA licensees that exemplify syndicators. See RIAA PFFCL ¶ 285.

Webcasters respond that, regardless of the type of service, "the nature of the public performance is the same; and the value of the performance does not change *merely* because of the technology of the webcaster or the fact that the sound recording is heard when it is accessed at a third-party web site rather than the originating webcasters' web site." Webcaster PFFCL ¶ 297 (emphasis added). In any event, the central question is whether the record supports a higher rate for B2B services based upon an application of the willing buyer/willing seller standard. We conclude that it does not.

We acknowledge that a few syndicators (that syndicated or intended to in the future) signed license agreements with RIAA containing rates above the predominant rate of 0.4¢. *See* RIAA Ex. [redacted]. However, a far greater number of agreements that permit syndication provide rates near or below the predominant 0.4¢ rate. *See* RIAA Exhibit [redacted]

[57] Under the definition of "eligible nonsubscription transmission," the primary purpose of the transmitting service must be to provide to the public "audio or other entertainment programming." 17 U.S.C. § 114(j)(6).

[58] Interestingly, business establishment music services are exempt from paying *any* performance fees. *See* 17 U.S.C. § 114(d)(1)(C)(iv).

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[redacted]. Of course, the agreement worthy of the most weight is the Yahoo! license. In sum, we find insufficient record evidence to support a separate rate for syndicator services and conclude accordingly that such performances shall be at a rate of 0.14¢ per performance.

2. **<u>"Listener-Influenced" Services</u>**

RIAA maintains that so called "listener-influenced" services are ineligible for the Section 114 statutory license and urges the Panel *not* to set a royalty rate for such services. RIAA PFFCL ¶ 226. However, if the Panel feels compelled to do so, RIAA submits that the rate should be set at 0.6¢ per-performance. RIAA PFFCL ¶ 227.

RIAA defines listener-influenced services (also referred to as "personalized services") as "those that allow their listeners some control over the programming they receive through the rating of artists, albums or songs, as well as providing listeners with a skip forward to the next song." RIAA PFFCL ¶ 286. Although the listener will not know which song will be coming next, by supplying ratings and using the skip feature, the listener has more control over the songs heard than a listener of a basic genre-based webcasting service. *See id.* Because RIAA deems most listener-influenced services as ineligible for the Section 114 statutory license (*see* notes 1 and 15, *supra*), and because RIAA is not permitted to negotiate as a common agent for non-statutory Section 114 licenses, it does not rely upon the 26 agreements as benchmarks for setting rates for such services. Rather, it relies upon several agreements between record companies and non-DMCA-compliant services.

The Panel's sentiments respecting services that offer listener influence are similar to those expressed respecting syndicators. While RIAA may believe that listener-influenced services displace demand for sales of their phonorecords (*see e.g.*, Tr. 1508-12 (Griffin)), there is no empirical evidence before us to confirm this belief. And RIAA's reliance upon agreements with non-DMCA compliant license agreements is unavailing. By definition, these license agreements grant rights beyond those conferred by the relevant statutory license. One would expect a rate premium for such additional rights. We also note that RIAA has reached agreements with several licensees that offer listener influence at rates consistent with its predominant rate (without premium). *See e.g.*, RIAA Exhibit [redacted] Tr. 9354-57 (Marks), [redacted].

Finally, the Panel cannot imagine how one would meaningfully draw the line between those services eligible for the basic webcasting rate and those that would be subject to a separate rate for listener-influenced services. Indeed, neither side has adequately described such a line of demarcation. We conclude that so long as a service complies with, and is deemed eligible for the statutory license, it should not pay a separate rate based upon listener influence.[59]

[59] Of course, we do not interpret the Librarian's Order of July 16, 2001 as compelling us to set a separate rate for listener-influenced services if we conclude, as we have, that the record does not support one.

K. ROYALTY RATES FOR COMMERCIAL BROADCASTERS

1. Introduction

Commercial broadcasters are FCC-licensed radio stations. Some currently operate, and others contemplate operating, services which simultaneously stream (retransmit) their over-the-air broadcasts via the internet. These streamed retransmissions are known as "simulcasts." *See, e.g.*, Proposed Definitions of RIAA, February 12, 2002 at 16. Some broadcast stations also offer "archived" programming, "side channel" programming, and "substituted" programming. *See* Section K.5. *infra*. The Panel must determine what rates to set for these various transmissions.

2. Procedural History

As previously noted, this proceeding was suspended for the period November 9, 2001 through December 2, 2001, to allow the parties an opportunity to pursue additional settlement negotiations. *See* Section II.D., *supra*. The negotiations resulted in a confidential settlement agreement between NPR and RIAA, and an accord respecting the great majority of the non-rate terms. *See id.* Commercial Broadcasters also reached a *tentative* settlement with RIAA. However, the settlement was contingent upon the agreed rates remaining confidential until after the Panel rendered its Report respecting non-broadcasters. *See* Request to Withdraw Issues from CARP, December 14, 2001. This contingency presented special challenges because, unlike the NPR/RIAA private agreement, which settled all matters among a finite class of services, the broadcaster/RIAA agreement affected only the signatories. *See* Order of December 20, 2001. The Panel remained obligated to set rates and terms for non-signatory broadcasters. Despite multiple, creative attempts by the Copyright Office and the parties to fashion a mutually acceptable procedure that preserved the required confidentiality, no agreement could be concluded. Accordingly, the Librarian directed the Panel to determine rates and terms for Commercial Broadcasters. *See* Order of January 7, 2002.

3. **Positions of the Parties**

RIAA urges the Panel to adopt the very same rate for commercial broadcaster streamers as the rate it proposes for B2C IO webcasting. *See* RIAA PFFCL (Broadcasters) ¶ 1. RIAA maintains that no record evidence leads to a different result, and that the Services' fee model should be rejected for all of the reasons previously discussed. *See id* ¶¶ 1-11.

Broadcasters note that broadcasters represent more than 1500 of the 2300 entities which filed Notices of Intent to use the statutory license. *See* Broadcasters PFFCL ¶ 33; Marks W.D.T. n.2. They argue that the fact that RIAA was able to negotiate agreements with only 26 webcasters, but with none of the 1500 broadcasters, demonstrates that broadcasters and webcasters represent different groups of "willing buyers," which would negotiate different rates in the marketplace. *See* Broadcasters PFFCL ¶¶ 27, 33; Tr. 7660-61 (S. Fisher).

4. **Determination of Commercial Broadcaster Rates**

With respect to webcasters, we previously stated that if we can observe agreements that willing buyers and willing sellers *actually negotiated* in the relevant marketplace, we would generally expect their negotiated rates to already reflect the parties' joint perceptions of the various factors identified in Sections 114(f)(2)(B) and 112(e)(4). In that event, no further rate adjustment would generally be required to determine a willing buyer/willing seller rate. Although no party has adduced a single digital sound recording performance license agreement with any radio broadcaster, the Yahoo!/RIAA agreement entails retransmissions of the same types of radio stations signals, albeit by a third party – Yahoo!. The Panel has already determined that the typical willing buyer/willing seller rate for that RR rate is 0.07¢ per performance. The Panel must now decide whether the record suggests a different rate for retransmission of an identical radio signal by the *station itself* -- rather than by a third party. We find the record (and consideration of the statutory factors) utterly devoid of evidence implying a *higher* rate and *insufficient* to warrant a lower rate.

Regarding the displacement of record sales, Section V.I. above discusses the extensive record evidence regarding the promotional effect of radio airplay. Some record evidence also suggests that record companies are less fearful of simulcasts by *both* broadcasters and third parties -- as contrasted with conventional multi-genre webcasting. *See e.g.* Tr. 1112-15 (Katz) (these streaming activities constitute the "safer end" of the spectrum warranting a lower rate). This implies a lower rate than the webcaster performance rate, for *both* broadcasters and third party retransmitters. However, we find no record evidence suggesting a different rate *as between* broadcasters and third party retransmitters.

Though not explicitly argued by any party, several other rational arguments could be advanced in favor of a *lower* rate for broadcasters *vis-à-vis* those third-party retransmitters which also aggregate stations (such as Yahoo!). First, third-party aggregators like Yahoo! aggregate hundreds of radio stations on their portal sites. This arguably provides the listener with a more satisfying listener experience than derived from a traditional broadcast radio dial. One might then contend that third-party aggregators derive more value from the sound recordings than do broadcasters that merely retransmit their own signals. Second, aggregators might arguably pay more to buy access to new, wider audiences than broadcasters would pay to stream to people who were already their listeners. And third, aggregators who have to pay a performance royalty to stream to all of their listeners might arguably pay more than broadcasters who have never paid any performance royalty during decades of broadcasting experience. In the final analysis, however, there is no record basis to quantify any possible difference in value due to these factors. Stated differently, the Panel does not and cannot know whether these arguments would impact the rate negotiated by a willing buyer and willing seller, or to what degree.

RIAA continues to press its contention that the Yahoo! RR rate is an inappropriate benchmark because it reflected alleged legal uncertainties surrounding the retransmission of broadcast signals. *See* RIAA PFFCL (Broadcasters) ¶ 14. We have already addressed this issue and confidently concluded that these alleged "exemptions" were "red herrings" that did not affect the negotiated rates. *See* Section V.G.7.c. and text accompanying n.44 *supra*. If at some future date, broadcasters were to prevail on their 150-mile exemption claim, we assume the courts would fashion a method of appropriately reducing the royalty to exclude listeners within that area. Contrary to RIAA's claim (*see* RIAA PFFCL (Broadcasters) ¶ 18), such reduction would *not* constitute a "double counting of the 150-mile exemption" because we have made the factual finding that the alleged exemption was *not* factored into the Yahoo! RR rate. *Id.*

In sum, the Panel finds no reason to set a different rate for broadcasters (that simulcast their own signals) than for third parties that retransmit the same signals on behalf of the broadcasters. Accordingly, we determine the willing buyer/willing seller commercial broadcaster rate also to be 0.07¢ per performance.

5. <u>**Archived Programming, Side Channels, and Substituted Programming**</u>

A broadcaster's steaming activity may involve making available to listeners previously-aired ("archived") radio programming, internet-only programming on their web sites ("side channels"), and/or "substituted programming" that is streamed whenever a broadcaster lacks authorization to stream a portion of the over-the-air programming.[60] *Cf.* Tr. 8556-67 (Davis); 5467-68 (Halyburton); RIAA Exhibit 140 DP-X.

The record is devoid of direct evidence of the willing buyer/willing seller rate for archived radio retransmissions. But the Panel must resolve *which* rate, of those we have already determined, should apply to these retransmissions – the 0.07¢ RR (and commercial broadcaster) rate, the 0.14¢ IO rate, or some other rate.

As part of their contingent settlement agreement discussed above, Broadcasters and RIAA evidently resolved all issues respecting archived programming, side channels, and substituted programming. *See* Proposed Terms filed on December 20, 2001, at ¶ 1(e) (setting forth definitions that would apply to the settlement). Broadcasters assert that, although the settlement has not been effectuated, the jointly submitted, proposed terms remain binding on all parties. *See* Broadcasters PFFCL ¶ 1, n.1. And these agreed terms contain a definition of AM/FM streaming that includes transmissions of certain archived

[60] For example, a professional sports franchise might conceivably license a radio station the rights to broadcast an event over-the-air, but withhold the rights to simulcast the event over the Internet.

programming, side channel programming, and substituted programming. *See id*; Proposed Terms of December 20, 2001, at ¶ 1(e). Accordingly, Broadcasters implicitly claim that these transmissions should be encompassed within the royalty rate set for commercial simulcast transmissions. *See id.* RIAA vehemently disagrees and contends that that definition was rendered moot when the settlement agreement was discarded. *See* Copyright Owners Submission Explaining Proposed Terms of February 1, 2002, at 2-4. The Panel fully agrees with RIAA. The definition of AM/FM streaming is so inextricably linked to the contingent settlement, it has lost all value for purposes of rate-setting. *See also* Section VII.C.1., *infra.*

In accordance with our previously articulated reasoning, the best benchmark for determining royalty rates for the transmission of archived programming, side channel programming, and substituted programming, is the Yahoo!/RIAA license agreement. That agreement provides compelling record evidence of two willing buyer/willing seller rates: (1) a rate for internet retransmissions of AM/FM broadcasts (RR rate); and (2) a rate for all other internet transmissions. The former is significantly lower than the latter. This apparently reflects marketplace assessment of the various promotion and substitution effects, along with myriad other factors.

The Yahoo!/RIAA license agreement defines a radio retransmission performance as [redacted] RIAA Ex. 75 DR at §1.16. The term "retransmission" is not further defined. Therefore, in the absence of contrary record evidence, the Panel adopts the definition of that term as set forth in 17 U.S.C. §114, namely "a further transmission of an initial transmission … if it is *simultaneous* with the initial transmission." 17 U.S.C. § 114(j)(12) (emphasis added).

Accordingly, absent contrary evidence, the Panel concludes that the Yahoo! RR rate applies only to *simulcast* transmissions and does not include archived transmissions, side channel transmissions, or transmissions containing substituted programming. Consistent with this approach, the Panel declines to include these transmissions within the 0.07¢ RR rate adopted for commercial broadcaster retransmissions. As RIAA correctly maintains, archived transmissions, side channel transmissions, and transmissions containing substituted programming, are essentially webcasting. *See* RIAA PFFCL (Broadcasters) ¶¶ 21-25; Proposed Definitions of RIAA of February 12, 2002 at 19. The Panel finds no record evidence warranting a separate rate for these transmissions and, therefore, adopts the 0.14¢ IO rate.

Indeed, the Panel determines that the 0.07¢ performance rate applies only to simulcast transmissions. *All* other transmissions are subject to the 0.14¢ performance rate.

L. ROYALTY RATES FOR NON-CPB AFFILIATED, NON-COMMERCIAL BROADCASTERS

At the outset of this Report, we noted that NPR has reached a private settlement with RIAA respecting webcasting by public broadcasters represented by NPR. *See* n.2, *supra*. However, NPR represents only itself, its member radio stations, and non-member radio stations which are eligible to receive federal funding from the Corporation for Public Broadcasting ("CPB"). *See* Murdoch/Woodbury W.D.T. 2. NPR does *not* represent the universe of non-commercial radio stations that are non-CPB affiliated.

Accordingly, the Panel must decide whether the existing record warrants a separate rate for webcasting by these non-commercial radio stations.[61]

Applying the same commercial broadcaster rate to non-commercial entities affronts common sense. A predecessor panel observed that, while commercial broadcasters can pass along some portion of their costs to their advertisers, "[n]o comparable mechanism exists for Public [non-commercial] Broadcasters." RIAA Exhibit 220 DP-X at 24 (CARP Report adopted by Library, Noncommercial Education Broadcasting Rate Adjustment Proceeding, 63 FR 49823). Unlike commercial broadcasters, "programming costs are not automatically accommodated through market forces. Contributions from government, business, and viewers remain voluntary." *Id.* "For these reasons, commercial rates almost certainly overstate fair market value to Public Broadcasters." *Id.* That panel concluded that "commercial license rates can *not* appropriately be used as a benchmark to determine Public Broadcasters' rates." *Id.* at 29 (emphasis in original).

Unfortunately, determination of the willing buyer/willing seller fees for non-CPB affiliated, non-commercial radio stations ("non-CPB broadcasters") presents an extraordinary challenge. Despite admonitions to all counsel from the Panel as early as September 7, 2001 (well prior to the rebuttal phase), the record remains virtually barren respecting such broadcasters. *See* Tr. 9009-13. The record tells little about those non-

[61] Non-commercial radio stations are those that meet the definition of public broadcasting entities found at 37 C.F.R. § 253.2.

CPB broadcasters that are represented by the NRBMLC,[62] and virtually nothing about those that are not.[63]

NRBMLC struggles mightily to quantify a proposed rate founded in record evidence. It urges the Panel to base non-commercial broadcaster rates upon the flat fees currently paid to the PROs for their over-the-air musical works performance rights, as set forth in 37 C.F.R. §§ 253.5(c), 253.6(c). *See* NRBMLC PFFCL ¶¶ 20-24. Putting aside our hesitancy to utilize over-the-air musical works performance rates as a proxy for webcasting sound recording performance rates, those fees were settled pursuant to joint proposals that are not part of this record. We do know, however, that those rate proposals were

> made on a nonprejudicial and nonprecedential basis. Therefore, the Librarian recognizes that the joint proposals do not reflect any assessment by any of the parties of the absolute or relative value of the right of the performance of music in the ASCAP, BMI or SESAC repertory by college radio stations .... [and] community radio stations.

62 Fed. Reg. 63502, 63504 (December 1, 1997). *See also* RIAA Exhibit 220 DP-X at 21-22 (CARP Report adopted by Library, Noncommercial Education Broadcasting Rate Adjustment Proceeding, 63 FR 49823) (Panel concluded that voluntary agreements containing "no-precedent clauses" are highly suspect as rate benchmarks, requiring an examination of the "totality of circumstances"). Absent a rigorous examination of the

[62] A party to this proceeding, the National Religious Broadcasters Music License Committee ("NRBMLC"), apparently represents a certain subset of the non-CPB broadcasters (although the record does not reflect the size of that subset), as well as many commercial broadcasters. In that capacity, they filed Proposed Findings of Fact and Conclusions of Law ("NRBMLC PFFCL") concerning this issue. *See* NRBMLC PFFCL ¶ 1.

[63] The only witness presented by NRBMLC was Joe D. Davis, Senior Vice President for Salem Communications – a very profitable commercial company traded on the NASDAQ exchange that owns 85 radio stations, a network, a media company, and an internet company. *See* Tr. 8540-44,

agreements that led to adoption of the rates set forth in Part 253, *supra*, this Panel must decline to adopt those rates as a benchmark.

NRBMLC attempts to bolster its proposal by citing the testimony of Dr. Murdoch, who testified on behalf of NPR. At the request of the Panel, Dr. Murdoch reluctantly[64] attempted to establish the ratio of fees currently paid by NPR to the PROs, as compared to the fees that NPR stations *would* pay the PROs if they were commercial radio stations. *See* Murdoch W.R.T. 6-10. Dr. Murdoch concluded that *if* the Panel insisted upon using "a commercial fee rate expressed on a *revenue* basis ... as a starting point for setting [*NPR*] website fees, it would be appropriate...to reduce the commercial fee rate by 90% to determine the fee rates to be paid by [*NPR*] webcasters." *Id* at 9 (emphasis added). Again putting aside the Panel's serious concerns about (1) using over-the-air musical works performance rates as a proxy for webcasting sound recording performance rates, and (2) using NPR as a proxy for non-CPB Broadcasters, Dr. Murdoch candidly conceded other problems that render her strained conclusion "fraught" with problems. *See id* at 9-10. For example, she explains that, should the Panel set commercial rates on a percentage of revenue basis (which we have not), identifying a public radio station's revenue attributable to music webcasting would be "exceedingly difficult." *Id.*at 9. And

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8574-84. Davis works with Salem's radio stations -- not the internet company -- and his testimony about non-commercial stations was primarily anecdotal. *See* Tr. 8542, 8554-55.

[64] Citing the Noncommercial Education Broadcasting Rate Adjustment Proceeding CARP, Dr. Murdoch opined that "the complexities of deriving fees for public broadcasters from benchmark fees for commercial broadcasters are not trivial, and are best avoided in situations where a public broadcasting benchmark exists.... Nonetheless, in response to the Panel's specific request, we have identified the nature of the adjustments that the Panel would need to recognize to derive a fee for public radio webcasters from a commercial webcaster benchmark." Murdoch W.R.T. 7.

if the Panel adopted a per-performance fee metric for commercial broadcasters (as we have),

> the adjustment to arrive at a [per-performance rate]…for public radio websites is less clear due to the limitations of information available to us. A problem in identifying the correct adjustment factor arises because the discount rate that we were able to calculate compounds a music use adjustment factor and a noncommercial adjustment factor. The per-[performance] … rate requires the adjustment for the noncommercial nature of public radio websites but does not require the adjustment for public radio's less-intensive music use. The Panel would find it necessary to deconstruct the 90 percent discount factor we have identified.

Id. at 10. Moreover, it appears that the revenue figure used in Dr. Murdoch's calculations was improperly inflated by the inclusion of revenue from non-CPB broadcasters and by revenue of NPR itself (which is not a radio station entity). *See* RIAA RPFFCL (re non-CPB broadcasters) ¶ 17. *See also* RIAA PFFCL (re Broadcasters) ¶ 42. In sum, the Panel must reject both approaches advanced by NRBMLC.

RIAA's methodology also suffers infirmities. Absent record evidence supporting a particular rate for non-CPB broadcasters, RIAA "borrowed a ratio" from the Noncommercial Education Broadcasting Rate Adjustment Proceeding CARP Report, *supra*. *See* RIAA PFFCL ¶¶ 237. RIAA maintains that the panel awarded ASCAP and BMI approximately one-third of the sum they had requested as a royalty fee for the Section 118 public broadcasting compulsory license, and ASCAP and BMI had based their request on royalties paid by commercial broadcasters. Based upon this ratio, RIAA is "willing to offer" non-CPB broadcasters a two-thirds discount from the commercial broadcaster rate.[65] *See* RIAA PFFCL (re Broadcasters) ¶ 44. Otherwise, RIAA contends,

[65] The RIAA offer is silent as to NRBMLC's request for the fee to include (1) substituted programming (where the station lacks the rights to transmit certain over-the-air programming via the internet), (2) previously aired archived programming, and (3) up to two side channels

the record reflects that non-CPB broadcasters "should pay the same royalty rates that apply to ... commercial broadcasters." *Id.* Given the state of the record, the Panel reluctantly would have to agree. Absent record evidence to support a differentiated rate, should the Panel decline RIAA's offer, non-CPB broadcasters would be subject to the commercial rate.

Accordingly, rather than subject the non-CPB broadcasters to the commercial rate, the Panel hereby accepts RIAA's invitation[66] to set a rate for non-CPB broadcasters at a rate which is one-third of the commercial broadcaster[67] rate of 0.07¢ per-performance. Rounded to the nearest hundredth of a cent, the derived rate equals 0.02¢ per-performance.

In accordance with the Panel's findings respecting the commercial broadcasters, we determine that this rate of 0.02¢ should not apply to archived radio broadcast programming *subsequently* transmitted via the internet. Nor should it apply to transmissions of substituted programming. The 0.02¢ rate applies only to simulcasts -- retransmissions under 17 U.S.C. § 114(j)(12). However, consistent with RIAA's one-

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consistent with and in furtherance of the educational purpose of the station. *See* NRBMLC PFFCL ¶ 40; RIAA PFFCL (re Broadcasters) ¶¶ 44-52.

[66] We assume that in a willing buyer/willing seller negotiation, the negotiated rate would be no higher than the rate "offered" herein by RIAA.

[67] Curiously, one week prior to the deadline for submission of this Report, RIAA asserted that their offer was not intended to be interpreted as one-third of the rate determined by the Panel for commercial broadcasters, but rather "one-third of the rate adopted for Webcasters." Proposed Definitions of February 12, 2002 at 14, n.6. This claim defies logic. Both the Panel and the Services plainly understood the offer as referring to the commercial broadcaster rate. *See id.* Indeed, we invite RIAA to review its initial offer: "Copyright Owners are willing to accept a rate for Noncommercial Broadcasters that is no less than one-third of the rate paid for commercial *broadcasters.*" Reply of Copyright Owners and Performers to Non-CPB Entities (December 18, 2001) at 3 (emphasis added). The Panel declines to modify its position based upon RIAA's eleventh hour assertion.

third offer, and its implicit recognition that non-commercial broadcasters should not be subject to commercial rates, transmissions of archived programming and substituted programming shall be subject to a rate of one-third the commercial IO rate of 0.14¢. Again rounded to the nearest hundredth of a cent, the derived rate equals 0.05¢ per performance.

Respecting side channel transmissions, these obviously do not qualify for the simulcast rate. In accordance with our reasoning, these transmissions would also be subject to the 0.05¢ per performance rate (one-third of the commercial IO rate of 0.14¢). However, the Panel accepts as appropriate the limitations proposed by NRBMLC. *See* n.65 *supra*. These limitations were proposed by NRBMLC (*see* NRBMLC PFFCL ¶ 40) apparently in recognition that allowing unlimited side channels could permit non-CPB broadcasters to essentially become commercial webcasters.

In summary, the Panel determines the performance royalty rate for non-CPB broadcaster retransmissions (simulcasts) to be 0.02¢ per performance. The rate for transmissions of archived programming substituted programming, and transmissions of one or two side channels of programming, consistent with the educational mission of the station, shall also be 0.05¢ per performance. The rate for transmissions on any side channels beyond the two shall be the same as the commercial non-simulcast rate, i.e., 0.14¢ per-performance.

M. THE MINIMUM FEE FOR WEBCASTING SERVICES

Both Sections 114(f)(2)(B) and 112(e)(4) direct us to set a minimum fee for each type of service. Because the Panel is setting a Section 114 rate (and concomitantly a Section 112 rate) that is based upon the number of performances that a service transmits, rather than a percentage of revenues generated by the service, the issue of minimum fees is of lesser significance. *See* Marks W.D.T. 17-18. RIAA was rightfully concerned that a start-up service with little revenues could transmit a large volume of performances, but pay very little in royalty fees, if fees were based upon a percent-of-revenue model. *See id.*

The Panel concurs with the Services that one purpose of the minimum fee is to protect against a situation in which the licensee's performances are such that it costs the license administrator more to administer the license than it would receive in royalties. *Cf.* Jaffe W.R.T. 31; Tr. 12387 (Jaffe). Another arguable purpose is to capture the intrinsic value of a service's *access* to the full blanket license, irrespective of whether the service actually transmits any performances. *See* RIAA RPFFCL ¶ 249. Whichever the purpose of the minimum fee requirement, the Panel believes that the lowest fee negotiated by RIAA under the per-performance fee model would necessarily cover the perceived administrative costs and the value for access to the blanket license. This belief is premised upon one fundamental assumption -- that a sophisticated and experienced negotiator, such as RIAA, would not negotiate a minimum fee that would expose it to a loss. We are quite comfortable with this assumption. Accordingly, we adopt the minimum fee prescribed in the [redacted] license agreement of $500 per annum,[68] which covers both the Section 114 license and the Section 112 license. *See* [redacted]. Our reliance upon the minimum fee prescribed in the [redacted] license agreement is in no way inconsistent with our prior decision to accord virtually no weight to that agreement with respect to the per performance fee. As previously explained, [redacted] is one of a large number of licensees that never

[68] This minimum fee appears to be generally comparable to the combined minimum fees set by other collection agencies such as the PROs. *See* Webcasters PFFCL ¶¶ 363-64.

paid royalties pursuant to the performance rate structure. It merely paid pursuant to the minimum fee requirements.

Accordingly, we apply this minimum fee to all webcasting services. Each statutory licensee is required to pay a minimum license fee of $500, payable as a non-refundable advance against future royalty fees in that year, due upon the first monthly payment of each year. And in accordance with the [redacted] license agreement, the minimum fee shall *not* be prorated based upon the date paid, but shall be due in full for any calendar year in which a service holds a statutory license.

N. SECTION 112(e) EPHEMERAL RECORDING RATES FOR WEBCASTING SERVICES

1. The Nature of Ephemeral Copies

Ephemeral copies of digital recordings, as addressed in §112 of the Copyright Act, refer to temporary copies of sound recordings made to enable or facilitate the digital transmission of such recordings. These may include, for example, multiple copies made to sit on multiple hard drives or servers, or copies configured differently to facilitate streaming at different bitrates and "codecs." Zittrain W.D.T. 2-6, 12; Tr. 4588 (Porteus); Porteus W.D.T. 12; Pearson W.D.T. 9-10; Wise W.D.T. 9; Juris W.D.T. 7; Roy W.D.T. 8; Moore W.D.T. 5; Tr. 6555-56 (Jaffe). Webcasters and broadcasters may use a single ephemeral copy in the streaming process without charge. 17 U.S.C. §112(a)(1). The creation or use of multiple ephemeral copies, however, is subject to a statutory license. One part of this Panel's responsibility is to set a royalty rate for the use of multiple ephemeral copies by webcasters and broadcasters. §112(e)(4). The royalty rate for the use of ephemeral copies by Business Establishment services is determined in Section VI of this Report.

The record establishes that ephemeral copies are integral to most digital performance streaming, but the testimony is contradictory regarding whether ephemeral copies have independent value apart from, or because of, their use in the streaming process.

2. The Value Of Ephemeral Copies

(a) The Services' View

As throughout this proceeding, the Panel is offered two contrasting views regarding what the appropriate analysis should be. The Services urge the Panel to adopt economic analysis reasoning, primarily by Professor Jaffe, while the Copyright Owners and Performers urge that the appropriate guidance is to be found in the 26 agreements negotiated between RIAA and its licensees.

Services witnesses argue that, because the only purpose of ephemeral copies is to facilitate licensed public performances, they have no economic value separate or distinct from the value of the performances they effectuate. Jaffe W.D.T. 52-54; Tr. 6556 (Jaffe). Because the payment of the performance royalty has already compensated the copyright owner for the full value of the public performance, according to this logic, paying any additional amount for the ephemeral right would constitute an inappropriate double payment. Tr. 3904 (Fisher). Arguing by analogy, ephemeral copies should be seen as similar to car keys, which are used to start and operate an automobile. See Jaffe W.D.T. 54. Although they are necessary for operation (except possibly for "hot wire" specialists), their "value" is included in the overall purchase price paid for the car.

Similarly, appropriate royalty payments for performance rights include payment for incidental ephemeral rights. Designating any separate value for an ephemeral right is thus arbitrary, and any amount so set should be subtracted from the royalty rate for the performance right in order to keep the combined cost of the two rights the same. Jaffe W.D.T. 52-54; Tr. 6556 (Jaffe). Again by analogy, if a $10 price tag were to be attached to car keys, the price of the automobile should be reduced by $10 to keep the total price constant. Jaffe W.D.T. 54; see also Tr. 6556-57, 12700-01 (Jaffe); Services RPFFCL ¶27.

(b) <u>The Copyright Office View</u>

Advocates of the "car keys" analogy urge the Panel to follow the August 2001 Report of the U.S. Copyright Office, issued during the pendency of this proceeding, which characterized §112(e)'s imposition of a separate ephemeral rate as an "aberration." This Report states: "we [see] no justification for...the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license." Jaffe W.R.T. Ex. 6, U.S. Copyright Office, DMCA Section 104 Report at 114 fn. 434 (August 2001). The Copyright Office also advocated this view in 1998. *Id.*

(c) <u>The Congressional View</u>

Although the Copyright Office did urge this policy position in 1998, both the text and the legislative history of §112 indicate that Congress declined to adopt it. 17 U.S.C. §112(e); DMCA Conf. Rpt. 89-91; DMCA Section-by-Section Analysis 52-53, 61-62. Whatever the Panel's private views regarding the merits of this policy debate (and the Panel affords great weight to the views of the Copyright Office professionals who have developed considerable expertise in these matters), this policy determination must be made by the Congress, not by the Panel. Unless and until Congress amends the current statute, the Panel's duty is clear: the Panel's responsibility is to follow the current Congressional mandate set forth in § 112(e)(4) and determine a separate rate for ephemeral copies.

(d) Evidence from the Marketplace

The record also establishes another reason to guide Panel analysis to this conclusion. In mandating a separate ephemeral compulsory license in §112(e)(4), Congress established the willing buyer/willing seller measure as the standard to be followed, and the Copyright Office has affirmed that "willing buyer/willing seller" is the standard this Panel must apply in determining an ephemeral royalty rate. July 16, 2001 Order at 5. It would be one thing if record evidence established that buyers of privately-negotiated licenses had refused to pay any separate ephemeral royalty or, if they had, had insisted that their performance royalty be reduced by the amount of their ephemeral royalty. However, as discussed below, record evidence before the Panel establishes the contrary: separate ephemeral rates, above and beyond the performance royalty were, in fact, often agreed to in the 26 RIAA statutory licensing agreements. Thus, whatever the merits of the theoretical economic analysis, actual actors in the marketplace have demonstrated behavior which matches the standard that Congress and the Copyright Office have indicated must be applied. For this reason, we turn next to an examination of the 26 agreements as they pertain to ephemeral royalty rates.

3. Four Measures from the 26 Agreements

In Section V.G. above, we explained why we have concluded that 25 of RIAA's 26 license agreements are entitled to little weight in determining the predominant performance royalty which willing buyers and willing sellers would agree to in the hypothetical marketplace we must replicate. The same infirmities greatly limit the usefulness of these agreements in determining ephemeral royalty rates. Nevertheless, the Panel considers it appropriate to look at these 26 agreements in order to see if they reveal a clear and consistent pattern. Regrettably, examination of the RIAA's initial 26 license agreements reveals an inconsistent, rather than a consistent, pattern.

Overall, the 26 agreements fall into four categories. Two set ephemeral rates as a percentage of gross revenue. One provides for a flat dollar amount payment. The largest single group indicating any rate (eight in number) provides for an ephemeral rate as a percentage of the performance rate amount. And a fourth group (of fifteen) is silent regarding ephemeral copies and provides no express ephemeral rate.

Percentage of Overall Revenue. Two of the initial 26 negotiated agreements [redacted] calculated ephemeral rates based on overall revenue ([redacted] in the first and [redacted] for a combined performance/ephemeral rate in the second). See RIAA Exs. [redacted]. Compared to the other 24 agreements, these two are the least probative because their percentage-of-overall-revenue basis was used only twice and is not now urged by any party as a formula for the webcasting ephemeral rate to be set by this Panel.

Flat fee. This second type of ephemeral rate agreement (with Yahoo!) resulted in the largest ephemeral royalty amount paid under any of the 26 agreements and was related to the largest number of performances. The Yahoo! agreement is calculated on the basis of a flat fee, with a payment of [redacted] for the initial time period (through 12-31-00) and an additional [redacted] for each 12-month renewal. See RIAA Ex. 75 DR at

§§ 3.1, 3.4. The total [redacted] ephemeral royalty amount paid, when divided by Yahoo!'s total non-ephemeral performance royalty payment of [redacted] million, Panel Rebuttal Hearing Ex. 1 (Mandelbrot W.R.T. 7), results in an effective royalty rate of 8.8% paid under this agreement. As the agreement which represents both the ephemeral royalty for the largest number of performances and the largest ephemeral amount paid, this Yahoo! ephemeral rate, like its per performance rate, is entitled to considerable weight.

Percentage of Performance Royalty Amount. The third category of ephemeral royalty rates is found in eight agreements, which provide for express ephemeral rates of, or calculable to be, 10%. The first of these ([redacted]) occurred in August 2000, contemporaneously with the Yahoo! agreement; the remainder occurred over the next eight months. The three which can be *calculated* to be 10% are [redacted], and [redacted]. *See also* RIAA Exs. [redacted]

Absence of Indication. Having concluded that the soundest basis for determining what willing buyers would pay willing sellers for an ephemeral rate would be to look at the 26 actual marketplace agreements, the Panel is faced with the anomaly that the majority (fifteen) of these 26 do not state any ephemeral royalty rate.[69] Based upon a careful examination of the agreements themselves, as discussed previously in Section V. G., the Panel concludes that the reason for this silence is that these agreements do not, in

[69] Clearly, the RIAA characterization that "Nearly all of the RIAA license agreements include the 10% surcharge for the making of ephemeral recordings under the Section 112(e) compulsory license," RIAA PFFCL ¶245, is decidedly wide of the mark.

fact, convey ephemeral rights to the licensees. Unlike the Yahoo! agreement and others which are typically labeled "WEBCASTING PERFORMANCE *AND EPHEMERAL* LICENSE AGREEMENT" (emphasis added), the fifteen silent agreements are labeled only "WEBCASTER PERFORMANCE LICENSE." *See, e.g.,* RIAA Exs. 60 DR-73 DR. Similarly, while the Yahoo! agreement and others grant an express ephemeral license (see, e.g., RIAA Ex. 75 at §2.1.2), the fifteen silent agreements lack this provision. What all 26 do have in common, however, is an express provision which states that [redacted] See, e.g., RIAA Ex. 75 DR at §2.2.3). Thus, both types of agreements are clear, internally consistent, and unambiguous on their face. The ones labeled as granting ephemeral licenses do so expressly, while the ones labeled simply as performance licenses are limited to that right. Because these fifteen do not provide any ephemeral royalty rate, they provide the Panel no guidance on what the ephemeral royalty rate should be.

However, because they do constitute a significant portion of the marketplace evidence, the Panel sought to analyze how they came about. Four different reasons could explain the unexpected state of affairs. First, at least some of the licensees may have believed that their agreements included ephemeral rights. For example, Mr. Heilbronn of Lomasoft, although he did not negotiate the agreement himself, was not a lawyer, and did not head his company at the time, testified to his understanding that his [redacted] royalty rate [redacted] Tr. 13106-07 (Heilbronn). The Panel believes that he was mistaken.

A second possible explanation is that these services could have been sufficiently small to enable them to operate using only the single free statutory ephemeral copy. Tr. 9769-80 (Marks); Tr. 14970 (Garrett). While some evidence indicates that some of these were smaller, single-channel, or never-launched webcasters, the record does not establish any specificity and suggests, at best, various contradictory inferences. Tr. 14974-88 (Garrett).

A third possible explanation is that ephemeral rates are generally so much smaller than performance rates that they were treated almost as an afterthought, possibly on the order of a sales tax, and accordingly were simply not addressed in some negotiations. For example, the record reveals that in the Yahoo! case, after eleven months of extensive negotiation, multiple term sheets, and near closure on many issues -- and six days before Mr. Marks reported to the RIAA Negotiating Committee that "we have a deal" (RIAA Ex. 137 DR at N14561 (6/29/00)) -- the ephemeral rate was still "to be agreed upon." *Id.* at N11828 (Term Sheet, 6/23/00). In the negotiation, in the last six days, an ephemeral rate agreement was reached (*id.* at N14561), although it may not have been in other negotiations.

A fourth possible explanation is that initially RIAA did not press the issue so long as it received what it regarded as a "satisfactory" performance royalty rate. In each of the first fifteen agreements, RIAA negotiated either 15% of revenue or about 0.4¢ per performance. *See* RIAA Exs. 60 DR-73 DR. While negotiating the [redacted] and Yahoo!), as it became clear that any agreement reached with Yahoo! would be closer to one-half the previous amounts, lead negotiator Marks asked the Negotiating Committee [redacted]

[redacted] RIAA Ex. 137 DR at N14548 (3/29/00). In the context of a non-"satisfactory" rate, the Committee was clear that [redacted] RIAA Ex. 137 DR at N14557 ([redacted], 3/31/00); and at N14555 ([redacted], 3/28/00). In virtually all the agreements thereafter, they did.

4. **The Panel's Ephemeral Royalty Determination**

In setting an ephemeral royalty rate, the Panel thus has before it the following: two agreements founded on a basis not now advocated by any party, fifteen agreements which did not provide a rate, the largest single agreement at an effective rate of 8.8%, and eight other agreements at a 10% rate (express or calculable). The Panel concludes that the rate most representative of that negotiated in the marketplace between willing buyers and willing sellers, as represented by these 26 agreements, lies within the range between 8.8% and 10% of the performance royalty amount. For all of the reasons discussed in Section V. G. above, the Panel places significant weight on the Yahoo! rate of 8.8% and does not afford great weight to the other 25 agreements. Indeed, even at face value, as explained here, they do not represent evidence which establishes RIAA's proposed rate. Accordingly granting very modest effect to the agreements which have ephemeral rates around 10%, the Panel rounds the 8.8% Yahoo! rate up to 9%. It determines, accordingly, that the §112(e) royalty rate for whatever number of ephemeral copies are necessary for the sole purpose of facilitating performances under §114(f) shall be set at 9% of the amount of performance royalties paid by a licensee.

O. OTHER ISSUES

1. Same Rates for Both License Periods

As previously noted, the purpose of this proceeding is to set rates and terms for two time periods: (1) October 28, 1998 (the effective date of the DMCA) through December 31, 2000; and (2) January 1, 2001 through December 31, 2002. *See* Order of December 4, 2000 at 5. However, the rates and terms proposed by all parties are the same for both periods.[70] The Panel agrees that, based upon the record before us, there is no warrant to set different rates, nor any inflation adjustments.

2. Long Song Surcharge

RIAA proposes a "long song surcharge" for all performances of songs over five minutes in duration. *See* RIAA PFFCL ¶ 210. RIAA asserts that this "provision is in all of the relevant RIAA license agreements with B2C webcasters." *Id.* To the contrary, this provision is [redacted]. Accordingly, we decline to impose this provision.

3. Partial Performances

Webcasters urge the Panel to exclude from payment *partial* performances of a sound recording that do not reach a threshhold duration of thirty seconds. *See* Webcasters' Supplemental Submission of January 18, 2002 at ¶¶ 13-14. Webcasters note

[70] Within the context of its rate proposal, Webcasters did propose a modest inflation adjustment. *See* Services' Proposed Rates and Terms (November 6, 2001) ¶¶ 2(a)(3) and 2(e). However, the record does not support this adjustment. In any event, the Panel readily acknowledges that its rate determinations are not so precisely calculated as to render an inflation adjustment meaningful or necessary. In this regard, we felt quite comfortable rounding our rate determinations to the nearest hundredth of a cent. This rounding likely subsumes any minor inflation adjustments.

that truncated performances can occur as a result of "technology glitches or user activation of song-skip functions." *Id.* at ¶ 15. This is true, however the record does not support payment exemptions.

Recognizing the potential for technological glitches that cause occasional streaming failures, three of the 26 RIAA agreements provide exemptions for performances under 10 seconds in duration (two of the three apply only in the introductory periods). *See* RIAA Exhibits [redacted] at § 1.6 [redacted] at § 3.1.1 [redacted] at §1.6 [redacted]. Indeed, streaming failures are also accommodated in the benchmark Yahoo! agreement which provides:

[redacted]

RIAA Exhibit 75 DR at § 3.2.1 (emphasis added).

However, the Panel has already partially accounted for this provision in our calculation of the per-performance rates. In our calculations, we used the [redacted] blended rate as an end point to determine the final IO and RR rates. The [redacted] blended rate constitutes the precise per-performance rate negotiated by the parties for the first [redacted] performances. These [redacted] performances included the "free" [redacted] performances. Accordingly, this provision has been partially accounted for because it was part of our calculations to find each mid-point, or arithmetic mean, that constitutes the final IO and RR rates. And only a "partial" accounting is appropriate because RIAA agreed to this accommodation in the initial period *only* – as it did in two of the other three agreements that made accommodations for technological glitches.

Respecting Webcasters' second argument, we find no justification for excluding short performances merely because the listener elected to skip a sound recording. The functionality of certain services that allow listeners to skip unwanted performances provides a benefit to webcasters.[71] Although the record does not support a higher performance rate for services that provide this functionality,[72] neither does the record support penalizing the copyright owners for this benefit to webcasters – a benefit that allows webcasters to offer a more satisfying experience to their listeners. None of the 26 agreements provides an exemption for skipped songs and no exemption is warranted.

Finally, we find that tracking and reporting partial performances would not significantly burden the services. *See* Tr. 13789 (Marks) ("Every webcaster that we've done a deal with has agreed to do so [report actual performances], generally speaking, and they do it in different ways."). *See also* Tr. 11800, 11817 (Kessler) (currently available software allows the generation of a performance report that "truly is the push of a button").

Accordingly, the Panel declines to exempt partial performances from payment obligations established herein. *See*, however, Panel discussion below regarding "incidental performances" and the definition of a "performance."

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[71] *See e.g.*, Tr. 7412 (Roy) ("... consumers really like this functionality. They like to be able to skip songs they don't like. That's one of the things they don't like about terrestrial radio. And they tend to stay on the services longer....")

[72] *See* our Section V.J.2., *supra*.

4. **Incidental Performances**

Webcasters also argue that "incidental performances" should be exempted from payment. *See* Webcasters' Supplemental Submission of January 18, 2002 at ¶¶ 13, 17. The Panel agrees. The benchmark Yahoo! agreement explicitly excludes [redacted] from [redacted] *See* RIAA Exhibit 75 DR at §§ 1.3, 1.10. We accordingly adopt this provision which excludes transmissions or retransmissions that make no more than incidental use of sound recordings, including but not limited to, certain performances of brief musical transitions, brief performances during news, talk and sports programming, commercial jingles, and certain background music. *See id.*

5. **Performances of Sound Recordings Already Licensed**

All parties agree that performances of sound recordings by webcasters that have already secured a license for that performance should be exempt from payment under the statutory licenses. *See* Webcasters' Supplemental Submission of January 18, 2002 at ¶ 19; RIAA's Comments of January 18, 2002 at 8-9. The Panel agrees.

6. **Definition of a Performance**

Consistent with the Panel's determinations above, and the applicable provisions of the Yahoo! agreement, we define a "performance" as:

> Each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (*e.g.* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:
>
> (1) A performance of a sound recording that does not require a license (*e.g.*, the sound recording is not copyrighted);
> (2) A performance of a sound recording for which the service has previously obtained a license from the copyright owner of such sound recording; and

> (3) An *incidental* performance that *both* (i) makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events *and* (ii) other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

See RIAA Exhibit 75 DR at §§ 1.3, 1.10; Webcasters' Supplemental Submission of January 18, 2002 at ¶ 19; RIAA's Comments of January 18, 2002 at 8-9.

7. __Calculating Number of Performances__

As previously explained, the per-performance fee metric is preferred because, among other reasons, it provides a fee structure directly tied to the intensity of sound recording usage. *See* Section V.B., *supra*. However, as RIAA apparently concedes (*cf.* RIAA PFFCL, Appendix C at ¶ 4), some services may not currently possess the proper software, or technical expertise, to track or calculate accurately their performances of sound recordings. Accordingly, as RIAA proposes *(see id)*, statutory licensees should be permitted to make a reasonable estimate of the number of their performances until such time as they can reasonably be expected to acquire the software and expertise.[73]

[73] RIAA proposes to permit estimation of performances prior to January 1, 2000 only. *See* RIAA PFFCL, Appendix C at ¶ 4. However, we view this deadline (which precedes by almost five months the expected date of the Librarian's decision in this matter) as inequitable and unworkable. The Panel believes services should be accorded more reasonable notice to acquire the requisite software and technical expertise to begin accurately tracking performances. And although the record does not support any particular timeframe, we view 30 days as reasonable. *Cf. Recording Industry of America v. Library of Congress*, 176 F.3d 528, 536 (1999) (there are "some circumstances in which the Librarian's Decision must, for want of concrete data, be based principally on sound judgment ... [so long as the matter in dispute has been] properly raised before the arbitration panel so that the parties have a fair opportunity to address it, and so that the Librarian has the benefit of the parties' views before reaching a judgment"). In the instant proceeding, the matter was raised during the hearing, and again in the RIAA PFFCL. The Services have had ample opportunity to respond.

Accordingly, the Panel accepts RIAA's proposal and permits estimation of the total number of performances by a service as follows:

> For the period up to the effective date of the rates and terms prescribed herein, and for 30 days thereafter, the statutory licensee may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the licensee's total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of retransmissions of AM and FM radio stations reasonably classified as news, business, talk or sports stations, and 12 performances per hour in the case of all other AM and FM radio stations).

8. Discount for Promotion and Security

In response to inquiries from the Panel during the hearing, RIAA proposes that a performance rate discount of 25% be allowed to any service that includes certain promotional and security features not otherwise required by Sections 114 and 112. *See* RIAA PFFCL ¶¶ 240-43. These include a "buy button" or other link to retail web sites that offer sales of CDs, certain promotional announcements, listener surveys, and limitations on the streaming technology used. *See id.* Some of these considerations are consistent with those offered in many of the RIAA licensees. *See* RIAA Exhibits 60 DR through 84 DR.

The Panel would encourage RIAA and webcasters relying upon the statutory licenses to consider voluntary agreements that would effectuate such discounts. In the final analysis, however, the Panel concludes that it should not mandate these discounts because they entail matters beyond the statutory license and, arguably, beyond the Panel's authority. Moreover, the Panel is aware of no record evidence to support any particular discount rate.

VI. ROYALTY RATES FOR BUSINESS ESTABLISHMENT SERVICES

A. NATURE OF THE SERVICE

In addition to webcasters and broadcasters, the record before us shows that certain organizations offer an entirely different type of music service, namely, the compilation and delivery of background and foreground music to be played in business establishments for the listening enjoyment of customers of those establishments. Pursuant to the "Business Establishment Exemption" found in 17 U.S.C. § 114(d)(1)(C)(iv), organizations which make digital transmissions in the course of such services are exempt from any performance royalty so long as they comply with the requirements of the DMCA. However, pursuant to § 17 U.S.C. § 112(e), those organizations are required to pay a royalty for the right to make multiple ephemeral copies in the operation of such services. RIAA's petition to set the royalty rate for such ephemeral copies has been assigned to this CARP panel for determination.

Unlike webcasting, Business Establishment (also called "background") music service is a form of business which has been in operation for decades. AEI Music Network, Inc. ("AEI") began distributing original artist recordings for use in business establishments in 1971. *See* Knittel W.D.T. 4. Other companies, including DMX Music, Inc. ("DMX"), Muzak, Inc. ("Muzak"), PlayNetwork, Inc., and Radio Programming and Management, Inc., have also offered background music services to business establishments for years. *See, e.g.*, RIAA Exhibits [redacted]. More recently, Music Choice and musicmusicmusic have sought to offer these services, (*see* RIAA Exhibit 60-A DR; Tr. 14,746), and other entities have expressed interest in entering the business as well. Tr. 2259 (Pipitone). In response to the Librarian's invitation, three companies--AEI, DMX, and Music Choice--filed notices of intent to participate in this CARP proceeding. Music Choice subsequently withdrew its notice, but AEI and DMX both filed direct cases in April 2001. In May 2001, these latter companies merged to become DMX/AEI Music ("DMX/AEI"), and that merged entity has continued as an active party in the proceedings.

Again unlike webcasting, the Business Establishment music business has large numbers of paying customers and substantial revenues. DMX/AEI provides music to about [redacted] businesses and generates revenues of over [redacted] per year from this service. *See* Knittel W.D.T. 4; Tr. 8492 (Knittel). As one would expect from a successful business such as this, there have been technological advances over time in the way in which such companies deliver their product.

Originally, AEI and DMX prepared musical programs on tapes and CDs to be played "on-premises" in specialized equipment at their clients' establishments. Later, this on-premise service was improved. AEI and DMX provided their customers with a proprietary hard disk based device which could play music programs that were placed on an internal hard drive. *See* Knittel W.D.T. 8-9. In 1999, DMX and AEI established "digital repositories" of numerous sound recordings, which could be utilized in all the different models of their services. Tr. 8409, 8413, 8416-17 (Knittel); Talley W.D.T. 3-4.

DMX/AEI and RIAA agree that the "on-premises" services are not subject to the § 112(e) license at issue. Thus, the rates set in this proceeding do not apply to those services. Instead, DMX, AEI, and other background music services have obtained from copyright owners voluntary licensing agreements to utilize sound recordings in the operation of those services.

Most recently, certain of the background music organizations have developed a so-called "broadcast model" of their service.[74] The model employed by DMX/AEI is described in detail in the written and oral testimony of Barry Knittel and Douglas Talley of DMX/AEI. In essence, the model involves digital transmission of musical programs to customers over cable and/or satellite facilities. In the course of operating this service, literally millions of ephemeral recordings are made at various stages of the process, including composing the digital repository, programming, quality control, "client computers," and transmissions. Tr. 8632-8639, 8658-59 (Talley). In particular, "cache" ephemerals are made when content is temporarily stored on a client server for transmission to a cable affiliate or satellite. *Id.* And "buffer" ephemerals, which are ubiquitous in the use of digital technology, are made at numerous stages throughout the operation of the service. *Id.*

The parties agree that it is only this "broadcast" model of background music service which is encompassed in the present proceeding and for which this Panel must set a royalty rate. *See* Tr. 9567 (Berz); 9576, 9581-82 (Garrett).

[74] For example, Muzak, the nation's largest background music service with annual revenues of approximately $87 million, operates a broadcast model of its service. *In re Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmissions of Sound Recordings*, No. 96-5 CARP DSTRA (Library of Congress November 12, 1997), Report of the Copyright Arbitration Royalty Panel ¶¶ 68-69. Musicmusicmusic is also licensed to operate a broadcast service. *See* RIAA Exhibit 60-A DR.

B. RATE PROPOSALS OF THE PARTIES

1. DMX/AEI's Rate Proposal

DMX/AEI proposes that the Panel set a royalty of $10,000 per year per company for the making of buffer and cache copies to facilitate the digital transmission of sound recordings in broadcast services, prorated for the period between October 28, 1998 and December 31, 1998. *See* DMX/AEI PFFCL ¶44.

While recognizing that, "as a theoretical matter the potential scope of ephemeral recording rights available to the background music industry may be broader," DMX/AEI asserts that the Panel should set a royalty only for the use of cache and buffer ephemerals, since its existing voluntary licenses allegedly give it the right to use its digital repository in operation of the broadcast service, as well as the on-premises services. DMX/AEI PFFCL ¶ 10.

DMX/AEI argues that the Panel would be entirely justified in setting this royalty rate at zero. *See* DMX/AEI PFFCL ¶¶ 42-44. It contends that, in exempting DMCA-compliant background music services from any performance royalty, Congress concluded that operation of such services would likely have a positive effect on the revenue of copyright owners, and envisioned only a modest ephemeral royalty if there were evidence of any significant "leakage" (ephemeral copies being used to generate records for sale), which there is not. DMX/AEI PFFCL ¶¶ 46-50. It points out that the Copyright Office has criticized the §112(e) statutory license as an "aberration" which should be repealed in favor of an ephemeral recording exemption which would exempt buffer copies from any royalty obligation. DMX/AEI PFFCL ¶¶ 51-53. Finally, DMX/AEI argues that, because they have no "independent economic value" other than facilitating performances, its ephemeral copies should have a royalty, at most, which is consistent with those set in RIAA license agreements for webcasters. Its fee proposal of $10,000 per company (i.e., $20,000 for the merged DMX/AEI) is allegedly quite compatible with the Yahoo! agreement, which sets a royalty of $50,000 per year for a much broader range of ephemeral rights than DMX/AEI will require. *See* DMX/AEI PFFCL ¶¶ 54-56.

2. RIAA's Rate Proposal

RIAA proposes that the Section 112(e) ephemeral license for broadcast background music service be set at 10% of the gross revenue from such service, with a minimum fee of $50,000 per year. *See* RIAA PFFCL ¶ 627. RIAA denies that DMX/AEI's existing licenses permit use of its non-DMCA-compliant digital repository in the broadcast service. Thus, asserts RIAA, DMX/AEI will likely be required to utilize in this service a DMCA-complaint database, which will entail creation of ephemeral recordings beyond the cache and buffer copies for which DMX/AEI wants the Panel to set a royalty. *See* RIAA Reply to DMX/AEI PFFCL ¶¶ 8 - 12.

Moreover, RIAA argues, even if DMX/AEI were to prevail in its contention that its presently licensed database can also be utilized in its broadcast service, the Panel should not tailor the royalty to the individual circumstances of one company. Rather, it should establish a blanket royalty which would permit any applicant, including those which may not have seperately licensed databases, to utilize ephemeral recordings throughout the operation of their service, regardless of the particular technology they choose to employ. *Id.*

Further, RIAA contends, Congress was certainly aware that, notwithstanding the absence of a performance royalty, background music companies have for years paid substantial royalties to make the sound recording reproductions necessary to operate their on-premises services, and there is no reason to believe that Congress intended to disturb this "traditional stream of revenue" by creation of the § 112(e) license. *Id.*

RIAA notes that the Copyright Office's comment about the aberrational nature of the ephemeral license was made in connection with webcasting, not background music, and, in any event, Congress has not accepted the Copyright Office's view on this matter. *Id.* at 11-12.

Finally, RIAA asserts that the appropriate benchmarks for a royalty for the background services are not recent licensee agreements from the very different world of webcasting, but rather agreements which have been utilized for years to license sound recording use by background services. *Id.* at 13-20.

C. <u>WHAT IS THE ROYALTY FOR?</u>

A threshold dispute that the Panel needs to resolve in order to set a royalty in this area is the question of what we are setting a royalty for. As noted above, DMX/AEI argues that we should only set the royalty for the use of cache and buffer copies because, it asserts, its existing licenses already give it the right to use its non-DMCA complaint database in the broadcast service. RIAA disputes that the existing licenses give DMX/AEI this right and argues that we should set the royalty for all ephemeral recordings utilized in a broadcast service, which will likely involve -- at least for some applicants - - ephemerals in DMCA-complaint databases, as well as cache and buffer ephemerals. Resolution of this threshhold matter is complicated by the fact that the dispute about the reach of DMX/AEI's existing licenses is a matter for determination by the courts, not this Panel, and no court has yet addressed the issue.

MATERIAL UNDER
SEAL DELETED

On reflection, we have concluded that the exact reach of DMX/AEI's existing licenses is irrelevant to our task. The background music license agreements introduced into evidence show that royalty rates have not been based on [redacted]. Thus, for example, Knittel Rebuttal Exhibit 22, [redacted]. Moreover, the royalty rates in DMX and AEI licenses were essentially the same before and after November 1999, when they introduced the new "digital repository" database.[75]

Some background music services may choose to operate broadcast services with DMCA-compliant databases, as musicmusicmusic has done. See RIAA Exhibit 60-A ¶ 2.1(c)(i). Others may conclude that a permanent, non-DMCA-complaint database involves substantial cost savings and thus elect to obtain voluntary licenses for that database. Still others may wish to operate without a database at all, as DMX and AEI did before 1999. *See* Tr. 14,789. Choices about which technology to use involve cost-and-benefit tradeoffs about which neither side presented detailed evidence.

However that choice is made, though, no broadcast service can operate without making millions of ephemeral recordings at many different stages of the process. Thus, after Mr. Talley of DMX explained that he uses the term "ephemeral copies" to include "cache and buffer copies" and nothing more, Tr. 8656, he was asked at what stages ephemeral copies are made in the DMX/AEI broadcast model. He answered, "Every

[75] Compare pre-1999 and post-1999 royalty rates in the respective license agreements and renewals provided as RIAA Exs. 09 DR, 10 DR, 11 DR, 12 DR, and 13 DR.

stage from the transmission to the reception. There are many, many, many places where this happens, where ephemeral copies are made." *Id.*

Over the next ten pages of transcript, Mr. Talley described the "many places" in the broadcast model at which ephemeral copies are made, including, but far from limited to, the digital repository, Tr. 8656-66, after which this colloquy occurred:

> Q: Okay. I guess as you said in your broadcast model there are a lot of different ephemeral copies that are made, correct?
>
> A: Yes.
>
> Q: And if you can't make those ephemeral copies, you can't use this broadcast model, can you?
>
> A: That's correct.

Tr. 8667

This testimony effectively refutes, in our view, DMX/AEI's contention that its ephemeral copies have "little or no independent economic value." DMX/AEI Reply to RIAA PFFCL ¶ 6. Without such ephemerals, no broadcast service could be operated, and no revenue could be generated.

We agree with RIAA that, in creating the § 112(e) statutory license, with rates for each type of service "binding on all copyright owners ... and transmitting organizations," 17 U.S.C. § 112(e)(4), Congress intended to create blanket licenses which would afford each licensee all the rights necessary to operate such a service, in this case, the right to make any and all ephemeral copies utilized in a broadcast background music service. We do not believe it appropriate to subdivide this package of rights into multiple mini-licenses for the making of different kinds of ephemeral copies at numerous different stages of the process. Nor does the evidence of the parties permit us to assign separate value and separate royalties to each such sub-license, as DMX/AEI counsel have acknowledged. *See* Tr. 14,762 (Rich).

Accordingly, the Panel concludes that the royalty we must set is for all ephemeral copies which may be utilized in the operation of a broadcast service, and the royalty rate is not dependent on whether or not a particular licensee's model includes a DMCA-complaint database.

D. DETERMINING THE ROYALTY RATE

1. The Views of Congress and the Copyright Office

We do not find persuasive DMX/AEI's argument that Congress envisioned the §112(e) royalty as a *de minimis* payment to guard only against the risk of leakage. Nothing in the statute says so, nor does the legislative history compel that conclusion. Rather, Congress plainly made fair market rate the talisman for this CARP, and we must assume that Congress knew that for years copyright owners have been collecting millions of dollars in royalties from background music companies for use of their sound recordings in those services.[76]

Nor do we think the Copyright Office report cited by DMX/AEI mandates that we set a zero or *de minimis* royalty. DMX/AEI PFFCL ¶ 51. First, the section of the report quoted by DMX/AEI deals with webcasting, not background music. Second, while the views of the Copyright Office on any matter are entitled to great respect, as stated previously, Congress has yet to accept the Office's view on this point. We are bound to apply the Copyright Law as presently enacted.

[76] Mr. Knittel testified that [redacted] pays over [redacted] per year in royalties and fees to copyright owners. Knittel W.D.T. 14.

2. The Statutory Factors

As we explained in Section III above, we believe the statutory command for setting rates under § 112(e) is essentially the same as for setting rates under § 114(f)(2), *i.e.*, the determinative question is what price a willing buyer and willing seller would agree to in the marketplace for the license in question. While the economic, competitive, and programming factors described in the statute are relevant, and we have considered them, the net effect of such factors is best gauged by looking at the prices actually negotiated by willing buyers and willing sellers, if such agreements are available.

Thus, with respect to § 112(e)(4)(A), we agree with DMX/AEI that use of sound recordings in background music services has significant promotional value. DMX/AEI PFFCL ¶¶ 32-35. This is true whether the music is delivered via the on-premise model or a broadcast service. This factor has led some small labels and individual artists on occasion to license the use of their sound recordings for little of no royalty payment in hopes of achieving wider public familiarity with their works. *See* Tr. 8380 (Knittel). However, notwithstanding the promotional potential, the major record labels, which hold the vast majority of sound recording copyrights, have insisted on significant royalty payments in exchange for use of their complete repertories, and background music companies have agreed to those payments, as discussed below.

Indeed, background music companies would have little economic incentive to incur the capital costs of establishing a new, broadcast service unless they had concluded that such a service would be more profitable than their existing, successful on-premises services. Given that conclusion, such companies would naturally seek to move as many customers as possible from on-premises to broadcast contracts. In fact, most DMX customers now receive their music through the broadcast service. Talley W.D.T. 3. If the royalty rate for broadcast service is substantially lower than for on-premises service, as DMX/AEI propose, then the shift in customers (and thus revenue) from on-premises to broadcast service will substantially reduce the copyright owners' "traditional stream of revenue" from broadcast music companies, a factor which Congress instructed us, via Section 112(e)(4)(A), to consider in setting the royalty rate.

Similarly, as regards §112(e)(4)(B), background music companies plainly have played a major role with respect to the creative and technology contributions, capital investment, cost, and risk relative to their services (*see, e.g.* evidence cited at DMX/AEI PFFCL ¶¶ 36-41), and copyright owners have played a major role with respect to such factors relative to the copyrighted works. (*See*, e.g., evidence cited at RIAA PFFCL ¶ ¶ 488-89, 493-97.) The weight to be given by willing buyers and willing sellers to such respective factors is, again, best demonstrated by the agreements they have actually reached.

3. <u>Agreements From Which Marketplace?</u>

DMX/AEI contends that, if we are to derive a royalty from marketplace agreements, we should look to the ephemeral royalty rates reflected in RIAA's agreements with certain webcasting licensees, particularly Yahoo!. However, in the webcasting market, the principal royalty is plainly the § 114(f) performance royalty; the ephemeral royalty is an ancillary royalty which produces only a modest increase in the licensee's overall royalty obligation. With respect to background music companies which are exempt from the § 114(f) royalty obligation, § 112(e) is the only royalty which licensees must pay in order to make use of all sound recordings in the operation of a digital broadcast service.

Moreover, webcasting is an entirely different kind of business than background music. It has different customers, different economics, and different delivery methods.

Webcasting, as noted above, is a new business which has yet to prove profitable on a large scale, whereas the background music business is well established and generates very substantial revenues.

Thus, we believe the appropriate license agreements to use as benchmarks are those by which copyright owners have for years granted background music companies the right to use all of their sound recordings in the operation of their on-premises service. We reject DMX/AEI's contention that these agreements are irrelevant because they involve the licensing of reproduction and distribution rights, rather than the right to make ephemeral copies. It is apparent to us that these licensing agreements (introduced by both RIAA and DMX/AEI) were effectively intended to permit the licensees to utilize sound recordings in operating the background music services in question. The Section 112(e) license here will have the same effect for broadcast services that make digital transmissions of sound recordings.

4. **Royalties Evidenced By the Pertinent Agreements**

The parties have introduced nearly three dozen license agreements between copyright owners and background music services. No party has contended, nor introduced evidence to show, that these are anything other than what they appear to be, namely, agreements between willing buyers and willing sellers, and we treat them as such. The critical question is what royalties do these agreements establish?

Barry Knittel, formerly President of AEI Music Markets – Worldwide and now DMX/AEI's Senior Vice President of Business Affairs Worldwide, testified that AEI has approximately [redacted] license agreements for North America, which fall into various categories. *See* Tr. 8379-80 (Knittel).

First are licensing agreements which are "strictly promotional" and in which the licensees do not expect a royalty. *See* Tr. 8380 (Knittel). These agreements are usually with individuals who are trying to get their songs played. *See* Tr. 8390 (Knittel). AEI has "very few" of these agreements. *Id.*

Second are agreements in which AEI pays a royalty of [redacted] every time a sound recording is used within one of its programs. *See* Tr. 8380.

Third are "marketing fund license agreements" in which the licensors "share in our profits from music programming and receive certain distributions of royalties from that and other promotional benefits." Tr. 8380. Under such an agreement, the label receives part of the royalty in cash and the balance is placed in an account to be used by AEI for promotion of the label's products in whatever way the label directs. *Id.* at 8384-85. AEI has such agreements with [redacted] *Id.*

Fourth are agreements in which [redacted] receive a percentage of AEI's proceeds in cash rather than have those funds retained by AEI in a promotional account. *See* Tr. 8468-69.

The Panel finds that the third and fourth form of agreement (whose principal difference is whether the royalty is received entirely in cash or partly in the form of promotional services requested by the licensor) comprise the predominant royalty arrangement between AEI and the major labels who license the vast majority of copyrighted sound recordings. *See also* Wilcox W.D.T. 12; Pipitone W.D.T. 3; Tr. 2266 (Pipitone). Similar agreements exist between major labels and other background music

MATERIAL UNDER SEAL DELETED

services, including [redacted], Muzak ([redacted]), Play Network Inc. ([redacted]), and Radio Programming and Management, Inc. ([redacted].

It is true, as DMX/AEI asserts, that these agreements convey to the licensees some benefits beyond the use of the sound recordings. But they also convey to the licensor benefits beyond the royalty payment. It is clear, however, that "by far the most important rights" conveyed to licensees by these agreements are the rights to copy and distribute (i.e., to use) sound recordings in their background music service (Tr. 8475-76 (Knittel)), and it is thus reasonable to infer that the royalty obligation in these agreements was assumed in exchange for those "far most important" rights.

The royalty obligation in these agreements is generally [redacted] of gross proceeds derived by the background music company from the licensed service. *See*, RIAA Exhibits 9 DR, 10 DR, 11 DR, 12 DR, 13 DR, 14 DR, 26 DR, 27 DR, 28 DR, 60-A DR, 66 DR-X, Knittel Rebuttal Ex. 22; Knittel W.D.T. 14-15. Two agreements (RIAA Exhibits [redacted]) set the percentage for satellite service at [redacted] and for on-premises service at [redacted]; these agreements were negotiated at a time when it was uncertain whether satellite service was subject to a royalty obligation. *See* Pipitone W.D.T. 3-4; Tr. 2268-70 (Pipitone); Marks W.D.T. 31. One of these agreements (RIAA Exhibit 14 DR) has subsequently expired, and the rate for on-premises service has gone back to [redacted]. (RIAA Exhibit 10 DR). Other subsequent agreements (RIAA Exhibit 60-A DR, Knittel Rebuttal Exhibit 22) have set a uniform percentage rate for satellite and on-premises services.

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In a few agreements (e.g., [redacted] Knittel Rebuttal Exhibit 22), there are certain deductions from "gross proceeds" before the royalty percentage is applied. In most of these agreements in evidence (RIAA Exs. [redacted]), however, there are no deductions from gross proceeds, and in some (e.g., RIAA Exs. [redacted]), the licensee is obligated to pay [redacted] per recording used in a program, in addition to the stated percentage of gross proceeds.

From the evidence before us, the Panel finds that, among major labels and a variety of background music companies, willing buyers and willing sellers have generally agreed to blanket licenses to use sound recordings in such services in exchange for royalty payments of approximately [redacted] of the gross proceeds of such services. As discussed in Section VI.C. above, there is no evidence that the royalty rate depends on what technology is used to deliver the music. Royalty rates for on-premises services were 10-15% of gross proceeds before 1999, when DMX and AEI did not utilize digital repositories, and 10-15% of gross proceeds after 1999, when they did. *See* note 75 *supra.* Nor is there any persuasive evidence that willing buyers and willing sellers place a significantly different value on a broadcast service which uses a DMCA-compliant database from one which does not. *See, e.g.*, RIAA Exhibit 60-A DR ([redacted] royalty for broadcast service with DMCA-compliant database) and Knittel Rebuttal Exhibit 22 (royalty of [redacted], for broadcast service without DMCA-compliant database).[77]

[77] The [redacted] per program feature is impossible to convert directly into a percent of revenue, but plainly means that the total royalty obligation is greater than [redacted] of gross proceeds.

In view of this evidence, the Panel concludes that, in exchange for a blanket license to utilize all copyright owners' sound recordings in a broadcast service under Section 112(e), background music companies and copyright owners would agree to a royalty of at least 10% of gross proceeds. RIAA has proposed that royalty, which lies at the low end of the [redacted] range described above, partly to give some consideration to the contention of DMX/AEI that its existing voluntary licenses already provide some of the rights (i.e., the digital repository) it needs to operate such a service. Tr. 14658 (Garrett).

One subsidiary question which must be answered in setting such a rate is how to define "gross proceeds." RIAA has proposed an expansive definition drawn from the [redacted]). We reject this proposal for two reasons. First, we believe that this licensee, [redacted], was particularly motivated to accommodate RIAA. Second, the definition in question is found in only one of the other background music license agreements before us. In contrast, [redacted] agreements before us (RIAA DR Exhibits [redacted]) provides, in substantially uniform language, a simpler and less sweeping definition of gross proceeds.[78] This definition, which appears in more of the

78 [redacted]

agreements before us than does any other, has apparently been utilized by [redacted] with most of the background music services (AEI, DMX, Muzak, Play Network, Inc. and Radio Programming and Management, Inc.) over a number of years. Thus the record shows that this simple definition has won broad marketplace acceptance. While not detailed, its widespread use suggests that the parties have developed workable understandings for applying it in actual practice. We adopt this definition, as rephrased to fit the Section 112(e) license.[79]

Secton 112(e) requires that the Panel also set a minimum fee for this kind of service. However, the evidence before us is too varied to draw the conclusion that willing buyers and willing sellers consistently agree to minimum fees on the order of $50,000 per year, as requested by RIAA. While several of the agreements (RIAA Exhibits [redacted]) have minimums of that size or larger, one has a much smaller minimum ([redacted]) and several (RIAA Exs. [redacted]) have no minimum payment at all. We conclude that the minimum fee of $500, which we have set to cover the administrative costs of dealing with the webcasting and broadcasting licensees, should apply to the Business Establishment licensees as well.

Accordingly, the Panel determines as follows:

[79] Because any one label can only demand royalty payments from the background services for use of its own recordings, a formula must be developed to calculate what portion of total proceeds resulted from use of that label's records. The definition we adopt does so differently for classical recordings and other titles, presumably because the playing time of classical recordings varies widely, whereas that of most other recordings is relatively uniform in length. For the blanket license under 17 U.S.C. § 112 (e), there is no need to distinguish the copyrighted recordings of one label from that of another, but there is a need to distinguish the portion of the background company's programs which utilize copyrighted recordings from the portions which utilize non-copyrighted recordings. The definition we select is easily adapted to that purpose.

1. The Section 112(e) royalty rate for the making of unlimited numbers of ephemeral recordings by background music organizations in the operation of broadcast services pursuant to the Business Establishment exemption contained in 17 U.S.C. § 114 (d)(1)(C)(iv) shall be a sum equal to ten percent (10%) of the licensee's gross proceeds derived from the use of the musical programs which are attributable to copyrighted recordings. The attribution of gross proceeds to copyrighted recordings shall be made on the basis of:

(i) for classical programs, the proportion that the playing time of copyrighted classical titles bears to the total playing time of classical titles; or

(ii) for all other programs, the proportion that the number of copyrighted titles bears to the total number of titles.

2. The minimum fee for each licensee shall be $500 per year.

VII. <u>TERMS FOR SECTION 114(f) AND 112(e) LICENSES</u>

A. <u>THE GOVERNING STANDARD</u>

17 U.S.C. § § 114(f) and 112(e) require that, in addition to determining royalty rates for the statutory licenses created by those sections, the Panel is also required to establish *terms* for such licenses. Section 114(f) explicitly provides that the Panel's determination of such terms is governed by the same standard which controls its rate determinations, i.e.,

> In establishing rates *and terms* for transmissions by eligible non-subscription services and new subscription services, the copyright arbitration royalty panel shall establish rates *and terms* that most clearly represent the rates *and terms* that would have been negotiated in the marketplace between a willing buyer and willing seller.

17 U.S.C. § 114(f)(2)(B) (emphasis added).

While the language of Section 112(e) is less explicit in defining the standard applicable to the Panel's determination of terms under that section, the Librarian has previously ruled that "the standard for setting royalty fees for the Section 112 license is identical to the standard used to set rates for the section 114 license" (Order of July 16, 2001 at 5), and there is no reason to conclude that this identity of standards would not apply to the setting of Section 112 terms as well.

Thus, it is evident that the Panel is bound to adopt those terms which the record shows would have been agreed to by willing buyers and willing sellers in the marketplace. The question of whether such terms represent the optimum alternative from the standpoint of administrative convenience and workability is not part of the governing standard for the Panel, nor is it a matter on which we have either record evidence or institutional expertise. Accordingly, while the Panel would not readily adopt terms which are obviously unworkable, and has not done so here, we must defer to the expertise of the Librarian the final evaluation of the administrative feasibility of terms which willing buyers and willing sellers would agree to in marketplace negotiations.

B. THE RECORD CONCERNING WILLING BUYER/ WILLING SELLER AGREEMENT

During the suspension of proceedings described in Section II.D. *supra*, the parties reached a contingent settlement concerning commercial broadcaster rates and an agreement concerning virtually all terms for webcasters, broadcasters and background music services. While the parties agreed that their rate settlement could not be presented to the Panel until certain conditions were met, there was no such restriction concerning the agreement on terms. Accordingly, on December 20, 2001, the Panel issued an order granting the joint motion of the parties to reopen the record for the purpose of receiving the agreed terms.

Subsequently, complications developed which prevented the Panel from receiving the parties' settlement concerning broadcaster rates. However, the parties continued to maintain general agreement regarding nearly all terms. In a hearing on January 11, 2002, the Panel solicited clarification and supporting authority for certain of the proposed terms.

On February 1, 2002, the Services and the Copyright Owners and Performers filed separate submissions tendering their respective proposals concerning terms. In each case, the actual terms proposed were virtually identical in all respects except for two matters addressed below. In each submission, the proposed term was followed by one or more explanatory comments. Again, in the vast majority of instances, the comments from each side were substantially identical.

The Panel has concluded that the nearly identical February 1, 2002 submissions of the parties, which reflect extensive negotiations between all the parties to this case -- including RIAA, AFIM, AFTRA, AFM, DMX/AEI, NRBMLC, five large broadcaster groups, and a dozen webcasting services -- meet the standard of clearly representing the terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. Extensive evidence in support of many of the terms was provided in the written and oral testimony of a number of witnesses, including Barrie Kessler, Executive Director of Internal Operations and Data Management for SoundExchange; Michael Williams, RIAA's Executive Vice President of Finance and Operations; Steven Marks, RIAA's Senior Vice President for Business and Legal Affairs; and Ronald Gertz, President and CEO of Music Reports, Inc. Moreover, we do not see any provisions in these terms which are plainly unworkable, although, as noted, we defer to the Librarian's greater expertise on this matter.[80] Accordingly, the Panel adopts those terms which reflect agreement among the parties.[81]

B. DISPUTED TERMS

The are two respects in which the parties did not reach agreement concerning terms. The Panel must therefore determine how willing buyers and willing sellers would have resolved those matters in their marketplace negotiations.

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[80] There are some provisions in the terms which cannot be fully settled until the Librarian makes his final determination with respect to the royalty rates at issue and also issues a final order under 17 U.S.C. §§ 114(f)(4)(A) and 112(e)(7)(A) establishing applicable notice and record-keeping requirements for the services involved in this proceeding. Those instances are noted in the Panel's determination of terms set forth in Appendix B hereto.

[81] One term on which all parties agreed was the provision in Paragraph 3(f) that requires Designated Agents to pay directly to performers their share of royalties. All parties seem to recognize, and the Panel concurs, that this is the most efficient, economical, and reliable way to assure that performers receive the royalties to which they are entitled under the statute. The Copyright Office has raised the question of whether, regardless of its desirability, the statute permits such direct payments. The memorandum submitted by AFM and AFTRA makes a strong argument that it does. In the absence of contrary authority, we accept the AFM/AFTRA position and commend it to the Copyright Office for favorable consideration.

1. **Definitions of Certain Terms**

The Services ask that the Panel include in the terms we adopt the definitions, contained in the parties' joint submission of December 20, 2001, of four terms: "Affiliated," "AM/FM Streaming," "Broadcaster," "Non-Public." Copyright Owners and Performers oppose the adoption of such definitions, noting that they were developed to explain the broadcaster rates settlement which has not been effectuated.

The Panel has concluded that these disputed definitions plainly relate to a broad settlement of broadcaster issues which went well beyond this Panel's jurisdiction, for example, by extending beyond 2002. Because that settlement could not be realized, and has never been presented to the Panel, we do not know the rate structure to which the definitions in question relate. Based on the evidence of record, the Panel has determined to adopt rates as set forth above, which are not tied to the particular definitions the Services ask us to adopt. Accordingly, there is no need to include such definitions in the terms we establish.

However, the Panel has concluded that, in view of the rate structure it has determined to adopt, it should also adopt definitions of some terms that were not included in the parties' February 1, 2002 submissions. Accordingly, on February 6, 2002, the Panel solicited the parties' definitions of certain additional terms, has carefully considered the parties responses` to this order, and has adopted what it deems the most appropriate definitions for those additional terms.

2. **Agent for Copyright Owners Who Do Not Designate an Agent**

The terms agreed to by all the parties permit copyright owners to designate either

SoundExchange or Royalty Logic Inc. (RLI) as their Designated Agent for the distribution of royalties to the copyright owners who designate them, and the performers entitled to receive royalties from the performance of recordings owned by such copyright owners. The parties, however, are in disagreement concerning who should be the agent for copyright owners who fail to designate an agent, and the performers entitled to receive royalties from the performance of such copyright owners' recordings. The Services propose RLI. Copyright Owners and performers propose SoundExchange.

While there are respectable arguments for either designation, the Panel has concluded that willing buyers and willing sellers would ultimately have agreed upon SoundExchange as the distribution agent for copyright owners who fail to designate one. While the Services would like to see some competition among designated agents, they do not have a vital stake in the matter. Once licensees have paid to the Receiving Agent (whom the Services have agreed should be SoundExchange) the royalties and fees for which they are liable, the distribution of such funds is not a matter in which they have a direct interest.

Copyright owners and performers, on the other hand, have a direct and vital interest in who distributes royalties to them and how that entity operates. AFM and AFTRA, in particular, have expressed a strong preference for SoundExchange because of its non-profit status, its experience with royalty payment, and a recent purported reorganization of SoundExchange which allegedly gives artists substantial control over its operations. Submission of AFM and AFSTRA Regarding Proposed Terms and Eligible Non-Subscription Transmissions And The Making of Ephemeral Reproductions at 15-18.

The Panel believes that, in any marketplace negotiation between willing buyers (i.e., licensees) and willing sellers (i.e., licensors) concerning the process for distributing licensor payments, the licensees, having no direct stake in that aspect, would ultimately have to accede to the strong preference of licensors concerning who should distribute royalties to copyright owners who have not designated a particular agent. Accordingly, we reflect such an agreement, or concession, in the terms we adopt here. The Panel also believes that, as a matter of public policy, when choosing between a for-profit and a not-for-profit entity to serve parties who have not indicated a preference for either one, it is generally more appropriate to select the not-for-profit organization, rather than one whose distributions would be reduced by some degree of profit margin in addition to the administrative cost of collecting and distributing such royalties.

C. THE FORMAT OF APPENDIX B

Set forth in Appendix B hereto are the terms which the Panel has adopted for the Section 114 and 112 statutory licenses in question. The terms themselves appear in regular type. Explanatory comments appear after each term in italics. Comments preceded by a bullet (•) were submitted by all parties. Comments preceded by an asterisk (*) were either written by the Panel or adopted by the Panel from the submission of one side or the other.

VIII. DETERMINATION AND ASSESSMENT OF COSTS

In accordance with the findings and conclusions set forth above, the Panel determines that the compulsory license rates and terms for the digital audio transmission of sound recordings by eligible nonsubscription services pursuant to 17 U.S.C. § 114(f) and the making of ephemeral recordings by transmitting organizations pursuant to 17 U.S.C. § 112(e) for the period October 28, 1998 through December 31, 2002 should be as set forth in Appendix B hereto.

Pursuant to 37 CFR § 251.54(a)(1) and (b), the costs of the arbitrators shall be borne by the parties hereto in accordance with their agreement, namely, one-half by the Copyright Owners and Performers and one-half by the Services.

IX. CERTIFICATION BY THE CHAIRPERSON

Pursuant to 37 CFR § 251.53(b), on this 20th day of February, 2002, the Panel Chairperson hereby certifies the Panel's determinations contained herein.

DATED: FEBRUARY 20, 2002

Eric E. Van Loon
Chairperson

Jeffrey S. Gulin
Arbitrator

Curtis E. von Kann
Arbitrator

proceeding.[20] RIAA established a Negotiating Committee comprised of record company executives with substantial experience in licensing sound recording rights to both new media and traditional media.[21] On behalf of the five major record companies and several hundred independent record companies, RIAA then commenced negotiations in early 1999 with the Digital Media Association ("DiMA"), which represents webcasters. Shortly thereafter, DiMA informed RIAA that it could not negotiate on behalf of webcasters collectively and that RIAA should approach webcasters individually.[22]

RIAA did just that, expending an enormous amount of time and effort in one-on-one negotiations, which were difficult to initiate and to conclude because the webcasters had little incentive to come to the table. Webcasters could use the necessary sound recordings for their business and wait for the CARP, without ever having to negotiate with the RIAA. Indeed, by refusing to enter into a voluntary agreement with RIAA, webcasters were able to defer their Section 112 and 114 royalty payments for years. Moreover, at the time RIAA was engaged in negotiations, DiMA began preparing for litigation and encouraging webcasters to join the DiMA "team" rather than to negotiate, claiming that webcasters were certain to get the same type of "remarkably" low royalty rate that their counsel and economists had obtained for others in ASCAP Rate Court litigation and that an earlier CARP had given to subscription services.[23] Despite these

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[20] RIAA PFOF ¶ 180.

[21] RIAA PFOF ¶ 175.

[22] RIAA PFOF ¶¶ 181-83.

[23] RIAA PFOF ¶ 193.

obstacles, RIAA reached agreement with 26 of the 60 webcasters with whom it had meaningful discussions.[24]

The CARP found that these 26 Agreements reflect "the next closest approximation of the hypothetical market" that the CARP must replicate.[25] It also found that the agreements "generally provide Section 114(f)(2) webcaster rates of 0.4¢ per performance."[26] Nevertheless, the CARP refused to use the royalty rates in the 25 Agreements as a benchmark and decided that these agreements are entitled to very little weight.[27] In doing so, the CARP summarily dismissed the other evidence that RIAA offered to corroborate the rates in these Agreements reasonable benchmarks, including 115 licensing agreements into which individual record companies had entered and a study that measured the economic value of the statutory licenses to webcasters. The CARP then determined that the Yahoo! agreement supports an Interent-only rate that is considerably below those in the other 25 Agreements, and that it supports radio retransmission and AM/FM Webcast rates that are even lower.

As discussed below, these determinations are predicated on a faulty analysis of the Yahoo! agreement, the 25 non-Yahoo! RIAA Agreements, and other record evidence, as well as a misunderstanding of relevant law.

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[24] RIAA PFOF ¶ 189.

[25] Report at 46.

[26] *Id.* at 70-74.

[27] Report at 60. The only weight given to the 25 Agreements is to bolster the CARP's decision to use the Yahoo! effective rate as the lower bound of its range of rates for Internet-only transmissions. *Id.* at 77. The CARP did, however, pick and choose from these agreements to use them against the Copyright Owners and Performers on other issues. *See infra* pages 50-52 (describing CARP's setting of the minimum fee) and pages 43-45 (describing failure to adopt a separate B2B syndicator rate).

RIAA sought to achieve such "industrywide" resolution by negotiating with all types of individual webcasters, big and small. Indeed, as described in detail in RIAA's Proposed Findings, by various measures the group of RIAA licensees looked very much like the group of webcasters who litigated in this proceeding.[88] Both the RIAA licensees and the Services had members who (1) went out of business; (2) incurred relatively small amounts of royalty obligations; (3) were adjuncts to larger businesses that did more than webcasting; (4) wanted certainty over rates and terms; and (5) wanted favorable publicity from a relationship with record companies.[89] In other words, the RIAA licensees consisted of "services" and "circumstances" quite comparable to the Services in this proceeding and the industry as a whole.

The CARP, however, claimed that this fact "entirely misses the point."[90] Even if the very Services litigating this proceeding "had reached agreements with RIAA, and then paid no royalties beyond the recited minimum, or quickly went out of business, the Panel would accord those agreements very little weight either [sic]."[91] This conclusion makes clear that the CARP's approach discards a large majority of the webcasting industry as irrelevant.[92] It also forestalls negotiation with members of that group, as copyright owners would be wary of entering an agreement with a company that might fail, as that

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[88] RIAA PFOF ¶¶ 268-309.

[89] *Id.*

[90] Report at 60.

[91] *Id.*

[92] It also stands in stark contrast to the CARP's assertion that RIAA did not reach agreement with enough of the 60 webcasters with whom it negotiated. Under the rationale expressed on page 60 of the Report, even if RIAA had reached agreements with these companies, the CARP would have rejected those additional agreements if those webcasters ultimately failed.

fact will be used to discredit the rates to which those parties agreed. It also calls into question whether parties during a proceeding could even settle on rates and terms and avoid the CARP's determination – under the CARP's rationale, an agreement with many of the Services in this proceeding would not have provided a benchmark for statutory license rates and no settlement could be adopted without a finding that all of the parties are representative of non-parties.

The CARP's approach also places undue emphasis on the fortuity of when the proceeding takes place. As the Office knows, the original schedule for this proceeding called for it to being in Spring 2000. If the proceeding occurred at that time, the circumstances of the RIAA licensees would have been very different. For example, OnAir.com would have been in operation and it would have been one of the leading webcasters at the time, and the CARP could not have easily dismissed its having paid close to [redacted] in royalties to the RIAA.[93] Indeed, like any other business, at the time they entered their agreements the RIAA licensees thought they would be successful and could afford the rates to which they agreed. It is that point at which they should be evaluated, not after the fact with the benefit of hindsight.[94]

In sum, the CARP's criticism of the RIAA licensees' characteristics was substantially overbroad, as it overlooks the actual makeup of the webcasting industry and will discourage negotiation and settlement with all but a handful of services who would meet the stringent criteria the CARP has established.

[93] RIAA Exhibit 015 RR.

[94] RIAA PFOF ¶ 411.

C. The CARP's Summary Dismissal Of The 115 Record Label Agreements Is Inadequately Explained And Unsupported By The Record.

The record in this proceeding contains 115 record label license agreements as well as testimony from nearly a dozen witnesses (including the Services' own witnesses) concerning these agreements. The agreements were the product of free market negotiations (*i.e.*, negotiations unconstrained by a compulsory license) between individual record companies (the "willing seller" in the CARP's formulation of the statutory standard) and individual licensees (in many cases, the webcasters who are the "willing buyers" in that formulation); they involved the licensing of sound recording performance and reproduction rights over new media (nonsubscription webcasting, subscription webcasting, co-branded webcasting, promotional webcasting, music videos, audio clips, music lockers, digital jukeboxes and concert streaming) and over traditional media (compilations, soundtracks and business establishment services).

As RIAA and its witnesses explained, these license agreements confirm that the rates in the RIAA Agreements are reliable benchmarks for determining rates that would have been negotiated in a free marketplace between willing buyers and willing sellers for the Section 112 and 114 compulsory licenses. The agreements also show why a theoretical economic analysis of the royalty rates to be paid by webcasters was not needed; the RIAA Negotiating Committee already had a wealth of experience licensing the rights to sound recordings.[95]

[95] RIAA PFOF ¶¶ 427-33. While the CARP dismisses the rates in the RIAA Agreements as not being based on any economic study, *see* Report at 48 n.28, the evidence showed that the RIAA Negotiating Committee based its evaluation of those rates on the experience gleaned from its negotiation of rates and terms in the marketplace, which does not have any constraints imposed by a compulsory license. RIAA PFOF ¶ 140.

The CARP summarily dismissed all of the record evidence concerning the 115 Agreements in a single paragraph, saying: "For reasons similar to those enunciated in our critique of the Webcasters' benchmark, the CARP rejects these agreements as useful benchmarks for the Section 114 rights at issue here."[96] As the Register has concluded, such cursory treatment of significant record evidence is improper. The requirement that the CARP provide a "rational analysis of its decision, setting forth specific findings of fact and conclusions of law" cannot be satisfied with such "simple undifferentiated allusions to a 10,000 page record."[97]

The CARP offered only two reasons for its rejection of the 115 label agreements – neither of which supports its back-of-the-hand treatment of the substantial record evidence concerning those agreements. First, the CARP states the effect of "utiliz[ing]" these agreements "would likely be to undermine, not corroborate, RIAA's proposals in that many of the agreements reflect rates below that which RIAA is proposing."[98] In fact, a majority of the individual label agreements contain royalty rates [redacted] that RIAA had proposed.[99] But even if the CARP's assertion were true, that does not justify the CARP's decision to discard the

[96] Report at 71.

[97] Librarian Subscription Services Order, 63 Fed. Reg. at 25398-99, *quoting Christian Broadcasting Network v. CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983).

[98] Report at 71.

[99] The rates and terms in the 115 Agreements are summarized in RIAA PFOF App. A and pages 169A & B (Figures 5 and 6).

agreements completely and its failure to consider whether the rates in the 115 label agreements support the substantially lower rates that the CARP actually adopted.[100]

Second, the CARP states that the 115 record company agreements are not "useful benchmarks" because they do not "license the precise rights at issue here." But RIAA has never suggested that the record company agreements encompass the precise rights at issue in this proceeding or that they themselves should be used as "benchmarks." Rather, they are *corroborating evidence* of the rates reflected in the RIAA Agreements and thus support the use of those rates as an appropriate benchmark. If, for example, the marketplace bears rates of [redacted] cents per performance for the right to transmit via the Internet [redacted] and the willing buyer is further willing to agree to substantial consideration such as advances, equity, data, and security, then it is reasonable to believe that the marketplace would bear at least a 0.4¢ per performance rate

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[100] For example, the CARP states that the rates for [redacted] which range from [redacted] undermine RIAA's request for a 0.5¢ syndication rate and a 0.6¢ listener-influenced rate. Those rates, however, were not the rates adopted by the CARP. The CARP never explains how it can justify a 0.14¢ rate for all forms of Internet-only webcasting, including syndication and listener-influenced webcasting, when digital audio services regularly pay [redacted] in marketplace transactions for the right to license [redacted].

The CARP also appears to imply that the rates it cites exist only for [redacted]. But this is incorrect. Many of the [redacted] submitted by RIAA are for [redacted]. *See, e.g.*, RIAA Exhibit Nos. 020 DR ([redacted]), 094 DR ([redacted]), 086 DR ([redacted]); 091 DR ([redacted]), 096 DR ([redacted]), 087 DR ([redacted]). Furthermore, the CARP does not consider the substantial consideration these agreements contain in addition to the royalty rates, such as six-figure advances, equity, data, security, free advertising, links, buy buttons, quality control, and the ability to control content. RIAA PFOF ¶¶ 348-51. Finally, the CARP ignores the basic fact that the principal purpose of creating [redacted] RIAA PFOF ¶¶ 348-51. Notwithstanding that fact, the market rate for the transmission of [redacted] over the Internet is significantly higher than the rates adopted by the CARP in this proceeding.

for the performance of sound recordings over the Internet without that additional consideration. The same is true for the other types of individual label agreements that the CARP failed to discuss.[101] What the 115 record company agreements do not support, however, is a rate as low as 0.14 cents per performance.

D. The CARP's Summary Dismissal Of The Strategic Pricing Group Economic Value Study Is Inadequately Explained And Contrary To The Record.

The CARP also erred in summarily dismissing, without substantive analysis or explanation, the economic value study presented by Dr. Thomas Nagle, Chairman of the Strategic Pricing Group ("SPG"). Dr. Nagle is an economist and nationally-recognized expert on pricing strategy. With SPG, he has developed pricing strategies for approximately 250 companies involving a wide array of products and services. RIAA requested Dr. Nagle's opinion regarding whether the royalty rates that RIAA had proposed and that were embodied in the RIAA Agreements are consistent with the market rates that SPG would recommend, based upon the principles that SPG routinely employs in advising other suppliers on how to price their products and services.[102]

SPG's study involves assessing the economic value of the seller's product to the buyer and establishing a price that represents what a willing buyer would pay for that

[101] The CARP's casual comparison of the 115 record company agreements to the Services' theoretical economic study is inapt. The CARP identifies a dozen differences between the Services' theoretical model and the marketplace that the CARP must replicate. Report at 39-40. Those differences do not apply to the 115 Agreements, all of which involve the licensing of sound recording performance or reproduction rights and many of which involve licensing such rights over the Internet. Certainly given the CARP's refusal to distinguish between personalized and non-personalized services, there was no proper basis for simply dismissing the 115 agreements with the assertion that "different rights" are involved.

[102] RIAA PFOF ¶¶ 400-401.

given hour, [redacted] performances. Because of this structure, there was no need to include in the [redacted] agreement the same type of long song surcharge that is included in the other per performance agreements – a fact that the CARP never considers.

In sum, there is no record basis for the CARP's refusal to adopt the long song surcharge proposed by Copyright Owners and Performers – as reflected in the RIAA per performance agreements and in the Section 115 mechanical license.[117] The explanation offered by the CARP for its refusal is based on a misunderstanding of the only record evidence it considered. The Librarian should modify the CARP's report on this issue and adopt the long song surcharge proposed by Copyright Owners and Performers. Of course, in those cases where a service chooses to estimate the number of its performances – as would be the case for past performances – such a provision is not necessary.

III. The CARP's Determination of a $500 Minimum Fee for All Webcasting Services is Unsupported by the Record and Inconsistent with Congressional Policy.

In support of its proposed minimum fee of $5,000 for webcasting services, RIAA presented evidence of the minimum fees in the agreements with its licensees.[118] These minimums ranged from $5,000 all the way up to $75,000 per year, and the most typical minimum fee was $5,000.[119] RIAA also negotiated one agreement with a minimum fee

[117] The other per performance agreement that does not include the surcharge is the [redacted] agreement. However, that agreement required substantial up-front payment of royalties (a circumstance not present in the statutory license context), which justified the concessions given to that licensee. Marks W.D.T. 14.

[118] RIAA PFOF App. A at 16-22.

[119] The $5,000 fee also predominates in the agreements that use a per performance metric. *See* RIAA PFOF App. A at 16-22.

of $500.[120] In establishing the minimum fee of $500 for all webcasting services, the CARP's report selects the *lowest* of the minimum fees negotiated by the RIAA.[121] This conclusion is flawed for several reasons.

First, the CARP's rationale discourages voluntary negotiation, as copyright owners would know that accepting a lower rate for one licensee due to special circumstances will likely be used against it in setting rates for the entire industry. Indeed, that is what happened in this case, as RIAA agreed to a $500 fee based on the particular characteristics of one webcaster -- [redacted] The CARP's ruling sends the message that copyright owners will be stuck with the lowest fee in their agreements, which makes it hard for copyright owners to lower their minimum fee offer where it would address a particular situation and help lead to a voluntary agreement. It also contradicts the CARP's ruling with respect to rates, which criticized the RIAA for not having a broad range of royalty rates in its agreements, and essentially rejected agreements from those licensees that the CARP concluded paid too little in royalties.

Second, the CARP's argument that the $500 fee is appropriate because the RIAA would not have accepted a minimum that resulted in a loss contradicts the CARP's other

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[120] RIAA PFOF App. A at 22.

[121] Report at 94-96.

[122] [redacted]. The fact that the licensee does not rely predominantly on SoundExchange recordings also makes the $500 fee a benchmark that is too low. The licensee would be obligated to pay additional fees to the other non-SoundExchange copyright owners whose recordings it performs, the minimum fee for all of its performances would be higher than $500. Indeed, had SoundExchange been responsible for non-member collection at the time of the agreement (as it is under the CARP's Report), that $500 fee would likely have been higher, as the transaction costs for serving non-members are usually higher. *See generally* Kessler W.R.T. at 7.

criticism of the RIAA expenditure of substantial resources in reaching agreement with only 26 licensees.[123] In addition, that fee must be viewed in the context of the other minimum fees negotiated by the RIAA, which, as noted above, range significantly higher and could offset any loss from a single $500 fee.

Third, the CARP attempted to rationalize its $500 fee by comparing it to the "combined" minimum fees allegedly paid under the PRO Internet licensing agreements.[124] As the CARP properly found in Section V.C of its Report, it is not appropriate to look to the musical work licensing market to establish the rates for the performance of sound recordings.[125] Just as the PRO agreements are not proper benchmarks for setting per performance rates, they are not proper benchmarks for setting sound recording minimum fees. Moreover, the "combined minimum fees" of the PROs are not comparable to the $500 minimum – RIAA established that the combined minimum fee under the PRO Internet license agreements would range from $673 to $931, depending on the revenues of the service.[126]

IV. The CARP's Adoption of a $500 Minimum Fee For Business Establishment Services is Unsupported by the Record and Inherently Contradictory.

The CARP based its decision regarding the rates business establishment services should pay under § 112(e) on the business establishment licenses in the record. The CARP, however, concluded that business establishment services should be subject to the

[123] *Compare* Report at 95 with Report at 50.
[124] Report at 95 n. 68.
[125] Report at 38-42.
[126] RIAA Reply PFOF ¶ 256.

promotional value upon broadcaster simulcast rates versus RR rates. Yet, the inescapable conclusion that one must draw from the record evidence and the Panel's own findings is that the promotional value of radio play would have a far greater impact on rates for simulcasts of over-the-air programming negotiated directly with a radio broadcaster that determines the content of that programming than on rates for radio retransmissions negotiated with a third party aggregator that has no input on programming content.

The longstanding relationship between record companies and radio stations provides compelling evidence of the credit record labels would give to radio stations for playing their sound recordings over the air and on their simulcasts in a free market negotiation. It is simply not credible that record labels would credit a third party aggregator such as Yahoo! -- which has no control over its music content -- for the enormous contribution that radio stations make to the sale of sound recordings.

The record in this proceeding demonstrated that the promotional value of radio play should be far and away the most significant factor in determining the fair market value of broadcasters simulcast rates. Record companies freely acknowledge that radio broadcast performances are the single biggest driver of record sales. See e.g., McDermott W.R.T at 3-4;[32] Broadcaster Findings ¶ 25, 59-60, 91. Broadcaster witnesses testified to the extensive efforts made by the record companies to encourage radio stations to play their recordings. Radio programmers play a critical role in getting new

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[32] RIAA's own market research data confirms the fact that radio airplay is by far the most prominent method by which CD purchasers become aware of the music they purchase, outstripping any other method by 10 or more percentage points. Purchasers of [ ] of CDs sold in 1999 and [ ] of those sold in 2000 reported that they had become familiar with a purchased recording by hearing it on the radio. SX-5 (at B0010); Tr. at 549-50 (Rosen); Broadcaster Findings ¶ 73.

In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2000-9 CARP DTRA 1&2

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ORDER

On February 20, 2002, the Copyright Arbitration Royalty Panel (CARP) reported its determination to the Librarian of Congress in the above-captioned proceeding. In accordance with 17 U.S.C. 802(f), the Librarian is given 90 days from date of delivery of a CARP report to review the determination and issue a decision setting forth the final royalty fee and terms of payment. However, if the Librarian rejects the CARP's determination, section 802(f) provides an additional 30 days for the Librarian to render his final determination.

The Register of Copyrights recommends, and the Librarian agrees, that the CARP's determination must be rejected. A final decision will be issued no later than June 20, 2002.

DATED: May 21, 2002

SO RECOMMENDED.

Marybeth Peters

Marybeth Peters,
Register of Copyrights.

SO ORDERED.

James H. Billington

James H. Billington,
Librarian of Congress.

Federal Register

Monday,
July 8, 2002

Part III

Library of Congress

Copyright Office

37 CFR Part 261

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule

II. The CARP Proceeding to Set Reasonable Rates and Terms

These proceedings began on November 27, 1998, when the Copyright Office announced a six-month voluntary negotiation period to set rates and terms for the webcasting license and the ephemeral recording license for the first license period covering October 28, 1998–December 31, 2000. 63 FR 6555 (November 27, 1998). During this period, the parties negotiated a number of private agreements in the marketplace, but no industry-wide agreement was reached. Consequently, in accordance with the procedural requirements, the Recording Industry Association of America, Inc. ("RIAA") petitioned the Copyright Office on July 23, 1999, to commence a CARP proceeding to set the rates and terms for these licenses. The Office responded by setting a schedule for the CARP proceeding. See 64 FR 52107 (Sept. 27, 1999).

However, the schedule proved unworkable for the parties. RIAA filed a motion with the Copyright Office on November 23, 1999, requesting a postponement of the date for filing direct cases. It argued that the Office should provide more time for the parties to prepare their cases in light of the complexity of the issues and the record number of new participants. The Office granted this request and held a meeting to clarify the procedural aspects of the proceeding, especially for the new participants, and to discuss a new schedule for the arbitration phase of the process. Order in Docket No. 99–6 CARP DTRA (dated December 22, 1999). In the meantime, the Office commenced the six-month negotiation period for the second license period, covering January 1, 2001–December 31, 2002. 66 FR 2194 (January 13, 2000). Ultimately, the Copyright Office consolidated these two proceedings into a single proceeding in which one CARP would set rates and terms for the two license periods for both the webcasting license and the ephemeral recording license. See Order in Docket Nos. 99–6 CARP DTRA and 2000–3 CARP DTRA 2 (December 4, 2000). The 180-day period for the consolidated proceeding began on July 30, 2001, and on February 20, 2002, the panel submitted its report (the "CARP Report" or "Report"), in which it proposed rates and terms to the Copyright Office. It is the decision of this Panel that is the basis for the Librarian's decision today.[2]

A. The Parties

The parties[3] to this proceeding are: (i) The Webcasters,[4] namely, BET.com, Comedy Central, Echo Networks, Inc., Listen.com, Live365.com, MTVi Group, LLC, Myplay, Inc., NetRadio Corporation, Radio Active Media Partners, Inc.; RadioWave.com, Inc., Spinner Networks Inc. and XACT Radio Network LLC; (ii) the FCC-licensed radio Broadcasters,[5] namely, Susquehanna Radio Corporation, Clear Channel Communications Inc., Entercom Communications Corporation, Infinity Broadcasting Corporation, and National Religious Broadcasters Music License Committee (collectively "the Broadcasters"); (iii) the Business Establishment Services,[6] namely, DMX/AEI Music Inc. (also referred to as "Background Music Services"); (iv) American Federation of Television and Radio Artists ("AFTRA"); [7] (v) American Federation of Musicians of the United States and Canada ("AFM");[8] (vi) Association For Independent Music ("AFIM");[9] and (vii) Recording Industry Association of America, Inc. ("RIAA").[10] Music Choice, a Business Establishment Service, was initially a party to this proceeding, but on March 26, 2001, it filed a motion to withdraw from the proceeding. Its motion was unopposed and, on May 9, 2001, its motion to withdraw was granted.

B. The Position of the Parties at the Commencement of the Proceeding

1. Rates Proposed by Copyright Owners

RIAA proposed rates derived from an analysis of 26 voluntarily negotiated agreements between itself and individual webcasters. RIAA claims that these agreements "involve the same buyer, the same seller, the same right, the same copyrighted works, the same time period and the same medium as those in the marketplace that the CARP must replicate." CARP Report at 26, citing RIAA PFFCL[11] (Introduction at 8). Based upon these agreements, RIAA proposed the following rates for DMCA compliant webcasting services:

(i) For basic "business to consumer" (B2C) webcasting services:

0.4c for each transmission of a sound recording to a single listener, or 15% of the service's gross revenues.

(ii) For "business to business" (B2B) webcasting services, where transmissions are made as part of a service that is syndicated to third-party websites:

0.5c for each transmission of a sound recording to a single listener

(iii) For "listener-influenced" webcasting services:

0.6c for each transmission of a sound recording to a single listener

(iv) Minimum fee (subject to certain qualifications): $5,000 per webcasting service

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[2] Section 802 (e) of the Copyright Act requires the CARP to report its determination concerning the royalty fee to the Librarian of Congress 180 days after the initiation of a proceeding. In this particular instance, the Panel submitted its report approximately three weeks later than anticipated under this provision due to a suspension of the proceedings during the period November 9, 2001, through December 2, 2001. The Copyright Office granted the suspension at the parties' request in order to allow them to engage in further settlement discussions. At the same time, the Office granted the Panel an additional period of time, commensurate with the suspension period, for hearing evidence and preparing its report. See Order, Docket No. 2000–9 CARP DTRA 1&2 (November 9, 2001). Additional details concerning the earlier procedural aspects of this proceeding are set forth in the CARP Report at pp. 10–18.

[3] At the outset of the proceeding, Webcaster parties also included Coollink Broadcast Network, Everstream, Inc., Incanta, Inc., Launch Media, Inc., MusicMatch, Inc., Univision Online, and Westwind Media.com, Inc., which have since withdrawn or been dismissed from the proceeding. Late in the proceeding, National Public Radio ("NPR") reached a private settlement with RIAA and withdrew prior to the conclusion of the 180-day hearing period. Because RIAA, AFTRA, AFM, and AFIM propose the same rates and take similar positions on most issues, they are sometimes referred to collectively as "RIAA" or "Copyright Owners and Performers" for convenience. Similarly, Webcasters, Broadcasters, and the Business Establishment Services are sometimes referred to collectively as "the Services."

[4] The Webcasters are *Internet* services that each employ a technology known as "streaming," but comprise a range of different business models and music programming.

[5] The Broadcasters are commercial AM or FM radio stations that are licensed by the Federal Communications Commission ("FCC").

[6] The Business Establishment Services, DMX/AEI Music, deliver sound recordings to business establishments for the enjoyment of the establishments' customers. See Knittel W.D.T. 4. DMX/AEI Music is the successor company resulting from a merger between AEI Music Network, Inc. ("AEI") and DMX Music, Inc. ("DMX").

[7] AFTRA, the American Federation of Television and Radio Artists, is a national labor organization representing performers and newspersons. See Tr. 2830 (Himelfarb).

[8] AFM, the American Federation of Musicians, is a labor organization representing professional musicians. See Bradley W.D.T. 1.

[9] AFIM, the Association For Independent Music, is a trade association representing independent record companies, wholesalers, distributors and retailers. See Tr. 2830 (Himelfarb)

[10] RIAA is a trade association representing record companies, including the five "majors" and numerous "independent" labels.

[11] Hereinafter, references to proposed findings of fact and conclusions of law shall be cited as "OFFCK" preceded by the name of the party that submitted the filing followed by the paragraph number. References to written direct testimony shall be cited as "W.D.T." preceded by the last name of the witness and followed by a page number. References 9to written rebuttal testimony shall be cited as "W.R.T." preceded by the last name of the witness and followed by a page number. References to the transcript shall be cited asd "TR." followed by the page number and the last name of the witness.

(v) Ephemeral license fee:

10% of each service's performance royalty fee payable under (i), (ii), or (iii).

For the section 112 license applicable to the business establishment services, the copyright owners proposed a rate set at 10% of gross revenues with a minimum fee of $50,000 a year.

2. Rates Proposed by Services

Webcasters proposed per-performance and per-hour sound recording performance fees, based upon an economic model, that considered the aggregate fees paid to the three performance rights organizations (ASCAP, BMI, and SESAC) that license the public performances of musical works for radio programs that are broadcast over-the-air by FCC-licensed broadcasters, by 872 radio stations during 2000. From this model, the webcasters derived a per-song and a per-listener hour base rate of 0.02¢ per song and 0.3¢ per hour, respectively. These figures were then adjusted to account for a number of factors, including the promotional value gained by the record companies from the performance of their works. This adjustment resulted in a fee proposal of 0.014¢ per performance or 0.21¢ per hour.

At the end of the proceeding, Webcasters suggested in their proposed findings of fact and conclusions of law an alternative method for calculating royalty fees, namely, a percentage-of-revenue fee structure. Specifically, Webcasters proposed a fee of 3% of a webcaster's gross revenues for all services. The alternative proposal was made with the understanding that the service would be able to elect either option.

Webcasters proposed no additional fee for the making of ephemeral recordings and a minimum fee of $250 per annum for each service operating under the section 114 license.

The Business Establishment Services who need only an ephemeral recording license proposed a flat rate of $10,000 per year for each company.

C. The Panel's Determination of Reasonable Rates and a Minimum Fees

In this proceeding, the Panel had to establish rates and terms of payment for digital transmissions of sound recordings made by noninteractive, nonsubscription services and rates for the making of ephemeral phonorecords made pursuant to the section 112(e) license; either to facilitate those transmissions made or by business establishments which are otherwise exempt from the digital performance right.

The proposed rates are set forth in Appendix A of the CARP Report, which is posted on the Copyright Office website at: *http://www.copyright.gov/carp/webcasting_rates_a.pdf.*

The proposed terms of payment may be found in Appendix B of the CARP Report, which is posted on the Copyright Office website at: *http://www.copyright.gov/carp/webcasting_rates_b.pdf.*

III. The Librarian's Scope of Review of the Panel's Report

The Copyright Royalty Tribunal Reform Act of 1993 (the Reform Act), Pub. L. No. 103–198, 107 Stat. 2304, created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review that result in final orders: one by the Librarian of Congress (Librarian) and a second by the United States Court of Appeals for the District of Columbia Circuit. Section 802(f) of title 17 directs the Librarian on the recommendation of the Register of Copyrights either to accept the decision of the CARP, or to reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." 17 U.S.C. 802(f). If the Librarian accepts it, then the determination of the CARP becomes the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals. 17 U.S.C. 802(g).

The review process has been thoroughly discussed in prior recommendations of the Register of Copyrights (Register) concerning rate adjustments and royalty distribution proceedings. See, e.g., Distribution of 1990, 1991, and 1992 Cable Royalties, 61 FR 55653 (1996); Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (October 28, 1997). Nevertheless, the discussion merits repetition because of its importance in reviewing each CARP decision.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP, "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency action is generally considered to be arbitrary when:

1. It relies on factors that Congress did not intend it to consider;
2. It fails to consider entirely an important aspect of the problem that it was solving;
3. It offers an explanation for its decision that runs counter to the evidence presented before it;
4. It issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;
5. It fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and
6. Its action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Mfrs. Ass'n. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983); *Celcom Communications Corp.* v. *FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp.* v. *FAA*, 758 F.2d 685 (D.C. Cir. 1985).

In reviewing the CARP's decision, the Librarian has been guided by these principles and the prior decisions of the District of Columbia Circuit in which the court applied the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) to the determinations of the former Copyright Royalty Tribunal (hereinafter "CRT or Tribunal"). See, e.g, *National Cable Tele. Ass'n* v. *CRT*, 724 F.2d 176 (D.C. Cir. 1983) (applying the Administrative Procedure Act's standard authorizing courts to set aside agency action found to be arbitrary, capricious, and abuse of discretion, or otherwise in accordance with law."); see also, *Recording Industry Ass'n of America* v. *CRT*, 662 F.2d 1, 7–9 (D.C. Cir. 1981); *Amusement and Music Operators Ass'n* v. *CRT*, 676 F.2d 1144, 1149–52 (7th Cir.), cert denied, 459 U.S. 907 (1982); *National Ass'n of Broadcasters* v. *CRT*, 675 F.2d 367, 375 n. 8 (D.C. Cir. 1982).

Review of judicial decisions regarding Tribunal actions reveals a consistent theme; while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its award of royalties to each claimant. See *National Ass'n of Broadcasters* v. *CRT*, 772 F.2d 922 (D.C. Cir. 1985), cert. denied, 475 U.S. 1035 (1986) *(NAB* v. *CRT)*; *Christian Broadcasting Network* v.

CRT, 720 F.2d 1295 (D.C. Cir. 1983) (*Christian Broadcasting* v. *CRT*); *National Cable Television Ass'n* v. *CRT*, 689 F.2d 1077 (D.C. Cir. 1982) (*NCTA* v. *CRT*); *Recording Indus. Ass'n of America* v. *CRT*, 662 F.2d 1 (D.C. Cir. 1981) (*RIAA* v. *CRT*). As the D.C. Circuit succinctly noted:

> We wish to emphasize * * * that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully. * * *

Christian Broadcasting v. *CRT*, 720 F.2d at 1319 (D.C. Cir. 1983), quoting *NCTA* v. *CRT*, 689 F.2d at 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal, he must be presented by the CARP with a rational analysis of its decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history of the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 103–286, at 13 (1993). This goal cannot be reached by "attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broadcasting* v. *CRT*, 720 F.2d at 1319.

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination. 17 U.S.C. 802(f).

IV. The CARP Report: Review and Recommendation of the Register of Copyrights

The law gives the Register the responsibility to review the CARP report and make recommendations to the Librarian whether to adopt or reject the Panel's determination. In doing so, she reviews the Panel's report, the parties' post-panel submissions, and the record evidence.

After carefully considering the Panel's report and the record in this proceeding, the Register has concluded that the rates proposed by the Panel for use of the webcasting license do not reflect the rates that a willing buyer and willing seller would agree upon in the marketplace. Therefore, the Register has made a recommendation that the Librarian reject the proposed rates ($0.14 per performance for Internet-only transmissions and $0.07 per performance for radio retransmissions) for the section 114 license and substitute his own determination (0.07c per performance for both types of transmissions), based upon the Panel's analysis of the hypothetical marketplace, and its reliance upon contractual agreements negotiated in the marketplace.

These changes necessitate an adjustment to the proposed rates for non-CPB, noncommercial broadcasters [12] for Internet-only transmissions as well. The adjusted rate for archived programming subsequently transmitted over the Internet, substituted programming and up to two side channels is 0.02¢, reflecting a downward adjustment from the 0.05¢ rate proposed by the Panel. The new rate for all other transmissions made by non-CPB, noncommercial broadcasters is 0.07¢ per performance per listener. Using this methodology, the Register recommends that the Librarian also reject the Panel's determination of a rate for the making of ephemeral recordings by those Licensees operating under the webcasting license. Because the Panel had made an earlier determination not to consider 25 of the 26 contracts submitted by RIAA for the purpose of setting a rate for the webcasting license, it was arbitrary for the Panel to use these same rejected licenses to set the Ephemeral License Fee. See section IV.13 herein for discussion. Consequently, the Register proposes a downward adjustment—from 9% of the performance royalties paid to 8.8%—to the Ephemeral License Fee to remove the effect of the discarded licenses.

In determining the Ephemeral License Fee for Business Establishment Services operating under an exemption to the digital performance right, the CARP considered separate licenses negotiated in the marketplace between individual record companies and these services. Its reliance on these agreements as an adequate benchmark for purposes of setting the rate for the section 112 license was well-founded and supported by the record. Therefore, the Register recommends adopting the Panel's proposal of setting the Ephemeral License Fee for Business Establishment Services at 10% of the service's gross proceeds. However, the Register cannot support the Panel's recommendation to set the minimum fee applicable to these services for its use of the ephemeral license at $500 when clear evidence exists in the contractual agreements to establish a much higher range of values for setting the minimum fee. Consequently, the Register evaluated the contracts and proposed a minimum fee consistent with the record evidence. The result is a minimum fee of $10,000 per license pro rated on a monthly basis.

[12] A non-CPB, noncommercial broadcaster is a Public Broadcasting Entity as defined in 17 U.S.C. 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Section 802(f) states that "[i]f the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of that 90-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be." During that 90-day period, the Register reviewed the Panel's report and made a recommendation to the Librarian to accept in part and reject in part the Panel's report, for the reasons cited herein. The Librarian accepted this recommendation and, on May 21, 2002, he issued an order rejecting the Panel's determination proposing rates and terms for the webcasting license and the ephemeral recording license. See Order, Docket No. 2000–9 CARP DTRA 1&2 (dated May 21, 2002).

The full review of the Register and her corresponding recommendations are presented herein. Within the limited scope of the Librarian's review of this proceeding, "the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it." Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55757 (1997), citing 61 FR 55663 (October 28, 1996) (Distribution of 1990, 1991 and 1992 Cable Royalties). Accordingly, the Register accepts the Panel's weighing of the evidence and will not question findings and conclusions which proceed directly from the arbitrators' consideration of factual evidence. The Register, however, may reject a finding of the Panel where it is clear that its determination is not supported by the evidence in the record.

A. Establishing Appropriate Rates

1. The "Willing Buyer/Willing Seller Standard"

Sections 112(e)(4) and 114(f)(2)(B), of title 17 of the U.S.C., provide that "the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," and enumerate two factors that the panel shall consider in making its decisions: (1) The effect of the use of the sound recordings on the sale of phonorecords, and (2) the relative contributions made by both industries in bringing these works to the public. In applying this standard, the Panel determined that it was to consider the enumerated factors along with all other relevant factors identified by the parties, but that it was not to accord the listed factors special consideration. Report at 21; see also Final Rule and Order, Rate Adjustment for the Satellite Carrier Compulsory License, Docket No. 96–3 CARP SRA, 62 FR 55742, 55746 (October 28, 1997).

Nevertheless, when the Panel considered the record evidence offered to establish a marketplace rate, it paid close attention to the two factors set forth in the statute. In analyzing the first factor, which focuses on the interplay between webcasting and sales of phonorecords, the panel found that the evidence offered during the proceeding was insufficient to demonstrate whether webcasting promoted or displaced sales of sound recordings. RIAA's evidence to demonstrate that performances of their sound recordings over the Internet displace record sales consisted of unsupported opinion testimony and consequently, the Panel afforded it no weight. Report at 33. Similarly, the Panel rejected the Webcasters' contention that webcasting promoted sales, affording little weight to its empirical studies. It concluded that the Sounddata survey [13] was not useful for purposes of this proceeding because it focused on the promotional value of traditional radio broadcasts and not the promotional value of webcasting. Id. Likewise, the Panel rejected a study by Professor Michael Mazis [14] because the response rates in the survey study fell below generally acceptable standards. All in all, the evidence on either side was not persuasive. Consequently, the Panel concluded that, for the time period under consideration, "the net impact of Internet webcasting on record sales [was] indeterminate." Id. at 34.

Broadcasters, however, disagree with the Panel's conclusions. They argue that the Panel should have made an adjustment for the promotional value of the transmissions, noting that the statute singled out this factor for consideration when setting the rates. Broadcasters Petition at 38. They further contend that the record demonstrates that "the promotional value of radio play should be far and away the most significant factor in determining the fair market value of broadcasters simulcast rates." Id. at 39–40. But all the evidence cited in the record references the interrelationship between radio stations and record companies in the analog world. As noted above, the Panel considered the evidence but did not find it persuasive.

Where the Panel makes a decision based upon its weighing of the evidence, the Register will not disturb its findings and conclusions that proceed directly from the Panel's consideration of the factual evidence. Thus, the Register accepts the Panel's conclusion that performances of sound recordings over the Internet did not significantly stimulate record sales. More importantly, though, the Panel correctly found that promotional value is a factor to be considered in determining rates under the willing buyer/willing seller model, and does not constitute an additional standard or policy consideration to be used after rates are set to adjust a base rate upwards or downwards. Report at 21. Therefore, the effect of any promotional value attributable to a radio retransmission would already be reflected in the rates for these transmissions reached through arms-length negotiations in the marketplace.

As for the second factor, the Panel found that both copyright owners and licensees made significant creative, technological and financial contributions. It concluded, however, that it was not necessary to gauge with specificity the value of these contributions in the case where actual agreements voluntarily negotiated in the marketplace existed, since such considerations, including any significant promotional value of the transmissions, would already have been factored into the agreed upon price. Id. at 35–36. This is not a contested finding.

It is also important at the outset of this review to distinguish the willing buyer/willing seller standard to be used in this proceeding from the standard that applies when setting rates for subscription services that operated under the section 114 license. They are not the same. Section 114(f)(1)(B), governing subscription services, requires a CARP to consider the objectives set forth in section 801(b)(1), as well as rates and terms for comparable types of digital audio transmission services established through voluntary negotiations. See Final Rule and Order, 63 FR 25394, 25399 (May 8, 1998). This standard for setting rates for the subscription services is policy-driven, whereas the standard for setting rates for nonsubscription services set forth in section 114(f)(2)(B) is strictly fair market value—willing buyer/willing seller. Thus, any argument that the two rates should be equal as a matter of law is without merit. See, e.g., Webcasters Petition at 4 (comparing rates set for preexisting subscription services under the policy driven standard with the proposed marketplace rates for nonsubscription services and inferring that the rates should be similar).

2. Hypothetical Marketplace/Actual Marketplace

To set rates based on a willing buyer/willing seller standard, the CARP first had to define the relevant marketplace in which such rates would be set. It determined, and the parties agreed, that the rates should be those that a willing buyer and willing seller would have agreed upon in a hypothetical marketplace that was not constrained by a compulsory license. The CARP then had to define the parameters of the marketplace: the buyers, the sellers, and the product.

In this configuration of the marketplace, the willing buyers are the services which may operate under the webcasting license (DMCA-compliant services), the willing sellers are record companies, and the product consists of a blanket license from each record company which allows use of that company's complete repertoire of sound recordings. Report at 24. Because of the diversity among the buyers and the sellers, the CARP noted that one would expect "a range of negotiated rates," and so interpreted the statutory standard as "the rates to which, absent special circumstances, most willing buyers and

[13] Michael Fine is an expert witness for the Webcasters and Broadcasters. He was the chief executive officer to Soundata, SoundScan and Broadcast Data Systems until December 31, 2000, and is now a management consultant to the firms operating these services. He analyzed data collected by these services to determine the promotional effect upon record sales from radio retransmissions and Internet-only transmissions and the displacement effect of record sales due to copying of sound recordings from Internet transmissions. Fine's W.D.T. at 1.

[14] Professor Mazis is a Professor in the Kogod School of Business, American University, who testified on behalf of the Webcasters and Broadcasters. He designed a survey study to analyze usage patterns of people who listen to simulcast of a radio station's over-the-air broadcast programming and transmissions made by services transmitting solely over the Internet. Specifically, the study was designed to measure:

a. The effect listening to transmissions over the Internet had on a listener's music purchases;

b. the extent to which listeners to radio retransmissions are either listeners from the broadcaster's local market or non-local listeners;

c. the amount of time spent listening to programming on the Internet and the proportion of that time spent listening to music programming versus non-music programming; and

d. the reasons why people visit radio station websites and the activities they engage in when they visit these sites. Mazis' W.D.T. at 1–2.

willing sellers would agree" in a competitive marketplace.[15] Id. at 25.

The Services take issue with the Panel's analysis of the hypothetical marketplace. They argue that the willing sellers should be considered as a group of hypothetical "competing collectives each offering access to the range of sound recordings required by the Services," and not, as the Panel contends, viewed as individual record companies. Broadcasters Petition at 9; Webcasters Petition at 9–10. It is hard to see, however, how competition would be stimulated in a marketplace where every seller offers the exact same product and where more likely than not, the sellers would act in concert to extract monopolistic prices. Possibly sellers would choose to undercut each other, but at some point the price would stabilize. In any event, the Services failed to explain how such collectives would operate in a competitive marketplace. Consequently, the Register rejects the Webcasters' challenge to the Panel's definition on this point and adopts the Panel's characterization of the relevant marketplace, recognizing that for purposes of this proceeding, the major record companies are represented by a single entity, the RIAA.

Turning next to the actual marketplace in which RIAA negotiated agreements with individual services, the Services voice a number of objections to the Panel's decision to rely on the 26 voluntary agreements offered into evidence by RIAA. Specifically, the Services object to the use of the voluntary agreements because they fail to exhibit a range of negotiated rates among diverse buyers and sellers. Broadcasters Petition at 10; Webcasters Petition at 10. They also question the validity of relying on agreements negotiated during the early stages of a newly emerging industry, noting the Panel's admonition to approach such agreements with caution. Report at 47. The reason for the warning was Dr. Jaffe's[16] stated concern that such licenses "may not reflect fully educated assessments of the nascent businesses" long-term prospects."

The Services also argue that the existence of the antitrust exemption in the statutory license gave RIAA an unfair bargaining advantage over the Services because RIAA represented the five major record companies who together owned most of the works. They contend that RIAA used its superior market power to negotiate supra-competitive prices with Services who could not match either RIAA's power in the marketplace or its sophistication in negotiating contracts. Moreover, they utterly reject the Panel's determination that RIAA's perceived market power was tempered by the existence of the statutory license, which, for purposes of negotiating a fair rate for use of sound recordings, leveled the playing field. Webcasters Petition at 12.

Not surprisingly, RIAA agrees with the Panel on this issue. It maintains that the statutory license offers the Services two clear advantages which more than offset any perceived advantage the RIAA may have had in negotiating a voluntary agreement. First, the license eliminates the usual transaction costs associated with negotiating separate licenses with each of the copyright owners. Second, services may avoid litigation costs associated with setting the rates for a statutory license provided they choose not to participate in the CARP process. RIAA reply at 12.

In essence, both sides articulate valid positions which are supported by the record. RIAA is clearly an established market force with extensive resources and sophistication. In fact, the Panel found that when RIAA negotiated with less sophisticated buyers who could not wait for the outcome of this proceeding, the rates were above-market value, and therefore, not considered by this CARP. Report at 54–56. Nevertheless, it would make no sense for RIAA to take any other position in a marketplace negotiation. Sellers expect to make a profit and will extract from the market what they can, just as buyers will do everything in their power to get the product at the lowest possible price. These are the fundamental principles guiding marketplace negotiations.

Such negotiations, however, were few. For the most part, webcasters chose not to enter into negotiations for voluntary agreements, knowing that they could continue to operate and wait for the CARP to establish a rate. Such actions on the part of the users clearly impeded serious negotiations in the marketplace and support the CARP's observation that the statutory license had a countervailing effect on the negotiation process and limited the ability of RIAA to exert undue marketplace power. See Tr. 9075–77, 9490–94 (Marks) (explaining the difficulties of bringing webcasters to the negotiating table due to the statutory license). Thus, the CARP could only consider negotiated rates for the rights covered by the statutory license that were contained in an agreement between RIAA and a Service with comparable resources and market power.

The only agreement that met these criteria was the Yahoo![17] agreement. The Panel found that both parties to that agreement entered into negotiations in good faith and on equal footing. Moreover, RIAA's negotiating advantage disappeared. RIAA could not extract super-competitive rates because Yahoo! brought comparable resources, sophistication, and market power to the negotiating table.

Moreover, Yahoo! could have continued to operate under the license and wait for the outcome of this proceeding. Yet, Yahoo!, unlike most of the other Services, did not take this course of action. It wanted a negotiated agreement so that it could fully develop its business model based on certainty as to the costs of the use of the sound recordings. Consequently, it had every incentive to negotiate a rate that reflected its perception of the value of the digital performance right in light of its needs and position in the marketplace. Had RIAA insisted upon a super competitive rate, Yahoo! could have walked away and waited for the CARP to set the rates. RIAA Reply at 13. Thus, it was not arbitrary for the Panel to consider the negotiated agreement between Yahoo! and RIAA. It met all the criteria identified by the CARP (discussed above) that characterized the hypothetical marketplace: Yahoo! was a DMCA-compliant Service; RIAA represented the interests of five independent record companies, and the license granted the same rights as those offered under the webcasting and the ephemeral recording licenses.

The Webcasters make one final argument concerning use of licenses negotiated in the marketplace. They fault the Panel for its reliance on a contract for which there was no prior marketplace precedent for setting a rate. Webcasters Petition at 15. Yet, that alone cannot be a reason to reject

[15] The panel used the same analysis for setting the rates for the ephemeral recording license because the statutory language defining the standard for setting rates for the ephemeral recording license is nearly identical to the standard set forth in section 114.

[16] Adam Jaffe is a Professor of Economics at Brandeis University. He is also the Chair of the Department of Economics and the Chair of the University Intellectual Property Policy Committee. He testified on behalf of the Webcasters and the Broadcasters.

[17] Yahoo! is a streaming service which provides a retransmissions of AM/FM radio stations and programming from other webcaster sites. Report at 61. Yahoo! is also a global Internet communications, commerce and media company, offering comprehensive services to more than 200 million users each month. Content for its features like Yahoo! Finance, Yahoo! News, and Yahoo! Sports, are typically licensed from third parties. Mandelbrot W.D.T. ¶ 3–5.

The Panel was well aware of the many faces of Yahoo! Nevertheless, it found no reason to reject the Yahoo! agreement merely because it offered other business services. See Report at 76, in 53.

consideration of agreements negotiated in the marketplace, albeit at an early stage in the development of the industry. At some point, rates must be set. Such rates then become the baseline for future market negotiations. RIAA recognized an opportunity to participate in this initial phase and moved forward to negotiate contracts with users with the intention of using these contracts to indicate what a willing buyer would pay in the marketplace. However, that was easier said than done. As discussed above, most Webcasters chose not to enter into marketplace agreements, preferring to wait for the outcome of the CARP proceeding in the hope of getting a low rate. Clearly, such resistance to enter into good faith negotiations made it difficult for the copyright owners to gauge the market accurately and find out just what a willing buyer would be willing to pay for the right to transmit a sound recording over the Internet.

3. Benchmarks for Setting Market Rates: Voluntary Agreements vs. Musical Works Fees

The parties offer two very different methods for setting the webcasting rates. RIAA argued that the best evidence of the value of the digital performance right is the actual rates individual services agreed to pay for the right to transmit sound recordings over the Internet. In support of its position, it offered into evidence 26 separate agreements it had negotiated in the marketplace prior to the initiation of the CARP proceeding. The Services take a different approach. They dispute the validity of the contracts as a bases for marketplace rates and offer in their place a theoretical model (the "Jaffe model") predicated on the fees commercial broadcasters pay to use musical works in their over-the-air AM/FM broadcast programs.

The Jaffe model builds on the premise that in the hypothetical marketplace, copyright owners would license their digital performance rights and ephemeral recording rights at a rate no higher than the rates music publishers currently charge over-the-air radio broadcasters for the right to publicly perform their musical works.[18] Report at 28, citing Webcasters PFFCL ¶¶ 276–78; Jaffe W.D.T. 16–19. To find the rate copyright owners would charge under this model, Webcasters calculated a per performance and a per hour rate by using the aggregate fees that 872 over-the-air radio stations paid in 2000 to the performing rights organizations BMI, ASCAP, and SESAC.[19] It combined the fee data with data on listening audiences obtained from Arbitron to generate an average fee paid by an over-the-air broadcaster per "listening hour." From this value, Webcasters calculated a per performance fee by dividing the "listener hour" fee by the average number of songs played per hour by music-intensive format stations. Id. These calculations yielded a per song fee of 0.02¢ or, in the alternative, a per listener hour fee of 0.22¢. For purposes of webcasting, these values were adjusted upward to reflect the fact that, on average, webcasters play 15 songs per hour, as compared to the 11 per-hour played on over-the-air radio. The webcaster per hour rate works out to be 0.3 instead of 0.2¢ per hour.

After carefully considering both approaches, the Panel chose to focus on the RIAA agreements. In rejecting Dr. Jaffe's theoretical model, the panel cited three reasons for its conclusion. First, the Panel expressed strong concern regarding the construct of the model, including: 1. The difficulty in identifying all the factors that must be considered in setting a price, and 2. The inherent error associated with predicating a prediction on a "string of assumptions," especially where the level of confidence in many of the assumptions is not high. Second, the Panel was wary of analogizing the market for the performance of musical works with the market for the performance of sound recordings, finding instead that the two marketplaces are distinct based upon the difference in cost and demand characteristics. And finally, the Panel determined that the Jaffe model was basically unreliable. It could not be used to predict accurately the amount of royalty fees owed to the performing rights societies by a particular radio station. It came to this conclusion after using the model to predict the royalty fees owed by a particular station and comparing that figure to the amount the radio station actually paid. For some radio stations, the model severely underestimated the amount owed to the performing rights societies, thus, drawing into serious question the reliability of the model. Report at 42.

a. *Fees paid for use of musical works.* The Broadcasters and the Webcasters fault the Panel for disregarding the fees paid for musical works as a viable benchmark. Webcasters Petition at 15, 47. They maintain that Dr. Jaffe's analysis proves that the value of the performance of the sound recording is no higher than the value of the performance of the musical work. Webcasters argue that the fees for musical works constitute a valid benchmark because these rates are the result of transactions between willing buyers and willing sellers over a long period of time, in a marketplace that shares economic characteristics with the marketplace for sound recordings. Webcasters Petition at 48. The Broadcasters agree. They maintain that even under the willing buyer/willing seller standard, "the over-the-air musical works license experience * * * has resulted in fees 'to which most willing buyers and willing sellers [have] agree[d]' and constitute 'comparable agreements negotiated over a longer period, which ha[ve] withstood 'the test of time.' " Broadcasters Petition at 45–46, citing Report at 25, 47.

Broadcasters and Webcasters also object to the Panel's characterization of its proposed benchmark as merely a theoretical model. Webcasters Petition at 51. They maintain that Dr. Jaffe's model was much more than a theoretical model because it used actual data from the musical works marketplace to calculate an analogous rate for use of sound recordings in the digital marketplace. Consequently, these Services contend that the Panel gave inadequate consideration to their proposed benchmark and rejected the model out of hand because it was purported to be only a theoretical model based upon a number of untested assumptions. Broadcasters Petition at 18–19; Webcasters Petition at 18–20, 52.

Finally, the Services argue that the statute does not compel the Panel to consider only negotiated agreements. They also contend, that the reliance on the fees paid for use of the musical works in a prior CARP proceeding to establish rates for subscription services operating under the same license required the panel to give more consideration to the musical works benchmark. Broadcaster's Petition at 1–2; Webcasters Petition at 1–2, 15, 17, 47. Webcasters find support for this last argument in an Order of the Copyright Office issued in this proceeding, dated July 18, 2001.

In that order, the Office acknowledged that in 1998 it had adopted the rates paid for musical works fees as a relevant benchmark for setting rates for

[18] A "musical work" is a musical composition, including any words accompanying the music. A "sound recording" is a work that results from the fixation of a series of musical, spoken, or other sounds, other than those accompanying a motion picture or other audiovisual work.

[19] BMI, Inc., American Society for Composers, Authors and Publishers, and SESAC, Inc. are performing rights organizations that represent songwriters, composers and music publisehrs in all genres of music. These societies offer licenses and collect and distribute royalty fees for the non-dramatic public performances of the copyrighted works of their members.

subscription services. It stated, however, that the evidence in that case did not support a conclusion that the value of the sound recording exceeded the value of the musical work. Moreover, and directly to the point, the Register's recommendation in the earlier proceeding concurred with the earlier Panel's determination that the musical works benchmark is NOT determinative of the marketplace value of the performance right in sound recordings. The relevant passage states: "The question, however, is whether this reference point (the musical works benchmark) is determinative of the marketplace value of the performance in sound recordings; and, as the Panel determined, the answer is no." 63 FR 25394, 25404 (May 8, 1998).

The July 18 Order went on to note that in the subscription service proceeding, "[h]ad there been record evidence to support the opposite conclusion, [namely, that the value of sound recordings exceeds the value of musical works], the outcome might have been different." This statement was an invitation to the parties to provide whatever evidence they could adduce in this proceeding to establish the value of the sound recording. It was not to be read as an absolute determination, that the value of the sound recording in a marketplace unconstrained by a compulsory license is less than the value of the underlying musical work. Instead, the Order stated that "the musical work fees benchmark identified in a previous rate adjustment proceeding as the upper limit on the value of the performance of a sound recording may or may not be adopted as the outer boundary of the "zone of reasonableness" in this proceeding. This is a factual determination to be made by the CARP based upon its analysis of the record evidence in this proceeding."

It is also important to note that in the prior proceeding, the only reason the Register and the Librarian focused on the musical works benchmark was because it was the only evidence that remained probative after an analysis of the Panel's decision. Each of the other benchmarks possessed at least one fatal deficiency and, consequently, each was rejected as a reliable indicator of the value of the performance of a sound recording by a subscription service. Of equal importance is the fact that the musical works benchmark had never been fully developed in the record, nor had any party relied on it to any great extent in making its case to that Panel. Consequently, it was not arbitrary for the Panel to reject the Services' invitation to anchor its decision for setting rates for nonsubscription services on the prior decision setting rates for preexisting subscription services.

Moreover, the Panel is not required to justify why the rates it ultimately recommended here are greater than the rates preexisting subscription services pay for use of the musical works. That is merely the result of the analysis of the written record before this Panel, and its decision flows naturally from its reliance upon contractual agreements negotiated in the relevant marketplace for the right at issue. This difference in the rates is also attributable to the different standards that govern each rate setting proceeding. As discussed previously in section IV.1, the standard for setting rates for subscription services is policy based and not dependent upon market rates. Consequently, it is more likely that the rates set under the different standards will vary markedly, especially when rates are being set for a new right in a nascent industry.

Nevertheless, the Register agrees with the Services on a number of theoretical points. Certainly, the Panel could have utilized Dr. Jaffe's model in making its decision, either alone or in conjunction with the voluntary agreements, provided that it considered the model's deficiencies, and made appropriate adjustments for the fact that the model required reliance on a string of assumptions to perform the conversion of a rate for the public performance of a musical work in an analog environment, into a comparable rate for the public performance of a sound recording in a digital format. *See AMOA v. CRT*, 676 F2d 1144 (7th Cir. 1982). But the fact remains that it was not required by law to do so. The Panel was free to choose any of the benchmarks offered into the record or to rely on each of them to the degree they aided the Panel in reaching its decision. *See, e.g.*, Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting, 43 FR 25068–69 (CRT found voluntary license between BMI, Inc., and the public broadcasters, Public Broadcasting System and National Public Radio, of no assistance in setting rates for use of ASCAP repertoire).

The Register also rejects the Services' contentions that the Panel failed to consider fully Dr. Jaffe's model. *See* Webcasters Petition at 20, 52. The Panel did consider Jaffe's model and concluded that it need not consider alternative benchmarks that are at best analogous when it had actual evidence of marketplace value of the performance of the sound recordings in the record. Report at 42. It also rejected the offer to utilize the model because the underlying assumptions were in many instances questionable. For example, the Panel did not accept the assumptions that a percentage of revenue model could be converted accurately to a per performance metric, or that the buyers and sellers in the two marketplaces are analogous.

Broadcasters assert that they had established that the value of the musical work is higher than the comparable right for sound recording based on the fees paid for use of these works in movies and television programs. Broadcasters Petition at 24. In addition, they offered a study of the fees paid for these rights in twelve foreign countries where the Services claim these rights are valued more or less equally. *Id.* at 24, 49. Because the Panel failed to analyze this information, the Services argue, the Panel's rejection of the musical benchmark was arbitrary.

RIAA responds that the information offered on the fees paid for the public performance of sound recordings fails to establish that in these countries sound recordings are valued according to a "willing buyer/willing seller" standard. RIAA Reply at 20, fn 36. In fact, many of the countries surveyed evidently use an "equitable remuneration" standard, which courts have held not to be equivalent to a fair market value. Because it is not possible to ascertain whether any of the rates offered in the survey of foreign countries represented a fair market rate, or that the rights in these countries are equivalent to the rights under U.S. law, the Panel was not arbitrary in its decision to disregard this evidence. The Register also concludes that the Panel's decision not to consider master use and synchronization licenses for use of musical works and sound recordings in motion pictures and television was not arbitrary. At best, these licenses offered potential benchmarks for evaluating the digital performance right for sound recordings, and they may well have been useful had not actual evidence of marketplace value of the sound recordings existed. In any event, they did not represent better evidence than the voluntary agreements negotiated in the marketplace for the sound recording digital performance right.

b. *Voluntary agreements.* On the other hand, the Panel articulated two affirmative reasons for its focus on the negotiated agreements. First, the statute invites the CARP to consider rates and terms negotiated in the marketplace. Second, the Panel accepted the premise that the existence of actual marketplace agreements pertaining to the same rights for comparable services offers the best evidence of the going rate. Report at 43, citing Jaffe Tr. at 6618.

But in choosing this approach, the Panel did not accept the 26 voluntary agreements at face value. It evaluated the relative bargaining power of the buyers and sellers, scrutinized the negotiating strategy of the parties, considered the timing of the agreements, discounted any agreement that was not implemented, eliminated those where the Service paid little or no royalties or the Service went out of business, and evaluated the effect of a Service's immediate need for the license on the negotiated rate. See Report at 45–59.[20] Ultimately, it gave little weight to 25 of the 26 agreements for these reasons and because the record demonstrated that the rates in these licenses reflect above-marketplace rates due to the superior bargaining position of RIAA or the licensee's immediate need for a license due to unique circumstances. At best, the Panel concluded that the rates included in these agreements establish an upper limit on the price of the digital performance right, and where included, the right to make ephemeral copies. Report at 59.

RIAA objects to the Panel's decision to reject 25 of the 26 agreements on the grounds that the Panel's criticisms were overbroad. RIAA Petition at 34. Specifically, it claims that the Panel mischaracterized its agreement with *www.com/OnAir* ("OnAir"), arguing that this Licensee paid substantial royalties and its decision to enter into the agreement was not motivated by special circumstances as the CARP claimed. Id. at 31. This observation, however, is not sufficient to overcome the Panel's conclusion in regard to this agreement, especially in light of the testimony of RIAA's own expert witness, Dr. Nagle, who testified the Panel should give no consideration to any agreement with a licensee who cannot survive in the marketplace. Report at 24. Had OnAir continued to operate in the marketplace and renew its license with RIAA, the Panel might have given it more serious consideration. But again, it was not required to do so, especially when the Panel found more probative evidence in the record upon which to rely.

Likewise, RIAA objected to the Panel's decision not to give any weight to the MusicMusicMusic ("MMM") agreement, arguing in this case that the Panel assumed MMM had renewed its agreement in 2001 for the same reasons that led it to accept a higher than market value rate in 1999. RIAA Petition at 32. Webcasters respond that RIAA misrepresents the facts of the renewal. They maintain that MMM renewed the agreement in 2001 based on "many of the same motivating factors" that led to the initial agreement, including its concerns about its long-term relationship with RIAA in other areas. Webcasters Reply at 29. Because the evidence supports a rationale for MMM to accept a higher than marketplace rate, it was not arbitrary for the Panel to decide not to adopt it as an adequate benchmark. The Panel need not rely on the MMM agreement when it had another agreement negotiated in the marketplace that did not suffer from the same perceived shortcomings.

Specifically, the Panel gave significant weight to the one remaining agreement negotiated—the RIAA-Yahoo! agreement—and used it as a starting point for setting the rates for the webcasting license and the ephemeral recordings license. The Panel found this agreement particularly reliable and probative because: (1) Yahoo! was a successful and sophisticated business which, to date, had made well over half of all DMCA-compliant performances; (2) it had comparable resources and bargaining power to those RIAA brought to the table; and (3) the agreement provided for different rates for different types of transmissions. See Report at 64–67; 70. While the first two reasons offer strong support for the Panel's decision to rely upon the Yahoo! agreement, the third reason is questionable in the context of the Yahoo! agreement because the different rates do not actually represent the parties' understanding of the value of the performance right for these types of transmissions. See discussion infra, section IV.5.

Webcasters, however, argue that the Panel's reliance on the Yahoo! agreement was fatal because it selected a single term out of a multifaceted contract. Webcasters at 22–23. Specifically, they maintain that the webcasting rate did not reflect merely the value of the sound recording, but an abundance of trade-offs that met the needs of RIAA and Yahoo!. Id. at 24. Webcasters make this argument because, in a prior CARP proceeding, the Register had refused to adopt a complicated partnership agreement that purportedly included a rate for the digital performance right as a benchmark for setting the statutory rate. See, Rate Setting Proceeding for Subscription Services, 63 FR 25394 (May 8, 1998). Specifically, the Register concluded that "it was arbitrary for the Panel to rely on a single provision extracted from a complex agreement where the evidence demonstrates that the [rate] provision would not exist but for the entire agreement." Id. at 25402.

The two agreements, however, are not analogous. The primary purpose of the Yahoo! agreement was to set a rate for use of sound recordings over the Internet. Thus, the noted trade-offs in this agreement were all directly tied to considerations relating to the value of the performance right, and did not affect its validity as a benchmark. Such was not the case with the subscription services agreement offered into evidence in the prior proceeding, where the performance right component was merely "one of eleven interdependent co-equal agreements which together constituted the partnership agreement between [Digital Cable Radio Associates ("DCR")] and the record companies." Id.

Along these same lines, the Services challenge the Panel's dependence upon a single contract negotiated between a single seller (RIAA) and a single buyer (Yahoo!), especially in light of the Panel's construct of the hypothetical marketplace. Broadcasters Petition at 14; Live365 Petition at 5; Webcasters Petition at 9, 14. These parties argue that under 17 U.S.C. 114(f)(2)(B), the Panel had discretion to consider negotiated agreements only when the agreements were for comparable types of services in comparable circumstances. Webcasters, including Live365, maintain that Yahoo! had a unique position among webcasters and argue that it was manifestly arbitrary for the Panel to set rates based solely on the rates paid by this one webcaster which by its own admissions was not similarly situated with other webcasters. Live365 Petition at 11; Webcasters Petition at 27. Specifically, they contend that Yahoo! had little concern about getting a reasonable rate for Internet-only transmissions so long as the rate for RR transmissions was favorable and it could continue to grow in this arena. Webcasters note that Yahoo!'s main business was the retransmission of radio re-broadcasts, and that over 90% of all transmissions made by Yahoo! fall within this category. Id. at 28. Consequently, Webcasters maintain that the rates set for Internet-only transmissions in the Yahoo! agreement cannot be fairly applicable to Webcasters at large. Id. at 29.

Broadcasters have other complaints with the Panel's approach. First, they object to the use of the Yahoo! contract to set rates for broadcasters when the buyer in that case was not a broadcaster

[20] The Panel also considered, and ultimately rejected three offers of corroborating evidence made by RIAA in support of its position that all 26 agreements should be used in setting the royalty rates: (1) License agreements for making [material redacted subject to Protective Order]; (2) prior case law articulating a method for assessing damages in patent infringement cases; and (3) a pricing strategy analysis.

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but a third-party aggregator—a completely different type of business. Second, they fault the Panel for its failure to follow its own dictate to proceed cautiously when viewing contracts negotiated in a nascent industry for newly created rights. Broadcaster Petition at 14. Similarly, Webcasters fault the Panel for relying exclusively on the Yahoo! agreement because it offers only a single, uniform rate for each type of transmission, in contrast to the "range of rates," involving "diverse buyers and sellers," that the Panel identified as the hallmark of a willing buyer/willing seller marketplace." Webcasters Petition at 14. Webcasters also contend that the Yahoo! agreement should not have been considered because it, like the Lomasoft-RIAA agreement, had not been renewed. Webcasters Petition at 41.

Moreover, Live365 questions the Panel's reliance on the Yahoo! contract when it had rejected use of a second similar agreement between MusicMatch ("MM") and RIAA because MM had accepted higher than marketplace rates for nearly identical reasons to those that account for the inflation in the Yahoo! rates. MM had wished to settle litigation with RIAA and it received a benefit from the inclusion of a Most Favored Nations (MFN) clause in the contract. Yet, in spite of the similarities, the Panel relied on the Yahoo! agreement and disregarded the second one. Such disparate treatment of similarly situated services is arguably arbitrary. Live365 Petition at 13. A closer examination of the agreements, however, reveals a significant difference between the two contracts which allowed the Panel to disregard the MM agreement for further consideration. Most importantly, the MM agreement contained a MFN clause that [material redacted subject to a protective order]. The Panel reasoned that this provision undermined the usefulness of the agreement to establish a marketplace rate because [material redacted subject to a protective order]. Report at 56–57. Such was not the case with the Yahoo! agreement since the MFN clause only allowed Yahoo! to receive a partial benefit commensurate with [material redacted subject to a protective order]. Report at 62.

The Register concurs and agrees with the Panel's observation that it would be unsound to establish a rate for the statutory license using a rate that itself is subject to change based on the outcome of this proceeding.

The Register also finds the other arguments by the parties unavailing. In spite of their objections, the Services' own expert, Dr. Jaffe, agreed in principle with the Panel's approach. In his testimony, he acknowledged that voluntary agreements between a willing buyer and a willing seller would constitute the best evidence of reasonable marketplace value if such agreements were between parties comparable to those using the webcasting license. Tr. 6618 (Jaffe). The Services' argument, of course, is that the Yahoo! agreement is not a comparable agreement for purposes of setting rates for all webcasters, and this appears to be a valid point. Yahoo!'s business model is somewhat unique. Unlike webcasters that create their own programming, Yahoo! merely offers programming by AM/FM radio stations and other webcasters.

Nevertheless, RIAA offers record evidence that contradicts the Webcasters' assertion that Yahoo! is not a comparable service for purposes of this proceeding, noting that many webcasters affirmatively stated that Yahoo! is a competitor. Moreover, RIAA asserts that the number of the performances made by Yahoo! on its Internet-only channels is roughly equivalent to the number of performances made by the other webcasters in this proceeding and, therefore, Yahoo!'s interest in getting a reasonable rate for its Internet-only stations should be comparable to those of the Webcasters in this proceeding. RIAA reply at 33–34.

Because Yahoo! is engaged in both types of transmissions, it is reasonable to accept this agreement as a basis for setting rates for both types of transmissions. Yahoo! has developed a significant business presence in the marketplace for Internet-only transmissions and understands the marketing and business of Internet-only webcasters. Consequently, allegations that Yahoo! has only a de minimis interest in the webcasting field and is thus less interested in getting a reasonable rate for the right to make digital transmissions are without merit. The question, however, is whether each rate in the Yahoo! agreement reflects the actual value of the particular transmission or whether one must consider both rates in concert to understand the valuation process. For a more detailed discussion on this point, see section IV.5 infra.

4. Alternative Methodology: Percentage-of-Revenue

The Panel also carefully considered and rejected a percentage-of-revenue model for assessing fees and determined that a per performance metric was preferable to a percentage-of-revenue model. A key reason for rejecting the percentage-of-revenue approach was the Panel's determination that a per performance fee is directly tied to the right being licensed. The Panel also found that it was difficult to establish the proper percentage because business models varied widely in the industry, such that some services made extensive music offerings while others made minimal use of the sound recordings. Report at 37. The final reason and perhaps the most critical one for rejecting this model was the fact that many webcasters generate little revenue under their current business models. As the Panel noted, copyright owners should not be "forced to allow extensive use of their property with little or no compensation." Id, citing H.R. Rep. 105–796, at 85–86. Thus, it seemed illogical to set a rate for the statutory license on a percentage-of-revenue basis when in fact a large proportion of the services admit they generate very little revenue, and, therefore, would generate meager royalties even for substantial uses of copyrighted works. Moreover, it is highly unlikely that a willing seller, who negotiates an agreement in the marketplace, would agree to a payment model which itself could not provide adequate compensation for the use of its sound recordings.

Nevertheless, Webcasters and Live365 assert that the Panel acted arbitrarily when it failed to provide a revenue-based royalty option. Webcasters at 54. They maintain that both sides advocated adoption of a percentage-of-revenue option, see RIAA PFFCL, Appendix C; Webcasters PFFCL ¶¶ 283–296, and that it was arbitrary for the Panel to refuse to adopt this approach. See Live365 Petition at 10; see also pg. 11, fn 6. Webcasters also assert that they had made clear that in the event the Panel rejected Jaffe's model, a revenue-based alternative license proposal would be necessary to avoid putting certain webcasters out of business. Webcasters Petition at 56, 60. Moreover, Webcasters reject the Panel's conclusion that the Services' revenue-based fee proposal was untimely. Id.. at 57–60. They maintain that under § 251.43(d) they were allowed to revise their claim or their requested rate "at any time during the proceeding up to the filing of the proposed findings of fact and conclusions of law," and that the Panel had no authority to alter this provision by order under § 251.50.[21]

[21] Section 251.50 of the 37 CFR provides that: In accordance with 5 U.S.C., subchapter II, a Copyright Arbitration Royalty Panel may issue rulings or orders, either on its own motion or that of an interested party, necessary to the resolution of issues contained in the proceeding before it: Provided, that no such rules or orders shall amend. Continued

In reply, RIAA notes that the Webcasters cite no evidence for their assertion that they reasonably believed the Panel would offer a percentage-of-revenue option and counters their timeliness argument by setting forth the timeline regarding the parties's submissions concerning the rates. RIAA Reply at 62. Evidently at the request of the Webcasters, the Panel issued an order setting November 2 as the deadline for submitting revised or new rate proposals, so that parties were fully aware of each other's position and could style their findings of fact and conclusions of law accordingly. Consequently, the Panel found that the Services' later submission including a proposed rate based on percentage-of-revenue in their PFFCL was untimely. Report at 31, citing Order of November 3, 2001.

After considering the arguments now advanced by the Services concerning the Panel's authority to require final submissions on rates prior to the filing of the PFFCLs, the Register finds that the Panel acted in a lawful manner and within its authority. As RIAA points out in its reply, the Panel has authority pursuant to 37 CFR 251.42 to waive or suspend any procedural rule in this proceeding, including the time by which parties must make final submissions regarding proposed rates. What the Panel cannot do is engage in a rulemaking proceeding to amend, supplement, or supersede any of the rules and regulations governing the CARP procedures. See 37 CFR 251.7. Moreover, the language in § 251.43 is somewhat ambiguous as to when a party can make its final rate proposal, lending itself to two interpretations. For this reason alone, it was prudent for the Panel to issue an order clarifying the application of the rule for purposes of this proceeding. In fact, Webcasters had asked for this ruling and cannot be heard at the end of the process to argue against a ruling that they sought and to which they never objected. Consequently, the Panel was not arbitrary when it found the Webcasters' request for a percentage-of-revenue fee structure untimely.

Moreover, the Panel was not arbitrary for failing to adopt a percentage-of-revenues model merely because some parties voiced an expectation that the Panel would offer such a model as an alternative means of payment. This complaint of unmet expectations is not a substantive argument for finding the Panel's decision arbitrary and, consequently, it will not be considered further.

On the other hand, Live365 does make a substantive argument concerning the Panel's decision not to adopt a percentage-of-revenue model. It notes that the current marketplace uses two types of rate structures, a revenue based model and a performance rate structure, and that the revenue based model is better for start-up and smaller webcasters. Live365 Petition at 8. In fact, Live365 points out that many of the agreements that RIAA negotiated with webcasters incorporated this model. Moreover, Live365 maintains that it was arbitrary for the Panel to propose rates that "had the effect of rendering sound recordings substantially more valuable than musical works, even though the CARP acknowledged that it was rendering no opinion on this issue." Live365 Petition at 5, 14–15. In its opinion, this result was arbitrary based upon Yahoo!'s stated perception that the value of the performance right for the musical work is comparable to the value of the performance right for the sound recording. Finally, Live365 argues that rates based upon mere perception, as those negotiated in the Yahoo! agreement, are by their very nature arbitrary and should be disregarded. Id. at 15.

RIAA refutes the Services' claim that the Panel was arbitrary because it failed to offer a percentage-of-revenue model. It argues that the record supports the Panel's conclusion that a percentage-of-revenue model would have been difficult to implement because Services use sound recordings to different degrees—a position taken by the Webcasters' own witness. Specifically, Jaffe questioned the appropriateness of using a percentage-of-revenue model where those percentages were based on the economics driving over-the-air broadcasts. RIAA Reply Petition at 52, citing Tr. 6487, 6488, 12582 (Jaffe). Jaffe also acknowledged that it was difficult to assess what the revenue base should be for such a model given the variation of the business models utilized by the webcasters. RIAA also notes that section 114(f)(2)(B) requires the Panel to consider the quantity and nature of the use of the sound recording and argues that a per performance metric automatically accounts for the amount of use by the various services. RIAA Reply at 59.

RIAA also argues that a basic percentage-of-revenue fee structure would frustrate the purpose of the law because it would deny copyright owners fair compensation for use of their works in those situations where a service generates little or no revenue. Certainly, the record contains evidence that a number of webcasters do not expect or intend to earn revenues from their webcasts, see Report at 37; see, e.g., Live365 Petition at 7, maintaining that their use is designed primarily to maintain their over-the-air audience. Because certain Services take this approach, when RIAA did consider using a percentage-of-revenue model, it included a substantial minimum fee proposal in conjunction with the percentage of fee proposal to address the problems associated with low revenue generating businesses. Specifically, the RIAA proposal required that a Service pay either 15% of revenues or $5,000 per $100,000 of a webcasters' operating costs, whichever is greater. RIAA Reply at 61. In this way, RIAA sought to avoid the anomaly of allowing a business unfettered use of the sound recordings without reasonable compensation to the copyright owners. Id. at 54, 61. This formulation, however, would not have given the webcasters the relief they seek through the adoption of a rate based on a percentage-of-revenues. In fact, under RIAA's percentage-of-revenue formulation, many webcasters, including Live365, would have paid more than they will under the Panel's per performance rate structure.

The Register finds that the Panel's decision not to set a percentage-of-revenue fee option was not arbitrary in light of the record evidence. First, it is clear that the Services' primary position was to seek adoption of a fee based upon performances and not a percentage-of-revenue. Indeed, Dr. Jaffe's model proposed a fee model based on listener hours or number of listener songs, and not a rate based upon percentage-of-revenues, because a royalty based upon actual performances would be directly tied to the nature of the right being licensed. Report at 37; Jaffe W.R.T. at 31. Moreover, because they took this position, Services argued for a low minimum rate that would only cover administrative costs and not the value of the performances themselves—an approach the CARP adopted in its Report.

Moreover, the statute does not require the CARP to offer alternative fee structures, and the Services should not have expected the Panel to do so, especially when the Webcasters never advanced a percentage-of-revenues option in their own case. In fact, there is no precedent in the statutory licensing scheme anywhere in the Copyright Act that would support alternative rates for the same right. Clearly, it cannot be arbitrary for the Panel to choose not to deviate from the

supplement or supersede the rules and regulations contained in this subchapter. See § 251.7.

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longstanding practice of establishing only one rate schedule for a license.

5. The Yahoo! Rates—Evidence of a Unitary Marketplace Value

The starting point for setting the rates for the webcasting license is the Yahoo! agreement. In that agreement, rates were set for two different time periods. For the initial time period covering the first 1.5 billion performances, Yahoo! agreed to pay one lump sum of $1.25 million. From this information, the Panel calculated a "blended," per performance rate of 0.083¢. This value represents the actual price that Yahoo! paid for each of the first 1.5 billion transmissions without regard to which type of service made the transmission. For the second time period, Yahoo! and RIAA agreed to a differential rate structure. One rate was set for performances in radio retransmissions (RR) (0.05¢ per performance) and another rate was set for transmissions in Internet-only (IO) programming (0.2¢ per performance). These rates were first used in early 2000 and do not apply to the first 1.5 billion performances.

However, the CARP did not accept these differentiated rates at face value. The Panel engaged in a far-ranging inquiry to determine how the parties established the negotiated rates. What it found was that Yahoo! agreed to a higher rate for the IO transmissions in exchange for a lower rate for the RR because this arrangement addressed specific concerns of both parties. In particular, RIAA wished to establish a marketplace precedent for IO transmissions in line with rates it had negotiated in earlier agreements, while Yahoo! sought to negotiate rates which, in the aggregate, yielded a rate it could accept. Consequently, the Panel found the rate for the IO transmissions to be artificially high and, conversely, the rates for the RR to be artificially low. For this reason, it made a downward adjustment to the IO rates and an upward adjustment to the RR rates.

Before making this adjustment, though, the Panel had to consider whether it was reasonable to establish separate rates for the two categories of transmissions. In reaching its decision, the Panel considered two facts, the fact that the Yahoo! agreement provided for two separate rates, and the fact that all parties agreed that performances of sound recordings in over-the-air radio broadcasts promote the sale of records. Report at 74. Based on this finding, the Panel concluded that a willing buyer and a willing seller would agree that the value of the performance right for RR would be considerably lower than for IO transmissions. Moreover, it attributed the existence of the rate differential in the Yahoo! agreement to the promotional value enjoyed by the copyright owners from the performance of the sound recordings by broadcasters in their over-the-air programs, and not to promotional value attributable to transmissions made over the Internet. Report at 74–75. Specifically, the Panel found that, "to the extent that Internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional effect is any less." Report at 75.

This finding, however, did not prompt the Panel to make any further adjustment for promotional value, finding instead that the differential rates in the Yahoo! agreement already reflect "marketplace assessment of the various promotion and substitution effects, along with a myriad of other factors." Report at 87. Primary among these factors were the Most Favored Nations (MFN) clause [22] and the cost savings to Yahoo! in avoiding CARP litigation. The Panel reasoned that Yahoo! was willing to accept somewhat inflated royalty rates in exchange for the costs it saved by not participating in the CARP proceeding, and for the MFN clause which had some indeterminate value for Yahoo!.

RIAA disagrees with the Panel's analysis and these findings. As an initial matter, it maintains that there was no record evidence to support a separate rate for commercial broadcasters. RIAA Broadcaster PFOF 24–52. Second, it argues that the Panel adopted a two-tier rate structure for RR and IO transmissions based on the different rates in the Yahoo! agreement, and its mistaken view of the significance of an exemption in the law for a retransmission of a radio station's broadcast transmission within a 150 mile radius of the radio broadcast transmitter in setting the rate for radio retransmissions.[23] See 17 U.S.C. 114(d)(1)(B).

Although RIAA maintains that in its negotiations with Yahoo! it had argued that the value of the radio retransmission should not be based on the location of the original radio broadcast transmitter, it claims that it was nervous about the application of the 150-mile radius exemption to retransmissions made by third-party aggregators, like Yahoo!. Consequently, RIAA maintains that it agreed to a lower rate for radio retransmissions, knowing that its arguments for not exempting these transmissions were weak, and because Yahoo! agreed to pay for each transmission without regard to the exemption. The resulting adjustment for the 150-mile exemption consisted of a reduction to the base rate, 0.2¢, and reflects the fact that about 70% of all radio retransmissions fall within the 150-mile zone.[24] In addition, RIAA agreed to a further reduction to compensate Yahoo! for any "competitive disadvantage" it faced if commercial broadcasters were found to be totally exempt from the digital performance right under a separate exemption.[25]

The Panel, however, did not credit RIAA's explanation and concluded that this concern over the exemptions, especially the 150-mile exemption, had no bearing on Yahoo!'s negotiations. The Panel steadfastly maintained throughout its report that Yahoo!'s only aim in the negotiation process was to achieve a rate that translated into an acceptable overall level of payment, and that it did not concern itself with the legal consequences of the 150-mile exemption. Report at 66–67. Thus, the Panel characterized RIAA's arguments in regard to the 150-mile exemption to be nothing more than a "red herring" and without effect in the negotiation process. Id. at 85. Consequently, the Panel found that Yahoo! willingly granted RIAA's request for the "whereas clause," relating to the transmissions within the 150-mile radius, because it

[22] The MFN clause in the Yahoo! agreement is discussed in detail in section IV.3, pg. 27.

[23] Section 114(d)(1)(B)(i) of the Copyright Act provides an exemption from the digital performance right for "a retransmission of a nonsubscription broadcast transmission: Provided, That in the case of a retransmission of a radio station's broadcast transmission—(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter."

[24] At the insistence of RIAA, the Yahoo! agreement includes a "whereas" clause which states that approximately 70 percent of Yahoo!'s radio retransmissions are within a 150-mile radius of the originating radio station.

[25] Section 114(d)(1)(A) exempts a "nonsubscription broadcast transmission." Following a lengthy rulemaking proceeding to determine the scope of this exemption, the Copyright Office concluded that the exemption applies only to over-the-air broadcast transmissions and does not include radio retransmissions made over the Internet. 65 FR 77292, December 11, 2000. This decision was upheld when challenged in the United States District Court for the Eastern District of Pennsylvania. See Bonneville Int'l, et al. v. Peters, 153 Supp. 2d 763 (E.D. Pa. 2001). The case is now on appeal to the United States Court of Appeals, Third Circuit.

However, during the negotiation period and prior to the Copyright Office's rulemaking decision and the court's decision, Yahoo! had argued that it would be at a competitive disadvantage if the courts adopted the broadcasters interpretation of section 114(d)(1)(A) and found all transmissions made by FCC-licensed broadcasters (those made over-the-air and those made over the Internet) to be exempt from the digital performance right.

cost Yahoo! nothing. Yahoo!'s perception of the clause, however, did not alter the significance of the "whereas clause" to RIAA, who wanted the provision included in the agreement because it would allow RIAA to argue before this CARP that the 0.05¢ rate for radio retransmissions represents a real rate of 0.2¢, which was discounted to account for the legal uncertainties at the time of the negotiation. Report at 67.

Webcasters had problems with the Panel's analysis, too. It found fault with the Panel's approach to setting rates for webcasting based on the rates in the Yahoo! agreement. Webcasters object to the methodology used by the Panel in calculating the proposed rates, especially the use of an inflated rate as a starting point for setting the rates for IO transmissions. Moreover, they contest the use of any rate for IO transmissions contained in the Yahoo! agreement because Yahoo! had less interest in negotiating a favorable rate for these transmissions, which constituted only 10% of its business. Webcasters Petition at 30–40. Instead, Webcasters argue that Yahoo! agreed to the 0.2¢ rate for IO transmissions only because it obtained a significantly lower rate for its radio retransmissions, and that any number of possible combinations of rates could have been set to achieve Yahoo!'s targeted rate. Because of this, Webcasters argue that the endpoints settled upon in the agreement were patently arbitrary. The Register concurs with the Webcasters' analysis on this point and finds that the Panel's use of the IO rate was arbitrary because of the IO rate, which, in and of itself, did not reflect what the willing buyers and willing sellers had agreed to in the Yahoo! deal.

Another flaw in the Panel's reasoning, according to Webcasters, was its reliance on the 0.083¢ "blended rate" as the lower end of the acceptable range of IO rates. They argue that this rate should not even be considered because it was never negotiated as a performance rate at all. This observation, however, overlooks the fact that Yahoo! actually paid this rate for 1.5 billion performances without regard to the nature of the performances. The fact that the rate was not negotiated as a separate rate for Internet-only transmissions does not diminish its usefulness for purposes of this proceeding. As the Panel asserted throughout this proceeding, it is hard to find better evidence of marketplace value than the price actually paid by a willing buyer in the marketplace.

The question, however, is whether the rates in the Yahoo! agreement represent distinct valuations of Internet-only transmissions and radio retransmissions. Ultimately, the Register concludes that they do not and, therefore, the Panel's reliance on these specific rates for IO transmissions and radio retransmissions as a tool for setting the statutory rates is arbitrary. The fundamental flaw in the Panel's analysis, though, is not its acceptance of the Yahoo! agreement as a starting point. Rather, it is the Panel's determination that the differential rate structure reflects a true distinction in value between Internet-only transmissions and radio retransmissions based upon the promotional value to the record companies and performers due to airplay of their music by local radio stations. The Panel reached this conclusion in spite of the fact that nothing in the record indicates that the parties considered the promotional value of radio retransmissions over the Internet when they negotiated these rates.

RIAA maintains, and the Broadcasters concur, that no evidence exists to support the Panel's determination that Yahoo! and RIAA considered and made adjustments for the promotional value of radio retransmissions. RIAA Reply at 48; Broadcasters Petition at 39. In fact, the Broadcasters argue that it was " 'patently' arbitrary for the Panel to conclude that promotional value was a "likely influence" on Yahoo!'s RR rate when the record evidence showed that neither party had ever suggested anything of the kind." Broadcasters Petition at 39. The Register agrees and finds that the Panel's reliance on promotional value to justify the price differential for IO transmissions and radio retransmissions was arbitrary. The Panel's speculative conclusion that "this factor was likely considered by RIAA and Yahoo!, and is evidently reflected in the resulting difference between RR and IO negotiated rates," only serves to undermine the validity of the Panel's final analysis on this point. See Report at 75.

Moreover, the Panel's own earlier findings with regard to the studies offered to show that the Internet has a promotional effect contradicts its later finding concerning the promotional effect derived from radio retransmissions over the Internet. After considering the two studies offered into evidence by the Services, the Panel categorically stated that it "could not conclude with any confidence whether any webcasting service causes a net substitution or net promotion of the sales of phonorecords, or in any way significantly affects the copyright owners' revenue streams." Report at 33–34. It noted that "the Soundata survey presented by Mr. Fine evinced a net promotional effect of radio broadcasts, but said little about the net promotional effect of the Internet—and nothing about the net promotional effect of webcasting." Id. at 33. It went on to say that "for the time period this CARP is addressing, the net impact of Internet webcasting on record sales is indeterminate. Id. at 34. These observations do not support a conclusion that radio retransmissions have a greater impact than IO transmissions on record sales or that either form of transmission has any impact on record sales.

However, the CARP did conclude that "to the extent promotional value influences the rates that willing buyers and willing sellers would agree to, it will be reflected in the agreements that result from those negotiations." Id. But therein lies the problem. As discussed above, RIAA and Yahoo! did not consider promotional value when negotiating the Yahoo! agreement, therefore, its effect cannot be reflected in the IO and RR rates set forth in the Yahoo! agreement.

However, rejection of the CARP's conclusion on this point does not nullify the usefulness of the Yahoo! agreement. The Register accepts the Panel's determination that the Yahoo! agreement yields valuable information about the marketplace rate for transmissions of sound recordings over the Internet, and is a suitable benchmark for setting rates for all the reasons discussed in section IV.3, supra. Moreover, a careful review of the record support's the Panel's further finding that in effect, the real agreement between Yahoo! and RIAA was for a single, unitary rate for the digital performance of a sound recording and not the two separate rates set forth in the agreement—rates, which the Panel found were artificially high (for IO transmissions) and low (for RR).

The Register accepts the CARP's conclusion that the differential rate structure was developed to effectuate particular objectives of the parties, distinct and apart from establishing an actual valuation of the performances. Specifically, the Panel found that RIAA obtained an artificially high IO rate in an attempt to protect its targeted valuation of IO transmissions for use in this proceeding and Yahoo! received an "effective rate" it could accept. Because the record evidence supports this finding, Report at 65, referring to Tr. 11256–57; 11281 (Mandelbrot); Panel Rebuttal Hearing Exhibit 1 at 4; Tr. 11279–81, 11395–96 (Mandelbrot); Tr. 10237–38 (Marks), it was not arbitrary for the Panel to reach this conclusion. Report at 64–65 (noting that "Yahoo!'s primary concern, as characterized by its negotiator, was to negotiate a license agreement under which it would pay 'the lowest amount possible', that "Yahoo! was willing to accept a higher IO rate in exchange for a lower RR rate in order to achieve the lowest overall effective rate for all its transmissions" (emphasis added), and that Yahoo! was pleased to achieve the lowest possible overall rate."); (noting that "the bottom line" combined rate was of paramount importance to Yahoo!). Report at 74. Moreover, Yahoo! maintains that it would not have paid the 0.2 cent rate for the IO transmissions but for the rate it received for radio retransmissions because the two rates, when considered together, yielded an acceptable "effective rate" for all transmissions. The testimony of David Mandelbrot, the Yahoo! representative, is particularly informative on this point.

Question: When you entered into the agreement with the RIAA, just looking at the 0.2 cents per performance rate for Internet-only broadcasting, you didn't consider that an unfair rate, did you?

Answer: Mandelbrot: We considered it a higher rate than we would have paid if we were just negotiating an Internet-only rate. I would say we did not consider it an unfair rate in the totality of the entire agreement, which was that we were getting the 0.05 cent rate for the radio retransmissions.

Mandelbrot Tr. at 11347–11348. This statement supports a finding that Yahoo!, the willing buyer in this case, did not accept the stated IO rate as an accurate reflection of what it would be willing to pay for the right to make those transmissions.

There is also scant evidence to indicate that Yahoo! gave any serious consideration to the effect of the 150-mile exemption for certain radio retransmissions when negotiating the IO and RR rates. Mandelbrot maintained that the exemptions were of little significance to Yahoo!, since it was "looking to use whatever [it] could to get as low a rate as possible." Id. at 11381; see also 11331 (Mandelbrot admits using the ambiguities in the law, even though they thought the arguments in their favor were weak, solely for the purpose of getting "an effective rate that we could live with"). Again it is clear that Yahoo!'s focus was the negotiation of a rate at the lowest possible level that would allow it to conduct business without concerns about copyright violations.

Where such determinations are based on the testimony and evidence found in the record, the Register and the Librarian must accept the Panel's weighing of the evidence and its determination regarding the credibility of a witness. Likewise, the Register and the Librarian may not question findings and conclusions that proceed directly from the arbitrators' consideration of factual evidence in the record. In this instance, the Panel credited Mandelbrot's testimony and his characterization of the negotiation process, specifically concluding that his testimony was credible, and that Yahoo! understood the argument based on the 150-mile exemption had no significant impact on the rates ultimately negotiated.[26] Report at 67. Consequently, we must accept the Panel's assessment on this point, which leads to the conclusion that the "effective rate" achieved through the unique rate structure represents the value these parties placed on the performance of a sound recording, without regard to origin of or the entity making the transmission.

Based upon a modification to the Panel's approach for calculating rates for making transmissions of sound recordings under statutory license that accepts as much of the Panel's reasoning as possible, the base rate for each performance is 0.07¢ (rounded to the nearest hundredth). The methodology for calculating this rate is presented and discussed in full in section IV.8.

6. Are Rates Based on the Yahoo! Agreement Indicative of Marketplace Rates?

Many webcasters, including Live365, maintain that the proposed rates derived from the Yahoo! rates do not reflect what a willing buyer would pay in the marketplace for the right to make these transmissions. Live365 maintains that the Panel incorrectly analyzed the evidence in the record. First, it notes that the Panel itself found that many of the rates in the voluntary agreements were prohibitively high, including a revenue-based royalty set at 15% of a webcaster's gross revenue. Live 365 Petition at 16. It then argues that it was arbitrary for the Panel to make this finding and then propose rates that exceed the rates it deemed to be excessive, and more than the market could bear. Id. To make its point, Live365 uses the Panel's per performance rate and calculates how much certain services would pay for the digital performance right and translates that amount into a percentage of revenue metric. In each of the cited examples, the amount to be paid based on the proposed per performance rate (as expressed as a percentage of revenues) is considerably higher than that that would be required under any of the percentage-of-revenue models proposed by any party at any time. For example, under the Panel's proposed rates, one service would purportedly pay 21% of its gross revenue, a figure which is considerably higher than the 15% of gross revenues contained in many of the voluntary agreements ultimately rejected by the Panel. Based on this observation, Live365 contends that the Panel's proposal runs counter to the evidence and, therefore, it is arbitrary. Id. at 18.

Moreover, Live365 argues that the Panel failed to account for relevant market factors, including how much a webcaster can pay. Id. at 19. Webcasters voice similar concerns, arguing that the adoption of a per performance rate will cause ruin to many webcasters who to date have yet to generate a viable income stream. Webcasters Petition at 60. In place of this structure, webcasters assert that a percentage-of-revenue model must be adopted in order to address the economic situation facing small, independent webcasters. They maintain that those Services that entered into voluntary agreements based on a percentage-of-revenue will remain in business while those operating under the statutory license with its per performance royalties will not. Webcasters Petition at 62–63. In the eyes of the Webcasters, such a result reflects unexplained disparate treatment of similarly situated parties, and requires an adjustment to eliminate this unjust and arbitrary result. Webcasters also argue that the Panel failed to articulate a rational basis for failing to offer an alternative rate structure based on percentage-of-revenue.

In addition, Live365 argues, as do the Broadcasters, that Yahoo! is a substantially different type of business from small start-up webcasters who would be unwilling to pay the same rates as Yahoo! for the use of sound

[26] The Register finds that RIAA's explanation for the rate structure is equally plausible. Certainly, at the time the Yahoo! agreement was being negotiated, the application of the general exemption for a nonsubscription broadcast transmission, 17 U.S.C. 114(d)(1)(A), and the more specialized exemption for radio retransmissions within 150 miles of the radio broadcast transmitter, 17 U.S.C. 114 (d)(1)(B)(I), was in dispute. Thus, it would have been totally rational for the parties to fashion a rate structure that accounted for possibly exempt transmissions. It would have been logical to achieve this end by discounting the unitary rate to reflect the number of exempt transmissions which, in this case, was approximately 70% of all the radio retransmissions.

However, it is not for the Register or the Librarian to choose between two equally plausible explanations of the facts. The law requires that the Librarian accept the Panel's determination unless its conclusions are unsupported by the record. Thus, having found record support for the Panel's conclusion that the 150-mile exemption played no role in the final determination of the negotiated rates, we must accept its finding on this point.

recordings. Thus, it contends that the Yahoo! rates do not reflect what these buyers would be willing to pay in the marketplace. The implication is that these businesses have expended significant monies on start-up costs, including software, infrastructure development, and bandwidth, and having not yet established substantial revenue streams would be unable or unwilling to pay the same rates. Live365 Petition at 7, 11. Moreover, Live365 argues that the rates set by the Panel thwart Congressional intent "by making Internet performances of sound recordings economically unviable for many webcasters." Live365 Petition at 21.

RIAA takes exception with the Webcasters and Live365 on these issues. It analyzes how much certain webcasters and Live365 pay, as a percentage-of-revenue, for sales and marketing cost, personnel cost and bandwidth. The results show that a company's costs for these services can amount to more than 100 times the amount of a company's revenue, whereas the projected costs of the royalties for transmitting sound recordings for the same time period are no more than 2 times the amount of a company's revenue. RIAA Reply at 57. In all cases, these costs reflect the start up nature of the industry, and not the ultimate make or break point of the business. Thus, a proposed fee that results in royalty payments above the current revenue stream for a webcaster is not atypical or unexpected. Certainly, if that were the measure of the value of these services, then the costs for employment, hardware, and marketing—so essential to establishing and maintaining the business—must also be viewed as excessive and above the fair market value for each of these services. Clearly, that is not the case, nor can one rationally conclude that it should be the case.

Moreover, RIAA notes that the courts have historically upheld rates set by the CRT, even when users have argued that the rates would cause the business to cease certain operations. Where the intent of Congress is to set a rate at fair market value, as in this proceeding, the Panel is not required to consider potential failure of those businesses that cannot compete in the marketplace. See *National Cable Television Ass'n.* v. *CRT*, 724 F.2d 176 (D.C. Cir. 1983) (holding that rates set at fair market value were proper even though cable operators argued that the rates were prohibitively high and would cause them to cease transmission of the distant signals at issue.).

The law requires only that the Panel set rates that would have been negotiated in the marketplace between a willing buyer and a willing seller. It is silent on what effect these rates should have on particular individual services who wish to operate under the license. Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates. It only needed to assure itself that the benchmarks it adopted were indicative of marketplace rates.

7. Should a Different Rate be Established for Commercial Broadcasters Streaming Their Own AM/FM Programming?

Although RIAA had argued that the rate for commercial broadcasters should be the same as the rate for Internet-only webcasters, the Panel did not agree. It did agree, however, that the rate for commercial broadcasters should be the same as the rate adopted for radio retransmissions and that these rates should be based on the Yahoo! agreement.

It noted that the Yahoo! agreement established rates for retransmissions of the same types of radio station signals as those directly streamed by commercial broadcasters. Consequently, it put the burden of proof on the broadcasters to present evidence to distinguish between the direct transmission of their programs over the Internet and the retransmission of the same programming made by a third-party. Broadcasters were unable to offer any compelling evidence on this point. Thus, in the end, the Panel was unable to distinguish between commercial broadcasters and radio retransmisions, stating that "the record was utterly devoid of evidence implying a *higher* rate [for commercial broadcasters] and *insufficient* [evidence] to warrant a lower rate." Report at 84–85. (emphasis in the original).

Nevertheless, Broadcasters are troubled by the Panel's use of the Yahoo! agreement to set rates for broadcasters for two main reasons. First, they argue that Yahoo! represents a substantially different type of business. Second, they maintain that the Panel must make affirmative findings that the businesses are comparable before applying the same rates to both Services. Broadcasters Petition at 26–27.

Indeed, Yahoo! offers a plethora of services, making available hundreds of radio stations, local television stations, video networks, concerts, CD listening programs, Internet-only music channels and educational and entertainment video programs. Id. at 28. Nevertheless, an examination of the record clearly shows that both business models are fundamentally comparable in at least one all-important way: they simulcast AM/FM programs over the Internet to anyone anywhere in the world who chooses to listen. Even accepting the fact that Broadcasters say their fundamental business is to provide programming to their local audiences, the potential for reaching a wider audience cannot be denied. Given that the record indicates that 70% of Yahoo!'s radio retransmissions are to listeners within 150 miles of the originating radio station's transmitter, Yahoo!'s business with respect to radio retransmissions seems to be very similar. Moreover, the fact that Yahoo! offers many additional services is not relevant to this proceeding because the Yahoo! agreement only addressed the rates Yahoo! paid for streaming sound recordings over the Internet. Had the contract been tied to other services offered by Yahoo!, it might well have been inappropriate to use this contract in this context. That is not the case and so it was not arbitrary for the Panel to rely on the Yahoo! contract to set the rate for broadcasters who stream their own programming over the Internet.

Commercial broadcasters then take another approach and argue that they never would have agreed to the rates that Yahoo! paid because their purposes for streaming differ from Yahoo!'s purposes. Commercial broadcasters assert that they began streaming in order to have a presence "in the online world, to maintain the local radio brand, and as a convenience to their regular over-the-air listeners." Broadcasters Petition at 29. They then note that many commercial broadcasters have already ceased streaming because of an increase in costs. They cite this fact as evidence of their assertion that they would only be willing to pay a significantly lower rate than a third-party aggregator like Yahoo! See Broadcasters Petition at 31, fn 25 (offering examples of decisions made by radio stations to cease their streaming operations because of bandwidth fees and dispute over royalty fees between AFTRA and the advertising agencies). They also cite the testimony of David Mandelbrot, who testified that Yahoo! feared broadcasters would be unwilling to absorb the rates Yahoo! negotiated for streaming AM/FM programming. Id. at 32. Based upon this evidence, the Broadcasters and Live365 conclude that the Panel acted in an arbitrary manner in setting the rates that will put many services out of business. Live365 Petition at 15, 18.

However, the Panel did consider the differences between the two business models, speculating that it was entirely possible that the cost to stream AM/FM programming would be lower for broadcasters than for third-party aggregators like Yahoo! Id. at 84–85. Had Broadcasters made that argument or similar ones to show that Yahoo! received greater value from its streaming activities, the Panel may well have set a lower rate for Broadcasters who stream their own programming. Id. at 85. But as the Panel observed, it cannot make adjustments based on mere speculation. So when the Panel found no record evidence to distinguish these services, it had no reason to offer a separate rate for commercial broadcasters who stream their own AM/FM signal over the Internet. Id. at 84.

Moreover, RIAA points out that Yahoo! never even tried to pass along the costs of the transmissions to the radio stations. Thus, no determination could be made as to whether the broadcasters would have accepted the rate and paid it, or rejected it out of hand. RIAA Reply at 45. RIAA's observation is persuasive, as is the Panel's general observation that the record did not contain any evidence to support a different rate for commercial broadcasters. Thus, the Panel's decision not to set a different rate for commercial broadcasters was not arbitrary.

For these reasons, the Register accepts the Panel's decision not to differentiate between simulcasts made by commercial broadcasters and simulcasts of the same programming made by a third-party aggregator. Accordingly, the rate for commercial broadcasters streaming their over-the-air radio programs on the Internet is the unitary rate gleaned from the Yahoo! agreement.

8. Methodology for Calculating the Statutory Rates for the Webcasting License

a. *Calculation of the unitary rate.* In section IV.5, the Register rejected the Panel's determination that the Yahoo! agreement provided a basis for establishing different rates for Internet-only transmissions and radio retransmissions. Instead, a determination was made that the Yahoo! agreement justified only a single rate applicable to all transmissions, without regard to the source of the transmission. To calculate this unitary rate, it is necessary to determine what Yahoo! paid for the initial 1.5 billion performances, based on the lump sum payment, and what it expected to pay for transmissions after that time.

The first calculation was actually done by the Panel based upon Yahoo!'s agreement to pay RIAA $1.25 million for the first 1.5 billion transmissions made by Yahoo!. It divided the amount paid by the number of performances ($1.25 million/1.5 billion performances) to get a "blended" rate of 0.083¢ per performance. Report at 63. To determine the "effective rate" for the second period, a calculation must be made to account for the differential IO and RR rates, 0.2¢ and 0.05¢, respectively, set forth in the agreement and the relative proportion of Internet-only transmissions to radio retransmissions. This is a simple arithmetic calculation and one that Yahoo! had already performed in order to gauge the actual costs of the performances under the differentiated rate structure. This calculation yielded an "effective" or "blended" rate of 0.065¢ per performance based upon Yahoo!'s expectation that 90% of its transmissions would continue to be radio retransmissions with the remaining 10% being Internet-only transmissions [((9 × 0.05¢) + (1 × 0.2¢))/10]. Report at 63, citing Tr. 11279, 11292 (Mandelbrot), Panel Rebuttal Hearing Exhibit 1 at 7.

Now the question is how to reconcile these values to determine the unitary rate. Although an argument can be made for adopting either value, it makes more sense to use both values and take the average of the two. In this way, the final unitary rate captures the actual value of the performances made in the initial period (for which Yahoo! paid a lump sum for the first 1.5 billion performances) and the projected value of the transmissions at the agreed upon rates for the remainder of the license period; and it falls within the range of acknowledged values of these transmissions. Courts have long acknowledged that rate setting is not an exact science, and all that is necessary is that the rates lie within a "zone of reasonableness." See *National Cable Television Assoc. Inc.* v. *CRT*, 724 F.2d 176, 182 (D.C. Cir. 1983) ("Ratemaking generally "is an intensely practical affair. The Tribunal's work particularly, in both ratemaking and royalty distributions, necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within a "zone of reasonableness""). Thus, the record here supports a "zone of reasonableness" between 0.083¢ and 0.065¢.

Accordingly, the Register recommends that the rate for making an eligible nonsubscription transmission of a sound recording over the Internet under section 114 be set at 0.07 cents per performance, per listener, the midpoint of the "zone of reasonableness."

Determination of this rate, however, is not necessarily the end of the rate-setting process. Webcasters had argued for a downward adjustment to the rates proposed by the Panel to compensate for litigation cost savings and added value due to MFN clause. Such arguments apply with equal force to the unitary rate proposed by the Register. Webcasters Petition at 42–43. The Webcasters' argument is well taken and, based on the record evidence, it is reasonable to assume that the rates in the Yahoo! agreement are slightly higher to account for these two factors. See Report at 68–69. However, there is a problem in making an adjustment to the proposed rate where the record contains no information quantifying the added value of the factors that purportedly resulted in inflated rates. See Report at 29 (discussing lack of record evidence quantifying value of any factor, other than promotional value, that allegedly influenced the negotiated rates). The potential (but apparently unquantifiable) added value attributable to these 2 factors might present a problem if the Register were proposing a rate at the high end of the 0.065¢–0.083¢ range, but because the Register is recommending a rate in middle of the "zone of reasonableness," it is safe to conclude that the recommended rate falls into that zone of reasonableness even taking these factors into account.

Similarly, Broadcasters argued for a downward adjustment of the simulcast rate to account for the promotional value associated with over-the-air broadcasts. Broadcasters Petition at 41. The record, however, does not support this suggestion. Indeed, the Panel did acknowledge that over-the-air radio retransmissions had promotional value, but it concluded that "the net impact *of Internet* webcasting on record sales is indeterminate." Report at 34. This is not to say that webcasting, including simulcasting of over-the-air radio programming, has no promotional value. It only means that the record companies gain similar benefits from both types of transmissions. Consequently, no adjustment is necessary.

b. *The 150-mile exemption.* Under section 114(d)(1)(B)(I), any retransmission of a nonsubscription broadcast transmission is exempt, as a matter of law, from the digital performance right, provided that "the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter." During the course of the negotiations between RIAA and Yahoo!, there was a great deal of uncertainty regarding this provision and whether it applied to transmissions made over the Internet. See discussion above, section IV.a.5.

As noted above (section IV.a.5.), in its Petition, RIAA argued that during the course of the negotiations between RIAA and Yahoo!, there was a great deal of uncertainly regarding this provision and whether it applied to transmissions made over the Internet. RIAA argued that because of this uncertainty, it had been willing to agree to a lower radio retransmission rate. In fact, RIAA pointed out that its chief negotiator had advised its negotiating committee that RIAA's arguments against application of the 150-mile exemption to a retransmitter such as Yahoo! "are not particularly strong." RIAA Petition at 20.

Confronted with the assertions made in RIAA's petition which indicated that RIAA itself had had considerable doubts on the subject at the time of the negotiations, the Register felt compelled to determine whether radio retransmissions over the Internet to recipients within 150 miles of the radio transmitter are, in fact, eligible for the section 114(d)(1)(B) exemption.[27] The Register issued an order on June 5, 2002, asking the parties to brief two legal questions concerning the 150-mile exemption. The first question asked whether a retransmission over the Internet of a radio station's broadcast transmission to a recipient located within 150 miles of the site of the radio broadcast transmitter is an exempt transmission pursuant to 17 U.S.C. 114(d)(1)(B). The second question then queried whether the exemption would still apply to radio retransmissions made within the 150-mile radius by a Licensee, in the case where that same service is simultaneously retransmitting the radio station's broadcast transmission of one or more recipients, located more than 150 miles from the site of the radio broadcaster's transmitter.

Section 114 could be read as allowing a Licensee to take advantage of the exemption for all Internet retransmissions of a radio broadcast to recipients within a 150 mile radius of that radio station's transmitter. The statutory language, however, does not make clear whether that same Licensee would retain the benefit of the exemption for those transmissions if additional retransmissions of the radio broadcast signal were also made "willfully" or "repeatedly" outside the 150-mile radius.

A critical piece in the analysis is the meaning of the word "retransmission." Each retransmission of a radio signal over the Internet may be viewed as a discrete, point-to-point transaction to be considered on its own merit without reference to further retransmissions made by the Licensee. Alternatively, the reference to "willful and repeated" may require consideration of each retransmission, together with all other retransmissions, made by the Licensee to multiple listeners over a period of time, both inside and outside the 150-mile radius.

Having considered the parties' responses, the statutory language and its relationship to section 112, the Register now concludes that the exemption is not applicable to radio retransmissions made over the Internet. While Copyright Owners and Performers offer many arguments in support of their position that radio retransmissions within 150 miles of the radio station's transmitter are not exempt, and while Broadcasters offer many arguments to the contrary, the critical piece of the analysis—and the argument that the Register finds persuasive—is found in the text of section 112(e). This section provides a statutory license for making ephemeral recordings only to "a transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f)." 17 U.S.C. 112(e)(1).

The statutory license for ephemeral recordings in section 112(e) was enacted as part of the same section of the DMCA—section 104—that expanded the section 114 statutory license to include webcasting. The purpose of this ephemeral recording statutory license was to enable business establishment services and services using the new section 114 statutory license for webcasting to make the ephemeral recordings they need to make in order to facilitate their licensed transmissions, and in recognition of the fact that the exemption in section 112(a) permitting the making of a single ephemeral recording might not be adequate. See H.R. Rep. 105–796, at 89–90.

Congress expressly provided in the DMCA amendments that business establishment services operating under the section 114(d)(1)(C)(iv) exemption are eligible for the section 112(e) statutory license for ephemeral recordings in order to facilitate Internet transmissions by business transmission services. Congress's failure to do the same for services operating under the section 114(d)(1)(B) exemption demonstrates that Congress did not contemplate that that exemption would be available to services making retransmissions via the Internet.

Moreover, if section 114(d)(1)(B) were interpreted as providing an exemption for a radio retransmission over the Internet, when that retransmission is to a recipient located within 150 miles of the radio station's transmitter, the Licensee could not make ephemeral recordings to facilitate such an exempt retransmission. This interpretation would put the Licensee in the illogical position of having a right to retransmit the radio signal, but no means of accomplishing the retransmission without negotiating private licenses to make ephemeral recordings to facilitate the exempt transmissions. At the same time, the Licensee could operate under a statutory license for making the ephemeral recordings to facilitate its non-exempt transmissions beyond the 150-mile radius made pursuant to the section 114(f) statutory license. As RIAA points out in its response to the June 5 Order: "Such a result is inconsistent with one of the purposes of the DMCA statutory licenses to create efficient licensing mechanisms for copyright owners and webcasters," citing H.R. Rep. 105–796, at 79–80 (1998). Consequently, the better interpretation of the section 114(d)(1)(B) exemption is to consider all retransmissions of a License in the aggregate, which logically means that no Internet retransmissions are exempt under section 114(d)(1)(B).

Based on the interplay between sections 112 and 114, the better interpretation of the law is that the exemption does not apply to radio retransmissions made over the Internet.[28]

[27] If the Register had concluded that Internet retransmissions to recipients located within the 150-mile radius are exempt, she most likely would have recommended an adjustment of the 0.07¢ per performance rate as applied to radio retransmissions to take into account the record evidence that approximately 70% of radio retransmissions are to recipients located within 150 miles of the radio transmitter. The result would have been a radio retransmission rate of..02¢ per performance, and correspondingly lower rates for radio retransmissions by non-CPB, noncommercial broadcasters.

[28] Copyright Owners argue that the Copyright Office had already decided this issue twice before: (1) In its decision in a rulemaking announced December 11, 2000 that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A). Public Performance of Sound Recordings: Definition of a Service, 65 FR 77292; and (2) in an Order issued July 16, 2001, in which the Office stated that the "Panel must use the "willing seller/willing buyer" standard to set rates for all non-interactive, nonsubscription transmissions made under the section 114 license, including those within 150 miles of the broadcaster's transmitter." (Emphasis added.) The Register made no such decision on either occasion.

9. Rates for Other Webcasting Services and Programming

a. *Business to business webcasting services.* Some Services provide specialized Internet radio-like stations to businesses rather than directly to consumers. These business-to-business webcasting services (B2B) are in many respects analogous to business establishment music services[29] and can provide programming customized to the demographics of the customers of a particular business. Report at 78. For this reason, RIAA had proposed setting a higher rate for business to business webcasting services than for business to consumer (B2C) services. The Panel, however, rejected this suggestion, finding that the evidence did not support a higher rate for B2B services. It found that most of the agreements for such services had rates near or below the predominant rate set for standard Internet-only transmissions. Report at 79. Thus, the Panel concluded that it had "found insufficient evidence to support a separate rate for syndicator services", and set the rate accordingly at 0.14¢ per performance, just as it had for Internet-only performances. Id.

RIAA argues for a premium rate for these Services, because they syndicate their programming through third-party non-entertainment websites. RIAA maintains that these transmissions are outside the scope of the webcasting license, and consequently, services should pay a premium when they make transmissions through non-entertainment websites. RIAA Petition at 50–52. In response, Webcasters argue that the "value of the performance does not change merely because of the technology of the webcaster or the fact that the sound recording is heard when it is accessed at a third-party website rather than the originating webcaster's website." Webcasters Reply at 57. Moreover, they maintain that RIAA offered no evidence to demonstrate that these transmissions should be valued at a higher rate. In fact, the record indicates the opposite. Most of the RIAA voluntary agreements which permit the licensee to distribute its webcasts to third-party websites contain no premium for this practice. Id. at 59.

Thus, based on the weight of the evidence, it was not arbitrary for the Panel to conclude that a separate rate should not be set for syndication services. The Panel is responsible for weighing the evidence and so long as the record supports its decision, the Register will not second-guess the Panel's finding of fact. Nevertheless, this determination does not end the inquiry. RIAA correctly cites section 114(j)(6) of the Copyright Act for the proposition that an eligible nonsubscription transmission does not include those made by a service whose primary purpose is to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events. Thus, in any given case a determination would have to be made to ascertain whether such transmissions are covered under the statutory license. This proceeding, however, is not the appropriate vehicle for such a fact-specific determination. If a court determines that the transmissions made by a particular business-to-business service fall outside the scope of the webcasting license, then those transmissions are acts of copyright infringement unless the service obtains licenses from the copyright owners. In such cases, an infringement action would be the appropriate course of action, rather than the imposition of a premium rate for such transmissions as suggested by RIAA. No rate—premium or otherwise—can be set for a transmission that does not comply with the terms of the license.

b. *Listener-influenced services.* There was also much discussion about listener-influenced services that allow the listener some control over the programming through on-line ratings and skip-through features. RIAA's position first and foremost is that these services do not qualify for the webcasting license. However, RIAA also proposed a much higher rate for these services in the event the Panel discerned a need to set a separate rate for these services. Again, the Panel found no record support for setting a separate and higher rate for listener-influenced services. It rejected the agreements between RIAA and non-DMCA compliant services because the rates in those agreements were for rights beyond those granted under the statutory license. Nor could the Panel discern from the record evidence which services would be subject to the basic webcasting rate as distinguished from the rate for listener-influenced services. Consequently, the Panel decided "that so long as a service complies with, and is deemed eligible for the statutory license, it should not pay a separate rate based upon listener influence." Report at 81.

The Register finds the Panel's analysis to be consistent with the law, and thus accepts the Panel's decision not to set a separate rate for transmissions which might not come within the scope of the license. Again, if transmissions made by a listener-influenced service are determined to be outside the scope of the statutory license, the proper course of action would be for the parties to negotiate a voluntary agreement for these transmissions, or for the copyright owner to file a copyright infringement suit against the service. The Panel has no authority to propose a rate for any transmission which cannot be made lawfully under the statutory license.

c. *Other types of transmissions.* A broadcaster may stream three different types of programming in addition to a simulcast of its AM/FM radio signal: (1) "Archived" (previously aired) radio programming; (2) "side channels" (Internet-only programming); and (3) "substituted programming" (programming that replaces over-the-air programming that has not been licensed for simulcast over the Internet). The question for the Panel was whether such programming is the same or substantially similar to radio retransmissions or Internet-only programming.

In making its decision, the Panel first considered the definition of a "radio retransmission performance." It found that the record failed to provide a coherent and workable definition, rejecting both the definition set forth in the Yahoo! agreement and the one that was included in the defunct settlement agreement between RIAA and the commercial broadcasters. Instead, it adopted the definition of the term provided by Congress in the statute which defines the term as "a further transmission of an initial transmission * * * if it is simultaneous with the initial transmission." See 17 U.S.C. 114(j)(12). Based on this definition, the

The scope of section 114(d)(1)(B) was not at issue in the December 2000 rulemaking on the status of broadcasters. Likewise, the July 16 Order was in response to Copyright Owners' Motion for Declaratory Ruling Concerning Statutory Standard, in which Copyright Owners argued that one of the Services' witnesses was "in effect" arguing for "an exemption for AM/FM Webcasts within the 150-mile area." However, the testimony in question actually was arguing only that in determining the radio retransmission rate, the CARP should take into account that no royalty is payable on non-Internet radio retransmissions within the 150-mile radius because of the promotional value those retransmissions have on record sales. The witness asserted that because "local distribution of exactly the same material via the Internet has identical economic effects," the Panel should exclude from its calculations "recipients of those transmissions who lie within 150 miles of the station's transmitter." Fisher Testimony at ¶ 52. In their opposition to the motion, the Services made no argument that Internet retransmissions are exempt under section 114(d)(1)(B), and the Office made no ruling with respect to the exemption. Thus, until the responses to the June 5, 2002 order were filed, the issue had never been joined, much less decided, on whether radio retransmissions within the 150-mile radius are exempt, and the issue had never been decided.

[29] See footnote 6, supra, for a description of a Business Establishment Service.

Panel concluded that a transmission made as part of archived programming, side channels or substituted programming was something other than a radio retransmission and, therefore, not entitled to the lower rate proposed for radio retransmissions. Instead, it agreed with RIAA that the programming was essentially the same as Internet-only programming, and without any record evidence to substantiate a different rate, should be subject to the 0.14¢ IO rate.

Broadcasters do not contest the Panel's determination with respect to side channels, and they recommend that the Librarian provide that the side channel rate be set at the webcaster rate expressly without prejudice to reconsideration in a subsequent CARP proceeding. Broadcasters Petition at 56. They do, however, object to the imposition of the rate for IO transmissions on the performances of sound recordings made during the transmission of an archived program or a substituted program. Id. at 55. Broadcasters' arguments no longer have any relevance under the statutory rate structure proposed by the Register, which proposes a single, unitary rate for all transmission. This fact in conjunction with the Panel's observation that the Yahoo! agreement did not differentiate or even recognize these alternative categories supports a determination that no separate rate should be set for these transmissions.

10. Rates for Transmissions Made by Non-CPB, Noncommercial Stations

National Public Radio ("NPR") and the National Religious Broadcasters Music License Committee ("NRBMLC") were the only two representatives of non-commercial stations participating in this proceeding. NPR reached a private settlement with the Copyright Owners during the proceeding and withdrew. In considering what the rate should be for the stations represented by NRBMLC and any other noncommercial station operating under the statutory license, the panel first considered past CARP decisions involving the statutory licenses. It found that a prior CARP had considered and distinguished commercial stations and noncommercial stations on the basis of their financial resources, noting that noncommercial stations depend upon funding from the government, business, and viewers, whereas commercial broadcasters generate a revenue stream through advertising. Report at 89, citing CARP report adopted by Librarian on September 18, 1998, Noncommercial Education Broadcasting Rate Adjustment Proceeding, 63 FR 49823. Moreover, the earlier Panel determined that a rate set for a commercial station is an inappropriate benchmark to use when setting a rate for the same right for noncommercial stations because of these economic differences between these businesses. Specifically, it acknowledged that use of a rate set for a commercial broadcaster would overstate the market value of the performance for a noncommercial station.

Next, the Panel examined RIAA's approach, which focused on the amount the performing rights organizations ("PROs") were awarded in the 1998 Noncommercial Education Broadcasting Rate Adjustment Proceeding for use of their works by noncommercial stations. It adduced that they received ⅓ the amount of the fees paid by the commercial stations. Based on this precedent, RIAA offered the noncommercial stations a rate that corresponds to ⅓ the rate to be paid by commercial broadcasters.[30] The Panel, finding no other evidence in the record to support a different rate, adopted the RIAA proposal for radio retransmissions, and proposed a rate of 0.02¢ per-performance (one-third of the 0.07¢ per performance rate, rounded to the nearest hundredth of a cent) for these transmissions only. Just as with the commercial broadcasters, the Panel found that archived programming subsequently transmitted over the Internet, transmissions of substituted programming, and transmissions of side channels constitute a transmission more akin to an Internet-only event. Consequently, it proposed a per performance rate for noncommercial broadcasters of 0.05¢ (one-third the rate paid by commercial broadcasters and webcasters for IO transmissions) for each sound recording included in these transmissions. This rate, however, is meant to apply only to the first two side channels—and not to additional side channels—in order to avoid the possibility of a noncommercial broadcaster gaining a competitive advantage over the commercial broadcasters and webcasters who initiate Internet-only programs and do so at a higher cost.

Non-CBP broadcasters argue in their petition to set aside the CARP report, that the Panel failed to set the appropriate rates in two ways. They contend that the Panel ignored the record evidence which clearly established that the noncommercial stations are fundamentally different from commercial broadcasters and webcasters, and less viable economically, thus requiring the Panel to establish a lower rate for these stations. They also dispute, like the Webcasters and the commercial broadcasters, the Panel's decision to reject, as a benchmark, the amount of royalty fees these services pay for the use of the underlying musical works in an analog market under a separate compulsory license. Non-CPB Petition at 4. They then calculate a ratio between what a commercial broadcast station pays for use of the musical works in the analog world and what on average the non-CPB stations pay in the same market, based on an estimation of the number of stations, and the amount of royalties the stations paid for use of musical works in their over-the-air broadcasts. From these calculations, they suggest that a noncommercial broadcaster, on average, pays only ¹⁄₃₄th the amount of royalties that a commercial station pays for use of the same musical works and argue for a rate equal to ¹⁄₃₄th the amount that commercial broadcasters will pay. Alternatively, they request a flat rate of $100 per station, see Non-CPB, Noncommercial Broadcasters Reply Petition at 5, and argue that in no case should the rate exceed ⅓ the rate adopted for commercial broadcasters. Non-CPB, Noncommercial Broadcasters Petition at 9.

NRBMLC also turned to the rates for the statutory noncommercial broadcasting license and argued that the rates for the webcasting license should be based upon the rates currently paid to performing rights organizations for use of the musical works in over-the-air programs under this license. The Panel rejected this proposal on a number of grounds. First, it noted that those rates were the subject of prior settlements which stated that the negotiated rates for the noncommercial license were to have no precedential value for future rate setting proceedings for the noncommercial license. In light of this term, the Panel found the rates for the statutory noncommercial license had no relevance to the current proceeding. Not only were the rates for a totally different right, but they apparently have no precedential value for considering

[30] RIAA stated that "the Noncommercial Broadcasters should pay the same royalty rates that apply to Webcasters and commercial broadcasters, which are based on a benchmark derived from marketplace agreements for the same and closely related rights." RIAA PFFCL concerning the Broadcaster Royalty Rate (Jan. 25, 2002) at ¶ 44; but *see*. Reply of Copyright Owners and Performers to Non-CPB Entities (Dec. 18, 2001) at 3 ("Copyright Owners are willing to accept a rate for Noncommercial Broadcasters that is no less than one-third of the rate paid for commercial broadcasters.").

future statutory noncommercial rates for use of the musical works. Report at 90. Second, the panel considered rates proposed by Dr. Murdoch, the expert witness for NPR, who at the request of the Panel made an attempt to identify an appropriate rate for noncommercial stations based on the fees currently paid to the PROs. Although she complied with the request of the Panel, she expressed severe reservations about her own conclusions, citing numerous problems with her own calculations. Report at 91. For these reasons, the Panel rejected Murdoch's proposed rates.

RIAA supports the Panel's decision, noting that the non-CPB, noncommercial broadcasters failed to offer any differential rate for this type of service in its direct case or an expert witness who could support their ultimate request for a $100 flat rate. The only witness who testified on behalf of this group was Joe Davis, who works for a commercial broadcaster, and had only anecdotal information concerning noncommercial stations. Because of his lack of expertise in this area, the Panel did not credit his testimony. Such action on the part of the panel is not arbitrary.

Nor was it arbitrary for the Panel to decide not to rely on the statutory rates set for use of the musical works by noncommercial broadcasters. The arbitrators rejected the non-CPB, commercial broadcasters' request to look to these rates because the agreements, at the insistence of the parties to the agreements, are not even considered precedent for setting future rates for the use of the musical works. If anything, it would be arbitrary to rely on these values as a benchmark for setting rates for a completely different category of works when they had no acknowledged value for readjusting the rates for the works to which they do apply. Had the Panel wished to use these rates, it needed at the very least an opportunity to examine the circumstances surrounding the adoption of the "no precedent" clause. It would have also required record evidence to substantiate such bold assertions on the part of the users as the notion that these rates were set at a rate higher than what would have been negotiated in the marketplace. Non-CPB Broadcasters Reply Petition at 7; RIAA Reply at 11. Because of these infirmities, the Register finds the Panel did not act arbitrarily in rejecting the rates set for the section 118 license as a benchmark.

Thus, in the end, the Panel accepted RIAA's proposal to set the rate for noncommercial broadcasters at one-third the rate established for commercial broadcasters. The Panel also provided a separate rate for archived programming subsequently transmitted over the Internet, substituted programming and up to 2 side channels set at one-third the rate established for Internet-only transmissions. The Panel made this adjustment based on its determination that a noncommercial broadcaster should not be subject to commercial rates when streaming programming consistent with the educational mission of the station, over the Internet. Report at 94. However, the Panel imposed a limitation on the use of this reduced rate for Internet-only transmissions to avoid the possibility that a non-CPB broadcaster could use its unique position to essentially become a commercial webcaster.

The Register accepts the Panel's methodology for setting the rate for noncommercial broadcasters. The rates proposed by the Panel, however, must be adjusted to reflect the Register's recommendation to set a unitary rate for both commercial broadcasters and webcasters. Using the proposed base rate of 0.07¢ and reducing this value by two-thirds, the adjusted rate for non-CPB, noncommercial broadcasters is 0.02¢ (one-third of 0.07¢, the base rate for all transmissions, rounded to the nearest hundredth) per performance, per listener. This rate shall apply to a simultaneous retransmission of the non-CPB, noncommercial over-the-air radio programming, archiving programming subsequently transmitted over the Internet, substituted programming, and up to two side channels. The rate for all other Internet-only transmissions is 0.07¢.

One last disputed issue raised by the non-CPB, noncommercial broadcasters is the imposition of the same $500 minimum fee that the CARP set for all other licensees. They argue that a $500 minimum fee far exceeds any reasonable rate that should be imposed on this category of users in light of the financial considerations that distinguish them from the other services. Non-CPB Broadcasters Reply Petition at 10. In support of this position, the users cite Dr. Murdoch's testimony to illustrate that the Internet license for use of SESAC's repertoire is less than $100. But this is not the total amount that a noncommercial station would pay; it would also have to pay fees to BMI and ASCAP in order to license all the works included in the sound recordings covered by the section 114 license. The minimal amount that a webcaster must pay to cover the combined works administered by the three PROs is $673, more than the proposed minimum rate to operate under the section 114 license. Webcasters PFFCL ¶ 363. In any event, the Panel set the rate at $500 to cover administrative costs to the copyright owners and access to the sound recordings. It was not arbitrary to impose a minimum fee on the Non-CPB, noncommercial broadcasters that merely covers costs for these rudimentary purposes nor can it be deemed excessive in light of what these entities pay the PROs for the public performance of musical works.

11. Consideration of Request for Diminished Rates and Long Song Surcharge

RIAA requested a surcharge for songs longer than five minutes. RIAA PFFCL ¶ 210. Its request was denied because the Panel did not find that such a charge was included in most of the relevant license agreements. Report at 105. RIAA, however, argues that the Panel misread the Yahoo! agreement. RIAA Petition at 42. It notes that Yahoo! could estimate the number of performances it made by multiplying its listening hours by a fixed number of performances and that when it did so, the record companies received compensation for [material redacted subject to a protective order] performances, even though Yahoo! may have only played, for example, 5 12-minute classical recordings in an hour. Id. The Yahoo! agreement, however, does not require that it employ the estimation methodology; it merely states that Yahoo! may make this calculation. Thus, there was no probative evidence that the marketplace valued a classical sound recording, or similar sound recordings of longer than average duration, at a different rate. Consequently, it was not arbitrary for the Panel to reject RIAA's suggestion to impose a "long song" surcharge. In any event, it is highly likely that this concern will be addressed for the time period to which these rates apply, since most services will be using the estimation formula for calculating the number of performances which assumes 15 performances for each aggregate tuning hour.[31] See section IV.11, infra.

On the other side, webcasters asked that there be no royalty fee for songs that are less than thirty seconds long, citing technology problems or the use of song-skip functions. Webcasters Petition at 71. The Panel disagreed and saw no

[31] Nevertheless, RIAA has raised a valid point and future CARPs should carefully consider how to value performances of longer recordings, such as classical music, to ensure that the copyright owner is fully compensated. That being said, no party should assume that a particular approach to the problem is being advocated by the Register for adoption by a future CARP.

need to make any adjustment. It noted that the use of the blended rate from which it calculated the proposed rates was itself based upon figures which already took into account problem performances that had occurred during the initial period. This adjustment was expressly made for the first 1.5 billion transmissions only. Report at 106–107. The Panel chose not to make a similar adjustment for subsequent performances because the Yahoo! agreement did not provide for such an adjustment.

Likewise, the Panel determined that the use of the skip function provides a benefit to webcasters and it saw no need to penalize copyright owners for the benefit that flowed to the users through a conscious use of a function provided by the service. Moreover, none of the negotiated agreements provided for any reduction in rate for skipped songs. Report at 107. Consequently, the Panel did not provide a lower rate or exemption for truncated performances resulting from use of the skip song function.

The Webcasters object to the Panel's conclusion, maintaining that the Panel failed to adequately explain its decision and consider relevant evidence. See Webccasters Petition at 71. They contend that the Panel should have given more weight to three of the 26 agreements, which provided an exemption for performances less than thirty seconds in duration. Such action, would itself, have been arbitrary. Clearly, the Panel could not rely on these agreements when it had already disregarded them for purposes of establishing the royalty rates.

Moreover, RIAA makes a number of arguments in support of the Panel's decision. First, it notes that the performance of even a portion of a sound recording without a license is an infringement of a copyright owner's rights. As such, there is no *a priori reason* for making 30-seconds-or-fewer performances exempt from royalty obligations. Second, RIAA cites 17 U.S.C. 114(h)(2)(B) to demonstrate that Congress recognized the value of performances of limited duration and the right to license such performances. Specifically, this section exempts copyright owners licensing public performances of sound recordings from the requirement to make these sound recordings available on no less favorable terms or conditions to all bona fide entities, when they are licensing promotional performances of up to 45 seconds in duration. RIAA Reply at 71–75. These arguments support the Panel's decision not to exempt performances of thirty seconds or less, and as such, its decision is neither arbitrary nor contrary to law.

The Panel did, however, grant the users an exemption for incidental performances, citing the existence of a similar term in the Yahoo! agreement as the basis for its decision. Specifically, the Panel "exclude[d] transmissions or retransmissions that make no more than incidental use of sound recordings, including but not limited to, certain performances of brief musical transitions, brief performances during news, talk and sports programming, commercial jingles, and certain background music." Report at 108. This is not a disputed provision.

With the agreement of the parties, the Panel also exempted performances of sound recordings made pursuant to a private license agreement. Id.

The Register notes, however, that the Webcasters' concerns regarding the Panel's determination not to grant its request to impose no royalty on songs less than 30 seconds in duration are ameliorated for the current licensing period. Under the proposed terms of payment, a service may estimate the number of performances for purposes of determining the extent of copyright liability on an "Aggregate Tuning Hour" basis, which calculates payment on the basis of 15 performances per hour.[32] This approach alleviates a Licensee's obligation to account for and pay for each performance, including those that are less than 30 seconds in duration.

12. Methodology for Estimating the Number of Performances

Until each service can account for each performance, and is required to do so, there is a need for a methodology that will allow a service to make a reasonable estimate of the number of performances. Accordingly, the Panel proposes the following procedure:

> For the period up to the effective date of the rates and terms prescribed herein, and for 30 days thereafter, the statutory licensee may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the licensee's total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of retransmissions of AM and FM radio stations reasonably classified as news, business, talk or sports stations, and 12 performances per hour in the case of all other AM and FM radio stations).

Report at 110.

The Broadcasters object to the Panel's formulation for estimating the number of performances, arguing that for many program formats, e.g., news, business, talk, or sports stations, the estimate would likely significantly overstate the use of music by these stations. Broadcasters Petition at 57. However, they do not offer an alternative methodology for calculating these performances. Moreover, a mere likelihood of overstating the values in some cases is not enough to undo the Panel's formulation.

Likewise, Webcasters argue that the 30-day cutoff period for using the methodology for estimating the number of performances is arbitrary because there is no record support for this determination. Webcasters Petition at 72. Instead, they propose allowing the Services to employ this methodology through the remainder of the current licensing period, which ends December 31, 2002, since it will be used, in any event, by most Services for purposes of calculating their liability for their past usage of the sound recordings. Id.

What is troubling about this provision is the Panel's determination to require a full accounting of each performance beginning 30 days after the effective date of the order setting the rates and terms. The Report documents that many services are not currently equipped to track or accurately account for each performance, and the Register agrees. In fact, until the issuance of final rules regarding Records of Use, there are no requirements for tracking these performances. Because the Office has yet to establish just how a service will account for its use of the sound recordings, the Register determines that the proposed timeframe for requiring a strict accounting is arbitrary. Instead, the rule shall require that a Service begin accounting for each performance in accordance with the rules and regulations regarding Records of Use 30 days after the effective date of final rules. These rules shall determine what information needs to be calculated to determine which sound recordings have been performed, how many of such performances occurred, and when and how often such information shall be collected by the Services. Meanwhile, interim rules are being promulgated that

[32] The Webcasters had advocated the use of "Aggregated Tuning Hours" as a way to address their concerns regarding the Panel's decision not to provide a lower rate for partial performances. Webcasters Petition at 71–72. Their argument, however, is not the bases for the Register's recommendation to provide for use of the estimation methodology throughout the license period.

The Register is proposing this course of action in the short term merely to address separate concerns of the Register regarding the logistics involved in reporting the number of performances of sound recordings. This recommendation on the part of the Register should in no way be construed as undermining the Panel's decision that transmissions of sound recordings of less than 30 seconds are compensable.

will, for the immediate future, impose more modest reporting requirements on Services.

In the meantime, for the remainder of the period covered by this proceeding (i.e., through December 31, 2002), Services may estimate the number of performances in accordance with the Panel's formulation. While this is not the perfect solution, it represents a reasonable approximation of the number of performances. And in those cases where a Service believes the formulation overestimates the use of the sound recordings, it has the option of actually counting the number of performances and calculating the royalties accordingly. Certainly, it cannot be seriously argued that a Service would be unduly burdened by undertaking this task. Conversely, if after accounting for each of the performances in the programs which are allowed to use the one performance per hour estimate, the Service finds its programming performs more sound recordings than the approximation, a Service benefits from use of the Panel's methodology.

13. Discount for Promotion and Security

RIAA proposed a 25% discount to any service that includes promotional and security features beyond those required under either the webcasting license or the ephemeral recording license. Because that proposal would exceed the scope of the terms set forth in the law, the Panel declined RIAA's invitation to provide for such discounts within the context of the statutory license. Report at 110. It is clear that the Panel may reject such a proposal, as it did here, because the statutory license does not expressly require that such a rate be established. No party contested the Panel's determination on this issue. Therefore, the Register sees no reason to question the Panel's decision.

14. Ephemeral Recordings for Services Operating Under the Section 114 License

A transmitting organization entitled to make transmissions of sound recordings under the webcasting license may also make a single ephemeral copy of each work to facilitate the transmission under an exemption in the law or it may make multiple copies of these works pursuant to a statutory license. See 17 U.S.C. 112(a) and (e), respectively. In addition to setting rates and terms for the webcasting license, the Panel in this proceeding had the responsibility for setting the rates for the ephemeral recordings. The Office combined these section 112 and section 114 proceedings because the licenses are interrelated and the beneficiaries of the license, just as the users, are in most instances the same for both the webcasting license and the ephemeral recording license. However, there is one group of users of the ephemeral recording license that is exempt from the digital performance right—services which provide transmissions to a business establishment for use by the business establishment within the normal course of its business ("business establishment services").[33] 17 U.S.C. 114(d)(1)(C)(iv).

During the proceeding, the Services argued that these "ephemeral" copies have no economic value apart from the value of the performance they facilitate. Webcasters Petition at 67; Broadcasters Petition at 50. In support of this position, the Services cite with approval a Copyright Office Report which stated that the Office found no rationale for "the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value, and are made solely to enable another use that is permitted under a separate license." Report at 98, citing U.S. Copyright Office, DMCA Section 104 Report at 114, fn 434 (August 2001). The Panel also contended that experts on both sides took this view. Webcasters Petition at 66, citing Jaffe W.D.T. 52–54; Tr. at 6556; Tr. at 2632 (Nagle). Had there been nothing more, the Panel might have agreed with the Services and adopted the Office's position. In construing the statute, however, the Panel found that Congress did not share the Copyright Office's view. Instead, the Panel found that Congress required that a rate be set for the making of ephemeral copies in accordance with the willing buyer/willing seller standard.[34] Report at 98–99.

The Panel utilized the same approach in setting rates for the ephemeral recording license as it had in setting the rates for the webcasting license. Report at 104. It first examined the 26 RIAA agreements for evidence that market participants paid a fee to make ephemeral copies and how much they paid. Of the 26 agreements, fifteen did not contain any rate for the ephemeral license and did not purport to convey this right; two used a percentage of overall revenues; eight used a percentage (calculable to 10%) of the performance royalty fees paid; and one paid a flat rate per use of the license for a year (calculable to 8.8% of the performance royalty fees paid). Id. From this, the Panel identified a range of rates between 8.8% and 10% of the performance fees paid.[35] It then chose to place significant weight on the 8.8% value because it was derived from the information in the Yahoo! agreement to which the Panel has given considerable weight throughout this proceeding. Id. However, the Panel did not rely solely on the Yahoo! agreement in this instance, choosing instead to give minimal weight to the eight other agreements that set the ephemeral rate at 10% of the performance rate, and so rounded the 8.8% value up to 9.0%. Id. Both Webcasters and Broadcasters filed Petitions to Modify in which they object to the Panel's approach to setting the ephemeral rate. They argue that the evidence supports their position that the ephemeral copies have no independent economic value apart from the performances they facilitate. In the alternative, they maintain that the value of the ephemeral copies is included in the royalty fee for the performance of the sound recording. Consequently, they contend that the appropriate way to set the ephemeral rate would be to determine the economic value of the ephemeral copies and reduce the performance rate by that amount. Webcasters Petition at 67; Broadcasters Petition at 51.

Moreover, the Services disagree with the Panel's use and analysis of the voluntary agreements for setting this rate. Specifically, they cite the lack of an ephemeral rate in 15 of the 26 agreements, even though it is clear that these recordings are necessary to effectuate a performance, as evidence of RIAA's view that the making of ephemeral copies had only a de minimis

[33] Business establishment services deliver sound recordings to business establishments for the enjoyment of the establishments' customers. Two such services, AEI, Music Network, Inc. and DMX Music, Inc., participated in these proceedings. These companies merged into a single company during the course of this proceeding. AEI/DMX provides music to more than 120,000 businesses, including Pottery Barn, Abercrombie & Fitch, Red Lobster, and Nordstrom. The rate setting process as it pertains to the business establishment services is discussed in Section IV.14.

[34] The Panel and the Services note that the Register has adopted a policy position regarding the making of ephemeral recordings which attributes no economic value to the making of such recordings when "made solely to enable another use that is permitted under a separate compulsory license." U.S. Copyright Office, DMCA Section 104 Report at 144, fn.434. (August 2001). This statement was made in a different context and has no relevance to the current proceeding. The task of the Register in this proceeding is to determine whether the Panel's determination is arbitrary or contrary to law without regard to the Office's own views on how the law should read to implement policy objectives.

[35] Most of the original 26 license agreements did not grant the right to make ephemeral copies, either because the Service did not realize it needed this right or because the Service had assumed the negotiated rate covered all rights needed to make the digital transmissions. However, that trend did not continue. Licenses that were renewed expressly granted the right to make ephemeral copies for a fee. Report at 58, fn 39.

value. Broadcasters Petition at 52. For this reason, webcasters and broadcasters argue that RIAA placed little value on these copies and implicitly acknowledged that the value of these recordings is at best de minimis. They then criticize the Panel's methodology, asserting that the calculation of the ephemeral rate based upon the rates derived from the Yahoo! agreement for a per performance model, totally ignored the fact that Yahoo! agreed to pay a flat fee once it began making payments on a per performance basis, without regard to the number of performances. Webcasters Petition at 69; Broadcasters Petition at 53. Finally, Webcasters object to any use of the non-Yahoo! agreements in calculating this rate because the Panel had already found these agreements to be unreliable for purposes of setting the marketplace rates. Similarly, the Broadcasters question the Panel's reliance on eight of the agreements that it had rejected earlier as "unreliable benchmarks." Id. at 54.

The non-CPB, noncommercial broadcasters adopt the objections to ephemeral recording rate put forth by the commercial broadcasters. Noncommercial Broadcasters Petition at 11.

On the other hand, RIAA supports the Panel's determination in general, noting that the CARP relied primarily on the Yahoo! agreement to calculate the ephemeral rate for webcasters. It maintains, however, that the Panel should have afforded the 25 voluntary agreements more weight and set the rate at 10% of the performance rate in deference to the fact that many RIAA licensees had agreed to a negotiated or effective ephemeral rate of 10%. RIAA Reply at 68. RIAA also challenges the Services' complaints in general, noting that in spite of all the objections to the Panel's determination, the Services fail to offer any evidence regarding an alternative rate.

The Panel's approach in setting the ephemeral rate was not arbitrary. It calculated the rate based on the fees Yahoo! actually paid to RIAA for the right to make ephemeral reproductions. Use of the Yahoo! agreement for this purpose was perfectly logical, and consistent with the general approach taken by the Panel in determining rates for webcasting. What causes concern, however, is the Panel's reliance, even to a small degree, on the ephemeral rates set forth in eight of the 25 voluntary agreements it had previously repudiated. Such action is arbitrary unless the Panel can offer a clear explanation for its actions. It did not do so and, in fact, it stated that its review of the 26 licenses "reveals an inconsistent, rather than a consistent, pattern." Report at 100. Moreover, the Panel conceded that these agreements "do not represent evidence which establishes RIAA's proposed rate." Id. at 104. Nevertheless, the Panel granted "very modest effect" to those agreements which have ephemeral rates around 10% to justify its decision to round the 8.8% effective rate up to 9%. Considering those agreements is clearly arbitrary and, consequently, to the extent the Panel gave any weight to any license agreement other than the Yahoo! agreement, it acted in an arbitrary manner. Accordingly, the rate for the ephemeral license for licensees operating under section 114 should be set at 8.8% of the performance rate.

15. Minimum Fees

The Panel established a minimum fee of $500 for each licensee for use of the webcasting license and the ephemeral recording license. These rates are in line with those negotiated by RIAA and the 26 services with which it reached an agreement. The Panel determined that RIAA would not have negotiated a minimum fee that failed to cover at least its administrative costs and the value of access to all the works up to the cost of the minimum fee. Report at 95. The adoption of the $500 minimum, however, is predicated on the adoption of a per performance rate and not a percentage-of-revenues. The Panel implied that had it decided to adopt a percentage-of-revenue model, the minimum fee would have been more substantial because the Panel would have had to consider more carefully the impact of start-up services with little revenue. Report at 95.

Because the minimum rate is calculated to cover at least the administrative costs of the copyright owners in administering the license and access to the sound recordings, the Panel applied the rate to all webcasting services and made it payable as a non-refundable advance against future royalty fees to be paid during that year, due upon the first monthly payment of each year. Moreover, the Panel offered no proration of the fee, making it due in full for any calendar year in which a service operates under the statutory license. Report at 96.

RIAA objects to the low value for the minimum fee set by the Panel because it fails to take into account the broad range of rates established in the licenses RIAA negotiated in the marketplace.[36] Moreover, as a policy matter, RIAA contends that use of the lowest value set forth in a single agreement discourages copyright owners from adopting a low minimum fee in a single instance to accommodate special circumstances for a particular service. RIAA Petition at 44–45. Finally, RIAA faults the Panel for justifying its choice by comparing the $500 minimum fee to the amount that the Services pay the performing rights organizations (PROs) under a blanket license. RIAA rejects this rationale on two fronts. First, the minimum fee does not approximate the amounts that are paid to the PROs; and second, use of the musical works benchmark has been found by the CARP to be an inappropriate measure for establishing fees in this proceeding.

In response, Broadcasters first note that RIAA never disputed the Panel's understanding for the existence of a minimum fee, or claimed that a higher fee is necessary to achieve the stated purposes of the minimum fee. Namely, the minimum fee is meant to cover the costs of incremental licensing, i.e., the cost to the license administrator of adding another license to the system without regard to the number of performances made by the Licensee, see Webcasters PFFCL ¶ 361; and access to the entire repertoire of sound recordings. Broadcasters Reply at 12–13; Webcasters Reply at 52–53. Moreover, they claim that the minimum fee is in line with the fees paid to the performing rights organizations which can serve as a benchmark for the minimum because "they serve the same purposes that the CARP identified in setting the minimum fees for the statutory license at issue." Broadcasters Reply at 14; Webcasters Reply at 52, 55. The Services, however, do not blindly accept the Panel's proposed fee, arguing first that the record supports a much lower minimum fee. They also strenuously object to RIAA's request for a $5,000 minimum, arguing that such a high minimum would be confiscatory for most users of the license, especially for those radio stations that play little featured music. Broadcasters Reply at 16; Webcasters Reply at 56.

None of these arguments compel the Librarian to reject the proposed $500 minimum. The Panel set a minimum rate to accomplish two purposes, and none of the parties argue that the $500 fee falls outside the "zone of reasonableness" for such rates. If anything, the fee may be viewed as too low, if one takes into account the

[36] According to RIAA, a $5,000 minimum fee is the typical amount paid by users in the marketplace, without regard to whether the royalties are paid on a percentage of revenue base or in accordance with a per performance metric. RIAA Petition at 43.

minimum amounts paid to the performing rights organizations for the blanket license for performing musical works. Together each Service must pay, at the very least, a total of $673 to the three performing rights organizations to cover access to the musical works for use over the Internet and the incremental cost of licensing—the very purposes for which the minimum fee is being set in this proceeding.

Whether to utilize the musical works benchmark was a decision for the Panel and it chose not to do so. This approach was not arbitrary. As it had done throughout this proceeding, the Panel could choose, as it did, to rely on agreements negotiated in the marketplace between willing buyers and willing sellers. Moreover, the Panel could propose any rate consistent with the agreements so long as the proposed rate would cover costs for administering the license and access to the works.[37] For this reason, the Panel examined the agreements offered into evidence by the RIAA and chose the lowest value that RIAA had accepted in a prior agreement. It did so because it assumed that an entity would not agree to a minimum rate that would result in a loss. Had RIAA truly believed that the $500 minimum fee was inadequate to cover at least the administrative costs and the value of access, the Panel reasoned that it would have required a higher fee. This approach is not arbitrary and, consequently, the proposed minimum fee is adopted for the period covered by this proceeding.

16. Ephemeral Recordings for Business Establishment Services ("BES")

a. *Rates for use of the statutory license.* Business establishment services are well-established businesses, which have offered their services for many years. Among the established businesses in this group are AEI Music Network, Inc.,[38] DMX Music, Inc., Muzak, Inc., PlayNetwork, Inc. and Radio Programming and Management Inc. Two of the old guard, AEI and DMX, and one new service, Music Choice, participated in this proceeding. At an early stage of this proceeding, but after filing a direct case, Music Choice withdrew from the proceeding.

Of the services offered by AEI and DMX only those services that transmit musical programs to their customers via cable or satellite in a digital format are eligible for the ephemeral recording license. The Panel referred to this aspect of the business as the "broadcast model" of the service. Through this process, these services make hundreds of thousands, if not millions, of copies of the sound recordings. The law allows these services to perform sound recordings publicly by means of a digital transmission under an exemption in section 114.[39] However, Congress did not exempt these services from copyright liability when making copies of these works in the normal course of their business. Rather, Congress created a statutory license to cover the making of ephemeral recordings by these services. In its proposed findings of fact and conclusions of law, DMX and AEI proposed a flat fee of $10,000 per year[40] for each company for the making of buffer and cache copies, but argued in the alternative for a zero rate. See DMX/AEI PFFCL ¶ 44. In support of the alternative position, DMX/AEI argued that Congress had only envisioned a minimal rate to compensate the copyright owners for the use of ephemeral copies. It also cited the Copyright Office's Section 104 DMCA Study for the proposition that ephemeral recordings have no independent economic value apart from its use to facilitate transmissions. However, as RIAA points out, these businesses have always paid for such copies. Report at 115–116, citing RIAA Reply to DMX/AEI PFFCL ¶¶ 8–12. RIAA asked that rate be set at 10% of gross revenues with a minimum fee of $50,000 a year and asked the Panel to refrain from setting rates tailored to the needs of specific companies. RIAA made the later request because AEI/DMX asserted that its digital database is already covered by preexisting licenses and therefore, it does not need an ephemeral license in order to make these phonorecords. Consequently, AEI/DMX asked the Panel to set a rate to cover only the cache and buffer copies it needed to facilitate its transmissions and to exclude the value of the database copies when setting the rate for the ephemeral license. In fact, AEI/DMX contends that it was arbitrary for the Panel to set a rate "for all ephemeral copies which may be utilized in the operation of a broadcast service" when it had received evidence for setting a rate only for buffer and cache copies. DMX/AEI Petition at 4. It also maintains that the statute contemplates that the Panel set rates according to the needs and desires of the parties. Id. at 8–10.

RIAA disagreed with this approach, asking the panel to establish a technology-neutral rate to cover the making of all copies that a business establishment service may need to make under the license. It also proposed that the CARP rely on license agreements between the copyright owners and Business Establishment Services when fashioning the appropriate rate and not the 26 voluntary licenses considered when setting the webcasting rates.

As an initial matter, the Panel had first to decide which copies and how many are covered by the ephemeral recording license. This is a necessary step in the process, because the statutory license allows a transmitting organization to make and retain no more than a single phonorecord of a sound recording, except as provided "under the terms and conditions as negotiated or arbitrated under the statutory license." Section-by-section analysis of the H.R. 2281 as passed by the United States House of Representatives on August 4, 1998, Committee Print, Serial No. 6, 105th Cong., 2d Sess., p. 61.

Thus, the Panel considered and ultimately rejected DMX/AEI's request for a rate that only covered certain types of ephemeral copies. It did so in large part because it determined that Congress had "intended to create blanket licenses which would afford each licensee all the rights necessary to operate such a service," and noted that in this case, that would include "the right to make any and all ephemeral copies utilized in a broadcast background music service." Report at 118. This interpretation of the law is consistent with the purpose of the section 112 license.

In creating the ephemeral recording license, Congress sought to provide a

[37] Had the Panel recommended a royalty based on a percentage-of-revenues, its recommended minimum fee also would have had to serve the function of ensuring that copyright owners receive adequate compensation in cases where a service makes substantial use of copyrighted works but generates little or no revenue.

[38] AEI and DMX were separate business entities at the beginning of this proceeding. During the course of this proceeding, they merged into a single company.

[39] Section 114(d)(1)(iv) provides that:

(d) Limitations on Exclusive Right.—Notwithstanding the provisions of section 106(6)—

(1) Exempt transmissions and retransmission.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(C) a transmission that comes within any of the following categories—

(iv) a transmission to a business establishment for use in the ordinary course of its business: Provided, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the second recording performance complement. Nothing in this clause shall limit the scope of the exemption. Nothing in this clause shall limit the scope of the exemption in Clause (ii).

[40] At the beginning of this proceeding, DMX and AEI each filed a separate direct cause in which each company proposed a flat rate of $25,000 for each year (prorated for the October–December 1998 period) covered by these proceedings for use of the section 112 license. Knittel W.D.T. 19; Troxel W.D.T. 15.

way for any licensee or business establishment service to clear all the reproduction rights involved in making digital transmissions of sound recordings under section 114. Congress "intended [this provision] to facilitate efficient transmission technologies, such as the use of phonorecords encoded for optimal performance at different transmission rates or use of different software programs to receive the transmissions." H.R. Rep. No. 105–796, at 90 (1998). These copies are known as "ephemeral recordings." "The term "ephemeral recording" is a term of art referring to certain phonorecords made for the purpose of facilitating certain transmissions of sound recordings, the reproduction of which phonorecords is privileged by the provisions of section 112." Id. Because the purpose of the license is to facilitate a lawful transmission of a sound recording under a statutory license or exemption, it would appear that the license covers not only the first reproduction of the sound recording on a company's server, but also all intermediate copies needed to facilitate the digital transmission of the sound recording.

The mere fact that the license covers different ephemeral recordings that may be catalogued in different ways does not mean that a separate rate must be set for each category. Had the record supported different rates for different categories of ephemeral recordings, or for different types of business establishment services, it is conceivable that the Panel might have chosen to differentiate among these categories or types of businesses by assigning different rates to each one.[41] See also Order (dated July 16, 2001) (advising Panel that it could set different rates for different business models, provided that the record supported such a decision). Whether such an approach would have been arbitrary would depend upon the findings of the Panel in light of the record evidence and, more importantly, upon whether the proposed rates covered the making of all ephemeral copies needed to facilitate the digital transmission of a sound recording under the section 114 business to business exemption.

The section 112 license is without question for the benefit of all services operating under the business to business exemption and not just DMX/AEI. A rate tailored only to meet the specific needs of a single service would by its very nature be arbitrary if the rate failed to cover the entire scope of the license. The fact that DMX/AEI has chosen to license the copies in its database through a private agreement and use the statutory license to cover the remaining ephemeral copies would not relieve the Panel of its responsibility to set rates for all ephemeral copies which fall within the scope of the license, including those copies in a DMCA compliant database. Other business establishment services using a DMCA-compliant database exist and may choose to meet their copyright liability by operating under the statutory license. See RIAA reply at 18; Report at 116. It is without question that such a service may take advantage of the statutory license without participating in a CARP proceeding.

Once these rates are set, a Service can either operate entirely under the statutory license or, alternatively, the Service may choose to make some ephemeral copies under the statutory license and others under a private agreement. These choices, however, have no bearing on the responsibility of the Panel to establish a rate, or a schedule of rates, that would allow a Service to utilize the license to the full extent of the law.

In fashioning the rate, the Panel considered the arguments put forth by the parties and ultimately rejected DMX/AEI's basic premise that Congress had contemplated a *de minimis* rate to compensate for "leakage" (use of ephemeral copies to make phonorecords for sale) and, its interpretation of what it characterized as the Copyright Office's view that such copies have no independent economic value. This decision was reached after examining the statute and its legislative history and finding nothing that directly supported the "leakage" theory.[42] Moreover, the Panel had already determined that its responsibility was not to give effect to the Copyright Office's view on how the law should change. Instead, it determined that its duty was "to follow the current Congressional mandate set forth in section 112(e)(4) and determine a separate rate for ephemeral copies' based upon the willing buyer/willing seller standard. Report at 98–99. Thus, the Panel rejected AEI/DMX's proposal to set a low rate based upon its finding that these entities have always paid substantial royalties to record companies in exchange for the use of its complete catalogue. Report at 119.

In any case, the starting point for setting the rates for the ephemeral recording license as it applies to business establishment services is the statute. It provides that, as with the rates for the webcasting license, the rates should be those that "most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. 112 (e)(4). Thus, the Panel turned to actual agreements that have been negotiated in the marketplace to discover how the market values these rights. As discussed previously, the use of rates negotiated in the marketplace is not arbitrary. It eliminates the need to try to value specific economic, competitive, and programming factors because the parties would have already accounted for these considerations during the negotiation process and their impact would be reflected in the negotiated rates.

Both sides seem to agree with the Panel's approach. RIAA had no complaint with the Panel's use of voluntarily negotiated licenses in setting the ephemeral rates for business establishment services. Moreover, DMX/AEI's own counsel acknowledged that marketplace agreements were appropriate benchmarks for establishing the rates for the rate for the section 112 license and conceded that the agreements relied upon were worthy of consideration. Tr. 9577–78 (Sept. 12, 2001). Nevertheless, DMX/AEI did argue that the proposed rate constitutes an undue financial burden that thwarts Congress' intent to facilitate the adoption of new technologies. DMX/AEI Petition at 11.

The question is which agreements should be considered when setting the rates for the ephemeral reproductions. Having found that the business establishment services offer a completely different type of service from webcasting, the Panel rejected DMX/AEI's invitation to use the ephemeral rates negotiated by the webcasters. Report at 121. Instead, the Panel opted to use the license agreements that had been negotiated between individual record companies and background music services[43] as a benchmark for setting the relevant section 112 rates even though, in some instances, the license conveyed some

[41] As RIAA points out, insufficient evidence exited to support his approach and accommodate DMX/AEI's proposal. RIAA reply at 15, citing Panel report at 118–10/9.

[42] RIAA supports the Panel's determinatin, nothing tha the legislative history makes clear that the purpsoe of the license is "to create fir and efficient licensing mechanisms." RIAA Reply at 20, citing H.R. Conf. Rep. 105–796 at 79–80 (1998).

[43] A background music service is a type of Business Establishment Service that complies and delivers music to business establishments who play the music for the enjoyment of their customers. Among the license agreements considered by the Panel were those negotiated between the major record labels and AEI, DMX, Muzak, Play Network, Inc., and Radio Programming and Management Inc. Report at 123–124.

rights to the licensee beyond the reproduction and distribution of the sound recording. The Panel was not troubled by this observation, however, because it found that in all cases the right to copy and distribute the works was by far the most important right for which the licensee paid royalties. Moreover, it noted that the rates did not fluctuate through the year even when a service altered its method for delivering music. Thus, the Panel used the rates reflected in these licenses to establish a range of rates (10–15% of gross proceeds) for consideration. See Report at 117; see e.g., RIAA Reply to AEI/DMX at 2. From this data, it found that "background music companies and record companies would agree to a royalty of at least 10% of gross proceeds," and set the rate accordingly. Report at 126.

RIAA agrees with the Panel's approach, and that it was appropriate for the Panel not to consider contracts for ephemerals made in the course of webcasting because these businesses are not comparable with Business Establishment Services. They serve different customers and operate under different economic business models with different delivery methods. For example, Business Establishment Services make reproductions of sound recordings and deliver them via cable or satellite for use by the establishment for the enjoyment of their customers. These differences are further underscored by transactions in the marketplace. RIAA notes that within a single license with one business entity, it negotiated a separate rate for webcasting ephemeral copies and a separate rate for ephemeral copies used by the Business Establishment Service. RIAA reply at 24–25. The fact that RIAA negotiated separate rates for the making of ephemeral recordings for different services supports a finding that the businesses are not comparable. Therefore, it was not arbitrary for the Panel to decline to consider the ephemeral rates set forth in the licenses between the webcasters and the record companies when establishing a rate for Business Establishment Services.

Moreover, an examination of the record evidence clearly shows that the 10% of revenues rate set by the Panel is not an arbitrary figure. RIAA Exhibits 9 DR, 10 DR, 11 DR, 12 DR, 13 DR, 14 DR, 26 DR, 27 DR, 28 DR, 60–A DR, 66 DR–X, Knittel Rebuttal Ex. 22; Knittel W.D.T. 14–15. It represents the low end of the range of rates set forth in the agreements between the major record labels and Business Establishment Services. The fact that two agreements, negotiated during a period of uncertainty whether there was a legal obligation to pay anything for the satellite transmissions they covered, reflect a lower rate does not change the outcome. See Report at 124. As RIAA points out, the rate in one of these agreements was reset at a substantially higher rate once the initial contract with the lower rate expired. RIAA Reply to AEI/DMX at 25, fn 25. Nor is there any reason to reject the Panel's determination, as DMX/AEI contends, because the Panel failed to adjust for the promotional value to the record companies or bring these rates into line with those set for Subscription Services in the previous proceeding. As the Panel stated on several occasions, it is unnecessary to adjust a marketplace-negotiated rate for the promotional value that flows to the record companies because that benefit would already be reflected in the contract price, if it were important to the parties.

Likewise, DMX/AEI's second premise for rejecting the Panel's determination must also be discarded. It argued that the Panel set an arbitrarily high rate for Business Establishment Services when compared to the rate set for Subscription Services in an earlier proceeding. DMX/AEI Petition at 19–20. As discussed in a previous section, see section IV.3, rates set for Subscription Services in a prior proceeding are just not comparable to rates under consideration in this proceeding. Marketplace rates for making reproductions of sound recordings for use by a Business Establishment Service have no established relationship to rates set under a totally different standard for the public performance of sound recordings by Subscription Services. There is no established nexus between the industries, the marketplaces in which they operate, or the rights for which the rates are set. To make any adjustments to the ephemeral rate based on the rate for the digital performance rate adopted for the Subscription Services in a previous proceeding would itself be patently arbitrary.

b. Minimum fee. The statute also requires the Panel to set a minimum fee for use of the license. Using the same licenses, it determined that the minimum fee should be $500 a year based on its observation that most, although not all, willing buyers have not agreed to a fee approaching RIAA's proposed rate of $50,000 a year and that some agreements include no minimum fee at all. Because there is no discernable trend in the licenses, the Panel chose to adopt the same fee it proposed for the webcasting licenses because it is calculated to cover at least the administrative costs of the license.

RIAA argues that a $500 minimum is too low and contradicts the record evidence, citing the existence of significantly higher rates in many of the industry agreements and the lack of any agreement with a minimum as low as $500. RIAA Petition at 46–47. RIAA further contends that the CARP by its own reasoning should set a significantly higher minimum fee where, as here, the ephemeral rate is based on a percentage-of-revenue model. Id. at 49. The Copyright Owners are concerned that a low minimum rate will increase "the risk that a service, especially a new one, will make a large number of ephemeral copies and not generate revenues, effectively giving the service a blanket license for free." Id. Consequently, the Copyright Owners ask the Librarian to adopt their proposal and set the minimum fee for use of the ephemeral license at rate no lower than $50,000.

DMX/AEI objects to RIAA's request for a higher minimum fee. It maintains that RIAA requested rate is inconsistent with record evidence, which establishes that either DMX/AEI currently pays [material redacted subject to a protective order] in its direct licensing agreements with the major labels for On-Premises services or that it is disproportionately high when compared with the minimum fees paid by other members of the background music service industry. DMX/AEI Reply at 7. Accordingly, AEI/DMX urges the Librarian not to entertain the RIAA's request.

An examination of the relevant agreements reveals that almost all of these agreements have a substantial minimum fee for the making of ephemeral recordings and that all of those minimum fees are considerably greater than the $500 minimum proposed by the CARP. Consequently, the Panel's decision to adopt a $500 minimum fee when no contract considered by the Panel contained a minimum fee as low as $500 is arbitrary. The minimum fees in the agreements before the CARP were by and large significantly higher than the $500 fee proposed by the CARP and should have served as the guiding principle in setting the minimum fee for the Business Establishment Services, especially in light of the Panel's earlier observation that a percentage of revenue fee requires the establishment of a substantial minimum fee to offset the risk that a start-up Service with little revenue could operate without paying adequate royalty fees for use of the license. Moreover, RIAA notes that each contract before the CARP was between a Business Establishment Service and a single record label. It then makes the argument that "[i]f a business establishment service is willing to pay a minimum fee [significantly higher than the minimum fee proposed by the Register] for access to just one label's sound recordings, the value of the blanket license to all copyrighted recordings must be higher." RIAA Petition at 46. Based on this evidence, the Panel should have set the minimum fee for the section 112 license as it applies to Business Service Establishments at a significantly higher level, and it was arbitrary not to have done so.

The Register notes that minimum fees have been as low as $5,000 and as high as the $50,000 minimum proposed by RIAA. The purposes of the minimum fee, however, are to cover the costs of administration and insure an adequate return to the copyright owners based upon the value of the right with respect to the overall fee for use of the license. For these reasons, the Register proposes a minimum fee of $10,000 per Licensee. The fee is at the low end of the range of negotiated minimum fees and is in line with DMX/AEI's own valuation of the license at $10,000 per year. Admittedly this fee appears high when compared with the minimum fee for the eligible nonsubscription services, but it serves to balance the risk associated with setting a statutory fee based upon a percentage of revenues instead of a fee that would charge a specific fee for each reproduction.

17. Effective Period for Proposed Rates

The rates and terms proposed by the parties were the same for each time period under consideration by the Panel. Consequently, the Panel proposed, and the parties agreed, that the same rates and terms would apply to both periods: (1) October 28, 1998 (the effective date of the DMCA) through December 31, 2000; and (2) January 1, 2001, through December 31, 2002. The Register finds that it was not arbitrary for the Panel to propose the same rates and terms for both periods under consideration.

B. Terms

Sections 112(e)(4) and 114((f)(2)(B) require that the CARP propose and the Librarian adopt terms for administering payment for the two statutory licenses. The Panel stated that, as with rates, the standard for setting these terms is what the willing seller and the willing buyer would have negotiated in the marketplace. The Panel did not interpret the standard to include necessarily setting terms that "represent the optimum alternative from the standpoint of administrative convenience and workability." It reasoned that such considerations were "not part of the governing standard for the Panel, nor [were they] a matter on which [the Panel] would have either record evidence or institutional expertise." Consequently, the Panel made no determination pertaining to administrative efficiency, choosing instead to defer to the expertise of the Librarian. Report at 129.

For the most part, the terms proposed by the Panel are those to which all parties to the CARP proceeding have agreed in negotiations. For this reason, the Panel accepted all terms on which the parties agreed, finding that where there was agreement, the terms meet the statutory standard under which these terms must be set. Moreover, the Panel found that there was evidence in the record to support adoption of most of these terms.

The Register is skeptical of the proposition that terms negotiated by parties in the context of a CARP proceeding are necessarily evidence of terms that a willing buyer and a willing seller would have negotiated in the marketplace. Especially when those terms relate to administration of the receipt and distribution of royalties by collectives that are artificial (but necessary) creations of the statutory license process, rather than entities likely to be created in an agreement between a copyright owner and a licensee, the fiction that those terms reflect the reality of the marketplace is difficult to accept.

Not all of the terms recommended by the Panel are terms that the Register would have adopted if her task were to determine the most reasonable terms governing payment of royalties. However, in light of the standard of review, the Register recommends accepting the terms adopted by the Panel except in the relatively few instances where the Panel's decision was either arbitrary or not feasible. See Report at 129 ("we must defer to the expertise of the Librarian the final evaluation of the administrative feasibility of terms which willing buyers and willing sellers would agree to in marketplace negotiations"). The discussion that follows addresses, first, the terms recommended by the Panel that one or more parties have asked the Librarian to reject. Following that discussion, the Register discusses those terms recommended by the Panel that, although they are acceptable to the parties, she proposes to modify or reject, because they are arbitrary or contrary to law.

1. Disputed Terms

The parties were unable to reach a consensus with respect to two issues: (1) The incorporation of specific definitions for the terms, "Affiliated," "AM/FM streaming," "Broadcaster," and "Non-Public;" and (2) the designation of an agent for unaffiliated copyright owners.

a. *Definitions.* The Panel carefully considered the utility of incorporating the proposed terms for Affiliated," "AM/FM streaming," "Broadcaster," and "Non-Public." It decided to reject the webcasters" request to adopt the disputed terms and definitions, noting that the terms were not applicable to the rate structure ultimately adopted by the Panel. The Parties have filed no objection on this point and the Register finds no reason to include a definition of these terms in the regulations.

Notwithstanding the Panel's decision as to these terms, it did incorporate other terms that were necessary for the administration of the license. The proposed definitions for these additional terms are based upon submissions from the parties made at the Panel's request. See, Services' Submission of Definitions; Proposed Definitions of the Recording Industry Association of America, Inc. (Feb. 12, 2002). Again, no party has filed an objection to the Panel's decision to propose additional terms the purpose of which is make the regulatory framework clearer and more functional.

b. *Designated Agent for Unaffiliated Copyright Owners.* Read literally, section 114 appears to require that Services pay the statutory royalties directly to each Copyright Owner. As a practical matter, it would be impractical for a Service to identify, locate and pay each individual Copyright Owner whose works it performed. As a result, in the administration of the predecessor statutory license for noninteractive subscription services, a Collective was appointed to receive and distribute all royalties. The RIAA has served as the Collective for the nonsubscription services.

In this proceeding, the Parties proposed and the CARP agreed to a modification of the single-collective model. Licensees making transmissions of a public performance of a sound recording pursuant to the statutory license in section 114 and/or making ephemeral recordings of these works under the statutory license in section 112(e) would make all payments owed under these licenses to the designated "Receiving Agent." [44] The Receiving

[44] A "Receiving Agent" is the agent designated by the Librarian of Congress through the rate setting process for the collection of the royalty fees from

Agent would then make further distribution of the royalty fees to the two Designated Agents[45] who would then distribute the royalty fees among the Copyright Owners and Performers in accordance with the methodology set forth in the regulations.

The CARP accepted the proposal of the parties to designate a single Receiving Agent, SoundExchange, in order to maximize administrative efficiencies for the Copyright Owners and Performers, on the one hand, and Licensees, on the other. SoundExchange is a nonprofit organization formed by RIAA for the purpose of administering the sections 112 and 114 statutory licenses. It has over 280 member companies, affiliated with more than 2,000 record labels accounting for over 90% of the sound recordings lawfully sold in the United States. W.D.T. at 4 (Rosen). SoundExchange is governed by a board comprised of representatives of Copyright Owners and Performers and, under a recent reorganization, the Copyright Owners and artists representatives will have equal control over the SoundExchange Board. AFM/AFTRA PFFCL ¶ 6.

In addition to its role as a Receiving Agent, the CARP accepted the Parties' proposal that both SoundExchange and Royalty Logic, Inc. ("RLI") serve as Designated Agents. RLI is a for profit subsidiary of Music Reports, Inc. and was created to offer a competitive alternative to SoundExchange. W.D.T. at 2 (Gertz). The purpose of having two designated agents is to provide Copyright Owners with the option of electing to receive their royalty distribution from either SoundExchange or RLI. The Receiving Agent will allocate royalties to the two Designated Agents based on the Copyright Owner's designation.[46]

However, the parties could not agree on which Designated Agent would distribute funds to Copyright Owners who failed to make an election. The Webcasters proposed that RLI be named the agent for unaffiliated Copyright Owners, but Copyright Owners and Performers asked the Panel to designate SoundExchange as the agent for those copyright owners.

After carefully considering the role of the Designated Agent for unaffiliated copyright owners and the record evidence, the Panel made a determination to name SoundExchange as the Designated Agent for those copyright owners who fail to expressly designate either SoundExchange or RLI as their agent to receive and distribute royalties on their behalf. The primary reason for this designation was the preference expressed by the Copyright Owners and the Performers. The Panel reasoned that the Services had no real stake in deciding this issue because their responsibilities and direct interest end with the payment of the royalty fees to the Receiving Agent. Moreover, AFM and AFTRA, which represent artists who are among the beneficiaries of the license, expressed a strong preference for the designation of SoundExchange as the agent in these instances. The Copyright Owners made this choice based on the non-profit status of SoundExchange, its experience with royalty payments, and the fact that SoundExchange has agreed to a reorganization that gives artists substantial control over its operations. The Panel agreed with the reasons articulated by the Copyright Owners and Performers and found that the probable outcome of a marketplace negotiation would have been the selection of SoundExchange.

Broadcasters contest the Panel's decision to designate SoundExchange as the agent for unaffiliated copyright owners. They assert that there is no record evidence to support the Panel's observation that this was the inevitable outcome of marketplace negotiations, in spite of the actual requests made by Copyright Owners who participated in this proceeding. Broadcasters Petition at 59–60.

The Copyright Owners and Performers disagree, and assert that unlike the Licensees whose only concern is whom to pay and when, copyright owners and performers have a vital interest in how their royalty fees are collected and distributed and have expressed a strong preference for SoundExchange as the designated agent. See RIAA Reply at 81; AFM/AFTRA Reply at 2. Certainly, Performers believe that SoundExchange will make fair and equitable distributions and not deduct additional costs beyond those necessary costs incurred to effectuate a distribution. AFM/AFTRA Reply at 2–3 ("SoundExchange is subject to the joint and equal control of copyright owner and performer representatives with an interest in maintaining an efficient operation that will distribute the maximum possible license fees, that SoundExchange is a nonprofit organization so that no copyright owner's or artist's royalty share will be diminished by anything other than necessary distribution costs, and that SoundExchange is experienced and has demonstrated its commitment to identifying, finding and paying performers during its distribution of Section 114 and 112 subscription service statutory license fees."); see also RIAA Reply at 83.

The CARP's decision to designate SoundExchange as the agent for unaffiliated copyright owners is fully supported by the record evidence and, consequently, it is not arbitrary. First, the fact that Copyright Owners and Performers commend SoundExchange to the Panel is direct evidence of their preference for a non-profit organization that has already invested heavily in a system designed to locate and pay Copyright owners and Performers. It would be arbitrary to ignore their wishes where, in fact, the alternative agent represents primarily broadcasters, television stations, and other Licensees—not Licensors. See AFM/AFTRA PFFCL concerning terms ¶ 13. Second, SoundExchange is a non-profit collective that will deduct only necessary distribution costs. On the other hand, RLI, the entity competing for the agency designation, is a for-profit organization whose acknowledged goal is to make a profit. In fact, RLI has suggested that it needs the designation from the CARP in order to generate enough revenues to make it worthwhile to take on the role of an agent for purposes of making distributions of statutory license royalty fees. See Services Proposed Findings (12/18/01) at ¶ 16. In addition, RLI has been unable to say just how much it expects to deduct as reasonable costs, making it impossible to ascertain whether designation of RLI would be in the best interest of the unaffiliated copyright owners. Third, Performers and Copyright Owners have a direct governance role in the operation of SoundExchange, thereby insuring their interests are not neglected or overshadowed by the interests of the agent. AFM/AFTRA Reply at 4; AFM/AFTRA PFFCL concerning terms ¶ 6. Performers have expressed strong concerns about the designation of an agent who has no mechanism or apparent interest in providing the Copyright Owners and Performers with

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the Licensees operating under the sections 112 and 114 licenses.

[45] A "Designated Agent" is an agent designated by the Librarian of Congress through the same rate setting process who receives royalty fees paid for use of the statutory licenses from the Receiving Agent and makes further distributions of these fees to Copyright Owners and Performers.

[46] The Register is skeptical of the benefit of this two-tier structure, which adds expense and administrative burdens to a process the purpose of which is to make prompt, efficient and fair payments of royalties to Copyright Owners and Performers with a minimum of expense. However, the Register cannot say that the Panel's decision, presumably based on the conclusion that competition among Designated Agents will result in better service to Copyright Owners and Performers, is arbitrary.

a means to voice their concerns. See AFM/AFTRA PFFCL concerning terms ¶ 9 (noting that designation of RLI as the agent for unaffiliated copyright owners would have the undesirable effect of forcing these non-members "into an agency relationship with an entity that not only is not governed by Copyright Owners and Performers, but also is not even required to obtain their guidance and input regarding policies, procedures or distribution methodologies.").

For all the foregoing reasons, the Register concludes that the CARP was not arbitrary in designating SoundExchange as the agent for unaffiliated copyright owners. Of the four factors considered by the Panel, each weighs in favor of SoundExchange. Of course, any Copyright Owner or Performer can affirmatively choose RLI to act on its behalf as a Designated Agent.

c. *Gross proceeds*. As discussed earlier, the Panel proposed the adoption of a rate for Business Establishment Services making ephemeral recordings under section 112 at 10% of gross proceeds. The Panel recognized the necessity of also formulating a definition of "gross proceeds" in order to make the rate workable. To meet this need, it opted to incorporate, with minor modifications to accommodate the section 112 license, the definition used in many of the background music agreements even though the definition is less than clear on its face as to what constitutes gross proceeds. The lack of specificity, however, did not trouble the Panel because it expected the parties to adopt the understandings within the industry developed during the normal course of dealings.

RIAA does not share the Panel's view. It objects to the proposed definition of "gross proceeds," arguing that the provision fails utterly to define the term in any meaningful way. It also contends that it is arbitrary to rely on industry practices to flesh out the industry's understanding of the term when no record evidence exists about these practices. To remedy this situation, RIAA proposes that the Librarian adopt the definition of "gross proceeds" for a Business Establishment Service that is set forth in the agreement between SoundExchange and MusicMusicMusic ("MMM"). RIAA Exhibit No. 60A. RIAA asserts that this is the only record evidence on this point. RIAA petition at 52–54.

DMX/AEI rejects RIAA's suggestion that the Librarian adopt a definition from an agreement with MMM, "an unsophisticated licensee, who by its own admission is unlikely to pay any significant royalties pursuant to the agreement." DMX/AEI Reply at 3. RIAA's proposed definition of "gross proceeds" would include fees generated by equipment rental, maintenance services, advertising of all kinds, and revenues payable to a licensee from any source in connection with the licensee's background music service. Id. at 5. DMX/AEI argues that such a definition is utterly contrary to the normal practice of using proceeds derived solely from the delivery of copyrighted sound recordings to business establishments.

As a general principle, terms pertaining to a statutory license must be defined with specificity. At first blush, the proposed definition of "gross proceeds" does not appear to meet this standard, merely reciting that a Business Establishment Service must pay a sum equal to ten percent of the licensee's gross proceeds derived from use of the musical programs that are attributable to copyrighted recordings. However, record evidence suggests the definition may be as simple as the CARP's characterization of the term. Barry Knittel,[47] in discussing the promotional funds established for the benefit of the record companies from gross proceeds, stated that the money placed into these accounts comes from the company's gross revenues, and that these revenues are generated from all the billings for music. Tr. 8384 (Knittel). This statement suggests that the determination of what constitutes "gross revenues" is not a mystery and that it is merely the amount the Business Establishment Services receive from their customers for use of the music. This approach, however, does not necessarily appear to capture in-kind payments of goods, free advertising or other similar payments for use of the license. See RIAA Petition at 54.

Consequently, the Register proposes to expand on the CARP's approach and adopt a definition of "gross proceeds" which clarifies that "gross proceeds" shall include all fees and payments from any source, including those made in kind, derived from the use of copyrighted sound recordings to facilitate the transmission of the sound recording pursuant to the section 112 license. See RIAA Exhibit No. 60A DR. (Second Webcasting Performance and Webcasting and Business Establishment Ephemeral Recording License Agreement). The Register finds it necessary to expand upon the proposed definition to avoid any confusion on this point and not as a means to capture additional revenue streams not contemplated by the Panel or by the parties to such agreements. Because the record fails to enumerate the types of revenue that may be received in kind, the Register finds it unwise to include even an illustrative list when there is little evidence of what specific types of revenues should be considered in the calculation of "gross proceeds." Thus, the definition of "gross proceeds" shall be as follows:

> "Gross proceeds" shall mean all fees and payments, including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).

2. Terms Not Disputed by the Parties

a. *Limitation of Liability*. One of the terms proposed by the Parties and adopted by the CARP was that "A Designated Agent shall have no liability for payments made in accordance with this subsection with respect to disputes between or among recipients." The Parties explained that the purpose of this provision was to "mak[e] clear that so long as a Designated Agent complies with the requirements adopted by the Copyright Office for distributing royalties, then a beneficiary of statutory royalties cannot sue such Designated Agent for payments made in accordance with Copyright Office regulations. Any dispute among recipients should be resolved among themselves."

The Register understands the desire of SoundExchange and RLI to insulate themselves from liability in cases where Copyright Owners or Performers dispute the Designated Agent's allocation of royalties. The Copyright Office's experience with distribution proceedings for the statutory licenses for which royalties are initially paid to the Copyright Office provides ample evidence that individual copyright owners and performers often believe they are being paid less than their fair share of statutory license royalties, and it is natural for a Designated Agent to wish to avoid having to defend against such claims.

Moreover, as has become apparent in the course of the pending rulemaking proceeding relating to notice and recordkeeping for the use of sound recordings under the statutory licenses, the information that Licensees will be providing to the Designated Agents about which (and how many) sound recordings they have performed will be far from perfect, and the Designated Agents necessarily will have to make

[47] Barry Knittel, formerly President of AEI Music Markets—Worldwide is now DMX/AEI's Senior Vice President of Business Affairs Worldwide.

difficult judgments in determining how to allocate royalties. If the Designated Agents had comprehensive information identifying each and every performance transmitted by a Licensee, and each and every Copyright Owner and Performer for each performance, in theory they could pay each Copyright Owner and Performer his or her precise share of royalties. In the real world—or at least for the remainder of the period for which this proceeding is setting rates and terms—some Copyright Owners and Performers inevitably will receive less than their precise share of the royalty pool, and others will receive more than their precise share. The Designated Agents should not be held to an impossibly high standard of care.

Unfortunately, neither the CARP nor the Librarian have the power to excuse a Designated Agent (or, for that matter, anyone else) from liability for a breach of a legal obligation. If a Designated Agent has in fact wrongfully withheld or underpaid royalties to a Copyright Owner or Performer, the law may provide a remedy to the Copyright Owner or Performer.

Although the Librarian cannot excuse the Designated Agents from potential liability, he can adopt terms that provide a mechanism that will make claims by disgruntled Copyright Owners or Performers less likely, or at least less viable. The Register therefore recommends that in place of the ultra vires provision excusing the Designated Agents from any liability, the Librarian provide that the Designated Agents must submit to the Copyright Office a detailed description of their methodology for distributing royalty payments to nonmembers. This information will be made available to the public, and any Copyright Owner or Performer who believes the methodology is unfair will have an opportunity to raise an objection with the Designated Agent prior to the distribution, thereby giving the Designated Agent the opportunity to address the problem before the Copyright Owner or Performer has suffered any alleged harm. This provision is modeled on a provision proposed by the parties to the previous CARP proceeding to establish rates and terms for noninteractive subscription services under section 114. See proposed 37 CFR 260.3(e), in Notice of Proposed Rulemaking, Determination of Reasonable Rates and Terms for the Public Performance of Sound Recordings, 66 FR 38226, 38228 (July 23, 2001).[48]

The Register also proposes that the Librarian adopt a term that provides a Designated Agent with an optional mechanism pursuant to which the Designated Agent may request that the Register provide a written opinion stating whether the Agent's methodology for distributing royalty payments to nonmembers meets the requirements of the terms for distribution set forth in the implementing regulations. Although such an opinion by the Register would not be binding on a court evaluating a claim against a Designated Agent, it can be assumed that a court would find the opinion of the Register persuasive.

The Register anticipates that under this scheme, a Designated Agent that acts conscientiously and in good faith in the distribution of royalties will not be found liable to a Copyright Owner or Performer who is dissatisfied with his or her share of the distribution.

b. *Deductions from Royalties for Designated Agent's Costs.* The parties had proposed, and the CARP agreed, that Designated Agents be permitted to deduct from the royalties paid to Copyright Owners and Performers "reasonable costs incurred in the licensing, collection and distribution of the royalties paid by Licensees * * * and a reasonable charge for administration." The Register recommends that the provision permitting deductions for costs incurred in licensing be removed from this provision. See § 261.4(i). Although a Designated Agent may happen to engage in licensing activities, licensing per se is not among the responsibilities of a Designated Agent under the terms of the statutory license. The purpose of the Designated Agent is to receive and distribute the statutory royalty fees. There is no justification for permitting a Designated Agent to deduct costs incurred in licensing activity from the statutory royalties, and the CARP's acquiescence in this term was therefore arbitrary.

There was also a suggestion in testimony presented to the CARP that it would be proper for a Designated Agent to deduct from statutory royalties its costs incurred as a participant in a CARP proceeding. Tr. 11891–11893 (Williams). Nothing in § 261.4(i), including the references to "reasonable costs incurred in the collection and distribution of the royalties paid by Licensees," can properly be construed as permitting a Designated Agent to deduct from the royalty pool any costs of participating in a CARP proceeding. Such activity is beyond the scope of collection and distribution of royalties. Of course, Copyright Owners and Performers may enter into agreements with a Designated Agent permitting such deductions, but a Designated Agent may not make such deductions from royalties due to unaffiliated Copyright Owners and Performers or those who have simply designated a Designated Agent without specifically agreeing to permit such deductions.[49]

c. *Ephemeral Recording.* The Register recommends that a definition of "Ephemeral Recording" be added to the definitions. This definition incorporates by reference the requirements set forth in section 112(e).

In a related provision, the Register has harmonized the language of §§ 261.3(b) and (c) and makes clear that beneficiaries of the statutory license for ephemeral recordings may make any number of ephemeral recordings so long as they are made for the sole purpose of facilitating the statutory licensees permitted transmissions of performances of sound recordings. The regulatory text proposed by the parties and accepted by the Panel provided that for Business Establishment Services, the section 112 royalty shall be paid "[f]or the making of unlimited numbers of ephemeral recordings in the operation of broadcast services pursuant to the Business Establishment exemption contained in 17 U.S.C. 114(d)(1)(C)(iv)," (emphasis added), but that for webcasters, the section 112 royalty shall be paid "[f]or the making of all ephemeral recordings required to facilitate their internet transmissions."

A literal reading of section 112(e) might lead to the conclusion that the ephemeral recording statutory license permits only the making of a single ephemeral recording, but the statute qualifies that provision by stating "(unless the terms and conditions of the statutory license allow for more)," and the legislative history makes clear that the terms established by the Librarian in this proceeding may include terms permitting the making of additional

[48] A similar provision is recommended with respect to the methodology for allocating royalties among Designated Agents.

[49] The Register is also troubled by the parties permitting a Designated Agent to deduct "a reasonable charge for administration" which is included "to permit a for-profit Designated Agent to make a reasonable profit on royalty collection and distribution on top of the direct expenses that may be incurred in licensing, collection and distribution." Appendix B, p. B–13. But in light of the parties' acceptance and the CARP's adoption of a procedure permitting multiple Designated Agents, including a for-profit Designated Agent, the Register reluctantly cannot conclude that the provision is arbitrary.

ephemeral recordings. H.R.Rep. 105–796, at 89. Therefore, it is appropriate that the terms make clear that statutory licensees may make more than one ephemeral recording to accomplish the purposes of the statutory license.

The reference to "all" ephemeral recordings "required" to facilitate webcasters" transmissions, and the reference to "unlimited" recordings for Business Establishment Services" "operation", are arguably inconsistent with each other and somewhat ambiguous. To clarify that the scope of the section 112 statutory license is similar for both types of service, and to more accurately reflect the appropriate scope of that license, the Register recommends that the regulatory language provide, in the case of webcasters, "[f]or the making of *any number* of ephemeral recordings to facilitate the Internet transmission of a sound recording," and in the case of Business Establishment Services, "[f]or the making of *any number* of ephemeral recordings in the operation of a service pursuant to the Business Establishment exemption." (Emphasis added).

d. *Definition of "Listener"*. The definitions of "Aggregate Tuning Hours" and "Performance" both include references to a "listener" or to "listeners." It is not clear from the text of these definitions whether each person who is hearing a performance is a "listener" even if all the persons hearing the performance are listening to the same machine or device (e.g., two or more persons listening to a performance rendered on a single computer). Clearly the intent is that all persons listening to a performance on a single machine or device constitute, collectively, a single "listener," because "listener" is used here to assist in defining what constitutes a single performance. Indeed, it would be difficult to implement an interpretation that counted all individuals in such circumstances as separate "listeners." Accordingly, the Register recommends including a definition that provides that if more than one person are listening to a transmission made to a single machine or device, those persons collectively constitute a single listener.

e. *Timing of Payment by Receiving Agent to Designated Agent.* The terms proposed by the Parties and accepted by the CARP included a provision requiring that the Receiving Agent pay a Designated Agent its share of any royalty payments received from a Licensee within 20 days after the day on which the Licensee's payment is due. While the Register recognizes that such a provision would, in principle, be unobjectionable, she concludes that under current conditions it is administratively unfeasible.

As the parties recognized in their commentary on this provision, "The parties do not know either the payment methodology that will be used to calculate royalties or the types of information that will be reported by Licensees. Such determinations cannot be made before the conclusion of this proceeding and the Notice and Recordkeeping Proceeding." Appendix B, p. B–10. However, they assumed that the Receiving Agent and the Designated Agent could agree on a "reasonable allocation method" even in the absence of any firm data.

The Register is skeptical. It is apparent at this point in the rulemaking on notice and recordkeeping that obtaining accurate reports of Licensees' use of sound recordings will be difficult, particularly during the first few months. Moreover, the initial reports of use will require reporting on less than a monthly basis, making it impossible in many instances for the Receiving Agent to make any determination whatsoever as to a Designated Agent's allocated share during at least the first month or two in which royalties are paid. Reports on past use of sound recordings (i.e., from October 28, 1998, to the present) will present an even more formidable challenge. It is difficult to imagine that 20 days after the Receiving Agent has received the first royalty payments from Licensees, the Receiving Agent and the Designated Agent will have any reliable information from which they can ascertain how the proceeds should be allocated. The Register therefore recommends that the proposed requirement that payment be made within 20 days of the day on which the Licensee's payment is due be replaced by a requirement that the payment be made "as expeditiously as is reasonably possible," a more flexible term that recognizes the difficulty in establishing a specific deadline. The Register cautions that during the first few months of operation of the system of reporting and or royalty payment, "expeditious" payment under the circumstances may be a matter of many weeks, if not months.

It can reasonably be expected that for future periods governed by future CARPs or negotiated agreements, more stringent requirements of prompt payment will be appropriate. But it must be recognized that in this initial, transitional period, delays will be inevitable.

f. *Allocation of Royalties among Designated Agents and Among Copyright Owners and Performers.* The terms proposed by the Parties and accepted by the Panel provide that the Receiving Agent allocate royalty payments to Designated Agents "on a reasonable basis to be agreed among the Receiving Agent and the Designated Agents," and that the Designated Agents distribute royalty payments "on a reasonable basis that values all performances by a Licensee equally." The Panel accepted these terms, but observed that a "determination of how royalty payments should be apportioned between the Designated Agents cannot be made until the parties know the rate structure adopted by the CARP (in the first instance) and the Librarian of Congress (on review) and the outcome of the Notice and Recordkeeping Proceeding." Appendix B, at p. B–10. Similarly, the Panel remarked that "The terms do not specifically provide how a Designated Agent should allocate royalties among parties entitled to receive such royalties because such allocation will depend upon the rate structure adopted by the CARP (in the first instance) and by the Librarian of Congress (on review) and may be affected by the types of reporting requirements that are adopted by the Copyright Office in the Notice and Record-keeping Proceeding for eligible nonsubscription transmissions and business establishment services." Id., p. B–12.

The Register recommends that the provisions for allocation of royalty payments among Designated Agents and for allocation of royalties among parties entitled to receive such royalties be clarified, making explicit the relationship between the notice and recordkeeping regulations and the allocation of royalties. Each of these provisions should provide that the method of allocation shall be based upon the information provided by the Licensee pursuant to the regulations governing records of use of performances.

The Register has some trepidation about the provision in § 261.4(a), proposed by the Parties and recommended by the CARP, that provides that apportionment among Designated Agents "shall be made on a reasonable basis that uses a methodology that values all performances equally and *is agreed upon* among the Receiving Agent and the Designated Agents." (Emphasis added). The regulation does not provide what happens in the event that the Receiving Agent and the Designated Agents cannot agree on an allocation methodology. One could recommend a provision that gives the ultimate decisionmaking power to one of the parties or to a third party, but instead, the Register proposes the addition of § 261.4(l), which would simply provide that in the event of a stalemate, "either the Receiving Agent or a Designated Agent may seek the assistance of the Copyright Office in resolving the dispute."

g. *Choice of Designated Agent by Performers.* A literal reading of the terms recommended by the Panel would permit a Copyright Owner to select the Designated Agent of its choice, but would require a Performer to accept the Designated Agent selected by the Copyright Owner; and the Panel's report appears to agree with this interpretation. Report at 132. However, the Report does not articulate any reason for the decision to deprive Performers of the same right to choose that is given to Copyright Owners, and the commentary in Appendix B is silent as well.

As the Panel acknowledged, "Copyright owners and performers, on the other hand, have a direct and vital interest in who distributes royalties to them and how that entity operates" Report at 132 (emphasis added). The Register agrees. It was arbitrary to permit Copyright Owners to make an election that Performers are not permitted to make. The Register can conceive of no reason why Performers should not be given the same choice. Accordingly, the Register recommends that § 261.4 be amended to provide that a Copyright Owner or a Performer may make such an election. See § 261.4(c) of the recommended regulatory text.

The Register has also inserted a housekeeping amendment to provide that for administrative convenience, a Copyright Owner's or Performer's designation of a Designated Agent shall not be effective until 30 days have passed.

h. *Performers' Right to Audit.* The terms proposed by the Parties and accepted by the CARP provided that a Copyright Owner may conduct an audit of a Designated Agent. These provisions also include safeguards to ensure that a Designated Agent is not subjected to more than one audit in a calendar year.

However, the terms do not provide that Performers have a similar right to conduct an audit of a Designated Agent, despite the fact that Performers, like Copyright Owners, depend upon the Designated Agent to make fair and timely royalty payments. The Parties' commentary in Appendix B states that audit rights are limited to Copyright Owners "rather than the entire universe of Copyright Owners and Performers, which could number in the tens of thousands." Appendix B at p. B–24. The commentary suggests that it would be impracticable for a Designated Agent to be subject to audit from individual Performers. Apart from reproducing the Parties' commentary, the Panel offered no observations on this point.

The Register fails to understand how it would be "impracticable" to permit Performers, who depend on a Designated Agent for their royalty payments, to initiate an audit of the Designated Agent when the Copyright Owners may do so. The Designated Agent is given sufficient protection by virtue of the provision that it can be subject to only a single audit in a calendar year, by the provision that the party requesting the audit must bear the presumably considerable costs of the audit, and by the provision that any audit "shall be binding on all Copyright Owners and Performers."[50] The Register, therefore, recommends that the audit provisions be amended to permit not only Copyright Owners, but also Performers, to initiate an audit.

i. *Effective date.* Section 114(f)(4)(C) states that payments in arrears for the performance of sound recordings prior to the setting of a royalty rate are due on a date certain in the month following the month in which the rate is set. The effective date of the rates, however, is not necessarily the date of publication in the **Federal Register**. The Librarian has often set the effective date of a rate several months after the initial announcement of the decision. See Determination of Reasonable Rates and Terms for Subscription Services, 63 FR 25394 (May 8, 1998) (setting the effective date for the rate for subscription services three weeks after the date of publication of the final order in the **Federal Register**); Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (October 28, 1997) (announcing an effective date of January 1, 1998, set to coincide with the next filing period of the statements of account).

Section 802(g) provides that the effective date of the new rates is "as set forth in the decision." 17 U.S.C. 802(g). The Register has interpreted the term "decision" to mean the decision of the Librarian, since section 802(g) only refers to the decision of the Librarian. Thus, this provision has been interpreted as providing the Librarian with discretion in setting the effective date. Moreover, the courts have held that an agency normally retains considerable discretion to choose an effective date, where, as here, the statute authorizing agency action fails to specify a timetable for effectiveness of decisions. *RIAA* v. *CRT*, 662 F.2d. 1, 14 (D.C. Cir. 1981).

In setting an effective date, the Register has considered the impact of the rate on the Licensees and the administrative burden on the Office in promulgating regulations to insure effective administration of the license. Clearly, there will be a burden on many Licensees who, by law, are required to make full payment of all royalties owed for transmissions made since the effective date of the DMCA, October 28, 1998, on or before the 20th day of the month next succeeding the month in which the royalty rate is set. Moreover, the Copyright Office is in the midst of promulgating rules governing records of use that will be used to make distribution of royalty fees in accordance with the terms of payment.

Consequently, the Register proposes an effective date of September 1, 2002, which will require the Licensees to make full payment of the arrears on October 20, 2002. Payment for the month of September shall be due on or before November 14, 2002, the forty-fifth (45th) day after the end of the month on which the rate becomes effective, in accordance with the term proposed by the parties and adopted by the CARP. Similarly, all subsequent payments shall be due on the 45th after the end of each month for which royalties are owed. This payment schedule provides the Licensees with additional time to make the initial payment and any necessary adjustments in their business operations to meet their copyright obligation.

V. Conclusion

Having fully analyzed the record in this proceeding, the submissions of the parties, the Register of Copyrights recommends that the Librarian adopt the statutory rates for the transmission of a sound recording pursuant to section 114, and the making of ephemeral phonorecords pursuant to section 112(e), as set forth below:

[50] It is noteworthy that although the Parties were unwilling to give Performers a right to initiate an audit, they did not hesitate to provide that Performers will be bound by an audit initiated by a Copyright Owner.

SUMMARY OF ROYALTY RATES FOR SECTION 114(F)(2) AND 112(E) STATUTORY LICENSES

Type of DMCA—Complaint service	Performance fee (per performance)	Ephemeral license fees
1. Webcaster and Commercial Broadcaster:		
All Internet transmissions, including simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.07¢	8.8% of Performance Fees Due.
2. Non-CPB, Non-Commercial Broadcaster:		
(a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.02¢	8.8% of Performance Fees Due.
(b) Other internet transmissions, including up to two side channels of programming consistent with the public broadcasting mission of the station.	0.02¢	8.8% of Performance Fees Due.
(c) Transmissions on any other side channels	0.07¢	8.8% of Performance Fees Due.
3. Business Establishment Service:		
For digital broadcast transmissions of sound recordings pursuant to 17 U.S.C. 114(d)(1)(C)(iv).	Statutorily Exempt	10% of Gross Proceeds.
4. Minimum Fee:		
(a) Webcasters, commercial broadcasters, and non-CPB, non-commercial broadcasters.	$500 per year for each licensee.	
(b) Business Establishment Services		$10,000

In addition, the Register recommends that the Librarian adopt the terms of payment proposed by the CARP, as modified in the recommendation, and set September 1, 2002, as the effective date for the statutory rates and the terms of payment.

VI. The Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter to set rates and terms for Licensees making certain digital performances of sound recordings under section 114(d)(2) and those making ephemeral recordings under section 112(e), the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order, and amending the rules of the Library and the Copyright Office, announcing the new royalty rates and terms of payment for the sections 112 and 114 statutory licenses.

List of Subjects in 37 CFR Part 261

Copyright, Digital audio transmissions, Performance right, Recordings.

Final Regulation

In consideration of the foregoing, part 261 of 37 CFR is added to read to as follows:

PART 261—RATES AND TERMS FOR ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Sec.

Authority: 17 U.S.C. 112(e), 114, 801(b)(1).

§ 261.1 General.

(a) This part 261 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of ephemeral recordings by certain Licensees in accordance with the provisions of 17 U.S.C. 112(e).

(b) Licensees relying upon the statutory license set forth in 17 U.S.C. 114 shall comply with the requirements of that section and the rates and terms of this part.

(c) Licensees relying upon the statutory license set forth in 17 U.S.C. 112 shall comply with the requirements of that section and the rates and terms of this part.

(d) Notwithstanding the schedule of rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and services within the scope of 17 U.S.C. 112 and 114 concerning eligible nonsubscription transmissions shall apply in lieu of the rates and terms of this part.

§ 261.2 Definitions.

For purposes of this part, the following definitions shall apply:

Aggregate Tuning Hours mean the total hours of programming that the Licensee has transmitted over the Internet during the relevant period to all end users within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. Likewise, if one listener listened to a service for 10 hours, the service's Aggregate Tuning Hours would equal 10.

Business Establishment Service is a Licensee that is entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) and that obtains a compulsory license under 17 U.S.C. 112(e) to make ephemeral recordings for the sole purpose of facilitating those exempt transmissions.

Commercial Broadcaster is a Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission to make over-the-air broadcasts, other than a CPB-Affiliated or Non-CPB-Affiliated, Non-Commercial Broadcaster.

Copyright Owner is a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) or 114.

Designated Agent is the agent designated by the Librarian of Congress for the receipt of royalty payments made pursuant to this part from the Receiving

Agent. The Designated Agent shall make further distribution of those royalty payments to Copyright Owners and Performers that have been identified in § 261.4(c).

Ephemeral Recording is a phonorecord created solely for the purpose of facilitating a transmission of a public performance of a sound recording under the limitations on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) or under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Gross proceeds mean all fees and payments, as used in § 261.3(d), including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).

Licensee is: (1) A person or entity that has obtained a compulsory license under 17 U.S.C. 112 or 114 and the implementing regulations therefor to make eligible non-subscription transmissions and ephemeral recordings, or

(2) A person or entity entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) and that has obtained a compulsory license under 17 U.S.C. 112 to make ephemeral recordings.

Listener is a recipient of a transmission of a public performance of a sound recording made by a Licensee or a Business Establishment Service. However, if more than one person is listening to a transmission made to a single machine or device, those persons collectively constitute a single listener.

Non-CPB, Non-Commercial Broadcaster is a Public Broadcasting Entity as defined in 17 U.S.C. 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g. the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained license from the copyright owner of such sound recording; and

(3) An incidental performance that both: (i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performer means the respective independent administrators identified in 17 U.S.C. 114(g)(2)(A) and (B) and the parties identified in 17 U.S.C. 114(g)(2)(C).

Receiving Agent is the agent designated by the Librarian of Congress for the collection of royalty payments made pursuant to this part by Licensees and the distribution of those royalty payments to Designated Agents, and that has been identified as such in § 261.4(b). The Receiving Agent may also be a Designated Agent.

Side channel is a channel on the Web Site of a Commercial Broadcaster or a Non-CPB, Non-Commercial Broadcaster, which channel transmits eligible non-subscription transmissions that are not simultaneously transmitted over-the-air by the Licensee.

Webcaster is a Licensee, other than a Commercial Broadcaster, Non-CPB, Non-Commercial Broadcaster or Business Establishment Service, that makes eligible non-subscription transmissions of digital audio programming over the Internet through a Web Site.

Web Site is a site located on the World Wide Web that can be located by an end user through a principal Uniform Resource Locator (a "URL"), e.g., www.xxxxx.com.

§ 261.3 Royalty fees for public performances of sound recordings and for ephemeral recordings.

(a) For the period October 28, 1998, through December 31, 2002, royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114(d)(2), and the making of ephemeral recordings pursuant to 17 U.S.C. 112(e) shall be as follows:

(1) Webcaster and Commercial Broadcaster Performance Royalty. For all Internet transmissions, including simultaneous Internet retransmissions of over-the-air AM or FM radio broadcasts, a Webcaster and a Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.07¢ per performance.

(2) Non-CPB, Non-Commercial Broadcaster Performance Royalty.

(i) For simultaneous Internet retransmissions of over-the-air AM or FM broadcasts by the same radio station, a non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.02¢ per performance.

(ii) For other Internet transmissions, including up to two side channels of programming consistent with the mission of the station, a Non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.02¢ per performance.

(iii) For Internet transmissions on other side channels of programming, a Non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.07¢ per performance.

(b) Estimate of Performance. Until December 31, 2002, a Webcaster, Commercial Broadcaster, or Non-CPB, Non-Commercial Broadcaster may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of transmissions or retransmissions of radio station programming reasonably classified as news, business, talk or sports, and 12 performances per hour in the case of transmissions or retransmissions of all other radio station programming).

(c) Webcaster and Broadcaster Ephemeral Recordings Royalty. For the making of any number of ephemeral recordings to facilitate the Internet transmission of a sound recording, each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster shall pay a section 112(e) royalty equal to 8.8% of their total performance royalty.

(d) Business Establishment Ephemeral Recordings Royalty. For the making of any number of ephemeral recordings in the operation of a service pursuant to the Business Establishment exemption contained in 17 U.S.C. 114(d)(1)(C)(iv), a Business Establishment Service shall pay a section 112(e) ephemeral recording royalty equal to ten percent (10%) of the Licensee's annual gross proceeds derived from the use in such service of the musical programs which are attributable to copyrighted recordings. The attribution of gross proceeds to copyrighted recordings may be made on the basis of:

(1) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program,

(2) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(e) Minimum fee. (1) Each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster licensed to make eligible digital transmissions and/or ephemeral recordings pursuant to licenses under 17 U.S.C. 114(f) and/or 17 U.S.C. 112(e) shall pay a minimum fee of $500 for each calendar year, or part thereof, in which it makes such transmissions or recordings.

(2) Each Business Establishment Service licensed to make ephemeral recordings pursuant to a license under 17 U.S.C. 112(e) shall pay a minimum fee of $10,000 for each calendar year, or part thereof, in which it makes such recordings.

§ 261.4 Terms for making payment of royalty fees and statements of account.

(a) A Licensee shall make the royalty payments due under § 261.3 to the Receiving Agent. If there are more than one Designated Agent representing Copyright Owners or Performers entitled to receive any portion of the royalties paid by the Licensee, the Receiving Agent shall apportion the royalty payments among Designated Agents using the information provided by the Licensee pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made. Such apportionment shall be made on a reasonable basis that uses a methodology that values all performances equally and is agreed upon among the Receiving Agent and the Designated Agents. Within 30 days of adoption of a methodology for apportioning royalties among Designated Agents, the Receiving Agent shall provide the Register of Copyrights with a detailed description of that methodology.

(b) Until such time as a new designation is made, SoundExchange, an unincorporated division of the Recording Industry Association of America, Inc., is designated as the Receiving Agent to receive statements of account and royalty payments from Licensees. Until such time as a new designation is made, Royalty Logic, Inc. and SoundExchange are designated as Designated Agents to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners.

(c) SoundExchange is the Designated Agent to distribute royalty payments to each Copyright Owner and Performer entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners, except when a Copyright Owner or Performer has notified SoundExchange in writing of an election to receive royalties from a particular Designated Agent. With respect to any royalty payment received by the Receiving Agent from a Licensee, a designation by a Copyright Owner or Performer of a particular Designated Agent must be made no later than thirty days prior to the receipt by the Receiving Agent of that royalty payment.

(d) Commencing September 1, 2002, a Licensee shall make any payments due under § 261.3 to the Receiving Agent by the forty-fifth (45th) day after the end of each month for that month. Concurrently with the delivery of payment to the Receiving Agent, a Licensee shall deliver to each Designated Agent a copy of the statement of account for such payment. A Licensee shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by the Receiving Agent after the due date. Late fees shall accrue from the due date until payment is received by the Receiving Agent.

(e) A Licensee shall make any payments due under § 261.3 for transmissions made between October 28, 1998, and August 31, 2002, to the Receiving Agent by October 20, 2002.

(f) A Licensee shall submit a monthly statement of account for accompanying royalty payments on a form prepared by the Receiving Agent after full consultation with all Designated Agents. The form shall be made available to the Licensee by the Receiving Agent. A statement of account shall include only such information as is necessary to calculate the accompanying royalty payment. Additional information beyond that which is sufficient to calculate the royalty payments to be paid shall not be required to be included on the statement of account.

(g) The Receiving Agent shall make payments of the allocable share of any royalty payment received from any Licensee under this section to the Designated Agent(s) as expeditiously as is reasonably possible following receipt of the Licensee's royalty payment and statement of account as well as the Licensee's Report of Use of Sound Recordings under Statutory License for the period to which the royalty payment and statement of account pertain, with such allocation to be made on the basis determined as set forth in paragraph (a) of this section. The Receiving Agent and the Designated Agent shall agree on a reasonable basis on the sharing on a pro-rata basis of any incremental costs directly associated with the allocation method. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the Receiving Agent and a Designated Agent for each calendar year no later than 180 days following the end of each calendar year.

(h) The Designated 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; Provided, however, that Copyright Owners and Performers who have designated a particular Designated Agent may agree to allocate their shares of the royalty payments among themselves on an alternative basis.

(i)(1) A Designated Agent shall provide to the Register of Copyrights:

(i) A detailed description of its methodology for distributing royalty payments to Copyright Owners and Performers who have not agreed to an alternative basis for allocating their share of royalty payments (hereinafter, "non-members"), and any amendments thereto, within 30 days of adoption and no later than 60 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(ii) Any written complaint that the Designated Agent receives from a non-member concerning the distribution of royalty payments, within 30 days of receiving such written complaint; and

(iii) The final disposition by the Designated Agent of any complaint specified by paragraph (i)(1)(ii) of this section, within 60 days of such disposition.

(2) A Designated Agent may request that the Register of Copyrights provide a written opinion stating whether the Agent's methodology for distributing royalty payments to non-members meets the requirements of this section.

(j) A Designated Agent shall distribute such royalty payments directly to the Copyright Owners and Performers, according to the percentages set forth in 17 U.S.C. 114(g)(2), if such Copyright

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Owners and Performers provide the Designated Agent with adequate information necessary to identify the correct recipient for such payments. However, Performers and Copyright Owners may jointly agree with a Designated Agent upon payment protocols to be used by the Designated Agent that provide for alternative arrangements for the payment of royalties to Performers and Copyright Owners consistent with the percentages in 17 U.S.C. 114(g)(2).

(k) A Designated Agent may deduct from the royalties paid to Copyright Owners and Performers reasonable costs incurred in the collection and distribution of the royalties paid by Licensees under § 261.3, and a reasonable charge for administration.

(l) In the event a Designated Agent and a Receiving Agent cannot agree upon a methodology for apportioning royalties pursuant to paragraph (a) of this section, either the Receiving Agent or a Designated Agent may seek the assistance of the Copyright Office in resolving the dispute.

§ 261.5 Confidontial information.

(a) For purposes of this part, "Confidential Information" shall include the statements of account, any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) Confidential Information shall not include documents or information that at the time of delivery to the Receiving Agent or a Designated Agent are public knowledge. The Receiving Agent or a Designated Agent that claims the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) In no event shall the Receiving Agent or Designated Agent(s) use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto; Provided, however, that the Designated Agent may report Confidential Information provided on statements of account under this part in aggregated form, so long as Confidential Information pertaining to any Licensee or group of Licensees cannot directly or indirectly be ascertained or reasonably approximated. All reported aggregated Confidential Information from Licensees within a class of Licensees shall concurrently be made available to all Licensees then in such class. As used in this paragraph, the phrase "class of Licensees" means all Licensees paying fees pursuant to § 261.4(a).

(d) Except as provided in paragraph (c) of this section and as required by law, access to Confidential Information shall be limited to, and in the case of paragraphs (d)(3) and (d)(4) of this section shall be provided upon request, subject to resolution of any relevance or burdensomeness concerns and reimbursement of reasonable costs directly incurred in responding to such request, to:

(1) Those employees, agents, consultants and independent contractors of the Receiving Agent or a Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities directly related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records;

(2) An independent and qualified auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Receiving Agent or a Designated Agent with respect to the verification of a Licensee's statement of account pursuant to § 261.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty payments pursuant to § 261.7;

(3) In connection with future Copyright Arbitration Royalty Panel proceedings under 17 U.S.C. 114(f)(2) and 112(e), under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings, Copyright Arbitration Royalty Panels, the Copyright Office or the courts; and

(4) In connection with *bona fide* royalty disputes or claims by or among Licensees, the Receiving Agent, Copyright Owners, Performers or the Designated Agent(s), under an appropriate confidentiality agreement or protective order, attorneys, consultants and other authorized agents of the parties to the dispute, arbitration panels or the courts.

(e) The Receiving Agent or Designated Agent(s) and any person identified in paragraph (d) of this section shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to such Receiving Agent or Designated Agent(s) or person.

(f) Books and records of a Licensee, the Receiving Agent and of a Designated Agent relating to the payment, collection, and distribution of royalty payments shall be kept for a period of not less than three (3) years.

§ 261.6 Vórification of statements of account.

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by the Designated Agent.

(b) *Frequency of verification.* A Designated Agent may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three (3) calendar years, and no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Designated Agent must submit a notice of intent to audit a particular Licensee with the Copyright Office, which shall publish in the **Federal Register** a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the Designated Agent's notice. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Designated Agents, and all Copyright Owners and Performers.

(d) *Acquisition and retention of records.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three (3) years. The Designated Agent requesting the verification procedure shall retain the report of the verification for a period of not less than three (3) 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 and qualified auditor, shall serve as an acceptable verification procedure for all Designated Agents with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Designated Agent, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit;

Provided that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Designated Agent requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; Provided, however, that a Licensee shall not have to pay any costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Licensee and more than $5,000.00.

§ 261.7 Verification of royalty payments.

(a) *General.* This section prescribes general rules pertaining to the verification by any Copyright Owner or Performer of royalty payments made by a Designated Agent; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or a Performer and a Designated Agent have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or a Performer may conduct a single audit of a Designated Agent upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three (3) calendar years, and no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must submit a notice of intent to audit a particular Designated Agent with the Copyright Office, which shall publish in the **Federal Register** a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the notice. The notification of intent to audit shall be served at the same time on the Designated Agent to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of records.* The Designated Agent making the royalty payment shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three (3) years. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than three (3) 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 and qualified auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Designated Agent being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Designated Agent reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Designated Agent shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; Provided, however, that a Designated Agent shall not have to pay any costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Designated Agent and more than $5,000.00.

§ 261.8 Unclaimed funds.

If a Designated Agent is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, the Designated Agent shall retain the required payment in a segregated trust account for a period of three (3) years from the date of payment. No claim to such payment shall be valid after the expiration of the three (3) year period. After the expiration of this period, the unclaimed funds of the Designated Agent may first be applied to the costs directly attributable to the administration of the royalty payments due such unidentified Copyright Owners and Performers and shall thereafter be allocated on a pro rata basis among the Designated Agents(s) to be used to offset such Designated Agent(s) other costs of collection and distribution of the royalty fees.

Dated: June 20, 2002.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 02–16730 Filed 7–5–02; 8:45 am]

BILLING CODE 1410–33–P

In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2000-9 CARP DTRA 1&2

LIBRARY OF COPYRIGHT OFFICE

Copyright Arbitration Royalty Panels

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ORDER

On June 20, 2002, the Librarian of Congress issued his Final Rule and Order ("Order") in the above-captioned proceeding establishing the royalty rates and terms for the statutory license for eligible nonsubscription services to perform sound recordings publicly by means of digital audio transmissions ("webcasting") under 17 U.S.C. §114 and the statutory license to make ephemeral recordings of sound recordings for use of sound recordings under the statutory license set forth in 17 U.S.C. §112. 67 FR 45239 (July 8, 2002). The Order was the final ruling in a Copyright Arbitration Royalty Panel ("CARP") proceeding conducted to determine the rates and terms for the two statutory licenses. Among other things, the Librarian's Order established royalty fees to be paid based on the number of performances of sound recordings a webcaster transmits and established a minimum royalty fee of $500.00 per year. As required by 17 U.S.C. §114, the Order provided that royalties must be paid for all transmissions that have been made pursuant to the statutory license since October 28, 1998, the date on which the statutory license went into effect. See 37 C.F.R. § 261.3(a); 17 U.S.C. §114(f)(2)(B).

On August 7, 2002, Live365.com, Inc. ("Live365") filed a notice of appeal[1] of the Order with the Clerk of the United States Court of Appeals for the District of Columbia Circuit. On September 30, 2002, Live365 filed with the Register of Copyrights a Motion for Stay Pending Appeal. The motion requested "a stay of the Librarian's Final Rule and Order ("Final Rule"), 67 Fed. Reg. 54240 (July 8, 2002), requiring statutory licensees to make royalty payments, based on stated rates and minimum fees, on October 20, 2002 and monthly thereafter."

On September 30, 2002, a procedural order was issued allowing parties to this proceeding an opportunity to file their oppositions to Live365's motion by October 8, 2002, and allowing Live365 to file a reply to any oppositions on October 11, 2002. Order, Docket No. 2000-9 CARP DTRA1&2 (September 30, 2002). An opposition was filed by the Recording Industry Association of America, Inc. ("RIAA"), the American Federation of Television and Radio Artists ("AFTRA"), and the American Federation of Musicians ("AFM") (collectively "Copyright Owners and Performers"). Intercollegiate Broadcasting System, Inc. ("IBS") and Collegiate Broadcasters Inc. ("CBI") filed statements in support of the motion.[2] Live365 filed a reply.

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[1] Live365 was one of 19 petitioners appealing the Order.

[2] Since IBS was not a party to this proceeding, IBS has no standing to file a statement in support of Live365's motion. CBI's statement in support of Live365's motion contained a separate motion for stay pending appeal. Because Collegiate and its members were not parties to this proceeding, they do not have a right to seek a stay of the Order. See, Order, Docket No. 2000-9 CARP DTRA1&2 (August 8, 2002). Therefore, neither IBS' nor CBI's filings will be addressed in this Order.

RECOMMENDATION

Merits of Live365's Motion

Although, as noted above, we have considered motions to stay the Librarian's statutory license rate determinations on two prior occasions, Order, Determination of Reasonable Rates and Term for the Digital Performance of Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA1&2 (August 8, 2002), Order Adjustment of Rates for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP SRA (November 14, 1997), we have never directly addressed whether the Librarian has the power to issue such stays. On the two prior occasions, we have concluded that the movant had not made the case for a stay; therefore, it was not necessary to determine the question of the Librarian's power. For the purposes of this motion, too, we assume without deciding that the Librarian has the power to stay his Order establishing rates for a statutory license. We note, however, that 17 U.S.C. §802(g) provides that "[t]he pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under sections 111, 112, 114, 115, 116, 118, 119, or 1003 who would be affected by the determination on appeal to deposit the statement of account and royalty fees specified in those sections." Therefore, a stay would, at the very least, be a departure from the generally applicable rule.

The factors to be considered in determining whether a stay is warranted are: 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed absent a stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay. Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

Discussion

A. Likelihood of Success on the Merits

The United States Court of Appeals for the District of Columbia Circuit has said that:

> [t]o justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa.

Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C.Cir. 1985). However, a movant is always required to demonstrate more than a mere possibility of success on the merits. Michigan Coalition v. Greipentrog, 945 F.2d 150, 153 (6th Cir. 1991).

Live365 asserts that it meets this requirement and that it will succeed in its appeal because "the rates set in the Final Order are arbitrary and capricious in light of the record, clearly frustrate the Congressional intent in establishing a compulsory license for sound recording performance royalties, and eliminate a new, but powerful, engine of free expression for all but the wealthiest, thereby burdening the First Amendment's right of free speech." Motion at 2.

Recommendation: Live365 has little probability of success on the merits for the following reasons.

As a fundamental matter, Live365 fails to discuss the relevant standard upon which the court will review the Librarian's Order. Section 802(g) of the Copyright Act defines the standard and scope of judicial review. It states that:

> [t]he court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner.

17 U.S.C. §802(g).

The D.C. Circuit has carefully considered this standard and found that the standard is "exceptionally deferential," and requires the court to uphold the decision of the Librarian provided that "the Librarian has offered a facially plausible explanation for it in terms of the record evidence." Recording Industry Association of America v. Librarian of Congress, 176 F.3d 528, 532 (D.C. Cir. 1999), citing National Ass'n of Broadcasters v. Librarian of Congress, 146 F.3d 907, 918 (D.C. Cir. 1998). Consequently, the court can only consider evidence that is in the written record before the Librarian.

On this basis alone, Live365's arguments pertaining to alleged violations of its First Amendment rights cannot even be considered by the court. No party to the proceeding, including the movant, made an argument that the webcasters' right to free speech under the First Amendment were violated by the CARP's decision or the Librarian's Order. Indeed, no party to the CARP asserted that the First Amendment is at all relevant to the determination of rates. Consequently, Live365 cannot hope to prevail on its First Amendment argument when it cannot even raise it on appeal.

Moreover, Live365's First Amendment argument is utterly without merit. As an initial matter, the cases cited by Live365 have nothing whatsoever to do with copyright or with any First Amendment restrictions on copyright, but relate to compelled speech required by the "fairness doctrine" formerly applied to broadcasters, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), compelled speech required by cable "must-carry" rules, Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622 (1994); and government restraints on nude dancing, Schad v. Mount Ephraim, 452 U.S. 61 (1981), on dissemination of publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime," Winters v. New York, 333 U.S. 507 (1948), on the ability of cable television operators to obtain permission to operate, Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986), on the ability of broadcasters that receive public funds to "engage in editorializing," FCC v. League of Women Voters, 468 U.S. 364 (1984), on "indecent transmission" and "patently offensive display" on the Internet, Reno v. ACLU, 521 U.S. 844 (1997), on transmission on the Internet of "material that is harmful to minors," Ashcroft v. ACLU, 122 S. Ct. 1700 (2002), and on newspaper/broadcaster cross-ownership, News America Publ'g v. FCC, 844 F.2d 800 (1988).

The fact that people may wish to communicate their views on music--and that their right to communicate those views is protected by the First Amendment--does not mean that the First Amendment gives them a right to transmit performances of copyrighted music, or that the First Amendment has any role in determining what royalty should be paid when they receive permission to make those transmissions. It was Congress' decision to create a statutory license that allows a person to make digital transmissions of sound recordings *provided that* the licensee pays a fair market rate. Certainly, it is quite clear that Live365 has no inherent right under the First Amendment to make commercial use of a copyright owner's protected works without complying with the law. "The Constitution grants Congress the power to secure for limited times to authors the exclusive right to their works, and this power generally supersedes the first amendment rights of those who wish to use another's copyrighted work." United Video v. FCC, 890 F.2d 1173, 1190 (D.C. Cir. 1989). In United Video, the court rejected a First Amendment challenge to rules governing a statutory copyright license, observing that "[i]n the present case, the petitioners desire to make commercial use of the copyrighted works of others. There is no first amendment right to do so." Id. at 1191. The District of Columbia Circuit's analysis applies equally to Live365's First Amendment challenge to the rates established for the section 114 statutory license.

Live365 also argues that the Librarian's Order is likely to be reversed due to his failure to consider a settlement agreement between the Recording Industry Association of America ("RIAA") and National Public Radio ("NPR"). Section 114(f)(3) allows one or more parties to negotiate licenses voluntarily at any time, even during the course of a rate setting proceeding, and gives effect to these agreements in place of any determination of the Librarian. However, an agreement reached during the hearing phase of a rate setting proceeding is not part of the written record unless a party to the proceeding offers it into evidence. In the case of the NPR/RIAA agreement, neither party made this offer, nor did the arbitrators request that the agreement be submitted for its consideration.

Live365 evidently thought otherwise, citing to an order issued on December 20, 2001, by the Panel for the limited purpose of admitting into evidence agreed-upon terms. But, as RIAA notes in its opposition, the agreed-upon terms referred to in that order by the CARP were those negotiated by the remaining parties to the proceeding and had absolutely nothing to do with NPR. Copyright Owners and Performers' Opposition at 11. The NPR/RIAA agreement is not in the written record of the rate adjustment proceeding, nor is it in the possession of the Copyright Office or the Librarian. Thus, Live365's allegation that the CARP failed in its purported duty to consider the rates and terms in the NPR/RIAA agreement is without merit.

In addition to these two original arguments, Live365 offers several additional reasons for why the Librarian should have adopted its recommended approach, but spends virtually no time in discussing why the Librarian's determination was arbitrary based upon the record evidence. For example, the law requires that the Librarian adopt rates that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). Yet, Live365 faults the Librarian for adhering to the law and setting a marketplace rate. It argues instead that the guiding principle for setting rates is that persons wishing to engage in webcasting should have unhampered access to all sound recordings, and it seems to argue that the Librarian must reject a marketplace rate when that rate would be more than some webcasters would be willing to pay. Motion at 11-12. This simply is not the case. In creating the statutory license, Congress balanced the equities between users and copyright owners. The result is a compulsory licensing scheme which eliminates transaction costs associated with negotiating separate voluntary licenses but which at the same time requires licensees to pay a marketplace rate. The court will not set aside a rate which reflects the standard set forth in the law.

Likewise, Live365 maintains that the Librarian acted in an arbitrary manner because the primary evidence he relied on to establish the rates for the statutory license was the Yahoo! agreement. It articulates four reasons for its position: the cost of the proceeding excluded parties who could have provided other useful evidence; the paucity of examples of willing seller/willing buyer transactions; lack of evidence pertaining to purported factors that the Panel had to consider; and the alleged collusion between Yahoo! and RIAA in setting benchmark rates that would "ensure that competitors' costs were prohibitively high." Motion at 13. Yet, none of these rationales offers a firm basis for overturning the Librarian's Order.

Certainly, any party to the proceeding, including Live365, had an opportunity to provide evidence on the standard for setting the rates, including any factors which Live365 thought fundamental to the calculation. Had Live365 found the record lacking, it was in a position to supplement it and bring forth witnesses to support its theories and proposals.

Similarly, had Live365 wished to present evidence from third parties who chose not to participate in the process, it could easily have included such evidence in its own case. Its complaint about cost appears to be a statement more about the statutory process adopted by Congress for setting the rates than the sufficiency of the record evidence. The fact is that the law requires that the parties to the proceeding bear the costs "in such manner and proportion as the arbitration panel shall direct." 17 U.S.C. § 802(c). It may be unfortunate that certain parties chose not to participate in the process because of its cost, but Live365's complaint really relates to the CARP process mandated by Congress rather than the decision the Librarian made based on a review of the CARP report and the evidence in the record.

Live365 also maintains that the Librarian was arbitrary in relying solely upon the Yahoo! agreement in setting the rates for webcasters. Yet, Live365 does not explain why the CARP's application of its criteria for adopting the Yahoo! agreement was unacceptable, especially in light of the fact that it did not think it arbitrary for the CARP to dismiss consideration of the other 25 agreements offered into evidence under the same criteria. Motion at 14; see also 67 FR 45240, 45245-46 and 45247-49. Rather, it merely asserts that Yahoo! wanted rates that would force other small webcasters out of business, then offers no citation to the record evidence for its assertion, other than a reference to the Most Favored Nations ("MFN") clause included in the contract. The Librarian's Order, however, carefully considered the presence of the MFN clause and stated specific reasons why it did not reject the Yahoo! agreement due to that clause and how it accounted for the effect of the clause. Id. at 45249, 45255; see also CARP Report at 62. The fact that Live365 disagrees with the final determination is insufficient for a showing of likelihood of success on the merits. Live365 must demonstrate why that decision was arbitrary, something that it does not even attempt to do.

Finally, Live365 argues that the Librarian acted arbitrarily when he adopted the Panel's recommendation to reject the musical works benchmark and set the minimum fee at $500 for all licensees. However, it falls short of demonstrating that it has any likelihood of prevailing on these points. The Order sets forth a detailed discussion of the musical works benchmark and why it accepted the Panel's recommendation to reject the model. See 67 FR at 45246-47. Similarly, the Librarian carefully considered the $500 minimum and concluded that a rate calculated to cover administrative costs and which is actually less than the $673 per year webcasters pay for use of the musical works under a separate license is not on its face arbitrary. See 67 FR at 45259, 45262-63. Instead of addressing the Librarian's reasons for adopting the CARP's recommendation on these points, Live365 again makes an offer of new evidence in the form of affidavits to support its contention that the minimum gives the copyright owners a "ridiculous windfall." However, such new evidence cannot be considered either by the Librarian in weighing the likelihood of success on the merits or by the court of appeals in an appeal from the Final Rule and Order. The CARP (and the court of appeals) can only consider the record evidence. Moreover, the Librarian did consider the rates that webcasters pay for use of musical works on the Internet and used it to assess the reasonableness of the proposed minimum fee. Thus, Live365's contention that the final rate was arbitrary because it was based solely upon a single agreement is simply inaccurate. Nor does Live365 point to other evidence in the record to demonstrate just what the rate should have been and why it was arbitrary for the Panel not to adopt this documented alternative rate.

All in all, Live365 offers little to support a finding that it has a possibility of success on the merits of its appeal. Thus, this factor weighs heavily against the granting of a stay.

B. Irreparable Harm

Irreparable harm is determined according to its substantiality, likelihood of occurrence, and adequacy of proof. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). "[T]he injury must be both certain and great; it must be actual and not theoretical." Id. The party requesting the stay must show that the "[i]njury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976).

> Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.

Wisconsin Gas, 758 F.2d at 674.

Further, it is "well established that economic loss does not, in and of itself, constitute irreparable harm." Id.

> [T]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not

> enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974), citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). "Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." Wisconsin Gas, 758 F.2d at 674, citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 n.2 (D.C. Cir. 1977).

Live365 argues that absent a stay it will suffer "severe and irreparable" harm, as it will have to pay "in excess of one million US dollars" in royalties on "approximately 1.4 billion sound recording performances." Motion at 24. This payment "threatens to put Live365 out of business." Id. In addition, Live365 submits that the Librarian's Order will increase its operating costs by $100,000 per month and that it will be "required to pay 90% of its revenue for July 2002 for royalties alone." Id.

Recommendation: As Cuomo makes clear, "[a] stay may be granted with either a high probability of success [on the merits] and some injury, or vice versa." Cuomo, 772 F.2d at 974. Because the probability of success on the merits of its appeal is low, Live365 must demonstrate a high probability of irreparable harm in order to sustain a stay of the Librarian's Order. Live365 has failed to meet that burden.

Irreparable harm is determined according to its substantiality, likelihood of occurrence, and adequacy of proof. Wisconsin Gas, 758 F.2d at 674. The injury must be "both certain and great," and bare allegations of what is likely to occur are of no value since the decisionmaker must decide whether the harm will in fact occur. Id.

Live365's arguments are insufficient to show irreparable harm. First, Live365 has not shown that paying the royalties due on October 20, 2002, threatens the very existence of its business; it merely alleges such an outcome. Motion at 24. Live365 provides no evidence that paying "in excess of one million" dollars, paying "90% of its revenue for July 2002 for royalties alone," or having its operating costs increased by $100,000 per month will be the death knell of its business. See Jeffrey Declaration at ¶¶ 14, 20. Indeed, Live365 provides no evidence for its claim that it will have to pay "in excess of one million U.S. dollars" on October 20, apart from the bare allegation of its executive vice president. Assuming that this figure is correct, Live365 fails to provide any evidence of its current financial situation to illustrate that the payment of royalties on October 20 will have a devastating effect on its business. See, Copyright Owners and Performers' Opposition at 14. On the contrary, Live365 states that it will "pay the royalties for transmissions by individual programmers using our service," seeming to imply that although it may be a hardship, Live365 will be able to make the payments. Motion at 25; Jeffrey Declaration at ¶ 15. Accordingly, Live365 has not shown that its harm is both certain and great, actual and not theoretical as required under Wisconsin Gas. 758 F.2d at 674.

Second, Live365 has not shown that its alleged harm would directly result from its obligation to make royalty payments. As Live365 and Mr. Jeffrey state, "[t]he company in its fifth year . . . is still losing money every month and will continue to lose money for the foreseeable future, with the most significant cost relating to the licensing of music." Motion at 25; Jeffrey Declaration at ¶ 11. Thus, Live365 has been losing money even without having had to pay any royalties under the section 114 statutory license. Consequently, Live365 has failed to show the requisite causality between the alleged harm–the threat that it may go out of business–and the action–the Librarian's Order–for which it seeks a stay. Wisconsin Gas, 758 F.2d at 674.

Even assuming that Live365 will suffer harm, such harm is not irreparable. As an appeal has been filed in this case, a favorable ruling for Live365 would render any harm reparable. If Live365 is successful on appeal, then the court can order refunds with interest that would provide Live365 with an adequate remedy at law. See 17 U.S.C. §802(g).

Live365 also asserts that "[i]f the royalty rate remains unchanged, it is difficult to calculate how Live365 will ever be able to achieve profitability without charging listeners to access the content available on Live365.com." Motion at 24-25; Jeffrey Declaration at ¶ 11. Even if being compelled to charge listeners for its service might constitute irreparable harm, the assertion about threats to Live365's future profitability ignores the fact that the rates that are the subject of this motion are for the period ending December 31, 2002–less than three months from now–and therefore a stay of the Librarian's Order would have little impact on the long-term profitability of Live365 or any other webcaster.

Finally, the timing of Live365's motion calls into question whether Live365 is really in danger of suffering irreparable harm in the absence of a stay. The Librarian issued his Order setting the royalty rates on June 20, 2002. Live365 filed its notice of appeal on August 7, 2002.[3] Yet, Live365 waited to file its motion for stay pending appeal until September 30, 2002, over three months after the Librarian issued his order, 54 days after Live365 filed its notice of appeal in the D.C. Circuit, and only 20 days before the due date for the first royalty payments. Live365's failure to seek a stay sooner "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." Citibank, N.A. v. Citytrust, 756 F.2d 273, 277 (2d Cir. 1985), quoting Le Sportsac, Inc. v. Dockside Research, Inc., 478 F. Supp. 602, 609 (S.D.N.Y. 1979); see Bourne Co. v.Tower Records, Inc., 976 F.2d 99, 101 (2d Cir. 1992); Fund for Animals v. Frizzell, 530 F.2d 982, 987 (D.C. Cir. 1975)(finding 44-day delay in seeking relief "inexcusable"). Surely, Live365 was just as aware of the "severe and irreparable" harm it allegedly would suffer as a result of the Librarian's Order when it filed its appeal on August 7 as it was on September 30, less than three weeks before the allegedly irreparable harm was going to occur.

For the reasons set forth above, we cannot ascertain a probability of irreparable harm sufficient to warrant a stay of the Librarian's Order.

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[3] Section 802(g) of title 17 of the United States Code states that the Librarian's decision with respect to a CARP report may be appealed to the D.C. Circuit within 30 days after publication of the decision in the Federal Register. The Librarian's Order was published in the Federal Register on July 8, 2002; therefore, the period for appealing the decision ended on August 7, 2002.

C. Harm to Copyright Owners and Performers

Any irreparable harm suffered by the movant in absence of a stay must be balanced against any harm suffered by other interested parties if a stay is granted. Cuomo, 772 F.2d at 977; Virginia Petroleum, 259 F.2d at 925. Harm to others in the event a stay is granted is also evaluated according to its substantiality, likelihood of occurrence and adequacy of proof. Cuomo, 772 F.2d at 977; see Wisconsin Gas, 758 F.2d at 674.

Live365 argues that the only harm that copyright owners and performers will suffer if a stay is granted is "a short delay" in receiving royalties. Motion at 36. Such delay will be a "minimal inconvenience." Id. Further, if the Librarian's Order is upheld on appeal, Live365 contends that copyright owners can be "compensated for the delay in collecting payments by assessing reasonable post-judgment interest." Id.

Recommendation: Having determined that Live365 has not made a sufficient showing of likelihood of success on the merits and irreparable harm, this factor is not dispositive. However, after examining the harm to Copyright Owners and Performers in terms of its substantiality, likelihood of occurrence and adequacy of proof should a stay be granted, we find that this factor weighs against Live365. Cuomo, 772 F.2d at 977; see Wisconsin Gas, 758 F.2d at 674.

If a stay is granted, the harm to Copyright Owners and Performers will be substantial, as no royalties will be paid until the D.C. Circuit renders its decision. Moreover, there is no question that such harm will occur to Copyright Owners and Performers in the event a stay is granted as the stay would delay payment of the royalties until the court issues its decision.

We recognize that such losses are recoverable once the D.C. Circuit renders its decision; however, we see no reason to delay receipt of the royalties in light of Live365's failure to demonstrate a likelihood of success on the merits and to show irreparable harm. Copyright Owners and Performers have received absolutely no royalties under the statutory license even though webcasters have been transmitting performances of their sound recordings under the license for almost four years. Moreover, webcasters' claims of financial distress actually raise the spectre that further delays in payment may mean that webcasters, who allegedly continue to lose money even without having had to pay the statutory royalties, will be even less able to pay what they owe if the obligation to make payments is deferred to some point in the future.[4] We conclude that the harm that a stay is likely to cause Copyright Owners and Performers is at least as great as the harm that denial of a stay is likely to cause to Live365 and others.

D. Public Interest

Live365 asserts that the public interest would be served by granting a stay because webcasting provides access to a diversity of music and fills a need that is not met by terrestrial

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[4] See Motion at 37 (Copyright owners "are never going to be paid anyway, or will be paid pennies on the dollar, because these payers will be bankrupt."). Allowing such licensees to continue webcasting without paying royalties when they allegedly will never be able to pay those royalties clearly will harm Copyright Owners and Performers.

radio for many listeners. Motion at 38. In addition, Live365 asserts that the harm that would come to college webcasters, recording artists whose works are played on Internet radio, and companies that benefit from Internet radio should be considered as factors in determining whether a stay is in the public interest. Id. at 25 n.12.

Copyright Owners and Performers counter that harm to these entities has no place in the analysis of Live365's motion for stay, as they are not parties to the appeal; therefore, "they have no possibility at all of prevailing on appeal." Copyright Owners and Performers' Opposition at 14 n.10. They urge that if any of the "stay analysis" is applied to those third parties, then the entire analysis should be applied. Id. They also argue that the Congressional directive that royalty payments be made pending appeal would be thwarted by the granting of a stay. Id. at 19.

Recommendation: At the outset, we agree with Live365 that harm to third parties absent a stay, if it is to be considered at all, should be examined as part of the analysis whether the issuance of a stay is in the public interest. Having said this, we determine that Live365 has failed to show that any alleged harm to third parties–college webcasters, recording artists whose works are played on Internet radio, or companies that benefit from Internet radio–overrides the public interest in ensuring that Congress' intent that copyright owners be compensated when their sound recordings are streamed over the Internet is carried out. We reach this conclusion for several reasons.

First, Live365 asserts that college webcasters will suffer severe, irreparable harm absent a stay. However, Live365 fails to make its case. Nowhere in the declarations provided to support this contention does a declarant state that his college Internet radio station will be unable to make the royalty payments or that doing so will put it out of business. On the contrary, William C. Robedee, general manager of KTRU (Rice University), affirmatively states that KTRU "can afford to pay the back royalties due on October 20." Motion at 27; Robedee Declaration at ¶ 18.[5] He states that "going forward," KTRU may not be able to pay its webcasting royalties in addition to the royalties it owes to the performing rights organizations for use of the musical works, "especially as its audience increases." Motion at 27-28; Robedee Declaration at ¶ 18. Such alleged future harm is speculative, especially because the period covered by the rates set forth in the Librarian's Order ends on December 31, 2002, less than three months from now. In addition, expenses (such as those incurred in complying with notice and recordkeeping requirements being considered in a separate rulemaking) other than the royalties due under the Librarian's Order are not considered in determining whether irreparable harm will occur now absent a stay. Likewise, Joel R. Willer, faculty supervisor at KXUL (University of Louisiana at Monroe), never asserts that KXUL cannot make the royalty payments; he merely asserts that to do so would be onerous. See Willer Declaration at ¶¶ 16, 20-24.

Nor has Live365 established a causal connection between the Librarian's Order and the cessation of webcasting by certain college webcasters. Live365 asserts that Mr. Robedee has personally confirmed that 70 stations have already stopped webcasting because of the Librarian's Order and has heard from "credible" sources that many more have also stopped. Motion at 30;

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[5] Page 2 of William C. Robedee's declaration was not filed with the Copyright Office or served on any of the parties to this proceeding. Counsel for Live365 was notified of the defect but failed to correct it.

Robedee Declaration at ¶¶ 23-24. However, Mr. Robedee has provided no evidence to show that these stations were compelled by the Librarian's Order to cease webcasting, or that a stay would result in their resumption of webcasting, even though there is a likelihood that the Court of Appeals ultimately will affirm the rates established by the Librarian. At most, Mr. Robedee's declaration merely shows that these college webcasters have chosen to cease webcasting, perhaps because they do not wish to pay the royalties.

Next, Live365 asserts that recording artists whose works are played on Internet radio will be severely, irreparably harmed absent a stay because many such artists do not receive exposure on terrestrial radio stations. Motion at 31. Again, Live365 fails to make its case. Recording artists, like Emilie Autumn, who own the copyrights to their works can decide to forego their royalties and license their work to webcasters royalty free. See Autumn Declaration ¶ 8. Other recording artists, like Janis Ian, who choose to sign with a record label are thereby bound by the deal they signed with the record label. If such an artist is dissatisfied with the amount of airplay given to his/her work, and wishes to permit her work to be performed for little or no royalty, the artist must address those concerns to the record label to which she has assigned the copyright. Thus, the declarations of Ms. Ian and Ms. Autumn do not evidence irreparable harm absent a stay of the Librarian's Order.

Finally, Live365 asserts that companies, like XSVoice, that benefit from Internet Radio will be harmed absent a stay. Live365 describes XSVoice as "a technology company that has developed a platform which enables mobile access to virtually any type of live and on-demand media content, including Internet-based streaming audio, radio, television or other audio source." Motion at 34; Coble Declaration at ¶ 2. XSVoice licenses this platform to wireless services like Nextel and Cingular as well as to third-party service providers. Id. Live365 asserts that absent a stay, Internet radio stations will go silent, which in turn will have "a severe impact" on XSVoice's "ability to attract new users" and its "ability to motivate existing users to continue using its service." Motion at 35; Coble Declaration at ¶ 11. We find this argument tenuous at best; as such, it does not warrant further discussion.

The purpose of section 114(a) is to compensate copyright owners when their sound recordings are publicly performed as part of a nonexempt eligible nonsubscription transmission. 17 U.S.C. §114(a). Because Live365 has not demonstrated a high probability of success on the merits of its appeal or that it will suffer irreparable harm absent a stay of the Librarian's Order, the public interest in ensuring that copyright owners are compensated for the use of their works overrides any countervailing public interest proffered by Live365. Therefore, after balancing all of the factors, we conclude the granting of a stay in this case would be contrary to the public interest.

Accordingly, it is recommended that the Librarian deny Live365's motion for a stay.

SO RECOMMENDED.

/S/

David O. Carson,
Acting Register of Copyrights.

railroad worker's survivors (*see* § 404.1407). Under certain circumstances (*see* § 404.1413), certification of benefits payable under the provisions of the Social Security Act will be made to the Railroad Retirement Board. The Railroad Retirement Board will certify such benefits to the Secretary of the Treasury.

(b) *Who is a vested railroad worker?* You are a vested railroad worker if you have:

(1) Ten years or more of service in the railroad industry, or

(2) Effective January 1, 2002, you have at least 5 years of service in the railroad industry, all of which accrue after December 31, 1995.

(c) *Definition of years of service.* As used in paragraph (b) of this section, the term *years of service* has the same meaning as assigned to it by section 1(f) of the Railroad Retirement Act of 1974, as amended, (45 U.S.C. 231(f)).

3. § 404.1402 is revised to read as follows:

§ 404.1402 When are railroad industry services by a non-vested worker covered under Social Security?

If you are a non-vested worker, we (the Social Security Administration) will consider your services in the railroad industry to be "employment" as defined in section 210 of the Social Security Act for the following purposes:

(a) To determine entitlement to, or the amount of, any monthly benefits or lump-sum death payment on the basis of your wages and self-employment income;

(b) To determine entitlement to, or the amount of, any survivor monthly benefit or any lump-sum death payment on the basis of your wages and self-employment income provided you did not have a "current connection" with the railroad industry, as defined in section 1(o) of the Railroad Retirement Act of 1974, as amended, (45 U.S.C. 231(o)), at the time of your death; (in such cases, survivor benefits are not payable under the Railroad Retirement Act);

(c) To determine entitlement to a period of disability (*see* subpart B of this part) on the basis of your wages and self-employment income; or

(d) To apply the provisions of section 203 of the Social Security Act concerning deductions from benefits under the annual earnings test (*see* subpart E of this part).

4. § 404.1403 is removed.

5. § 404.1405 is amended by revising the section heading and paragraph (b) to read as follows:

§ 404.1405 If you have been considered a non-vested worker, what are the situations when your railroad industry work will not be covered under Social Security?

* * * * *

(b) *You continue to work in the railroad industry after establishing entitlement to old-age insurance benefits under section 202(a) of the Social Security Act.* If your service in the railroad industry is used to establish your entitlement to, or to determine the amount of, your old-age insurance benefits under section 202(a) of the Social Security Act, but you become vested after the effective date of your benefits, your railroad service will no longer be deemed to be in "employment" as defined in section 210 of the Act. Your benefits and any benefits payable to your spouse or child under section 202(b), (c), or (d) of the Act will be terminated with the month preceding the month in which you become a vested worker. However, if you remain insured (*see* subpart B of this part) without the use of your railroad compensation, your benefits will instead be recalculated without using your railroad compensation. The recalculated benefits will be payable beginning with the month in which you become a vested worker. Any monthly benefits paid prior to the month you become a vested worker are deemed to be correct payments.

6. § 404.1413 is revised to read as follows:

§ 404.1413 When will we certify payment to the Railroad Retirement Board (RRB)?

(a) *When we will certify payment to RRB.* If we find that you are entitled to any payment under title II of the Social Security Act, we will certify payment to the Railroad Retirement Board if you meet any of the following requirements:

(1) You are a vested worker; or

(2) You are the wife or husband of a vested worker; or

(3) You are the survivor of a vested worker and you are entitled, or could upon application be entitled to, an annuity under section 2 of the Railroad Retirement Act of 1974, as amended, (45 U.S.C. 231(a)); or

(4) You are entitled to benefits under section 202 of the Social Security Act on the basis of the wages and self-employment income of a vested worker (unless you are the survivor of a vested worker who did not have a current connection, as defined in section 1(o) of the Railroad Retirement Act of 1974, as amended, (45 U.S.C. 231(o)) with the railroad industry at the time of his or her death).

(b) *What information does certification include?* The certification we make to the Railroad Retirement Board for individuals entitled to any payment(s) under title II will include your name, address, payment amount(s), and the date the payment(s) should begin.

(c) *Applicability limitations.* The applicability limitations in paragraphs (a)(1) through (4) of this section affect claimants who first become entitled to benefits under title II of the Social Security Act after 1974. (*See* also § 404.1810.)

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 262 and 263

[Docket Nos. 2002–1 CARP DTRA3 and 2001–2 CARP DTNSRA]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office of the Library of Congress is announcing final regulations that set rates and terms for the public performance of a sound recording made pursuant to a statutory license by means of certain eligible nonsubscription transmissions and digital transmissions made by a new type of subscription service. The final rule also announces rates and terms for the making of related ephemeral recordings. The rates and terms are for the 2003 and 2004 statutory licensing period, except in the case of a new subscription service, in which case the license period runs from 1998 through 2004.

DATES: *Effective Date:* March 8, 2004.

Applicability Dates: The regulations govern the license period which commenced on January 1, 2003, and ends on December 31, 2004, except in the case of a new subscription service, in which case the regulations govern the license period which commenced on October 28, 1998, and ends on December 31, 2004.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Senior Attorney, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707–8380; Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION: With the passage of the Digital Performance Right in Sound Recordings Act of 1995, as amended by the Digital Millennium Copyright Act of 1998, copyright owners of sound recordings have enjoyed an exclusive right to perform their works publicly by means of certain digital audio transmissions, subject to certain limitations. 17 U.S.C. 114. Among these limitations are certain exemptions and a statutory license which allows for the public performance of sound recordings as part of "eligible nonsubscription transmissions" and digital transmissions made by "new subscription services." [1]

The section 114 statutory license, however, does not necessarily cover all the rights needed to effectuate a digital transmission. It is often necessary for the licensee to first make a number of digital copies of the sound recording in order to bring about the transmission. For this reason, Congress created a new statutory license in 1998 with the passage of the Digital Millennium Copyright Act of 1998, Public Law 105–304, to allow for the making of ephemeral reproductions for the purpose of facilitating certain digital audio transmissions pursuant to the section 114 statutory license, including those transmissions made by eligible nonsubscription services and new subscription services. *See* 17 U.S.C. 112(e).

The procedure for setting the rates and terms for these two statutory licenses is a two-step process. 17 U.S.C. 112(e)(3), (4), and (6) and 17 U.S.C. 114(f)(2). The first step requires the Librarian of Congress to initiate a voluntary negotiation period in order to give interested parties an opportunity to reach consensus with respect to the applicable rates and terms through an informal process. However, in the event the parties are unable to reach an agreement during this period, sections 112(e)(4) and 114(f)(2)(B) direct the Librarian of Congress to convene a three-person Copyright Arbitration Royalty Panel ("CARP") for the purpose of determining the rates and terms for the compulsory license, provided that an interested party files a petition in accordance with 17 U.S.C. 803(a)(1), requesting the formal proceeding.

The initial schedule of rates and terms for the sections 112 and 114 licenses applicable to eligible nonsubscription services for the period from October 28, 1998, to December 31, 2002, was published on July 8, 2002, after a formal hearing before a CARP. *See* 67 FR 45239 (July 8, 2002). Yet, this announcement did not settle the matter for long. It only established rates and terms for the license period ending December 31st of that year.

For this reason, the Library initiated a new proceeding to adjust the rates and terms applicable to eligible nonsubscription transmissions for the 2003–2004 license period by publishing a notice in the **Federal Register** in January 2002 announcing the six-month voluntary negotiation period that commences a rate adjustment proceeding. *See* 67 FR 4472 (January 30, 2002). The Librarian took this step even though the rates for 1998–2002 had not been announced, in order to comply with the timetable set forth in sections 112(e)(7) and 114(f)(2)(C)(i)(II). Specifically, these sections require the Librarian to publish a notice commencing the negotiation process in the first week of January 2000 and at two year intervals thereafter, unless the parties have agreed to an alternative schedule during the settlement phase of the process. In any event, the parties did not negotiate a proposed settlement during the specified period to cover the next license period and opted instead to file petitions with the Office, requesting that the Librarian of Congress convene a CARP to adjust the rates and terms for the license period 2003–2004. Two such petitions were filed with the Copyright Office. The Recording Industry Association of America, Inc. ("RIAA") filed one of the two petitions, and IOMedia Partners, Inc., 3WK, Digitally Imported Radio, IM Networks, Inc., Beethoven.com, LLC, All Bass Radio, Discombobulated, LLC, Wolf FM and Integrity Media Group, Inc. d/b/a Boomer Radio, filed jointly a second petition on behalf of certain licensees.

Likewise, in accordance with the time frame set forth in the law for the purpose of setting rates and terms for use of the section 114 license by new subscription services, the Library initiated a six-month voluntary negotiation period to adjust the rates and terms for new subscription services. *See* 66 FR 9881 (February 12, 2001). Again, no settlement was reached by the end of the six-month period. Consequently, Music Choice and the RIAA filed separate petitions with the Copyright Office requesting that a CARP be convened in order to set the rates and terms for the public performance of sound recordings by new subscription services.

Proposed Settlement Agreements

The parties in both proceedings continued to negotiate in good faith beyond the statutorily mandated six-month negotiation periods in hopes of reaching an industry wide settlement. Ultimately, they succeeded, as evidenced by the adoption of the proposed rates and terms as final rules. The process, however, required the consideration of three separate agreements, explained herein.

On May 1, 2003, the Copyright Office published a notice in the **Federal Register**, requesting comment on proposed regulations that set rates and terms for the use of sound recordings in certain eligible nonsubscription transmissions made pursuant to section 114 during the 2003 and 2004 statutory licensing period, as well as for the making of ephemeral recordings necessary for the facilitation of such transmissions in accordance with the section 112(e) license. The proposal also included rates and terms for the use of sound recordings in transmissions made by new subscription services from 1998 through December 31, 2004, and the making of the related ephemeral recordings under these same statutory licenses. 68 FR 23241 (May 1, 2003). These proposed rates and terms were part of a settlement agreement negotiated by SoundExchange, a division of the RIAA, the American Federation of Television and Radio Artists ("AFTRA"), the American Federation of Musicians of the United States and Canada ("AFM"), and the Digital Media Association ("DiMA") and were submitted to the Copyright Office on April 14, 2003, along with a petition requesting that the Office publish the proposed rates and terms pursuant to § 251.63(b) of title 37 of the Code of Federal Regulations, which the Office did. *Id. See* 68 FR 23241 (May 1, 2003).

The April 14 proposal was later superseded by a second proposal which was submitted to the Copyright Office on May 8, 2003. The new agreement amended the proposal in the April 14 submission with the approval of the parties to the first agreement and included, for the first time, rates and terms for simulcasts of AM and FM radio broadcast programming. These new rates were the result of an agreement between SoundExchange,

[1] For purposes of the section 114 license, an "eligible nonsubscription transmission" is a noninteractive digital audio transmission which, as the name implies, does not require a subscription for receiving the transmission. The transmission must also be made as part of a service that provides audio programming consisting in whole or in part of performances of sound recordings the purpose of which is to provide audio or entertainment programming, but not to sell, advertise, or promote particular goods or services. *See* 17 U.S.C. 114(j)(6). A "new subscription service" is "a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription or a preexisting satellite digital audio radio service." 17 U.S.C. 114(j)(8).

AFM, and AFTRA (collectively, "Copyright Owners and Performers"), on the one hand, and Broadcasters,[2] on the other hand. The May 8 agreement also included proposed rates and terms applicable to business establishment services that make ephemeral phonorecords pursuant to section 112(e) for the purpose of transmitting a public performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv). These rates and terms were agreed to by the Copyright Owners and Performers and Music Choice, the only business establishment service participating in this proceeding, and cover the 2003 and 2004 statutory license period. As before, the Petitioners requested that the Office publish the amended proposed rates and terms for public comment pursuant to 37 CFR 251.63(b). *See* 68 FR 27506 (May 20, 2003).

On July 3, 2003, SoundExchange, the American Council on Education, and the Intercollegiate Broadcasting System, Inc., jointly with Harvard Radio Broadcasting Co., Inc. submitted the third and final proposal to the Copyright Office. It proposed rates and terms for use of the section 112 and section 114 statutory licenses by noncommercial licensees during the 2003–2004 license period that are identical to the statutory rates and terms adopted by the Librarian for the period ending December 31, 2002. *See* 67 FR 45239 (July 8, 2002). It should be noted, however, that many noncommercial webcasters will not be using these rates and terms for this time period. Instead, certain noncommercial licensees will operate under the rate structure adopted in a separate license, negotiated with RIAA in accordance with the Small Webcaster Settlement Act of 2002. *See* 68 FR 35008 (June 11, 2003).

Objections to the Proposed Rates and Terms

The Copyright Office received objections to the proposals announced in the May 20 and the August 21 notices from four entities: Live365.com, Lester Chambers ("Chambers"), Royalty Logic, Inc. ("RLI") and SRN Broadcasting & Marketing, Inc. ("SRN"). Specifically, Live365.com objected to the rates and terms applicable to commercial webcasters, but withdrew its objections early in the process, obviating the need to consider its concerns further. Similarly, SRN objected to these same rates. However, SRN was eventually dismissed from the proceedings for its failure to comply with the Orders issued in this proceeding and the rules governing this process. *See* Order in Docket No. 2002–1 CARP DTRA3, dated August 15, 2003. That left the objections of RLI and RLI's client, Lester Chambers, which, in both cases, concerned the appointment and responsibilities of those agents designated to collect and distribute the royalty fees.

An objection, however, can only be considered if the party filing the objection has a significant interest in the outcome of the proceeding. In the case of RLI, the Office determined that RLI had no independent standing to pursue its own objections but held that RLI could represent the interests of its client, Lester Chambers, provided that Chambers expressly authorized RLI to represent its interest in these proceedings. *See* Order in Docket Nos. 2002–1 CARP DTRA3 and 2001–2 CARP DTNSRA, dated August 18, 2003. Consequently, at the beginning of the hearing phase of this proceeding, Chambers, as represented by RLI, was the only remaining party that had filed an objection to the proposed rates and terms. This objection, however, became moot on January 8, 2003, when RLI filed a notice with the Copyright Office withdrawing its Notice of Intent to Participate in these proceedings and its Direct Case.

Because there are no longer any parties objecting to the proposed rates and terms, the Librarian is adopting as final regulations the rates and terms for the section 112(e) and section 114 licenses proposed in the May 20 and August 21 notices. The rates and terms apply to the public performance of a sound recording by means of certain eligible nonsubscription transmissions and digital transmissions made by a new type of subscription service. The final rules also announce rates and terms for the making of related ephemeral recordings. The rates and terms are for the 2003 and 2004 license period, except in the case of new subscription services, in which case the license period runs from 1998 through 2004.

Adoption of the rules presented herein as final regulations concludes the above-captioned proceedings.

List of Subjects in 37 CFR Parts 262 and 263

Copyright, Digital audio transmissions, Performance right, Sound recordings.

[2] Those entities who negotiated on behalf of the broadcasters include Bonneville International Corporation, Clear Channel Communications, Inc., the National Religious Broadcasters Music License Committee, Salem Communications Corporation, and Susquehanna Radio Corporation.

Final Regulation

In consideration of the foregoing, the Copyright Office adds parts 262 and 263 to 37 CFR to read as follows:

PART 262—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Sec.

Authority: 17 U.S.C. 112(e), 114, 801(b)(1).

§ 262.1 General.

(a) *Scope.* This part 262 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by certain Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period 2003–2004 and in the case of Subscription Services 1998–2004 (the "License Period").

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114 shall comply with the requirements of those sections, the rates and terms of this part and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and services shall apply in lieu of the rates and terms of this part to transmissions within the scope of such agreements.

§ 262.2 Definitions.

For purposes of this part, the following definitions shall apply:

(a) *Aggregate Tuning Hours* means the total hours of programming that the Licensee has transmitted during the relevant period to all Listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous Listeners, the service's Aggregate Tuning Hours would equal 10. If 30 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one Listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

(b) *Broadcast Simulcast* means

(1) A simultaneous Internet transmission or retransmission of an over-the-air terrestrial AM or FM radio broadcast, including one with previously broadcast programming substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained and one with substitute advertisements, and

(2) An Internet transmission in accordance with 17 U.S.C. 114(d)(2)(C)(iii) of an archived program, which program was previously broadcast over-the-air by a terrestrial AM or FM broadcast radio station, in either case whether such Internet transmission or retransmission is made by the owner and operator of the AM or FM radio station that makes the broadcast or by a third party.

(c) *Business Establishment Service* means a service making transmissions of sound recordings under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv).

(d) *Copyright Owner* is a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) or 114.

(e) *Designated Agent* is the agent designated by the Librarian of Congress as provided in § 262.4(b).

(f) *Ephemeral Recording* is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under the limitations on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) or for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

(g) *Licensee* is a person or entity that

(1) Has obtained a compulsory license under 17 U.S.C. 114 and the implementing regulations therefor to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)), or that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make Ephemeral Recordings for use in facilitating such transmissions, or

(2) Is a Business Establishment Service that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make Ephemeral Recordings, but not a person or entity that:

(i) Is 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 a State or possession or any governmental entity or subordinate thereof, or the United States or District of Columbia, making transmissions for exclusively public purposes.

(h) *Listener* is a player, receiving device or other point receiving and rendering a transmission of a public performance of a sound recording made by a Licensee, irrespective of the number of individuals present to hear the transmission.

(i) *Nonsubscription Service* means a service making eligible nonsubscription transmissions.

(j) *Performance* is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (*e.g.*, the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.*, the sound recording is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(k) *Performers* means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

(l) *Subscription Service* means a new subscription service (as defined in 17 U.S.C. 114(j)(8)) making noninteractive digital audio transmissions.

(m) *Subscription Service Revenues* shall mean all monies and other consideration paid or payable, including the fair market value of non-cash or in-kind consideration paid or payable by third parties, from the operation of a Subscription Service, as comprised of the following:

(1) Subscription fees and other monies and consideration paid for access to the Subscription Service by or on behalf of subscribers receiving within the United States transmissions made as part of the Subscription Service;

(2) Monies and other consideration (including without limitation customer acquisition fees) from audio or visual advertising, promotions, sponsorships, time or space exclusively or predominantly targeted to subscribers of the Subscription Service, whether

(i) On or through the Subscription Service media player, or on pages accessible only by subscribers or that are predominantly targeted to subscribers, or

(ii) In e-mails addressed exclusively or predominantly to subscribers of the Subscription Service, or

(iii) Delivered exclusively or predominantly to subscribers of the Subscription Service in some other manner, in each case less advertising agency commissions (not to exceed 15% of those monies and other consideration) actually paid to a recognized advertising agency not owned or controlled by Licensee;

(3) Monies and other consideration (including without limitation the proceeds of any revenue-sharing or commission arrangements with any fulfillment company or other third party, and any charge for shipping or handling) from the sale of any product or service directly through the Subscription Service media player or through pages or advertisements

accessible only by subscribers or that are predominantly targeted to subscribers (but not pages or advertisements that are not predominantly targeted to subscribers), less

(i) Monies and other consideration from the sale of phonorecords and digital phonorecord deliveries of sound recordings,

(ii) The Licensee's actual, out-of-pocket cost to purchase for resale the products or services (except phonorecords and digital phonorecord deliveries of sound recordings) from third parties, or in the case of products produced or services provided by the Licensee, the Licensee's actual cost to produce the product or provide the service (but not more than the fair market wholesale value of the product or service), and

(iii) Sales and use taxes, shipping, and credit card and fulfillment service fees actually paid to unrelated third parties; provided that:

(A) The fact that a transaction is consummated on a different page than the page/location where a potential customer responds to a "buy button" or other purchase opportunity for a product or service advertised directly through such player, pages or advertisements shall not render such purchase outside the scope of Subscription Service Revenues hereunder, and

(B) Monies and other consideration paid by or on behalf of subscribers for software or any other access device owned by Licensee (or any subsidiary or other affiliate of the Licensee, but excluding, for the avoidance of doubt, any entity that sells a third-party product, whether or not bearing the Licensee's brand) to access the Licensee's Subscription Service shall not be deemed part of Subscription Service Revenues, unless such software or access device is required as a condition to access the Subscription Service and either is purchased by a subscriber contemporaneously with or after subscribing or has no independent function other than to access the Subscription Service;

(4) Monies and other consideration for the use or exploitation of data specifically and separately concerning subscribers or the Subscription Service, but not monies and other consideration for the use or exploitation of data wherein information concerning subscribers or the Subscription Service is commingled with and not separated or distinguished from data that predominantly concern nonsubscribers or other services; and

(5) Bad debts recovered with respect to paragraphs (m)(1) through (4) of this section; provided that the Subscription Service shall be permitted to deduct bad debts actually written off during a reporting period.

§ 262.3 Royalty fees for public performances of sound recordings and for ephemeral recordings.

(a) *Basic royalty rate.* Royalty rates and fees for eligible nonsubscription transmissions made by Licensees pursuant to 17 U.S.C. 114(d)(2) during the period January 1, 2003, through December 31, 2004, and the making of Ephemeral Recordings pursuant to 17 U.S.C. 112(e) to facilitate such transmissions; noninteractive digital audio transmissions made by Licensees pursuant to 17 U.S.C. 114(d)(2) as part of a new subscription service during the period October 28, 1998, through December 31, 2004, and the making of Ephemeral Recordings pursuant to 17 U.S.C. 112(e) to facilitate such transmissions; and the making of Ephemeral Recordings by Business Establishment Services pursuant to 17 U.S.C. 112(e) during the period January 1, 2003, through December 31, 2004, shall be as follows:

(1) *Nonsubscription Services.* For their operation of Nonsubscription Services, Licensees other than Business Establishment Services shall, at their election as provided in paragraph (b) of this section, pay at one of the following rates:

(i) *Per Performance Option.* $0.000762 (0.0762¢) per Performance for all digital audio transmissions, except that 4% of Performances shall bear no royalty to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to imply that permitting users of a service to "skip" a recording is or is not permitted under 17 U.S.C. 114(d)(2). For the avoidance of doubt, this 4% exclusion shall apply to all Licensees electing this payment option irrespective of the Licensee's actual experience in respect of partial Performances.

(ii) *Aggregate Tuning Hour Option.* (A) Non-Music Programming. $0.000762 (0.0762¢) per Aggregate Tuning Hour for programming reasonably classified as news, talk, sports or business programming.

(B) *Broadcast Simulcasts.* $0.0088 (0.88¢) per Aggregate Tuning Hour for Broadcast Simulcast programming not reasonably classified as news, talk, sports or business programming.

(C) *Other Programming.* $0.0117 (1.17¢) per Aggregate Tuning Hour for programming other than Broadcast Simulcast programming and programming reasonably classified as news, talk, sports or business programming.

(2) *Subscription Services.* For their operation of Subscription Services, Licensees other than Business Establishment Services shall, at their election as provided in paragraph (b) of this section, pay at one of the following rates:

(i) *Per Performance Option.* $0.000762 (0.0762¢) per Performance for all digital audio transmissions, except that 4% of Performances shall bear no royalty to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to imply that permitting users of a service to "skip" a recording is or is not permitted under 17 U.S.C. 114(d)(2). For the avoidance of doubt, this 4% exclusion shall apply to all Licensees electing this payment option irrespective of the Licensee's actual experience in respect of partial performances.

(ii) *Aggregate Tuning Hour Option.*—(A) *Non-Music Programming.* $0.000762 (0.0762¢) per Aggregate Tuning Hour for programming reasonably classified as news, talk, sports or business programming.

(B) *Broadcast Simulcasts.* $0.0088 (0.88¢) per Aggregate Tuning Hour for Broadcast Simulcast programming not reasonably classified as news, talk, sports or business programming.

(C) *Other Programming.* $0.0117 (1.17¢) per Aggregate Tuning Hour for programming other than Broadcast Simulcast programming and programming reasonably classified as news, talk, sports or business programming.

(iii) *Percentage of Subscription Service Revenues Option.* 10.9% of Subscription Service Revenues, but in no event less than 27¢ per month for each person who subscribes to the Subscription Service for all or any part of the month or to whom the Subscription Service otherwise is delivered by Licensee without a fee (*e.g.*, during a free trial period), subject to the following reduction associated with the transmission of directly licensed sound recordings (if applicable). For any given payment period, the fee due from Licensee shall be the amount calculated under the formula described in the immediately preceding sentence *multiplied by* the following fraction: the total number of Performances (as defined under § 262.2(j), which excludes directly licensed sound recordings) made by the Subscription Service during the period in question, *divided by* the total number of digital audio transmissions of sound recordings made by the Subscription Service during the period in question (inclusive of Performances and equivalent transmissions of directly licensed sound recordings). Any Licensee paying on such basis shall report to the Designated Agent on its statements of account the pertinent music use information upon which such reduction has been calculated. This option shall not be available to a Subscription Service where—

(A) A particular computer software product or other access device must be purchased for a separate fee from the Licensee as a condition of receiving transmissions of sound recordings through the Subscription Service, and the Licensee chooses not to include sales of such software product or other device to subscribers as part of Subscription Service Revenues in accordance with § 262.2(m)(3), or

(B) The consideration paid or given to receive the Subscription Service also entitles the subscriber to receive or have access to material, products or services other than the Subscription Service (for example, as in the case of a "bundled service" consisting of access to the Subscription Service and also access to the Internet in general). In all events, in order to be eligible for this payment option, a Licensee may not engage in pricing practices whereby the Subscription Service is offered to subscribers on a "loss leader" basis or whereby the price of the Subscription Service is materially subsidized by payments made by the subscribers for other products or services.

(3) *Business Establishment Services.* For the making of any number of Ephemeral Recordings in the operation of a service pursuant to the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), a Licensee that is a Business Establishment Service shall pay 10% of such Licensee's "Gross Proceeds" derived from the use in such service of musical programs that are attributable to copyrighted recordings. "Gross Proceeds" as used in paragraph (a)(3) of this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to copyrighted recordings may be made on the basis of:

(i) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and

(ii) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(b) *Election process.* A Licensee other than a Business Establishment Service shall elect the particular Nonsubscription Service and/or Subscription Service royalty rate categories it chooses (that is, among paragraph (a)(1)(i) or (ii) of this section and/or paragraph (a)(2)(i), (ii) or (iii) of this section) for the License Period by no later than March 8, 2004. Notwithstanding the preceding sentence, where a Licensee has not previously provided a Nonsubscription Service or Subscription Service, as the case may be, the Licensee may make its election by no later than thirty (30) days after the new service first makes a digital audio transmission of a sound recording under the 17 U.S.C. 114 statutory license. Each such election shall be made by notifying the Designated Agent in writing of such election, using an election form provided by the Designated Agent. A Licensee that fails to make a timely election shall pay royalties as provided in paragraphs (a)(1)(i) and (a)(2)(i) of this section, as applicable. Notwithstanding the foregoing, a Licensee eligible to make royalty payments under an agreement entered into pursuant to the Small Webcaster Settlement Act of 2002 may elect to make payments under such agreement as specified in such agreement.

(c) *Ephemeral Recordings.* The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Licensee other than a Business Establishment Service during the License Period, and used solely by the Licensee to facilitate transmissions for which it pays royalties as and when provided in this section and § 262.4 shall be deemed to be included within, and to comprise 8.8% of, such royalty payments. The royalty payable under 17 U.S.C. 112(e) for the reproduction of phonorecords by a Business Establishment Service shall be as set forth in paragraph (a)(3) of this section.

(d) *Minimum fee.* (1) *Business Establishment Services.* Each Licensee that is a Business Establishment Service shall pay a minimum fee of $10,000 for each calendar year in which it makes Ephemeral Recordings for use to facilitate transmissions under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), whether or not it does so for all or any part of the year.

(2) *Other Services.* Each Licensee other than a Business Establishment Service shall pay a minimum fee of $2,500, or $500 per channel or station (excluding archived programs, but in no event less than $500 per Licensee), whichever is less, for each calendar year in which it makes eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings for use to facilitate such transmissions, whether or not it does the foregoing for all or any part of the year; except that the minimum annual fee for a Licensee electing to pay under paragraph (a)(2)(iii) of this section shall be $5,000.

(3) *In General.* These minimum fees shall be nonrefundable, but shall be fully creditable to royalty payments due under paragraph (a) of this section for the same calendar year (but not any subsequent calendar year).

(e) *Continuing Obligation.* For the limited purpose of the period immediately following the License Period, and on an entirely without prejudice and nonprecedential basis relative to other time periods and proceedings, if successor statutory royalty rates for Licensees for the period beginning January 1, 2005, have not been established by January 1, 2005, then Licensees shall pay to the Designated Agent, effective January 1, 2005, and continuing for the period through April 30, 2005, or until successor rates and terms are established, whichever is earlier, an interim royalty pursuant to the same rates and terms as are provided for the License Period. Such interim royalties shall be subject to retroactive adjustment based on the final successor rates. Any overpayment shall be fully creditable to future payments, and any underpayment shall be paid within 30 days after establishment of the successor rates and terms, except as may otherwise be provided in the successor terms. If there is a period of such interim payments, Licensees shall elect the particular royalty rate categories it chooses for the interim period as described in paragraph (b) of this section, except that the election for a service that is in operation shall be made by no later than January 15, 2005.

(f) *Other royalty rates and terms.* This part 262 does not apply to persons or entities other than Licensees, or to Licensees to the extent that they make other types of transmissions beyond those set forth in paragraph (a) of this section. For transmissions other than those governed by paragraph (a) of this section, or the use of Ephemeral Recordings to facilitate such transmissions, persons making such transmissions must pay royalties, to the extent (if at all) applicable, under 17 U.S.C. 112(e) and 114 or as prescribed by other law, regulation or agreement.

§ 262.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to designated agent.* A Licensee shall make the royalty payments due under § 262.3 to the . Designated Agent.

(b) *Designation of agent and potential successor designated agents.* (1) Until such time as a new designation is made, SoundExchange, presently an unincorporated division of the Recording Industry Association of America, Inc. ("RIAA"), is designated as the Designated Agent to receive statements of account and royalty payments from Licensees due under § 262.3 and to distribute such royalty payments to each Copyright Owner and Performer entitled to receive royalties under 17 U.S.C. 112(e) or 114(g). SoundExchange shall continue to be designated after its separate incorporation.

(2) If SoundExchange should fail to incorporate by July 1, 2003, dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by successor entities upon the fulfillment of the requirements set forth in paragraphs (b)(2)(i) and (ii) of this section.

(i) By a majority vote of the nine copyright owner representatives on the SoundExchange Board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Office designating a successor Designated Agent to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Designated Agent.

(ii) By a majority vote of the nine performer representatives on the SoundExchange Board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Office designating a successor Designated Agent to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Designated Agent.

(iii) The Copyright Office shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) or (ii) of this section an order designating the Designated Agents named in such petitions. Nothing contained in this section shall prohibit the petitions filed under paragraphs (b)(2)(i) and (ii) of this section from naming the same successor Designated Agent.

(3) If petitions are filed under paragraphs (b)(2)(i) and (ii) of this section, then, following the actions of the Copyright Office in accordance with paragraph (b)(2)(iii) of this section:

(i) Each of the successor entities shall have all the rights and responsibilities of a Designated Agent under this part 262, except as specifically set forth in this paragraph (b)(3).

(ii) Licensees shall make their royalty payments to the successor entity named by the copyright owner representatives under paragraph (b)(2)(i) of this section (the "Receiving Agent") and shall provide statements of account on a form prepared by the Receiving Agent. Licensees shall submit a copy of each statement of account to the collective named by the performer representatives under paragraph (b)(2)(ii) of this section at the same time such statement of account is delivered to the Receiving Agent.

(iii) The Designated Agents shall agree between themselves concerning responsibility for distributing royalty payments to Copyright Owners and Performers that have not themselves authorized either Designated Agent. The Designated Agents also shall agree to a corresponding methodology for allocating royalty payments between them using the information provided by the Licensee pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made. Such methodology shall value all performances equally. Within 30 days after their agreement concerning such responsibility and methodology, the Designated Agents shall inform the Register of Copyrights thereof.

(iv) With respect to any royalty payment received by the Receiving Agent from a Licensee, a designation by a Copyright Owner or Performer of a Designated Agent must be made no later than 30 days prior to the receipt by the Receiving Agent of that royalty payment.

(v) The Receiving Agent shall promptly allocate the royalty payments it receives between the two Designated Agents in accordance with the agreed methodology. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the Receiving Agent and the collectives named under paragraph (b)(2) of this section for each calendar year no later than 180 days following the end of each calendar year. The Designated Agents shall agree on a reasonable basis for the sharing on a pro-rata basis of any costs associated with the allocations set forth in paragraph (b)(3)(iii) of this section.

(vi) If a Designated Agent is unable to locate a Copyright Owner or Performer that the Designated Agent otherwise would be required to pay under this paragraph (b) within 3 years from the date of payment by Licensee, such Copyright Owner's or Performer's share of the payments made by Licensees may first be applied to the costs directly attributable to the administration of the royalty payments due such Copyright Owners and Performers by that Designated Agent and shall thereafter be allocated between the Designated Agents on a pro rata basis (based on distributions to entitled parties) to offset any costs permitted to be deducted by a designated agent under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

(c) *Monthly payments.* A Licensee shall make any payments due under § 262.3(a) by the 45th day after the end of each month for that month, except that payments due under § 262.3(a) for the period from the beginning of the License Period through the last day of the month in which these rates and terms are adopted by the Librarian of Congress and published in the **Federal Register** shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any payment due under § 262.3(d) by January 31 of the applicable calendar year, except that:

(1) Payment due under § 262.3(d) for 2003, and in the case of a Subscription Service any earlier year, shall be due 45 days after the last day of the month in which these rates and terms are adopted by the Librarian of Congress and published in the **Federal Register**; and

(2) Payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to licenses under 17 U.S.C. 114(f) and/or 17 U.S.C. 112(e) shall be due by the 45th day after the

end of the month in which the Licensee commences to do so.

(e) *Late payments.* A Licensee shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by the Designated Agent after the due date. Late fees shall accrue from the due date until payment is received by the Designated Agent.

(f) *Statements of account.* For any part of the period beginning on the date these rates and terms are adopted by the Librarian of Congress and published in the **Federal Register** and ending on December 31, 2004, during which a Licensee operates a service, by 45 days after the end of each month during the period, the Licensee shall deliver to the Designated Agent a statement of account containing the information set forth in this paragraph (f) on a form prepared, and made available to Licensees, by the Designated Agent. If a payment is owed for such month, the statement of account shall accompany the payment. A statement of account shall include only the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment, or if no payment is owed for the month, to calculate any portion of the minimum fee recouped during the month, including, as applicable, the Performances, Aggregate Tuning Hours (to the nearest minute) or Subscription Service Revenues for the month;

(2) The name, address, business title, telephone number, facsimile number, electronic mail address and other contact information of the individual or individuals to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or a corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or a corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this statement of account and hereby state that it is true, accurate and complete to my knowledge after reasonable due diligence.

(g) *Distribution of payments.*—(1) The Designated Agent shall distribute royalty payments directly to Copyright Owners and Performers, according to 17 U.S.C. 114(g)(2); Provided that the Designated Agent shall only be responsible for making distributions to those Copyright Owners and Performers who provide the Designated Agent with such information as is necessary to identify and pay the correct recipient of such payments. The agent shall distribute royalty payments on a 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 sound recordings by Licensees; Provided, however, Performers and Copyright Owners that authorize the Designated Agent may agree with the Designated Agent 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 17 U.S.C. 114(g)(2).

(2) The Designated Agent shall inform the Register of Copyrights of:

(i) Its methodology for distributing royalty payments to Copyright Owners and Performers who have not themselves authorized the Designated Agent (hereinafter "nonmembers"), and any amendments thereto, within 60 days of adoption and no later than 30 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(ii) Any written complaint that the Designated Agent receives from a nonmember concerning the distribution of royalty payments, within 60 days of receiving such written complaint; and

(iii) The final disposition by the Designated Agent of any complaint specified by paragraph (g)(2)(ii) of this section, within 60 days of such disposition.

(3) A Designated Agent may request that the Register of Copyrights provide a written opinion stating whether the Designated Agent's methodology for distributing royalty payments to nonmembers meets the requirements of this section.

(h) *Permitted deductions.* The Designated Agent may deduct from the payments made by Licensees under § 262.3, 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 under 17 U.S.C. 112(e) or 114(g) may agree to permit the Designated Agent to make any other deductions.

(i) *Retention of records.* Books and records of a Licensee and of the Designated Agent relating to the payment, collection, and distribution of royalty payments shall be kept for a period of not less than 3 years.

§ 262.5 Confidential information.

(a) *Definition.* For purposes of this part, "Confidential Information" shall include the statements of account, any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Receiving Agent or a Designated Agent are public knowledge. The Designated Agent that claims the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Designated Agent use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto; Provided, however, that the Designated Agent may disclose to Copyright Owners and Performers Confidential Information provided on statements of account under this part in aggregated form, so long as Confidential Information pertaining to any individual Licensee cannot readily be identified, and the Designated Agent may disclose the identities of services that have obtained licenses under 17 U.S.C. 112(e) or 114 and whether or not such services are current in their obligations to pay minimum fees and submit statements of account (so long as the Designated Agent does not disclose the amounts paid by the Licensee).

(d) *Disclosure of Confidential Information.* Except as provided in paragraph (c) of this section and as required by law, access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the

collection and distribution of royalty payments hereunder and activities related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of their work, require access to the records;

(2) An independent and qualified auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Designated Agent with respect to the verification of a Licensee's statement of account pursuant to § 262.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty payments pursuant to § 262.7;

(3) The Copyright Office, in response to inquiries concerning the operation of the Designated Agent;

(4) In connection with future Copyright Arbitration Royalty Panel proceedings under 17 U.S.C. 114(f)(2) and 112(e), and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings, Copyright Arbitration Royalty Panels, the Copyright Office or the courts; and

(5) In connection with bona fide royalty disputes or claims that are the subject of the procedures under § 262.6 or § 262.7, and under an appropriate confidentiality agreement or protective order, the specific parties to such disputes or claims, their attorneys, consultants or other authorized agents, and/or arbitration panels or the courts to which disputes or claims may be submitted.

(e) *Safeguarding of Confidential Information.* The Designated Agent and any person identified in paragraph (d) of this section shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to such Designated Agent or person.

§ 262.6 Verification of statements of account.

(a) *General.* This section prescribes procedures by which the Designated Agent may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Designated Agent may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Designated Agent must file with the Copyright Office a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of records.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than 3 years. The Designated Agent shall retain the report of the verification for a period of not less than 3 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 and qualified auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Designated Agent, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Designated Agent shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 262.7 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty payments made by the Designated Agent; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or a Performer and the Designated Agent have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or a Performer may conduct a single audit of the Designated Agent upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Office a notice of intent to audit the Designated Agent, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Designated Agent. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of records.* The Designated Agent shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than 3 years. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 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 and qualified auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Designated Agent in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Designated Agent reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Designated Agent shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 262.8 Unclaimed funds.

If a Designated Agent is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, the Designated Agent shall retain the required payment in a segregated trust account for a period of 3 years from the date of payment. No claim to such payment shall be valid after the expiration of the 3-year period. After the expiration of this period, the Designated Agent may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

PART 263—RATES AND TERMS FOR CERTAIN TRANSMISSIONS AND THE MAKING OF EPHEMERAL REPRODUCTIONS BY NONCOMMERCIAL LICENSEES

Authority: 17 U.S.C. 112(e), 114, 801(b)(1).

§ 263.1 General.

This part 263 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Noncommercial Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of ephemeral recordings by certain Noncommercial Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period 2003–2004.

§ 263.2 Definitions.

For purposes of this part, the following definition shall apply:

A *Noncommercial Licensee* is a person or entity that has obtained a compulsory license under 17 U.S.C. 114 and the implementing regulations therefor, or that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make ephemeral recordings for use in facilitating such transmissions, and—

(a) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(b) 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

(c) Is a State or possession or any governmental entity or subordinate thereof, or the United States or District of Columbia, making transmissions for exclusively public purposes.

§ 263.3 Royalty rates and terms.

A Noncommercial Licensee shall in every respect be treated as a "Licensee" under part 262 of this chapter, and all terms applicable to Licensees and their payments under part 262 of this chapter shall apply to Noncommercial Licensees and their payment, except that a Noncommercial Licensee shall pay royalties at the rates applicable to such a "Licensee," as currently provided in § 261.3(a), (c), (d) and (e) of this chapter, rather than at the rates set forth in § 262.3(a) through (d) of this chapter.

Dated: January 22, 2004.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 04–2535 Filed 2–5–04; 8:45 am]

BILLING CODE 1410–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2930

[WO–250–1220–PA–24 1A]

RIN 1004–AD45

Permits for Recreation on Public Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM) is amending its regulations on Special Recreation Permits by changing the maximum term for these permits to 10 years instead of 5 years. The reason for this change is to add a reasonable expectation of continuity for outfitters, guides, and other small businesses that provide services to recreationists on public lands.

BLM is also amending its regulations on Recreation Use Permits for fee areas by adding a section on prohibited acts and penalties. This new provision is necessary to give BLM law enforcement personnel authority to cite persons who do not pay fees or otherwise do not follow the regulations on Recreation Use Permits.

EFFECTIVE DATE: April 6, 2004.

ADDRESSES: You may submit suggestions or inquiries to the following addresses: Mail: Director (250), Bureau of Land Management, Eastern States Office, 7450 Boston Blvd., Springfield, VA 22153. Personal or messenger delivery: Room 301, 1620 L Street, NW., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Lee Larson at (202) 452–5168 as to the substance of the final rule, or Ted Hudson at (202) 452–5042 as to procedural matters. Persons who use a telecommunications device for the deaf (TDD) may contact either individual by calling the Federal Information Relay Service (FIRS) at (800) 877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

I. Background

BLM published a final rule on Permits for Recreation on Public Lands in the **Federal Register** on October 1, 2002 (67 FR 61732). That final rule included a new subpart containing regulations on recreation use permits. These permits are for use of BLM fee areas. Fee areas are sites that provide specialized facilities, equipment, or services related to outdoor recreation. These include areas that are developed by BLM, receive regular maintenance, may have on-site staffing, and are supported by Federal funding. Not all fee areas necessarily have all of these attributes. Examples of fee areas are campgrounds that include improvements such as picnic tables, toilet facilities, tent or trailer sites, and drinking water; and specialized sites such as swimming pools, boat launch facilities, places with guided tours, hunting blinds, and so forth.

The October 1, 2002, final rule did not include a section on prohibited acts for such fee areas. We later determined that such a provision was necessary to give BLM law enforcement personnel authority to cite persons who use these areas without proper authorization, without paying required fees, without properly displaying their authorizations, or with falsified documentation. The proposed rule published on October 1, 2002 (67 FR 61746), listed these acts as those that would be prohibited.

The October 1, 2002, final rule left substantially intact the existing

Notices of Intent to Participate filed in the Digital Performance Right in Sound Recordings and Ephemeral Recordings Consolidated Rate Adjustment Proceeding (For periods 1998-2000 and 2001-2002)

Docket No. 2000-9 CARP DTRA1&2

1. Digital Bitcasting Corp.
2. NetRadio Corporation
3. cdnow Online, Inc.
4. Musicplex.com
5. The American Federation of Television and Radio Artists (AFTRA)
6. Hardradio.com
7. CBS Corporation
8. The American Federation of Musicians of the United States and Canada (AFM)
9. Global Media Network
10. Virgin E-Commerce (US), Inc.
11. Bonneville International Corporation
12. Emmis Communications Corporation
13. NRB Music License Committee
14. AMFM, Inc.
15. Clear Channel Communications
16. Salem Communications Corp.
17. Music Choice
18. America Online, Inc.
19. The Walt Disney Company
20. ABC, Inc.
21. MTV Networks
22. Westwind Media.com, Inc.
23. The Eclectic Radio Company, LLC
24. American Broadband Productions, LLC
25. Live365.com
26. Recording Industry Association of America, Inc. (RIAA)
27. VergeRadio.com
28. igroove.com, Inc. fka FunkyFreshTunes.com
29. Muzak, LLC
30. AEI Music Network
31. iCAST Corporation
32. Blue Tape, LLC d/b/a Sputnik7.com
33. Everstream, Inc.
34. Launch Media, Inc.
35. BET.com, LLC
36. National Public Radio
37. Tunes.com Inc.

38. Nordic Entertainment
39. RadioWave.com, Inc.
40. TuneTo.com, Inc.
41. SOUNDSBIG.com, Inc.
42. RadioActive Media Partners, Inc.
43. Association for Independent Music ("AFIM")
44. BroadcastAmerica.com, Inc.
45. Performing Artists Society of America
46. XM Satellite Radio Inc.
47. Sirius Satellite Radio Inc.
48. Future of Music Coalition
49. MyPlay, Inc.
50. Echo Networks (fka iGroove.com)
51. American Online, Inc./Spinner.com
52. Listen.com
53. Broadtime.com LLC
54. Univision Online
55. Incanta, Inc.
56. Moodlogic, Inc.
57. EGBS
58. Loudeye Technologies, Inc.
59. Country.com, Inc.
60. MTVi Group LLP/MTV Networks, a division of Viacom
61. RealNetworks/Rolling Stone Radio
62. Comedy Central
63. VocaLoca, Inc.
64. MusicMatch, Inc.
65. iVillage Inc.
66. Virgin Audio Holdings LLC
67. SBR Custom Channels
68. WREF-AM
69. WLAD-AM
70. WDAQ-FM
71. WJLS-FM
72. KWUF-AM & FM
73. WOLC/Maranatha, Inc.
74. Dead-Air Broadcasting Co., Inc.
75. XACT Radio LLC
76. Coollink Broadcast Network
77. CBS Broadcasting Inc. (amended)
78. WITZ AM/FM
79. Ocean Broadcasting, LLC
80. WMET/WMIT c/o Tom Atema
81. KOSP-FM
82. KKLH-FM

83. KOM6-FM
84. WCVO Radio
85. Iroquois County Broadcasting Corp. (WGFA FM 94.1)
86. WTUZ Webcast
87. KXST (Sets 102)
88. Radio Station KNGT-FM
89. KKMA-FM Radio
90. KLEM-AM Radio
91. KSCJ-AM Radio
92. KSUX-FM Radio
93. WNYQ-FM/WHTR-FM/WMML-AM/WENU-AM & FM
94. Albany Radio Corp. (dba KWIL and/or KHPE and/or KEED)
95. WHLC FM 104.5 (Charisma Radio Corp.)
96. KUKN Radio
97. KLOG Radio
98. CBS Television Stations Group
99. Viacom Internet Services Inc.
100. Educational Community Radio, Inc. T/A WOBO
101. KMTS
102. Wild West Radio, Inc.
103. WVKC Galesburg
104. WMCX 88.9 FM
105. KNCK Radio
106. Midcontinent Broadcasting Co.
107. Susquehanna Radio Corp.
108. Cromwell Group, Inc. and Cromwell Radio Group
109. Local Media Internet Venture Inc.
110. DMX Music, Inc.
111. KGGL (FM) Radio, Missoula, MT
112. KGRZ (AM) Radio, Missoula, MT
113. KZOQ (FM) Radio, Missoula, MT
114. KYLT (AM) Radio, Missoula, MT
115. KXDR(FM) Radio, Missoula, MT
116. KAAK (FM) Radio, Great Falls, MT
117. KXGF(AM) Radio, Great Falls, MT
118. KQDI-FM & AM Radio, Great Falls, MT
119. KMBR (FM) Radio, Butte, MT
120. KAAR (FM) Radio, Butte, MT
121. KXTL (AM) Radio, Butte, MT
122. KRKX (FM) Radio, Billings, MT
123. KBLG (AM) Radio, Billings, MT
124. KYYA (FM) Radio, Billings, MT
125. KRZN (FM) Radio, Billings, MT
126. KYSN (FM) Radio, E. Wenatchee, WA
127. KAAP (FM) Radio, Rock Island, WA

128. KZPH (FM) Radio, Wenatchee WA
129. KWWW-FM Radio, Quincy, WA
130. KWWX (AM) Radio, Wenatchee, WA
131. KKBS
132. KWED-AM
133. Radio Station KMRY
134. wsmonline.com
135. WARX Radio (aka Oldies 106.9 FM)/Manning Broadcasting Inc.
136. KOTK-AM Radio
137. KWJJ-FM Radio
138. Entercom Communication Corp.
139. Journal Broadcast Group, Inc.
140. WSWI/University of Southern Indiana
141. WCPE Radio
142. Ithaca College Radio
143. Comedyaudio.com
144. Cox Radio, Inc.
145. Yahoo! Inc.
146. Paradis Broadcasting of Alexandria, Inc. d/b/a KXRA-KX92-Z99
147. South Central Communications Corp.
148. Sheridan Broadcasting Corp./Sheridan Gospel Network
149. WQME 98.7 FM/Anderson University
150. Hall Communications, Inc.
151. FM 92 Broadcasters, Inc. (KMZE-FM)
152. Omni Communications (KWOX-FM)

Respectfully Submitted,

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February 19, 2004

CERTIFICATE OF SERVICE

I, Daniel Lee, hereby certify that I have served one copy of the foregoing Appendix, this 19th day of February, 2004, by first class mail, to the following counsel of record:

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* Due to problems with U.S. mail delivery to government offices, the brief has been served by hand-delivery.